Law of contracts,

PRINCIPLES

OF THE

LAW OF ATTORNEY AND CLIENT

A MONOGRAPH BY

W. B. HALE, LL. B.

Author of "Bailments and Carriers"; "Damages"

ST. PAUL, MINN.

WEST PUBLISHING CO.

1896

ATTORNEY AND CLIENT.

1. In General—Definition.
2. Establishment of Relation.
3–4. General Powers of an Attorney.
5. Rights and Liabilities—Good Faith and Fairness.
6. Duty to Account—Liability for Money Received.
7. Liability for Negligence.
8. Liability for Breach of Contract—Exceeding Authority.
9. Liability to Third Persons.
10. Reimbursement and Indemnity.
11. Compensation.
12. Attorneys' Liens.
13. Retaining Lien.
14. Charging Lien.
15. Confidential Communications.
16. Termination.

IN GENERAL—DEFINITION.

1. An attorney at law is an officer of a court of record legally qualified to prosecute and defend actions in courts of law on the retainer of clients.[1]

The relation existing between an attorney and his client is that of principal and agent. The client is the principal; the attorney is the agent. In its broadest sense, "an attorney is one that is set in the turn, stead, or place of another"; [2] the term being synonymous with "agent." Attorneys, in the modern use of the term, are of two sorts: attorneys at law, and attorneys in fact. An attorney in fact is a private attorney authorized by another to act in his place and stead, either for some particular purpose, as to do a particular act, or for the transaction of business in general, not of a legal character.[3] An attorney at law is a public attorney employed by a party in a cause to manage the same for him in the courts. Attorneys

[1] Weeks, Attys. at Law, p. 146. [2] Co. Litt. 513. [3] Black, Law Dict.

at law are officers of the courts in which they practice,[4] and must possess certain legal qualifications. No one not possessing these qualifications is entitled to conduct another's cause in the courts.[5] Attorneys at law, on account of their peculiar knowledge and skill, are frequently employed in the transaction of business not involving litigation, such as drawing contracts, deeds, wills, etc., managing property, and the like. Any person of competent skill, however, although not an attorney at law, may transact such business. In England persons engaged in the practice of law are divided into several classes, under the names of attorneys, solicitors, proctors, counselors, barristers, and advocates. Each class performs different functions. For example, attorneys and solicitors prepare the causes for trial, but cannot try them. This is done by the barristers. These distinctions do not prevail in the United States. Attorneys at law perform all the duties and have all the powers of all classes of legal practitioners in England. For convenience, the term "attorney" will be used as meaning attorneys at law in the broad sense here indicated.

Who Authorized to Practice.

"The bar is no unimportant part of the court, and its members are officers of the court," and therefore in some sense officers of the state for which the court acts.[6] Accordingly, no one is entitled to practice in the courts of a state who has not been duly admitted according to the lex fori.[7] Aliens and nonresidents cannot be admitted.[8] In some jurisdictions women are entitled to practice; in others, they are not.[9] The most usual requirement for admission is that the applicant shall be a citizen of the state of good moral

[4] Thomas v. Steele, 22 Wis. 207; In re Mosness, 39 Wis. 509; Robinson's Case, 131 Mass. 376.

[5] Cobb v. Judge of Superior Court, 43 Mich. 289, 5 N. W. 309.

[6] In re Mosness, 39 Wis. 509.

[7] Whart. Ag. 557; Robb v. Smith, 3 Scam. (Ill.) 46; State v. Garesche, 36 Mo. 256; McKoan v. Devries, 3 Barb. (N. Y.) 196. Circuit judge not entitled to practice. Hobby v. Smith, 1 Cow. (N. Y.) 588; Seymour v. Ellison, 2 Cow. (N. Y.) 13.

[8] In re O'Neil, 90 N. Y. 584; In re Mosness, 39 Wis. 509.

[9] In re Goodell, 48 Wis. 693; In re Hall, 50 Conn. 131; In re Leonard, 12 Or. 93, 6 Pac. 426; Robinson's Case, 131 Mass. 376. And see note to In re Leonard, 53 Am. Rep. 325, 6 Pac. 426.

character, upward of 21 years of age, and learned in the law. In other respects, the general principles of agency apply.

ESTABLISHMENT OF RELATION.

2. The relation of attorney and client may be established in any of the ways in which any other relation of agency may be established. The act of a client by which he engages an attorney to manage his cause is called "retainer."

"It is said that two things are necessary to establish the relation between attorney and client: (1) The agreement of the attorney to be attorney for the party, and (2) the agreement of the party to have the other for an attorney." [10] In civil cases, an attorney cannot be compelled to act for a party against his will. An attorney has no power to appear and act by virtue of his license alone. He must be employed by the party for whom he appears, or by some one authorized to represent such party.[11] The act of employing an attorney is called "retainer." Formerly attorneys were required to be appointed by warrant, and to file their powers in court;[12] but that practice has long since been disused, and a mere parol retainer is sufficient.[13] The appearance of the party by attorney instead of personally must appear on the record.[14] An allegation in the pleadings that the party "comes by his attorney" is sufficient.[15] The re-

[10] Weeks, Attys. at Law, p. 388.

[11] McAlexander v. Wright, 3 T. B. Mon. (Ky.) 189. An attorney prosecuting a suit on a champertous contract cannot surrender the contract and proceed with the suit in the client's absence, though he be also her attorney in fact under a power. Kelly v. Kelly, 86 Wis. 170, 56 N. W. 637.

[12] Manchester Bank v. Fellows, 28 N. H. 302; McAlexander v. Wright, 3 T. B. Mon. (Ky.) 189.

[13] Manchester Bank v. Fellows, 28 N. H. 302; Weeks, Attys. at Law, § 185; Owen v. Ord, 3 Car. & P. 349; Hirshfield v. Landman, 3 E. D. Smith (N. Y.) 208; Hardin v. Ho-Yo-Po-Nubby's Lessee, 27 Miss. 567; Leslie v. Fischer, 62 Ill. 118.

[14] Weeks, Attys. at Law, p. 401; Hunter v. Neck, 3 Man. & G. 181; Fisher v. Anderson, 101 Mo. 460, 14 S. W. 629.

[15] Weeks, Attys. at Law, p. 401; Parsons v. Gill, 1 Salk. 88. The verifica-

tainer of an attorney may be implied, as where the general attorney of a party appears for him in a particular case, with his knowledge and without objection.[16] So an unauthorized appearance by an attorney may be ratified,[17] or the party may be estopped to deny the authority. Where a duly-licensed attorney assumes to appear for a party, his authority to do so is prima facie presumed.[18] Such authority, however, may be questioned either by the alleged client or the opposite party, and the presumption rebutted.

Questioning Attorney's Authority—By Opposite Party.

When the opposite party questions the authority of the attorney he must state facts tending to show, or the grounds and reasons which induced him to believe, that the attorney had no authority to appear.[19] When the want of authority to bring a suit is shown, the action should be dismissed, on motion of defendant.[20] "An attorney is not permitted to commence a suit in the name of another without first receiving authority for the purpose. His position gives him the right to appear for a suitor when employed, but none to interfere in a case in which he is not retained. * * * He must be actually employed for the purpose before he can represent the

tion of a complaint by plaintiff is sufficient written recognition. Graham v. Andrews (Super. N. Y.) 32 N. Y. Supp. 795.

[16] Cooper v. Hamilton, 52 Ill. 119; Tabram v. Horn, 1 Man. & R. 228; Hall v. Laver, 1 Hare, 571; Lee v. Jones, 2 Camp. 496; Reynolds v. Howell, L. R. 8 Q. B. 398.

[17] Payment to the attorney for services rendered is a ratification. Ryan v. Doyle, 31 Iowa, 53. See Olmstead v. Firth, 60 Minn. 126, 61 N. W. 1017.

[18] Hamilton v. Wright, 37 N. Y. 502; Denton v. Noyes, 6 Johns. (N. Y.) 298; Arnold v. Nye, 23 Mich. 296; Norberg v. Heineman, 59 Mich. 210, 26 N. W. 481; Leslie v. Fischer, 62 Ill. 118; Ferriss v. Bank, 55 Ill. App. 218; Schlitz v. Meyer, 61 Wis. 418, 21 N. W. 243; Piggott v. Addicks, 3 G. Greene (Iowa) 427; Harshey v. Blackmarr, 20 Iowa, 161; Dorsey v. Kyle, 30 Md. 512; Osborn v. Bank, 9 Wheat. 738; Noyes v. Belding, 5 S. D. 603, 59 N. W. 1069.

[19] People v. Mariposa Co., 39 Cal. 683; Norberg v. Heineman, 59 Mich. 210, 26 N. W. 481; Hamilton v. Wright, 37 N. Y. 502; Leslie v. Fischer, 62 Ill. 118; Keith v. Wilson, 6 Mo. 435; McAlexander v. Wright, 3 T. B. Mon. (Ky.) 189; Thomas v. Steele, 22 Wis. 207; Schlitz v. Meyer, 61 Wis. 418, 21 N. W. 243. Objection should be made by motion before trial. People v. Lamb, 85 Hun, 171, 32 N. Y. Supp. 584.

[20] Frye's Adm'rs v. Calhoun Co., 14 Ill. 132.

party in court. The relation of client and attorney must subsist between them. That relation cannot be created by the attorney alone. The suitor has a right to select his own attorney. If an attorney brings a suit in the name of another, the legal presumption is that he has been retained for the purpose. It is only when his right to represent the plaintiff is questioned, and the presumption that he has been engaged by him is repelled, that he can be called upon to make proof of his authority. But in such a case, if he fails to show any authority to institute the suit, the same should be summarily dismissed by the court. * * * A defendant is not bound to answer to the merits of a suit commenced without authority from the plaintiff. Otherwise, he might be twice compelled to litigate the same cause of action. A judgment in his favor in a suit prosecuted without authority would be no bar to a second action brought by direction of the plaintiff." [21] The question should be raised at the earliest opportunity. It cannot be entertained after a default.[22] The affidavit of the attorney himself, or his mere statement, is evidence of his authority.[23] Letters received in due course purporting to come from plaintiff may be sufficient, though he might be unable to prove the handwriting. "All that is required to be shown in such cases, in the first instance, is that the attorney has acted in good faith and under an authority appearing to be genuine, though informal. It then devolves upon the party impeaching the authority to show by positive proof that it is invalid or insufficient in substance." [24]

[21] Id.

[22] Reed v. Curry, 35 Ill. 536. See Morgan v. Thorne, 7 Mees. & W. 400. Cannot be raised for the first time on appeal. State v. Carothers, 1 G. Greene (Iowa) 464.

[23] Eickman v. Troll, 29 Minn. 124, 12 N. W. 347; Penobscot Boom Co. v. Lamson, 16 Me. 224; Manchester Bank v. Fellows, 28 N. H. 302. An affidavit of plaintiff's agent that he was directed to cause suit to be brought, and that he had employed the attorney, is sufficient. Hughes v. Osborn, 42 Ind. 450.

[24] Hardin v. Ho-Yo-Po-Nubby's Lessee, 27 Miss. 567; Savery v. Savery, 8 Iowa, 217; Bush v. Miller, 13 Barb. (N. Y.) 481; Grignon v. Schmitz, 18 Wis. 620.

Same—By Alleged Client.

Not only may the opposite party question an attorney's authority, but his alleged client may do so. Where an action is brought without authority, on prompt application by the plaintiff the proceedings will be stayed.[25] Laches or acquiescence will estop the party to deny the attorney's authority.[26] It has been held that a judgment cannot be collaterally attacked on the ground that the attorney's appearance on which it was entered was unauthorized.[27] A distinction in this regard has been often made between foreign and domestic judgments. The rule is well settled in actions on foreign judgments that, if the record recites that the defendant appeared by attorney, this may well be conclusive proof that the attorney did appear for him;[28] but it is only prima facie evidence that the attorney was authorized to appear for him, and the defendant is at full liberty to prove that such appearance was unauthorized or fraudulent, and consequently that there was no jurisdiction of his person.[29] A contrary rule has been applied in some states to ac-

[25] Harshey v. Blackmarr, 20 Iowa, 161; De Louis v. Meek, 2 G. Greene (Iowa) 55; Hefferman v. Burt, 7 Iowa, 321; Sherrard v. Nevius, 2 Ind. 241. It has, however, been held that a party is bound by an unauthorized appearance. Abbott v. Dutton, 44 Vt. 546; Denton v. Noyes, 6 Johns. (N. Y.) 298; England v. Garner, 90 N. C. 197; Dorsey v. Kyle, 30 Md. 512; Bunton v. Lyford, 37 N. H. 512; Latuch v. Pasherante, 1 Salk. 86.

[26] Dorsey v. Kyle, 30 Md. 512.

[27] Brown v. Nichols, 42 N. Y. 26; Hamilton v. Wright, 37 N. Y. 502; Hoffmire v. Hoffmire, 3 Edw. Ch. (N. Y.) 174; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496; Finneran v. Leonard, 7 Allen (Mass.) 54; Lowe v. Stringham, 14 Wis. 222; Baker v. Stonebraker, 34 Mo. 175; Carpentier v. City of Oakland, 30 Cal. 439; Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766. Contra, Wiley v. Pratt, 23 Ind. 628; Hess v. Cole, 23 N. J. Law, 125; Shumway v. Stillman, 6 Wend. (N. Y.) 453; Shelton v. Tiffin, 6 How. 163. See Wright v. Andrews, 130 Mass. 149.

[28] In Ferguson v. Crawford, 70 N. Y. 257, it was held that a defendant in an action on a domestic judgment might show collaterally that what purports to be an appearance on his behalf, signed by an attorney, attached to the judgment roll, is a forgery.

[29] Aldrich v. Kinney, 4 Conn. 380; Hall v. Williams, 6 Pick. (Mass.) 232; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Price v. Ward, 25 N. J. Law, 225; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241; Boylan v. Whitney, 3 Ind. 140; Welch v. Sykes, 3 Gilm. (Ill.) 197; Thompson v. Emmert, 15 Ill. 416; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nosler,

tions on domestic judgments.[30] But the better opinion is that no valid distinction can be drawn, and that want of jurisdiction because of want of authority on the part of the attorney to appear

1 Iowa, 588; Harshey v. Blackmarr, 20 Iowa, 172; Marx v. Fore, 51 Mo. 69; Eager v. Stover, 59 Mo. 87. In the case of Bodurtha v. Goodrich, 3 Gray (Mass.) 508, Chief Justice Shaw remarked: "It would certainly be very strange if an inhabitant of another state could thus be bound by a court having no jurisdiction, without any act or default of such party. * * * We think that where it appears that, as in the present case, the defendant was an inhabitant of another state, that no property of his was attached by trustee process or otherwise, and that he was not served with process, and the only ground to sustain the judgment is that he appeared by attorney, it is competent for the plaintiff in error to aver and prove that such attorney was never authorized to appear for him and thereby give the court jurisdiction; and, even had the record gone further, and stated that such attorney was duly authorized and did appear, still it would be open to the plaintiff in error to aver and prove facts tending to show that the court had no jurisdiction of the cause, and therefore that they could make no record binding upon him, being a stranger, and such record would not be conclusive. It would be reasoning in a circle, and inconclusive, to say that the court had jurisdiction because it was shown by their record that the defendant appeared by attorney, and that they had authority to make such record binding upon him, because they had jurisdiction." Some of the earlier cases are contra. Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766; Roberts v. Caldwell, 5 Dana (Ky.) 512; Edmonds v. Montgomery, 1 Iowa, 143. This was also the doctrine in Missouri (see Warren v. Lusk, 16 Mo. 102; Baker v. Stonebraker, 34 Mo. 172) until the decision in the case of Thompson v. Whitman, 18 Wall. 457, after which the courts felt obliged to conform to the principles therein established. See Eager v. Stover, 59 Mo. 87.

[30] Everett v. Bank, 58 N. H. 340; Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766; Pillsbury's Lessee v. Dugan's Adm'r, 9 Ohio, 117; Campbell v. Bristol, 19 Wend. (N. Y.) 101. In Denton v. Noyes, 6 Johns. (N. Y.) 297, it was held that a domestic judgment rendered by a court of general jurisdiction against a party who had not been served with process, but for whom an attorney of the court had appeared, though without authority, was neither void nor irregular. This is now the settled rule in New York. Grazebrook v. McCreedie, 9 Wend. (N. Y.) 437; Hamilton v. Wright, 37 N. Y. 502; Brown v. Nichols, 42 N. Y. 31. "The courts in this state, while holding that strictly domestic judgments rendered against a party not served, but for whom an attorney appeared without authority, cannot be assailed on this ground when coming in question collaterally, nevertheless grant relief on motion, either by setting aside the judgment absolutely, or by staying proceedings and permitting the party to come in and defend the action. Where

may always be set up against the judgment, whether foreign or domestic, and proved by extrinsic evidence.[31]

GENERAL POWERS OF AN ATTORNEY.

3. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action.[32]

4. More specifically, by reason of his general authority, an attorney has the following powers, inter alia:

(a) He has general control over conduct of suit; but,

(b) He cannot compromise his client's claim.

(c) He may receive payment, even after judgment.

(d) He may enforce judgment by the usual means.

(e) He may employ subordinates, but not substitutes.

(f) He may bind his client by bonds and undertakings in cases of strict necessity.

An attorney, like any other agent, may bind his principal by acts within the course of his employment. He is employed to conduct and manage a cause; that is, to secure the remedy, not to discharge

the attorney is insolvent, the judgment will be absolutely vacated and set aside. Campbell v. Bristol, 19 Wend. (N. Y.) 101. In other cases the proceedings will be stayed, and the party permitted to come in and defend." Vilas v. Railroad Co., 123 N. Y. 440, 25 N. E. 941. In New York a foreign judgment may be assailed collaterally by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney that the appearance was unauthorized, and this even where the proof directly contradicts the record. Vilas v. Railroad Co., supra. A domestic judgment against a nonresident not within the jurisdiction is governed by the rule as to foreign judgments. Vilas v. Railroad Co., supra; Nordlinger v. De Mier, 54 Hun, 276, 7 N. Y. Supp. 463. See reason suggested for distinction by Dillon, J., in Harshey v. Blackmarr, 20 Iowa, 161.

[31] Reynolds v. Fleming, 30 Kan. 106, 1 Pac. 61; Ferguson v. Crawford, 70 N. Y. 253; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232.

[32] Moulton v. Bowker, 115 Mass. 36.

the cause of action. This is the fundamental principle by which to determine what acts of an attorney are binding upon his client.[33] Acts in or out of court, incidental or necessary to the due prosecution of the remedy, are prima facie within the attorney's authority,[34] and are binding upon the client as against innocent third persons.[35] Private instructions limiting an attorney's actual authority are of no avail, as against third persons having no knowledge or notice of such limitations.[36]

Control of Suit—Implied Powers.

An attorney has full control of a case in court.[37] In the absence of collusion, a client is bound by whatever his attorney does affecting the remedy only. If it be done without actual authority, the only remedy is against the attorney.[38] "It is indispensable to the decorum of the court, and the due and orderly conduct of a cause, that such attorney shall have the management and control of the action, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the cause." [39] An attorney's general control over the conduct of a suit has been

[33] Attorney cannot bind client by sale of land sued for. Corbin v. Mulligan, 1 Bush (Ky.) 297. Nor by purchase of land for client at sale under client's execution. Beardsley v. Root, 11 Johns. (N. Y.) 464.

[34] The attorney and not the client has exclusive management of the cause in court. Board of Com'rs, etc., of City of San José v. Younger, 29 Cal. 147.

[35] Foster v. Wiley, 27 Mich. 244; Clark v. Randall, 9 Wis. 135; Moulton v. Bowker, 115 Mass. 36; Wieland v. White, 109 Mass. 392; De Louis v. Meek, 2 G. Greene (Iowa) 55.

[36] Payment to an attorney of record discharges the debt in spite of private instructions limiting attorney's authority. State v. Hawkins, 28 Mo. 366; Pickett v. Bates, 3 La. Ann. 627.

[37] Whart. Ag. § 585; Nightingale v. Railway Co., 2 Sawy. 339, Fed. Cas. No. 10,264; Ward v. Hollins, 14 Md. 158; Clark v. Randall, 9 Wis. 135; Pierce v. Strickland, 2 Story, 292, Fed. Cas. No. 11,147; Simpson v. Lombas, 14 La. Ann. 103.

[38] Moulton v. Bowker, 115 Mass. 36; Gaillard v. Smart, 6 Cow. (N. Y.) 385; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220; Anon., 1 Wend. (N. Y.) 108.

[39] Foster v. Wiley, 27 Mich. 244; Sampson v. Obleyer, 22 Cal. 200; Bethel Church v. Carmack, 2 Md. Ch. 143; Greenlee v. McDowell, 4 Ired. Eq. (N. C.) 481; Chambers v. Hodges, 23 Tex. 104.

held to include the power to make stipulations regarding the conduct of the trial;[40] to waive objections to evidence;[41] to admit facts;[42] to waive technical advantages;[43] to waive notices;[44] to open defaults and vacate the judgment;[45] to verify papers by affidavit,[46] or waive verification;[47] to stipulate for continuances;[48] to extend the time for filing papers and pleadings;[49] to charge client with cost of printing briefs;[50] to remit damages;[51] to agree to a reference;[52] to submit the cause to arbitration;[53] to dismiss the cause;[54] to agree that execution shall be suspended after judg-

[40] Board of Com'rs, etc., of City of San José v. Younger, 29 Cal. 147.

[41] Town of Alton v. Town of Gilmanton, 2 N. H. 520.

[42] Lewis v. Sumner, 13 Mete. (Mass.) 269; Farmers' Bank of Maryland v. Sprigg, 11 Md. 389; Treadway v. Railroad Co., 40 Iowa, 526; Starke v. Keenan, 11 Ala. 819; Talbot v. McGee, 4 T. B. Mon. (Ky.) 375; Young v. Wright, 1 Camp. 140; Smith's Heirs v. Dixon, 3 Mete. (Ky.) 438; Wenans v. Lindsey, 1 How. (Miss.) 577.

[43] Town of Alton v. Town of Gilmanton, 2 N. H. 520; Hanson v. Hoitt, 14 N. H. 56; Hart v. Spalding, 1 Cal. 213.

[44] Hefferman v. Burt, 7 Iowa, 320; Town of Alton v. Town of Gilmanton, 2 N. H. 520.

[45] Read v. French, 28 N. Y. 293.

[46] Wright v. Parks, 10 Iowa, 342; Bates v. Pike, 9 Wis. 224. He may make necessary affidavits, when facts are within his own knowledge. Simpson v. Lombas, 14 La. Ann. 103; Austin v. Lathan, 19 La. 88; Manley v. Headley, 10 Kan. 88; Willis v. Lyman, 22 Tex. 268.

[47] Smith v. Mulliken, 2 Minn. 319, 322 (Gil. 273).

[48] Shaw v. Kaider, 2 How. Prac. (N. Y.) 244.

[49] Hefferman v. Burt, 7 Iowa, 320.

[50] Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534.

[51] Lamb v. Williams, 1 Salk. 89.

[52] Tiffany v. Lord, 40 How. Prac. (N. Y.) 481; Stokely v. Robinson, 34 Pa. St. 315; Wade v. Powell, 31 Ga. 1.

[53] Connett v. City of Chicago, 114 Ill. 233, 29 N. E. 280; Tilton v. Insurance Co., 8 Daly (N. Y.) 84; Town of Alton v. Town of Gilmanton, 2 N. H. 520. Contra, McPherson v. Cox, 86 N. Y. 472; Sargeant v. Clark, 108 Pa. St. 588; Haskell v. Whitney, 12 Mass. 47; Buckland v. Conway, 16 Mass. 396; Jenkins v. Gillespie, 10 Smedes & M. (Miss.) 31.

[54] Gaillard v. Smart, 6 Cow. (N. Y.) 385; Barrett v. Railroad Co., 45 N. Y. 628; McLeran v. McNamara, 55 Cal. 508; Davis v. Hall, 96 Mo. 659, 3 S. W. 382; Rogers v. Greenwood, 14 Minn. 333 (Gil. 256).

ment;[55] and the like.[56] It has been held that an attorney has no implied power to assign the suit;[57] to release indorsers;[58] to release the interest of witnesses;[59] to bind his client by erroneous admissions of law;[60] to enter a retraxit, when it is a final bar;[61] to agree not to appeal or move for a new trial.[62]

[55] Wieland v. White, 109 Mass. 392; Union Bank of Georgetown v. Geary, 5 Pet. 99.

[56] Attorney has power to accept service, Hefferman v. Burt, 7 Iowa, 320; to appeal from the decision, Adams v. Robinson, 1 Pick. (Mass.) 462; to release an attachment, Moulton v. Bowker, 115 Mass. 36; to confess judgment, Denton v. Noyes, 6 Johns. (N. Y.) 296. See Thompson v. Pershing, 86 Ind. 303; Talbot v. McGee, 4 T. B. Mon. (Ky.) 377. But see People v. Lamborn, 1 Scam. (Ill.) 123. It is within the scope of an attorney's authority to agree that, if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court, subject to be disposed of pursuant to the decision and mandate of the appellate court. Halliday v. Stuart, 151 U. S. 229, 14 Sup. Ct. 302. As to power to issue writs outside of county, where admitted, see Hooven Mercantile Co. v. Morgan, 15 Pa. Co. Ct. R. 567; Id., 4 Pa. Dist. R. 48. As to power to levy on property, and liability of client therefor, see Graham v. Reno, 5 Colo. App. 330, 38 Pac. 835; Wiegmann v. Morimura, 12 Misc. Rep. 37, 33 N. Y. Supp. 39; Fischer v. Hetherington, 11 Misc. Rep. 575, 32 N. Y. Supp. 795. As to power to make stipulation, see Beardsley v. Poke, 11 Misc. Rep. 117, 32 N. Y. Supp. 926; Smith v. Barnes, 9 Misc. Rep. 368, 29 N. Y. Supp. 692; Ives v. Ives, 80 Hun, 136, 29 N. Y. Supp. 1053. Admission of service, Sullivan v. Susong (S. C.) 18 S. E. 268.

[57] Weathers v. Ray, 4 Dana (Ky.) 474; Head v. Gervais, Walk. (Miss.) 431; Mayer v. Blease, 4 S. C. 10. An attorney to whom a note is sent for collection has no authority to indorse the same in the name of his client. Sherrill v. Clothing Co., 114 N. C. 436, 19 S. E. 365

[58] Varnum v. Bellamy, 4 McLean, 87, Fed. Cas. No. 16,886; Kellogg v. Gilbert, 10 Johns. (N. Y.) 220; East River Bank v. Kennedy, 9 Bosw. (N. Y.) 543; York Bank v. Appleton, 17 Me. 55; Mitchell v. Cotton, 3 Fla. 134. Or release a surety. Union Bank of Tennessee v. Govan, 10 Smedes & M. (Miss.) 333; Savings Institution of Harrodsburg v. Chinn's Adm'r, 7 Bush (Ky.) 539; Givens v. Briscoe, 3 J. J. Marsh. (Ky.) 529.

[59] East River Bank v. Kennedy, 9 Bosw. (N. Y.) 543; Murray v. House, 11 Johns. (N. Y.) 464; Browne v. Hyde, 6 Barb. (N. Y.) 392; Ball v. Bank, 8 Ala. 590; Shores v. Caswell, 13 Metc. (Mass.) 413; Marshall v. Nagel, 1 Bailey (S. C.) 308.

[60] Mitchell v. Cotton, 3 Fla. 134.

[61] Lambert v. Sandford, 2 Blackf. (Ind.) 137.

[62] People v. Mayor, etc., 11 Abb. Prac. (N. Y.) 66. Contra, Pike v. Emerson, 5

Power to Compromise Claim.

In England it seems to be settled that general authority to conduct a cause gives the attorney power to compromise.[63] The compromise is binding on the client, though against his express instructions, provided this limitation on the attorney's authority was unknown to the opposite party.[64] This rule is followed in some American decisions,[65] but by the weight of authority in America attorneys have no implied power to compromise their client's claims.[66] A compromise may be ratified by acquiescence.[67]

Power to Receive Payment.

An attorney has implied power to receive payment on behalf of his client, either before or after judgment.[68] But, in the absence

N. H. 393. Attorney cannot release garnishee from attachment, Quarles v. Porter, 12 Mo. 76; nor agree that dismissal of an action shall bar a subsequent action for malicious prosecution, Marbourg v. Smith, 11 Kan. 554; nor to release his client's cause of action, Wadhams v. Gay, 73 Ill. 415; Mandeville v. Reynolds, 68 N. Y. 528; nor release property from the lien of a judgment, Horsey v. Chew, 65 Md. 555, 5 Atl. 466; Phillips v. Dobbins, 56 Ga. 617; or from the levy of an execution, Banks v. Evans, 10 Smedes & M. (Miss.) 35; Benedict v. Smith, 10 Paige (N. Y.) 126.

[63] Swinfen v. Swinfen, 18 C. B. 485, 1 C. B. (N. S.) 364, 2 De Gex & J. 381; Swinfen v. Swinfen, 5 Hurl. & N. 890; Prestwich v. Poley, 18 C. B. (N. S.) 806; Strauss v. Francis, 12 Jur. (N. S.) 486.

[64] Potter v. Parsons, 14 Iowa, 286.

[65] Mallory v. Mariner, 15 Wis. 172; Wieland v. White, 109 Mass. 392; Penn Steel & Iron Co. v. Whipple File & Steel Manuf'g Co., Id. 464; Potter v. Parsons, 14 Iowa, 286; North Missouri R. Co. v. Stephens, 36 Mo. 150; Holker v. Parker, 7 Cranch, 436; Gordon v. Coolidge, 1 Sumn. 537, Fed. Cas. No. 5,606.

[66] Mandeville v. Reynolds, 68 N. Y. 528; Wetherbee v. Fitch, 117 Ill. 67; 7 N. E. 513; Wadhams v. Gay, 73 Ill. 415; Kelly v. Wright, 65 Wis. 236, 26 N. W. 610; Fritchey v. Bosley, 56 Md. 96; Whipple v. Whitman, 13 R. I. 512; Granger v. Batchelder, 54 Vt. 248; Spears v. Ledergerber, 56 Mo. 465; Isaacs v. Zugsmiths, 103 Pa. St. 77; Filby v. Miller, 25 Pa. St. 264; Township of North Whitehall v. Keller, 100 Pa. St. 105. See Holker v. Parker, 7 Cranch, 436. Generally, as to the release and compromise of claims, see Senn v. Joseph (Ala.) 17 South. 543; Barton v. Hunter, 39 Mo. App. 610; Maxwell v. Pate (Miss.) 16 South. 529; Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031; Armstrong v. Hurst, 39 S. C. 498, 18 S. E. 150.

[67] Mayer v. Foulkrod, 4 Wash. C. C. 511, Fed. Cas. No. 9,342.

[68] Hudson v. Johnson, 1 Wash. (Va.) 10; Carrol Co. v. Checham, 48 Mo.

of express authority, he has no right to accept anything but money.[69] Confederate money, bonds, notes, or other property, though accepted by the attorney, are not payment to the client.[70] He may receive partial payments,[71] but cannot discharge the debtor except upon full payment.[72] Authority to receive payment is not authority to sell or assign the claim.[73] Payment to an attorney without notice of the revocation of his authority is payment to the client.[74] Where money is due on a written security, and such security is not in possession of the attorney, its absence is prima facie notice that he has no authority to receive payment.[75]

385; Powel v. Little, 1 W. Bl. 8; Yorley v. Garrad, 2 Dowl. 490; Yates v. Freckleton, 2 Doug. 623; Ducett v. Cunningham, 39 Me. 386; Langdon v. Potter, 13 Mass. 320; Miller v. Scott, 21 Ark. 396; Smyth v. Harvie, 31 Ill. 62; Wyckoff v. Bergen, 1 N. J. Law, 214; White v. Johnson, 67 Me. 287. The fact that an attorney has been employed by an executor in connection with the winding up of the testator's estate does not authorize him to receive payment of a mortgage which had been assigned to the executors, he having drawn the papers at the time, where he has not possession of the mortgage. Bryant v. Hamlin's Ex'rs (Pa. Com. Pl.) 3 Pa. Dist. R. 385.

[69] Walker v. Scott, 13 Ark. 644; Gullett v. Lewis, 3 Stew. (Ala.) 23; Cost v. Genette, 1 Port. (Ala.) 212; Huston v. Mitchell, 14 Serg. & R. (Pa.) 307; Lord v. Burbank, 18 Me. 178; Treasurer v. McDowell, 1 Hill (S. C.) 184; Garvin v. Lowry, 7 Smedes & M. (Miss.) 24; Jeter v. Haviland, 24 Ga. 252. But see Livingston v. Radcliff, 6 Barb. (N. Y.) 201.

[70] Trumbull v. Nicholson, 27 Ill. 149; Davis v. Lee, 20 La. Ann. 248; West v. Ball, 12 Ala. 340; Chapman v. Cowles, 41 Ala. 103; Harper v. Harvey, 4 W. Va. 539; Kirk's Appeal, 87 Pa. St. 243; Stackhouse v. O'Hara, 14 Pa. St. 88; Herriman v. Shomon, 24 Kan. 387; Fassitt v. Middleton, 47 Pa. St. 214; Miller v. Lane, 13 Ill. App. 648; Smock v. Dade, 5 Rand. (Va.) 639; Jeter v. Haviland, 24 Ga. 252; Langdon v. Potter, 13 Mass. 319; Moye v. Cogdell, 69 N. C. 93.

[71] Ducett v. Cunningham, 39 Me. 386; Brackett v. Norton, 4 Conn. 517; Miller v. Scott, 21 Ark. 396; Pickett v. Bates, 3 La. Ann. 627; Rogers v. McKenzie, 81 N. C. 164.

[72] Mechem, Ag. § 817.

[73] Herriman v. Shomon, 24 Kan. 387; Miller v. Lane, 13 Ill. App. 648; Mechem, Ag. § 810.

[74] Weist v. Lee, 3 Yeates (Pa.) 47.

[75] Smith v. Kidd, 68 N. Y. 130; Doubleday v. Kress, 50 N. Y. 410; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325; Henn v. Conisby, 1 Ch. Cas. 93.

Power to Enforce Judgment.

An attorney has implied authority to employ the usual means to realize on the judgment. He may sue out and manage the execution,[76] delay its issue, or stay proceedings under it;[77] but he cannot assign the judgment,[78] nor release the lien of the judgment or execution,[79] nor satisfy the judgment without payment of the full amount.[80] But an attorney's unauthorized satisfaction of a judgment may be binding on the client as against a bona fide purchaser.[81] It is said that, after judgment, an attorney's powers are limited to receiving satisfaction;[82] but the tendency is to relax the rule. An attorney employed to collect a debt has the same implied powers after judgment as before.[83] The authority may be continued by any acts showing the client's intention that his attorney shall continue to act in that relation.[84]

[76] Union Bank v. Geary, 5 Pet. 99; Farmers' Bank of Maryland v. Mackall, 3 Gill (Md.) 447; White v. Johnson, 67 Me. 287; Gorham v. Gale, 7 Cow. (N. Y.) 739; Lynch v. Com., 16 Serg. & R. (Pa.) 368; Brackett v. Norton, 4 Conn. 517; Conway County v. Railroad Co., 39 Ark. 50. He may direct the time and manner of enforcing execution. Gorham v. Gale, 7 Cow. (N. Y.) 739.

[77] Wieland v. White, 109 Mass. 392; Silvis v. Ely, 3 Watts & S. 420; White v. Johnson, 67 Me. 287. But not for so long a period that the judgment lien would be lost. Doe v. Ingersoll, 11 Smedes & M. 249. After levy of execution, attorney may delay a sale. Albertson v. Goldsby, 28 Ala. 711. Attorney at law has no authority to direct what shall be sold under his client's execution. Averill v. Williams, 4 Denio (N. Y.) 295; Welsh v. Cochran, 63 N. Y. 185.

[78] Banks v. Evans, 10 Smedes & M. 35.

[79] Banks v. Evans, 10 Smedes & M. 38; Jewett v. Wadleigh, 32 Me. 110; Fritchey v. Bosley, 56 Md. 96; Phillips v. Dobbins, 56 Ga. 617. Or discharge defendant from imprisonment. Kellogg v. Gilbert, 10 Johns. (N. Y.) 220.

[80] Beers v. Hendrickson, 45 N. Y. 665; Kirk's Appeal, 87 Pa. St. 243; Banks v. Evans, 10 Smedes & M. 35; Trumbull v. Nicholson, 27 Ill. 149; McCarver v. Nealy, 1 G. Greene (Iowa) 360; Smock v. Dade, 5 Rand. (Va.) 639; Lewis v. Gamage, 1 Pick. (Mass.) 347; Lewis v. Woodruff, 15 How. Prac. (N. Y.) 539; Benedict v. Smith, 10 Paige (N. Y.) 128; Jackson v. Bartlett, 8 Johns. (N. Y.) 361; Chapman v. Cowles, 41 Ala. 103.

[81] Wyckoff v. Bergen, 1 N. J. Law, 214; Weeks, Attys. at Law, § 242; Whart. Ag. § 588.

[82] Weeks, Attys. at Law, § 238.

[83] McDonald v. Todd, 1 Grant (Pa.) 17; Butler v. Knight, L. R. 2 Exch. 109.

[84] Id.; Weeks, Attys. at Law, § 238.

Employment of Subordinates and Substitutes.

The relation of attorney and client is peculiarly a relation of trust and confidence. Because of the attorney's large discretionary powers, he is presumably chosen for personal reasons, and therefore he cannot delegate his authority to a substitute without the client's consent.[85] Such consent, however, may be either express or implied, or such delegation may be ratified, in either of which cases the substitute becomes authorized to act for the client. Ratification may be presumed from acquiescence.[86] The retainer of one member of a firm is a retainer of all, and, unless otherwise stipulated, the cause may be argued and conducted by any one of them.[87] Matters not involving discretion, however, may be delegated to subordinates, to be performed under the direction and control of the attorney.[88]

Power to Bind Client by Bond.

Where the execution of a bond or other undertaking becomes necessary in the due prosecution of a cause, and it is impossible to communicate with the client in time to accomplish the object, an attorney has implied power to execute the bond or undertaking in his client's name, provided it is not required to be under seal;[89] or he may do so in his own name, and look to his client for indemnity.[90] The power exists only in case of necessity.[91] Where

[85] In re Bleakley, 5 Paige (N. Y.) 311; Hitchcock v. McGehee, 7 Port. (Ala.) 556; Kellogg v. Norris, 10 Ark. 18; Ratcliff v. Baird, 14 Tex. 43; Antrobus v. Sherman, 65 Iowa, 230, 21 N. W. 579; Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78; Dickson v. Wright, 52 Miss. 585.

[86] Eggleston v. Boardman, 37 Mich. 14; Briggs v. Georgia, 10 Vt. 68. Client is not bound by acts of unauthorized substitute. Kellogg v. Norris, 10 Ark. 18. See, also, Dickson v. Wright, 52 Miss. 585. A client is not liable to an attorney for services rendered without his knowledge at the request of the attorney employed by him. Moore v. Orr, 10 Ind. App. 89, 37 N. E. 554. Cf. Hyde v. Nerve-Food Co., 160 Mass. 559, 36 N. E. 585.

[87] Eggleston v. Boardman, 37 Mich. 14; Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98.

[88] Eggleston v. Boardman, supra; McEwen v. Mazyck, 3 Rich. Law (S. C.) 210.

[89] Clark v. Courser, 29 N. H. 170.

[90] Clark v. Randall, 9 Wis. 135.

[91] Clark v. Randall, supra; Schoregge v. Gordon, 29 Minn. 367, 13 N. W. 194; Fulton v. Brown, 10 La. Ann. 350; Mechem, Ag. § 816.

the client is present, or within reach, and can act for himself, the attorney has no such implied power. It has been held he has no power to execute an appeal [92] or replevin bond.[93] The attorney's unauthorized act is ratified by the acceptance of benefits.[94]

RIGHTS AND LIABILITIES — GOOD FAITH AND FAIRNESS.

5. An attorney must exercise perfect good faith and fairness in all his dealings with his client.

An attorney is bound to the highest honor and integrity and the utmost good faith in all his transactions with his client.[95] The relation is a fiduciary one of the closest intimacy, and is jealously guarded by the courts. Transactions between attorney and client by which the former obtains a benefit are closely scrutinized, and all the rules and presumptions which apply in the case of other fiduciary relations apply with special force to this.[96] "Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position, that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger." [97] If, while acting as attorney, one

[92] Clark v. Courser, 29 N. H. 170; Ex parte Holbrook, 5 Cow. 35. Though an attorney, by virtue of his employment, may execute in the name of client bonds on appeal (Comp. St. Neb. c. 7, § 7), he is not authorized to thus execute an indemnity bond to the sheriff (Luce v. Foster, 42 Neb. 818, 60 N. W. 1027).

[93] Narraguagus Land Proprietors v. Wentworth, 36 Me. 339.

[94] Bank of Augusta v. Conrey, 28 Miss. 667.

[95] Cox v. Sullivan, 7 Ga. 144.

[96] Mechem, Ag. § 821. As to purchase of client's property and of claims against client, see Mitchell v. Colby (Iowa) 63 N. W. 769; Sutherland v. Reeve, 151 Ill. 384; 38 N. E. 130; Owers v. Olathe Silver Min. Co. (Colo. App.) 39 Pac. 980; Kreitzer v. Crovatt, 94 Ga. 694, 21 S. E. 585.

[97] Savery v. King, 5 H. L. Cas. 655. See, also, Merryman v. Euler, 59 Md. 588; Whipple v. Barton, 63 N. H. 613, 3 Atl. 922; Yeamans v. James, 27 Kan. 195; Gray v. Emmons, 7 Mich. 533; Laclede Bank v. Keeler, 109 Ill. 385; Kisling v. Shaw, 33 Cal. 425; Starr v. Vanderheyden, 9 Johns. 253, Zeigler v. Hughes, 55 Ill. 288.

buys property sold in the course of litigation, he holds as trustee for the client.[98] "An attorney can in no case, without the client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates."[99] The fact that one of the parties to a contract is an attorney, and that he offers to and does draw the necessary writings without charge, does not establish the relationship of attorney and client between them, or impose upon the attorney the duties and obligations of that relationship, or raise a presumption of fraud against him. Nor do these facts, or the inference (which may be drawn from the nature of his business) that by reason of superior experience, sagacity, and shrewdness he may have exercised some control over the other party, and so have obtained an advantage in the contract, establish or justify a finding of undue influence. There must be evidence showing some confidential relationship or intimacy between the parties.[100] It is an attorney's duty to disclose any adverse interest that he may have, personally or as attorney for others, and, having accepted a retainer, he cannot thereafter accept conflicting interests.[101] An attorney cannot act as such to both parties.[102] These obligations of an attorney will be enforced summarily by the court, by virtue of its control over its own officers, or they may be enforced by private action.[103]

[98] Taylor v. Young, 56 Mich. 285, 22 N. W. 799; Pearce v. Gamble, 72 Ala. 341; Byington v. Moore, 62 Iowa, 470, 17 N. W. 644.

[99] Henry v. Raimad, 25 Pa. St. 354. See, also, Smith v. Brotherline, 62 Pa. St. 461; Hockenbury v. Carlisle, 5 Watts & S. 348; Case v. Carroll, 35 N. Y. 385; Giddings v. Eastman, 5 Paige (N. Y.) 561; Moore v. Bracken, 27 Ill. 23. See Cameron v. Lewis, 56 Miss. 601, as to attorney's right to purchase of tax title of client's land. Cf. Bowers v. Virden, 56 Miss. 595. See, also, Harper v. Perry, 28 Iowa, 58; Baker v. Humphrey, 101 U. S. 494.

[100] Stout v. Smith, 98 N. Y. 25.

[101] Williams v. Reed, 3 Mason, 405, Fed. Cas. No. 17,733; Mechem, Ag. § 822.

[102] Mechem, Ag. § 823.

[103] Cooley, Torts, p. 618.

SAME—DUTY TO ACCOUNT—LIABILITY FOR MONEY RECEIVED.

6. An attorney must account for property of the client coming into his possession, and promptly pay over money collected for the client's account.

An attorney must account to his client for money or property of the latter coming into his hands. An action cannot ordinarily be maintained against an attorney for money collected by him as such until after a demand and refusal to pay over.[104] But it is the attorney's duty to notify his client of the receipt of money within a reasonable time, and, if he fails to do so, an action may be maintained without a demand.[105] The statute of limitations does not run against such an action until the client has notice of the collection.[106] Where the attorney retains the money an unreasonably long time, or converts it to his own use, he is liable for interest.[107] Mingling his client's funds with his own, or depositing them in a bank in his own name, amounts to a conversion, and therefore, if the bank fails before payment, the attorney and not the client must bear the loss.

[104] Jett v. Hempstead, 25 Ark. 464; Chapman v. Burt, 77 Ill. 337; Black v. Hersch, 18 Ind. 342; Roberts v. Armstrong's Adm'r, 1 Bush (Ky.) 263. Cf. Schroeppel v. Corning, 6 N. Y. 117; Lillie v. Hoyt, 5 Hill (N. Y.) 395.

[105] Jett v. Hempstead, 25 Ark. 464; Chapman v. Burt, 77 Ill. 337; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826.

[106] Jett v. Hempstead, 25 Ark. 464; Voss v. Bachop, 5 Kan. 67; Way v. Cutting, 20 N. H. 187.

[107] Chapman v. Burt, 77 Ill. 337; Ketcham v. Thorp, 91 Ill. 611; Dwight v. Simon, 4 La. Ann. 490; Walpole's Adm'r v. Bishop, 31 Ind. 156; Mansfield v. Wilkerson, 26 Iowa, 482. Ordinarily a demand is necessary to show conversion and start running of interest. Johnson v. Semple, 31 Iowa, 49; Walpole's Adm'r v. Bishop, 31 Ind. 156. Liability for diversion of fund, see Richardson v. Richardson, 100 Mich. 364, 59 N. W. 178. Money withheld by attorney. Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; C. Aultman & Co. v. Goldsmith, 84 Iowa, 547, 51 N. W. 43. Summary proceedings to enforce payment. Gillespie v. Mulholland (Com. Pl.) 33 N. Y. Supp. 33; Mundy v. Strong (N. J. Err. & App.) 31 Atl. 611; McKibbin v. Nafis, 76 Hun, 344, 27 N. Y. Supp. 723.

SAME—LIABILITY FOR NEGLIGENCE.

7. An attorney must possess and exercise that reasonable degree of skill and care which is ordinarily possessed by other attorneys in the same locality. Failure to do so is actionable negligence.

An attorney is bound to possess and exercise diligently and faithfully that reasonable degree of learning, skill, and experience which is ordinarily possessed by other members of the profession. Undertaking to exercise judgment in a matter which requires skill is not a mere error of judgment, but is negligence.[108] As to attorneys, Tindal, C. J., has said:[109] "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking and that 'crasse negligentia' or 'lata culpa,' mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, * * * appear to establish, in general, that he is liable for the consequences of ignorance or nonobservance of the rules of practice of this court,[110] for the want of care in the preparation of the cause for trial[111] or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; while, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction." "God

[108] City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686.

[109] Godefroy v. Dalton, 6 Bing. 467, 469. Further, as to difference as to English members of the bar, see Ireson v. Pearman, 3 Barn. & C. 799. An action for professional negligence will not lie against the barrister. Swinfen v. Chelmsford, 5 Hurl. & N. 918, 29 Law J. Exch. 382.

[110] Caldwell v. Hunter, 10 Q. B. 83; Bracey v. Carter, 12 Adol. & E. 373. Negligently suffering judgment by default. Godefroy v. Jay, 7 Bing. 413; Hoby v. Built, 3 Barn. & Adol. 350.

[111] Or bringing an action in a court without jurisdiction. Williams v. Gibbs, 6 Nev. & M. 788; Cox v. Leech, 1 C. B. (N. S.) 617, 26 Law J. C. P. 125. Cf. Meredith v. Woodward, 16 Wkly. Notes Cas. 146.

forbid that it should be imagined that an attorney, or even a judge, is bound to know all the law."[112] The liability of an English attorney or solicitor[113] is essentially that of a member of the bar in America, viz. he is required to exercise such diligence as a good lawyer is accustomed to apply under similar circumstances.[114] He cannot be held liable for a mistake in reference to a matter as to which members of the profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled in the courts, nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers.[115] The stand-

[112] Abbott, C. J., in Montriou v. Jefferys, 2 Car. & P. 113. Lord Mansfield's saying in Pitt v. Yalden, 4 Burrows, 2060, 2061, is famous: "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. * * * Not only a counsel, but judges, may differ or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt." The saying of Lord Cottenham in Hart v. Frame, 6 Clark & F. 193, is also much quoted. Et vide Laidler v. Elliott, 3 Barn. & C. 738; Russell v. Palmer, 2 Wils. 325.

[113] Hart v. Frame, 6 Clark & F. 193; Caldwell v. Hunter, 10 Q. B. 83; Parker v. Rolls, 14 C. B. 691; Purves v. Landell, 12 Clark & F. 91.

[114] Whart. Neg. § 749; Sprague v. Baker, 17 Mass. 586; Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655; Isham v. Parker, 3 Wash. St. 755, 29 Pac. 835; White v. Washington, 1 Barnes, Notes Cas. 411; Holmes v. Peck, 1 R. I. 242; Stevens v. Walker, 55 Ill. 151; Wilson v. Russ, 20 Me. 421; Stubbs v. Beene's Adm'r, 37 Ala. 627; Gambert v. Hart, 44 Cal. 542. Reasonable care and diligence. Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655. A contract for the services of members of a legal profession is not a hiring of labor, but a mandate. Gurley v. City of New Orleans, 41 La. Ann. 75, 5 South. 659. Generally, as to liability of attorneys for erroneous advice, see 4 Yale Law J. 65, by William B. Bosley. Generally, as to liability for negligence, see Kepler v. Jessup, 11 Ind. App. 241, 37 N. E. 655; Waln v. Beaver, 161 Pa. St. 605, 29 Atl. 114, 493; Ahlhauser v. Butler, 57 Fed. 121; Pinkston v. Arrington, 98 Ala. 489, 13 South. 561; Cohn v. Hausner, 9 Misc. Rep. 482, 30 N. Y. Supp. 244; King v. Fourchy, 47 La. Ann. 354, 16 South. 814.

[115] Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075. Cf. Cochrane v. Little, 71 Md. 323, 18 Atl. 698. An attorney cannot

ard of skill required of lawyers is substantially the same as that of physicians.[116] It is determined by the particular practice of the particular bar. "A metropolitan standard is not to applied to a rural bar."[117] A lawyer is not expected to guaranty success.[118] This standard would not seem consistent with the early theory that an attorney at law is not liable if he acts honestly and to the best of his ability.[119] Of course, he must exercise reasonable diligence generally in the conduct of his client's business.[120] Thus, in ex-

be charged with negligence when he accepts, as a correct exposition of the law, a decision of the supreme court of his state in another case upon the question of the liability of stockholders of corporations of the state, in advance of any decision thereon in his own case. Marsh v. Whitmore, 21 Wall. 178. Nor is he liable for an insufficient affidavit in attachment. Ahlhauser v. Butler, 57 Fed. 121.

[116] Watson v. Muirhead, 57 Pa. St. 161. "The law is not a mere art, but a science." Sharswood, J., in Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075, reviewing many cases. Approved in Nickless v. Pearson, 126 Ind. 490, 26 N. E. 478.

[117] Weeks, Attys. at Law, § 289; Pennington's Ex'rs v. Yell, 11 Ark. 212; Whart. Neg. § 750.

[118] Weeks, Attys. at Law, § 290.

[119] Lynch v. Com., 16 Serg. & R. (Pa.) 368; Crosbie v. Murphy, 8 Ir. C. L. 301; Kemp v. Burt, 4 Barn. & Adol. 424; Gilbert v. Williams, 8 Mass. 57. He has, however, been held liable for gross negligence. Purves v. Landell, 12 Clark & F. 91; Baikie v. Chandless, 3 Camp. 17; Elkington v. Holland, 9 Mees. & W. 661.

[120] Failing to commence an action against a debtor in failing circumstances, Rhines' Adm'rs v. Evans, 66 Pa. St. 192; or in time to avoid bar by the statute of limitations, Fox v. Jones (Tex. App.) 14 S. W. 1007; Hett v. Pun Pong, 18 Can. Sup. Ct. 290; failing to be present when his case is reached, City of Lincoln v. Staley, 32 Neb. 63, 48 N. W. 887; or to advise client as to expenses on appeal, Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996; making negligent investments, Blyth v. Fladgate [1891] 1 Ch. 337 (et vide Mellish, L. J., in Sawyer v. Goodwin, 1 Ch. Div. 351); loaning money, Whitney v. Martine, 88 N. Y. 535; for not notifying his client of impending tax sales, Wahl v. Beaver, 161 Pa. St. 605, 29 Atl. 114, 493; for negligence in preparing mechanic's lien, Joy v. Morgan, 35 Minn. 184, 28 N. W. 237; generally, for misdescription, Taylor v. Gorman, 4 Ir. Eq. 550; for loss of bond, Walpole v. Carlisle, 32 Ind. 415. Not liable for failure to transfer insurance policy to vendee, Herbert v. Lukens, 153 Pa. St. 180, 25 Atl. 1116. When not liable for failure to plead statutory limitations, Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262.

amination of titles, he must scrutinize vigilantly, and is liable, for example, for failure to note the existence of an incumbrance.[121] But, as to doubtful points of law, it is sufficient if he conforms to the standard of good professional men of the place.[122] An attorney, as bailee of papers or other property of his client, is liable for failure to exercise ordinary care and diligence.

Negligence of Associates, Partners, and Subordinates.

An attorney is not liable for the negligence of an associate, as distinguished from a partner or subordinate, where such associate is employed by the client, or employed by the attorney with the client's consent, express or implied, as where it is necessary to employ an associate to take depositions in a distant city. An attorney, however, is liable for negligence in selecting an associate.[123] Attorneys are also liable for the negligence of their partners,[124] clerks, or subordinates.[125] This liability rests on familiar principles of agency.

[121] Pennoyer v. Willis (Or.) 32 Pac. 57. But, even under such circumstances, the question of negligence has been left to the jury. Pinkston v. Arrington, 98 Ala. 489, 13 South. 561. And see Hinckley v. Krug (Cal.) 34 Pac. 118.

[122] Watson v. Muirhead, 57 Pa. St. 161; Whart. Ag. § 597; Potts v. Dutton, 8 Beav. 493; Taylor v. Gorman, 4 Ir. Eq. 550; Wilson v. Tucker, 3 Starkie, 154, Dowl. N. P. 30; Knights v. Quarles, 4 Moore, 532; Allen v. Clark, 7 Law T. (N. S.) 781, 1 N. R. 358; Drax v. Scroope, 2 Barn. & Adol. 581; Stannard v. Ullithorne, 10 Bing. 491; Ireson v. Pearman, 5 Dowl. & R. 687; Howell v. Young, 5 Barn. & C. 259; Whitehead v. Greetham, 2 Bing. 464, 10 Moore, 183; Dartnall v. Howard, 4 Barn. & C. 345; Brumbridge v. Massey, 28 Law J. Exch. 59; Cooper v. Stephenson, 21 Law J. Q. B. 292; Hayne v. Rhodes, 8 Q. B. 342, 10 Jur. 71, 15 Law J. Q. B. 137.

[123] Whart. Ag. § 601; Godefroy v. Dalton, 6 Bing. 468.

[124] Wilkinson v. Griswold, 12 Smedes & M. (Miss.) 669; Poole v. Gist, 4 McCord (S. C.) 259; Smyth v. Harvie, 31 Ill. 62; Livingston v. Cox, 6 Pa. St. 360; McFarland v. Crary, 8 Cow. (N. Y.) 253; Warner v. Griswold, 8 Wend. (N. Y.) 665.

[125] Walker v. Stevens, 79 Ill. 193; Floyd v. Nangle, 3 Atk. 568; Birkbeck v. Stafford, 14 Abb. Prac. (N. Y.) 285.

SAME—LIABILITY FOR BREACH OF CONTRACT—EXCEEDING AUTHORITY.

8. An attorney is liable for breach of the contract of employment.

An attorney is, of course, liable for damages resulting from his breach of the contract of employment. He impliedly contracts to obey instructions,[126] and not to exceed his authority.[127] He is liable for default in either respect.

SAME—LIABILITY TO THIRD PERSONS.

9. An attorney is not liable to third persons for breach of duty owing to his client alone; but, where his conduct violates a duty owed to third persons, growing out of his personal contract or imposed by law, he is so liable.

Liability in Contract.

For breach of duty imposed upon him merely by virtue of his retainer, an attorney is liable to his client alone, for to him alone the duty is owing.[128] But for breach of a duty imposed upon him by law, as a responsible individual, in common with all other members of society, he is liable to any one harmed by the breach.[129] Thus, for negligence in the examination of title, an attorney is liable only to the person by whom he was employed, and not to a third person who relied on the attorney's certificate to his injury.[130] An attorney, however, like other agents, may assume a duty towards

[126] Where he fails to bring an action immediately as directed, he is liable for consequent damage to his client. People v. Cole, 84 Ill. 327; Gilbert v. Williams, 8 Mass. 51; Cox v. Livingston, 2 Watts & S. (Pa.) 103.

[127] Attorney is liable for unauthorized appearance whereby assumed client is damaged. O'Hara v. Brophy, 24 How. Prac. (N. Y.) 379.

[128] National Sav. Bank of District of Columbia v. Ward, 100 U. S. 195; Dundee Mortg. & Trust Inv. Co. v. Hughes, 20 Fed. 39.

[129] Mechem, Ag. § 572.

[130] See cases cited in note 128, supra.

third persons, as where he contracts personally with them, and in such cases is liable accordingly.[131] An attorney is usually held personally liable for clerk's and sheriff's fees for issuing, filing, and serving writs and other papers.[132] This is on the ground "that an attorney placing a writ in an officer's hands for service is to be regarded as personally requesting the service, and as personally liable for it, unless he expressly informs him that he will not be personally liable, or there are circumstances which make it clear that that was the understanding of the parties." [133] In this view of the case, the rule is no departure from the general law of agency, and is supported by the additional argument of convenience. The rule, however, has not been universally followed. In Michigan it has been held that an attorney is liable for such fees only upon proof of his express promise to pay them, or of some practice or course of dealing between him and the clerk from which such personal promise can be implied.[134] The rule is the same in Vermont.[135]

Attorneys are liable for torts on the same principles that other persons are.[136] Thus, attorneys may be liable for malicious prosecution, where the malice is their own, and they have no probable cause. But it may be that evidence which would show a want of probable cause for the client would not establish the same thing as to the attorney.[137] Where an attorney acts in good faith, he is not liable, though the action on his client's part was malicious and without probable cause.[138] An attorney may rely on the facts stat-

[131] He is liable for clerk's and sheriff's fees when he promises to pay them. Wires v. Briggs, 5 Vt. 101; Preston v. Preston, 1 Doug. (Mich.) 292.

[132] Campbell v. Cothran, 56 N. Y. 279; Adams v. Hopkins, 5 Johns. (N. Y.) 252; Ousterhout v. Day, 9 Johns. (N. Y.) 114; Watertown v. Cowen, 5 Paige (N. Y.) 510; Heath v. Bates, 49 Conn. 342; Tilton v. Wright, 74 Me. 214.

[133] Heath v. Bates, 49 Conn. 342.

[134] Preston v. Preston, 1 Doug. (Mich.) 292.

[135] Wires v. Briggs, 5 Vt. 101.

[136] Attorneys are liable for fraud or collusion, and cannot injure a third person without liability. Such conduct violates a right in rem. National Sav. Bank of District of Columbia v. Ward, 100 U. S. 195.

[137] Burnap v. Marsh, 13 Ill. 535; Lynch v. Com., 16 Serg. & R. (Pa.) 368; Peck v. Chouteau, 91 Mo. 139, 3 S. W. 577.

[138] Stockley v. Hornidge, 8 Car. & P. 11; Hunt v. Printup, 28 Ga. 297. And see cases cited supra, note 137.

ed by his client.[139] As in trespass liability is wholly independent of motive, an attorney, even though acting in good faith, is liable if he participates in a trespass. Thus, an attorney who directs the execution of a void writ is liable in trespass to the person injured.[140] The client and officer are also liable.[141] They are joint trespassers. The attorney and client are not liable, however, even though the writ is void, where the officer exceeds the command of the writ,[142] unless they individually participate in, direct, or ratify the act which constitutes the trespass.[143] Where an attorney assumes to act wholly without authority, he is liable to any one damaged by his unauthorized act.[144]

SAME—REIMBURSEMENT AND INDEMNITY.

10. An attorney is entitled to reimbursement and indemnity from his client.

A client must reimburse his attorney for all reasonable expenses advanced in the course of litigation, and indemnify him against liabilities incurred.[145]

SAME—COMPENSATION.

11. An attorney is entitled to compensation for his services. This is determined either—

(a) By contract, or

(b) By quantum meruit.

[139] Burnap v. Marsh, 13 Ill. 535; Peck v. Chouteau 91 Mo. 139, 3 S. W. 577.

[140] Burnap v. Marsh, 13 Ill. 535; Cook v. Hopper, 23 Mich. 511. But see Ross v. Griffin, 53 Mich. 5, 18 N. W. 534 (judicial privilege).

[141] Newberry v. Lee, 3 Hill (N. Y.) 525; Foster v. Wiley, 27 Mich. 244; Bates v. Pilling, 6 Barn. & C. 38.

[142] Averill v. Williams, 1 Denio (N. Y.) 501; Adams v. Freeman, 9 Johns. (N. Y.) 118; Ford v. Williams, 13 N. Y. 577, 24 N. Y. 359.

[143] Cook v. Hopper, 23 Mich. 511; Hardy v. Keeler, 56 Ill. 152; Welsh v. Cochran, 63 N. Y. 181; Averill v. Williams, 4 Denio (N. Y.) 295. See, also, Vanderbilt v. Turnpike Co., 2 N. Y. 479.

[144] Burnap v. Marsh, 13 Ill. 535.

[145] Clark v. Randall, 9 Wis. 135; Campion v. King, 6 Jur. 35.

Attorneys are prima facie entitled to compensation for their services, and may maintain an action therefor,[146] unless they have specially agreed to serve gratuitously, and the burden of showing such special agreement is on the client.[147] The right to compensation and its extent is determined by the contract when there is one.[148] Where there is no contract on the subject, the attorney may recover on a quantum meruit.[149] The parties may make such contracts as they please, provided they are fairly entered into and are neither extortionate nor champertous.[150] Compensation may be made contingent on success, or proportioned to the amount of recovery.[151] The cases are not wholly agreed as to what contracts are champertous. The modern tendency is certainly against the old strictness. It is generally, but not universally, held that a contract whereby the attorney is to receive a part of the thing recovered as his compensation is not champertous, unless the attorney also agrees to pay the expenses of litigation.[152] It is in all cases essen-

[146] Wylie v. Coxe, 15 How. 415; Stanton v. Embrey, 93 U. S. 548; Brackett v. Sears, 15 Mich. 244; Eggleston v. Boardman, 37 Mich. 14; Smith v. Davis, 45 N. H. 566; Nichols v. Scott, 12 Vt. 47; Webb v. Browning, 14 Mo. 354; Harland v. Lilienthal, 53 N. Y. 438; Balsbaugh v. Frazer, 19 Pa. St. 95. Cf. Seeley v. Crane, 15 N. J. Law, 35; Law v. Ewell, 2 Cranch, C. C. 144, Fed. Cas. No. 8,127; Mowat v. Brown, 19 Fed. 87. And see Hassell v. Van Houten, 39 N. J. Eq. 105; Brackenridge v. McFarland, Add. 49.

[147] Brady v. Mayor, 1 Sandf. 569; Webb v. Browning, 14 Mo. 354.

[148] Moses v. Bagley, 55 Ga. 283; Badger v. Gallaher, 113 Ill. 662; Hitchings v. Van Brunt, 38 N. Y. 335; Tapley v. Coffin, 12 Gray, 420; Stanton v. Embrey, 93 U. S. 548.

[149] Eggleston v. Boardman, 37 Mich. 14; Town of Bruce v. Dickey, 116 Ill. 527, 6 N. E. 435; Campbell v. Goddard, 17 Ill. App. 385; People v. Bond Street Sav. Bank, 10 Abb. N. C. 15; Stanton v. Embrey, 93 U. S. 557; Smith v. Railroad Co., 60 Iowa, 515, 15 N. W. 291; Mundy v. Strong (N. J. Err. & App.) 31 Atl. 611. In New York costs belong to attorney. Guliano v. Whitenack (Com. Pl.) 30 N. Y. Supp. 415.

[150] Wright v. Tebbitts, 91 U. S. 252; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441; Boardman v. Thompson, 25 Iowa, 489.

[151] Duke v. Harper, 66 Mo. 51; Allard v. Lamirande, 29 Wis. 502; Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617; Stanton v. Embrey, 93 U. S. 548; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441; Wylie v. Coxe, 15 How. 415; Perry v. Dicken, 105 Pa. St. 83; Dale v. Richards, 21 D. C. 312.

[152] Duke v. Harper, 66 Mo. 51; Coleman v. Billings, 89 Ill. 183; Martin v. Clarke, 8 R. I. 389; Allard v. Lamirande, 29 Wis. 502; Backus v. Byron, 4

tial, to constitute champerty, that there be an agreement for a portion of the very thing recovered. If there is no such agreement, but the attorney's compensation is to be a personal liability of the client, though proportioned to the amount of recovery, the agreement is not champertous. It is immaterial that the avails of the suit were the means or the security on which the attorney relied for payment, if it was to be payment of a debt due from the client.[153] Unless the stipulation for a contingent fee amounts to an assignment, and the opposite party has notice of it, the client may make a binding settlement of the suit in disregard of the attorney's claims.[154] Notice will not alter the rule unless the claim was legally assignable.[155] A cause of action for a personal tort is not assignable.[156] But, although the settlement of the case may be binding, the client will be liable for breach of contract to the attorney.[157] The attorney may recover at least the reasonable value of his services.[158] Where there is no special contract respecting compensation, an attorney may recover the reasonable value of his services.[159] It is, of course, necessary to show a retainer.[160] Where the attorney was retained by another party, the mere fact that his services were beneficial to defendant is insufficient to show liability.[161] In fixing the value

Mich. 535; Ware's Adm'r v. Russell, 70 Ala. 174; Thurston v. Percival, 1 Pick. (Mass.) 415; Lathrop v. Amherst Bank, 9 Metc. (Mass.) 489; Smith v. Davis, 45 N. H. 566; Davis v. Sharron, 15 B. Mon. (Ky.) 64; Boardman v. Thompson, 25 Iowa, 489. In Massachusetts an agreement to look solely to the fund for compensation without any personal liability on the part of the client is held to be champertous. Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681.

153 Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681.

154 Coghlin v. Railroad Co., 71 N. Y. 442; Pulver v. Harris, 62 Barb. 500, 52 N. Y. 73; Quincey v. Francis, 5 Abb. N. C. 286; Lamont v. Washington, etc., R. Co., 2 Mackey, 502; Miller v. Newell, 20 S. C. 122.

155 Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617.

156 Id.

157 Kersey v. Garton, 77 Mo. 645; Polsley v. Anderson, 7 W. Va. 202.

158 Quint v. Mining Co., 4 Nev. 305.

159 See cases cited in note 149, ante; In re Sherwood, 3 Beav. 338.

160 Weeks, Attys. at Law, §§ 338, 339; Cochran v. Newton, 5 Denio (N. Y.) 482; Chicago, St. C. & M. R. Co. v. Larned, 26 Ill. 218; Turner v. Myers, 23 Iowa, 391.

161 Chicago, St. C. & M. R. Co. v. Larned, 26 Ill. 218; Turner v. Myers,

of an attorney's services, his professional skill and standing, his experience, the nature and character of the questions raised in the case, the amounts involved, and the result must all be considered.[162] Want of success, however, is no defense, in the absence of a special contract making compensation contingent on success.[163] The client may recoup damages for negligence or bad faith on the part of the attorney.[164] Where an attorney refuses to pay over money collected for his client, and the client is compelled to bring an action against him for the amount collected, the attorney forfeits any fees that may have been agreed upon for his services.[165] An attorney, retained generally to conduct a legal proceeding, enters into an entire contract to conduct the proceeding to its termination. If an attorney without just cause abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire, he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation.[166] The rule is the same where the attorney is dis-

23 Iowa, 391; Ex parte Lynch, 25 S. C. 193; Savings Bank v. Benton, 2 Metc. (Ky.) 240.

[162] Eggleston v. Boardman, 37 Mich. 14; Phelps v. Hunt, 40 Conn. 97; Robbins v. Harvey, 5 Conn. 335; Harland v. Lilienthal, 53 N. Y. 438; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58; Frink v. McComb, 60 Fed. 486. The wealth of a client cannot be considered. Stevens v. Ellsworth (Iowa) 63 N. W. 683.

[163] Brackett v. Sears, 15 Mich. 244; Rush v. Cavenaugh, 2 Pa. St. 187; Bills v. Polk, 4 Lea (Tenn.) 494. Disregard of instructions is a defense. O'Halloran v. Marshall, 8 Ind. App. 394, 35 N. E. 926

[164] Chatfield v. Simonson, 92 N. Y. 209; Hopping v. Quin, 12 Wend. (N. Y.) 517; Caverly v. McOwen, 123 Mass. 574; Nixon v. Phelps, 29 Vt. 198; Pearson v. Darrington, 32 Ala. 227. Where an attorney advised his client in an action against a nonresident that service by publication was good, and a valid judgment could be obtained, such attorney cannot recover for services rendered therein. Hinckley v. Krug (Cal.) 31 Pac. 118.

[165] Large v. Coyle (Pa. Sup.) 12 Atl. 343; Gray v. Conyers, 70 Ga. 349; Wills v. Kane, 2 Grant, Cas. 60.

[166] Tenney v. Berger, 93 N. Y. 524, 529; Eliot v. Lawton, 7 Allen, 274; Davis v. Smith, 48 Vt. 54. But see Britton v. Turner, 6 N. H. 481.

charged by his client for cause.[167] Where, however, the attorney has sufficient cause for abandoning the employment, he may always recover on a quantum meruit;[168] and it has been held, that when the services were rendered under a contract fixing the amount of compensation, he could recover the stipulated sum.[169] What shall be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. If the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money during the progress of a long litigation, to his attorney, to apply upon his compensation, sufficient cause may thus be furnished to justify the attorney in withdrawing from the service of his client. So any conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses or other unjustifiable means, would furnish sufficient cause.[170] The employment by the client, without consent of or consultation with the attorney, of counsel with whom the attorney has personal and professional objections to being associated is sufficient cause.[171] The client, unless he has bound himself to employ the attorney for a stated period, may discharge him at any time, with or without cause.[172] If it is without cause, the attorney may recover the reasonable value of his services.[173] If the discharge is a breach of a contract to employ the attorney

167 Walsh v. Shumway, 65 Ill. 471.

168 Tenney v. Berger, 93 N. Y. 524; Eliot v. Lawton, 7 Allen, 274. And see Whitner v. Sullivan (S. C.) 2 S. E. 391.

169 Polsley v. Anderson, 7 W. Va. 202; Baldwin v. Bennett, 4 Cal. 392; Kersey v. Garton, 77 Mo. 645.

170 Tenney v. Berger, 93 N. Y. 530.

171 Id.

172 Tenney v. Berger, 93 N. Y. 524; Trust v. Repoor, 15 How. Prac. 570; In re Prospect Ave. (Sup.) 32 N. Y. Supp. 1013. But the court will not permit a substitution until the attorney's fees and charges are first secured. Ogden v. Devlin, 45 N. Y. Super. Ct. 631; Board of Sup'rs of Ulster Co. v. Brodhead, 44 How. Prac. 411.

173 Tenney v. Berger, 93 N. Y. 524; Ogden v. Devlin, 45 N. Y. Super Ct. 631.

for a definite time, he may recover damages for such breach.[174] If the discharge is for cause, as has been seen, the attorney forfeits all right to compensation. Unfaithfulness, want of diligence and skill, and the like will justify a discharge.

SAME—ATTORNEYS' LIENS.

12. An attorney has a lien to secure his charges. Attorneys' liens are of two kinds:

(a) The general, or retaining, lien; and

(b) The special, or charging, lien.

13. RETAINING LIEN—An attorney's general or retaining lien is a right on the part of an attorney to retain all property of his client that comes into his possession in the course of his professional employment until all his costs and charges against his client are paid.[175]

An attorney's general lien is a common-law lien,[176] and, like other common-law liens, it is founded on possession. It is a mere right to retain possession.[177] It cannot be enforced by sale, or by any proceeding in law or equity.[178] It is a mere right to embarrass the client by withholding possession.[179] But the lien continues until

[174] Polsley v. Anderson, 7 W. Va. 202; Baldwin v. Bennett, 4 Cal. 392; Myers v. Crockett, 14 Tex. 257; McElhinney v. Kline, 6 Mo. App. 94.

[175] Jones, Liens, § 113.

[176] In some states this lien is declared by statute. Gen. Laws Colo. 1877, § 32; Gen. St. Colo. 1883, § 85; McClain's Code Iowa 1888, § 293; Rev. Codes Dak. 1877, §§ 9, 10; Code Ga. 1882, § 1989; Comp. Laws Kan. 1879, p. 114, §§ 468, 469; Gen. St. Ky. 1883, p. 149, § 15; Gen. St. Minn. 1894, § 6194; Hill's Ann. Laws Or. 1892, § 1044; Rev. St. Mont. 1879, p. 414, c. 3, § 54; Comp. St. Neb. 1881, c. 7, § 8; Rev. St. Wyo. 1887, § 138.

[177] In re Wilson, 12 Fed. 237; Heslop v. Metcalfe, 3 Mylne & C. 183; Bozon v. Bolland, 4 Mylne & C. 354; Colegrave v. Manley, Turn. & R. 400.

[178] Jones, Liens, § 132; In re Wilson, 12 Fed. 235; Brown v. Bigley, 3 Tenn. Ch. 618; Thames Iron Works Co. v. Patent Derrick Co., 1 Johns. & H. 93; Heslot v. Metcalfe, 3 Mylne & C. 183; Bozon v. Bolland, 4 Mylne & C. 354.

[179] West of England Bank v. Batchelor, 51 Law J. Ch. 199. See, also, Jones, Liens, § 162. In Doane v. Russell, 3 Gray (Mass.) 382, Chief Justice

the debt secured is paid,[180] even though the debt is barred by the statute of limitations.[181] This lien is a general, as distinguished from a special, lien.[182] That is to say, it covers a general balance due the attorney from his client, and is not confined to charges due in the special matter in relation to which the property was received.[183] But it does not cover collateral debts not due the attorney in his character of attorney.[184] This general lien exists only in

Shaw says: "If it be said that a right to retain the goods, without the right to sell, is of little or no value, it may be answered that it is certainly not so adequate a security as a pledge with a power of sale; still, it is to be considered that both parties have rights which are to be regarded by the law, and the rule must be adapted to general convenience. In the greater number of cases, the lien for work is small in comparison with the value to the owner of the article subject to lien, and in most cases it would be for the interest of the owner to satisfy the lien and redeem the goods, as in the case of the tailor, the coach maker, the innkeeper, the carrier, and others; whereas, many times, it would cause great loss to the general owner to sell the suit of clothes or other articles of personal property. But, further, it is to be considered that the security of this lien, such as it is, is superadded to the holder's right to recover for his services by action."

[180] Young v. English, 7 Beav. 10; Warburton v. Edge, 9 Sim. 508.

[181] Higgins v. Scott, 2 Barn. & Adol. 413; In re Murray (1867) Wkly. Notes, 190.

[182] "A general lien differs essentially from a particular lien in this: that, while the latter is a right which grows out of expense or services bestowed on the particular property, the former is a right to retain certain property of another on account of a general balance due from the owner." Story, Bailm. § 382; Bouvier, Pers. Prop. § 382.

[183] Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; In re Knapp, 85 N. Y. 284; Bowling Green Sav. Bank of City of New York v. Todd, 52 N. Y. 489; Ward v. Craig, 87 N. Y. 550; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 46 Fed. 426; McPherson v. Cox, 96 U. S. 404; In re Wilson, 12 Fed. 235; Howard v. Town of Osceola, 22 Wis. 453; Chappell v. Cady, 10 Wis. 111; Stewart v. Flowers, 44 Miss. 513; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Hurlbert v. Brigham, Id. 368; In re Paschal, 10 Wall. 483; Ex parte Sterling, 16 Ves. 258. A lien on papers for professional compensation does not exist in Pennsylvania. Du Bois' Appeal, 38 Pa. St. 231; Walton v. Dickerson, 7 Pa. St. 376. A lien for a general balance has been denied. McDonald v. Napier, 14 Ga. 89; Waters v. Grace, 23 Ark. 118; Pope v. Armstrong, 3 Smedes & M. (Miss.) 214; Cage v. Wilkinson, Id. 223.

[184] Whart. Ag. 625. It covers a stipulated fee in another case. Randolph v. Randolph, 34 Tex. 181.

favor of attorneys,[185] though other persons may have a special lien for services rendered on the specific property on which the lien is claimed.[186] Where the property is received by the attorney, not in his professional capacity, but, for example, as trustee,[187] or mortgagee,[188] the lien does not attach.[189] The lien extends to papers,[190] money,[191] and property[192] of all kinds, belonging to the client and received by the attorney in his professional capacity. Where the attorney claims a right to retain money, it is a disputed question whether his claim rests upon the law of lien or the law of set-off.[193] The right to retain money has been said to be a right to defalcate rather than a right of lien.[194] No lien arises when it is obvious that

[185] A real-estate broker has no lien on papers in his hands. Arthur v. Sylvester, 105 Pa. St. 233. Nor an auctioneer. Sanderson v. Bell, 2 Cromp. & M. 304.

[186] Hollis v. Claridge, 4 Taunt. 807; Sanderson v. Bell, 2 Cromp. & M. 304.

[187] Rex v. Sankey, 6 Nev. & M. 839; Ex parte Newland, 4 Ch. Div. 515.

[188] Pelly v. Wathen, 7 Hare, 351, 18 Law J. Ch. 281.

[189] Worrall v. Johnson, 2 Jac. & W. 214, 218; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; Stevenson v. Blakelock, 1 Maule & S. 535.

[190] St. John v. Diefendorf, 12 Wend. (N. Y.) 261; Hooper v. Welch, 43 Vt. 169; In re Knapp, 85 N. Y. 284; Bowling-Green Sav. Bank of City of New York v. Todd, 52 N. Y. 489; In re Wilson, 12 Fed. 235; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Redfern v. Sowerby, 1 Swanst. 84. An attorney has no lien on his client's will. Balch v. Symes, 1 Turn. & R. 87. Nor to public records or court files. Clifford v. Turrill, 2 De Gex & S. 1.

[191] Dowling v. Eggemann, 47 Mich. 171, 10 N. W. 187; Bowling-Green Sav. Bank of City of New York v. Todd, 52 N. Y. 489; In re Knapp, 85 N. Y. 284; Ward v. Craig, 87 N. Y. 550; In re Paschal, 10 Wall. 483; Lewis v. Kinealy, 2 Mo. App. 93; Diehl v. Friester, 37 Ohio St. 473; Cooke v. Thresher, 51 Conn. 105; Casey v. March, 30 Tex. 180; Hurlburt v. Brigham, 56 Vt. 368; Read v. Bostick, 6 Humph. (Tenn.) 321; Wells v. Hatch, 43 N. H. 246; Ormerod v. Tate, 1 East, 464. Cf. Lucas v. Campbell, 88 Ill. 447. The lien exists for a stipulated fee, or to the extent of quantum meruit. In re Knapp, 85 N. Y. 284. The lien does not attach until the money is received, and must not be confounded with the attorney's charging lien. See post, p. 33; Casey v. March, 30 Tex. 180; St. John v. Diefendorf, 12 Wend. (N. Y.) 261. Fees of associate attorneys may be retained, as well as his own. Balsbaugh v. Frazer, 19 Pa. St. 95; Jackson v. Clopton, 66 Ala. 29.

[192] As upon articles delivered to be used as evidence in the case. Friswell v. King, 15 Sim. 191.

[193] Wells v. Hatch, 43 N. H. 246.

[194] Du Bois' Appeal, 38 Pa. St. 231. See, also, Balsbaugh v. Frazer, 19 Pa.

the parties intended that there should be no lien, and, of course, the attorney may waive it. Where the contract of employment is inconsistent with the existence of a lien, as where a term of credit is provided for,[195] there is no lien. So the delivery of property to an attorney for a special purpose is inconsistent with the existence of a lien.[196] Continued possession is essential to the continued existence of the lien. Where the attorney voluntarily parts with possession, the lien is gone.[197] Taking other security operates as a waiver.[198] Payment discharges the lien. Taking the client's note does not,[199] unless it is received as payment.[200] The attorney's lien takes priority over all claims by or under the client.[201]

14. CHARGING LIEN—An attorney has an equitable lien upon a judgment or fund in court realized from his exertions. This lien is called a charging lien, and is a special, not a general, lien.

An attorney's charging lien must not be confounded with the general or retaining lien just explained. The retaining lien is strict-

St. 95; McKelvey's Appeal, 108 Pa. St. 615. In Wells v. Hatch, 43 N. H. 246,, it was called a right of set-off.

[195] See Stoddard Woolen Manufactory Co. v. Huntley, 8 N. H. 441.

[196] In re Larner, 20 Wkly. Dig. 73; Anderson v. Bosworth, 15 R. I. 443, 8 Atl. 339; Balch v. Symes, 1 Turn. & R. 92; Lawson v. Dickenson, 8 Mod. 306; Ex parte Sterling, 16 Ves. 258. But, if the property is left with him after the special purpose is accomplished, the lien attaches. Ex parte Pemberton, 18 Ves. 282.

[197] In re Wilson, 12 Fed. 235; Nichols v. Pool, 89 Ill. 491; Du Bois' Appeal, 38 Pa. St. 231; Oakes v. Moore, 24 Me. 214. But not where the possession is obtained from him by force or fraud. Dicas v. Stockley, 7 Car. & P. 587. A lien is lost by a transfer. In re Wilson, 12 Fed. 235; Lovett v. Brown, 40 N. H. 511.

[198] Balch v. Symes, 1 Turn. & R. 87; Cowell v. Simpson, 16 Ves. 275; Watson v. Lyon, 7 De Gex, M. & G. 288.

[199] Bennett v. Cutts, 11 N. H. 163.

[200] Cowell v. Simpson, 16 Ves. 275.

[201] Schwartz v. Jenney, 21 Hun, 33; Ward v. Craig, 87 N. Y. 550; Ex parte Sterling, 16 Ves. 258; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Randolph v. Randolph, 34 Tex. 181. The attorney's possession is notice of his claim. Hutchinson v. Howard, 15 Vt. 544; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; In re Wilson, 12 Fed. 235.

ly a common-law lien, founded upon possession. Moreover, it is a general lien, extending to all the attorney's professional charges, and not limited to charges with reference to any specific property. On the other hand, the charging lien is a special lien, and is confined to costs and fees due the attorney in the particular suit in which the judgment is recovered.[202] This lien is not founded on possession. There can be no possession of a judgment. "The lien which an attorney is said to have on a judgment—which is, perhaps, an incorrect expression—is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt."[203] "Although we talk of an attorney having a lien upon a judgment, it is, in fact, only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client's depriving him of his costs."[204] In many states this lien has been declared and regulated by statute. In others it is enforced independently of statute, and in some it does not exist at all. The statutes vary greatly in their provisions, and the decisions are conflicting, owing largely to the confusion of the two kinds of lien.[205]

[202] Williams v. Ingersoll, 89 N. Y. 508; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; St. John v. Diefendorf, 12 Wend. (N. Y.) 261; Phillips v. Stagg, 2 Edw. Ch. (N. Y.) 108; Wright v. Cobleigh, 21 N. H. 339, 341; McWilliams v. Jenkins, 72 Ala. 480; Forbush v. Leonard, 8 Minn. 303 (Gil. 267); Mosely v. Norman, 74 Ala. 422; In re Wilson, 12 Fed. 235; Hall v. Laver, 1 Hare, 571; Lucas v. Peacock, 9 Beav. 177; Stephens v. Weston, 3 Barn. & C. 535.

[203] Barker v. St. Quintin, 12 Mees. & W. 441.

[204] Mercer v. Graves, L. R. 7 Q. B. 499. "'Lien,' properly speaking, is a word which applies only to a chattel; 'lien upon a judgment' is a vague and inaccurate expression; and the words 'equitable lien' are intensely undefined." Brunsdon v. Allard, 2 El. & El. 19, 27. The lien of an attorney upon a judgment is an equitable lien. Jones, Liens, § 155. It is not recognized by common law, but only in equity, unless declared by statute. Forsythe v. Beveridge, 52 Ill. 268; Simmons v. Almy, 103 Mass. 33; Baker v. Cook, 11 Mass. 236; Getchell v. Clark, 5 Mass. 309; Potter v. Mayo, 3 Me. 34; Stone v. Hyde, 22 Me. 318; Hobson v. Watson, 34 Me. 20; Patrick v. Leach, 2 McCrary, 635, 12 Fed. 661; In re Wilson, 12 Fed. 235.

[205] The lien exists in some form in the following states: Alabama: Warfield v. Campbell, 38 Ala. 527; Jackson v. Clopton, 66 Ala. 29; Central Railroad & Banking Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Ex parte Lehman, Durr & Co., 59 Ala. 631. Arkansas: Mansf. Dig. 1884, §§ 3935, 3939; Lane v. Hallum, 38 Ark. 385; Gist v. Hanly, 33 Ark. 223. Colorado: Mills' Ann. St. 1891, §

What Charges Secured—Taxable Costs—Fees.

As before stated, an attorney's lien upon the fruits of a suit is limited to the services rendered therein; and, although a number of separate suits involve the same question, and are argued and determined together, the fruits of one are not subject to a lien for serv-

212; Johnson v. McMillan, 13 Colo. 423, 22 Pac. 769; Fillmore v. Wells, 10 Colo. 228, 15 Pac. 343. Connecticut: Andrews v. Morse, 12 Conn. 444; Cooke v. Thresher, 51 Conn. 105; Benjamin v. Benjamin, 17 Conn. 110; Gager v. Watson, 11 Conn. 168. Florida: Carter v. Bennett, 6 Fla. 214; Carter v. Davis, 8 Fla. 182. Georgia: Code 1882, § 1989; Morrison v. Ponder, 45 Ga. 167; Hawkins v. Loyless, 39 Ga. 5; Green v. Express Co., 39 Ga. 20, Twiggs v. Chambers, 56 Ga 279; Little v. Sexton, 89 Ga. 411, 15 S. E. 490. Indiana: Rev. St. 1881, § 5276; Hanna v. Island Coal Co., 6 Ind. App. 163, 31 N. E. 846. Iowa: McClain's Ann. Code 1888, §§ 293, 294; Winslow v. Railroad Co., 71 Iowa, 197, 32 N. W. 330. South Dakota: Comp. Laws, § 470; Pirie v. Harkness, 52 N. W. 581. Kansas: Gen. St. 1889, par. 395; Turner v. Crawford, 14 Kan. 499; Kansas Pac. R. Co. v. Thacher, 17 Kan. 92. Kentucky: Gen. St. 1888, c. 5, § 15; Stephens v. Farrar, 4 Bush, 13. Louisiana: Rev. Laws 1884, § 2897. Michigan: 2 Ann. St. 1882, § 7710; Kinney v. Tabor, 62 Mich. 517, 29 N. W. 86, 512; Wells v. Elsam, 40 Mich. 218. Maine: Hobson v. Watson, 34 Me. 20; Newbert v. Cunningham, 50 Me. 231. Maryland: See Marshall v. Cooper, 43 Md. 46; Strikes' Case, 1 Bland 57. Massachusetts: Ocean Ins. Co. v. Rider, 22 Pick. 210; Thayer v. Daniels, 113 Mass. 129; Simmons v. Almy, 103 Mass. 33. See Baker v. Cook, 11 Mass. 236. Minnesota: Gen. St. 1894, § 6194; Dodd v. Brott, 1 Minn. 270 (Gil. 205); Forbush v. Leonard, 8 Minn. 303 (Gil. 267); Crowley v. Le Duc, 21 Minn. 412; Henry v. Traynor, 42 Minn. 234, 44 N. W. 11. Oregon: 2 Hill's Ann. Laws 1892, § 1044; In re Scoggin, 5 Sawy. 549, Fed. Cas. No. 12,511. Mississippi: Stewart v. Flowers, 44 Miss. 513; Pugh v. Boyd, 38 Miss. 326. Montana: Comp. St. 1887, p. 623. Nebraska: Comp. St. 1887, § 138; Patrick v. Leach, 2 McCrary, 635, 12 Fed. 661; Abbott v. Abbott, 18 Neb. 503, 26 N. W. 361. New Hampshire: Young v. Dearborn, 27 N. H. 324; Whitcomb v. Straw, 62 N. H. 650; Currier v. Railroad Co., 37 N. H. 223. New Jersey: Heister v. Mount, 17 N. J. Law, 438; Braden v. Ward, 42 N. J. Law, 518; Barnes v. Taylor, 30 N. J. Eq. 467. New York: The lien is upon the cause of action. Goodrich v. McDonald, 2 N. Y. St. Rep. 144; Whitaker v. Railroad Co., 3 N. Y. St. Rep. 537; McCabe v. Fogg, 60 How. Prac. (N. Y.) 488; Lansing v. Ensign, 62 How. Prac. (N. Y.) 363; In re Bailey, 66 How. Prac. (N. Y.) 64; Tullis v. Bushnell, 65 How. Prac. (N. Y.) 465; Oliwell v. Verdenhalven, 17 Civ. Proc. R. 362, 7 N. Y. Supp. 99; Rooney v. Railroad Co., 18 N. Y. 368; Wright v. Wright, 70 N. Y. 100; Marshall v. Meech, 51 N. Y. 140; Coughlin v. Railroad Co., 71 N. Y. 443. South Carolina: Sharlock v. Oland, 1 Rich. Law (S. C.) 207; Miller v. Newell, 20 S. C. 123. Tennessee: Hunt v. McClan-

ices rendered in the others.[206] In some states the lien is confined to the taxed costs and the attorney's disbursements.[207] This was originally, perhaps, the universal rule. In other states, the lien is extended to include the fee for his services.[208] The lien does not extend to prospective services in the hearing of an appeal.[209]

ahan, 1 Heisk. (Tenn.) 503; Brown v. Bigley, 3 Tenn. Ch. 618; Perkins v. Perkins, 9 Heisk. (Tenn.) 95. Vermont: Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Hooper v. Welch, 43 Vt. 169. Virginia and West Virginia: Renick v. Ludington, 16 W. Va. 378; Code Va. 1873, c. 160, § 11; Code W. Va. 1887, c. 119, § 13. Wyoming: Comp. St. Wyo. 1881, p. 66, c. 7, § 81. The lien does not exist in the following states: California: Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Russell v. Conway, 11 Cal. 93. Ex parte Kyle, 1 Cal. 331. Illinois: Forsythe v. Beveridge, 52 Ill. 268; Nichols v. Pool, 89 Ill. 491; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; La Framboise v. Grow, 56 Ill. 197. An equitable lien exists on the proceeds of litigation where there is a special contract of employment. Smith v. Young, 62 Ill. 210. Missouri: Lewis v. Kincaly, 2 Mo. App. 33; Frissell v. Haile, 18 Mo. 18; Roberts v. Nelson, 22 Mo. App. 28. Ohio: Diehl v. Friester, 37 Ohio St. 473. Texas: Casey v. March, 30 Tex. 180; Whittaker v. Clarke, 33 Tex. 647. Wisconsin: Courtney v. McGavock, 23 Wis. 619.

[206] Massachusetts & S. Const. Co. v. Gill's Creek Tp., 48 Fed. 145.

[207] Newbert v. Cunningham, 50 Me. 231; Hooper v. Brundage, 22 Me. 460; Ocean Ins. Co. v. Rider, 22 Pick. (Mass.) 210; Wells v. Hatch, 43 N. H. 246; Whitcomb v. Straw, 62 N. H. 650; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Ex parte Kyle, 1 Cal. 331; Mansfield v. Dorland, 2 Cal. 507; Massachusetts & S. Const. Co. v. Gill's Creek Tp., 48 Fed. 145; Coughlin v. Railroad Co., 71 N. Y. 443.

[208] Henchey v. City of Chicago, 41 Ill. 136; Humphrey v. Browning, 46 Ill. 476; Kinney v. Tabor, 62 Mich. 517, 29 N. W. 86, 512; Wells v. Elsam, 40 Mich. 218; Warfield v. Campbell, 38 Ala. 527; McDonald v. Napier, 14 Ga. 89; Carter v. Bennett, 6 Fla. 214; Carter v. Davis, 8 Fla. 183; Pope v. Armstrong, 3 Smedes & M. (Miss.) 214; Andrews v. Morse, 12 Conn. 444; Hill v. Brinkley, 10 Ind. 102; Central Railroad & Banking Co. v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387; Hershy v. Du Val, 47 Ark. 86, 14 S. W. 469; In re Bailey, 66 How. Prac. (N. Y.) 61; Tullis v. Bushnell, 65 How. Prac. (N. Y.) 465; Ollwell v. Verdenhalven, 17 Civ. Proc. R. 362, 7 N. Y. Supp. 99; McCabe v. Fogg, 60 How. Prac. (N. Y.) 488; Lansing v. Ensign, 62 How. Prac. (N. Y.) 363. An attorney has a lien on his client's cause of action for compensation that may be due him for services in that or any other proceeding. Canary v. Russell, 10 Misc. Rep. 507, 31 N. Y. Supp. 291.

[209] Massachusetts & S. Const. Co. v. Gill's Creek Tp., 48 Fed. 145.

When Lien Attaches.

The charging lien does not attach until judgment is entered, in the absence of statutory regulation.[210] It does not attach upon rendition of verdict. In New York and some other states, however, the statute gives a lien upon the cause of action, and in these states the lien dates from the commencement of the action.[211] Until the lien attaches, the parties may settle the suit without regard to the attorney.[212]

To What Lien Attaches.

The lien is on the judgment, not on the subject-matter of the action,[213] unless otherwise provided by statute. In a few states, however, the lien is held to extend to the property in litigation, whether real or personal.[215]

[210] Marshall v. Meech, 51 N. Y. 140; Shank v. Shoemaker, 18 N. Y. 489; Sweet v. Bartlett, 4 Sandf. (N. Y.) 661; Rooney v. Railroad Co., 18 N. Y. 368; Wright v. Wright, 70 N. Y. 96; Coughlin v. Railroad Co., 71 N. Y. 443; Crotty v. MacKenzie, 52 How. Prac. (N. Y.) 54; Tullis v. Bushnell, 65 How. Prac. (N. Y.) 465; Sullivan v. O'Keefe, 53 How. Prac. (N. Y.) 426; Potter v. Mayo, 3 Me. 34; Hobson v. Watson, 34 Me. 20; Hanna v. Coal Co., 5 Ind. App. 163, 31 N. E. 846; Wells v. Hatch, 43 N. H. 246; Hooper v. Welch, 43 Vt. 169; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570; Henchey v. City of Chicago, 41 Ill. 136; Getchell v. Clark, 5 Mass. 309; Brown v. Bigley, 3 Tenn. Ch. 618; Kusterer v. City of Beaver Dam, 56 Wis. 471, 14 N. W. 617; Courtney v. McGavock, 23 Wis. 622; Newbert v. Cunningham, 50 Me. 231; Lamont v. Railroad Co., 2 Mackey (D. C.) 502.

[211] Code Civ. Proc. N. Y. 1879, § 66.

[212] See cases cited in note 210, supra. It has been held that a settlement before judgment will not defeat the attorney's lien for costs and charges which are legally taxable. Swain v. Senate, 2 Bos. & P. (N. R.) 99; Cole v. Bennett, 6 Price, 15; Morse v. Cooke, 13 Price, 473; Rasquin v. Stage Co., 12 Abb. Prac. (N. Y.) 324; Dietz v. McCallum, 44 How. Prac. (N. Y.) 493; Talcott v. Bronson, 4 Paige (N. Y.) 501. See, also, Lamont v. Railroad Co., 2 Mackey (D. C.) 502; Parker v. Blighton, 32 Mich. 266; Wright v. Hake, 38 Mich. 525; Courtney v. McGavock, 23 Wis. 622. In Howard v. Town of Osceola, 22 Wis. 433, a discontinuance was set aside to enable the attorney to proceed to collect costs of the action and his fees.

[213] McWilliams v. Jenkins, 72 Ala. 480. No lien on lands for services respecting title. Lee v. Winston, 68 Ala. 402; McWilliams v. Jenkins, 72 Ala. 480; Shaw v. Neale, 6 H. L. Cas. 581; McCullough v. Flournoy, 69 Ala. 189; Hershy v. Du Val, 47 Ark. 86, 14 S. W. 469; Humphrey v. Browning, 46 Ill. 476; Stewart v. Flowers, 44 Miss. 513; Hanger v. Fowler, 20 Ark. 667.

[215] Hunt v. McClanahan, 1 Heisk. (Tenn.) 503; Perkins v. Perkins, 9

Priorities—Notice.

An attorney's lien takes priority over a set-off acquired after the lien has attached,[216] but it is subject to the judgment debtor's right to set off demands existing at that time.[217] In some states the attorney must give notice of his lien.[218] In others, no notice is required.[219] In New York, where the lien is on the cause of action, no notice is necessary.[220] A judgment for costs alone has been held notice of the attorney's lien.[221] The lien will, of course, prevail over a collusive settlement; and the attorney may recover from the opposite party the amount of his claim.[222]

Heisk. (Tenn.) 95; Skaggs v. Hill (Ky.) 14 S. W. 363 (under statute); Fillmore v. Wells, 10 Colo. 231, 15 Pac. 343 (under statute).

[216] Warfield v. Campbell, 38 Ala. 527; Boyle v. Boyle, 106 N. Y. 654, 12 N. E. 709; Caudle v. Rice, 78 Ga. 81, 3 S. E. 7; Pierce v. Lawrence, 16 Lea (Tenn.) 572, 1 S. W. 204.

[217] Bosworth v. Tallman, 66 Wis. 22, 27 N. W. 404; Id., 66 Wis. 533, 29 N. W. 542; Mohawk Bank v. Burrows, 6 Johns. Ch. (N. Y.) 317; Porter v. Lane, 8 Johns. (N. Y.) 357; Nicoll v. Nicoll, 16 Wend. (N. Y.) 446; National Bank of Winterset v. Eyre, 8 Fed. 733; Ex parte Lehman, 59 Ala. 631; Hurst v. Sheets, 21 Iowa, 501; Gager v. Watson, 11 Conn. 168. Generally, as to effect of set-off of judgments, see Delaney v. Miller, 84 Hun, 244, 32 N. Y. Supp. 505; Roberts v. Mitchell, 94 Tenn. 277, 29 S. W. 5; Bevins v. Albro, 86 Hun, 590, 33 N. Y. Supp. 1079; Field v. Maxwell, 44 Neb. 900, 63 N. W. 62.

[218] Dodd v. Brott, 1 Minn. 270 (Gil. 205); Hurst v. Sheets, 21 Iowa, 501; Marshall v. Meech, 51 N. Y. 140.

[219] Gammon v. Chandler, 30 Me. 152; Hobson v. Watson, 34 Me. 20; Newbert v. Cunningham, 50 Me. 231; Weeks v. Wayne Circuit Judge, 73 Mich. 256, 41 N. W. 269.

[220] Albert Palmer Co. v. Van Orden, 64 How. Prac. (N. Y.) 79; Coster v. Green Point Ferry Co., 5 N. Y. Civ. Proc. R. 146; Goodrich v. McDonald, 41 Hun, 235. An attorney's lien for compensation attaches to the judgment in the hands of an assignee for value without notice. Guliano v. Whitenack, 9 Misc. Rep. 562, 30 N. Y. Supp. 415.

[221] Marshall v. Meech, 51 N. Y. 140; McGregor v. Comstock, 28 N. Y. 237; Haight v. Holcomb, 16 How. Prac. (N. Y.) 173; Stratton v. Hussey, 62 Me. 286.

[222] Whart. Ag. § 627; McGregor v. Comstock, 28 N. Y. 237; McKenzie v. Wardwell, 61 Me. 136; Pleasants v. Kortrecht, 5 Heisk. 604; Foot v. Tewksbury, 2 Vt. 97; Currier v. Railroad Co., 37 N. H. 223; Read v. Dupper, 6 Term R. 361. Effect of compromise and settlement by parties. Sheedy v. McMurtry, 44 Neb. 499, 63 N. W. 21; Keane v. Keane, 86 Hun, 159, 33 N. Y. Supp. 250; Parsons v. Hawley (Iowa) 60 N. W. 520; Roberts v. Railroad

Waiver of Lien.

An attorney's charging lien may be waived or lost in the same manner as a general or retaining lien.[223] The lien is lost by the abandonment of the case.

Enforcement of Lien.

The lien of an attorney upon a judgment recovered by him will be enforced according to the law of the state where the lien attached, and not according to the law of the state where the judgment is sought to be collected.[225] An attorney is regarded as an equitable assignee of the judgment to the extent of his lien.[226] He may enforce his lien by an action on the judgment in the name of his client,[227] but not in his own name.[228] Where a fund is in court, on motion, the court will order payment to the attorney out of the fund.[229] The lien continues and may be enforced, though the client's debt secured by it is barred by the statute of limitations.[230]

SAME—CONFIDENTIAL COMMUNICATIONS.

15. An attorney cannot be compelled and will not be permitted to disclose confidential communications made to him by his client, except—

EXCEPTIONS (a) Where the communications relate to the proposed commission of a crime.

(b) Where the disclosure is necessary to the attorney's protection.

Co., 84 Hun, 437, 32 N. Y. Supp. 387; Voigt Brewery Co. v. Donovan, 103 Mich. 190, 61 N. W. 343; Crouch v. Hoyt, 24 Civ. Proc. R. 60, 30 N. Y. Supp. 406; Canary v. Russell, 10 Misc. Rep. 597, 31 N. Y. Supp. 291; Mosely v. Jamison, 71 Miss. 456, 14 So. 529; Foster v. Danforth, 59 Fed. 750.

223 See ante, p. 33.

225 Citizens' Nat. Bank v. Culver, 54 N. H. 327; note on enforcing attorney's lien, 10 Abb. N. C. 391.

226 Jones, Liens, § 232; Newbert v. Cunningham, 50 Me. 231; Mosely v. Norman, 74 Ala. 422; Ex parte Lehman, Durr & Co., 59 Ala. 631; Woods v. Verry, 4 Gray, 357; Marshall v. Meech, 51 N. Y. 140.

227 Stone v. Hyde, 22 Me. 318. But not without authority from his client. Horton v. Champlin, 12 R. I. 550.

228 Adams v. Fox, 40 Barb. 442.

229 Walker v. Floyd, 30 Ga. 237; Smith v. Goode, 29 Ga. 185.

230 Higgins v. Scott, 2 Barn. & Adol. 413.

Communications made to an attorney by his client for the purpose of obtaining his advice and assistance are privileged; that is to say, the attorney will not be compelled or permitted to disclose them. This privilege rests on reasons of public policy, growing out of the confidential character of the relation, and the necessity the client is under of making full disclosure to enable the attorney to successfully conduct his cause.[231] The existence of the relation of attorney and client is essential to the existence of the privilege.[232] A formal retainer or the payment of a fee is not necessary,[233] however, and communications in anticipation of employment are privileged.[234] But communications made to an attorney, not in his professional capacity, but as a friend, are not privileged.[235] Of course, if the person to whom the communication is made is not an attor-

[231] Hatton v. Robinson, 14 Pick. (Mass.) 416; Crosby v. Berger, 11 Paige (N. Y.) 377; Coveney v. Tannahill, 1 Hill (N. Y.) 33; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; Williams v. Fitch, 18 N. Y. 551; Britton v. Lorenz, 45 N. Y. 51; Thompson v. Kilborne, 28 Vt. 750; Hunter v. Watson, 12 Cal. 363.

[232] Mechem, Ag. § 883; Rochester City Bank v. Suydam, 5 How. Prac. (N. Y.) 254; Earle v. Grout, 46 Vt. 113; Randolph v. Quidnick Co., 23 Fed. 278; House v. House, 61 Mich. 69, 27 N. W. 858; Sharon v. Sharon, 79 Cal. 632, 22 Pac. 26, 131; Brayton v. Chase, 3 Wis. 456; Granger v. Warrington, 3 Gilm. (Ill.) 299; Rockford v. Falver, 27 Ill. App. 604; Bogert v. Bogert, 2 Edw. Ch. (N. Y.) 389; Parker v. Carter, 4 Munf. (Va.) 273.

[233] Bacon v. Frisbie, 80 N. Y. 394; March v. Ludlum, 3 Sandf. Ch. (N. Y.) 35; Foster v. Hall, 12 Pick. (Mass.) 89; Belzhoover v. Blackstock, 3 Watts (Pa.) 20; Cross v. Riggins, 50 Mo. 335. Cf. Thompson v. Kilborne, 28 Vt. 750; Cuts v. Pickering, 1 Vent. 197.

[234] Bacon v. Frisbie, 80 N. Y. 394; Thorp v. Goewey, 85 Ill. 611; Orton v. McCord, 33 Wis. 205; Cross v. Riggins, 50 Mo. 335; Young v. State, 65 Ga. 325; Bean v. Quimby, 5 N. H. 94.

[235] 1 Greenl. Ev. § 244; Goltra v. Wolcott, 14 Ill. 89; Cady v. Walker, 62 Mich. 157, 28 N. W. 805; Hoffman v. Smith, 1 Caines (N. Y.) 157. There is no privilege where an attorney is employed as a mere scrivener or conveyancer. House v. House, 61 Mich. 69, 27 N. W. 858; Hebbard v. Haughian, 70 N. Y. 54; Smith v. Long, 106 Ill. 485; De Wolf v. Strader, 26 Ill. 225; Hatton v. Robinson, 14 Pick. 416; Appeal of Goodwin Gas Stove & Meter Co., 117 Pa. St. 514, 12 Atl. 736. Contra, Getzlaff v. Seliger, 43 Wis. 297; Parker v. Carter, 4 Munf. (Va.) 273. See, generally, Brown v. Jewett, 120 Mass. 215; Johnson v. Daverne, 19 Johns. (N. Y.) 134; Clark v. Richards, 3 E. D. Smith (N. Y.) 89.

ney, the relation of attorney and client cannot exist, and the communication is not privileged.[236] The privilege extends, however, to communications made to interpreters, agents, and attorney's clerks.[237] It is also essential to the existence of the privilege that the communication be confidential. Thus, communications made openly in the presence of others,[238] or made for the purpose of being communicated by the attorney to others,[239] are not privileged. But a special injunction of secrecy is not essential to the privilege, and it attaches though the client was unaware of it.[240] The privilege does not apply to collateral facts involving no matter of confidence, such as the fact of his employment,[241] the name of his client,[242] and the like.[243] The communication must have been made by the client to the attorney. Where it is made to third persons and overheard

[236] McLaughlin v. Gilmore, 1 Ill. App. 563; Holman v. Kimball, 22 Vt. 555; Sample v. Frost, 10 Iowa, 266; Barnes v. Harris, 7 Cush. (Mass.) 576. The rule applies only to licensed attorneys. Holman v. Kimball, 22 Vt. 555. Cf. Benedict v. State, 44 Ohio St. 679, 11 N. E. 125, where it was held communications to a person regularly practicing in a justice court, but who was not an attorney, were privileged.

[237] Foster v. Hall, 12 Pick. (Mass.) 89.

[238] Mobile, etc., R. Co. v. Yeates, 67 Ala. 167; Jackson v. French, 3 Wend. (N. Y.) 337; House v. House, 61 Mich. 69, 27 N. W. 858; Gallagher v. Williamson, 23 Cal. 331; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286.

[239] Henderson v. Terry, 62 Tex. 281; Ripon v. Davies, 2 Nev. & M. 310; Hughes v. Boone, 102 N. C. 137, 9 S. E. 286; Cady v. Walker, 62 Mich. 157, 28 N. W. 805; Bartlett v. Bunn, 56 Hun, 507, 10 N. Y. Supp. 210; White v. State, 86 Ala. 69, 5 South. 674.

[240] McLellan v. Longfellow, 32 Me. 494; Wheeler v. Hill, 16 Me. 329.

[241] White v. State, 86 Ala. 69, 5 South. 674; Mobile etc., R. Co. v. Yeates, 67 Ala. 164; Leindecker v. Waldron, 52 Ill. 283; Gower v. Emery, 18 Me. 79; Chirac v. Reinicker, 11 Wheat. 280; Forshaw v. Lewis, 1 Jur. (N. S.) 263.

[242] Fulton v. Maccracken, 18 Md. 528; Levy v. Pope, 1 Moody & M. 410.

[243] Wheatley v. Williams, 1 Mees. & W. 536; Brown v. Payson, 6 N. H. 443; In re Austin, 42 Hun, 516; Burnside v. Terry, 51 Ga. 186; Hebbard v. Haughian, 70 N. Y. 54; House v. House, 61 Mich. 69, 27 N. W. 858; Cady v. Walker, 62 Mich. 157, 28 N. W. 805. An attorney may be asked whether he has in his possession a certain paper, in order to lay a foundation for the admission of secondary evidence as to its contents. Coveney v. Tannahill, 1 Hill (N. Y.) 33; Jackson v. M'Vey, 18 Johns. (N. Y.) 330. But he cannot be compelled to produce it or state its contents. Id.

by the attorney,[244] or where he derives information by observation [245] or from third persons,[246] it is not privileged. The privilege is for the benefit of the client, not the attorney. It continues until waived by the client or his personal representative.[247] It is not waived merely by making the attorney a witness, but it is waived if the client examines him as to the privileged transactions.[248]

Exceptions.

"Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy; and it is not only lawful to divulge such communications, but, under such circumstances, it might become the duty of the attorney to do so. * * * The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases." [249] This exception applies only to contemplated crimes. Communications with reference to completed crimes are privileged.[250] It is an essential element of the right to be defended by counsel. The exception is also confined to crimes, as distinguished from mere civil frauds.[251] A second exception exists where the disclosure is neces-

[244] House v. House, 61 Mich. 69, 27 N. W. 859.

[245] Crosby v. Berger, 11 Paige (N. Y.) 377; Brandt v. Klein, 17 Johns. (N. Y.) 335; Chillicothe Ferry Co. v. Jameson, 48 Ill. 281; Stoney v. M'Neil, Harper (S. C.) 557.

[246] Crosby v. Berger, 11 Paige (N. Y.) 377; Hunter v. Watson, 12 Cal. 363; Gallagher v. Williamson, 23 Cal. 331.

[247] Mechem, Ag. § 885; Hatton v. Robinson, 14 Pick. (Mass.) 416. The client may waive. Chase's Case, 1 Bland, Ch. (Md.) 206; Parker v. Carter, 4 Munf. (Va.) 273; Whiting v. Barney, 30 N. Y. 330; Benjamin v. Coventry, 19 Wend. (N. Y.) 353; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; Fossler v. Schriber, 38 Ill. 172; Passmore v. Passmore, 50 Mich. 626, 16 N. W. 170; Hamilton v. People, 29 Mich. 173; Foster v. Hall, 12 Pick. (Mass.) 89.

[248] Vaillant v. Dodemead, 2 Atk. 524; Waldron v. Ward, Style, 449.

[249] People v. Van Alstine, 57 Mich. 69, 23 N. W. 594. See, also, Coveney v. Tannahill, 1 Hill, 33; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; State v. Mewherter, 46 Iowa, 88; Dudley v. Beck, 3 Wis. 274; Graham v. People, 63 Barb. (N. Y.) 468; Clay v. Williams, 2 Munf. (Va.) 105; Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616.

[250] 1 Greenl. Ev. § 240.

[251] Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; Maxham v. Place, 46 Vt. 434.

sary to the protection of the attorney's own rights, as where he sues or is sued by his client, and it becomes material to show the nature of his employment or the instructions of the client.[252]

16. TERMINATION.

The relation of attorney and client may be terminated in any of the ways in which any other agency may be terminated.[253] But the court may interfere to do justice between them. The attorney of record cannot be changed without leave of court,[254] and an attorney can withdraw only by leave of court.[255]

[252] Nave v. Baird, 12 Ind. 318; Mitchell v. Bromberger, 2 Nev. 345; Rochester City Bank v. Suydam, 5 How. Prac. (N. Y.) 254.

[253] Death of client. Adams v. Nellis, 59 How. Prac. (N. Y.) 385. Unless coupled with an interest. Villlamer v. City of Toledo, 32 Wkly. Law Bul. 154; Harness v. State, 57 Ind. 1; Lapaugh v. Wilson, 43 Hun, 619; Clegg v. Baumberger, 110 Ind. 536, 9 N. E. 700. A client has the right, without assigning any reason therefor, to change his attorney at any time on paying or securing the attorney's fees. In re Prospect Ave., 85 Hun, 257, 32 N. Y. Supp. 1013.

[254] Krekeler v. Thaule, 49 How. Prac. 138; Ginders v. Moore, 1 Barn. & C. 654; Jerome v. Boeram, 1 Wend. (N. Y.) 293. A substitution will not be permitted unless the costs of the first attorney have been paid. Witt v. Ames, 11 Wkly. Rep. 751, 8 Law T. (N. S.) 425.

[255] U. S. v. Curry, 6 How. 106; Boyd v. Stone, 5 Wis. 240.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF FACTORS

A MONOGRAPH BY

EARL P. HOPKINS, A. B., LL. M.

Author of "Real Property," Etc

ST. PAUL, MINN.

WEST PUBLISHING CO.

1896

†

FACTORS.

1. Factor Defined.
2. Establishment of Relation.
3–4. Implied Powers of Factors.
5. Rights and Liabilities of Factors.
6. Duty to Exercise Good Faith.
7. Duty to Keep Principal Posted.
8. Liability for Negligence.
9. Duty to Follow Instructions.
10. Duty to Account.
11. Duty in Remitting.
12. Del Credere Agents.
13. Right to Commissions.
14. Right to Reimbursement.
15. Right to Indemnity.
16. Lien.
17. Rights against Third Persons.
18. Liabilities to Third Persons.
19. Rights and Liabilities of Principals and Third Persons.
20. Termination of Relation.

FACTOR DEFINED.

1. A factor or commission merchant is an agent who makes a business of receiving and selling consignments of goods, usually in his own name.

The following are some definitions of a factor which are found in the books: "A factor is a specialist employed to receive and sell goods for a commission." [1] A factor is "an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called 'factorage' or 'commission.'" [2] "A factor is an agent who, in the pursuit of an inde-

[1] Whart. Ag. § 735. A factor may receive a salary instead of a commission. State v. Thompson, 120 Mo. 12, 25 S. W. 346.

[2] Story, Ag. § 33.

pendent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser."[3] The term "commission merchant," as used in common parlance, means the same as the legal term "factor."[4] Possession of the goods with which the factor deals, and authority to sell them, are essential to the character of a factor. A factor is distinguished from a broker chiefly by the fact that he has possession of the goods, while the broker does not; and that the factor usually sells in his own name, while the broker usually deals in the name of his principal.[5] To constitute one a factor, he must make the selling of goods on commission a regular business. The receipt and sale of a single consignment would be insufficient. Thus, under a statute requiring factors to take out licenses, it is only the person who intends to engage in the business of a factor as a source of profit—to pursue that as a vocation, either alone or in connection with some other business—who is required to obtain a license. Such a statute does not make it necessary for one who may gratuitously assume the duties of a factor, or who may in one or two instances discharge such duties, to take out a license.[6] In some cases the term "factor" has been applied to agents to purchase goods;[7] but this use of the word seems improper. A factor really means nothing except an agent to sell goods, though the factor may perform other duties for his principal in addition to those he performs as factor.[8] One who purchases goods for a principal is really a broker.

[3] Civ. Code Cal. § 2026; Civ. Code Dak. § 1168.

[4] Brickell, J., in Perkins v. State, 50 Ala. 154, 156.

[5] Baring v. Corrie, 2 Barn. & Ald. 137; Harbert v. Neill, 49 Tex. 143; Saladin v. Mitchell, 45 Ill. 79; Higgins v. Moore, 34 N. Y. 417; Slack v. Tucker, 23 Wall. 321.

[6] Perkins v. State, 50 Ala. 154.

[7] Bryce v. Brooks, 26 Wend. 367; Stevens v. Robins, 12 Mass. 180.

[8] See Patterson v. Leake, 5 La. Ann. 547; Emerson v. Manufacturing Co., 12 Mass. 237. One who takes milk from farmers, manufactures it into butter and cheese, and sells the product, deducting a certain compensation per pound, is a factor. First Nat. Bank of Elgin v. Schween, 127 Ill. 573, 20 N. E. 681. Where several owners of a vessel and cargo constitute one of their number to transact the business connected with the property, he is viewed as a factor.

ESTABLISHMENT OF RELATION.

2. The relation of principal and factor is established by original grant of authority or by ratification.

For the establishment of the relation of principal and factor, the same rules are applicable as in ordinary cases of agency. It may arise by an express contract of the parties; it may be implied from their acts; or the principal may ratify the acts of an unauthorized factor.

IMPLIED POWERS OF FACTORS.

3. A factor has the following implied powers:

(a) **To sell in his own name** (p. 4).
(b) **To fix the price** (p. 5).
(c) **To sell on credit** (p. 5).
(d) **To warrant** (p. 6).
(e) **To receive payment** (p. 7).
(f) **To insure** (p. 7).

4. A factor has no implied power:

(a) **To barter** (p. 8).
(b) **To pledge, unless authorized by statute** (p. 8).
(c) **To delegate his authority** (p. 10).
(d) **To settle except for payment in full** (p. 11).

Bradford v. Kimberley, 3 Johns. Ch. (N. Y.) 431. The captain of a steamboat, selling flour on freight, will not be considered a factor without express authority, or such as is implied by the usages of trade. Taylor v. Wells, 3 Watts (Pa.) 65; Rapp v. Palmer, 3 Watts (Pa.) 178. Where a person employs another to sell goods and wares at a distant place, agrees that the employé shall receive a certain sum yearly and a stipulated portion of the profits for his services, and the employé is to select and rent a business house, and employ clerks, and conduct the business, and all rents and expenses are to be paid out of the proceeds, if sufficient, but, if not, then by the employer, the person conducting the business is a factor. Winne v. Hammond, 37 Ill. 99; Blood v. Palmer, 11 Me. 414. A common carrier may occupy the position of a factor by selling the goods he has transported for the shipper, at the place of destination. Kemp v. Coughtry, 11 Johns. (N. Y.) 107; Williams v. Nichols, 13 Wend. (N. Y.) 58; Harrington v. McShane, 2 Watts (Pa.) 443; Taylor v. Wells, 3 Watts (Pa.) 65.

A factor is bound to conform to the instructions of his consignor as to the price of the article to be sold, the terms, the mode of payment, etc.[10] But, in the absence of any instructions, the consignor is presumed by law to be acquainted with and to assent to the course of dealing which is usually practised at the same market by others in the same line of business.[11] A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not.[12]

To Sell in His Own Name.

Among the implied powers of a factor is the power to sell goods consigned to him in his own name, without disclosing his principal.[13] This, as already stated, is one of the chief tests in distinguishing a factor from a broker.[14]

[10] Van Alen v. Vanderpool, 6 Johns. (N. Y.) 70; Leland v. Douglass, 1 Wend. (N. Y.) 490; Goodenow v. Tyler, 7 Mass. 36; Day v. Holmes, 103 Mass. 306; Cotton v. Hiller, 52 Miss. 7; Hall v. Storrs, 7 Wis. 258; Osborne, D. M. & Co. v. Rider, 62 Wis. 235, 22 N. W. 394. The factor must sell within a reasonable time after the goods are received. Atkinson v. Burton, 4 Bush (Ky.) 299. As to the place of sale, see Phillips v. Scott, 43 Mo. 86; Kauffman v. Beasley, 54 Tex. 563; Wallace v. Bradshaw, 6 Dana (Ky.) 382; Grieff v. Cowguill, 2 Disn. (Ohio) 58. Where a consignment is made to a commission merchant for sale without instruction, in the absence of an established usage to the contrary, of which the consignor has or must be presumed to have knowledge, the consignee's authority to sell is limited to the place to which the consignment was originally made. Burke v. Frye, 44 Neb. 223, 62 N. W. 476.

[11] Dwight v. Whitney, 15 Pick. (Mass.) 179; Randall v. Kehlor, 60 Me. 37; Kauffman v. Beasley, 54 Tex. 563.

[12] Bailey v. Bensley, 87 Ill. 556; Story, Ag. §§ 60, 96, 199; 1 Chit. Cont. (11th Am. Ed.) 83; Sutton v. Tatham, 10 Adol. & E. 27; Bayliffe v. Butterworth, 1 Welsb. H. & G. 428; Lyon v. Culbertson, 83 Ill. 33; United States Life Ins. Co. v. Advance Co., 80 Ill. 549.

[13] Graham v. Duckwall, 8 Bush (Ky.) 12; Johnston v. Usborne, 11 Adol. & E. 549.

[14] Baring v. Corrie, 2 Barn. & Ald. 137; ante, p. 2.

To Fix the Price.

The consignment of goods to a factor for sale, without special instructions as to the price for which he shall sell, confers upon him the right to use his own judgment as to what offers to accept, and the probable changes in the market.[15] A sudden falling off of the market after the goods are received does not alter the case, and the factor may sell without waiting for instructions.[16] He may even sell for less than the amount he has advanced to the principal on the goods, and recover the difference from the principal.[17] The principal may, of course, fix the price, and then the factor must follow his instructions.[18]

To Sell on Credit.

A factor has implied power to sell goods on a reasonable term of credit.[19] He must, however, exercise the care that a reasonably prudent business man would use, and not extend credit to irresponsible persons.[20] A factor, however, has no authority to give credit against the express instructions of his principal,[21] or when the usage of the trade is to sell for cash only.[22] When a factor

[15] Adams v. Capron, 21 Md. 186; Conway v. Lewis, 120 Pa. St. 215, 13 Atl. 826; Given v. Lemoine, 35 Mo. 110.

[16] Adams v. Capron, supra.

[17] Given v. Lemoine, supra.

[18] See post, p. 15. Letters of instruction from a merchant to his factor, accompanying a consignment of goods, not expressly fixing the minimum price of the goods, but merely expressing an expectation that the goods, on account of their superior quality, would readily command a certain price named, will not be construed as fixing the minimum price; and if the factor sell for a less price than the one named, in good faith and without negligence, he will not be liable in damages. Vianna v. Barclay, 3 Cow. (N. Y.) 281.

[19] Van Alen v. Vanderpool, 6 Johns. (N. Y.) 69; Robertson v. Livingston, 5 Cow. (N. Y.) 473; Goodenow v. Tyler, 7 Mass. 36; Hapgood v. Batcheller, 4 Mete. (Mass.) 576; M'Connico v. Curzen, 2 Call (Va.) 358; Pinkham v. Crocker, 77 Me. 563, 1 Atl. 827.

[20] Pinkham v. Crocker, 77 Me. 563, 1 Atl. 827; James v. M'Credie, 1 Bay (S. C.) 294.

[21] Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252; Johnson v. Totten, 3 Cal. 343.

[22] Kauffman v. Beasley, 54 Tex. 563; Harbert v. Neill, 49 Tex. 143; Neill v. Billingsley, Id. 161.

sells on credit, he may take negotiable paper payable to himself.[23] If the maker of the paper becomes insolvent, the factor is not liable for the loss if he has exercised due care.[24] But, if the factor discounts such paper for his own accommodation, he becomes liable for any loss which occurs,[25] though he has implied power to discount paper for his principal.[26] A factor may also sell the goods of different principals in one sale, and take a note for the whole sum from the purchaser payable to himself.[27]

To Warrant.

The usage of trade generally gives a factor power to warrant the quality of the goods he sells.[28] But the warranty must be a reasonable one. Thus, it has been held that there is no implied authority to warrant that flour will keep sweet during a long sea voy-

[23] But where there was a sale on credit, and, at the expiration of the term of credit, the factor took a note payable to himself, he was held personally liable. Hosmer v. Beebe, 2 Mart. (N. S.) 368.

[24] Goodenow v. Tyler, 7 Mass. 36; Gorman v. Wheeler, 10 Gray (Mass.) 362; Leech v. Beardslee, 22 Conn. 404; Greely v. Bartlett, 1 Greenl. (Me.) 172. As to the diligence he must use in collecting notes, see Folsom v. Mussey, 8 Greenl. (Me.) 400. All such notes belong to the principal, and do not pass to the factor's assignee in bankruptcy. Kip v. Bank, 10 Johns. (N. Y.) 63; Messier v. Amery, 1 Yeates (Pa.) 533; Thompson v. Perkins, 3 Mason, 232, Fed. Cas. No. 13,972.

[25] Morris v. Wallace, 3 Pa. St. 319; Myers v. Entriken, 6 Watts & S. (Pa.) 44; Johnson v. O'Hara, 5 Leigh (Va.) 456.

[26] Greely v. Bartlett, 1 Greenl. (Me.) 172.

[27] Roosevelt v. Doherty, 129 Mass. 301; Chestertield Manuf'g Co. v. Dehon, 5 Pick. (Mass.) 7; West Boylston Manuf'g Co. v. Searle, 15 Pick. (Mass.) 225; Hapgood v. Batcheller, 4 Metc. (Mass.) 573; Hamilton v. Cunningham, 2 Brock. 350, Fed. Cas. No. 5,978; Corlies v. Cumming, 6 Cow. (N. Y.) 181. But see Story, Ag. §§ 179n, 204a. Where a commission merchant takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable to his principal for the amount of the goods, as he has deprived him of the means of pursuing his claim against his debtor, by extinguishing the debt due by simple contract. Jackson v. Baker, 1 Wash. C. C. 394, Fed. Cas. No. 7,129. And cf. Johnson v. O'Hara, 5 Leigh (Va.) 456.

[28] Schuchardt v. Allens, 1 Wall. 359; Woodford v. McClenahan, 9 Ill. 85; Upton v. Suffolk Co. Mills, 11 Cush. (Mass.) 586; Smith v. Tracy, 36 N. Y. 79; Nelson v. Cowing, 6 Hill (N. Y.) 336; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Bradford v. Bush, 10 Ala. 386; Hunter v. Jameson, 6 Ired. (N. C.) 252. But see Argersinger v. MacNaughton (N. Y. App.) 21 N. E. 1022.

age;[29] nor to warrant against gratuitous and unwarrantable interferences with the subject of the sale.[30]

To Receive Payment.

A factor has power to receive payment for the goods sold by him, since he is in possession and invested with all the indicia of ownership. He may receive payment at the time of the sale, or subsequently if the sale was on credit.[31]

To Insure.

It is the settled law that factors, having the goods of their principal in their possession, may insure them;[32] but they are not bound to do so, unless they have received orders to insure, or promise to insure,[33] or the usage of trade or the habit of dealing between them and their principal raises an obligation to insure.[34] And if, in any of the cases mentioned, the agent neglect to make the insurance, he is himself, by the custom of merchants, to be considered as the insurer, and liable as such in the event of loss, in which case he is entitled to credit for the premium which should have been paid.[35] A factor may insure in his own name;[36] and if he does so, and a loss occurs, he can recover the full value of the goods.[37]

[29] Upton v. Suffolk Co. Mills, 11 Cush. (Mass.) 586.

[30] As where whisky was sold with a warranty against seizure for violation of the revenue laws. Palmer v. Hatch, 46 Mo. 585.

[31] Lumley v. Corbett, 18 Cal. 494; Rice v. Groffmann, 56 Mo. 434; Drinkwater v. Goodwin, Cowp. 251, 256.

[32] Brisban v. Boyd, 4 Paige (N. Y.) 17; Lee v. Adsit, 37 N. Y. 78; De Forest v. Insurance Co., 1 Hall (N. Y.) 94; Schaeffer v. Kirk, 49 Ill. 251; Shoenfeld v. Fleisher, 73 Ill. 404. That the factor cannot insure in a mutual company, see White v. Madison, 26 N. Y. 117.

[33] Lee v. Adsit, 37 N. Y. 78; Shoenfeld v. Fleisher, 73 Ill. 404; Aetna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242; Duncan v. Boye, 17 La. Ann. 273.

[34] Area v. Milliken, 35 La. Ann. 1150; Gordon v. Wright, 29 La. Ann. 812.

[35] De Tastett v. Crousillat, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; Gordon v. Wright, 29 La. Ann. 812; Shoenfeld v. Fleisher, 73 Ill. 404; Waters v. Assurance Co., 5 El. & Bl. 870.

[36] Brisban v. Boyd, 4 Paige (N. Y.) 17; Johnson v. Campbell, 120 Mass. 449; Sargeant v. Morris, 3 Barn. & Ald. 377; Upsaricha v. Noble, 13 East, 332.

[37] Brisban v. Boyd, 4 Paige (N. Y.) 17; Ballard v. Insurance Co., 9 La. 258. A factor who has insured his principal's goods at the latter's expense, and collected the insurance on their being damaged by fire while in his possession, is liable to his principal for the amount collected, with interest from the time

To Barter.

A factor has no implied power to barter or exchange the goods consigned to him for other goods. If he does so, no title to the property passes, and the principal may recover the goods, though the person dealing with the factor supposed the latter to be the owner.[38]

To Pledge.

Although a factor or broker has a lien on his principal's goods for advances made, yet at common law he cannot pledge them.[39] When goods are so attempted to be pledged, the title and right of property of the owner are not divested by his own act, or by his authority. The factor has authority to sell, and a sale passes a good title from the owner. But the factor has no authority to pledge goods consigned to him. His acts attempting to do so are void, and vest no title in the pledgee.[40]

payment is demanded of him, even though there was no contract between them as to insurance. Fish v. Seeberger, 47 Ill. App. 580, affirmed, 39 N. E. 982, 154 Ill. 30. A promise by a factor that he would write to his principal to get insurance done does not bind the principal to insure. It is a personal engagement of the factor, for which the principals are not liable. Randolph v. Ware, 3 Cranch, 503.

[38] Wheeler & Manufacturing Co. v. Givan, 65 Mo. 89; Wing v. Neal (Me.) 2 Atl. 881; Guerreiro v. Peile, 3 Barn. & Ald. 616; Victor Sewing Mach. Co. v. Heller, 44 Wis. 265 (under factors' act).

[39] Kennedy v. Strong, 14 Johns. (N. Y.) 127; Rodriguez v. Heffernan, 5 Johns. Ch. (N. Y.) 417; Newbold v. Wright, 4 Rawle (Pa.) 195; Kinder v. Shaw, 2 Mass. 397; Gray v. Agnew, 35 Ill. 315; Kelly v. Smith, 1 Blatchf. 290, Fed. Cas. No. 7,675; Van Amringe v. Peabody, 1 Mason, 440, Fed. Cas. No. 16,825; Insurance Co. v. Kiger, 103 U. S. 352; Warner v. Martin, 11 How. 208; First Nat. Bank of Macon v. Nelson, 38 Ga. 391; Wright v. Solomon, 19 Cal. 64; Merchants' Nat. Bank of Memphis v. Trenholm, 12 Heisk. (Tenn.) 520; McCreary v. Gaines, 55 Tex. 485; Paterson v. Tash, 2 Strange, 1178; Daubigny v. Duval, 5 Term R. 604; Newsom v. Thornton, 6 East, 17; Graham v. Dyster, 2 Starkie, 21; Martini v. Coles, 1 Maule & S. 140; Shipley v. Kymer, Id. 484; Solly v. Rathbone, 2 Maule & S. 298; Cockran v. Irlam, Id. 301, note; Boyson v. Coles, 6 Maule & S. 14; Fielding v. Kymer, 2 Brod. & B. 639; Quelroz v. Trueman, 3 Barn. & C. 342; Bonito v. Mosquera, 2 Bosw. (N. Y.) 401. But cf. Hutchinson v. Bours, 6 Cal. 384; Leet v. Wadsworth, 5 Cal. 404; Wright v. Solomon, 19 Cal. 64; Miller v. Schneider, 19 La. Ann. 300; McCreary v. Gaines, 55 Tex. 485; First Nat. Bank v. Nelson, 38 Ga. 391.

[40] Hoffman v. Noble, 6 Mete. (Mass.) 68. The factor, however, cannot dis-

The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law a factor is but the attorney of his principal, and he must pursue the powers delegated to him.[41] The party receiving such a pledge, and advancing his money, acquires no title, as against the principal. Nor is it material in such a case whether the pledgee knew that he was dealing with a factor or not. If he knew the fact, he was bound to know that by law the factor had no authority to pledge the goods of his principal. If he did not know that the person with whom he was dealing was a factor, still his want of knowledge of this fact could not extend the authority of the factor. As such an act is not within the ordinary powers of a factor, it is clear that it cannot work a divestiture of the title of the principal; and he may pursue the goods in the hands of the pledgee, or may bring trover against both the pledgee and factor, or either of them, at his election.[42]

But a factor may deliver the possession of goods on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit. This is a continuance, in effect, of the factor's possession.[43]

Same—Statutory Power to Pledge.

In a number of states, however, the rules of the common law as to factors have been changed by statute.[44] These enactments

affirm the pledge on the ground that he had no authority to make it. Bott v. McCoy, 20 Ala. 578.

[41] Kinder v. Shaw, 2 Mass. 398; McCreary v. Gaines, 55 Tex. 485.

[42] Bott v. McCoy, 20 Ala. 578; Kinder v. Shaw, 2 Mass. 397; McCreary v. Gaines, 55 Tex. 485; Phillips v. Huth, 6 Mees. & W. 572, 596; Martini v. Coles, 1 Maule & S. 140; Baring v. Corrie, 2 Barn. & Ald. 137; McCombie v. Davies, 6 East, 538. But see Hutchinson v. Bours, 6 Cal. 384; Story, Ag. § 437.

[43] Urquhart v. M'Iver, 4 Johns. (N. Y.) 103; Laussatt v. Lippincott, 6 Serg. & R. (Pa.) 440; Bowie v. Napier, 1 McCord (S. C.) 1; Blair v. Childs, 10 Heisk. (Tenn.) 199; First Nat. Bank of Louisville v. Boyce, 78 Ky. 42. Contra, Merchants' Nat. Bank of Memphis v. Trenholm, 12 Heisk. (Tenn.) 520.

[44] 1 Stim. Am. St. Law, §§ 4380–4385. New York, 2 Rev. St. 1875, p. 1168, §§ 1, 5; 3 Rev. St. 1882, p. 2257. Ohio, 1 Rev. St. 1880, §§ 3214, 3218. Massachusetts, Gen. St. 1860, c. 54; Pub. St. 1882, c. 71. Pennsylvania, Bright. & Purd. Dig. 1873, p. 664. Wisconsin, Rev. St. 1878, pp. 854, 855, §§ 3345–3347.

make it possible for persons dealing with factors to take pledges of goods held by the latter, and, by so doing, acquire rights superior to those of the owner, who, by placing the property in the factor's hands, clothes him with apparent ownership. If the pledgee takes the goods knowing that the pledgor holds them as a factor, then the pledge is subject to the rights of the owner. The statutes are designed merely for the protection of bona fide pledgees.[45] Nor, on the other hand, is the factor given any right to pledge his principal's goods without the latter's consent. The owner may maintain an action against the factor for the tort.[46] The factor's acts, as they are called, apply in most of the states only to factors to whom the goods are consigned for sale, and not to mere consignees.[47] The owner may, in all cases, recover the goods pledged, by paying the amount which the pledgee has advanced.

To Delegate Authority.

The mere existence of the relation of principal and factor gives the latter no implied power to delegate the authority conferred upon him. A principal having imposed trust and confidence in the ability and integrity of the factor himself, the factor must perform his duties in person, and not turn them over to subagents.[48] Mere mechanical duties, requiring no exercise of discretion, need not be performed by the factor himself; and a usage of trade may justify a delegation of authority by incorporating into the contract an

Maryland, Rev. Code 1878, pp. 291, 292, 294, §§ 3, 5, 6, 14. Rhode Island, Gen. St. 1872, p. 261, c. 123; Pub. St. 1882, c. 136. Louisiana, Act 1874, No. 66.

[45] St. Louis Nat. Bank v. Ross, 9 Mo. App. 399; Evans v. Trueman, 1 Moody & R. 10.

[46] Stollenwerck v. Thacher, 115 Mass. 224.

[47] Jennings v. Merrill, 20 Wend. (N. Y.) 9; Stevens v. Wilson, 6 Hill (N. Y.) 512; Id., 3 Denio (N. Y.) 472; Cartwright v. Wilmerding, 24 N. Y. 521; First Nat. Bank of Toledo v. Shaw, 61 N. Y. 283; Kinsey v. Leggett, 71 N. Y. 387; Howland v. Woodruff, 60 N. Y. 72; Chicago Taylor Printing Press Co. v. Lowell, 60 Cal. 451; Nickerson v. Darrow, 5 Allen (Mass.) 419; Stollenwerck v. Thacher, 115 Mass. 224; Cole v. Northwestern Bank, L. R. 10 C. P. 354; Fuentes v. Montis, L. R. 3 C. P. 268; Id., L. R. 4 C. P. 93; Johnson v. Credit Lyonnais, 2 C. P. Div. 224; Pickering v. Busk, 15 East, 38; Boyson v. Coles, 6 Maule & S. 14; Dyer v. Pearson, 3 Barn. & C. 38.

[48] Warner v. Martin, 11 How. 209; Merchants' Nat. Bank of Memphis v. Trenholm, 12 Heisk. (Tenn.) 520.

implied power to delegate.[49] So, a principal may confer the power of delegation or substitution, either expressly or impliedly,[50] or may, after delegation by the agent, ratify or confirm the same, in such manner as to make the subagent responsible directly to the principal; but the fact that the principal knows that a subagent or factor will be employed does not relieve the liability of the agent to the principal.[51]

To Settle except for Payment in Full.

As already seen, a factor may sell on credit, and receive payment according to the terms of the credit, but that is the limit of his power. A factor has no power, unless authorized by his principal, to receive payment for goods sold in anything but money. He cannot take depreciated currency;[52] nor, as already seen, can he accept other goods in payment, for that would be an exchange or barter.[53] So, a factor cannot sell his principal's goods in payment of his own debts,[54] even when there is a balance due him from the principal.[55] He has no power to compromise the claim of the principal.[56] A factor cannot bind his principal by submitting to arbitration a controversy arising out of a sale made by the factor; for instance, a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold.[57] When a factor has sold goods on credit, he has no implied power to extend the time of payment.[58]

[49] Harralson v. Stein, 50 Ala. 347; Johnson v. Cunningham, 1 Ala. 249; Planters' & Farmers' Nat. Bank v. First Nat. Bank, 75 N. C. 534. A factor cannot delegate the selling of goods intrusted to him to his clerk. Warner v. Martin, 11 How. 224; Loomis v. Simpson, 13 Iowa, 532; Combes' Case, 9 Coke, 75, 76a.

[50] Campbell v. Reeves, 3 Head (Tenn.) 226; Loomis v. Simpson, 13 Iowa, 532; Combes' Case, 9 Coke, 75.

[51] Loomis v. Simpson, 13 Iowa, 532.

[52] Sangston v. Maitland, 11 Gill & J. (Md.) 286; Underwood v. Nicholls, 17 C. B. 239. But see Greenleaf v. Moody, 13 Allen, 363.

[53] Ante, p. 8.

[54] Warner v. Martin, 11 How. 209; Benny v. Rhodes, 18 Mo. 147; Holton v. Smith, 7 N. H. 446.

[55] Benny v. Pegram, 18 Mo. 191.

[56] Russ. Merc. Ag. 48. But see West Boylston Manuf'g Co. v. Searle, 15 Pick. (Mass.) 225.

[57] Carnochan v. Gould, 1 Bailey (S. C.) 179.

[58] Douglass v. Bernard, Auth. N. P. 278.

RIGHTS AND LIABILITIES OF FACTORS.

5. The rights and liabilities of factors will be considered under the following heads:

(a) Duty to exercise good faith (p. 12).
(b) Duty to keep principal posted (p. 13).
(c) Liability for negligence (p. 14).
(d) Duty to follow instructions (p. 15).
(e) Duty to keep and render accounts (p. 19).
(f) Duty in remitting (p. 22).
(g) Del credere agents (p. 23).
(h) Right to commissions (p. 27).
(i) Right to reimbursement (p. 28).
(j) Right to indemnity (p. 29).
(k) Right to a lien (p. 30).
(l) Rights against third persons (p. 37).
(m) Liability to third persons (p. 39).

SAME—DUTY TO EXERCISE GOOD FAITH.

6. A factor must exercise the utmost good faith in all his dealings with his principal.

Good faith is the paramount and vital principle of the law governing the relation of principal and factor. Good faith must be exercised by the factor in all his dealings with the principal's goods. The factor is not permitted to make any profit out of his agency beyond his legitimate commissions.[59] He cannot purchase for himself the goods consigned to him for sale, except with the knowledge and consent of his principal upon a full disclosure of the circumstances surrounding the transaction, and a total absence of all fraud and concealment.[60] If he should purchase without

[59] Keighler v. Manufacturing Co., 12 Md. 383; Evans v. Potter, 2 Gall. 12, Fed. Cas. No. 4,569; Babcock v. Orbison, 25 Ind. 75; Shaw v. Stone, 1 Cush. (Mass.) 228; Clarke v. Tipping, 9 Beav. 284. The making of advances by the factor does not change the rule. Rice v. Brook, 20 Fed. 611.

[60] Keighler v. Manufacturing Co., 12 Md. 383. So, he cannot act as agent for the purchaser. Bensley v. Moon, 7 Ill. App. 415; Talcott v. Chew, 27 Fed. 273.

such consent, the principal, on learning of the fraud, may, nevertheless, ratify the sale, and recover the purchase price.[61]

SAME—DUTY TO KEEP PRINCIPAL POSTED.

7. A factor must keep his principal posted on all matters material to the agency.

It is a part of a factor's duty to his principal to keep him posted on all things concerning the agency of which the principal should be informed. If he fails to do so, it is negligence, and a palpable violation of duty, for which the factor is liable to respond in damages to the principal.[62] If a factor sells on credit, and the purchaser becomes insolvent, the factor becomes liable for the debt by failing to notify the principal within a reasonable time that the debt is bad. The principal need not prove that he has sustained any damage by reason of the factor's neglect.[63] So, a factor, after a loss of the principal's goods, has been held liable for failure to give early notice of the insolvency of the underwriters, with whom he has effected insurance on behalf of the principal, in order that the latter might enforce his claim, and take such steps as he might think proper for his own security.[64] If the goods consigned to the factor are taken out of his possession by virtue of some legal process, he should at once inform the principal.[65]

[61] Wadsworth v. Gay, 118 Mass. 44. A factor cannot make a valid sale to a partnership of which he is a member. Martin v. Moulton, 8 N. H. 504.

[62] Harvey v. Turner, 4 Rawle (Pa.) 223; Arrott v. Brown, 6 Whart. (Pa.) 9; Howe v. Sutherland, 39 Iowa, 484.

[63] Harvey v. Turner, 4 Rawle (Pa.) 223; Arrott v. Brown, 6 Whart (Pa.) 9.

[64] Jameson v. Swainston, 2 Camp. 546, note. If it is the factor's duty to insure (see ante, p. 7), and for any reason he is unable to do so, he should notify the principal. Callander v. Oelrichs, 5 Bing. N. C. 58; Smith v. Lasceles, 2 Term R. 187; Smith v. Cologan, Id. 188, note.

[65] Moore v. Thompson, 9 Phila. 164.

SAME—LIABILITY FOR NEGLIGENCE.

8. A factor is liable for all losses caused by his negligence in conducting his principal's business.

A factor must exercise a sound and honest judgment in those matters which are left to his discretion. He will not be responsible if he appear to have acted to the best of his abilities, and not to have been guilty of breach of orders, gross negligence, or fraud.[66] It is not sufficient, however, that he has not been guilty of fraud, or such gross negligence as would carry with it the badges of fraud. He is required to act with reasonable care and prudence in his employment, and exercise his judgment after proper inquiry and precautions.[67]

If, through carelessness or want of proper examination and inquiry, he gives credit to a man who is insolvent, should a loss happen he must indemnify the principal; and, if a debt be lost by the inattention of the factor in omitting to collect it when it is in his power so to do, he will be liable for it.[68] Where a factor makes a sale "on 'change" for his principal, he will be held to a very high degree of vigilance in learning the pecuniary ability of the purchaser. To protect himself in case of a loss growing out of the insolvency or failure of the purchaser to pay for the goods sold, he must resort to all available sources of information that are accessible, and inattention or carelessness in this respect will render him liable for any loss sustained thereby; but he will not be held as a guarantor of such a sale.[69]

A factor is bound to the use of all reasonable diligence in caring for the property of his principal, and protecting it from loss. If

[66] Phillips v. Moir, 69 Ill. 155; Liotard v. Graves, 3 Caines (N. Y.) 238; Van Alen v. Vanderpool, 6 Johns. (N. Y.) 72; Moore v. Mourgue, Cowp. 480. The appointment of agents of known ability to make a collection is prima facie evidence of due diligence, and the consignor must prove negligence to hold the factor liable. McConnico v. Curzen, 2 Call. (Va.) 358.

[67] Leverick v. Meigs, 1 Cow. (N. Y.) 641; Millbank v. Dennistown, 21 N. Y. 386; Deshler v. Beers, 32 Ill. 368; Falsom v. Mussey, 8 Greenl. (Me.) 400; Randall v. Kehlor, 60 Me. 37; Gorman v. Wheeler, 10 Gray (Mass.) 362; Phillips v. Moir, 69 Ill. 155; Chandler v. Hogle, 58 Ill. 46.

[68] Greely v. Bartlett, 1 Me. 157. [69] Foster v. Waller, 75 Ill. 464.

the principal gives instructions as to the place of storing his goods until sale, these instructions must be followed by the factor, or he will be held liable for any loss which occurs.[70] A factor is not, however, to be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.[71] To protect his principal from loss, a factor may, in extraordinary cases, deviate from the instructions of the principal.[72]

SAME—DUTY TO FOLLOW INSTRUCTIONS.

9. A factor is bound to follow any instructions given him by his principal, except—

EXCEPTION—When necessary to protect his advances, he may depart from his instructions.

If the instructions given by a principal to his factor are so ambiguous that two constructions may fairly be given to them, every principle of justice demands that the want of precision in the language of the principal should fix the loss, if any, upon him, rather than upon his correspondent.[73] If the order leaves the latter a discretion, the law requires of him nothing further than the exercise of a sound, honest judgment. But if the order be free from ambiguity, is positive and unqualified, it must be rigidly obeyed, if it be practicable; and no motive connected with the interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of it.[74] Thus, where the principal gives

[70] Vincent v. Rather, 31 Tex. 77. Since a factor is required to exercise only ordinary care in taking care of property consigned to him, he is not liable for damage to cotton caused by exposure on the wharf to the weather, he being unable to procure immediate warehouse room, owing to the destruction of all the warehouses in the city by fire. Foster v. Bush, 104 Ala. 662, 16 South. 625.

[71] Johnson v. Martin, 11 La. Ann. 27.

[72] Joslin v. Cowee, 52 N. Y. 90.

[73] Brown v. McGrann, 14 Pet 479; Courcier v. Ritter, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; Mann v. Laws, 117 Mass. 293; Geyer v. Decker, 1 Yeates (Pa.) 487.

[74] Bessent v. Harris, 63 N. C. 542; Courcier v. Ritter, 4 Wash. C. C. 549, Fed. Cas. No. 3,282; Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394; Williams v. Littlefield, 12 Wend. (N. Y.) 362; Shoenfeld v. Fleisher, 73 Ill. 404; Pulsifer v.

orders to sell "on arrival," it is no excuse for a failure to do so that the market was dull, if a sale could in fact have been made, though at a low price.[75] So, a disobedience due to a mistake of the factor is no excuse.[76] But a departure from instructions may be excused by the happening of an event not contemplated at the time the instructions were given.[77]

If the principal, being informed by his agent of a deviation from his orders, make no objection to the factor's conduct, the law construes his silence into a tacit recognition of the act or omission, against which he will not be permitted afterwards to complain. The reason is obvious. He shall not, by his silence, place his agent in the predicament of losing all the gain which may result from his well-intended disobedience, and yet be exposed to sustain the loss

Shepard, 36 Ill. 513; Maynard v. Pease, 99 Mass. 555; Field v. Farrington, 10 Wall. 141; Rice v. Brook, 20 Fed. 611; Sigerson v. Pomeroy, 13 Mo. 620; Housel v. Thrall, 18 Neb. 484, 25 N. W. 612; Hatcher v. Comer, 73 Ga. 418. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and, if not sold on that day, to ship the same to New York, the factor must obey instructions, or he will be liable as for a conversion of the wheat. If, on the day he is required to sell, he give a refusal until the morning of the day following, and accordingly perfects the sale on that day, he will be liable for disobeying the instructions of his principal, and may be treated as having converted the wheat to his own use. Scott v. Rogers, 31 N. Y. 676. Where a factor sells on credit, in disregard of his instructions, he becomes liable for the payment of the debt. Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252.

[75] Evans v. Root, 7 N. Y. 186. And see Howland v. Davis, 40 Mich. 545; Weed v. Adams, 37 Conn. 378. But where a factor neglects to sell cotton within a reasonable time after being instructed to sell, and it is destroyed by fire, the delay in selling is not the proximate cause of the loss, and he is not liable therefor. Lehman v. Pritchett, 84 Ala. 512, 4 South. 601. Where a factor receives a peremptory order from his principal to sell goods consigned to him, he must sell at once, or, if a sale cannot be made, inform his principal, and await instructions. Spruill v. Davenport, 116 N. C. 34, 20 S. E. 1022.

[76] Rundle v. Moore, 3 Johns. Cas. (N. Y.) 36.

[77] In Dusar v. Perit, 4 Bin. (Pa.) 361, a supercargo was compelled to go to the Havana to repair his vessel, in consequence of an accident. He sold the vessel and part of the cargo at the limited price. The residue of the cargo was sold at less than the price fixed by his instructions, in consequence of the arrival of other like cargoes. The departure from instructions was held to be justified. Cf. Bell v. Palmer, 6 Cow. (N. Y.) 128.

which a mistaken judgment or unforeseen circumstances may produce. But, to entitle the agent to the benefit of this principle of law it is incumbent upon him to act with the utmost good faith, by making to his employer a candid disclosure of his conduct, and of the causes which influenced it, in order that the latter may have the means of judging in respect to the course which it becomes him to adopt.[78]

When a factor disobeys his instructions, the principal can hold him liable as for a conversion of the goods,[79] and recover the actual loss he has sustained through the factor's wrongful conduct. When the factor sells at some other time than that ordered by his principal, the measure of damages is the difference between the sum realized and what would have been realized had the sale been made according to instructions.[80] Where the factor sells at a less price than ordered, the recovery is not the difference between what is received and the price set,[81] but between what is received and what might have been received within a reasonable time.[82] If no actual loss has been sustained, only nominal damages are recoverable.[83]

Protecting His Advances.

Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been

[78] Courcier v. Ritter, 4 Wash. C. C. 549, Fed. Cas. No. 3,282. A sale by a factor contrary to the orders of his principal may be ratified by the receipt of the proceeds by the latter, unless it was understood by both parties at the time of such receipt that the right of action against the factor was to be left subsisting. Boyce v. Smith, Dud. (S. C.) 248. Where a factor sells cotton in direct violation of his instructions, the mere consignment in a succeeding year of another crop by the principal does not ratify the act, nor waive the latter's right to damages which he has notified the factor he would claim. Maggotlin v. Cowan, 11 La. Ann. 554.

[79] Scott v. Rogers, 31 N. Y. 676.

[80] Evans v. Root, 7 N. Y. 186; McLendon v. Wilson, 52 Ga. 41.

[81] Dalby v. Stearns, 132 Mass. 230. Contra, Switzer v. Connett, 11 Mo. 88.

[82] Romaine v. Van Allen, 26 N. Y. 315; Blot v. Boiceau, 3 N. Y. 78; Maynard v. Pease, 99 Mass. 555; Fordyce v. Peper, 16 Fed. 516. For the rule of highest intermediate value, see Hale, Dam. 186.

[83] Dalby v. Stearns, 132 Mass. 230; Blot v. Boiceau, 3 N. Y. 78; George v. M'Neill, 7 La. 124; Johnson v. Wade, 2 Baxt. (Tenn.) 480.

made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right. Thus, for example, if, contemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods, to reimburse his advances or liabilities, until after that time has elapsed.[84] The same rule will apply to orders not to sell below a fixed price, unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor.[85] And in no case will the factor be at liberty to sell the consignment contrary to the order of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities, out of the proceeds of the sale; and the consignor has no right, by any subsequent orders, given after

[84] Brown v. McGran, 14 Pet. 479; Fordyce v. Peper, 16 Fed. 516; De Comas v. Prost, 3 Moore, P. C. (N. S.) 158; Smart v. Sandars, 5 Man., G. & S. 895.

[85] Parker v. Brancker, 22 Pick. (Mass.) 40; Martield v. Goodhue, 3 N. Y. 62; Hilton v. Vanderbilt, 82 N. Y. 591; Mooney v. Musser, 45 Ind. 115; Davis v. Kobe, 36 Minn. 214, 30 N. W. 662. When a demand would be useless or impracticable, as where the principal is insolvent or in a distant country, no demand is necessary. Brown v. McGran, 14 Pet. 479.

advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities.[86] The factor must not sell more than is necessary to reimburse himself.[87] Of course, this right of the factor to sell, to reimburse himself for his advances and liabilities, applies with stronger force to cases where the consignor is insolvent, and where, therefore, the consignment constitutes the only fund for indemnity.[88]

SAME—DUTY TO ACCOUNT.

10. It is a factor's duty to keep accurate accounts of his dealings on behalf of his principal, and to render statements of account when required.

A factor, like other agents, is in duty bound, whenever reasonably requested so to do, to make and present to his principal a full and complete statement of the dealings and state of the accounts between the parties, to the end that the principal may know the state of his affairs, and ascertain the obligations he may be under to his agent. The information sought by a demand of a statement is presumed to be solely with the agent, and that the principal is ignorant of the true state of affairs as connected with the business confided to the agent.[89] In order that he may fulfill his obligation

[86] Feild v. Farrington, 10 Wall. 141; Talcott v. Chew, 27 Fed. 273; Rice v. Brook, 20 Fed. 611; Blackmar v. Thomas, 28 N. Y. 67; Butterfield v. Stephens, 59 Iowa, 596; Howard v. Smith, 56 Mo. 314; Davis v. Kobe, 36 Minn. 214, 30 N. W. 662.

[87] Nelson v. Railroad Co., 2 Ill. App. 180; Weed v. Adams, 37 Conn. 378; Howard v. Smith, 56 Mo. 314.

[88] Brown v. McGran, 14 Pet. 479. Where goods are consigned to a factor, without instructions, and without advances made or liabilities incurred by the factor, the principal may at any time control and direct him as to the terms, time, and manner of selling. Marfield v. Douglass, 1 Sandf. (N. Y.) 360. A factor who does not accept the terms on which a consignment to him is made cannot resist such other disposal of the goods as the consignor may make. Winter v. Coit, 7 N. Y. 288.

[89] Terwilliger v. Beals, 6 Lans. (N. Y.) 403; Keighler v. Manufacturing Co., 12 Md. 383; Dodge v. Perkins, 9 Pick. (Mass.) 368; Clark v. Moody, 17 Mass.

to account, it is the duty of a factor to keep books, in which shall be correctly entered the transactions on account of his principal, and the latter is entitled to a correct copy of the entries, including all memoranda connected therewith.[90] But where a factor has rendered his account of sales regularly, and the same were settled with full knowledge of all their items, and the names of purchasers were not then required, it is unreasonable, at any considerable distance of time thereafter, to subject the factor to a demand for such names, if his conduct has been honest and faithful, and free from fraud or deceit.[91] A factor is not bound to account to his principal until the time fixed by the terms of his employment or a demand made by the principal.[92] When a factor receives money for

145. A principal is entitled to a full knowledge of the collateral securities in the hands of his factor, of what has been received from them, and a detailed statement of their condition. Keighler v. Manufacturing Co., supra. The factor cannot refuse to account on the ground that the dealings between the principal and the purchasers were illegal. Baldwin v. Potter, 46 Vt. 402. Where a principal applied to his factor, to whom he had intrusted goods for sale under an agency of indefinite duration, for return of the goods, and notified him of a termination of the agency, and the factor, claiming a lien for advances and commissions, declined to surrender, and, upon the principal's offer to pay the amount of the claims, substantially refused to make a statement of them, it was held that the lien was forfeited, and the principal could maintain replevin for the goods. Terwilliger v. Beals, 6 Lans. (N. Y.) 403. Where a factor has transmitted to his principal accounts of two different sales of the same goods, the principal, after having approved and recognized the first account, is not bound to notice or object to the second, at the peril of its being taken as a stated account, and held binding upon him. Cartwright v. Greene, 47 Barb. (N. Y.) 9. The owner of goods has a right to waive a tort, as against factors, and to bring an action to compel them to account. Lubert v. Chauviteau, 3 Cal. 458. Since he waives the tort, and sues the defendants as factors, he can recover only the net proceeds, deducting charges, etc., and not the absolute value of the goods. Lubert v. Chauviteau, 3 Cal. 458. A pledgee is a proper party to call a factor to account, where he receives the goods with the understanding that he should dispose of them through a factor, and credit the debtor with the amount of sales, and he accordingly commits them to a factor, from whom he takes a receipt. Bigelow v. Walker, 24 Vt. 149. A factor may file a bill against his principal for an account. Ludlow v. Simond, 2 Caines, Cas. (N. Y.) 1.

[90] Keighler v. Manufacturing Co., 12 Md. 383.

[91] Id.

[92] Leake v. Sutherland, 25 Ark. 219; Cooley v. Betts, 24 Wend. (N. Y.) 203.

his principal, he becomes the principal's debtor in that amount, and is not required to keep the funds of the principal separate from his own. If he is acting for several principals, he may mingle all the funds in a common mass.[93] In this respect, factors differ from other agents.[94]

The payment of a balance of account by a factor or commission merchant to his principal, after the sales made, and for the purpose of closing the accounts between the parties, is an assumption of the outstanding debts; and consequently the principal is no longer accountable or bound to refund advances, though the debtors finally fail to pay for goods sold on credit, the proceeds of which were looked to for reimbursement.[95] But a note given for the balance of an account, though prima facie evidence of payment of the account, may be explained and rebutted by proof as to the nature of the transaction between the original parties.[96]

It is the duty of factors who receive goods to sell to account for the proceeds in a reasonable time, without previous demand, where a demand is impracticable or highly inconvenient. Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. (N. Y.) 590.

[93] Vail v. Durant, 7 Allen (Mass.) 408.

[94] Mechem, Ag. § 529.

[95] Oakley v. Crenshaw, 4 Cow. (N. Y.) 250. But, to throw this upon the factor, a clear intention to assume it should in all cases be shown. Robertson v. Livingston, 5 Cow. (N. Y.) 473. Accepting the final account of a factor, without objection, discharges him from all further liability to account for sales made by him on a credit, the proceeds of which he has not collected. Rion v. Gilly, 6 Mart. (La.) 417.

[96] Hapgood v. Batcheller, 4 Metc. (Mass.) 573. Where a commission merchant sold goods on a credit, and then settled with his principal, giving him a note for the balance, which he stated was to accommodate him, and, for that reason, he made it payable a few days after the note of the vendee fell due, held, that this was not an assumption of the vendee's debt, but that, to throw this upon the commission merchant, a clear intention to assume it should have been shown. Robertson v. Livingston, 5 Cow. (N. Y.) 473. In absence of any contract, or usage which may be evidence of contract, a factor is not liable for interest until he is in some default. Ellery v. Cunningham, 1 Metc. (Mass.) 112. A del credere factor who, by the default of purchasers, has become liable to pay the price to his principal, is chargeable with interest, without demand. Blakely v. Jacobson, 9 Bosw. (N. Y.) 140.

SAME—DUTY IN REMITTING.

11. A factor is not bound to remit until ordered to do so. If he remits without orders, the remittance is at his own risk.

A factor is under no obligation to remit to his principal any balance due the latter until he is instructed to do so.[97] A usage or course of dealing between the parties, by which the factor was to remit without instructions, would, of course, alter the case.[98] Until there has been a demand by the principal, he cannot maintain an action against the factor for any balance due, since the factor is guilty of no breach of duty in retaining the funds.[99] If the factor undertakes to remit when no direction or authority has been given, the remittance is at his own risk.[100] If a factor remit in some other manner than that ordered by his principal, or justified by the course of dealing between them, he assumes the risk himself, and must bear any loss that occurs.[101]

But where a factor is directed to remit in bills, if he procure such as are drawn by persons of undoubted credit at the time, it is a compliance with the duty he has to perform. The person on whom the bill is drawn rests in the discretion of the drawer. The law presumes he has effects of the drawer in his hands. If the factor has no cause to doubt the fact, he may take the bill consistently with the duty he owes his principal, and will not be liable on the ground of negligence, although it should afterwards turn out that the drawee was not of known responsibility. In such a case it is not required of the factor first to ascertain whether the person on whom the bill is drawn is in good credit. Where the principal and factor reside at a distance from each other, it cannot be rea-

[97] Halden v. Crafts, 4 E. D. Smith (N. Y.) 490; Ferris v. Paris, 10 Johns. (N. Y.) 285; Cooley v. Betts, 21 Wend. (N. Y.) 203.

[98] Brink v. Dolsen, 8 Barb. (N. Y.) 337.

[99] Halden v. Crafts, 4 E. D. Smith (N. Y.) 490; Brink v. Dolsen, 8 Barb. (N. Y.) 337; Cooley v. Betts, 21 Wend. (N. Y.) 203; Clark v. Moody, 17 Mass. 145.

[100] Halden v. Crafts, 4 E. D. Smith (N. Y.) 490; Clark v. Moody, 17 Mass. 145.

[101] Kerr v. Cotton, 23 Tex. 411.

sonably expected that the latter will have it in his power to obtain information, so as to decide with safety. But where the factor procures bills drawn by a firm on one of the partners, and the drawee proves insolvent, the factor is liable if he was in any way negligent in investigating the credit of the partners.[102]

SAME—DEL CREDERE AGENTS.

12. A del credere agent contracts to become absolutely liable for the price of goods sold by him if they are not paid for by the purchaser at the expiration of the term of credit. Such a contract is not within the statute of frauds.

A certain amount of confusion in terms is to be found in the books as to the exact nature of the undertaking of a factor who acts under a del credere contract. Such a contract is in form a guaranty or warranty of the purchaser's solvency. On the one hand, there are those who maintain that an agent del credere for the sale of goods makes himself absolutely and in the first instance liable to his principal for the price of the goods sold;[103] while, on the other hand, it has been strongly maintained that such an agent only incurs a secondary responsibility, that of mere surety, whereby he can be required to pay only in the event of failure on the part of the principal debtor.[104] And some of the authorities have gone to the extreme of maintaining that the undertaking of the agent under a del credere commission is a mere guaranty of the debt of another, and therefore within the statute of frauds.[105] The truth of the matter seems to be that the del credere contract is sui generis. The factor does in a certain measure become the principal debtor, but yet an agency relation continues which materially affects that of debtor and creditor. There is little, if any, conflict

[102] Leverick v. Meigs, 1 Cow. (N. Y.) 645.

[103] Wienholt v. Roberts, 2 Camp. 586; Houghton v. Matthews, 3 Bos. & P. 485; Grove v. Dubois, 1 Term R. 112; Mackenzie v. Scott, 6 Brown, P. C. 280.

[104] Morris v. Cleasby, 4 Maule & S. 566; Thompson v. Perkins, 3 Mason, 232, Fed. Cas. No. 13,972.

[105] See Lewis v. Brehme, 33 Md. 412.

in the decisions themselves apart from the dicta found in the opinions.

All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods, or to pursue his goods or the notes taken for them into the hands of third parties, precisely as if no del credere contract existed.[106] And, though such right in the principal would seem to be consistent only with a collateral undertaking by the agent, yet the contract del credere, being sui generis, is held in no wise to change the original and independent character of the agent's undertaking to his principal.[107] A factor, under a del credere commission, becomes liable to his principal when the purchase money is due. As between him and his principal, he then, in effect, becomes the purchaser, or is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, in the first instance. Hence, after the factor has sold the goods on credit, and sent an account of sales to his principal, the latter may recover the price of the goods of the factor, without showing that he has endeavored to collect the money of the persons to whom the factor sold the goods.[108] And it is no defense to such an action that the sale made by the factor was an incomplete sale, so that, as between the factor and purchaser, the factor could not have enforced the same, and collected the money of the purchaser, in consequence of the want of some formality, or memorandum or entry in writing, or actual delivery, where the factor has, in his correspondence, treated the sale as complete and binding.[109] "The undertaking of a factor is merely to answer for

[106] Thompson v. Perkins, 3 Mason, 232, Fed. Cas. No. 13,972.

[107] Lewis v. Brehme, 33 Md. 412.

[108] Cartwright v. Greene, 47 Barb. (N. Y.) 9. A factor who guarantles sales made by him on commission is entitled to credit for goods which he had sold, and charged to himself in his account of sales, but afterwards received back from the buyers, pursuant to authority given by his principal to settle a dispute as to the quality, and for goods recovered from the buyers for fraud in procuring the sale. Talcott v. Mills Co. (Ct. Arb.) 30 N. Y. Supp. 421. A factor may, by contract, guaranty the collection of the price of goods to be sold, and also that their sale shall realize certain sums. First Nat. Bank of Elgin v. Schween, 127 Ill. 573, 20 N. E. 681.

[109] Cartwright v. Greene, 47 Barb. (N. Y.) 9.

the solvency of the buyers of the goods, or rather to guaranty to the principal the payment of the debts due from the buyers. He becomes liable to pay to the principal the amount of the purchase money, if the buyers fail to pay it, when it becomes due; and his undertaking is not collateral within the statute of frauds, but is an original and absolute agreement, that the prices for which the goods are sold, or the debts created by the sales of the goods, shall be paid to the principal when the credit given on the sales shall have expired." [110]

The only difference between an ordinary factor and one acting under a del credere commission is as to the sales made on credit.[111] In the latter case he is absolutely liable, and may correctly be said to become the debtor of his principal; but it is not strictly correct to say he is placed in the same situation as if he had become the purchaser himself, for, as we have seen, the principal, notwithstanding this liability, may exercise a control not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. This shows that the effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. It is not a contingent liability, so as to require legal measures to be exhausted against the purchaser before the factor is bound, but an engagement to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser.[112]

Statute of Frauds.

But it seems nowhere to be required that a guaranty of this nature should be in writing, for the liability is admitted to be original; and although the vendor may in such case forbid payment to the agent if he is insolvent, and maintain an action for himself, which in other cases is held to be the distinctive mark of a collat-

[110] Bradley v. Richardson, 23 Vt. 720.

[111] Morris v. Cleasby, 4 Maule & S. 566. The del credere agent must follow instructions like other factors. Ex parte White, 6 Ch. App. 397. He cannot receive payment except in the usual way. Catterall v. Hindle, L. R. 1 C. P. 186.

[112] Leverick v. Meigs, 1 Cow. (N. Y.) 645.

eral undertaking, yet in this particular contract such a privilege to the vendor is held not to alter the nature of his claim upon the factor.[113] A guaranty by a factor differs very materially from a promise to pay the debt of another. The principal transfers a right, although not the exclusive right, to the factor, to sue for and recover the money in his own name, and to collect the debt and hold the money, accounting only for the net balance of account between the parties. Thus, the debt of the purchaser is to some extent made the property of the factor, and he to that extent becomes the purchaser of it, and so far substitutes his liability in place of that of the purchaser. The effect of this generally is to make the factor practically the owner of the debt, and this is almost invariably so if he remains solvent and on just terms with his principal. Then the principal is unknown to the purchaser.[114]

Remittances.

Of course, the agent, acting under a commission del credere, where the goods have been sold on an authorized credit, cannot be required to account to his principal before the expiration of the credit given to the buyer. And if the money which comes into his hands be remitted under special instruction from the principal, then it will be at the risk of the latter, provided the instructions are observed with proper caution and diligence on the part of the agent. But if, by the engagement, the agent became a debtor absolutely, as if he were himself the purchaser, he would be bound for the remittance of the money, as well as for its payment by the buyer, on the general principle that the debtor is bound to make payment to his creditor.[115]

[113] Swan v. Nesmith, 7 Pick. (Mass.) 220; Wolff v. Kappel, 2 Denio (N. Y.) 368.

[114] Sherwood v. Stone, 14 N. Y. 267.

[115] Lewis v. Brehme, 33 Md. 412. But, if the agent del credere deviates from the instructions given him as to remittances, he is liable for a resulting loss like any factor. Leverick v. Meigs, 1 Cow. (N. Y.) 646. See Mackenzie v. Scott, 6 Brown, P. C. 280. If a del credere factor makes a remittance to his principal by bill of exchange, before the expiration of the term of credit on which the goods are sold, it will be considered as a remittance of his own funds, in discharge of a personal debt, and therefore at his own risk. Henback v. Rother, 2 Duer (N. Y.) 227. The guaranty of a del credere commission does not extend to the remittance of funds in the hands of the factor; but if, by agree-

SAME—RIGHT TO COMMISSIONS.

13. A factor is entitled to a commission on the sales made by him, unless some other compensation has been agreed upon.

A factor usually receives his compensation in a commission on the amount of sales made. The rate is fixed by the contract of the parties, by the usage of trade, or upon a quantum meruit.[116] The relation of principal and factor may exist though the factor receives his compensation in the form of a salary.[117] A del credere agent usually receives an additional commission for guarantying the solvency of the purchasers.[118] Ordinarily, a factor who takes commissions from his principal, who employs him to sell, would violate his contract should he also take commissions from the person to whom he sells;[119] but, when it is clearly understood by all the

ment of parties, the factor is authorized to charge a commission for the guaranty of bills of exchange remitted, his omission to charge such commission does not absolve him from his liability as guarantor of the exchange. Heuback v. Rother, 2 Duer (N. Y.) 227.

116 Story, Ag. § 326. Whether a factor is entitled to commission on a sale on credit where the purchaser fails depends on usage. Clark v. Moody, 17 Mass. 145. Factors in gold dust have no right to take their pay or compensation out of the gold dust. The gold dust is to be treated as property, and their compensation must be estimated in money. McCune v. Erfort, 43 Mo. 134. The suggestion in 1 Pars. Cont. *99, that a factor may be entitled to commissions when he is prevented without his fault, by some irresistible obstacle, from completing a sale, does not seem to be supported by the authorities cited. A factor cannot be deprived of his commissions by the willful act of his principal. The execution of a contract of agency, whose obligations are mutual, cannot be placed entirely at the principal's option. Thompson v. Packwood, 2 La. Ann. 624.

117 State v. Thompson, 120 Mo. 12, 25 S. W. 346.

118 Lewis v. Brehme, 33 Md. 412. A del credere commission is not demandable when the sale is made on credit, but is, nevertheless, paid for in cash, in consideration of a deduction of a certain percentage. Kingston v. Wilson, 4 Wash. C. C. 310, Fed. Cas. No. 7,823.

119 Talcott v. Chew, 27 Fed. 273; Raisin v. Clark, 41 Md. 158; Lynch v. Fallon, 11 R. I. 311; Scribner v. Collar, 40 Mich. 375.

parties that one who is paid commissions to sell is also to charge commissions from the buyer, the transaction is not illegal.[120]

A factor who is guilty of fraud or negligence in the conduct of his principal's business forfeits all claim to commissions or other compensation for his services.[121]

SAME—RIGHT TO REIMBURSEMENT.

14. A factor is entitled to be reimbursed for advances made to the principal, and for expenses properly incurred in conducting the business.

A principal is bound to reimburse his factor for all advances made on goods consigned to the latter, and for all sums properly expended on the principal's account.[122] Where a factor makes advances, independent of an actual agreement to that effect, the legal inference is that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the latter without at all affecting his personal remedy. So he may renounce his right to resort to the person, and look alone to his lien for reimbursement.[123] It is then a right

[120] Talcott v. Chew, 27 Fed. 273.

[121] Fordyce v. Peper, 16 Fed. 516; Norman v. Peper, 24 Fed. 403; Talcott v. Chew, 27 Fed. 273; Dodge v. Tileston, 12 Pick. (Mass.) 328; Branman v. Strauss, 75 Ill. 234; Segar v. Parrish, 20 Grat. (Va.) 672; Vennum v. Gregory, 21 Iowa, 326; Smith v. Crews, 2 Mo. App. 269; White v. Chapman, 1 Starkie, 113; Hamond v. Holiday, 1 Car. & P. 384, Denew v. Daverell, 3 Camp. 451; Hurst v. Holding, 3 Taunt. 32.

[122] Dolan v. Thompson, 126 Mass. 183; Beckwith v. Sibley, 11 Pick. (Mass.) 482; Upham v. Lefavour, 11 Metc. (Mass.) 174; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Strong v. Stewart, 9 Heisk. (Tenn.) 137.

[123] Burrill v. Phillips, 1 Gall. 360, Fed. Cas. No. 2,200; Pelsch v. Dickson, 1 Mason, 9, Fed. Cas. No. 10,911; Corlies v. Cumming, 6 Cow. (N. Y.) 181; Balderston v. Rubber Co., 18 R. I. 338, 27 Atl. 507. The owner of goods, on consigning them to a commission merchant for sale, drew bills upon the consignee, which were accepted and paid, and the consignee, on selling the goods, took notes of the purchasers, payable to himself or order, but, before the notes fell due, the purchasers became insolvent. It was held that prima facie a right of action accrued to the consignee immediately upon his making the advances

of which the factor or his representatives may avail themselves; but, where there is no contract other than that which is implied, one who has become a surety of the principal, to refund advances made to him, cannot elect for the factor, and force him (at least at law) to assert his lien upon the goods or money of the principal.[124]

SAME—RIGHT TO INDEMNITY.

15. A factor is entitled to indemnity for all losses and liabilities growing out of the principal's business.

A principal is bound to indemnify his factor for all losses sustained or liabilities incurred in the course of the agency. If the factor sells goods in his own name, with the usual warranties, and is compelled to pay the purchaser damages for breach of warranty, he is entitled to indemnity from the principal.[125] And where cotton was consigned to a factor, to be sold on commission, and if, after it was sold, and the account between him and the principal settled, he was compelled to refund to the purchaser on account of the false packing of some of the cotton, he can recover

to the consignor, notwithstanding he had a lien on the notes as security for the debt due to him, and that the burden of proof was on the consignor to show an agreement not to commence an action until the notes should have fallen due, and been dishonored. Beckwith v. Sibley, 11 Pick. (Mass.) 482. The factor may sue without waiting for a sale to be made. Dolan v. Thompson, 126 Mass. 183. There may, of course, be an agreement to wait for a sale. Upham v. Lefavour, 11 Mete. (Mass.) 174.

[124] Martin v. Pope, 6 Ala. 532.

[125] Holdgate v. Clark, 10 Wend. (N. Y.) 216; Hill v. Packard, 5 Wend. (N. Y.) 375. So, where the factor mistakenly sold repudiated bonds, under a representation that they were good "fundable bonds," the principal was compelled to make the loss good to the factor. Maitland v. Martin, 86 Pa. St. 120. Where a commission merchant, by direction of his principal, sold for the latter 5,000 bushels of wheat, to be delivered at any time during the current year, at the seller's option, and after an advance in the price the principal refused to stand to the contract, and the factor settled with the buyer by paying him the difference between the contract price and the market value, the principal being unknown to the purchaser; held, that the principal was liable to his agent for the sum so paid by him, and also for his commissions. Searing v. Butler, 69 Ill. 575.

therefor from the principal; but reclamation must be made according to the custom of the business, within such reasonable time as would enable the defendants to reclaim from the parties from whom they purchased. What would be a reasonable time would be for the jury to decide.[126]

SAME—LIEN.

16. A factor has a general lien on all the property of his principal in his hands, to secure his demands against the principal. The lien is subject to the following conditions:

(a) It does not attach to the goods of the principal until they come into the factor's possession.

(b) It is extinguished by payment or waiver.

(c) It may be foreclosed or enforced by a sale of the property by the factor.

A factor has a lien, not only for his commissions, but for his expenses in conducting the business, for advances made to the principal, and for liabilities incurred by the factor for the principal.[127]

[126] Beach v. Branch, 57 Ga. 362.

[127] Eaton v. Truesdail, 52 Ill. 307; Matthews v. Menedger, 2 McLean, 145, Fed. Cas. No. 9,289; Vail v. Durant, 7 Allen (Mass.) 408; Haebler v. Luttgen (Minn.) 63 N. W. 720; Colley v. Merrill, 6 Greenl. (Me.) 51; State v. Thompson, 120 Mo. 12, 25 S. W. 346; Hodgson v. Payson, 3 Har. & J. 339; Nesmith v. Calendering Co., 1 Curt. C. C. 130, Fed. Cas. No. 10,124; Jordan v. James, 5 Ohio, 88. The lien does not cover debts having no connection with the agency. Stevens v. Robins, 12 Mass. 182; Houghton v. Matthews, 3 Bos. & P. 485; Drinkwater v. Goodwin, Cowp. 251. And see Barry v. Boninger, 46 Md. 59. The right of election which the law gives the party injured to convert a tort into a contract of sale cannot be extended to create a lien for the money which would become due thereby upon goods held in pursuance of an ordinary commercial relation. "The doctrine of a factor's lien for a general balance of account never went so far as to embrace even the price of goods sold by a factor to his principal not connected with the general purposes of their relation as principal and agent." Thacher v. Hannahs, 4 Rob. (N. Y.) 407. A factor's lien does not exist when the general balance of account is against the factor. McGraft v. Rugee, 60 Wis. 406, 19 N. W. 530. A factor has no lien in respect of debts which arose prior to the time at which his character of factor commenced, nor in respect to torts. Sturgis v. Slacum, 18 Pick. (Mass.) 36. A

No distinction is recognized between a lien for special advances or general advances on account of business. Nor do the books seem to limit the lien to property acquired with the money advanced, but it seems to extend all of the property in his hands, against third persons.[128]

The doctrine of general lien in favor of a factor is not confined to a general agency, but applies as well to a limited number of distinct transactions as to a continuous dealing. Whenever the relation of principal and factor exists, the right of lien attaches to secure all advances made or liabilities incurred in the course of his business by the factor. So, it seems that the doctrine of lien may be enforced as well by a so-called "purchasing factor" as by a "selling factor."[129] As between the principal and factor, the general right of property in the owner will be made to yield to the special property of the factor, necessary to satisfy his liens.[130] Yet the

factor, accepting a consignment with instructions as to payment of the proceeds, has no lien for any general balance due him. Goodhue v. McClarty, 3 La. Ann. 447. Where a factor indorses bills for his principal, such liability gives him, as a factor, a lien on a bill then in his hands belonging to the principal, and indorsed to him for collection, to meet the event of his indorsements; and the fact that the factor receives a commission on his indorsements does not in any way affect the general question as to his lien as factor. Hodgson v. Payson, 3 Har. & J. (Md.) 339. A factor's lien for a general balance accrued in the lifetime of his principal does not attach to the property coming into the factor's possession after the principal's death, by order of his representative. See Wylly v. King, Ga. Dec. (pt. 2) p. 7. Statutes in Georgia and Louisiana give a factor who advances money and supplies to a planter, to enable him to raise a crop, under an agreement that the crop shall be consigned to the factor, a lien on the crop while growing. Thomason v. Poullain, 54 Ga. 306; Tift v. Newson, 44 Ga. 600; Smith v. Williams, 22 La. Ann. 268; Richardson v. Dinkgrave, 26 La. Ann. 651.

[128] Winne v. Hammond, 37 Ill. 99.

[129] Where a purchasing factor had transmitted two distinct orders for goods, and, on the arrival of the first parcel, delivered an invoice of the same to his principal, and accepted his draft for the amount thereof, payable at a future day, it was held that, by so doing, he had waived his lien, which otherwise would have existed on the first parcel, for the price paid or responsibility assumed on account of the second parcel; and, upon his refusal to deliver up the first parcel, an action of trover was held to lie against him. Bryce v. Brooks, 26 Wend. 367.

[130] Hollingworth v. Tooke, 2 H. Bl. 503. The factor has only a special prop-

owner may, at any time before actual sale, by paying the balance and discharging the responsibilities of the factor, withdraw his effects; and, if the factor become insolvent, the goods remain the property of the principal, subject to the lien of the factor.[131] These liens are allowed for the convenience of trade, with a view to the nature of the factor's employment, and to encourage advances upon goods in his possession, or to be consigned to him, and are favored.[132] The factor's right to his lien is an agreement which the law implies.[133] If the factor has sold the goods, and parted with the possession, he has a lien on the price in the hands of the purchaser for what is due to him; and the owner cannot set up his right to the money, except where the factor has nothing due to him.[134] And, where the owner aliens the property, the purchaser takes it subject to the lien of the factor.[135]

A commission merchant who has sold a part of the goods left with him for sale is entitled to a lien upon the residue.[136] The lien of a factor covers also money recovered on an insurance policy, taken out in favor of the principal.[137] But a factor has no lien on goods of a stranger consigned to him by one having no right to do so.[138] In some states, however, it has been provided by statute that every person in whose name merchandise is shipped for sale shall be deemed the true owner so far as to entitle the consignee to a lien thereon for money advanced or securities given to the shipper on account of the consignment, unless the consignee

erty. U. S. v. Villalonga, 23 Wall. 35; Williams v. Tilt, 36 N. Y. 319; Heard v. Brewer, 4 Daly (N. Y.) 136; Hall v. Hinks, 21 Md. 406.

[131] Zinck v. Walker, 2 W. Bl. 1154, 1156.

[132] Houghton v. Matthews, 3 Bos. & P. 485, 488, 498.

[133] Walker v. Birch, 6 Term R. 262.

[134] Brander v. Phillips, 16 Pet. 121; Brown v. McGrann, 14 Pet. 479; Brown v. Combs, 63 N. Y. 598; Drinkwater v. Goodwin, Cowp. 256; Houghton v. Matthews, 3 Bos. & P. 489.

[135] Godin v. Assurance Co., 1 Burrows, 489; Jordan v. James, 5 Ohio, 88; Eaton v. Truesdail, 52 Ill. 307.

[136] Sewall v. Nichols, 34 Me. 582.

[137] Johnson v. Campbell, 120 Mass. 449.

[138] Bank of Rochester v. Jones, 4 N. Y. 497; Thacher v. Hannahs, 4 Rob. (N. Y.) 407; Oliver v. Moore, 12 Heisk. (Tenn.) 482; Ryberg v. Snell, 2 Wash. C. C. 403, Fed. Cas. No. 12,190; Bell v. Powell, 23 La. Ann. 796; Succession of Norton, 24 La. Ann. 218; Holland v. Humble, 1 Starkie, 143.

had notice, by the bill of lading or otherwise, that the shipper was not the actual owner.[139] These statutes do not apply, of course, unless the real owner consented to the shipment. The acts operate as an estoppel on him for the protection of the factor. When the consignment was made in violation of his rights, he is not estopped.[140]

When Lien Attaches.

The lien of a factor is dependent on possession, and does not attach until the property on which it is obtained is in the possession of the factor.[141] A great deal of difficulty has been encountered in determining what constitutes possession by the factor, and there is some conflict in the cases, though it is not so extensive as it seems at first sight. Whether the necessary possession exists is a question to be determined by the special facts of each case. The difficulty is confined almost entirely to cases where goods have been consigned to a factor to whom the consignor was indebted, and the consignor has subsequently, but before the goods were received into the actual custody of the factor, attempted to change the consignment to another person,[142] or the consignor's creditors have seized the goods before they reached the factor.

Where there is a general balance of account due the factor, a consignment of goods, without any special contract that those goods shall be so consigned, does not give the factor a lien at the time they are received by the carrier.[143] And especially is this

[139] Massachusetts, Pub. St. c. 71, § 2; Maine, Rev. St. c. 31, § 1; Rhode Island, Pub. St. c. 136, § 1; New York, Laws 1830, c. 179, § 1; Ohio, Rev. St. § 3214; Wisconsin, Sanb. & B. Ann. St. § 3345; Maryland, Rev. Code, art. 34, §§ 1, 2; Pennsylvania, Brightly's Purd. Dig. "Factors," §§ 1, 2.

[140] Kinsey v. Leggett, 71 N. Y. 387; Howland v. Woodruff, 60 N. Y. 73; Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 60 N. Y. 40.

[141] When goods are loaded upon the factor's drays, his lien is complete against attaching creditors of the owner. Burrus v. Kyle, 56 Ga. 24. Actual possession of the cargo of a ship may be obtained without unloading. Rice v. Austin, 17 Mass. 197.

[142] The right of the consignor to substitute another consignee is in some of the cases put on the ground of his right of stoppage in transitu. Jordan v. James, 5 Ohio, 88; The Merrimack, 8 Cranch, 317, 329.

[143] Lewis v. Railroad Co., 40 Ill. 281; Strahorn v. Transit Co., 43 Ill. 424;

the case when the bill of lading for the goods is held by a third person as a pledgee for a valuable consideration.[144] If actual custody of the goods is obtained by the factor wrongfully, his lien does not attach.[145] Thus, where the bill of lading is sent attached to a draft on the factor, if he refuses to accept the draft, his retention of the bill of lading will give him no lien for his general balance, though, by means of the bill, he obtains the goods.[146] But, when the factor makes advances on the faith of the consignment of designated goods, his lien attaches on their delivery to the carrier.[147] Some cases so hold when the factor makes no new advance, but the goods are consigned under a special agreement to do so in payment on a general balance.[148] To the proposition that

Ryberg v. Snell, 2 Wash. C. C. 294, 403, Fed. Cas. Nos. 12,189, 12,190; Bonner v. Marsh, 10 Smedes & M. (Miss.) 376. A delivery of property to a carrier by the owner, to be shipped to another point, not the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor, and forwarding it to him, are not conclusive on the question of the intent of the owner to deliver possession to the factor, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate, which could not be obtained if the shipment was made part of the way in the name of the owner, and thereafter the balance of the distance to the place of business of the factor in his name. Rosenbaum v. Hayes (N. D.) 67 N. W. 951.

[144] Marine Bank v. Wright, 48 N. Y. 1; First Nat. Bank of Chicago v. Bayley, 115 Mass. 228; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; First Nat. Bank of Batavia v. Ege, 109 N. Y. 129, 16 N. E. 317.

[145] Winter v. Coit, 7 N. Y. 288; Bank of Rochester v. Jones, 4 N. Y. 497; Marine Bank of Chicago v. Wright, 48 N. Y. 1; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; Bruce v. Wait, 3 Mees. & W. 15.

[146] Allen v. Williams, 12 Pick. (Mass.) 297; Bank of Rochester v. Jones, 4 N. Y. 497; Winter v. Coit, 7 N. Y. 288.

[147] Bailey v. Railroad Co., 49 N. Y. 70; Holbrook v. Wight, 24 Wend. (N. Y.) 169; Jordan v. James, 5 Ohio, 88; Hardeman v. De Vaughn, 49 Ga. 596; Elliott v. Cox, 48 Ga. 39; Besha v. Pope, 6 Ala. 690. And see Valle v. Cerre's Adm'r, 36 Mo. 575. Where acceptances were made on the credit of a consignment the destination of which was subsequently changed by the consignor, the factor cannot enforce his claim for a lien if the drafts have been paid by the consignor before the suit is brought, and the factor thus relieved from liability. Woodruff v. Railroad Co., 2 Head (Tenn.) 87.

[148] Clark v. Mauran, 3 Paige (N. Y.) 373; Wade v. Hamilton, 30 Ga. 450; Davis v. Bradley, 28 Vt. 118. And see Brown v. Wiggin, 16 N. H. 312.

the lien attaches in these cases, there are some contra decisions.[149] As long as the goods remain in the possession of the principal, the factor acquires no lien.[150]

How Lien Lost.

A factor's lien continues only while the factor himself has the possession, and therefore if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for he has constructive possession notwithstanding the lien.[151] None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and cannot be transferred, nor can the question upon it arise between any but the principal and factor.[152] But, unless the factor does some act which amounts to a relinquishment of his lien, he cannot be deprived of it by the creditors of the principal.[153] The death of the principal while the

[149] Saunders v. Bartlett, 12 Heisk. (Tenn.) 316; Kinloch v. Craig, 3 Term R. 119.

[150] Oliver v. Moore, 12 Heisk. (Tenn.) 482. And see Baker v. Fuller, 21 Pick. (Mass.) 318. Where goods were shipped to the consignor's agent, to be by him delivered to the factor, his lien was held not to have attached. Brown v. Wiggin, 16 N. H. 312.

[151] Holly v. Huggeford, 8 Pick. (Mass.) 73; Jarvis v. Rogers, 15 Mass. 389; Jones v. Sinclair, 2 N. H. 319; Daubigny v. Duval, 5 Term R. 606. A commission merchant advanced money to his principal on his indorsement, and charged the note upon which the advance was made in his general account. *Held*, that the mere charging of the note to the principal did not entitle the latter to its possession. The agent had a right to retain it as his principal's property until he was paid the balance of his general account arising in the course of their dealings. Myer v. Jacobs, 1 Daly (N. Y.) 32. Taking a note from the principal is not a waiver of the lien. Story v. Flournoy, 55 Ga. 56. But see Darlington v. Chamberlain, 20 Ill. App. 443, where taking a judgment note was held a waiver. That neglect to enforce the lien will operate as a waiver, see Grieff v. Cowgill, 2 Disn. (Ohio) 58.

[152] Holly v. Huggeford, 8 Pick. (Mass.) 73; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482; Jones v. Sinclair, 2 N. H. 321; Ames v. Palmer, 42 Me. 197; Daubigny v. Duval, 5 Term R. 606. The personal representatives of a deceased factor may enforce his lien. Gage v. Allison, 1 Brev. (S. C.) 495.

[153] Eaton v. Truesdail, 52 Ill. 307; White Mountain Bank v. West, 46 Me.

goods are in transit will not defeat a factor's lien which had attached.[154] If the property be voluntarily delivered, the lien is extinguished, and cannot be reasserted.[155] But if the delivery be special, so that the factor still retains the control of the property, the lien is not relinquished.[156]

A factor cannot stop property in transitu, where he has voluntarily delivered up the possession of it, on any pretense that he has a lien upon it for advances made on account of the principal. Having parted with the possession of the property, he has relinquished his lien, and cannot reassert it. The owner may, in some cases, regain the possession of property sold and delivered by him, and hold it until the payment of the consideration shall be received. But this cannot be done by a factor whose interest is special and connected with the possession.[157] If a factor has a lien on goods, but, when they are demanded of him, places his refusal to deliver on some other ground than that of his right to a lien, he waives the lien.[158] The lien may, of course, be waived by express contract before or after it has attached.[159] The principal may at any time discharge the lien by tendering the balance due the factor, and securing him against acceptances or other outstanding liabilities incurred for the principal.[160]

15; Baugh v. Kirkpatrick, 54 Pa. St. 84; Barnett v. Warren, 82 Ala. 557, 2 South. 457; Bard v. Stewart, 3 T. B. Mon. 72.

[154] Hammonds v. Barclay, 2 East, 227.

[155] Sawyer v. Lorillard, 48 Ala. 332; Lickbarrow v. Mason, 6 East, 22; Bligh v. Davies, 28 Beav. 211.

[156] Matthews v. Menedger, 2 McLean, 145, Fed. Cas. No. 9,289; Winne v. Hammond, 37 Ill. 99; Jordan v. James, 5 Ohio, 88; Davis v. Bradley, 28 Vt. 118. A factor, having a lien on goods consigned to him by virtue of an agreement with his principal, does not preclude himself from insisting on his lien by holding out his principal as the owner of the goods. Seymour v. Hoadley, 9 Conn. 418. The conveyance by a principal cannot destroy or impair any lien which the factor had previously acquired. Bard v. Stewart, 3 T. B. Mon. (Ky.) 72.

[157] Matthews v. Menedger, 2 McLean, 145, Fed. Cas. No. 9,289.

[158] Winter v. Colt, 7 N. Y. 288.

[159] Schiffer v. Feagin, 51 Ala. 335.

[160] Beebe v. Mead, 33 N. Y. 587; Gage v. Allison, 1 Brev. (S. C.) 495; Jones v. Tarleton, 9 Mees. & W. 675.

How Lien Enforced.

We have already seen [161] that a factor may sell enough of the goods in his hands to satisfy his lien, and that he may so sell against the orders of the principal as to time and price, if he first gives notice to the principal to redeem.[162] If, after the sale, a balance remains due the factor, he may proceed against the principal personally.[163] The factor is not, however, confined to this remedy. He may have his lien foreclosed in equity, and will be entitled to a decree for any deficiency that may remain.[164]

SAME—RIGHTS AGAINST THIRD PERSONS.

17. A factor may maintain actions against third persons on contracts of sale made by him, and for injuries to the goods of his principal.

A factor, in selling the goods of his principal, acquires contract rights against the vendee, and may sue him for the price of the goods sold,[165] or for breach of the contract of sale,[166] being ac-

[161] Ante, p. 19. A factor, while indebted to his principal, cannot sell the property of the principal to pay obligations on account of the factorage. Alexander v. Morris, 3 Call (Va.) 89.

[162] Miller v. Price (Cal.) 39 Pac. 781; Weed v. Adams, 37 Conn. 378; Marfield v. Douglass, 1 Sandf. (N. Y.) 360.

[163] Whitman v. Horton, 46 N. Y. Super. Ct. 531; Gihon v. Stanton, 9 N. Y. 476; Corlies v. Cumming, 6 Cow. (N. Y.) 184; Mottram v. Mills, 2 Sandf. (N. Y.) 189.

[164] Whitman v. Horton, 46 N. Y. Super. Ct. 531; Gihon v. Stanton, 9 N. Y. 476; Denney v. Wheelwright, 60 Miss. 733; Strong v. Stewart, 9 Heisk. (Tenn.) 137.

[165] Toland v. Murray, 18 Johns. (N. Y.) 24; White v. Chouteau, 10 Barb. (N. Y.) 202; Ilsley v. Merriam, 7 Cush. (Mass.) 242; Girard v. Taggart, 5 Serg. & R. (Pa.) 19; Graham v. Duckwall, 8 Bush (Ky.) 12; Miller v. Lea, 35 Md. 396; Sadler v. Leigh, 4 Camp. 195. The factor may collect, in his own name, notes for his principal's goods, which are payable to himself. Van Staphorst v. Pearce, 4 Mass. 258. The factor may maintain an action against a warehouseman for a breach of his contract to store the goods. Allen v. Steers, 39 La. Ann. 586, 2 South. 199. But a factor cannot maintain an action against a carrier for delay in transportation when his lien has not attached. Cobb v. Railroad Co., 88 Ill. 394.

[166] Groover v. Warfield, 50 Ga. 644.

countable to his principal for the amount recovered. As will be seen later,[167] the principal also has a right to sue the purchaser; and a recovery by him will bar an action by the factor.[168] But, when the factor has a lien on the proceeds of the sale, the principal cannot cut off the factor's rights therein.[169] If the factor gives the purchaser notice of his lien, payment by the latter to the principal will not relieve him of liability to the factor.[170] When a factor sues a purchaser on the contract of sale, the latter may avail himself of any defenses which he has against the principal [171] or against the factor;[172] but the purchaser is not allowed to avail himself of set-offs against the principal to an extent that would defeat the factor's lien.[173]

It has been seen that a factor has a special property in the goods of his principal, so far as they come to his hands. This is by virtue of his lien. This special property gives him the right to sue for and recover it if illegally dispossessed,[174] or to maintain trespass for injury it may sustain by a wrongdoer, precisely as if he was the general owner.[175] Nor can a tort feasor question his

[167] Post, p. 41.

[168] Kelley v. Munson, 7 Mass. 319; Golden v. Levy, 1 Car. Law Repos. 527.

[169] Hudson v. Granger, 5 Barn. & Ald. 27.

[170] Story, Ag. § 424; Drinkwater v. Goodwin, Comp. 251.

[171] Grice v. Kenrick, L. R. 5 Q. B. 344.

[172] Gibson v. Winter, 5 Barn. & Adol. 96.

[173] Drinkwater v. Goodwin, Cowp. 251. See ante, p. —.

[174] Winne v. Hammond, 37 Ill. 99; Holbrook v. Wight, 24 Wend. (N. Y.) 169; Ladd v. Arkell, 37 N. Y. Super. Ct. 35; Gorum v. Carey, 1 Abb. Prac. (N. Y.) 285; Fitzhugh v. Wiman, 9 N. Y. 559. He may maintain replevin for the goods, even against an officer who has attached them on precept against the general owner. His consent to become keeper of the goods for the attaching officer does not defeat his right to maintain such action of replevin. Sewall v. Nichols, 34 Me. 582.

[175] U. S. v. Villalonga, 23 Wall. 35; Fitzhugh v. Wiman, 9 N. Y. 559; Gorum v. Carey, 1 Abb. Prac. (N. Y.) 285; Robinson v. Webb, 11 Bush (Ky.) 464; Beyer v. Bush, 50 Ala. 19. Where buildings are destroyed to arrest a conflagration, a factor may claim damages for goods destroyed, to the amount of his lien for charges, etc., but he cannot claim the value of the goods for the benefit of the owner. Mayor of New York v. Stone, 20 Wend. (N. Y.) 139, 25 Wend. (N. Y.) 157. An action for conversion will lie at suit of a factor who has stored property consigned to him with a third party, from whose possession it has been taken by a wrongdoer. The right of action does not depend

title.[176] When the factor sues a stranger for a conversion of the principal's goods, the measure of damages is the value of the goods. But when he sues the principal or some one standing in the principal's place, as an attaching creditor, the recovery is limited to the value of the factor's special property; that is, to the amount of his lien.[177]

SAME—LIABILITIES TO THIRD PERSONS.

18. A factor may be liable in contract to purchasers from him, or for conversion to the real owners of goods wrongfully consigned to him.

The liability of factors to third persons with whom they contract in relation to the business of their agency is the same as that of other agents making contracts on behalf of principals who are disclosed or undisclosed.[178]

Foreign Factors.

It was formerly considered that factors, acting for merchants resident in a foreign country were personally liable for contracts

upon the fact of possession; it grows out of the right to the possession. Gorum v. Carey, 1 Abb. Prac. (N. Y.) 285.

[176] Winne v. Hammond, 37 Ill. 99.

[177] Heard v. Brewer, 4 Daly (N. Y.) 136.

[178] McCullough v. Thompson, 45 N. Y. Super. Ct. 449; Johnson v. McCampbell, 6 Baxt. (Tenn.) 294. When the proceeds of a sale made by the factor are appropriated by the principal, with the consent of the factor, to the use of a creditor of the principal, the factor is bound to hold the proceeds for that purpose. Lowery v. Steward, 25 N. Y. 239. Where a consignor directs the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, he is warranted in countermanding the direction at any time before the factor has thus appropriated the money, or entered into an agreement with the creditor who is the object of the remittance to hold it for his use. Walton v. Tims, 7 Ala. 470. A factor has the right to pay the proceeds of property sold by him to the owner, although he may know that the owner has promised them to his creditors. Pearce v. Roberts, 27 Mo. 179. A factor who sells oil, with a warranty of quality, without designating himself as "agent," is personally liable on the warranty, although he has settled with his principal before notice of the breach, and although the vendee was informed before action brought that the factor was not acting for himself. Hastings v. Lovering, 2 Pick. (Mass.) 214.

made by them for their employers, notwithstanding they fully disclosed at the time the character in which they were acting. "In such cases the ordinary presumption is that credit is given to the agent or factor. This presumption, however, is liable to be rebutted either by proofs that the credit was given to both principal and agent, or to the principal only, or that the usage of trade does not extend to the particular case." [179] But the rule above stated has been held not applicable to the case of a principal who is domiciled in another state of the Union.[180] And the rule has been repudiated by the later decisions, and no distinction is now recognized between foreign and domestic factors.[181]

Liability for Conversion.

The correct rule to determine the liability of a factor who has in good faith sold goods which did not belong to the principal is involved in some doubt. This is owing, probably, to the confusion which exists in the law as to what constitutes conversion. If a factor receives a consignment of goods from one having no right to sell them, and the factor sells them, and pays over the proceeds to his principal without notice of the true owner's rights, he is not liable for a conversion.[182] But, if he refuses to comply with a demand of the true owner while the goods or their proceeds are in his possession, he becomes liable for their value.[183] So, if he has constructive notice in any way that they do not belong to the principal, he is liable.[184] And it has been held that a factor who makes

[179] Story, Ag. § 268; McKenzie v. Nevins, 22 Me. 143; Vawter v. Baker, 23 Ind. 63; Rogers v. March, 33 Me. 106.

[180] Kirkpatrick v. Stainer, 22 Wend. (N. Y.) 254; Vawter v. Baker, 23 Ind. 63.

[181] Oelricks v. Ford, 23 How. 49; Bray v. Kettell, 1 Allen (Mass.) 80; Kaulback v. Churchill, 59 N. H. 296; Green v. Kopke, 36 Eng. Law & Eq. 396; Hsley v. Merriam, 7 Cush. (Mass.) 242.

[182] Abernathy v. Wheeler (Ky.) 17 S. W. 858; Roach v. Turk, 9 Heisk. (Tenn.) 708, overruling Taylor v. Pope, 5 Cold. (Tenn.) 413.

[183] Roach v. Turk, 9 Heisk. (Tenn.) 708. A factor notified that cotton consigned to him by a third person belongs to plaintiffs, and directed not to pay over the proceeds without their consent, is liable for any subsequent payment to the consignor, not depending upon a superior right. Ledoux v. Anderson, 2 La. Ann. 558; Ledoux v. Cooper, Id. 586.

[184] As where there is a chattel mortgage on a growing crop, duly recorded, or where the factor knows facts which give him implied notice of a landlord's

advances on goods which his principal had no right to consign to him asserts a special property therein, adverse to the claim of the true owner, and thereby becomes liable for conversion, though he has sold the goods to satisfy his advances, or has returned them to the principal on the latter repaying the advances.[185]

RIGHTS AND LIABILITIES OF PRINCIPALS AND THIRD PERSONS.

19. Principals may maintain actions on the contracts made by their factors, and for injuries to their property in the hands of their factors. They are liable on the contracts made for them with third persons.

A principal may, of course, sue on contracts made by the factor,[186] whether the purchaser knew at the time of the sale that he was dealing with a factor or not.[187] The principal's right to recover the purchase price is, however, limited in two ways: First, as already seen, his right of action is subject to the factor's lien on the proceeds of the sale;[188] and, second, when the principal was not disclosed, the purchaser can set off against him any claims he may have acquired against the factor, up to the time he received

lien on them, he is liable for conversion if he sells the crop, and pays the proceeds to his principal. Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406.

[185] Newcomb-Buchanan Co. v. Baskett, 14 Bush (Ky.) 658. And see Hollins v. Fowler, L. R. 7 H. L. 757.

[186] Ilsley v. Merriam, 7 Cush. 242; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Kelley v. Munson, 7 Mass. 319; Merrick's Estate, 5 Watts & S. 9.

[187] Locke v. Lewis, 124 Mass. 1; Roosevelt v. Doherty, 129 Mass. 301; Guard v. Taggart, 5 Serg. & R. 19; Miller v. Lea, 35 Md. 396.

[188] Ante, p. 38. A factor may make an entire contract for the sale of his own goods and those of a principal, or for the sale of goods of two or more principals. In such case no action can be maintained for part of the goods unless the contract made by the factors has been performed. Roosevelt v. Doherty, 129 Mass. 301. So, where the factor takes one note for such a sale, it operates to suspend the right of action of any of the principals until the expiration of the credit given by the factor in taking the note. Hapgood v. Batcheller, 4 Mete. (Mass.) 573.

notice of the rights of the principal.[189] If the purchaser knew at the time of the sale that he was dealing with a factor as such, he cannot set up any claims on the factor against the principal.[190] The special property which a factor acquires by reason of his lien does not deprive the principal, as general owner, of his right to maintain actions for the injury or conversion of his goods.[191] He may recover them or their value when they have been taken on judicial process against the factor.[192] The principal may follow the goods or their proceeds in the hands of third persons to whom the factor has disposed of them in some way in which he had no power to do so, as where the factor has loaned the proceeds of the goods to one who knew the fact.[193]

[189] Locke v. Lewis, 124 Mass. 1; Barry v. Page, 10 Gray (Mass.) 398; Huntington v. Knox, 7 Cush. (Mass.) 371; Hogan v. Shorb, 24 Wend. (N. Y.) 458; Merrick's Estate, 5 Watts & S. (Pa.) 9; Parker v. Donaldson, 2 Watts & S. (Pa.) 9; Gardner v. Allen, 6 Ala. 187. But see Brown v. Morris, 83 N. C. 251.

[190] Ladd v. Arkell, 40 N. Y. Super. Ct. 150; Guy v. Oakley, 13 Johns. (N. Y.) 332; Darlington v. Chamberlain, 120 Ill. 585, 12 N. E. 78; St. Louis Nat. Bank v. Ross, 9 Mo. App. 399; George v. Clagett, 7 Term R. 359; Catterall v. Hindle, L. R. 1 C. P. 186; Dresser v. Norwood, 17 C. B. (N. S.) 466; Carr v. Hinchliff, 4 Barn. & C. 547. Though the purchaser knew that the person he was dealing with was engaged in the business of selling goods on commission, that is not notice that he sold as a factor in that transaction. He may presume that he is selling his own goods. Schell v. Stephens, 50 Mo. 379. But see Miller v. Lea, 35 Md. 396; Stewart v. Woodward, 50 Vt. 78.

[191] Mechem, Ag. §§ 792, 1045.

[192] Holly v. Huggeford, 8 Pick. (Mass.) 73; Moore v. Hillabrand, 16 Abb. N. C. (N. Y.) 477; Loomis v. Barker, 69 Ill. 360; Ellsner v. Radcliff, 21 Ill. App. 195; National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482.

[193] Sheffer v. Montgomery, 65 Pa. St. 329. But cf. Lime Rock Bank v. Plimpton, 17 Pick. (Mass.) 159. And see generally, as to following goods, Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. St. 202; Pitts v. Mower, 18 Me. 361; Potter v. Dennison, 10 Ill. 590; Kelley v. Munson, 7 Mass. 319; Veil v. Mitchel, 4 Wash. C. C. 105, Fed. Cas. No. 16,908; Thompson v. Perkins, 3 Mason, 232, Fed. Cas. No. 13,972; Fahnestock v. Bailey, 3 Metc. (Ky.) 48. The principal may recover the proceeds of his goods in the hands of a bank with which they have been deposited by the factor in an account separate from his general banking account. Baker v. Bank, 100 N. Y. 31, 2 N. E. 452; Richardson v. Bank, 10 Mo. App. 216. Where the factor mingles the proceeds of sale of his principal's goods with his general funds, the principal cannot follow them. Price v. Ralston, 2 Dall. 69. When a factor assigns his principal's open ac-

The rights of third persons against principals are the correlatives of the powers of the factors. These have already been discussed.[194] A purchaser from a factor may maintain an action against the principal for nonperformance of the contract of sale,[195] or for breach of warranty[196] if the warranty was one which the factor had power to make.[197] Goods sold by the factor within the scope of his powers cannot be recovered by the principal from the purchaser, though the factor has violated his instructions.[198] The implied powers of a factor cannot be limited, as against purchasers, by secret instructions.[199]

count against a purchaser, before its maturity, and without a demand on the principal to reimburse him for advances, the assignee acquires no right to the account against the principal. Commercial Nat. Bank v. Heilbronner, 108 N. Y. 439, 15 N. E. 701. Where a factor delivers goods of his principal in payment of his own debt, the principal may recover them, notwithstanding he is indebted to the factor to an amount as great as the value of the goods. Benny v. Pegram, 18 Mo. 191. If a factor to whom goods are consigned pledges them as owner, the owner of the goods has an immediate right of action against the pledgee for the goods or their value, though the pledgee is innocent; and the pledgee cannot reduce the amount of judgment against him by exhibiting the accounts between the owner and the factor. Bonito v. Mosquera, 2 Bosw. (N. Y.) 401. A party receiving of a factor goods of his principal, in payment of or as security for a previous debt due him from the factor, is liable to account to the principal for the goods, although he did not know that they belonged to the principal. Warner v. Martin, 11 How. 209. In an action by a shipper against a carrier for damage to goods consigned to a factor, evidence that drafts drawn by the plaintiff for more than the value of the goods had been accepted and paid by the consignee was properly excluded. Hill v. Railroad Co., 43 S. C. 461, 21 S. E. 337.

194 Ante, p. 3.

195 Higgins v. McCrea, 116 U. S. 671, 6 Sup. Ct. 557. The authority of factors and brokers acting in the line of their employment cannot be limited by private instructions not known to the party dealing with them. Lobdell v. Baker, 1 Metc. (Mass.) 193.

196 Schuchardt v. Allans, 1 Wall. 359; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Randall v. Kehlor, 60 Me. 37.

197 See ante, p. 6.

198 Dias v. Chickering, 64 Md. 348, 1 Atl. 709.

199 Lobdell v. Baker, 1 Metc. (Mass.) 193.

TERMINATION OF THE RELATION.

20. The relation of principal and factor is terminated

(a) By the expiration of the time for which the agency was created.

(b) By the sale of all the goods consigned.

(c) By notice by either party.

(d) By the death of either party.

EXCEPTION—The principal cannot terminate the relation, so as to deprive the factor of his special property in the goods.

The relation of principal and factor continues until the goods consigned to the factor are sold, and the accounts settled, unless the agency is sooner terminated by expiration of the time for which it was created, or in some other manner in which agencies are terminated. In the absence of a contrary agreement, a factor may put an end to the relation at any time; but he should give reasonable notice to the principal, and afford him an opportunity to take charge of any goods remaining in the factor's hands. The principal may also terminate the agency at any time, by reimbursing the factor for advances made and liabilities incurred; otherwise, the factor may retain the principal's goods under his lien, and, as has been seen, sell enough to satisfy his charges.[200] The death of either the factor or the principal terminates the relation except as to the special property of the factor. This is not affected, and a factor may, after the principal's death, sell to satisfy his lien.[201]

[200] Ante, p. 37.

[201] Hammonds v. Barclay, 2 East, 227. And see Jackson Ins. Co. v. Partee, 9 Heisk. (Tenn.) 296.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF BROKERS

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

BROKERS.

Section.

1. Broker Defined.
2. Establishment of Relation.
3. Legality of Object.
4. Implied Powers of Brokers.
5. Rights and Liabilities of Brokers.
6. Good Faith—Acting for Both Parties.
7. Negligence.
8. Following Instructions.
9. Duty to Account.
10. Right to Commissions.
11. Right to Reimbursement and Indemnity.
12-14. Right to a Lien.
15. Rights against and Liabilities to Third Persons.
16. Rights and Liabilities of Principals and Third Persons.
17. Termination of Relation.
18. Merchandise Brokers.
19. Real-Estate Brokers.
20. Bill and Note Brokers.
21. Loan Brokers.
22. Stock Brokers.
23. Ship Brokers.
24. Insurance Brokers.
25. Custom-House Brokers.

BROKER DEFINED.

1. A broker is an agent who, for a commission and usually in the name of a principal, negotiates commercial contracts, including the purchase and sale of real and personal property. Brokers do not have possession of the property sold by them, except—

EXCEPTIONS—Stock and bill brokers may have possession of the property.

It is difficult to find a definition of a broker which is accurate and yet specific enough to be of any value as a definition.[1] The term

[1] See Black, Law Dict. tit. "Broker." A person engaged in selling on commission, in a city, merchandise by sample for his several principals, having an

"broker" is applied in commercial transactions to such a variety of diverse occupations that it is difficult to formulate rules which will govern the rights and liabilities of brokers as a class. Certain classes of brokers, such as bill brokers and stock brokers, are, more accurately speaking, factors; but their designation as brokers has become unalterably fixed in commercial usage. The possession of the goods is what distinguishes the factor from the selling broker.

On the other hand, the so-called "purchasing factor" is in reality a broker.[2] Pawnbrokers who loan their own money on the security of personal property are not brokers at all, but are principals in the business.[3] A broker is, in general, one who buys or sells property for another. Real-estate brokers are agents for the sale and purchase of real property. Merchandise brokers are those who deal in personal property of a corporeal nature. The principal classes of brokers dealing in incorporeal personalty are stock brokers, bill and note brokers, and exchange brokers. The business of brokers is not, however, confined to the purchase and sale of property. There are insurance brokers who negotiate the making of contracts of insurance as the agents of the insured.[4] Ship brokers, in addition to the buying and selling of ships, are agents for the making of charter parties.

While it is probable that a broker might receive his compensation otherwise than in the form of commissions, and still retain his character as a broker, yet a salaried agent buying bills of exchange with the money of his principal cannot be required to take out a broker's license.[5]

office where his samples are exhibited, is a local commercial broker, though he makes special arrangements in advance with those by whom he is employed, and is their sole representative in his city. Stratford v. City Council, 110 Ala. 619, 20 South. 127.

[2] See monograph on Factors, p. 2.

[3] City of Little Rock v. Barton, 33 Ark. 436, 450.

[4] Insurance brokers are the agents of the insured; insurance agents are the agents of the insurer. Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Miller v. Insurance Co., 27 Iowa, 203.

[5] City of Portland v. O'Neill, 1 Or. 218.

ESTABLISHMENT OF RELATION.

2. The relation of principal and broker is established in the same ways as other agencies. The broker's authority need not be in writing, except—

EXCEPTION—In California, by statute, a broker's authority to sell real property must be in writing.

The establishment of a broker's authority differs in no material respect from the creation of any ordinary agency.[6] A broker cannot, of course, bind by contract one whom he has no authority to represent. If the supposed principal subsequently ratifies the contract, the broker may become entitled to commissions.[7] But a broker cannot, by sending a purchaser to the owner of property, who has given the broker no authority to act for him, claim commissions if a sale is consummated. The broker must show an appointment as a broker, or he is not entitled to the rights arising out of the relation.[8]

Ordinarily, the authority of a broker may be granted by parol. Thus, a real-estate broker, having no written authority, may sign a contract binding his principal to sell, and specific performance of the contract can be enforced against the principal.[9] In such a case, also, the broker, acting under a parol authority, can recover commissions.[10] But it is provided by statute in some states that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation shall be invalid unless some note or memorandum thereof is made in writing, and subscribed by the party to be charged, or by his agent.[11] Under such a statute, a broker who has no written

[6] A partnership may act as a broker. Bromley v. Elliot, 38 N. H. 287, 309. The principal must be competent to contract. Cavender v. Waddingham, 5 Mo. App. 457; Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269; Keys v. Johnson, 68 Pa. St. 42; Holley v. Townsend, 16 How. Prac. (N. Y.) 125; Hinds v. Henry, 36 N. J. Law, 328.

[7] Pierce v. Thomas, 4 E. D. Smith (N. Y.) 354; Sibbald v. Iron Co., 83 N. Y. 378; Lyons v. Wait, 51 N. J. Eq. 60, 26 Atl. 334.

[8] Pierce v. Thomas, 4 E. D. Smith (N. Y.) 354. And see post, p. 21.

[9] Dickerman v. Ashton, 21 Minn. 538; Brown v. Eaton, Id. 409; Worrall v. Munn, 5 N. Y. 229.

[10] Fiero v. Fiero, 52 Barb. (N. Y.) 288; Fischer v. Bell, 91 Ind. 243.

[11] Civ. Code Cal. § 1624; Revision N. J. p. 446, § 10.

authority cannot recover commissions, though the principal has completed the sale negotiated by the broker, either on the express oral contract or on a quantum meruit.[12]

LEGALITY OF OBJECT.

3. Where a contract made by a broker is illegal, it cannot be enforced by the parties to it; nor can the broker recover for services and expenses if he was privy to the illegal intent.

When the business in which a broker is engaged is illegal, the contracts made through him are not enforceable by the parties to them. And, as in the case of other illegal contracts, the law leaves the parties as it finds them.[13] But, if the broker has money in his hands belonging to his principal, he cannot retain it on the ground that the transaction through which he received it was illegal.[14]

Marriage Brokerage.

A marriage brokerage contract is an agreement for the payment of money or other compensation for the procurement of a marriage. Although there may be no fraud practiced on either party to the marriage, such contracts are held void as being against public policy.[15] Neither the amount agreed to be paid for procuring the marriage nor money advanced on account of it can be recovered.[16]

[12] McCarthy v. Lompe, 62 Cal. 299; Myres v. Surryhne, 67 Cal. 657, 8 Pac. 523; Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636; Mendenhall v. Rose (Cal.) 33 Pac. 884. But see Griffith v. Daly, 56 N. J. Law, 466, 29 Atl. 169. Though Gen. Laws Minn. 1887, c. 26, requires the authority of an agent to sell land to be in writing, where an agent has performed his part of a parol contract to sell land he is entitled to his compensation thereunder. Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. 1075.

[13] Clark, Cont. 470.

[14] Tenant v. Elliott, 1 Bos. & P. 3; McBlair v. Gibbes, 17 How. 232; Armstrong v. Toler, 11 Wheat. 258; Com. v. Cooper, 130 Mass. 285.

[15] White v. Benefit Union, 76 Ala. 251; Crawford v. Russell, 62 Barb. (N. Y.) 92; Johnson v. Hunt, 81 Ky. 321; Hall v. Potter, 3 Lev. 412; Drury v. Hooke, 1 Vern. 412; Cole v. Gibson, 1 Ves. Sr. 503; Debenham v. Ox, Id. 276; Rex v. Thorp, 5 Mod. 221; Smith v. Bruning, 2 Vern. 392. And cf. Boynton v. Hubbard, 7 Mass. 112, 118.

[16] Crawford v. Russell, 62 Barb. (N. Y.) 92; Johnson v. Hunt, 81 Ky. 321.

Dealing in Futures.

The class of contracts made by brokers in which the question of the legality of the transaction is most often raised embraces those made on the produce or stock exchange for the purchase or sale of grain, stocks, etc., for future delivery. Such a contract is valid, though there is an option as to the time of delivery, and though the seller has no other means of getting the property than to go into the market, and buy it;[17] but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only paid, then the transaction is a wager, and the contract is void.[18] It is not enough to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended a settlement only of differences.[19] The burden of showing the validity of the contract rests upon the party asserting it.[20]

[17] Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713; Story v. Salomon, 71 N. Y. 420; Bigelow v. Benedict, 70 N. Y. 202; Cole v. Milmine, 88 Ill. 349; Wolcott v. Heath, 78 Ill. 433; Wall v. Schneider, 59 Wis. 352, 18 N. W. 443; Gregory v. Wattowa, 58 Iowa, 711, 12 N. W. 726; Bartlett v. Smith, 4 McCrary, 388, 13 Fed. 263; Cobb v. Prell, 15 Fed. 774. "The right to buy grain in the market, in the hope to profit by a rise in the market value, is as plain as the right to buy wild lands or any other property." Gregory v. Wendell, 40 Mich. 432.

[18] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Gregory v. Wendell, 39 Mich. 337; Lyon v. Culbertson, 83 Ill. 33; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Maxton v. Gheen, 75 Pa. St. 166; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Lowry v. Dillman, 59 Wis. 197, 18 N. W. 4; Bullard v. Smith, 139 Mass. 492, 2 N. E. 86.

[19] Pixley v. Boynton, 79 Ill. 351; Gregory v. Wendell, 39 Mich. 337; Whitesides v. Hunt, 97 Ind. 191; Bangs v. Hornick, 30 Fed. 97; Williams v. Tiedemann, 6 Mo. App. 269; Jones v. Shale, 34 Mo. App. 302. Contracts between a stock broker and a customer for buying or selling stocks upon a margin, in the hope of profit from fluctuation in price, are not illegal, when the broker expects the final balance to be liquidated by a delivery of the remaining stocks, and keeps command of sufficient stock to make delivery on demand, and at the end of the last deal actually transfers the remaining stock to his customer's order. Dillaway v. Alden, 88 Me. 230, 33 Atl. 981. If stock purchased by a

[20] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Cockrell v. Thompson, 85 Mo. 510; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713.

If, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have the right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise, and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices.[21]

The illegality of wagers on the fluctuations of the market depends on statutory provisions in the several states.[22] In some states the provisions are broader, and every contract for the sale or transfer of stock or bonds of a state or corporation is void, unless the vendor is, at the time of making the contract, the owner or assignee of the stock or bonds, or an agent authorized to sell.[23] The Illinois statute forbids

broker for another is called for by the latter, and an actual tender thereof made, he is not exempted from liability for the price by the fact that the stock was, in the first place, bought for him by the broker on a margin. Anthony v. Unangst, 174 Pa. St. 10, 34 Atl. 284.

[21] Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49; Barnes v. Smith, 159 Mass. 344, 34 N. E. 463; Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152.

[22] Pub. Acts Mich. 1887, No. 199; Sanb. & B. Ann. St. Wis. 1889, § 2319a; Laws Ohio, 1885, p. 254; Laws Tex. 1887, c. 13; Mansf. Dig. Ark. § 1848; Laws Miss. 1882, c. 117; Acts Tenn. 1883, c. 251.

[23] Pub. St. Mass. c. 78, § 6; Acts S. C. 1883, No. 306, p. 451, § 1 (unless there is a bona fide intention to make a delivery). A similar provision in New York was repealed by Laws 1858, c. 134. These statutes have been construed in the

contracts for options to buy or sell at a future "any grain or other commodity, stock of any railroad or other company, or gold";[24] that is, the sale of "puts" and "calls" is made illegal.[25]

IMPLIED POWERS OF BROKERS.

4. A broker has such implied powers as are necessary, according to the usage of the business, to accomplish the object of the agency. These powers will be discussed under the following heads:

(a) To act in his own name.
(b) To fix price.
(c) To sell on credit.
(d) To warrant.
(e) To sign contract for both parties.
(f) To delegate authority.
(g) To receive payment.
(h) To rescind or submit to arbitration.

Power to Act in His Own Name.

According to the usage of business, brokers, as a general rule, make their contracts in the names of their principals.[26] But stockbrokers usually act in their own names in buying and selling, and in many instances never disclose the names of their principals at all.[27]

following cases: Stebbins v. Leowolf, 3 Cush. (Mass.) 137; Barrett v. Hyde, 7 Gray (Mass.) 160; Barrett v. Mead, 10 Allen (Mass.) 337; Brown v. Phelps, 103 Mass. 313; Price v. Minot, 107 Mass. 49; Bullard v. Smith, 139 Mass. 492, 2 N. E. 86; Gram v. Stebbins, 6 Paige (N. Y.) 124; Frost v. Clarkson, 7 Cow. (N. Y.) 24.

[24] Rev. St. 1893, c. 38, § 130. And see Pickering v. Cease, 79 Ill. 328; Pixley v. Boynton, Id. 351; Sanborn v. Benedict, 78 Ill. 309; Wolcott v. Heath, Id. 433.

[25] A "put" is a contract which gives an option to sell or not at a certain price. A "call" gives an option to buy or not. Black, Law Dict. tit. "Puts and Calls."

[26] Saladin v. Mitchell, 45 Ill. 79; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485; Evans v. Waln, 71 Pa. St. 69; Graham v. Duckwall, 8 Bush (Ky.) 12; Brown v. Morris, 83 N. C. 254. When a broker, not intrusted with possession, contracts in his own name, payment to him will not relieve the purchaser from liability to the principal. Crosby v. Hill, 39 Ohio St. 100.

[27] Markham v. Jaudon, 41 N. Y. 235; Horton v. Morgan, 19 N. Y. 170.

Powers Necessary to Accomplish Object.

When a broker is employed to conduct a negotiation, the principal, by implication, clothes him with all the powers which are usual and necessary for the successful transaction of the business. What these powers are will depend in each case on the nature of the broker's employment. Within the scope of his employment, he has power to bind his principal by whatever contract the carrying out of the latter's commission may require.[28]

Powers Fixed by Usage.

The implied powers of brokers are fixed almost entirely by custom or usage. This is especially true when the broker is dealing in a regular market as a member of a board like a stock exchange or a board of trade. The rules of such body enter into all the contracts made by the broker, and are binding on his principal. A person who deals in a particular market must be taken to deal according to the known, general, and uniform custom or usage of that market; and he who employs another to act for him at a particular place or market must be taken as intending that his business shall be done according to the usage of that market, whether he in fact knew of the usage or not.[29] There are, however, certain reasonable limits to the powers which may be conferred by usage. No usage is admissible to control rules of law[30] or the provisions of an express contract.[31] A usage which causes the broker to assume the relation of a principal to those

[28] Le Roy v. Beard, 8 How. 451; Star Line v. Van Vliet, 43 Mich. 364, 5 N. W. 418; Saladin v. Mitchell, 45 Ill. 79; Craighead v. Peterson, 72 N. Y. 279; McBean v. Fox, 1 Ill. App. 177; Benninghoff v. Insurance Co., 93 N. Y. 495; Lawrence v. Gallagher, 42 N. Y. Super. Ct. 309; Benjamin v. Benjamin, 15 Conn. 347; Huntley v. Mathias, 90 N. C. 101; Hardee v. Hall, 12 Bush (Ky.) 327; Shackman v. Little, 87 Ind. 181; McAlpin v. Cassidy, 17 Tex. 449; Boyd v. Satterwhite, 10 S. C. 45.

[29] Lyon v. Culbertson, 83 Ill. 33; United States Life Ins. Co. v. Advance Co., 80 Ill. 549; Bailey v. Bensley, 87 Ill. 556; Horton v. Morgan, 19 N. Y. 170; Lawrence v. Maxwell, 53 N. Y. 19; Nourse v. Prime, 4 Johns. Ch. (N. Y.) 490; Rosenstock v. Tormey, 32 Md. 169; Durant v. Burt, 98 Mass. 161; Sumner v. Stewart, 69 Pa. St. 321; Sutton v. Tatham, 10 Adol. & E. 27.

[30] Wheeler v. Newbould, 16 N. Y. 392; Higgins v. Moore, 34 N. Y. 417; Bowen v. Newell, 8 N. Y. 190.

[31] Clark v. Baker, 11 Metc. (Mass.) 186; Blackett v. Assurance Co., 2 Tyrw. 266.

employing him is invalid.[32] So, a principal is not bound by a usage of brokers when dealing with brokers in another city to put all the transactions between them into one account, and to settle the general balance.[33] Nor can a stockbroker justify, on the authority of usage, a sale of stock held by him to secure advances, without notice to his principal.[34]

Power to Fix Price.

When a broker is ordered to sell or purchase property for his principal without any instructions as to the price, he has implied power to fix the price. This is ordinarily the case with merchandise and stock brokers. Their principals rely on them to get the best prices possible in the market. With purchases and sales of real estate through brokers the price is almost always fixed by the principal, though, if a broker receives an order to buy or sell a certain piece of land without any instructions as to price, he would probably have power to fix the price. Whenever a broker fixes the price, it must be the market price if there is a market price, and, if not, the price must be reasonable, and the best that the broker could obtain.[35]

Power to Sell on Credit.

A broker has an implied power to sell on credit when such is the usage of the trade in which he is engaged. The length of the credit depends, like the power itself, on that usage. Dealings on the stock market, however, are usually for cash; and therefore a stock broker cannot give credit without an express authority from his principal to do so.[36]

[32] Robinson v. Mollett, L. R. 7 H. L. 802.

[33] Evans v. Wahl, 71 Pa. St. 69.

[34] Allen v. Dykers, 3 Hill (N. Y.) 593; Wheeler v. Newbould, 16 N. Y. 392; Markham v. Jaudon, 41 N. Y. 235; Pickering v. Demerritt, 100 Mass. 421; Day v. Holmes, 103 Mass. 306.

[35] No adjudicated case has been found in which the power of a broker to fix the price has been in controversy, but the rules stated in the text are sanctioned by usage and by a like power possessed by factors. See monograph on Factors, p. 5.

[36] Delafield v. Illinois, 26 Wend. (N. Y.) 192; Wiltshire v. Sims, 1 Camp. 258; Boorman v. Brown, 3 Q. B. 511.

Power to Warrant.

Whenever the custom of a particular trade is to give a warranty to purchasers, brokers dealing in that kind of property have an implied power to warrant. When there is no such usage, the power does not exist.[37] Thus, when a broker sells by sample, he may warrant the quality of the goods as equal to the sample.[38] But it has been held that a broker has no power to warrant against a latent defect present in the sample itself.[39]

Power to Sign Contract for Both Parties.

Merchandise [40] and stock brokers,[41] when they make contracts for their principals, are, so far as the statute of frauds is concerned, agents for both parties. When so acting, they have authority to do all that is necessary to bind the bargain, and hence may sign the requisite memorandum.[42] In this country it is customary for the broker to make an entry of the sale in a book kept for that purpose, and such an entry, if it contains the terms of the bargain, is a sufficient memorandum,[43] nor need it be signed by the broker.[44] A note containing the terms of the bargain, and delivered by him to either party, is also

[37] Ahern v. Goodspeed, 72 N. Y. 108; Nelson v. Cowing, 6 Hill (N. Y.) 336; Sturgis v. Steamboat Co., 62 N. Y. 625. It is held in Massachusetts that evidence of usage is inadmissible to establish such implied power. Dodd v. Farlow, 11 Allen, 426; Boardman v. Spooner, 13 Allen, 353.

[38] Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Boorman v. Jenkins, 12 Wend. (N. Y.) 566; Waring v. Mason, 18 Wend. (N. Y.) 425.

[39] Dickinson v. Gay, 7 Allen (Mass.) 29.

[40] Suydam v. Clark, 2 Sandf. (N. Y.) 133; Peltier v. Collins, 3 Wend. (N. Y.) 459; Davis v. Shields, 26 Wend. (N. Y.) 341.

[41] Colvin v. Williams, 3 Har. & J. (Md.) 38.

[42] Coddington v. Goddard, 16 Gray (Mass.) 436. But where, upon the making of a contract of sale and purchase, a broker acts merely to bring the parties together, after which they negotiate with each other directly, the broker has no power to bind them by memoranda signed by him. Aguirre v. Allen, 10 Barb. (N. Y.) 74. The actual signing of the memorandum, being merely a ministerial act, may be by the broker's clerk. Williams v. Woods, 16 Md. 220.

[43] Coddington v. Goddard, 16 Gray (Mass.) 436; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484; Merritt v. Clason, 12 Johns. (N. Y.) 102; Sale v. Darragh, 2 Hill. (N. Y.) 184; Williams v. Woods, 16 Md. 220; Bacon v. Eccles, 43 Wis. 227.

[44] Coddington v. Goddard, 16 Gray (Mass.) 436; Merritt v. Clason, 12 Johns. (N. Y.) 102; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484.

sufficient,[45] though, if he delivers to buyer and seller notes which materially differ, there is no valid memorandum.[46]

In England it is customary for the broker, when he makes a contract, to reduce it to writing, and to deliver to each party a copy of the terms as reduced to writing by him, and also to enter them in his book and to sign the entry.[47] As to the effect of the entry in the broker's book, there has been great difference of opinion. The view which seems to have prevailed, unlike that adopted in this country, and founded, perhaps, in some measure on the fact that brokers in London were until recently required by law to make such entries, is that the entry constitutes the contract itself, and is a contract in writing.[48] It is natural, therefore, that difficult questions have arisen in England, where the sold note and the bought note differ from each other or from the entry in the broker's book. The result of the English decisions on this point, which, owing to the difference in the law and the custom, are of comparatively little value as precedents in this country, may be briefly stated as follows:[49] (1) If the broker make and sign an entry of the agreement in his books, the entry so signed constitutes the original agreement between the parties, and is the primary evidence thereof,[50] to the exclusion of any notes which may be delivered to the

[45] Butler v. Thomson, 92 U. S. 412; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950; Remick v. Sandford, 118 Mass. 102; Newberry v. Wall, 84 N. Y. 576; Weidmann v. Champion, 12 Daly (N. Y.) 522; Bacon v. Eccles, 43 Wis. 227.

[46] Peltier v. Collins, 3 Wend. (N. Y.) 459; Suydam v. Clark, 2 Sandf. (N. Y.) 133; Bacon v. Eccles, 43 Wis. 227; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, per Jackson, J.

[47] Benj. Sales, § 276.

[48] Heyman v. Neale, 2 Camp. 337, per Lord Ellenborough; Thornton v. Charles, 9 Mees. & W. 802, per Parke, B.; Sievewright v. Archibald, 17 Q. B. 115, 20 Law J. Q. B. 529, per Lord Campbell, C. J., and Patterson, J.; Thompson v. Gardiner, 1 C. P. Div. 777; Thornton v. Meux, Moody & M. 43, per Abbott, C. J.; Townend v. Drakeford, 1 Car. & K. 20, per Denman, C. J.; Thornton v. Charles, supra, per Lord Abinger. But these authorities are overruled by Sievewright v. Archibald, supra. Benj. Sales, § 294. See Langd. Cas. Sales, 1035. The view was held by some judges that the entry not only did not constitute the contract, but was not even admissible in evidence, at least not without proof that it was seen by the parties when they contracted or was assented to by them. Cumming v. Roebuck, Holt N. P. 172, per Gibbs, C. J.

[49] The statement is taken from Kerr, Dig. Sales, § 20. Cf. Benj. Sales, § 292.

[50] Cases cited in note 48, ante.

parties.[51] But if such notes correspond with one another, and differ from the entry, it becomes a question of fact for the jury whether their acceptance by the parties constitutes a new contract, as evidenced by the notes.[52] (2) If there be no signed entry, the notes, if they correspond with one another and state all the terms of the bargain, together constitute a memorandum of the contract.[53] But if they do not correspond, or are insufficient, no memorandum at all exists.[54] (3) Either note by itself constitutes a memorandum, in the absence of evidence that the signed entry or the other note differs therefrom.[55]

Real-estate brokers, however, have no power to sign memoranda which will bind both parties;[56] their power to sign an agreement which shall bind even the principal is denied in some cases,[57] though it is recognized, and, it seems, with better reason, in others.[58]

Power to Delegate Authority.

A broker employed to make a contract for his principal must give the business his personal attention, because the principal is presumed to rely on his experience and discretion. The broker must not delegate his authority.[59] But mere ministerial acts may be performed by a subagent or clerk, such as signing a memorandum of sale,[60] or

[51] The notes do not constitute the contract. Thornton v. Charles, 9 Mees. & W. 802, per Parke, B.; Heyman v. Neale, 2 Camp. 337, per Lord Ellenborough; Sievewright v. Archibald, 20 Law J. Q. B. 529, 17 Q. B. 115.

[52] Thornton v. Charles, 9 Mees. & W. 802; Sievewright v. Archibald, supra.

[53] Goom v. Aflalo, 6 Barn. & C. 117; Sievewright v. Archibald, supra.

[54] Thornton v. Kempster, 5 Taunt. 786; Grant v. Fletcher, 5 Barn. & C. 436; Sievewright v. Archibald, supra.

[55] Hawes v. Forster, 1 Moody & R. 368; Parton v. Crofts, 16 C. B. (N. S.) 11; Thompson v. Gardiner, 1 C. P. Div. 777.

[56] Morris v. Ruddy, 20 N. J. Eq. 236.

[57] Glentworth v. Luther, 21 Barb. (N. Y.) 145; Roach v. Coe, 1 E. D. Smith (N. Y.) 175; Shepherd v. Hedden, 29 N. J. Law, 334; Morris v. Ruddy, 20 N. J. Eq. 236; O'Reilly v. Kehn (N. J. Err. & App.) 34 Atl. 1073; Chapman v. Jewett (Va.) 24 S. E. 261; Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258.

[58] Force v. Dutcher, 18 N. J. Eq. 401; Rutenberg v. Main, 47 Cal. 213; Pringle v. Spaulding, 53 Barb. (N. Y.) 17; Haydock v. Stow, 40 N. Y. 363, overruling Coleman v. Carrigues, 18 Barb. (N. Y.) 60.

[59] Williams v. Woods, 16 Md. 220; Sims v. May, 49 Hun, 607, 1 N. Y. Supp. 671; Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Elwell v. Chamberlain, 2 Bosw. (N. Y.) 220.

[60] Williams v. Woods, 16 Md. 220.

selling stock on the market when the broker has decided upon the advisability of selling.[61] So, when a broker has a purchase or sale to make in a distant city, he may make it through an agent resident there.[62] When a broker has wrongfully delegated his authority, the principal, knowing of the delegation, cannot retain the benefits, and deny the power of the subagent.[63]

Power to Receive Payment.

A broker has ordinarily no implied power to receive payment for goods sold by him.[64] In a New York case evidence was refused of a local usage allowing brokers to receive payment for grain sold by them when the seller resided out of the city.[65] When, however, a broker is intrusted with the possession of the goods sold by him, he may receive payment; but this is because, by having possession, the broker becomes a factor, and clothed with the powers of a factor.[66] For this reason, stock brokers, who, as has been seen, are in reality factors, may receive payment for stock sold and delivered by them.[67] A real-estate broker having power to "sell and convey" land has also an implied power to receive payment therefor. "An attorney who has power to convey has so essentially the power to receive the purchase money that a voluntary conveyance, without receiving the stipulated price or security for it, would be fraudulent; and either the whole contract might be rescinded by the principal, or the vendee [be held] liable for the purchase money." [68]

[61] Sims v. May, 49 Hun, 607, 1 N. Y. Supp. 671; Gregory v. Wendell, 40 Mich. 432; Gheen v. Johnson, 90 Pa. St. 38.

[62] Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Rosenstock v. Tormey, 32 Md. 169.

[63] As where the subagent makes false representations. Elwell v. Chamberlain, 2 Bosw. (N. Y.) 230.

[64] Higgins v. Moore, 34 N. Y. 417; Saladin v. Mitchell, 45 Ill. 79; Graham v. Duckwall, 8 Bush (Ky.) 12; Crosby v. Hill, 39 Ohio St. 100. And see Bassett v. Lederer, 1 Hun (N. Y.) 274; Gallup v. Lederer, Id. 282.

[65] Higgins v. Moore, 34 N. Y. 417.

[66] See ante, p. 2, and monograph on Factors, 2.

[67] Bid. Stock Brok. 91; Young v. Cole, 4 Scott, 489; Cropper v. Cook, L. R. 3 C. P. 194; Mollett v. Robinson, L. R. 5 C. P. 646.

[68] Peck v. Harriott, 6 Serg. & R. (Pa.) 145.

Power to Rescind or Submit to Arbitration.

A broker has no implied power to settle disputes growing out of contracts made by him for his principal by submitting the differences to arbitration;[69] and, having made a contract, the broker has no implied power to rescind it.[70]

RIGHTS AND LIABILITIES OF BROKERS.

5. The rights and liabilities of brokers will be considered under the following heads:

(a) Duty to observe good faith—Acting for both parties.
(b) Liability for negligence.
(c) Duty to follow instructions.
(d) Duty to account.
(e) Right to commissions.
(f) Right to reimbursement and indemnity.
(g) Right to a lien.
(h) Rights against and liabilities to third persons.

SAME—GOOD FAITH—ACTING FOR BOTH PARTIES.

6. A broker is required to observe perfect good faith in his dealing with his principal. He cannot act as agent for both parties, except—

EXCEPTION—By the weight of authority, a broker may act for both parties

(a) When he introduces a named person or sells at a fixed price, or
(b) When both parties consent.

A broker, being trusted with the confidence of his principal, is in a fiduciary relation to him, and is bound to exercise the utmost good faith. He must not put himself in any position which makes his interest adverse to that of his principal. He cannot act as agent for several principals whose interests are in conflict.[71] Nor can a broker

[69] Ingraham v. Whitmore, 75 Ill. 24.
[70] Saladin v. Mitchell, 45 Ill. 79; Kelly v. Milling Co., 92 Ga. 105, 18 S. E. 363.
[71] Murray v. Beard, 102 N. Y. 505, 7 N. E. 553.

instructed to buy or sell for his principal become the seller or purchaser,[72] unless it is with the knowledge and consent of the principal.[73] In such case it is no answer that his intention was honest, and that the broker did better for his principal by selling him his own property than he could have done by going into the open market. The rule is inflexible, and, although its violation in a particular case caused no damage to the principal, he cannot be compelled to adopt the purchase.[74]

Acting for Both Parties.

Good faith to his principal requires that a broker shall not attempt to act as agent for the other party also.[75] If a broker so acting makes a contract, the principals are not bound by it.[76] When an agent is thus employed by one party to sell, and by the other to purchase, and is vested with any discretion or judgment in the negotiation, his duties are in conflict, and he cannot fairly serve both parties. The duty of

[72] Bain v. Brown, 56 N. Y. 285; Tewksbury v. Spruance, 75 Ill. 187; Hughes v. Washington, 72 Ill. 84; Helberg v. Nichol, 149 Ill. 249, 37 N. E. 63; Stewart v. Mather, 32 Wis. 344; Sharman v. Brandt, L. R. 6 Q. B. 720; Mollett v. Robinson, L. R. 5 C. P. 655. A broker cannot sell to a firm of which he is a member. Francis v. Kerker, 85 Ill. 190. When a broker is authorized to sell at a certain price, and is to receive as compensation all above that price, it would seem that he might become the purchaser himself at the price fixed. But see Tower v. O'Neil, 66 Pa. St. 332.

[73] When a broker, authorized to sell, by a subsequent agreement with his principal becomes the purchaser himself, he is entitled to his commissions as though he had sold to a third person. Stewart v. Mather, 32 Wis. 344; Grant v. Hardy, 33 Wis. 668. This is true even if he has been guilty of a fraud on one who became a co-purchaser. Hardy v. Stonebraker, 31 Wis. 640.

[74] Taussig v. Hart, 58 N. Y. 425. A custom for a broker to buy of or sell to himself, unknown to the employer, is against public policy, and illegal. Farnsworth v. Hemmer, 1 Allen (Mass.) 494; Com. v. Cooper, 130 Mass. 285.

[75] Robbins v. Sears, 23 Fed. 874; Rice v. Wood, 113 Mass. 133; Raisin v. Clark, 41 Md. 158; Meyer v. Hanchett, 43 Wis. 246. And see Empire State Ins. Co. v. American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200. A real-estate agent who sells the lands, for more than the price fixed by the terms of his contract, to another, for whom he is also agent for the investment of money, and secretly retains the excess, is liable to a double recovery therefor by the seller and purchaser. Lewis v. Denison, 2 App. D. C. 387.

[76] Taussig v. Hart, 58 N. Y. 425. For the right of a broker, acting for both parties, to commissions, see post, p. 24.

an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent.[77]

Same—Exceptions—Middleman.

In some of the cases it is stated, as a broad exception to the rule that a broker cannot act for both parties, that he may do so when he is a mere middleman, and has no other duties to perform than to bring the parties together to contract for themselves.[78] But a broker does not act in good faith to his first employer if he turn aside all proposals that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him if he may levy a fee from both parties. When he has secured the retainer of the other party, he is interested, in order to win his double commission, to bring together these two, to the exclusion of all others. The interests of his principal are in danger of prejudice from this counter interest in the agent. And, besides, the broker is ordinarily and almost inevitably intrusted, to a greater or less extent, with the confidence of his principal.[79]

The proper limits for the exception to the general rule seem to be that the broker may act for both parties when the one first employing him merely engages him to establish negotiations between the principal and a named person; and in such case there is no reason why the broker cannot lawfully receive a commission from the latter.[80] So, when a broker is employed to buy or sell at a fixed price, the

[77] Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24; Farnsworth v. Hemmer, 1 Allen (Mass.) 494.

[78] Knauss v. Brewing Co., 142 N. Y. 70, 36 N. E. 867; Siegel v. Gould, 7 Lans. (N. Y.) 177; Haviland v. Price, 6 Misc. Rep. 372, 26 N. Y. Supp. 757; Bonwell v. Auld, 9 Misc. Rep. 65, 29 N. Y. Supp. 15; Rupp v. Sampson, 16 Gray (Mass.) 398; Orton v. Scofield, 61 Wis. 382, 21 N. W. 261; Herman v. Martineau, 1 Wis. 151.

[79] Walker v. Osgood, 98 Mass. 348; Scribner v. Collar, 40 Mich. 375.

[80] See Knauss v. Brewing Co., 142 N. Y. 70, 36 N. E. 867; Scribner v. Collar, 40 Mich. 375.

broker to retain any difference, he may lawfully act as agent for the other party also.[81] But, if he conceals his agency from the latter, the broker cannot lawfully act as his agent, because he has a personal interest in selling at as high, or buying at as low, a price as possible, and this interest is in conflict with that of the second principal.[82]

Same—Parties Consenting.

When both parties know of the double agency of a broker, and consent to it, he violates no duty to either principal, and his employment by each is legal.[83] Some cases, however, have declared such double agencies to be illegal, as against public policy.[84] The weight of authority and the better reason support the legality of such contracts. Thus, it was said in an Ohio case:[85] "We admit that all such transactions should be regarded with suspicion; but, where full knowledge and consent of all parties interested are clearly shown, we know of no public policy or principle of sound morality which can be said to be violated. It seems to us, rather, that public policy requires that contracts fairly entered into by parties competent to contract should be enforced where no public law has been violated, and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud,—a fair and valuable service, in which his best judgment and his soundest discretion are fully and freely exercised. And in such case such service is all that either of his principals contracted for. Undoubtedly, if two persons desire to negotiate an exchange or a bargain and sale of property, they may

81 Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24; Montross v. Eddy, 94 Mich. 100, 53 N. W. 916; Alexander v. University, 57 Ind. 466.

82 Everhart v. Searle, 71 Pa. St. 256.

83 Rowe v. Stevens, 53 N. Y. 621; Alexander v. University, 57 Ind. 466; Joslin v. Cowee, 56 N. Y. 626; Adams Min. Co. v. Senter, 26 Mich. 73; Fitzsimmons v. Express Co., 40 Ga. 330; United States Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450; Pugsley v. Murray, 4 E. D. Smith (N. Y.) 245. See, also, note by Bennett to Lynch v. Fallon, 16 Am. Law Reg. 333; Bell v. McConnell, 37 Ohio St. 396; Manders v. Craft, 3 Colo. App. 236, 32 Pac. 836.

84 Raisin v. Clark, 41 Md. 158; Meyer v. Hanchett, 43 Wis. 246.

85 Bell v. McConnell, 37 Ohio St. 396.

agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers,—an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment and the one in the present case, which should cause the law to favor the former and abhor the latter?" [86]

SAME—NEGLIGENCE.

7. A broker is bound to possess and exercise reasonable skill and diligence. He is liable to his principal for losses due to his negligence.

A broker holds himself out as possessed of ordinary skill in the business in which he is engaged; and, when he undertakes a negotiation, he is bound to conduct it with reasonable diligence.[87] If he does this, he is not liable to his principal for negligence.[88] A money broker, to whom money is intrusted to loan, is liable if, by his want of care in estimating the value of the land on which a mortgage is taken as security, his principal suffers a loss.[89] So if he fails to record the mortgage, when that is part of his duty.[90] A broker who, without sufficient information, advises his principal to make a sale, will be held responsible if the sale causes a loss.[91] But an insurance broker who

[86] Bell v. McConnell, 37 Ohio St. 396, 401.

[87] Shipherd v. Field, 70 Ill. 438; McFarland v. McClees (Pa. Sup.) 5 Atl. 50; Barnard v. Coffin, 138 Mass. 37; Stewart v. Muse, 62 Ind. 385.

[88] Gheen v. Johnson, 90 Pa. St. 38; Gettins v. Scudder, 71 Ill. 86; Matthews v. Fuller, 123 Mass. 446. When property is placed with a broker for sale, he is not bound to consummate a sale, or procure a purchaser upon the agreed terms. Walsh v. Hastings, 20 Colo. 243, 38 Pac. 324.

[89] McFarland v. McClees (Pa. Sup.) 5 Atl. 50; Shipherd v. Field, 70 Ill. 438. Where defendant, a stock broker, took certificates of stock as collateral security for a loan he was authorized to make for a client, without inquiring as to their validity at the office of the corporation, which was accessible to him, or taking other precautions, and the certificates proved to be forgeries, defendant was guilty of such negligence as to render him liable for the loss. Isham v. Post, 71 Hun, 184, 23 N. Y. Supp. 211, 1168; Post v. Isham, Id.

[90] Stewart v. Muse, 62 Ind. 385.

[91] Barnard v. Coffin, 138 Mass. 37.

takes out policies for his principal in companies reputed solvent at that time is not liable if they subsequently fail.[92] And a stock broker has been held not to be liable for margins lost which he had deposited with another broker, according to the usage of the "Board of Brokers," and had not required security therefor.[93] A broker exercising reasonable care in making investments is not liable for a subsequent depreciation in the stocks bought.[94]

SAME—FOLLOWING INSTRUCTIONS.

8. A broker is bound to follow the instructions given him by his principal, and is liable for all losses resulting from his failure to do so.

A broker must conform to the instructions given him by his principal.[95] If he exceeds his instructions, contracts made by him for the principal do not bind the latter.[96] By failing to follow instructions, the broker becomes liable to the principal for any losses resulting from the breach of duty.[97] Under an order to buy stock "on 60 days' buy-

[92] Gettins v. Scudder, 71 Ill. 86.

[93] Gheen v. Johnson, 90 Pa. St. 38.

[94] Matthews v. Fuller, 123 Mass. 446.

[95] Pickering v. Demerritt, 100 Mass. 416; White v. Smith, 54 N. Y. 522. Authority to a real-estate agent to contract for a sale will not authorize him to make a contract for the sale of an option to purchase. Jones v. Holladay, 2 App. D. C. 279. After preliminary correspondence, a real-estate broker wrote to defendant, stating that he could sell defendant's land (800 acres) for $4,000, one-half cash, balance in one and two years at 8 per cent. interest. Defendant telegraphed, "Accept the $4,000 proposition." Held not to authorize the broker to contract to sell for cash. Everman v. Herndon, 71 Miss. 823, 15 South. 135. A usage of brokers will not justify a breach of instructions. Parsons v. Martin, 11 Gray (Mass.) 111; Day v. Holmes, 103 Mass. 306.

[96] Morris v. Ruddy, 20 N. J. Eq. 236. A sale on terms more advantageous than those ordered by the principal will not bind him, unless he ratifies the sale. Nesbitt v. Helser, 49 Mo. 383.

[97] Laverty v. Snethen, 68 N. Y. 522; Gray v. Murray, 3 Johns. Ch. (N. Y.) 167; Schmertz v. Dwyer, 53 Pa. St. 335. Where grain brokers employed by a dealer to buy and sell wheat for future delivery write the dealer that a contract which he has for May can be changed to June delivery, to which letter the dealer makes no reply, though he is in a position to do so, and the brokers then change the contract, the fact that the dealer receives and retains a statement sent him

er's option," a broker cannot buy the stock himself, and hold it on his principal's account for 60 days.[98] By disobeying instructions, a broker may lose his lien on money or property in his hands.[99]

SAME—DUTY TO ACCOUNT.

9. A broker is bound to render his principal an account of all business transacted on his behalf, and pay over any balance due the principal.

The duty of a broker in keeping and rendering accounts to his principal is practically the same as that of a factor.[100] He must keep accurate record of all his transactions, and render statements thereof on the demand of the principal. The broker must pay over to the principal any balance remaining due him.[101]

SAME—RIGHT TO COMMISSIONS.

10. A broker is entitled to commissions for the service he performs. This right will be considered under the following heads:

(a) Employment necessary.
(b) Amount of commission.
(c) Acting for both parties.
(d) Illegal contracts.
(e) What is performance by broker.
(f) Performance within time given.
(g) Sale completed by principal—Broker procuring cause.
(h) Sale prevented by principal.
(i) Exclusive agency—More than one broker employed.
(j) Effect of requiring a license.

by the broker, showing such change, does not show a ratification of the broker's act in making the change. Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571.

[98] Pickering v. Demerritt, 100 Mass. 416. And see Day v. Holmes, 103 Mass. 306.

[99] Jones v. Marks, 40 Ill. 313.

[100] See monograph on Factors, p. 19.

[101] Haas v. Damon, 9 Iowa, 589; Nourse v. Prime, 7 Johns. Ch. (N. Y.) 69.

Employment Necessary.

A broker is entitled to compensation in some form for the services performed for his principal. But, before a broker can recover any form of compensation, he must show employment; that is, he must establish the existence of the relation of principal and broker.[102] Per-

[102] Campbell Printing Press & Manufacturing Co. v. Yorkston, 11 Misc. Rep. 340, 32 N. Y. Supp. 263; De Mars v. Boehm, 6 Misc. Rep. 38, 26 N. Y. Supp. 67; Cook v. Welch, 9 Allen (Mass.) 350; Cummings v. Town of Lake Realty Co., 86 Wis. 382, 57 N. W. 43; Hinds v. Henry, 36 N. J. Law, 328; Atwater v. Lockwood, 39 Conn. 45; Meston v. Davies (Tex. Civ. App.) 36 S. W. 805; Walton v. Clark, 54 Minn. 341, 56 N. W. 40. But see, for facts held to show employment, Holden v. Starks, 159 Mass. 503, 34 N. E. 1069; Bassett v. Rogers, 162 Mass. 47, 37 N. E. 772. The one contracting to pay the commission need not be the beneficial owner of the property to be sold. Jones v. Adler, 34 Md. 440. And see Landsberger v. Murray, 6 Misc. Rep. 605, 25 N. Y. Supp. 1007; Bowles v. Allen (Va.) 21 S. E. 665. To recover commissions from a corporation, a broker must prove employment by some one having power to bind the corporation. Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269. A wife has no power to bind her husband to pay a broker commissions. Harper v. Goodall, 62 How. Prac. (N. Y.) 288. Where a broker employed to sell defendant's farm on commission produces a purchaser, who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission. Donohue v. Padden, 93 Wis. 20, 66 N. W. 804. Where a broker asks and obtains from the owner of land the price at which he is willing to sell it, this, of itself, does not establish the relation of principal and agent between the owner and the broker. Castner v. Richardson, 18 Colo. 496, 33 Pac. 163. Mere consent by a person to the rendering by a real-estate agent of the unsolicited services, which enable him to sell his land, does not entitle the agent to recover compensation therefor under an implied promise of remuneration. Viley v. Pettit, 96 Ky. 576, 29 S. W. 438. Defendant, in a conversation with plaintiff, whom he knew to be a real-estate broker, but whose services in selling the property in question he had previously declined, told plaintiff that he would take $30,000 for the property. Plaintiff asked him if he was in earnest, and defendant said that he meant business, and that, if plaintiff did not think so, let him bring a purchaser. Held, that the language did not constitute an offer to pay plaintiff a commission for procuring a purchaser at the price stated. Dunn v. Price, 87 Tex. 318, 28 S. W. 681. A real-estate broker employed to sell land, who agrees to pay another broker a commission if he procures a purchaser therefor, is liable for the commission if the purchaser is procured, though he afterwards discovers that the land is not the property of his principal. Barthell v. Peter, 88 Wis. 316, 60 N. W. 429. Where

forming services as a mere volunteer, from which the principal derives a benefit, does not entitle the broker to compensation; as, where a broker, without a previous employment, sends to the owner of property a person to whom he sells it, the broker acquires no right to a commission from the vendor.[103] In some cases it is said, however, that a broker is entitled to commissions if the principal adopts and ratifies his acts.[104]

Amount of Commission.

A broker's compensation is nearly always paid in the form of a commission.[105] This is usually a percentage on the amount involved in the transaction in which the broker is employed;[106] but it may be a

a broker employed to sell whisky introduced a purchaser, to whom the principal gave an option on goods made and to be made the next year, the broker was held not entitled to commissions on whisky sold under the option, but of the next season's manufacture. Block v. Walker, 19 C. C. A. 65, 72 Fed. 650.

[103] Cook v. Welch, 9 Allen (Mass.) 350; Castner v. Richardson, 18 Colo. 496, 33 Pac. 163; Atwater v. Lockwood, 39 Conn. 45. And see Ellis v. Dunsworth, 49 Ill. App. 187.

[104] Low v. Railroad Co., 46 N. H. 284; Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269; Keys v. Johnson, 68 Pa. St. 42. Cf. Maze v. Gordon, 96 Cal. 61, 30 Pac. 962. A departure of a real-estate agent from the terms of his authority in effecting a sale becomes, on ratification by the principal, a part of the original contract of employment, and the compensation fixed therein controls. Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882. The fact that in the sale of land the vendor and vendee agree that the latter shall pay the commissions agreed upon between the vendor and plaintiff for the services of the latter in negotiating the sale does not relieve the vendor of liability to plaintiff, in the absence of an agreement on plaintiff's part to release the vendor. Burnett v. Casteel (Tex. Civ. App.) 36 S. W. 782.

[105] Whether one who is paid a salary can be a broker, see ante, p. 2.

[106] An agent for the sale of land, who makes a sale payable in installments, is entitled to commission on the installments as paid, and not to his entire commission out of the first installment paid. Melvin v. Aldridge, 81 Md. 650, 32 Atl. 389. Gresham v. Galveston Co. (Tex. Civ. App.) 36 S. W. 796. Where a broker who sold certain property for a receiver was entitled to have only a proportionate part of his commission out of the sum paid down, and was to participate at the same rate in the deferred payments, but the purchaser made default in the deferred payments, and the property was sold under a trust deed securing the unpaid purchase price, and was bid in by another for a nominal sum, but the purchaser, pursuant to a guaranty he had made to the receiver, paid a much larger sum, the broker is entitled to his commission on said larger sum. Peters v. Anderson (Va.) 23 S. E. 754.

definite sum, independent of the price received by the vendor, or the broker for the sale of property may be given all he receives over a fixed price.[107] The amount of a broker's commission is determined by the express contract of the parties, by usage, or, in the absence of either contract or usage, by the reasonable value of the services performed.[108] A usage, however, to fix the rate of compensation, must be established, known, and definite.[109]

Acting for Both Parties.

It has already been seen that in most cases a broker cannot act as agent for both parties. The exceptions to that general rule have also been stated.[110] When the circumstances are such that the double em-

[107] A real-estate agent employed to sell land for a certain price is not entitled to any excess, over such price, he may obtain for the land. Snow v. Macfarlane, 51 Ill. App. 448. And see Humphreys v. Hoge (Va.) 25 S. E. 106.

[108] Carruthers v. Towne, 86 Iowa, 318, 53 N. W. 240. That a real-estate broker may recover compensation for the value of his services when no sale has resulted, see Hawkins v. Chandler, 8 Houst. (Del.) 434, 32 Atl. 464.

[109] Potts v. Aechternacht, 93 Pa. St. 138; Deshler v. Beers, 32 Ill. 368; Morgan v. Mason, 4 E. D. Smith (N. Y.) 636; Erben v. Lorillard, *41 N. Y. 567; Thomas v. Brandt (Md.) 26 Atl. 524. In an action on a quantum meruit to recover compensation for effecting a sale of real estate, plaintiff not being a regular real-estate agent, proof of the customary charges of such agents for similar services is not conclusive. Kennerly v. Sommerville, 2 Mo. App. Rep'r, 918.

[110] Ante, p. 16. An agreement by real-estate agents to divide their commissions with the purchaser of land, made without the knowledge of their principal, does not affect their right to recover the commissions which such principal agreed to pay. Scott v. Lloyd, 19 Colo. 401, 35 Pac 733. The mere fact that an agent employed to find a purchaser for land advanced to the purchaser money to make a part payment does not prevent a recovery of his commission from the vendor. Lawson v. Thompson, 10 Utah, 462, 37 Pac. 732. Where a broker's contract to procure a purchaser at a specified price simply requires him to bring his principal and the purchaser together, so that they themselves can make their own contract, he may recover commissions from both parties on separate contracts with each. Childs v. Ptomey, 17 Mont. 502, 43 Pac. 714. A real-estate agent, employed to buy certain property at a certain price, does not forfeit the commission which the purchaser agreed to pay him because he secured another commission from the vendor after the vendor had accepted the terms offered. Jones v. Henry, 15 Misc. Rep. 151, 36 N. Y. Supp. 483. Where a broker is employed to sell at a specified price, he does not, by accepting a commission from the purchaser, lose his right to commissions from the vendor. Alexander v. University, 57 Ind. 466; Barry v. Schmidt, 57 Wis. 172, 15 N. W. 24. It has

ployment is legal, the broker may recover commissions from both parties;[111] otherwise, he may lose his right to a commission from either.[112] When a broker has been employed to perform certain duties under promise of a commission, and he attempts to act as agent for the other party also, for an additional commission, by engaging with the second he forfeits his right to compensation from the one who first employed him.[113] By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And, for the same reason, he cannot recover from the second employer, who is ignorant of the first engagement.[114] And, if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. It is no answer to say that the second employer, having knowledge of the first employment, should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy

been held in some cases that knowledge and consent of both parties to a broker's double agency would not entitle him to commissions from both. Ralsin v. Clark, 41 Md. 158; Lynch v. Fallon, 11 R. I. 311.

[111] Finch v. Comrade's Ex'r, 154 Pa. St. 326, 26 Atl. 368; Bell v. McConnell, 37 Ohio St. 396; McDonald v. Maltz, 94 Mich. 172, 53 N. W. 1058; Herman v. Marthneau, 1 Wis. 151; Rowe v. Stevens, 53 N. Y. 621; Siegel v. Gould, 7 Lans. (N. Y.) 177; Lansing v. Bliss, 86 Hun, 205, 33 N. Y. Supp. 310; Smith v. Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722; Sherwin v. O'Connor, 24 Neb. 603, 39 N. W. 620; Campbell v. Baxter, 41 Neb. 729, 60 N. W. 90.

[112] Rice v. Wood, 113 Mass. 133; Young v. Trainor, 158 Ill. 428, 42 N. E. 139; Fuller Watchman's Electrical Detector Co. v. Louis, 50 Ill. App. 428; Perkins v. Quarry Co., 11 Misc. Rep. 328, 32 N. Y. Supp. 230; Strawbridge v. Swan, 43 Neb. 781, 62 N. W. 199. Real-estate agents representing the different owners in an exchange of lands lose the right to commissions by their entering into an agreement, without the consent of their principals, to pool or divide their commissions. Norman v. Roseman, 59 Mo. App. 682.

[113] Walker v. Osgood, 98 Mass. 348; Bell v. McConnell, 37 Ohio St. 396; Tinsley v. Pennilman, 12 Tex. Civ. App. 591, 34 S. W. 365.

[114] Meyer v. Hanchett, 39 Wis. 419; Bell v. McConnell, 37 Ohio St. 396. A usage of brokers to charge a commission to both parties to an exchange of property will not be enforced. Ralsin v. Clark, 41 Md. 158; Farnsworth v. Hemmer, 1 Allen (Mass.) 494. But see Mullen v. Keetzleb, 7 Bush (Ky.) 253.

and good morals, and, both parties thereto being in pari delicto, the law will leave them as it finds them.[115]

Illegal Contracts.

It has already been seen that certain classes of contracts, entered into through the agency of brokers, are illegal.[116] The question is now as to the effect of such illegality on the broker's right to compensation. A broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances.[117] But when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.[118]

[115] Farnsworth v. Hemmer, 1 Allen (Mass.) 494; Walker v. Osgood, 98 Mass. 348; Smith v. Townsend, 109 Mass. 500; Rice v. Wood, 113 Mass. 133; Bollman v. Loomis, 41 Conn. 581; Everhart v. Searle, 71 Pa. St. 256; Morison v. Thompson, L. R. 9 Q. B. 480; Bell v. McConnell, 37 Ohio St. 396; Lynch v. Fallon, 11 R. I. 311.

[116] Ante, p. 4.

[117] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713; Bartlett v. Smith, 13 Fed. 263; Kirkpatrick v. Adams, 20 Fed. 287; First Nat. Bank v. Oskaloosa Packing Co., 66 Iowa, 41, 23 N. W. 255. The fact that an agreement for the sale of land to a purchaser procured by plaintiff was made on Sunday does not affect plaintiff's right of action on a prior agreement to pay him for securing a purchaser. Boland v. Kistle, 92 Iowa, 369, 60 N. W. 632. It has been held that a broker who merely brings parties together, and they make and carry out an illegal contract, can recover the agreed commission, even though he knew of his principal's illegal object. Ormes v. Dauchy, 45 N. Y. Super. Ct. 85. For a more stringent rule, see In re Green, 7 Biss. 338, Fed. Cas. No. 5,751; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252. In some cases, notably in Pennsylvania and New Jersey, the illegality of the transaction is held to make the broker a principal, and to prevent his recovery of commissions or advances. Dickson's Ex'r v. Thomas, 97 Pa. St. 278; Ruchizky v. De Haven, Id. 202; Flagg v. Baldwin, 38 N. J. Eq. 219. An agent employed to procure a purchaser for real estate cannot recover a commission for effecting a sale to a person who has agreed to buy as the agent's silent partner. Reardon v. Washburn, 59 Ill. App. 161.

[118] Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160; Crawford v. Spencer, 92 Mo. 498, 4 S. W. 713; Cobb v. Prell, 15 Fed. 774; Bangs v. Hornick, 30 Fed. 97.

What is Performance by Broker.

What constitutes performance by a broker, so that he is entitled to his commissions, is a question depending on the facts of each case, and the construction of the contract between the broker and his principal. The usages of trade in many cases determine when a broker has earned his commissions under the indefinite contracts so often entered into in commercial transactions. A broker's compensation is usually made to depend on his success in carrying through the negotiation which he undertakes.[119] A broker is not entitled to compensation when, from his negligence or willful misconduct, the benefit of the transaction is lost to his principal;[120] nor when he violates his duty to exercise good faith.[121] A broker who becomes the purchaser of property placed in his hands for sale has no right to commissions.[122]

[119] Where the broker's contract with his principal is that he shall receive all obtained from the purchaser above a fixed price, the broker is entitled to no compensation when a sale is made at or below that price. Rees v. Spruance, 45 Ill. 368; Beatty v. Russell, 41 Neb. 321, 59 N. W. 919. But where there was a contract to pay the broker a commission if he effected a sale at $16,000, if the owner subsequently sells to a purchaser produced by the broker at $14,000, the broker is entitled to a proportional commission, without an express agreement to pay. Jones v. Adler, 34 Md. 440; Byrd v. Frost (Tex. Civ. App.) 29 S. W. 46.

[120] Fisher v. Dynes, 62 Ind. 348; Hamond v. Holiday, 1 Car. & P. 384; Hurst v. Holding, 3 Taunt. 32.

[121] A real-estate agent is not entitled to commissions from the vendee, as agreed on between them, where the agent asks the vendee a price greatly in excess of that fixed on the land by the vendor, and conceals from the vendee the fact that the vendor had instructed him to sell to the former at the reduced price. Phinney v. Hall, 101 Mich. 451, 59 N. W. 814. Where brokers, who are authorized to sell for a certain price, by colorable sales to an employé, and actual sales of part of the premises, sell for a much larger price without their principal's knowledge, the brokers cannot retain the commission charged on the colorable sale to the employé, nor charge commissions on the actual sales made. Powers v. Black, 159 Pa. St. 153, 28 Atl. 133. The fact that the broker reported to his principal that an offer of $16,000 for the land had been made, instead of $15,000, does not affect his right to a commission, where, as a result of his negotiation, a sale for the smaller sum was made. Peckham v. Ashhurst, 18 R. I. 376, 28 Atl. 337. The fact that the purchaser procured by the agent was acting in behalf of another does not affect the agent's right to commissions. Gelatt v. Ridge, 117 Mo. 553, 23 S. W. 882.

[122] The fact that, unknown to the principal, a member of a firm employed to sell land belongs to the syndicate to which the land is sold, bars the firm from recovering a commission for the sale, though the price received by the principal

The broker may also, by special agreement with his principal, so contract as to make his compensation dependent on a contingency which his efforts cannot control, even though it relate to the acts of his principal.[123]

The nature of the services required of a broker is determined by the business in which he is engaged. Thus, a broker who is employed to procure a loan is entitled to his commission when he procures a lender ready, willing, and able to lend the money upon the terms proposed. His right to commission does not depend upon the contingency of the applicant's acceptance of the loan, but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing.[124] So, it seems that a loan broker is entitled to his commissions, although the lender finally refuses to make the proposed loan because the borrower's title is found to be defective.[125]

So, a broker to effect a sale of property earns his commissions by producing a purchaser who is ready, willing, and able to purchase at the price fixed by the principal.[126] A written contract, binding on the

was fair, and all that he demanded. Hammond v. Bookwalter, 12 Ind. App. 177, 39 N. E. 872. When an agent employed to sell real estate becomes the purchaser, though it be with the consent of the principal, he cannot recover a commission for the sale, in the absence of a special agreement therefor made at or after the time he presented himself as purchaser. Hammond v. Bookwalter, 12 Ind. App. 177, 39 N. E. 872.

[123] Bull v. Price, 7 Bing. 237; Alder v. Boyle, 4 C. B. 635; Tombs v. Alexander, 101 Mass. 255; Walker v. Tirrell, Id. 257; Hinds v. Henry, 36 N. J. Law, 328. Where an owner of mines contracts with a broker to pay him a commission "if he effects a sale or deal of the mines" with a person introduced by the broker, and the agreement made with such person is made conditional on his approval of the organization of a corporation, and fails for want of such approval, the broker is not entitled to his commission. Hammond v. Crawford, 14 C. C. A. 109, 66 Fed. 425. Under an agreement to pay commissions for negotiating a "satisfactory lease," the lessor cannot arbitrarily refuse to accept a lease negotiated. Mullally v. Greenwood, 127 Mo. 138, 29 S. W. 1001.

[124] Vinton v. Baldwin, 88 Ind. 104. Cf. Corning v. Calvert, 2 Hilt. (N. Y.) 56.

[125] Holly v. Gosling, 3 E. D. Smith (N. Y.) 262. Contra, Budd v. Zoller, 52 Mo. 238 (but see dissenting opinion). Statutes in some states limit the commissions which a broker may charge for procuring a loan. Broad v. Hoffman, 6 Barb. (N. Y.) 177; Revision N. J. p. 519, § 5.

[126] Moses v. Bierling, 31 N. Y. 462; Wylie v. Bank, 61 N. Y. 415; Gerding

principal, is not necessary if the purchaser procured by the broker stands ready to perform.[127]

v. Haskin, 141 N. Y. 514, 36 N. E. 601; Barnard v. Monnot, 42 N. Y. 203; Sibbald v. Iron Co., 83 N. Y. 378; Menifee v. Higgins, 57 Ill. 50; Lang v. Hand, 57 Ill. App. 134; Bash v. Hill, 62 Ill. 216; Williams v. McGraw, 52 Mich. 480, 18 N. W. 227; Stewart v. Mather, 32 Wis. 344; Bradford v. Menard, 35 Minn. 197, 28 N. W. 248; Hamlin v. Schulte, 31 Minn. 486, 18 N. W. 415; McGavock v. Woodlief, 20 How. 221; Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200; Brown v. Wilson, 98 Iowa, 316, 67 N. W. 251; Jones v. Holladay, 2 App. D. C. 279. Refusal of the principal to complete the sale does not relieve him of his liability to the broker. Kock v. Emmerling, 22 How. 69; Glentworth v. Luther, 21 Barb. (N. Y.) 145; Van Llen v. Byrnes, 1 Hilt. (N. Y.) 134. It has been held that a broker was not entitled to commissions when the purchaser produced by him refused to accept a quitclaim deed, and demanded a warranty deed. Garcelon v. Tibbetts, 84 Me. 148, 24 Atl. 797. Authority to sell land at $16 per acre, for one-third cash, and balance in 1, 2, and 3 years, or for $10,000 cash, is not complied with by a sale by the terms of which the vendee pays $5 cash, and balance of one-third the price in 60 days, and balance of the price in 36 months. Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258. A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission. Witte v. Taylor, 110 Cal. 224, 42 Pac. 807. A contract giving the proposed purchaser an option to purchase at the price and terms proposed is not such a contract of sale as entitles the broker to commissions as for sale. Runyon v. Wilkinson, Gaddis & Co., 57 N. J. Law, 420, 31 Atl. 390; Dwyer v. Raborn, 6 Wash. 213, 33 Pac. 350. Where a broker has produced a purchaser ready and willing to contract on the terms stipulated, a subsequent agreement, without consideration, not to claim his commissions until delivery of the deed, is not binding on him. McComb v. Von Ellert, 7 Misc. Rep. 59, 27 N. Y. Supp. 372. A broker who is promised a commission for selling street-car lines to a certain syndicate, or to a corporation organized by such syndicate, is entitled to the commission on effecting a sale to a railroad company organized by the syndicate, though such company was not duly incorporated. Smith v. Mayfield, 60 Ill. App. 266.

[127] Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950; Ward v. Lawrence, 79 Ill. 295; Levy v. Ruff, 4 Misc. Rep. 180, 23 N. Y. Supp. 1002; Vaughan v. McCarthy, 58 Minn. 199, 60 N. W. 1075. So, where a loan broker is employed to secure a loan for his principal, it is not essential to his right to commissions that he have a binding contract with the proposed lender. Middleton v. Thompson, 165 Pa. St. 112, 29 Atl. 796.

Same—Responsible Purchaser.

It is a prerequisite to the broker's right to commissions that the proposed purchaser be financially able to carry out the contract.[128] The broker undertakes to furnish a purchaser; and, when one is presented, the employer is not bound to accept him or to pay the commission, unless he is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed or upon modified terms then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned.[129] But if the principal rejects the purchaser, and the broker claims his commission, he must show, not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser, and such as the principal was bound, as between himself and the broker, to accept.[130] When the principal rejects the proposed purchaser without cause and without objection to his pecuniary responsibility, the burden of proof is not on

[128] Pratt v. Hotchkiss, 10 Ill. App. 603; Coleman's Ex'r v. Meade, 13 Bush (Ky.) 358; Hayden v. Grillo, 26 Mo. App. 289; Chipley v. Leathe, 60 Mo. App. 15. Under an agreement that a broker shall receive a commission for finding a purchaser for property, he is entitled thereto on introducing to his principal a purchaser to whom a sale is made, though the purchaser fails to meet deferred payments. Hallack v. Hinckley, 19 Colo. 38, 34 Pac. 479; Stewart v. Fowler, 53 Kan. 537, 36 Pac. 1002. Where the owner of personalty agreed to pay an agent a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procured a purchaser who made a written contract with the owner to buy the goods, and to pay for the same partly with a deed to certain land, and such purchaser was unable to perform his contract, for want of title to such land, the agent was not entitled to commissions. Grensel v. Dean, 98 Iowa, 405, 67 N. W. 275. A real-estate agent who offers his services to F. to effect an exchange of F.'s stock of goods for land belonging to T. is not entitled to compensation for bringing F. and T. together, where the negotiations fell through because T. had no title to the land which he proposed to exchange. Freedman v. Gordon, 4 Colo. App. 343, 35 Pac. 879; Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594; Woolley v. Lowenstein, 83 Hun, 155, 31 N. Y. Supp. 570; Moskowitz v. Hornberger, 15 Misc. Rep. 645, 38 N. Y. Supp. 114.

[129] Coleman's Ex'r v. Meade, 13 Bush (Ky.) 358.

[130] McGavock v. Woodlief, 20 How. 221; Coleman's Ex'r v. Meade, 13 Bush (Ky.) 358; Neiderlander v. Starr, 50 Kan. 766, 32 Pac. 359.

the broker to show that the purchaser was able to carry out the contract, in order that he may recover his commissions.[131]

Performance within Time Given.

Where a broker has a definitely limited time within which to effect a sale of property, he is not entitled to compensation unless he performs his undertaking within that time.[132] The cases are not, how-

[131] Gerding v. Haskin, 2 Misc. Rep. 172, 21 N. Y. Supp. 636; Levy v. Ruff, 4 Misc. Rep. 180, 23 N. Y. Supp. 1002; Cook v. Kroemeke, 4 Daly (N. Y.) 268; Goss v. Broom, 31 Minn. 481, 18 N. W. 290. Solvency is presumed in the absence of evidence to the contrary. Hart v. Hoffman, 44 How. Prac. (N. Y.) 168. Contra, Iselin v. Griffith, 62 Iowa, 668, 18 N. W. 302. Where the purchaser furnished by a broker is accepted by the seller, without any misrepresentation on the part of the broker as to such purchaser's financial standing, the burden of proof is on the seller to show that the purchaser is not able to pay for the goods according to the contract. Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108. Where the proposed purchaser admits that he had not the ability to pay the price fixed, his testimony that he was acting in behalf of a syndicate, and that he would have been prepared, when the time arrived to complete the purchase, to find the money required, does not satisfactorily show his ability to buy. Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200. In an action to recover commissions for the sale of land alleged to have fallen through on account of the principal's failure to procure a patent to the land within the time agreed on, the intended purchaser being unable to complete the purchase when the patent was secured, the agent cannot recover, unless he affirmatively proves that the purchaser had during the time the actual cash to make the payment; it not being sufficient to show that he had property out of which the price could have been made by suit. Dent v. Powell, 93 Iowa, 711, 61 N. W. 1043.

[132] McCarthy v. Cavers, 66 Iowa, 342, 23 N. W. 757; Watson v. Brooks, 11 Or. 271, 3 Pac. 679; Halperin v. Callender, 17 Misc. Rep. 362, 39 N. Y. Supp. 1044; Beauchamp v. Higgins, 20 Mo. App. 514; Zeimer v. Antisell, 75 Cal. 509, 17 Pac. 642. A real-estate broker who produces a customer after his principal has withdrawn his offer to sell is not entitled to a commission. Young v. Trainor, 158 Ill. 428, 42 N. E. 139, affirming 57 Ill. App. 632. Where the minds of vendor and purchaser have met on a contract to sell real estate, the broker who procured the execution of such contract is entitled to recover his promised commission, whether or not the contract is finally consummated, and notwithstanding any vagueness in its terms. Folinsbee v. Sawyer, 15 Misc. Rep. 293, 36 N. Y. Supp. 405. Where an application for a loan is made to a broker, who secures a party willing to make the loan, but does not so notify the applicant, and, after the time has elapsed within which

ever, altogether satisfactory as to what constitutes such performance. When a sale within the time limited is prevented by the negligence, fault, or fraud of the principal, the broker can recover his commissions.[133] In some cases, it has been held that the sale must be completed within the time specified.[134] In others, the broker has been held entitled to compensation when he produced a purchaser within the time, to whom a sale is made after the time has expired.[135]

Sale Completed by Principal—Broker Procuring Cause.

A broker earns his commission whenever the sale or other business about which he is employed is effected through his agency. But he need not conduct the transaction in person. After the broker has produced a purchaser, the negotiation may be concluded by the principal in person, and the broker will be entitled to his commission.[136]

the broker was to place the loan has expired, the applicant, without knowledge of the steps taken by the broker, secures the loan from the same person with whom the latter had arranged to place it, the broker is not entitled to commission. Biddison v. Johnson, 50 Ill. App. 173. Where a contract with a broker to sell a note and mortgage is silent as to the time within which the sale is to be made, the broker is entitled to a reasonable time. Peterson v. Hall, 61 Minn. 268, 63 N. W. 733.

[133] Fultz v. Wimer, 34 Kan. 576, 9 Pac. 316; Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772. A real-estate agent employed to sell land within a certain time, on certain terms, is entitled to his commissions where he procures a purchaser within the time willing to buy, and communicates that fact to the owner; and the owner, by deferring the meeting with the purchaser until after the time of the agent's employment has expired, cannot defeat his right. Vanderveer v. Suydam, 83 Hun, 116, 31 N. Y. Supp. 392.

[134] Fultz v. Wimer, 34 Kan. 576, 9 Pac. 316; Watson v. Brooks, 11 Or. 271, 3 Pac. 679; Zelmer v. Antisell, 75 Cal. 509, 17 Pac. 642.

[135] Goffe v. Gibson, 18 Mo. App. 1; Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772.

[136] Martin v. Silliman, 53 N. Y. 615; Ludlow v. Carman, 2 Hilt. (N. Y.) 107; Timberman v. Craddock, 70 Mo. 638; Bass v. Jacobs, 63 Mo. App. 393; Loud v. Hall, 106 Mass. 404; Bornstein v. Laus, 104 Mass. 214; Dowling v. Morrill, 165 Mass. 491, 43 N. E. 295; Howe v. Werner, 7 Colo. App. 530, 44 Pac. 511. The broker need not be present during the negotiations or at the completion of the bargain. Dreisback v. Rollins, 39 Kan. 268, 18 Pac. 187; Sibbald v. Iron Co., 83 N. Y. 378; Baker v. Thomas, 11 Misc. Rep. 112, 31 N. Y. Supp. 993.

If the broker was the procuring cause of the sale, he can recover;[137] otherwise, he cannot.[138] The principal need not know, at the time the sale was completed, that the purchaser was obtained through the broker's efforts.[139] Nor need the broker have introduced the pur-

[137] Pope v. Beals, 108 Mass. 561; Royster v. Magevency, 9 Lea (Tenn.) 148; Earp v. Cummins, 54 Pa. St. 394; Lloyd v. Matthews, 51 N. Y. 124; Redfield v. Tegg, 38 N. Y. 212. The completed transaction need not result in a benefit to the principal. Schwartze v. Yearly, 31 Md. 270. An owner of real estate, after her efforts to sell to W. had failed and been abandoned, put it in the hands of a real-estate agent to sell at a certain price. He then commenced negotiations with W., and, while it still remained in his hands, without notice to him, the owner sold it to W., for a less price than that at which the agent had been authorized to sell. Held, that he was entitled to commissions on the amount for which it was sold. Schlegal v. Allerton, 65 Conn. 260, 32 Atl. 363. Where a real-estate agent, with whom land has been placed for sale, places it with another, reserving the right to sell the land himself, he cannot sell the land to a customer of the latter, and thereby defeat the latter's right to his commissions. Leonard v. Roberts, 20 Colo. 88, 36 Pac. 880. Where an agent's authority to sell lands upon certain terms is revoked, and the owner, in good faith, thereafter sells upon less favorable terms to one who had declined to purchase from the agent, such agent is not entitled to commissions. Bailey v. Smith, 103 Ala. 641, 15 South. 900. A real-estate broker is not entitled to commissions on a sale of land where the purchaser bought solely upon his own information, after negotiating with the owners, and was not influenced by the broker, though the broker made efforts to sell the land to such purchaser. Brown v. Shelton (Tex. Civ. App.) 23 S. W. 483. Where a real-estate agent brings the parties together, and negotiations are thus opened between them, which continue without withdrawal of either party therefrom, and culminate in a sale, though on different terms than originally arranged, the broker is entitled to his commissions. Jones v. Henry, 15 Misc. Rep. 151, 36 N. Y. Supp. 483.

[138] Stewart v. Mather, 32 Wis. 344; Wyckoff v. Bliss, 12 Daly (N. Y.) 324; Sussdorff v. Schmidt, 55 N. Y. 319; McClave v. Paine, 49 N. Y. 561; Tyler v. Parr, 52 Mo. 249; Carter v. Webster, 79 Ill. 435. Where a broker employed to procure a customer sends to his principal one with whom the latter, without the broker's knowledge, is already negotiating, and the principal, ignorant that the broker and customer have had any communication, deals with the customer, the broker, whose acts had no influence in effecting the trade, is not entitled to commission. Neufeld v. Oren, 60 Ill. App. 350.

[139] Lloyd v. Matthews, 51 N. Y. 124; Hanford v. Shapter, 4 Daly (N. Y.) 243; Kelly v. Stone, 94 Iowa, 316, 62 N. W. 842; Bryan v. Abert, 3 App. D. C. 180. But see Soule v. Deering, 87 Me. 365, 32 Atl. 998.

chaser to the principal,[140] or even know the purchaser himself.[141] Thus, where the one who purchases the principal's property first learns that it is for sale from the advertisements of the broker,[142] or from a third person to whom the broker had communicated the fact.[143] When a broker, having been unsuccessful in finding a purchaser, abandons the undertaking, he does not become entitled to a commission if the property is subsequently sold to one to whom he had tried to sell, but failed.[144]

Sale Prevented by Principal.

A broker has performed his duty when he finds some one who is ready, willing, and able to purchase on the terms proposed by his principal. When the contract which the principal desires to enter into has been made, the broker is entitled to his commissions. The principal cannot deprive the broker of this right by subsequently releasing the purchaser from his contract to buy; nor, if the purchaser refuses to perform, can a principal, who refuses to bring an action for specific performance, set up the purchaser's breach of the contract of sale as a defense to the broker's action for compensation.[145] It

[140] Royster v. Mageveney, 9 Lea (Tenn.) 148; Wylie v. Bank, 61 N. Y. 415; Anderson v. Cox, 16 Neb. 10, 20 N. W. 10. But see Getzler v. Boehm, 16 Misc. Rep. 390, 38 N. Y. Supp. 52.

[141] Derrickson v. Quinby, 43 N. J. Law, 373; Lincoln v. McClatchie, 36 Conn. 136; Wylie v. Bank, 61 N. Y. 415. And see Newhall v. Pierce, 115 Mass. 457.

[142] Earp v. Cummins, 54 Pa. St. 394.

[143] Anderson v. Cox, 16 Neb. 10, 20 N. W. 10; Lincoln v. McClatchie, 36 Conn. 136. Where a broker talks about land which he has for sale (the owner retaining a right to sell it) to one who, not acting for the broker, mentions it to a third person, who purchases from the owner, he is not entitled to a commission. Gleason v. Nelson, 162 Mass. 245, 38 N. E. 497.

[144] Sibbald v. Iron Co., 83 N. Y. 378; Wylie v. Bank, 61 N. Y. 415; Holley v. Townsend, 2 Hilt. (N. Y.) 34; Boucher v. Larkins, 84 Hun, 288, 32 N. Y. Supp. 305; Earp v. Cummins, 54 Pa. St. 394. Cf. Ware v. Dos Passos, 4 App. Div. 32, 38 N. Y. Supp. 673. A real-estate broker is not entitled to commissions for procuring a purchaser for lands where the sale is abandoned with his own consent. Sawyer v. Bowman, 91 Iowa, 717, 59 N. W. 27.

[145] Parker v. Walker, 86 Tenn. 566, 8 S. W. 391; Love v. Miller, 53 Ind. 294. But where the contract entered into contains a stipulation that, in case either party should fail to comply with the contract, a forfeiture of $1,000 should be paid by the party in default, the broker is not entitled to his com-

would be no defense to say that a bill to enforce specific performance would be of no avail on account of the purchaser's insolvency. The principal was not bound to accept the proposed purchaser, unless he was able to perform.[146]

When performance by a broker is prevented by his principal, the broker is, nevertheless, entitled to compensation. The principal cannot, by refusing to complete the contract when a proper customer is produced by the broker, escape liability to the latter.[147] Nor does a

mission if the purchaser does not perform. Bennett v. Egan, 3 Misc. Rep. 421, 23 N. Y. Supp. 154; Kimberly v. Henderson, 29 Md. 512; Algier v. Land Co., 51 Kan. 718, 33 Pac. 593. But see Richards v. Jackson, 31 Md. 250. In Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, the broker was in a similar case given a commission on the forfeit money.

[146] See ante, p. 29.

[147] Middleton v. Thompson, 163 Pa. St. 112, 29 Atl. 796; McGuire v. Carlson, 61 Ill. App. 295; Cook v. Fiske, 12 Gray (Mass.) 491; Felts v. Butcher, 93 Iowa, 414, 61 N. W. 991; Nesbitt v. Helser, 49 Mo. 383; Reeves v. Vette, 62 Mo. App. 440; Goss v. Stevens, 32 Minn. 472, 21 N. W. 549; Riemer v. Rice, 88 Wis. 16, 59 N. W. 450; Kock v. Emmerling, 22 How. 69; Watson v. Brooks, 8 Sawy. 316, 13 Fed. 540. Where the principal sold the property himself, but permitted the broker to make further efforts to secure a purchaser without informing him of the sale, he was held liable for commissions. Lane v. Albright, 49 Ind. 275. So, where a purchaser is procured by the broker, and the principal gives an option for a limited time to the proposed purchaser, but sells to another within that time, the broker may recover commissions. Reed's Ex'rs v. Reed, 82 Pa. St. 420. A real-estate agent, who procures a purchaser able, ready, and willing to take the property, and pay for it at the price agreed, and who is prevented from doing so by his principal's refusal to carry out the contract, is entitled to compensation, though the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. Holden v. Starks, 159 Mass. 503, 34 N. E. 1069. Defendant employed plaintiff as a broker to sell goods at a certain commission. Plaintiff procured a purchaser, to whom defendant shipped the goods, but they were rejected by him as not of the quality specified. Held, that plaintiff, having performed his part of the contract, was entitled to his commission. Strong v. Brownstone Co., 6 Misc. Rep. 57, 26 N. Y. Supp. 85. Where a landowner refuses to execute a deed pursuant to the terms of sale made by his authorized agent, neither the agent nor the purchaser need tender the purchase money before the agent can sue for his services. Vaughan v. McCarthy, 59 Minn. 199, 60 N. W. 1075. A broker who agrees to procure a loan performs his contract when he secures a company able, willing, and ready to make the loan, and need not tender or cause

defect in the principal's title, which causes the purchaser to reject it, relieve the principal,[148] unless the broker knew of the defect.[149] Where the principal sees that the broker is about to effect a sale, he cannot cut off the latter's right to commissions, by any fraudulent

to be tendered the amount of the loan before he is entitled to his compensation. Phister v. Gove, 48 Mo. App. 455; Felford v. Brinkerhoff, 45 Ill. App. 586. One may recover in an action on a contract to pay him a certain sum on securing a purchaser for defendant's land, where it appeared that he conducted to the premises one with whom defendant afterwards entered into a written agreement for the sale of the land, though the land was in fact sold to another. Boland v. Kistle, 92 Iowa, 369, 60 N. W. 632. Where real-estate brokers procure a contract for the sale of land, and the vendor voluntarily releases the purchaser from his obligation, the brokers are still entitled to their commissions. Granger v. Griffin, 43 Ill. App. 421; Foster v. Wynn, 51 Ill. App. 401. A real-estate agent who procures a purchaser ready and willing to purchase land on the terms on which he was employed to sell is entitled to his commissions, though the vendor, with knowledge thereof, voluntarily completes the sale on different terms. Corbel v. Beard, 92 Iowa, 360, 60 N. W. 636.

[148] Knapp v. Wallace, 41 N. Y. 477; Doty v. Miller, 43 Barb. (N. Y.) 529; Glentworth v. Luther, 21 Barb. (N. Y.) 145; Allen v. James, 7 Daly (N. Y.) 13; Gonzales v. Broad, 57 Cal. 224; Stage v. Gosse, 110 Mich. 153, 67 N. W. 1108; Roberts v. Kimmons, 65 Miss. 332, 3 South. 736; Sullivan v. Hampton (Tex. Civ. App.) 32 S. W. 235; Goodridge v. Holladay, 18 Ill. App. 363; Davis v. Morgan, 96 Ga. 518, 23 S. E. 417; Davis v. Lawrence, 52 Kan. 383, 34 Pac. 1051; Topping v. Healey, 3 Fost. & F. 325. But see Tombs v. Alexander, 101 Mass. 255; Rockwell v. Newton, 44 Conn. 333; Blankenship's Adm'r v. Ryerson, 50 Ala. 426. Refusal of the principal's wife to release her dower does not relieve him of liability to the broker. Clapp v. Hughes, 1 Phila. (Pa.) 382; Hamlin v. Schulte, 34 Minn. 534, 27 N. W. 301. But see Hill v. Jones, 152 Pa. St. 433, 25 Atl. 834. A broker employed to obtain a loan is, in the absence of a condition to the contrary, entitled to commissions on obtaining a person able and willing to make the loan, though it is not consummated because the title to the premises on which the loan was to be made is defective, in that the building thereon encroaches on adjoining property. Egan v. Kieferdorf, 16 Misc. Rep. 385, 38 N. Y. Supp. 81. But contra under a contract making compensation depend on the payment of the purchase price. Cremer v. Miller, 56 Minn. 52, 57 N. W. 318. In Condict v. Cowdrey, 139 N. Y. 273, 34 N. E. 781, it was held that a broker was not entitled to commissions where the contract of purchase was conditional on the title being found as represented, and investigation showed that the principal had no title.

[149] Hart v. Hopson, 52 Mo. App. 177.

device.[150] When the purchaser refuses to perform because of false representations made by the owner respecting the property, this will not deprive the broker of his commissions.[151]

Exclusive Agency—More than One Broker Employed.

When an owner of property lists it with a broker for sale, he does not, without an express agreement, give the broker the exclusive right to sell. The owner may, of course, agree not to sell himself or through any other agent.[152] In the absence of such an agreement, the principal may effect a sale independently of the broker's efforts; and, if he do so, he will not be liable to the broker for the payment of commissions.[153] It has, however, been intimated in some cases that the

[150] Stewart v. Mather, 32 Wis. 344; Fox v. Byrnes, 52 N. Y. Super. Ct. 150; Briggs v. Boyd, 56 N. Y. 289; Keys v. Johnson, 68 Pa. St. 42; Reed v. Reed, 82 Pa. St. 420; Lane v. Albright, 49 Ind. 275; Doonan v. Ives, 73 Ga. 295. And see Bash v. Hill, 62 Ill. 216; Nesbitt v. Helser, 49 Mo. 383. A vendor cannot escape liability for commissions to the agent employed to negotiate a sale of the land, on completing himself a sale to a purchaser with whom the agent had been negotiating, by including in the sale other lands in addition to those the agent was employed to sell. Ranson v. Weston, 110 Mich. 240, 68 N. W. 152.

[151] Glentworth v. Luther, 21 Barb. (N. Y.) 145.

[152] Ward v. Fletcher, 124 Mass. 224; Stringfellow v. Powers, 4 Tex. Civ. App. 199, 23 S. W. 313; Levy v. Rothe, 17 Misc. Rep. 402, 39 N. Y. Supp. 1057. An exclusive agency may be given by contract, and the principal may agree to pay a commission if he sells himself within the time given the broker. Levy v. Rothe, 17 Misc. Rep. 402, 39 N. Y. Supp. 1057; Rucker v. Hall, 105 Cal. 425, 38 Pac. 962; Holland v. Howard, 105 Ala. 538, 17 South. 35. One who agrees to allow a real-estate broker commissions on sales of land made by himself is not liable for commissions upon making a conveyance, absolute on its face, but which in fact is a mortgage. Terry v. Wilson's Estate, 50 Minn. 570, 52 N. W. 973.

[153] McClave v. Paine, 49 N. Y. 561; Hay v. Platt, 66 Hun, 488, 21 N. Y. Supp. 362; Carlson v. Nathan, 43 Ill. App. 364; Metzen v. Wyatt, 41 Ill. App. 487; Vandyke v. Walker, 49 Mo. App. 381; Lawrence v. Weir, 3 Colo. App. 401, 33 Pac. 646. The broker did not have the exclusive right to sell. After he had found a purchaser ready and willing to buy on the owner's terms, but before he had notified the owner thereof, the owner found another purchaser, and closed a sale with him. Held, the owner was not liable to the broker for a commission. Baars v. Hyland, 65 Minn. 150, 67 N. W. 1148. But see Carroll v. Pettit, 67 Hun, 418, 22 N. Y. Supp. 250.

broker is entitled to a reasonable time within which to make a sale.[154] Not only may the principal sell himself, but he may employ other brokers to sell the property, and he will be bound to pay commissions only to the one who secures a purchaser.[155] A sale by one broker is a revocation of the authority of the others without any notice to them;[156] and a broker will not, by subsequently producing a purchaser, have any claim on the principal for commissions.[157]

If a broker who first procures a purchaser reports his offers to his principal without identifying the person from whom they come, he cannot recover commissions in case of a subsequent sale through another broker at the same price, to the same purchaser, unless it appears in evidence that the seller knew this fact, or that notice was given him by the plaintiff before the completion of the contract and

[154] Charlton v. Wood, 11 Heisk. (Tenn.) 19.

[155] Ward v. Fletcher, 124 Mass. 224; Dreyer v. Rauch, 42 How. Prac. (N. Y.) 22; Livezy v. Miller, 61 Md. 336; Mears v. Stone, 44 Ill. App. 444; Jenks v. Nobles, 42 Ill. App. 33; Brennan v. Roach, 47 Mo. App. 290. A real-estate broker who procures a purchaser for realty, and brings the parties together, is entitled to his commission, although the sale is consummated by another broker upon different terms. Wood v. Wells, 103 Mich. 320, 61 N. W. 503. Plaintiff, having been employed as broker to sell property for defendant, introduced another broker as a customer, but the negotiations were unsuccessful. Afterwards defendant employed the broker so introduced, and he consummated a sale. Held, that plaintiff was not entitled to the commission. Latshaw v. Moore, 53 Kan. 234, 36 Pac. 342. A broker is not entitled to commissions for a sale where the customer found by him, having declined to purchase, thereafter calls the attention of a third party to the land, who completes the purchase through another agent. Thuner v. Kanter, 102 Mich. 59, 60 N. W. 299. A broker under a contract for commissions for introducing a purchaser ready and willing to buy is not entitled thereto for introducing a person at the time not ready or willing to buy, though a few weeks later he is introduced by another broker, through whose efforts a sale is made to him. Platt v. Johr, 9 Ind. App. 58, 36 N. E. 294.

[156] Ahern v. Baker, 34 Minn. 98, 24 N. W. 341. Withdrawing the sale of the property from one is not notice to the others, or a revocation of their authority. Lloyd v. Matthews, 51 N. Y. 124. Where two brokers are employed to secure a loan, acceptance of a loan negotiated by one is a revocation of the other's authority. Glenn v. Davidson, 37 Md. 365.

[157] Ahern v. Baker, 34 Minn. 98, 24 N. W. 341.

payment of commissions to the second broker.[158] If there be but one broker employed, he can with safety withhold the name of the purchaser until the sale shall have been made. But, as the employment of one broker does not preclude the employment of another to procure a purchaser for the same property, it becomes, therefore, the duty of the broker who procures one, and who looks to the security of his commissions, to report the name and offer to his principal, that the latter may be notified in time, and thus put upon his guard before he pays the commissions to another.[159]

Effect of Requiring a License.

In many instances, statutes and ordinances, mainly for purposes of raising revenue, require brokers to take out licenses. If a broker fails to comply with such a requirement, he cannot recover commissions for business transacted by him.[160] To prevent such a recovery, it is not necessary that the statute declare the contract to pay commissions void.[161] But a broker bringing an action for commissions is not required to show that he had a license.[162] If it appears on the trial that he did not have the required license, his action will fail.[163] A statute requiring brokers to be licensed does not apply to one employed on a salary,[164] nor to one not engaged in business as a broker regularly, but merely negotiating a single transaction.[165]

[158] Tinges v. Moale, 25 Md. 480; Eggleston v. Austin, 27 Kan. 245; Clifford v. Meyer, 6 Ind. App. 633, 34 N. E. 23.

[159] Vreeland v. Vetterlein, 33 N. J. Law, 247; Tinges v. Moale, 25 Md. 480.

[160] Chadwick v. Collins, 26 Pa. St. 138; Johnson v. Hulings, 103 Pa. St. 498; Holt v. Green, 73 Pa. St. 198; Hustis v. Pickands, 27 Ill. App. 270; Whitfield v. Huling, 50 Ill. App. 179; Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230; Richardson v. Brix, 94 Iowa, 626, 63 N. W. 325; Yount v. Denning, 52 Kan. 629, 35 Pac. 207.

[161] Holt v. Green, 73 Pa. St. 198; Yount v. Denning, 52 Kan. 629, 35 Pac. 207. Contra, Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108.

[162] Shepler v. Scott, 85 Pa. St. 329.

[163] Johnson v. Hulings, 103 Pa. St. 498; Holt v. Green, 73 Pa. St. 198.

[164] Portland v. O'Neill, 1 Or. 218. And see Spear v. Bull, 49 Ill. App. 348.

[165] O'Neill v. Sinclair, 153 Ill. 525, 39 N. E. 124; Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575; Chadwick v. Collins, 26 Pa. St. 138; Johnson v. Williams, 8 Ind. App. 677, 36 N. E. 167.

SAME—RIGHT TO REIMBURSEMENT AND INDEMNITY.

11. A broker is entitled to reimbursement for money expended on his principal's account, and to indemnity for liabilities incurred in the execution of his agency.

A principal is not generally liable for his broker's expenses.[166] It is presumed that the commissions paid when the broker is successful cover all expenses incurred by him; and, when not successful, the loss is on the broker, he having taken that risk by making his compensation and reimbursement dependent on success.[167] It has, however, been held that a broker would be entitled to recover for expenses incurred by him when the principal does not give him a reasonable time to perform.[168] In such cases the expenditures are in reality on the broker's own account, not that of his principal. When, however, a broker lays out money in carrying out the orders of his principal, as when he buys property or pays insurance premiums, he is entitled to be reimbursed for such sums.[169] So, when a broker incurs liabilities in his principal's business, the latter must indemnify him against loss therefrom.[170]

[166] An insurance broker may recover of the assured the expense of the telegrams relating to the insurance sent at the latter's request, without proof that they were received by the parties to whom they were sent. Ward v. Tucker, 7 Wash. 399, 35 Pac. 1086. Where one employed to sell mining land, he to receive all over a certain amount, devotes a large amount of time thereto, and performs labor and incurs large expenses to effect it, and is permitted to do so for a period of years, he is entitled to recover on a quantum meruit for his time, labor, and expenses if his authority is revoked. Jaekel v. Caldwell, 156 Pa. St. 266, 26 Atl. 1063.

[167] Charlton v. Wood, 11 Heisk. (Tenn.) 19.

[168] Hill v. Jones, 152 Pa. St. 433, 25 Atl. 834. And see McFarland, J., in Charlton v. Wood, 11 Heisk. (Tenn.) 19, 26.

[169] Knapp v. Simon, 96 N. Y. 284; Searing v. Butler, 69 Ill. 575.

[170] Maitland v. Martin, 86 Pa. St. 120; D'Arcy v. Lyle, 5 Bin. (Pa.) 441; Stocking v. Sage, 1 Conn. 519; Bennett v. Covington, 22 Fed. 816. But see Carpenter v. Momsen, 92 Wis. 449, 65 N. W. 1027. A broker employed to negotiate the sale of flour at a certain price, who, without express authority, makes a contract for the sale thereof at such price in his own name, cannot, on his principal's refusal to deliver at the price named, recover from the principal damages paid by him to the purchaser for his failure to perform the contract of sale. Haas v. Ruston, 14 Ind. App. 8, 42 N. E. 298.

SAME—RIGHT TO A LIEN.

12. Insurance brokers, stock brokers, and purchasing agents have general liens.

13. A loan broker has a lien which is probably particular.

14. Ship brokers and real-estate brokers have no liens.

Insurance Brokers.

Insurance brokers have a general lien for their commissions and for premiums paid by them, on the policies in their hands,[171] and on the moneys received under such policies in the event of a loss.[172] If the broker delivers the policy to his principal, his lien is gone.[173] But, if it should come into his hands again, the lien would revive,[174] unless the manner of his parting with the policy manifests an intention to abandon the lien.[175] A subagent of the broker has a particular lien on a policy in his hands for his expenditures and services in procuring that policy, but not as against the insured, for a general balance due him from his principal, the broker.[176]

Stock Brokers.

Stock brokers generally stand in the relation of pledgees[177] to the principals, rather than holding a lien. When a broker buys stock or bonds for his principal, and advances most of the money to make the purchase, he holds the stock or bonds as collateral security,[178] and has

[171] McKenzie v. Nevins, 22 Me. 138; Cranston v. Insurance Co., 5 Bin. (Pa.) 538; Moody v. Webster, 3 Pick. (Mass.) 424.

[172] Spring v. Insurance Co., 8 Wheat. 268; McKenzie v. Nevins, 22 Me. 138.

[173] Cranston v. Insurance Co., 5 Bin. (Pa.) 538.

[174] Moody v. Webster, 3 Pick. (Mass.) 424.

[175] Spring v. Insurance Co., 8 Wheat. 268; Sharp v. Whipple, 1 Bosw. (N. Y.) 557.

[176] McKenzie v. Nevins, 22 Me. 138; Foster v. Hoyt, 2 Johns. Cas. (N. Y.) 327; Maanss v. Henderson, 1 East, 335; Snook v. Davidson, 2 Camp. 218. The rule is the same where the subagent did not know that the broker who employed him was himself acting as an agent. Bank of Metropolis v. New England Bank, 1 How. 234; Mann v. Forrester, 4 Camp. 60; Rabone v. Williams, 7 Term R. 360.

[177] See post, p. 52; Hale, Bailm. & Car. 126, note 137.

[178] Baker v. Drake, 66 N. Y. 518; Stenton v. Jerome, 54 N. Y. 480; Van-

power to sell after proper notice.[179] Stock brokers may, however, hold a lien, strictly speaking, on the property of their principals in their hands. Since, as already seen,[180] stock brokers are in reality factors, they have the same power to sell to reimburse themselves that factors have.[181]

Purchasing Agents.

Brokers whose business is to make purchases for their principals have a general lien on the goods in their hands for advances and commissions.[182] Such brokers are often called "purchasing factors." [183] A broker who is intrusted with the possession of goods which he is to sell becomes, by reason of such possession, a factor,[184] and so has a general lien.[185]

Loan Brokers.

A loan broker has been held to have a lien on the money borrowed while it remains in his hands for his commissions.[186] The courts, however, have not given the question careful consideration, and it has not been determined what the exact nature of this lien is, or whether it is a general lien or a particular lien. It would seem, however, that the lien is a particular one, since general liens are not favored by the common law.[187] A usage of business in the market where the parties were dealing would be sufficient to establish a general lien.[188]

pell v. Woodward, 2 Sandf. Ch. (N. Y.) 143; Thompson v. Toland, 48 Cal. 99; Worthington v. Tormey, 34 Md. 182; Hatch v. Douglas, 48 Conn. 116.

[179] Hale, Bailm. & Car. 165; Brown v. Ward, 3 Duer (N. Y.) 660; Wallace v. Berdell, 24 Hun (N. Y.) 379; Canfield v. Association, 14 Fed. 801.

[180] See ante, p. 2.

[181] 1 Jones, Liens (2d Ed.) § 421; Monograph on Factors, p. 37.

[182] Bryce v. Broks, 26 Wend. (N. Y.) 367; Stevens v. Robins, 12 Mass. 180.

[183] See ante, p. 2.

[184] See ante, p. 2.

[185] Monograph on Factors, p. 30. Circumstances may make the lien of such a broker a particular one. Barry v. Boninger, 46 Md. 59.

[186] Vinton v. Baldwin, 95 Ind. 433. Cf. James' Appeal, 89 Pa. St. 54. A broker is entitled to a lien for commissions on a note and mortgage left in his possession for sale on commission. Peterson v. Hall, 61 Minn. 268, 63 N. W. 733.

[187] 1 Jones, Liens (2d Ed.) § 19; Rushforth v. Hadfield, 7 East, 224.

[188] Green v. Farmer, 4 Burrows, 2214, 2221.

Ship Brokers.

Ship brokers have no lien on the ship concerning which they negotiate.[189] Thus, a broker has no lien for his services in procuring a charter party.[190] Nor has an agent who solicits freight.[191] The question of a ship broker's lien on papers in his hands has not been raised in any case which has come to the writer's notice.

Real-Estate Brokers.

It is probable that a real-estate broker has no lien on deeds, plats, etc., in his hands for his commissions and expenses.[192] In Richards v. Gaskill[193] it was held that such a lien existed for "work thereon, and for their commissions and advances." The case, however, is not well considered. Scriveners and conveyancers have a particular lien on papers in their hands for work done on such papers,[194] but such services are not performed as real-estate brokers. A lien, in Richards v. Gaskill, was properly given for work in drawing the deed.

189 The Thames, 10 Fed. 848; The Crystal Stream, 25 Fed. 575; The J. C. Williams, 15 Fed. 558. And see The Paola R., 32 Fed. 174; Ferris v. The E. D. Jewett, 2 Fed. 111.

190 The Thames, 10 Fed. 848.

191 The Crystal Stream, 25 Fed. 575. And see The J. C. Williams, 15 Fed. 558.

192 Arthur v. Sylvester, 105 Pa. St. 233. In Gresham v. Galveston Co. (Tex. Civ. App.) 36 S. W. 796, it was held that a broker had a lien for his commission upon the notes given for deferred payments, entitling him to the possession of the notes for the purpose of collection. A real-estate broker has no lien for services on a certificate of deposit placed in his hands by his principal, to be used, conditionally, in purchasing land. Robinson v. Stewart, 97 Mich. 454, 56 N. W. 853.

193 39 Kan. 428, 18 Pac. 494.

194 Hollis v. Claridge, 4 Taunt. 807; Steadman v. Hockley, 15 Mees. & W. 553. A real-estate broker, who is not an attorney at law, cannot claim a general lien on all securities in his possession for expenses incurred in managing some of such securities, but the lien is confined to the specific securities for which the expenses were incurred. Carpenter v. Momsen, 92 Wis. 449, 65 N. W. 1027.

SAME—RIGHTS AGAINST AND LIABILITIES TO THIRD PERSONS.

15. Against third persons, a broker has the usual rights of any agent.

Rights against Third Persons.

Brokers usually make their contracts in the name of their principals. But a broker may contract in his own name as apparent principal, or for a principal who is not disclosed. In any case the broker's rights against the person with whom the contract is made present no points calling for particular attention. The rules are the same as for agents in general.[195] So, in those cases where a broker has possession of his principal's goods, he has the usual rights of action against third persons who interfere with his possession.[196]

Liabilities to Third Persons.

Brokers who make contracts for principals whom they disclose are not liable thereon personally.[197] They are liable when they do not disclose their principals.[198] A broker selling property in his possession, with a warranty, is liable for a breach of the warranty when he does not disclose the existence of his agency,[199] but not when he does.[200]

The liability of a broker for conversion by dealing with the goods of a third person in ignorance of the true owner's rights is unsettled.

[195] See Mechem, Ag. c. 6. In Farrow v. Insurance Co., 18 Pick. (Mass.) 53, it was held that either the principal or the broker could sue on a policy of insurance made payable to the broker.

[196] See Monograph on Factors, p. 38.

[197] Wright v. Cabot, 89 N. Y. 570; Cabot Bank v. Morton, 4 Gray (Mass.) 158; McGraw v. Godfrey, 14 Abb. Prac. N. S. (N. Y.) 397; Knapp v. Simon, 96 N. Y. 284.

[198] Wright v. Cabot, 89 N. Y. 570; Knapp v. Simon, 96 N. Y. 284; Beebe v. Robert, 12 Wend. (N. Y.) 413; Cobb v. Knapp, 71 N. Y. 348. A broker purchasing in his own name is liable to the carrier transporting the goods for demurrage. Falkenburg v. Clark, 11 R. I. 278.

[199] Merriam v. Wolcott, 3 Allen (Mass.) 258; Wilder v. Cowles, 100 Mass. 487; Thompson v. McCullough, 31 Mo. 224; Aldrich v. Jackson, 5 R. I. 218; Dumont v. Williamson, 18 Ohio St. 515; Sere v. Faures, 15 La. Ann. 189.

[200] Morrison v. Currie, 4 Duer (N. Y.) 79. He may bind himself personally by a contract to do so. Wilder v. Cowles, 100 Mass. 487.

It seems to be conceded that a broker who has no possession of the goods, but merely sells or buys them for his principal, is not liable for conversion.[201] But, when the broker has possession of the property at any time, the cases are unsatisfactory and scarce.[202]

RIGHTS AND LIABILITIES OF PRINCIPALS AND THIRD PERSONS.

16. Principals, whether disclosed or not, may maintain actions on the contracts made for them by their brokers. They are liable to third persons on contracts made by their brokers within their authority.

Principal's Rights against Third Persons.

The principal may sue third persons with whom his broker makes contracts for him. He may do this whether the broker, at the time of making the contracts, disclosed the name of the principal or not.[203] When the broker selling property does not have possession, the purchaser, when sued by the principal, cannot set off claims against the broker.[204] For injuries to his property in the hands of his broker, a principal has the usual rights of a general owner.[205]

Liabilities of Principal to Third Persons.

Third persons contracting through a broker can sue his principal on such contracts.[206] When the broker exceeds his authority, the principal is not bound.[207] A broker not having possession of his principal's goods cannot bind the latter by contracts made according to the usages of trade and of the market in which he is dealing.[208]

201 Fowler v. Hollins, L. R. 7 Q. B. 616.

202 Williams v. Merle, 11 Wend. (N. Y.) 80; Fowler v. Hollins, L. R. 7 Q. B. 616. And see Monograph on Factors, p. 40.

203 Graham v. Duckwall, 8 Bush (Ky.) 12; Mechem, Ag. § 768 et seq.

204 Braden v. Insurance Co., 1 La. 220.

205 Mechem, Ag. § 792.

206 Mechem, Ag. §§ 695, 703.

207 Clark v. Cumming, 77 Ga. 64; Clark v. Smith, 88 Ill. 298; Saladin v. Mitchell, 45 Ill. 83; Brown v. Morris, 83 N. C. 254; Kornemann v. Monaghan, 24 Mich. 36. But see Whilden v. Bank, 64 Ala. 1.

208 Seiple v. Irwin, 30 Pa. St. 514; Crosby v. Hill, 39 Ohio St. 100; Higgins v. Moore, 34 N. Y. 417; Rosenstock v. Tormey, 32 Md. 169; Borries v. Bank, L. R. 9 C. P. 38.

In this respect there is a difference between brokers and factors.[209] When the broker has possession, his contracts within the scope of his implied powers [210] are binding on the principal.[211]

TERMINATION OF RELATION.

17. The relation of principal and broker may be terminated

(a) By expiration of the time for which the agency was created.

(b) By agreement of the parties.

(c) By notice by either party after a reasonable time, unless created for a definite time.

(d) By death of either party.

If a principal and broker, at the time the relation is established, agree that the relation shall continue for a definite time, when that time has expired the broker's authority will be at an end, and the relation terminated.[212] The parties may terminate the relation at any time by mutual agreement, whether created for a definite or an indefinite time. If the agency was established for a definite time, neither party could put an end to the agency without the consent of the other.[213] But, when no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith.[214] The contract of the par-

209 Monograph on Factors, p. 43; Barings v. Corrie, 2 Barn. & Ald. 138.

210 Ante, p. 7.

211 Thorne v. Bank, 37 Ohio St. 254; Lobdell v. Baker, 1 Metc. (Mass.) 193; Borries v. Bank, L. R. 9 C. P. 38.

212 A broker's authority may be terminated by performance of his undertaking. Walker v. Derby, 5 Biss. 134, Fed. Cas. No. 17,068. The destruction of a house by fire is a revocation of a broker's authority to sell, and a subsequent sale of the lot by the owner to a purchaser to whom the broker had attempted to sell before the fire does not entitle the broker to commissions. Cox v. Bowling, 54 Mo. App. 289.

213 Brown v. Pforr, 38 Cal. 550. An agreement to pay a broker a commission if he sells land within a month is not necessarily an agreement not to revoke the agency during the month. Brown v. Pforr, Id.

214 Sibbald v. Iron Co., 83 N. Y. 378; Satterthwaite v. Vreeland, 3 Hun (N. Y.) 152; Brown v. Pforr, 38 Cal. 550; Doonan v. Ives, 73 Ga. 295; Wilson v. Dyer, 12 Ind. App. 320, 39 N. E. 163; Neal v. Lehman, 11 Tex. Civ. App.

ties may, however, without an express stipulation, require the continuance of the relation for a reasonable time. Where the performance of the broker's undertaking necessarily involves expenditures, the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently. But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if, in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority; and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor.[215]

461, 34 S. W. 153; Farmer v. Robinson, 2 Camp. 339, note. Where a real-estate broker for several months takes no steps to find a purchaser, the owner is justified in treating his conduct as an abandonment of all effort to sell the property. Singer & Talcott Stone Co. v. Hutchinson, 61 Ill. App. 308. Cf. Vincent v. Oil Co., 165 Pa. St. 402, 30 Atl. 991. The broker must be given notice of the revocation of his authority. Lamson v. Sims, 48 N. Y. Super. Ct. 281; Bash v. Hill, 62 Ill. 216. One who has given a broker authority, until further notice, to sell land, has the burden to show that he revoked the authority before the broker found a purchaser. Bourke v. Van Keuren, 20 Colo. 95, 36 Pac. 882.

[215] Sibbald v. Iron Co., 83 N. Y. 378; Kelly v. Marshall, 172 Pa. St. 396, 33 Atl. 690. A contract of agency to sell lots, stipulating for additional pay to the agent should he sell them all in one year, gives him one year to sell them; and, though not engaging his whole time, it cannot be revoked by the principal so long as the agent is diligent in his business. Glover v. Henderson, 120 Mo. 367, 25 S. W. 175.

So, when a stock broker undertakes a transaction for a client which involves a carrying of stock by the broker, there is an implied agreement to continue the relation a reasonable time, provided the principal complies with his part of the contract.[216] If the principal does not keep up the margins agreed upon, the broker may, after proper notice, sell the stock.[217]

The death of either the principal or the broker puts an end to the latter's authority.[218]

MERCHANDISE BROKERS.

18. Merchandise brokers negotiate the purchase and sale of goods without having possession.

Merchandise brokers are most nearly allied to factors. They differ from them as selling agents principally in not having the possession of the goods sold. When a broker for the sale of goods is intrusted with possession, he becomes a factor.[219] The differences in the implied powers of a merchandise broker[220] and a factor arise from the possession of the goods. The powers of a broker employed to purchase goods depend on the authority given him. If he departs from his instructions, his principal is not bound. Such a broker has im-

[216] White v. Smith, 54 N. Y. 522; Rogers v. Wiley, 131 N. Y. 527, 30 N. E. 582; Hess v. Rau, 95 N. Y. 359.

[217] Stenton v. Jerome, 54 N. Y. 480; Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Rosenstock v. Tormey, 32 Md. 169.

[218] Boone v. Clarke, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641; Hunt v. Rousmanier's Adm'r, 8 Wheat. 174; Lincoln v. Emerson, 108 Mass. 87; Adriance v. Rutherford, 57 Mich. 170, 23 N. W. 718; Merrick's Estate, 8 Watts & S. (Pa.) 402; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180. But the death of the principal does not revoke the broker's authority where it is coupled with an interest, as where a stock broker is carrying stock on margins. Hunt v. Rousmanier's Adm'r, supra; Hess v. Rau, 95 N. Y. 359.

[219] Ante, p. 41. Cf. Bragg v. Meyer, 1 McAll. 408, Fed. Cas. No. 1,801.

[220] The implied powers of merchandise brokers selling goods were considered in treating of the implied powers of brokers generally. Ante, p. 7. Such a broker has no implied power to rescind a sale which he has made. Saladin v. Mitchell, 45 Ill. 79; nor to receive payment, Higgins v. Moore, 34 N. Y. 417; Western R. Co. v. Roberts, 4 Phila. (Pa.) 110. For their right to commissions, see Moses v. Bierling, 31 N. Y. 462.

plied power, in the absence of instructions on the point, to fix the price at which the purchase shall be made.[221] The power of merchandise brokers to bind both parties to the contract by the execution of bought and sold notes has already been considered.[222] There are various special kinds of merchandise brokers, who take their names from the articles in which they deal. Thus, we have grain brokers, produce brokers, sugar brokers, etc. Their rights and powers differ only as the customs and usages in their several kinds of business differ.

REAL-ESTATE BROKERS.

19. Real-estate brokers negotiate the purchase, sale, and leasing of real property.

Most of the cases touching real-estate brokers are on the question of their right to compensation. This has already been considered.[223] Most cases hold that a real-estate broker who is given authority to sell on terms definitely fixed by the principal may bind the latter by signing a written contract to sell,[224] though, of course, the broker cannot convey without a power of attorney;[225] and a few cases have held that he has no authority to bind the principal by a contract to convey.[226]

Real-estate brokers in many instances combine, with the business of selling real property, the care, management, and renting of such

[221] Ante, p. 9.

[222] Ante, p. 10.

[223] Ante, p. 20.

[224] Smith v. Armstrong, 24 Wis. 446; Pringle v. Spaulding, 53 Barb. (N. Y.) 17; Glentworth v. Luther, 21 Barb. (N. Y.) 145; Force v. Dutcher, 18 N. J. Eq. 401; Smith v. Allen, 86 Mo. 178. But see Haydock v. Stow, 40 N. Y. 363; Roach v. Coe, 1 E. D. Smith (N. Y.) 175.

[225] Glentworth v. Luther, 21 Barb. (N. Y.) 145; Force v. Dutcher, 18 N. J. Eq. 401. Cf. Blood v. Goodrich, 12 Wend. (N. Y.) 525.

[226] Duffy v. Hobson, 40 Cal. 240; Rutenberg v. Main, 47 Cal. 213; Morris v. Ruddy, 20 N. J. Eq. 236; Keim v. Lindley (N. J. Eq.) 30 Atl. 1063; Coleman v. Garrigues, 18 Barb. (N. Y.) 60 (overruled Haydock v. Stow, 40 N. Y. 363); Mannix v. Hildreth, 2 App. D. C. 259. Where the terms of the sale are to be submitted to the principal, the broker has no authority to bind him by contract. Furst v. Tweed, 93 Iowa, 300, 61 N. W. 857; Berry v. Tweed, 93 Iowa, 296, 61 N. W. 858. But see Smith v. Keeler, 151 Ill. 518, 38 N. E. 250.

property. But such an agent, though he has power to make ordinary repairs, has no implied power to rebuild in case the buildings are destroyed by fire.[227] An agent for the care of property has been held to have no authority to bring suit in his own name, for the recovery of possession of the property from one claiming under a tax title.[228]

BILL AND NOTE BROKERS.

20. Bill and note brokers negotiate the purchase and sale of commercial paper.

Brokers who negotiate the purchase and sale of foreign bills of exchange are called "exchange brokers";[229] and so sometimes when they negotiate bills drawn on other places in this country.[230] When a bill or note broker acts in his own name, he is liable if the paper he sells proves not to be genuine.[231] The same is true when he does not disclose the name of his principal, though the purchaser knows he is dealing with an agent.[232] It has been held, however, that, when he has sold such paper, he will not be liable if he has paid over the proceeds to his principal.[233] The broker is not liable when he discloses the name of his principal, though the signatures of some of the parties are forged.[234] There is no implied warranty of the solvency of any of the parties to paper sold by a broker, whether his principal is disclosed or not.[235] A principal selling a note through a broker can reclaim the proceeds in the hands of the broker as long as they can be identified.[236] A principal has been held bound by rep-

227 Beckman v. Wilson, 61 Cal. 335.

228 McHenry v. Painter, 58 Iowa, 365, 12 N. W. 338.

229 Black, Law Dict. tit. "Broker."

230 Bouv. Law Dict. tit. "Brokers."

231 Merriam v. Wolcott, 3 Allen (Mass.) 258; Worthington v. Cowles, 112 Mass. 30; Thompson v. McCullough, 31 Mo. 224; Lyons v. Miller, 6 Grat. (Va.) 427; Aldrich v. Jackson, 5 R. I. 218; Bell v. Cafferty, 21 Ind. 411.

232 Morrison v. Currie, 4 Duer (N. Y.) 79.

233 Morrison v. Currie, 4 Duer (N. Y.) 79.

234 Worthington v. Cowles, 112 Mass. 30; Lyons v. Miller, 6 Grat. (Va.) 427; Merriam v. Wolcott, 3 Allen (Mass.) 258; Thompson v. McCullough, 31 Mo. 224.

235 Aldrich v. Jackson, 5 R. I. 218.

236 Clark v. Bank, 1 Sandf. (N. Y.) 498.

resentations made by his broker that the note he was selling was not usurious,[237] and that the principal was bound thereon as guarantor.[238] A bill broker having possession of paper which he sells has implied power to receive payment.[239]

LOAN BROKERS.

21. Loan brokers negotiate the lending of money.

What constitutes performance of the undertaking of a loan broker has already been considered.[240] A broker empowered to borrow money has implied authority to give to the lender the ordinary securities therefor.[241] An agent employed to loan money for the principal has, by implication, no power to loan it at an illegal rate. If the agent takes more than the legal rate, the principal will not be affected.[242] In some states the amount of commission which a broker may charge for procuring a loan is limited by statute.[243]

It has already been stated that pawnbrokers loaning their own money are not brokers at all, but are principals.[244]

STOCK BROKERS.

22. Stock brokers negotiate the purchase and sale of corporate stocks and bonds and government securities.

As already stated,[245] stock brokers, when selling stocks or bonds, are very much like factors, since they usually have possession of the property in which they deal. The business of stock brokers is very

237 Ahern v. Goodspeed, 72 N. Y. 108.

238 Frevall v. Fitch, 5 Whart. (Pa.) 325.

239 Lentilhon v. Vorwerck, Hill & D. (N. Y.) 443.

240 Ante, p. 27.

241 Hatch v. Coddington, 95 U. S. 48. Where a loan broker is applied to for a loan, he has implied authority to agree with the proposed lender that "full brief of title and searches, with opinion of counsel, will be required." Middleton v. Thompson, 163 Pa. St. 112, 29 Atl. 796.

242 Gokey v. Knapp, 44 Iowa, 32.

243 Revision N. J. p. 519, § 5; Broad v. Hoffman, 6 Barb. (N. Y.) 177.

244 Ante, p. 2.

245 Ante, p. 13.

largely governed by the rules and usages of the stock exchange. The parties may, of course, govern their rights by any special contracts they see fit to make.[246] If no such agreement is made, the relation of the parties, when a customer orders his broker to buy stock in the expectation of a rise in the market, has been well stated by Hunt, C. J., in Markham v. Jaudon,[247] as follows: "The customer, Mr. M., employs the broker, Mr. J., to buy certain railroad stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent. of their market value, and agrees to keep good such proportionate advance according to the fluctuations of the market. Waiving for the moment all disputed questions, I state the following as the result of this agreement: The broker undertakes and agrees (1) at once to buy for the customer the stocks indicated; (2) to advance all the money required for the purchase, beyond the ten per cent. furnished by the customer; (3) to carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by either party that the transaction must be closed; an appreciation in the value of the stocks is the gain of the customer, and not of the broker; (4) at all times to have in his name or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock; (5) to deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or (6) to sell such shares upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract, the customer undertakes (1) to pay a margin of ten per cent. on the current market value of the shares; (2) to keep good such margin, according to the fluctuations of the market;[248] (3) to take the shares so purchased on his order, whenever required by the broker, and to pay the difference between the percentage advanced by him and the

[246] Robinson v. Norris, 6 Hun (N. Y.) 233; Baker v. Drake, 66 N. Y. 518; Hyatt v. Argenti, 3 Cal. 151.

[247] 41 N. Y. 235, 239.

[248] If he fails to do so, the broker may, after proper notice, sell the stock to protect himself. Baker v. Drake, 66 N. Y. 518; Gruman v. Smith, 81 N. Y. 25; Gillett v. Whiting, 120 N. Y. 402, 24 N. E. 790; Esser v. Linderman, 71 Pa. St. 76.

amount paid therefor by the broker.[249] The position of the broker is twofold. Upon the order of the customer, he purchases the shares of stocks desired by him. This is a clear act of agency. To complete the purchase, he advances from his own funds, for the benefit of the customer, ninety per cent. of the purchase money." In making these advances, the broker assumes a new relation to the client; he becomes a creditor of the client, and holds the stock as a pledgee.[250]

When the customer desires to speculate on his judgment that the market will fall, he orders his broker to sell stocks or bonds which the principal does not own. The broker executes the order by borrowing the stock of some other broker for delivery to the purchaser. When the transaction is to be closed, the broker buys in stock on the market to replace that borrowed. An operation of this kind is called "selling short."[251] The broker is, of course, bound to follow the instructions of his principal in the execution of all orders for buying or selling. If he fails to do so, he is liable to his principal for the resulting

[249] A broker who advanced margins for the purchase of stocks for his client could not recover the amount thereof before calling upon his client to take up the stock. Muller v. Legendre, 47 La. Ann. 1017, 17 South. 500. A broker is not entitled to recover from his principal differences on stock which he purports to carry over on his behalf, when there is no existing contract between such broker and any third party available for the principal at the time when such differences arise. Skelton v. Wood, 15 Reports, 130. Stock ordered of a broker on margin contracts belongs, not to the broker, but to customers, and may be redeemed by them from an assignee of the broker for the benefit of creditors. Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874.

[250] Markham v. Jaudon, 41 N. Y. 235; Baker v. Drake, 53 N. Y. 211, 66 N. Y. 518; Stenton v. Jerome, 54 N. Y. 480; Gruman v. Smith, 81 N. Y. 25; Taussig v. Hart, 58 N. Y. 425; Gilpin v. Howell, 5 Pa. St. 41; Child v. Hugg, 41 Cal. 519; Thompson v. Toland, 48 Cal. 99; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 243. For a discussion of the rights and liabilities of a stock broker so far as he is a pledgee, see Hale, Bailm. & Carr. c. 4. A broker is not bound to retain the identical certificates of stock, since one share is the exact equivalent of any other. It is sufficient if he always has on hand stock enough to fill his contract. Caswell v. Putnam, 120 N. Y. 153, 24 N. E. 287; Taussig v. Hart, supra; Levy v. Loeb, 85 N. Y. 365; Atkins v. Gamble, 42 Cal. 86; Hale, Bailm. & Carr. 159.

[251] Knowlton v. Fitch, 52 N. Y. 288; White v. Smith, 54 N. Y. 522; Rogers v. Wiley, 131 N. Y. 527, 30 N. E. 582; Hess v. Rau, 95 N. Y. 359; Maxton v. Gheen, 75 Pa. St. 166; Smith v. Bouvier, 70 Pa. St. 325.

loss.[252] Where the broker is given a "stop order,"—that is, an instruction to buy or sell when the market reaches a certain figure,—he must wait for some other broker to make that price, and not make it himself by offering to buy or sell at that price.[253] Ordinarily, in stock transactions the brokers do not disclose their clients, but deal only with each other. The usual rules of liability apply, however, and a broker who discloses the name of his principal will not be liable on the contract he makes;[254] otherwise, he will.[255] One who has deposited margins with a broker, and ordered the purchase of stock, may withdraw the margins at any time before the order is executed, and revoke the broker's authority.[256]

SHIP BROKERS.

23. Ship brokers negotiate the purchase and sale of ships and the business of freighting vessels.[257]

Ship brokers engaged in the business of selling ships resemble in many respects real-estate brokers.[258] A contract to pay a broker a

[252] Smith v. Bouvier, 70 Pa. St. 325; Davis v. Gwynne, 57 N. Y. 676; Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335. Where a broker who had purchased securities for a customer on margins is directed, after the margin is exhausted, to sell, it is his duty to sell within a reasonable time thereafter, and, if he fails to do so, he is liable for the resulting loss. Zimmermann v. Heil, 86 Hun, 114, 33 N. Y. Supp. 391.

[253] Porter v. Wormser, 94 N. Y. 431; Wicks v. Hatch, 62 N. Y. 535; Wronkow v. Clews, 52 N. Y. Super. Ct. 176; Hope v. Lawrence, 50 Barb. (N. Y.) 258.

[254] Coles v. Bristowe, 4 Ch. App. 3.

[255] Nickalls v. Merry, L. R. 7 H. L. 530; Royal Exch. Ins. Co. v. Moore, 11 Wkly. Rep. 592; Stray v. Russell, 1 El. & El. 888.

[256] Fletcher v. Marshall, 15 Mees. & W. 761.

[257] Bouv. Law Dict. tit. "Brokers."

[258] For a ship broker's right to commissions, see Stillman v. Mitchell, 2 Rob. (N. Y.) 523; Howland v. Coffin, 47 Barb. (N. Y.) 653; Brown v. Post, 6 Rob. (N. Y.) 111; Cook v. Fiske, 12 Gray (Mass.) 491; Cook v. Welch, 9 Allen (Mass.) 350; Rennell v. Kimball, 5 Allen (Mass.) 356. For the effect of the words "by telegraphic authority," used by a ship broker in signing a charter party, on his implied warranty of authority, see Lilly v. Smales [1892] 1 Q. B. 456.

specified commission for obtaining a charter of a vessel from the United States government is not void on the ground that it contravenes public policy.[259] The business of a ship broker includes the purchase and sale of ships, and the negotiation of contracts for building them,[260] as well as the soliciting of freight for the owner of the vessel, or the securing of a vessel to carry the goods of the shipper. Where a ship broker has negotiated a charter party, the loss of the vessel during the voyage will not deprive him of his commissions.[261]

INSURANCE BROKERS.

24. Insurance brokers negotiate contracts of insurance generally as agents for the insured.

Persons who negotiate insurance on behalf of the insurer are more properly called "insurance agents." A broker who acts for the insured may, nevertheless, be the agent of the insurer for receiving the premiums.[262] But the broker has no authority to give the insured credit for his premiums,[263] unless the insurer is in the habit of giving the broker credit.[264] Being the agent of the insured, the broker's statements in making an application for a policy are binding on the insured, and, if false, will avoid the policy.[265] Where a broker has procured the insurance which he was instructed to negotiate, his authority to act for his principal, the insured, is at an end. He cannot surrender the policy for cancellation;[266] nor has he authority to receive

[259] Howland v. Coffin, 47 Barb. (N. Y.) 653.

[260] Holmes v. Neafie, 151 Pa. St. 392, 24 Atl. 1096.

[261] Hagar v. Donaldson, 154 Pa. St. 242, 25 Atl. 824.

[262] How v. Insurance Co., 80 N. Y. 39; Mayo v. Pew, 101 Mass. 555; Monitor Mut. Fire Ins. Co. v. Young, 111 Mass. 537; Crousillat v. Ball, 3 Yeates (Pa.) 375; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

[263] Hambleton v. Insurance Co., 6 Biss. 91, Fed. Cas. No. 5,972; Marland v. Insurance Co., 71 Pa. St. 393.

[264] White v. Insurance Co., 120 Mass. 330; Train v. Insurance Co., 62 N. Y. 598; Stebbins v. Insurance Co., 60 N. H. 65; Bang v. Banking Co., 1 Hughes, 290, Fed. Cas. No. 838; Cf. Gentry v. Insurance Co., 15 Mo. App. 215.

[265] Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85; Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74; McFarland v. Insurance Co., 6 W. Va. 425; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

[266] Bennett v. Insurance Co., 115 Mass. 211; Van Valkenburgh v. Insur-

for the insured notices affecting the insurance,[267] unless he is regularly employed by the insured to attend to his insurance.[268]

The lien of an insurance broker has already been considered.[269] Such a broker is bound to procure insurance in reliable companies,[270] and to see that the policy is so drawn that it covers the risk intended to be insured against.[271]

An insurance broker may act under a del credere commission, and guaranty the solvency of the insurers with whom he takes out policies for his clients.[272]

CUSTOM-HOUSE BROKERS.

25. Custom-house brokers arrange the entry and clearance of ships, and the importation and exportation of merchandise.

Custom-house brokers are defined by the United States statutes[273] as follows: "Every person whose occupation it is, as the agent of others, to arrange entries and other custom-house papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded a custom-house broker." The term is also applied to agents authorized to attend to the entry and clearance of ships.[274]

ance Co., 51 N. Y. 465; Rothschild v. Insurance Co., 5 Mo. App. 596; Latoix v. Insurance Co., 27 La. Ann. 113. But see Goodson v. Brooke, 4 Camp. 163.

[267] White v. Insurance Co., 120 Mass. 330; Hermann v. Insurance Co., 100 N. Y. 411, 3 N. E. 341; Grace v. Insurance Co., 109 U. S. 278, 3 Sup. Ct. 207.

[268] Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85.

[269] Ante, p. 40. And see the following cases: Spring v. Insurance Co., 8 Wheat. 268; Cranston v. Insurance Co., 5 Bin. (Pa.) 538; Moody v. Webster, 3 Pick. (Mass.) 424; Sharp v. Whipple, 1 Bosw. (N. Y.) 557; Foster v. Hoyt, 2 Johns. Cas. (N. Y.) 327.

[270] Gettins v. Scudder, 71 Ill. 86.

[271] Park v. Hammond, 6 Taunt. 495; Moore v. Mourgue, 2 Cowp. 479; Mallough v. Barber, 4 Camp. 150; Maydew v. Forrester, 5 Taunt. 615.

[272] Grove v. Dubois, 1 Term R. 112.

[273] 14 Stat. 117.

[274] Black. Law Dict. tit. "Custom-House Broker."

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF CONDITIONAL SALES AND CHATTEL MORTGAGES

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

CONDITIONAL SALES AND CHATTEL MORTGAGES.

CONDITIONAL SALES.

1. GENERAL CHARACTERISTICS.

An agreement to sell personal property upon condition is executory, and no title passes from the seller to the purchaser until the condition is performed. The nature of the condition varies in different cases. Thus the following rules have been laid down:

"(1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property." (3) That "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled." (4) "Where the buyer is, by the contract, bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." [1]

In the first two classes above mentioned the sale is, in a sense, conditional, because the performance of some further act contemplated on the part of the seller must be performed before title can pass; but the third and fourth classes, relating more particularly to cases where

[1] Blackb. Sales, 152, and Benj. Sales, §§ 318, 320, quoted in Harkness v. Russell, 118 U. S. 667, 7 Sup. Ct. 51; Bishop v. Shillito, 2 Barn. & Ald. 329, note; Brandt v. Bowlby, 2 Barn. & Adol. 932.

the goods are already completed and ascertained, but where it is agreed that no title shall pass until some act is done by the purchaser, —as, for example, payment,—or to cases where some particular event must happen, or some particular condition be performed by either party, before title shall pass, cover what are usually described as conditional sales. Thus, in Mires v. Solebay [2] one Allston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay a certain sum, he should have the sheep, and before the time expired the owner sold them to another person, and it was held that the sale was valid, and that the agreement to sell the sheep to Allston, if he would pay for them at a certain date, did not amount to a sale, but only to an agreement. So, also, where goods are sold to be paid for in cash or securities upon delivery, it is held that the sales are conditional only, and that the vendors are entitled to retake the goods, even after delivery, if the condition is not performed, the delivery being considered as conditional. This often happens in case of sales by auction, when certain terms of payment are prescribed with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any damage between the second sale and the first. Such was the case of Lamond v. Davall.[3] In Crawcour v. Robertson [4] certain furniture dealers let Robertson have a lot of furniture upon his paying £10 in cash, and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid, and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeal held that the property did not pass by this agreement, and could not be taken as Robertson's property, by his trustee, under a liquidation proceeding. The same conclusion was reached in the subsequent case of Crawcour v. Salter.[5] In these cases, it is true, support of the transactions was sought from the custom, which prevailed in the places where the transactions took place, of hotel keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This

[2] 2 Mod. 243. [3] 9 Q. B. 1030. [4] 9 Ch. Div. 419. [5] 18 Ch. Div. 30.

policy, in England, is regulated by statute. It has long been a provision of the English bankruptcy laws, beginning with 21 Jac. I. c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those above referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration.[6]

This presumption of property in a bankrupt, arising from his possession and reputed ownership, became so deeply imbedded in the English law that in the process of time many persons in the profession were led to regard it as a general doctrine of the common law, and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and ordinary conditional sales have been condemned either as being fraudulent and void, as against creditors, or as amounting in effect to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money; this being based on the notion that such sales are not allowed by law, and that the intent of the parties, however formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud, and, when this is charged, all the circumstances of the case will be open for the consideration of the jury. Where no fraud is intended, but the purpose of the parties is that the vendee shall not have the possession of the goods until he has paid for them, there is no general principle of law to prevent them from having effect. In this country, in states where no such statute as the English statute referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.[7]

[6] Harkness v. Russell, 118 U. S. 663, 669, 7 Sup. Ct. 51; Horn v. Baker, 9 East, 215; Holroyd v. Gwynne, 2 Taunt. 176.

[7] Harkness v. Russell, 118 U. S. 663, 670, 7 Sup. Ct. 51; Warren v. Liddell,

In Herring v. Hoppock [8] the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor, but it was expressly understood that no title was to pass until the note was paid, and, if not paid, the vendor was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of the vendor. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale, which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." And upon breach the seller may retake the property.[9]

2. BONA FIDE PURCHASER FROM VENDEE.

In Smith v. Lynes [10] and Wait v. Green [11] it was held that a bona fide purchaser, without notice, from the vendee, who is in possession under a conditional sale, will be protected as against the original vendor. But these cases were subsequently overruled in Ballard v. Burgett,[12] Cole v. Mann,[13] and Bean v. Edge.[14]

In Thomas, Chat. Mortg. § 63, it is said that the controlling test in this respect is found in the distinction between a conditional *sale* of chattels and a conditional *delivery* upon a sale. "That is to say, we

110 Ala. 232, 244, 20 South. 89; Hussey v. Thornton, 4 Mass. 404; Wentworth v. Machine Co., 163 Mass. 28, 39 N. E. 414; Marston v. Baldwin, 17 Mass. 606; Barrett v. Pritchard, 2 Pick. (Mass.) 512, 515; Coggill v. Railroad Co., 3 Gray (Mass.) 545; Chase v. Ingalls, 122 Mass. 381; Forbes v. Marsh, 15 Conn. 384; Hart v. Carpenter, 24 Conn. 427; Haggerty v. Palmer, 6 Johns. Ch. (N. Y.) 437; Strong v. Taylor, 2 Hill (N. Y.) 326.

[8] 15 N. Y. 409.

[9] Iserman v. Conklin, 21 Misc. Rep. 194, 47 N. Y. Supp. 107.

[10] 5 N. Y. 41.

[11] 35 Barb. 585, 36 N. Y. 556.

[12] 40 N. Y. 314.

[13] 62 N. Y. 1.

[14] 84 N. Y. 510.

Compare Dows v. Kidder, 84 N. Y. 121, Parker v. Baxter, 86 N. Y. 586, and Farwell v. Bank, 90 N. Y. 483, which are discussed in Harkness v. Russell, 118 U. S. 663, 675, 7 Sup. Ct. 51.

are to examine as to whether the sale itself has been upon the condition, or whether the sale is absolute, and the condition only affects the right of the vendee to immediate possession. The question in each case will be as to whether the contract of sale is or is not complete. If it is an executed sale, the obligation of the buyer to pay is absolute, and the property is at his risk. If it is destroyed or lost, the obligation to pay will not be discharged, notwithstanding that, as between the vendor and the vendee, the title has not passed. As a security for the vendor, it may be stipulated that the delivery shall not carry the title; and this agreement will so fully protect the vendor, while there are no intervening rights, that the distinction now being made will not then be important; but after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains a perfect title, though a voluntary assignee of the purchaser does not. But where a contract is for a sale in the future, and the delivery amounts to a mere bailment, and the sale is on the condition that certain payments are made, so that the property, while in the hands of the so-called 'vendee,' is at the risk of the vendor, then the intended vendee has no title to the property, and can convey none, even to a bona fide purchaser." [15]

In 1884, however, a statute was passed in New York, which is now found embodied in the so-called "Lien Law," [16] providing that, "except as otherwise provided in this article, conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and a continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor, or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees, or mortgagees, in good faith; and as to them the sale shall be deemed absolute, unless such contract of sale containing such conditions and reservations, or a true copy thereof, be filed as directed in this article." In nearly all of the states the title of the vendor, subject in some states to statutes similar to that just

[15] Thomas, Chat. Mortg. § 63, citing numerous cases, and also articles upon the title of "Bona Fide Purchasers" in 24 Alb. Law J. 185, 226, 264, 280, 343, 363.

[16] Laws 1897, c. 418, § 112.

quoted,[17] has been sustained, not only as to the creditors of the bankrupt, but also as to bona fide purchasers from him.[18] In many states the subject is now regulated by statutes, some of which require filing of the agreement, while others declare that no agreement that personal property delivered to another shall remain the property of the vendor shall be valid against third persons without notice.[19]

3. RULE IN THE FEDERAL COURTS.

The liability of property to be sold under legal process issuing from the courts of the state where it is situated must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides.[20]

4. AFFIRMANCE OF SALE BY SELLER.

When chattels are sold upon condition that title shall not pass from the vendor to the vendee until the agreed price is paid, the vendor may waive the right to retake the chattels on default, and recognize title

[17] Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306.

[18] Warren v. Liddell, 110 Ala. 232, 244, 20 South. 89; Wentworth v. Machine Co., 163 Mass. 28, 39 N. E. 414; Thomas, Chat. Mortg. § 58. See Leatherberry v. Connor, 54 N. J. Law, 172, 23 Atl. 684. Contra, Ryle v. Loom Works, 31 C. C. A. 340, 87 Fed. 976; Union Bank of Wilton v. Creamery Package Mfg. Co. (Iowa) 74 N. W. 921.

[19] Call v. Seymour, 40 Ohio St. 670; Ryle v. Loom Works, 31 C. C. A. 340, 87 Fed. 976; Marquette Mfg. Co. v. Jeffrey, 49 Mich. 283, 13 N. W. 592; Harkness v. Russell, 118 U. S. 663, 675, 7 Sup. Ct. 51; George v. Stubbs, 26 Me. 243; Sargent v. Gile, 8 N. H. 325; Hefflin v. Bell, 30 Vt. 134; Thorpe v. Fowler, 57 Iowa, 541, 11 N. W. 3; Cole v. Berry, 42 N. J. Law, 308. See, also, Mr. Freeman's note to Kanaga v. Taylor, 7 Ohio St. 134, in 70 Am. Dec. 62; and compare Haak v. Linderman, 64 Pa. St. 499; Van Duzor v. Allen, 90 Ill. 499; Hervey v. Locomotive Works, 93 U. S. 664, 671.

[20] Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139; Hervey v. Locomotive Works, 93 U. S. 664.

in the vendee.[21] If, in affirmance of the contract, the vendor seizes the chattels for the avowed purpose of selling them, and collecting the amount due upon the contract, he has no right to seize and sell or seize and retain more than is sufficient to satisfy his demand and expenses.[22]

The fact that the vendor recovers against the conditional vendee a judgment for so much of the purchase price as has not been paid by the vendee, after the latter has taken possession under the conditional agreement, does not impair the vendor's title, and the vendee still has no leviable interest in the property until the purchase money is fully paid.[23]

5. SALE BY BAILEE FOR HIRE.

Where the owner of personal property delivers it to a bailee for hire, under an agreement that the latter may purchase it, the latter, prior to the performance of the condition, cannot give title to a purchaser in good faith, for value, and without notice.[24]

[21] Detroit Heating & Lighting Co. v. Stevens, 16 Utah, 177, 52 Pac. 379; Hervey v. Dimond (N. H.) 39 Atl. 331.

[22] O'Rourke v. Hadcock, 114 N. Y. 541, 549, 22 N. E. 33. See, also, section 116 of the New York Lien Law (Laws 1897, c. 418), providing that, in case of a retaking by the vendor or a successor in interest, the goods shall be retained for a period of 30 days, during which the vendee or his successor in interest may comply with the terms of the contract, and thereupon receive the property, and that after the expiration of that period, if the terms are not complied with, the articles may be sold at public auction on notice, in which case the vendor or his successor in interest may retain from the proceeds the amount due on his contract and the expenses of storage and of sale; the balance to be held subject to the demand of the vendee or his successor in interest for 30 days, and then deposited with the treasurer, chamberlain, or supervisor, who shall hold it for the vendee or his successor in interest for five years, and, if unclaimed, shall transfer it to the funds of the town, village, or city. Similar provisions exist in many states. Orner v. Manufacturing Co., 18 Ind. App. 122, 47 N. E. 644; Richardson Drug Co. v. Teasdall, 52 Neb. 698, 72 N. W. 1028; Milburn Mfg. Co. v. Wayland (Tenn. Ch. App.) 43 S. W. 129.

[23] National Cash-Register Co. v. Coleman, 85 Hun, 125, 32 N. Y. Supp. 593; Campbell Printing Press & Mfg. Co. v. Rockaway Pub. Co., 56 N. J. Law, 676, 29 Atl. 681; Clark v. Richards (Minn.) 75 N. W. 605.

[24] Austin v. Dye, 46 N. Y. 500; Ryle v. Loom Works, 31 C. C. A. 340, 87 Fed. 976.

6. SALE BY BORROWER HAVING RIGHT TO PURCHASE.

Where an owner delivers goods to another, who signs a writing reciting that he has "borrowed and received" the goods, to be returned to the lender on demand, and that the borrower may purchase the goods for a certain sum, payable in installments, which he agrees to pay, and that until payment the right to possession shall remain in the lender, no title passes to the borrower, but the title remains in the lender, who, until payment of the stipulated sum, is entitled to possession.[25]

7. FRAUD.

The common law recognizes the validity of verbal contracts of sales of chattels for any amount, and however proven; but a great modification was introduced by the statute of 29 Car. II. c. 3, known as the "Statute of Frauds," which exists, with some slight variations, in almost every state of the Union. The seventeenth section of the English statute provided that no contract for the sale of any goods, wares, or merchandise for the price (value) of £10 sterling or upwards shall be allowed to be good except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

In New York it is provided by section 21 of the Personal Property Law[26] that: "Every agreement, promise or undertaking is void unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therefor, or by his lawful agent, if such agreement, promise or undertaking * * * is a contract for the sale of any goods, chattels or things in action for the price of $50 or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action, nor at the time pay any part of the purchase price." And by section 24 of the same act it is provided that: "Every transfer of any interest in personal property or the income thereof, and every charge on such property or income, made with the intent to hinder, delay or defraud

[25] Nichols v. Ashton, 155 Mass. 205, 29 N. E. 519. [26] Laws 1897, c. 417.

creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with such intent, is void as against every person so hindered, delayed, or defrauded." And by section 25 it is provided that: "Every sale of goods and chattels in the possession or under the control of the vendor, and every assignment of goods and chattels by way of security or on any condition, but not constituting a mortgage nor intended to operate as a mortgage, unless accompanied by an immediate delivery, followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control, or subsequent purchasers of such goods and chattels in good faith; and is conclusive evidence of such fraud unless it appear on the part of the person claiming, under the sale or assignment, that it was made in good faith, and without intent to defraud such creditor or purchaser. But this section does not apply to a contract of bottomry or respondentia, or to an assignment of a vessel of goods at sea or in a foreign port;" and by section 26 that "the question of the existence of fraudulent intent in cases arising under this article is a question of fact, and not of law." The fact that the conditional vendee of goods not delivered is permitted by the agreement to sell the articles embraced therein upon condition that the proceeds of sales shall be accounted for and paid to the vendee to apply upon the purchase price, does not impair the rights of the vendor, or render it void as to the creditors of the vendee.[27] The same principle applies where there is a delivery under an agreement for conditional sale, with a right in the purchaser to sell, and remit the proceeds.[28] But if the conditional vendee is given absolute power to sell for his own benefit or to consume the property, the result is to vest title in the purchaser as against his creditors.[29]

[27] Prentiss Tool & Supply Co. v. Schirmer, 136 N. Y. 305, 32 N. E. 849; Mansur & Tebbetts Implement Co. v. Beeman-St. Clair Co. (Tex. Civ. App.) 45 S. W. 729.

[28] Cole v. Mann, 62 N. Y. 1; Ufford v. Winchester, 69 Vt. 542, 38 Atl. 239.

[29] Devlin v. O'Neill, 6 Daly (N. Y.) 305; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705.

8. FORM OF CONDITIONAL SALE.

The mere nominal form of a transaction is not conclusive in determining whether it is or is not a conditional sale. The law looks at its real nature. Thus, a transaction in form a lease, or bailment, or absolute sale may be in fact a conditional sale if the intent is to make an agreement of sale conditional upon the happening of a contingency or the performance of a condition.[30]

9. SPECIAL STATUTORY PROVISIONS.

In addition to the provisions already referred to, the New York statute, which may be taken as typifying in general the statutes of other states, although the latter vary from it and among themselves in many respects, contains the following provisions:

Definitions.

"The term 'conditional vendor,' when used in this article, means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; the term 'conditional vendee,' when so used, means the person to whom such goods and chattels are so sold." [31]

Filing.

The same statute, after providing that conditions and reservations in a contract for conditional sale accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the vendor until payment, or some future event, shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, or a true copy thereof, shall be filed, as there provided.[32] The lien law goes on to provide in section 114 that the provisions of the preced-

[30] Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Singer Sewing-Mach. Co. v. Holcomb, 40 Iowa, 33; Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. 811; Ryle v. Loom Works, 31 C. C. A. 340, 87 Fed. 976.

[31] Lien Law (Laws 1897, c. 418, § 110).

[32] Id. §§ 112, 113.

ing article, relating to chattel mortgages, apply to the indorsement, entry, refiling, and discharge of contracts for the conditional sale of goods and chattels. Upon this subject, therefore, reference is here made to the subject of filing of chattel mortgages, which is discussed hereafter.[33]

Exceptions.

The New York statute does not apply to a number of articles enumerated therein, including household goods, pianos, threshing machines, coaches, carriages, bicycles, and other devices for locomotion by human power, if the contract for the sale thereof is executed in duplicate, and one duplicate delivered to the purchaser.

10. SALE WITH OPTION TO RETURN.

Where an owner of property sells it subject to the condition that the purchaser may, at his option, return it, the seller is thereby devested of all title and control over the goods, unless the seller elects to return them; for until the exercise of this option the goods are his; he has the jus disponendi, and is at liberty to sell upon his own terms, and to whom he pleases, the only consequence being that he is to pay the seller the agreed price, and to this extent becomes the seller's debtor.[34] In this respect such a sale differs radically from a conditional sale, properly so called, for here the title passes subject to a condition subsequent, while in a proper conditional sale the title does not pass until the performance of a condition precedent thereto.[35]

[33] See, also, Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163; Cohen v. Manufacturing Co. (Conn.) 40 Atl. 455; Holland v. Adams (Ga.) 30 S. E. 432; Johnston v. Wood (Wash.) 53 Pac. 707; Woolley v. Wagon Co., 59 N. J. Law, 278, 35 Atl. 789.

[34] Costello v. Herbst, 18 Misc. Rep. 176, 41 N. Y. Supp. 574.

[35] Fish v. Benedict, 74 N. Y. 613; Carter v. Wallace, 32 Hun (N. Y.) 384; Ex parte White, 6 Ch. App. 397.

CHATTEL MORTGAGES.

11. CHATTEL MORTGAGE DEFINED.

A chattel mortgage is a present transfer of the title to personal property, subject to defeat by payment of the sum or instrument it is given to secure; and, in default of performance by the mortgagor of the condition, the title of the mortgagee becomes absolute.[36] "A chattel mortgage is a transfer of personal property as security for a debt or obligation, in such form that, upon failure by the mortgagor to comply with the terms of the contract, the title of the property will be in the mortgagee." [37]

12. CHATTEL MORTGAGE AND CONDITIONAL SALE DISTINGUISHED.

The owner of personal property may sell the same outright, subject to no condition. This is an absolute sale. Instead of this, he may agree to sell it upon a condition to be performed by the purchaser. This is a conditional sale. Or, again, he may make an absolute sale, and take back from the purchaser a chattel mortgage upon it, by virtue of which, upon the failure of the purchaser to perform something which he agrees to do, the title to the property will again become vested in the original owner. Or, still again, he may keep the property, and himself give a mortgage upon it, in which case, upon his failure to perform some agreement on his part, the title shall vest in the mortgagee. The second and third of these cases present some points of similarity, but in other respects are different. In the case of a conditional sale, the title continues in the original owner, and is devested only upon the happening of the specified condition. In the case of a sale, the seller parts with the title, and, if he takes back a mortgage, he thereby

[36] Parshall v. Eggert, 54 N. Y. 18; Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477.

[37] Thomas, Chat. Mortg. § 2.

reacquires a mere technical title, and does not reacquire absolute title, except in case of nonperformance by the purchaser. But in both cases the result of the transaction is to give to the purchaser certain rights in respect to the property, and to leave certain other rights in respect to it in the seller. If one who owns property wishes, for example, to dispose of it, but the proposed purchaser is not at present in a position to pay the price, and the seller is willing to deliver the property and wait for payment, if only he can assure himself of ultimately having either the property or the price, without relying merely upon the purchaser's promise to pay, he may either deliver it to the purchaser under an agreement that the title should not pass until the price is paid, or he may sell and deliver it, and take back a chattel mortgage upon it, containing the condition that, if the stipulated sum should be paid by a specified date, the mortgage shall be void; otherwise to remain in full force and effect. In the former case, if payment was not made, a seller would be in the same position as if he had not agreed to sell; while in the latter, if the amount named in the mortgage was not paid, he would again own the property. As between these two forms of the transaction, a distinction sometimes exists under the statutes relating to the necessity of filing either chattel mortgages, or conditional bills of sale, or both.[38]

13. MORTGAGE, PLEDGE, AND SALE DISTINGUISHED.

In the case of an absolute sale, the title passes to the purchaser, subject to no condition. A conditional sale may, as already seen, be conditioned upon the doing of some act to the property by the vendor before the transaction is completed, as weighing or separating it from other property; or it may be conditional, even though ready for delivery, and even though delivered, if the agreement is that title is not to pass until the performance of some condition by the vendee or the happening of some subsequent contingency. In all these cases, title does not pass until the condition is complied with, or the contingency happens. In the case of a chattel mortgage, the title passes, theoretically; but no delivery is necessary to consummate the transaction, and usually the mortgaged goods are not in fact delivered. As already

[38] Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51.

seen, the mortgagor retains some of the rights incident to ownership; such as the right to sell, or to place a second mortgage on the property subject to the first mortgage, until default, at which time the absolute legal title passes to the mortgagee, subject to an equitable right in the mortgagor to redeem. In the case of a pledge, the delivery of the property to the pledgee is essential.[39]

14. MORTGAGE, CONDITIONAL SALE, AND BAILMENT DISTINGUISHED.

"When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed; it is a sale," absolute or conditional, according to the circumstances.[40]

15. FORM OF CHATTEL MORTGAGE.

A chattel mortgage is usually in the form of a transfer of the property to the mortgagee, his executors, administrators, and assigns, specifying the goods mortgaged, upon condition, nevertheless, that if the mortgagor, his heirs, executors, administrators, and assigns, shall and do well and truly pay, or cause to be paid, to the mortgagee, his executors, administrators, and assigns, a specified sum of money, or the amount of specified obligations, then and in that event the mortgage to be void, otherwise to remain in full force and effect. It commonly provides, also, that the mortgagor shall insure the goods and chattels mortgaged, and keep them insured, against loss and damage by fire, in a company to be approved by the mortgagee, with the loss, if any,

[39] Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275; People v. Kirkpatrick, 69 Ill. App. 207; Ward v. Lord, 100 Ga. 407, 28 S. E. 446; Canfield v. W. J. Gould & Co. (Mich.) 73 N. W. 550; Anglin v. Barlow (Tex. Civ. App.) 45 S. W. 827.

[40] Wright v. Barnard, 89 Iowa, 166, 56 N. W. 424; Foster v. Pettibone, 7 N. Y. 435; Chickering v. Bastress, 130 Ill. 206, 22 N. E. 542; Mowbray v. Cady, 40 Iowa, 604; Budlong v. Cottrell, 61 Iowa, 235, 20 N. W. 166.

payable to the mortgagee, as his interest may appear; and the mortgage also usually contains special provisions against the removal of the property by the mortgagor without the mortgagee's consent, and for the retention by the mortgagor of the property mortgaged, until default, and for the taking of the property by the mortgagee in case the mortgagor sells or assigns the same, and for a sale thereof, and the retention out of the proceeds of the amount then unpaid, with the costs and charges of removing and selling the property. But no particular form is essential.[41] It need not, for example, state the sum of money for which it is given as security, nor that the mortgagee shall have the right to take possession of the goods. Thus, the following instrument has been held to be a chattel mortgage: "For value received, I, Isabella Corbett, do hereby sell and assign the above mentioned and described books to Henry A. Blake, his heirs and assigns, I to hold and retain possession of said books for eight months from this sale; and if, during that period, the sum of indebtedness to said Blake now owing to him by Richard Crowley is paid or satisfied, for the payment of which this assignment is made as security, then this conveyance shall be null and void." [42]

So, where an instrument which was in form an absolute bill of sale contained a provision that "it is further understood and agreed by the parties hereto that, if the said party of the first part pay unto the party of the second part the sum of $400, within ——— from the date hereof, the party of the second part agrees and will resell the property mentioned herein, back to the said party of the first part, and it is further understood and agreed by the parties hereto that the property mentioned herein and specified in the schedule shall remain in the possession of the party of the first part, he agreeing to pay the party of the second part $2.50 per week for the use of said mentioned property in his business"; and it appeared that the owner of the property had applied for a loan of money, offering to secure its repayment by giving a chattel mortgage; that the lender had refused to accept a chattel mortgage, but had accepted the instrument in question instead; and that he had acknowledged that the instrument was to be given back

[41] Gilbert v. Register Co., 67 Ill. App. 496; Smith-McCord Dry-Goods Co. v. John B. Farwell Co. (Okl.) 50 Pac. 149; Raphael v. Mullen (Mass.) 50 N. E. 515.

[42] Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477.

when the money should be repaid to him,—it was held that these facts, taken in connection with the provisions of the instrument, contemplated a loan of money and a sale of the property, upon the condition that the property should be returned upon the payment of the money so loaned, and that this was, in effect, a chattel mortgage.[43]

16. EFFECT ON THE TITLE BEFORE DEFAULT.

While, strictly speaking, upon the execution of a chattel mortgage, a conditional legal title to the property is vested in the mortgagee, which title is subject to defeasance by the performance of the conditions contained in the mortgage, and title vests at law in the mortgagee, upon default in the payment of the mortgage, and thereafter there is left in the mortgagor only an equity of redemption, this view is more technical and theoretical than practical. Practically, the substantial title remains in the mortgagor, with all the incidents of the legal title. He retains the use, control, and benefit of the property, subject to the mortgage. If the property is taken from his possession wrongfully during the time when, by the terms of the mortgage, he is entitled to retain possession thereof, he may maintain an action for conversion against any wrongdoer, even against the mortgagee. He can sell it, and convey a good title, subject to the mortgage, to any purchaser; and it may be seized and sold by virtue of an execution against him.[44] The mortgagor can sell the property, or mortgage it; and a subsequent mortgage of personal property is not an uncommon form of security.[45]

[43] Susman v. Whyard, 149 N. Y. 127, 43 N. E. 413. As to what is a sufficient description for the mortgage to contain of the chattels mortgaged, see Williamson v. Wylie, 69 Mo. App. 368; Wilson v. Rustad (N. D.) 75 N. W. 260; Desany v. Thorp (Vt.) 39 Atl. 309; Cragin v. Dickey, 113 Ala. 310, 21 South. 55.

[44] Leadbetter v. Leadbetter, 125 N. Y. 290, 26 N. E. 265; Casserly v. Witherbee, 119 N. Y. 522, 23 N. E. 1000.

[45] Moore v. Supply Co., 133 N. Y. 144, 149, 30 N. E. 736.

17. EFFECT ON TITLE AFTER DEFAULT.

After default in the payment of the mortgage, whatever title the mortgagor had is vested absolutely, subject to the right of redemption in equity, in the mortgagee;[46] and thereafter the mortgagee, even though his mortgage is a second mortgage, has the same right to sue for a conversion of the property, or an injury to it, as the mortgagor would have possessed if there had been no default in the payment. This is the result where the first mortgage is not yet overdue; but, when the title of the first mortgage has become absolute at law, the second mortgagee cannot thereafter sue for conversion.[47]

When default is made in the payment of the debt secured by a mortgage on personal property, the legal title to the property becomes vested in the mortgagee; and thereafter the mortgagor or any one holding his title has but an equitable right of redemption, and he can accordingly transfer no greater right to his assignee.[48]

Where default has been made in the payment of a first mortgage before the second is executed, and in the second before the third is executed, the last two mortgages transfer nothing but the equity of redemption, because the legal title has become vested in the first mortgagee, who could at any time assert that title by taking the property into his possession. But while the holder of a first mortgage, after default in payment of his debt, becomes vested with the legal title, yet, so long as he does not take possession, he does not acquire all the rights nor subject himself to all the duties and responsibilities of owner. So long as the possession of the mortgagor is not disturbed, the mortgagor is entitled to receive the earnings of the property, if any, and is liable for repairs, and for the discharge of the duties and obligations incident to ownership; and the mortgagee, though having the legal title after default, is not charged with any such obligations, in the absence of express contract, until he assumes

[46] Martin v. Jenkins, 51 S. C. 42, 27 S. E. 947; Trustees of Ashland Lodge v. Williams (Wis.) 75 N. W. 954.

[47] Moore v. Supply Co., 133 N. Y. 144, 30 N. E. 736; Treat v. Gilmore, 49 Me. 34; Ring v. Neale, 114 Mass. 111.

[48] Kimball v. Bank, 138 N. Y. 500, 504, 34 N. E. 337.

them by taking possession, and then he becomes entitled to receive the earnings of the property, if any.[49]

If a mortgagee holding a mortgage upon several chattels continues to sell after he has realized enough to satisfy the debt and costs, he becomes a trespasser.[50]

18. CHATTEL MORTGAGE ON NONEXISTENT PROPERTY.

A mortgage cannot be given effect at law as a lien upon personal property which, at the time of its delivery, was not in existence, either actually or potentially, when the rights of creditors intervene. At law, such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer in præsenti property not in esse. But it may operate by way of a personal contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity will enforce as against the latter.[51]

Even where a chattel mortgage operates as an executory agreement to give a lien when the property comes into existence, some further act is necessary in order to make it actual and effectual as against creditors. If no further act is done by the parties to the instrument, to create such an actual lien, the levy of an execution upon the property by a creditor of the mortgagor operates to transfer the possession from the owner to that of the sheriff. As against his possession, the equities of the mortgagee are unavailing for any purpose.[52]

[49] Kimball v. Bank, 138 N. Y. 500, 505, 34 N. E. 337; Wilson v. Wilson, L. R. 14 Eq. 40; Brown v. Tanner, 3 Ch. App. 597; Liverpool Marine Credit Co. v. Wilson, 7 Ch. App. 507.

[50] O'Rourke v. Hadcock, 114 N. Y. 541, 549, 22 N. E. 33.

[51] Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632; Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542; Electric Lighting Co. of Mobile v. Rust (Ala.) 23 South. 751; Standard Brewery v. Nudelman, 70 Ill. App. 356; Otis v. Sill, 8 Barb. (N. Y.) 102; Gardner v. McEwen, 19 N. Y. 123; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811. Compare Allen v. Manufacturing Co., 87 Fed. 786; Ainsworth v. Trading Co. (Ga.) 29 S. E. 142; Snow v. Ulmer, 90 Me. 324, 39 Atl. 993; Midland State Bank v. Kilpatrick-Koch Dry-Goods Co. (Neb.) 74 N. W. 837; Kane v. Lodor (N. J. Ch.) 38 Atl. 966.

[52] Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632. Compare Holroyd v. Marshall, 10 H. L. Cas. 209; McCaffrey v. Woodin, 65 N. Y. 459; Moody v. Wright, 13 Mete. (Mass.) 17.

Where a mortgage covers chattels in existence, and also professes to cover property which the mortgagor may thereafter purchase, the fact that it is invalid as to property of the latter class does not render it invalid as to the existent property which is specified in it.[53]

But it is not necessary that property, in order to be a subject of a chattel mortgage, should be in actual existence. It is enough that it has a potential or possible existence, as, for example, in the case of the spontaneous product of the earth, or the increase of that which is in existence. In such a case the right to it, when it comes into existence, is regarded as a present vested right.[54]

So, also, in cases arising between a lessor of land and his lessee, a principle different from that generally applicable might operate to create a lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect as a reservation, at the time, of the title to the product of the land.[55]

19. THE RIGHT OF POSSESSION.

As the execution of a chattel mortgage invests the mortgagee with title subject to be defeated by subsequent performance of the condition, the right of possession, which ordinarily follows that of property, would pass with the title, under the transfer, in the absence of any express or implied agreement for the retention of the goods by the mortgagor. But it is not necessary that such an agreement should be expressed in terms; it may be implied from the provisions of the instrument. Thus, where the mortgage defines the circumstances under which the grantee shall become entitled to the right of possession,

[53] Gardner v. McEwen, 19 N. Y. 123.

[54] Grantham v. Hawley, Hob. 132; Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632; Desany v. Thorp (Vt.) 39 Atl. 309.

[55] Andrew v. Newcomb, 32 N. Y. 417; McCaffrey v. Woodin, 65 N. Y. 459; Butt v. Ellett, 19 Wall. 544. And see Lemon v. Wolff (Cal.) 53 Pac. 801; Hogan v. Elevator Co., 66 Minn. 344, 69 N. W. 1. As to mortgages given by railroad companies to cover future acquired rolling stock, etc., see Jones, Mortg. §§ 152–154, 452.

it may evince the mutual intent of the parties that, until it vests in the mortgagee, possession shall remain in the mortgagor.[56]

20. FRAUDULENT CHATTEL MORTGAGES.

Numerous authorities deal with the subject of mortgages which, either upon their face or in connection with a contemporaneous oral agreement between the parties, are intended to authorize the mortgagor to continue to sell or otherwise to deal with the property as his own.

It is obvious that such an arrangement is strongly indicative of an intention to give a false credit to the mortgagor. Chattel mortgages were formerly in most of the states treated as invalid, unless actual possession was surrendered to the mortgagee; but it is not so now, for modern legislation has as a general thing (the cases to the contrary being exceptional) conceded the right to the mortgagor to retain possession if the transaction is for a good consideration, and bona fide. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make bona fide mortgages of it, to secure creditors, without any actual change of possession. But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and involve injuries to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any purpose other than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages. The cases cannot be reconciled by any process of reasoning, or on any principles of law. It is not difficult to see that the mere retention of use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The

[56] Hall v. Sampson, 35 N. Y. 274.

former is frequently permitted by statute, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgagee, is not for the protection of the mortgagee, and of itself furnishes a shield to a dishonest debtor. Where such a mortgagee permits the mortgagor not only to continue in possession, but to dispose of the property, sell it at retail, and use the money obtained to replenish his stock, and there is no covenant to account with the mortgagee, nor any recognition that the property is sold for the latter's benefit, the manifest object of it is to entitle the mortgagor to continue his business, and appear to the world as the absolute owner of the goods, and enjoy all the advantages resulting therefrom. Where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.[57]

In order to invalidate a mortgage because of its authorizing the mortgagor to dispose of the property generally for his own benefit, it is not necessary that such an authorization should be contained in terms in the mortgage. The arrangement may be shown by an oral agreement between the parties, and this, in turn, may be established by evidence of a course of dealing between the parties in accordance with which the mortgagor would be entitled thus to deal with the mortgaged chattels.[58]

So, also, if the mortgage contains merely an inhibition upon the mortgagor's selling "on credit," he is, by a necessary implication, authorized to sell for cash; and this fact, together with other circumstances showing the intention that he may continue to retail the mortgaged property and receive the proceeds to his own use, may suffice to render the mortgage void as against creditors; and where such is the effect of the written instrument, and there is no doubt what the language means, the mortgage is void, as matter of law; and, as the court would be obliged to set aside a verdict confirming its validity as often as one should be rendered, the question of fraud need not be submitted to the jury.[59] And if, for the reasons now under consideration, a mortgage is void as to a portion of the property, it is fraudulent as to all

[57] Robinson v. Elliott, 22 Wall. 513; Freeman v. Rawson, 5 Ohio St. 1; Barnet v. Fergus, 51 Ill. 352.

[58] Gardner v. McEwen, 19 N. Y. 123.

[59] Edgell v. Hart, 9 N. Y. 213.

the property covered by the mortgage; for the mortgage is one single instrument, given to secure one debt, and, to render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object in part or as to part of the property is to defraud creditors. The unlawful design vitiates the entire instrument.[60]

But, notwithstanding the foregoing propositions, it is still true that a chattel mortgage is not per se void because of a provision contained in it allowing the mortgagor to sell the mortgaged property; for if the agreement is that, as he sells it himself, he is to account to the mortgagee for the proceeds, and apply them on the mortgage debt, it is unobjectionable. Such a sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly what the latter had the right to do, and what it was his privilege and duty to accomplish. It devotes the mortgaged property to the payment of the mortgage debt. If the mortgagor sells, and actually pays over the whole proceeds, nobody is harmed; for that only has happened which is the proper and lawful operation of the mortgage. If, on the other hand, under such an arrangement, such proceeds have not been paid over, the adverse lien is still unharmed; for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although, as between the mortgagor and mortgagee, the debt remains and is still unpaid.[61]

21. FILING AND REFILING.

It is frequently provided by statute that, where the mortgagor retains possession[62] of mortgaged chattels, the mortgage shall be void

[60] Russell v. Winne, 37 N. Y. 591.

[61] Brackett v. Harvey, 91 N. Y. 214; Robinson v. Elliott, 22 Wall. 524; Mansur & T. Imp. Co. v. Beeman-St. Clair Co. (Tex. Civ. App.) 45 S. W. 729; Ufford v. Winchester, 69 Vt. 542, 38 Atl. 239.

[62] Drury v. Moors (Mass.) 50 N. E. 618; Burchinell v. Schoyer (Colo. App.) 50 Pac. 217; Martin v. Sexton, 72 Ill. App. 395; Schneider v. Kraby, 97 Wis. 519, 73 N. W. 61.

as against his creditors, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage is filed; and it is commonly provided, further, that it must be refiled from time to time in order to continue it in force. An illustration of such statutes is found in the New York lien law,[63] by which it is provided (section 90) that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels, or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees[64] in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article."

"Mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation or by any telegraph, telephone, or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone, or electric light corporation runs, need not be filed or refiled as chattel mortgages."[65]

"An instrument, or a true copy thereof, if intended to operate as a mortgage of a canal boat, steam tug, scow or other craft, or of the appurtenances thereof, navigating the canals of this state, must be filed in the office of the comptroller, and need not be filed elsewhere. Every other chattel mortgage or an instrument intended to operate as such, or a true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the state, resides at the time of the execution thereof, and if not a resident, in the town or city where the property mortgaged is, at the time of the execution of the mortgage. If there is more than one mortgagor, the mortgage, or a certified copy thereof, must be filed in each city or town within the state where each mortgagor resides at the time of the execution thereof. In the city of New York, such instruments must be filed in the office of the register of the city and county of New York; in the city of Brooklyn, in the office of the register of the county of Kings, and

[63] Laws 1897, c. 418, §§ 90–96.

[64] Wolf v. Rausch, 22 Misc. Rep. 108, 48 N. Y. Supp. 716.

[65] Laws 1897, c. 418, § 91.

in every other city or town of the state, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it must be filed therein." [66]

After further providing, in section 93, for the method of filing and indexing chattel mortgages, and, in section 94, for the official fees, the act proceeds to provide, in section 95, that "a chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or creditors in good faith, after the expiration of the first or any existing term of one year, reckoning from the time of the first filing, unless (1) within 30 days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or of any person who has succeeded to his interest in the property claimed by virtue thereof, or (2) a copy of such mortgage and its endorsements, together with a statement attached thereto or endorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office in the city or town where the mortgagor then resides, if he is then a resident of the town or city where the mortgage or a copy thereof or such statement was last filed; if not such resident, but a resident of the state, a true copy of such mortgage, together with such statement, shall be filed in the proper office of the town or city where he then resides; and if not a resident of the state, then in the proper office of the city or town where the property so mortgaged was at the time of the execution of the mortgage."

It will be noticed that, while the statute prescribes how and where chattel mortgages shall be filed, it does not in terms prescribe the time within which this is to be done. While the act does not in terms require an immediate filing, its purpose can only be satisfied by prompt and diligent action on the part of the mortgagee in filing his mortgage. Some time, of course, will necessarily elapse between the execution and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there has been no unnecessary delay, and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lienholders could question the validity of the mortgage. But a delay

[66] Id. § 92.

of six weeks in filing has been held not to be a compliance with the former statute on this subject, where there were no circumstances rendering so long a delay necessary, even though it is filed before the creditor's rights have attached.[67]

22. THE RIGHT TO REDEEM.

Although, upon the mortgagor's default, the absolute legal title to the property vests in the mortgagee, yet the mortgagor has, as already stated, an equitable right to redeem until the mortgagee has foreclosed it. This right he may enforce by suit, after first paying or tendering the full amount due.[68]

The relief sought may be either the return of the property,[69] or, if the property has in the meantime been illegally sold by the mortgagee, a recovery of the value, less the amount of the mortgage debt;[70] while, if the sale has been lawful, the mortgagor may recover the surplus.[71] The right to redeem may be exercised by the mortgagor, or by any one who has a title to or lien on the property under or through the mortgagor.[72]

23. FORECLOSURE.

Inasmuch as, after default, and after the mortgagee has taken possession, the mortgagor retains the equitable right of redemption, the mortgagee is on his part afforded means of extinguishing this right, and having the respective rights of the parties finally

[67] Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Ledoux v. Silk Co., 19 Misc. Rep. 440, 44 N. Y. Supp. 489; Stephens v. Meriden Britannia Co., 13 App. Div. 268, 43 N. Y. Supp. 226. And, as to refiling, in general, see Stevenson Brewing Co. v. Eastern Brewing Co., 22 App. Div. 523, 48 N. Y. Supp. 89; William Deering & Co. v. Hanson (N. D.) 75 N. W. 249; Beskin v. Felgenspan (Sup.) 52 N. Y. Supp. 750.

[68] Porter v. Parmley, 52 N. Y. 185; Lambert v. Miller, 38 N. J. Eq. 117; Stoddard v. Denison, 2 Sweeny (N. Y.) 54; Noyes v. Wyckoff, 30 Hun (N. Y.) 466; Brush v. Evans, 53 N. Y. Super. Ct. 523; Coe v. Cassidy, 72 N. Y. 133.

[69] Porter v. Parmley, 58 N. Y. 185.

[70] Stoddard v. Denison, 2 Sweeny (N. Y.) 54.

[71] Davenport v. McChesney, 86 N. Y. 242.

[72] Hinman v. Judson, 13 Barb. (N. Y.) 629; Pettibone v. Drakeford, 37 Hun (N. Y.) 628.

adjusted. This subject is frequently regulated by statute. In most cases, however, the mortgagee may foreclose either by action, or, in some cases, by sale. An action lies in equity to foreclose a chattel mortgage; but the remedy by sale, under the power contained in the mortgage, is, in most cases, a more speedy and effectual means of extinguishing the equity of redemption. But the right to foreclose by action has not been taken away.[73]

The New York Code of Civil Procedure, by sections 1737 to 1740, provides for actions "to foreclose a lien upon a chattel"; but by section 1741 it is provided that these sections do not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel without action; and it does not apply to a case[74] where another mode of enforcing a lien upon a chattel is specially prescribed by law.[75]

Taking possession of mortgaged chattels, and selling them, prior to the contingencies mentioned in the mortgage upon which the mortgagee may proceed to foreclose, amounts to a conversion.[76]

24. DISCHARGE OF MORTGAGE.

Where statutory provisions are made for the filing of chattel mortgages, the statutes also provide the method of discharging such mortgages of record. Thus, by the New York statute[77] it is provided that, "upon the payment or satisfaction of a chattel mortgage, the mortgagee, his assignee or legal representative, upon the request of the mortgagor or of any person interested in the mortgaged property, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer with whom the mortgage, or a copy thereof, is filed, must, on receipt of such certificate, file the same in his office, and write the word 'Discharged' in the book where the mortgage is entered, opposite the entry thereof; and the mortgage is thereby discharged."

[73] Briggs v. Oliver, 68 N. Y. 336, 339.

[74] As, for example, a mechanic's lien, or liens on vessels. Code Civ. Proc. §§ 3398–3441.

[75] See, also, McCarthy v. Hetzner, 70 Ill. App. 480; Brook v. Bayless (Okl.) 52 Pac. 738; Desany v. Thorp (Vt.) 39 Atl. 309; Lexington Bank v. Wirges, 52 Neb. 649, 72 N. W. 1049.

[76] Johnston v. Robuck, 104 Iowa, 523, 73 N. W. 1062.

[77] Lien Law, Laws 1897, c. 418, § 98.

SALES TO ARRIVE.

25. IN GENERAL.

Sales "to arrive" are frequently made, and "it is not always easy to determine in given instances whether the language used implies a condition or not, or what the real condition is." [78]

26. NATURE AND CHARACTERISTICS.

But in a proper case of a sale "to arrive," apart from any additional and peculiar provisions, the contract is both conditional and executory. Certainly until arrival, the title to the goods does not pass to the vendee, and it may be that it does not pass until the goods are delivered.[79]

The contract is conditional as to both parties, and if the vessel does not arrive, or if, though it arrives, the goods are not on board, the contract is at an end. So, if a part only of the goods arrive, the seller would not be bound to deliver nor the purchaser to accept it. The same result follows if goods of the same general description, but not of the stipulated quality, arrive.[80]

These propositions rest, of course, upon the assumption that there is no warranty by the seller that they shall arrive, or that, arriving, they shall be of a particular quality; for, if such a warranty is made, he is liable thereon.[81] And the same principle applies where, in a

[78] Benj. Sales, § 578.

[79] Benedict v. Field, 16 N. Y. 595, 597.

[80] O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269; Clark v. Fey, 121 N. Y. 470, 24 N. E. 703.

[81] Shields v. Pettie, 4 N. Y. 122; Boyd v. Siffkin, 2 Camp. 326; Alewyn v. Pryor, 1 Ryan & M. 406; Lovatt v. Hamilton, 5 Mees. & W. 639; Johnson v. Macdonald, 9 Mees. & W. 600; Russell v. Nicoll, 3 Wend. (N. Y.) 112.

contract for sale of goods to arrive, it is stipulated that they shall be equal to sample.[82]

Other conditions besides the "arrival" of the goods may be, and frequently are, introduced into the contract; as, for example, that they shall be shipped by a particular vessel, or a particular route, or that they shall arrive in a particular vessel, or that the goods sold "to arrive" shall be of a particular quality. But a provision that the sale is of goods "to be shipped by" a specified vessel, "no arrival, no sale," refers to the arrival of the goods, and not to the arrival of the vessel named; and it is not to be inferred that the goods must arrive in that vessel;[83] and in this respect such a contract differs from a sale of goods "to arrive by" or "on arrival of" a ship named, as in Lovatt v. Hamilton,[84] Johnson v. Macdonald,[85] and Hale v. Rawson.[86]

[82] Dike v. Reitlinger, 23 Hun (N. Y.) 241; Simond v. Braddon, 2 C. B. (N. S.) 324; Jones v. Just, L. R. 3 Q. B. 197; Cleu v. McPherson, 1 Bosw. (N. Y.) 480.

[83] Harrison v. Fortlage, 161 U. S. 57, 16 Sup. Ct. 488; Iasigi v. Rosenstein, 141 N. Y. 414, 36 N. E. 509.

[84] 5 Mees. & W. 639.

[85] 9 Mees. & W. 600.

[86] 4 C. B. (N. S.) 85.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF SURETYSHIP AND GUARANTY

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

SURETYSHIP AND GUARANTY.

1. DEFINITIONS.

(a) *A guaranty* is an undertaking by one person that in case another, who is primarily liable to pay or perform some debt or obligation, fails to do so, he will be answerable for the nonpayment or nonperformance.

(b) *Suretyship* is the obligation assumed by one who binds himself with a principal, as an original promisor, for the payment or performance of a debt or obligation of the principal. McMillan v. Bank, 32 Ind. 14.

(c) *A guarantor* is one who makes a guaranty.

(d) *A guarantee* is one for whose benefit a guaranty is given.

(e) *A surety* is one who binds himself with a principal as an original promisor for the payment or performance of some debt or obligation of the principal.

(f) *A principal, or principal debtor,* is one who is ultimately liable for the payment or performance of some debt or obligation in respect of which another acts as guarantor or surety.

(g) *A creditor* is one who is entitled to enforce a debtor obligation against a principal debtor or surety, or to hold a guarantor answerable in case of nonpayment or nonperformance. In the latter case he is also termed a "guarantee."

(h) *Suretyship and guaranty compared.* The terms "suretyship" and "guaranty" are often used inaccurately, as if having the same meaning. But, while they have certain points of resemblance, there are important differences between them. Thus, both involve the liability of one person for a debt or obligation for which another is, as between themselves, ultimately liable. But, the surety being bound with his principal as an original promisor, he is himself a

debtor from the beginning, and must see that the debt is paid, and is held, ordinarily, to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may, in fact, injure him. On the other hand, the contract of a guarantor is his own separate contract that the thing guarantied to be done by the principal shall be done,—not a mere joint agreement to do it. A guarantor, therefore, is not bound to do what the principal has contracted to do, but only to answer for the consequences of the default of the principal. He is not invariably bound to take notice of nonperformance by the principal; and if, when entitled to notice, he suffers damage through the creditor's failure to notify him, he is pro tanto discharged. It is not so with a surety. McMillan v. Bank, 32 Ind. 13; Wright v. Simpson, 6 Ves. 714; Saint v. Manufacturing Co., 95 Ala. 371, 10 South. 539; Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. 35; Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. 94.

Usually, a surety is bound by the same terms of the same contract as his principal. Powell v. Allen, 11 Ill. App. 134.

(i) *Suretyship, guaranty, and indorsement compared.* An indorsement is the writing of the name of a holder upon an instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both. It strictly applies only to negotiable instruments.

An indorsement is classed by itself as a distinct body of contract rights and liabilities. It has its origin in, and is confined to, negotiability. Orrick v. Colston, 7 Grat. (Va.) 195. It is a contract, and one to which the law merchant and the common law have appended very peculiar conditions. It is a contract something in the nature of a guaranty (Oakley v. Boorman, 21 Wend. [N. Y.] 588; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48); something in the nature of a warranty, and to the liability under which the laws have attached the very unusual conditions of presentment, demand, and notice of dishonor (Osgood's Adm'rs v. Artt, 17 Fed. 575; Johns. Cas. Bills & N. 107).

An indorser is liable only when the note has been duly presented for payment on the exact date, and when due notice has been given

to him of its nonpayment, in exact compliance with the law as to time and method of service of notice. If these conditions are fulfilled, he is liable; if not, he is absolutely discharged. A guarantor is liable upon receiving notice of nonpayment within a reasonable time; and, even though the notice is unreasonably delayed, this only discharges him to the extent of damage to him thereby occasioned. Story, Prom. Notes, § 460; Hunter v. Moul, 98 Pa. St. 16, 17; Gibbs v. Cannon, 9 Serg. & R. (Pa.) 198; Overton v. Tracey, 14 Serg. & R. (Pa.) 311.

(j) *Guaranty and warranty distinguished.* Warranty differs from a guaranty in that it relates, not to some debt or obligation of any third party, but to some feature of an agreement made by the very person who also makes the warranty as a part thereof. Wiley v. Inhabitants of Athol, 150 Mass. 434, 23 N. E. 311; De Col. Guar. & Sur. 1, 2.

(k) *Guaranties of payment and of collection.* The fundamental distinction between a guaranty of payment and one of collection is that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that, if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means, are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor. McMurray v. Noyes, 72 N. Y. 525; Cass v. Shewman, 61 Hun, 472, 16 N. Y. Supp. 236. Compare Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. 35.

The general rule in regard to one who becomes the guarantor of the collection of a demand is that, in so doing, he undertakes that the claim is collectible by due course of law, and the guarantor only promises to pay when it is ascertained that it cannot be collected by suit prosecuted to judgment and execution against the principal; and the endeavor to so collect is a condition precedent to

a right of action against the guarantor. And the fact of insolvency is no excuse for the failure to prosecute. The judgment must have been recovered, and the execution issued thereon must have been returned unsatisfied in whole or in part, before any liability is fastened upon the guarantor. And the judgment must have been recovered without unreasonable delay. Between the two extremes represented by a guaranty of collection and one of payment, however, the parties may, by the terms of the contract of guaranty, create variations upon these general principles. Salt Springs Nat. Bank v. Sloan, 135 N. Y. 371, 32 N. E. 231; Dutcher v. Buck, 96 Mich. 171, 55 N. W. 676; Chatham Nat. Bank v. Pratt, 135 N. Y. 423, 32 N. E. 236; Mead v. Parker, 111 N. Y. 259, 18 N. E. 727; Cummings v. Arnold, 3 Metc. (Mass.) 486; McCown v. Muldoon, 147 Pa. St. 311, 23 Atl. 369.

And in Gillespie v. Wheeler, 46 Conn. 410, it is held that as against a third party who indorses a note before delivery, and so is a guarantor, no suit against the principal need be brought if he has not enough property to satisfy the demand in full.

A guaranty of payment is a special form of contract, by which the guarantor renders himself liable under conditions other than those which, according to general principles, would be essential to establish his liability. Arents v. Com., 18 Grat. (Va.) 770.

(1) *Summary.* The true distinction between a surety and a guarantor is obscured by the fact that the term "surety" is frequently used in different senses. Thus:

(1) It is sometimes employed in a general sense, to designate any one who is liable to a third party for a debt or obligation for which another person is ultimately liable as the real principal; thus including both sureties and guarantors, and sometimes even indorsers, of commercial paper. An illustration of this use is found in the familiar propositions that a surety who is obliged to pay the debt secured is entitled to contribution from his co-sureties, and to reimbursement from the principal (De Col. Guar. & Sur. 307, 336),—propositions which apply with equal force to both sureties and guarantors. "A guarantor has all the rights of a surety in equity." De Col. Guar. & Sur. 1, note.

So the terms "guaranty" and "guarantor" are often used in a generic sense, so as to include both guaranty and suretyship, as where

De Colyar begins the sixth chapter of his work (page 211) by saying that, in proceeding to ascertain the extent and nature of a *surety's* liability, he proposes to call attention to the rules for the construction of *guaranties;* and, in the notes on the same page, it is said that doubtful language in a contract of *guaranty* may be construed most strongly against the *guarantor*, but that the meaning of the contract cannot be extended, to the prejudice of the *surety*,—all the foregoing statements being intended, in fact, to apply both to sureties and guarantors.

(2) Sometimes the term "surety" is employed to distinguish the party thus designated from a guarantor, as where it is said that a surety, jointly bound with his principal as an original promisor, may be joined with the principal as a defendant in an action brought by the creditor upon their common contract (Dart v. Sherwood, 7 Wis. 523); while a guarantor, being bound by a distinct and separate contract from that of the principal, cannot thus be joined as a defendant in an action based on the principal contract, but must generally be sued separately (Read v. Cutts, 7 Greenl. [Me.] 186).

(3) Still, again, it frequently happens that the term "surety" is loosely employed in referring to one who is a guarantor as distinguished from a surety; as, for example, in Cass v. Shewman, 61 Hun, 472, 16 N. Y. Supp. 236, where the defendant had signed an agreement, upon a lease given by plaintiff to a third party, which the court say was in substance a guaranty, and yet they elsewhere speak of the defendant as the surety.

(4) It must also be noticed that the term "guarantor," even when correctly employed in its strict sense, may vary somewhat in meaning, and that the rights and liabilities of a guarantor may vary according to the nature of the given guaranty. Thus, a guarantor of collection is not liable, as already stated, until the creditor, after default, has exhausted the appropriate legal means (to an extent which varies somewhat in different jurisdictions) of enforcing payment by the principal; while a guarantor of payment usually is held liable at once upon default, even before any demand has been made upon the principal. This latter form of guaranty, which in fact approaches very closely to a contract of suretyship, is nevertheless distinguishable therefrom in this: that the surety undertakes, jointly

with the principal, to see that the debt is paid, and to pay it if the principal does not, while the guarantor of payment agrees, not to pay the debt, but, in case of the principal's default, to answer to the creditor for the consequences of such default.

In distinguishing between a surety and a guarantor, on the one hand, and an indorser of commercial paper, on the other, it is to be noticed, in addition to the distinction arising out of the peculiar rules as to presentment and notice of dishonor, which exist in favor of the latter, that the indorser merely signs his name, his agreement being implied by the law, and not express, while the contract of a guarantor or surety is almost invariably expressed in terms.

(m) *A letter of credit* is a writing addressed to one or more individuals or classes of persons, or, generally, to any person, by which the signer undertakes to become responsible, either directly as a surety or collaterally as a guarantor, and either generally or specially, for payments to be made, or credits to be extended, to a third party named in the letter.

Letters of credit are governed by the same general legal principles as other guaranties. Bank of Montreal v. Recknagel, 109 N. Y. 482, 17 N. E. 217.

(n) *A continuing guaranty* is one which is not confined to a particular transaction, but which covers successive future credits, advances, or obligations, existing at any given time, either generally or to a specified standing amount. Beakes v. Da Cunha, 126 N. Y. 298, 27 N. E. 251; Sherburne v. Paper Co., 40 Ill. App. 383; Smith v. Van Wyck, 40 Mo. App. 522; Dover Stamping Co. v. Noyes, 151 Mass. 342, 24 N. E. 53.

In construing a given guaranty, it is frequently difficult to determine on which side of the line separating limited from continuous guaranty it belongs. The intent of the party to be derived from the words is the only sure guide, and therefore very little aid is to be derived from the adjudged cases, which necessarily turn upon the peculiar phraseology of particular guaranties. McShane Co. v. Padian, 142 N. Y. 207, 36 N. E. 880.

But the mere fact that a guaranty is for an unlimited amount of goods does not render it continuing in respect to time, for it may

merely guaranty any amount of purchases to be made at a given time. Rogers v. Warren, 8 Johns. (N. Y.) 119.

(o) *General and special guaranties.* Guaranties are of two kinds, general or special. They are general when they guaranty any person who may act upon them, and special when the particular person or class of persons guarantied is specified. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 277; Lowry v. Adams, 22 Vt. 160.

This is the usual meaning of the terms defined. But the terms are also sometimes used in other senses. For a given guaranty may be general in certain aspects and special in others. Thus, it may be general as to the whole world, to whom the principal may be accredited, and to any portion of whom, at his own option, he may make the guarantor a debtor, and at the same time it may be special as to the amount of the credit; or it may be unlimited or general as to amount, and special as to the parties who may act upon it. Taylor v. Wetmore, 10 Ohio, 491. And even when general, both as to amount and persons, it may contemplate only a single transaction, or an open and continued credit embracing several transactions. Union Bank v. Coster's Ex'rs, 3 N. Y. 214.

It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract; and, if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions, or acquire any advantage therefrom, unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed. Robbins v. Bingham, 4 Johns. (N. Y.) 476; Evansville Nat. Bank v. Kaufmann, 93 N. Y. 279.

It has been suggested in some cases that the right of a party advancing money upon a general letter of credit to maintain an action on it might be questionable, on the ground that there is no privity of contract. Bank of Ireland v. Archer, 11 Mees. & W. 383; Russell v. Wiggin, 2 Story, 214, Fed. Cas. No. 12,165; Torrance v. Bank, L. R. 5 C. P. 252.

But in this country the contrary doctrine is well settled, on the theory that the general letter is addressed to any and every person, and therefore gives to any person to whom it may be shown authority to advance upon its credit, so that it becomes, in legal effect,

the same as if addressed to him by name. Union Bank v. Coster's Ex'rs, 3 N. Y. 214; Duval v. Trask, 12 Mass. 154; Adams v. Jones, 12 Pet. 207.

FORMATION OF THE CONTRACT.

2. FORM OF THE CONTRACT.

Besides a consideration, it is essential that a contract of suretyship or guaranty should be between proper parties, viz. a promisor, a principal, and a promisee; and it is also essential that such contracts should describe or refer to these parties so as to identify them, either individually or as a class. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 279.

Except as otherwise required by its nature in a given case or by statute, the contract may be oral, but in practice is almost always in writing.

3. ASSENT OF THE PARTIES—ACCEPTANCE.

A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. Davis Sewing-Mach. Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173.

Upon the question whether, or in what cases, the guarantee, in addition to accepting in fact, and acting upon, a guaranty, must notify the guarantor thereof, a difference of opinion exists. In the federal courts, it is established, the guaranty is signed by the guarantor at the request of the guarantee, or if the latter's agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, or if the instrument is in the form of a bilateral contract in which the guarantee binds himself to make the contemplated advances, or which otherwise creates by its recitals a privity of contract between the guarantor and guarantee, in all these cases the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the guarantee, and in his absence, for no consideration moving between them except fu-

ture advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance and notice thereof by the other party to complete the contract. Davis Sewing-Mach. Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173; Davis v. Wells, 104 U. S. 164; City Council of Greenville v. Ormand, 51 S. C. 58, 28 S. E. 50; Gano v. Bank (Ky. App.) 45 S. W. 519.

In other jurisdictions, it is the fact of compliance with the outstanding offer, represented by a guaranty of a future obligation, which constitutes the consideration, and raises a privity of contract between the guarantor and the guarantee, and accordingly there is no general requirement of a notice of acceptance, such notice being unnecessary where the guaranty is absolute in form and only required where it is conditional upon such notice. Union Bank of Louisiana v. Coster's Ex'rs, 3 N. Y. 212; City Nat. Bank of Poughkeepsie v. Phelps, 86 N. Y. 493; Village of Chester v. Leonard, 68 Conn. 506, 37 Atl. 397; Taussig v. Reid, 145 Ill. 494, 32 N. E. 918; Mussey v. Rayner, 22 Pick. (Mass.) 223; Howe v. Nickels, 22 Me. 175; Norton v. Eastman, 4 Greenl. (Me.) 521.

An offer to guaranty may be a proposition which is to become a contract upon the giving of a promise for a promise, in which case a notice of acceptance is necessary; or it may be an offer intended to become a contract upon the doing of the act referred to, in which case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. But, even in such a case, if the act is of such a kind that knowledge of it will not quickly come to the guarantor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. Bishop v. Eaton, 161 Mass. 499, 500, 37 N. E. 665; Babcock v. Bryant, 12 Pick. (Mass.) 133; Whiting v. Stacy, 15 Gray (Mass.) 270.

When notice of acceptance is required, the implication is that notice shall be given in a reasonable manner, which may be by mail or otherwise, according to circumstances. If notice by letter is enough, a due mailing suffices, although the notice is not in fact received (Bishop v. Eaton, 161 Mass. 500, 501, 37 N. E. 665; Reynolds v. Douglass, 12 Pet. 504); and a due acceptance may arise by implication (Johnson v. Gerald, 169 Mass. 500, 48 N. E. 764).

Delivery. Although delivery of an instrument, as distinguished from a meeting of the minds of the parties, is not essential to the formation of a contract, as a general proposition, there are cases in which such delivery is essential to the creation of the obligation of a surety or guarantor. Thus, where one enters into an agreement with a building contractor, upon the faith of the latter's promise to give a bond as security, the other party is not bound until such bond is delivered, and the obligation of the sureties arises at the same time. Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669.

So the circumstances in connection with the execution of any contract, though signed and witnessed, may be such as to establish the understanding that it was not to become operative until delivery. Dietz v. Farish, 79 N. Y. 520.

Thus, if one surety signs and places a bond in the hands of his co-obligor with the stipulation that it is not to take effect unless another surety signs, and the obligee has notice of this, the first surety is not liable if the other did not sign. McFarlane v. Howell (Tex. Civ. App.) 43 S. W. 315; Quimby v. Wood, 19 R. I. 571, 35 Atl. 149; City of Hallettsville v. Long, 11 Tex. Civ. App. 180, 32 S. W. 567; Schuff v. Pflanz, 99 Ky. 97, 35 S. W. 132. But otherwise if the creditor has no notice of the fact. Etz v. Place, 81 Hun, 203, 30 N. Y. Supp. 765.

And an offer to guaranty, though reciting a consideration, must be delivered to the person guarantied, before it can take effect. Davis v. Wells, 104 U. S. 168.

And, in the case of a contract of guaranty or suretyship indorsed upon an instrument transferring an estate in land, a delivery of the principal instrument is requisite, delivery being an element of the execution of a deed. Kahn v. Brewing Co., 17 Misc. Rep. 394, 39 N. Y. Supp. 1093.

4. CONSIDERATION.

Like other contracts, that of a surety or guarantor requires a consideration.

(a) If the principal contract has already been executed, and the guaranty is given subsequently, there must be a new consideration, distinct from that supporting the principal contract. If, in such a case, the contract of guaranty is for the benefit of the guarantor, that fact constitutes a sufficient consideration. Davis v. Wells, 104 U. S. 165, 166; Overton v. Tracey, 14 Serg. & R. (Pa.) 311.

And the obligation of a surety to pay a note, though barred by the statute of limitations, is sufficient consideration for his subsequent guaranty thereof. Miles v. Linnell, 97 Mass. 298.

And if the owner of a note indorses and transfers it for a consideration, and guaranties collection, no further consideration to him is requisite. Gillighan v. Boardman, 29 Me. 79; Osborne v. Lawson, 26 Mo. App. 554.

(b) If a subsequent guaranty of an existing obligation is not given for the benefit of the guarantor, then an advantage accorded by the guarantee to the principal, involving forbearance, detriment, loss, or responsibility on the part of the guarantee, upon the faith of the guaranty, is a sufficient consideration. Traders' Nat. Bank v. Parker, 130 N. Y. 420, 29 N. E. 1094; Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330; Ware v. Adams, 24 Me. 177.

And if a debtor transfers property to a third person in consideration of the latter's promise to the debtor to pay the debt to the creditor, the latter may accept and adopt the promise when it becomes known to him, and may maintain an action upon it. When the promise in such cases is the consideration or condition upon which the third party has received the debtor's property, he thereby makes the debt his own, and assumes an independent duty of payment, irrespective of the liability of the principal or original debtor. Clark v. Howard, 150 N. Y. 238, 44 N. E. 695.

Even where the obligation has been created, but is not yet due and payable, a new consideration must appear, in order to bind one who then guaranties it. Tenney v. Prince, 4 Pick. (Mass.) 385.

An agreement by a creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional

promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear or to give time. If he is requested by his debtor to extend the time, and a third person undertakes, in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request, followed by performance, is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound except on condition that the other party entered into an immediate and reciprocal obligation to do the thing presented. The proposition of the guarantor is an outstanding offer, which the creditor may transform into a contract by an acceptance consisting in acting upon the faith thereof. Strong v. Sheffield, 144 N. Y. 394, 39 N. E. 330; Morton v. Burn, 7 Adol. & E. 19; Wilby v. Elgee, L. R. 10 C. P. 497; King v. Upton, 4 Greenl. (Me.) 387; Leake, Cont. p. 54; Forth v. Stanton, 1 Saund. 210, note (b). Compare Cary v. White, 52 N. Y. 138.

In the absence of a specified time, a reasonable time is held to be intended. Strong v. Sheffield, 144 N. Y. 395, 39 N. E. 330; Oldershaw v. King, 2 Hurl. & N. 517; Calkins v. Chandler, 36 Mich. 320.

In some jurisdictions, however, the rule is that mere forbearance by the creditor, in the absence of any agreement that he will forbear, is no consideration. Hess' Estate, 150 Pa. St. 346, 24 Atl. 676; Manter v. Churchill, 127 Mass. 31.

And the fact that the collateral may not be enforceable until a definite time in the future does not operate to extend the time of payment of the principal debt or suspend the right to sue upon the original security. U. S. v. Hodge, 6 How. 279; Fallkill Nat. Bank of Poughkeepsie v. Sleight, 1 App. Div. 191, 37 N. Y. Supp. 155.

(c) If the contract of guaranty or suretyship is made at the same time with the principal contract, and the latter is based upon the former, then no distinct consideration is requisite (Simons v. Steele, 36 N. H. 73; Erie Co. Sav. Bank v. Coit, 104 N. Y. 537, 11 N. E. 54); for

the guaranty or suretyship, on the one hand, and the execution of the principal contract by the guarantee, on the other, are considerations one for the other (Davis v. Wells, 104 U. S. 165); or, from another point of view, the consideration passing from the creditor supports both the principal contract and that of the surety or guarantor (Erie Co. Sav. Bank v. Coit, 104 N. Y. 537, 11 N. E. 54; Gillighan v. Boardman, 29 Me. 79; Hopkins v. Richardson, 9 Grat. [Va.] 494; Leonard v. Vredenburgh, 8 Johns. [N. Y.] 29; Darby v. Bank, 97 Ala. 645, 11 South. 881).

In order that the principal contract and the guaranty should be contemporaneous within the meaning of the foregoing proposition, it is not necessary that they should be strictly simultaneous. Thus, if A. procures a credit from B. upon the assurance that he will procure a guaranty from C., and within a short time he does so, the transactions are regarded as simultaneous, and no separate and distinct consideration to C. is requisite. Oppenheim v. Waterbury, 86 Hun, 122, 33 N. Y. Supp. 183; McNaught v. McClaughry, 42 N. Y. 22; Moies v. Bird, 11 Mass. 436; Leonard v. Wildes, 36 Me. 265; Hawkes v. Phillips, 7 Gray (Mass.) 286; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669.

(d) When the contract of guaranty or suretyship is tendered before the principal contract is made, as in the case of a letter of credit, and thus constitutes an outstanding offer, it becomes a binding contract, when accepted and acted upon, either with or without notice, according to the varying laws of different jurisdictions. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 279; Union Bank of Louisiana v. Coster's Ex'rs, 3 N. Y. 211; Davis v. Wells, 104 U. S. 166; Kennaway v. Treleavan, 5 Mees. & W. 498.

(e) When the consideration relied on is one passing directly from the guarantee to the guarantor, a nominal consideration of one dollar is sufficient. Davis v. Wells, 104 U. S. 167, 168.

(f) A written guaranty given by a third party to a creditor, that his debtor will thereafter pay to him a pre-existing debt, must, notwithstanding the amendment of the statute of frauds in New York by Laws 1863, c. 464, expressly or by fair implication disclose that the promise rests on a legal consideration. Barney v. Forbes, 118 N. Y. 585, 23 N. E. 890; Church v. Brown, 21 N. Y. 331; Drake v. Seaman, 97 N. Y. 230.

5. COMPETENCY TO CONTRACT.

The usual rules applicable to other contracts in respect to the capacity of corporations (Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755; Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 304), infants (Naples v. Wightman, 4 Conn. 376; Kline v. Beebe, 6 Conn. 503; Reed v. Lane, 61 Vt. 482, 17 Atl. 796; Patchin v. Cromack, 13 Vt. 334), intoxicated persons (Page v. Krekey, 137 N. Y. 311, 33 N. E. 311; Harty v. Smith, 74 Ill. App. 194), lunatics (Van Patton v. Beals, 46 Iowa, 62; Seaver v. Phelps, 11 Pick. [Mass.] 304), and persons under duress (see post, p. 15), to bind themselves by contract, apply to contracts of suretyship and guaranty, except as sometimes varied by statute.

The same principle applies to married women, except that general statutes conferring the right to contract have sometimes been construed not to cover the right to make contracts of suretyship, and that in New Jersey and some other states married women are prohibited from binding themselves as sureties. Todd v. Bailey, 58 N. J. Law, 10, 32 Atl. 696; Thacker v. Thacker, 125 Ind. 489, 25 N. E. 595; Taylor v. Acom (Ind. T.) 45 S. W. 130; Wolf v. Zimmerman, 127 Ind. 486, 26 N. E. 173; Freeman v. Coleman, 86 Ga. 590, 12 S. E. 1064; Walker v. Crucible Co., 47 N. J. Eq. 342, 20 Atl. 885; Athol Mach. Co. v. Fuller, 107 Mass. 437; Wiltbank v. Tobler, 181 Pa. St. 108, 37 Atl. 188; Willard v. Eastham, 15 Gray (Mass.) 328; Gosman v. Cruger, 69 N. Y. 87.

As to the liability of attorneys, where a statute or court rule requires that they shall not act as sureties on bonds required in legal proceedings, see Evans v. Harris, 15 Jones & S. (N. Y.) 366; Holandsworth v. Com., 11 Bush (Ky.) 617.

One who takes a promissory note bearing the indorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business. And, in order to recover, the holder is required to show special authority to make the indorsement on the part of the partner who signed the firm name, or an authority to be implied from the common course of business of the firm, or previous course of dealing between the parties, or that the indorsement was subsequently adopted and acted upon by the firm. Clarke v.

Wallace, 1 N. D. 404, 48 N. W. 339; Sweetser v. French, 2 Cush. (Mass.) 309; National Sec. Bank v. McDonald, 127 Mass. 82; Schermerhorn v. Schermerhorn, 1 Wend. (N. Y.) 119; Moynahan v. Hanaford, 42 Mich. 329, 3 N. W. 944; Moore v. Stevens, 60 Miss. 809. See Andrews v. Congar, 26 Lawy. Ed. 90; Winn v. Hillyer, 43 Mo. App. 139.

Duress. A bond executed under the duress of the principal is void as to the surety also, if the surety acted without knowledge of the fact of the duress; and knowledge of the imprisonment does not necessarily involve knowledge of its want of legality; but, if the surety knows of the duress when he undertakes to bind himself, the duress does not relieve him. Patterson v. Gibson, 81 Ga. 804, 10 S. E. 9; Osborn v. Robbins, 36 N. Y. 365; State v. Brantley, 27 Ala. 44; Fisher v. Shattuck, 17 Pick. (Mass.) 252.

The reason for the rule is that duress is illegal, a contract procured by duress is corrupt in its origin, and the wrongdoer should not be allowed to take a benefit from his wrongful act. Besides, if the surety contracts in ignorance of the duress, it materially increases the risk beyond that assumed in the usual course of business of that kind. Patterson v. Gibson, 81 Ga. 805, 10 S. E. 9.

Other authorities, however, hold that duress of the principal is not an available defense for the surety. Hauscombe v. Standing, Cro. Jac. 187; Robinson v. Gould, 11 Cush. (Mass.) 55; Bowman v. Hiller, 130 Mass. 153; Plummer v. People, 16 Ill. 358. Justice Paxson, in Griffith v. Sitgreaves, 90 Pa. St. 161, after reviewing many cases of the latter class, states that in all of them the duress was either upon the party seeking to avoid the contract sued on or it was known to him. See Fairbanks v. Snow, 145 Mass. 154, 13 N. E. 596, for a general discussion of duress, its nature and effect. Both principal and surety may be relieved by proof of duress as against both. U. S. v. Tingey, 5 Pet. 115.

Illegality. If the principal contract is contrary to public policy, the sureties or guarantors are not liable, and the same principle applies where the contract of suretyship or guaranty is itself contrary to public policy.

Thus, if A., having embezzled funds of B., gives his note for the amount in settlement, and C. guaranties the note on condition that A. shall not be prosecuted, or if a public board illegally loans pub-

lic moneys to one for his private use, and takes back his note for the same, which a third party signs as surety, the guarantor or surety is not liable. McMahon v. Smith, 47 Conn. 221; Howard v. Smith (Tex. Sup.) 38 S. W. 15; Rouse v. Mohr, 29 Ill. App. 321; Gorham v. Keyes, 137 Mass. 583; Board of Education of Hartford Tp. v. Thompson, 33 Ohio St. 321.

A promise by a payee to have the maker appointed to a public office, though made to induce a surety to sign, is, as against public policy, void, and could not deceive or defraud the surety. Graham v. Marks, 98 Ga. 67, 25 S. E. 931.

But if an administrator, in order to induce one to go upon his official bond, deposits with him the funds of the estate as security, this does not release the surety in case of a default on the part of the administrator; for the surety, by executing the bond, secured the appointment of the administrator upon the strength thereof. The giving of the bond is legal, and the only illegality consists in the attempt to illegally protect the surety from the legal liability he assumes,—an illegality in which the persons for whose benefit the bond is given have no part. Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. 94.

6. STATUTE OF FRAUDS.

The English statute of frauds (29 Car. II. c. 3), which is substantially followed by the statutes of most of our states, provides, in section 4, par. 2, "that no action shall be brought whereby to charge * * * the defendant upon any special promise to answer for the debt, default or miscarriage of another person * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(a) The term "special promise" is designed to avoid only such promises as are especially and particularly to answer for the debts of others, and not those which, while incidentally assuming the responsibility for such debts, are wholly or principally for the purpose of performing some distinct obligation of the promisor. Durham v. Manrow, 2 N. Y. 533; Mallory v. Gillett, 21 N. Y. 412; Sutton v. Grey [1894] 1 Q. B. 285; Little v. Edwards, 69 Md. 499,

16 Atl. 134; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58; Mitchell v. Beck, 88 Mich. 342, 50 N. W. 305; First Nat. Bank v. Chalmers, 120 N. Y. 658, 24 N. E. 848. A contract of reinsurance has been held not within the statute. Bartlett v. Insurance Co., 77 Iowa, 155, 41 N. W. 601. But see, contra, Egan v. Insurance Co., 27 La. Ann. 368.

Under this rule, the holder of a note or other security is bound by a verbal guaranty of its payment, made for the purpose of inducing another to purchase it. Milks v. Rich, 80 N. Y. 269; Cardell v. McNiel, 21 N. Y. 338; Darst v. Bates, 95 Ill. 493, at page 512. And see, in case of assignment and guaranty of judgment, Little v. Edwards, 69 Md. 499, 16 Atl. 134. So, also, where a person having property of his debtor to sell for payment of the debt guaranties the title to induce the promisee to buy it. Farnham v. Chapman, 61 Vt. 395, 18 Atl. 152. But see Dows v. Swett, 134 Mass. 142. And the promise by a del credere agent to his principal to guaranty the solvency of the persons to whom he sells goods is not within the statute. Couturier v. Hastie, 8 Exch. 40, 5 H. L. Cas. 673; Sherwood v. Stone, 14 N. Y. 267; Wolff v. Koppel, 5 Hill (N. Y.) 458, 2 Denio (N. Y.) 368; Swan v. Nesmith, 7 Pick. (Mass.) 220.

Again, if a creditor has, or is about to file, a lien on property to secure his claim, and a third person, whose interests are or may be prejudiced thereby, guaranties the debt in consideration of a release of the lien or forbearance to file it, his object is to remove or prevent the lien, and the guaranty is merely incidental, and some courts hold that it need not be in writing (Fitzgerald v. Dressler, 7 C. B. [N. S.] 374; Smith v. Bank, 110 Pa. St. 508, 1 Atl. 760; Wills v. Brown, 118 Mass. 138; Prime v. Koehler, 77 N. Y. 91); though the weight of authority is probably to the contrary, where the liability of the debtor continues (Nelson v. Boynton, 3 Metc. [Mass.] 396; Mallory v. Gillett, 21 N. Y. 412; Bunneman v. Wagner, 16 Or. 433, 18 Pac. 841; Clark v. Jones, 85 Ala. 127, 4 South. 771). And it has even been held that where the owner of a building, on which the contractor has abandoned work, promises to pay the contractor's workmen what is due them from the contractor if they will go on with the work, the undertaking is original; or to pay a material man if he will continue to supply materials to the contractor if the contractor fails to pay as agreed. Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516; Andre v. Bodman, 13 Md. 241. In this latter

case the claim against the contractor, it seems, was given up, so that there no longer existed any primary liability of a third person. Crawford v. Edison, 45 Ohio St. 239, 13 N. E. 80; Greenough v. Eichholtz (Pa. Sup.) 15 Atl. 712; Yeoman v. Mueller, 33 Mo. App. 343; Buchanan v. Moran, 62 Conn. 83, 25 Atl. 396. But the contrary has been held. See Farnham v. Davis, 79 Me. 282, 9 Atl. 725; Greene v. Latcham, 2 Colo. App. 446, 31 Pac. 233. Where a widow, continuing her deceased husband's business, promised her husband's creditor to pay his debt if he would sell her goods on credit, the promise was held to be within the statute. Ruppe v. Peterson, 67 Mich. 437, 35 N. W. 82. And see Dirringer v. Moynihan (Com. Pl.) 10 N. Y. Supp. 540.

(b) "*Debt, default, or miscarriage.*" The words, "debt, default, or miscarriage," seem, as said by De Col. Guar. & Sur. p. 61, to "point to three distinct kinds of guaranty, namely: (1) Guaranties for the payment of a 'debt' already contracted by another person; (2) guaranties against the 'default' of another person, i. e. for the payment of debts to be contracted by another person, or against loss that may occur from another's future breach of duty; and (3) guaranties against the 'miscarriage' of another person, i. e. against loss that may occur from another's past or future breaches of duty." The exact sense intended by the framers of the act to be attributed to each of these words, respectively, has been a subject of frequent speculation and some doubt. Throop, Verb. Agreem. 192.

However, it is settled that, taken together, they include all liabilities of a third person, however they may arise, and therefore include liabilities arising out of a wrong act or tort as well as those arising out of contract. Kirkham v. Marter, 2 Barn. & Ald. 613. And see Turner v. Hubbell, 2 Day (Conn.) 457; Mountstephen v. Lakeman, L. R. 7 Q. B. 202. They also include prospective as well as existing liabilities. "If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made." Mead v. Watson, 57 Vt. 426. And see Matson v. Wharam, 2 Term R. 80; Matthews v. Milton, 4 Yerg. (Tenn.) 576. A promise by one person to indemnify another for becoming a guarantor for a third is not within the statute. Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216.

(c) "*Of another person.*" The promise contemplated by the statute is a promise to answer for the debt, default, or miscarriage of "another person"; or, in other words, a contract of guaranty or suretyship. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. There must be three parties in contemplation,—a person who is actually or prospectively liable to another person, and a third person who promises the creditor to answer for the debt or liability; or, in other words, a creditor, a principal debtor, and a guarantor of the debt, or surety. Though there is considerable conflict between the courts in their construction of this clause of the statute, the following rules for determining whether a contract comes within it are established by the weight of authority:

(d) There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. Baldwin v. Hiers, 73 Ga. 739; Morris v. Osterhout, 55 Mich. 262, 21 N. W. 339; De Witt v. Root, 18 Neb. 567, 26 N. W. 360. Where an agent has become liable to his principal by lending money contrary to instructions, his guaranty of the loan is not within the statute. Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033. A promise by a married woman to pay her parent for her support was held a promise to pay her husband's debt. Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. 139. If, for instance, two persons come into a store, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," or "I will see you paid," and credit is given to him alone, he is himself the buyer, and the undertaking is original. Birkmye v. Darnell, 1 Salk. 27; Hartley v. Varner, 88 Ill. 561; Nelson v. Boynton, 3 Metc. (Mass.) 396; Greene v. Burton, 59 Vt. 423, 10 Atl. 575; Geelan v. Reid, 22 Ill. App. 165; Higgins v. Hallock, 60 Hun, 125, 14 N. Y. Supp. 550; Boston v. Farr, 148 Pa. St. 220, 23 Atl. 901; Crowder v. Keys, 91 Ga. 180, 16 S. E. 986; Mountstephen v. Lakeman, L. R. 7 H. L. 17. And see cases cited above and in the following notes. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to

the promisor, his undertaking is original (Chase v. Day, 17 Johns. [N. Y.] 114; Morris v. Osterhout, 55 Mich. 262, 21 N. W. 339; Larson v. Jensen, 53 Mich. 427, 19 N. W. 130; Hartley v. Varner, 88 Ill. 561; Myer v. Grafflin, 31 Md. 350; Grant v. Wolf, 34 Minn. 32, 24 N. W. 289; Ellis v. Murray, 77 Ga. 542; Hake v. Solomon, 62 Mich. 377, 28 N. W. 908; Hazeltine v. Wilson, 55 N. J. Law, 250, 26 Atl. 79); but it is collateral if any credit was given to the other party (Welch v. Marvin, 36 Mich. 59; Cahill v. Bigelow, 18 Pick. [Mass.] 369; Norris v. Graham, 33 Md. 56; Matthews v. Milton, 4 Yerg. [Tenn.] 576; Baldwin v. Hiers, 73 Ga. 739; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. 622; Bugbee v. Kendricken, 130 Mass. 437; Mead v. Watson, 57 Vt. 426; Studley v. Barth, 54 Mich. 6, 19 N. W. 568; Robertson v. Hunter, 29 S. C. 9, 6 S. E. 850).

(c) Even though there is an existing liability of a third person for which the promisor undertakes to answer, still the promise is not within the statute, if the terms are such that it effects an extinguishment of such liability; in other words, the liability of the original debtor must continue. A promise to pay another's debt in consideration of the creditor's doing something which will extinguish his claim against the debtor, and release him absolutely, need not be in writing. Mallory v. Gillett, 21 N. Y. 412; Goodman v. Chase, 1 Barn. & Ald. 297; Teeters v. Lamborn, 43 Ohio St. 144, 1 N. E. 513; Andre v. Bodman, 13 Md. 241; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247; Curtis v. Brown, 5 Cush. (Mass.) 488; Mulcrone v. Lumber Co., 55 Mich. 622, 22 N. W. 67; Runde v. Runde, 59 Ill. 98; Whittemore v. Wentworth, 76 Me. 20; Green v. Solomon, 80 Mich. 234, 45 N. W. 87; Carlisle v. Campbell, 76 Ala. 247. To take the promise out of the statute, the original debtor's release must be absolute. If the creditor may still hold him liable at his option, the promise must be in writing. Nelson v. Boynton, 3 Mete. (Mass.) 396; Welch v. Marvin, 36 Mich. 59; Waggoner v. Gray, 2 Hen. & M. (Va.) 612; Willard v. Bosshard, 68 Wis. 454, 32 N. W. 538; Hill v. Frost, 59 Tex. 25; Pfaff v. Cummings, 67 Mich. 143, 34 N. W. 281. The fact that a lien against the original debtor is released has been held immaterial, if the debtor himself remain liable. Nelson v. Boynton, supra; Mallory v. Gillett, 21 N. Y. 412. A promise to pay another's debt merely, if the promisee will forbear to sue the debtor, which he does, is within the statute. Gump v. Halberstadt, 15 Or. 356, 15 Pac. 467, containing a collection of the

cases on this point; Watson v. Randall, 20 Wend. (N. Y.) 201; White v. Rintoul, 108 N. Y. 222, 15 N. E. 318. Novations fall within this class of agreements.

(f) The promise must contemplate payment by the promisor out of his own property, or, at least, not out of the property of the debtor, from which, or from the proceeds of which, the promisor is under a duty to pay or is authorized to pay; for in such a case the payment is, in effect, by the debtor. The statute has no application to "cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claims of a particular creditor of the debtor. The promise, in such case, is an original promise, and the property placed in his hands is its consideration. In this class of cases it is immaterial whether the liability of the original debtor continues or not." Mallory v. Gillett, 21 N. Y. 412; Wait v. Wait, 28 Vt. 350; Belknap v. Bender, 75 N. Y. 446; First Nat. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 39 N. E. 331; Fehlinger v. Wood, 134 Pa. St. 517, 19 Atl. 746; Sext v. Geise, 80 Ga. 698, 6 S. E. 174. But see Gower v. Stuart, 40 Mich. 747; Frame v. August, 88 Ill. 424.

(g) A promise to pay another's debt, to come within the statute, must be made to the creditor, and not to the debtor. A promise to the debtor himself to pay his debt for him does not require writing. Eastwood v. Kenyon, 11 Adol. & E. 438; Windell v. Hudson, 102 Ind. 521, 2 N. E. 303; Alger v. Scoville, 1 Gray (Mass.) 391, 395. Illustrations of this are where a person buys land or goods, and agrees to pay the purchase money to a creditor of the seller, or, as part of the consideration, assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt in a particular way. Wilson v. Bevans, 58 Ill. 232; Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. 112; Delp v. Brewing Co., 123 Pa. St. 42, 15 Atl. 871; Bateman v. Butler, 124 Ind. 223, 24 N. E. 989; Price v. Reed, 38 Mo. App. 489; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937. Nor is a promise to indemnify or save another harmless from any liability which he may incur as the result of a transaction into which he enters at the instance of the promisor, as in the case of a promise to indemnify the promisee against loss from going bail for another, within the statute. Anderson v. Spence, 72 Ind. 315; Aldrich v. Ames, 9 Gray (Mass.) 76; Thomas v. Cook, 8 Barn.

& C. 728; Beaman v. Russell, 20 Vt. 205; Barry v. Ransom, 12 N. Y. 462. So, also, a promise made to a debtor to indemnify him against any claim arising from his debt is not within the statute, where the promisor does not become liable to the creditor. Conkey v. Hopkins, 17 Johns. (N. Y.) 113; Weld v. Nichols, 17 Pick. (Mass.) 538. It is nothing more than a promise to pay a prospective debt of the promisee. It has been sought in some, if not most, of the books to distinguish between contracts within the statute and contracts of indemnity by saying, without qualification, that a promise of indemnity is not within the statute; but this may mislead. Such a promise to indemnify the promisee against any liability which he may incur, as we have mentioned, is not within the statute; but it is otherwise where the promise is to indemnify the promisee against any loss he may sustain by reason of the default or miscarriage of a person under liability to him. Nugent v. Wolfe, 111 Pa. St. 471, 4 Atl. 15; Mallory v. Gillett, 21 N. Y. 412; Cheesman v. Wiggins, 122 Ind. 352, 23 N. E. 945. In jurisdictions where acceptances of bills of exchange are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances, if assented to by the holder, are permitted. Scudder v. Bank, 91 U. S. 406; Stockwell v. Bramble, 3 Ind. 428; Exchange Bank v. Rice, 98 Mass. 288.

PRINCIPLES OF CONSTRUCTION.

7. (a) The liability of a surety or guarantor is strictissimi juris, and he is not to be held liable beyond the precise stipulations of his contract. Douglass v. Reynolds, 7 Pet. 125; Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397; Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560.

This does not mean that a different rule must be applied in the construction of such contracts from that which is to be applied in the construction of contracts in general. Like all other contracts, they must be construed fairly and reasonably, and according to the intention of the parties. But when the meaning of the language used has been thus ascertained, the responsibility of the guarantor or surety is not to be extended or enlarged by implication or construction, and is strictissimi juris. People v. Backus, 117 N. Y. 196, 22 N. E. 759; Northern Light Lodge No. 1, I. O. O. F., v. Kennedy

(N. D.) 73 N. W. 524; Locke v. McVean, 33 Mich. 473; Weiler v. Henarie, 15 Or. 28, 13 Pac. 614.

(b) If the phraseology of a contract of guaranty or suretyship is so ambiguous as not to furnish conclusive evidence of its meaning, light may be sought from the extrinsic circumstances. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 281.

(c) If, as thus interpreted, the contract is still fairly open to different constructions, it is to be interpreted most strongly against the surety or guarantor, because it was he who adopted the phraseology. Lawrence v. McCalmont, 2 How. 426; Hargreave v. Smee, 6 Bing. 244; Belloni v. Freeborn, 63 N. Y. 388; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669.

LIABILITY OF SURETY OR GUARANTOR.

8. WHEN DOES THE LIABILITY ARISE.

The surety, being a debtor from the beginning, must see that the debt is paid, and his liability to pay the debt himself arises as soon as it is due. The guarantor is not liable until after the principal has failed to perform, and even then his obligation, at least theoretically, is not to pay the debt, but to answer for the consequences of the default. In a guaranty of collection, he is only liable after the appropriate means of collecting from the principal have been exhausted; while in a guaranty of payment his liability arises immediately upon default, subject, in certain cases elsewhere considered, to his right to have demand made upon the principal and notice of default given to himself. Saint v. Manufacturing Co., 95 Ala. 371, 10 South. 539; McMurray v. Noyes, 72 N. Y. 525; McMillan v. Bank, 32 Ind. 13. Compare Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. 35; and, as to the Pennsylvania cases, see Walton v. Mascall, 13 Mees. & W. (Hare & W. Am. Ed.) p. 72, note.

The prospective obligation, however, both of surety and guarantor, exists as soon as their contract is complete. Davis Sewing-Mach. Co. v. Richards, 115 U. S. 527, 6 Sup. Ct. 173; City Nat. Bank of Poughkeepsie v. Phelps, 86 N. Y. 493; Mussey v. Rayner, 22 Pick. 223; Kennaway v. Treleavan, 5 Mees. & W. 498.

By the general rule of law, a covenant to indemnify against a

future judgment, charge, or liability is broken by the recovery of a judgment, or the fixing of a charge or liability in the matter to which the covenant relates. When the covenant is one of indemnity against the recovery of a judgment, the cause of action on the covenant is complete the moment the judgment is recovered, and an action for damages may be immediately maintained thereon, measured by the amount of the judgment; and this, although the judgment has not been paid by the covenantee, and although the covenantor was not a party, or had no notice of the former action. The covenantor, in an action on a covenant of general indemnity against judgments, is concluded, by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity to make the right of the covenantee to maintain an action on the covenant depend upon the result of the retrial of an issue which, as against the covenantee, had been conclusively determined in the former action; always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding, on the ground of fraudulent collusion, for the purpose of charging the surety. A judgment by default or on consent is also covered by the covenant, but in such cases is only presumptive evidence against the sureties. Conner v. Reeves, 103 N. Y. 527, 9 N. E. 439.

The cases relating to bonds conditioned on the faithful performance of duty by officials present certain peculiarities because of the fact that the statutes under which they are usually given vary in their terms. Accordingly, the bond may go into effect from its date, or upon delivery, or upon acceptance by the government, or otherwise, as affected by special circumstances, or as specified or implied in the statutes governing a given case. Broome v. U. S., 15 How. 143; U. S. v. Le Baron, 19 How. 73; Ætna Life Ins. Co. v. American Surety Co., 34 Fed. 299; Dawes v. Edes, 13 Mass. 177; Reilly v. Dodge, 42 Hun, 646.

And after the bond goes into effect, it may relate back to cover a period contemplated by its terms. Ætna Life Ins. Co. v. American Surety Co., 34 Fed. 299; Dawes v. Edes, 13 Mass. 177; Choate v. Arrington, 116 Mass. 557.

Negotiability and assignability. In considering the question of the transfer from one person to another of the benefit of a guaranty, or of rights arising therefrom, it is important to distinguish between negotiability and mere assignability. Negotiability is the peculiar characteristic of commercial paper, by virtue of which the indorsee before maturity and for value takes the thing transferred free from equities existing between the original parties. The term "assignment" relates to a transfer by which the transferee merely steps into the shoes of his transferror, and is thus affected by equities which might have been set up against the latter if no transfer had been made. Trust Co. v. National Bank, 101 U. S. 71.

It was probably the common-law rule, in the first instance, that no assignee of the benefits of a contract could sue for and recover them. 2 Rand. Com. Paper, 290.

The primitive view was, in the first place, that the contract created a strictly personal obligation between the creditor and the debtor, and also that the assignment of choses in action would increase litigation, —a reason which led the courts to set their faces resolutely against it. Pol. Cont. 207; Beecher v. Buckingham, 18 Conn. 110.

And whether from reasons of business expediency, or because they were influenced by equitable doctrines, is not clear, but the courts of common law, at an early day, modified this rule into one that for a long time prevailed, namely, that an assignment of a contract might be made, but the assignee must sue for its benefit in the name of the assignor or his representatives. The theory was that the courts of common law would so far take cognizance of equitable rights created by the assignment that the name of the assignor might be used as a trustee of the benefits of the contract for the benefit of the assignee. Caister Parish v. Eccles Parish, 1 Ld. Raym. 683; McWilliams v. Webb, 32 Iowa, 577; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31.

This doctrine has been generally modified by statutes, the commonest ones, in the United States, being the provisions of the various Codes that "every action must be prosecuted by the real party in interest," and that the "transfer of every claim or demand passes an interest which the transferee may enforce by an action in his own name, as the transferror might have done." With courts of equity, it is true, the rule was different; for in equity, from immemorial times, the as-

signment of a chose in action or of the benefits under a contract has been permitted, and the assignee could maintain a suit in equity in his own name. Smith v. Brittain, 38 N. C. 347; Tibbets v. Gerrish, 25 N. H. 41.

But, however salutary the operation of this equitable rule might have been in some phases of the enforcement of contract rights, it could have had little influence with bills and notes. Cases arising upon them came within the cognizance of the courts of common law. And there are cases to show that even when the assigned nonnegotiable promise was to pay a sum of money to the promisee, or to bearer, or to order, or where, by any other form of words, the instrument purported to be made assignable, even then the holder could not sue in his own name, but only in that of his assignor. Coolidge v. Ruggles, 15 Mass. 387; Clark v. King, 2 Mass. 524; Weidler v. Kauffman, 14 Ohio, 455; Jones v. Carter, 8 Q. B. 134.

There were other rules relating to the transfer of ordinary contracts, governing alike courts of common law and equity, which were of greater practical importance. The first is the doctrine of notice. The rule governing assignment is that title in third parties, as against the debtor, is not complete without notice to him. Naturally, as the result of this rule, follows the one that a debtor who performs his contract to the original creditor, without notice of any assignment by the creditor to another person, is released from his obligation under it. Judson v. Corcoran, 17 How. 612; Vanbuskirk v. Insurance Co., 14 Conn. 141; Smith v. Ewer, 22 Pa. St. 116; Merchants' & Mechanics' Bank of Chicago v. Hewitt, 3 Iowa, 93; Winberry v. Koonce, 83 N. C. 351; Hobson v. Stevenson, 1 Tenn. Ch. 203; Richards v. Griggs, 16 Mo. 416.

The rules in regard to negotiability are in sharp contrast to the principles governing assignments. With instruments made payable in blank or to bearer, the debtor is prima facie protected in payments upon negotiable bills and notes made to the person who has the instrument in his possession. Pettee v. Prout, 3 Gray (Mass.) 502; Way v. Richardson, Id. 412; Garvin v. Wiswell, 83 Ill. 215; Jewett v. Cook, 81 Ill. 260; Collins v. Gilbert, 94 U. S. 753; Rubey v. Culbertson, 35 Iowa, 264; Ecton v. Harlan, 20 Kan. 452; Wells v. Schoonover, 9 Heisk. (Tenn.) 806.

The last, and perhaps most important, distinction made between the

transfers of nonnegotiable contracts and those of negotiable bills and notes is that in case of the former the assignee takes subject to the equities or defenses existing between the prior parties, while the bona fide holder of a negotiable instrument may disregard these equities, and recover, upon suit, the full amount called for by the instrument he buys. According to Dwight, C. (Trustees of Union College v. Wheeler, 61 N. Y. 101), the assignee of a non-negotiable contract takes subject, not only to the equities existing between the original parties, but also must always abide the case of the person from whom he buys. The holder of a chose in action cannot alienate anything but the beneficial interest he possesses. Warner v. Whittaker, 6 Mich. 133; Seligman v. Ten Eyck's Estate, 49 Mich. 104, 13 N. W. 377; Shotwell v. Webb, 23 Miss. 375; Howell v. Medler, 41 Mich. 641, 2 N. W. 911; Ayres v. Campbell, 9 Iowa, 213; Timms v. Shannon, 19 Md. 296; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. St. 438; Cary v. Bancroft, 14 Pick. (Mass.) 315; Harwood v. Jones, 10 Gill & J. (Md.) 404; Scott v. Shreeve, 12 Wheat. 605.

It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. This is undoubtedly the law in England and in New York, though in many of the states of the Union the great authority of Chief Justice Kent has prevailed to limit the equities to those existing between the original parties, and does not extend them to those existing in favor of third parties. The technical or theoretical reason of the rule is that given by Judge Story (Eq. Jur. § 1040): "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession." This theory leads to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his name, and on the supposition that, for the purposes of the action, he is still the owner.

As to the negotiability of guaranties indorsed on or referring to negotiable paper, the authorities are in some respects conflicting. Daniel, Neg. Inst. §§ 1774–1784.

(1) A guaranty of a negotiable promissory note, in general terms, if upon a separate paper, is not itself negotiable. McLaren v. Watson, 26 Wend. (N. Y.) 430, 446, affirming 19 Wend. (N. Y.) 557.

(2) This rule applies both where the guaranty is made to a given individual by name, and where no guarantee is named, for in the latter case it is limited to the first person who thereafter takes the instrument guaranteed, in reliance upon the guaranty. Id.; Story, Prom. Notes, § 484.

(3) Where, before delivery, a general guaranty is indorsed upon negotiable paper by one not a party thereto, and naming no guarantee, it is held in some states that it does not partake of the negotiability of the paper guaranteed. Tinker v. McCauley, 3 Mich. 188; True v. Fuller, 21 Pick. (Mass.) 140; Sandford v. Norton, 14 Vt. 228.

Such a guaranty becomes fixed whenever any one takes it upon the guarantor's credit. Nevius v. Bank, 10 Mich. 547.

But, where a note is guaranteed in general terms, there is a presumption that the plaintiff suing thereon, appearing to be the first and only holder for value, was the person to whom the guaranty was given or duly transferred. Northumberland Co. Bank v. Eyer, 58 Pa. St. 103; Cooper v. Dedrick, 22 Barb. (N. Y.) 516; Nevius v. Bank, 10 Mich. 547. See Taylor v. Binney, 7 Mass. 481; True v. Fuller, 21 Pick. (Mass.) 142.

If the guaranty, though on a separate paper, is attached to the instrument guaranteed, the effect is the same as though it were indorsed thereon. Everson v. Gere, 122 N. Y. 292, 25 N. E. 492.

In other states it is held that a general guaranty upon the back of a negotiable instrument, specifying no person to whom the guarantor undertakes to be liable, runs with the instrument on which it is written and to which it refers, partakes of its character of negotiability, and any person having the legal interest in the principal instrument takes in like manner the incident and may sue upon the guaranty. Commercial Bank v. Cheshire Provident Inst. (Kan. Sup.) 53 Pac. 131; Webster v. Cobb, 17 Ill. 466; Partridge v. Davis, 20 Vt. 499. See Watson v. McLaren, 19 Wend. (N. Y.) 557. Pars. Notes & B. p. 132, says that though strong opinions, resting on strong arguments, have been expressed in favor of the doctrine that the negotiability of paper guaranteed attaches to the contract of guaranty which is indorsed upon it, the weight of authority is opposed to this view.

(4) Where the holder of a negotiable note, in transferring it to another, indorses and signs a guaranty thereon, but does not other-

wise indorse the note, it has been held that the guaranty does not inure to the benefit of any holder subsequent to the one taking from the guarantor, so as to enable him to sue the latter thereon, in the absence of proof of any subsequent privity. Taylor v. Binney, 7 Mass. 481. See Trust Co. v. National Bank, 101 U. S. 70. Contra, Phelps v. Church, 65 Mich. 232, 32 N. W. 30; Cooper v. Dedrick, 22 Barb. (N. Y.) 516; Partridge v. Davis, 20 Vt. 499; Benton v. Fletcher, 31 Vt. 418; Judson v. Gookwin, 37 Ill. 286. But the immediate transferee for whose benefit the guaranty is given may sue upon it. Brown v. Curtiss, 2 N. Y. 225. And see Upham v. Prince, 12 Mass. 14; Barrett v. May, 2 Bailey (S. C.) 1.

(5) Passing from the question of negotiability to that of assignability, the principle in equity is that, in any case of a guaranty upon or accompanying negotiable paper, the holder of the paper may assign his right with the paper guaranteed, so that the assignee may sue in the name of the original guarantee. 2 Daniel, Neg. Inst. 1775; Story, Bills, 457.

In New York it is settled that a special guaranty, limited to the person to whom it is addressed, and contemplating a trust or reposing a confidence in such person, is not assignable until a cause of action has arisen thereon. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273; Bennett v. Draper, 139 N. Y. 266, 34 N. E. 791. Thereafter, by virtue of the statute relating to actions by the real party in interest, the assignee of the cause of action may now sue thereon in his own name. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 277.

But where, as in the case of a guaranty of a promissory note previously executed and delivered, the amount and time of payment of which are fixed, the guarantor undertakes to pay it if the maker does not, it makes no difference to the guarantor whether he pays it to the payee, or to some one else to whom the latter transfers his claim, and the latter may sue in his own name. Everson v. Gere, 122 N. Y. 290, 25 N. E. 492. Compare Lamourieux v. Hewit, 5 Wend. (N. Y.) 307.

The fact that a guaranty is in terms negotiable makes the guaranty pass with the instrument, and vests whomsoever may hold the note with right to sue upon it, but this does not change its character of a guaranty (Allen v. Rightmere, 20 Johns. [N. Y.] 365; Ketchell v. Burns, 24 Wend. [N. Y.] 456. Compare Story, Prom. Notes, § 484; Palmer v. Grant, 4 Conn. 389); and accordingly, being

a guaranty, the debtor must seek the creditor, and the guarantor is entitled to no notice of the failure of the maker or acceptor to pay the instrument (Allen v. Rightmere, 20 Johns. [N. Y.] 365; Walton v. Mascall, 13 Mees. & W. 72); though this may be varied by the particular terms of given guaranties (Arents v. Com., 18 Grat. [Va.] 770).

Under the statutes declaring only bills and notes to be negotiable, a guarantor of coupons on railroad bonds, though the guaranty is available as such to a transferee of the principal instruments, may make any defense that he could have made if sued by the original payee in the bonds. Eastern Townships Bank v. St. Johnsbury & L. C. R. Co., 40 Fed. 423.

Words of assignment on the back of instruments, unless clearly showing an intention to exempt the transferror from an indorser's liability, are treated as an indorsement. Sears v. Lantz, 47 Iowa, 658; Vanzant v. Arnold, 31 Ga. 210; Fassin v. Hubbard, 55 N. Y. 465; Richards v. Frankum, 9 Car. & P. 221; Shelby v. Judd, 24 Kan. 166; Hall v. Toby, 110 Pa. St. 318, 1 Atl. 369.

9. EXTENT OF LIABILITY.

The liability of a surety or guarantor is not to be extended beyond the terms of his contract, properly construed. To the extent, and in the manner, and under the circumstances prescribed in his obligation, he is bound, but no further.

He has a right to stand upon the precise terms of his contract. And if there be a default, or breach of condition, his liability must be determined by the terms of the contract, which cannot be extended by construction or implication to cover a case not within its provisions. Cushing v. Cable, 48 Minn. 3, 50 N. W. 891; Peru Plow & Wheel Co. v. Ward, 1 Kan. App. 6, 41 Pac. 64; Miller v. Stewart, 9 Wheat. 681; Flynn v. Mudd, 27 Ill. 323; Chase v. McDonald, 7 Har. & J. (Md.) 160; Noyes v. Granger, 51 Iowa, 227, 1 N. W. 519; Ludlow v. Simond, 2 Caines, Cas. (N. Y.) 1; U. S. v. Boecker, 21 Wall. 652.

If a surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal; and, if he is sued upon the substituted agreement, he is entitled, both in law and equity, to make

the short and conclusive answer, "Non hæc in fœdera veni." Ide v. Churchill, 14 Ohio St. 372; Mayhew v. Boyd, 5 Md. 102; Bacon v. Chesney, 1 Starkie, 192; Peru Plow & Wheel Co. v. Ward, 1 Kan. App. 6, 41 Pac. 64; Paine v. Jones, 76 N. Y. 274; Coburn v. Webb, 56 Ind. 96.

A surety for an official holding office for a period fixed by statute is generally only liable for that period. Board of Adm'rs v. McKowen, 48 La. Ann. 251, 19 South. 328; Hassell v. Long, 2 Maule & S. 363; Mayor, etc., of Wilmington v. Horn, 2 Har. (Del.) 190.

But see, further, as to the question of liability while the official holds over pending the appointment of a successor, Baker City v. Murphy, 30 Or. 405, 42 Pac. 133; Eddy v. Kincaid, 28 Or. 537, 41 Pac. 156.

Where a bond given by a surety for himself and his administrators, to secure the due discharge of his trust by a bank cashier, was conditional upon such performance during his entire employment, whether under his present or any subsequent election, and whether under the bank's present charter or any renewals or extensions thereof, the surety was held liable, though the breach of duty by the cashier occurred while he thereafter held office, without the formal re-election, as required by statute. Shackamaxon Bank v. Yard, 143 Pa. St. 129, 22 Atl. 908; Id., 150 Pa. St. 351, 24 Atl. 635.

But a bond to secure the faithful performance of official duties by a third person in a specified capacity does not render the surety liable for his default in the duties of a distinct office to which he is subsequently appointed. National Mechanics' Banking Ass'n v. Conkling, 90 N. Y. 120.

The sureties of a city clerk are not responsible for his misappropriation of public moneys paid to him which should have been paid to another official. Orton v. City of Lincoln, 156 Ill. 499, 41 N. E. 159; San Luis Obispo Co. v. Farnum, 108 Cal. 562, 41 Pac. 445; Lowe v. City of Guthrie, 4 Okl. 287, 44 Pac. 198. Compare Campbell v. People, 154 Ill. 595, 39 N. E. 578; Spindler v. People, 154 Ill. 637, 39 N. E. 580.

So, the sureties of an official are not liable for his misfeasance occurring entirely during a term of office prior to that covered by their bond (Bogardus v. People, 52 Ill. App. 179); but are liable for his failure to account, during the latter term, for moneys received during the prior term (U. S. v. Dudley, 21 D. C. 337), as well as for his mis-

appropriation of funds during the term covered by the bond, though effected for the purpose of covering a defalcation committed during the prior term (People v. Hammond, 109 Cal. 384, 42 Pac. 36); and the sureties on the new bond of an official who succeeds himself are liable for his misappropriation or failure to account, during that term, for funds remaining in his hands when the prior term ended (Trustees of Schools v. Arnold, 58 Ill. App. 103).

If a register of deeds, during the term for which a bond has been given to secure the faithful performance of all the duties of his office, is by statute subjected to liability for damages to individuals injured by his failure to index instruments, the sureties are also liable (State v. Grizzard, 117 N. C. 105, 23 S. E. 93); and sureties on an official bond may be liable for various torts of the principal, in so far as they constitute a breach of his official duty (Rischer v. Meehan, 11 Ohio Cir. Ct. R. 403; Stephenson v. Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137. Compare Marquis v. Willard, 12 Wash. 528, 41 Pac. 889).

The terms of an official bond may be such as not to render the sureties liable for disbursements erroneously made by the official, if actually made in good faith and for the benefit of the government. U. S. v. McClane, 74 Fed. 153.

The terms of a given contract of suretyship or guaranty may be such as to cover a wider field than the usual one. Thus, where a bond was given to a bank, conditioned upon the faithful and honest performance by the cashier of all his duties during his term of office, and he converted funds of the bank to his own use, and engaged in a conspiracy to defraud the bank, by which the latter lost funds belonging to it, it was held that the fact that the bank had failed to provide an "exchange committee," as required by its by-laws, and that in the absence of such a committee the cashier had exclusive authority to transact the business of the bank, would not relieve the sureties, nor would the fact that his salary had been increased in consideration of his performing other duties not affecting the continuance of his full duties as cashier, if the losses in question occurred because of his breach of duty as cashier. Wallace v. Bank, 126 Ind. 265, 26 N. E. 175; Shackamaxon Bank v. Yard, 150 Pa. St. 351, 24 Atl. 635. Compare American Tel. Co. v. Lennig, 139 Pa. St. 594, 21 Atl. 162.

And a surety for a contractor is not discharged from liability although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor, against which the surety has, by the contract of suretyship, guarantied the employer. Mayor, etc., of Kingston-upon-Hull v. Harding [1892] 2 Q. B. 494.

As to the liability of sureties on statutory undertakings to secure a stay on appeal, see Foo Long v. Surety Co., 146 N. Y. 251, 40 N. E. 730.

The liability of a guarantor under a continuing guaranty remains in operation, in respect to advances, credits, etc., made during the entire period covered thereby, if any time limit or other condition is named, either expressly or by implication, or otherwise, until revocation, in cases where the guaranty may be revoked. Burch v. De Rivera, 53 Hun, 367, 6 N. Y. Supp. 206.

Inasmuch as a contract of suretyship or guaranty may, as elsewhere stated, be general or special, assignable or nonassignable, negotiable or nonnegotiable, the persons in favor of whom a given contract may operate are different in these different classes of cases. The surety or guarantor may restrict his obligation to specified persons, or extend it to any person whatever who may act upon it, or to those who shall first act upon it, or to any person in a specified class; and the only difficulty in given cases is to ascertain what was intended by the terms of his contract, subject to certain restrictive principles as to assignability and negotiability,—topics which are considered below. Evansville Nat. Bank v. Kaufmann, 93 N. Y. 277, 279; Lowry v. Adams, 22 Vt. 160; Robbins v. Bingham, 4 Johns. (N. Y.) 476; Union Bank v. Coster, 3 N. Y. 214.

A guaranty may be given to specified persons, expressly or by implication on behalf of others; and in such a case the former may sue, though it was the latter who made advances or otherwise incurred obligations or liabilities on the faith of the guaranty. Lloyd's v. Harper, 16 Ch. Div. 290.

A guaranty to secure credit is terminated, as to future credits, by the insolvency of the person credited, of which the creditor has notice. Lennox v. Murphy (Mass.) 50 N. E. 644.

If a guaranty is given with the purpose of securing a partnership, the fact that it was in form addressed to one of the members, under whose name the firm did business, does not prevent their availing

themselves of it (Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251); though it is otherwise where the guarantor does not know that it is a firm that proposes to rely on the guaranty, and he proposes to guaranty only the individual to whom the guaranty runs (Barns v. Barrow, 61 N. Y. 39; Lord Arlington v. Merricke, 2 Saund. 414; Wright v. Russel, 2 W. Bl. 934; Myers v. Edge, 7 Term R. 254; Holmes v. Small, 157 Mass. 223, 32 N. E. 3).

In the absence of language, in a guaranty given to a firm, showing that the parties intended that it should survive changes in the partnership, and inure to the benefit of a new firm, as well as the old, it terminates with the existence of the firm to which it was given. Bennett v. Draper, 139 N. Y. 270, 34 N. E. 791; Strange v. Lee, 3 East, 489; Add. Cont. 655.

But loans on advances made by the old firm on the faith of the guaranty could be assigned to the new firm, and such assignment would carry with it a right of action on the guaranty. Bennett v. Draper, 139 N. Y. 270, 34 N. E. 791.

And the fact that a guaranty addressed to a firm is a continuing one does not operate to continue it after the membership of the firm changes. Burch v. De Rivera, 53 Hun, 367, 6 N. Y. Supp. 206.

RIGHTS OF THE SURETY OR GUARANTOR.

10. (a) *As against the principal.* After the debt is due, and the surety or guarantor has paid the same, his right of action arises against the principal without demand for what he has thus paid, with interest and costs. Collins v. Boyd, 14 Ala. 505; Harper v. McVeigh, 82 Va. 751; Tillotson v. Rose, 11 Metc. (Mass.) 299; Eaton v. Lambert, 1 Neb. 339; Ward v. Henry, 5 Conn. 595; Coggeshall v. Ruggles, 62 Ill. 401; Bushong v. Taylor, 82 Mo. 670; Cranmer v. McSwords, 26 W. Va. 417.

The surety or guarantor may also, by special agreement, have other means of indemnifying himself, as by enforcing securities given to secure him against loss (West v. Hayes, 117 Ind. 290, 20 N. E. 155); and is not debarred from becoming a purchaser at sheriff's sale of the property of the principal (Mathis v. Stufflebeam, 94 Ill. 487). He may also seek the aid of equity for reimbursement. Bisp. Eq. § 331.

And because the surety has no interest in the contract of his prin-

cipal, he may, in a proper case, proceed in a court of equity against the principal to compel him to pay the debt. 1 Story, Eq. Jur. § 327; Bishop v. Day, 13 Vt. 81; Harris v. Newell, 42 Wis. 691; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123.

If a surety or guarantor, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may proceed in equity to compel the debtor to discharge the debt or other obligation for which the surety is responsible. Story, Eq. Jur. § 849; Norton v. Reid, 11 S. C. 593; Watson v. Barr, 37 S. C. 463, 16 S. E. 188; Philadelphia & R. R. Co. v. Little, 41 N. J. Eq. 519, 7 Atl. 356; Gibbs v. Mennard, 6 Paige (N. Y.) 258; Hannay v. Pell, 3 E. D. Smith (N. Y.) 432.

(b) *As against the creditor.* A surety, if compelled to pay the principal's debt, is entitled to stand in the creditor's place, and to enforce the same remedies and avail himself of all securities held by the creditor. Hays v. Ward, 4 Johns. Ch. (N. Y.) 130; Kidd v. Hurley, 54 N. J. Eq. 179, 33 Atl. 1057; Schroeppell v. Shaw, 3 N. Y. 457.

At law the surety is liable to pay the debt, though the creditor holds securities; but in equity, if no injury would result to the creditor and otherwise might result to the surety, the latter may require the creditor to first resort to his securities before coming to the surety. Kidd v. Hurley, 54 N. J. Eq. 180, 33 Atl. 1057; Irick v. Black, 17 N. J. Eq. 195.

But subrogation is a matter of grace, not of right, and is a creature of pure equity. It will never be decreed where it works injustice. Budd v. Olver, 148 Pa. St. 194, 23 Atl. 1105; Prairie State Nat. Bank v. U. S., 164 U. S. 231, 17 Sup. Ct. 142; Gadsden v. Brown, Speer, Eq. (S. C.) 41.

As a general proposition, it is no defense to an action against a surety or guarantor that the creditor has other securities, and the defendant has no right to ask an assignment thereof to himself prior to his payment of the creditor's demand. Lumbermen's Ins. Co. v. Sprague, 59 Minn. 208, 60 N. W. 1101.

A guarantor or surety, when sued by the creditor, cannot avail himself, in exoneration of his liability, of a cause of action for damages for a breach of the contract existing in favor of the principal. Newton v. Lee, 139 N. Y. 332, 336, 34 N. E. 905.

Conversely, securities belonging to the principal debtor, and pledged

by him to indemnify his surety, inure to the benefit of the creditor. Meyers v. Campbell, 59 N. J. Law, 378, 35 Atl. 788; Eastman v. Foster, 8 Mete. (Mass.) 19; Rice v. Dewey, 13 Gray (Mass.) 47; Russell v. Clarke, 7 Cranch, 69; Evertson v. Booth, 19 Johns. (N. Y.) 486; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494.

Grave doubts were for a time entertained as to the right of a surety, by suit in equity, to require the creditor to prosecute his demand against the principal. Wright v. Simpson, 6 Ves. 714.

But the right is now recognized in appropriate cases, the surety being required, however, to indemnify the creditor against loss by a fruitless suit. In re Babcock, 3 Story, 393, Fed. Cas. No. 696; Thompson v. Taylor, 72 N. Y. 32; Huey v. Pinney, 5 Minn. 310 (Gil. 246); Irick v. Black, 17 N. J. Eq. 189.

There are cases where, apart from this right in equity, the surety or guarantor, in case of default by the principal, is entitled to notify the creditor to proceed against the principal, at the peril of otherwise releasing the surety or guarantor to the extent of any injury resulting from the failure to comply. This is the view adopted in some jurisdictions (King v. Baldwin, 17 Johns. [N. Y.] 384; Pain v. Packard, 13 Johns. [N. Y.] 174; Remsen v. Beekman, 25 N. Y. 552; Colgrove v. Tallman, 67 N. Y. 95; Harriman v. Egbert, 36 Iowa, 270); while in others the right is denied (Frye v. Barker, 4 Pick. [Mass.] 382; May v. Reed, 125 Ind. 199, 25 N. E. 216; Thompson v. Bowne, 39 N. J. Law, 3; Taylor v. Beck, 13 Ill. 376).

But the nature of the given contract of suretyship or guaranty, and its terms, and other special circumstances, may vary the result that would otherwise follow. Gage v. Bank, 79 Ill. 62.

And, even where the general right of the surety or guarantor to notify the creditor to proceed against the principal is upheld, the courts have not been disposed to apply this doctrine, except where the surety became such at the inception of the contract, or that relation was created by dealings between the parties originally bound by the contract, subsequent thereto, of which the creditor had notice. Newcomb v. Hale, 90 N. Y. 326; Trimble v. Thorne, 16 Johns. (N. Y.) 152; Colgrove v. Tallman, 67 N. Y. 95; Remsen v. Beekman, 25 N. Y. 552.

It is not extended to engagements which, though collateral in form, were entered into for the benefit of the surety or guarantor subsequent to the original transaction, and upon a new and independent consid-

eration (Wells v. Mann, 45 N. Y. 327); nor to cases where the very purpose of the guaranty is to avoid the necessity of the creditor's resorting to his ordinary remedies against the principal (Snow v. Horgan, 18 R. I. 289, 27 Atl. 338).

Demand and notice of default. A surety, in the strict sense, as distinguished from a guarantor, is not, as a general proposition, entitled to have a demand made on the principal, or to notice of his default; being himself a debtor from the beginning, and so liable to see that the debt is paid. But the contract may provide otherwise. McMillan v. Bank, 32 Ind. 13; Page v. Machine Co., 12 Tex. Civ. App. 327, 34 S. W. 988; Douglass v. Reynolds, 7 Pet. 113; Carr v. Card, 34 Mo. 513; Redfield v. Haight, 27 Conn. 37; Watson v. Barr, 37 S. C. 463, 16 S. E. 188.

And the same principle applies to a guarantor where he is liable immediately upon default. Carr v. Card, 34 Mo. 513.

On the other hand, the right of a mere guarantor, in the absence of special circumstances or special agreement, to have demand made on the principal, or to receive notice of default, is viewed in different lights in different jurisdictions. In New York, a guarantor is not, in general, entitled to notice (Barhydt v. Ellis, 45 N. Y. 110; Brown v. Curtiss, 2 N. Y. 225); and, even where notice is in terms required, it may not be a condition precedent (Barhydt v. Ellis, 45 N. Y. 111); while in other states a mere guarantor is generally entitled to have a demand made upon the principal, and to have notice of the default. Thus, if a guaranty is given to secure performance by the principal upon demand, such a demand is a condition precedent to his liability. Ewen v. Wilbor, 70 Ill. App. 153; Redfield v. Haight, 27 Conn. 37; Dole v. Young, 24 Pick. (Mass.) 250.

And where a continuing guaranty is given to secure the faithful performance of duty by an official or an employé, and is in its nature revocable, the guarantor is entitled to notice of a default involving moral turpitude, so that he may, if he chooses, terminate his further liability (Ætna Ins. Co. v. Fowler, 108 Mich. 557, 66 N. W. 470); but is not entitled to have the employé discharged, or to receive notice in case of a mere default in a contract obligation (Manchester Fire Assur. Co. v. Redfield [Minn.] 71 N. W. 709; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261).

Other illustrations of cases where notice of default is required are

where there is a guaranty, in general terms, of a note payable on demand; or a guaranty, before maturity, of payment according to the terms of the note. Oxford Bank v. Haynes, 8 Pick. (Mass.) 423; Whiton v. Mears, 11 Metc. (Mass.) 563. And, even where it would not otherwise be called for, notice of default may be specially required as a condition precedent to the liability of a surety or guarantor. Waldheim v. Sonnenstrahl, 8 Misc. Rep. 219, 28 N. Y. Supp. 582; Davis v. Wells, 104 U. S. 170; Barhydt v. Ellis, 45 N. Y. 110. And if notice of default would result in no benefit whatever to the guarantor, as where the principal was insolvent when the guaranty was given, and so remained, failure to give notice is no defense to the guarantor. Taussig v. Reid, 145 Ill. 495, 32 N. E. 918; Gibbs v. Cannon, 9 Serg. & R. (Pa.) 198. And the same principle has been applied where the principal is insolvent at the maturity of the debt (Sullivan v. Field, 118 N. C. 358, 24 S. E. 735); and to cases where, from the circumstances, the guarantor must know all that a notice would tell him (Cooper v. Page, 24 Me. 75; Williams v. Granger, 4 Day [Conn.] 444; Milroy v. Quinn, 69 Ind. 411). Under this head fall many cases of absolute and unconditional guaranties of payment. McDonald v. Fernald (N. H.) 38 Atl. 729.

And, in general, even where a notice is requisite under a continuing guaranty, notice of the amounts due, given within a reasonable time after all transactions with the principal are closed, is sufficient, and, if no injury results, an entire omission of notice is immaterial. Ferst v. Blackwell, 39 Fla. 621, 22 South. 892; Stevens v. Gibson, 69 Vt. 142, 37 Atl. 244.

Notice of default may be waived. Page v. Machine Co., 12 Tex. Civ. App. 327, 34 S. W. 988.

And the relation of the sureties or guarantors may be such in regard to a transaction as to make the principal their agent in respect to the default, and so dispense with notice. Jungk v. Reed, 12 Utah, 196, 42 Pac. 292.

(c) *As against co-sureties and co-guarantors.* One of several sureties or guarantors who is obliged to and does pay the creditor is thereupon entitled to contribution from the others. Lansdale v. Cox, 7 T. B. Mon. (Ky.) 401; Woodworth v. Bowes, 5 Ind. 276. And the mere fact that they were bound by different instruments is immaterial (Deering v. Earl of Winchelsea, 2 Bos.

& P. 270; Rosenbaum v. Goodman, 78 Va. 121); as is also the fact that the one who pays did not then know that there were co-sureties (Warner v. Morrison, 3 Allen [Mass.] 566). And, as between two or more sureties, one who pays is entitled to the benefit of securities held by another. Silvey v. Dowell, 53 Ill. 260; Agnew v. Bell, 4 Watts (Pa.) 31; Currier v. Fellows, 27 N. H. 366.

But contribution does not rest upon contract, but on the broad, equitable principle that equality is equity. Justice and fair dealing demand that where two or more parties sign the same obligation, and become obligated in precisely the same degree thereby, and stand upon the same footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their common liability. Bulkeley v. House, 62 Conn. 459, 26 Atl. 352.

Parol evidence is therefore admissible to show that apparent principals are sureties, or vice versa. Robison v. Lyle, 10 Barb. (N. Y.) 512; Barry v. Ransom, 12 N. Y. 462; Apgar's Adm'rs v. Hiler, 24 N. J. Law, 815; Mansfield v. Edwards, 136 Mass. 15.

"If the sureties are not bound for the same thing, or do not occupy towards each other the same relative position, then one of these results may follow: (1) The surety paying the debt may have no right to contribution; (2) a surety first in point of time may have no remedy against one who is subsequent; (3) or a subsequent surety may have no remedy against the first." Bulkeley v. House, 62 Conn. 459, 26 Atl. 352; Bisp. Eq. 308; Harris v. Warner, 13 Wend. (N. Y.) 402; Paul v. Berry, 78 Ill. 158; Sayles v. Sims, 73 N. Y. 552; Oldham v. Broom, 28 Ohio St. 53; Sherman v. Black, 49 Vt. 198.

Thus, if one signs as surety for one who is himself a surety, he is not liable for contribution to the latter. Robertson v. Deatherage, 82 Ill. 511.

And if a note signed by a principal and two sureties is discharged by the execution and delivery of a new note executed by the principal and one of those sureties, and the latter is forced to pay the last note, he is not entitled to contribution from his co-surety on the first note. Chapman v. Garber, 46 Neb. 16, 64 N. W. 362; Bell v. Boyd, 76 Tex. 133, 13 S. W. 232.

While a mere voluntary payment by a surety or guarantor, which could not have been compelled, gives him no right to reimbursement from the principal nor to contribution from co-sureties or co-guarantors (Suppiger v. Garrels, 20 Ill. App. 629; Hough v. Insurance Co., 57 Ill. 318; Bradley v. Burwell, 3 Denio [N. Y.] 69), yet it is not necessary for him, in order to recover, to show that he was compelled to pay by execution. When the principal contract has been broken, he may pay without suit, and recover the amount of his principal (Mauri v. Heffernan, 13 Johns. [N. Y.] 58); and by analogy is entitled to contribution (Bradley v. Burwell, 3 Denio [N. Y.] 69).

Death of co-surety. While, as above stated, the right to contribution originated in equitable principles, yet it has been grafted upon the law, with the aid of an implied promise to secure the legal remedy. It follows, therefore, that the death of one of two or more sureties or guarantors does not relieve his estate from the liability to contribute under their implied contract to that effect, originating when they executed the original undertaking (Johnson v. Harvey, 84 N. Y. 365); even though the default by the principal was subsequent to the death of the co-surety (Bradley v. Burwell, 3 Denio [N. Y.] 61).

In this respect the mutual obligation to contribute is like any other contract made by one in his lifetime to pay money at a future time, either absolutely or contingently, who dies before the occurrence of any breach of the contract. Bradley v. Burwell, 3 Denio (N. Y.) 66; Toussaint v. Martinnant, 2 Term R. 104; Cowell v. Edwards, 2 Bos. & P. 268; Wood v. Leland, 1 Mete. (Mass.) 387; Batchelder v. Fiske, 17 Mass. 464.

The theory that the liability of the sureties or guarantors, as between themselves, rests on an implied contract, is not universally recognized, and, accordingly, in some jurisdictions, the death of one relieves his estate from the duty of contribution. Waters v. Riley, 2 Har. & G. (Md.) 305.

Even under the New York rule, the death of one of two or more co-sureties or co-guarantors, who are jointly bound, relieves his estate from direct liability to the creditor. Risley v. Brown, 67 N. Y. 160; Wood v. Fisk, 63 N. Y. 245; Getty v. Binsse, 49 N. Y. 385; Pickersgill v. Lahens, 15 Wall. 140.

DISCHARGE OF SURETY OR GUARANTOR.

11. The surety or guarantor may be able, in given cases, to set up any one of numerous defenses to an action against him by the creditor on the ground that his original contract was not binding ab initio, or that by some subsequent alteration in it, or in the principal contract, or some subsequent acts of the creditor injurious to his rights, or some change in circumstances, he is discharged. Thus:

(a) *Fraud.* If the creditor knows that the surety or guarantor was induced to become such by fraudulent representations, he cannot hold him to his contract. Beath v. Chapoton (Mich.) 73 N. W. 806.

But he is not responsible for any deception practiced by the principal upon the guarantor, without the creditor's knowledge. Powers v. Clarke, 127 N. Y. 422, 28 N. E. 402; Western New York Life Ins. Co. v. Clinton, 66 N. Y. 326.

(b) *Concealment.* If the creditor misleads the surety or guarantor at the time of the latter's executing his contract, or suppresses facts he should have disclosed, or refuses to answer proper inquiries, which would have revealed facts the surety or guarantor had a right to know, he cannot hold the latter liable. Benton Co. Sav. Bank v. Boddicker (Iowa) 75 N. W. 632; Bellevue Building & Loan Ass'n v. Jeckel (Ky.) 46 S. W. 482; Denton v. Butler, 99 Ga. 264, 25 S. E. 624; Fassnacht v. Gagin Co., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480; Traders' Ins. Co. v. Herber, 67 Minn. 106, 69 N. W. 701; Powers Dry-Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16; Jungk v. Holbrook, 15 Utah, 198, 49 Pac. 305.

But, if no inquiry be made, mere silence does not necessarily release the surety. Lake v. Thomas, 84 Md. 608, 36 Atl. 437.

The creditor is not required to make any disclosure or explanation the withholding of which would not amount to fraud. Powers v. Clarke, 127 N. Y. 423, 28 N. E. 402.

(c) *Invalidity of principal debt.* Usually, if the principal debt is not bound by the principal contract, the surety is not bound by his contract of suretyship. But this principle does not apply where the nonliability of the principal is occasioned by a purely personal

defense, in the nature of a privilege or protection, as infancy or coverture. In such cases, the surety is not released, but the contract subsists, as to him, in full force. The existence or possibility of the disability may have been the very reason why a surety was required. Kyger v. Sipe, 89 Va. 510, 16 S. E. 627.

When the name of the principal or a surety has been forged, a co-surety, though he signed in the belief that the forged name was genuine, is nevertheless bound if the creditor accepted the instrument without notice of the forgery. Helms v. Agriculture Co., 73 Ind. 329; Veazie v. Willis, 6 Gray, 90; Franklin Bank v. Stevens, 39 Me. 532.

The holder of a note may recover against one guarantying prompt payment at maturity, though the note is void as against the maker, if purchased on the faith of such guaranty. Holm v. Jamieson, 173 Ill. 295, 50 N. E. 702.

But, where a note is usurious and void, the guaranty, if depending solely upon the same consideration, and not an independent contract, is also void. Heidenheimer v. Mayer, 42 N. Y. Super. Ct. 516; Rosa v. Butterfield, 33 N. Y. 665.

If usury in a note makes a waiver therein—as, for example, of a homestead right—absolutely void, the surety signing in ignorance of the usury is not bound. Prather v. Smith, 101 Ga. 283, 28 S. E. 857; Eagle Roller-Mill Co. v. Dillman, 67 Minn. 232, 69 N. W. 910; Allen v. Wilkerson, 99 Ga. 139, 25 S. E. 26.

But statutes providing that a corporation shall not set up the defense of usury render such defense also unavailable to individual sureties and guarantors. Rosa v. Butterfield, 33 N. Y. 665; Stewart v. Bramhall, 74 N. Y. 85. Compare Merchants' Exchange Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635.

If a bond is not merely a contract between the parties thereto, but is also part and parcel of a judicial proceeding, as in the case of a bond to procure an adjournment of a bastardy proceeding, it is void unless the officer who required the party to give it, as a condition of the adjournment, had jurisdiction of the person and of the case, and the sureties are not bound. People v. Higgins, 151 N. Y. 577, 45 N. E. 1033.

(d) Any change in the principal contract, unless obviously unsubstantial or certainly nonprejudicial, discharges the surety, if made

without his consent, even though it might prove beneficial to him. Prairie State Nat. Bank v. U. S., 164 U. S. 237, 17 Sup. Ct. 142; Holme v. Brunskill, 3 Q. B. Div. 495, 505; Polak v. Everett, 1 Q. B. Div. 669; Ellesmere Brewery Co. v. Cooper [1896] 1 Q. B. 75; Reese v. U. S., 9 Wall. 21; Finney v. Condon, 86 Ill. 78; Paine v. Jones, 76 N. Y. 278, 279; Page v. Krekey, 137 N. Y. 313, 33 N. E. 311; Bennett v. Draper, 139 N. Y. 266, 34 N. E. 791; Village of Chester v. Leonard, 68 Conn. 509, 37 Atl. 397; Board of Com'rs of Morgan Co. v. Branham, 57 Fed. 179; United States Glass Co. v. West Virginia Flint Bottle Co., 81 Fed. 993. Compare Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65.

Thus, if, after a promissory note payable to a named payee or bearer is signed by one as surety, the principal so alters it as to increase the rate of interest, the note is thereby rendered void as to the surety, even in the hands of a bona fide holder for value without notice. Hill v. O'Neill, 101 Ga. 832, 28 S. E. 996; Derr v. Keaough, 96 Iowa, 397, 65 N. W. 339; Farmers' & Merchants' Nat. Bank v. Novich, 89 Tex. 381, 34 S. W. 914; Windle v. Williams, 18 Ind. App. 158, 47 N. E. 680. Compare Keene's Adm'r v. Miller (Ky.) 45 S. W. 1041.

But it is usually held that there may be changes so immaterial as not to effect a discharge. Etz v. Place, 81 Hun, 206, 30 N. Y. Supp. 765; Troy City Bank v. Lauman, 19 N. Y. 477. And, if the agreement for a change is void, it does not effect a discharge. Slaughter v. Moore (Tex. Civ. App.) 42 S. W. 372. And a change of part of a guarantied account into the form of notes does not discharge the guarantor (Lennox v. Murphy [Mass.] 50 N. E. 644), nor does a change in the nature or extent of the acts guarantied, as compared with those performed in the same line of business, employment, or credit before the contract of suretyship or guaranty was executed, if the new class of acts is in fact covered by the terms of the latter contract (People v. Backus, 117 N. Y. 196, 22 N. E. 759). And the same result follows where, after a bond has been executed by sureties or guarantors to secure the agreement of a national bank as a depository of state funds, the charter expires, but is extended under a federal statute declaring that in case of such extension the bank shall continue to be in all respects the identical association it was before the extension. People v. Backus, 117 N. Y. 196, 22 N. E. 759; Exeter Bank v. Rogers, 7 N. H. 21. Compare Thompson v. Young, 2 Ohio, 334; Union Bank v. Ridgely, 1 Har. &

G. 324; Bank v. Barrington, 2 Pen. & W. 27; Brown v. Lattimore, 17 Cal. 93.

A bond for faithful service may be so worded as to survive various changes that would otherwise discharge. Singer Mfg. Co. v. Reynolds, 168 Mass. 588, 47 N. E. 438.

Illustrations of cases where a change in the relation, situation, status, etc., of the parties, or in the circumstances, does operate to release the surety or guarantor, or to throw given defaults outside the range of his liability, are stated under the head of "Extent of Liability."

(c) And where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is discharged absolutely or pro tanto, according to the circumstances. Smith v. Molleson, 148 N. Y. 247, 42 N. E. 669; General Steam Nav. Co. v. Rolt, 6 C. B. (N. S.) 550; Calvert v. Dock Co., 2 Keen, 638; Warre v. Calvert, 7 Adol. & El. 143; Plunkett v. Machine Co., 84 Md. 529, 36 Atl. 115.

Mere delay by the creditor in suing the principal, or in proceeding against a fund pledged by him, does not release the surety or guarantor, even though loss may have thereby resulted. Purdy v. Forstall, 45 La. Ann. 814, 13 South. 95; Schroeppell v. Shaw, 3 N. Y. 446; Evans v. Evans, 16 Ala. 465; Darby v. Bank, 97 Ala. 645, 11 South. 881; Watson v. Barr (S. C.) 16 S. E. 188.

And mere postponement of one of the ordinary proceedings in a case in which an undertaking has been given does not release the sureties. Steinbock v. Evans, 122 N. Y. 556, 25 N. E. 929.

This rule, of course, yields where the duty to proceed with diligence to collect of the principal is imposed by the contract, as in the case of a guaranty of collection (Northern Ins. Co. v. Wright, 76 N. Y. 445); though even in such cases, if indulgence by the creditors to the principal, in not enforcing the debt, is with the acquiescence of the guarantor, the latter thereby waives his strict right (Mead v. Parker, 111 N. Y. 264, 18 N. E. 727; Woodcock v. Railway Co., 21 Law & Eq. Rep. 285; Cummings v. Arnold, 3 Metc. [Mass.] 486; Adams v. Way, 32 Conn. 160); and, where laches of the creditor is such as to discharge the surety or guarantor, it thus operates only to the extent that the latter has suffered loss (Gillighan v. Boardman, 29 Me. 79).

One who guaranties a sole trader for the faithful performance of duty by a clerk is no longer responsible if the trader takes a partner (Wright v. Russell, 3 Wils. 530; Holmes v. Small, 157 Mass. 223, 32 N. E. 3; Lloyd v. Blackburn, 9 Mees. & W. 363), unless the contract otherwise provides (Garrett v. Handley, 4 Barn. & C. 666).

But the mere fact that a government, having a judgment against a principal debtor, releases him by a statute from imprisonment thereunder, does not discharge the surety. Hunter v. U. S., 5 Pet. 173.

The duty of the creditor, in respect of securities held by him, towards the surety, is not active, but negative, and he is simply bound not to cancel, waste, or impair them. If securities are released by the creditor, they must possess more than a supposititious or imaginary value, in order to discharge the surety, and so with a bona fide exchange of securities. State Bank of Lock Haven v. Smith, 155 N. Y. 200, 49 N. E. 680; Neff's Appeal, 9 Watts & S. (Pa.) 36; Coates v. Coates, 33 Beav. 249; Thomas v. Cleveland, 33 Mo. 126; Moss v. Pettingill, 3 Minn. 217 (Gil. 145).

But, if security held by a creditor is lost through his negligence, or voluntarily released, without the surety's consent, the surety is pro tanto discharged. Mingus v. Daugherty, 87 Iowa, 56, 54 N. W. 66; Sherraden v. Parker, 24 Iowa, 28; Burr v. Boyer, 2 Neb. 265.

(f) A binding extension of the time of payment of the principal debt, without consent of the guarantor, discharges him, unless he subsequently assents to the extension and ratifies it. Bishop v. Eaton, 161 Mass. 501, 37 N. E. 665; Chace v. Brooks, 5 Cush. (Mass.) 43; Calvo v. Davies, 73 N. Y. 211.

(g) The full payment or performance of the debt, act, or obligation of suretyship or guaranty operates to discharge the surety or guarantor. Thus, such liability ipso facto terminates when the debt secured is paid or payment is tendered (Petefish v. Watkins, 124 Ill. 384, 16 N. E. 248; Woodman v. Mooring, 14 N. C. 237; Felch v. Lee, 15 Wis. 265; Sharp v. Miller, 57 Cal. 415; Joslyn v. Eastman, 46 Vt. 258; Sears v. Van Dusen, 25 Mich. 351; Johnson v. Mills, 10 Cush. [Mass.] 503); but contra as to tender (Clark v. Sickler, 64 N. Y. 231).

A contract of suretyship, entered into on behalf of a partnership as principal, continues no longer than the partnership itself. London & L. Fire Ins. Co. v. Holt (S. D.) 72 N. W. 403.

But a firm may by its conduct, after a change in its membership, ratify, and thus bind itself by, a letter of credit given by the old firm. Smith v. Ledyard, 49 Ala. 279.

(h) The surety or guarantor may, of course, be discharged by any act which, by the terms of their agreement, is accorded that effect, as by revocation in accordance with an express reserved right to revoke. So, also, by a binding mutual substitution of a new agreement in place of the old. Taylor v. Hilary, 1 Cromp., M. & R. 741.

(i) *Death of surety or guarantor.* The general presumption, in the absence of express words, that the parties to a contract intend to bind not only themselves, but their personal representatives, applies to contracts of suretyship or guaranty. The parties may, if they choose, contract otherwise. And the nature of the contract may be conclusive in determining the intent. In the case of a continuing guaranty of successive credits, the death of the guarantor, and notice thereof, terminates the guaranty as to subsequent credits, unless the contract provides otherwise. Coulthart v. Clementson, 5 Q. B. Div. 42; Harriss v. Fawcett, L. R. 15 Eq. Cas. 311; Lloyd's v. Harper, 16 Ch. Div. 290.

But, if the guaranty creates a continuing pecuniary obligation, the consideration for which is entire and given once for all, the death of the guarantor does not terminate the guaranty, unless so provided. Kernochan v. Murray, 111 N. Y. 306, 18 N. E. 868; Holthausen v. Kells, 18 App. Div. 80, 45 N. Y. Supp. 471, affirmed 154 N. Y. 776, 49 N. E. 1098; Hecht v. Weaver, 34 Fed. 111; Green v. Young, 8 Greenl. (Me.) 14; Shackamaxon Bank v. Yard, 143 Pa. St. 129, 22 Atl. 908; Id., 150 Pa. St. 351, 24 Atl. 635.

And, as the death of the principal does not terminate the obligation to pay stipulated sums for a given period, so the liability of his surety or guarantor continues after the death of the principal. Elmendorf v. Whitney, 153 Pa. St. 460, 25 Atl. 607.

(j) *Revocation.* Contracts of suretyship or guaranty are irrevocable or revocable according as the consideration is entire, or is supplied from time to time, and therefore divisible.

An instance of the first class is where a person enters into a guaranty that, in consideration of the lessor granting a lease to a third person, he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for

the lessor to do, and such a guaranty of necessity runs on throughout the duration of the lease. The lease was intended to be a guarantied lease, and therefore the guarantor cannot put an end to the guaranty at his pleasure, nor is it to be put an end to by the death of the guarantor. So with a guaranty, in consideration of another party taking a person into his service, to be answerable for his fidelity as long as he continued therein. Instances of the second class are found in guaranties of a running account at a banker's, or a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guaranty stipulates to the contrary, that the guarantor may at any time terminate the guaranty as to subsequent transactions. In such cases, also, notice of the death of a guarantor is a sufficient notice to terminate the guaranty. Lloyd's v. Harper, 16 Ch. Div. 319; Calvert v. Gordon, 3 Man. & R. 124; Coulthart v. Clementson, 5 Q. B. Div. 42; Snow v. Horgan, 18 R. I. 289, 27 Atl. 338; National Eagle Bank v. Hunt, 16 R. I. 151, 13 Atl. 115; Green v. Young, 8 Me. 16; Moore v. Wallis, 18 Ala. 463; Royal Ins. Co. v. Davies, 40 Iowa, 471; Rapp v. Insurance Co., 113 Ill. 394; Offord v. Davies, 12 C. B. (N. S.) 756, 757; Jordan v. Dobbins, 122 Mass. 170, 171; Menard v. Scudder, 7 La. Ann. 391, 392.

But a surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed, and certain to become due, may revoke and end his future liability in either of two cases, viz.: Where the guarantied contract has no definite time to run; and where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach. Emery v. Baltz, 94 N. Y. 414; Burgess v. Eve, L. R. 13 Eq. 450; Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Aston, L. R. 8 Exch. 73; Singer Mfg. Co. v. Draughan (N. C.) 28 S. E. 136.

SURETYSHIP IN RESPECT TO PARTNERSHIPS AND SALES OF REALTY.

12. (a) Where a partner withdraws from a firm, or it is dissolved, and it is agreed that the other shall take the property and pay the firm debts, the latter becomes a principal, and the other a surety, and the usual principles of suretyship apply, both as between themselves and as to creditors with notice. Porter v. Baxter (Minn.) 73 N. W. 844; Williams v. Boyd, 75 Ind. 286; Colgrove v. Tallman, 67 N. Y. 95; Sizer v. Ray, 87 N. Y. 220; Chandler v. Higgins, 109 Ill. 602; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Oakeley v. Pasheleer, 10 Bligh, 548.

Thus, if the retiring partner is obliged to pay a firm debt, he may recover the amount from the one who remains (Shanburg v. Abbott, 112 Pa. St. 12, 4 Atl. 518); while, if the remaining partner pays the debt, he is not entitled to contribution from the one retiring (Hanna v. Hyatt, 67 Mo. App. 308).

The same result follows where one partner transfers his interest in the firm property and assets to an outsider, who is thereupon admitted to the new firm, consisting of the other members of the old. Morss v. Gleason, 64 N. Y. 204.

But, to affect a creditor who extends time of payment or does other acts which would discharge a surety, he must have notice of the new arrangement and its binding effect. Palmer v. Purdy, 83 N. Y. 144.

And in some jurisdictions it is held that he is not bound, even by notice, unless he has assented to the new relationship. Ridgley v. Robertson, 67 Mo. App. 45.

(b) Where the owner of real property, incumbered by a mortgage which he is liable to pay, sells the equity to a purchaser, who assumes and agrees to pay the mortgage, the grantee becomes the principal in respect thereto, while the grantor becomes his surety. Curry v. Hale, 15 W. Va. 867; 2 White & T. Lead. Cas. Eq. pt. 1, p. 282; Wager v. Link, 134 N. Y. 122, 31 N. E. 213.

It follows that if, when the debt becomes due, the guarantor pays it, he becomes entitled to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for his indemnity. Calvo v. Davies, 73 N. Y. 211.

And if, without the consent of the grantor, the mortgagee and the grantee effect a release or satisfaction of the mortgage, or a binding extension of the time for payment (Calvo v. Davies, 73 N. Y. 211; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 191, 12 Sup. Ct. 437), or a change in its terms (Paine v. Jones, 76 N. Y. 274), the grantor is thereby discharged either absolutely or to the extent of his resulting injury, in accordance with principles already stated.

In order to establish the relation of principal and surety as to the grantor and the grantee, it is essential that the grantor be himself personally obligated to pay the debt, though it is not necessary that such obligation should have been created by the deed under which he acquired title. Wager v. Link, 134 N. Y. 122, 31 N. E. 213; Id., 150 N. Y. 555, 44 N. E. 1103.

It is also essential that the grantee should assume the payment of the mortgage. It is not enough that he take title subject to the mortgage. Chilton v. Brooks, 72 Md. 557, 20 Atl. 125; Wager v. Link, 150 N. Y. 554, 44 N. E. 1103; Crowell v. Hospital, 27 N. J. Eq. 650.

While it is the generally accepted doctrine that where land incumbered by a mortgage, which the owner is obligated to pay, is conveyed by him to a grantee, who assumes payment thereof, the mortgagee is entitled in some form to enforce the agreement against the grantee, there is a conflict upon the question whether his remedy should be at law or in equity. Burr v. Beers, 24 N. Y. 178; Thorp v. Coal Co., 48 N. Y. 253; Dean v. Walker, 107 Ill. 540, 545, 550.

The question whether the remedy is at law or in equity is to be determined by the lex fori. Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 190, 12 Sup. Ct. 437.

In New York the right of the mortgagee has been supported upon the theory that, if one who is indebted transfers property to a third party upon the latter's promise to pay the debt, the creditor may sue the third party upon the contract thus made for the creditor's benefit, under the authority of the line of cases beginning with Lawrence v. Fox, 20 N. Y. 268; Wager v. Link, 134 N. Y. 127, 31 N. E. 213; Hand v. Kennedy, 83 N. Y. 154.

Accordingly, in that state, the mortgagee is entitled to maintain his suit against the grantee, either in equity or at law. Halsey v. Reed, 9 Paige (N. Y.) 446; King v. Whitely, 10 Paige (N. Y.) 465;

Blyer v. Monholland, 2 Sandf. Ch. 478; Trotter v. Hughes, 12 N. Y. 74; Burr v. Beers, 24 N. Y. 178; Campbell v. Smith, 71 N. Y. 26; Pardee v. Treat, 82 N. Y. 385; Hand v. Kennedy, 83 N. Y. 150; Bowen v. Beck, 94 N. Y. 861.

And the grantor's liability to the mortgagee is released by a binding extension of time given by the latter to the grantee, with knowledge of the mutual relations of the grantor and grantee, and without the grantor's consent, even though the mortgagee did not know of that relation at the time of the original contract, or even if that relation has been created since that time. Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 191, 12 Sup. Ct. 437; Ewin v. Lancaster, 6 Best & S. 571; Oriental F. Corp. v. Overend, 7 Ch. App. 142, and L. R. 7 H. L. 348; Smith v. Shelden, 35 Mich. 42.

As to the form of remedy, however, the United States supreme court has approved the doctrine that while the purchaser of lands subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor, as between the parties, is that of surety, and if the vendor pays the mortgage debt he may sue the vendee at law for the moneys so paid, yet in equity, as at law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee. And it has approved the doctrine that it is in application of the equitable principle that a creditor may have the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others holds for his indemnity, that decrees for deficiency in foreclosure suits have been made against subsequent purchasers, who have assumed the payment of the mortgage debt. The mortgagee, upon this theory, is allowed, by a mere rule of procedure, to go directly, as a creditor, against the person ultimately liable, in order to avoid circuity of action, and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him, and upon whom the liability will ultimately fall. The mortgagee's only remedy against the grantee is in equity. In such a case, therefore, a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of

the mortgagor's grantee to pay the mortgage, has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement, when inserted in the deed by mistake; and, on the other hand, such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494; Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. 375; Drury v. Hayden, 111 U. S. 223, 4 Sup. Ct. 405; Shepherd v. May, 115 U. S. 505, 511, 6 Sup. Ct. 119; Episcopal City Mission v. Brown, 158 U. S. 227, 15 Sup. Ct. 833; Crowell v. Currier, 27 N. J. Eq. 152, s. c. sub nom. Crowell v. Hospital, Id. 650, 655, 656.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF INTEREST AND USURY

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

INTEREST AND USURY.

INTEREST.

1. INTEREST DEFINED.

Interest is the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss thereof to the party entitled to its use.[1]

2. WHEN INTEREST IS ALLOWED.

When interest is allowed in any case, it must be by virtue of some contract, express or implied, or by virtue of some statute, or on account of the default of the party liable to pay; and then it is allowed as damages for the default.[2]

By the common law, interest could in no case be recovered. The first English statute allowing interest was that of 37 Hen. VIII. c. 9.[3]

Even after that time, the common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade.[4]

In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, even though to be paid for on a particular day, or for work and labor.[5]

[1] Suth. Dam. § 300; Sedg. Meas. Dam. § 282; Loudon v. Taxing Dist., 104 U. S. 771; Minard v. Beans, 64 Pa. St. 411; Daniels v. Wilson, 21 Minn. 530; Davis v. Yuba Co., 75 Cal. 452, 13 Pac. 874, and 17 Pac. 533.

[2] In re Trustees of New York & B. Bridge, 137 N. Y. 98, 32 N. E. 1054; Barnard v. Bartholomew, 22 Pick. (Mass.) 291.

[3] National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437.

[4] Mayne, Dam. 105; Higgins v. Sargent, 2 Barn. & C. 349.

[5] White v. Miller, 78 N. Y. 394; Gordon v. Swan, 12 East, 419; Calton v.

Thus the law remained in England until St. 3 & 4 Wm. IV. c. 42, §§ 28, 29, providing that upon all debts or sums certain, and in actions of trover and trespass de bonis asportatis, and in actions upon policies of insurance, the jury may, in their discretion, allow interest as part of the recovery. Independently of this statute, interest was allowed as special damages for the detention of money, but it must be specially pleaded.[6]

In America some states hold that the right to interest is given by the common law.[7]

In other states, however, it is held that the common law gives no right to interest, but merely allows the parties to contract for it, and that, unless the right is given by contract or statute, it cannot be recovered.[8]

In all the states the matter of interest is largely regulated by statute. In New York the allowance of interest was at first mainly confined to cases coming within the common-law rule, and to actions to recover money wrongfully detained by the defendant. The rule was then extended so as to allow interest upon the value of property unjustly detained or wrongfully taken or converted, and for goods sold and delivered, and for work and labor; and thus, by a sort of judicial legislation, the allowance of interest, as a legal right, was carried much further here than the scope of the English statute where the allowance was placed simply in the discretion of the jury. There is no New York statute regulating the allowance of interest in any of these cases.[9] In some states such statutes exist.[10]

Bragg, 15 East, 223; Walker v. Constable, 1 Bos. & P. 306; Carr v. Edwards, 3 Starkie, 132; Nichol v. Thompson, 1 Camp. 52, note; Trelawney v. Thomas, 1 H. Bl. 303.

[6] Watkins v. Morgan, 6 Car. & P. 661; Price v. Railway Co., 16 Mees. & W. 244; Cameron v. Smith, 2 Barn. & Ald. 305; Cook v. Fowler, L. R. 7 H. L. 27.

[7] Young v. Godbe, 15 Wall. 562; Young v. Polack, 3 Cal. 208; Wood v. Robbins, 11 Mass. 504; Boyd v. Gilchrist, 15 Ala. 849.

[8] Parmelee v. Lawrence, 48 Ill. 331; Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 5 Pac. 142; Kenney v. Railroad Co., 63 Mo. 99.

[9] White v. Miller, 78 N. Y. 395.

[10] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 619, 13 Sup. Ct. 444; Morley v. Railway Co., 146 U. S. 168, 13 Sup. Ct. 54.

Where, for any reason, the defendant is not responsible for the delay in payment, he is not chargeable with interest. Thus, tender of a sufficient amount

By Contract.

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures or until payment is made.[11] The agreement for interest may be either express or implied, and an agreement to that effect will be implied where there was a custom to charge interest, which was known to the defendant.[12] But "interest does not run upon a contract, unless especially provided for therein, until the time fixed for payment." [13]

In an action for breach of contract, whether interest is recoverable does not rest in the discretion of the jury, but it is a question of law for the court.[14] Whether, in a given case, interest is recoverable as matter of law, depends in part upon statutes and in part upon principles to be hereafter stated.[15]

will stop the accruing of interest, even in actions of tort. Thompson v. Railroad Co., 58 N. H. 524. Where the debtor is forbidden by law to pay the debt, he is not liable for interest during the delay. Thus, trustee process or injunction will interrupt the running of interest. Le Grange v. Hamilton, 4 Term R. 613; Hamilton v. Le Grange, 2 H. Bl. 144; Osborn v. Bank, 9 Wheat. 738; Norris v. Hall, 18 Me. 332; Bickford v. Rich, 105 Mass. 340; Le Branthwait v. Halsey, 9 N. J. Law, 3; Kellogg v. Hickok, 1 Wend. (N. Y.) 521; Stevens v. Barringer, 13 Wend. (N. Y.) 639. In some states a garnishee of person enjoined must bring the money into court, or he will be chargeable with interest. Kirkman v. Vanlier, 7 Ala. 217; Smith v. Bank, 60 Miss. 69. Interest as damages does not accrue in time of war, where the debtor is in one hostile country and the creditor in the other. Interest accruing by contract is not affected. Hoare v. Allen, 2 Dall. 102; Foxcraft v. Nagle, Id. 132; Bigler v. Waller, Chase, 316, Fed. Cas. No. 1,404; Mayer v. Reed, 37 Ga. 482; Selden v. Preston, 11 Bush (Ky.) 191; Bordley v. Eden, 3 Har. & McH. (Md.) 167; Brewer v. Hastie, 3 Call (Va.) 22; Lash v. Lambert, 15 Minn. 416 (Gil. 336); Brown v. Hiatts, 15 Wall. 177; Ward v. Smith, 7 Wall. 447. Generally, as to what will relieve a debtor from interest, see Miller v. Bank, 5 Whart. (Pa.) 503; Redfield v. Iron Co., 110 U. S. 174, 3 Sup. Ct. 570; Bartells v. Redfield, 27 Fed. 286; Stewart v. Schell, 31 Fed. 65; Jane v. Hagen, 10 Humph. (Tenn.) 332.

[11] Morley v. Railway Co., 146 U. S. 168, 13 Sup. Ct. 54.

[12] Ayers v. Metcalf, 39 Ill. 307; Veiths v. Hagge, 8 Iowa, 163; McAllister v. Reab, 4 Wend. (N. Y.) 483, 8 Wend. (N. Y.) 109; Meech v. Smith, 7 Wend. (N. Y.) 315; Dickson v. Surginer, 3 Brev. (S. C.) 417; Fisher v. Sargent, 10 Cush. (Mass.) 250; Knox v. Jones, 2 Dall. 193; Bispham v. Pollock, 1 McLean, 411, Fed. Cas. No. 1,442; Koons v. Miller, 3 Watts & S. (Pa.) 271; Watt v. Hoch, 25 Pa. St. 411; Adams v. Palmer, 30 Pa. St. 346.

[13] In re Clever's Estate, 154 Pa. St. 482, 25 Atl. 814.

[14] Mansfield v. Railroad Co., 114 N. Y. 336, 21 N. E. 735, 1037.

[15] Lewis v. Rountree, 79 N. C. 122, 128; Dana v. Fiedler, 12 N. Y. 40–50;

Interest on Promissory Notes.

"The words 'with interest,' in a contract,—as, for example, in a promissory note,—imply a promise to pay interest from date. Without them, the note would carry interest from maturity, as matter of law." [16] A promissory note payable on demand, and making no provision for interest, carries interest, not from its date, but from demand.[17] If no time of payment is specified, interest begins to accrue at once, though not provided for.[18]

Interest on Insurance Policies.

Interest is recoverable on the amount due on an insurance policy.[19]

Interest on Coupons.

Coupons attached to bonds, and representing the interest payable upon the principal, may or may not themselves carry interest, according to circumstances. While they are in the hands of the holder of the bond, though detached and overdue, they remain mere incidents of the bond, and have no greater force and effect than the stipulation for the payment of interest contained in the bond. But they may become separate and independent instruments. This does not occur until they are utilized as such.[20]

In some states, however, coupons, though still attached to the bonds, carry interest from the time when payable.[21] And if the law of a state, as it exists when bonds with coupons are issued, allows interest on coupons from the time when they fall due, the legislature has no

Broughton v. Mitchell, 64 Ala. 210; Hamer v. Hathaway, 33 Cal. 117; Andrews v. Durant, 18 N. Y. 496; De Lavallette v. Wendt, 75 N. Y. 579; Robinson v. Insurance Co., 1 Abb. Prac. N. S. (N. Y.) 186; Wehle v. Butler, 43 How. Prac. (N. Y.) 5; Rhemke v. Clinton, 2 Utah, 230.

[16] Smith v. Goodlett, 92 Tenn. 230, 21 S. W. 106; Gibbs v. Fremont, 9 Exch. 25; Kitchen v. Bank, 14 Ala. 233; Swett v. Hooper, 62 Me. 54.

[17] Bishop v. Sniffen, 1 Daly (N. Y.) 155; 2 Pars. Notes & B. 393; Herrick v. Woolverton, 41 N. Y. 581, 596; Hunter v. Wood, 54 Ala. 71; Dodge v. Perkins, 9 Pick. (Mass.) 369.

[18] Purdy v. Philips, 11 N. Y. 406; Sheldon v. Heaton, 88 Hun, 535, 34 N. Y. Supp. 856.

[19] Swamscot Mach. Co. v. Partridge, 25 N. H. 369, 380.

[20] Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 481, 32 N. E. 1058; Bowman v. Neely, 137 Ill. 443, 447, 27 N. E. 758; Id., 151 Ill. 37, 37 N. E. 840; Evertson v. Bank, 66 N. Y. 14.

[21] Mills v. Town of Jefferson, 20 Wis. 50; Gelpcke v. City of Dubuque, 1 Wall. 175, 206; Aurora City v. West, 7 Wall. 82, 104.

power, even in the form of a retroactive declaration as to what the former law was, to change this principle as to such coupons, and cut off the right to interest thereon.[22]

By Statute.

Interest is frequently provided for by statute; as, for example, from the maturity of certain debts until judgment,[23] or upon judgments,[24] in both which cases the interest is in the nature of damages. And sometimes the right to interest as compensation, and not as damages, also rests upon statute; as, for example, in statutes relating to condemnation proceedings, and providing that title shall vest in the city upon confirmation of the commissioners' report, and that the comptroller shall pay the compensation awarded, "with lawful interest from the date of confirmation." [25]

In some states there are statutes providing that interest shall be allowed "on money withheld by an unreasonable and vexatious delay of payment." In such a case interest is not to be computed merely from the time when the delay began to be unreasonable and vexatious, but is to be computed from the time when the debt became due.[26]

As Damages.

Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of the debtor.

(a) Where it is expressly reserved in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages it is often matter of discretion.[27]

[22] Koshkonong v. Burton, 104 U. S. 668, 676.

[23] Morley v. Railway Co., 146 U. S. 168, 13 Sup. Ct. 54.

[24] Code Civ. Proc. N. Y. § 1211; O'Brien v. Young, 95 N. Y. 428.

[25] Devlin v. City of New York, 131 N. Y. 123, 30 N. E. 45.

[26] City of Chicago v. Tebbetts, 104 U. S. 120, 125.

[27] Redfield v. Iron Co., 110 U. S. 176, 3 Sup. Ct. 570; Jourolmon v. Ewing, 26 C. C. A. 23, 80 Fed. 604. See Mansfield v. Railroad Co., 114 N. Y. 336, 21 N. E. 735, 1037.

Interest may therefore be demanded in a declaration or complaint in an action to recover the principal, and is computed to the time of verdict or judgment. "The interest is an accessory to the principal, and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it. * * * I don't know of any court in any

(b) If the contract does not provide for interest after maturity and failure to pay, the question whether interest shall accrue depends wholly on the law of the state. If the state declares that, in case of breach, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.[28]

(c) At common law, neither verdicts nor judgments bore interest,[29] but now, after the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the federal constitution is concerned, to provide for interest as a penalty, or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, change the rate or declare that such interest shall, from then on, cease to accrue. For such purposes the judgment is not a contract, and consequently such a statutory declaration is not within the prohibition of the federal constitution against impairing contracts, or depriving one of property without due process of law.[30]

country (and I have looked into the matter) which don't carry interest down to the last act by which the sum is liquidated." Lord Mansfield, in Robinson v. Bland, 2 Burrows, 1087.

[28] Morley v. Railway Co., 146 U. S. 168, 13 Sup. Ct. 54.

[29] Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234.

[30] Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54; O'Brien v. Young, 95 N. Y. 428.

It is usually held that interest is recoverable in an action of debt on a judgment, regardless of whether the original demand carried interest or not. Klock v. Robinson, 22 Wend. (N. Y.) 157. It is held in some states to be recoverable by common law. Perkins v. Fourniquet, 14 How. 328, 331; Crawford v. Shouton's Ex'rs, 7 Port. (Ala.) 110; Gwinn v. Whitaker's Adm'x, 1 Har. & J. (Md.) 754; Hodgdon v. Hodgdon, 2 N. H. 169; Mahurin v. Bickford, 6 N. H. 567; Harrington v. Glenn, 1 Hill (S. C.) 79; Nelson v. Felder, 7 Rich. Eq. (S. C.) 395; Beall v. Silver, 2 Rand. (Va.) 401; Mercer's Adm'r v. Beale, 4 Leigh (Va.) 189; Booth v. Ableman, 20 Wis. 602. It is recoverable by statute. Dougherty v. Miller, 38 Cal. 548; Brigham v. Vanbuskirk, 6 B. Mon. (Ky.) 197; Todd v. Botchford, 86 N. Y. 517; Coles v. Kelsey, 13 Tex. 75; Hagood v. Aikin,

So, in some states, it is provided by statute that interest may be recovered upon the amount awarded by a verdict, to be computed from the date thereof, the judgment to be entered for the amount of the verdict with such interest.[31]

So, under the national banking act, the claim of a depositor, in a bank which has suspended, is, after being proved to the satisfaction of the comptroller, of the same efficacy as a judgment, and bears interest as a judgment would do.[32]

Rate between Default and Judgment.

By the law of many states, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards.[33] While in others the contract rate in such a case continues only until maturity, and from then on the statutory rate prevails.[34] And even in states where the statutory rate prevails after maturity, in the absence of any contrary provision in the contract, a provision for a specified rate of interest "until payment" continues the contract rate in force after maturity;[35] and so where the stipulation is for interest "annually."[36] But this latter rule does not apply where the agreement is to pay a principal sum in installments, at specified dates, with interest at a specified rate "on all sums remaining unpaid." Such a provision refers only to the sums not due at any given time. After

57 Tex. 511. It was held not recoverable, without statute, in Reece v. Knott, 3 Utah, 451, 24 Pac. 757. See, also, Guthrie v. Wickliffs, 4 Bibb (Ky.) 541; Cogwell's Heirs v. Lyon, 3 J. J. Marsh. (Ky.) 38.

31 Code Civ. Proc. N. Y. § 1235; Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234; Munsell v. Flood, 46 N. Y. Super. Ct. 134.

32 National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 439.

33 Hand v. Armstrong, 18 Iowa, 324; Brannon v. Hursell, 112 Mass. 63; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; Phinney v. Baldwin, 16 Ill. 108; Kohler v. Smith, 2 Cal. 597; Ohio v. Frank, 103 U. S. 697.

34 O'Brien v. Young, 95 N. Y. 430; Holden v. Trust Co., 100 U. S. 72; Brewster v. Wakefield, 22 How. 118; Burnhisel v. Firman, 22 Wall. 170; Cook v. Fowler, L. R. 7 H. L. 27; Kohler v. Smith, 2 Cal. 597; First Ecclesiastical Society of Suffield v. Loomis, 42 Conn. 570; Jefferson Co. v. Lewis, 20 Fla. 980; Brown v. Hardcastle, 63 Md. 484; Ashuelot R. Co. v. Elliot, 57 N. H. 397; Pearce v. Hennessy, 10 R. I. 223; Kitchen v. Bank, 14 Ala. 233. See Cromwell v. Sac Co., 96 U. S. 51.

35 O'Brien v. Young, 95 N. Y. 430.

36 Westfield v. Westfield, 19 S. C. 85.

they become due, and then remain unpaid, the statutory rate prevails.[37]

Where a note is payable on demand,[38] or one day after date,[39] the intent to make a continuing obligation is obvious, and therefore interest will be allowed at the stipulated rate.

Interest as damages is given at the statutory rate.[40] Where no rate is fixed by statute, it is given at the customary rate.[41] Where the statutory rate is changed after interest begins to accrue, interest, as damages, accrues thereafter at the new rate.[42] But otherwise where it is not allowed as damages.[43]

In an action to recover possession of bonds, the fact that they only bore 4 per cent. interest is immaterial on the rate to which plaintiffs are entitled to recover, from the date of demand, in addition to the amount found to represent the value of the bonds. Upon demand, the plaintiff is entitled to either the bonds or to their value, and from that time on, if the bonds cannot be restored, to their value, with interest thereon at the legal rate.[44]

In an action on a contract,[45] interest should be given at the rate of the place of performance, or of the place where the contract was made.[46] The parties may legally agree upon interest at the rate either

37 Ferris v. Hard, 135 N. Y. 365, 32 N. E. 129. Compare Miller v. Hall, 18 S. C. 141.

38 Paine v. Caswell, 68 Me. 80.

39 Casteel v. Walker, 40 Ark. 117; Gray v. Briscoe, 6 Bush (Ky.) 687; Sharpe v. Lee, 14 S. C. 341.

40 Wegner v. Bank, 76 Wis. 242, 44 N. W. 1096.

41 Davis v. Greely, 1 Cal. 422; Perry v. Taylor, 1 Utah. 63.

42 Wilson v. Cobb, 31 N. J. Eq. 91; White v. Lyons, 42 Cal. 279; Woodward v. Woodward, 28 N. J. Eq. 119; In re Doremus' Estate, 33 N. J. Eq. 234; Mayor, etc., of Jersey City v. O'Callaghan, 41 N. J. Law, 349; Reese v. Rutherfurd, 90 N. Y. 644; Sanders v. Railway Co., 94 N. Y. 641; O'Brien v. Young, 95 N. Y. 428; Stark v. Olney, 3 Or. 88.

43 Wyckoff v. Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662. Compare Searle v. Adams, 3 Kan. 515.

44 Govin v. De Miranda, 140 N. Y. 479, 35 N. E. 626.

45 Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704; Sutro Tunnel Co. v. Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

46 Gibbs v. Fremont, 9 Exch. 25; Courtois v. Carpentier, 1 Wash. C. C. 376, Fed. Cas. No. 3,285; French v. French, 126 Mass. 360; Pauska v. Daus, 31 Tex. 67; Porter v. Munger, 22 Vt. 191.

of the state where the contract is executed or where payment is to be made.[47] Where no rate is stipulated, the law of the state where the contract was to be performed is usually controlling.[48]

But it has been held that interest on overdue coupons should be given at the rate of the place where the action was brought.[49] The question of the rate of interest is a local one, and the federal courts follow the local law in a given case,[50] even as applied to interest on judgments in actions removed from a state court.[51]

Rate after Judgment.

The parties may, by their contract, stipulate that a specified rate of interest shall be paid after judgment. Such is sometimes held to be the effect of a provision in the contract that interest shall be at a specified rate "until payment." [52] While sometimes that clause is understood to refer to payment of the principal sum as such, as distinguished from the payment of a judgment therefor; and under that construction the contract provision ceases to be operative when the creditor, after maturity of the debt, elects to merge it in a judgment.[53]

Apart from the effect of a special contract provision, the rate of interest upon a judgment depends upon the terms of the statute of the state, so far as concerns the enforcement thereof in that state; but, if an action is brought in another state upon the judgment, the rate of interest recoverable is that allowed by the latter,[54] and, if the original action is brought in a federal court, interest is allowed on the judgment in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated at the rate so allowed from the date of the judgment; and interest may also be computed

47 Pecks v. Mayo, 14 Vt. 33; Kilgore v. Dempsey, 25 Ohio St. 413.

48 Hunt's Ex'r v. Hall, 37 Ala. 702; Von Hemert v. Porter, 11 Metc. (Mass.) 210; Cartwright v. Greene, 47 Barb. (N. Y.) 9.

49 Fauntleroy v. Hannibal, 5 Dill. 219, Fed. Cas. No. 4,692.

50 Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234.

51 Id.

52 Morley v. Railway Co., 146 U. S. 168, 13 Sup. Ct. 54.

53 O'Brien v. Young, 95 N. Y. 430.

54 Morley v. Railway Co., 146 U. S. 171, 13 Sup. Ct. 54; Parker v. Thompson, 3 Pick. (Mass.) 429; Hopkins v. Shepard, 129 Mass. 600; Nelson v. Felder, 7 Rich. Eq. (S. C.) 395. See Crone v. Dawson, 19 Mo. App. 214; Porter v. Munger, 22 Vt. 191.

from the date of the verdict, and included in the judgment, if allowed by the statutes of that state.[55]

Liquidated and Unliquidated Damages.

"The general rule is that, whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay." [56]

In actions for breach of a contract, where the damages are unliquidated, interest is not to be allowed upon the damages, unless they are such as might be easily ascertained and computed, at the time of the breach, from facts which are then known to exist.[57]

Liquidated Damages.

Where the amount involved is liquidated, interest begins to run as soon as it is payable, either from a time stipulated for payment, or from demand, or from the time of suit brought, according to the terms of the contract and the circumstances of the given case.[58]

Damages Capable of Liquidation.

The same principle is applicable where the damages, though not actually liquidated, are, at the time of breach, and from facts then known, easily ascertainable.[59]

[55] Massachusetts Ben. Ass'n v. Miles, 137 U. S. 691, 11 Sup. Ct. 234.

[56] People v. New York Co., 5 Cow. (N. Y.) 331; Curtis v. Innerarity, 6 How. 146; Whitworth v. Hart, 22 Ala. 343; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Clark v. Dutton, 69 Ill. 521; Stern v. People, 102 Ill. 540; Hall v. Huckins, 41 Me. 574; Newson's Adm'r v. Douglass, 7 Har. & J. (Md.) 417; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Buzzell v. Snell, 25 N. H. 474; Stuart v. Binsse, 10 Bosw. (N. Y.) 436; Gutta Percha & Rubber Mfg. Co. v. Benedict, 37 N. Y. Super. Ct. 430; Spencer v. Pierce, 5 R. I. 63; Hanxhurst v. Hovey, 26 Vt. 544; Foote v. Blanchard, 6 Allen (Mass.) 221. Interest is recoverable on legacies from the time when they should have been paid. Custis v. Adkins, 1 Houst. (Del.) 382; Hennion's Ex'rs v. Jacobus, 27 N. J. Eq. 28; Vermont State Baptist Convention v. Ladd, 58 Vt. 95, 4 Atl. 634.

[57] Gray v. Railroad Co. (N. Y. App.) 52 N. E. 555; Sloan v. Baird, 12 App. Div. 486, 42 N. Y. Supp. 38; Mansfield v. Railroad Co., 114 N. Y. 331, 21 N. E. 735, 1037; McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

[58] Lawrence v. Church, 128 N. Y. 324, 332, 28 N. E. 499; Mead v. Wheeler, 13 N. H. 351. But see Yellow Pine Lumber Co. v. Carroll, 76 Tex. 135, 13 S. W. 261.

[59] McMahon v. Railroad Co., 20 N. Y. 463; Mansfield v. Railroad Co., 114 N. Y. 331, 21 N. E. 735, 1037; Sipperly v. Stewart, 50 Barb. (N. Y.) 62; Smith v. Velie, 60 N. Y. 106. In an action for breach of a contract to deliver property

Thus, in Van Rensselaer v. Jewett,[60] the action was for rent payable in specific articles, with no sum mentioned; and in Dana v. Fiedler[61] the action was for the recovery of damages for nondelivery of a quantity of madder pursuant to contract, the value of which could be ascertained by reference to market values; and in both cases interest was allowed.

Unliquidated Damages.

In McMaster v. State[62] the claim was for damages founded upon a breach of contract for the supply of materials for and services in the construction of a public building. The damages resulted from the refusal of the state to permit the contractor to proceed with the work to its completion, as provided by the contract, and such damages consisted of a loss of profits which would have been realized by performance of the work at the contract price. The court held that interest was not allowable, even from the time of the commencement of the action or proceeding, because the claim was unliquidated, and "there was no possible way for the state to adjust the same and ascertain the amount which it was liable to pay." White v. Miller[63] was an action to recover damages for breach of warranty upon sale of a quantity of cabbage seed. The referee, upon the first trial, allowed interest upon the damages from the time the crop would have been harvested. The court held that was error, because "the demand was unliquidated, and

at a certain time, interest is recoverable on the value of the property from that time. Pujol v. McKinlay, 42 Cal. 559; Bickell v. Colton, 41 Miss. 368; Bicknall v. Waterman, 5 R. I. 43; Merryman v. Criddle, 4 Munf. (Va.) 542; Enders v. Board, 1 Grat. (Va.) 364, 390; Van Rensselaer v. Jewett, 5 Denio (N. Y.) 135, 2 N. Y. 135; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Livingston v. Miller, 11 N. Y. 80; McKenney v. Haines, 63 Me. 74; Savannah & C. R. Co. v. Callahan, 56 Ga. 331; Inhabitants of Canton v. Smith, 65 Me. 203–209. Contra, Dobenspeck v. Armel, 11 Ind. 31. Where the goods have not been paid for, interest is recoverable on the difference between the contract and the market price. Dana v. Fiedler, 12 N. Y. 40; Cease v. Cockle, 76 Ill. 484; Driggers v. Bell, 94 Ill. 223; Thomas v. Wells, 140 Mass. 517, 5 N. E. 485; Clark v. Dales, 20 Barb. (N. Y.) 42; Hamilton v. Ganyard, 34 Barb. (N. Y.) 204; Fishell v. Winans, 38 Barb. (N. Y.) 228; Currie v. White, 6 Abb. Prac. N. S. (N. Y.) 352, 385.

[60] 2 N. Y. 135.

[61] 12 N. Y. 40.

[62] 108 N. Y. 542, 15 N. E. 417.

[63] 71 N. Y. 118, 78 N. Y. 393.

that the amount could not be determined by computation simply, or reference to market values." On the second trial the plaintiffs were allowed to recover interest upon the amount of damages from the time of the commencement of the action. This was held to be error, for, even when the action was begun, "the claim is no less unliquidated, contested, and uncertain." [64]

Where an action is brought by an employé, pending the term of employment fixed by the contract, for a breach thereof by the employer in discharging him, the damages are necessarily unliquidated, and interest cannot be allowed either from demand or the commencement of the action.[65]

Actions for a tort are, in respect to an allowance of interest, divided into three classes:

(a) "There is a class of cases sounding in tort, in which interest is not allowable at all; such as assault and battery, slander, libel, seduction, false imprisonment," etc.[66] And interest is not allowed in any case on exemplary damages;[67] nor where the damages caused by a tort are not only unascertained, but unascertainable, save by the enlightened conscience of a jury, interest cannot be recovered.[68]

(b) "There is another class in which the law gives interest on the loss as a part of the damages, such as trover, trespass, replevin," etc.[69] In an action against a common carrier for the loss of goods, interest is allowed on their value.[70] "In an action for destroying or carrying off property, the plaintiff recovers interest from the time of the wrongful

[64] See, also, Gray v. Railroad Co. (N. Y. App.) 52 N. E. 555.

[65] Crawford v. Publishing Co., 22 App. Div. 54, 56, 47 N. Y. Supp. 747.

[66] Wilson v. City of Troy, 135 N. Y. 96, 105, 32 N. E. 44; Louisville & N. R. Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882.

[67] Ratteree v. Chapman, 79 Ga. 574, 4 S. E. 684.

[68] Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912; Pittsburgh S. Ry. Co. v. Taylor, 104 Pa. St. 306.

[69] Wilson v. City of Troy, 135 N. Y. 96, 105, 32 N. E. 44; Ekins v. East India Co., 1 P. Wms. 395; Hamer v. Hathaway, 33 Cal. 117; Clark v. Whitaker, 19 Conn. 320; Tuller v. Carter, 59 Ga. 395; Hayden v. Bartlett, 35 Me. 203; Negus v. Simpson, 99 Mass. 388.

[70] Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566; Parrott v. Railroad Co., 47 Conn. 575; Mote v. Railroad Co., 27 Iowa, 22; McCormick v. Railroad Co., 49 N. Y. 303.

act." [71] In actions of replevin, where the prevailing party recovers, not the property itself, but its value, interest is allowed from the time the property was taken.[72] Damages for detention and interest cannot both be recovered.[73] Some courts allow interest in cases of negligence as a matter of law,[74] while others leave it to the discretion of the jury.[75]

(c) There is "still a third class in which interest cannot be recovered as of right, but may be allowed in the discretion of the jury, according to the circumstances of the case"; as, for example, where the value of property is diminished by an injury wrongfully inflicted.[76]

The foregoing classification is based in part upon historical reasons and in part upon a tendency of courts in modern times to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. "What seemed to be the demands of justice did not permit the [original] principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases." [77]

Accordingly, it will be found that in some states interest which would be allowable under the principles above stated cannot be recovered. When the matter appears to have been regulated by a state statute, and the statute has been interpreted by its highest court, the regulation of the statute will be followed in the courts of the United States.[78]

[71] 1 Sedg. Meas. Dam. § 316; Fail's Adm'r v. Presley's Adm'r, 50 Ala. 342.

[72] Yelton v. Slinkard, 85 Ind. 190; Blackie v. Cooney, 8 Nev. 41; Brizee v. Maybee, 21 Wend. (N. Y.) 144; McDonald v. Scaife, 11 Pa. St. 381; Bigelow v. Doolittle, 36 Wis. 115.

[73] McCarty v. Quimby, 12 Kan. 494.

[74] Parrott v. Ice Co., 46 N. Y. 361, 369; Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113; Arthur v. Railway Co., 61 Iowa, 648, 17 N. W. 24.

[75] Western & A. R. Co. v. McCauley, 68 Ga. 818; Chicago & N. W. Ry. Co. v. Shultz, 55 Ill. 421; Frazer v. Carpet Co., 141 Mass. 126, 4 N. E. 620.

[76] Wilson v. City of Troy, 135 N. Y. 96, 105, 32 N. E. 44; 1 Sedg. Meas. Dam. §§ 317, 320; Mairs v. Association, 89 N. Y. 498; Pennsylvania S. V. R. Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. 187; Moore v. Railroad Co., 126 N. Y. 671, 673, 27 N. E. 791; Greenfield Sav. Bank v. Simons, 133 Mass. 415.

[77] Wilson v. City of Troy, 135 N. Y. 96, 103, 32 N. E. 44.

[78] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 619, 13 Sup. Ct. 444; Kimes v. Railway Co., 85 Mo. 611; State v. Harrington, 44 Mo. App. 297; Lincoln v. Claflin, 7 Wall. 132, 139.

3. INTEREST FROM DEMAND OR SUIT.

In an action for breach of a contract, if the amount is, by the terms of the contract and the nature of the given circumstances, liquidated, or capable of being ascertained, and is then due and payable without demand, interest begins to accrue at once, except in jurisdictions where, as already stated, interest is not allowed, unless the contract so provides, between default and judgment.[79] The same result follows where interest is allowed as compensation, and not as damages.[80] But if, by the express or implied terms of the contract, the principal sum is not to become payable until demand,—as, for example, in the case of a deposit,—then, until such demand, there can be no default, and therefore no interest can be allowed as damages until demand is made.[81]

But it is sometimes provided by statute that where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed (with certain exceptions) from the time when the right to make the demand is complete.[82]

Where demand is necessary to establish a conversion, interest is recoverable only from demand.[83]

If goods withheld are returned, and damages are allowed for injury and depreciation, and no conversion is alleged, no interest can be allowed for the period of detention.[84]

In New York it has been held that, where rents have been paid quarterly, the interest should be computed quarterly.[85] But the

[79] Lawrence v. Church, 128 N. Y. 324, 28 N. E. 499; Mead v. Wheeler, 13 N. H. 351.

[80] Devlin v. City of New York, 131 N. Y. 123, 30 N. E. 45.

[81] Sheldon v. Heaton, 88 Hun, 535, 34 N. Y. Supp. 856; Whitcomb v. Harris, 90 Me. 206, 38 Atl. 138; Irlbacker v. Roth, 25 App. Div. 290, 49 N. Y. Supp. 538; Bell v. Rice, 50 Neb. 547, 70 N. W. 25; Zautcke v. Town-Site Co., 95 Wis. 21, 69 N. W. 978.

[82] Code Civ. Proc. N. Y. § 410; McMullen v. Rafferty, 89 N. Y. 456.

[83] Garrard v. Dawson, 49 Ga. 434; Northern Transp. Co. of Ohio v. Sellick, 52 Ill. 249; Johnson v. Sumner, 1 Metc. (Mass.) 172; Schwerin v. McKie, 51 N. Y. 180.

[84] Wilson v. Sullivan (Utah) 53 Pac. 994.

[85] Jackson v. Wood, 24 Wend. 443.

Massachusetts courts have held otherwise.[86] And, if the amount recoverable is wholly unliquidated, and cannot be ascertained until verdict or judgment, interest can usually be recovered only from that time, and not from demand;[87] though a claim for compensation for services, resting solely on quantum meruit, the amount being wholly uncertain, carries interest from a demand for a specific amount claimed as due, for then the defendant is in default.[88]

Where the plaintiff has made a reasonable demand for an accounting, and defendant fails to accede to it, or to pay the amount which would have been found due, he is in default from the date of demand, and chargeable with interest.[89]

A demand for a sum assumed to be due may be considered a sufficient demand for a settlement, if the sum is a reasonable one.[90]

In a case where the claim is such as not to draw interest from an earlier date, interest can be allowed from the commencement of an action only when the claim is such that the interest could be set running by a demand; the commencing of the action in such a case being a sufficient demand.[91]

Where defendant reduces plaintiff's recovery by a recoupment, the demands on both sides are unliquidated, and interest on the balance is usually allowed only from verdict.[92]

[86] Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

[87] Day v. Railroad Co., 22 Hun (N. Y.) 412; Crawford v. Publishing Co., 22 App. Div. 54, 47 N. Y. Supp. 747. Compare Kuhn v. McKay (Wyo.) 51 Pac. 205; Vietti v. Nesbitt, 22 Nev. 390, 41 Pac. 151.

[88] Carricarti v. Blanco, 121 N. Y. 230, 24 N. E. 284. Compare White v. Miller, 78 N. Y. 393, 395, et seq., and the cases there reviewed.

[89] Gray v. Van Amringe, 2 Watts & S. (Pa.) 128.

[90] Adams v. Bank, 36 N. Y. 255; Mygatt v. Wilcox, 45 N. Y. 306; Hand v. Church, 39 Hun (N. Y.) 303. Contra, People v. Supervisors of Delaware, 9 Abb. Prac. N. S. (N. Y.) 408. A demand for an unreasonably large sum will not put defendant in default. Goff v. Inhabitants, 2 Cush. (Mass.) 475; Shipman v. State, 44 Wis. 458.

[91] White v. Miller, 78 N. Y. 393, 398; Crawford v. Publishing Co., 22 App. Div. 54, 47 N. Y. Supp. 747; Patterson v. Glass Co., 72 Mo. App. 492. Compare Goddard v. Foster, 17 Wall. 123; Mercer v. Vose, 67 N. Y. 56; Hand v. Church, 39 Hun (N. Y.) 303; Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479.

[92] Brady v. Wilcoxson, 44 Cal. 239; Still v. Hall, 20 Wend. (N. Y.) 51; McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

4. COMPOUND INTEREST.

Interest computed upon interest is called "compound interest." It is not favored in the law, and it is a general rule that compound interest cannot be recovered.[93]

There are, however, a number of exceptions to this general rule. Compound interest can usually be recovered only upon some new and independent agreement, made upon a good consideration. The right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract, made after the interest has accrued, upon a sufficient consideration, is allowed. But a provision that future interest, if not paid, shall be taken as principal, and bear interest, is void.[94]

Engagements to pay interest in future upon interest already accrued have a consideration in forbearing and giving day of payment for moneys presently due. But a like promise, to operate not only in futuro, but also retrospectively, unsupported by any consideration (if one exists) other than the moral consideration resulting from the fact that the interest is in arrear and unpaid, is invalid.[95] But, if there is other sufficient consideration, such a retrospective agreement is valid.[96]

"Compound interest is recoverable upon merchants' accounts of mutual dealings, upon an express agreement, or when an agreement may be implied from usage or custom, for the reason that an extension of time for payment is implied, and the transaction is fair, as the balance may change, and the benefit of the usage be mutual." [97]

[93] Mason v. Callender, 2 Minn. 350 (Gil. 302); State v. Jackson, 1 Johns. Ch. (N. Y.) 13; Whitcomb v. Harris, 90 Me. 206, 38 Atl. 138; Daniell v. Sinclair, 6 App. Cas. 181.

[94] Young v. Hill, 67 N. Y. 162; Bowman v. Neely, 151 Ill. 37, 37 N. E. 840; Lord Ossulston v. Lord Yarmouth, 2 Salk. 449; Ex parte Bevan, 9 Ves. 223; Guernsey v. Rexford, 63 N. Y. 631; Grimes v. Blake, 16 Ind. 160; Doe v. Warren, 7 Me. 48; Thayer v. Mining Co., 105 Ill. 540.

[95] Young v. Hill, 67 N. Y. 162; Ehle v. Judson, 24 Wend. (N. Y.) 96; Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313. Compare Stewart v. Petree, 55 N. Y. 621; Rose v. City of Bridgeport, 17 Conn. 243, 247.

[96] Tillotson v. Nye, 88 Hun, 101, 34 N. Y. Supp. 606.

[97] Kelly, Usury, 49; Young v. Hill, 67 N. Y. 167, 171; Lord Clancarty v. Latouche, 1 Ball & B. 429; Von Hemert v. Porter, 11 Metc. (Mass.) 210; Carpenter v. Welch, 40 Vt. 251.

But the law will not imply a promise to pay compound interest, except under peculiar circumstances and upon some evidence from which an agreement to turn the interest into principal to bear interest for the future can be inferred.[98]

Other exceptions to the rule against the allowance of interest on interest are found in the case of coupons (under certain circumstances; or, in some states, in all cases), as already stated; and where compound interest is allowed as a punishment for a fraudulent breach of trust, or other gross or willful wrong.[99]

Compound interest is never allowed by way of damages.[100] But where, by the terms of a contract, interest is due at a fixed day, it is a debt; and, if not paid when due, interest thereon may be recovered as damages.[101] This secondary interest does not, in turn, bear interest.[102]

5. PARTIAL PAYMENTS—METHOD OF COMPUTATION.

The rule for casting interest when partial payments have been made is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal

[98] Young v. Hill, 67 N. Y. 162, 172.

[99] Ackerman v. Emott, 4 Barb. (N. Y.) 626; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; State v. Howarth, 48 Conn. 207; Jennison v. Hapgood, 10 Pick. (Mass.) 77.

[100] Lewis v. Small, 75 Me. 323.

[101] Calhoun v. Marshall, 61 Ga. 275; Mann v. Cross, 9 Iowa, 327; Taliaferro's Ex'rs v. King's Adm'r, 9 Dana (Ky.) 331; Peirce v. Rowe, 1 N. H. 179; Bledsoe v. Nixon, 69 N. C. 89; Lanahan v. Ward, 10 R. I. 299; Catlin v. Lyman, 16 Vt. 44 (contra, Broughton v. Mitchell, 64 Ala. 210); Rose v. City of Bridgeport, 17 Conn. 243; Leonard v. Villars' Adm'r, 23 Ill. 377; Banks v. McClellan, 24 Md. 62 (contra, Fitzhugh v. McPherson, 3 Gill [Md.] 408); Hastings v. Wiswall, 8 Mass. 455; Corrigan v. Falls Co., 5 N. J. Eq. 232, 245; Young v. Hill, 67 N. Y. 162 (contra, Howard v. Farley, 3 Rob. [N. Y.] 599); Stokely v. Thompson, 34 Pa. St. 210.

[102] Wheaton v. Pike, 9 R. I. 132; Vaughan v. Kennan, 38 Ark. 114; Bowman v. Neely, 151 Ill. 37, 37 N. E. 840.

until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance, as aforesaid.[103]

6. ACTION FOR INTEREST ONLY.

Where interest is recoverable as damages, it does not form the basis of an action, but is an incident to the recovery of the principal debt. And therefore, if the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost. This principle applies, for example, where one who has illegally been required to pay a tax receives back and accepts the amount thus paid from the government, without protest. He cannot thereafter recover interest thereon as damages.[104]

Where interest is secured by contract, or is allowed, not as damages, but as part of the compensation,—for example, for property taken for public purposes,—an action may be maintained for it, although the principal has been paid.*

And where both principal and interest are due and payable, the mere fact that the debtor pays, and the creditor receives, a sum equal to the principal only, does not prevent the creditor from suing the debtor for the unpaid balance, for by itself alone it does not justify an inference of acceptance in full satisfaction.[105] If, in such a case, the payments

[103] Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13, 17; Peyser v. Myers, 135 N. Y. 599, 607, 32 N. E. 699.

[104] Stewart v. Barnes, 153 U. S. 462, 14 Sup. Ct. 849; also, Pacific R. Co. v. U. S., 158 U. S. 118, 15 Sup. Ct. 766; Moore v. Fuller, 47 N. C. 205; Tillotson v. Preston, 3 Johns. (N. Y.) 229; Dixon v. Parkes, 1 Esp. 110; Churcher v. Stringer, 2 Barn. & Adol. 777; Cutter v. Mayor, etc., 92 N. Y. 166; Hamilton v. Van Rensselaer, 43 N. Y. 244; Hayes v. Railway Co., 64 Iowa, 753, 19 N. W. 245; Southern Cent. R. Co. v. Town of Moravia, 61 Barb. (N. Y.) 181; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 364; Gillespie v. Mayor, etc., 3 Edw. Ch. (N. Y.) 512; Jacot v. Emmett, 11 Paige (N. Y.) 142; Succession of Mann, 4 La. Ann. 28; Succession of Anderson, 12 La. Ann. 95; American Bible Soc. v. Wells, 68 Me. 572; Tenth Nat. Bank v. Mayor, etc., 4 Hun (N. Y.) 429.

* Robbins v. Cheek, 32 Ind. 328; Stone v. Bennett, 8 Mo. 41; Fake v. Eddy's Ex'r, 15 Wend. (N. Y.) 76; King v. Phillips, 95 N. C. 245; Devlin v. City of New York, 131 N. Y. 123, 30 N. E. 45; Smith v. City of Buffalo (Sup.) 39 N. Y. Supp. 881.

[105] People v. New York Co., 5 Cow. (N. Y.) 331.

are made generally on account, interest is first extinguished thereby, and accordingly the unsatisfied balance, even though exactly equaling the interest, may be sued for as principal.[106]

7. LIABILITY OF TRUSTEE FOR INTEREST.

If a trustee holds funds which can and should be invested, and through fraud, or mismanagement, or other breach of trust he does not invest them, or invests them in his own business, or that of others, or in commercial or manufacturing enterprises, or speculative ventures, he will be charged with interest, as a general rule;[107] or, at the option of the beneficiary, with the profits earned.[108] But the beneficiary cannot have rests at selected periods, so as to claim profits when they exceeded interest, and interest when it exceeded profits. If profits have first exceeded interest, and then there has been actual loss, if the beneficiary claims profits he can only recover net profits for the entire period.[109] And where the trustee has made separate unauthorized investments of separate parts of the fund, the beneficiary's right to elect applies to each investment by itself, so that, according as his interest may appear, he may approve some and accept the profits, and reject others and insist on legal interest.[110] And he may so elect even during the pendency of the trust.[111] And a beneficiary is not required to keep watch of all the trustee's acts, so as to be prepared at once to protest in case of improper investments. It is the duty of the trustee, and not of the beneficiary, to attend to the investment of the estate.[112] But it may be the beneficiary's duty, if he proposes to

[106] Id. See, also, National Bank of Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 440.

[107] Price v. Holman, 135 N. Y. 124, 32 N. E. 124; In re Barnes, 140 N. Y. 468, 471, 35 N. E. 653; Cook v. Lowry, 95 N. Y. 103, 113; Reynolds v. Sisson, 78 Hun, 595, 29 N. Y. Supp. 492.

[108] Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; In re Myers, 131 N. Y. 409, 30 N. E. 135; Deobold v. Oppermann, 111 N. Y. 531, 538, 19 N. E. 94; King v. Talbot, 40 N. Y. 76, 86; Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665.

[109] Baker v. Disbrow, 18 Hun (N. Y.) 29, affirmed in 79 N. Y. 631.

[110] King v. Talbot, 40 N. Y. 76, 91. Compare In re Porter's Estate, 5 Misc. Rep. 274, 25 N. Y. Supp. 822.

[111] Gillespie v. Brooks, 2 Redf. Sur. (N. Y.) 349, 360.

[112] In re Foster, 15 Hun (N. Y.) 387, 393.

object to the trustee's failure to invest small sums, to find and call to his attention suitable opportunities for investing the same.[113] And the mere fact that the trustee deposits trust moneys with his own, or uses them in his own business, does not necessarily render him liable for interest; as, for instance, where the funds are too small to make it practicable to invest them, or where the trustee may be called on at any moment to pay over the fund to the beneficiary. In order to make him liable for interest, there must be superadded a breach of trust, a neglect or refusal to invest the funds at the time or in the mode which the trust instrument or the law itself has pointed out.[114]

In a case where a trustee has made use of the funds, but no breach of trust is involved, he will be charged with interest, if it be proved that he has earned interest.[115]

If, when rents and income are due and payable, the beneficiary voluntarily leaves them in the trustee's hands, they do not draw interest.[116]

If a penalty is incurred, owing to the negligent failure of the trustee to pay taxes when due, and is paid by him, he cannot be credited therewith on his accounting.[117]

If commissions are prematurely withdrawn by the trustee, he is chargeable with interest thereon.[118] But not solely on that ground,

[113] Rapalje v. Norsworthy's Ex'rs, 1 Sandf. Ch. (N. Y.) 399, 405.

[114] Rapalje v. Norsworthy's Ex'rs, 1 Sandf. Ch. (N. Y.) 399, 404; Jacot v. Emmett, 11 Paige (N. Y.) 142, 145; Price v. Holman, 135 N. Y. 124, 133, 32 N. E. 124; In re Barnes, 140 N. Y. 468, 35 N. E. 653; In re Nesmith, 140 N. Y. 609, 615–617, 35 N. E. 942; Shuttleworth v. Winter, 55 N. Y. 624, 631; In re Clark's Estate, 16 Misc. Rep. 405, 39 N. Y. Supp. 722. As to whether, in deciding whether a trustee had in his hands a fund large enough to call for investment thereof, it is permissible to take into account the fact that he held several entirely distinct trust funds, which, if combined, would have afforded such a gross sum, see Rapalje v. Norsworthy's Ex'rs, 1 Sandf. Ch. (N. Y.) 399.

[115] Rapalje v. Norsworthy's Ex'rs, 1 Sandf. Ch. (N. Y.) 399, 404. As to liability for interest, see, also, note to Kellett v. Rathbun, 4 Paige (N. Y.; Banks' Ann. Ed.) 102, 109.

[116] Holley v. S. G., 4 Edw. Ch. (N. Y.) 284, 286.

[117] Stubbs v. Stubbs, 4 Redf. Sur. (N. Y.) 170.

[118] In re Peyser, 5 Dem. Sur. (N. Y.) 244, 247; Wheelwright v. Wheelwright, 2 Redf. Sur. (N. Y.) 501; In re Freeman's Estate, 4 Redf. Sur. (N. Y.) 211, 215; United States Trust Co. v. Bixby, 2 Dem. Sur. (N. Y.) 494. But see Wyckoff v. Van Siclen, 3 Dem. Sur. (N. Y.) 75.

if they had then been actually earned.[119] If commissions which have been earned, but not allowed, are in good faith withdrawn by the trustee, under an assumption that he is entitled so to do, this mere fact, in the absence of any resulting loss to the estate, is not ground for charging him with interest thereon.[120]

It is only in extraordinary cases that the trustee is charged with compound interest.[121] In King v. Talbot [122] it was held that in case of bad faith or willful failure of duty, the highest rate of interest should be imposed; but where, as in that case, a mistake occurs in investing funds, but the trustee acted honestly and in good faith, the rate of interest to be charged rests in a discretion which permits the consideration of all the circumstances, which show that substantial justice can be done to the cestui que trust, by allowing a less rate. Accordingly, following the English rule in such cases of charging 4 per cent. where the legal rate was 5, the court charged the trustee 6 per cent., the legal rate in New York being then 7 per cent.[123] In Clarkson v. De Peyster [124] it was said that the English rule of "equitable interest" at 1 per cent. less than the legal rate has never been adopted in this state. But the court in King v. Talbot, supra, say that there is nothing in Clarkson v. De Peyster, supra, that affects the soundness of their adoption of the English rule.[125]

In cases where there has been an active breach of trust, resulting in loss, but the circumstances are not sufficiently aggravated to call for compound interest, legal interest is commonly charged, but each case must depend to a considerable degree on its own circumstances, as

[119] Beard v. Beard, 140 N. Y. 260, 265, 266, 35 N. E. 488; Price v. Holman, 135 N. Y. 124, 32 N. E. 124; Whitney v. Phœnix, 4 Redf. Sur. (N. Y.) 180, 195.

[120] Beard v. Beard, 140 N. Y. 260, 266, 35 N. E. 488.

[121] Price v. Holman, 135 N. Y. 124, 133, 134, 32 N. E. 124. For instances of such charges, see Hannahs v. Hannahs, 68 N. Y. 610; Brown v. Knapp, 79 N. Y. 136, 145; Tucker v. McDermott, 2 Redf. Sur. (N. Y.) 312; Morgan v. Morgan, 4 Dem. Sur. (N. Y.) 353, 356; Smith v. Rockefeller, 3 Hun (N. Y.) 295; Reynolds v. Sisson, 78 Hun, 595, 598, 29 N. Y. Supp. 492; Utica Ins. Co. v. Lynch, 11 Paige, 520.

[122] 40 N. Y. 76.

[123] See, also, Shuttleworth v. Winter, 55 N. Y. 624; Haskin v. Teller, 3 Redf. Sur. (N. Y.) 316, 323.

[124] Hopk. Ch. 424, 426.

[125] To the same effect appear to be Wilmerding v. McKesson, 103 N. Y. 329, 341, 8 N. E. 665; Bruen v. Gillet, 115 N. Y. 10, 21, 21 N. E. 676.

affected by the degree of wrongdoing, the probable actual loss, the personal profits, if any, realized by the trustee, etc.[126]

Somewhat similar principles apply where it is found that one person has been holding funds belonging to another, even though he only knew that the latter claimed them, without knowing the particulars of the claim. For if, instead of setting the fund apart to await the settlement of the dispute, he mingles it with his own funds, and enjoys the benefit of it, he is chargeable with legal interest.[127]

8. FEDERAL JURISDICTION—AMOUNT IN CONTROVERSY.

In determining whether the amount of a judgment in an action in a federal court is sufficient to warrant a review thereof in the supreme court in cases where the right to a review still depends on the amount in controversy, interest accruing before and included in the judgment appealed from is deemed to form part of the amount in controversy.[128] But interest on the judgment appealed from is not included in determining the jurisdictional amount.[129]

In all judgments brought to the supreme court for review, the value of the "matter in dispute," where that is still involved, under present statutes, is determined by the amount due at the time of the judgment brought there to be reviewed, namely, the judgment of the intermediate appellate court, and not at the time of the judgment of the trial court; and thus the total amount due included interest on the original judgment, if it bore interest, until the date of that of the intermediate appellate court.[130] And where in an action brought in a state court, and removed to the federal court, a judgment is entered which, in accordance with the statutes of the state, includes interest upon the amount of the verdict, from its date, until the entry of judgment, the

[126] Cook v. Lowry, 95 N. Y. 103, 114, and cases there cited; Morgan v. Morgan, 4 Dem. Sur. (N. Y.) 353, 356, and cases there cited.

[127] Moors v. Washburn, 159 Mass. 172, 34 N. E. 182.

[128] New York El. R. R. v. Fifth Nat. Bank, 118 U. S. 608, 7 Sup. Ct. 23; District of Columbia v. Gannon, 130 U. S. 227, 9 Sup. Ct. 508; The Patapsco, 12 Wall. 451; The Rio Grande, 19 Wall. 78.

[129] Knapp v. Banks, 2 How. 73; W. U. Tel. Co. v. Rogers, 93 U. S. 565, 566.

[130] Zeckendorf v. Johnson, 123 U. S. 617, 8 Sup. Ct. 261; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877.

total amount of the judgment thus composed determines the question whether the amount involved is sufficient to give the federal supreme court jurisdiction to review it.[131]

9. REMISSION OF INTEREST AWARDED.

If interest is erroneously awarded or allowed, and is included in a judgment, the appellate court may allow the appellee, if he wishes, to remit the interest, and may, where that is the only reversible error, affirm the judgment appealed from, upon condition that such remission be made.[132]

[131] Massachusetts Ben. Ass'n v. Miles, 137 U. S. 689, 11 Sup. Ct. 234. See, also, U. S. Sup. Ct. Rule 23 (137 U. S. 691, 692, 3 Sup. Ct. xiii.); Baltimore & O. R. Co. v. Griffith, 159 U. S. 605, 16 Sup. Ct. 105.

[132] Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Upham v. Dickinson, 50 Ill. 97; Whitehead v. Kennedy, 69 N. Y. 462; Town of Union v. Durkes, 38 N. J. Law, 21. Compare dissenting opinions in Burdict v. Railway Co., 123 Mo. 221, 27 S. W. 453; and see Suth. Dam. § 460; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751.

USURY.

10. USURY DEFINED.

Where money or property is exacted or reserved by agreement for the loan or forbearance of money in excess of the legal rate of interest fixed by statute, the agreement is usurious, and the money or property thus exacted or reserved in excess is termed usury. The latter term is also applied to the act of loaning money at a usurious rate.

11. USURIOUS INTENT ESSENTIAL.

Usury consists in the corrupt agreement of the parties by which more than lawful interest is to be paid. To constitute usury, there must be a usurious or corrupt intent. When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute. To increase or alter it, a special agreement is necessary.[133]

Thus the accidental inclusion of an extra sum, neither principal nor interest, in the amount for which a note is given, and where it is the intention of the parties to provide for the payment of principal and of legal interest only, does not render the note usurious. As to the surplus item, it is without consideration, but it is not usury.[134]

The same principle applies to mistakes in attempting to eliminate usury by recomputing and giving a new security.*

12. LOAN OR FORBEARANCE ESSENTIAL.

Usury must be founded on a loan or forbearance of money. If neither of these elements exists, there can be no usury, however unconscionable the contract may be.[135] Thus, a change of securities for an

[133] Rosenstein v. Fox, 150 N. Y. 354, 363, 44 N. E. 1027.

[134] Brown v. Bank, 86 Iowa, 527, 53 N. W. 410, 412; Rushing v. Willingham (Ga.) 31 S. E. 154.

* Jarvis v. Grocery Co., 63 Ark. 225, 229, 38 S. W. 148.

[135] Meaker v. Fiero, 145 N. Y. 165, 39 N. E. 714; Ellenbogen v. Griffey, 55 Ark. 268, 18 S. W. 126.

existing debt, and payment of a sum of money to the creditor for his consent to the change, is not a loan, and, if there is no forbearance, there is no usury.[136]

13. FORM OF CONTRACT IMMATERIAL.

In determining whether a contract is usurious, the law looks not at the mere form, but at the substance. If there be in fact a usurious loan, no shift or device will protect it.[137]

Thus, if one mortgage his real estate, and at the same time agree that, in addition to the legal rate of interest, the mortgagee shall have the manure from the place, there is usury.[138] So, if an applicant for a loan from an insurance company is required, as a condition of procuring it, to take out a policy.[139]

A sale of stock, coupled with an agreement by the seller to buy it back at the price paid for it, with 1 per cent. a month added, if the purchaser should wish to sell, may be usurious, but the mere agreement does not in itself, as matter of law, stamp the transaction as a scheme or device to cover up a usurious loan.[140]

A seller of land or chattels may stipulate for a larger price on a credit sale than he would be willing to accept in cash, and the transaction is not rendered usurious by the fact that the credit price is in excess of the cash price and legal interest to the date of payment.[141] But when the sale is in fact at an agreed cash price, and the form of a sale on credit is resorted to for the purpose of evading the statute against usury, the transaction will be declared usurious.[142]

[136] Meaker v. Fiero, 145 N. Y. 165, 171, 39 N. E. 714.

[137] Scott v. Lloyd, 9 Pet. 446; Phelps v. Bellows, 53 Vt. 539; Meaker v. Fiero, 145 N. Y. 165, 169, 39 N. E. 714; Krumsieg v. Trust Co., 71 Fed. 350, 352; Brower v. Insurance Co., 86 Fed. 748; Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. Supp. 1098; Id., 153 N. Y. 647, 47 N. E. 1105.

[138] Vilas v. McBride, 62 Hun, 324, 17 N. Y. Supp. 171, affirmed in 136 N. Y. 634, 32 N. E. 635.

[139] Carter v. Insurance Co. (N. C.) 30 S. E. 341; Union Cent. Life Ins. Co. v. Morrow, 7 Ohio Dec. 118; Hilliard v. Sanford, Id. 449.

[140] Phillips v. Mason, 66 Hun, 580, 21 N. Y. Supp. 842.

[141] Bass v. Patterson, 68 Miss. 310, 313, 8 South. 849; Hogg v. Ruffner, 1 Black, 115; Brooks v. Avery, 4 N. Y. 225; Rushing v. Worsham (Ga.) 30 S. E. 541; Beete v. Bidgood, 7 Barn. & C. 453; Floyer v. Edwards, 1 Cowp. 112.

[142] Bass v. Patterson, 68 Miss. 310, 313, 8 South. 849; Quackenbos v. Sayer,

So, antedating a note for a loan is usurious, if with corrupt intent, but not otherwise.[143]

14. HISTORICAL.

The taking of any interest whatever was, by the ancient common law, absolutely prohibited.[144] The statute 37 Hen. VIII. c. 9, limited the rate to 10 per cent., and thus negatively authorized interest. The statute 12 Anne, St. 2, c. 16, reduced the authorized rate to 5 per cent., and provided that all bonds, contracts, and assurances whatsoever for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, should be utterly void, and that any person who should take more than that rate should forfeit and lose for every such offense the treble value of the moneys, wares, merchandises, and other things so lent. Various English statutes establishing different rates had been passed between the dates of these two statutes.[145] By 17 & 18 Vict. c. 90, all the laws against usury were repealed, leaving parties at liberty to contract for any rate of interest. In the United States the statutes of usury have been based on the statute of Anne, but contain many variations from its provisions, differing among themselves in the rates of interest authorized and in other respects.

15. THE FEDERAL STATUTE.

By the national currency act of June 3, 1864,[146] it is provided that national banks may loan money at the rate in force, in the states where they are respectively organized, in respect to state banks, and that this interest may be taken in advance. The knowingly taking, receiving, reserving, or charging a greater rate of interest effects a forfeiture of the entire interest, but does not prevent a recovery of the principal. If a greater rate of interest has actually been paid, the per-

62 N. Y. 344; Thompson v. Nesbit, 2 Rich. Law (S. C.) 73; Torrey v. Grant, 10 Smedes & M. (Miss.) 89.

143 Ansley v. Bank, 113 Ala. 467, 479, 21 South. 59.

144 Hawk. P. C. bk. 1, c. 82; Suth. Dam. § 301.

145 See 2 Pars. Notes & B. 391.

146 13 Stat. 99; Rev. St. U. S. § 5197.

son paying it, or his legal representatives, may recover back twice the amount of interest thus paid, by an action to be brought within two years from the consummation of the transaction.

This statute thus embodies two provisions: First, that in case of an action by the bank upon a usurious agreement, only the principal of the loan may be recovered, and the defendant may set up the defense of usury to defeat a recovery of any interest; and, secondly, that in such an action, where interest in excess of the legal rate has already been paid, the defendant cannot, by way of counterclaim or offset, recover under the clause entitling him to double the amount thus paid, but must enforce that right by a separate action against the bank.[147] And this federal statute applies to actions by or against national banks, even though brought in a state court.[148]

The general scheme of the federal statute is found embodied in some state statutes, and will be further discussed in the following sections.

16. NEW YORK STATUTES.

In New York there are two principal statutes (with some minor ones) relating to usury. The first deals with the general subject, and the second deals with loans by state banks and "individual bankers."

(a) Under the statute first mentioned, the rate of interest upon the loan or forbearance of any money, goods, or things in action is 6 per cent., and the statute prohibits every person or corporation from directly or indirectly taking or receiving in money, goods, or things in action, or otherwise, any greater rate of interest. If any higher rate is paid, the person paying it may recover the excess by action, and all bonds, bills, notes, assurances, conveyances, and all other contracts or securities (except bottomry and respondentia bonds and contracts), and all deposits of goods or other things, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for a loan or forbearance, than is

[147] Barnet v. Bank, 98 U. S. 555.

[148] National Bank of Auburn v. Lewis, 81 N. Y. 15; Marion Nat. Bank v. Thompson (Ky.) 40 S. W. 903; Peterborough Nat. Bank v. Childs, 133 Mass. 248, 251; First Nat. Bank of Clarion v. Gruber, 91 Pa. St. 377. As to the meaning of "twice the amount of interest paid," which may be recovered, see Hill v. Bank, 15 Fed. 432; Hintermister v. Bank, 64 N. Y. 212.

prescribed by the statute, are void;[149] and a person who directly or indirectly receives any interest, discount, or consideration upon the loan or forbearance of money, goods, or things in action greater than is allowed by statute, is guilty of a misdemeanor.[150] It will thus be noticed that under this statute usury invalidates the contract for repayment, and no action will lie by the lender to recover even the principal; while the borrower, if he has paid excessive interest, may recover such excess.

(b) Another statute (Laws 1892, c. 689, § 55) follows in practically identical language the federal statute relating to national banks, but applies its provisions to state banks and individual bankers, fixes the legal rate at 6 per cent., and adds: "The true intent and meaning of this section is to place and continue banks and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of congress."[151]

The result of these provisions is that under this statute the construction given to the federal act restricting the right of the borrower who has actually paid excessive interest to recover twice the amount thereof to a direct action, applies also to the state statute, so that such a claim cannot be set up by way of counterclaim or offset in an action by the lender to recover the principal.[152]

The New York law, prior to the revision of 1892, above cited, referred in terms not only to banks and "individual bankers," but also to "private bankers." The term "individual banker" denotes a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection and supervision. "Private bankers" are persons or firms engaged in banking without having any special privileges or authority from the state. The statute, as it stood prior to 1892, protected not only banking corporations, and individual bankers, but also private bankers, from the consequences imposed by the general statutes on citizens not engaged in banking who receive more than the legal rate of interest.[153]

149 2 Rev. St. (9th Ed.) pp. 1854–1857.

150 Pen. Code, § 378.

151 Act June 3, 1864 (13 Stat. 99).

152 Caponigri v. Altieri, 29 App. Div. 304, 51 N. Y. Supp. 418.

153 Perkins v. Smith, 116 N. Y. 441, 449, 23 N. E. 21; Carley v. Tod, 83 Hun,

17. STATUTES OF OTHER STATES.

As already stated, the statutes of usury in the several states, while similar in many respects, differ in some particulars among themselves. Thus, in New York, if interest is paid at a usurious rate, the excess may be recovered back by an action;[154] while in Nebraska and other states the borrower cannot recover any part of the interest paid, but is confined to the defense of usury in an action against him on the contract.[155]

Under such statutes the payment of the usurious interest, together with the whole of the principal, constitutes a settlement; while, if the contract or note be only partially settled, then the defense of usury can still be made.[156] And by Rev. St. U. S. § 5198, if usurious interest has been paid to a national bank, twice that amount may be recovered by action.[157]

So, by the general New York statute, usury renders void the contracts or securities reserving or securing it, while in other states the contract is not avoided, but in an action thereon the plaintiff may still recover the principal without any interest, diminished by any interest that shall have been already paid.[158] And under the federal statute,[159] and also the New York statute relating to banks and individual bankers, usury forfeits the interest, but the principal may be recovered without offset, the borrower being left to his action for debt to recover twice the interest paid.[160]

53, 73, 31 N. Y. Supp. 635. But as to the effect of Laws 1892, c. 689, above summarized, which omitted the term "private banker," see Hawley v. Kountze, 16 Misc. Rep. 249, 250, 38 N. Y. Supp. 327 (reversed, but not on this point, in 6 App. Div. 217, 39 N. Y. Supp. 897).

[154] 2 Rev. St. (9th Ed.) p. 1854.

[155] Blain v. Willson, 32 Neb. 302, 49 N. W. 224; Latham v. Association, 77 N. C. 145; Hadden v. Innes, 24 Ill. 381; Quinn v. Boynton, 40 Iowa, 304; Spurlin v. Millikin, 16 La. Ann. 217.

[156] New England Mortg. Sec. Co. v. Aughe, 12 Neb. 504, 11 N. W. 753; Hadden v. Innes, 24 Ill. 381.

[157] So, in actions in New York against state banks and individual bankers. Laws 1892, c. 689, § 55.

[158] Blain v. Willson, 32 Neb. 302, 49 N. W. 224.

[159] Rev. St. U. S. § 5198.

[160] Barnet v. Bank, 98 U. S. 555, 558.

In still other states the parties may agree in any contract in writing for the payment of any rate of interest, and it must then be allowed, both at law and in equity, and there can be no relief on the mere ground of excessive interest in the absence of fraud or imposition.[161] Further variations also exist in different jurisdictions, under the terms of local statutes.[162]

18. EXCEPTIONS.

Demand Loans.

In New York, where advances of money, repayable on demand, to an amount not less than $5,000, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it is lawful to receive, or contract to receive, and collect, as compensation, any sum, to be agreed upon in writing by the parties to such transaction.[163] And where one borrows a sum not less than $5,000 upon his note, secured by shares of stock, the fact that he gives to the lender, at the same time, an agreement to sell him such stock at the latter's option, at a specified price, even though the price fixed is less than its actual value, does not take the case out of the protection of the statute relating to call loans upon security. The effect of the statute is to remove such loans from the operation of the usury laws, and it seems that the only importance of an agreement in writing as to the sum to be received by the lender is to enable the latter to collect more than 6 per cent. as his compensation.[164]

Loans to Corporations.

It is also provided by statute in New York that no corporation shall interpose the defense of usury. The term "corporation," as used in the New York statute, includes all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.[165]

161 Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Pub. St. Mass. p. 426.

162 See, also, in general, 3 Gen. St. N. J. pp. 3703, 3704; Brightly, Purd. Dig. Pa. (12th Ed.) pp. 1062–1064; Pub. St. Mass. p. 426; 1 Supp. Pub. St. Mass. p. 757; 2 Supp. Pub. St. Mass. p. 661.

163 2 Rev. St. (9th Ed.) p. 1060, § 56.

164 Hawley v. Kountze, 6 App. Div. 217, 39 N. Y. Supp. 897.

165 2 Rev. St. (9th Ed.) p. 1855.

The result of this statute is that "the condition of this class of beings becomes the same as if the usury laws never existed," so far as concerns contracts governed by the laws of New York, but the act has no application to contracts controlled by the laws of another state or country.[166]

Loans by Pawnbrokers.

Pawnbrokers are generally required by statute to procure licenses, and the interest they may charge is usually fixed by law at a rate in excess of that allowed in other cases. In New York[167] the rate is fixed at 3 per cent. per month for the first six months, and 2 per cent. per month thereafter, on loans not exceeding $100, and at a lower rate for larger loans.

Loans by Pawnbroking Corporations.

By Laws N. Y. 1895, c. 326, amended by Laws N. Y. 1896, c. 206, provision is made for the incorporation, in certain counties, of corporations for the loan of money not exceeding $200 to any one person, upon pledge or mortgage of personal property; and by section 3 it is provided that such corporations may charge upon each loan made without the actual delivery to it of the property pledged interest at the rate of 3 per cent. per month for a period of two months or less, and not exceeding 2 per cent. per month for any further period. Section 5 provides that in any such county no person or corporation other than corporations organized under the act shall charge or receive any interest, discount, or consideration greater than at the rate of 6 per cent. per annum upon the loan, use, or forbearance of money, goods, or things in action less than $200 in amount or value, or upon the loan, use, or sale of personal credit in any wise, where there is taken for such loan, use, or sale of personal credit any security upon any household furniture, etc. A violation of this prohibition is a misdemeanor, and upon proof of the fact the debt shall be discharged, and the security void. But the section does not apply to licensed pawnbrokers making loan upon the actual and permanent deposit of personal property as security.

[166] Curtis v. Leavitt, 15 N. Y. 9, 85.

[167] 2 Rev. St. (9th Ed.) p. 2573, § 7.

19. COMPENSATION FOR SERVICES.

Whether the payment of a sum described as commissions, in addition to the legal rate of interest, renders a loan usurious, depends on the question of fact whether or not the person to whom it is paid is in reality the agent of the borrower to procure the loan, and is thus paid for his services in procuring it. If so, this is no ground for charging the lender with usury.[168]

But if the alleged agent of the borrower really received the so-called commission as an additional payment for the loan, on behalf of the lender, the transaction is usurious.[169]

The mere fact that the person to whom a commission is paid, and by whom it is exacted, is in fact also an agent of the lender in reference to effecting the loan, does not, in itself, result in usury. To have that effect, it must be shown that he took it with the knowledge and assent of the lender, so that the latter, at least by acquiescence, became a party to the usurious exaction. It is not even sufficient to show that the lender knew of the usurious exaction after he had made the loan and the transaction was completed. He must have known of it at the time. Nor is it sufficient to show that he supposed that his agent was to receive some compensation for services which he rendered to the borrower.[170]

But where an agent authorized to lend, though not to take usury, lends the money of his principal at a usurious rate, and both the sum lent and the usury exacted are secured by the same instrument, which the principal, knowing that it is for a larger amount than the sum

[168] Telford v. Garrels, 132 Ill. 550, 554, 24 N. E. 573; Moore v. Bogart, 19 Hun (N. Y.) 227; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Ginn v. Security Co., 92 Ala. 135, 138, 8 South. 388; Conover v. Van Mater, 18 N. J. Eq. 481; Grant v. Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841; Smith v. Wolf, 55 Iowa, 555, 8 N. W. 429.

[169] Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. Supp. 1098; Id., 153 N. Y. 647, 47 N. E. 1105; Hare v. Hooper (Neb.) 76 N. W. 1055; Hughson v. Loan Co. (N. J. Ch.) 41 Atl. 492.

[170] Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. 301; Muir v. Institution, 16 N. J. Eq. 537; Chicago Fire-Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

loaned, without explanation, accepts, and has the benefit, he adopts the act of his agent the same as if it had been done by himself.[171]

As the borrower may pay a third party for services in connection with procuring the loan, without rendering the loan itself usurious, so he may pay to the lender, out of the money borrowed, or the lender may, by his direction, retain, a sum in excess of interest, if it is in reality a bona fide payment for services rendered to the borrower by the lender in other connections, and is not a cloak for usury.[172]

So a payment by a borrower to the lender's agent, under the lender's requirement, of the expenses of examining the title of the property mortgaged as security and of preparing the necessary papers, or a clause providing for payment of attorney's fees in foreclosure, if necessary, has been held unobjectionable.[173] And the borrower may even validly agree to pay the lender, in addition to legal interest, for the latter's services and disbursements in collecting in other loans from others, in order to lend to him, and for that purpose going to another town, borrowing funds to make up the required loan, etc. For such payment is not, if bona fide, for the loan, but for work, labor, services, and expenses.[174]

20. SALES OF PROPERTY OR CREDIT.

Usury laws apply only to a loan or forbearance of money, and not to a sale. The purchase, for example, of an existing security for money at a discount, is a common and legitimate transaction, and the purchaser may enforce it for its full amount. Such a transaction may, of course, however, be a cloak for a usurious loan, and in that case it will not avail.[175]

[171] Bliven v. Lydecker, 130 N. Y. 107, 28 N. E. 625; McNeely v. Ford, 103 Iowa, 508, 72 N. W. 672.

[172] Swanstrom v. Balstad, 51 Minn. 276, 53 N. W. 648.

[173] Ammondson v. Ryan, 111 Ill. 506; Ginn v. Security Co., 92 Ala. 135, 138, 8 South. 388; Glover v. Mortgage Co., 31 C. C. A. 105, 87 Fed. 518. See Ellenbogen v. Griffey, 55 Ark. 268, 272, 18 S. W. 126.

[174] Thurston v. Cornell, 38 N. Y. 281; Harger v. McCullough, 2 Denio (N. Y.) 119; Eaton v. Alger, *41 N. Y. 41; Palmer v. Baker, 1 Maule & S. 56.

[175] Siewert v. Hamel, 91 N. Y. 199, 202; Standen v. Brown, 152 N. Y. 128, 46 N. E. 167; Ellenbogen v. Griffey, 55 Ark. 268, 18 S. W. 126; Struthers v. Drexel, 122 U. S. 487, 7 Sup. Ct. 1293.

Thus, many statutes relating to usury, as, for example, Rev. St. U. S. § 5197, and Laws N. Y. 1892, c. 689, § 55, provide, in substance, that the purchase, discount, or sale of a bona fide bill of exchange, note, or other evidence of debt payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for the collection of the same in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than 6 per cent.

But, to come within the field of a sale, there must be an existing valid security to be sold. Thus, where one makes a note, and gives it to a note broker for sale at a rate not exceeding 6 per cent. per annum, and he sells it at a discount of 10 per cent., the real nature of the transaction is a loan by the so-called purchaser to the maker through the broker, and accordingly the loan is usurious, and the note void.[176]

This rule, which renders void a note in the hands of a third party who has purchased it at a discount greater than the legal interest, finds its application in the case of instruments that have no legal inception between the parties, or which are not intended to be available until discounted.[177] So, a sale of a legacy, if bona fide, and not a cloak for usury, is valid, though the price paid is less than the face of the legacy.[178] So, a sale of one's credit can never be void for usury, at whatever price it may be made, unless it can be seen that it is intended as a cover for a usurious loan of money.[179] Any person is at liberty to sell his credit at whatever price he can get for it, precisely as he is at liberty to sell any other property which he may have,[180] except where it is specifically prohibited by statute under given circumstances.[181]

[176] Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Freeport Bank v. Hagemeyer, 91 Hun, 194, 36 N. Y. Supp. 214.

[177] Joy v. Diefendorf, 130 N. Y. 6, 10, 28 N. E. 602. See National Revere Bank v. Morse, 163 Mass. 383, 385, 40 N. E. 180.

[178] Hintze v. Taylor, 57 N. J. Law, 239, 30 Atl. 551.

[179] Forgotston v. McKeon, 14 App. Div. 342, 344, 43 N. Y. Supp. 939; Elwell v. Chamberlin, 31 N. Y. 611, 617; More v. Howland, 4 Denio (N. Y.) 264.

[180] Forgotston v. McKeon, 14 App. Div. 342, 344, 43 N. Y. Supp. 939.

[181] Pen. Code N. Y. § 378; 3 Rev. St. N. Y. (9th Ed.) p. 2573, § 7.

21. INTEREST IN ADVANCE.

If, upon the making of a loan, interest at the legal rate is paid in advance, the necessary result is, of course, to give the lender more than legal interest, for he thus has, in addition, the use of that interest before his loan has earned it. This is a matter which has been variously treated in different jurisdictions. Thus, in Illinois, it is not usurious to exact the payment of interest in advance.[182] Thus, by the federal law relating to national banks, and the New York law relating to state banks and individual bankers, it is provided that interest at the legal rate may be taken in advance, reckoning the days for which the note, bill, or evidence of debt has to run. "Upon the discounting of commercial paper not having a longer time to run to maturity than the notes and bills which are usually discounted by bankers, interest on the whole amount of principal agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance."[183] But, in order to render this principle applicable, the paper discounted must be a negotiable instrument, and payable at no very distant day.[184] So, interest may be validly made payable monthly, quarterly, or semiannually on paper having a longer time to run.[185]

22. BOTTOMRY AND RESPONDENTIA.

The fundamental element of usury consisting in the corrupt reservation or exaction of a payment, for a loan or forbearance, in addition to a repayment of the principal, in excess of the legal rate of interest, it is obvious that there must be cases where, the repayment of both

[182] Telford v. Garrels, 132 Ill. 550, 554, 24 N. E. 573.

[183] Marvine v. Hymers, 12 N. Y. 223, 227; Manhattan Co. v. Osgood, 15 Johns. (N. Y.) 162; New York Firemen's Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664; Bank of Utica v. Wager, Id. 712, 8 Cow. (N. Y.) 398; Bank of Utica v. Phillips, 3 Wend. (N. Y.) 408; Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652; Thornton v. Bank, 3 Pet. 36; International Bank v. Bradley, 19 N. Y. 245, 254; Lloyd v. Williams, 2 W. Bl. 792.

[184] Marvine v. Hymers, 12 N. Y. 223, 229; Marsh v. Martindale, 3 Bos. & P. 158.

[185] Mowry v. Bishop, 5 Paige (N. Y.) 98, 101; Peirce v. Rowe, 1 N. H. 179; Greenleaf v. Kellogg, 2 Mass. 568; Gladwyn v. Hitchman, 2 Vern. 135; Sessions v. Richmond, 1 R. I. 305.

principal and interest being contingent, the reservation of a reasonable payment in excess of the legal rate to cover that risk would not fall within the purpose of the prohibition. Such instances are found in the case of loans upon bottomry or respondentia, where money is loaned, respectively, on a ship or its cargo, and it is agreed that, if the property thus pledged to secure the loan should be lost, the borrower shall repay nothing to the lender.[186]

The same principle applies to the case of a purchase of an annuity involving similar uncertainty, and to the so-called post obit contracts.[187]

23. USURY AND PENALTY DISTINGUISHED.

As already noticed, statutes of usury frequently contained two distinct provisions, namely, that the agreement for a usurious rate of payment for a loan or forbearance shall result in a forfeiture of either principal or interest or both, and that, in addition, a borrower who has in fact paid interest in excess of the legal rate may recover back by action not merely what he has paid, but an additional sum, by way of penalty. This represents one use of the term "penalty." [188]

A second sense in which the term is employed is found in cases where one agrees that, in case of breach by him of his agreement to pay the principal when due, he will pay an extra sum as a penalty for the breach. This is unobjectionable, for, if the payment of the extra sum is purely conditional, and that condition it is within the power of the debtor to perform, so that the creditor may, by the debtor's act, be deprived of any extra payment, it is not usurious.[189]

[186] Thorndike v. Stone, 11 Pick. (Mass.) 183; Bray v. Bates, 9 Metc. (Mass.) 237, 250; 1 Pars. Mar. Ins. 208.

[187] 3 Pars. Cont. 140; Lloyd v. Scott, 4 Pet. 205; Id., 9 Pet. 418; Delano v. Wild, 6 Allen (Mass.) 1, 8; Earl of Chesterfield v. Janssen, 1 Atk. 301, 2 Ves. Sr. 125; Batty v. Lloyd, 1 Vern. 141.

[188] Osborn v. Bank, 154 Pa. St. 134, 26 Atl. 289.

[189] Sumner v. People, 29 N. Y. 337; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 124; Green v. Brown, 22 Misc. Rep. 279, 49 N. Y. Supp. 163; Floger v. Edwards, Cowp. 112, 115; Garret v. Foot, Comb. 133; Roberts v. Trenayne, Cro. Jac. 507; Burton's Case, 5 Coke, 69a; Cutler v. How, 8 Mass. 259. But, if it is a mere cover for usury, it will not avail. Sumner v. People, 29 N. Y. 337, 342.

24. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.

In some states, where usury renders void the instrument affected thereby, it is held that: "A note void in its inception for usury continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade." [190] While in other states, where a usurious note is not void, but void or voidable as to the usury only, at the instance of the debtor, it is held that, if a purchaser of a note knows nothing of the usury between the original parties, he will not be affected thereby.[191] While in still others, where the statute renders the note void as to interest while valid as to principal, the innocent purchaser for value, before maturity, may enforce it as to principal, but not as to interest, for it gathers no validity by circulation.[192] After a lender has parted with the note given for the loan to a bona fide holder, the latter cannot be prejudiced by any subsequent acts of the original parties.[193]

25. CONTINGENT BENEFITS AS USURY.

When a lender stipulates for a contingent benefit beyond the legal rate of interest, and has the right to demand the repayment of the principal sum, with the legal interest thereon, in any event, the contract is in violation of the statute for prohibiting usury; as, for example, where, in addition to stipulating for legal interest in any event, a borrower agreed that the lender should have a contingent interest in the profits of a certain business.[194]

[190] Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Union Bank of Rochester v. Gilbert, 83 Hun, 417, 420, 31 N. Y. Supp. 945.

[191] Bradshaw v. Van Valkenburg, 97 Tenn. 316, 320, 37 S. W. 88.

[192] Miles v. Kelley (Tex. Civ. App.) 40 S. W. 599, 601; Andrews v. Hoxie, 5 Tex. 172; Ward v. Sugg, 113 N. C. 489, 18 S. E. 717.

[193] Seymour Opera-House Co. v. Thurston (Tex. Civ. App.) 45 S. W. 815.

[194] Browne v. Vredenburgh, 43 N. Y. 195; Gilbert v. Warren, 19 App. Div. 403, 46 N. Y. Supp. 489.

26. SUBSTITUTED SECURITIES.

When a security tainted with usury is given up, and a new security substituted, in renewal or continuance, the new security is also tainted with usury.[195]

27. SUBSEQUENT USURIOUS AGREEMENT.

If, when a loan is made, there is no agreement for usurious interest, the fact that subsequently it is agreed that a usurious rate shall be paid, and notes for the loan are given, which are invalidated by this illegal feature, the invalidity of the notes does not react upon the original loan, so as to invalidate it also. The only effect of avoiding the notes is to leave the original loan standing.[196] So the mere fact that excessive interest has been paid does not show that it was originally agreed on or exacted for the loan or forbearance.[197] And so a promissory note, not originally usurious, cannot be made so by an agreement for an extension, subsequently entered into, in consideration of a payment of, or a promise to pay, usurious interest.[198]

28. RECOVERING BACK USURIOUS PAYMENTS.

The rule that, when a plaintiff is in pari delicto with the defendant, money paid by the former to the latter cannot be recovered back, applies only where the act done is in itself immoral, or a violation of the general laws of public policy, but does not bar a recovery where the law violated is intended for the protection of the citizen against op-

195 Treadwell v. Archer, 76 N. Y. 196; Walker v. Bank, 3 How. 67, 71; Feldman v. McGraw, 1 App. Div. 574, 37 N. Y. Supp. 434; Id., 14 App. Div. 631, 43 N. Y. Supp. 885; Sheldon v. Haxtun, 91 N. Y. 124, 131; Marion Nat. Bank v. Thompson (Ky.) 40 S. W. 903-905; Brown v. Bank, 169 U. S. 416, 18 Sup. Ct. 390; Bank of Russellville v. Coke (Ky.) 45 S. W. 867; Farmers' Bank of Kearney v. Oliver (Neb.) 76 N. W. 449; Pardoe v. Bank (Iowa) 76 N. W. 800. See First Nat. Bank of Garden City v. Segal, 21 Pa. Co. Ct. R. 113; McFarland v. Bank (Kan. App.) 52 Pac. 110.

196 In re Consalus, 95 N. Y. 340, 344; Humphrey v. McCauley, 55 Ark. 143, 146, 17 S. W. 713; Nichols v. Fearson, 7 Pet. 104.

197 Willard v. Pinard, 65 Vt. 160, 166, 26 Atl. 67.

198 Morse v. Wellcome, 68 Minn. 210, 70 N. W. 978.

pression, extortion, or deceit. Within the latter class falls the case of usurious payments.[199]

This principle is subject, of course, to that elsewhere discussed, and adopted under the statutes of some states,—that, if all the principal and usurious interest have been paid, no action will lie to recover back the interest.

Statutes authorizing actions to recover back usurious interest that has been paid provide that they must be brought within some specified time "from the time when the usurious transaction occurred." Under such a clause, the "usurious transaction" occurs only when a greater amount than the principal, with legal interest, has been paid, or judgment has been taken for such greater amount. In other words, the time of the limitation does not begin to run until the creditor has received, in the way of payment of principal and usurious interest, a sum in excess of the principal and legal interest, or has taken judgment for such excessive sum. The theory is that the creditor, when entitled in any event to his principal, and only liable to a forfeiture of interest, or to a recovery thereof by the borrower, or of some larger sum by way of penalty, in case he has actually received an excess, has an election to repent him of his usurious exaction, which may be made or evidenced by crediting all payments received, whether intended at the time they are made to be of usury or not, on the principal or legal interest; and his failure to avail himself of this option, and his receipt of illegal interest, cannot, while he still has this locus pœnitentiæ, be affirmed; so that until the payment of an actual excess above principal and legal interest, or judgment therefor, the "usurious transaction" has not "occurred." [200]

After the time limited by the statute, no further right of action exists.[201]

[199] Hintze v. Taylor, 57 N. J. Law, 239, 241, 30 Atl. 551; Jones v. Barkley, Doug. 684; Wheaton v. Hibbard, 20 Johns. (N. Y.) 290; Thomas v. Shoemaker, 6 Watts & S. (Pa.) 183.

[200] First Nat. Bank of Gadsden v. Denson, 115 Ala. 650, 22 South. 518, 522; Duncan v. Bank, Fed. Cas. No. 4,135; McBroom v. Investment Co., 153 U. S. 318, 328, 14 Sup. Ct. 852, 856; Stevens v. Lincoln, 7 Metc. (Mass.) 525; Harvey v. Insurance Co., 60 Vt. 209, 14 Atl. 7.

[201] Palen v. Johnson, 46 Barb. (N. Y.) 23, affirmed in 50 N. Y. 49; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463. Compare Wheaton v. Hibbard, 20 Johns. (N. Y.) 290; Brown v. McIntosh, 39 N. J. Law, 22; Baum v. Thoms (Ind. Sup.) 50 N. E. 357.

Statutes authorizing the borrower or his "personal representatives" to recover, for example, twice the excess over legal interest, do not allow such an action by his assignee.[202]

29. CREDITING USURIOUS PAYMENTS.

As long as any sum is due upon a lawful debt, out of or in connection with which a usurious contract has once arisen, all payments made on either should be credited on the valid claim.[203]

Where a debtor does in fact pay the lender sums in excess of legal interest, but only from motives of gratitude or generosity, and not in pursuance of an agreement or exaction for the loan or forbearance of money, he cannot recover such payments back, or have them credited as payments upon the principal.[204]

30. WHO MAY SET UP USURY.

The right to set up the defense of usury is personal to the borrower, and, under some circumstances, those in privity with him; as, for example, his heirs, devisees, mortgagees subsequent to a usurious mortgage, purchasers, and trustees.[205]

31. PLEADING USURY.

Usury, as a defense, must be pleaded. It is like every other defense, and cannot be proved unless it is set up in the answer. If it is not pleaded, it will be considered as waived. And the rule is so strict with reference to pleading it that it has been held that it must be set forth "with such precision and certainty as to make out on the face of the

[202] Pardoe v. Bank (Iowa) 76 N. W. 800; Osborn v. Bank, 175 Pa. St. 494, 499, 34 Atl. 878.

[203] Humphrey v. McCauley, 55 Ark. 143, 147, 17 S. W. 713; Payne v. Newcomb, 100 Ill. 611; Rogers v. Buckingham, 33 Conn. 81; Fretz v. Murray (Mich.) 76 N. W. 495; Haskins v. Bank, 100 Ga. 216, 27 S. E. 985.

[204] White v. Benjamin, 138 N. Y. 623, 626, 33 N. E. 1037.

[205] Berdan v. Sedgwick, 44 N. Y. 626; Williams v. Tilt, 36 N. Y. 319, 325; Post v. Dart, 8 Paige (N. Y.) 639; De Wolf v. Johnson, 10 Wheat. 367, 393; Green v. Kemp, 13 Mass. 515; 3 Pars. Cont. 122.

pleading that a corrupt and usurious contract has been entered into."[206]

It is not necessary to use the word "corrupt," nor even the word "usury," if the facts establishing those incidents of the transaction are set forth;[207] but merely applying epithets, or pleading a definition of usury, does not constitute that "plain statement of facts" necessary to a sufficient pleading.[208]

32. BURDEN OF PROOF.

Where the defense of usury is interposed, the burden of showing that the special agreement for an illegal rate, which must exist in every case of usury, was in fact made, rests upon the defendant.[209] He enters upon the defense with the presumption against the violation of the law and in favor of the innocence of the party charged with the usury. It is a just requirement that all the facts constituting the usury should be proved with reasonable certainty, and that they should not be established by mere surmise and conjecture, or by inferences entirely uncertain.[210]

33. CRIMINAL PROSECUTION FOR USURY.

Where a statute simply provides, as in New York (Pen. Code, § 378), that a person receiving usurious interest shall be guilty of a misdemeanor, the allegations of an indictment thereunder, in order to constitute a good plea, must not merely allege the unlawful exacting and receiving of a specified sum in excess of the legal rate for the loan and forbearance of another specified sum for a specified period, but must charge the usurious agreement, specifying its terms, and the particular facts relied upon to bring it within the prohibitive clause of the

[206] Laux v. Gildersleeve, 23 App. Div. 352, 355, 48 N. Y. Supp. 301; Chapuis v. Mathot, 91 Hun, 565, 36 N. Y. Supp. 835; Stanley v. Bank, 165 Ill. 295, 46 N. E. 273; Mosier v. Norton, 83 Ill. 519. See Hollis v. Association (Ga.) 31 S. E. 215; Ansley v. Bank, 113 Ala. 467, 479, 21 South. 59.

[207] Miller v. Schuyler, 20 N. Y. 522.

[208] Chapuis v. Mathot, 91 Hun, 565, 568, 36 N. Y. Supp. 835.

[209] Rosenstein v. Fox, 150 N. Y. 354, 363, 44 N. E. 1027; Guggenheimer v. Geiszler, 81 N. Y. 293; Telford v. Gerrels, 132 Ill. 550, 554, 24 N. E. 573.

[210] White v. Benjamin, 138 N. Y. 623, 33 N. E. 1037.

section. The reason is that the receiving or exacting of a greater rate of interest than is authorized by statute may or may not constitute usury, according to the circumstances; for, in order to constitute usury, it must appear that the exaction and reception of the additional interest was in pursuance of a mutual agreement between the parties, and this agreement must be alleged and proved.[211]

And where the statute (Pen. Code N. Y. § 378), requires the receipt of usurious interest in order to render the lender guilty of a crime, the mere corrupt agreement to exact or receive it, which would suffice as a defense in a civil action on the contract, will not suffice to secure a conviction. And therefore, in a civil action, where the defendant seeks an examination of the plaintiff in order to learn the details of the original transaction of which he is ignorant, in order that he may plead them in connection with the defense of usury, the plaintiff cannot object that the examination would compel the disclosure of facts constituting a criminal offense, if, for all that appears, it would only disclose an agreement for, and not a receipt of, usurious interest.[212]

34. EQUITABLE RELIEF AGAINST IMPROVIDENT BARGAINS.

"From an early period equity has relieved against usurious contracts by requiring payment of the principal debt and legal interest. * * * It would not, as is supposed, follow the repeal of all usury laws, that even then courts of equity would refuse to afford relief. 'No usury laws now exist in England, having been repealed by statute. It has nevertheless been decided that the repeal of these laws did not alter the doctrine by which the court of chancery affords relief against improvident and extravagant bargains.'" [213] Thus an agreement, made in advance, to pay compound interest, save in certain excepted cases, elsewhere considered, although not usurious, is not enforceable.[214]

[211] People v. Hubbard, 10 Misc. Rep. 104, 31 N. Y. Supp. 114.

[212] Fox v. Miller, 20 App. Div. 333, 46 N. Y. Supp. 837.

[213] Bisp. Eq. § 222. Higgins v. Lansingh, 154 Ill. 301, 370, 40 N. E. 362.

[214] Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313; Young v. Hill, 67 N. Y. 162; Higgins v. Lansingh, 154 Ill. 301, 370, 40 N. E. 362; Bowman v. Neely, 137 Ill. 443, 27 N. E. 758. But see Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473.

35. EQUITABLE RELIEF AGAINST USURIOUS TRANSACTION.

When a borrower on usurious interest "comes into a court of equity to ask for relief by having the transaction set aside, equity will not afford him redress, except upon the terms of his returning the amount actually borrowed, with lawful interest." [215] This rule has been changed, so far as concerns suits by borrowers, in New York, by statute.[216] But the term "borrower," in the New York statute last cited, is used in its literal sense. It does not apply to his sureties, his grantees, or his devisees, or his assignee in bankruptcy. The act was intended to confer a special and peculiar privilege upon the actual borrower, and is purely personal. The devisee, for example, cannot secure equitable relief against a usurious mortgage placed on the land devised by his devisor, without offering to pay the principal, with legal interest.[217]

36. WAIVER OF USURY.

Even where a statute declares usurious agreements void, they are void only in a limited sense. They are not so absolutely void that the borrower is prevented from making payment if he desires; and, if he voluntarily does this, he cannot reclaim the money thus paid. Nor are they so far void that the borrower is not at liberty to deduct the payment of the debt. Thus the maker of a general assignment for the benefit of creditors may lawfully include in it, and direct the payment of, a usurious debt; so the borrower of money upon a usurious contract, which is secured by a mortgage upon land, upon making sale of the land may lawfully contract with his vendee for the payment of the usurious mortgage, and the vendee will not then be at liberty to set up the objection of usury.[218]

[215] Bisp. Eq. § 43; Hubbard v. Tod, 19 Sup. Ct. 14.

[216] 2 Rev. St. (9th Ed.) p. 1856, § 8. See, also, Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864; Krumsieg v. Trust Co., 71 Fed. 350; Mathews v. Trust Co. (Minn.) 72 N. W. 121.

[217] Buckingham v. Corning, 91 N. Y. 525; Hubbard v. Tod, 19 Sup. Ct. 14.

[218] Berdan v. Sedgwick, 44 N. Y. 626, 630; Chapuis v. Mathot, 91 Hun, 565, 36 N. Y. Supp. 835; Cole v. Savage, 10 Paige (N. Y.) 583; Hartley v. Harrison, 24 N. Y. 171; Murray v. Judson, 9 N. Y. 73; Chapin v. Thompson, 89 N. Y. 270.

But subsequent grantees of the mortgaged premises, with no agreement to either assume or take subject to the prior and usurious mortgage, may, upon foreclosure, set up the defense of usury, even though judgment has been rendered against the mortgagor, establishing the validity of the mortgage, if such judgment was subsequent to the purchase of the land; for after that date the mortgagor cannot do any act to affect his grantee.[219]

37. ESTOPPEL.

The doctrine of estoppel extends to the case of usury, and in appropriate cases prevents the borrower from setting up that defense. But it is subject to the qualification that the person by whom it is invoked must not be a stranger to the transaction, or one whose conduct the declaration was not designed to influence. Thus, where an assignee for value takes a chose in action—for example, a bond and mortgage—by assignment, in reliance upon the debtor's explicit written declaration that he has no defense or set-off to the debt assigned, and that it will be good and valid in the hands of an assignee, the debtor cannot set up in defense, on foreclosure, that the bond and mortgage are void for usury; and this is true although the plaintiff in foreclosure is a second assignee, so that the debtor did not have him specifically in mind in executing the declaration, for the circumstances are such as to entitle the second assignee to rely on the declaration.[220]

38. PURGING FROM USURY.

A usurious contract can be purged of the taint of usury, and money loaned upon a usurious contract can furnish a valid consideration for a promise to pay the money actually loaned. If the usurious contract

[219] Berdan v. Sedgwick, 44 N. Y. 626. See National Loan & Investment Co. of Detroit v. Stone (Tex. Civ. App.) 46 S. W. 67; Building & Loan Ass'n of Dakota v. Price, Id. 92; People's Building, Loan & Savings Ass'n v. Sellars, Id. 370.

[220] Weyh v. Boylan, 85 N. Y. 394; Mechanics' Bank of Brooklyn v. Townsend, 29 Barb. (N. Y.) 569; Stoll v. Reel, 11 Misc. Rep. 461, 32 N. Y. Supp. 737; Horn v. Cole, 51 N. H. 287; Holbrook v. Zinc Co., 57 N. Y. 616; Ashton's Appeal, 73 Pa. St. 153; Ryall v. Rowles, 2 White & T. Lead. Cas. Eq. pt. 2, p. 1673.

be mutually abandoned by the parties, and the securities be canceled or destroyed so that they can never be made the foundation of an action, and the borrower subsequently makes a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury, and can be enforced.[221]

[221] Sheldon v. Haxtun, 91 N. Y. 124, 132; McConkey v. Petterson, 15 App. Div. 77, 44 N. Y. Supp. 286; Kilbourn v. Bradley, 3 Day (Conn.) 356; Houser v. Bank, 57 Ga. 95.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

~~assuming~~ a penalty of ...
If interest due a year ago - & you agree to pay interest on that interest - agreement N.Y. held a past consid. a rule = the Consideration
67 N.Y. 162.

Partial Payments. Let $1000 debt - & $60 be due as interest - payment of $100 is made - then residue is $960. But if payment does not equal the interest - you must allow interest to accrue
1 John ch 13. till payment large enough -
N.J. rule is same -

Liability of trustee - Sometimes ... for negligence

— Usury —

The amt of interest in excess of that allowed by the usury limit - with wrongful intent -

Form of Contract. of no account. Corrupt intent is the vital point. ... a ... made to cover up the usury - ... defense

Penalty for Usury.
1. In N.Y. can't collect anything - neither interest nor principal.
2. Nat'l Banks - also ... - forfeits interest
3. Forfeits only illegal interest ... ??
4. Mass - no forfeit - ...

N.Y. rule. exceptions. No corporation ... defence of usury - ... a ... or a Corporation
By statute. Call loans - $5000 - up - charge any rate - must

109 M/473

... a borrower or mortgagor ... may by ... (1837) go into a court of equity, & get relief from a usurious contract without paying ... back. But before the statute equity demanded that original amt be returned with legal interest. But the statute is in derogation of the common law, & must be strictly construed — & so a ... can take advantage of it ...

Buckingham v Corning 91 NY 525

171 US 474 - 501-2 ; 172 US 351.

Purging contract of usury — ... ...

but this is ...

~~Settlement & ...~~

Arbitr

PRINCIPLES

OF THE

LAW OF ARBITRATION AND AWARD

A MONOGRAPH BY

R. W. FISHER

ST. PAUL, MINN.
WEST PUBLISHING CO.
1896

ARBITRATION AND AWARD.

1. In General.
2. Parties.
3. Subject-Matter.
4. The Arbitrators.
5. The Submission.
6. Revocation.
7. Proceedings.
8. Award.
9. Impeachment.
10. Effect.
11. Enforcement.

IN GENERAL.

1. Arbitration is the investigation and determination of disputed matters by one or more unofficial persons, called "arbitrators" or "referees," chosen by the parties to the controversy.

The term "arbitration" is often broadly used to include all the various steps in the settlement of a controversy by reference to third persons, and in this sense to embrace the award; but a more strict use confines its meaning to the submission and the hearing, the decision being separately spoken of as the "award." [1] The distinguishing feature of an arbitration is that it amounts to a substitution, by the parties, of judges of their own selection for the usual remedies offered by the courts, under an agreement, expressed or implied, that the unprejudiced decision of these persons, after a full and fair hearing, shall be binding and final.[2] But while a submission to arbitration is thus, to an extent, a taking of the controversy out of the hands of the courts, its scope, procedure, and effect are limited and controlled by certain well-defined rules which make up what is technically called the "law of arbitration and award." Most of these rules have for their object the protection of

[1] Black, Law Dict.

[2] Abb. Law Dict.

each party from the fraud or unfairness of the other or of the arbitrator, and to secure an unprejudiced decision upon the merits of the controversy as presented by the parties. If these results are reached, the settlement will generally be upheld, regardless of any lack of formality in the proceedings.[3]

PARTIES.

2. Generally, the power of a party to a controversy to submit it to arbitration is co-extensive with his capacity and authority to contract relative to the subject-matter. But to this rule may be made the following exceptions:

(a) Agents, from a general authority to contract, have no implied power to arbitrate.

(b) Partners have no general power to bind their copartners by a submission to arbitration.

(c) Officers of the United States have no power, as such, to refer matters arising out of the public business under their control.

In General.

As to the contractual capacity of the parties, an agreement to submit a disputed matter to arbitration is governed by the general law of contracts.[4] But, in addition to being legally competent to contract, the parties to a submission must have such control over the subject-matter as will enable them to perform any legal award that may be made.[5] The power to submit to arbitration generally grows out of the power or authority to compromise[6] or to prosecute

[3] See, generally, cases cited under note 123.

[4] Morse, Arb. 3; Caldw. Arb. 15; Russ. Arb. 15; Shelf v. Baily, 1 Comyn, 183; Brady v. Mayor, etc., 1 Barb. (N. Y.) 584; Burrell v. Jones, 8 Barn. & Ald. 47; Blair v. Wallace, 21 Cal. 317; Cox v. Jagger, 2 Cow. (N. Y.) 638; Wood v. Ellis, 3 Caines (N. Y.) 254.

[5] Morse, Arb. 3. Thus, a religious corporation, which has no power, without consent of the supreme court, to sell its real estate, cannot submit to arbitration the question whether it shall be sold. Wyatt v. Benson, 23 Barb. (N. Y.) 327.

[6] Schoff v. Bloomfield, 8 Vt. 472.

or defend a suit relative to the subject-matter;[7] and it might be laid down as a general rule that any person competent to contract in an individual or a representative capacity may submit to arbitration any civil controversy for the determination of which he has the right or authority to prosecute a suit. From these principles it follows that the submission of an infant in his own right is voidable at his election;[8] since he has neither capacity to contract nor power to sue. Corporations, both municipal[9] and private,[10] may be parties to a submission, and are bound by an award legally rendered. Administrators[11] and executors[12] may submit

[7] Buckland v. Conway, 16 Mass. 396; Alexandria Canal Co. v. Swann, 5 How. 83; Somers v. Balabrega, 1 Dall. 164; Brady v. Mayor, etc., 1 Barb. (N. Y.) 584.

[8] Russ. Arb. 18; Morse, Arb. 4; Bac. Abr. "Arbitration," C; Godfrey v. Wade, 6 Moore, 488; Rudston v. Yates, March, 111, 141; Baker v. Lovett, 6 Mass. 78; Britton v. Williams' Devisees, 6 Munf. (Va.) 453.

[9] Brady v. Mayor, etc., 1 Barb. (N. Y.) 584; Kane v. City of Fond du Lac, 40 Wis. 495; Buckland v. Conway, 16 Mass. 396; Schoff v. Bloomfield, 8 Vt. 472; Campbell v. Upton, 113 Mass. 67; City of Shawneetown v. Baker, 85 Ill. 563. Under a statute giving selectmen of a town power "to audit, and in their discretion to allow, the claim of any person against the town for money paid or servies performed for the town," they have power to submit to arbitration a claim against the town for building a bridge. Dix v. Dummerston, 19 Vt. 262.

[10] Alexandria Canal Co. v. Swann, 5 How. 83; Wood v. Railroad Co., 8 N. Y. 160; Isaacs v. Society, 1 Hilt. (N. Y.) 469; Madison Ins. Co. v. Griffin, 3 Ind. 277; Memphis & C. R. Co. v. Scruggs, 50 Miss. 284; Proprietors of Fryeburg Canal v. Frye, 5 Greenl. (Me.) 38; Merchants' Bank of Macon v. Taylor, 21 Ga. 334.

[11] Worthington v. Barlow, 7 Term R. 453; Barry v. Rush, 1 Term R. 691; Lyle v. Rodgers, 5 Wheat. 394; Dickey v. Sleeper, 13 Mass. 244; Cotlin v. Cottle, 4 Pick. (Mass.) 454; Bean v. Farnam, 6 Pick. (Mass.) 269; Bacon v. Crandon, 15 Pick. (Mass.) 79; Jones v. Deyer, 16 Ala. 221; Russell v. Lane, 1 Barb. (N. Y.) 519; Chadbourn v. Chadbourn, 9 Allen (Mass.) 173; Eaton v. Cole, 1 Fairf. (Me.) 137; Kendall v. Bates, 35 Me. 357; Merchants' Bank of Macon v. Taylor, 21 Ga. 334; Wheatley v. Martin's Adm'r, 6 Leigh (Va.) 62; Alling v. Munson, 2 Conn. 691. But when the statute expressly requires all claims against the estate to be adjusted in a particular way, the administrator cannot resort to arbitration. Clark v. Hogle, 52 Ill. 427; Reitzell v. Miller, 25 Ill. 53; Yarborough v. Leggett, 14 Tex. 674.

[12] Morse, Arb. 19; Russ. Arb. 29; Bac. Abr. "Arbitrament," C; Wood v. Tunnicliff, 74 N. Y. 38; Logsdon v. Roberts' Ex'rs, 3 T. B. Mon. (Ky.) 255;

claims in favor of or against the estates they represent. The guardian of an infant [13] or a lunatic [14] may submit on behalf of the ward; but a guardian ad litem has no such power.[15] An attorney employed to prosecute or defend a suit may submit it to arbitration [16] without special authority from the client to do so.[17] A married woman may refer a dispute relating to property of which she has absolute control and independent power of disposal; and she will be bound by any submission by the husband, where he has power to carry out the award without her joinder or consent, or where such joinder would be enforced by law, if necessary to the performance of the award.[18]

Agents.

An agent cannot make a submission in behalf of his principal unless the authority to do so is expressly given or arises by neces-

Overly's Ex'r v. Overly's Devisees, 1 Mete. (Ky.) 117; and cases cited in note 11, supra.

[13] Wats. Arb. 41; Weed v. Ellis, 3 Caines (N. Y.) 252; Strong v. Beroujon, 18 Ala. 168; Goleman v. Turner, 14 Smedes & M. (Miss.) 118; McComb v. Turner, 14 Smedes & M. (Miss.) 119.

[14] Hutchins v. Johnson, 12 Conn. 376; Weston v. Stuart, 2 Fairf. (Me.) 326; Bean v. Farnam, 6 Pick. (Mass.) 269; and cases cited in preceding note.

[15] Hannum's Heirs v. Wallace, 9 Humph. (Tenn.) 129; Frazier v. Pankey, 1 Swan (Tenn.) 75; Fort v. Battle, 13 Smedes & M. (Miss.) 133. See, also, Wheatley's Lessee v. Harvey, 1 Swan (Tenn.) 484.

[16] 2 Pars. Cont. 688; Morse, Arb. 15; Russ. Arb. 25; Somers v. Balabrega, 1 Dall. 164; Wilson v. Young, 9 Pa. St. 101; Holker v. Parker, 7 Cranch, 436; Evans v. Kamphaus, 59 Pa. St. 379; Babb v. Stromberg, 14 Pa. St. 397; Stokely v. Robinson, 31 Pa. St. 315; Talbot v. McGee, 4 T. B. Mon. (Ky.) 375; Beverly v. Stephens, 17 Ala. 701; Town of Alton v. Town of Gilmanton, 2 N. H. 520; Williams v. Danziger, 91 Pa. St. 232. But the client may revoke the submission, in some cases, before it is acted upon. Wilson v. Young, 9 Pa. St. 101; Coleman v. Grubb, 23 Pa. St. 393; Bingham's Trustees v. Guthrie, 19 Pa. St. 418.

[17] "It is believed to be the practice throughout the Union for suits to be referred by consent of counsel without special authority, and this universal practice must be founded on a general conviction that the power of an attorney at law over the cause of his client extends to such a rule." Marshall, C. J., in Holker v. Parker, 7 Cranch, 436. See, also, Filmer v. Delber, 3 Taunt. 486.

[18] Morse, Arb. 26; Bac. Abr. "Arbitration," C; Fort v. Battle, 13 Smedes & M. (Miss.) 133; McComb v. Turner, 14 Smedes & M. (Miss.) 119; Lumley

sary implication from the powers conferred;[19] for otherwise the submission would be, in effect, an unwarranted delegation of the agent's power to bind his principal.[20] No power to submit to arbitration is implied from a general authority to contract,[21] or to collect[22] or "settle"[23] claims or accounts. But it seems that any authority to an agent to secure or enforce any kind of a judicial determination of the matter, or which gives him absolute control over it, will imply power to arbitrate. Thus, authority to prosecute or defend a suit gives by implication power to submit it to arbitration.[24] Authority to "compromise" a claim has been held to warrant a reference by the agent;[25] and the same effect has been given to a general authority to act for a partner in the dissolution of the firm and settlement of its business.[26]

Partners.

A submission by one partner without special authority is not binding on his co-partners.[27] This is unquestioned so far as con-

v. Hutton, Cro. Jac. 447; Memphis & C. R. Co. v. Scruggs, 50 Miss. 284. See, also, Spurck v. Crook, 19 Ill. 415.

[19] Bacon v. Dubarry, 1 Ld. Raym. 246; Cox v. Fay, 54 Vt. 446; Trout v. Emmons, 29 Ill. 433; Gibbs v. Holcomb, 1 Wis. 33; Scarborough v. Reynolds, 12 Ala. 252; Ingraham v. Whitmore, 75 Ill. 24; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Lowenstein v. McIntosh, 37 Barb. (N. Y.) 251. Authority to an agent to make the submission does not empower him to ratify the award, when made. Bullitt v. Musgrave, 3 Gill (Md.) 31.

[20] But the unauthorized submission by an agent may be ratified by the principal, and thus rendered binding. Diedrick v. Richley, 2 Hill (N. Y.) 271; Perry v. Mulligan, 58 Ga. 479; Furber v. Chamberlain, 9 Fost. (N. H.) 405; Memphis & C. R. Co. v. Scruggs, 50 Miss. 284; Isaacs v. Society, 1 Hilt. (N. Y.) 469.

[21] Story, Ag. § 98; Bacon v. Dubarry, 1 Ld. Raym. 246; Trout v. Emmons, 29 Ill. 433; Scarborough v. Reynolds, 12 Ala. 252.

[22] See Pars. Cont. 689; Morse, Arb. 11, and cases there cited.

[23] Mechem, Ag. § 405; Huber v. Zimmerman, 21 Ala. 488; Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Scarborough v. Reynolds, 12 Ala. 252.

[24] Buckland v. Conway, 16 Mass. 396; Wilson v. Young, 9 Pa. St. 101; Somers v. Balabrega, 1 Dall. 164.

[25] Schoff v. Bloomfield, 8 Vt. 472.

[26] Henley v. Soper, 8 Barn. & C. 16.

[27] Morse, Arb. 7; Russ. Arb. 20; 1 Pars. Cont. 191; 1 Lindl. Partn. 129; Karthaus v. Ferrer, 1 Pet. 222; St. Martin v. Thrasher, 40 Vt. 460; Antram v. Chace, 15 East, 209; Stead v. Salt, 10 Moore, 389; Fancher v. Furnace

cerns submissions by an instrument requiring a seal.[28] And while there are cases upholding the power of one partner to bind the firm by a parol submission not specially authorized,[29] the weight of authority clearly sustains the rule that such submissions are not binding on co-partners not consenting thereto before the award is rendered.[30] In such cases the partner making the unauthorized submission is alone bound.[31]

United States Officers.

It is not within the general powers of an officer of the United States to submit to arbitration any matter involving the rights of the government.[32] The denial of this power is put upon the ground that, as the constitution has vested the judicial power in the supreme and inferior courts, no officer of the government can vest it elsewhere. Such a submission, it is said, must be based on special authority given by an act of congress.

Co., 80 Ala. 481, 2 South. 268; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Walker v. Bean, 34 Minn. 427, 26 N. W. 232; Buchoz v. Grandjean, 1 Mich. 367; Jones v. Bailey, 5 Cal. 345; Harrington v. Higham, 13 Barb. (N. Y.) 660.

[28] Backus v. Coyne, 35 Mich. 5; Savercool v. Farwell, 17 Mich. 321; Buchanan v. Curry, 19 Johns. (N. Y.) 137; Karthaus v. Ferrer, 1 Pet. 222; Davis v. Berger, 54 Mich. 652, 20 N. W. 629; McBride v. Hagen, 1 Wend. (N. Y.) 326; St. Martin v. Thrasher, 40 Vt. 460; Abbott v. Dexter, 6 Cush. (Mass.) 108; and cases cited in preceding note.

[29] Such is the law in Illinois, Ohio, Kentucky, and Pennsylvania. See Hallack v. March, 25 Ill. 33; Wilcox v. Singletary, Wright (Ohio) 420; Southard v. Steele, 3 T. B. Mon. (Ky.) 435; Taylor v. Coryell, 12 Serg. & R. (Pa.) 243; Gay v. Waltman, 89 Pa. St. 453.

[30] See, generally, cases cited in notes 27, 28, and 31. Also, Eastman v. Burleigh, 2 N. H. 484; Horton v. Wilde, 8 Gray (Mass.) 425; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; Tillinghast v. Gilmore, 17 R. I. 413, 22 Atl. 942. But the assent of the partner may be presumed where he is present at the hearing, and fails to object. See Hallack v. March, 25 Ill. 33.

[31] 1 Lindl. Partn. 129; Buchanan v. Curry, 19 Johns. (N. Y.) 137; Strangford v. Green, 2 Mod. 228; Harrington v. Higham, 13 Barb. (N. Y.) 660; McBride v. Hagen, 1 Wend. (N. Y.) 326; Smith v. Van Nostrand, 5 Hill (N. Y.) 419; Karthaus v. Ferrer, 1 Pet. 222. An unauthorized submission by a partner may operate as a release of the partnership claim where he accepts the amount awarded in favor of the firm, and indorses a receipt on the award. Buchanan v. Curry, 19 Johns. (N. Y.) 137.

[32] U. S. v. Ames, 1 Woodb. & M. 76, Fed. Cas. No. 14,441.

SUBJECT-MATTER.

3. Any actual doubt or dispute which the parties might legally settle by contract may be submitted by them to arbitration.

A doubtful or disputed matter, to come within the meaning of this rule, must be of such a character that its determination will require an exercise of judicial discretion on the part of the arbitrator, and not merely the performance of a ministerial act.[33] A doubt or uncertainty which an application of the ordinary rules of calculation or measurement would remove will not serve as the basis of an arbitration. Thus, a surveyor chosen to establish a boundary line,[34] an accountant to examine the accounts of the parties and report a balance,[35] a clerk to calculate the interest on a note and determine the amount due,[36] persons chosen to determine the difference to be paid in an exchange of slaves,[37] are generally not regarded as arbitrators, nor are their reports given the conclusiveness of awards.[38] The same may be said generally of persons chosen to appraise property according to their own judgment of its value;[39] although in some cases appraisers have been regarded as arbitrators.[40] The reference of a matter concerning which no dispute exists, for the purpose of preventing future

[33] Morse, Arb. 36; Leeds v. Burrows, 12 East, 1; Hale v. Handy, 26 N. H. 206; Norton v. Gale, 95 Ill. 533; McKinney v. Page, 32 Me. 513; Terry v. Chandler, 16 N. Y. 354; Elmendorf v. Harris, 5 Wend. (N. Y.) 521; Lee v. Hemingway, 3 Nev. & M. 860.

[34] Thayer v. Bacon, 3 Allen (Mass.) 163.

[35] Stage v. Gorich, 107 Ill. 361; Kelly v. Crawford, 5 Wall. 785.

[36] Grimes v. Blake, 16 Ind. 160.

[37] Curry v. Lackey, 35 Mo. 389.

[38] But see Board of Trustees, etc., v. Lynch, 5 Gilman (Ill.) 521; McAvoy v. Long, 13 Ill. 147; Robbins v. Clark, 129 Mass. 145; Oakes v. Moore, 24 Me. 214.

[39] See cases cited in note 33 supra. Also, Garred v. Macey, 10 Mo. 161; Curry v. Lackey, 35 Mo. 389; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405.

[40] See Smith v. Railroad Co., 36 N. H. 458; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339; Leonard v. House, 15 Ga. 473; Efner v. Shaw, 2 Wend. (N. Y.) 567; Oakes v. Moore, 24 Me. 214.

differences from arising, is not regarded as a submission to arbitration.[41] But the matter need not be involved in a pending suit;[42] it is sufficient that it be actually disputed, or even merely doubted.[43] It need not consist solely of questions of fact; for a pure question of law may be submitted.[44] Generally, any controversy concerning real [45] or personal [46] property or an injury thereto [47] may be adjusted by arbitration. While criminal matters cannot be submitted, a civil claim for damages, growing out of an act punishable as a crime, may be so adjusted,[48] even after indictment.[49]

[41] Stose v. Heissler, 120 Ill. 433, 11 N. E. 161; Norton v. Gale, 95 Ill. 533.

[42] Titus v. Scantling, 4 Blackf. (Ind.) 89.

[43] Brown v. Wheeler, 17 Conn. 345; Findly v. Ray, 5 Jones (N. C.) 125; Mayo v. Gardner, 4 Jones (N. C.) 359; Higgins v. Kinneady, 20 Iowa, 474.

[44] Ching v. Ching, 6 Ves. 282; Green v. Ford, 17 Ark. 586; Strawbridge v. Funstone, 1 Watts & S. (Pa.) 517; Jones v. Mill Corp., 6 Pick. (Mass.) 148; Smith v. Thorndike, 8 Greenl. (Me.) 119; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,863.

[45] Caldw. Arb. 1; Morse, Arb. 54; Knight v. Burton, 6 Mod. 231; Round v. Hatton, 10 Mees. & W. 660; McMullen v. Mayo, 8 Smedes & M. (Miss.) 298; Jones v. Mill Corp., 6 Pick. (Mass.) 148; Clark v. Burt, 4 Cush. (Mass.) 396; Akely v. Akely, 16 Vt. 450; Sellick v. Addams, 15 Johns. (N. Y.) 197; Carey v. Wilcox, 6 N. H. 177; Byers v. Van Deusen, 5 Wend. (N. Y.) 268; Munro v. Alaire, 2 Caines (N. Y.) 320; Davis v. Havard, 15 Serg. & R. (Pa.) 165; Page v. Foster, 7 N. H. 392; Hunter v. Rice, 15 East, 100; McCracken v. Clarke, 31 Pa. St. 498; Blair v. Wallace, 21 Cal. 318. A dispute as to a division line between two tracts of land may be submitted. Jones v. Dewey, 17 N. H. 596; Bowen v. Cooper, 7 Watts (Pa.) 311; Page v. Foster, 7 N. H. 392. An action of ejectment may be referred. Austin v. Snow's Lessee, 2 Dall. 157; Harvey v. Snow, 1 Yeates (Pa.) 156; Duer v. Boyd, 1 Serg. & R. (Pa.) 203.

[46] See, generally, cases cited in note 46, supra. Also, Penniman v. Rodman, 13 Mete. (Mass.) 382; Munro v. Alaire, 2 Caines (N. Y.) 320; McMullen v. Mayo, 8 Smedes & M. (Miss.) 298; De Long v. Stanton, 9 Johns. (N. Y.) 38.

[47] Fitch v. Hydraulic Co., 44 Mich. 74, 6 N. W. 91; Fitch v. Taft, 126 Mass. 503.

[48] Morse, Arb. 53; Baker v. Townshend, 1 Moore, 120; Noble v. Peebles, 13 Serg. & R. (Pa.) 319; Ligon v. Ford, 5 Munf. (Va.) 10. See, also, Yates v. Russell, 17 Johns. (N. Y.) 461; People v. Bishop, 5 Wend. (N. Y.) 111.

[49] Noble v. Peebles, 13 Serg. & R. (Pa.) 319.

THE ARBITRATORS.

4. Any one having no concealed interest in the matter submitted is competent to act as arbitrator, whether legally competent to contract or not.

The arbitrators are the persons selected as judges to hear and determine the controversy; and it is said that a party may select whom he pleases to act as his judge.[50] Whatever may have been the rule formerly,[51] it is now well settled that neither infancy, idiocy, lunacy, coverture, nor any other natural or legal disability will disqualify a person to act as arbitrator.[52] Nor will a known interest in the subject-matter of the submission.[53] But if an arbitrator has a substantial interest in the controversy not known to the parties, and which is of such a nature that it might affect his decision,[54] or if other circumstances tending to create prejudice exist, such as a relationship between the arbitrator and one of the parties, which fact is not known to the other, the award may be set aside on this ground.[55] But an objection to an arbitrator because of any interest or incompetency known to or dis-

[50] Russ. Arb. 111; Morse, Arb. 99; Vin. Abr. "Arbitration," A, 2.

[51] Russ. Arb. 111; Com. Dig. "Arbitrament," C.

[52] Russ. Arb. 111; Bac. Abr. "Arbitration," D; Huntig v. Ralling, 8 Dowl. 879; Evans v. Ives, 15 Phila. (Pa.) 635 (as to competency of married woman).

[53] Fisher v. Towner, 14 Conn. 26; Brown v. Leavitt, 26 Me. 251; Hubbard v. Hubbard, 61 Ill. 228.

[54] Earl v. Stocker, 2 Vern. 251; Rand v. Redington, 13 N. H. 72; Inhabitants of Leominster v. Fitchburg & W. R. Co., 7 Allen, 38; Spearman v. Wilson, 44 Ga. 473.

[55] Brown v. Leavitt, 26 Me. 251; Pool v. Hennessy, 39 Iowa, 192. An employé of one of the parties is a competent arbitrator. Howard v. Pensacola & A. R. Co., 24 Fla. 560, 5 South. 356. An alderman is a competent arbitrator in a case to which the city is a party. Kane v. Fond du Lac, 40 Wis. 495. One who has formerly been counsel for the successful party in another case is not thereby disqualified to act as arbitrator. Goodrich v. Hulbert, 123 Mass. 190; Cheney v. Martin, 127 Mass. 304. A person who has been subpœnaed as a witness in the case is competent to act as an arbitrator. Temple v. Myers, 16 Pa. Co. Ct. R. 232. Stockholders in a bank which holds shares of a railroad company pledged it as collateral security by a person of good credit and fair standing, are not disqualified by reason

covered by the party in the course of the proceedings may be waived,[56] and a waiver is implied from failure to object before the award is made.[57]

Umpire and Third Arbitrator.

As a general rule, the parties to the submission each select an arbitrator, and give to them the power to select a third in case of disagreement. This third person is called an "umpire." Generally, under such a submission, the arbitrators need not wait until they have actually disagreed, but may appoint an umpire even before commencing the hearing.[58] The appointment may be by parol, unless the statute, the terms of the submission, or the nature of the subject-matter require it to be in writing;[59] and where the parties appear before the umpire without objection as to the mode of his appointment they cannot afterwards raise the objection that he should have been appointed by written instrument.[60] But an umpire cannot be appointed by parol where it is agreed that the submission shall be made a rule of court.[61] Upon the disagreement of the arbitrators, it is the duty of the umpire to decide, not merely the points upon which the arbitrators have failed to agree, but the whole controversy, exactly as though he had been appointed sole arbitrator in the first instance.[62] He should hear the oral

of interest from acting as arbitrators in a case in which the railroad company is a party. Inhabitants of Leominster v. Fitchburg & W. R. Co., 7 Allen (Mass.) 38.

[56] Brown v. Leavitt, 26 Me. 251; Davis v. Forshee, 34 Ala. 107; Fox v. Hazelton, 10 Pick. (Mass.) 275; Dougherty v. McWhorter, 7 Yerg. (Tenn.) 239; Strong v. Strong, 9 Cush. 560.

[57] Robb v. Brachman, 38 Ohio St. 423; Monongahela Nav. Co. v. Fenlon, 4 Watts & S. (Pa.) 205; Fox v. Hazelton, 10 Pick. (Mass.) 275; Anderson v. Burchett, 48 Kan. 153, 29 Pac. 315; Brown v. Leavitt, 26 Me. 251.

[58] Alexandria Canal Co. v. Swann, 5 How. 83; Bigelow v. Maynard, 4 Cush. 317; Dudley v. Thomas, 23 Cal. 365; Newton v. West, 3 Mete. (Ky.) 24; McKinstry v. Solomons, 2 Johns. (N. Y.) 57; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; Butler v. Mayor, etc. of New York, 1 Hill (N. Y.) 489; Peck v. Wakely, 2 McCord (S. C.) 279; Woodrow v. O'Conner, 28 Vt. 776; Stevens v. Brown, 82 N. C. 460.

[59] Morse, Arb. 215; Bryan v. Jeffreys, 101 N. C. 242, 10 S. E. 167.

[60] Knowlton v. Homer, 30 Me. 552.

[61] Ehmendorf v. Harris, 23 Wend. (N. Y.) 628.

[62] Bates v. Cooke, 9 Barn. & C. 407; McKinstry v. Solomons, 2 Johns.

and examine the documentary evidence in the case, and not rely solely on the facts reported by the arbitrators.[63] The award is his act alone; the joinder of the other arbitrators therein will be rejected as surplusage.[64] But sometimes the submission provides for the selection of a third person in case of disagreement, and stipulates that the award shall then be by concurrence of a majority. In such a case the third person is not an umpire, but a third arbitrator, charged with the same duties and vested with the same powers as a member of the original board.[65]

THE SUBMISSION.

5. The submission is the contract between the parties to refer the dispute and abide by the award of the arbitrators.[66] It may be—

(a) At common law; either oral, or by written instrument with or without a seal.

(b) Under the statute; in which case the form and execution of the contract must comply with the statutory provisions.

(N. Y.) 57; Shields v. Renno, 1 Overt (Tenn.) 313; Passmore v. Pettit, 4 Dall. 271; Crabtree v. Green, 8 Ga. 8.

[63] Taber v. Jenny, Spr. 315, Fed. Cas. No. 13,720, Falconer v. Montgomery, 4 Dall. 232; In re Grening, 74 Hun, 62, 26 N. Y. Supp. 117; Passmore v. Pettit, 4 Dall. 271; Daniel v. Daniel, 6 Dana (Ky.) 93; Small v. Courtney, 1 Bred. (S. C.) 205; Ingraham v. Whitmore, 75 Ill. 24; Gaffy v. Hartford Bridge Co., 42 Conn. 143; Alexander v. Cunningham, 111 Ill. 511. But see Sharp v. Lipsey, 2 Bailey (S. C.) 113; Graham v. Graham, 9 Pa. St. 254.

[64] Kile v. Chapin, 9 Ind. 150; King v Cook, Charlt. (Ga.) 286; Tyler v. Webb, 10 B. Mon. (Ky.) 123; Rigden v. Martin, 6 Har. & J. (Md.) 403; Frissell v. Fickes, 27 Mo. 557; Boyer v. Aurand, 2 Watts (Pa.) 74; Rison v. Berry, 4 Rand. (Va.) 275; Shields v. Renno 1 Overt. (Tenn.) 313; Haven v. Winnisimmet Co., 11 Allen (Mass.) 377; Ingraham v. Whitmore, 75 Ill. 24.

[65] Reade v. Dutton, 2 Mees. & W. 69; Lyon v. Blossom, 4 Duer (N. Y.) 318; Willis v. Higginbotham, 61 Miss. 164; Mullins v. Arnold, 4 Sneed (Tenn.) 262; Battey v. Button, 13 Johns. (N. Y.) 189; Bassett v. Cunningham, 9 Grat. (Va.) 684; Rison v. Berry, 4 Rand (Va.) 275; Haven v. Winnisimmet Co., 11 Allen (Mass.) 377; Gaffy v. Hartford Bridge Co., 42 Conn. 143; Quay v. Westcott, 60 Pa. St. 163.

[66] That agreements to submit to arbitration will not be specifically en-

Common-Law Submissions.

Submissions at common law are liberally construed, the intention of the parties being the controlling element.[67] The form of the agreement must be governed largely by the subject-matter. The submission and the award have the general effect of a single contract between the parties;[68] and therefore it may be said that a verbal submission will be valid when the subject-matter is such that a verbal agreement between the parties in the terms of the award would be valid; but if the statute of frauds would require such a contract to be in writing, or by sealed instrument, the submission and award must be of corresponding dignity.[69] Thus a submission affecting the title to real estate must be under seal;[70] but any other question relative to land, such as a claim for rent,[71] a controversy as to the price to be paid for a certain tract,[72] a claim

forced, see Clark, Contracts, 432, and cases there cited. The following cases are also in point: Keeffe v. National Acc. Soc., 38 N. Y. Supp. 854; McGunn v. Hanlin, 29 Mich. 476; Corbin v. Adams, 76 Va. 58; King v. Howard, 27 Mo. 21; Copper v. Wells, 1 N. J. Eq. 10.

[67] Wilson v. Getty, 57 Pa. St. 266; Brady v. Mayor, etc., 1 Barb. (N. Y.) 584; Gerrish v. Ayers, 3 Scam. (Ill.) 245; Kimball v. Walker, 30 Ill. 482; Ross v. Watt, 16 Ill. 99; Noble v. Peebles, 13 Serg. & R. (Pa.) 319; King v. Jemison, 33 Ala. 499; Valentine v. Valentine, 2 Barb. Ch. 430; Hopson v. Doolittle, 13 Conn. 236. The stipulation should fix the number of arbitrators and the mode of their selection. Greiss v. Insurance Co., 98 Cal. 241, 33 Pac. 195.

[68] See Russ. Arb. 53; Walters v. Morgan, 2 Cox, Ch. 369; Ballance v. Underhill, 3 Scam. (Ill.) 453; Stone v. Atwood, 28 Ill. 30. From the fact of submission, the law always implies an agreement to abide by the award. Valentine v. Valentine, 2 Barb. Ch. 430.

[69] Morse, Arb. 51. And see, generally, Thomasson v. Risk, 11 Bush (Ky.) 619; Smith v. Douglass, 16 Ill. 34; Martin v. Chapman, 1 Ala. 278; Philbrick v. Preble, 18 Me. 255; Stark's Heirs v. Cannady, 3 Litt. (Ky.) 399; Phelps v. Dolan, 75 Ill. 90; Logsdon v. Roberts' Ex'rs, 3 T. B. Mon. (Ky.) 255; Byrd v. Odem, 9 Ala. 755; Dilks v. Hammond, 86 Ind. 563; Donnell v. Lee, 58 Mo. App. 288; McMullen v. Mayo, 8 Smedes & M. (Miss.) 298. The submission of a pending suit may be by parol. Wells v. Lane, 15 Wend. 99.

[70] Morse, Arb. 55; Miller v. Graham, 1 Brev. (S. C.) 448; Stark's Heirs v. Cannady, 3 Litt. (Ky.) 399; Hodges v. Saunders, 17 Pick. 470.

[71] Peabody v. Rice, 113 Mass. 31.

[72] Davy v. Faw, 7 Cranch, 172; Weston v. Stuart, 2 Fairf. (Me.) 326.

for damages growing out of a contract relative to land,[73] may be submitted by parol.[74] Where a submission is first made by parol, but is followed by another in writing, the second supersedes the first,[75] even though it provides for a different number of arbitrators.[76]

Statutory Submissions.

While there is a tendency towards a liberal construction, in many particulars, of statutes governing arbitrations,[77] a statutory submission, so far as concerns its form and execution, must, as a rule, conform strictly to the terms of the statute. Such submissions are generally required to be in writing, sometimes under seal, and acknowledged before a justice of the peace or other officer. The statute usually provides for giving effect to the award by entry of judgment upon it; and it is said that the jurisdiction of the arbitrators to make an award upon which the court can render judgment is "a special jurisdiction, created entirely by the statute," and can be sustained only by a full compliance with the statutory provisions.[78] But statutes authorizing and regulating submissions, and prescribing the mode by which the award may become the foundation of a judgment, and enforceable as such, generally do not abrogate the common-law practice of arbitration.[79] The par-

[73] Carson v. Earlywine, 14 Ind. 256.

[74] A general submission of "all matters in dispute" between the parties will embrace questions relating both to real and to personal property. Munro v. Alaire, 2 Caines (N. Y.) 320; Sellick v. Addams, 15 Johns. (N. Y.) 197. And involves a submission of both the law and the facts. Indiana Cent. R. Co. v. Bradley, 7 Ind. 49; Plank v. Mizell (Pa. Com. Pl.) 11 Pa. Co. Ct. R. 670.

[75] Symonds v. Mayo, 10 Cush. (Mass.) 39.

[76] Loring v. Alden, 3 Metc. (Mass.) 576.

[77] See Morse, Arb. 47, and cases there cited.

[78] Abbott v. Dexter, 6 Cush. 108; Francis v. Ames, 14 Ind. 251; Weinz v. Dopler, 17 Ill. 111; Moody v. Nelson, 60 Ill. 229; Gibson v. Burrows, 41 Mich. 713, 3 N. W. 200.

[79] Martin v. Chapman, 1 Ala. 278; Byrd v. Odem, 9 Ala. 755; Carson v. Earlywine, 14 Ind. 256; Titus v. Scantling, 4 Blackf. (Ind.) 89; Torrance v. Amsden, 3 McLean, 509, Fed. Cas. No. 14,103; Overly's Ex'r v. Overly's Devisees, 1 Metc. (Ky.) 117; Brown v. Kincaid, Wright (Ohio) 37; Howard v. Sexton, 4 N. Y. 157; Pierce v. Kirby, 21 Wis. 125; Peachy v. Ritchie, 4 Cal. 205; Giles L. & L. Printing Co. v. Recaimer Manuf'g Co., 14 Daly, 475.

ties may generally select, at their option, either the statutory or the common law mode; and if the submission, proceedings, and award are sufficient when tested by the rules of the common law, although not in conformity with the statute, the award will be given effect as a common law award.[80] But where it clearly appears that a statutory arbitration was intended, the submission and proceedings will generally be judged by the statute; and any substantial departure from its positive requirements will be fatal to the validity of the award.[81]

REVOCATION.

6. Either party may revoke the submission at any time before the award is made. The revocation may be—

(a) Express, either oral or written, as corresponds to the submission; or

(b) Implied from circumstances, or the acts or condition of the parties.

Express Revocation.

Unless denied by statute, the right of express revocation exists generally as to all submissions[82] except such as have actually

[80] Weinz v. Dopler, 17 Ill. 111; Cook v. Schroeder, 55 Ill. 530; Eisenmeyer v. Sauter, 77 Ill. 515; Titus v. Scantling, 4 Blackf. (Ind.) 89; Moore v. Barnett, 17 Ind. 349; Clement v. Comstock, 2 Mich. 359; McGinn v. Hanlin, 29 Mich. 476; Galloway v. Gibson, 51 Mich 135, 16 N. W. 310; Willingham v. Harrell, 36 Ala. 583; Tyler v. Dyer, 13 Me. 41; Fink v. Fink, 8 Iowa, 312; Conger v. Dean, 3 Iowa, 463; Dockery v. Randolph (Tex. Civ. App.) 30 S. W. 270; Wilkes v. Cotter, 28 Ark. 519.

[81] Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259; Wesson v. Newton, 10 Cush. (Mass.) 114; Deerfield v. Arms, 20 Pick. (Mass.) 480; Hamilton v. Hamilton, 27 Ill. 158; Winne v. Elderkin, 1 Chand. (Wis.) 219; Cope v. Gilbert, 4 Denio (N. Y.) 347; Estep v. Larsh, 16 Ind. 82; Bowes v. French, 2 Fairf. (Me.) 182; Pierce v. Kirby, 21 Wis. 125; Francis v. Ames, 14 Ind. 251; Thompson v. Seay (Tex. Civ. App.) 26 S. W. 895; Abbott v. Dexter, 6 Cush. (Mass.) 108; Allen v. Chase, 3 Wis. 249; Conger v. Dean, 3 Iowa, 463; Erie Telegraph & Telephone Co. v. Bent, 39 Fed. 409. The statute must be complied with as to the number of arbitrators. Chickering-Chase Bros. Co. v. De Voll, 55 Ill. App. 112.

[82] Milne v. Gratrix, 7 East, 608; Vynior's Case, 8 Coke, 80a; Leonard v.

been made a rule of court;[83] and it cannot be defeated by a stipulation in the submission that it shall be irrevocable.[84] Whether the agreement to submit be under seal or by parol, the right to revoke is the same; but the revocation must be of at least equal dignity with the submission. If the submission be in writing, the revocation must also be in writing;[85] if under seal, it can be revoked only by a sealed instrument.[86] As the submission is in every sense a contract, of course the party revoking it thereby renders himself liable to the other for resulting damages.[87] The right of revocation ceases upon the making and publishing of the award.[88]

House, 15 Ga. 473; Allen v. Watson, 16 Johns. (N. Y.) 205; Aspinwall v. Tousey, 2 Tyler (Vt.) 328; Jones v. Harris, 59 Miss. 214; Marsh v. Packer, 20 Vt. 198; Erie v. Tracy, 2 Grant (Pa.) 20; Johnson v. Andress, 5 Phila. (Pa.) 8; Peters' Adm'r v. Craig, 6 Dana (Ky.) 307; Tobey v. Bristol Co., 3 Story, 800, Fed. Cas. No. 14,065; Bank of Monroe v. Widner, 11 Paige (N. Y.) 529; Donnell v. Lee, 58 Mo. App. 288; Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22.

[83] Dexter v. Young, 40 N. H. 130; Huston v. Clark, 12 Phila. (Pa.) 383; Haskell v. Whitney, 12 Mass. 47; Tyson v. Robinson, 3 Ired. (N. C.) 333; Pollock v. Hall, 4 Dall. 222; Sutton v. Tyrrell, 10 Vt. 91; Bray v. English, 1 Conn. 498; Masterson v. Kidwell, 2 Cranch C. C. 670, Fed. Cas. No. 9,269. Compare Green v. Pole, 6 Bing. 443; Bank of Monroe v. Widner, 11 Paige (N. Y.) 529.

[84] See cases cited in note 82. Also, Davis v. Maxwell, 27 Ga. 368; Power v. Power, 7 Watts (Pa.) 205; Shroyer v. Bash, 57 Ind. 349. A stipulation in the submission that if either party fails to appear the arbitrators may proceed ex parte, does not render the submission irrevocable. Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751.

[85] Sutton v. Tyrrell, 10 Vt. 91.

[86] Wallis v. Carpenter, 13 Allen (Mass.) 19; McFarlane v. Cushman, 21 Wis. 401; Brown v. Leavitt, 26 Me. 251; Mullins v. Arnold, 4 Sneed (Tenn.) 262; Howard v. Cooper, 1 Hill (N. Y.) 44; Van Antwerp v. Stewart, 8 Johns. (N. Y.) 125.

[87] Brown v. Leavitt, 26 Me. 251; Rison v. Moon, 91 Va. 384, 22 S. E. 165; Hawley v. Hodge, 7 Vt. 237; Dexter v. Young, 40 N. H. 130; Craftsbury v. Hill, 28 Vt. 763; Miller v. Canal Co., 53 Barb. (N. Y.) 590; Pond v. Harris, 113 Mass. 114; Frets v. Frets, 1 Cow. (N. Y.) 335.

[88] Macarthur v. Campbell, 5 Barn. & Adol. 518; Knowlton v. Homer, 30 Me. 552; Clement v. Hadlock, 13 N. H. 185; Coon v. Allen, 156 Mass. 113, 30 N. E. 83; Hunt v. Wilson, 6 N. H. 36; Tobey v. Bristol Co., 3 Story, 800, Fed. Cas. No. 14,065; Musselbrook v. Dunkin, 9 Bing. 605. See Bank of Monroe v. Widner, 11 Paige (N. Y.) 529.

In case of statutory submissions, the exercise of the power of revocation is limited and controlled by the statute.[89] The revocation must be absolute and unconditional,[90] and it will not become operative until notice thereof is given to the arbitrators.[91] No specific form of words is required. Any words which, when liberally construed, disclose an intention to revoke the power of the arbitrators, will be held sufficient.[92]

Implied Revocation.

A revocation results by implication or operation of law from any act or circumstance which renders the continuance of the proceedings legally or actually impossible. Thus, unless the submission provides against such a contingency, the death of an arbitrator,[93] or of a party,[94] or the refusal of an arbitrator to proceed,[95] or the marriage of a female party where such marriage destroys her control over the subject-matter of the submission,[96] or the bringing of a suit on the disputed matter pending the arbitration,[97] will amount to a revocation. But the bankruptcy of a party does not

[89] See Bloomer v. Sherman, 5 Paige (N. Y.) 575; Carey v. Commissioners, 19 Ohio, 245; Shroyer v. Bash, 57 Ind. 349.

[90] Goodwine v. Miller, 32 Ind. 419; Steere v. Brownell, 113 Ill. 415.

[91] Allen v. Watson, 16 Johns. (N. Y.) 205; Brown v. Leavitt, 26 Me. 251.

[92] Freis v. Frets, 1 Cow. (N. Y.) 335.

[93] Sutton v. Tyrrell, 10 Vt. 91; Potter v. Sterrett, 24 Pa. St. 411.

[94] Bailey v. Stewart, 3 Watts & S. (Pa.) 560; Power v. Power, 7 Watts (Pa.) 205; Gregory v. Trust Co., 36 Fed. 408; Tyler v. Jones, 3 Barn. & C. 144; Tyson v. Robinson, 3 Ired. (N. C.) 333; Whitfield v. Whitfield, 8 Ired. (N. C.) 163; Marseilles v. Kenton's Ex'rs, 17 Pa. St. 238. See Freeborn v. Denman, 8 N. J. Law, 116. Where a trustee of an express trust for the management of real estate takes out a policy of insurance, and agrees to submit the amount of loss to arbitration, the submission is not revoked by his death before award. Citizens' Ins. Co. of Evansville v. Coit, 12 Ind. App. 161, 39 N. E. 766.

[95] Donnell v. Lee, 58 Mo. App. 288; Relyea v. Ramsay, 2 Wend. 602; Wilson v. Cross, 7 Watts (Pa.) 495; Crawshay v. Collins, 3 Swanst. 90; Chapman v. Seccomb, 36 Me. 102.

[96] Com. Dig. "Arbitrament," D, 5; Charnley v. Winstanley, 5 East, 266; Sutton v. Tyrrell, 10 Vt. 91; Abbott v. Keith, 11 Vt. 525.

[97] Peters' Adm'r v. Craig, 6 Dana (Ky.) 307; Paulsen v. Manske, 24 Ill. App. 95; Kimball v. Gilman, 60 N. H. 51. But see Sutton v. Tyrrell, 10 Vt. 91.

have that effect,[98] nor does the death of a party where the submission has been made a rule of court.[99]

PROCEEDINGS.

7. The mode of conducting the reference is left largely to the discretion of the arbitrators, subject to the requirement that all proceedings shall be fair and just to both parties. The following are essential features:

(a) Notice of the meetings of the arbitrators for the hearing of evidence must be given to each party, unless waived.

(b) Each party must be given an opportunity to present evidence and argument in support of his own case, and to be present when his opponent is heard.

(c) All competent and material evidence offered by either party should be heard; but it is for the arbitrators to determine its competency or materiality.

(d) The arbitrators must act jointly and in person at every stage of the proceedings, unless otherwise provided by the submission.

(e) All proceedings must end with the making of the award.

As to the proceedings generally in a common-law arbitration the law prescribes no formality. If the investigation is conducted fully, fairly, and without prejudice, the arbitrator may select his own method. The essential features of the proceedings as above outlined need but little explanation. A hearing is indispensable unless waived, and an award made from the arbitrators' personal knowledge or ex parte investigation of the case is void.[100] Each

[98] Andrews v. Palmer, 4 Barn. & Ald. 250; Snook v. Hellyer, 2 Chit. 43.

[99] Bacon v. Crandon, 15 Pick. (Mass.) 79; Freeborn v. Denman, 8 N. J. Law, 116; Moore v. Webb, 6 Heisk. (Tenn.) 301. See, also, Bash v. Christian, 77 Ind. 290.

[100] Billings v. Billings, 110 Mass. 225; Wiberly v. Matthews, 91 N. Y. 648; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151. Waiver of

party is entitled to notice of the time and place of the hearing; and omission to give it, if not waived,[101] is fatal to the award.[102] But notice need not be given of meetings of the arbitrators other than those for the hearing of evidence.[103] The hearing must be in the presence of both parties unless this right is waived.[104] The examination of a witness in the absence of a party, and without his knowledge and consent, or the reception of information from one of the parties in the absence of the other,[105] is such an irregularity as will invalidate the proceedings.[106] As to the reception

hearing will not be presumed. It must be shown by unequivocal proof. Alexander v. Cunningham, 111 Ill. 511.

[101] Newton v. West, 3 Mete. (Ky.) 24; Whitlock v. Ledford, 82 Ky. 390; Kankakee & S. R. Co. v. Alfred, 3 Ill. App. 511; Shockey's Adm'r v. Glasford, 6 Dana (Ky.) 9; Madison Ins. Co. v. Griffin, 3 Ind. 277; Kane v. City of Fond du Lac, 40 Wis. 495; Pike v. Stallings, 71 Ga. 860. And a waiver of notice will not be readily presumed from the conduct of the parties, especially when there is evidence which prevents the court from indulging presumptions wholly in favor of the award. Warren v. Tinsley, 3 C. C. A. 613, 53 Fed. 689.

[102] Elmendorf v. Harris, 23 Wend. 628; Grimes v. Brown, 113 N. C. 154, 18 S. E. 87; Small v. Courtney, 1 Brev. (S. C.) 205; Thornton v. Chapman, 2 Cranch, C. C. 244, Fed. Cas. No. 13,997; Walker v. Walker, 28 Ga. 140; Falconer v. Montgomery, 4 Dall. 232; Ingraham v. Whitmore, 75 Ill. 24; Rigden v. Martin, 6 Har. & J. (Md.) 403. Notice must be given, even though the submission is silent as to notice. Shively v. Knoblock, 8 Ind. App. 433, 35 N. E. 1028. But where a party, knowing that the referee, without giving notice to him, has made an ex parte investigation of the case, allows the hearing to proceed without objection, he thereby waives the irregularity. Duckworth v. Diggles, 139 Mass. 51, 29 N. E. 221. See, also, Fox v. Hazelton, 10 Pick. (Mass.) 275. And fixing, in the presence of the parties, a time for the hearing, is sufficient notice, if the hearing is had at the time so fixed. Box v. Costello, 6 Misc. Rep. 415, 27 N. Y. Supp. 293.

[103] Miller v. Kennedy, 3 Rand. (Va.) 2; Zell v. Johnston, 76 N. C. 302.

[104] Falconer v. Montgomery, 4 Dall. 232; Citizens' Ins. Co. v. Hamilton, 48 Ill. App. 503.

[105] In re Gregson, 10 Coke, 108.

[106] Ingraham v. Whitmore, 75 Ill. 24; Elmendorf v. Harris, 23 Wend. (N. Y.) 628; Lutz v. Linthicum, 8 Pet. 178; Hagner v. Musgrove, 1 Dall. 83; Chaplin v. Kirwan, 1 Dall. 201; Mullins v. Arnold, 4 Sneed (Tenn.) 262; McKinney v. Page, 32 Me. 513. But it is no objection that the arbitrators took advice relative to the questions before them if they decided on their own judgment. Simons v. Mills, 80 Cal. 118, 22 Pac. 25.

of evidence, the arbitrator is not bound by the strict rules of law. He may examine witnesses interested in the event of the suit, and who would be incompetent in a court of law.[107] He is the sole judge of the admissibility of the evidence offered,[108] and his decision is final. But where it appears that the exclusion of evidence is not the result of the arbitrator's judgment upon its admissibility, but of a mistake as to the scope of the submission, it then becomes such a mistake of fact as will form a ground of impeaching the award.[109] The mode of examining witnesses is left to his discretion. It is no ground for setting aside the award that the witnesses were not sworn; and especially where no objection is interposed by the parties at the time.[110] Neither is it necessary that the arbitrators be sworn, unless this is demanded by the parties, or required by the terms of the submission or by statute.[111] Unless the submission provides otherwise, the arbitrators must act together at every step in the proceedings. Each must be present at every meeting, and must hear all the evidence;[112] and this is essential

[107] Fuller v. Wheelock, 10 Pick. (Mass.) 135; Maynard v. Frederick, 7 Cush. (Mass.) 247.

[108] Boston Water-Power Co. v. Gray, 6 Metc. (Mass.) 131; Fuller v. Wheelock, 10 Pick. (Mass.) 135; Hooper v. Taylor, 39 Me. 224; Campbell v. Western, 3 Paige (N. Y.) 124; Pike v. Gage, 9 Fost. (N. H.) 461. And see Halstead v. Seaman, 52 How. Prac. (N. Y.) 415.

[109] Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405, and cases in preceding note. Where parties are selected as arbitrators because of their special knowledge of the matter in controversy, and it is apparent that the parties intended to rely on that knowledge, the arbitrators may be justified in refusing to hear evidence. Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356.

[110] Hall v. Lawrence, 4 Term R. 589; Maynard v. Frederick, 7 Cush. (Mass.) 247; Fox v. Hazelton, 10 Pick. (Mass.) 275; Patten v. Hunnewell, 8 Greenl. (Me.) 19; Woodrow v. O'Conner, 28 Vt. 776; Greer v. Canfield, 38 Neb. 169, 56 N. W. 883; Terry v. Moore (Com. Pl.) 22 N. Y. Supp. 785; Cochran v. Bartle, 91 Mo. 636, 3 S. W. 854.

[111] Kankakee & S. W. R. Co. v. Alfred, 3 Ill. App. 511; Katt v. Insurance Co., 26 Hun (N. Y.) 429; Payne v. Crawford (Ala.) 10 South. 911.

[112] Taylor v. Towing Co., 25 Ill. App. 503; Id., 126 Ill. 250, 18 N. E. 663; Thompson v. Mitchell, 35 Me. 281; Carpenter v. Wood, 1 Metc. (Mass.) 400; Smith v. Smith, 28 Ill. 56; Maynard v. Frederick, 7 Cush. 247; Harris v. Norton, 7 Wend. 534.

although it be stipulated that a majority may make the award.[113] But it is held that in the latter case, if one of the arbitrators refuse to act, the others have power to make a valid award.[114] Each arbitrator must act in person. He cannot delegate his authority without consent of all the parties to the submission.[115] As the authority of the arbitrators ends with the making and publication of the award, any proceedings thereafter are a nullity. They have then no power to hear further evidence, reconsider any decided point, or even to change the award for the purpose of correcting a material error.[116]

AWARD.

8. The award is the expressed decision of the arbitrators on the questions submitted. To be valid, it must be—

(a) Co-extensive with the submission.

(b) Certain to a common intent.

(c) Possible and reasonable.

(d) Final and conclusive.

The term "award" is used to designate the decision of the arbitrators without regard to the form in which it is expressed; it is

[113] Kent v. French, 76 Iowa, 187, 40 N. W. 713; Doherty v. Doherty, 148 Mass. 367, 19 N. E. 352.

[114] Kile v. Chapin, 9 Ind. 150.

[115] Morse, Arb. 166; Russ. Arb. 198; Wright v. Meyer (Tex. Civ. App.) 25 S. W. 1122.

[116] Bayne v. Morris, 1 Wall. 97; Dudley v. Thomas, 23 Cal. 365; Talbott v. Hartley, 1 Cranch, C. C. 31, Fed. Cas. No. 13,732; Lansdale v. Kendall, 4 Dana (Ky.) 613; Butler v. Boyles, 10 Humph. (Tenn.) 155; Aldrich v. Jessiman, 8 N. H. 516; Thompson v. Mitchell, 35 Me. 281; Woodbury v. Northy, 3 Greenl. (Me.) 85; Doke v. James, 4 N. Y. 568; Patton v. Baird, 7 Ired. Eq. (N. C.) 255; Rogers v. Corrothers, 26 W. Va. 238; Herbst v. Hagemaers, 137 N. Y. 290, 33 N. E. 315; Flannery v. Sahaglan, 134 N. Y. 85, 31 N. E. 319. But a mere clerical error of omission, not affecting the merits, may be corrected after delivery. Goodell v. Raymond, 27 Vt. 241. An award made according to the terms of the submission is not rendered invalid by a supplemental award which is not within the terms of the submission. Eddy's Ex'r v. Northup (Ky.) 23 S. W. 353.

also used in a more specific sense as referring to the instrument containing that decision when put into writing.[117] Generally, a parol award will be valid [118] even though the submission be in writing,[119] unless, by reason of statutory provisions, the terms of the submission, or the nature of the subject-matter, a written award is required.[120] But stipulations in the submission as to the form and execution of the award should control.[121] The language will be liberally construed; [122] and if it expresses a positive decision with reasonable clearness and certainty, trifling inaccuracies, insensible expressions, and lack of technical formality will be disregarded. The intention of the arbitrators is the essential element, and effect will be given to it whenever possible.[123]

Essential Features.

As the arbitrators derive all their authority from the submission, and as the obligation of the parties to abide by the award springs

[117] Bouv. Inst. § 2496; Com. Dig. "Arbitrament," E; 3 Vin. Abr. 52, 372.

[118] Elmendorf v. Harris, 23 Wend. 628; Giles Lithographic & Liberty Printing Co. v. Recamier Manuf'g Co., 15 N. Y. St. Rep. 354; Philbrick v. Preble, 18 Me. 255; Shelton v. Alcox, 11 Conn. 239; Smith v. Douglass, 16 Ill. 34; Gay v. Waltman, 89 Pa. St. 453; Jones v. Dewey, 17 N. H. 596. A parol award is not vitiated by a subsequent ineffectual attempt to reduce it to writing. Donnell v. Lee, 58 Mo. App. 288.

[119] Morse, Arb. 256; White v. Fox, 29 Conn. 570; Goodell v. Raymond, 27 Vt. 241; Marsh v. Packer, 20 Vt. 198; Crabtree v. Green, 8 Ga. 8.

[120] Philbrick v. Preble, 18 Me. 255; Evans v. McKinsey, Litt. Sel. Cas. (Ky.) 262; McManus v. McCulloch, 6 Watts (Pa.) 357; Darby's Lessee v. Russell, 5 Hayw. (Tenn.) 139.

[121] Morse, Arb. 257; Pratt v. Hackett, 6 Johns. (N. Y.) 14; Stanton v. Henry, 11 Johns. (N. Y.) 133; Bloomer v. Sherman, 5 Paige (N. Y.) 575; Caldwell v. Dickinson, 13 Gray (Mass.) 365; Allen v. Galpin, 9 Barb. (N. Y.) 246; Newman v. Labeaume, 9 Mo. 30. But such stipulations may be waived. Tudor v. Scovell, 20 N. H. 174. An award valid in other respects is not invalid because not made under seal, though required by the submission to be so made. Mathews v. Miller, 25 W. Va. 817.

[122] Rinford v. Nye, 20 Vt. 132; Coxe v. Lundy, 1 N. J. Law, 255; Grier v. Grier, 1 Dall. 174; Innes v. Miller, Id. 188; Gonsales v. Deavens, 2 Yeates (Pa.) 539; Joy v. Simpson, 2 N. H. 179.

[123] Morse, Arb. 252; Adams v. Adams, 2 Mod. 169; McDonald v. Arnout, 14 Ill. 58; Lewis v. Burgess, 5 Gill (Md.) 129; Ross v. Watt, 16 Ill. 99; Dibblee v. Best, 11 Johns. 103.

from their promise to that effect, expressed or implied, in that agreement,[124] it is apparent that the award, to be binding, must, in all essential particulars, conform to the submission. If it fails to embrace, expressly or by necessary implication, all the matters submitted and actually presented at the hearing,[125] it is void;[126] and if it includes matters not submitted it will at least be void as to them; and, unless the unauthorized part can be separated from the rest, the whole must fall.[127] But in support of the award it will be presumed, until the contrary is shown, that the terms of the submission have been followed, and that all matters actually presented were determined.[128] That the award is co-extensive with

[124] Caldw. Arb. 226, note 1. See Stone v. Atwood, 28 Ill. 30.

[125] That the arbitrators are bound to pass upon only the matters actually presented at the hearing, see Jones v. Welwood, 71 N. Y. 208; Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751; Page v. Foster, 7 N. H. 392; Ballance v. Underhill, 3 Scam. (Ill.) 453; Whetstone v. Thomas, 25 Ill. 361; Ott v. Schroeppel, 5 N. Y. 482; Warfield v. Holbrook, 20 Pick. 531.

[126] Bradford v. Bryan, Willes, 268; Wright v. Wright, 5 Cow. (N. Y.) 197; Sherfy v. Graham, 72 Ill. 158; Hewitt v. Furman, 16 Serg. & R. (Pa.) 135; Carnochan v. Christie, 11 Wheat. 446; Harker v. Hough, 7 N. J. Law, 428; Scott v. Barnes, 7 Pa. St. 134; Jones v. Welwood, 71 N. Y. 208.

[127] Hamilton v. Hart, 125 Pa. St. 142, 17 Atl. 226, 473; Waters v. Bridge, Cro. Jac. 630; Lee v. Elkins, 12 Mod. 587; Hill v. Thorn, 2 Mod. 309; Peters v. Pelree, 8 Mass. 399; Culver v. Ashley, 17 Pick. (Mass.) 98; Lorey v. Lorey, 1 Mo. App. Rep'r, 189; Thrasher v. Haynes, 2 N. H. 429; Leslie v. Leslie, 52 N. J. Eq. 332, 31 Atl. 724; Sawtells v. Howard (Mich.) 62 N. W. 156; Doane College v. Lanham, 26 Neb. 421, 42 N. W. 405; White v. Arthur, 59 Cal. 33; McBride v. Hagen, 1 Wend. (N. Y.) 326; Clement v. Durgin, 1 Greenl. (Me.) 309; Cox v. Jagger, 2 Cow. (N. Y.) 638; Conger v. Jaines, 2 Swan (Tenn.) 213; Lynch v. Nugent, 80 Iowa, 422, 46 N. W. 61; Philbrick v. Preble, 18 Me. 255; Walker v. Merrill, 13 Me. 173; Hill v. Thorn, 2 Mod. 309.

[128] Sperry v. Rieker, 4 Allen (Mass.) 17; Call v. Ballard, 65 Wis. 187, 26 N. W. 547; Jones v. Welwood, 71 N. Y. 208; Darst v. Collier, 86 Ill. 96; Karthaus v. Ferrer, 1 Pet. 222; Harris v. Wilson, 1 Wend. (N. Y.) 511; Ott v. Schroeppel, 5 N. Y. 482; Tallman v. Tallman, 5 Cush. (Mass.) 325; Young v. Kinney, 48 Vt. 22; Lamphire v. Cowan, 39 Vt. 129; Solomons v. McKinstry, 13 Johns. (N. Y.) 27; Joy v. Simpson, 2 N. H. 179; Clement v. Comstock, 2 Mich. 359; Hadaway v. Kelly, 78 Ill. 286. One who has accepted the benefits of the award is estopped to object to its validity on the ground that it did not embrace all matters submitted. Grimmett v. Smith, 42 Ill. App. 577. A party

the submission may appear by implication.[129] The rule measuring the scope of the award by the submission applies to persons as well as to the subject-matter; and from this it follows that the award can impose no obligation on a stranger to the submission.[130] But it is not rendered invalid by a reference to a stranger merely as the agent or instrument of one of the parties,[131] nor by a direction that one of the parties shall pay a sum of money to a stranger on account of the other,[132] or that one party shall discharge the other from a bond to a stranger on which others are also bound.[133]

The requirement that an award must be certain is complied with if it is so expressed that no reasonable doubt can arise upon its face as to the nature and extent of the duties imposed by it upon the parties.[134] It is sufficiently certain if stated in such language that an ordinary man acquainted with the subject-matter can understand it,[135] or if it can be rendered certain by inspection or mere calculation[136] or by other sufficient means provided for in the

cannot accept the benefits of a part of the award and object to the invalidity of another part; the award is an entirety. Thornton v. McCormick, 75 Iowa, 285, 39 N. W. 502.

[129] Rixford v. Nye, 20 Vt. 132; Smith v. Demarest, 8 N. J. Law, 195; Stickles v. Arnold, 1 Gray (Mass.) 418; Buckland v. Conway, 16 Mass. 396; Mickles v. Thayer, 14 Allen (Mass.) 114; Lamphire v. Cowan, 39 Vt. 420; Dolbier v. Wing, 3 Greenl. (Me.) 421.

[130] Com. Dig. "Arbitrament," E, 1; Caldw. Arb. 228; Bretton v. Prat, Cro. Eliz. 758; Adams v. Stratham, 2 Lev. 235; Thirsby v. Helbont, 3 Mod. 272; Martin v. Williams, 13 Johns. (N. Y.) 264; Chapman v. Champion, 2 Day (Conn.) 101; Wyatt v. Benson, 23 Barb. (N. Y.) 327; Collins v. Freas, 77 Pa. St. 493.

[131] Caldw. Arb. 228; Snook v. Hellyer, 2 Chit. 43; Bird v. Bird, 1 Salk. 74.

[132] Beckett v. Taylor, 1 Mod. 9; Bird v. Bird, 1 Salk. 74; Boston v. Brazer, 11 Mass. 447; Lamphire v. Cowan, 39 Vt. 420.

[133] Bradley v. Clyston, Cro. Car. 541.

[134] Russ. Arb. 286; Ingraham v. Whitmore, 75 Ill. 21; Hawkins v. Colclough, 1 Burrows, 275; Purdy v. Delavan, 1 Caines (N. Y.) 304; McDonald v. Bacon, 3 Scam. (Ill.) 431; Waite v. Barry, 12 Wend. (N. Y.) 377; Akely v. Akely, 16 Vt. 450; Woodward v. Atwater, 3 Iowa, 61; Strong v. Strong, 9 Cush. (N. Y.) 560; Perkins v. Giles, 53 Barb. (N. Y.) 312.

[135] Butler v. Mayor of New York, 1 Hill (N. Y.) 489.

[136] Henrickson v. Reinbach, 33 Ill. 299; Cochran v. Bartle, 91 Mo. 636, 3 S. W. 854; Butler v. Mayor of New York, 1 Hill (N. Y.) 489; Bush v. Davis, 34 Mich. 190; Emery v. Hitchcock, 12 Wend. (N. Y.) 156; White v. Jones, 8

award itself.[137] Technical precision is not required. The fact that the award is conditional,[138] or in the alternative,[139] does not necessarily render it void for uncertainty.

The thing awarded to be done must also be possible.[140] But if it is in its nature possible, a subsequent impossibility created by the party himself will not affect its validity.[141] The award should be reasonable;[142] but, since it is the decision of judges chosen by the parties, the courts will not interfere on the ground of its unreasonableness unless a strong case be made out.[143]

It is also essential to the validity of the award that it should make a final disposition of the questions submitted, so that they may

Serg. & R. (Pa.) 349; Concord v. Fletcher, 50 Me. 398. If the award is certain, uncertainty in the reasoning which led up to it will not affect its validity. Lamphire v. Cowan, 39 Vt. 420.

[137] Fletcher v. Webster, 5 Allen (Mass.) 566; Macon v. Crump, 1 Call (Va.) 575; Benson v. White, 101 Mass. 48; Waite v. Barry, 12 Wend. (N. Y.) 377. An award which is sufficiently definite to be obligatory as a contract is sufficiently certain as an award. Bush v. Davis, 34 Mich. 190; Purdy v. Delavan, 1 Caines (N. Y.) 394; Clement v. Comstock, 2 Mich. 359; Akely v. Akely, 16 Vt. 450. An award that the defendant pay a certain sum to "the executors of A." is sufficiently certain. It may be shown that the plaintiffs are the executors. Grier v. Grier, 1 Dall. 173. An award that one of the parties shall have in his own right all the interest which the parties jointly had in a certain brewery is not bad for uncertainty. Byers v. Van Deusen, 5 Wend. (N. Y.) 268. An award of a specific sum of money, directing that the party against whom the award was rendered should give "good and sufficient security" therefor, is void for uncertainty as to the kind of security required. Jackson v. De Long, 9 Johns. (N. Y.) 43. An award that a certain sum "was due on the 3d of March last, with interest on the same," the date named being several months before the meeting of the referees, is bad for uncertainty. Young v. Reuben, 1 Dall. 119.

[138] 1 Steph. N. P. 118; Furser v. Prowd, Cro. Jac. 423; Linfield v. Ferne, 3 Lev. 18.

[139] Lee v. Elkins, 12 Mod. 585; Wharton v. King, 2 Barn. & Adol. 528; Thornton v. Carson, 7 Cranch, 596; McDonald v. Arnout, 14 Ill. 58.

[140] 2 Pars. Cont. 694; Lee v. Elkins, 12 Mod. 585.

[141] Com. Dig. "Arbitrament," E. 12; 2 Pars. Cont. 694.

[142] Bolle, Arb. F. 1; Caldw. Arb. 258; 1 Steph. N. P. 125; 2 Pars. Cont. 695.

[143] Wood v. Griffith, 1 Swanst. 43; Brown v. Brown, 1 Vern. 157; Waller v. King, 9 Mod. 63; Perkins v. Giles, 53 Barb. (N. Y.) 342; and authorities cited in preceding note.

not become the subject of future litigation.[144] An award is final when nothing more than mere ministerial acts remain to be done to fix the rights and obligations of the parties as to the matters included in it.[145] It is also said that an award must be mutual; but this seems to mean but little more than that it shall be a final settlement of the case.[146] An award which puts an end to the controversy, and directs mutual releases, is sufficiently mutual.[147] The fact that not all of the parties on one side are bound does not render it void for want of mutuality.[148]

Entire and Divisible Awards.

The fact that a part of the award is not within the submission, or is otherwise invalid, will render the whole void only when the award is indivisible. The general tendency of courts to uphold the award has led to the establishment of the rule that where the unauthorized or invalid part is independent of the rest, and can be severed without prejudice to the rights of the parties, it may be rejected, and the remaining valid portion enforced. But if, under the submission, the reward is required to be an entirety, it must stand or fall as an entirety; and, if bad in part, it will be bad altogether.[149]

[144] Waite v. Barry, 12 Wend. (N. Y.) 377; Ingraham v. Whitmore, 75 Ill. 24; Purdy v. Delavan, 1 Caines (N. Y.) 304; Carnochan v. Christie, 11 Wheat. 446.

[145] Colcord v. Fletcher, 50 Me. 398; Lincoln v. Whittenton Mills, 12 Metc. (Mass.) 31; Owens v. Boerum, 23 Barb. (N. Y.) 187. An award that a suit shall cease is final. Simon v. Gavil, 1 Salk. 74; Knight v. Burton, Id. 75.

[146] "This mutuality is nothing more than that the thing awarded to be done should be a final discharge of all future claims by the party in whose favor the award is made against the others for the causes submitted; in other words, that it shall be final." Kent, J., in Purdy v. Delavan, 1 Caines (N. Y.) 303. See, also, 2 Pars. Cont. 695.

[147] Munro v. Alaire, 2 Caines (N. Y.) 320; Kunckle v. Kunckle, 1 Dall. 364. And an award that one party shall pay to the other a specific sum is final without a release. Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

[148] Harrington v. Higham, 15 Barb. (N. Y.) 524; Smith v. Van Nostrand, 5 Hill (N. Y.) 419; Strong v. Beroujon, 18 Ala. 168. The objection that a submission was not binding because some of the parties were married women and minors cannot prevail as to parties having capacity. Fortune v. Killebrew (Tex. Civ. App.) 21 S. W. 986.

[149] Lee v. Elkins, 12 Mod. 585; Eckersley v. Board, 9 Reports, 827, [1894] 2

SAME—IMPEACHMENT.

9. The award may be impeached for—

(a) Insufficiency.

(b) Irregularity in the proceedings.

(c) Mistake of law or fact apparent on its face.

(d) Misconduct of the arbitrators.

(e) Fraud of the parties in procuring it.

It has been seen in the preceding section that if the award is insufficient—that is, lacking in any of the recognized essentials of a valid award there named—it cannot be enforced. It may also be impeached by proof of any substantial irregularity in the proceedings; such as failure to give notice of the hearing, examining witnesses in the absence of one of the parties, refusing to receive competent evidence, etc. These points also have been sufficiently noticed under the head of "Proceedings."[150] Prominent among the other grounds on which an award may be impeached is a mistake of fact apparent on its face. To invalidate the award, however, the mistake must be of such a material character, and so affecting the principles on which the award is based, that, if it had been seasonably known or disclosed to the arbitrators, they would probably have come to a different decision.[151] In such a case the award

Q. B. 967; Cox v. Jagger, 2 Cow. (N. Y.) 638; Martin v. Williams, 13 Johns. (N. Y.) 264; Harrington v. Higham, 15 Barb. (N. Y.) 524; Stearns v. Cope, 109 Ill. 340; Adams' Adm'r v. Ringo, 79 Ky. 211; Littlefield v. Waterhouse, 83 Me. 307, 22 Atl. 176; Leslie v. Leslie, 50 N. J. Eq. 103, 24 Atl. 319; McCall v. McCall, 36 S. C. 80, 15 S. E. 348; Bouck v. Bouck, 57 Minn. 490, 59 N. W. 547; and, generally, cases cited in note 127.

[150] See "Proceedings," ante, p. 17.

[151] Boston Water-Power Co. v. Gray, 6 Mete. (Mass.) 131; Bell v. Price, 22 N. J. Law, 578; Morris v. Ross, 2 Hen. & M. (Va.) 408; McKinney v. Newcomb, 5 Cow. (N. Y.) 425; Bridgman v. Bridgman, 23 Mo. 272; Herrick v. Blair, 1 Johns. Ch. (N. Y.) 101; Perkins v. Giles, 53 Barb. (N. Y.) 342; Peachy v. Ritchie, 4 Cal. 205; McCalmont v. Whitaker, 3 Rawle (Pa.) 84. One seeking to set aside an award on the ground of mistake must show that if the mistake had not occurred the award would have been different. Gorham v. Millard, 50 Iowa, 554; Tank v. Rohweder (Iowa) 67 N. W. 106.

does not express the true judgment of the arbitrators. This same principle applies to mistakes of law in cases where the whole matter of law and fact is submitted. An erroneous assumption of what the law is, if apparent on the face of the award, may be ground for setting it aside; but, if the arbitrator has exercised his judgment as to the law, it is conclusive, though it be erroneous.[152] The award may also be impeached for misconduct on the part of the arbitrators which is presumably prejudicial to one of the parties.[153] Thus the fact that one of the arbitrators was intoxicated at the time of the hearing,[154] or that prior to his appointment he had formed and expressed an opinion on the case, and accepted the office of arbitrator without disclosing this fact,[155] or that after his appointment he conversed freely about the controversy with one who had acted as arbitrator upon a prior submission of the same matter,[156] is ground for setting aside his award. Fraud by the parties in obtaining the award may also render it invalid.[157] But in all these cases the ground of impeachment must be substantial, prejudicial to the party urging it, and not the result of his own mis-

[152] Smith v. Thorndike, 8 Greenl. (Me.) 119; Boston Water-Power Co. v. Gray, 6 Metc. (Mass.) 131; Halstead v. Seaman, 52 How. Prac. (N. Y.) 415; Hall v. Insurance Co., 57 Conn. 105, 17 Atl. 356; Goddard v. King, 40 Minn. 164, 41 N. W. 659; Swasey v. Laycock, 1 Handy (Ohio) 331; Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148; Bell v. Price, 22 N. J. Law, 578; May v. Miller, 59 Vt. 577, 7 Atl. 818.

[153] Strong v. Strong, 9 Cush. (Mass.) 561; Rand v. Redington, 13 N. H. 72; Bash v. Christian, 77 Ind. 290. The fact that one of the arbitrators, during the hearing, remained at the house of the successful party several nights, partaking of his hospitality, and that another of them dined at an hotel at his expense, is sufficient evidence of misconduct to warrant setting aside the award. Robinson v. Shanks, 118 Ind. 125, 20 N. E. 713.

[154] Smith v. Smith, 28 Ill. 56. See, also, White v. Robinson, 60 Ill. 499.

[155] Beattie v. Hilliard, 55 N. H. 428. But see Morville v. American Tract Soc., 123 Mass. 129.

[156] Moshier v. Shear, 102 Ill. 169. But the fact that one selected as an arbitrator had, five years before, expressed an opinion on the subject of dispute unfavorable to one of the parties, did not render him incompetent. Brush v. Fisher, 70 Mich. 469, 38 N. W. 446.

[157] 2 Pars. Cont. 707; Morse, Arb. 540; Stockton Combined Harvester & Agricultural Works v. Insurance Co., 98 Cal. 557, 33 Pac. 633.

conduct.[158] The presumptions are all in favor of its validity and conclusiveness.[159]

SAME—EFFECT.

10. As to all matters submitted and decided, a valid award has, in general, the force and effect of a final judgment in an action between the parties.

As soon as the award is made and published, the controverted matters become merged,[160] and no longer furnish ground for litigation. So long as the award remains unimpeached, suit can be maintained only for its enforcement, and not on the original cause of action. Unless the award expressly provides that it shall have a temporary effect only,[161] it binds the rights of the parties for all time, without the right of appeal.[162] It may be used in evidence,[163] or as a defense or bar to a subsequent suit,[164] or it may be

[158] Rogers v. Corrothers, 26 W. Va. 238; Thompson v. Blanchard, 2 Iowa, 44; Davy v. Faw, 7 Cranch, 171; Pomroy v. Kibbee, 2 Root (Conn.) 92; Tomlinson v. Hammond, 8 Iowa, 40; Daniels v. Willis, 7 Minn. 374 (Gil. 295); McKinney v. Newcomb, 5 Cow. (N. Y.) 425; Kimball v. Walker, 30 Ill. 482; Plummer v. Sanders, 55 N. H. 23; Stearns v. Cope, 109 Ill. 340; Steere v. Brownell, 113 Ill. 415; Karthaus v. Ferrer, 1 Pet. 222; Beam v. Macomber, 33 Mich. 127. Mere irregularity without fraud will not invalidate the award. Golder v. Mueller, 22 Ill. App. 527.

[159] Karthaus v. Ferrer, 1 Pet. 222; Ott v. Schroeppel, 5 N. Y. 482; Merritt v. Merritt, 11 Ill. 565; Strong v. Strong, 9 Cush. (Mass.) 560; Young v. Kinney, 48 Vt. 22; Bush v. Davis, 34 Mich. 190; Clement v. Comstock, 2 Mich. 359; McDonald v. Arnout, 14 Ill. 58; Liverpool & London & Globe Ins. Co. v. Goehring, 99 Pa. St. 13.

[160] Varney v. Brewster, 14 N. H. 49; Tevis' Ex'r v. Tevis' Ex'r, 4 T. B. Mon. (Ky.) 46; Armstrong v. Masten, 11 Johns. (N. Y.) 189; Evans v. McKinsey, Litt. Sel. Cas. (Ky.) 262; Gerrish v. Ayers, 3 Scam. (Ill.) 245.

[161] See Russ. Arb. 514.

[162] Whitehead v. Tattersall, 1 Adol. & E. 491; Memphis & C. R. Co. v. Scruggs, 50 Miss. 281; Richardson v. Lanning, 26 N. J. Law, 130; Rogers v. Holden, 13 Ill. 293; Stevenson v. Beecher, 1 Johns. (N. Y.) 492; Abbott v. Keith, 11 Vt. 525; Miller v. Vaughan, 1 Johns. (N. Y.) 315; Morse v. Bishop, 55 Vt. 231.

[163] Russ. Arb. 555; Sybray v. White, 1 Mees. & W. 435; Whitehead v. Tattersall, 1 Adol. & E. 491; Moore v. Helms, 74 Ala. 368.

[164] Brazill v. Isham, 12 N. Y. 9; Jessiman v. Iron Co., 1 N. H. 68; Owens

enforced by an action at law or in equity;[165] but in either case it operates only between the parties, and, as a general rule, it can neither be used by nor against a stranger.[166] As to questions affecting real estate, it operates by way of estoppel only; it cannot pass title.[167] If offered in evidence, or on motion for judgment upon it, the adverse party may usually present evidence to impeach its validity;[168] but until this has been successfully done it remains in all respects conclusive as between the parties.

SAME—ENFORCEMENT.

11. The award may be enforced by—

(a) Suit for specific performance.

(b) Suit at law on the award.

(c) Suit on the arbitration bond; or, where provided by statute, by

(d) Entry of judgment on the award, enforceable as other judgments, by execution or attachment.

The award, itself, and not the submission, is the proper foundation of an action for the enforcement of its provisions.[169] If the terms of the submission require that the award shall be published, the action will not lie until after publication.[170] Generally, equity will enforce specific performance of the award where the thing it orders

v. Boerum, 23 Barb. (N. Y.) 187; Preston v. Whitcomb, 11 Vt. 47; Baltes v. Machine Works, 129 Ind. 185, 28 N. E. 319; Riley v. Hicks, 81 Ga. 265, 7 S. E. 173.

[165] See "Enforcement," p. 29.

[166] Morse, Arb. 519; Russ. Arb. 521; Thompson v. Noel, 1 Atk. 60.

[167] Henry v. Kirwan, 9 Ir. C. L. 459; Smalley v. Railroad Co., 2 Hurl. & N. 158; Shelton v. Alcox, 11 Conn. 240; Cox v. Jagger, 2 Cow. (N. Y.) 638; Whitney v. Holmes, 15 Mass. 152; Shepard v. Ryers, 15 Johns. (N. Y.) 497.

[168] Ingram v. Milnes, 8 East, 445; Robertson v. Wells, 28 Miss. 99; Relyea v. Ramsay, 2 Wend. (N. Y.) 602; Hinkle v. Harris, 34 Mo. App. 223; Tennant v. Devine, 24 W. Va. 387.

[169] Rank v. Hill, 2 Watts & S. (Pa.) 56; West v. Stanley, 1 Hill (N. Y.) 63. See, also, Hodsden v. Harridge, 2 Saund. 64b.

[170] Varney v. Brewster, 14 N. H. 49; Kingsley v. Bill, 9 Mass. 198; Parsons v. Aldrich, 6 N. H. 264

to be done is such as a court of equity would have specifically enforced had it been made the subject of a contract between the parties.[171] Following the general principles of equity, therefore, an action for specific performance will not lie where there is an adequate remedy at law,[172] or where the party seeking the aid of the court has not performed on his part, or by his laches or otherwise has prejudiced the rights of the other party.[173] The award may also be enforced by a suit at law appropriate to the nature of the submission or the thing awarded; as by an action of covenant where the submission is by deed,[174] or an action of the debt where the award directs the payment of a sum of money,[175] or an action on the case where the default in performance has resulted in an injury to the property of the other party,[176] or an action of assumpsit generally, where the submission is not under seal.[177] Default in performance also gives a right of action on the arbitration bond,

[171] Russ. Arb. 563; Walters v. Morgan, 2 Cox, Ch. 369; Jones v. Mill Corp., 4 Pick. (Mass.) 507; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Burke v. Parke, 5 W. Va. 122; McNear v. Bailey, 18 Me. 251; Ballance v. Underhill, 3 Scam. (Ill.) 453; McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915; Perkins v. Gilles, 53 Barb. (N. Y.) 342; Caldwell v. Dickinson, 13 Gray, 365; Smith v. Smith, 4 Rand. (Va.) 95.

[172] Russ. Arb. 563; Walters v. Morgan, 2 Cox, Ch. 369; Smith v. Smith, 4 Rand. (Va.) 95; Cannady v. Roberts, 6 Ired. Eq. (N. C.) 422; Memphis & C. R. Co. v. Scruggs, 50 Miss. 284; Jones v. Mill Corp., 4 Pick. (Mass.) 507; McNear v. Bailey, 18 Me. 251; McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915.

[173] Morse, Arb. 604; McNeil v. Magee, 5 Mason, 244, Fed. Cas. No. 8,915; Blackett v. Bates, 35 Law J. Ch. 324; Eads v. Williams, 24 Law J. Ch. 531.

[174] Charnley v. Winstanley, 5 East, 266; Marsh v. Bulteel, 5 Barn. & Ald. 507.

[175] Winter v. White, 3 Moore, 671; Ferrer v. Oven, 7 Barn. & C. 427; Hampton v. Boyer, Cro. Eliz. 557; McKinstry v. Solomons, 2 Johns. (N. Y.) 57; Riddell v. Sutton, 5 Bing. 200; McNear v. Bailey, 18 Me. 251; Williams v. Paschall, 4 Dall. 284; Bean v. Farnum, 6 Pick. 268; Webb v. Zeller, 70 Ind. 408; Griggs v. Seeley, 8 Ind. 261.

[176] Sharpe v. Hancock, 7 Man. & G. 354.

[177] Russ. Arb. 541; Holsden v. Harridge, 2 Saund. 62; Diedrick v. Richley, 2 Hill (N. Y.) 271; Dowse v. Coxe, 3 Bing. 20; Swicard v. Wilson, 2 Mill, Const. (S. C.) 218; Taylor v. Railroad Co., 57 Vt. 106; Bates v. Curtis, 21 Pick. 247; Taylor v. Coryell, 12 Serg. & R. (Pa.) 243; Bierly v. Williams, 5 Leigh (Va.) 700.

where one has been executed.[178] And generally, in the United States, in case of statutory submission, the award is made returnable into court, where judgment is entered upon it, which is enforceable in the same manner as any other judgment.[179] But the fact that the statute has been pursued in respect to the form of the submission does not make this step imperative. Generally the party in whose favor the award is made may still elect to enforce it under the statute, or treat it as a common-law award, and enforce it by action.[180]

[178] Ferrer v. Oven, 7 Barn. & C. 427; Nolte v. Lowe, 18 Ill. 437; Bayne v. Morris, 1 Wall. 97; Thompson v. Mitchell, 35 Me. 281; Thompson v. Childs, 7 Ired. Law (N. C.) 435; Plummer v. Morrill, 48 Me. 184; George v. Farr, 46 N. H. 171; Nichols v. Insurance Co., 22 Wend. (N. Y.) 125; Francis v. Ames, 14 Ind. 251; Tompkins v. Corwin, 9 Cow. (N. Y.) 255; Shroyer v. Bash, 57 Ind. 349.

[179] Morse, Arb. 574; Yates v. Russell, 17 Johns. (N. Y.) 461; Davis v. Forshee, 34 Ala. 107; Wilkes v. Cotter, 28 Ark. 519; Thorpe v. Starr, 17 Ill. 139; Low v. Nolte, 15 Ill. 368; Dickerson v. Hays, 4 Blackf. (Ind.) 44; Com. v. Pejepscut Proprietors, 7 Mass. 399; Hopkins v. Flynn, 7 Cow. (N. Y.) 526; Hollenback v. Fleming, 6 Hill (N. Y.) 303; Ebersoll v. Krug, 3 Bin. (Pa.) 528.

[180] Dickerson v. Tyner, 4 Blackf. (Ind.) 253; Burnside v. Whitney, 24 Barb. (N. Y.) 632; Titus v. Scantling, 4 Blackf. (Ind.) 89; Coats v. Kiger, 14 Ind. 179; Diedrick v. Richley, 2 Hill, 271; Collins v. Karatopsky, 36 Ark. 316; Wilkes v. Cotter, 28 Ark. 519; Swasey v. Laycock, 1 Handy (Ohio) 334; Griggs v. Seeley, 8 Ind. 264; Mitchell v. Bush, 7 Cow. (N. Y.) 185; Bigelow v. Newell, 10 Pick. 348.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

THE

STATUTE OF LIMITATIONS

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

THE STATUTE OF LIMITATIONS.

1. HISTORICAL.

Laches may bar the right to relief in equity,[1] and at law a creditor's delay in asserting his claim may raise a rebuttable presumption that he has been paid;[2] but, aside from this, lapse of time, in the absence of express statutory provision, does not affect the rights of parties to a contract. The rights arising from a contract are of a permanent and indestructible character, unless either from the nature of the contract or from its terms it is limited in point of duration.[3]

But, though the rights arising from contract are of this permanent character, yet as long ago as the time of James I.[4] a limitation of the right to sue thereon in certain cases was effected by a provision that all actions of account and on the case, other than accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, and all actions of debt for arrearages of rent, should be commenced and sued within six years next after the cause of such action or suit, and not after. In consequence of uncertainty as to whether the lapse of the prescribed period merely raised a rebuttable presumption of payment, allowing evidence of subsequent acknowledgment of the debt by the debtor, or actually closed the door to enforcement and precluded evidence of nonpayment,—in other words, to use the technical terms, whether the statute was one of

[1] Eads v. Williams, 4 De Gex, M. & G. 674; Southcomb v. Bishop of Exeter, 6 Hare, 213; Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399; Rogers v. Saunders, 16 Me. 92.

[2] Williams v. Mitchell, 112 Mo. 300, 20 S. W. 647; Knight v. McKinney, 84 Me. 107, 24 Atl. 744; Wanmaker v. Van Buskirk, 1 N. J. Eq. 685; Stover v. Duren, 3 Strob. (S. C.) 448.

[3] Anson, Cont. 316; Llanelly Railway & Dock Co. v. London & N. W. Ry. Co., L. R. 7 H. L. 550, 567.

[4] 21 Jac. I. c. 16.

presumption or of *repose*,—a later statute,[5] known as "Lord Tenterden's Act," disposed of the question by providing, in effect, that the bar of the statute might be removed by a new promise or acknowledgment in writing, and signed by the party to be charged thereby; but not otherwise. It did not deal with the effect of a part payment, nor define by whom it might be made, nor who should be bound thereby. It left that subject to be regulated by the courts.[6]

Statutory provisions, generally in terms similar to those of Lord Tenterden's act, have been adopted in all our states, providing that actions must be brought within a certain number of years, or be barred. Such statutes are known as the "Statutes of Limitations." The time limited varies in the different states.

2. LACHES IN EQUITY.

Irrespective of the operation of statutes of limitation, a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like.[7]

[5] 9 Geo. IV. c. 14.

[6] Murdock v. Waterman, 145 N. Y. 55, 61, 62, 39 N. E. 829, Chitty, J., In Re Hollingshead, 37 Ch. Div. 651.

[7] Hammond v. Hopkins, 143 U. S. 224, 250, 12 Sup. Ct. 418; Marsh v. Whit-

Thus, under the varying facts of given cases, the doctrine of laches has been applied to debar the complainant of relief after the lapse of seven,[8] five,[9] four,[10] and even two years.[11]

The party who appeals to the conscience of the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent, if fraud is alleged, to keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the court may justly refuse to consider his case, on his own showing, even though the laches is not pleaded or the bill demurred to.*

The burden of showing that the running of the statute of limitations has been arrested is upon the plaintiff, as was the former rule in equity.†

Apart from their own inherent doctrine of laches, as above stated, courts of equity, in cases where their jurisdiction is concurrent with courts of law, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy.[12] In many other cases they act

more, 21 Wall. 178; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350; Gilliher v. Cadwell, 145 U. S. 368, 371, 12 Sup. Ct. 873; Penn Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685, 696, 18 Sup. Ct. 223; Murray v. Coster, 20 Johns. (N. Y.) 576, 583; Deconche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 216; Hamer v. Sidway, 124 N. Y. 538, 548–551, 27 N. E. 256.

[8] Brown v. Buena Vista Co., 95 U. S. 157.

[9] Harwood v. Railroad Co., 17 Wall. 78; Davison v. Davis, 125 U. S. 90, 8 Sup. Ct. 825.

[10] Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.

[11] Holgate v. Eaton, 116 U. S. 33, 16 Sup. Ct. 224; Société Foncière et Agricole des Etats Unis v. Milliken, 135 U. S. 304, 10 Sup. Ct. 823.

* Marsh v. Whitmore, 21 Wall. 178, 185; Penn Mut. Life Ins. Co. v. City of Austin, 168 U. S. 685, 697, 18 Sup. Ct. 223. Compare Macaulay v. Palmer, 125 N. Y. 742, 26 N. E. 912; Jackson v. Sackett, 7 Wend. (N. Y.) 94; Bean v. Tonnele, 94 N. Y. 381.

† Mason v. Henry, 152 N. Y. 529, 539, 46 N. E. 837; Baldwin v. Martin, 14 Abb. Prac. N. S. (N. Y.) 9.

[12] Badger v. Badger, 2 Wall. 87, 94; Butler v. Johnson, 111 N. Y. 204, 213,

upon the analogy of the like limitation at law;[13] while in some jurisdictions the statute of limitations makes special provision for actions in equity, but in such cases the statute merely fixes the time beyond which the claim shall not be prosecuted, but does not deprive courts of equity of their power of refusing relief on the ground of laches, even though the time fixed by the statute has not yet expired.[14] Thus, in New York, the period of limitation in equitable actions is fixed, by Code Civ. Proc. § 388, at 10 years after the cause of action accrues.[15]

3. STALE CLAIMS AT LAW.

As already stated, delay in asserting a claim might, at common law, raise a rebuttable presumption of payment. And, notwithstanding the adoption of statutes of limitation, such delay is still evidence of payment. The distinction between the operation of the statute and of this presumption, however, is that the former is pleaded as a bar, while the other raises a question of fact for the jury. The former is conclusive, and excludes discussion of the question whether the debt has in fact been paid or not; while the other turns on the question whether, from the delay, together with other circumstances, payment may be presumed. If the jury are satisfied by such evidence that the defense of payment is made out, it is, of course, immaterial that the period fixed by the statute of limitations has not yet expired.[16]

18 N. E. 643; In re Neilley, 95 N. Y. 382, 390; Roberts v. Ely, 113 N. Y. 128, 133, 20 N. E. 606.

[13] Badger v. Badger, 2 Wall. 87, 94; Murdock v. Waterman, 145 N. Y. 55, 61, 39 N. E. 829; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545.

[14] Calhoun v. Millard, 121 N. Y. 69, 82, 24 N. E. 27; People v. Donohue, 70 Hun, 317, 322, 24 N. Y. Supp. 437.

[15] Mason v. Henry, 152 N. Y. 529, 46 N. E. 837; Gilmore v. Ham, 142 N. Y. 1, 6, 36 N. E. 826; Exkorn v. Exkorn, 1 App. Div. 124, 37 N. Y. Supp. 68.

[16] Hall v. Roberts, 63 Hun, 473, 479, 18 N. Y. Supp. 480; Macauley v. Palmer, (Sup.) 6 N. Y. Supp. 404; Id., 125 N. Y. 744, 26 N. E. 912; 2 Phil. Ev. 171; Jackson v. Sackett, 7 Wend. (N. Y.) 94; Bean v. Tonnele, 94 N. Y. 381; Anon., 6 Mod. 22; Oswald v. Legh, 1 Term R. 270; Duffield v. Creed, 5 Esp. 52; Perkins v. Kent, 1 Root (Conn.) 312; Daggett v. Tallman, 8 Conn. 168; Wells v. Washington's Adm'r, 6 Munf. (Va.) 532; Bass v. Bass, 8 Pick. (Mass.) 187. See Knight v. McKinney, 84 Me. 107, 24 Atl. 744.

4. IT IS A STATUTE OF REPOSE.

As already stated, the English statute of 21 Jac. I. c. 16, left open for discussion the question whether it was to be considered as a statute which merely created a presumption of payment after the lapse of a specified period, but allowed that presumption to be rebutted, or was a statute which absolutely barred the enforcement of the claim after the lapse of a specified period, and permitted no inquiry into the question of whether it had in fact been paid or not; in other words, whether it was a statute of presumption or of repose. There was, accordingly, a lack of harmony in the decisions upon this question. Part of the difficulty arose out of the early conception of the defense under the statute as one which the courts should not encourage, and which they looked on as unjust and discreditable; and accordingly they were inclined to admit even slight evidence which would serve to deprive the defendant of the benefit of the statute.[17]

The modern view, however, has been that the statute was a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transactions may have been forgotten, or be incapable of explanation; and that, accordingly, it would have been wiser to make it, what it was intended to be, emphatically a statute of repose.[18]

As above stated, this view was subsequently embodied in the English statute of 9 Geo. IV. c. 14 (Lord Tenterden's Act). American statutes had been based upon the earlier English statute. Some of the state courts, in construing their own statutes, followed the English precedent; while in other states the courts construed them as statutes of repose.[19] Later on, the subject was generally dealt with by statutes based on Lord Tenterden's act, but even prior to that time the drift of the American decisions was in favor of construing the

[17] Bell v. Morrison, 1 Pet. 351–360.

[18] Bell v. Morrison, 1 Pet. 351–360. See Woods v. Irwin, 141 Pa. St. 278, 295, 21 Atl. 603.

[19] Clementson v. Williams, 8 Cranch, 72; Wetzell v. Bussard, 11 Wheat. 309; Bangs v. Hall, 2 Pick. (Mass.) 368; Sands v. Gelston, 15 Johns. (N. Y.) 511; Bell v. Rowland's Adm'rs, Hardin (Ky.) 301.

statute strictly as one of repose.[20] And if the decisions in a given state construed a local statute of limitation, though similar in form to the earlier English statute, as one of repose, the United States courts adopted the same construction with respect to transactions governed by the laws of that state.[21]

5. WHAT IS A SUFFICIENT ACKNOWLEDGMENT.

Prior to the passage of Lord Tenterden's act in England, and even in cases treating the earlier statute of limitations as one of repose, it was always held that there were certain facts which might be shown to prevent a defendant from availing himself of the statute as a bar to an action against him. Thus, an acknowledgment of the debt by the debtor, after time had begun to run under the statute, was held to vitiate the effect of any lapse of time prior thereto, and set the time running anew from that date. But just what sort of an acknowledgment would suffice for that purpose was not very clear. Many cases admitted loose and general expressions of the debtor, from which a probable or possible inference might be deduced of the acknowledgment of a debt by a court or jury, so that any acknowledgment, however slight, or any statement not amounting to a denial of the debt, or any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, was yet sufficient to take the case out of the statute of limitations, and to let in evidence aliunde to establish any debt, however large. The English decisions upon this subject had gone great lengths, and in some instances to an extent irreconcilable with any just principles. Subsequently there was a disposition on the part of the courts to retrace their steps, and bring the doctrine back to rational limits, and it was held that, to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continued so, and, if there had been a conditional promise, that the condition had been performed.[22]

[20] Bell v. Morrison, 1 Pet. 351-360; Bangs v. Hall, 2 Pick. (Mass.) 368; Sands v. Gelston, 15 Johns. (N. Y.) 511; Kerper v. Wood, 48 Ohio St. 613, 622, 29 N. E. 501.

[21] Bell v. Morrison, 1 Pet. 351-360.

[22] Bell v. Morrison, 1 Pet. 351-360; Bangs v. Hall, 2 Pick. (Mass.) 368; In

A doctrine quite as comprehensive was early asserted in the supreme court of New York,[23] in which it was said that "if, at the time of the acknowledgment of the existence of the debt, such acknowledgment was qualified in a way to repel the presumption of the promise to pay, it will not be evidence of a promise, sufficient to revive the debt, and take it out of the statute"; and in accord with this principle the same court held that, "if the acknowledgment be accompanied by a declaration that the party intends to rely on the statute as a defense, such an acknowledgment is wholly insufficient." [24]

Various courts have thus stated the requisite character of an acknowledgment: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay." [25] "The acknowledgment must be clear, distinct, and unequivocal, and it must be consistent with the promise to pay." [26] The writing, in order to constitute an acknowledgment, must recognize an existing debt, and it should contain nothing inconsistent with the intention on the part of the debtor to pay it.[27] "At common law the admission removed the bar of the statute only when it was of such a nature that a promise to pay might be inferred from it." [28]

Under Lord Tenterden's Act (9 Geo. IV. c. 14), Code Civ. Proc. N. Y. § 395, and other statutes following the English act, the new

re River Steamer Co., 6 Ch. App. 822, 828. See, also, Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Heany v. Schwartz, 155 Pa. St. 154, 25 Atl. 1078; Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361.

[23] Bangs v. Gelston, 15 Johns. 511.

[24] See, also, Brown v. Campbell, 1 Serg. & R. (Pa.) 176; Clementson v. Williams, 8 Cranch, 72; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Perry v. Chesley, 77 Me. 393; Hussey v. Kirkman, 95 N. C. 63; Stafford v. Richardson, 15 Wend. (N. Y.) 302; Shoemaker v. Benedict, 11 N. Y. 176, 183.

[25] Bell v. Morrison, 1 Pet. 351; Russell v. Davis, 51 Minn. 482, 53 N. W. 766. Compare Gay's Estate v. Hassam, 64 Vt. 495, 24 Atl. 715.

[26] Keener v. Zartman, 144 Pa. St. 179, 22 Atl. 889; Russell v. Davis, 51 Minn. 482, 53 N. W. 766; Chapman's Appeal, 122 Pa. St. 331, 15 Atl. 400. Compare Custy v. Doulan, 159 Mass. 245, 34 N. E. 360; Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361.

[27] Manchester v. Braedner, 107 N. Y. 346-349, 14 N. E. 405; Wald v. Arnold, 168 Mass. 134, 46 N. E. 419.

[28] Henry v. Roe, 83 Tex. 446, 18 S. W. 806, 808; Busw. Lim. § 42.

promise or acknowledgment must be in writing, signed by the party to be charged thereby.[29] But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt, and its amount, or to fix the date of the writing relied upon as an acknowledgment, when the circumstances are omitted, or expressed ambiguously.[30]

Although, as above shown, it is sometimes said that the promise must be unconditional, this term does not exclude as insufficient an absolute promise to pay upon the happening of some contingency or the fulfillment of some condition, for when this happens, or is fulfilled, the promise then becomes absolute. In such a case, in order to take advantage of the promise, it must be shown that it has thus become operative.[31]

6. WAIVER.

The theory on which an acknowledgment or new promise takes the debt out of the statute of limitations is sometimes stated to be that it waives the bar of the statute, though it is admitted that this view, particularly when the so-called waiver is made before the period of limitation has expired, and when, accordingly, there is nothing to waive, and the liability is undeniable, is not free from difficulties.[32] And it is said that probably the doctrine is a relic of the time when the statute was regarded with disfavor, and evaded as far as possible.[33]

The term "waiver" is, however, sometimes used in another sense, as referring to a contract by the debtor with the creditor not to avail himself of the benefit of the statute, in return for an extension of time to pay, or other benefit passing from the creditor;[34] while

[29] See Patterson v. Neuer, 165 Pa. St. 66, 73, 30 Atl. 748.

[30] Manchester v. Braedner, 107 N. Y. 346, 349, 14 N. E. 405; Kincaid v. Archbald, 73 N. Y. 189; Lechmere v. Fletcher, 3 Tyrw. 450; Bird v. Gammon, 3 Bing. (N. C.) 883; 1 Smith, Lead. Cas. 960, and cases cited.

[31] Wakeman v. Sherman, 9 N. Y. 85; Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361; Parker v. Butterworth, 46 N. J. Law, 244.

[32] Wald v. Arnold, 168 Mass. 131, 46 N. E. 419; Ilsley v. Jewett, 3 Metc. (Mass.) 439, 445; Bigelow v. Norris, 139 Mass. 12, 29 N. E. 61.

[33] Wald v. Arnold, 168 Mass. 131, 46 N. E. 419.

[34] Wetzell v. Bussard, 11 Wheat. 309.

sometimes the binding effect of a waiver is explained on the theory of estoppel.[35]

7. WHAT IS PART PAYMENT.

As already stated, Lord Tenterden's act did not deal with the effect upon the running of the time, under the statute, of a part payment. And the same proposition is true of many American statutes founded upon the English statute. Thus the New York statute, after declaring that an acknowledgment or promise in writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the provisions relating to limitations, adds that "this section *does not alter* the effect of a payment of principal or interest";[36] thus leaving the effect undefined, and to be determined by the principles established by the decisions of the courts applicable to the subject.[37]

Partial payments, which, as well as formal acknowledgments, may be relied upon to take a case out of the statute, are not in reality entirely distinct from acknowledgments of an existing indebtedness, but are to be regarded as mere facts from which an admission of the existence of the entire debt and the present liability to pay may be inferred. As a fact by itself, a payment only proves the existence of the debt to the amount paid; but from that fact courts and juries have inferred a promise to pay the residue. But, in any view, it is only reliable as evidence of a promise, or from which a promise may be implied. Any other evidence which establishes such a promise may, apart from the operation of any statutory requirement of a special form of acknowledgment or promise, be equally efficacious. In any case the question is as to the weight to be given to evidence, and, if a new promise is satisfactorily proved,—as, for example, by the fact of the partial payment,—the debt is renewed, and without a promise, express or implied, it is not renewed.[38]

Where a partial payment is made on account of an existing indebtedness, the whole debt upon which such payment is made is

[35] Utica Ins. Co. v. Bloodgood, 4 Wend. (N. Y.) 652.

[36] Code Civ. Proc. § 395.

[37] Murdock v. Waterman, 145 N. Y. 55, 62, 39 N. E. 829.

[38] Shoemaker v. Benedict, 11 N. Y. 176, 185.

thereby taken out of the statute of limitations up to that time. The payment is an acknowledgment of an existing indebtedness, and raises an implied promise at that time to pay the balance.[39] In order to have that effect, it must not only appear that a payment was made on account of a debt, but also on account of *the* debt for which action is brought, and that the payment was made as part of a larger indebtedness, and under such circumstances as will warrant a jury in finding an implied promise to pay the balance.[40]

If it be doubtful whether a payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt, so as to extend the period of limitation. If there be a mere naked payment of money, without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute.[41]

The provisions of the New York Code change neither the nature nor the effect of payment of interest or principal, nor introduce any rule of evidence in regard to the establishment of the same, different from that existing before the adoption of the Code, and the payment need not be evidenced by writing.[42]

Payment on Notes or Bills.

To make an indorsement of principal or interest upon a note admissible in evidence at all, it must be proved to have been made before the presumption of payment attached by lapse of time; in other words, the indorsement, which is only evidence of the payment, must appear to have been made by a creditor at a time when he had no motive to give a false credit, and at least before the statute

[39] Day v. Mayo, 154 Mass. 472, 28 N. E. 898; Lang v. Gage, 65 N. H. 173, 18 Atl. 795.

[40] Crow v. Gleason, 141 N. Y. 489, 493, 36 N. E. 497.

[41] 1 Wood, Lim. 271; Abb. Tr. Ev. 824; Harper v. Fairley, 53 N. Y. 442; Alloo v. Figuera, 60 N. Y. 630; Smith v. Ryan, 66 N. Y. 352; Adams v. Olin, 140 N. Y. 150, 35 N. E. 448; Haines' Adm'r v. Watts' Adm'r, 53 N. J. Law, 455, 21 Atl. 1032; Hamilton v. Coffin, 45 Kan. 556, 26 Pac. 42; U. S. v. Wilder, 13 Wall. 254, 256.

[42] In re Hearman's Estate (Sur.) 19 N. Y. Supp. 539; Mills v. Davis, 113 N. Y. 246, 21 N. E. 68; Cleave v. Jones, 6 Exch. 573; First Nat. Bank of Utica v. Ballou, 49 N. Y. 155; Anthony v. Fritts, 45 N. J. Law, 1.

of limitations had created a bar.[43] But where it satisfactorily appears that an indorsement was made at a time when it could be against the interest of the party making it, it will furnish evidence for the consideration of the trial court of payment according to its terms.[44] But where an indorsement of payment is made by the actual authorization of both parties to the note, it may, together with other facts supporting it as evidence of an acknowledgment of an existing debt, be relied on to take the case out of the statute, even though it was made after the statutory period had expired.[45]

8. WHEN MUST ACKNOWLEDGMENT OR PAYMENT BE MADE.

It is not necessary that an acknowledgment or partial payment, in order to take a case out of the statute of limitations, should be made before the full time fixed by the statute has elapsed. It may be made either while the time is running or after the time has fully expired. The reason is that in any case the acknowledgment or payment does not properly revive the original contract, so that an action may be maintained thereon after the statutory period of limitation has expired; but it constitutes, or is evidence of, a new promise to pay the debt, upon which new promise the action is to be brought. The consideration for such a promise, either express or implied, is to be found in the moral obligation of the debtor to pay the debt. The statute does not wipe the debt out of existence after the lapse of the statutory period, but merely prohibits its enforcement by action; in other words, the statute relates merely to the remedy. The debt, therefore, thus continuing to exist, furnishes a sufficient basis for a new agreement to pay it. After the statutory period of limitation has expired, therefore, an action may be maintained upon the new promise by proof that such promise was made either before or after the statutory period had expired; and, for the same reason, as soon as the new promise is made, the statute again begins to run against it, and the action based upon it must, therefore, be begun before the

[43] In re Hearman's Estate (Sur.) 19 N. Y. Supp. 539; Roseboom v. Billington, 17 Johns. (N. Y.) 182.

[44] Roseboom v. Billington, 17 Johns. (N. Y.) 182; In re Hearman's Estate, (Sur.) 19 N. Y. Supp. 539.

[45] Bouton v. Hill, 4 App. Div. 251, 38 N. Y. Supp. 498.

statutory period, with reference to such new promise, has expired. Thus, if the period of limitation is six years, and a new promise is not made until the end of the seventh year, an action may be maintained thereon within six years from the time of the making of the new promise.[46]

9. PAYMENT NEED NOT BE MADE IN MONEY.

A payment, sufficient to take a case out of the statute of limitations, need not be made in the form of money. Thus, for example, where a claim arose in 1878, and in 1883–84 work was performed by the debtor for the creditor under an agreement that the amount thereof should be credited upon the account, and credits were given accordingly, such credits were held to take the case out of the operation of the statute.[47]

So, delivery by a debtor to a creditor, of the note of a third person as collateral to the payment of his debt, is equally significant as an acknowledgment by the debtor of his liability for the whole demand as would be a cash payment of a like amount.[48]

So, the delivery to the creditor of a policy of life insurance, or of the renewal certificate of such policy, as collateral security for the payment of the debt, is sufficient to constitute a renewal of the debt, and the statute will begin to run from the time of such delivery. The theory upon which the delivery of the policy saves the operation of the statute is that the debtor, by such act, acknowledges the debt, and evinces a willingness to pay.[49]

So, also, if one gives his note for an amount computed by the creditor to be due, but which the debtor claims to be incorrect, and it is then agreed that, if a recomputation shall show the amount to be too large, the error may be corrected, a subsequent indorsement, dated back to the date of the note, of an amount in which it was subsequently ascertained that the note was actually excessive, constitutes such a part payment of the note as to take the case out of the stat-

[46] Shoemaker v. Benedict, 11 N. Y. 176.

[47] Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Manson v. Lancey, 84 Me. 380, 24 Atl. 880; Bodger v. Arch, 10 Exch. 333.

[48] Smith v. Ryan, 66 N. Y. 352.

[49] Miller v. Magee, 49 Hun, 610, 2 N. Y. Supp. 156.

ute. Such an indorsement represents no actual payment upon the note, but a mere correction; but the difference, if any, that should be found to exist between the face of the note and the actual amount due the creditor, being such that the debtor could assert it as a defense pro tanto to an action upon the note brought against him, such difference constitutes a claim or credit in favor of the defendant against the plaintiff,—something which could be applied in partial reduction, extinguishment, or payment of the note.[50]

10. BY WHOM ACKNOWLEDGMENT MUST BE MADE.

By Joint Debtor.

Much discussion has arisen, and some difference of opinion has existed, over the question of the power of one joint debtor, under certain circumstances, to bind the other by making an acknowledgment of the existence of an indebtedness. The controlling principle by which all such cases should be tested is this: That an acknowledgment, in order to deprive a debtor of his defense under the statute of limitations, must have been made by him or by his authorized agent. Thus, if such agency does in fact exist, one joint contractor may make payments as agent for all the contractors, or a principal debtor may make payments for and in the name of his surety as his agent, or payments may thus be made in the name of all the joint contractors or of the surety without previous authority, but they must be subsequently ratified; and in all such cases the running of the statute may be prevented. But in all cases, to make the payments effective, they must, by previous authorization or subsequent ratification, be the payments of the party sought to be affected by them.[51]

A partial payment by a stranger, or by a person not authorized to represent the debtor, offers no ground for assuming any payment on the part of the latter or for inferring a new promise by him to pay the balance of the debt; and the payment, not being made by the debtor or by his authority, cannot, therefore, arrest the running of the statute. But in the application of the doctrine that a part payment,

[50] Bouton v. Hill, 4 App. Div. 251, 38 N. Y. Supp. 498; Amos v. Smith, 1 Hurl. & C. 238.

[51] McMullen v. Rafferty, 89 N. Y. 456, 460.

within the statute, must be made by the debtor or by his authority, there has been much diversity of judicial opinion.[52]

Prior to the decision of Van Keuren v. Parmelee,[53] it was well settled that payments or acknowledgments by one of several makers of a promissory note, made before the statute of limitations had barred an action upon it, might prevent the statute of limitations from attaching to the demand, on the ground that by the joint contract there was a unity of interest by which a quasi agency was created between the contractors, so that the admission or promise of one would bind all.[54] And so in other states.[55]

The Van Keuren Case, supra, held that an acknowledgment and promise to pay, made by one partner after the dissolution of the firm, would not revive a debt against the firm, which was barred by the statute of limitations, on the theory that the dissolution of the partnership terminated the agency of each partner to bind the others. In Shoemaker v. Benedict [56] the question was presented whether the joint contract creates an agency in one of several joint debtors to continue a debt or renew a debt already barred against all, and prevent the statute of limitations from attaching by a new promise, express or implied; or, in other words, whether such joint debtor is authorized, by virtue of his relation to the parties, to make such new contract, which shall bind them all. It was held that a new promise and a partial payment both stood on the same footing, the latter being available merely as a fact from which an admission of the existence of the entire debt and the present liability to pay may be inferred; and also that a promise, made while the statute of limitation was running, is to be construed and acted upon in the same manner as if made after the statute had attached, and that the partial payment, or an acknowledgment by one of two joint debtors, did

[52] Murdock v. Waterman, 145 N. Y. 55-63, 39 N. E. 829; Knapp v. Crane, 14 App. Div. 120, 43 N. Y. Supp. 513.

[53] 2 N. Y. 523.

[54] Whitcomb v. Whiting, 2 Doug. 652; Patterson v. Choate, 7 Wend. (N. Y.) 441; Hammon v. Huntley, 4 Cow. (N. Y.) 493.

[55] Moore v. Goodwin, 109 N. C. 218, 13 S. E. 772; Sigourney v. Drury, 14 Pick. (Mass.) 387; Perham v. Raynal, 2 Bing. 306; Pike v. Warren, 15 Me. 393; Joslyn v. Smith, 13 Vt. 356; Shelton v. Cocke, 3 Munf. (Va.) 191; Beltz v. Fuller, 1 McCord (S. C.) 541; Simpson v. Geddes, 2 Bay (S. C.) 533.

[56] 11 N. Y. 176.

not deprive the other of his defense that the claim was barred by the statute.[57]

At common law, and in some of the states where the common-law rule prevails, a distinction is made between those cases in which part payment is made by one of several promissors of a note before the statute of limitations has attached and those in which a payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter that it is revived only as to the party making the payment.[58] The reason of this distinction lies in the principle that, by withdrawing from the joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness.[59]

By a Partner.

The part payment of a partnership debt by one partner, while the partnership is still in existence, will take the case out of the statute of limitations as against the other partners, as well as against the partner making the payment; for as to matters pertaining to the partnership business, and while the partnership relation continues, the act of one of the members of a firm is the act of all.[60]

By an Executor.

An acknowledgment by an executor cannot amount to a contract which will bind the estate of the testator. It is no part of the duty of an executor to subject the estate of his testator to a demand from which it was by law exempt.[61]

[57] See, also, Lewis v. Woodworth, 2 N. Y. 512.

[58] Parker v. Butterworth, 46 N. J. Law, 244, 251; Atkins v. Tredgold, 2 Barn. & C. 23; Moore v. Beaman, 111 N. C. 328, 16 S. E. 177; Sigourney v. Drury, 14 Pick. (Mass.) 387–391; Ellicott v. Nichols, 7 Gill (Md.) 85.

[59] Cross v. Allen, 141 U. S. 528–536, 12 Sup. Ct. 67.

[60] Harding v. Butler, 156 Mass. 34, 30 N. E. 168. Compare Simpson v. Geddes, 2 Bay (S. C.) 533; Sage v. Ensign, 2 Allen (Mass.) 245; Tappan v. Kimball, 30 N. H. 136; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501; Merritt v. Day, 38 N. J. Law, 32.

[61] Bloodgood v. Bruen, 8 N. Y. 362, 370; Mooers v. White, 6 Johns. Ch. (N. Y.) 373.

By Heirs of Mortgaged Premises.

Where one who owns real estate, upon which he has placed a mortgage, conveys a portion thereof, and dies intestate, a payment thereafter by his heirs, in whom the remaining part of the mortgaged premises has vested, does not take out of the statute the claim of the mortgagee under his mortgage upon the other part of the premises conveyed to a third person, who assumed no duty in respect thereto, and was under no obligation to pay the debt; for the heirs, in such a case, are in no respects agents of the third party.

By a Mortgagor.

It has been held that a partial payment by a mortgagor on the debt, even after he had conveyed the premises mortgaged, would continue the lien of the mortgage;[62] for the mortgage is an incident to the debt, and, when payments are made by the debtor, the mortgagee is not called upon to inquire how the mortgagor has dealt with the equity of redemption. But upon the death of a mortgagor personally bound to pay the debt a new situation arises, as already seen. His personal representatives become liable to the extent of the personal assets. If the mortgaged premises descend to his heirs, or are devised, they are the primary resort in exclusion of the personalty, unless (in case of a will) the testator otherwise directs. If, during his life, the mortgagor has conveyed the equity of redemption, his grantee does not become personally liable for the debt, unless he assumed this payment, for the land remains subject to the pledge, whatever may be the form of the conveyance. But upon the death of a mortgagor, after having conveyed the land, the person liable is separated from the ownership of the land. Where the equity of redemption has been conveyed in parcels, without any personal obligation of the grantees to pay the debt, the land alone, as between them and the mortgagee, is liable. The owner of one of the parcels, acting separately and independently of the owners of other parcels, cannot, by payment, continue the lien of the mortgage beyond 20 years upon the other parcels, because he does not control the owners of the other parcels. So, with payment by an heir or devisee as such. His acknowledgment would

[62] New York Life Insurance & Trust Co. v. Covert, 6 Abb. Prac. N. S. (N. Y.) 154; Hughes v. Edwards, 9 Wheat. 489; Murdock v. Waterman, 145 N. Y. 55, 66, 69 N. E. 829.

continue his liability under the statute to the extent of the real assets in his hands, but would have no effect against the owners of the equity of redemption in suspending the running of the statute.[63]

Effect on Surety.

At common law, a payment made upon the note by the principal debtor, before the completion of the bar of the statute, served to keep the debt alive, both as to the debtor and the surety.[64] The same rule prevails in many states of the Union,* and, unless the common-law rule has been changed by statute in a state whose laws control in a given case, this principle will be applied by the United States courts.[65]

Nor does the death of a surety before the demand matures make any difference in principle, where the liability is not of a personal nature, but is an incumbrance upon the surety's property; for while there is authority holding that payment of interest by the principal debtor after the death of the surety, but before the statute of limitation has run against the debt, will not prevent the surety's executors from pleading the statute,[66] this rule does not extend to the representative of the deceased surety, whose liability was not personal, but upon property mortgaged.[67] But as to the effect of a part payment, by a principal, upon a surety in New York, see Littlefield v. Littlefield,[68] where it was held that one joint maker of a note, even though in fact a surety, does not lose his right to set up the statute of limitations on account of a part payment made by another joint maker, who was in fact the principal. So, part payment by a surety does not relieve the demand against the principal, unless made at the express request of the principal;[69] and the mere fact that a surety, when applied to for payment, requests the creditor to seek payment

63 Murdock v. Waterman, 145 N. Y. 55, 66, 69 N. E. 829.

64 Whitcomb v. Whiting, 2 Doug. 652; Burleigh v. Stott, 8 Barn. & C. 36; Wyatt v. Hodson, 8 Bing. 309; Mainzinger v. Mohr, 41 Mich. 685, 3 N. W. 183.

* Bank v. Cotton, 53 Wis. 31, 9 N. W. 926; Quimby v. Putnam, 28 Me. 419.

65 Cross v. Allen, 141 U. S. 528, 536, 12 Sup. Ct. 67.

66 Lane v. Doty, 4 Barb. (N. Y.) 530; Smith v. Townsend, 9 Rich. Law (S. C.) 44.

67 Cross v. Allen, 141 U. S. 528, 536, 12 Sup. Ct. 67. See, also, Miner v. Graham, 24 Pa. St. 491; Bank of Albion v. Burns, 46 N. Y. 170.

68 91 N. Y. 203.

69 Harper v. Fairley, 53 N. Y. 442.

from the principal, does not constitute such a request or authorization to the principal to make a payment on behalf of the surety as to render such a payment operative to take the case out of the statute as against the surety.[70]

11. TO WHOM ACKNOWLEDGMENT MUST BE MADE.

In order to take a case out of the operation of the statute, an acknowledgment must be made to the creditor, or his agent, or some one acting in his behalf, or at least must be intended to be communicated to him, or to influence his conduct. Thus, apart from other objections, the fact that an admission or acknowledgment of an indebtedness is made by the debtor in an answer interposed by him in an action to which the creditor is not a party would not suffice to rebut the presumption of payment, or to revive a debt barred by the statute.[71]

12. APPLICATION OF PAYMENTS.

Where one person holds several distinct claims against another, and the latter makes a payment to the former, the question as to the claim on which the payment is to be applied is, of course, important in determining which of them is thereby taken out of the statute of limitations. If the debtor owes all the debts in his individual capacity, no serious difficulty is presented. The debtor, in making a payment under such circumstances, has the right to designate the particular claim upon which the payment shall be applied; and, if he does not do so, the creditor may apply the payment as he sees fit. And if neither party makes any specific application of the payment as among the several claims, then the court, whenever the matter comes before it, will make such application of the payment as equity and justice require, according to its own notion of the intrinsic equity and justice of the case.[72] If, however, the creditor applies the payment to a debt already barred, such application does not take that debt out of the statute,

[70] Littlefield v. Littlefield, 91 N. Y. 203.

[71] In re Kendrick, 107 N. Y. 104, 110, 13 N. E. 762; Stamford, Spalding & Boston Banking Co. v. Smith [1892] 1 Q. B. 765.

[72] Field v. Holland, 6 Cranch, 8; Cremer v. Higginson, 1 Mason, 325, Fed. Cas. No. 3,383; Bank of California v. Webb, 91 N. Y. 467.

so as to sustain an action for the balance.[73] But if a creditor holds one claim against an individual debtor, and another claim against the same debtor jointly with other debtors, and the individual debtor makes a payment from his own funds, and no application is in fact made by either party, the weight of authority favors the view that, in the absence of qualifying circumstances, the payment should first be applied by the court upon the debtor's individual obligation.[74]

13. WHEN THE PERIOD BEGINS TO RUN.

Inasmuch as the statute of limitations bases its bar upon the existence of a period of time during which a plaintiff has failed to prosecute his cause of action, it follows that the period of limitation does not begin to run until a cause of action arises, and also that it does begin to run as soon as a cause of action arises. Thus, for example, if a legacy is left by will to one person for life, and then to another absolutely, the latter's cause of action to recover the legacy does not arise until the death of the person first entitled thereto; and thereupon, and not until then, the period of limitation begins to run against his action to recover the legacy.[75]

This principle is also illustrated in the case where lands are affected by an assessment appearing to be valid on its face, and an apparent lien upon the lands, but in fact illegal and void, by reason of facts outside of the record. In such a case the owner, who has involuntarily paid the assessment in ignorance of the facts, could, in one action, seek to set aside the assessment, and also to recover back the money paid upon it, and therefore his cause of action accrues immediately upon payment; while, if the circumstances had been such that he must first have the assessment set aside before he could bring an action to recover back the payment, then his cause of action upon the latter ground would not accrue until the assessment had been set aside.[76]

[73] Blake v. Sawyer, 83 Me. 129, 21 Atl. 831.

[74] Camp v. Smith, 136 N. Y. 187–201, 32 N. E. 640; Baker v. Stackpoole, 9 Cow. (N. Y.) 420; Livermore v. Claridge, 33 Me. 428; Johnson v. Boone's Adm'rs, 2 Har. (Del.) 172; Munger, Paym. p. 173.

[75] Gilbert v. Taylor, 148 N. Y. 298, 305, 42 N. E. 713; Matson v. Abbey, 141 N. Y. 179, 183, 36 N. E. 11; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826.

[76] Trimmer v. City of Rochester, 134 N. Y. 76, 31 N. E. 255. Compare Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641.

This principle is embodied in statutory form in the New York Code of Civil Procedure (section 415). So, in an action in Illinois, for work done under an expressed contract, which was not fully performed, in which each party accused the other of causing the work to be stopped, and most of the work had been done more than five years (that being the local period of limitation) before an action was begun, it was held erroneous to charge that, even if plaintiff was entitled to recover, under an implied contract, for the work done, he could only recover for that part of the work done within five years of the commencement of the action; since, as the work was an entirety, the statute of limitation did not begin to run against any of it until plaintiff ceased working.[77]

Where Demand is Necessary.

Numerous instances are elsewhere referred to, where a demand is necessary in order to set the statute of limitations running. These rest upon the proposition that where, by the express or implied agreement of the parties, money is only to come due when payment is sought by the party entitled thereto, there is no reason why the person obliged to pay should be able ultimately to refuse payment merely because the other party had exercised his right not to call for it. In a proper sense, there is in such a case no cause of action in existence until the contemplated request has been made and refused.[78] Instances of such cases are found in deposits, as distinguished from loans, while notes payable on demand, on grounds already stated, constitute an apparent exception. So, where one receives money for the use of another, under such circumstances that it is the duty of the former to pay it over, an action for money had and received may be brought to recover it, without a demand, and the statute of limitations begins to run from the date of the receipt of the money.[79] Thus, if one person receives from an insurance company moneys that belong to another, it is the ordinary case of the receipt of money by one to and for the use of another, in which the duty rests upon the party receiving the money, from the moment of its receipt, to

[77] O'Brien v. Sexton, 140 Ill. 517, 30 N. E. 461; Knight v. Knight (Ind. App.) 30 N. E. 421; Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225; Hall v. Wood, 9 Gray (Mass.) 60; Walker v. Goodrich, 16 Ill. 341.

[78] Patterson v. Blanchard, 98 Ga. 518, 25 S. E. 572.

[79] Mills v. Mills, 115 N. Y. 80, 21 N. E. 714.

pay it over to the party for whose use it was received; and if the person receiving it has no lien upon it, no right to retain it, nor any trust duty to discharge in respect to it, he is liable in an action to recover the same, and without any demand before suit.[80] So, an obligation binding one to pay a specified sum, but specifying no time for payment, is due at once, and the statute of limitations begins to run immediately.[81] Further illustrations of the application of the foregoing principles are given below:

(a) *Against a Deposit.*

The time fixed by statute begins to run, against the right of a depositor with a bank or a private person to recover his deposit, only from the time when payment thereof is refused. If the period of limitation, for example, is six years, the mere lapse of six years from the time when the deposit was made is no bar to an action.[82]

(b) *Against a Certified Check.*

A certification does not make the check due without demand. It simply binds the drawee bank to have and hold sufficient funds to pay the check to one lawfully demanding payment. In other respects it still remains a depository liable to pay only upon demand. And the mere drawing of a check is not a demand. Thus, if a depositor draws a check, which is duly certified by the drawee bank, and is subsequently paid to some one other than the payee, upon a forged indorsement of the latter's name, these facts constitute no demand. The only person authorized by the depositor to make a demand did not do so, and therefore, whenever the depositor discovers the mistake, although more than six years subsequent to the payment, he may repudiate the charge made against him, return the check, and claim payment of the sum really unpaid to him, or upon his order.[83]

[80] Wood v. Young, 141 N. Y. 211, 217, 36 N. E. 193.

[81] Ervin v. Brooks (N. C.) 16 S. E. 240. The distinction between these different classes of cases is discussed and illustrated in Dorman v. Gannon, 4 App. Div. 458, 38 N. Y. Supp. 659; Baker v. Moore, 4 App. Div. 234, 38 N. Y. Supp. 559; Watson v. Walker, 23 N. H. 471; King v. Mackellar, 109 N. Y. 215, 16 N. E. 201.

[82] Thomson v. Bank, 82 N. Y. 1, 8; Payne v. Gardiner, 29 N. Y. 146, 168, 171.

[83] Bank of British North America v. Merchants' Nat. Bank of New York, 91 N. Y. 106.

(c) *Against a Certificate of Deposit.*

In case of a deposit of money evidenced by the ordinary certificate, which simply acknowledges a deposit, a demand is necessary before action brought, as in the case of an ordinary bank deposit for which no certificate is issued.[84]

The certificate given for a deposit sometimes closely resembles a promissory note,—as, for example, in Howell v. Adams,[85] where the certificate provided that, if the money remained on deposit six months, interest would be paid at 5 per cent. per annum, but contained no promise to pay either principal or interest; while in Baker v. Leland [86] the certificate was to the effect that the depositor had deposited a specified sum, *payable to his order three months after date*, with interest at 7 per cent. if left beyond a specified date. The former certificate was held to be a certificate of deposit, against which the statute would begin to run only from demand, while the latter was held to be a promissory note, against which the statute would begin to run from three months after its date.[87]

(d) *Against Demand Notes.*

Upon a note payable on demand, and whether with or without interest, an action may be maintained against the maker without any demand, because it is due; and the statute of limitations therefore begins to run at once, even though no demand is made.[88] The same rule applies where expressions equivalent to "on demand" are used,—such as "on request," "on being called on,"—for in all the term is employed to indicate that the money is due, and not to provide a condition precedent to its payment.[89] But terms of similar import may,

[84] Gutch v. Fosdick, 48 N. J. Eq. 353, 356, 22 Atl. 590; Payne v. Gardiner, 29 N. Y. 146, 168.

[85] 68 N. Y. 314.

[86] 9 App. Div. 365, 41 N. Y. Supp. 339.

[87] See, also, Hunt v. Divine, 37 Ill. 137; Miller v. Austen, 13 How. 218; Bank of Orleans v. Merrill, 2 Hill (N. Y.) 295.

[88] Wheeler v. Warner, 47 N. Y. 519; In re King's Estate, 91 Mich. 411, 423, 54 N. W. 178; Newman v. Kethelle, 13 Pick. (Mass.) 418; Fenno v. Gay, 146 Mass. 118, 15 N. E. 87; Larason v. Lambert, 12 N. J. Law, 247; Kingsbury v. Butler, 4 Vt. 458; Wenman v. Insurance Co., 13 Wend. (N. Y.) 267; Norton v. Ellam, 2 Mees. & W. 461.

[89] Howland v. Edmonds, 24 N. Y. 307; Norton v. Ellam, 2 Mees. & W. 461; McMullen v. Rafferty, 80 N. Y. 456, 459.

of course, be so employed as to require a demand as a condition precedent; as, where a note was payable 24 months after demand, and it was held that the statute did not begin to run until a demand was made, and the time mentioned had expired.[90]

The principle by which the statute of limitations begins to run upon a demand note, as between the holder and the maker, from its inception, applies also in an action against a guarantor, whose obligation is co-extensive with that of the maker; for, the moment the maker fails in law to perform his contract, a cause of action accrues against the guarantor upon which he could at once be sued.[91] If, however, the guarantor makes it a part of his collateral contract of guaranty that the maker shall pay the note upon demand, then his obligation would not mature until an actual demand of payment has been made upon the maker.[92]

(e) *Against Indorser on Demand Note.*

In New York it is the settled law that, a note payable on demand, with interest, being a continuing security, no cause of action arises against an indorser until after actual demand. The plain import of the indorser's contract is that the maker of the note will pay the same at a certain time and place named, and, if it remains unpaid after demand made at such time and place, he will pay it upon notice of its nonpayment. And until then the statute of limitations does not begin to run.[93] But as, against the maker, the note is due at its inception, and the statute begins to run against him from its date, failure to make demand within the statutory period operates as a bar in his favor, and a demand thereafter will not serve to lay a basis for an action against the indorser, who is, therefore, discharged by the laches of the holder of the note.[94]

90 Thorpe v. Booth, Ryan & M. 388; also, Sinkler v. Turnpike Co., 3 Pen. & W. (Pa.) 149; Miles v. Bough, 3 Adol. & E. (N. S.) 845; Ross v. Railroad Co., 6 Ind. 299.

91 McMullen v. Rafferty, 89 N. Y. 456.

92 Nelson v. Bostwick, 5 Hill (N. Y.) 37.

93 Parker v. Stroud, 98 N. Y. 379; Merritt v. Todd, 23 N. Y. 28; Pardee v. Fish, 60 N. Y. 265.

94 Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588.

(f) *In Case of an Express Trust.*

The statute of limitations does not begin to run against the beneficiary, in the case of an express trust, until the trustee, with the knowledge of the beneficiary, has disavowed and repudiated the trust.[95] The rule is different in case of implied or constructive trusts forced upon the conscience of a party as a means of preventing the consummation of a wrong.[96] But in the case of admitted trusts the possession of the trustee is not hostile or adverse to the claim of the beneficiary, and is consistent with the continuing recognition of the trust relation until that relation is distinctly disclaimed. The cases arising in bankruptcy, or under the insolvent laws of a state, are numerous to the effect that from the time of the institution of the proceedings and the appointment of an assignee or trustee in bankruptcy or insolvency, the running of the statute is suspended as to claims not then barred, and that the assignee or trustee cannot resist payment because more than the statutory period for bringing an action on the claim has elapsed before payment was demanded.[97] The case of the appointment of a receiver for the final winding up of the estate of a dissolved corporation is plainly within the reason upon which the authorities cited proceed.[98] There are many cases of trust, within the comprehensive meaning of that term, where there are concurrent remedies at law and in equity. In such cases the general rule is that, if the legal remedy is barred, the equitable remedy is barred also.[99] But in the case of an executor or administrator, although in a sense he is a trustee for creditors and persons interested in the estate of the decedent as legatees or next of kin, he may nevertheless interpose the statute of limitations as a defense to an action to recover a debt not barred at the death of the testator. This right,

[95] Gisborn v. Insurance Co., 142 U. S. 326, 337, 12 Sup. Ct. 277; Miles v. Thorne, 38 Cal. 335; Hearst v. Pujol, 44 Cal. 230; Grant v. Burr, 54 Cal. 298; Henry v. Mining Co., 1 Nev. 619; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3; Seymour v. Freer, 8 Wall. 202; Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328; Zebley v. Trust Co., 139 N. Y. 461, 34 N. E. 1067; Van Camp v. Searle, 147 N. Y. 150, 161, 41 N. E. 427.

[96] Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328; In re Lehman, 32 Md. 225.

[97] Ex parte Ross, 2 Glyn & J. 46, 329; Minot v. Thacher, 7 Metc. (Mass.) 348; Parker v. Sanborn, 7 Gray (Mass.) 191; Von Sachs v. Kretz, 72 N. Y. 548, 550.

[98] Kirkpatrick v. McElroy, 41 N. J. Eq. 555, 7 Atl. 647.

[99] Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90.

subject to certain qualifications, is generally recognized by statute, it being the policy of the law to regulate the settlement of estates of decedents so that claims should be presented and adjusted without unreasonable delay. There is little analogy between a person standing in such a relation and the position of a receiver of the estate of a dissolved corporation, appointed as the officer and agent of the court to get its assets, and distribute them among its then existing creditors; and as against the latter he cannot plead the statute.[100]

(g) *In Case of Fraud or Mistake.*

The fact that an action is based upon a fraud of the defendant operates in equity to remove the bar of the statute to the extent of sustaining the action if brought within the statutory period, reckoned from the discovery of the fraud.[101] In New York this principle is embodied in a statute declaring that in an action to procure a judgment other than for a sum of money on the ground of fraud, in a case which would formerly have been cognizable in chancery, the cause of action is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.[102] Under the principle embodied in this statute, the rule is that, where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises; and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him, and he will be held, for the purposes of the statute of limitations, to have actually known what he might have known and ought to have known.[103]

The decisions of courts of equity formerly placed mistake, as a

[100] Ludington v. Thompson, 153 N. Y. 499, 47 N. E. 903. For an explanation of the present English statute of limitations, as applied to trustees, see Birrell's Duties and Liabilities of Trustees, p. 153 et seq.; Thorne v. Heard [1894] 1 Ch. 599; In re Gurney [1893] 1 Ch. 590; In re Bowden, 45 Ch. Div. 444; Swain v. Bringeman [1891] 3 Ch. 233; In re Page, Jones v. Morgan [1893] 1 Ch. 304; Somerset v. Earl Poulett [1894] 1 Ch. 231; How v. Earl Winterton [1896] 2 Ch. 626.

[101] Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 122; Hickam v. Hickam, 46 Mo. App. 496; Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318.

[102] Code Civ. Proc. § 382, subd. 5; Carr v. Thompson, 87 N. Y. 160.

[103] Higgins v. Crouse, 147 N. Y. 411, 42 N. E. 6.

ground for relief, upon the same footing, in respect to the statute of limitation, with fraud. But the New York statute above cited applies the principle to the case of fraud only, and thus excludes mistake, so that the time begins to run from the time when the mistake occurred, and not from the time of its discovery.[104]

The question whether courts of law can recognize the existence of fraud, as the basis of an action, and as removing the bar of the statute in favor of an action brought within the prescribed period after discovery thereof, has received different answers. In some courts it has been held that fraud has this effect,[105] while in others the contrary doctrine has been adopted.[106] The New York statute contains no provision recognizing, in respect to actions at law, the principle applied in equity.[107]

(h) *In Action to Set Aside Fraudulent Conveyance.*

The last preceding subdivision relates to cases where the *right* of action arose as soon as the fraud was committed, but where the person who had that right did not know of the fraud, and so did not know of his right to sue until subsequently. A different case is presented where a debtor makes a conveyance of his property which is fraudulent as to creditors. Here a creditor, even though he knows of the fraud, has no right to maintain an action to set the conveyance aside until he has first recovered judgment against the debtor upon the indebtedness, and execution thereon has been returned unsatisfied. Until then, therefore, the statute of limitations does not begin to run.[108]

[104] Exkorn v. Exkorn, 1 App. Div. 124, 37 N. Y. Supp. 68; Oakes v. Howell, 27 How. Prac. 151; Hoyt v. Putnam, 39 Hun, 402, 406; Mason v. Henry, 152 N. Y. 529, 46 N. E. 837. Compare De Forest v. Walters, 153 N. Y. 229, 47 N. E. 294.

[105] First Massachusetts Turnpike Corp. v. Field, 3 Mass. 201; Matlock v. Todd, 25 Ind. 128.

[106] Troup v. Smith's Ex'rs, 20 Johns. (N. Y.) 33; McLure v. Ashby, 7 Rich. Eq. (S. C.) 430.

[107] See Hickam v. Hickam, 46 Mo. App. 496; Freeholders of Somerset v. Veghte, 44 N. J. Law, 509, 511.

[108] Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641. Compare Trimmer v. City of Rochester, 134 N. Y. 76, 31 N. E. 255.

(i) *In Actions against an Attorney.*

By the common law an attorney at law was not subject to an action for moneys of his client, collected in his professional capacity, until after demand and refusal to pay, except in cases where he had applied the money to his own use, or otherwise wrongfully dealt with it.[109] When he has acted in good faith, he should be protected from the costs of a suit until, upon demand, he neglects or refuses to pay. But, if the client has knowledge of the receipt of the money by the attorney, then the statute of limitations will begin to run from the time when the client had such knowledge, because upon that his right to make the demand may be said in such cases to depend.[110] But the client's right of action against an attorney for negligence—as, for example, in the examination of a title—accrues at the time the examination is made and reported, and not when damages result therefrom.[111]

(j) *Cloud on Title.*

Where an action is brought by one already in possession of land to compel the removal of an instrument which apparently impairs and injuriously affects the plaintiff's title, the statute of limitations is not available as a defense. An owner has a right to invoke the aid of a court of equity, at any time while he is the owner, to have an apparent, though in fact not a real, incumbrance discharged from the record. It is a continuing right, which exists as long as the occasion for its exercise.[112] Such a cloud upon title results sometimes from fraud and sometimes from mistake. In either case the mere existence of a cloud does not set the statute of limitations running on account of the continuing nature of the ground of action; and even if the mistake is made the basis of an actual adverse claim, the stat-

[109] Taylor v. Bates, 5 Cow. (N. Y.) 376. See Wood v. Young, 141 N. Y. 211, 218, 36 N. E. 193.

[110] Wood v. Young, 141 N. Y. 211, 218, 36 N. E. 193; Bronson v. Munson, 29 Hun (N. Y.) 54.

[111] Schade v. Gehner (Mo. Sup.) 34 S. W. 576; Moore v. Juvenal, 92 Pa. St. 484; Lilly v. Boyd, 72 Ga. 83. As to the running of the statute in actions by an attorney to recover for services, see Ennis v. Car Co., 165 Ill. 161, 46 N. E. 439; Adams v. Bank, 36 N. Y. 255; Hale's Ex'rs v. Ard's Ex'rs, 48 Pa. St. 22.

[112] Smith v. Reid, 134 N. Y. 568, 577, 31 N. E. 1082; Miner v. Beekman, 50 N. Y. 337, 343; Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741; De Forest v. Walters, 153 N. Y. 229, 241, 47 N. E. 294.

ute, if it runs at all, does not, in any event, begin to run until the party against whom it is invoked is charged with knowledge of an assertion of some adverse claim. Such a case exists, for example, where an ambiguous expression in the deed constitutes the basis of an adverse claim, and the mistake is not apparent on the face of the deed.[113]

Relief against a cloud on a title may also be sought by a defendant in an action in which the plaintiff attempts to assert title through a deed alleged by the defendant to be inoperative by reason of the mistake in description. The plaintiff's action of ejectment in such a case, where equitable relief may be demanded by the defendant, furnishes the occasion for the interposition of such a claim by the defendant; and if, in such a case, there is nothing in the record to show when the plaintiff first asserted a claim under the deed to the knowledge of the defendant, or when the latter first learned of the mistake, or of the plaintiff's claim, no basis is furnished for the application of the statute of limitations.[114]

(k) *In Case of a Foreign Corporation.*

Inasmuch as it is a general object of the statute of limitations to save the remedy of the creditor in all cases where he has been prevented from prosecuting the debtor in the local court in consequence of the absence of the latter from the state, this principle applies to a foreign corporation, so that as it is legally confined to the territory of another state, and cannot possibly return to that of the forum, an action against it in the latter state may, under statutes such as that of New York, be commenced at any time, for the period of limitation will never commence to run. The policy of the law is that no persons, natural or artificial, who are so circumstanced that they cannot come within the local jurisdiction, can impute laches to their creditors, or those claiming to have rights of action against them, in not pursuing them in the foreign jurisdiction where they reside.[115] This rule obtains, although the foreign corporation has, before the

[113] De Forest v. Walters, 153 N. Y. 229, 241, 47 N. E. 294; Smith v. Reid, 134 N. Y. 568, 578, 31 N. E. 1082.

[114] De Forest v. Walters, 153 N. Y. 229, 241, 47 N. E. 294; Bartlett v. Judd, 21 N. Y. 200; Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000.

[115] Olcott v. Railroad Co., 20 N. Y. 210. See, also, Clark v. Railroad Co., 94 N. Y. 217.

commencement of the action, for the time specified in the statute, continuously operated and carried on its business in this state, and had property and officers therein.[116]

14. ADVERSE POSSESSION.

If, in litigation respecting the title to real estate, it appears that the defendant has maintained what the law deems a perfect possession, "if continued without interruption during a whole period which is prescribed by the statute for the enforcement of the right of entry, such possession is evidence of a fee. Independent of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest, and upon this acquiescence is founded the presumption of the existence of some substantial reason (though, perhaps, not known) for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive, force." [117] The possession which will thus bar the right of the former owner to recover property must be an open, visible, continuous, and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claims.[118] This subject is usually regulated by statutes of limitation, which frequently enumerate the particular facts which must be shown in order to establish a title by adverse possession.[119]

15. MUTUAL, OPEN, AND CURRENT ACCOUNTS.

The statute of 21 Jac. I. c. 16, expressly excepted from its operation "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It was held that the exception in that statute applied only to the action of account, or

116 Boardman v. Railroad Co., 84 N. Y. 157, 185.

117 Angel on Limitations, quoted in Sharon v. Tucker, 144 U. S. 544, 12 Sup. Ct. 720.

118 Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720.

119 Code Civ. Proc. N. Y. § 365 et seq.; Miller v. Railroad Co., 71 N. Y. 380; Hall v. Powel, 4 Serg. & R. (Pa.) 465.

to an action on the case for not accounting, and, after considerable vacillation in the decisions, that accounts within the exception were not barred, even if there were no items on the other side of the account, within six years.[120] It was also held that the exception in the statute extended only to accounts concerning the trade of merchandise between merchant and merchant, and not to other accounts. Other accounts were held to be within the statute, and the cause of action upon them was held to accrue from the last item of credit therein.[121] It was only mutual, open, and current accounts that could come within the exception of the statute as to merchants' accounts; and in the case of accounts not concerning the trade of merchandise, to escape the bar of the statute, there must have been new accounts and items of credit within six years.[122]

This statute, with slight verbal alterations, having become the law of New York, the exception as to merchants' accounts continued until the adoption of the Revised Statutes, and it was early held that the law enacted in that state should receive the same construction as the statute of Jac. I. had received in England.[123] But there had been some confusion and uncertainty in the various decisions, and there was some departure from the law as stated in England.[124] The provisions of the Revised Statutes, and the subsequent provisions of the Code, produced no change in the law as previously settled in New York, in respect to accounts, which has just been stated. "(1) The exception relating to mutual, open, and current accounts extends to all persons, whether merchants or others; (2) where all the accounts have ceased for six years, the demand is barred, and, consequently, that, where there is an open, mutual account within six years, the whole account may be recovered; (3) that the limitation of the statute applies as well to accounts between merchants as others."[125]

Where goods are delivered by a debtor to his creditor as an account

[120] Robinson v. Alexander, 8 Bligh (N. S.) 352; Inglis v. Haigh, 8 Mees. & W. 770.

[121] Catling v. Skoulding, 6 Term R. 189.

[122] Green v. Disbrow, 79 N. Y. 1, 6; Day v. Mayo, 154 Mass. 472, 28 N. E. 898.

[123] Ramchunder v. Hammond, 2 Johns. (N. Y.) 200.

[124] Green v. Disbrow, 79 N. Y. 1, 6.

[125] Green v. Disbrow, 79 N. Y. 1, 6. Also Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013, 1014; Miller v. Cinnamon, 168 Ill. 447, 48 N. E. 45; Gulick v. Turnpike Co., 14 N. J. Law, 545.

against him, it will not be presumed that they were delivered in payment. Before they can be held to have been so delivered, there must be proof that it was so intended, and that both parties so understood it. An account of items upon one side and payments upon the other is not a mutual account. The payments do not, in such case, enter into the account. They are at once applied, and reduce the account.[126]

Where there are mutual accounts between two persons, it is always the understanding that the accounts upon one side shall offset that upon the other, and in law the debt due from one to the other is only the balance left after the application in reduction of the account on the opposite side. The very theory on which the provision of the statute of limitations relating to accounts is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance.[127] "In ordinary cases of mutual dealings, no obligation is created in regard to each particular item, but only for the balance; and it is the constantly varying balance which is the debt."[128] Thus, where a party, who has items charged against him upon an account, delivers goods to the other party on the mutual understanding that they are to enter into the account between the parties, to be adjusted when the account should be settled, the delivery does not constitute a payment on account of existing items, but they would be credited on the opposite side of the account, so that in any future settlement between the parties he could have the benefit of them. The legal effect of such a transaction is that the party delivering the goods sells them to the other party, the price to be credited on the account.[129]

126 Green v. Disbrow, 79 N. Y. 1, 9. Compare Warren v. Sweeney, 4 Nev. 101.

127 Green v. Disbrow, 79 N. Y. 1, 10.

128 Abbott v. Keith, 11 Vt. 525; Trueman v. Fenton, 1 Smith, Lead. Cas. (Hare & W. Notes) 966.

129 Green v. Disbrow, 79 N. Y. 1, 10; Chambers v. Marks, 25 Pa. St. 286; Norton v. Larco, 30 Cal. 126.

16. LIMITATIONS AS AGAINST THE GOVERNMENT.

Apart from the operation of statutes of limitation, the defenses of stale claims and laches cannot be set up against the government.[130] This doctrine was embodied in the phrase, "Nullum tempus occurrit regi." This maxim is founded, not on the ground of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious loss, if the doctrine of laches could be applied to its transactions.[131]

But the principle is confined to cases where the government has a direct pecuniary interest in the subject-matter of the litigation.[132] Thus, for example, if a suit is brought in the name of the United States, to set aside public land patents issued by one of its departments, if the government has in fact no interest in the result, the suit being brought for the interest of individuals, the statute of limitation, if a bar against the latter, may be set up against the United States as the nominal plaintiff.[133] But the fact that a government is not bound by statutes of limitation, does not involve the conclusion that a citizen is not bound by them, as between himself and the government;[134] and agents of the government, when treated as principals, may rely upon the protection of the statute.[135]

Although the principles above stated had become established in connection with the equitable doctrine of laches and the common-law rule respecting stale claims, irrespective of the operation of statutes of limitation, the same principles apply under such statutes, but the application of the principles is generally controlled by statutes fixing some period within which the government, although an actual party in interest, must bring actions, if at all. Thus, by Code Civ. Proc. N. Y.

[130] U. S. v. Dalles Military Road Co., 140 U. S. 599-632, 11 Sup. Ct. 988; U. S. v. Kirkpatrick, 9 Wheat. 720.

[131] U. S. v. Kirkpatrick, 9 Wheat. 720.

[132] San Pedro Canon del Agua Co. v. U. S., 146 U. S. 120, 135, 13 Sup. Ct. 94; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510-539, 12 Sup. Ct. 308.

[133] Curtner v. United States, 149 U. S. 662, 672, 13 Sup. Ct. 985.

[134] Stanley v. Schwalby, 147 U. S. 508, 517, 13 Sup. Ct. 418.

[135] Ware v. City Co., 111 U. S. 170, 4 Sup. Ct. 337.

§ 362, it is provided: "That the people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either (1) the cause of action accrued within 40 years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time." And by section 389 it is provided, with reference to actions other than for the recovery of real property, that the limitations prescribed "apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons." And, even apart from the operation of such statutes, the maxim, "Lapse of time is no bar to the rights of the sovereign," applies only to a sovereign state, and not to municipal corporations deriving their powers from the state; and so the statute runs against cities, towns, counties, and school districts, except as otherwise provided by statute.[136]

17. EXCEPTIONS AND DISABILITIES.

It is very evident that there are classes of cases where it would be most unjust to allow the mere lapse of time to bar the enforcement of a cause of action. Such, for example, would be cases of infants; for an infant, being under general legal disabilities in many respects, ought not, during his minority, to have time counted against him under the statute. But, as the absolute bar created by the lapse of a specified time rests upon a statutory basis, so any exceptions to the application of the statutes of limitation must be sought in the statutes, and accordingly the details of the law upon this subject vary in different jurisdictions.

Statutory Provisions in New York.

(a) Thus the New York Code of Civil Procedure, after regulating the subject of alterations in actions for the recovery of real property (sections 362, 374), provides in section 375 that if a person who might maintain an action to recover real property, or the possession thereof,

[136] State v. School Dist. No. 9, 30 Neb. 520, 46 N. W. 613, and 27 Am. St. Rep. 420; Pimental v. City of San Francisco, 21 Cal. 351; Clark v. Iowa City, 20 Wall. 583; Evans v. Erie Co., 66 Pa. St. 225; Inhabitants of Kennebunkport v. Smith, 22 Me. 445.

or make an entry, or interpose the defense or counterclaim founded on the title to real property, or rents or services out of the same, is, *when his title first descends*, or his cause of action or right of entry *first accrues*, either (1) within the age of 21; or (2) insane; or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life,—the time of such disability is not a part of the time limited for commencing the action, or making the entry, or interposing the defense or counterclaim, except that the time so limited cannot be extended more than 10 years after the disability ceases, or after the death of the person so disabled.

(b) So, again, after regulating the period of limitation in actions other than for the recovery of real property (sections 376, 395), the Code provides, in section 396, that in all these cases, with two or three specified exceptions, the time of disability caused by infancy, insanity, or imprisonment under the circumstances above mentioned, is not a part of the time limited for commencing the action, except that the time so limited cannot be extended more than five years by any such disability except infancy; or, in any case, more than one year after the disability ceases.

(c) So, again, by Code Civ. Proc. § 401, it is provided that: "If, *when the cause of action accrues* against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, *after* a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state, under such false name, is not a part of the time limited for the commencement of the action." This section does not apply while the designation of another resident of the state as a person upon whom to serve summons or other process or papers, executed and filed in accordance with the provisions of section 430, or subdivision 2 of section 432, remains in force. The operation of this section is illustrated by the case of an action upon a written instrument in the nature of a promissory note for $1,000, dated January 23, 1882, made by the defendant's testatrix to the plaintiff, payable on or before one year after the death of the maker, with interest. The maker died in January, 1890, leaving a will, in which the de-

fendant, then and ever since a resident of Chicago, was named as executrix. The defendant duly qualified, and proceeded to administer the estate by advertising for claims under the order of the surrogate of Otsego county, where the testatrix resided at the time of her death, and who had jurisdiction in the case. In compliance with the notice calling for the presentation of claims against the estate, the plaintiff's claim was presented and was rejected on January 25, 1891, and notice of its rejection given to the plaintiff, and thereafter an action was commenced by procuring an order for the publication of the summons, December 14, 1891, and which was followed by service of the summons upon the defendant, in Chicago, January 9, 1892. The defendant appeared, and, among other defenses, interposed that of the statute of limitations. By section 1822 of the Code, an action upon a disputed claim against the estate of a deceased person must be commenced within six months after its rejection by the executor, unless it is referred under the statute. But by section 401, if the defendant, when a cause of action accrues against him, is without the state, the action may be commenced within the time limited therefor, after his return into the state. The question was whether this section applied to the case in hand, for, if so, it was a complete answer to the defense. The defendant's contention was that the effect of section 401 was qualified by section 414, to the effect that the provisions of the chapter of the Code relating to limitations "apply and constitute the only rules of limitation applicable to a civil action, or such proceeding, except in one of the following cases: (1) A case where a different limitation is specially prescribed by law, or (2) a shorter limitation is prescribed by the written contract of the parties." Now, the six-months statute of limitations found in section 1822 is "a case where a different limitation is specially prescribed by law," but it was held that section 414 was not intended to apply to cases like that under consideration, and that the general provisions of the chapter, including section 401, were applicable.[137]

(d) So, by section 402 of the Code, "if a person entitled to maintain an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death."

137 Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638.

(e) The case of the death, within the state, of a person against whom a cause of action exists, or the death of a person who shall have died within 60 days after the attempt shall have been made to institute an action against him pursuant to the provisions of section 399, is dealt with by section 403 of the Code, and other special provisions are found in the following sections. The operation of section 403 is illustrated in a case where, at the time of the death of the maker of a note, the six years had not run out by 40 days. He died August 12, 1887, and letters testamentary were issued March 23, 1889, and an action upon the note was commenced March 21, 1890,—two years and a half after the expiration of six years from the time when the note came due. It was held that the event of his death operated, under section 403, to sustain the running of the statute of limitations upon the liability, for under that section it is provided that the term of 18 months after the death is not a part of the time limited for the commencement of an action against the executor or administrator. The 18 months mentioned, being computed as calendar months, expired on February 13, 1889. Thus, when the suspension caused by the intervention of the statutory provision was at an end, on February 13th, the running of the six years was resumed. Of that year there had remained just 40 days when the testatrix died, and, if that period be computed from February 13, 1889, it brings the time down to March 25, 1889. But, as already stated, letters testamentary were issued on March 23, and under section 403 the plaintiff had one year thereafter to commence the action.[138]

18. SEVERAL CONCURRENT DISABILITIES.

It sometimes happens that several distinct disabilities are recognized by statute to co-exist, each of them being sufficient for the time being to suspend the operation of the statute. Thus, a person owning a cause of action, might at the same time be a minor and also imprisoned on a criminal charge, or a minor and insane. In such cases it follows that the statute does not again begin to run until all disabilities are removed. If, for example, a person 18 years of age should be imprisoned for a term of 10 years, there would be no reason why the

[138] Hall v. Brennan, 140 N. Y. 409, 35 N. E. 663. See, also, Adams v. Fassett, 149 N. Y. 61, 43 N. E. 408.

suspension of the statute should be for a shorter period than it would have been if he had been of full age at the time when his imprisonment began.[139]

19. AFTER STATUTE BEGINS TO RUN, NO SUSPENSION.

"In the absence of express statute or controlling adjudication to the contrary, the general rule is well settled that, when the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue."[140] The statutes relating to exceptions and disabilities, elsewhere considered, include qualifications of this general principle. The operation of the general principle is illustrated in the case where there are successive owners of the cause of action, or of equitable relief, and the right to prosecute arises in the time of the first. Here the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes; and, when the statutory period has elapsed, the demand is barred, though the last proprietor has recently acquired his right.[141]

20. WHEN THE ACTION IS COMMENCED.

Inasmuch as the period of limitation is measured, in a given case, from the time when the cause of action accrues to the time when the action is commenced, it is important to determine what constitutes a commencement of an action. This is a matter regulated by statute in the several states. In New York it is provided that the action is begun either by service of the summons upon the defendant, or by delivering the same, for the purpose of service, to the sheriff or other officer, and thereafter, within a specified period, effecting personal service upon the defendant, or beginning the publication of the summons in the statutory method.[142]

139 3 Pars. Cont. 95; Code Civ. Proc. N. Y. § 409.

140 Bauserman v. Blunt, 147 U. S. 647–657, 13 Sup. Ct. 466; Walden v. Gratz's Heirs, 1 Wheat. 292; McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142; Grady v. Wilson, 115 N. C. 344, 20 S. E. 518.

141 Bucklin v. Bucklin, 1 Abb. Dec. (N. Y.) 251; Cooley v. Lobdell, 153 N. Y. 596–603, 47 N. E. 783.

142 Code Civ. Proc. §§ 398, 399; Riley v. Riley, 141 N. Y. 409, 36 N. E. 398; Clare v. Lockard, 122 N. Y. 263, 25 N. E. 391.

21. THE STATUTE AFFECTS THE REMEDY ONLY.

The statute of limitations does not, after the prescribed period, discharge or pay the debt, but it simply bars a remedy thereon. The debt, and the obligation to pay the same, remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the statute of limitations, and then the payment of a debt upon which the right of action was barred at the time of the repeal could be enforced by action, and the statutory rights of the debtor are not invaded by such legislation.[143] The statute of limitations acts only upon the remedy; does not impair the obligation of a contract nor pay a debt, nor produce a presumption of payment, but is merely a statutory bar to a recovery.[144] Thus, if notes are given, secured by a mortgage under seal, the fact that the statute has run against the notes does not prevent a foreclosure of the mortgage, as to which the longer period of limitation applicable thereto has not expired; for the notes are not paid, and, until they are paid, the mortgage is a subsisting security.[145]

22. ABSENCE FROM THE STATE.

It would obviously be unjust to provide that a claim should be barred unless prosecuted within a specified period, without also making some special provision for the case of absence from the jurisdiction of the person against whom the action should be brought; for otherwise he might, by absenting himself, render it impracticable to institute a suit against him, and then return after the statutory period

[143] Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209.

[144] Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638; Quantock v. England, 5 Burrows, 2628; Johnson v. Railroad Co., 54 N. Y. 416; Allen v. Glenn, 87 Ga. 414, 13 S. E. 565.

[145] Hulbert v. Clark, 128 N. Y. 295, 28 N. E. 638; Lewis v. Hawkins, 23 Wall. 119; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771; Coldclough v. Johnson, 34 Ark. 312; Thayer v. Mann, 19 Pick. (Mass.) 535; Hancock v. Insurance Co., 114 Mass. 155; Joy v. Adams, 26 Me. 330; Belknap v. Gleason, 11 Conn. 160; Ballou v. Taylor, 14 R. I. 277; Spears v. Hartly, 3 Esp. 81; Higgins v. Scott, 2 Barn. & Adol. 413; Jackson v. Sackett, 7 Wend. (N. Y.) 94; Pratt v. Huggins, 29 Barb. (N. Y.) 277; Mayor, etc., of New York v. Colgate, 12 N. Y. 140; Dinnhy v. Gavin, 4 App. Div. 298, 39 N. Y. Supp. 485.

had expired, and take advantage of the bar of the statute. Accordingly, statutes of limitation usually provide, as has already been seen in respect to the statutes of New York, that the running of the statute shall be suspended while the proposed defendant is out of the jurisdiction. The various statutes differ somewhat in the phraseology and in the particulars adopted to regulate this subject. It has been held that, if a person resides in another state, the period of limitation does not run as to a claim against him, under the law of the forum, even though he has an office for the transaction of business there, or owns land there;[146] and under section 401 of the New York Code, if, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. Statutes which provide for a suspension of the running of the statute during absence of the debtor from the state and until his return, use the term "return" in the sense of "come into the state," and so one who comes within the state for the first time thereby "returns" to it, and until then the statute does not run.[147]

23. FEDERAL CONSTRUCTION OF STATE STATUTES.

"The courts of the United States, in the absence of legislation upon the subject by concurrence, recognize the statutes of limitation of the several states, and give them the same construction and effect which are given by the local tribunals. * * * If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute, and reverses its former decisions, this court will follow the latest settled adjudications."[148] The application of this principle is not affected by the fact that some other state, other than the one whose laws govern the case in hand, has adopted a different

[146] Bennett v. Cook, 43 N. Y. 537; Riker v. Curtis, 17 Misc. Rep. 134–136, 39 N. Y. Supp. 340; Waterman v. Manufacturing Co., 55 Conn. 554, 576, 12 Atl. 240.

[147] Burrows v. French, 34 S. C. 165, 13 S. E. 355; Alexander v. Burnet, 5 Rich. Law (S. C.) 189; Ruggles v. Keeler, 3 Johns. (N. Y.) 263; Fowler v. Hunt, 10 Johns. (N. Y.) 464. See Langdon v. Doud, 83 Am. Dec. 645, note; Moore v. Armstrong, 36 Am. Dec. 76; Musurus Bey v. Gadban [1894] 2 Q. B. 352.

[148] Bauserman v. Blunt, 147 U. S. 647–654, 13 Sup. Ct. 466.

construction of a similar statute.[149] Nor by the fact that the case in hand has been decided by the circuit court of the United States prior to any construction by the state court, if, subsequent to such decision, and before the argument of the appeal, the statute is construed by the state court.[150] These principles have been applied in numerous cases.[151] Thus, the state construction has been followed in the case of statutes of Tennessee,[152] New York,[153] Illinois,[154] and Ohio.[155]

24. THE LAW OF THE FORUM GOVERNS.

The limitation of actions is governed by the lex fori, and is controlled by the legislature of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions.[156] This principle operates in the case where the period of limitation in another state where the cause of action arose has not expired, although that of the state where the action is brought has expired, and in the case where the period prescribed by the laws where the action is brought has not yet expired, although that of the state where the cause of action arose has expired. In both cases the only question relates to the operation of the lex fori.[157] But a state cannot constitutionally provide that an action shall not be brought in its courts upon a judgment recovered in another state upon the original cause of action, which would have been barred in the former if the original action had been brought there. Such a statute, instead of

[149] Bauserman v. Blunt, 147 U. S. 647–657, 13 Sup. Ct. 466.

[150] Bauserman v. Blunt, 147 U. S. 647–657, 13 Sup. Ct. 466.

[151] Higginson v. Mein, 4 Cranch, 415–419; Sohn v. Waterson, 17 Wall. 596–600; Davis v. Briggs, 97 U. S. 628–637; Barney v. Oelrichs, 138 U. S. 529, 11 Sup. Ct. 414.

[152] Green v. Neal's Lessee, 6 Pet. 291.

[153] Tioga R. R. v. Blossburg & C. R. R., 20 Wall. 137–143.

[154] Kibbe v. Ditto, 93 U. S. 674.

[155] Moores v. Bank, 104 U. S. 629.

[156] Great Western Tel. Co. v. Burnham, 162 U. S. 339, 16 Sup. Ct. 850; Metcalf v. Watertown, 153 U. S. 671, 675, 14 Sup. Ct. 947; Code Civ. Proc. N. Y. § 390; Waterman v. Manufacturing Co., 55 Conn. 554, 576, 12 Atl. 240; Sisson v. Niles, 64 Vt. 449, 24 Atl. 992.

[157] Miller v. Brenham, 68 N. Y. 83.

being a statute of limitations in any sense known to the law, is, in legal effect, only an attempt to give operation to the statute of limitations of that state in all the other states of the Union by denying the efficacy of a judgment recovered in another state, for any cause of action which was barred in her tribunals. Such a statute is in derogation of section 1 of article 4 of the federal constitution, providing that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and of the legislation enacted in pursuance of that provision.[168]

168 Christmas v. Russell, 5 Wall. 290.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

THE CONFLICT OF LAWS

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

CONFLICT OF LAWS.

1. INTRODUCTORY.

Laws have no force of themselves, beyond the jurisdiction of the nation or state which enacts them, and can have extraterritorial effect only by the comity of other nations or states.[1] Very frequently, however, the courts of a given jurisdiction are called upon to deal with litigations involving questions as to the existence, nature, construction, and effect of the laws of some other jurisdiction, and either to recognize their bearing and their controlling effect, or to hold them unavailing except within the jurisdiction whose laws they are.

Sometimes these questions go to the very heart of the litigation, and involve, according to the answers given thereto, the right to maintain it at all in the jurisdiction selected, while sometimes, where the right to sue in the jurisdiction selected is unassailable or unassailed, the questions raised in respect of the laws of some other state or country relate to the effect thereof; for example, upon the validity or construction of some instrument executed in another state, and upon which the action is based, or the validity of a foreign marriage or divorce, which is either directly or indirectly involved, or the binding effect of a foreign judgment upon which the action is brought, or the enforceability of a cause of action arising under the laws of some other state, and based on facts which would not have given any right to sue if they had happened in the state in which the action is brought.

There are certain kinds of actions which, upon commonly accepted principles, can only be brought in the jurisdiction where the property to be affected by the result is located, or where the transactions or events on which the action or proceeding is based occurred. These cases will be more fully considered hereafter. But the general rule

[1] Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224; Hilton v. Guyot, 159 U. S. 113, 163, 16 Sup. Ct. 139; Marshall v. Sherman, 148 N. Y. 9, 25, 42 N. E. 419.

is that, in cases of other than penal actions, the foreign law, if not contrary to the public policy of the state where the action is brought, or to abstract justice or pure morals, or calculated to injure the latter state or its citizens, will be recognized and enforced there, if the court has jurisdiction of all necessary parties, and can see that, consistently with the local forms of procedure and law of trials, it can do substantial justice between the parties. But if the foreign law is a penal statute, or offends the policy of the state, or is repugnant to justice or to good morals, or is calculated to injure the state or its citizens, or if the court has not jurisdiction of parties who must be brought in to enable it to give a satisfactory remedy, or if under the local forms of procedure an action in the state where it is brought cannot give a substantial remedy, the court is at liberty to decline jurisdiction.[2]

"International law, in its widest and most comprehensive sense,—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. The most certain guide, no doubt, for the decision of such questions, is a treaty or statute of this country; but when * * * there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations." [3]

The foregoing quotation relates to the rights of persons within the territory and dominion of one *nation* by reason of acts, private or public, done within the dominions of another *nation*. The same principles would be applicable if for the word "nation" we substituted the word

[2] Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. 534; Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972.

[3] Hilton v. Guyot, 159 U. S. 113, 163, 16 Sup. Ct. 139.

"state," in the sense of one of the United States, except that, under the federal constitution, certain special provisions render it obligatory upon each state to give effect to certain specified acts done in other states,—a subject to be discussed hereafter.

2. DEFINITIONS.

"Lex loci rei sitae" is the term designating the law of the place where given property is situated. "Lex loci contractus" is the law of the place where a given contract is made. "Lex loci actus" is "the law of a place where a legal transaction takes place."[4] "Lex loci solutionis" is the law of the place where a given contract is to be performed. "Lex loci domicilii" is the law of the place where a given person has his domicile. "Lex fori" is the law of the place where a given action or proceeding is pending.

3. COMITY.

As already stated, no law has any effect, of its own force, beyond the limits of the sovereign power from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what has been called the "comity of nations." "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[5]

[4] Dicey, Confl. Laws, 74.

[5] Hilton v. Guyot, 159 U. S. 113, 163, 16 Sup. Ct. 139; Marshall v. Sherman, 148 N. Y. 9, 25, 42 N. E. 419; Story, Confl. Laws, §§ 23, 24, 28, 33, 38; Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 596; Bank of Augusta v. Earle, 13 Pet. 519, 589; Wheat. Int. Law (8th Ed.) §§ 78, 79, 147.

Foreign Assignees.

While the statutes of one state can in no case have any force and effect in another state ex proprio vigore, and hence the statutory title of foreign assignees in bankruptcy can have no recognition solely by virtue of the foreign statute, yet the comity of nations allows a certain effect to titles derived under, and powers created by, the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced when that may be done without injustice to the citizens of the state where such recognition is sought, and without prejudice to the rights of creditors pursuing their remedies there under its statutes, and provided such titles are not in conflict with the laws or public policy of the latter state. Subject to these conditions, foreign assignees may appear and maintain suits against debtors of the bankrupt whom they represent, or against others who have interfered with or withhold the property of the bankrupt.[6]

Foreign Trustees.

A trustee holding title under an instrument executed in one state or country, by a resident thereof, may sue in another state or country to recover trust property, or damages for conversion, for he has the legal title.[7]

Foreign Executor or Administrator.

An executor or administrator appointed in one state cannot bring an action in another to enforce claims in favor of the estate, without first taking out letters in the latter. But a voluntary payment to such an administrator is valid.[8]

4. LOCAL AND TRANSITORY ACTIONS.

Actions are designated as local or transitory, according as they must, on the one hand, be brought in the jurisdiction where the subject-matter is located, or where the transactions involved occurred, or, on the

[6] In re Waite, 99 N. Y. 433, 2 N. E. 440.

[7] Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 123 N. Y. 37, 25 N. E. 198; Bromley v. Mitchell, 155 Mass. 509, 30 N. E. 83. See Bingham v. Bank, 112 N. Y. 661, 19 N. E. 416.

[8] Schluter v. Bank, 117 N. Y. 125, 129, 22 N. E. 572; Parsons v. Lyman, 20 N. Y. 103; Wilkins v. Ellett, 9 Wall. 740; Stevens v. Gaylord, 11 Mass. 256; Palmer v. Insurance Co., 84 N. Y. 63, 67.

other hand, may be brought in other jurisdictions whose courts are willing to entertain them.[9] The distinction will be best pointed out by the following statement of the principal illustrations of each class:

5. PENAL PROCEEDINGS ARE LOCAL.

Every crime involves the doing of some act by the criminal; every such act must be done at some particular place; and it is there, and there only, that it constitutes a crime, if it is a crime at all; for, if a crime, it is a crime against the sovereignty having jurisdiction over that place.[10] This principle has been briefly expressed as follows: "The courts of no country execute the penal laws of another." [11] In interpreting this maxim there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language. Strictly and primarily, the words "penal" and "penalty" denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws.[12] But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer, in favor of the person wronged, not limited to the damages suffered, and even as including cases of private contracts wholly independent of statutes, as in the case of the penal sum or penalty of a bond.[13]

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state, for the recovery of pecuniary penalties for any violation of stat-

9 Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972.

10 Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224; Com. v. Pettes, 114 Mass. 307; State v. Kelly, 76 Me. 331; U. S. v. Guiteau, 1 Mackey (D. C.) 498; State v. Hall, 114 N. C. 909, 19 S. E. 602; Huntington v. Attrill [1893] App. Cas. 150.

11 The Antelope, 10 Wheat. 66, 123.

12 U. S. v. Reisinger, 128 U. S. 398, 402, 9 Sup. Ct. 99; U. S. v. Chouteau, 102 U. S. 603, 611.

13 Huntington v. Attrill, 146 U. S. 657, 667, 13 Sup. Ct. 224.

ntes, for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." [14]

Thus, in the case last cited, it was held that the United States supreme court had no original jurisdiction of an action by a state upon a judgment recovered by it in one of its own courts against a citizen of another state, for a pecuniary penalty for a violation of its municipal law. So, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States.[15] So (except in cases removed from a state court in obedience to an express act of congress, in order to protect rights under the constitution and laws of the United States), a circuit court of the United States cannot entertain jurisdiction of a suit in behalf of the state, to recover a penalty imposed by way of punishment for a violation of a statute of the state.[16] So, again, for the purposes of extraterritorial jurisdiction it has been held that actions by a common informer to recover a penalty imposed by statute for an offense against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the state or its officers.[17] And personal disabilities imposed by the law of a state as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person,—such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce to marry again,—are strictly penal, and therefore have no extraterritorial operation.[18]

On the other hand, if the statute of one state makes a person or corporation, whose wrongful act, neglect, or default should cause the death of any person, liable to an action by his administrator, for the benefit

[14] Wisconsin v. Insurance Co., 127 U. S. 265, 290, 8 Sup. Ct. 1370.

[15] Martin v. Hunter's Lessee, 1 Wheat. 304, 330, 337; U. S. v. Lathrop, 17 Johns. (N. Y.) 4; Ely v. Peck, 7 Conn. 239; State v. Pike, 15 N. H. 83, 85; Ward v. Jenkins, 10 Mete. (Mass.) 583, 587.

[16] Gwin v. Breedlove, 2 How. 29, 36, 37; Gwin v. Barton, 6 How. 7; Iowa v. Chicago, B. & Q. R. Co., 37 Fed. 497.

[17] Adams v. Woods, 2 Cranch, 336; U. S. v. Connor, 138 U. S. 61, 66, 11 Sup. Ct. 229; Bryant v. Ela, Smith (N. H.) 396.

[18] Folliott v. Ogden, 1 H. Bl. 123, 3 Term R. 726; Logan v. U. S., 144 U. S. 263, 303, 12 Sup. Ct. 617; Dickson v. Dickson's Heirs, 1 Yerg. (Tenn.) 110; Com. v. Lane, 113 Mass. 458, 471; Van Voorhis v. Brintnall, 86 N. Y. 18, 28, 29.

of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the death has taken place in that state, may, upon general principles of law, be maintained in a federal circuit court held in another state, by an administrator of the deceased appointed in that state; for, although the remedy is statutory, the action is merely to recover damages for a civil injury, and may be maintained without regard to whether a similar liability would have attached for a similar cause in the state in which the federal court is held.[19] This principle has been adopted in several states.[20] So, a state statute making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or quasi criminal law.[21]

The question whether, in a given case, a law is penal, and an action based thereon is therefore local, or is nonpenal, and the action therefore maintainable in other jurisdictions, is to be determined, not by the name applied to it by the legislature which enacted it, nor by the construction placed upon it by the courts of that jurisdiction, but by the principles of international law, applied by the court appealed to for its enforcement in another state or country. If the suit is originally brought in a federal circuit court, that court must, in the first instance, decide the question itself, uncontrolled by local decisions.[22] If a suit on the original liability under the statute of one state is brought in a court of another state, the constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by the federal supreme court.[23] But if the original liability has passed into judgment in one state, the courts of another state, when asked to enforce it, are bound by the constitution and laws of the United States to give full faith and credit to that judgment, and if they do not their decision may be reviewed by the federal supreme

[19] Dennick v. Railroad Co., 103 U. S. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 605, 12 Sup. Ct. 905.

[20] Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413; Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; Knight v. Railroad Co., 108 Pa. St. 250; Morris v. Railway Co., 65 Iowa, 727, 23 N. W. 143; Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. 534.

[21] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224.

[22] Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10.

[23] New York Life Ins. Co. v. Hendren, 92 U. S. 286.

court on writ of error.[24] And that court, in order to determine whether full faith and credit was given to the judgment sued on, must determine for itself whether the *original cause of action* is penal in the international sense; for, if so, the mere fact of putting it in the form of a judgment does not change its essential nature and real foundation, and so the judgment is entitled to no more credit in another state than would have been the original cause of action.[25]

6. ACTIONS IN REM TO DETERMINE LAND TITLES.

Proceedings in rem to determine the title to land must be brought in the state within whose borders the land lies.[26]

7. DAMAGES FOR TRESPASSES TO REAL ESTATE.

Whether actions to recover pecuniary damages for trespasses to real estate, "of which the causes could not have occurred elsewhere than where they did occur," [27] are purely local, or may be brought in another jurisdiction, depends upon the question whether they are viewed as relating to the real estate or only as affording a personal remedy.[28] By the common law of England, adopted in most of the states of the Union, such actions are regarded as local, and can be brought only where the land is situated.[29] But in some states and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one state can be brought in another state depends on the view which the latter state takes of the nature of the action. For instance, Chief Justice Marshall held that an action could not be maintained in Virginia, by whose law it was local, for a trespass to land in Louisiana.[30] On the other hand, an action for a

[24] Green v. Van Buskirk, 5 Wall. 307, 311; Crapo v. Kelly, 16 Wall. 610, 619; Carpenter v. Strange, 141 U. S. 87, 103, 11 Sup. Ct. 960.

[25] Huntington v. Attrill, 146 U. S. 657, 683, 13 Sup. Ct. 224; Huntington v. Attrill [1893] App. Cas. 150.

[26] Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224.

[27] Westl. Priv. Int. Law, p. 13.

[28] Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224.

[29] Ellenwood v. Chair Co., 158 U. S. 105, 15 Sup. Ct. 771; American Union Tel. Co. v. Middleton, 80 N. Y. 408; Doulson v. Matthews, 4 Term R. 503; McKenna v. Fisk, 1 How. 241, 248.

[30] Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411.

trespass to land in Illinois, where the rule of the common law prevailed, was maintained in Louisiana.[31]

8. INJURIES TO PERSONS OR TO MOVABLE PROPERTY.

In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done;[32] while in others, including the federal courts, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another, and actionable there, although a like wrong would not be actionable in the state where the suit is brought.[33]

9. ACTIONS ON CONTRACT.

As a general proposition, an action to recover damages for the breach of a contract, or specific performance of its terms, is transitory.[34]

10. LOCALITY IN EQUITY SUITS.

In suits in equity the situation presented is somewhat different from that in actions at law; for "where the subject-matter is situated within another country or state, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in

[31] Holmes v. Barclay, 4 La. Ann. 63. See, also, Companhia de Mocambique v. British South Africa Co. [1892] 2 Q. B. 358; Cragin v. Lovell, 88 N. Y. 258; Allin v. Lumber Co., 150 Mass. 560, 23 N. E. 581.

[32] The Halley, L. R. 2 P. C. 193, 204; Phillips v. Eyre, L. R. 6 Q. B. 1, 28, 29; The M. Moxham, 1 Prob. Div. 107, 111; Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E. 1050; Ash v. Railroad Co., 72 Md. 141, 19 Atl. 643.

[33] Smith v. Condry, 1 How. 28; The China, 7 Wall. 53, 64; The Scotland, 105 U. S. 24, 29; Dennick v. Railroad Co., 103 U. S. 11; Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905; Walsh v. Railroad Co., 160 Mass. 571, 36 N. E. 584. Compare Anderson v. Railway Co., 37 Wis. 321; Leonard v. Navigation Co., 84 N. Y. 48.

[34] Midland Co. v. Broat, 50 Minn. 562, 52 N. W. 972; Higgins v. Railroad Co., 155 Mass. 176, 29 N. E. 534.

the decree, and the defendant is ordered to do or refrain from certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted." [35]

Pomeroy mentions, as examples of this rule, suits for specific performance, relief on the ground of fraud, final accounting, settlement of partnerships, and the like. So, where an action is brought, for example, in Connecticut, upon a New York judgment, although the judgment sued on cannot be attacked in that action, on the ground that it was procured by fraud, yet the defendant may file a bill in equity against the plaintiff, alleging that the judgment was procured by fraud, and, upon establishing his allegations, procure a decree enjoining the plaintiff from prosecuting the action upon it. And in such a case, if an action is subsequently brought upon the original judgment, in New York, where it was originally rendered, the decision of the Connecticut court that it had been obtained by fraud would be conclusive in New York against its validity.[36] So, the courts of a state have power, in a suit in equity, to set aside a judgment or decree obtained by fraud, although it was obtained in a United States court.[37]

Although in cases of trust, of contract, and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree,[38] yet it does not follow that such decree is in itself necessarily binding upon the courts of the state where the land is situated. Thus, if the court of a state in which land is not situated, instead of directing a conveyance or in some way exerting control over the party, in order thereby to effectuate its decision, merely adjudicates upon the title, the courts of the state where the land lies are not obliged thereby to surrender jurisdiction to the court rendering the decree, by acceding to its decision.[39]

[35] 3 Pom. Eq. Jur. § 1318; Davis v. Cornue, 151 N. Y. 172, 178, 45 N. E. 449; Dobson v. Pearce, 12 N. Y. 156; Stevens v. Bank, 141 N. Y. 50, 39 N. E. 68.

[36] Dobson v. Pearce, 12 N. Y. 156.

[37] Stevens v. Bank, 141 N. Y. 50, 39 N. E. 68. See, also, Bunbury v. Bunbury, 1 Beav. 318; Beckford v. Kemble, 1 Sim. & S. 7; Wedderburn v. Wedderburn, 2 Beav. 208; Jones v. Geddes, 1 Phil. 724.

[38] Massie v. Watts, 6 Cranch, 148.

[39] Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960; Davis v. Headley, 22 N. J. Eq. 115; Miller v. Birdsong, 7 Baxt. (Tenn.) 531; Cooley v. Scarlett, 38 Ill. 316; Gardner v. Ogden, 22 N. Y. 327.

11. WHAT LAW GOVERNS CONTRACTS.

(a) *Contracts Relating to "Movables."*

It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act inter vivos as its transmission by last will and testament, and by succession upon an owner dying intestate.[40]

This rule proceeds on the fiction of law that the domicile draws to it the personal estate of the owner, wherever it may happen to be. But this fiction is by no means of universal application, and yields wherever it is necessary, for the purposes of justice, that the actual situs of the thing should be examined, and always yields when the law and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives; and to this effect are all the authorities.[41] Thus, a general assignment for the benefit of creditors, which is operative in New York, as to property situated in that state, cannot operate in another state to pass title to the property in contravention of the laws of that state.[42]

So, while the validity of a disposition of personal property at the domicile of the owner is generally the test of its validity in other jurisdictions, the rule only requires compliance with forms and with principles of law, general or universal, recognized as essential to the transfer or transmission of property. If personal property is disposed of by will, in trust for charity, to take effect in another country, no good reason is apparent for insisting that a full compliance with the local law of the domicile with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. Such laws are not generally regarded as limitations upon the power of the owner to transfer or transmit the property, but regulations applicable to the holding of property in a particular community, founded upon political or social considerations. Thus,

[40] Cross v. Trust Co., 131 N. Y. 330, 339, 30 N. E. 125.

[41] Warner v. Jaffray, 96 N. Y. 248, 255; Green v. Van Buskirk, 7 Wall. 139; Hervey v. Locomotive Works, 93 U. S. 664.

[42] Warner v. Jaffray, 96 N. Y. 248.

a disposition of personal property made in New York by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purpose of a charity to be established in that country, is valid, although not in compliance with the New York statute or the rules of law in force there in regard to trusts, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there.[43]

(b) *Conditional Sales.*

Where a chattel is sold under a contract executed in another state, whereby the vendor retains the legal title until the price is paid, the law of the state where the contract was made will govern the rights of the parties.[44]

(c) *Contracts Relating to "Immovables."*

"It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its possession, alienation, and transfer, and for the effect and construction of wills." [45] Thus, for example, where an action in the federal courts involves the application of the rule in Shelley's Case, the court is relieved from the consideration of the innumerable cases in which the courts in England and in the several states of the Union have dealt with its origin and application, and has only to do with the rule as expounded and applied by the courts of the state in which the land lies.[46]

The rule which subjects a contract made in one state concerning land in another state to the law of the place where the land is situated is not confined in its operation to the formal execution of the deed, but extends to and includes all questions as to its construction and

[43] Hope v. Brewer, 136 N. Y. 126, 139, 32 N. E. 558; Cross v. Trust Co., 131 N. Y. 330, 30 N. E. 125; Burbank v. Whitney, 24 Pick. (Mass.) 154; Fordyce v. Bridges, 2 Phill. Ch. 497; Vansant v. Roberts, 3 Md. 119. See, also, in general, as to contracts valid where made, and also where the movable property is situated, and the recognition of their validity elsewhere, Cleveland Mach. Works v. Lang (N. H.) 31 Atl. 20; Offutt v. Flagg, 10 N. H. 46; Weinstein v. Freyer, 93 Ala. 257, 9 South. 285.

[44] Barrett v. Kelley, 66 Vt. 515, 29 Atl. 809; Cobb v. Buswell, 37 Vt. 337; Holt v. Knowlton, 86 Me. 456, 29 Atl. 1113; Cleveland Mach. Works v. Lang (N. H.) 31 Atl. 20; Marvin Safe Co. v. Norton, 48 N. J. Law, 410, 7 Atl. 418.

[45] De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461; U. S. v. Crosby, 7 Cranch, 115.

[46] De Vaughn v. Hutchinson, 165 U. S. 566, 570, 17 Sup. Ct. 461.

interpretation.[47] Not only must resort be had to the law of the site, to determine the construction and legal effect of a deed, but also to determine whether the subject-matter of the instrument is real or personal.[48] The question, being one of foreign law, must be determined by the court upon the evidence presented, in the same manner as any other question of fact.[49]

The true rule to follow, in cases depending on the law of a particular state, is to adopt the construction which the courts of that state have given to those laws.[50] Thus, a testator domiciled in New York devised land in another state to his executors, in trust, with power to collect the rents and profits, sell the land in their discretion, and reinvest the proceeds, as they might deem advisable. The trustees were directed to pay over to the beneficiaries the rents and profits, "and all net proceeds of sales, made pursuant to the authority so given them, which they shall deem inadvisable to reinvest." Testator then "gave, devised, and bequeathed" all the property of which the trustees had received the rents and profits, and all the residue of his property, "in such manner that the parties, theretofore receiving the income only, shall receive and become vested with the estate and property out of which such income arose." And it was held that, though the trustees sold the land under the power, and brought the proceeds into New York without reinvesting them, such proceeds retained the character of realty, and the testamentary disposition thereof was governed by the law of the state in which the land was situated.[51]

The doctrine applies not merely to what is actually immovable, but to what may be deemed to partake of an immovable or real nature by the law of the locality. Servitudes, easements, rents, and other incorporeal hereditaments and interests in, and appurtenances to, land,

[47] Genet v. Canal Co., 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; McGoon v. Scales, 9 Wall. 23.

[48] Genet v. Canal Co., 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; Chapman v. Robertson, 6 Paige (N. Y.) 627, 630; Holbrook v. Bowman, 62 N. H. 313; Bronson v. Lumber Co., 44 Minn. 348, 46 N. W. 570.

[49] Genet v. Canal Co., 13 Misc. Rep. 409, 421, 35 N. Y. Supp. 147; Monroe v. Douglass, 5 N. Y. 447; Kline v. Baker, 99 Mass. 254; Concha v. Murrieta, 40 Ch. Div. 543.

[50] Elmendorf v. Taylor, 10 Wheat. 152, 159.

[51] Butler v. Green (Sup.) 19 N. Y. Supp. 800.

come within the legal definition of "land," as subject to the lex loci rei sitae.[52]

12. LEX LOCI REI SITAE.

In addition to the principles elsewhere stated as to the controlling effect of the law of the site in respect to contracts, deeds, assignments, and other transactions affecting immovable property, that law exclusively governs the descent and heirship of real property. No persons can take by descent unless recognized as legitimate heirs by the law of the country or state where the land lies.[53] The same principle applies to devises of real property.[54]

Other illustrations, and further discussion, of the law of the site, both with regard to movable and immovable property, will be found under other heads, where for convenience it is treated by way of comparison or contrast with the law of the forum, of the place of the contract, etc.

13. LEX LOCI CONTRACTUS.

An instrument, as to its form and the formalities attending its execution, must be tested by the law of the place where it is made.[55] Such is the usual statement of the general rule, and yet upon the question by what law the execution, interpretation, and validity of a contract is to be determined there are different theories when a contract is made in one place and to be performed in another. Thus, in Scudder v. Bank,[56] it is said that "matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made; matters connected with its performance are regulated by the law prevailing at the place of performance; matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statute of limitation, depend upon the law of the place where the suit is brought." In that case it was held

[52] Butler v. Green (Sup.) 19 N. Y. Supp. 890, 891; Levy v. Levy, 33 N. Y. 97.

[53] Williams v. Kimball, 35 Fla. 783, 16 South. 783; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650; Dawes v. Boylston, 9 Mass. 337; Potter v. Titcomb, 22 Me. 300; Duncan v. Lawson, 41 Ch. Div. 394.

[54] Guarantee Trust & Safe-Deposit Co. v. Maxwell (N. J.) 30 Atl. 339.

[55] Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111.

[56] 91 U. S. 406, 412.

that the validity of an acceptance in Chicago, by a member of an Illinois firm, of a bill of exchange, drawn in Chicago upon the firm, was to be determined by the law of Illinois.[57]

In the Liverpool & G. W. Steam Co. Case, it is said that a review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view,[58] requires a contract of affreightment made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country,[59] unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.[60]

But, as already stated, the parties may contract with reference to the law of the state where the contract is to be performed, and in such case its validity and interpretation are to be determined according to the law of the latter place.[61] Thus, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalty of usury;[62] though, if a promissory note is made, for example, in New York, by a resident of that state, and payable within the state, and intended to be discounted there, and no rate of interest is mentioned, and it is in fact discounted in another state, at a rate of interest valid according to the laws of the latter state, but in excess of the rate allowed in New York, it is invalid;[63] and if a draft made in one state, by parties residing there, is payable in an

57 See, also, Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 453, 9 Sup. Ct. 469; Oliphant v. Vannest, 58 N. J. Law, 162, 33 Atl. 382.

58 Hamlyn v. Talisker Distillery [1894] App. Cas. 202.

59 Taylor v. Sharp, 108 N. C. 377, 13 S. E. 138.

60 See, as to promissory notes, McGarry v. Nicklin, 110 Ala. 559, 17 South. 726; Case v. Dodge, 18 R. I. 661, 29 Atl. 785.

61 In re Missouri S. S. Co., 42 Ch. Div. 321; Davis v. Insurance Co. (N. H.) 34 Atl. 464; Hart v. Machine Co., 72 Miss. 869, 878, 17 South. 769.

62 Andrews v. Pond, 13 Pet. 65; London Assurance v. Companhia de Moagens, 167 U. S. 149, 161, 17 Sup. Ct. 785.

63 Dickinson v. Edwards, 77 N. Y. 573.

other, where the drawee resides, the law of the latter state, in respect to presentation and demand for payment, is controlling.[64]

In New York it is held that the lex loci solutionis and the lex loci contractus must both be taken into consideration, neither, of itself, being conclusive, but the two must be considered in connection with the whole contract, and the circumstances under which the parties acted, in determining the question of their intent.[65] In some states it is held that, in the absence of a contrary intention, when a contract is made in one place or country, to be performed in another, its validity and effect are to be determined by the law of the place of performance.[66]

If a stipulation in a contract with a common carrier, relieving the carrier from liability for injuries resulting from the negligence of its servants, is valid where made, it will be enforced, and, if void there, will not be enforced, on principles of comity, in another jurisdiction, although contrary to its own local policy.[67]

14. DEFENSES AND DISCHARGES.

The general rule, as stated by Story, is that a defense or discharge, good by the law of the place where the contract is made or is to be performed, is to be of equal validity in every other place where the question may come to be litigated.[68] Thus, infancy, if a valid de-

[64] Sylvester v. Crohan, 138 N. Y. 494, 34 N. E. 273. See Douglas v. Bank, 97 Tenn. 133, 36 S. W. 874; Abt v. Bank, 159 Ill. 467, 42 N. E. 856.

[65] Wilson v. Mill Co., 150 N. Y. 314, 323, 44 N. E. 959.

[66] Burnett v. Railroad Co., 176 Pa. St. 45, 34 Atl. 972; Abt v. Bank, 159 Ill. 467, 42 N. E. 856.

[67] O'Regan v. Steamship Co., 160 Mass. 356, 361, 35 N. E. 1070; Davis v. Railway Co., 93 Wis. 470, 480, 67 N. W. 16, 1132; Fonseca v. Steamship Co., 153 Mass. 553, 27 N. E. 665; Brockway v. Express Co., 168 Mass. 257, 47 N. E. 87. So, as to telegrams, Reed v. Telegraph Co., 135 Mo. 661, 37 S. W. 904. Otherwise, in the federal courts, The Iowa, 50 Fed. 561; even though the parties stipulate to be governed by the foreign law, The Energia, 56 Fed. 124; Lewisohn v. Steamship Co., 56 Fed. 602. Upon the question of when it is that a contract, as, for example, an insurance policy, becomes complete, so as to determine the "place of the contract," see Curnow v. Insurance Co., 37 S. E. 406, 16 S. E. 132; Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, 11 Sup. Ct. 822.

[68] Story, Confl. Laws, § 331.

fense by the lex loci contractus, will be a valid defense everywhere.[69] The tender and refusal, good by the same law, either as a full discharge or as a present fulfillment of the contract, will be respected everywhere.[70] Payment in paper money, bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere.[71]

And, on the other hand, where a payment by negotiable bills or notes is by the lex loci contractus held to be a conditional payment only, it will be so held, even in states where such payment under the domestic law would be held absolute. So, if, by the law of the place of the contract, equitable defenses are allowed in favor of the maker of a negotiable note, any subsequent indorsement will not change his rights in regard to the holder. The latter must take it cum onere.[72]

15. THE LAW OF THE PLACE OF PERFORMANCE.

In every forum, a contract is governed by the law with a view to which it was made.[73] The law of the place where a contract is made can never be the rule where the transaction is entered into with an express view of adopting the law of another country as the rule by which it is to be governed.[74] It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, where there is nothing in its terms, or in the explanatory circumstances of its execution, inconsistent with that intention. It is the will of the contracting parties, and not the law, which fixes the place of fulfillment.[75]

But if no place is designated, the place of sale is the point at which goods ordered or purchased are set apart and delivered to the

69 Thompson v. Ketchum, 8 Johns. (N. Y.) 189; Male v. Roberts, 3 Esp. 163.

70 Warder v. Arell, 2 Wash. (Va.) 282.

71 Searight v. Calbraith, 4 Dall. 325.

72 Evans v. Gray, 12 Mart. O. S. (La.) 475; Story, Conf. Laws, § 332.

73 Pritchard v. Norton, 106 U. S. 124, 136, 1 Sup. Ct. 102.

74 Robinson v. Bland, 2 Burrows, 1077, 1078; Le Breton v. Miles, 8 Paige (N. Y.) 261.

75 4 Phillim. Int. Law, 469, 470. See, also, Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148.

purchaser.[76] "Matters connected with the performance of a contract are regulated by the law prevailing at the place of the performance."[77] The rule that the obligation of shippers of a cargo is to be determined by the law of the place where the contract of affreightment was made[78] disposes of any theory that the question can be affected by the "law of the flag." The fact that the vessel, for instance, was Italian, does not subject the contract of shipment to the operation of the Italian Commercial Code.[79]

Interest.

The general proposition is that where a promissory note or other obligation for the payment or forbearance of money is made in one state, and payable in another, the parties may voluntarily agree upon a rate of interest allowed by the laws either of the state where the obligation is made, or by the laws of the state where it is made payable. If a party goes into another state, and there makes an agreement with a citizen of that state for the loan or forbearance of money, lawful by the laws of that state, he does not render his obligation void by making it payable in another state, under whose laws the contract would be usurious. Neither can it be claimed that, because the obligation, instead of being signed in the state where the contract was made, is signed in another state, and sent by mail to the place of the contract, it must be governed by the local laws of the place where it was signed.[80]

Where a contract of loan is made between a citizen of Illinois and a

[76] Perlman v. Sartorius, 162 Pa. St. 320, 29 Atl. 852.

[77] Waverly Nat. Bank v. Hall, 150 Pa. St. 466, 473, 24 Atl. 665; Scudder v. Bank, 91 U. S. 406; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102.

[78] Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469.

[79] China Mut. Ins. Co. v. Force, 142 N. Y. 90, 100, 36 N. E. 874.

[80] Wayne Co. Sav. Bank v. Low, 81 N. Y. 566; Jackson v. Mortgage Co., 88 Ga. 756, 15 S. E. 812; Mott v. Rowland, 85 Mich. 561, 48 N. W. 638; New England Mortg. Sec. Co. v. McLaughlin, 87 Ga. 1, 13 S. E. 81; Staples v. Nott, 128 N. Y. 403, 28 N. E. 515; Andrews v. Pond, 13 Pet. 65; London Assurance v. Companhia de Moagens Do Barreiro, 167 U. S. 149, 161, 17 Sup. Ct. 785; Nickels v. Association, 93 Va. 380, 25 S. E. 8. See Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103; United States Savings & Loan Co. v. Scott, 98 Ky. 695, 34 S. W. 235; American Freehold Land & Mortgage Co. v. Jefferson, 69 Miss. 779, 12 South. 464.

corporation of Connecticut, and bonds are executed in Illinois, payable in a third state, and secured by mortgage upon real estate situated in Illinois, the defense of usury cannot be sustained upon the ground simply that the rate of interest exacted or reserved is in excess of that allowed by the state in which the bonds are made payable.[81]

16. LEX DOMICILII.

Domicile Defined.

The domicile of a person is "the place or country which is considered by law to be his permanent home."[82] That place is properly the domicile of a person in which the habitation is fixed, without any present intention of removing therefrom.[83] As generally defined, a person's domicile is the place where he has his true, fixed, and permanent home, and principal establishment, and to which, if he is absent, he has the intention of returning. Beginning life as an infant, every person is at first necessarily dependent. When he becomes an independent person, he will find himself in possession of a domicile, which in most cases will be at the place of his birth, or "*domicile of origin*," as it is termed. By his own act and will, he can then acquire for himself a legal home or domicile different from that of origin, termed a "*domicile of choice.*" This is acquired by actual residence, coupled with the intention to reside in a given place or country, and cannot be acquired in any other way. For that purpose, residence need not be of long duration. If the intention of permanently residing in a particular place exists, a residence in pursuance of that intent, however short, will establish a domicile. The requisite animus is present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely. Domicile of origin must be presumed to continue until another sole domicile has been acquired, by actual residence, coupled with the intention of abandoning the domicile of origin. This change must be animo et

[81] Fowler v. Trust Co., 141 U. S. 384, 397, 12 Sup. Ct. 1.

[82] Dicey, Dom. p. 1.

[83] In re Craignish [1892] 3 Ch. 180, 192; Story, Confl. Laws, § 43G; Hayes v. Hayes, 74 Ill. 312, 314. See, also, Foote, Int. Jur. c. 2; Westl. Priv. Int. Law, c. 14.

facto, and the burden of proof is on the party who asserts the change.[84]

Thus, if one is committed to a prison, he has a residence somewhere before going there, and before he can change that it would be requisite that he should go to the prison intending to make that his home and domicile, either permanently or for some unlimited time, and without any intention of returning or reverting to his former residence, and in fact intending thereby to change his former residence to the prison. But a prison is not a place of residence for a prisoner. It is not constructed or maintained for that purpose. It is a place of confinement for all except the warden and his family, and a person cannot, under guise of a commitment, or even without any commitment, go there as a prisoner, having a right to be there only as a prisoner, and thereby gain a residence there.[85]

17. RESIDENCE, INHABITANCY, AND DOMICILE COMPARED.

Various statutes and rules of law employ, for the purposes of their varying provisions, the terms "residence," "inhabitancy," and "domicile," and to some extent the meaning to be attached to each of these terms varies according to the subject-matter or context or purpose of the statute or rule. Thus, it has been held that, within the meaning of statutes regulating attachments against the property of debtors, and arrest on civil process for debts, it was actual residence of the defendant, and not his domicile, that determined the rights of the parties;[86] and a similar construction has been given to the clause, sometimes found in statutes of limitations, providing that if, after the cause of action shall have accrued, the defendant shall "depart from, and reside out of, the state," the time of his absence shall not be included in the period of limitation.[87]

In general, inhabitancy and residence do not mean precisely the same thing as domicile, when the latter term is applied to succession

[84] Price v. Price, 156 Pa. St. 617, 27 Atl. 291; Anderson v. Watt, 138 U. S. 694, 706, 11 Sup. Ct. 449.

[85] People v. Cady, 143 N. Y. 100, 37 N. E. 673. As to domicile of origin and domicile of choice, see, also, In re Craigoish [1892] 3 Ch. 180; domicile of a lunatic, Sharpe v. Crispin, L. R. 1 Prob. & Div. 611, 618; Urquhart v. Butterfield, 37 Ch. Div. 357; Mowry v. Latham, 17 R. I. 480, 23 Atl. 13.

[86] Pentfield v. Railroad Co., 134 U. S. 351, 10 Sup. Ct. 566.

[87] Barney v. Oelrichs, 138 U. S. 529, 533, 11 Sup. Ct. 414.

to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as distinguished from a mere temporary locality of existence.[88] The word "inhabitancy" implies a more fixed and permanent abode than the word "residence," and frequently imports many privileges and duties which a mere resident cannot claim or be subject to, and the transient visit of a person for a time at a place does not make him a resident while there; something more is necessary to entitle him to that character. There must be a settled, fixed abode, and intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. It is a settled rule that a person may be a resident in one state and have his domicile in another.[89]

18. LEGAL EFFECTS OF DOMICILE.

(a) *As to Personal Capacity.*

The question as to what law governs the validity of contracts, so far as concerns the personal capacity to contract, has received different answers, and in some particulars is involved in doubt. Thus Dicey[90] states it to be the general rule, subject to specified exceptions, that a person's capacity to enter into a contract is governed by the law of his domicile at the time of making the contract; while Gray, C. J., in Milliken v. Pratt,[91] treats the law of the place of contract as usually controlling, save in exceptional cases.[92] Thus, the capacity of an infant to contract is frequently held to be determined by the lex loci contractus.[93] In Cooper v. Cooper,[94] however, it is said that whether the capacity of a minor to bind himself by personal contract ought to be determined by the law of his domicile or by the lex loci contractus has been a fertile subject of controversy, but that perhaps, in Eng-

88 Wrigley's Case, 4 Wend. (N. Y.) 602, 8 Wend. (N. Y.) 134;

89 Frost v. Brisbin, 19 Wend. (N. Y.) 11. See Pells v. Snell, 130 Ill. 379, 23 N. E. 117.

90 Conflict of Laws, 543.

91 125 Mass. 374.

92 Also, Taylor v. Sharp, 108 N. C. 377, 381, 13 S. E. 138.

93 Male v. Roberts, 3 Esp. 163; Thompson v. Ketchum, 8 Johns. (N. Y.) 189; Baldwin v. Gray, 4 Mart. N. S. (La.) 192, 193; Saul v. His Creditors, 5 Mart. N. S. (La.) 569, 597.

94 13 App. Cas. 88, 108.

land, the question is not finally settled, though the preponderance of opinion there, as well as in America, seems to be in favor of the law of the domicile.[95]

So, according to most authorities, the capacity of a married woman to contract is determined by the law, not of the domicile, but of the contract.[96] Thus, if a married woman domiciled in Massachusetts signs a note there, written and dated at a place in Maine, as surety for her husband (which by the laws of her domicile she cannot do), and mails it to the payee in Maine, where it is accepted and acted on, its validity and binding effect upon her is to be determined by the law of Maine.[97]

Where a married woman, a resident of one state, enters into a contract in another state, to take effect in that state, which, though valid there, is invalid in her own state, and the latter state afterwards empowers her to make such a contract, the contract may be there sued upon.[98]

Where one domiciled in one state subscribes for stock of a national bank of another state, and then transfers it to his wife, so that, by the law of the state of their domicile, she becomes owner thereof, she is subject to a stockholder's liability, under Rev. St. U. S. § 5152, without regard to the laws of the state where the bank is relative to contracts by married women.[99] The capacity of a husband to contract with his wife, and her competency to receive his covenant, are determined by the law of their domicile, even in respect to a contract by him to surrender his rights in lands owned in another state, and the contract will be there recognized and enforced.[100]

[95] Cooper v. Cooper, 13 App. Cas. 88, 108.

[96] Pearl v. Hansborough, 9 Humph. (Tenn.) 426; Milliken v. Pratt, 125 Mass. 374. Contra, Armstrong v. Best, 112 N. C. 59, 17 S. E. 14; Freeman's Appeal, 68 Conn. 533, 37 Atl. 420.

[97] Bell v. Packard, 69 Me. 105; Milliken v. Pratt, 125 Mass. 374; Bowles v. Field, 78 Fed. 742; Evans v. Beaver, 50 Ohio St. 190, 33 N. E. 643. See, also, Bamm v. Birchall, 150 Pa. St. 164, 24 Atl. 620; Robinson v. Queen, 87 Tenn. 445, 11 S. W. 38. Contra, Freeman's Appeal, 68 Conn. 533, 37 Atl. 420.

[98] Case v. Dodge, 18 R. I. 661, 29 Atl. 785; Milliken v. Pratt, 125 Mass. 374, 376.

[99] Kerr v. Erie, 86 Md. 72, 37 Atl. 789.

[100] Polson v. Stewart, 167 Mass. 211, 45 N. E. 737. But the rule is otherwise as to a conveyance of land. Ross v. Ross, 129 Mass. 243, 246. And

(b) *Domicile of Student.*

The question of the bearing of a residence acquired by a student, in connection with the pursuit of his studies at an institution of learning, upon his domicile, is sometimes regulated by statute. It may sometimes happen, when a student leaves his previous place of abode, in order to pursue studies at such an institution, he does, in fact, take up a permanent residence at the place where the institution is located, with the intention of abandoning his previous domicile and establishing a new one. On the other hand, it may be that the change is one of residence merely, and not of domicile. This distinction is recognized by the New York constitution,[101] to the effect that, for the purpose of voting, a residence cannot be gained or lost by reason of presence or absence while a student of any seminary of learning. Under that provision a student who has previously been domiciled elsewhere does not acquire a new residence at the place where he goes to study, unless his intent to change his domicile is manifested by acts other than his mere presence as a student in his new place of residence.[102]

(c) *Domicile of Corporation.*

A corporation always has a domicile in the state or country in which it is incorporated. As to whether it may also have a domicile elsewhere, the authorities differ.[103]

(d) *Domicile of Infant.*

An infant has, during his minority, the same domicile as his father.[104] An illegitimate child has the domicile of his mother;[105] but if an illegitimate child is afterwards legitimated, according to the law of the parents' domicile, by their subsequent marriage, while he cannot in consequence inherit land, by intestacy, in a country where such an

even as to contracts to convey. See Cochran v. Benton, 126 Ind. 58, 25 N. E. 870; Doyle v. McGuire, 38 Iowa, 410; Sell v. Miller, 11 Ohio St. 331.

[101] Article 2, § 3.

[102] In re Garvey, 147 N. Y. 117, 41 N. E. 439.

[103] In the affirmative, National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 494, 32 Atl. 663. In the negative, Douglass v. Insurance Co., 138 N. Y. 209, 33 N. E. 938.

[104] In re Macreight, 30 Ch. Div. 165.

[105] In re Beaumont [1893] 3 Ch. 490; Ryall v. Kennedy, 40 N. Y. Super. Ct. 347, 361.

effect is not given to a subsequent marriage, he may nevertheless be entitled to take it as a "child" of the parent, under a devise to his "children." [106] But in New York the subsequent remarriage of the parents, which according to the law of their domicile would legitimate the child, renders him legitimate in New York for all purposes, including the right to inherit.[107]

(e) *Domicile of a Married Woman.*

A married woman is domiciled where the husband has his domicile, even though she may be in fact residing in another place, and even though she is living apart from her husband, if without sufficient cause.[108] This rule is founded upon the theoretical identity of person and of interest between husband and wife, as established by law, and the presumption that, from the nature of that relation the home of the one is that of the other; and is intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists, where unity and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of legal proceedings is to show that the relation itself ought to be dissolved for the husband's fault, or so modified as to establish separate interests.[109]

(f) *Change of Domicile.*

The act which, if coupled with a due intent, may suffice to constitute a change of domicile, may be any act whatever which in its nature may, in a given case, bear out the claim of a change; but it must, in effect, be an actual change of residence.[110]

(g) *Situs of a Debt.*

The general rule is settled that the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of New

[106] Birtwhistle v. Vardill, 2 Clark & F. 571, 7 Clark & F. 895; In re Grey's Trusts [1892] 3 Ch. 88.

[107] Miller v. Miller, 91 N. Y. 315. See Laws N. Y. 1896, c. 272, § 18.

[108] Cheely v. Clayton, 110 U. S. 701, 705, 4 Sup. Ct. 328; Anderson v. Watt, 138 U. S. 694, 706, 11 Sup. Ct. 449.

[109] Harteau v. Harteau, 14 Pick. (Mass.) 181, 185; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Anderson v. Watt, 138 U. S. 694, 706, 11 Sup. Ct. 449.

[110] Mitchell v. U. S., 21 Wall. 350; Brown v. Butler, 87 Va. 621, 13 S. E. 71; Dicey, Confl. Laws, 105–119; Chambers v. Prince, 75 Fed. 176; McMullen v. Wadsworth, 14 App. Cas. 631, 636.

York and of other states recognize the right of a creditor of a nonresident to attach the debt or credit, owing or due to him, from a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of the state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor. It is at least doubtful whether this qualification of the general rule applies to negotiable instruments, or other written obligations of a resident debtor, held by and in the possession of his nonresident creditor.[111]

(h) *As to Marriage.*

The domicile of parties to a marriage contract, entered into in another jurisdiction, does not control its validity, which depends in general on the law of the place where it was contracted.[112]

(i) *As to Divorce.*

The bearing of the question of domicile upon the validity of a divorce has been elsewhere discussed. But a general discussion of the subject may be found also in Thompson v. Waters,[113] Knowlton v. Knowlton,[114] Flower v. Flower,[115] and Anthony v. Rice,[116] which should be read in connection with those cited under "Foreign Divorce." [117]

(j) *As to Wills.*

The law of a testator's domicile controls as to the formal requisites of the validity of a will of personal property, the capacity of the testator, and the construction of the instrument. But a will of real property must be executed in compliance with the law of the place where the land lies. And if a will contains a particular bequest of funds, to be transmitted to and administered for particular purposes in another state, the validity of the bequest must be tested by the law of the latter state.[118]

[111] Douglass v. Insurance Co., 138 N. Y. 209, 219, 33 N. E. 938. See National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

[112] Milliken v. Pratt, 125 Mass. 374, 380. See post, p. 42, "Foreign Marriages."

[113] 25 Mich. 247.

[114] 155 Ill. 158, 39 N. E. 595.

[115] 42 N. J. Eq. 152, 7 Atl. 669.

[116] 110 Mo. 223, 19 S. W. 423.

[117] Post, p. 43.

[118] Sickles v. City of New Orleans, 26 C. C. A. 204, 80 Fed. 868; Chamber-

The validity of the execution of a testamentary power of disposition of personal property depends on the law of the domicile, not of the donee, but of the testator,—the donor of the power.[119] The distribution of a decedent's personal estate is governed by the law of the testator's domicile.[120]

(k) *As to General Assignments for Creditors.*

The general rule that the validity of a transfer of personal property is governed by the law of the domicile of the owner is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of his creditors, as well as to a specific transfer by way of ordinary sale or contract, and the title of such assignee, valid by the law of the domicile, will prevail against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or a nonresident, upon a debt or chattel belonging to the assignor, embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state or be repugnant to its public policy. This is the general, though not the universal, rule, supported by the preponderating weight of authority, and is the settled law of New York.[121]

But this general rule is subject to a qualification, established in the jurisprudence of the American states, that a title to personal property acquired in invitum under foreign insolvent or bankrupt laws, though good according to the law of the state where the proceedings

lain v. Chamberlain, 43 N. Y. 431; Jones v. Habersham, 107 U. S. 179, 2 Sup. Ct. 336; Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407; Id., 141 N. Y. 565, 35 N. E. 1088.

[119] Cotting v. De Sartiges, 17 R. I. 668, 24 Atl. 530.

[120] Jenkins v. Safe-Deposit Co., 53 N. J. Eq. 194, 32 Atl. 208; Bruce v. Bruce, 6 Brown, Parl. Cas. 566; Doglioni v. Crispin, L. R. 1 H. L. 301. As to the rule in testamentary provisions creating perpetuities, or effecting a suspension of the power of alienation, see Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636; Cross v. Trust Co., 131 N. Y. 330, 30 N. E. 125.

[121] Barth v. Backus, 140 N. Y. 230, 234, 35 N. E. 425; Ockerman v. Cross, 54 N. Y. 29; Speed v. May, 17 Pa. St. 91; Forbes v. Scannell, 13 Cal. 242. See Train v. Kendall, 137 Mass. 366; Pierce v. O'Brien, 129 Mass. 314; Van Winkle v. Armstrong, 41 N. J. Eq. 402, 5 Atl. 449; Bentley v. Whittemore, 19 N. J. Eq. 462; Consolidated Tank-Line Co. v. Collier, 148 Ill. 259, 35 N. E. 756. See Dearing v. Hardware Co., 33 App. Div. 31, 53 N. Y. Supp. 513.

were taken, will not be recognized in another state, where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor.[122] And some states refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignments, where it comes in conflict with the claims of domestic creditors.[123] But New York, while recognizing the full validity of such assignments, makes no such distinction between foreign and domestic creditors, in case of an involuntary transfer.[124] And the same rule applies in some other states.[125]

19. LEX FORI.

Whatever relates merely to the remedy, and constitutes part of the procedure, is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation, and affects the rights of the parties, as growing out of the contract itself, and inhering in, or attaching to it, is governed by the law of the contract. And, still further, wherever any matter is not, according to settled principles, to be decided in accordance with the law of any other place, it must be settled by the law of the forum.[126]

Thus, whether an assignee of a chose in action shall sue in his own name, or that of his assignor, is a technical question of mere process, and determinable by the law of the forum;[127] but whether the foreign assignment on which the plaintiff claims is valid at all, or whether valid against the defendant, goes to the merits, and must be decided by the law of the place in which the case has its legal seat. And the same claim may sometimes be a mere matter of process, and so determinable by the law of the forum, and sometimes a matter of substance, going to the merits, and therefore determinable by the law of the contract. Thus, in the courts of America, the defense of the stat-

[122] Holmes v. Remsen, 20 Johns. (N. Y.) 229; Barth v. Backus, 140 N. Y. 230, 235, 35 N. E. 425.

[123] May v. Wannemacher, 111 Mass. 202; Moore v. Bonnell, 31 N. J. Law, 90.

[124] Barth v. Backus, 140 N. Y. 230, 239, 35 N. E. 425.

[125] McClure v. Campbell, 71 Wis. 350, 37 N. W. 343; Boston Iron Co. v. Boston Locomotive Works, 51 Me. 585.

[126] Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. 102.

[127] Id. But see Lower v. Segal, 59 N. J. Law, 66, 34 Atl. 945.

ute of limitations is governed by the law of the forum, as being a matter of mere procedure, while in Continental Europe the defense of prescription is regarded as going to the substance of the contract, and therefore is governed by the law of the seat of the obligation; and it has been held that, when such a case arises in an American court, in reference to a claim thus absolutely extinguished and nullified by the foreign law, the same result, in the absence of any special considerations depending on absence from the state, etc., will follow here, and the claim will be regarded as not only barred, but as void.[128]

The principle that what is apparently a mere matter of remedy in some circumstances becomes in others, where it attaches to the substance of the controversy, a matter of right, is familiar in the application of the constitutional provision prohibiting the passing by a state of any law impairing the obligation of contracts; for any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.[129]

The law of the forum determines the form of the action, as, whether it shall be assumpsit, covenant, or debt.[130] It regulates all process, both mesne and final.[131] It may also admit, as a part of its domestic procedure, a set-off or counterclaim of distinct causes of action, between parties to the suit, though not admissible by the law of the place of the contract.[132] The rules of evidence are also applied by the law of the forum.[133] Thus, a contract, valid by the law of the place where it was made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing.[134]

Where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, as was the case of Scud-

128 Pritchard v. Norton, 106 U. S. 124, 131, 1 Sup. Ct. 102.

129 McCracken v. Hayward, 2 How. 608, 612.

130 Warren v. Lynch, 5 Johns. (N. Y.) 239; Adam v. Kerr, 1 Bos. & P. 360.

131 Ogden v. Saunders, 12 Wheat. 213.

132 Gibbs v. Howard, 2 N. H. 296; Ruggles v. Keeler, 3 Johns. (N. Y.) 263.

133 Wilcox v. Hunt, 13 Pet. 378; Bain v. Railroad Co., 3 H. L. Cas. 1; Hoadley v. Transportation Co., 115 Mass. 304; (proof of protest) Corbin v. Bank, 87 Va. 661, 13 S. E. 98.

134 Leroux v. Brown, 12 C. B. 801.

der v. Bank, [135] because the *form* of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum. This principle does not apply to a parol contract for the sale of land in another state, executed in that state, where an action is brought to enforce it in another state; for, in the absence of any proof that the laws of the state where it was executed require such contracts to be in writing, it is enforced, even though it would be invalid if orally executed in the state in which suit is brought.[136]

But the question of consideration, whether arising upon the admissibility of evidence or presented as a point in pleading, is not one of procedure and remedy. It goes to the substance of the right itself, and applies to the constitution of the contract.[137] Where a mortgagee has acquired, by the law of the state where the mortgaged land is situated, a right to enforce, against a grantee of the mortgagor, his agreement to assume and pay the mortgage debt, yet the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the law of the place where the action is brought.[138]

The statutes of another state have of course no extraterritorial force, but rights acquired under them will always in comity be enforced, if not against the public policy of the laws of the state where the action is brought. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And the principle is the same whether the right of action be ex contractu or ex delicto. Thus, in an action to recover damages for death caused by the defendant's negligence, where the death occurred in Montana and the action was brought in Minnesota, it appeared that, when the death occurred, the limit of recovery under the laws of Minnesota was $5,000, but at the time of the trial of the case the limit had been increased to $10,000, while, under the laws of Montana,

135 91 U. S. 406.

136 Miller v. Wilson, 146 Ill. 523, 34 N. E. 1111. See Dearing v. Hardware Co., 33 App. Div. 31, 53 N. Y. Supp. 513; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737; Cochran v. Benton, 126 Ind. 58, 25 N. E. 870.

137 Pritchard v. Norton, 106 U. S. 124, 135, 1 Sup. Ct. 102.

138 Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831.

the recovery was limited to such an amount as the jury might think proper under all the circumstances. There was a verdict for $10,000. It was held that the right to recovery, and the limit of recovery, were governed by the lex loci, and not by the lex fori.[139]

It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, ex proprio vigore, no force or effect in another. The enforcement of such a law depends on the express or tacit consent of the latter state by virtue of the adoption of the doctrine of comity,—a doctrine which has many limitations and qualifications.[140]

It is a well-settled rule, founded on reason and authority, that the lex fori furnishes in all cases, prima facie, the rule of decision, and if either party wishes the benefit of a different rule or law,—as, for instance, the lex domicilii, lex loci contractus, or lex loci rei sitæ,—he must aver and prove it. The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be averred and proved like other facts of which courts do not take notice.[141]

It is equally well settled that the several states of the Union are to be considered in this respect as foreign to each other, and that the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws of another state.[142]

The courts of the United States take notice, without proof, of the laws of each of the United States, when exercising an original jurisdiction. When the federal supreme court exercises an appellate jurisdiction from a lower court of the United States, it takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws needing no averment or proof; but on a writ of error to the highest court of a state, while the law of that state, being known to its courts as law, is of course within the judicial notice of the supreme court at the hearing on error, yet, as in the

[139] Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978. Compare Wooden v. Railroad Co., 126 N. Y. 10, 16, 17, 26 N. E. 1050; Denilek v. Railroad Co., 103 U. S. 11.

[140] Marshall v. Sherman, 148 N. Y. 9, 25, 42 N. E. 419.

[141] Monroe v. Douglass, 5 N. Y. 452; Latham v. De Loiselle, 3 App. Div. 525, 38 N. Y. Supp. 270; Davison v. Gibson, 5 C. C. A. 543, 56 Fed. 443.

[142] Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. 242.

state court the laws of another state are but facts requiring to be proved in order to be considered, the supreme court does not take judicial notice of them, unless made part of the record sent up, unless by the local law of a state its highest court does take judicial notice of the laws of other states.[143]

The principle that, in the absence of proof of different laws existing in the place where a contract was made, or where transactions involved occurred, the court in which an action is pending will proceed according to its own laws, applies, not to its statute laws, but to the common law;[144] for it presumes, in the absence of proof, that the common law prevails in other states settled by English colonists, and if the party wishes to prove the contrary, or to rest his rights upon some statute of another state, he must produce proof in support of his position.[145] But this principle does not apply, for example, to Russia, or the Indian Territory, or the Creek Nation.[146] In such cases, in the absence of proof of the foreign law, the law of the forum prevails.[147]

Statute of Limitations.

The limitation of actions is governed by the lex fori, and is controlled by the legislatures of the several states in which the action is brought, as construed by the highest court of that state, even though the judicial construction differs from that prevailing in other jurisdictions,[148] subject to the qualification that the state in question cannot by its statute make any discrimination against the citizens, the contracts, or the judgments of other states, or against any right asserted under the constitution or laws of the United States.[149]

[143] Hanley v. Donoghue, 116 U. S. 1, 6, 6 Sup. Ct. 242.

[144] Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837; Waln v. Waln, 53 N. J. Law, 429, 22 Atl. 203.

[145] Wooden v. Railroad Co., 126 N. Y. 10, 26 N. E. 1050; Chase v. Insurance Co., 91 Mass. 311; National Bank of Michigan v. Green, 33 Iowa, 140; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862.

[146] Davison v. Gibson, 5 C. C. A. 543, 56 Fed. 443.

[147] Davison v. Gibson, supra.

[148] Great Western Tel. Co. v. Purdy, 162 U. S. 329, 339, 16 Sup. Ct. 810; Munos v. Southern Pac. Co., 2 C. C. A. 163, 51 Fed. 188.

[149] Christmas v. Russell, 5 Wall. 290.

20. LEX LOCI ACTUS.

"Another law often invoked is the lex loci actus.—that of the place where the instrument was executed or where judicial proceedings have been had." [150] The lex loci actus governs the forms of instruments, and the validity of foreign judicial proceedings.[151]

21. ACTIONS ON JUDGMENTS.

Where a judgment is procured by one litigant against another, it is, of course, enforceable as such, by process, only within the nation or state in which it was rendered. If, for example, a judgment is rendered in New Jersey, execution cannot be levied under it in Pennsylvania; if it is rendered in the federal circuit court for the Southern district of New York, execution cannot be levied in the federal district of Rhode Island; if it is rendered in England, execution cannot be levied in the United States. In any case in which it is desired to reach property situated in a jurisdiction other than that in which the judgment is rendered, and subject it to satisfaction of the judgment, it is necessary, in order to utilize the judgment, to bring a new action upon it in the latter jurisdiction. Sometimes, also, a party seeks to utilize the judgment of another jurisdiction, not as the basis of a new action, but by way of defense, or as evidence in an action. As the principles in accordance with which the permissibility of such use of a foreign judgment are determined differ in some respects, according as the two different jurisdictions involved are, on the one hand, nations, or a nation and a state of the Union, or are, on the other hand, both states of the Union, these two situations will be considered separately. In both cases, the judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice.[152]

(1) *As between Nations, or a Nation and a State.*

(a) A judgment in rem, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid

[150] Westl. Priv. Int. Law, p. 6.

[151] Id. p. 9.

[152] Hilton v. Guyot, 159 U. S. 113, 166, 16 Sup. Ct. 139.

everywhere. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law; but the same rule applies to judgments in rem under municipal law.[153]

(b) So, also, where the matter in controversy is land or other immovable property, a judgment pronounced in the forum rei sitæ is held to be of universal obligation, as to all matters of right and title which it professes to decide in relation thereto, and is absolutely conclusive.[154]

(c) A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own laws.[155]

(d) Other judgments, not strictly in rem, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached; and if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt, in a suit by him to recover the amount upon the promise of indemnity.[156] Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country, between citizens or residents thereof.[157]

[153] Hilton v. Guyot, 159 U. S. 113, 167, 16 Sup. Ct. 139; Williams v. Armroyd, 7 Cranch, 423, 432; Croudson v. Leonard, 4 Cranch, 434; Hudson v. Guestier, Id. 293; Scott v. McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108; Castrique v. Imrie, L. R. 4 H. L. 414; Ludlow v. Dale, 1 Johns. Cas. (N. Y.) 16.

[154] Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126, 179.

[155] Hilton v. Guyot, 159 U. S. 113, 167, 16 Sup. Ct. 139; Cottington's Case, 2 Swanst. 326; Roach v. Garvan, 1 Ves. Sr. 157; Harvey v. Farnie, 8 App. Cas. 43; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328.

[156] Hilton v. Guyot, 159 U. S. 113, 168, 16 Sup. Ct. 139; Gold v. Canham, 2 Swanst. 325, note, 1 Cas. Ch. 311; Tarleton v. Tarleton, 4 Maule & S. 20; Konitzky v. Meyer, 49 N. Y. 571.

[157] Hilton v. Guyot, 159 U. S. 113, 168, 16 Sup. Ct. 139; May v. Breed, 7 Cush. (Mass.) 15; Burroughs v. Jamineau, Mos. 1, 2 Strange, 733, 2 Eq. Cas.

(e) The extraterritorial effect of judgments in personam, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind, between two citizens or residents of the country, and therefore subject to the jurisdiction in which it was rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound.[158]

The effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled, in an action thereon against the latter in his own country, presents a more difficult question, upon which there has been some diversity of opinion.[159] The cases last cited establish that by the law of England, prior to the Declaration of Independence, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only prima facie evidence of the demand, and subject to be examined and impeached.

In the courts of the several states of the Union, it was long ago recognized that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only prima facie evidence of the matter adjudged.[160] In more recent times, foreign judgments rendered within the dominions of the English crown, and under the law of England, after a trial on the merits, and where no want of jurisdiction and no fraud or mistake is shown or offered to be shown,

Abr. p. 524, pl. 7, 1 Dickens, 48. See Novelli v. Rossi, 2 Barn. & Adol. 757; Castrique v. Imrie, L. R. 4 H. L. 414, 435.

[158] Hilton v. Guyot, 159 U. S. 113, 170, 16 Sup. Ct. 139; Ricardo v. Garcias, 12 Clark & F. 368; The Griefswald, Swab. 430, 435; Barber v. Lamb, 8 C. B. (N. S.) 95; Lea v. Deakin, 11 Blss. 23, Fed. Cas. No. 8,154.

[159] See Dupleix v. De Roven, 2 Vern. 540; Sinclair v. Fraser, 2 Pat. App. Cas. 253, Mor. Dict. 4542, 1 Doug. 5, note; Crawford v. Whittal, 1 Doug. 4, note; Phillips v. Hunter, 2 H. Bl. 402, 409, 410; Buchanan v. Rucker, 1 Camp. 65-67; Harris v. Saunders, 4 Barn. & C. 411.

[160] Bissell v. Briggs, 9 Mass. 462; Middlesex Bank v. Butman, 29 Me. 19, 21; Bryant v. Ela, Smith (N. H.) 396, 404; Rathbone v. Terry, 1 R. I. 73, 76; Hitchcock v. Aicken, 1 Caines (N. Y.) 460; Benton v. Burgot, 10 Serg. & R. (Pa.) 240-242.

have been treated as conclusive by the highest courts of New York, Maine, and Illinois.[161]

In the United States supreme court, in the leading case of Hilton v. Guyot,[162] from the opinion in which many of the foregoing statements have been taken, it is said on page 202, 159 U. S., and page 158, 16 Sup. Ct., that, "in view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad, before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, or on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact." [163]

But both in this country and in England a foreign judgment may be impeached for fraud;[164] and judgments rendered in a foreign country by the laws of which our own judgments are reviewable upon the merits (as they are, for example, in France) * are not entitled to full credit and conclusive effect when sued upon in a federal court in this country, but are prima facie evidence, only, of the justice of

[161] Lazier v. Westcott, 26 N. Y. 146, 150; Dunstan v. Higgins, 138 N. Y. 70, 74, 33 N. E. 729; Rankin v. Goddard, 54 Me. 28; Baker v. Palmer, 83 Ill. 568.

[162] 159 U. S. 113, 16 Sup. Ct. 139.

[163] Also, Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171.

[164] Hilton v. Guyot, 159 U. S. 113, 206, 16 Sup. Ct. 139; Vadala v. Lawes, 25 Q. B. Div. 316; Duchess of Kingston's Case, 20 How. St. Tr. 543, note, 2 Smith, Lead. Cas. Eq. 799; Ochsenbein v. Papelier, 8 Ch. App. 695; Messina v. Petrocochino, L. R. 4 P. C. 144, 157; Abouloff v. Oppenheimer, 10 Q. B. Div. 295, 305–308; Crozat v. Brogden [1894] 2 Q. B. 30, 34, 35.

* Holker v. Parker, Merlin, Questions de Droit, Judgment, § 14, No. 2; Moreau, No. 106; Clunet, 1882, p. 166, and 1894, p. 913; Sirey, 1892, 1, 201, quoted in Hilton v. Guyot, 159 U. S., at page 217, 16 Sup. Ct. 139.

the plaintiff's claim. In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, the court does not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law as recognized in most civilized nations, and by the comity of our own country, the judgment of a foreign court which does not consider a judgment of a court of another jurisdiction conclusive is itself not entitled to be considered conclusive here.[165]

In New York, foreign judgments are held conclusive so far as to preclude a retrial upon the merits, although it is competent for the defendant in an action thereon to show that the foreign court had not jurisdiction over the subject-matter of the original suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained.[166] And although, in the cases just cited, the judgments were in fact rendered in England or Canada, it is not suggested that the result would have been otherwise if they had been rendered in a country whose courts do not give like conclusive effect to judgments rendered here. The question whether the "rule of reciprocity" adopted in Hilton v. Guyot [167] would be applied in New York does not appear to have been considered.[168]

(2) *As between States of the Union.*

By the common law, before the American Revolution, all the courts of the several colonies and states were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England; and, in order to remove that inconvenience, statutes were in some cases passed by which judgments rendered by a court of compe-

[165] Hilton v. Guyot, 159 U. S. 113, 210, 228, 16 Sup. Ct. 139.

[166] Lazier v. Westcott, 26 N. Y. 146, 151; Dunstan v. Higgins, 138 N. Y. 70, 33 N. E. 729.

[167] 159 U. S. 113, 210, 228, 16 Sup. Ct. 139.

[168] See Nouvion v. Freeman, 15 App. Cas. 1, 13.

tent jurisdiction in a neighboring colony could not be impeached.[169]

It was because of that condition of the law, as between the American colonies and states, that the United States, at the beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the states of the Union in the courts of another of those states.[170] "Full faith and credit shall be given, in each of these states, to the records, acts and judicial proceedings of every other state; and the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." [171] Thereafter congress, after prescribing the manner of authentication and proof, enacted, and the Revised Statutes now provide, that "the said records and judicial proceedings so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which they are taken." [172]

The result of these provisions is that the judgment of a court of one of the states is conclusive in every court (including the federal circuit and district courts) within the United States. Thus, in the early case of Mills v. Duryee[173] it was held that *nul tiel record*, and not *nil debet*, was a proper plea to an action brought in a federal court in the District of Columbia upon a judgment recovered in a court of the state of New York.[174]

These provisions of the constitution and laws, however, are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties,[175] nor an effect beyond the scope of the jurisdiction which

169 Bissell v. Briggs, 9 Mass. 462, 464, 465; Story, Const. §§ 1306, 1307.

170 Articles of Confederation of 1777, art. 4, § 3.

171 Const. art. 4, § 1.

172 Rev. St. U. S. § 905.

173 7 Cranch, 481, 484, 485.

174 Atlanta Hill Gold Min. & Mill. Co. v. Andrews, 120 N. Y. 58, 61, 23 N. E. 987; National Bank of City of Brooklyn v. Wallis, 59 N. J. Law, 46, 34 Atl. 983.

175 Huntington v. Attrill, 146 U. S. 657, 685, 13 Sup. Ct. 224; D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Grover & Baker Sewing-Mach. Co. v. Radcliffe, 137 U. S. 287, 294, 11 Sup. Ct. 92.

the court did have in an action, though duly brought before it for certain purposes.[176]

Jurisdiction is the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issues.[177]

In order that a court of one state may acquire jurisdiction in an action *in personam* against a nonresident, so as to render its judgment binding upon the courts of other states, service must be made within the territorial jurisdiction of the court, or the defendant must voluntarily appear in the action, in order that he may be personally bound; or, if the action is *in rem*, the property must not only be within the state, but must, by attachment or otherwise, be brought within the control of the court, or the action must in some form be one to reach or dispose of specific property within the state, as in an action to foreclose a mortgage or for partition. In such cases, the judgment is valid to the extent of the property thus affected, but no further.[178]

A judgment rendered in one state, under its local laws upon the subject, may be valid there, and yet, under the principles just stated, be invalid in other states.[179] A law which substitutes constructive for actual service is binding upon persons domiciled within the state, where such law prevails, and as respects the property of others situated there, but can bind neither person nor property beyond its limits.[180]

[176] Van Cleaf v. Burns, 133 N. Y. 540, 30 N. E. 661.

[177] Reynolds v. Stockton, 140 U. S. 254, 268, 11 Sup. Ct. 773; Hunt v. Hunt, 72 N. Y. 217, 228.

[178] Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525; Grover & Baker Sewing-Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92; Pennoyer v. Neff, 95 U. S. 714; Guthrie v. Lowry, 84 Pa. St. 533; President, etc., of Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; Weaver v. Boggs, 38 Md. 255. But, as to attachment of choses in action, see National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 484, 32 Atl. 663.

[179] Steel v. Smith, 7 Watts & S. (Pa.) 447; Hill v. Bowman, 11 La. 445.

[180] Weaver v. Boggs, 38 Md. 255.

The appearance of a defendant, in order to obviate the necessity of service, must be general. When he wishes to prevent a judgment by default, by presenting to the court the facts showing its lack of jurisdiction, and at the same time does not intend to subject himself to the jurisdiction of the court, he must "appear specially," for the purpose of raising the question of jurisdiction by motion; or he may allow the plaintiff to go on and take judgment by default, without affecting his rights in personam, since no judgment entered without service of process in some form could bind him, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act. But if he once appears generally, the court thereupon has jurisdiction of him personally; and if it also has jurisdiction of the subject-matter, he is bound. An answer thereafter interposed by him, raising the question of jurisdiction, is unavailing, and the judgment will be recognized as valid in other states.[181]

The constitutional provision and statute above referred to confer no new jurisdiction on the courts of any state, and therefore, for example, do not authorize them to take jurisdiction of any suit or prosecution of such a penal nature (in the sense elsewhere stated) that it cannot, on settled rules of public policy or international law, be entertained by the judiciary of any other state than that in which the penalty was incurred.[182]

Nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they may be sued on, pleaded, or offered in evidence.[183] But when duly pleaded and proved * in a court of that state, they have the effect of being not merely prima facie evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect in this respect which they had in the state in which they were rendered denies to the party a right secured to him by the constitution and laws of the United States, and by a writ

[181] Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884.

[182] Huntington v. Attrill, 146 U. S. 657, 685, 13 Sup. Ct. 224.

[183] McElmoyle v. Cohen, 13 Pet. 312, 325; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370.

* Ensign v. Kindred, 163 Pa. St. 638, 30 Atl. 274.

of error from a judgment against the party thus denied such rights the case may be taken to the United States supreme court for review, where the judgment will be reversed and the case remanded for further proceedings.[184] In short, judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.[185]

But as to whether fraud in procuring a judgment in one state may be a ground for the refusal of the courts of another state to recognize it, the cases just cited may be compared with Hunt v. Hunt[186] and White v. Reid.[187] The seeming discrepancy is apparently explainable on the ground that where any question of fraud is involved in the original action, and has been, or might have been, passed on and decided by the court, the same question cannot be reopened for examination in a subsequent action upon the judgment in another state, while if the original judgment was procured by fraud, consisting in preventing the unsuccessful party from fully exhibiting his case, by fraud or deception practiced upon him by his opponent, the facts establishing such fraud may be shown in an action upon the judgment in another state.[188]

[184] Huntington v. Attrill, 146 U. S. 657, 685, 13 Sup. Ct. 224; Christmas v. Russell, 5 Wall. 290; Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960.

[185] Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. 242; Christmas v. Russell, 5 Wall. 290, 305; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370; Hilton v. Guyot, 159 U. S. 113, 184, 185, 16 Sup. Ct. 139; Mooney v. Hinds, 160 Mass. 469, 36 N. E. 484.

[186] 72 N. Y. 217, 225.

[187] 70 Hun, 197, 24 N. Y. Supp. 290.

[188] White v. Reid, 70 Hun, 197, 24 N. Y. Supp. 290; Mooney v. Hinds, 160 Mass. 469, 36 N. E. 484; National Bank of City of Brooklyn v. Wallis, 59 N. J. Law, 46, 34 Atl. 983. And for comparison of the rule in case of judgments of a foreign country, see Vadala v. Lawes, 25 Q. B. Div. 310, 316.

22. JUDGMENTS IN REM AND IN PERSONAM.

A judgment *in rem* binds only the property within the control of the court which rendered it, and a judgment *in personam* binds only the parties to that judgment and those in privity with them.[189] Thus, a judgment recovered against the administrator of a deceased person in one state is no evidence of a debt, in a subsequent suit by the same plaintiff in another state, either against an administrator (whether the same or a different person) appointed there, or against any other person having assets of the deceased; for the original defendant's representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary, or other officer or court, from whom he receives his authority, had jurisdiction.[190]

23. EFFECT OF STATE LAWS ON ABSENT CITIZEN.

A citizen of a state is so far bound by its laws, in consequence of the allegiance which he owes to it, that, even though he is absent, he is bound upon a judgment rendered against him, without personal service, but by some form of advertisement or other substituted service, which is recognized as valid by the laws of his state.[191]

24. INTRATERRITORIAL OPERATION OF LAWS.

"All laws duly made and published by a state bind all persons and things within that state." [192] A citizen of a state, going into another state, owes a temporary allegiance to the latter state, and is bound by its laws, and is amenable to its courts. If in such a case he is not

[189] Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525; Hilton v. Guyot, 159 U. S. 113, 167, 16 Sup. Ct. 139; China Mut. Ins. Co. v. Force, 142 N. Y. 90, 95, 36 N. E. 874; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884.

[190] Johnson v. Powers, 139 U. S. 156, 159, 11 Sup. Ct. 525; Stacy v. Thrasher, 6 How. 44; Low v. Bartlett, 8 Allen (Mass.) 259.

[191] Douglas v. Forrest, 4 Bing. 686; Becquet v. MacCarthy, 2 Barn. & Adol. 951; Martin v. Nicolls, 3 Sim. 458; Schibsky v. Westenholz, L. R. 6 Q. B. 155. See Hunt v. Hunt, 72 N. Y. 217, 238.

[192] Story, Confl. Laws, § 395; Companhia de Mocambique v. British South Africa Co. [1892] 2 Q. B. 394, 395; Allen v. Buchanan, 97 Ala. 399, 11 South. 777.

served with process, he is not bound to appear in the action. He can stand aloof, and so long as he does so he could not be affected by the proceeding; but if he chooses to avail himself of the right, given by the laws of the state where the action is brought, to file an answer, and contest the claim of the plaintiff, he is bound by the consequences which the local laws affix to such a proceeding,—as, for instance, a provision that such steps shall be deemed equivalent to an appearance in the action, and shall dispense with the service of citation. He could not, under such circumstances, invoke the general rule that an answer on the merits does not waive an objection to jurisdiction, because the statute in such a case intervenes.[193]

25. FOREIGN MARRIAGES.

The English rule seems to be that it is indispensable to the validity of a marriage that the lex loci actus be satisfied, (1) so far as regards the forms or ceremonies; (2) so far as regards the consent of parents or guardians; (3) so far as regards the capacity of the parties to contract it,—whether in respect of the prohibited degrees of affinity or in respect of any other cause of incapacity, whether absolute or relative.† But the fact that it does in these respects comply with the lex loci actus is not necessarily conclusive of its validity in England.

As a general proposition, the validity of a marriage contract is to be determined by the law of the state where it is entered into. If valid there, it is valid everywhere, unless contrary to the prohibitions of natural law or the express prohibitions of a statute of the state where its validity is brought in issue.[194] There are exceptions to this rule,—cases, first, of incest or polygamy, coming within the

[193] Jones v. Jones, 108 N. Y. 415, 427, 15 N. E. 707; Bissell v. Briggs, 9 Mass. 461.

† Westl. Priv. Int. Law, 53, 54.

[194] Rex v. Machado, 4 Russ. 225; Potter v. Brown, 5 East, 130; Warrender v. Warrender, 2 Clark & F. 529, 530; Connelly v. Connelly, 2 Eng. Law & Eq. 570; Dalrymple v. Dalrymple, 2 Hagg. Consist. 54; Thorp v. Thorp, 90 N. Y. 602; Van Voorhis v. Brintnall, 86 N. Y. 18; Parton v. Hervey, 1 Gray (Mass.) 119; Dickson v. Dickson's Heirs, 1 Yerg. (Tenn.) 110; Stevenson v. Gray, 17 B. Mon. (Ky.) 193.

prohibitions of natural law;[195] second, of prohibition by positive law. Thus, a state might provide that a marriage by one of its own citizens, without the state, after a decree of divorce had been granted against him in the state, in favor of a former wife, should be void. But, in the absence of any such express provision, a mere prohibition upon his marrying again would not have such an effect. Thus, if A. procures a decree of absolute divorce against B., in New York, where the statute provides that the defendant in such case shall not marry again until the death of the plaintiff, yet if B. does go to New Jersey, even though for the express purpose of marrying there, and the marriage there celebrated is valid under the laws of New Jersey, it will be valid for all purposes in New York.[196]

26. FOREIGN DIVORCES.

As elsewhere stated, jurisdiction over personal status is governed by the law of domicile, and while the domicile of a husband usually determines that of the wife, this does not apply in actions for divorce based on the husband's wrong. The leading classes of cases involving the validity in one state of a divorce granted in another will now be considered:

(a) In the case of a divorce granted in a state where both parties had their domicile at the time the action was commenced, if the defendant was served personally with process within the territorial jurisdiction, or voluntarily appeared in the action, the divorce is regarded everywhere as valid and binding; and if, in such a case, the defendant was neither so served nor appeared in the action, but was served by publication or by other substituted service sufficient under the laws of the state where the decree was granted, and where both parties were domiciled, the decree is still entitled to full credit everywhere.[197]

[195] Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; Hutchins v. Kimmell, 31 Mich. 133.

[196] Van Voorhis v. Brintnall, 86 N. Y. 18; Thorp v. Thorp, 90 N. Y. 602; Com. v. Lane, 113 Mass. 458; Putnam v. Putnam, 8 Pick. (Mass.) 433; Com. v. Hunt, 4 Cush. (Mass.) 49; Sutton v. Warren, 10 Metc. (Mass.) 453.

[197] Hunt v. Hunt, 72 N. Y. 217, 241; Campbell v. Campbell, 90 Hun, 233, 35 N. Y. Supp. 280, 693; In re Denick, 92 Hun, 161, 36 N. Y. Supp. 518; Bissell

(b) In the case of a divorce granted in a state where only the plaintiff is domiciled, and the defendant appeared in the action, or was served with process within the territorial jurisdiction, the decree is still accorded extraterritorial effect.[198] But if, in such a case, the nonresident defendant does not appear in the action, and is not served with process within the territorial jurisdiction, the question of whether a decree of divorce is of binding effect without the state where it is rendered is the subject of a sharp difference of opinion, and the decisions in different courts are diametrically opposed. The New York doctrine is that such a decree, rendered in another state, is absolutely invalid in New York.[199]

The opposite doctrine is adopted in many states, where it is held that the courts of a state where the plaintiff resides, although the defendant resides elsewhere, are empowered to determine the status of its citizen, and hence to establish such status, by a decree of divorce, as that of an unmarried person; and that, as one party to the marriage cannot be a single person while the other continues to be a married person, the status of both is thereby determined; and that, as the court rendering the decree has jurisdiction to determine the cause, its decree is binding upon the other states, under the United States constitution,[200] requiring each state to give full faith and credit to the records and judicial proceedings of every other state, and the legislation, elsewhere considered, prescribing the manner in which such records and proceedings shall be proved, and the effect thereof.[201]

v. Briggs, 9 Mass. 464; Ditson v. Ditson, 4 R. I. 107; Hood v. Hood, 11 Allen (Mass.) 196; Cooper v. Reynolds, 10 Wall. 308.

[198] Jones v. Jones, 108 N. Y. 415; 15 N. E. 707; Rich v. Rich, 88 Hun, 566, 34 N. Y. Supp. 854, Bissell v. Briggs, 9 Mass. 464.

[199] People v. Baker, 76 N. Y. 78; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405 (reversed, on another point, 160 U. S. 531, 16 Sup. Ct. 366); Williams v. Williams, 130 N. Y. 193, 29 N. E. 98; In re Kimball, 155 N. Y. 62, 49 N. E. 331; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933; People v. Karlsloe, 1 App. Div. 571, 37 N. Y. Supp. 481. Also, Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443. Compare the dicta in Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328; Cheever v. Wilson, 9 Wall. 108; Pennoyer v. Neff, 95 U. S. 714, 734, 735.

[200] Article 4, § 1.

[201] Anthony v. Rice, 110 Mo. 223, 19 S. W. 423; Felt v. Felt (N. J. Ch.) 40

Effect on Dower.

The effect which a divorce granted by the courts of a state has upon lands of the husband in that state must be determined by its laws; but the effect which it has upon his lands in another state must be determined by the laws of the latter state. Thus, if a divorce be procured in Illinois, on the ground of abandonment, and the result, by the laws of that state, is to deprive the wife of dower, she is not thereby deprived of her dower in lands in New York, where such a result follows only from an absolute divorce, founded on the one ground recognized therefor in the latter state.[202]

Antenuptial Contracts.

A discussion of the effect of antenuptial contracts executed in one country, upon the property rights of the parties in other countries, will be found in the cases cited below.[203]

Atl. 436; State v. Schlachter, 61 N. C. 520; Ditson v. Ditson, 4 R. I. 87; Harrison v. Harrison, 19 Ala. 499; Beard v. Beard, 21 Ind. 321.

202 Van Cleaf v. Burns, 133 N. Y. 540, 30 N. E. 661. See, also, Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055.

203 Long v. Hess, 154 Ill. 482, 40 N. E. 335; Fuss v. Fuss, 24 Wis. 256; Castro v. Illies, 22 Tex. 479; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

PRINCIPLES

OF THE

LAW OF DAMAGES

A MONOGRAPH

ST. PAUL, MINN.
WEST PUBLISHING CO.
1899

DAMAGES.

DEFINITION AND NATURE.

1. Damages are the pecuniary reparation which the law compels a wrongdoer to make to the person injured by his wrong.

Wherever the common law recognizes a right, it also gives a remedy for its violation.[1]

"Ubi jus, ibi remedium." "Right" and "remedy" are correlative terms. Remedies are either preventive of threatened wrongs, or redressive of wrongs committed. Redressive remedies may afford specific relief, as where one is compelled to do the very thing he agreed to do, or they may afford merely a pecuniary reparation, as where a money award is given in lieu of the thing agreed to be done. Common-law remedies, with few exceptions,[2] are of the latter kind. For most wrongs, an award of a pecuniary recompense is the sole remedy afforded. Equity may prevent threatened wrongs by injunction, or afford specific relief; but at common law almost the sole power of the court is to make and enforce a money judgment.

THE THEORY OF DAMAGES.

2. The theory upon which damages are awarded in civil actions is that they are an indemnity to the person injured, not a punishment to the wrongdoer.

EXCEPTION—Where a tort is accompanied by circumstances of fraud, gross negligence, malice, or oppression, exemplary damages are sometimes awarded as a punishment to the offender.

[1] 3 Bl. Comm. p. 123, c. 8; Ashby v. White, 1 Salk. 19, 21; Yates v. Joyce, 11 Johns. (N. Y.) 136, 140.

[2] Replevin, detinue, ejectment, proceedings to recover dower, abatement of nuisance, quo warranto, mandamus, prohibition, habeas corpus, estrepe-

Compensation the Rule.

Compensation is the fundamental and all-pervasive principle governing the award of damages.[3]

Compensation, not restitution, value, not cost, is the measure of relief.[4]

Whether the action be ex contractu or ex delicto, the end in view is the same,—that plaintiff be made whole. "In civil actions, the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort. Except in those special cases where punitory damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured? And the answer to that question cannot be affected by the form of action in which he seeks his remedy." In an action for breach of contract of carriage, "what the passenger is entitled to recover is the difference between what he ought to have had and what he did have." [5]

Damages for breach of contract are not limited by the consideration paid.[6]

Measure of Damages.

(a) The measure of damages in actions for conversion is ordinarily the market price of the property converted, at the time and place of conversion, with interest.[7]

ment, and the obsolete brevia anticipantia. See 1 Co. Litt. 100a; Story, Eq. Jur. §§ 730, 825.

[3] Filliter v. Phippard, 12 Jur. 202, 204, 11 Adol. & E. (N. S.) 347, 356; Smith v. Sherwood, 2 Tex. 460; Griffin v. Colver, 16 N. Y. 489; Mechem, Cas. Dam. 74; Robinson v. Harman, 1 Exch. 850.

[4] Pol. Torts, c. 5, citing Whitham v. Kershaw, 16 Q. B. Div. 613. See, also, Snell v. Insurance Co., 4 Dall. (U. S.) 430; Quinn v. Van Pelt, 56 N. Y. 417. Cf. Waters v. Lumber Co., 115 N. C. 648, 20 S. E. 718. In an action in tort for wrongful conversion of notes intrusted to the defendant under a contract which defendant has violated by the misappropriation, he cannot resort to the contract thus abandoned to establish the measure of damages. Hynes v. Patterson, 95 N. Y. 1, 6.

[5] Hobbs v. Railroad Co., L. R. 10 Q. B. 111, 120.

[6] Quinn v. Van Pelt, 56 N. Y. 417; Bennett v. Buchan, 61 N. Y. 222.

[7] Spicer v. Waters, 65 Barb. (N. Y.) 227; Allen v. Dykers, 3 Hill (N. Y.) 593; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Warehouse Co., 58 N. Y. 308; Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032; Hawyer v. Bell, 141 N. Y. 140, 36 N. E. 6; Ormsby v. Mining Co., 56 N. Y. 623; Fowler v. Merrill,

In an action for conversion of stocks, the measure of damages in some jurisdictions is the highest value intermediate the conversion and the end of the trial; while in others the measure is the highest price reached within a reasonable time after the plaintiff had learned of the conversion. The latter view is adopted in New York;[8] and in the United States supreme court;[9] and in Pennsylvania if there was a trust relation between the parties, and justice cannot be reached by the ordinary measure of damages.[10]

In an action for conversion of bills and notes, the amount appearing to be unpaid thereon at the time of the conversion, with interest, is prima facie the measure of damages; but this may be reduced by showing invalidity, payment, or insolvency of the maker.[11]

(b) In an action of replevin, it was held in Suydam v. Jenkins[12] that the damages recoverable were the same as in trover. The plaintiff, if successful, is entitled to compensation for the taking and detention. The defendant, if successful, and if the goods are returned, is entitled to like compensation. If the defendant does not before trial require the return of the property, and it is sold, the defendant, if successful, is entitled to recover what it was worth at the time of the trial, and the value of its use during the time of its detention; but, if he buys it in at the sale, he is entitled to the value of the property, and interest thereon from the time is was taken to the time of the trial.[13]

(c) The measure of damages in an action by a vendee against a ven-

11 How. 375; Barry v. Bennett, 7 Metc. (Mass.) 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Lyon v. Gormley, 53 Pa. St. 261; Jenkins v. McConico, 26 Ala. 213.

8 Baker v. Drake, 53 N. Y. 211; Wright v. Bank, 110 N. Y. 237, 18 N. E. 79. Compare Barnes v. Brown, 130 N. Y. 382, 29 N. E. 760. And see Smith v. Savin, 141 N. Y. 315, 36 N. E. 338.

9 Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335, where the various authorities are reviewed.

10 Huntingdon & B. T. R. & C. Co. v. English, 86 Pa. St. 247. And see In re Jamison & Co.'s Estate, 163 Pa. St. 143, 29 Atl. 1001; Galigher v. Jones, 129 U. S. 193, 9 Sup. Ct. 335.

11 Griggs v. Day, 136 N. Y. 160, 32 N. E. 612; Stevens v. Wiley, 165 Mass. 402, 43 N. E. 177; Latham v. Brown, 16 Iowa, 118; 3 Pars. Notes & B. 196. Cf. Booth v. Powers, 56 N. Y. 22.

12 3 Sandf. (N. Y.) 614.

13 Ditmars v. Sackett, 81 Hun, 319, 30 N. Y. Supp. 721; 3 Pars. Cont. p. 202.

dor of personal property, for breach of the contract, is stated and discussed in Tiff. Sales, § 127 et seq.[14]

(d) The measure of damages for breach of warranty is the difference between the actual value of the article and its value if it had conformed with the warranty, and not the difference between its purchase price and the actual value.[15]

(e) The measure of damages in actions by a vendor of personal property against a vendee is stated and discussed in Tiff. Sales, § 123 et seq.[16]

(f) Where a breach of contract by one party prevents performance by the other, the latter is entitled to recover the amount of expenses which he has properly incurred in preparing and providing for performance, and which were naturally to be anticipated.[17]

If, under a contract for specified work at a specified price, the defendant prevents the plaintiff from completing the work, the plaintiff may recover for the work done in proportion to the ratable cost of that portion, and, for the work prevented, the profits he has lost thereon.[18]

(g) In some states, in an action of ejectment to recover the possession of land wrongfully held by another, no damage for the wrongful detention can be recovered.[19]

To recover his substantial damages, the plaintiff must resort to a subsequent action of trespass for mesne profits.[20]

[14] See, also, Theiss v. Weiss, 166 Pa. St. 9, 31 Atl. 63.

[15] Park v. Furnace Co., 91 Wis. 189, 64 N. W. 859; Sharpe v. Bettis (Ky.) 32 S. W. 395; Himes v. Kiehl, 154 Pa. St. 190, 25 Atl. 632; Ogden v. Beatty, 137 Pa. St. 197, 20 Atl. 620; Carroll-Porter Boiler & Tank Co. v. Columbus Mach. Co., 5 C. C. A. 190, 55 Fed. 451; Bach v. Levy, 101 N. Y. 511, 5 N. E. 345; Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025; White v. Miller, 71 N. Y. 118, 78 N. Y. 393. But see Jones v. Ross, 98 Ala. 448, 13 South. 319.

[16] See, also, Tufts v. Grower, 83 Me. 407, 22 Atl. 382; Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982; Mason v. Decker, 72 N. Y. 595; Dustan v. McAndrew, 44 N. Y. 78; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Van Brocklen v. Smeallie, 140 N. Y. 75, 35 N. E. 415. But see Gordon v. Norris, 49 N. H. 376.

[17] Bernstein v. Meech, 130 N. Y. 359, 29 N. E. 255; Friedland v. Myers, 139 N. Y. 438, 34 N. E. 1055.

[18] Kehoe v. Borough of Rutherford, 56 N. J. Law, 23, 27 Atl. 912.

[19] Goodtitle v. Tombs, 3 Wils. 118; Harvey v. Snow, 1 Yeates (Pa.) 156.

[20] Mitchell v. Mitchell, 1 Md. 55.

But in other states the possession and damages for the detention are recovered in one action,—either ejectment,[21] or trespass to try title,[22] or in a similar statutory action.

In both classes of states the measure of damages is the same. It is the annual value of the premises;[23] not what the occupant actually received, but what should have been received.[24]

The defendant may deduct, from the amount received as the income of the land, necessary expenses paid by him, such as taxes,[25] and repairs.[26]

When the occupant has made valuable improvements on the land, which will be a benefit, their value may be set off against the latter's claim for damages.[27]

The improvements must have been made, however, by one who acted in good faith, believing that he had title to the land, or no allowance will be made.[28]

The plaintiff, in an action for mesne profits, may recover damages from the time his right to possession accrued,[29] up to the time the defendant gives up the possession.[30]

[21] Compton v. The Chelsea, 139 N. Y. 538, 34 N. E. 1090, in which the New York statutes (Code Civ. Proc. §§ 1496, 1497, 1531), and other provisions, including those relating to treble damages in certain cases, are discussed.

[22] Boyd's Lessee v. Cowan, 4 Dall. 138; Battin v. Bigelow, Pet. C. C. 452, Fed. Cas. No. 1,108.

[23] New Orleans v. Gaines, 15 Wall. 624; Larwell v. Stevens, 12 Fed. 559; Woodhull v. Rosenthal, 61 N. Y. 382; Taylor v. Taylor, 43 N. Y. 578; Ege v. Kille, 84 Pa. St. 333.

[24] Woodhull v. Rosenthal, 61 N. Y. 382; Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355. But see Rabb v. Patterson, 42 S. C. 528, 20 S. E. 540; McMahan v. Bowe, 114 Mass. 140.

[25] Wallace v. Berdell, 101 N. Y. 13, 3 N. E. 769; Ringhouse v. Keener, 63 Ill. 230; Semple v. Bank, 5 Sawy. 394, Fed. Cas. No. 12,660.

[26] Semple v. Bank, 5 Sawy. 394, Fed. Cas. No. 12,660. And see Ewalt v. Gray, 6 Watts (Pa.) 427.

[27] Green v. Biddle, 8 Wheat. 1; Woodhull v. Rosenthal, 61 N. Y. 396; Bedell v. Shaw, 59 N. Y. 46; Jackson v. Loomis, 4 Cow. (N. Y.) 168; Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502.

[28] Campbell v. Brown, 2 Woods, 349, Fed. Cas. No. 2,355; Dothage v. Stuart, 35 Mo. 251; Code Civ. Proc. N. Y. § 1531.

[29] Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482; Clark v. Boyreau, 14 Cal. 634.

[30] Danziger v. Boyd, 120 N. Y. 628, 24 N. E. 482; Gilman v. Gilman, 111 N. Y. 265, 18 N. E. 849; Mitchell v. Freedley, 10 Pa. St. 198.

This is the rule in the absence of some statute of limitations applicable to such actions.[31]

But in most states the right of recovery is limited to a few years before the action is begun;[32] generally, six years.[33]

Where, owing to the technical form of the action of ejectment, no costs were recovered, they may be made a part of the damages in a subsequent action for mesne profits.[34]

In England, reasonable counsel fees in the ejectment action may be recovered.[35]

The same has been held in this country in some cases,[36] and denied in others.[37]

(h) Damages for detention of dower were first made recoverable by the statute of Merton;[38] and the subject is largely regulated by statute in the United States.[39]

The amount of damages is computed on the same basis as for the detention of real property in other cases; that is, the net value of the land. But, in the case of a widow suing for detention of dower, only one-third of the husband's whole estate is recoverable, that being the share of her husband's land to which she is entitled by the common law.[40]

[31] New Orleans v. Gaines, 15 Wall. 624.

[32] Gatton v. Tolley, 22 Kan. 678; Ringhouse v. Keener, 63 Ill. 230. But see Budd v. Walker, 9 Barb. (N. Y.) 493; Gaslight Co. v. Rome, W. & O. R. Co., 51 Hun, 119, 5 N. Y. Supp. 459.

[33] Jackson v. Wood, 24 Wend. (N. Y.) 443; Hill v. Myers, 46 Pa. St. 15.

[34] Baron v. Abell, 3 Johns. (N. Y.) 481; Pearse v. Coaker, L. R. 4 Exch. 92. But see Hunt v. O'Neill, 44 N. J. Law, 564; Doe v. Filliter, 13 Mees. & W. 47.

[35] Doe v. Huddart, 4 Dowl. 437.

[36] Doe v. Perkins, 8 B. Mon. (Ky.) 198; Den v. Chubb, 1 N. J. Law, 466. And see Gibson, C. J., in Alexander v. Herr's Ex'rs, 11 Pa. St. 537, 539.

[37] Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104; White v. Clack, 2 Swan (Tenn.) 230; Alexander v. Herr's Ex'rs, 11 Pa. St. 537.

[38] 20 Hen. III. c. 1.

[39] See 1 Stim. Am. St. Law, § 3278; 2 Scrib. Dower (2d Ed.) 700; 3 Pars. Cont. 222; Code Civ. Proc. N. Y. § 1600.

[40] Rea v. Rea, 63 Mich. 257, 29 N. W. 703; Henderson v. Chaires, 35 Fla. 423, 17 South. 574; Stull v. Graham, 60 Ark. 461, 31 S. W. 46.

(i) Against an alienee of the husband, damages can only be recovered from the time of demand.[41]

As to an alienee of the heir, the rule is not uniform.[42]

Market Value.

The market value is the fair cash value if sold in the market for cash, and not on time.[43]

A single sale will not usually establish a market value.[44]

Value in Nearest Market.

Where there is no market for the article at the place where its value is to be estimated, the value at the nearest market is taken as a basis, and an allowance is made for the cost of transportation, the object being to ascertain the real value at the place of compensation.[45]

Value of Property in Course of Manufacture.

The value of articles partially manufactured is the value they would have when completed, less the cost of completing them.[46]

(j) Interest should be allowed as damages whenever it represents a loss proximately caused by defendant's wrong.[47]

41 McClanahan v. Porter, 10 Mo. 746; Thrasher v. Tyack, 15 Wis. 256. That no damages are recoverable, see Sharp v. Pettit, 3 Yeates (Pa.) 38; Gannon v. Widman, 3 Pa. Dist. R. 835; Marshall v. Anderson, 1 B. Mon. (Ky.) 198.

42 As holding damages recoverable from husband's death, see 2 Scrib. Dower (2d Ed.) 715; Seaton v. Jamison, 7 Watts (Pa.) 533; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290; from demand, 2 Scrib. Dower (2d Ed.) 714.

43 Brown v. Railway Co., 125 Ill. 600, 18 N. E. 283; Sloan v. Baird, 12 App. Div. 483, 42 N. Y. Supp. 38.

44 Graham v. Maitland, 1 Sweeney (N. Y.) 149. But see Parmenter v. Fitzpatrick, 135 N. Y. 190, 31 N. E. 1032.

45 Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Furlong v. Polleys, 30 Me. 491; Rice v. Manley, 66 N. Y. 82; Wemple v. Stewart, 22 Barb. (N. Y.) 154; Grand Tower Co. v. Phillips, 23 Wall. 471.

46 Emmons v. Bank, 97 Mass. 230.

47 For a discussion of this subject, and a reference to the authorities, see the monograph on "Interest and Usury."

WRONG AND DAMAGE.

3. Whenever a legal right is violated, and only then, damages may be recovered.

"*Damnum Absque Injuria—Injuria sine Damno.*"

The term "damnum absque injuria" is applied to cases where a person suffers actual damage, but not in a sense recognized by the law as constituting an injury entitling him to a cause of action for relief.[48]

The term "injuria sine damno" is applied to cases where an injury, in a legal sense, is suffered, but where there is in fact no actual damage. Here nominal damages, and nothing more, may be recovered.[49]

Not every damage in fact is damage in law. To sustain an action for damages, the violation of a legal right must be shown.[50]

For every violation of a legal right, damages may be recovered.[51]

PROXIMATE AND REMOTE CONSEQUENCES IN GENERAL.

4. For purposes of liability, the consequences of wrongful conduct may be divided into

(a) Proximate consequences, and

(b) Remote consequences.

[48] Hague v. Wheeler, 157 Pa. St. 324, 27 Atl. 714; Talbot v. Railroad Co., 151 N. Y. 162, 45 N. E. 382; Phelps v. Nowlen, 72 N. Y. 39.

[49] Fullam v. Stearns, 30 Vt. 443; Mayne, Dam. § 6; Paul v. Slason, 22 Vt. 231; Little v. Stanback, 63 N. C. 285; Francis v. Schoellkopf, 53 N. Y. 152.

[50] Webb v. Manufacturing Co., 3 Sumn. 189, Fed. Cas. No. 17,322; and Mechem, Cas. Dam. 3. "A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered a damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law, mere damage is not enough; there must also be injuria." Jag. Torts, 87; Jessell, M. R., in Day v. Brownrigg, 10 Ch. Div. 294, 304. See, also, Backhouse v. Bonomi, 9 H. L. Cas. 503; Salvin v. Coal Co., 9 Ch. App. 705; Rogers v. Dutt, 13 Moore, P. C. 209; Rich v. Railroad Co., 87 N. Y. 382; Talbot v. Railroad Co., 151 N. Y. 162, 45 N. E. 382; Lord Kenyon, C. J., in Pasley v. Freeman, 3 Term R. 51, 63.

[51] Webb v. Manufacturing Co., 3 Sumn. 189, Fed. Cas. No. 17,322; and Mechem, Cas. Dam. 3.

5. Compensation may be recovered only for proximate losses resulting from wrongful conduct, and never for any losses which are remote.

Though compensation is the theory and aim of the law in awarding damages, every consequence of a wrong is not an element in the calculation of what is legal compensation. A person wronged can recover compensation only for the direct or proximate consequences of the wrong. To hold one liable for all the consequences of a wrongful act "would set society on edge, and fill the courts with useless and injurious litigation." [52]

The distinction of proximate from remote consequences is necessary —First, to ascertain whether there is any liability at all; and, second, if a wrong is established for which the defendant is liable, to fix the limit of liability or measure of damages.[53]

DIRECT AND CONSEQUENTIAL LOSSES.

6. For the purpose of determining what consequences are proximate and what remote, the losses caused by a wrong may be divided into

(a) Direct, and

(b) Consequential losses.

7. Direct losses are such losses as proceed immediately from wrongful conduct, without the intervention of any intermediate cause.[54]

[52] Fleming v. Beck, 48 Pa. St. 309, 313; Squire v. Telegraph Co., 98 Mass. 232; Cutting v. Railway Co., 13 Allen (Mass.) 381; Fox v. Harding, 7 Cush. (Mass.) 516; Le Peintur v. Railway Co., 2 Law T. (N. S.) 170; Jordan v. Patterson, 67 Conn. 480, 35 Atl. 521.

[53] Pol. Torts, 27. "The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or legal knowledge, but of fact, for a jury to determine in view of the accompanying circumstances." Schumaker v. Railroad Co., 46 Minn. 39, 48 N. W. 559; Moulton v. Inhabitants of Sanford, 51 Me. 127, 134. See, also, Dole v. Insurance Co., 2 Cliff. 431, Fed. Cas. No. 3,966; Baltimore & P. R. Co. v. Reaney, 42 Md. 117; Sutton v. Town of Wauwatosa, 29 Wis. 21. But see Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Gates v. Railroad Co., 39 Iowa, 45.

[54] Schumaker v. Railroad Co., 46 Minn. 39, 48 N. W. 559.

8. Direct losses are necessarily proximate, and compensation therefor is always recoverable.

Direct Losses.

A tort feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been foreseen by him.[55]

Direct consequences are necessarily proximate. One is conclusively presumed to intend the direct consequence of one's acts. Thus, it was held in a civil action for assault, where defendant had intentionally kicked plaintiff on the leg during school hours, though he did not intend to injure him, that, the act being unlawful, defendant was liable for the injury which in fact resulted, though it could not have been foreseen.[56]

So, also, a sleeping-car company is liable for a miscarriage caused by the wrongful expulsion of a married woman from a berth, though its servants were ignorant of her delicate condition.[57]

In actions of contract the rule in respect to direct losses is the same.[58]

[55] Cogdell v. Yett, 1 Cold. (Tenn.) 230; Tally v. Ayres, 3 Sneed (Tenn.) 677; Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713; Perley v. Railroad Co., 98 Mass. 414; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911; Sloan v. Edwards, 61 Md. 89; Eten v. Luyster, 60 N. Y. 252. Cf. Allen v. McConihe, 124 N. Y. 347, 26 N. E. 812.

[56] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403.

[57] Mann Boudoir-Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646. Contra, Pullman Palace-Car Co. v. Barker, 4 Colo. 344, a case much criticised, and opposed to all the other authorities. See, also, Campbell v. Car Co., 42 Fed. 484; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911; Terre Haute & I. R. Co., v. Buck, 96 Ind. 346; Lapleine v. Steamship Co., 40 La. Ann. 661, 4 South. 875; Baltimore & L. T. Co. v. Cassell, 66 Md. 419, 7 Atl. 805; Elliott v. Van Buren, 33 Mich. 49; Jewell v. Railway Co., 55 N. H. 84; Stewart v. City of Ripon, 38 Wis. 584; Coleman v. Railroad Co., 106 Mass. 160; Tice v. Munn, 94 N. Y. 621; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911; Beauchamp v. Mining Co., 50 Mich. 163, 15 N. W. 65. See, also, cases collected in Clark v. Chambers, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. 942. "Where a disease caused by the injury supervenes, as well as where the disease exists at the time, and is aggravated by it, the plaintiff is entitled to full compensatory damages." Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

[58] Hadley v. Baxendale, 9 Exch. 341; Burrell v. Salt Co., 14 Mich. 34; Brown v. Foster, 51 Pa. St. 165; Collard v. Railroad Co., 7 Hurl. & N. 79; Williams v. Vanderbilt, 28 N. Y. 217; Smith v. Railway Co., 30 Minn. 169, 14

SAME—CONSEQUENTIAL LOSSES.

9. Consequential losses are the indirect losses caused by a wrong, but to which some intermediate cause has contributed.

10. Consequential losses may be either
(a) Proximate, or
(b) Remote.

11. PROXIMATE AND REMOTE CONSEQUENTIAL LOSSES—Consequential losses are proximate when the natural and probable effect of the wrongful conduct under the circumstances is to set in operation the intervening cause from which the loss directly results. When such is not the natural and probable effect of the wrongful conduct, the losses are remote.

Consequential Losses in General.

"A loss which is the immediate result of a wrong is called a 'direct loss'; one that is an indirect result of the wrong is called a 'consequential loss.' " [59]

For example, where a fence is destroyed, loss of the fence is the direct result. Loss of the crops by reason of trespassing cattle entering at the gap is indirect or consequential. Consequential losses differ from direct losses in this: That some intermediate cause has contributed to the injury. Whether or not compensation can be recovered for such losses will depend on the nature of the intervening cause.

N. W. 797; Rhodes v. Baird, 16 Ohio St. 581; Brayton v. Chase, 3 Wis. 456; Bridges v. Stickney, 38 Me. 361; Paducah Lumber Co. v. Paducah Water-Supply Co., 89 Ky. 340, 12 S. W. 554, and 13 S. W. 249; Louisville, N. A. & C. Ry. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404; Houser v. Pearce, 13 Kan. 101. See Prosser v. Jones, 41 Iowa, 674; Mellose v. Fulmer, 73 Pa. St. 365; Wilkinson v. Davies, 146 N. Y. 25, 40 N. E. 501; Collins v. Stephens, 58 Ala. 543; Cohn v. Norton, 57 Conn. 480, 492, 18 Atl. 595; Kenrig v. Eggleston (1648) Aleyn. 93; Little v. Railroad Co., 66 Me. 239. See, also, Mather v. Express Co., 138 Mass. 55; Starbird v. Barrows, 62 N. Y. 615.

[59] Sedg. Dam. § 111.

Proximate consequences, therefore, are simply those that are natural and probable.[60]

Whether or not a given result is natural and probable is for the jury.*

The rule of natural and probable consequences is a vague one; but, as Sir Frederick Pollock has said,[61] if English law seems vague on these questions, it is because it has grappled more closely with the inherent vagueness of facts than any other system.

But the strong inclination of the courts to administer legal redress upon fixed and certain rules has sometimes led to the adoption of such rules in cases to which they could not be consistently or justly applied. Hence there is, perhaps, no branch of the law upon which there is a greater conflict of judicial decisions, and none in which so many merely arbitrary rules have been adopted.[62]

Where plaintiff was induced by false representations to put money in a speculation, and afterwards put in more money, the loss of the latter money was held a proximate consequence of the fraud.[63]

Injury to plaintiff's mill and machinery, caused by a boiler explosion, is a proximate consequence of defects in the boiler.[64]

Where defendant abducted plaintiff's slaves, leaving no one to care for the plantation, it was held that compensation could be recovered for corn destroyed by cattle of the neighbors, and for wood swept away by a flood.[65]

A loss through deprivation of means of protection is proximate.[66]

[60] Covert v. Cranford, 141 N. Y. 521, 36 N. E. 597.

* Haverly v. Railroad Co., 135 Pa. St. 50, 19 Atl. 1013. In an action of contract, Blackburn, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." Hobbs v. London Railroad Co., L. R. 10 Q. B. 111.

[61] Pol. Torts, p. 33.

[62] Allison v. Chandler, 11 Mich. 542; Mechem, Cas. Dam. 99.

[63] Crater v. Binninger, 33 N. J. Law, 513.

[64] Page v. Ford, 12 Ind. 46; Erie City Iron Works v. Barber, 106 Pa. St. 125.

[65] McAfee v. Crofford, 13 How. 447.

[66] Derry v. Ellmer, 118 Mass. 131; The George and Richard, L. R. 3 Adm. & Ecc. 466; Wilson v. Newport Dock Co., L. R. 1 Exch. 177; Borradaile v. Brunton, 8 Taunt. 535, 2 Moore, 582. But see Hadley v. Baxendale, 9 Exch. 341, 347.

A defect in a fence is a proximate cause of a trespass by cattle and injury to crops.[67]

It is natural and probable that a trespassing horse will kick other horses on the premises.[68]

Where plaintiff's horses escaped through the defect, and were killed by the falling of a haystack on defendant's premises, the loss was held not too remote.[69]

Where cattle escaped, and ate branches of a yew tree, and were thereby poisoned, the loss is the proximate result of the defect.[70]

Where defendant's wrong obliges plaintiff to raise money, a loss through a forced sale of property is too remote to be compensated.[71]

Selling animals with an infectious disease is the proximate cause of its communication to other animals of the purchaser.[72]

Loss of business caused by the deprivation of machinery or of business premises is usually considered proximate.[73]

Loss of goods by sudden flood is not a proximate consequence of a negligent delay by a carrier.[74]

Where a defect in the street causes a traveler to be thrown out of his carriage, and exposed to the cold and rain, the city is liable for a serious disease thereby contracted.[75]

In all cases, it is, of course, prerequisite to any liability that defendant's act had an influence in causing the injury.[76]

67 Scott v. Kenton, 81 Ill. 96.

68 Lee v. Riley, 34 Law J. C. P. 212; Lyons v. Merrick, 105 Mass. 71.

69 Powell v. Salisbury, 2 Younge & J. 391.

70 Lawrence v. Jenkins, L. R. 8 Q. B. 274.

71 See Deyo v. Waggoner, 19 Johns. (N. Y.) 241; Donnell v. Jones, 13 Ala. 490; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 151; Larios v. Gurety, L. R. 5 P. C. 346; Travis v. Duffau, 20 Tex. 49; Smith v. O'Donnell, 8 Lea (Tenn.) 468.

72 Wheeler v. Randall, 48 Ill. 182; Sherrod v. Langdon, 21 Iowa, 518.

73 Waters v. Towers, 8 Exch. 401; New York & C. Min. Syndicate & Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665. But see Vedder v. Hildreth, 2 Wis. 427, and Ruthven Woolen Mfg. Co. v. Great Western R. Co., 18 U. C. C. P. 316.

74 Denny v. Railroad Co., 13 Gray (Mass.) 481; Morrison v. Davis, 20 Pa. St. 171; Railroad Co. v. Reeves, 10 Wall. 176. But see, contra, Michaels v. Railroad Co., 30 N. Y. 564; Read v. Spaulding, Id. 630.

75 Ehrgott v. Mayor, etc., 96 N. Y. 264.

76 Royston v. Railroad Co., 67 Miss. 376, 7 South. 320; Ellis v. Cleveland, 55 Vt. 358.

There must be an immediate and natural relation between the act complained of and the injury, without the intervention of other independent causes, or the damages will be too remote.[77]

Where a human agency or the voluntary act of a person over whom defendant has no control intervenes after defendant's wrongful act, the consequences are usually remote.[78]

Loss of a situation is not a proximate consequence of an assault and battery.[79]

But, where the act of the third party is a natural and probable result of defendant's acts, the loss is not too remote.[80]

Loss of credit or custom involves the intervention of the will of strangers, and is therefore usually too remote.[81]

But, where the wrongful conduct directly affects the credit or trade of plaintiff, the rule is otherwise.[82]

A trespasser is liable for the injury caused by a crowd which he draws after him, if his act was of a nature to attract a destructive crowd.[83]

12. CONSEQUENTIAL DAMAGES FOR TORTS — Compensation may be recovered for all the consequential losses resulting from a tort which were natural and probable at the time the tort was committed.

13. CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT—Compensation may be recovered only for such consequential losses resulting from a

[77] Rucker v. Manufacturing Co., 54 Ga. 84.

[78] Burton v. Pinkerton, L. R. 2 Exch. 340; Stone v. Codman, 15 Pick. (Mass.) 297; Schmidt v. Mitchell, 84 Ill. 195.

[79] Brown v. Cummings, 7 Allen (Mass.) 507.

[80] Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62).

[81] Lowenstein v. Monroe, 55 Iowa, 82, 7 N. W. 406; Weeks v. Prescott, 53 Vt. 57. See Alexander v. Jacoby, 23 Ohio St. 358. Contra, MacVeagh v. Bailey, 29 Ill. App. 606.

[82] Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025; Boyd v. Flitt, 14 Ir. C. L. 43.

[83] Fairbanks v. Kerr, 70 Pa. St. 86; Guille v. Swan, 19 Johns. (N. Y.) 381.

breach of contract as were natural and probable under the circumstances contemplated by the parties at the time the contract was made.

In determining what consequential losses shall be compensated, there is an important distinction between cases of contract and cases of tort.[84]

Liability for consequences is much more extended in the case of torts than of contracts. Compensation may be recovered for all the injurious consequences of a tort which result according to the usual order of events and general experience, and which, therefore, at the time the tort was committed, the wrongdoer may reasonably be presumed to have anticipated.[85]

But, for breach of contract, compensation may be recovered only for such consequential losses as are natural and probable under the circumstances contemplated by the parties at the time the contract was made; and it is wholly immaterial what consequences are natural and probable, or even actually contemplated at the time of the breach.[86]

Consequential Damages for Torts.

Where, at the time a tort was committed, it might have been reasonably expected to set in operation the intermediate cause of an injury, or where it exposes plaintiff to the risk of injury from some fairly obvious danger, which ultimately results in injury, the loss is a natural and probable one, and may be compensated.[87]

[84] Suth. Dam. § 45.

[85] Hoadley v. Transportation Co., 115 Mass. 304; Flori v. City of St. Louis, 69 Mo. 341; Hughes v. McDonough, 43 N. J. Law, 459.

[86] Suth. Dam. § 45; Anson, Cont. 310; Hadley v. Baxendale, 9 Exch. 341; Candee v. Telegraph Co., 34 Wis. 479; Pacific Exp. Co. v. Darnell, 62 Tex. 639; Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827; Smith v. Osborn, 143 Mass. 185, 9 N. E. 558; Packard v. Slack, 32 Vt. 9; Smith v. Green, 1 C. P. Div. 92; Riech v. Bolch, 68 Iowa, 526, 27 N. W. 507; Jones v. Gilmore, 91 Pa. St. 310.

[87] Suth. Dam. § 28; Bowas v. Tow Line, 2 Sawy. 21, Fed. Cas. No. 1,713; Whart. Neg. §§ 77, 78; Higgins v. Dewey, 107 Mass. 494; Stevens v. Dudley, 56 Vt. 168; Evans v. Railroad Co., 11 Mo. App. 463; Ehrgott v. Mayor, etc., 96 N. Y. 281; Baltimore City Pass. Ry. Co. v. Kemp, 61 Md. 74. See Brown v. Railroad Co., 54 Wis. 342, 11 N. W. 356, 911.

Consequential Damages for Breach of Contract.

For anything amounting to a direct breach of contract, whether foreseen or unforeseen, the party responsible therefor is liable, because he has contracted that the other party shall receive that very thing; but he is not liable for indirect or consequential losses resulting from the breach, unless they are such as the parties may reasonably be presumed to have contemplated at the time the contract was made.[88]

In Hadley v. Baxendale* an attempt was made to settle this branch of the law, and a rule was laid down to govern the award of damages for breach of contract, that has been generally accepted both in England and America. The court said: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Three rules may be deduced from Hadley v. Baxendale: First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable;[89] secondly, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract;[90] thirdly, that where the special

[88] Allison v. Chandler, 11 Mich. 542; Mech. Cas. Dam. 99; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 217, 31 N. E. 1018.

* 9 Exch. 341, 23 Law J. Exch. 179, 18 Jur. 358, 26 Eng. Law & Eq. 398.

[89] Sedg. Meas. Dam. § 148; Peak v. Frost, 162 Mass. 298, 38 N. E. 518. See, also, Little v. Railroad Co., 66 Me. 239; Collard v. Railroad Co., 7 Hurl. & N. 79; Gee v. Railroad Co., 6 Hurl. & N. 211; Wilson v. Railroad Co., 9 C. B. (N. S.) 632; Wilson v. Dock Co., L. R. 1 Exch. 177; Baldwin v. Telegraph Co., 45 N. Y. 744, 750; Ward v. Railroad Co., 47 N. Y. 29, 32; Shepard v. Gaslight Co., 15 Wis. 318; Booth v. Mill Co., 60 N. Y. 487; Cory v. Iron-Works Co., L. R. 3 Q. B. 188.

[90] Gee v. Railroad Co., 6 Hurl. & N. 211; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500; Case v. Stevens, 137 Mass. 551; Mather v. Express Co., 138 Mass. 55; Fox v. Railroad Co., 148 Mass. 220, 19 N. E. 222; Benziger v. Miller, 50 Ala. 206; Keith's Ex'r v. Hinkston, 9 Bush (Ky.) 283;

circumstances are known or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable.[91]

A further rule is implied, viz. that damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable, whether those circumstances were or were not known to the person who is being charged.[92]

THE REQUIRED CERTAINTY OF DAMAGES.

14. Losses must be certain in amount, and certain in respect to the cause from which they proceed, or damages therefor cannot be recovered. The burden of proving both these facts is on the plaintiff.

In an action for damages, the plaintiff must prove, as a part of his case, both the amount and the cause of his loss. Absolute certainty is not required, but both the cause and the probable amount of the loss must be shown with reasonable certainty.[93]

Reasonable certainty means reasonable probability.[94]

Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642, 22 N. W. 827.

[91] Borries v. Hutchinson, 18 C. B. (N. S.) 463; Messmore v. Lead Co., 40 N. Y. 422; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128; Hammond v. Bussey, 20 Q. B. Div. 79; Smith v. Flanders, 129 Mass. 322.

[92] Mayne, Dam. 10; Hamilton v. Railroad Co., 96 N. C. 338, 3 S. E. 164; Deming v. Railroad Co., 48 N. H. 455; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 217, 31 N. E. 1018. See Hexter v. Knox, 63 N. Y. 561.

[93] East Tennessee, V. & G. R. Co. v. Staub, 7 Lea (Tenn.) 397; Wolcott v. Mount, 36 N. J. Law, 262, 271; Allison v. Chandler, 11 Mich. 542, 555; Satchwell v. Williams, 40 Conn. 371; Suth. Dam. § 53; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 217, 31 N. E. 1018; Griffin v. Colver, 16 N. Y. 494; Leeds v. Gaslight Co., 90 N. Y. 26; Duke v. Railway Co., 99 Mo. 347, 351, 12 S. W. 636.

[94] Griswold v. Railroad Co., 115 N. Y. 61, 21 N. E. 726; United States Trust Co. v. O'Brien, 143 N. Y. 284, 38 N. E. 266.

SAME—PROFITS OR GAINS PREVENTED.

15. Compensation may be recovered for profits lost when the loss is a proximate and certain result of the tort or breach of contract.

"The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." [95]

Where the losses claimed are contingent, speculative, or merely possible, they cannot be compensated.[96]

Anticipated profits from a competition or speculation are too uncertain to be compensated.[97]

Where plaintiff is engaged in a mercantile business, compensation for a personal injury is limited to the value of his loss of time. Loss of profits of the business through the injury to the good will is not a natural consequence.[98]

[95] Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58; Griffin v. Colver, 16 N. Y. 489, 491; Booth v. Mill Co., 60 N. Y. 487; Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 47, 39 N. E. 7; Danforth v. Railroad Co., 99 Ala. 331, 13 South. 56; Pennypacker v. Jones, 106 Pa. St. 237. Cf. Anson, Cont. (Am. Ed.) 311, note; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500.

[96] Witherbee v. Meyer, 155 N. Y. 446, 453, 50 N. E. 58; De Costa v. Mining Co., 17 Cal. 613; Todd v. Keene, 167 Mass. 157, 45 N. E. 81; Moss v. Tompkins, 69 Hun, 288, 23 N. Y. Supp. 623; Id., 144 N. Y. 659, 39 N. E. 858; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Fry v. Railway Co., 45 Iowa, 416; Lincoln v. Railroad Co., 23 Wend. (N. Y.) 425; Staal v. Railroad Co., 107 N. Y. 625, 13 N. E. 624; Chicago City Ry. Co. v. Henry, 62 Ill. 142.

[97] Watson v. Railroad Co., 15 Jur. 448; W. U. Tel. Co. v. Crall, 39 Kan. 580, 18 Pac. 719; Mizner v. Frazier, 40 Mich. 592; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577. But see Adams Exp. Co. v. Egbert, 36 Pa. St. 360.

[98] Marks v. Railroad Co., 14 Daly (N. Y.) 61; Bierbach v. Rubber Co., 54

The usual and ordinary profits of an established business or profession are reasonably certain, and may be recovered in an action for interruption of the business, in the absence of anything showing that they would not have been realized.[99]

Some businesses are of so uncertain a nature that their profits never become established, such as fishing.[100]

Plaintiff cannot recover anticipated profits of a new business, in which he was wrongfully prevented from embarking.[101]

Damages for the loss of use of land or business premises are the rental value, and the same measure is to be applied in actions based on breach of contract to deliver machinery, or furnish water power for mills, etc., where no special circumstances exist rendering loss of expected profits a more appropriate measure.[102]

Compensation may be recovered for loss of earnings or income caused by personal injuries.*

Loss of profits by the destruction of an unmatured crop is usually regarded as too uncertain to be compensated;[103] but compensation based on the average crop of that year has been allowed.[104]

Wis. 208, 11 N. W. 514; Masterton v. Village of Mt. Vernon, 58 N. Y. 391. But see Ehrgott v. Mayor, etc., 96 N. Y. 275.

99 Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Allison v. Chandler, 11 Mich. 542; Peltz v. Eichele, 62 Mo. 171; Ehrgott v. Mayor, etc., 96 N. Y. 275; French v. Lumber Co., 145 Mass. 261, 14 N. E. 113.

100 Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045.

101 Red v. City Council, 25 Ga. 386; Greene v. Williams, 45 Ill. 206; Morey v. Gaslight Co., 38 N. Y. Super. Ct. 185.

102 Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58; Griffin v. Colver, 16 N. Y. 489; City of Chicago v. Huenerbein, 85 Ill. 594; Hexter v. Knox, 63 N. Y. 561; Townsend v. Wharf Co., 117 Mass. 501; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398. But see Cargill v. Thompson, 57 Minn. 548, 59 N. W. 638.

* Moore's Adm'r v. Minerva, 17 Tex. 20; Wade v. Leroy, 20 How. 34; Pierce v. Millay, 44 Ill. 189; Masterton v. Village of Mt. Vernon, 58 N. Y. 391; Sheehan v. Edgar, 58 N. Y. 631; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. St. 290; Houston & T. C. Ry. Co. v. Boehm, 57 Tex. 152.

103 Gresham v. Taylor, 51 Ala. 505; Richardson v. Northrup, 66 Barb. (N. Y.) 85; Texas & St. L. R. Co. v. Young, 60 Tex. 201.

104 Payne v. Steamship Co., 38 La. Ann. 164; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501. See, also, Wolcott v. Mount, 36 N. J. Law, 262; Passinger v. Thorburn, 34 N. Y. 634.

For breach of a contract of partnership, plaintiff may recover such profits as he can prove with reasonable certainty. Evidence of past profits is admissible, but not conclusive.[105]

Where the partnership was terminable on notice, future profits cannot be recovered.[106]

Profits of collateral transactions are usually too remote and uncertain to be recovered for breach of contract;[107] but, where the profit is the thing contracted for, it may be recovered.[108]

The average or usual value of the use of personal property is the measure of damages for the loss of its use.[109]

For the loss of personal property, the wholesale market value, and not the retail value, is the measure of damages.[110]

The labor of professional men has no fixed market value. What the injured person has earned in the past is evidence, though not conclusive, of what he might have earned.[111]

It is immaterial that plaintiff is not legally entitled to such earnings, if he was in the customary receipt of them.[112]

But loss of earnings in an illegal employment cannot be compensated.[113]

[105] Bagley v. Smith, 10 N. Y. 489; Gale v. Leckie, 2 Starkie, 107; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291; Dennis v. Maxfield, 10 Allen (Mass.) 138.

[106] Skinner v. Tinker, 34 Barb. (N. Y.) 333; Ball v. Britton, 58 Tex. 57.

[107] Fox v. Harding, 7 Cush. (Mass.) 516; Mace v. Ramsey, 74 N. C. 11; Mitchell v. Cornell, 44 N. Y. Super. Ct. 401; Shaw v. Hoffman, 25 Mich. 162.

[108] Masterton v. Mayor, etc., 7 Hill (N. Y.) 61; Lentz v. Choteau, 42 Pa. St. 435.

[109] Benton v. Fay, 64 Ill. 417; Shelbyville L. R. R. Co. v. Lewark, 4 Ind. 471; Johnson v. Inhabitants of Holyoke, 105 Mass. 80; Luce v. Hoisington, 56 Vt. 436; Whitson v. Gray, 3 Head (Tenn.) 441.

[110] Young v. Cureton, 87 Ala. 727, 6 South. 352; Wehle v. Haviland, 69 N. Y. 448. But see Alabama Iron Works v. Hurley, 86 Ala. 217, 5 South. 418.

[111] Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; New Jersey Exp. Co. v. Nichols, 33 N. J. Law, 434; Nash v. Sharpe, 19 Hun (N. Y.) 365; Walker v. Railway Co., 63 Barb. (N. Y.) 260; Baker v. Railway Co., 54 N. Y. Super. Ct. 394; Phillips v. Railroad Co., 5 C. P. Div. 280; Metcalf v. Baker, 57 N. Y. 662; Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Masterton v. Village of Mt. Vernon, 58 N. Y. 391.

[112] Phillips v. Railroad Co., 5 C. P. Div. 280; Holmes v. Halde, 74 Me. 28.

[113] Jacques v. Railroad Co., 41 Conn. 61; Kauffman v. Babcock, 67 Tex. 241, 2 S. W. 878.

Where one is not engaged in business at the time of an injury, he may recover compensation for being prevented from engaging in business in the future.[114]

A dealer, having a contract right to exclusive county sales of another's goods, may, if the latter breaks the contract and makes sales by others, recover the profits he would have realized on those sales.[115]

Where a construction contract calls for payments in installments, the contractor may, upon failure to pay a given installment, rescind and recover for materials and services already supplied or rendered, or may proceed with the work and sue for the installment due; but he cannot refuse to proceed, and then recover prospective profits. To entitle him to such profits, it must appear that he is willing to proceed, and that the defendant has repudiated or abandoned the contract.[116]

Prospective Gains from Property Totally Destroyed.

Anticipated profits or gains from the use of property which has been totally destroyed by defendant's wrong do not fall within the rule, and cannot be recovered. In such cases compensation is given for the whole value of the property destroyed, and thereupon, in legal contemplation, all plaintiff's title and interest in the property ceases.[117]

ELEMENTS OF COMPENSATION.

16. Damage in respect to anything in the enjoyment of which one is protected by law may be a subject for compensation.

17. Damage for which the law affords compensation may be divided into three classes:

(a) Pecuniary losses, direct and indirect;

(b) Physical pain and inconvenience;

(c) Mental suffering.

The law awards damages only for injuries to person, property, or reputation. An injury in any one of these respects may affect one in one or more of three ways. It may cause (1) pecuniary loss, direct or

114 Fisher v. Jansen, 128 Ill. 549, 21 N. E. 598.

115 Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 312, 53 N. W. 501.

116 Wharton & Co. v. Winch, 140 N. Y. 287, 35 N. E. 589.

117 Sedg. Meas. Dam. § 178; McKnight v. Ratcliff, 44 Pa. St. 156. Edwards v. Beebe, 48 Barb. (N. Y.) 106.

indirect; (2) physical pain and inconvenience; and (3) mental suffering. All three are proper elements of compensation to be considered in estimating damages.

SAME—PECUNIARY LOSSES.

18. Compensation for all pecuniary losses which are the proximate and certain result of the cause of action may be recovered, except—

EXCEPTION—Counsel fees incurred in litigation caused by the wrong are usually not recoverable.

Generally speaking, pecuniary losses are always an element in estimating the damages caused by a wrong.

Expenses of Litigation.

The expenses of litigation to obtain compensation for a wrong, though the natural and probable consequence of an injury, cannot usually be recovered as damages.[118]

In general, the law considers the taxed costs as the only damage which a party sustains by the defense of a suit against him, and these he recovers by the judgment in his favor.[119]

SAME—PHYSICAL PAIN AND INCONVENIENCE.

19. Compensation may always be recovered for physical pain which is the proximate and certain result of a wrong.

20. Inconvenience amounting to physical discomfort may be compensated.

Physical pain or inconvenience which is the proximate and certain result of a wrong is always an element of compensation.[120]

[118] CONTRACTS—Goodbar v. Lindsley, 51 Ark. 380, 11 S. W. 577; Vorse v. Phillips, 37 Iowa, 428; Offutt v. Edwards, 9 Rob. (La.) 90.

TORTS—Flanders v. Tweed, 15 Wall. 450; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Kelly v. Rogers, 21 Minn. 146; Hicks v. Foster, 13 Barb. (N. Y.) 663; Bishop v. Hendrick, 82 Hun, 323, 31 N. Y. Supp. 502.

[119] Young v. Courtney, 13 La. Ann. 193.

[120] Pierce v. Millay, 14 Ill. 189; McKinley v. Railroad Co., 44 Iowa, 314; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Stephens v. Railroad Co., 96 Mo.

The amount of damages awarded is necessarily left to the sound discretion of the jury, for there is no arithmetical rule by which the equivalent of such injuries in money can be estimated. Damages cannot be recovered for inconvenience or annoyance,[121] unless it amounts to physical discomfort.[122]

"The injury must be physical, as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance, through the medium of the senses, not from delicacy of taste or refined fancy." [123]

SAME—MENTAL SUFFERING.

21. Mental suffering standing alone will not support an action where damages is the gist of the wrong

22. Mental suffering which is the proximate and certain result of conduct actionable per se, whether a tort or breach of contract, may be compensated.

EXCEPTION—In many states compensation cannot be recovered for mental suffering resulting from a breach of contract.

Mental Suffering as the Basis of a Cause of Action.

It has been doubted whether compensation can ever be recovered for mental suffering, as distinguished from physical suffering.[124]

It is true that where the negligent or wrongful act of one person puts another in a position of peril, and thereby causes fear and appre-

207, 9 S. W. 589; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. St. 290; Goodno v. City of Oshkosh, 28 Wis. 300.

[121] Hamlin v. Railway Co., 1 Hurl. & N. 408; Hunt v. D'Orval, Dud. (S. C.) 180; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; Wilcox v. Railroad Co., 3 C. C. A. 73, 52 Fed. 264.

[122] Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Emery v. City of Lowell, 109 Mass. 197; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695. But see Walsh v. Railway Co., 42 Wis. 23.

[123] Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490; Id., 44 N. J. Eq. 297, 18 Atl. 80. And see Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052.

[124] See Sedg. Meas. Dam. § 44; 1 Suth. Dam. 78; Wadsworth v. Telegraph Co., 86 Tenn. 721, 8 S. W. 574.

hension in the mind of the latter, but no actual harm results, there is no cause of action.[125]

Where, however, the fright or shock causes illness, nervous prostration, or any other physical injury, the original fault is the proximate cause of the injury; and compensation may be recovered, not for the fright, but for the results of it.[126]

Where the fear or anxiety, instead of causing the physical injury, accompanies it, as a concomitant or incident, the injury being proved, compensation may be had for the mental suffering. The physical injury supports the action.[127]

And it is often difficult to fix the damages, even where injury in a legal sense results.[128]

But, where the law recognizes a right to compensation for an injury, such difficulty is never a ground for withholding all damages;[129] and the difficulty is solved by leaving the matter to the sound discretion of a jury.[130]

Mental Suffering in Actions of Tort.

Compensation for mental suffering which is the natural, proximate, and certain result of a tort may be recovered.[131]

[125] O'Flaherty v. Railroad Co., 34 App. Div. 74, 54 N. Y. Supp. 96; Canning v. Inhabitants of Williamstown, 1 Cush. (Mass.) 451; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Ft. Worth & D. C. Ry. Co. v. Burton (Tex. App.) 15 S. W. 197; Wyman v. Leavitt, 71 Me. 227; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340. Contra, Yoakum v. Kroeger (Tex. Civ. App.) 27 S. W. 953.

[126] Smith v. Railway Co., 30 Minn. 169, 14 N. W. 797; Bell v. Railway Co., L. R. 26 Ir. 428, disapproving Victorian Railways Com'rs v. Coultas, 13 App. Cas. 222. Contra, Mitchell v. Railway Co., 151 N. Y. 107, 45 N. E. 354; White v. Sander, 168 Mass. 296, 47 N. E. 90. See, also, Fitzpatrick v. Railway Co., 12 U. C. Q. B. 645; Oliver v. Town of La Valle, 36 Wis. 592; Warren v. Railroad Co., 163 Mass. 484, 40 N. E. 895.

[127] O'Flaherty v. Railroad Co., 34 App. Div. 74, 54 N. Y. Supp. 96; Allen v. Railway Co. (Tex. Civ. App.) 27 S. W. 943; Fell v. Railroad Co., 44 Fed. 248.

[128] Wadsworth v. Telegraph Co., 86 Tenn. 721, 8 S. W. 574.

[129] Id.

[130] Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574; Ballou v. Farnum, 11 Allen (Mass.) 77, 78.

[131] Personal Injury. Van De Venter v. Railway Co., 26 Fed. 32; Drinkwater v. Dinsmore, 16 Hun, 250; Ransom v. Railroad Co., 15 N. Y. 415; Curtis v. Railroad Co., 18 N. Y. 534; Walker v. Railway Co., 63 Barb. (N. Y.)

Prospective Mental Suffering.

Damages may be recovered for prospective mental suffering.[132]

In personal injury cases, damages may be recovered for grief and mortification which will be caused in the future by any serious deformity and disfigurement.[133]

Damages for dread of hydrophobia may be recovered by one who has been bitten by a dog.[134]

While compensation for mental suffering alone cannot be recovered, where the same act that causes mental suffering also injures plaintiff

260; Demann v. Railroad Co., 10 Misc. Rep. 191, 30 N. Y. Supp. 926; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430, 31 N. E. 661, and 32 N. E. 85; Fleming v. Town of Shenandoah, 71 Iowa, 456, 32 N. W. 456; Sidekum v. Railway Co., 93 Mo. 400, 4 S. W. 701. Assault and Battery. Galther v. Blowers, 11 Md. 536; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; McIntyre v. Giblin, 131 U. S. 174, Append. Indecent Assault. Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110; Fay v. Swan, 44 Mich. 544, 7 N. W. 215; Ford v. Jones, 62 Barb. (N. Y.) 484. Injury to Child—Recovery by Parent. Durkee v. Railroad Co., 56 Cal. 388. Civil Damage Laws. Black, Intox. Liq. § 309; Mulford v. Clewell, 21 Ohio St. 191. Ejection of Passenger by Carrier. Coppin v. Braithwaite, 8 Jur. 875; Gallena v. Railroad Co., 13 Fed. 116; Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. 312; Hamilton v. Railroad Co., 53 N. Y. 25; Dorrah v. Railroad Co., 65 Miss. 14, 3 South. 36; Chicago & A. R. Co. v. Flagg, 43 Ill. 364. False Imprisonment. Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; Catlin v. Pond, 101 N. Y. 649, 5 N. E. 41. Malicious Prosecution. Parkhurst v. Masteller, 57 Iowa, 174, 10 N. W. 864; Fagnan v. Knox, 40 N. Y. Super. Ct. 41; Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382. Libel; Slander. Shattuc v. McArthur, 29 Fed. 136; Terwilliger v. Wands, 17 N. Y. 54; Wilson v. Goit, Id. 442; Samuels v. Association, 6 Hun (N. Y.) 5; Hamilton v. Eno, 16 Hun (N. Y.) 599; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125; Warner v. Publishing Co., 132 N. Y. 181, 30 N. E. 396. Seduction and Criminal Conversation. Irwin v. Dearman, 11 East, 23; Barbour v. Stephenson, 32 Fed. 66; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Emery v. Gowen, 4 Me. 33; Hatch v. Fuller, 131 Mass. 574; Lipe v. Eisenlerd, 32 N. Y. 229. Abduction of Children. Magee v. Holland, 27 N. J. Law, 86; Stowe v. Heywood, 7 Allen (Mass.) 118.

132 Matteson v. Railroad Co., 62 Barb. (N. Y.) 364; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; South & N. A. R. Co. v. McLendon, 63 Ala. 266.

133 Heddles v. Railway Co., 77 Wis. 228, 46 N. W. 115. Power v. Harlow, 57 Mich. 107, 23 N. W. 606. Contra, Chicago, B. & Q. R. Co. v. Hines, 45 Ill. App. 299; Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 552, 63 Fed. 896.

134 Godeau v. Blood, 32 Vt. 251.

in respect to a right protected by law, as in regard to his person, property, or reputation, the law, in redressing such injury, will also award to plaintiff a suitable compensation for his mental suffering, considered as an inseparable part of the general result of the tort against him.[135]

Mental Suffering in Actions of Contract.

Upon the question as to whether damages are recoverable for mental suffering resulting from a breach of contract, the authorities are in conflict. It has been held that such damages as are recoverable are subject to the general limitation that damages for the breach of a contract must be proximate, certain, and contemplated at the time the contract was made.[136]

The breach of a promise of marriage has always been regarded as an exception, and damages for mental suffering allowed.[137]

Actions against telegraph companies for delay or failure to deliver messages constitute by far the most numerous class of cases in which this question has been raised.

In the case of So Relle v. Telegraph Co.,[138] it was held that the addressee of a telegraphic message could recover, as compensatory damages, for the failure to deliver promptly a message announcing the death of his mother, by reason of which delay he was prevented from attending her funeral. And it is now well established in Texas that, where the nature of the message is such as to apprise the company that mental suffering will result from delay or failure to transmit it,

[135] Lynch v. Knight, 9 H. L. Cas. 577; O'Flaherty v. Railroad Co., 34 App. Div. 74, 54 N. Y. Supp. 96; Trigg v. Railway Co., 74 Mo. 147; Burnett v. Telegraph Co., 39 Mo. App. 599; W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823; Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973; Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880.

[136] Wadsworth v. Telegraph Co., 86 Tenn. 695, 703, 8 S. W. 574. Contra, Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078. In the following cases mental suffering has been held too remote or unexpected to be compensated: Beasley v. Telegraph Co., 39 Fed. 181; Wells, Fargo & Co.'s Express v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Nichols v. Eddy (Tex. Civ. App.) 21 S. W. 316; Thompson v. Telegraph Co., 107 N. C. 449, 12 S. E. 427.

[137] Collins v. Mack, 31 Ark. 684; Chellis v. Chapman, 125 N. Y. 222, 26 N. E. 308; Sherman v. Dawson, 102 Mass. 395, 399; Johnson v. Jenkins, 24 N. Y. 252; Thorn v. Knapp, 42 N. Y. 474.

[138] 55 Tex. 308.

compensation for such suffering can be recovered, though not connected with any physical injury or pecuniary loss.[139]

The "Texas Doctrine" has been followed in some other jurisdictions,[140] but repudiated in others, including the federal courts.[141]

Damages for Mental Suffering Compensatory, not Exemplary.

Damages for mental suffering, when allowed at all, are purely compensatory, not exemplary, vindictive, or punitive.[142]

AGGRAVATION AND MITIGATION OF DAMAGES.

23. Where damages are not capable of exact pecuniary measurement, but must be left to the discretion of a jury, evidence of the circumstances of the wrong addressed to the jury for the purpose of influencing its estimate is said to be in aggravation or mitigation of damages.

The terms "aggravation" and "mitigation" of damages are properly used only where the damages are incapable of exact pecuniary measurement. Indemnity is the aim of the law. Where the exact loss is definitely known, the damages cannot be mitigated to less than full and complete compensation; nor can they be aggravated to more than that amount, unless the circumstances justify the imposition of exemplary damages. These terms are sometimes loosely used to mean evidence

139 Loper v. Telegraph Co., 70 Tex. 689, 8 S. W. 600; W. U. Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734; W. U. Tel. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25.

140 W. U. Tel. Co. v. Henderson, 89 Ala. 510, 7 South. 419; Chapman v. Telegraph Co., 90 Ky. 265, 13 S. W. 880.

141 Curtin v. Telegraph Co., 13 App. Div. 253, 42 N. Y. Supp. 1109; Francis v. Telegraph Co., 58 Minn. 252, 59 N. W. 1078; W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823; Summerfield v. Telegraph Co., 87 Wis. 1, 57 N. W. 973; Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901; International Ocean Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148; Chase v. Telegraph Co., 44 Fed. 554; Crawson v. Telegraph Co., 47 Fed. 544. And see note by Wm. L. Clark, Jr., in W. U. Tel. Co. v. Coggin, 15 C. C. A. 235, "Damages in Actions against Telegraph Companies." See, also, Lynch v. Knight, 9 H. L. Cas. 577, per Lord Wensleydale.

142 Smith v. Overby, 30 Ga. 241; Bixby v. Dunlap, 56 N. H. 456; Thomp. Elect. § 382.

of anything that tends to increase or decrease the damages, but the proper sense is that indicated above.

It is for the jury to say whether the matters given in evidence aggravate or mitigate the damages. It is not a question of law for the court.[143]

"Nevertheless, certain rules as to the effect of some common circumstances (such as provocation, good faith, the position of the parties, etc.) in aggravating or mitigating the damages have been laid down, and are followed in ordinary cases, though, as has been said, they should not be regarded as conclusive. These rules are applied in actions of breach of promise of marriage and of tort for personal injury, and in all actions where exemplary damages are allowed." [144]

Ordinarily, evidence in aggravation or mitigation of damages, in the strict sense, is inadmissible in actions of contract. And in such actions the defendant's motive or intention in breaking the contract is not an element in the case, unless it belongs directly to the issue.[145]

If the person injured thereafter negligently suffers his loss to be enhanced, the increase so occasioned cannot be recovered from the person who first violated his contract or duty; and in some cases it is incumbent on the person damnified to take such active measures as he reasonably may to minimize the damages naturally flowing from the breach.[146]

Apart from the principles of aggravation and mitigation, in their strict sense, the special circumstances of given cases, or special provisions of given contracts, may, of course, modify the general rules which would be applicable under ordinary circumstances, and operate, according to their nature, to either increase or lessen the damages recoverable. Thus, where rooms were let, with table board, for a fixed period and specified weekly payment, "with no deduction in case of absence," and the boarder left pending the term, it was held that he

[143] Osmun v. Winters, 25 Or. 260, 35 Pac. 250.

[144] Sedg. Dam. § 52. See, generally, as to aggravation and mitigation of damages, Grable v. Margrave, 3 Scam. (Ill.) 372; Storey v. Early, 86 Ill. 461; Sayre v. Sayre, 25 N. J. Law, 235; Duval v. Davey, 32 Ohio St. 604; Mahoney v. Belford, 132 Mass. 393; Sullivan v. Railway Co., 162 Mass. 536, 39 N. E. 185.

[145] 3 Pars. Cont. 167; Anson, Cont. 311.

[146] Allen v. McConihe, 124 N. Y. 347, 26 N. E. 812; 1 Suth. Dam. 148.

was liable to the other party, not merely for prospective profits, but for the full contract price.[147]

So, while, in an action for conversion of property of fluctuating value, the market value for a reasonable time, in which to replace the property, furnishes the guide to the proper measure of damages,[148] yet, if there is no market, and no market value, and in the absence of special circumstances, the value at the time of conversion, with interest, is the measure of compensation.[149]

So, again, if one who is intrusted with property to be disposed of according to a contract between the parties, and an action is brought against him by the other party for a conversion thereof resulting in loss to the plaintiff, the defendant cannot resort to the contract which he has abandoned for the purpose of diminishing his liability, or to establish the measure of damages.[150]

Illustrations.

In assault and battery, leave and license,[151] and provocation,[152] are in mitigation of damages.[153]

In false imprisonment, wanton disregard of legal right entitles the plaintiff to punitive damages.[154]

So, proof of malice in defamation aggravates the wrong in libel and slander, while whatever negatives malice operates to mitigate damages.[155]

Provocation may mitigate damages;[156] and so may a retraction of defamatory statements, or proof of honest belief in rumors,[157] or proof of plaintiff's previously blemished character, or general bad reputation.[158]

147 Wilkinson v. Davies, 146 N. Y. 25, 40 N. E. 501.

148 Baker v. Drake, 53 N. Y. 211.

149 Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

150 Hynes v. Patterson, 95 N. Y. 6.

151 Fredericksen v. Manufacturing Co., 38 Minn. 356, 37 N. W. 453.

152 Kiff v. Youmans, 86 N. Y. 324.

153 Cf. Birchard v. Booth, 4 Wis. 76; Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010.

154 Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913.

155 Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457.

156 Tarpley v. Blabey, 2 Bing. N. C. 437.

157 Turton v. Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Nelson v. Wallace, 48 Mo. App. 193.

158 Ward v. Dean, 57 Hun, 585, 10 N. Y. Supp. 421; Earl of Leicester v.

24. An injured party cannot be compelled to accept specific reparation in lieu of damages; but, if he does so voluntarily, it will operate as a reduction of damages.[159]

EXEMPLARY DAMAGES.

25. Exemplary, punitive, or vindictive damages are damages awarded in addition to compensation as a punishment to the defendant, and as a warning to other wrongdoers.

26. The authorities are in great conflict as to whether exemplary damages can ever be allowed.

(a) In some jurisdictions, exemplary damages cannot be recovered.[160]

(b) In a few jurisdictions, exemplary damages, so called, may be recovered, but they are, in fact, compensatory.[161]

(c) In most jurisdictions, exemplary damages may be recovered in cases of aggravated torts.[162]

The doctrine of exemplary damages is anomalous and illogical. "It has been suffered to lean upon and support itself by the supposed weight of authority, rather than to stand upon principle and inherent strength." [163]

Walter, 2 Camp. 251; Hallam v. Publishing Co., 55 Fed. 456; Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530.

[159] Norman v. Rogers, 29 Ark. 365; Livermore v. Northrup, 44 N. Y. 107; McCormick v. Railroad Co., 80 N. Y. 353; Perham v. Coney, 117 Mass. 102.

[160] Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815; Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119; Fay v. Parker, 53 N. H. 342.

[161] Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485, now overruled, Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58; Quigley v. Railroad Co., 11 Nev. 350; Stuyvesant v. Wilcox, 92 Mich. 233, 52 N. W. 467.

[162] Day v. Woodworth, 13 How. 363, 371; Voltz v. Blackmar, 64 N. Y. 444; Emblen v. Myers, 6 Hurl. & N. 54; Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Dalton v. Beers, 38 Conn. 529.

[163] Field, Dam. p. 79.

The fact remains, however, that, in a vast body of decisions, damages have been allowed strictly in pœnam. The doctrine of these cases is to be sustained, if at all, mainly on the ground of authority.[164]

27. WHEN RECOVERABLE—In jurisdictions where exemplary damages are allowed, they can be recovered only in actions of tort,[165] and when the tort is accompanied by violence, oppression, gross negligence, malice, or fraud.

EXCEPTIONS—(a) Exemplary damages may be recovered for breach of promise of marriage.[166]

(b) In a few states exemplary damages may be recovered in an action on a statutory bond, where the breach of condition was a tort.[167]

(c) In some jurisdictions, exemplary damages cannot be recovered where the tort is also a crime.[168]

Exemplary damages, being designed to punish the wrongdoer, can be justified only where the wrong was willful or wanton; and their allowance is limited to that class of cases.[169] Good faith,[170] and provocation,[171] may be shown in mitigation.

It is the province of the court to determine whether there is any evidence to support an award of exemplary damages,[172] and of the

164 Sedg. Dam. § 354.

165 Sedg. Dam. § 370; Anson, Cont. 311; Guildford v. Steamship Co., 9 Can. Sup. Ct. 303; Murdock v. Railroad Co., 133 Mass. 15.

166 Johnson v. Jenkins, 24 N. Y. 252; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308.

167 Floyd v. Hamilton, 33 Ala. 235. Contra, Cobb v. People, 84 Ill. 511.

168 Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119. Contra, Cook v. Ellis, 6 Hill (N. Y.) 466. But see People v. Meakim, 133 N. Y. 225, 30 N. E. 828.

169 Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276; Consolidated Coal Co. v. Haenni, 146 Ill. 628, 35 N. E. 162; Reeder v. Purdy, 48 Ill. 261; Moore v. Crose, 43 Ind. 30; Brown v. Allen, 35 Iowa, 306; U. S. v. Taylor, 35 Fed. 484; Ames v. Hilton, 70 Me. 36; Sapp v. Railway Co., 51 Md. 115; Railway Co. v. Lee, 90 Tenn. 570, 18 S. W. 268; Hamilton v. Railroad Co., 53 N. Y. 25; Yates v. Railroad Co., 67 N. Y. 100; Caldwell v. Steamboat Co., 47 N. Y. 282.

170 Millard v. Brown, 35 N. Y. 297.

171 Kiff v. Youmans, 86 N. Y. 331.

172 Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456.

jury to determine whether or not such damages should be awarded.[173]

In suits in equity, exemplary damages are never given.[174]

When the circumstances justify it, exemplary damages may be recovered in actions for assault and battery,[175] false imprisonment,[176] malicious prosecution,[177] defamation.[178]

The falsity of the defamation is evidence of malice,[179] willful injuries to person[180] or property,[181] and in actions of trover[182] and replevin.[183]

In actions founded on loss of service, as for enticement,[184] seduction,[185] criminal conversation,[186] and for harboring plaintiff's wife,[187] exemplary damages may be recovered.

In case of physical injury to a child or servant, exemplary damages can be recovered only in an action by the child or servant. They cannot be recovered in an action by the master or parent for loss of services.*

Where a wrongdoer dies before trial, only compensatory damages can be recovered against his estate. The liability to exemplary damages does not survive.[188]

[173] Pratt v. Pond, 42 Conn. 318.

[174] Bird v. Railroad Co., 8 Rich. Eq. (S. C.) 46.

[175] Conners v. Walsh, 131 N. Y. 590, 30 N. E. 59; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Cook v. Ellis, 6 Hill (N. Y.) 466.

[176] Huckle v. Money, 2 Wils. 205.

[177] Donnell v. Jones, 13 Ala. 490.

[178] Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202.

[179] Bergmann v. Jones, 94 N. Y. 51. See Holmes v. Jones, 147 N. Y. 67, 41 N. E. 409; Swain v. Schieffelin, 134 N. Y. 474, 31 N. E. 1025.

[180] Dalton v. Beers, 38 Conn. 529.

[181] U. S. v. Taylor, 35 Fed. 484; Allaback v. Utt, 51 N. Y. 651.

[182] Dennis v. Barber, 6 Serg. & R. (Pa.) 420. Contra, Berry v. Vantries, 12 Serg. & R. (Pa.) 89.

[183] Cable v. Dakin, 20 Wend. (N. Y.) 172.

[184] Smith v. Goodman, 75 Ga. 198.

[185] Robinson v. Burton, 5 Har. (Del.) 335.

[186] Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79.

[187] Johnson v. Allen, 100 N. C. 131, 5 S. E. 666.

*Whitney v. Hitchcock, 4 Denio (N. Y.) 461.

[188] Edwards v. Ricks, 30 La. Ann. 926; Rippey v. Miller, 33 N. C. 247.

LIABILITY OF PRINCIPAL FOR ACT OF AGENT.

28. A principal is not liable to exemplary damages for the tort of his agent or servant, unless he authorized or ratified the act as it was performed, or was himself guilty of negligence.[189]

EXCEPTION — In some jurisdictions, if the principal is liable for compensatory damages, he is liable also for exemplary damages, if the agent or servant would be.[190]

Liability of Corporations.

It is usually held that corporations are liable to exemplary damages for the acts of their agents or servants in cases where the agent or servant would be liable to such damages.[191]

In many jurisdictions, however, the same rule is applied to corporations as is applied to individuals, and the corporation is not liable unless it authorized or ratified the act, or is otherwise responsible for it.[192]

189 The Amiable Nancy, 3 Wheat. 546; Pollock v. Gantt, 69 Ala. 373; Lienkauf v. Morris, 66 Ala. 406; Burns v. Campbell, 71 Ala. 271; Freese v. Tripp, 70 Ill. 496.

190 Southern Exp. Co. v. Brown, 67 Miss. 260, 7 South. 318, and 8 South. 425. Cf. Cleghorn v. Railroad Co., 56 N. Y. 44.

191 Citizens' St. Ry. Co. v. Steen, 42 Ark. 321; Illinois Cent. Ry. Co. v. Hammer, 72 Ill. 353; Southern Kansas R. Co. v. Rice, 38 Kan. 398, 16 Pac. 817; Goddard v. Railway Co., 57 Me. 202; Perkins v. Railroad Co., 55 Mo. 201; Belknap v. Railroad Co., 49 N. H. 358; Quinn v. Railway Co., 29 S. C. 381, 7 S. E. 614.

192 Cleghorn v. Railroad Co., 56 N. Y. 44; City Nat. Bank v. Jeffries, 73 Ala. 183; Murphy v. Railroad Co., 48 N. Y. Super. Ct. 96; Keil v. Gas Co., 131 Pa. St. 466, 19 Atl. 78; Hagan v. Railroad Co., 3 R. I. 88; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261.

AVOIDABLE CONSEQUENCES.

29. Compensation cannot be recovered for injuries which the injured party, by due and reasonable diligence, after notice of the wrong, could have avoided. Such consequences are regarded as remote, the injured party's will having intervened as an independent cause.[193]

The rule applies in an action against a carrier for nondelivery, where the consignee can protect himself against loss by a purchase in the market.[194]

Where an employé is wrongfully discharged before the expiration of the term of service, he must seek other employment; and the measure of damages is the difference between what he might have earned and what he should have received under his contract.[195]

Reasonable diligence in seeking other employment does not require one to accept employment of an entirely different or inferior sort, or to abandon one's home and place of residence.[196]

Rule of Contributory Negligence Distinguished.

The rule of avoidable consequences must not be confounded with that of contributory negligence, though their results are somewhat similar. Contributory negligence is a complete bar to the maintenance of the action. It defeats the right to recover any damages

[193] Loker v. Damon, 17 Pick. (Mass.) 284; Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391; Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696; Brant v. Gallup, 111 Ill. 487; Grindle v. Express Co., 67 Me. 317; Sutherland v. Wyer, Id. 64; Simpson v. City of Keokuk, 34 Iowa, 568; Watkins v. Rist, 67 Vt. 284, 31 Atl. 413; Thompson v. Shattuck, 2 Mete. (Mass.) 615; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717.

[194] Scott v. Steamship Co., 106 Mass. 468.

[195] Walworth v. Pool, 9 Ark. 394; McDaniel v. Parks, 19 Ark. 671; Sutherland v. Wyer, 67 Me. 64; Hoyt v. Wildfire, 3 Johns. (N. Y.) 518; Shannon v. Comstock, 21 Wend. (N. Y.) 457; Howard v. Daly, 61 N. Y. 362; Hendrickson v. Anderson, 50 N. C. 246; King v. Steiren, 44 Pa. St. 99; Gordon v. Brewster, 7 Wis. 355.

[196] Williams v. Coal Co., 60 Ill. 149; Costigan v. Railroad Co., 2 Denio (N. Y.) 609; Howard v. Daly, 61 N. Y. 362; Fuchs v. Koerner, 107 N. Y. 529, 14 N. E. 445.

whatever. On the other hand, the rule of avoidable consequences presupposes a valid cause of action. It has no application until a right to recover some damages at all events has arisen, and then it operates merely to reduce the amount of recovery. It cannot entirely defeat the action. Though plaintiff might have avoided the entire loss, yet, if an absolute right was invaded, he is entitled to nominal damages.[197]

NOMINAL DAMAGES—DEFINITION AND GENERAL NATURE.

30. Nominal damages are damages insignificant in amount; a sum of money that can be spoken of, but has no existence in point of quantity.

31. Nominal damages are awarded only in cases where the law presumes damage. Whenever the law presumes damage, it presumes the lowest possible amount; that is, nominal damages.

32. Whenever damages must be proved to show the violation of a legal right, proof of nominal damage will not support an action. The law applies the maxim, "De minimis non curat lex."

In cases where damages are the gist of the action, proof of damage is essential to the proof of a legal wrong. In this class of cases, the law awards the amount of damages that have been proved. But there is another class of cases, in which damages are not the gist, and need not be proved, because they are presumed by law. This occurs whenever the conduct complained of is absolutely forbidden. In this class of cases a wrong can be shown without proof of damage. If no damages in fact are or can be proved, the legal presumption nevertheless remains.[198]

[197] Armfield v. Nash, 31 Miss. 361; Parker v. Meadows, 86 Tenn. 181, 6 S. W. 49.

[198] Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Dayton v. Parke, 142 N. Y. 403, 37 N. E. 642; Webb v. Manufacturing Co., 3 Sumn. 189, Fed. Cas. No. 17,322; New Jersey School & Church Furniture Co. v. Board of Education of Somerville, 58 N. J. Law, 646, 35 Atl. 398; Noble v. Hand, 163 Mass. 289, 39 N. E. 1020; Latlin v. Willard, 16 Pick. (Mass.) 64. See, also, Whittemore v. Cutter, 1 Gall. 429, 433, Fed. Cas. No. 17,600; Davis v. Kendall, 2 R. I. 566. Cf. Paul v. Slason, 22 Vt. 231; Mechem. Cas. Dam. 8; Ashby v. White, 1 Ld. Raym. 938, 958; Pig. Torts, 10; Suth. Dam. 18.

A riparian owner may recover nominal damages for a bare infringement of his rights.[199]

Nominal damages may be recovered for the unlawful flowage of lands,[200] or for false imprisonment.[201]

In England it is held that, in an action against a public officer for neglect of duty, the plaintiff must show damage.[202] In America it is generally held that the officer is liable without proof of damage.[203]

Nominal Damages Establish Rights.

The principal purpose of allowing nominal damages is the establishment of rights.[204]

The importance of the right to recover nominal damages often consists in its effect on costs.[205]

PENAL BONDS.

33. In an action on a penal bond, the measure of damages is compensation for the actual loss, not exceeding the penalty named.

Questions involving a consideration of liquidated damages and penalties formerly arose chiefly in connection with that peculiar form of obligation known as a "common-law bond." [206]

Chancery assumed jurisdiction to relieve against the penalty in all cases of default, from whatever cause, on the payment of just compen-

[199] New York Rubber Co. v. Rothery, 132 N. Y. 293, 30 N. E. 844; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78.

[200] Chapman v. Copeland, 55 Miss. 476; Gerrish v. Manufacturing Co., 30 N. H. 478; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 53.

[201] Doyo v. Van Valkenburgh, 5 Hill (N. Y.) 242.

[202] Wood, Mayne, Dam. 11; Wylie v. Birch, 4 Q. B. 566.

[203] Laflin v. Willard, 16 Pick. (Mass.) 64; Mickles v. Hart, 1 Denio (N. Y.) 548; Francis v. Schoellkopf, 53 N. Y. 152.

[204] Webb v. Manufacturing Co., 3 Sumn. 189, Fed. Cas. No. 17,322; Hathorne v. Stinson, 12 Me. 183. See, also, Seidensparger v. Spear, 17 Me. 123; Chapman v. Manufacturing Co., 13 Conn. 269; Devendorf v. Wert, 42 Barb. (N. Y.) 227; Thomas v. Brackney, 17 Barb. (N. Y.) 654; Carhart v. Gaslight Co., 22 Barb. (N. Y.) 297; Tunbridge Wells Dipper's Case, 2 Wils. 414.

[205] Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499.

[206] See 3 Bl. Comm. 434.

sation. This practice was ultimately followed by courts of law, and was finally sanctioned by statute.[207]

LIQUIDATED DAMAGES AND PENALTIES.

34. Liquidated damages are damages agreed upon by the parties as and for compensation for, and in lieu of, the actual damages arising from a breach of contract.*

35. A penalty is a sum agreed to be paid or forfeited absolutely upon nonperformance of the contract, regardless of the actual damages suffered, and intended rather to secure performance than as compensation for a breach.

36. Where the parties to a contract agree upon liquidated damages, the sum fixed is the measure of damages for a breach, whether it exceeds or falls short of the actual damages; but, where the sum fixed is a penalty, the actual damages suffered, whether more or less, may be recovered.

Intent of the Parties.

In making contracts, the parties are at perfect liberty to stipulate for liquidated damages to be paid by one party to the other as compensation for a breach.[208]

To have this effect, it is, of course, primarily essential that the parties so intended.[209]

[207] Betts v. Burch, 4 Hurl. & N. 506. See 2 White & T. Lead. Cas. Eq. 1068.

* Dwinel v. Brown, 54 Me. 468, 474, per Appleton, C. J., dissenting.

[208] In an action to recover a sum stipulated in a contract as liquidated damages, no proof of actual damages is required. Sanford v. Bank, 94 Iowa, 680, 63 N. W. 459. Contract of employment; damages for discharge stipulated at two weeks' wages. Watson v. Russell, 149 N. Y. 388, 44 N. E. 161.

[209] Kemp v. Ice Co., 69 N. Y. 15; Crisdee v. Bolton, 3 Car. & P. 240. See, also, Dwinel v. Brown, 54 Me. 468; Noyes v. Phillips, 60 N. Y. 408; Clement v. Cash, 21 N. Y. 253; Lampman v. Cochran, 16 N. Y. 275; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829.

SAME—RULES OF CONSTRUCTION.

37. In seeking to ascertain the real intent, the courts lean strongly towards a construction that the sum fixed is a penalty, rather than liquidated damages. The language of the parties is not conclusive, and will be strictly construed.[210]

There are four forms of contracts in which the question under discussion is usually presented:

First. The contract may be to do or refrain from doing a particular thing, or, in the alternative, to pay a stipulated sum of money. Prima facie, it is an alternative contract, but may be a mere cloak to cover a penalty.[211]

Second. The contract may be in the form of a common-law bond. Prima facie, the sum stipulated in a bond is a penalty; but, nevertheless, it has sometimes been held to be liquidated damages.[212]

Third. The contract may bind the parties to do or refrain from doing a certain thing, and provide that, in case of default, a certain sum shall be paid as a penalty. Prima facie, the sum named in this class of contracts is a penalty; but the presumption is not so strong as in the case of bonds.[213]

Fourth. The agreement may be in the same form as the last, except that the stipulated sum is called "liquidated damages" or a "forfeiture." This language will be given its literal effect only where the sum named is, in fact, reasonable compensation for a breach.[214]

[210] Doane v. Railway Co., 51 Ill. App. 353; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829; Tode v. Gross, 127 N. Y. 487, 28 N. E. 469.

[211] Standard Button Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346. See post, "Alternative Contracts."

[212] Studabaker v. White, 31 Ind. 212; Fisk v. Fowler, 10 Cal. 512; Duffy v. Shockey, 11 Ind. 70; Clark v. Barbard, 108 U. S. 436, 453, 2 Sup. Ct. 878.

[213] Suth. Dam. § 284. Cf. Law v. Local Board [1892] 1 Q. B. 130.

[214] Grand Tower Co. v. Phillips, 23 Wall. 471; Hamilton v. Moore, 33 U. C. Q. B. 520.

38. Where the stipulated sum is wholly collateral to the object of the contract, and is evidently inserted in terrorem as security for performance, it will be construed to be a penalty.[215]

39. Where the stipulated sum is to be paid on the non-payment of a less amount, or on failure to do something of less value, it will generally be construed to be a penalty.[216]

40. Where the actual damages arising from a breach may be either greatly more or greatly less than the stipulated sum, according to the time of the breach, such sum will usually be regarded as a penalty.[217]

And, generally, where a contract provides for payment in installments, and stipulates that a certain proportion shall be retained from each installment, the whole to be forfeited upon a breach, the sum retained is considered a penalty.[218]

41. Where the damages resulting from a breach of contract cannot be measured by any definite pecuniary standard, as by market value or the like, but are wholly uncertain, the law favors a liquidation of the damages by the parties themselves; and, where they stipulate for a reasonable amount, it will be enforced, unless glaringly disproportionate.[219]

215 Henry v. Davis, 123 Mass. 345; Spear v. Smith, 1 Denio (N. Y.) 464; Henderson v. Cansler, 65 N. C. 542; Brown v. Bellows, 4 Pick. (Mass.) 179; Robeson v. Whitesides, 16 Serg. & R. (Pa.) 320; Burr v. Todd, 41 Pa. St. 206; Merrill v. Merrill, 15 Mass. 488; Burrage v. Crump, 48 N. C. 330.

216 Suth. Dam. § 288; Mayne, Dam. 166; Thompson v. Hudson, L. R. 4 H. L. 1, L. R. 2 Eq. 612; Ashtown's Lessee v. White, 11 Ir. Law R. 400; McNitt v. Clark, 7 Johns. (N. Y.) 465.

217 Davis v. Freeman, 10 Mich. 188; Richardson v. Woehler, 26 Mich. 90.

218 Savannah & C. R. Co. v. Callahan, 56 Ga. 331. But, where the sum was not excessive, it has been allowed as liquidated damages. See Elizabethtown & P. R. Co. v. Geoghegan, 9 Bush (Ky.) 56.

219 Kelso v. Reid, 145 Pa. St. 606, 23 Atl. 323.

Thus, stipulations for liquidated damages have been upheld in actions for breach of marriage promise;[220] breach of contract for the sale of property of uncertain value;[221] breach of agreement not to carry on business.[222]

42. Where damages can be easily and precisely determined by a definite pecuniary standard, as by proof of market values, but the parties have stipulated for a much larger sum, such sum will usually be held to be a penalty; for it is evident that the principle of compensation has been disregarded.[223]

But the parties may stipulate for compensation for losses which the law would regard as too remote or uncertain to be considered; and, if the stipulation is reasonable, it will be enforced as liquidated damages.[224]

[220] Lowe v. Peers, 4 Burrows, 2225.

[221] Gammon v. Howe, 14 Me. 250. In New York it is held that the damages for breach of an ordinary contract for the sale or exchange of lands are not uncertain, and a stipulation for liquidated damages cannot be sustained upon this ground. Noyes v. Phillips, 60 N. Y. 408; Richards v. Edick, 17 Barb. 260; Laurea v. Bernauer, 33 Hun, 307. But if the sum fixed is reasonable in amount, and clearly intended as compensation, it is recoverable as liquidated damages. Slosson v. Beadle, 7 Johns. 72; Hasbrouck v. Tappen, 15 Johns. 200; Knapp v. Maltby, 13 Wend. 587; otherwise not. Dennis v. Cummins, 3 Johns. Cas. 297.

[222] Jaquith v. Hudson, 5 Mich. 123; Tode v. Gross, 127 N. Y. 480, 28 N. E. 469. Delay in the performance of contracts. Fletcher v. Dyche, 2 Term R. 32; Curtis v. Brewer, 17 Pick. (Mass.) 513; Bridges v. Hyatt, 2 Abb. Prac. (N. Y.) 449; O'Donnell v. Rosenberg, 14 Abb. Prac. N. S. (N. Y.) 59; Farnham v. Ross, 2 Hall (N. Y.) 167; Weeks v. Little, 47 N. Y. Super. Ct. 1; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. Law, 132, 26 Atl. 140. Cf. Wilcus v. Kling, 87 Ill. 107; Ward v. Building Co., 125 N. Y. 230, 235, 26 N. E. 256.

[223] Sath. Dam. § 289; Fisher v. Bidwell, 27 Conn. 363; Stewart v. Grier, 7 Houst. 378, 32 Atl. 328.

[224] Jaqua v. Headington, 114 Ind. 309, 16 N. E. 527; Manice v. Brady, 15 Abb. Prac. (N. Y.) 173; Cotheal v. Talmage, 9 N. Y. 551; Knapp v. Maltby, 13 Wend. (N. Y.) 587; Powell v. Burroughs, 54 Pa. St. 329. But if the sum fixed varies materially from a just compensation, or if the intention is doubtful, the sum will be held a penalty. Dennis v. Cummins, 3 Johns. Cas. (N. Y.) 297; Esmond v. Van Benschoten, 12 Barb. (N. Y.) 366. A provision in a lease for $5,000 damages, to cover interruption of earnings and other losses in addition

43. Where a sum is deposited, and the contract declares that it shall be forfeited for nonperformance, if reasonable in amount, it will be enforced as liquidated damages.[225]

44. Where the stipulated sum is to be paid on any breach of a contract containing several stipulations of widely different degrees of importance, it is usually held to be a penalty.[226]

45. A sum stipulated to be paid upon a breach of contract cannot be recovered as liquidated damages for a partial breach, for one sum cannot consistently be compensation alike for either a total or a partial breach;[227] and, if it appears from the language used that the stipulation was meant to be applicable only to a total breach, it will be disregarded in an action for a partial breach.[228]

So, also, a partial breach may justify the other party in treating the contract as at an end. So, the sum named may be recovered; but, if he accepts part performance, it cannot.[229]

to unpaid rent, in case of breach by the lessee, when, on an actual breach, no substantial damage has been suffered, must be held to be a penalty. Gay Mfg. Co. v. Camp, 25 U. S. App. 134, 13 C. C. A. 137, and 65 Fed. 794.

225 Reilly v. Jones, 1 Bing. 302; Hinton v. Sparkes, L. R. 3 C. P. 161; Swift v. Powell, 44 Ga. 123; Perzell v. Shook, 53 N. Y. Super. Ct. (N. Y.) 501; Wallis v. Smith, 21 Ch. Div. 243; Chaude v. Shepard, 122 N. Y. 397, 25 N. E. 358. See In re Dagenham (Thames) Dock Co., 8 Ch. App. 1022.

226 Watts v. Camors, 115 U. S. 360, 6 Sup. Ct. 91; Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053; Bignall v. Gould, 119 U. S. 495, 7 Sup. Ct. 294; Lyman v. Babcock, 40 Wis. 503, 517; Kemble v. Farren, 6 Bing. 141; Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170; Hathaway v. Lynn, 75 Wis. 186, 43 N. W. 956; Trustees of First Orthodox Congregational Church v. Walrath, 27 Mich. 232; Trower v. Elder, 77 Ill. 453; Clement v. Cash, 21 N. Y. 253; Niver v. Rossman, 18 Barb. (N. Y.) 50; Staples v. Parker, 41 Barb. (N. Y.) 648; Lansing v. Dodd, 45 N. J. Law, 525; Chase v. Allen, 13 Gray (Mass.) 42.

227 Sedg. Dam. § 415.

228 Cook v. Finch, 19 Minn. 407 (Gil. 350).

229 Wibaux v. Live-Stock Co., 9 Mont. 154, 165, 22 Pac. 892; Hoagland v. Segur, 38 N. J. Law, 230; Lampman v. Cochran, 16 N. Y. 275, per Shankland, J.; Shiell v. McNitt, 9 Paige (N. Y.) 101; Mundy v. Culver, 18 Barb. (N. Y.)

46. Where the sum stipulated to be paid on the breach of a contract would constitute an evasion of the usury laws, it will be treated as a penalty,[230] if, indeed, it is not absolutely void.[231]

ALTERNATIVE CONTRACTS.

47. The measure of damages for the breach of an alternative contract is compensation for the least beneficial alternative.

An alternative contract is one which may be executed by doing either of several acts, at the election of the party from whom performance is due.[232]

The contract is completely performed when any one of the alternatives is performed, and so, of course, no question of damages for a breach arises. An alternative contract is not a contract for liquidated damages.[233]

To constitute an alternative contract, there must have been an intention to really give the party an option. When this is the case, the damages for a breach are limited to compensation for the least beneficial alternative.[234] Where, however, there is an absolute engagement to do a thing, and, if not, to pay a sum of money, the damages for not doing the thing are the sum of money.[235] In such a case the party has no option,[236] and the agreement is one for liquidated dam-

336; Town of Wheatland v. Taylor, 29 Hun (N. Y.) 70; Chase v. Allen, 13 Gray (Mass.) 42.

230 Clark v. Kay, 26 Ga. 403; Kurtz v. Sponable, 6 Kan. 395; Davis v. Freeman, 10 Mich. 188; State v. Taylor, 10 Ohio, 378; Gray v. Crosby, 18 Johns. (N. Y.) 219, 226. But see Lawrence v. Cowles, 13 Ill. 577. Within the bounds of the legal rate of interest, parties may liquidate damages for nonpayment of money when due. Hackenberry v. Shaw, 11 Ind. 392; Dagget v. Pratt, 15 Mass. 177.

231 This would depend on the language of the statute.

232 Suth. Dam. § 282.

233 Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690.

234 Sedg. Dam. § 421.

235 Deverill v. Burnell, L. R. 8 C. P. 475; Stewart v. Bedell, 79 Pa. St. 336; Crane v. Peer, 43 N. J. Eq. 553, 4 Atl. 72, collecting cases. But see Hahn v. Society, 42 Md. 460.

236 Equity may enforce performance or enjoin a violation. Ayres v. Pease,

ages. Where the contract is to do a certain thing or to pay a certain sum of money, he has usually had his election, and payment of the money may be enforced.[237]

PARTIAL PERFORMANCE—ENTIRE AND DIVISIBLE CONTRACTS.

48. A contract may be divisible,—that is, the promise may be susceptible of more or less complete performance; and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure.[238]

On the other hand, the promise may be indivisible or entire; and if it is so, and is not independent of the promise of the other party, its entire performance is, as a rule, a condition concurrent or precedent to the liability of the other party to perform.[239]

12 Wend. (N. Y.) 393; Phenix Ins. Co. v. Continental Ins. Co., 14 Abb. Prac. (N. S.) 266; Long v. Bowring, 33 Beav. 585; Gray v. Crosby, 18 Johns. (N. Y.) 219; Chilliner v. Chilliner, 2 Ves. Sr. 528; Ingeledew v. Cripps, 2 Ld. Raym. 814; Lampman v. Cochran, 16 N. Y. 275; Ward v. Jewett, 4 Rob. (N. Y.) 714; Robeson v. Whitesides, 16 Serg. & R. (Pa.) 320; National Provincial Bank v. Marshall, 40 Ch. Div. 112.

237 Pearson v. Williams' Adm'rs, 24 Wend. (N. Y.) 244, 26 Wend. (N. Y.) 630; Hodges v. King, 7 Metc. (Mass.) 583; Slosson v. Beadle, 7 Johns. (N. Y.) 72. See, also, Morrell v. Insurance Co., 33 N. Y. 429. This rule is difficult to reconcile with that of the least beneficial alternative. Its practical effect is to make an alternative contract one for liquidated damages, with this difference: that specific performance of a contract can be enforced, though it stipulate for liquidated damages, while, in alternative contracts, only the alternative chosen can be enforced. See Crane v. Peer, 43 N. J. Eq. 553, 558, 4 Atl. 72, and Suth. Dam. § 282. In Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690, it was held that a covenant not to practice medicine in a certain town so long as the plaintiff should remain in practice there, but containing a provision that defendant might resume practice provided he would pay plaintiff a certain sum, did not provide for either a penalty or liquidated damages. The sum named was a price fixed for what the contract permitted him to do if he paid.

238 Ritchie v. Atkinson, 10 East, 295; Simpson v. Crippin, L. R. 8 Q. B. 14; Honck v. Muller, 7 Q. B. Div. 92; Hoare v. Rennie, 5 Hurl. & N. 19; Norris v. Harris, 15 Cal. 226; McGrath v. Cannon, 55 Minn. 457, 57 N. W. 150; Fullmer v. Poust, 155 Pa. St. 275, 26 Atl. 543; note 134, infra.

239 Hartupee v. Crawford, 56 Fed. 61; Simpson v. Crippin, L. R. 8 Q. B. 14.

Having once determined that a promise is divisible, it is a comparatively simple matter to apply the law; but the question of divisibility is difficult, and this difficulty has resulted in a direct conflict in the decisions. The question is one of construction.

Examples of divisible contracts are found in charter parties to load and deliver a complete cargo, and in contracts for the sale of goods in which delivery and acceptance are to take place by installments extending over a considerable period of time. In these contracts it has been laid down, as a general rule, that a breach which only deprives the other party of a part of that to which he was entitled does not discharge him from such performance as may be due from him.[240]

The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an announcement of intention not to perform the contract upon the agreed terms, or, what amounts to the same thing, if the failure to fully perform is deliberate and intentional, and not the result of inadvertence or inability to perform, the rule we have been discussing does not apply. The other party, under these circumstances, may treat the contract as being at an end.[241]

So, also, the general rule applicable to divisible contracts may be contravened by express stipulation. It is always permissible for the

And see Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27; Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736.

[240] Ritchie v. Atkinson, 10 East, 295; Simpson v. Crippin, L. R. 8 Q. B. 14; Mersey Steel Co. v. Naylor, 9 Q. B. Div. 648, 9 App. Cas. 434; Cahen v. Platt, 69 N. Y. 348; Trotter v. Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Gerli v. Manufacturing Co., 57 N. J. Law, 434, 31 Atl. 401; Bollman v. Burt, 61 Md. 415.

Directly opposed to Simpson v. Crippin, supra, is another case, decided earlier. Hoare v. Rennie, 5 Hurl. & N. 19. See, also, Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639; King Phillip Mills v. Slater, 12 R. I. 82; Catlin v. Tobias, 26 N. Y. 217; Hill v. Blake, 97 N. Y. 216; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Bradley v. King, 44 Ill. 339.

[241] Withers v. Reynolds, 2 Barn. & Adol. 882; Catlin v. Tobias, 26 N. Y. 217; Stephenson v. Cady, 117 Mass. 6; Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27; Gerli v. Manufacturing Co., 57 N. J. Law, 434, 31 Atl. 401; Rugg v. Moore, 110 Pa. St. 236, 1 Atl. 320; Wharton v. Winch, 110 N. Y. 287, 35 N. E. 589. So, also, if nonpayment of one installment of goods be accompanied by such circumstances as to give the seller reasonable grounds for thinking that the buyer will not be able to pay for the rest, he may take advantage of this one omission to repudiate the contract. Bloomer v. Bernstein, L. R. 9 C. P. 588.

parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfillment by the other party of his promise. In such a case nothing can be obtained, either upon the contract or upon a quantum meruit, for what has been performed. All must have been performed.[242]

ENTIRETY OF DEMAND.

49. All the damage resulting from a single cause of action must be recovered in a single action. The demand cannot be split, and separate actions maintained for the separate items of damage.

A single cause of action gives rise to but a single demand for damages. Plaintiff must demand the full amount of damages to which he is entitled in one suit, and a judgment therein is a bar to any subsequent suit on the same cause of action, even though losses arise subsequently, which could not have been foreseen or proved at the time of the former suit. When an award of damages has been once made for a wrong, that wrong is redressed. Losses subsequently arising, without a renewal or continuance of the conduct, are damnum absque injuria.[243]

TIME TO WHICH COMPENSATION MAY BE RECOVERED—PAST AND FUTURE LOSSES.

50. The damages recoverable in an action include compensation, not only for losses already sustained at the time of beginning the action, but also for losses

242 Cutter v. Powell, 6 Term. R. 320, 2 Smith, Lead. Cas. Eq. 1, and notes; Leonard v. Dyer, 26 Conn. 172; Martin v. Schoenberger, 8 Watts & S. (Pa.) 367; Hartley v. Decker, 89 Pa. St. 470.

243 Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502; Hill v. Joy, 149 Pa. St. 243, 24 Atl. 293; Howell v. Goodrich, 69 Ill. 556; Pierro v. Railway Co., 39 Minn. 451, 40 N. W. 520; Winslow v. Stokes, 48 N. C. 285; Potter v. Beal, 1 Ld. Raym. 339, 692, 1 Salk. 11. Compare, for illustrations of separate causes of action, Secor v. Sturgis, 16 N. Y. 548; Nathans v. Hoper, 77 N. Y. 420.

As to contracts for sale and delivery of goods in installments, see Nichols v. Steel Co., 137 N. Y. 471, 33 N. E. 561; Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589.

which have arisen subsequently, and for prospective losses, if such losses are the certain and proximate results of the cause of action, and do not themselves constitute a new cause of action.

If, pending a fixed term of employment, the employé is wrongfully discharged, he may bring his action for damages at once, without waiting for the expiration of the term, and in some states may recover damages for the entire damages suffered, based upon both past and prospective loss of wages,[244] while in others he can only recover for loss of wages up to the time of the trial.[245]

If, at the time of the discharge, his wages are then paid in full, only one action will lie to recover damages, based on future wages, even though they were by the contract made payable in installments.[246]

The employé discharged during the term of employment may either (1) sue during the term, for damages; or (2) treat the contract as rescinded, and sue on the quantum meruit for the work actually performed; or (3) wait until the expiration of the term, and claim as damages the wages agreed on, less what he has or could have earned after his discharge, and pending the term.[247]

"Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery, in an action, of compensation for the damage to the goods, is no bar to an action subsequently commenced for the injury to the person." [248]

[244] Cutter v. Gillette, 163 Mass. 95, 39 N. E. 1010; Remelee v. Hall, 31 Vt. 582; Sutherland v. Wyer, 67 Me. 64; King v. Steiren, 44 Pa. St. 99.

[245] Bassett v. French, 10 Misc. Rep. 675, 31 N. Y. Supp. 667; Zender v. Seliger-Toothill Co., 17 Misc. Rep. 126, 39 N. Y. Supp. 346; Jordan v. Patterson, 67 Conn. 480, 35 Atl. 521; Fowler v. Armour, 24 Ala. 194; Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. 975; Gordon v. Brewster, 7 Wis. 355. And see the dictum in Everson v. Powers, 89 N. Y. 527.

[246] James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246. Cf. Mount Hope Cemetery Ass'n v. Weidenmann, 139 Ill. 67, 28 N. E. 834.

[247] Colburn v. Woodworth, 31 Barb. (N. Y.) 381, 383.

[248] Brunsden v. Humphrey, 14 Q. B. Div. 141. In the recent case of Reilly v. Paving Co., 31 App. Div. 302, 52 N. Y. Supp. 817, the contrary rule was adopted; but, as pointed out in 28 Civ. Proc. R. 63, note, the English rule had previously been adopted and followed in the case of Mulligan v. Ice Co., re-

Repetition of Wrong.

Where an action has been brought for a wrong, and the wrong is subsequently repeated, a new action must be brought to recover the damages caused thereby. Such repetition constitutes a new cause of action, and compensation for the loss as caused by one wrong cannot be recovered in an action brought to recover the damages caused by another and a distinct wrong.[249]

Continuing Torts and Breaches of Contract.

A single wrongful act, however, may be of such a nature as to give rise to a continuous succession of torts or breaches of contracts. "In the case of a personal injury, the act complained of is complete and ended before the date of the writ. It is the damage only that continues and is recoverable, because it is traced back to the act; while in the case of a nuisance it is the act which continues, or, rather, is renewed day by day." [250]

A continuing tort or breach of contract is, in effect, simply the repetition of the same wrong an infinite number of times.[251]

As a general rule, where a continuous duty is imposed by contract, each moment its performance is neglected constitutes a separate breach, for which an action will lie. This has been held in actions for the breach of contracts for support; [252] contracts not to engage in business; [253] and contracts to convey land.[254]

Where permanent structures have been erected which result in injury to land, there is much confusion and conflict in the authorities as to whether all the damages, past and prospective, may be recovered in a single suit, or whether successive actions must be brought to

ported in the note referred to, which was affirmed on appeal in 109 N. Y. 657, 16 N. E. 684.

249 In an action for slander, evidence of words spoken after commencement of suit are inadmissible. Root v. Lowndes, 6 Hill (N. Y.) 518; Keenholts v. Becker, 3 Denio (N. Y.) 346.

250 Rockland Water Co. v. Tillson, 69 Me. 255, 268.

251 Beach v. Crain, 2 N. Y. 86.

252 Fay v. Guynon, 131 Mass. 31.

253 Hunt v. Tibbetts, 70 Me. 221.

254 Warner v. Bacon, 8 Gray (Mass.) 397. As to nuisances, see, also, Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 505; Markley v. Duncan, 1 Harp. (S. C.) 276; Cobb v. Smith, 38 Wis. 21; Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629. See, also, Pearson v. Carr, 97 N. C. 194, 1 S. E. 916; Dailey v. Canal Co., 24 N. C. 222.

recover compensation for the damage as it arises. The better view is that, if the structure is expressly authorized, there is no liability for the damage necessarily resulting. If it is authorized on condition that compensation be made for the resulting damage (a condition commonly imposed by the authorizing act or the constitution), and it is permanent in its nature, its continuance may reasonably be presumed, and full compensation for both past and prospective losses may be recovered in one action.[255]

Where the erection of the structure was a forbidden act,—that is, where it was a trespass, and the act of trespass is completed once for all,—the entire damage, past and prospective, must be recovered in one suit.[256]

CARRIERS OF GOODS—DAMAGES FOR REFUSAL TO TRANSPORT.

51. The measure of damages for refusal to receive and transport goods is the difference between the value of the goods at the time and place of refusal, and what would have been their value at the time and place where they should have been delivered, with an allowance for what the freight charges would have been.[257]

52. If other reasonable mode of conveyance can be procured, the measure of damages is the increased cost of transportation.[258]

[255] Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush (Ky.) 667. But see Uline v. Railroad Co., 101 N. Y. 98, 4 N. E. 536; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282; Pond v. Railway Co., 112 N. Y. 186, 19 N. E. 487. Cf. Cadle v. Railroad Co., 44 Iowa, 11; Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229; City of Eufaula v. Simmons, 86 Ala. 515, 6 South. 47; Reed v. State, 108 N. Y. 407, 15 N. E. 735; Duryea v. Mayor, etc., 26 Hun (N. Y.) 120. See, also, City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821.

[256] See Adams v. Railroad Co., 18 Minn. 260 (Gil. 236).

[257] Pennsylvania R. Co. v. Titusville & P. Plank R. Co., 71 Pa. St. 350; Galena & C. U. R. Co. v. Rae, 18 Ill. 488; Harvey v. Railroad Co., 124 Mass. 421; Bridgman v. The Emily, 18 Iowa, 509; Ward's Cent. & Pac. Lake Co. v. Elkins, 34 Mich. 439; O'Conner v. Forster, 10 Watts (Pa.) 418; Bracket v. McNair, 14 Johns. (N. Y.) 170.

[258] O'Conner v. Forster, 10 Watts (Pa.) 418; Ogden v. Marshall, 8 N. Y.

SAME—DAMAGES FOR LOSS OR NONDELIVERY.

53. The measure of damages for total loss or nondelivery is the value of the goods at the time and place they should have been delivered.[259]

Obviously, the natural and probable consequences of a failure to deliver the goods at their destination is a loss to the owner, amounting to the value of the goods at that point, and such value is therefore the measure of damages.

SAME—DAMAGES FOR INJURY IN TRANSIT.

54. The measure of damages for injury to goods in transit is the difference between the value of the goods at the time and place of delivery in their damaged condition, and what their value would have been had they been delivered in good order.[260]

340; Grund v. Pendergast, 58 Barb. (N. Y.) 216; Higginson v. Weld, 14 Gray (Mass.) 165; Crouch v. Railway Co., 11 Exch. 742. See, also, Nelson v. Elevating Co., 55 N. Y. 480. Cf. Bohn v. Cleaver, 25 La. Ann. 419. Plaintiff cannot recover for damages caused by his failure to properly care for the goods while they were in store, awaiting transportation, and before they had been accepted by the carrier. Hamilton v. McPherson, 28 N. Y. 72. One with whom a carrier has made a contract for transporting his goods may, in case of breach, elect to sue for damages for failure to perform the public duties of a carrier, or he may waive the tort, and sue for breach of the special contract. Hutch. Carr. §§ 737–748; Denman v. Railroad Co., 52 Neb. 140, 71 N. W. 967.

259 Rodocanachi v. Milburn, 18 Q. B. Div. 67. Cf. Magnin v. Dinsmore, 56 N. Y. 168, 62 N. Y. 35, and 70 N. Y. 410. See, also, Faulkner v. Hart, 82 N. Y. 413; Spring v. Haskell, 4 Allen (Mass.) 112; Sturgess v. Bissell, 46 N. Y. 462. But see The Telegraph, 14 Wall. 258; Krohn v. Oechs, 48 Barb. (N. Y.) 127.

260 Notara v. Henderson, L. R. 7 Q. B. 225; Chicago, B. & Q. R. Co. v. Hale, 83 Ill. 360; Brown v. Steamship Co., 147 Mass. 58, 16 N. E. 717; Louisville & N. R. Co. v. Mason, 11 Lea (Tenn.) 116; Magdeburg General Ins. Co. v. Paulson, 29 Fed. 530; The Mangalore, 23 Fed. 463. See Morrison v. Steamship Co., 36 Fed. 569, 571; The Compta, 5 Sawy. 137, Fed. Cas. No. 3,070; Bowman v. Teall, 23 Wend. (N. Y.) 306; Hackett v. Railroad Co., 35 N. H. 390; Western Mfg. Co. v. The Guiding Star, 37 Fed. 641.

SAME—DAMAGES FOR DELAY.

55. The measure of damages for delay is the difference between the value of the goods at the time and place fixed for delivery, and their value at the time and place of actual delivery.[261]

56. Where the value of the goods is not diminished by the delay, the measure of damages is the value of their use during the period of delay.[262]

SAME—CONSEQUENTIAL DAMAGES.

57. Consequential damages arising from a carrier's default may be recovered provided they are natural and probable consequences of the breach of duty.[263]

DAMAGES FOR INJURIES TO PASSENGER.

58. "The obligation or responsibilities of public carriers do not arise altogether or mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty."

261 Hudson v. Railway Co., 92 Iowa, 231, 60 N. W. 608; Wilson v. Railway Co., 9 C. B. (N. S.) 632; Cutting v. Railroad Co., 13 Allen (Mass.) 381; The Caledonia, 157 U. S. 124, 139, 15 Sup. Ct. 537; Weston v. Railway Co., 54 Me. 376; Sherman v. Railroad Co., 64 N. Y. 254; Ward v. Railroad Co., 47 N. Y. 29; Scott v. Steamship Co., 106 Mass. 468.

262 United States Exp. Co. v. Haines, 67 Ill. 137. Priestly v. Railroad Co., 26 Ill. 206.

263 Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Hadley v. Baxendale, 9 Exch. 341; Gee v. Railway Co., 6 Hurl. & N. 211. As to sufficiency of notice of special circumstances, see Horne v. Railway Co., L. R. 8 C. P. 131, affirming L. R. 7 C. P. 583. See, also, Cobb v. Railroad Co., 38 Iowa, 601, 630; Harvey v. Railroad Co., 124 Mass. 421; Pennsylvania R. Co. v. Titusville & P. Plank R. Co., 71 Pa. St. 350; Hales v. Railway Co., 4 Best & S. 66; Farwell v. Davis, 66 Barb. (N. Y.) 73; Mather v. Express Co., 138 Mass. 55; Black v. Baxendale, 1 Exch. 410; Favor v. Philbrick, 5 N. H. 358.

Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and therefore actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same.[264]

The consequences in this class of cases fall directly upon the person, and in most cases are not distinguishable from those of a tort. In either tort or contract the damages are measured by the probable or natural consequences of the wrong, but the natural and probable consequences of a breach of contract must be determined with regard to all the facts known to the parties at the time the contract was made.[265]

SAME—EXEMPLARY DAMAGES.

59. Where the action is upon the contract, exemplary damages cannot be recovered;[266] but where the action is for a tort, founded on a breach of the public duty, exemplary damages may be given in proper cases.[267]

SAME—PERSONAL INJURY.

60. In actions for personal injury to a passenger, the measure of damages is usually the same as in ordinary cases of personal injury.[268]

264 3 Suth. Dam. 934.

265 Cf. Hobbs v. Railway Co., 10 Q. B. 111, with McMahon v. Field, 7 Q. B. Div. 591; Williams v. Vanderbilt, 28 N. Y. 217; Alabama G. S. R. Co. v. Heddleston, 82 Ala. 218, 3 South. 53; Baltimore C. P. Ry. Co. v. Kemp, 61 Md. 74, 619; Murdock v. Railroad Co., 133 Mass. 15; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474; 2 Sedg. Dam. § 868; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911.

266 New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Hamlin v. Railway Co., 1 Hurl. & N. 408, 411.

267 Heirn v. McCaughan, 32 Miss. 17; Thomp. Carr. p. 546, § 5; Id. p. 573, § 27.

268 Sedg. Dam. § 860.

SAME—FAILURE TO CARRY PASSENGER—DELAY.

61. Damages for failure to transport a passenger include compensation for the increase of cost of carriage by another conveyance, the loss of time, and other ordinary expenses of delay.[269]

SAME—FAILURE TO CARRY TO DESTINATION—WRONGFUL EJECTION.

62. Where a carrier fails to carry a passenger to his destination, and sets him down at some intermediate point, compensation may be recovered for all the expenses of delay,[270] including loss of time,[271] and cost of a reasonable conveyance to his destination.[272]

He may also recover compensation for the indignity of the expulsion from a train, and, if there are aggravating circumstances, he may recover exemplary damages.[273]

Where, by the fault of the carrier's agents, and without the passenger's fault, the ticket of the passenger is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him.[274]

[269] Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Eddy v. Harris, 78 Tex. 661, 15 S. W. 107; Porter v. The New England, 17 Mo. 290; The Zenobia, 1 Abb. Adm. 80, Fed. Cas. No. 18,209; Williams v. Vanderbilt, 28 N. Y. 217.

[270] Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; carrying beyond, Trigg v. Railway Co., 74 Mo. 147.

[271] Hamilton v. Railroad Co., 53 N. Y. 25.

[272] Indianapolis, B. & W. Ry. Co. v. Birney, 71 Ill. 391; Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Francis v. Transfer Co., 5 Mo. App. 7; Hamilton v. Railroad Co., 53 N. Y. 25. Cf. Miller v. King, 88 Hun, 181, 34 N. Y. Supp. 425.

[273] Hanson v. Railway Co., 62 Me. 84; Yates v. Railroad Co., 67 N. Y. 100. But not in an action for breach of the contract of carriage. Miller v. King, 88 Hun, 181, 34 N. Y. Supp. 425.

[274] Lake Erie & W. R. Co. v. Fix, 88 Ind. 381; Murdock v. Railroad Co., 137 Mass. 293; Yorton v. Railway Co., 54 Wis. 234, 11 N. W. 482; Id., 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401; Bradshaw v. Railroad Co., 135 Mass. 407.

63. BREACH OF CONTRACT FOR SALE OF GOODS.[275]

64. BREACH OF WARRANTY.[276]

CONTRACTS TO SELL REAL PROPERTY—BREACH BY VENDOR.

65. The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest.

EXCEPTION—In some states the vendee can recover, in addition to purchase money advanced, with interest, only nominal damages for a breach of the contract, due to failure of the vendor's title, provided the vendor acted in good faith. In Pennsylvania the good faith of the vendor is immaterial.

The Better Rule.

In most American states a vendee can recover substantial damages for his vendor's breach of contract to convey real property;[277] that is, the vendee is given the benefit of his bargain. This is of particular importance when the property has risen in value after the contract of sale was entered into.[278]

The value of the land in estimating the damages is taken at the time it should have been conveyed under the contract.[279]

[275] See Tiff. Sales, §§ 125–128.

[276] See Tiff. Sales, §§ 131–133.

[277] Hopkins v. Lee, 6 Wheat. 109; Plummer v. Rigdon, 78 Ill. 222; Loomis v. Wadhams, 8 Gray (Mass.) 557; Skaaraas v. Finnegan, 31 Minn. 48, 16 N. W. 456; Case v. Wolcott, 33 Ind. 5; Robinson v. Heard, 15 Me. 296; Irwin v. Askew, 74 Ga. 581; Barbour v. Nichols, 3 R. I. 187; Russ v. Telfener, 57 Fed. 973.

[278] Hopkins v. Lee, 6 Wheat. 109.

[279] Allen v. Atkinson, 21 Mich. 351; Combs v. Scott, 76 Wis. 662, 45 N. W. 532; Plummer v. Rigdon, 78 Ill. 222; Whiteside v. Jennings, 19 Ala. 784. For breach of a contract to give a lease, the measure of damages is the value of

Nominal Damages Only—The English Rule.

In England an anomalous rule of damages has been adopted in actions against vendors for breach of contracts to sell, to the effect that the vendee cannot recover for the loss of his bargain, whether the vendor has been guilty of fraud or not. If there has been fraud, the vendee can only recover nominal damages in an action for breach of contract; and, to recover substantial damages, he must bring an action for deceit.[280]

The uncertainty of English titles is assigned as the reason for the rule, but such considerations have no place under our registry laws. The English rule has been followed, however, in some states. In Pennsylvania this is carried so far that only nominal damages are recoverable, even in cases where the vendor knew that his title was not good.[281]

But in the other states which follow the English rule it is necessary that the vendor act in good faith, or he is held liable for substantial damages.[282]

The New York rule is that "the vendee in a contract for the sale of land, in the absence of fraud or bad faith, is not entitled to recover, aside from the purchase money paid, and expenses of examination of the title, other than nominal damages as for breach on the part of the vendor arising from his inability to convey a good or marketable title." [283]

the lease; that is, the difference between the value of the premises for the term and the rent which was to be paid. Loyd v. Capps (Tex. Civ. App.) 29 S. W. 505; Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Trull v. Granger, 8 N. Y. 115. Expenses necessarily caused by the lessor's breach may be added. Yeager v. Weaver, 64 Pa. St. 425. But see, for expenses not recoverable, Eddy v. Coffin, 149 Mass. 463, 21 N. E. 870.

[280] The leading cases establishing the rule in that country are Flureau v. Thornhill, 2 W. Bl. 1078, and Bain v. Fothergill, L. R. 7 H. L. 158; Robinson v. Harman, 1 Exch. 850.

[281] Burk v. Serrill, 80 Pa. St. 413; McCafferty v. Griswold, 99 Pa. St. 276; McNair v. Compton, 35 Pa. St. 23; Gerbert v. Trustees, 59 N. J. Law, 160, 35 Atl. 1121. But see Hennershotz v. Gallagher, 124 Pa. St. 1, 16 Atl. 518.

[282] Pumpelly v. Phelps, 40 N. Y. 59; Conger v. Weaver, 20 N. Y. 140; Margraf v. Muir, 57 N. Y. 155; Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115. See Rineer v. Collins, 156 Pa. St. 342, 27 Atl. 28; Heimburg v. Ismay, 35 N. Y. Super. Ct. 35.

[283] Walton v. Meeks, 120 N. Y. 79, 23 N. E. 1115; Northridge v. Moore, 118 N. Y. 419, 23 N. E. 517. See Pumpelly v. Phelps, 40 N. Y. 66.

Many states state the rule in such cases to be that, if the vendor fails to convey because he has not a good title, he is always liable to the vendee in substantial damages for the loss of the bargain. This rule is not to be varied because the vendor acted in good faith.[284]

SAME—BREACH BY VENDEE.

66. The measure of damages for the breach by a vendee of his contract to purchase real property is the difference between the contract price and the value of the land.[285]

In some cases the vendor has been permitted to recover the contract price;[286] but this gives him more than compensation, since he still has the land. Where the vendee has been in possession, interest on the whole amount of purchase money unpaid has been allowed as additional damages.[287]

BREACH OF COVENANTS—SEISIN AND RIGHT TO CONVEY.

67. The measure of damages for breach of a covenant of seisin or right to convey is the purchase price paid, with interest, and costs of the ejectment suit.[288]

If the eviction is only partial, a proportionate amount of the consideration paid is recovered.[289]

284 Doherty v. Dolan, 65 Me. 87; Hartzell v. Crumb, 90 Mo. 629, 3 S. W. 59; Hopkins v. Lee, 6 Wheat. 109; Plummer v. Rigdon, 78 Ill. 222.

285 Allen v. Mohn, 86 Mich. 328, 49 N. W. 52; Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25; Ellet v. Paxson, 2 Watts & S. (Pa.) 418; Griswold v. Sabin, 51 N. H. 167; Porter v. Travis, 40 Ind. 556; Anderson v. Truitt, 53 Mo. App. 590. But see McGuinness v. Whalen, 16 R. I. 558, 18 Atl. 158.

286 Richards v. Edick, 17 Barb. (N. Y.) 260; Goodpaster v. Porter, 11 Iowa, 161; Inhabitants of Alna v. Plummer, 4 Me. 258.

287 Stevenson v. Maxwell, 2 N. Y. 408.

288 Weber v. Anderson, 73 Ill. 439; Bingham v. Weiderwax, 1 N. Y. 509; Pitcher v. Livingston, 4 Johns. (N. Y.) 1; Nichols v. Walter, 8 Mass. 243; Bickford v. Page, 2 Mass. 455; Rickert v. Snyder, 9 Wend. (N. Y.) 416. But see Smith v. Strong, 14 Pick. (Mass.) 128, a case where the consideration paid could not be proved.

289 Tone v. Wilson, 81 Ill. 529; Guthrie v. Pugsley, 12 Johns. (N. Y.) 126;

If there has been no eviction, only nominal damages can be recovered.[290]

SAME—WARRANTY AND QUIET ENJOYMENT.

68. In nearly all the states the damages which are given on covenants of warranty and quiet enjoyment are based on the old feudal doctrine of warranty, and the value of the land at the time of the covenant is made the measure. But the value of the land is taken at the price which was paid for it. Though this may be contrary to all the fundamental principles of damages, it is certainly the rule in the great majority of states.[291]

According to some authorities, the rule is that, "if the eviction has been from all the lands conveyed, the recovery has been limited to the purchase price paid and interest for the time of dispossession; if from a definite part capable of definite ascertainment and boundary, then to such part of the original price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole premises";[292] and that, "without the aid of fraud or bad faith, nothing can be recovered for improvements made or for the increased value of the premises produced by them,"[293] though the value of such improvements is deducted from the mesne profits which are recovered by the real owner.[294]

Morris v. Phelps, 5 Johns. (N. Y.) 49; Cornell v. Jackson, 3 Cush. (Mass.) 506; Hartford & Salisbury Ore Co. v. Miller, 41 Conn. 112.

[290] Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Cockrell v. Proctor, 65 Mo. 41.

[291] Staats v. Ten Eyck's Ex'rs, 3 Caines (N. Y.) 111; Harding v. Larkin, 41 Ill. 413; Devine v. Lewis, 38 Minn. 24, 35 N. W. 711; Brandt v. Foster, 5 Iowa, 287. But see Brooks v. Black, 68 Miss. 161, 8 South. 332.

[292] See Hymes v. Esty, 133 N. Y. 342, 347, 31 N. E. 105.

[293] See Walton v. Mecks, 120 N. Y. 83, 23 N. E. 1115; Pitcher v. Livingston, 4 Johns. (N. Y.) 1; Hunt v. Raplee, 44 Hun (N. Y.) 149; Ela v. Card, 2 N. H. 175; Sedg. Dam. § 951; Taylor v. Wallace, 20 Colo. 211, 37 Pac. 963; Wetzel v. Richereek, 53 Ohio St. 62, 40 N. E. 1007; Copeland v. McAdory, 100 Ala. 553, 560, 13 South. 545; Furnas v. Durgin, 119 Mass. 500.

[294] Green v. Biddle, 8 Wheat. 1; Woodhull v. Rosenthal, 61 N. Y. 396; Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502; Stark v. Starr, Fed. Cas. No. 13,307.

EXCEPTION—In a few states the measure of damages for breach of these covenants is the value of the land at the time of eviction,[295] including improvements.[296]

SAME—AGAINST INCUMBRANCES.

69. The measure of damages for breach of a covenant against incumbrances is:

(a) For a permanent incumbrance, the diminution in the value of the premises due to the incumbrance,—not exceeding, in most states, the consideration paid; in others, not exceeding the value of the land.[297]

(b) For an incumbrance which causes a total eviction, the consideration, with interest and costs, in most states;[298] or the amount necessarily paid to avoid eviction, not exceeding the consideration;[299] or the value of the land, with interest in others;[300] and, for a partial eviction, a proportionate amount.[301]

Removable Incumbrances.

Where incumbrances exist, such as mortgages, which can be removed by the payment of money, the grantee, if no fraud intervenes,

295 Norton v. Babcock, 2 Mete. (Mass.) 510; Hardy v. Nelson, 27 Me. 525; Keeler v. Wood, 30 Vt. 242; Sterling v. Peet, 14 Conn. 245.

296 Coleman v. Ballard's Heirs, 13 La. Ann. 512; Bunny v. Hopkinson, 27 Beav. 565.

297 Bronson v. Coffin, 108 Mass. 175; Harlow v. Thomas, 15 Pick. (Mass.) 66; Grant v. Tallman, 20 N. Y. 191; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; Kellogg v. Malin, 62 Mo. 429; Mitchell v. Stanley, 44 Conn. 312; Clark v. Ziegler, 79 Ala. 346; Koestenbader v. Pierce, 41 Iowa, 204.

298 Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Grant v. Tallman, 20 N. Y. 191; Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Stewart v. Drake, 9 N. J. Law, 139.

299 Dillahunty v. Railway Co., 59 Ark. 629, 27 S. W. 1002, and 28 S. W. 657.

300 Barrett v. Porter, 14 Mass. 143; Horsford v. Wright, Kirby (Conn.) 3; Rickert v. Snyder, 9 Wend. (N. Y.) 416; Terry's Ex'r v. Drabenstadt, 68 Pa. St. 400. But see Harrington v. Murphy, 109 Mass. 299.

301 Harlow v. Thomas, 15 Pick. (Mass.) 66; Alexander v. Bridgford, 59 Ark. 195, 27 S. W. 69.

and no attempt has been made to enforce the incumbrance, can recover nominal damages only, unless he shall have paid the amount;[302] but this must not exceed the price or value of the land, as the case may be.[303]

The covenantee must not pay more than is necessary in removing the incumbrance.[304]

SAME—COVENANTS IN LEASES.

70. When any of the foregoing covenants occur in leases, the same rules generally govern the damages for their breach, as when they are found in deeds.[305]

Anciently, the rule was that, where the lessor was sued for a breach of a covenant to give possession, the lessee could, ordinarily, recover only nominal damages and incidental expenses, but nothing for the value of the lease. But this rule was inapplicable where, when the lessor covenanted to give possession, he must be deemed to have known that he had no authority to do so, and the lessor would then be held liable for the loss of the bargain; and the damages in such cases are now usually measured by the difference between the rent reserved and the actual rental value of the premises for the stipulated term. And other damages may also be recovered, provided they are proximate and certain, and were fairly within the contemplation of the parties when the lease was made, or might have been foreseen as a consequence of a breach of its covenants.[306]

The other covenants usually inserted in leases are mere contracts,

[302] Delavergne v. Norris, 7 Johns. (N. Y.) 358; Grant v. Tallman, 20 N. Y. 191; McGuckin v. Milbank, 83 Hun, 473, 31 N. Y. Supp. 1049, affirmed 152 N. Y. 297, 46 N. E. 490; Prescott v. Trueman, 4 Mass. 627; Winslow v. McCall, 32 Barb. (N. Y.) 241; Hall v. Dean, 13 Johns. (N. Y.) 105.

[303] Johnson v. Collins, 116 Mass. 392; Grant v. Tallman, 20 N. Y. 191; Bailey v. Scott, 13 Wis. 618.

[304] Bradshaw v. Crosby, 151 Mass. 237, 24 N. E. 47; Coburn v. Litchfield, 132 Mass. 449. For breach of covenants to remove incumbrances, see Somers v. Wright, 115 Mass. 292.

[305] Dobbins v. Duquid, 65 Ill. 464; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830; Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; Wetzell v. Richereek, 53 Ohio St. 62, 40 N. E. 1004.

[306] Friedland v. Myers, 139 N. Y. 436, 34 N. E. 1055.

for the breach of which the principles of damages have already been discussed.[307]

DAMAGES FOR DEATH BY WRONGFUL ACT.

71. At common law no civil action could be maintained for wrongfully causing the death of a human being.[308]

The common-law rule has been unanimously accepted by the courts of the various states and of the United States.[309]

None of the reasons assigned for the rule has been generally accepted as satisfactory, and it rests upon adjudication.[310]

But, almost universally, direct legislation has practically abrogated the rule, by creating a new cause of action, in favor of specified relatives of the deceased who have suffered pecuniary loss, as in the case of Lord Campbell's act, passed in 1846, and similar statutes in most of the states.[311]

Many statutes provide that the amount that may be recovered as damages shall not exceed a certain sum. This sum is limited to $5,000 in Colorado, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Oregon, Wisconsin, and Wyoming; to $7,000 in New Hampshire; to $10,000 in the District of Columbia, Indiana,

307 See Beach v. Crain, 2 N. Y. 86; Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N. Y. 34, 39 N. E. 7; United States Trust Co. v. O'Brien, 143 N. Y. 284, 38 N. E. 266; Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852; Trinity Church v. Higgins, 48 N. Y. 532; Penley v. Watts, 7 Mees. & W. 601. See, also, Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059; Eastman v. City of New York, 152 N. Y. 468, 46 N. E. 841.

308 Higgins v. Butcher, 1 Yel. 89; Baker v. Bolton, 1 Camp. 493; Osborn v. Gillett, L. R. 8 Exch. 88.

309 Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Green v. Railroad Co., 28 Barb. (N. Y.) 9; Insurance Co. v. Brame, 95 U. S. 754.

310 Osborn v. Gillett, L. R. 8 Exch. 88; Hyatt v. Adams, 16 Mich. 180; Green v. Railroad Co., 41 N. Y. 294; Pol. Torts, 53.

311 Tiff. Death Wrong. Act, p. xvii.; Seward v. The Vera Cruz, 10 App. Cas. 59; Whitford v. Railroad Co., 23 N. Y. 465; Littlewood v. Mayor, etc., 89 N. Y. 24; Hulbert v. City of Topeka, 34 Fed. 519.

Kansas, Ohio, Oklahoma, Utah, Virginia, and West Virginia; and to $20,000 in Montana. With these exceptions, the statutes impose no limit, and in New York the constitution forbids the creation of any limit.[312]

The New York act provides that the amount recovered shall draw interest from the death, which interest shall be added to the verdict, and inserted in the entry of judgment. This provision is not unconstitutional.[313]

The rate of interest is governed by the statute regulating interest in force at the time of the verdict.[314]

The interest is to be added and inserted by the clerk.[315]

Remission of Damages.

Where the verdict is excessive, the plaintiff may frequently cure the error by remitting the excess. Where an item of damage has been erroneously included in the estimate by the jury, the error may be cured by remitting the amount allowed for such item, provided it can be definitely ascertained;[316] otherwise, not.[317]

In the case of nonpecuniary injuries, where the verdict of the jury is final, unless it shows that the jury were influenced by partiality, prejudice, or passion, the plaintiff has been permitted to remit enough to prevent the verdict from being excessive. It is a common practice for both trial and appellate courts to indicate the amount by which

312 Code Civ. Proc. § 1904.

313 Cornwall v. Mills, 44 N. Y. Super. Ct. 45.

314 Salter v. Railroad Co., 86 N. Y. 401; Id., 23 Hun (N. Y.) 533, overruling Erwin v. Steamboat Co., 23 Hun (N. Y.) 578.

315 See Manning v. Iron Co., 91 N. Y. 665, reversing 27 Hun (N. Y.) 219. As to the measure of damages, see, also, Blake v. Railway Co., 18 Q. B. 93; Illinois Cent. R. Co. v. Barron, 5 Wall. 95; Oldfield v. Railroad Co., 14 N. Y. 310; Murphy v. Railroad Co., 88 N. Y. 445; Tilley v. Railroad Co., 24 N. Y. 471, 29 N. Y. 252; Houghkirk v. Canal Co., 92 N. Y. 219; Pennsylvania Co. v. Lilly, 73 Ind. 252; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago & N. W. R. Co. v. Whitton's Adm'r, 13 Wall. 270; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. 108; Terry v. Jewett, 78 N. Y. 338; Ihl v. Railway Co., 47 N. Y. 317.

316 Toledo, W. & W. Ry. Co. v. Beals, 50 Ill. 150; Evertsen v. Sawyer, 2 Wend. (N. Y.) 507; Lambert v. Craig, 12 Pick. (Mass.) 199; King v. Howard, 1 Cush. (Mass.) 137; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696.

317 Pavey v. Insurance Co., 56 Wis. 221, 13 N. W. 925.

they deem the verdict excessive, and require the plaintiff to remit it, as a condition of refusing a new trial.[318]

It is a grave question whether this practice does not deprive the parties of the right to trial by jury, and it would seem to be an invasion of the province of the jury;[319] but the practice is supported by the weight of authority.[320]

[318] Upham v. Dickinson, 50 Ill. 97; Hegeman v. Railroad Corp., 13 N. Y. 9; Diblin v. Murphy, 3 Sandf. (N. Y.) 19; Whitehead v. Kennedy, 69 N. Y. 462, 470.

[319] See dissenting opinions in Burdict v. Railway Co., 123 Mo. 221, 27 S. W. 453.

[320] Baker v. City of Madison, 62 Wis. 137, 22 N. W. 141, 583; Town of Union v. Durkes, 38 N. J. Law, 21; Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590; Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.