THE LAWYERS REPORTS ANNOTATED

BOOK LV.

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P. FARNHAM, EDITORS.

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LAWYERS' REPORTS

ANNOTATED.

MASSACHUSETTS SUPREME JUDICIAL COURT.

William M. MORGAN, Trustee, etc., of Michael J. Dillon, Bankrupt, *Appt.*,
v.
Marcus M. WORDELL.

(178 Mass. 350.)

1. **A bankrupt's debtor, who in the relation of a surety has paid claims** against the bankrupt which have been disallowed in the bankruptcy proceedings because the creditor had accepted a preference contrary to § 57*g* of the bankruptcy act, cannot, on the theory of subrogation, set them off under § 68*b* of that act, allowing set-off only of claims provable against the estate, since he takes them subject to the disabilities attaching to them in the creditor's hands.

2. **A debtor of a bankrupt, who, as quasi surety, has paid claims against the bankrupt,** may, under § 68 of the bankruptcy act, set them off in a proceeding to enforce the debt against him as a "mutual credit," although they could not have been enforced by the original creditor, since the provision of § 68*b*, forbidding set-off of claims "not provable against the estate," refers, not to claims which could not be proved in the bankruptcy proceeding, but to those not provable in their nature,—that is, not liquidated when the set-off is claimed.

(April 1, 1901.)

NOTE.—*Set-off in bankruptcy cases.*

I. *Debts or claims existing and mature at the time of insolvency.*
- a. *In general.*
- b. *Provability of debt.*
- c. *Unliquidated damages.*
- d. *Breach of contract.*
- e. *Security for particular debt, or special directions or agreements as to application or payment of funds.*
  - 1. *In general.*
  - 2. *Brokers or agents.*
  - 3. *Banking and commercial paper.*
- f. *Debtors and creditors in same right.*
  - 1. *In general.*
  - 2. *Joint or partnership debts.*
  - 3. *Corporations.*
  - 4. *Agents, factors, and brokers.*
    - a. *In general.*
    - b. *Insurance brokers.*
  - 5. *Trustees.*
  - 6. *Executors and administrators.*
  - 7. *Husband and wife.*
  - 8. *Assignee in bankruptcy.*
- g. *Unpaid shares of corporate stock.*
- h. *Bank deposits.*
  - 1. *Bankruptcy of bank.*
  - 2. *Bankruptcy of depositor.*
- i. *Other banking transactions and commercial paper.*
- j. *Insurance matters.*
- k. *Landlord and tenant.*
- l. *Overpayment in composition proceedings.*

II. *Debts created, or claims arising, after insolvency.*
- a. *In general.*
- b. *Agreement to pay cash or by bill of exchange.*
- c. *Debtors and creditors in same right.*
  - 1. *Agents and factors.*
  - 2. *Executors and administrators.*

II.—continued.
- d. *Bank deposits.*
  - 1. *Deposits by trustee in bankruptcy in bank which subsequently becomes bankrupt.*
  - 2. *Bankruptcy of depositor.*
- e. *Other banking transactions and commercial paper.*
- f. *Landlord and tenant.*
- g. *Expenses of, or payments by, assignees for creditors.*
- h. *Payments by bankrupt.*
- i. *Set-off of costs.*
- j. *Set-off after discharge.*

III. *Immaturity of debts or claims at time of insolvency.*
- a. *In general.*
- b. *Uncertainty or contingency of claims.*
- c. *Breach of contract.*
- d. *Security for particular debt or special directions or agreements as to application or payment of funds.*
  - 1. *In general.*
  - 2. *Banking and commercial paper.*
- e. *Debtors and creditors in same right.*
  - 1. *In general.*
  - 2. *Agents, factors, and brokers.*
    - a. *In general.*
    - b. *Insurance brokers.*
  - 3. *Executors and administrators.*
- f. *Bank deposits.*
  - 1. *Bankruptcy of bank.*
  - 2. *Bankruptcy of depositor.*
- g. *Other banking transactions and commercial paper.*
  - 1. *In general.*
  - 2. *Accommodation acceptor or indorser.*
- h. *Insurance matters.*
  - 1. *Life insurance.*
  - 2. *Fire and marine insurance.*
- i. *Landlord and tenant.*
- j. *Principal and surety.*

APPEAL by plaintiff from a judgment of the Superior Court for Bristol County in favor of defendant upon an agreed statement of facts to determine the liability of defendant for a debt which he owed to the bankrupt. *Judgment for defendant.*

Wordell and Dillon were members of a partnership engaged in the dry-goods business. The partnership was dissolved by an agreement under which Dillon purchased the interest of the copartners and agreed to pay the debts of the firm. Some of these debts he failed to pay. After the dissolution of the firm Wordell bought of Dillon goods for the purchase price of which this action was brought. After Dillon's bankruptcy, defendant paid claims against the partnership to an amount exceeding that which he owed to Dillon. The amount so paid he sought to set off against the claim of the trustee for the purchase price of the goods.

Further facts appear in the opinion.

Messrs. **William M. Morgan** and **Henry T. Richardson,** for appellant:

Wordell was a surety of Dillon as to the Claflin Company, and by paying the latter, at best, is only subrogated to the Claflin Company's rights, and therefore must be subject to its liabilities.

24 Am. & Eng. Enc. Law, p. 199, note 7.

The defendant's set-off cannot be allowed because it is founded on a claim not due to himself individually, but due, if at all, to him jointly with McGuire. Therefore this demand is not due to the defendant in his own right, and is not a subject of set-off.

Pub. Stat. chap. 168, § 4.

At best this is but an equitable set-off, which cannot be allowed in an action at law.

III.—continued.
- k. *Annuities.*

IV. *Debts or claims assigned.*
- a. *In general.*
- b. *Partnership.*
- c. *Bank deposits.*
  - 1. *Bankruptcy of bank.*
  - 2. *Bankruptcy of depositor.*
- d. *Other banking transactions and commercial paper.*
- e. *Insurance matters.*

V. *Bankruptcy of third persons.*
VI. *Form of action.*
VII. *Effect of proving claim.*
VIII. *Extent of set-off.*
IX. *Conclusion.*

This note is intended to cover cases arising under the English and Federal bankruptcy acts only, and does not include any cases under the insolvency laws of the different states except where the decision rests on a provision in the state law as to set-off which is essentially similar to the provisions of the Federal laws on that subject, in which case they are included, special attention being called to them as they appear throughout the note.

As to set-off of new credit given to bankrupts by creditors who have previously received preferences, see *note* to Peterson v. Nash Bros. (Minn.) *post,* —.

I. *Debts or claims existing and mature at the time of insolvency.*

a. *In general.*

The ordinary provision as to set-off under the bankruptcy acts is one for set-off in case of "mutual credits" or "mutual debts" existing at the time the bankruptcy occurs, or at some other particular time specified. In 32 & 33 Vict. chap. 71, § 39, a provision for set-off in case of "mutual dealings" was inserted, but no such provision occurs in any of the Federal bankruptcy acts.

The earliest statutory provision as to set-off in bankruptcy is that of 4 Anne, chap. 17, § 11, which, as cited in Lanesborough v. Jones, 1 P. Wms. 326, provides that where there is mutual credit between a bankrupt and another only the balance shall be paid. Before its passage two cases which are frequently cited had been decided, which are apparently the earliest reported decisions on the subject.

One of these, decided in 1675, holds that where there are accounts between two merchants, one of whom becomes bankrupt, the debt of one may be set off against that of the other, and the balance only be paid or proved. Anonymous, 1 Mod. 215.

In the other case, that of Chapman v. Derby, 2 Vern. 117, it is said that in the case of a bankrupt it was adjudged by Lord Hale that where there were dealings on account a man should not be charged for a debt on the credit side and put to come in as a creditor for the debt owing to himself, but should answer to the bankrupt's estate for the balance of the account only.

Set-offs have been allowed in bankruptcy cases much more freely than in ordinary cases of set-off, the principal reason being that it seemed unjust to make one pay his own debt to the bankrupt in full, and receive only a dividend on the debt due from the bankrupt to him.

Thus, in Green v. Farmer, 4 Burr. 2214, Lord Mansfield said that natural equity required that cross demands should compensate each other by deducting the less sum from the greater, and that the difference was the only sum which could be justly due; that when there were mutual debts uncollected the law said that they should not be set off, but that each must sue, and courts of equity followed the same rule because it was the law, for had they done otherwise they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, chap. 17, § 11, cited above, and by 5 Geo. II. chap. 30, § 28, which provided for the set-off in case of mutual credits or mutual debts at any time before the bankruptcy occurred.

In Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731, Affirming 3 Biss. 293, Fed. Cas. No. 12,400, it is said, however, that the Federal bankruptcy act of 1867, § 20, providing that in all cases of mutual debts or credits between the parties the account shall be stated and one debt set off against the other and the balance only allowed or paid, was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

But in Ryall v. Rolle, 1 Atk. 165, 1 Ves. Sr. 375, Hardwicke, Lord Chancellor, said that under the act of 5 Geo. II. chap. 30, § 28, persons might set off debts, as that act extended to all mutual debts, though independent of and not relative to the mutual credit between the bankrupt and other persons in the course of trade, and though the debts were of such a nature as could not be brought into a general account.

One sued by assignees in bankruptcy may set

Howe v. *Snow*, 3 Allen, 111.

The defendant's claim was acquired after notice to him of the assignment of Dillon's claim to the plaintiff, and therefore cannot be set off against it.

A surety has no claim until he pays the debt of his principal.

Backus v. *Spaulding*, 129 Mass. 234; *Jones* v. *Wolcott*, 15 Gray, 541.

The adjudication and the appointment of the trustee were an assignment to the plaintiff of Dillon's claim against Wordell by operation of law.

United States bankruptcy act 1898, § 70; *Rogers* v. *Union Stone Co.* 134 Mass. 31.

In the case of an insolvent estate of a person living, all claims existing at the time of the first publication of the notice of the issuing of the warrant are subjects of set-off, and only such.

Ex parte Hale, 3 Ves. Jr. 304; *Chance* v. *Isaacs*, 5 Paige, 592; *Aldrich* v. *Campbell*, 4 Gray, 284; 22 Am. & Eng. Enc. Law, p. 283, and note.

The United States law is to the same effect.

United States bankruptcy act 1898, § 68*b*.

The set-off should be disallowed because it is *res judicata*.

Case v. *Beauregard*, 101 U. S. 688, *sub nom. Case* v. *New Orleans & C. R. Co.* 25 L. ed. 1,004; 21 Am. & Eng. Enc. Law, p. 129.

If a set-off is once submitted to the court or jury, and disallowed, it cannot be brought up again in any action.

21 Am. & Eng. Enc. Law, p. 224, and cases cited.

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off a debt due him from the bankrupt. Ridout v. Brough, 1 Cowp. 133. It is said that the court in this case seemed to impeach the decision in Ryall v. Larkin, 1 Wils. 155, which provides that one sued by assignees of a bankrupt for a balance due for goods sold cannot set off an amount due to him from the bankrupt on a bond, as the statute for setting off one debt against another does not extend to assignees in bankruptcy, and there are not mutual debts, as there are not mutual remedies, the defendant having no action on the bond against the assignees in bankruptcy.

Where there are mutual demands between the bankrupt and a creditor the defendant may set off his demand against the plaintiff in an action at law without the necessity of coming into equity under 5 Geo. II. chap. 30, § 29, providing that no more shall be claimed and paid than appears to be due on either side upon a balance of accounts stated. Lock v. Bennet, 2 Atk. 48.

The law of Scotland on the subject of compensation and retention in bankruptcy is in effect very nearly, if not precisely, the same as the law of England as to mutual credit. M'Kinnon v. Armstrong Bros. L. R. 2 App. Cas. 531, 36 L. T. N. S. 482.

A bankrupt in a composition case stands, as to set-off, in the position of an assignee in bankruptcy if no assignee has been appointed. *Ex parte* Howard Nat. Bank, 2 Low. Dec. 487, Fed. Cas. No. 6,764.

A claim for rent filed against a bankrupt will be disallowed where the claimant is indebted to the bankrupt in a larger amount. *Re* Gerson, 105 Fed. 893, 3 N. B. N. Rep. 442.

In *Ex parte* Mennett, 1 Rose, Bankr. 395, as digested in 2 Mews' Digest, 871, an injunction was granted where commissioners had found a balance in favor of one against whom assignees in bankruptcy were proceeding as a debtor of the bankrupt's estate.

The fact that one has collateral security against a third person for his debt against the bankrupt does not destroy his right to set it off against the trustee in bankruptcy if it is otherwise well founded. M'Kinnon v. Armstrong Bros. L. R. 2 App. Cas. 531, 36 L. T. N. S. 482.

In an action by assignees of a bankrupt to compel a company to transfer to them stock in such company owned by the bankrupt the company may set off an indebtedness due to it from the bankrupt under the bankruptcy act directing the commissioners to state the account between mutual dealers, and providing that only the balance of the account shall be

55 L. R. A.

claimed or paid. Gibson v. Hudson's Bay Co. 2 Eq. Cas. Abr. 122, 1 Strange, 645.

In Lee & Chapman's Case, L. R. 30 Ch. Div. 216, 54 L. J. Ch. N. S. 460, 53 L. T. N. S. 65, 33 Week. Rep. 513, the court, while stating that it was not necessary to give any opinion on the subject, said that in case of the winding up of a company having several contracts for street paving, the right of the company to set-off on the ground of mutual credits under the bankruptcy act, 32 & 33 Vict. chap. 71, § 39, was confined as to any particular contract to any money payable by the commissioners under that contract, unless there were specific words to the contrary.

In Murray v. Riggs, 15 Johns. 571, the court said that under the provisions for set-off in case of mutual credits under the act of 1800, § 42, one having goods of the bankrupt in his possession which could not be got at without an action at law or bill in equity, might set off a debt or demand against the bankrupt.

In an action by assignees in bankruptcy for a debt due the bankrupt the defendant may give evidence of a set-off as to part of the debt without having pleaded the set-off. Wells v. Crofts, 4 Car. & P. 332.

Where trustees in bankruptcy deny the right of one owing a debt to the bankrupt to set off a debt due from the bankrupt, under 32 & 33 Vict. chap. 71, § 39, they have the burden of proving a binding agreement excluding such right. *Ex parte* Fletcher, L. R. 6 Ch. Div. 350, 37 L. T. N. S. 282, 25 Week. Rep. 573.

Assignees in bankruptcy may proceed by petition to have declared a part of the bankrupt's estate, money received by one who has proved undisputed debts against the bankrupt, as to which they would be entitled to dividends upon which the assignees would have a lien if the petition were granted. *Ex parte* Timbrel, Buck, Bankr. 305.

The mutual credit clause of 32 & 33 Vict. chap. 71, § 39, will not be applied in the administration of the estate of a decedent until it is shown that the estate is insolvent, but the court may direct that a debt claimed by the estate against a creditor shall be paid into court to a separate account, with liberty to the creditor to apply in case it should appear that the estate is insolvent. *Re* Smith, L. R. 22 Ch. Div. 586, 52 L. J. Ch. N. S. 411, 48 L. T. N. S. 254, 31 Week. Rep. 413.

Where the alleged bankrupt has set-offs or counterclaims against the petitioning creditor of such a nature as are provable in bankruptcy, and the amount so proved will reduce the latter's claim below $250, the petition will be

If by a judgment the set-off does not appear to have been allowed, the conclusion is as effective as a direct decision against it.

Green v. *Sanborn*, 150 Mass. 454, 23 N. E. 224; *Stevens* v. *Miller*, 13 Gray, 283.

An insolvent estate is analogous to the estate of a decedent, which is held to be governed, so far as decisions upon its distribution are concerned, by the general principles of judgments *in rem*.

Loring v. *Steineman*, 1 Met. 204.

Messrs. **John W. Cummings** and **Charles R. Cummings**, for appellee:

The set-off is allowable on both the legal right founded on Dillon's breach of the covenant and the equitable right of subrogation after the defendant has paid the firm's debts.

Lowell, Bankruptcy, § 282; Parsons, Partn. 4th ed. p. 472, ¶ 380; 1 Bates, Partn. p. 549, ¶ 532.

The fact about the preference to H. B. Claflin & Company is inadmissible. It was *res inter alios acta*.

The rejection of the claim for the balance in bankruptcy would *not* prevent the use of that balance in set-off.

Wright v. *Dunham*, 9 Pick. 37; Lowell, Bankruptcy, ¶ 284.

Holmes, Ch. J., delivered the opinion of the court:

This is a suit by a trustee in bankruptcy against a debtor of the bankrupt. The debtor claims a set-off on the ground that since the bankruptcy he has paid debts due from a former partnership consisting of himself, the bankrupt, and one McGuire,

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dismissed. *Re* Osage Valley & S. K. R. Co. Fed. Cas. No. 10,592.

So long as a creditor's debt stands proved and unimpeached a claim made by the bankrupt before the register that any indebtedness that ever existed from him to such creditor is offset and extinguished by a counter indebtedness, furnishes no ground for a refusal by the bankrupt to be sworn and examined on the application of such creditor. *Re Kingsley*, 6 Ben. 300, Fed. Cas. No. 7,818.

b. *Provability of debt.*

One of the requirements for a set-off under the bankruptcy act of 1898, § 68*b*, is that the set-off or counterclaim must be provable against the estate of the bankrupt. Under the act of 1867, § 20, U. S. Rev. Stat. § 5073, the provision was that no set-off should be allowed as to a claim "in its nature" not provable against the estate. No provision as to provability of the claim was contained in either the act of 1800, or of 1841.

In England no provision as to the provability of a claim was contained in any of the bankruptcy acts until that of 6 Geo. II. chap. 16, § 50, by which the opportunity for set-off was increased instead of being restricted as in the Federal bankruptcy laws, the provision being that every debt or demand made provable against the estate of the bankrupt might also be set off in the same manner as is provided in such section in case of mutual debts or mutual credits.

Questions as to the provability of claims are not, of course, considered in this note, except in those cases where it is sought to set off the claim.

As to what debts are provable as a fixed liability as evidenced by a judgment or instrument in writing absolutely owing at the time of filing the petition in bankruptcy, see *note* to Cobb v. Overman (C. C. A. 4th C.) 54 L. R. A. 369.

MORGAN v. WORDELL holds that the requirement that the claim shall be provable against the estate refers to the nature of the claim at the moment when it is sought to set it off, and not to its nature at the beginning of the bankruptcy proceedings; and that the right to set off a claim liquidated after the beginning of such proceedings is based upon its being a mutual credit, not upon the claim itself being provable.

And a claim due from the bankrupt may be set off if it is a provable debt. Lloyd v. Turner, 5 Sawy. 463, Fed. Cas. No. 8,436; *Re* Osage Valley & S. K. R. Co. 9 Nat. Bankr. Reg. 281, Fed. Cas. No. 10,592.

And in *Re* Kalter, 2 N. B. N. Rep. 264, the court holds that a bankrupt's balance of deposit in a bank may be set off against a note by the bankrupt held by the bank and maturing after the filing of the petition under the act of 1898, § 68*a*, stating that under such section the provability of the debt which is not affected by the time of its maturity seems to be the criterion of its availability for the purposes of set-off.

And Fort v. McCully, 59 Barb. 87, holds that where a bank makes an assignment for creditors containing a direction that the assignee shall use the fund for the payment of debts in the manner provided by the act of 1867, the debtor of the insolvent may set off, under § 20, the amount of a deposit with the banker, payable on demand, although no demand has been made, as such claim is provable, even though it is not due at the time of the assignment, the case being one of "mutual credits."

And Makeham v. Crow, 15 C. B. N. S. 847, holds that in an action by assignees in bankruptcy for the purchase price of machinery sold by the bankrupt the defendant may plead a set-off for unliquidated damages for nonperformance of the contract by the bankrupt, under 12 & 13 Vict. chap. 106, § 171, providing that every debt or demand made provable against the bankrupt's estate may be set off in the same manner as in the case of mutual debts or mutual credits.

And MORGAN v. WORDELL holds that a debtor of the bankrupt, who, as quasi surety of the bankrupt, has paid claims against him, may set them off as a mutual credit, under the act of 1898, § 68*b*, in a proceeding to enforce the debt against him, though they could not have been enforced by the original creditor because the latter had accepted a preference contrary to § 57*g*, as the provision of § 68*b*, forbidding the set-off of claims not provable against the estate, does not refer to claims which cannot be proved in the bankruptcy proceeding, but to those which are not, in their nature, provable at the time when the set-off is claimed, because they are not then liquidated.

The preceding case, however, holds that the surety would not be entitled to the benefit of the set-off on the theory that he had been subrogated to the rights of the creditor whose claims he had paid.

And in *Re* Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 663, which is another form of the same case, the court suggested, without deciding, with reference to the right of a quasi surety paying a creditor since the bankruptcy, that although such debt must, under the act of 1898, be proved by the surety in the name of the

from which debts the bankrupt had covenanted to save his partners harmless. It is objected that the covenant runs to the two other partners jointly, but it is sufficiently plain that there are several covenants to each. The more serious objection is that the principal debt paid is one which has been disallowed by final judgment when offered by the creditors, H. B. Claflin & Co., for proof against the estate, on the ground that they received a preference, and that a claim offered in the defendant's name in respect of the payment also has been disallowed.

As it was assumed on both sides that the provision in § 68*b* of the United States bankruptcy act concerning set-off is more than a rule of procedure, and governs in this court as well as in the courts of the United States, we shall make the same assumption for the purposes of this case, without argument. See *Hunt* v. *Holmes*, 16 Nat. Bankr. Reg. 101, 105, Fed. Cas. No. 6,890; *Partridge* v. *Phœnix Mut. L. Ins. Co.* 15 Wall. 573, 580, 21 L. ed. 229, 239. We shall assume further, as a corollary, that if a set-off is to be maintained it must be brought within the words of the section referred to. Those words are: "A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate." These words are universal in form, and we do not see how a set-off can be claimed in this case outside of them.

If, then, the defendant claims by virtue of the rights of a quasi surety (*Fisher* v. *Tifft*, 127 Mass. 313, 314) who has paid and therefore is subrogated to the claim of a joint creditor of himself and the debtor (§ 57*i*), the trouble is that he has to take the claim

creditor, he might nevertheless avail himself of it as a set-off against a debt due from himself to the bankrupt. In this case the court also remarks that while he does not decide the question as to the right of a quasi surety paying a creditor who could not prove the debt under § 57*g*, because he had received a preference, it might be difficult to establish that any debt provable against the estate had been discharged by the surety's act, so as to authorize him to rely on it as a set-off under § 68*b*, providing that the set-off to be allowed must be "provable" against the estate.

And *Re* Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223, holds that a debtor of the bankrupt cannot set off against his debt a liability as surety for the bankrupt on a note which such debtor as surety was required to pay after the filing of the petition in bankruptcy under § 68*b*, by which, according to the court, the provability of all claims turns upon their status at the time of the filing.

The weight of authority, however, seems clearly to be in favor of the holding in MORGAN v. WORDELL, that the provability turns on the status of the claim at the time the action is brought.

c. *Unliquidated damages.*

That a claim is unliquidated at the time of the bankruptcy does not render it unavailable as a set-off under the present bankruptcy act, if it is liquidated when the set-off is claimed, although some of the earlier English cases—especially those decided before the passage of 5 Geo. IV. chap. 16, § 50, allowing the set-off of every debt or demand provable against the bankrupt's estate—held the other way.

Thus, a claim for unliquidated damages is available as a set-off under the bankruptcy act of 1867, § 20, if it is a provable debt; and if the damages cannot be assessed an application to the court for that purpose may be made. Lloyd v. Turner, 5 Sawy. 463, Fed. Cas. No. 8,436.

Unliquidated damages growing out of any contract or promise are provable debts, under the act of 1867, § 19, and are therefore available as a set-off under § 20. *Re* Osage Valley & S. K. R. Co. 9 Nat. Bankr. Reg. 281, Fed. Cas. No. 10,592.

One sued by a trustee in bankruptcy for the purchase price of shares of stock may set off a claim for unliquidated damages for a fraudulent misrepresentation by which he was induced to purchase the stock, under 32 & 33 Vict. chap. 71, § 39, authorizing a set-off in case of mutual credits, mutual debts, or other "mutual dealings," as such misrepresentation is not a tort, but a breach of the obligation arising out of the contract of sale. Jack v. Kipping, L. R. 9 Q. B. Div. 113, 51 L. J. Q. B. N. S. 463, 46 L. T. N. S. 169, 30 Week. Rep. 441.

In an action by one in whom the estate of a bankrupt was vested on annulling the bankruptcy in accordance with 32 & 33 Vict. chap. 71, § 28, to recover for work, labor, and material done and furnished by the bankrupt before his bankruptcy, the defendant may set off as a mutual credit a claim for unliquidated damages provable in bankruptcy existing at the time of the bankruptcy, as under the vesting order the property is vested subject to the right to set off counterclaims, whether of specific sums, or of unliquidated damages provable in bankruptcy. West v. Baker, L. R. 1 Exch. Div. 44, 45 L. J. Exch. N. S. 113, 34 L. T. N. S. 102, 24 Week. Rep. 277.

For unliquidated damages from the breach of a contract, see *infra*, I. d, e; II. b; III. c, d.

For cases where a loss under an insurance policy has not been adjusted at the time of the bankruptcy, see *infra*, III. e, 2, *b*; III. h.

d. *Breach of contract.*

A set-off has ordinarily been allowed on a claim for breach of contract other than as to the payment or application of the particular fund in question.

Thus, in Bemis v. Smith, 10 Met. 194, which was a case arising under the Massachusetts insolvency law of 1838, chap. 163, the provision as to set-off in § 3 being similar to that of the act of 1867, § 20, the court held that in a suit by the assignee of an insolvent debtor on a covenant of warranty in a deed to such debtor the defendant might set off notes and accounts due him from such debtor.

One who signs a joint and several note for the benefit of the other signer may, in an action by the assignees in bankruptcy of the bankers to whom the note was payable, set off, under 5 Geo. II. chap. 30, § 28, a liability of the bankers to her for their failure to purchase certain securities for her with money furnished by her for that purpose, and which they claimed to have so used. *Ex parte* Stephens, 11 Ves. Jr. 24, 8 Revised Rep. 75.

In *Ex parte* Blagden, 19 Ves. Jr. 465, Lord Eldon expressed a doubt whether he would have been justified in going so far as he did in the above case if it had not been for the fraud practised.

Where, at the time of executing a deed of assignment providing that all questions should be settled according to the bankruptcy law, a

of Claflin & Co. as he finds it, and he finds it a claim which is not provable against the estate, because Claflin & Co. have received preferences which have not been surrendered. Section 57*g*. It seems hard that a matter between Claflin & Co. and the bankrupt, with which the defendant had nothing to do, should bar rights arising out of a payment which he was compelled to make. But we do not feel at liberty to give the language of § 57*i* other than its most natural meaning, or to interpret the subrogation there provided for as a subrogation free from the disabilities attached to the creditor, or as a subrogation to the creditor's rights independent of the effect of the preference upon them. One result of such an interpretation would be to allow the claim without a surrender of the preference, contrary to § 57*g*.

It is suggested that the adjudication against Claflin & Co. is *res inter alios*, and there is no other evidence that they accepted a preference. But the defendant's claim *by subrogation* is affected by the judgment as it is by the preference, and for the same reason. He stands in the shoes of Claflin & Co., succeeds to their place, in the language of the Roman law, and is the same person with them for this purpose, a notion frequently *recurring in the* law. Dernusson, Subrogation, 3d ed. chap. 1, No. 7; Sheldon, Subrogation, 2; 4 Masse, Droit Commercial, 2d ed. chap. 60, No. 2,125, D 20, 4, 12, § 9, D 4, 12, 16. See *Day* v. *Worcester, N. & R. R. Co.* 151 Mass. 302, 307, 308, 23 N. E. 824.

The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the

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landlord is liable in an amount then unascertained for breach of covenants, which amount is subsequently ascertained in an action brought for that purpose, the tenant may set off such amount against an amount due from him for rent, under 32 & 33 Vict. chap. 71, § 39, authorizing a set-off in case of "mutual dealings." Booth v. Hutchinson, L. R. 15 Eq. 30, 42 L. J. Ch. N. S. 492, 27 L. T. N. S. 600, 21 Week. Rep. 116.

But *Ex parte* Dyke, L. R. 22 Ch. Div. 410, 52 L. J. Ch. N. S. 570, 48 L. T. N. S. 303, 31 Week. Rep. 278, holds that the claim of the landlord for damages from breach of covenant by the tenant could not be set off against a claim by the trustee in bankruptcy of the tenant for hay and straw raised by, and belonging to, the tenant in the landlord's possession, as such hay and straw was the property of the trustees instead of the tenant.

In an action by a trustee in bankruptcy for the purchase price of iron the defendant may set off an unliquidated claim arising from the failure to deliver part of the iron contracted for on the ground that it is a case of "mutual dealings." Peat v. Jones, L. R. 8 Q. B. Div. 147, 51 L. J. Q. B. N. S. 128, 30 Week. Rep. 433.

In an action by assignees for the purchase price of machinery sold by the bankrupt the defendant may plead a set-off for unliquidated damages for nonperformance of the contract by the defendant, under 12 & 13 Vict. chap. 106, § 171, providing that every debt or demand made provable against the bankrupt's estate may be set off in the same manner as in cases of mutual debts, or mutual credits, and 24 & 25 Vict. chap. 134, § 153, providing that if the bankrupt shall be liable to a demand in the nature of damages which had not and cannot otherwise be liquidated or ascertained, the court acting in the prosecution of the bankruptcy may direct such damages to be ascertained by the jury, or the court may, if the parties agree, assess the damages without a jury. Makeham v. Crow, 16 C. B. N. S. 847.

On the winding up of a company into which the judicature act of 1875, § 10, imports the rules as to set-off in bankruptcy, a purchaser of goods from the company may set off against a claim for the purchase price damages for breach of contract by nondelivery of part of the goods under 32 & 33 Vict. chap. 71, § 39. Mersey Steel & I. Co. v. Naylor, L. R. 9 App. Cas. 434, Affirming L. R. 9 Q. B. Div. 648, 51 L. J. Q. B. N. S. 576, 47 L. T. N. S. 369, 31 Week. Rep. 80.

In *Re* Wheeler, 2 Low. Dec. 252, Fed. Cas. No. 17,488, a creditor offered for proof a claim for goods sold to the bankrupt, and his assignees attempted to set off a claim against the creditor for breach of the contract for the sale of the goods to the bankrupt. The court denied the set-off on the ground that no breach of the contract was shown, it seeming to be taken for granted that the set-off would have been allowed if the breach had been proved.

But in an action by the assignees in bankruptcy of the supercargo of a ship for money expended in repairs and supplies on the ship of defendants, the defendants cannot set off a claim against the bankrupt for failing to keep the vessel insured, as such claim is unliquidated, uncertain, and contingent in its nature. Brown v. Cuming, 2 Cal. 33.

In an action for damages for not accepting or paying for goods bought, defendant cannot claim a set-off on the ground that he purchased of an agent of the plaintiff, who was the apparent owner, and that such agent was afterwards adjudicated a bankrupt, and that before the bankruptcy mutual credit had been given between the defendant and such agent in respect to the sale of goods and as to money payable by the agent to defendant, as 32 & 33 Vict. chap. 71, § 39, relating to mutual debts, mutual credits, and mutual dealings between the bankrupt and any other person, does not apply in a case in which the bankrupt is not a party. Turner v. Thomas, L. R. 6 C. P. 610, 40 L. J. C. P. N. S. 271, 24 L. T. N. S. 879, 19 Week. Rep. 1170.

In *Re* Orne, 1 Ben. 361, Fed. Cas. No. 10,581, the court held that an entirely unliquidated claim against a creditor in favor of the bankrupt for breach of a contract for the purchase of lumber, for the purchase price of which the creditor made a claim, must be disregarded in proceedings for the choice of an assignee, but said that when it was put into the shape of a debt against such creditor it might perhaps fall within the provisions of the act of 1867, § 20, relating to the set-off of mutual debts and credits.

For cases where the debt or claim is immature at the time of the insolvency, see *infra*, III. c.

For breach of agreements as to the application or payment of particular funds or the use of particular securities, etc., see *infra*, I. e., II. b., III. d.

e. Security for particular debt, or special directions or agreements as to application or payment of funds.

1. In general.

There is considerable conflict on the question

district court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim *on the covenant against the estate. If*, therefore, the prohibition of a set-off of a claim "which is not provable against the estate" is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of § 68 for a set-off of mutual debts "or mutual credits," and that so read they interpose no obstacle to the defendant's claim.

The provision for the set-off of mutual credits is old. Stat. 4 Anne, chap. 17, § 11; 5 Geo. II. chap. 30, § 28; 46 Geo. III. chap. 135, § 3; *Gibson* v. *Bell*, 1 Bing. N. C. 743, 753; *Ex parte Prescott*, 1 Atk. 230. *It was adopted in the United States* (Acts 1800, chap. 19, § 42, Acts 1841, chap. 9, § 5, and Acts 1867, chap. 176, § 20). But while the provision as to mutual credits was thought to be more extensive than that as to mutual debts (*Atkinson* v. *Elliott*, 7 T. R. 378, 380), it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such, for instance, as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. *Abbott* v. *Hicks*, 5 Bing. N. C. 578; Robson, Bankr. 7th ed. 374. But the moment when

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of the right of set-off in case of special directions *or agreements as to the payment or application* of certain funds, and in cases where securities are held for certain debts due from the bankrupt and other debts are also due from him. At the present time, however, it would seem that a set-off as to the other debts will not be allowed in such cases unless the person secured has the absolute right to convert the security into money and apply the proceeds on the debt secured, in which case other debts of the bankrupt may be set off against the claim of the assignee or trustee in bankruptcy for the surplus arising.

Thus, where money has been deposited with solicitors for a specified purpose, which fails, they cannot after the bankruptcy of the depositor retain such money as a set-off for an amount due them from the depositor, under 32 & 33 Vict. chap. 71, § 39. Wright v. Watson, 1 Cab. & El. 171.

And where *money is sent by a company to* solicitors for the specific purpose of settling claims against it, and only part of it is used for that purpose, the rest being retained by the solicitors without the knowledge or consent of the company or its liquidator, the solicitors cannot, if a winding up takes place, set off a *debt owing* to them from the company for costs, on the ground of mutual dealing, under 46 & 47 Vict. chap. 52, § 38, as the necessity for mutuality still exists. *Re* Mid Kent Fruit Factory [1896] 1 Ch. 567, 65 L. J. Ch. N. S. 250, 74 L. T. N. S. 22.

And where the debtor deposits money with a solicitor, who thereupon prepares a deed of assignment which the debtor executes and which is adjudged an act of bankruptcy, the solicitor cannot, on an application by the trustee for the unused balance of such deposit, set off a prior debt due from the bankrupt for costs, under 46 & 47 Vict. chap. 52, § 38, as there are no mutual credits, the money having been deposited by the bankrupt for a specific purpose, which was not carried out. *Re* Pollitt [1893] 1 Q. B. 455, Affirming [1893] 1 Q. B. 175.

Where one undertakes to settle the debt of another for which the latter has deposited life insurance policies as security, and to pay the amount received on the policies, after making the settlement, to the account of the debtor, who becomes bankrupt before the money is paid over, whereupon the person agreeing to make the settlement refuses to pay the money to the assignee in bankruptcy on the ground that the bankrupt owes him a larger amount, the assignee cannot, even with the banker's assent, maintain an action against him for breach of his undertaking. Chalmer v. Page, 3 Barn. & Ald. 697.

Where one purchases goods of another, promising the seller that after paying certain debts of the seller, including a specified part of an indebtedness to himself, he will pay over the balance to the seller, the purchaser cannot, in an action by the assignees in bankruptcy of the seller for damages for refusal to pay over such balance according to his agreement, set off the balance of the debt due him from the bankrupt, as the statute of set-off goes only to cases of mutual debts, although he might have set it off if the action had been for money had and received. Colson v. Welsh, 1 Esp. 378.

A creditor of a bankrupt cannot set off as a mutual credit under the act of 1867, § 20, an unsecured debt due him from the bankrupt against a claim for money sent by the bankrupt to him with directions to apply it on a debt secured by mortgage, which application he *refuses to make, as in such case the creditor does* not become the bankrupt's debtor, but his trustee as to the money thus sent. Libby v. Hopkins, 104 U. S. 303, 26 L. ed. 769.

Money collected by a creditor, at or before the bankruptcy of the debtor, on securities given for specified advances in excess of such advances, may be set off under the act of 1867, § 20, against another debt due him from the bankrupt. Clark v. Iselin, 10 Blatchf. 204, Fed. Cas. No. 2,825, Reversed, but not as to this point, in 21 Wall. 360, 22 L. ed. 568.

Where one member of a firm mortgages his real estate to a bank to secure the balance of the current account of the firm, and afterwards sells the realty with the concurrence of the bank under an agreement that a certain part of the purchase price shall be deposited as security in such member's name to remain his separate property with the right on the part of the bank to withdraw at any time after giving twelve months' notice, and the firm subsequently becomes bankrupt, the bank can prove for the whole amount of its debt against the joint estate of the firm without deducting the amount of the deposit, as it is not a case of mutual credits, within 32 & 33 Vict. chap. 71, § 39, and no set-off arises thereunder. *Ex parte* Caldicott, L. R. 25 Ch. Div. 716, 53 L. J. Ch. N. S. 618, 50 L. T. N. S. 651, 32 Week. Rep. 396, Affirming 48 L. T. N. S. 910.

For cases where the debt is created or the claim arises after the bankrupt's insolvency, see *infra*, II. b.

For cases where the debts or claims are immature at the time of the debtor's insolvency, see *infra*, III. d.

the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of 1867, although not in the present law, and yet if it had been liquidated, as here by payment, before the defendant was sued, he was allowed without question to set it off. *Smith* v. *Hodson*, 4 T. R. 211; *Ex parte Boyle, Re Sheperd*, 1 Cooke, Bankrupt Laws, 8th ed. 561; *Ex parte Wagstaff*, 13 Ves. Jr. 65; *Marks* v. *Barker*, 1 Wash. C. C. 178, 181, Fed. Cas. No. 9,096.

The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words "but no set-off shall be allowed of a claim in its nature not provable against the estate." These words, as it seems to us, following the cases, refer yet to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. The present statute leaves out the words "in its nature," but we can have no

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2. Brokers or agents.

In *Ex parte* Deeze, 1 Atk. 228, Hardwicke, Lord Chancellor, held that when goods had been delivered to a packer by a merchant who subsequently became bankrupt, the goods delivered being, according to a custom existing, security for all the indebtedness of the merchant instead of merely for packing, the packer could, in an action by the assignees of the bankrupt to recover the goods, set off the entire debt instead of merely the amount due for packing,—especially where he owed the bankrupt for wine about the amount due for the packing.

In Young v. Bank of Bengal, 1 Deacon Bankr. 622, *infra*, III. d, 2, it is said that the above case, as reported in 1 Atk. 228, is no longer law, the statement being made that it is impossible to regard it as resting on the ground on which such report places it.

And in *Ex parte* Ockenden, 1 Atk. 235, on a petition by a miller for the payment of a debt due him from a bankrupt flour factor, out of the proceeds of a sale of wheat and sacks in his possession at the time of the bankruptcy, and which he delivered to the assignees in bankruptcy without prejudice to his right to have the whole debt paid, instead of the amount due for grinding merely, he having considered at all times that such flour and sacks were security for the entire indebtedness to him, but there being no contract or custom to that effect, Lord Chancellor Hardwicke held that no case could be put in which the whole debt could be allowed on the ground of mutual credits, as a set-off under 5 Geo. II. chap. 30, § 28.

And Rose v. Hart, 8 Taunt. 499, 20 Revised Rep. 533, 2 J. B. Moore, 547, which is a leading case, and is frequently cited as having fixed the law on the subject, holds that in trover by assignees in bankruptcy for cloths deposited by the bankrupt before his bankruptcy with a fuller for dressing the latter cannot set off a general balance for such work, but is only entitled to set off the cost of dressing those particular cloths, as the delivery of them for dressing was not a mutual credit, within 5 Geo. II. chap. 30, § 28, as it would not terminate in a debt from the fuller to the bankrupt, which is a necessary characteristic of such a credit.

But where timber has been placed by one who subsequently becomes bankrupt in the hands of a broker for sale on commission on his promise to pay over the proceeds to the bankrupt after deducting his commissions, the broker may, in an action by the assignees in bankruptcy for the proceeds of the sale, retain a debt due him from the bankrupt, under 6 Geo. IV. chap. 16, § 50, as such agreement is not binding so as to deprive him of the legal right to set-off. M'Gillivray v. Simson, 9 Dowl. & R. 35, 2 Car. & P. 320.

As to factors, brokers, and agents generally, see *infra*, I. f, 4; II. c, 1; III. e, 2.

3. Banking and commercial paper.

In *Ex parte* Peysen, 2 Rose, Bankr. 366, as digested in 2 Mews, Digest, col. 861, the assignees in bankruptcy were ordered to apply the proceeds of one bill of exchange in satisfaction of another upon circumstances of specific appropriation or substitution.

Where one sells goods to be paid for promptly in two months or by an acceptance, and becomes bankrupt after their delivery and before payment, the purchaser may, under 6 Geo. IV. chap. 16, § 50, set off a debt due him from the bankrupt, as there is a mutual credit, and the fact that the assignees allege a special damage to the bankrupt from the breach of contract does not have any effect. Groom v. West, 8 Ad. & El. 758, 8 L. J. Q. B. N. S. 25, 2 Jur. 940, 1 Perry & D. 19.

Where one intrusts a bill of exchange to another for the specific purpose of obtaining advances thereon, and becomes bankrupt after receiving certain advances, the one receiving it cannot, in an action by the assignees for the amount of such bill, less the amount advanced thereon, set off the general indebtedness of the bankrupt to him, under 5 Geo. II. chap. 30, § 28, as the case is not one of mutual credit which must mean mutual trust, but is a case of breach of trust. Key v. Flint, 8 Taunt. 23, 1 J. B. Moore, 451.

And on a subsequent petition in chancery by the creditor to be allowed such set-off, the court held that the petitioner had no right to consider the bill as an item of mutual account, and that the use he sought to make of it was contrary to natural equity. *Ex parte* Flint, 1 Swanst. 30, 18 Revised Rep. 12.

Where bills are transmitted to a given person with directions to get them discounted and apply part of the proceeds in a specified manner, and the person to whom they are sent fails to get them discounted, and the one transmitting them thereupon requires their return, which request is not complied with, the one having them receiving the money instead on the bills becoming due, the assignees in bankruptcy of the one transmitting them may recover the amount so received in assumpsit, and the one receiving such money cannot set off a debt due from the bankrupt, as he was a wrongdoer in receiving the money without following the instructions of the bankrupt. Buchanan v. Findlay, 9 Barn. & C. 738, 4 Mann. & R. 593, 7 L. J. K. B. 314.

And where one pays money to a bank to be applied to payment of specified bills of exchange, and the bank, in violation of its agreement, applies such money to its credit on a debt due it from the one paying it, who subsequently becomes bankrupt, the bills of exchange being dishonored, the bank cannot, in an action of special assumpsit by the assignees in bankruptcy for breach of such agreement, set off

doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. "Provable" means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings.

The right to set off the claim when liquidated after the beginning of the bankruptcy proceedings was based upon its being a mutual credit, not upon the claim being provable, which it was not until the later bankruptcy statutes. *Russell v. Bell*, 8 Mees. & W. 277, 281. Conversely, of course the exclusion of a set-off, when the claim still was contingent and the defendant had made no payment, did not stand on the ground that the claim was not provable in the existing bankruptcy proceedings, but on the ground that it was not provable in its nature, and that there was no machinery available to liquidate it. If we are right in supposing that the act of 1867 meant merely to codify a principle, or rather a limitation developed by the courts, and that the words of the present act mean no more than those of the act of 1867, it follows that, although the defendant's claim could not have been proved against the estate, still it is a mutual credit and may be set off when he is sued.

Judgment for defendant.

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as a mutual credit the debt due it from the bankrupt, although if the action had been in *indebitatus assumpsit for money had and received* the set-off would have been allowed. Hill v. Smith, 12 Mees. & W. 618, 13 L. J. Exch. N. S. 243, 8 Jur. 179.

Where one holding an accepted bill against a tradesman sends his carriage to the latter to be repaired, agreeing to pay for the repairs in ready money, the tradesman's subsequent bankruptcy does not do away with such agreement so as to entitle him to receive the carriage on offering to strike off the amount due on the bill, under 6 Geo. IV. chap. 16, § 50, on the ground that there are mutual credits, but in order to recover the carriage he must pay the full amount charged for repairs, as, although the law of mutual credits under the bankruptcy act goes farther than the ordinary law of set-off, it does not do away with the express contract. Clarke v. Fell, 1 Nev. & M. 244, 4 Barn. & Ad. 404, 2 L. J. K. B. N. S. 84.

Where one has corporate stock as collateral security for a particular note due from one who becomes bankrupt after the maturity of the debt, the creditor may apply the surplus which would remain after selling the stock and paying in full the debt secured to another debt due from the bankrupt at the time of the bankruptcy, and the fact that he had promised to return any surplus after paying the debt secured would not change the case in that respect. *Ex parte* Whiting, 2 Low. Dec. 472, Fed. Cas. No. 17,573.

This case was disapproved in Brown v. New Bedford Inst. for Savings, 137 Mass. 262, *infra*, III. d, 2.

Analogous cases.

Where the maker of a note, to secure which corporate stock is pledged with authority to the pledgee to sell the same in case of nonpayment of the note, the pledgee to give the pledgeor credit for any balance of the proceeds, executes a note in trust for the benefit of creditors, and the trustee on the maturity of the note tenders the pledgee the amount due thereon, the latter cannot, in an action by the trustee to redeem the stock, set off, under the Massachusetts insolvency law (Mass. Gen. Stat. chap. 118, § 26), other debts due him from the insolvent at the time the note matured, even though the pledgee has applied the stock in payment of such debts, as the mutual credit contemplated by such section must be property consigned, deposited, or intrusted to be converted into money, so that the liability to account for it will ultimately become a debt. Hathaway v. Fall River Nat. Bank, 131 Mass. 14.

A bank which refuses to discount notes left with it for that purpose by one who subsequently becomes insolvent cannot, in an action by the assignees for their conversion, set off an indebtedness due to them from the insolvents, under the Massachusetts insolvency law (Mass. Stat. 1838, chap. 163, § 3), as there are no mutual credits. Stetson v. Exchange Bank, 7 Gray, 425.

For case of immaturity of claim at time of bankruptcy, see *infra*, III. d, 2.

As to matters of banking and commercial paper generally, see *infra*, I. f; II. e; III. g; IV. d; VIII.

As to set-off of commercial paper against deposits in bank, see *infra*, I. h; II. d; III. f; IV. c.

As to set-off of such paper against a claim for goods purchased after the debtor's insolvency with intent to set it off, see *infra*, II. b.

f. Debtors and creditors in same right.

1. *In general.*

To allow of set-off in bankruptcy the debts must be mutual, and be in the same right. Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731.

Where commissioners empowered to levy rates and duties on vessels entering a given harbor, and also tolls on vessels navigating rivers emptying into the harbor, are required to apply the rates and duties in the improvement of the harbor and the tolls in the improvement of the river, and they deposit the money received with a banker, who keeps separate accounts for the harbor and river moneys, the commissioners may, on the banker becoming bankrupt, set off against an amount due him on one account a larger amount due from him on the other. *Ex parte* Pearce, 2 Mont. D. & De G. 142.

Where a trustee in bankruptcy deposits money in a bank which subsequently becomes bankrupt, the trustees in bankruptcy of the bank may set off a debt due from the bankrupt to the bank against the amount of such deposit, where the adjudication in bankruptcy against such bankrupt was annulled soon after the bankruptcy of the bank in a proceeding for that purpose which had then been commenced. Bailey v. Johnson, L. R. 7 Exch. 263, 20 Week. Rep. 1013, 41 L. J. Exch. N. S. 211, *Affirming* L. R. 6 Exch. 279, 24 L. T. N. S. 711, 40 L. J. Exch. N. S. 189, 19 Week. Rep. 1069.

2. *Joint or partnership debts.*

The decisions on the question of the right to set off joint or partnership debts against individual debts are conflicting, but according to the weight of authority it would seem that at the present time such set-off will not be allowed unless there was some agreement or understanding to that effect, or the debts were contracted with reference to each other. It will be seen that there are several cases in which a set-off has been permitted.

Thus, a solvent firm of which a bankrupt is a member may set off against a debt due from it to the bankrupt a debt due from the bankrupt to the firm. Warren v. Burnham, 32 Fed. 579.

Where one member of a partnership becomes bankrupt, and the other partner is found to be indebted to him on a settlement of the firm business, the solvent partner can set off against such indebtedness an indebtedness of the bankrupt to him in transactions independent of the partnership business, under the Federal bankruptcy act of 1867, § 20 (U. S. Rev. Stat. § 5073). *Re* Voetter, 4 Fed. 632.

A debt due from a firm of which the bankrupt is a member may be set off by the holder against a debt due from him to the bankrupt individually, in an action by the assignee in bankruptcy. Bean v. Cabbaness, 6 Ala. 343.

An individual debtor of a bankrupt may, under the act of 1867, § 20, set off against such debt a debt due jointly from the bankrupt and a third person. *Re* Carrier, 39 Fed. 193.

In an action by assignees in bankruptcy on a joint debt, one of the debtors being surety for the other, the surety may set off a debt for a greater amount due from the bankrupt to him alone, on the ground that assignees take subject to all equities attaching upon the bankruptcy, and if the bankrupt had continued solvent and obtained judgment, and the surety had paid the debt, he could have obtained judgment for his debt, and had the money so paid repaid to him. *Ex parte* Hanson, 1 Rose. Bankr. 156, 8 Revised Rep. 335, 12 Ves. Jr. 346.

And upon the case again coming up in *Ex parte* Hanson, 18 Ves. Jr. 232, Lord Eldon said that the decision of Lord Erskine in the preceding case was right on the ground that the joint debt was nothing more than security for the separate debt.

One sued by the assignee of a bankrupt for work and labor performed, goods sold, and money lent by the bankrupt may set off a claim for work and labor performed for the bankrupt by a partnership of which he is the surviving partner. Slipper v. Stidstone, 5 T. R. 493, 1 Esp. 47.

In *Ex parte* Quintin, 3 Ves. Jr. 248, where one member of a firm became bankrupt and the other had paid the debts, a debtor of the firm was permitted to set off against the bankrupt's share of the joint debt to the firm a separate debt from the bankrupt to him, the solvent member of the firm consenting to receive his share of the debt. This case was criticised and disapproved in *Ex parte* Twogood, 11 Ves. Jr. 517, *infra*, IV. b, the court stating that there were certain things in the opinion that he did not understand.

One who signs a joint and several note for the benefit of the other signers may, in an action by the assignees in bankruptcy of the bankers to whom the note was payable, set off, under 5 Geo. II. chap. 30, § 28, a liability of the bankers to her from their failure to purchase certain securities for her with money furnished by her for that purpose and which they claimed to have so used. *Ex parte* Stephens, 11 Ves. Jr. 24, 8 Revised Rep. 75.

In *Ex parte* Blagden, 19 Ves. Jr. 465, Lord Eldon expresses a doubt whether he would have been justified in going as far as he did in the preceding case if it had not been for the fraud.

In an action by an assignee in bankruptcy for goods sold and delivered by the bankrupt, the defendant may set off a debt due him from a firm of which the bankrupt was a member, under the act of 1800, § 42, providing that where there has been mutual credit given by the bankrupt and any other person, or mutual debts between them before the bankruptcy, the assignee shall state the account, and one debt shall be set off against the other, and only the balance shall be claimed, and § 34, providing that the discharge of a bankrupt shall not release one who was his partner at the time of the bankruptcy. Tucker v. Oxley, 5 Cranch, 34, 3 L. ed. 29, Reversing 1 Cranch, C. C. 419, Fed. Cas. No. 10,638.

In Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535, it is said that this seems to be an exceptional case, and that the ruling was made under the peculiar wording of the act of 1800.

Where one has acceptances of a firm, the continuing member of which has made a composition with creditors by which 10 shillings in the pound is paid, and the owner of such acceptances has also entered into liquidation under the bankruptcy act of 32 & 33 Vict. chap. 171, § 125, he may, in a subsequent suit by a retiring partner for money lent him, rely, as an equitable set-off, on the unpaid balance of the acceptances, whether the right of action for such balance is considered as having been, at the commencement of the action, legally in him or in his trustee in bankruptcy in trust for him. Megrath v. Gray, L. R. 9 C. P. 216, 43 L. J. C. P. N. S. 43, 30 L. T. N. S. 16, 22 Week. Rep. 409.

Where partners borrow money upon their joint and several bonds, and one of them subsequently sells his interest in the partnership and the selling partner, with the consent of the purchasing partner, before the purchase is completed, takes from money in the bank intended to pay for his interest the amount of the bond, taking back a note therefor instead of having the bond discharged, and the obligee in the bond thereafter becomes bankrupt, there exists a case of mutual credit authorizing the setting off of the note against the bond. James v. Kynnier, 5 Ves. Jr. 108.

Where, on the dissolution of a partnership, the continuing partner agrees to pay the retiring partner a certain amount, which amount is not to be paid until the satisfaction of certain mortgages on the premises, and the continuing partner becomes bankrupt, and his assignees in bankruptcy pay the mortgages before the retiring partner proves his debt, the assignees are entitled to deduct the sums so paid by them from the dividend on the sum due to the retiring partners at the time of the bankruptcy. Rowe v. Anderson, 4 Sim. 267.

Where a customer of a banking firm transfers to it certain stock as security for money borrowed from it, to be retransferred on payment of the notes given for the amount, and pays the same in full without calling for a retransfer of the stock, borrowing a further sum on the joint note of himself and his son, and the banking firm sells the stock, and the proceeds are applied to the use of the firm, which subsequently becomes bankrupt, such customer is entitled to set off against the joint note of himself and his son the proceeds of the sale of the stock. Vulliamy v. Noble, 3 Meriv. 593.

Bradley v. Millar, 1 Rose, Bankr. 273, as digested in 2 Mew's Digest, col. 866, holds that where partners give a joint and several bond to one who subsequently becomes indebted to one of them, and the other partner afterwards becomes bankrupt, and the obligee proves his bond under the commission, and then brings a joint action against both partners, to which the bankrupt pleads his certificate, the solvent partner may enjoin the obligee from proceeding in the joint action, as it precludes him from setting off his joint debt.

An allegation that before the bankruptcy it had been agreed that a specific joint debt due from the bankrupt to defendant and another should be set off against separate debts due from each of them to the bankrupt is sufficiently

proved by evidence of an agreement, before the debts were contracted, that all joint debts subsequently arising from the bankrupt should be set off against the separate debts of defendant and such other person and the bankrupt. Kinnerley v. Hossack, 2 Taunt. 170.

The cases in which a set-off has been allowed are, however, more numerous.

Thus, a debt due from a firm of which the bankrupt had been a member cannot be set off against a debt to the bankrupt individually. Wright v. Rogers, 3 McLean, 229, Fed. Cas. No. 18,090.

An indebtedness due from a bankrupt to partners jointly cannot be set off against a separate demand due from one of the partners to the bankrupt, as it is not a case of mutual credit. *Ex parte* Riley, W. Kelynge, 24.

In *Ex parte* Edwards, 1 Atk. 100, Lord Chancellor Hardwicke said that it was doubtful if a creditor under a separate commission against one person and debtor, to a joint commission against such person and another could set off the debt he owed the latter by his demand against the former, under the statute relating to mutual debts, but nevertheless stayed the action for the purpose of finding out the amounts of the respective claims.

In an action by an assignee in bankruptcy on a note executed after the commission in bankruptcy and assigned to such assignee, the defendant cannot set off a bond given before the bankruptcy to the defendant and another who is dead, as there was not a mutual credit before the bankruptcy. McIver v. Wilson, 1 Cranch, C. C. 423, Fed. Cas. No. 8,833.

Where five persons, only one of whom is solvent, have a joint claim against a bankrupt, and each of them has severally become bound to pay the trustee in bankruptcy certain sums, the aggregate of which exceeds the joint claim, the trustee cannot set off the several liabilities of the different claimants where it does not appear that the joint debt and the several liabilities grew out of the same transaction or under circumstances showing that the joint credit had been given on account of the separate debts, as the claims are not mutual within the act of 1898, § 68a. *Re* Crystal Spring Bottling Co. 100 Fed. 265, 4 Am. Bankr. Rep. 55.

Re Van Allen, 37 Barb. 225, which is an action under the New York state insolvency law, holds that where debts are due to an insolvent bank from several persons jointly, and the credit belongs to an individual, or *vice versa*, there are no mutual debts or credits, within 2 N. Y. Rev. Stat. 47, § 36; but that, where the credit equitably and in reality belongs to the same person from whom the debt is owing, and where it is obvious from the dealings of the parties that their contract or intention was to apply the one debt in extinguishment of the other, the set-off may be allowed.

In an action by the trustee of a bankrupt firm for goods sold to defendants, the latter cannot set off on the ground of "mutual dealings" under 32 & 33 Vict. chap. 71, § 39, an amount due for goods supplied by defendants to the separate members of the banking firm, in the absence of an agreement, express or implied, to make the firm liable for the debts of its separate members, although a custom had existed for twenty years to settle each year the balance between the goods supplied to and by them. Tyso v. Pettit, 40 L. T. N. S. 132.

One who signs as surety an administrator's bond under a representation by the members of a firm of which the administrator is a member, that the administration is to be a matter of partnership business, cannot, when sued by the assignees in bankruptcy of the firm for a debt due to it, set off a loss incurred by him as surety on such bond, as an arrangement for the firm to take the assets of the decedent's estate into its possession, and to share in the disposition of them, is against public policy. Forsyth v. Woods, 11 Wall. 484, 20 L. ed. 207.

One of two joint and several makers of a note to a bankrupt insurance company cannot set off against his liability on such note an indebtedness of the company to him and a third person jointly on an insurance policy, even though such third person consents to the set-off, as the debts are not mutual within the act of 1867, § 20, nor are there mutual credits within such section, the note having been given and the insurance taken without reference to each other. Gray v. Rollo, 18 Wall. 629, 21 L. ed. 927, Affirming 9 Nat. Bankr. Reg. 337.

Where one purchases corporate stock on joint speculation with another, paying therefor with his own money and pledging it for his own debt, and the pledgee sells it at a loss without any notice to the other joint owner, and it is agreed between the two owners that the share of the loss of the one who had not paid for the stock should be set off against a larger debt due from the other owner to a firm of which the former was a partner, and the one paying for the stock became bankrupt before all the members of the firm had consented to such set-off, the other owner could not set up the bankrupt's debt to the firm as a set-off when sued by the assignees in bankruptcy for his share of the loss on the stock. Clark v. Sparhawk, 2 W. N. C. 115, Fed. Cas. No. 2,836.

Where one member of a firm mortgages his real estate to a bank to secure the balance of the current account of the firm, and afterwards sells the realty with the concurrence of the bank, under an agreement that a certain part of the purchase price shall be deposited as security in such member's name, to remain his separate property with the right on the part of the bank to withdraw at any time after giving twelve months' notice, and the firm subsequently becomes bankrupt, the bank can prove for the whole amount of its debt against the joint estate of the firm without deducting the amount of the deposit, as it is not a case of mutual credits within 32 & 33 Vict. chap. 71, § 39, and no set-off arises thereunder. *Ex parte* Caldicott, L. R. 23 Ch. Div. 716, 53 L. J. Ch. N. S. 618, 50 L. T. N. S. 651, 32 Week. Rep. 396, Affirming 48 L. T. N. S. 910.

Where one sends shooks to partners, directing them to send to him wine in specified lots in pipes made from such shooks, one of the partners after the dissolution of the firm cannot set off, in an action by the assignees in bankruptcy of the consignor of the shooks for the proceeds of a sale of them by the partners, an amount due them from such consignor for wine sent to him during the existence of the partnership although he notified the consignor that he would continue to ship the wine, as the debt due the partnership did not thereby become a separate debt due such partner alone. *Ex parte* Ross, Buck. Bankr. 125.

One who has apprenticed his son to one who becomes bankrupt two years thereafter cannot, in a proceeding by creditors to compel him to account for the apprentice fee, no part of which has been paid, set off a debt due from the bankrupt to a firm of which he is a member, where there has been no agreement that the fee should be paid in that manner. *Ex parte* Soames, 3 Deacon & C. 320.

A debt due individually from a residuary legatee and executrix of her husband's estate to the survivor of two obligors on a bond to her husband cannot be set off against the amount due on the bond after such survivor be-

comes bankrupt, under 5 Geo. II. chap. 30, § 28, as there is no mutual credit. Bishop v. Church, 3 Atk. 691.

See also *Ex parte* Morier, L. R. 12 Ch. Div. 491, 49 L. J. Bankr. N. S. 9, 40 L. T. N. S. 792, 28 Week. Rep. 235, *infra*, I. f, 6.

And where a receiver, appointed for the estate of a testatrix, proves a debt in bankruptcy against a firm of which a specific and residuary legatee is a member, and receives a dividend thereon, the right to set off the debt from the firm against the amount of the legacy is lost. Armstrong v. Armstrong, L. R. 12 Eq. 614, 25 L. T. N. S. 199, 19 Week. Rep. 971.

A debtor by bond to the separate estate of a deceased partner cannot set off in equity in an action on the bond acceptances on which he had become liable to the partnership, and which he had proved under the joint commission of bankruptcy, the assignees in bankruptcy having already filed a bill against the executors of the deceased partner for the balance due to creditors after exhausting the partnership estate and that of the surviving partner. Addis v. Knight, 2 Meriv. 117.

Where, on the dissolution of a firm, the retiring partner agrees to pay the continuing partner a specified amount as his share of the liabilities, and the continuing partners agree to pay a debt of a specified larger amount due from the firm, and they become bankrupt without having paid such debt, the retiring partner, when sued for the amount which he has agreed to pay, cannot set off the debt which the bankrupt has agreed to pay and on which he is contingently liable, as it is not certain that he will ever have to pay it, and it is not a mutual credit, debt, or demand, within 6 Geo. IV. chap. 16, § 50. Abbott v. Hicks, 5 Bing. N. C. 578, 7 Scott, 715, 8 L. J. C. P. N. S. 314, 3 Jur. 871.

Part owners of a ship cannot, in the absence of a showing that they are not partners, set off debts due to them severally from the bankrupt master of the ship, against their proportions of a debt due on account to the master, as it would be nothing more than a set-off of a separate debt against a joint debt. *Ex parte* Christie, 10 Ves. Jr. 105.

For cases where the debt or claim has been assigned, see *infra*, IV. b.

For cases where only part of the members of the firm become bankrupt, see *infra*, V.

3. *Corporations.*

In an action by the assignees in bankruptcy of a former director in defendant company to compel the transfer of stock therein purchased by the bankrupt, the defendant cannot set off the amount of a loan made to him by the other directors as private persons, as there is no case of mutual dealings or account within 5 Geo. I. chap. 11. Meliorucchi v. Royal Exch. Assur. Co. 1 Eq. Cas. Abr. 8, Case 8.

In an action by the trustee in bankruptcy of an insolvent corporation which carried on a livery stable for board of defendant's horses, the defendant cannot set up, as a counterclaim, amounts due him before the incorporation, from the owner of the stable or her husband, although the business was carried on in the same name after as before the incorporation, and the husband continued to be the manager of the business. Davis v. Lohsen, 68 N. Y. Supp. 795.

Where the trustee in bankruptcy of a corporation is prosecuting an action against another corporation for goods sold, a creditor of the bankrupt cannot have the value of the property credited upon his claim against the bankrupt on the ground that the goods were bought by him from the bankrupt and sold by him to the corporation sought to be charged, where it appears that he was an officer and agent of both corporations, and it is obvious that he sold the property to the other corporation as agent of the bankrupt corporation. *Re* Ft. Wayne Electric Corp. 95 Fed. 264, 2 Am. Bankr. Rep. 503.

4. *Agents, factors, and brokers.*

a. *In general.*

A broker who sells goods under a *del credere* commission, paying the price of the goods to the seller, may set off the amount so paid in an action by the assignees in bankruptcy of the purchaser subsequently appointed, to recover the proceeds of other goods sold for the bankrupt, as there are mutual credits within 5 Geo. II. chap. 30, § 28. Morris v. Cleasby, 1 Maule & S. 576. In this case the broker acted for both parties, and did not at the time of sale disclose to the purchaser the name of the merchants, but did so before paying for the goods. Lord Ellenborough stated that he wished to have it better ascertained whether it should be considered a case of mutual credit when the disclosure of the principal took place.

And on another appeal, 4 Maule & S. 566, Lord Ellenborough delivering the opinion of the court, it was held that, as the principal's name was disclosed before the broker paid the purchase price, which occurred before the bankruptcy, and as the bankrupt did not know that the broker was acting under a *del credere* commission, nor of the payment until long afterwards, and had given the broker no directions, either to guarantee the payment of, or to pay for, the goods, no case of mutual credits arose, as the sale was in all essential respects the same as if the name of the principal had been disclosed at the time of the sale, and the *del credere* commission merely required the broker to pay in case the one for whom he bought failed to pay, and did not make him liable in the first instance.

Where goods purchased by brokers for sale on speculation in a foreign country are shipped in the name of another person, who is represented by them to those from whom they purchased the goods as the real owner for whom they are acting as agents, and such third person makes advances to the brokers after the shipment, after which the brokers become bankrupt, such third person may retain the proceeds of the sale of the goods received from the consignees as a set-off for the money advanced by him, as it is a case of mutual credits within 5 Geo. II. chap. 30, § 28, and he has sufficient possession to support the doctrine of the same. Easum v. Cato, 5 Barn. & Ald. 861, 1 Dowl. & R. 530, 24 Revised Rep. 594.

Where a person about to convey his estate to trustees for sale to pay an encumbrance and to pay the residue over to him obtains advances of an auctioneer intended to be employed to be repaid out of the deposits, and the conveyance to trustees is made as designed, and the sale is made by the auctioneer, and he receives deposits to a greater amount than the advances made by him and afterwards becomes bankrupt, the one obtaining the advances is entitled to an equitable set-off of deposits against his debt to the bankrupt's estate according to the amount in which, on taking the account, he shall appear to be in reality interested beneficially in the surplus of the proceeds of the sale, and is not entitled to any set-off if he has no beneficial interest in such proceeds. Alvanley v. Lewis, 1 L. J. Ch. N. S. 53.

The colonel of a regiment sued for clothing furnished to men of the regiment by the assignees in bankruptcy of the one furnishing it, who had been appointed by the colonel by power

of attorney to receive from the paymaster all pay and allowances due to all the men of the regiment, may, where the agent had, at the time of his bankruptcy, a much larger amount so received, set off the same against the claim sued on as a mutual credit, even though such agent may also be liable to the government for the payment of such money, as in receiving it he acted as agent of the colonel. Knowles v. Maitland, 4 Barn. & C. 173, 6 Dowl. & R. 312.

The bankruptcy of the payee of a note taken for a debt due to his principal will not deprive the maker of the right to such offsets as he acquired under the honest belief that the payee was the real party in interest instead of a mere agent. Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

In an action for damages for not accepting or paying for goods bought the defendant cannot claim a set-off on the ground that he purchased from an agent of the plaintiff who was the apparent owner, and that such agent was afterwards adjudicated a bankrupt, and that before the bankruptcy mutual credit had been given between defendant and such agent in respect to the sale of goods and as to money payable by the agent to defendant, as 32 & 33 Vict. chap. 71, § 39, relating to mutual credit, debts, and dealings between the bankrupt and any other person, does not apply in the case of a third person. Turner v. Thomas, L. R. 6 C. P. 610, 40 L. J. C. P. N. S. 271, 24 L. T. N. S. 879, 19 Week. Rep. 1170.

Where assignees in bankruptcy bring suit against an agent of the bankrupt for money of the bankrupt in his hands at the time of the bankruptcy, the defendant may set off the full amount of bills drawn upon him by the bankrupt and accepted by him and paid out by the bankrupt, although the holders of such bills, in order to relieve him from his responsibility to them, have taken from him a composition upon the acceptances and delivered them up to him, as it is a gift to him by the holders if the composition was fair, and he is still liable to them if it was not fair. Stonehouse v. Read, 3 Barn. & C. 669, 5 Dowl. & R. 603.

As to the right to apply securities for a particular debt in the hands of an agent, factor, or broker to another debt, see *supra*, I. e, 2.

For debts created or claims arising after the bankrupt's insolvency, see *infra*, II. c, 1.

For immaturity of debt or claim at the time of the insolvency, see *infra*, III. e, 2.

b. Insurance brokers.

Claims between broker and underwriter.

The custom has prevailed to quite an extent, especially in England, for an insurance broker to make the contract for the insured with the underwriter, frequently taking out the policy in his own name, and the insured being entirely unknown to the underwriter. In these cases a set-off for losses occurring has ordinarily been allowed against amounts due the underwriter for premiums if the broker acted for the insured under a *del credere* commission, or had some other special interest in the policy,—especially if it was taken out in his own name.

Thus, in an action by assignees of a bankrupt underwriter against insurance brokers for premiums due the bankrupt the brokers may set off, by reason of mutual credit, under 12 & 13 Vict. chap. 106, § 171, a loss occurring before the bankruptcy upon a policy underwritten by the bankrupt in the name of the brokers for a principal for whom they were acting on a *del credere* commission. Lee v. Bullen, 8 El. & Bl. 693, note, 27 L. J. Q. B. N. S. 161, 4 Jur. N. S. 557.

And in Elgood v. Harris [1896] 2 Q. B. 491, 66 L. J. Q. B. N. S. 53, 75 L. T. N. S. 419, 45 Week. Rep. 158, it was admitted that insurance brokers might set off as against claims for premiums on policies issued by an underwriter subsequently becoming bankrupt an amount due from the bankrupt on policies effected in their own names, as well as for their principals to whom they guaranteed the solvency of the underwriter.

And in an action by the assignees of an underwriter against insurance brokers they may set off as a mutual credit losses sustained on a policy taken out by them in their own name for the benefit of their principal, although they were not acting on a *del credere* commission, where they had accepted bills of exchange drawn on them on account of the goods insured, which were consigned to them and lost before their arrival. Parker v. Beasley, 2 Maule & S. 423, 15 Revised Rep. 299.

And a broker sued by the assignees in bankruptcy of the underwriter for premiums received may set off the amount due from the underwriter on a policy on the goods of a third person taken out by the broker in his own name at the request of the owner, where he has a lien on the goods for more than the set-off claimed. Davies v. Wilkinson, 4 Bing. 573, 1 Moore & P. 502.

But in Wilson v. Creighton, 3 Dougl. 132, *sub nom.* Wilson v. Watson, 1 Esp. N. P. Dig. pt. 2, p. 78, 1 Bacon, Abr. 761, 27 Viner, Abr. 52, the insurance broker was agent for the various other correspondents, but had no *del credere* commission, and the company debited him with the premiums on insurance for them and credited him for losses as they happened; and it is stated that he was not permitted to set off, in an action for premiums due the underwriter, losses happening before the bankruptcy. It would appear from the decision in Grove v. Dubois, 1 T. R. 112, that the principal reason was that the broker was not acting under a *del credere* commission.

And a broker cannot set off against a claim for premiums on policies subscribed by an underwriter before his bankruptcy the amount of a loss occurring before the bankruptcy on one of the policies which was taken out by the broker acting under a *del credere* commission in the name of the assured and retained by the latter, although the underwriter was a party to the agreement by which the broker guaranteed the underwriter's solvency to the insured, and the broker has paid the amount of the loss, as there was no mutual credit. Peele v. Northcote, 7 Taunt. 478, 1 J. B. Moore, 178, 18 Revised Rep. 549.

In an action by assignees in bankruptcy of an underwriter to recover from the broker premiums collected by him in which he claims a right to set off losses which had happened upon the policies before the bankruptcy it is not sufficient proof of the losses that the commissioners had permitted the defendant to prove them. Pirie v. Mennett, 3 Campb. 279, 1 Rose, Bankr. 359. The court stated in this case that if it could be shown that that assignees acknowledged that the proof was just that would be sufficient evidence.

For losses occurring or adjusted after the bankruptcy, see *infra*, III. e, 2, *b*.

Claims between broker and assured.

A broker is entitled to deduct money due from the bankrupt to him for premiums out of what he collects on the policy, where it is put into his hands to receive the money from the underwriters. Whitehead v. Vaughan County Bank, 1 Bacon, Abr. 761, 27 Viner, Abr. 52; Parker v. Carter, 1 Bacon, Abr. 761, 27 Viner, Abr. 52.

An insurance broker sued in trover for an

insurance policy effected by him by assignees of the insured must, if he relies on the right to set off a debt due him from the bankrupt as a mutual credit, under 6 Geo. IV. chap. 16, § 50, plead the particular facts, and bring himself within such provisions. Hewison v. Guthrie, 2 Bing. N. C. 755, 2 Hodges, 51, 3 Scott, 298.

For immaturity of claim at time of the bankruptcy, see *infra*, III. e, 2, *b*.

5. *Trustees.*

One holding the legal title to a note against a bankrupt as trustee for another cannot set it off against a debt due from him to the bankrupt for goods sold to him. *Re* Lane, 2 Low. Dec. 305, Fed. Cas. No. 8,043.

Where a debtor covenants to pay a debt due to his father to a trustee to whom the father assigned it, trusts being declared therein under which the debtor is to take a reversionary interest, such trustee can prove for the whole amount of the debt on the debtor's subsequently becoming bankrupt, without any deduction or set-off for the debtor's reversionary interest. *Ex parte* Stone, L. R. 8 Ch. 914, 42 L. J. Bankr. N. S. 73.

Where, on a marriage settlement, a trust secured by bond is created by the wife's father payable within six months after his death, the interest being payable to the wife (his daughter) for life and after that to her husband for life and after his death for the benefit of the daughter's estate, and the husband creates a trust payable six months after his death, secured by bond and also by insurance policies on his life, the interest being payable to his wife for life and after her death without children to his estate, and the husband soon after becomes bankrupt, the wife's father purchasing all his interest from his assignees and the husband soon after dying, the policies being paid to the trustees under the settlement, after which the father becomes bankrupt, his assignees in bankruptcy are not entitled to the interest in the policies, coming to him under the assignment from the husband's assignees, without first satisfying the debt due from the father to the trustees under the marriage settlement, whether the case is considered as one of mutual credit or as one of retainer. Burridge v. Row, 8 Jur. 299, 13 L. J. Ch. N. S. 173, Affirming 1 Younge & C. Ch. Cas. 183, 11 L. J. Ch. N. S. 369, 6 Jur. 121.

See also Alvanley v. Lewis, 1 L. J. Ch. N. S. 55, *supra*, I. f, 4, *a*; Brandon v. Brandon, 3 Swanst. 312, 2 Wils. 14, *infra*, III. e, 1.

6. *Executors and administrators.*

Executors have the right to set off a debt due from the bankrupt to the testator against the amount of the legacy, except where the bankruptcy occurs before the testator's death.

Thus, a debt due from a bankrupt legatee to the testator, and also to the executor, may be set off against the legacy. Jeffs v. Wood, 2 P. Wms. 128.

In *Ex parte* O'Ferrall, 1 Glyn & J. 347, as digested in Mews' Digest, col. 862, executors were allowed to set off a moiety of a legacy given by their testator to the wife of the bankrupt against a debt due from the bankrupt to the testator, the other moiety being ordered to be settled on the wife for life with remainder to the issue of the marriage.

Where a legatee becomes bankrupt after the testator's death, and a larger sum is due from him to the estate than the amount of his legacy, his assignees in bankruptcy are not entitled to take any part of the legacy, but it is to be deducted from the amount due from him. Richards v. Richards, 9 Price, 219, 23 Revised Rep. 665.

Where executors advance money to one of the legatees, obtaining the same by a sale of some of the testator's stock, and taking back as security for its replacement an instrument authorizing the entry of judgment against such legatee if the money is not paid to them, although not expressly giving a lien on his share of the estate, and he subsequently becomes bankrupt, they have the right to look to his share of the estate for the restitution of the stock so sold for his benefit. *Ex parte* Makins, 6 Jur. 468.

Where a testator leaves all his residuary estate to his daughter, and she, on her death, leaves her residuary personalty to her children, one of whom becomes bankrupt after her death, the executors of the daughter have the right of retainer or set-off as to a debt due from the bankrupt to the testator, his grandfather, as against the demand of the assignees in bankruptcy for his share in his mother's estate, where it was ascertained before his bankruptcy that there was a clear residue of his grandfather's estate exclusive of the debt due from the bankrupt. Bousfield v. Lawford, 1 De G. J. & S. 459, 11 Week. Rep. 842, 8 L. T. N. S. 619, 33 L. J. Ch. N. S. 26. Affirming 31 Beav. 591.

A debt due individually from a residuary legatee and executrix of her husband's estate to the survivor of two obligors on a bond to her husband cannot be set off against the amount due on the bond after such survivor becomes bankrupt, under 5 Geo. II. chap. 30, § 28, as there is no mutual credit. Bishop v. Church, 3 Atk. 691.

An executor sued by the trustee in bankruptcy of a bank for the amount of an overdraft on his individual account may set off the amount of an account in his name as executor on which a larger amount is due from the bank, where he is the sole residuary legatee, and there will be a much larger amount coming to him as such, although an annuity charged on the real and personal estate, and an amount to be invested for the benefit of certain persons, had not been provided for at the date of the bankruptcy, there being, however, in his hands, in addition to the amount in the bank, more than sufficient for this purpose. Bailey v. Finch, L. R. 7, Q. B. 34, 41 L. J. Q. B. N. S. 83, 25 L. T. N. S. 871, 20 Week. Rep. 294.

But where at the time a bank becomes bankrupt executors have a joint account on which there is an amount due them, and one of the executors has an account which is overdrawn to a somewhat less amount, the joint account cannot be set off against the individual account, although the one keeping it was the residuary legatee and all the debts and funeral expenses had been paid and securities had been set apart to answer the legacies bequeathed by the will, leaving only a comparatively small amount for rates, taxes, and solicitor's costs due from the executors jointly, as there is no legal right of set-off, and the case could not be brought within the rules of equitable set-off or mutual credit, unless the executor having the individual account was so much the person solely beneficially interested that a court of equity, without any terms or further inquiry, would have obliged the other executors to transfer the account into his name alone. *Ex parte* Morier, L. R. 12 Ch. Div. 491, 46 L. J. Bankr. N. S. 9, 40 L. T. N. S. 792, 28 Week. Rep. 235.

For the effect of proving the claim against the bankrupt, see Armstrong v. Armstrong, L. R. 12 Eq. 614, 25 L. T. N. S. 199, 19 Week. Rep. 971; Stammers v. Elliott, L. R. 3 Ch. 195, 37 L. J. Ch. N. S. 353, 18 L. T. N. S. 1, 16 Week. Rep. 489,—*infra*, VII.

For cases where the testator dies after the bankruptcy, see *infra*, II. c, 2.

For cases where the bankruptcy occurs before the legacy is payable, see *infra*, III. e, 3.

For cases of annuities, see *infra*, II. k.

7. *Husband and wife.*

A debt due from a bankrupt to a married woman cannot be set off by her husband against a debt from him to the bankrupt, either at law or in equity, or as a case of mutual debt or credit. *Ex parte* Blagden, 19 Ves. Jr. 465, 2 Rose, Bankr. 249.

And in an action by assignees of a bankrupt in their own names on a note given by the defendant to the bankrupt's wife before their marriage, the defendant cannot set off a debt due from the bankrupt. Yates v. Sherrington, 11 Mees. & W. 42, 2 Dowl. N. S. 803, 12 L. J. Exch. N. S. 216.

But on appeal in 12 Mees. & W. 855, the court held that the assignees could not sue on the note in their own names.

In Ranking v. Barnard, 5 Madd. 32, where a bequest was made to the wife of one who owed the testatrix a much larger amount and the wife died without asserting a claim on the legacy, the husband having previously become bankrupt, the executors were allowed to set off the amount due from the bankrupt to the testatrix against a claim by his assignees in bankruptcy for the legacy, as a legacy to the wife is, at law, a legacy to the husband, subject only to the wife's claim for a provision out of it.

In *Ex parte* O'Ferrall, 1 Glyn & J. 347, as digested in 2 Mews' Digest, col. 862, a moiety of a legacy by the testator to the wife of the bankrupt was set off against a debt due from the bankrupt to the testator, and the other moiety was ordered to be settled on the wife for life with remainder to the issue of the marriage.

8. *Assignee in bankruptcy.*

One of two assignees in bankruptcy cannot set off against the amount of a dividend payable to a creditor from the bankrupt's estate a debt from the creditor to such assignee, although he swears that the creditor agreed to allow such set-off. *Ex parte* Bailey, 1 Mont. D. & De G. 263.

g. *Unpaid shares of corporate stock.*

No right of set-off against calls on stock exists except in cases where the stockholder or contributory himself is a bankrupt, in which case a set-off is allowed in England, no cases of that kind having been decided in this country. The right of set-off in England where the contributory is solvent as to cases decided prior to 1875 is not considered here, as the rules in bankruptcy cases were not applicable to cases for winding up companies until made so by the provision in the judicature act of 1875, § 10. The rule has always been, however, not to allow a set-off in such cases.

A creditor of a bankrupt corporation who still owes it on his contract of subscription to its stock cannot prove his debt until he has paid the amount due on his stock. *Re* Wiener & G. Shoe Co. 96 Fed. 949.

And stockholders of a bankrupt corporation, who are also its creditors, cannot be allowed to deduct the debts to them from the amount due on their unpaid stock; but if they prove their debts under the bankruptcy, deductions equal to their estimated dividends may perhaps be made. Wilbur v. Corporation Stockholders, 13 Phila. 479, Fed. Cas. No. 17,636.

And a stockholder in an insurance company rendered insolvent by fire cannot escape liability on a note given by him for his stock by presenting a certificate of indebtedness on an adjusted policy and obtaining a surrender of his policy therefor, where he knows at the time of the company's insolvency. Jenkins v. Armour, 6 Biss. 312, Fed. Cas. No. 7,260.

And a stockholder in a company cannot, in an action on a note for unpaid shares, set off against it a debt due him from the company under the act of 1867, § 20, as the fund arising from unpaid shares constitutes a trust fund devoted to payment of all its creditors. Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731, Affirming 3 Biss. 293, Fed. Cas. No. 12,400; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483, Reversing, on another point, 5 Biss. 431, Fed. Cas. No. 12,435.

Money paid by a stockholder in a corporation before the beginning of bankruptcy proceedings against it on stock which the corporation was not authorized to issue cannot be set off in an action by the assignees against his liability on valid stock owned by him. Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968.

Where a company which is being wound up owes a bankrupt stockholder more than the amount due on his shares he may set off the debt to him against his indebtedness for his shares, under 12 & 13 Vict. chap. 106, § 171, as such set-off is allowable either in bankruptcy or in winding up proceedings. *Re* Universal Bkg. Corp. L. R. 5 Ch. 491, 18 Week. Rep. 475, 22 L. T. N. S. 219.

And where a contributory of a company in the process of winding up has executed an inspectorship deed, the effect of which is to import the mutual credit clause of 12 & 13 Vict. chap. 106, § 171, the inspectors cannot prove against the company bills of exchange held by such contributory at the date of the deed which had been accepted by the company and which were indorsed to an agent for collection soon after its date, but it must be set off against a call exceeding their amount made on such contributory after he became the holder of the bills and before their maturity. *Re* Anglo-Greek Steam Nav. & Trading Co. L. R. 4 Ch. 174, 17 Week. Rep. 244.

And where a shareholder in a limited company has executed a deed of assignment which has been registered under the bankruptcy act the trustees in such deed may set off a debt due to the shareholder from the company against a demand for calls made by the official liquidator of the company on the ground that there are mutual debts within such section. *Re* Duckworth, L. R. 2 Ch. 578, 36 L. J. Bankr. N. S. 28, 16 L. T. N. S. 580, 15 Week. Rep. 858, Affirming 15 L. T. N. S. 637, 15 Week. Rep. 363.

The rule that a solvent contributory cannot set off a judgment due to him from the company against calls made on him by the official liquidator in the winding up of the company has not been affected by the judicature act of 1875, § 10, providing that in a winding up the same rules shall apply as are in force in bankruptcy, there being no mutual debt or mutual credit. Gill's Case, L. R. 12 Ch. Div. 755, 41 L. T. N. S. 21, 48 L. J. Ch. N. S. 774, 27 Week. Rep. 934.

But one sued by a trustee in bankruptcy for the purchase price of shares of stock may set off a claim for unliquidated damages for a fraudulent misrepresentation by which he was induced to purchase, under 32 & 33 Vict. chap. 71, § 39, authorizing a set-off in case of mutual credits, mutual debts, or other "mutual dealings," as such misrepresentation is not a tort, but a breach of the obligation arising out of the contract of sale. Jack v. Kipping, L. R.

9 Q. B. Div. 113, 51 L. J. Q. B. N. S. 463, 46 L. T. N. S. 169, 30 Week. Rep. 441.

b. *Bank deposits.*

1. *Bankruptcy of bank*

A depositor in a bank which becomes bankrupt may set off a deposit therein against an indebtedness to the bank which is due and owing at the time of the bankruptcy.

Thus, one indebted to bankrupt bankers on a note may set off in equity an amount on deposit with the bankrupt at the time of the bankruptcy. *Ex parte* Clennell, 4 L. T. N. S. 60, 9 Week. Rep. 380.

See also Bailey v. Finch, L. R. 7 Q. B. 34, 41 L. J. Q. B. N. S. 83, 25 L. T. N. S. 871, 20 Week. Rep. 294; *Ex parte* Morier, L. R. 12 Ch. Div. 491, 49 L. J. Bankr. N. S. 9, 40 L. T. N. S. 792, 28 Week. Rep. 235, *supra*, I. f, 6; *Ex parte* Pearce, 2 Mont. D. & De G. 142, *supra*, I. f, 1; *Re* Van Allen, 37 Barb. 225, *supra*, I. f, 2.

For deposits of trustee in bank which subsequently becomes bankrupt, see *infra*, II. d, 1.

For set-off between deposits and debts due the bank which are not mature at the time of the insolvency, see *infra*, III. f, 1.

For set-off of deposits where the deposit, or the claim against the bank, has been assigned, see *infra*, IV. c, 1.

2. *Bankruptcy of depositor.*

Where a depositor in a bank becomes bankrupt the bank may set off a matured debt due it from the bankrupt against the amount of the deposit.

Thus, a bank may set off a deposit of the bankrupt in such bank against an indebtedness of the bankrupt to it, as it is a case of mutual debts within the bankruptcy act of 1898, § 68*a*. *Re* Little, 110 Fed. 621.

And in Blair v. Allen, 3 Dill. 101, Fed. Cas. No. 1,483, the court said, *obiter*, that a bank holding an indorsed note executed by a bankrupt may set it off against a deposit of the bankrupt in the bank.

And in an action of trover by assignees in bankruptcy against bankers for a note paid in to the bank by the bankrupt on the day before his bankruptcy and entered in his cash account with the bank, the bankers may set up their right to hold such note against their liability on bad bills discounted by them for the bankrupt before the bankruptcy. Jourdaine v. Lefevre, 1 Esp. 66.

A bank in which a bankrupt has a deposit may retain the deposit and apply it on notes for a greater amount against the bankrupt held by the bank, and the act of the bank in transferring the deposit to the name of the trustee in bankruptcy does not affect such right. *Re* Myers, 99 Fed. 691, 3 Am. Bankr. Rep. 760.

And a bank which by mistake pays over the entire amount which a bankrupt has on deposit in the bank to the trustee in bankruptcy without first deducting the amount of the note of the bankrupt held by it may recover the amount of such note from the trustee in equity without first offering to satisfy the note or bringing it into court for cancelation. Union Nat. Bank v. McKey, 42 C. C. A. 583, 102 Fed. 662.

And a claim for losses by fire due from a bankrupt insurance company may be set off by the insured against a claim of the company for money deposited by it before its bankruptcy with him as a private banker. Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483, Reversing 5 B'ss. 431, Fed. Cas. No. 12,435.

But where one member of a firm mortgages his real estate to a bank to secure the balance of the current account of the firm, and afterwards sells the realty with the concurrence of the bank under an agreement that a certain part of the purchase price shall be deposited as security in such member's name to remain his separate property with the right on the part of the bank to withdraw at any time after giving twelve months' notice, and the firm subsequently becomes bankrupt, the bank can prove for the whole amount of its debt against the joint estate of the firm without deducting the amount of the deposit, as it is not a case of mutual credits within 32 & 33 Vict. chap. 71, § 39, and no set-off arises thereunder. *Ex parte* Caldicott, L. R. 25 Ch. Div. 716, 53 L. J. Ch. N. S. 618, 50 L. T. N. S. 651, 32 Week. Rep. 396.

And the bank loses its right to set off a debt from the depositor against the deposit by proving its entire debt without offering to abate its claim by the amount of the deposit, as a plea of set-off is equivalent to an original suit on the debt, within the prohibition of the act of 1867, § 21, against bringing suit on a debt which has been proved. Brown v. Farmers' Bank, 6 Bush, 198.

For cases where the deposit or debt due from the bankrupt is not yet mature, see *infra*, III. f, 2.

For cases where the deposit is made after insolvency, see *infra*, II. d, 2.

For cases where the deposit or debt due from the bankrupt has been assigned, see *infra*, IV. c, 2.

1. *Other banking transactions and commercial paper.*

Bills or notes held by the parties in their own right may be set off against similar paper or other debts if both claims are mature at the time of the bankruptcy.

Thus, a note which is subject to an offset for a larger amount due from the holder to the bankrupt is not a provable debt. *Re* Ford, 18 Nat. Bankr. Reg. 426, Fed. Cas. No. 4,932.

And where one party is indebted to another on a mortgage, and the latter to the former on notes, one debt will be set off against the other under 4 Anne, chap. 17, § 11, providing that where there is mutual credit between a bankrupt and another only the balance shall be paid. Lanesborough v. Jones, 1 P. Wms. 326, 2 Eq. Cas. Abr. 122.

An action by assignees of a bankrupt on a bill accepted by defendants who have acceptances of the bankrupt for a much larger amount will be stayed, and the matter referred to take the account, as there is a clear right of set-off at law. *Ex parte* Clegg, 3 Deacon & C. 505, 1 Mont. & A. 91.

The estate of a bankrupt acceptor of a bill has no right to require the holder of the bill to have recourse to any prior indorser before availing himself of the right to protect himself by compensation and retention in Scotland, or under the mutual credit clauses in England. M'Kinnon v. Armstrong Bros. L. R. 2 App. Cas. 531, 36 L. T. N. S. 482.

A provision in a note that it is "without offset" does not prevent the maker from setting off an indebtedness due him from the holder in case the latter becomes bankrupt, under U. S. Rev. Stat. § 5073 (act 1867, § 20) relating to mutual debts and mutual credits. Harmanson v. Bain, 1 Hughes, 391, Fed. Cas. No. 6,073.

And in Remis v. Smith, 10 Met. 194, which was an action under the Massachusetts insolvency law (Mass. Stat. 1838, chap. 163), the defendant was permitted to set off notes and accounts due him from the insolvent against a claim by the assignee in insolvency on a covenant of warranty in a deed to the insolvent, under § 3, providing that when it appears that

there as been mutual credit given by the insolvent and any other person, or mutual debts between them, the account shall be stated and one debt set off against the other.

A plea of set-off in an action by the assignees in bankruptcy for money lent by the bankrupts, alleging that before the issue of the fiat defendants discounted a bill of exchange for the bankrupts and then lent and advanced to them and gave credit to them for a certain large sum of money exceeding the amount sued for upon the security of such bill of exchange, is sufficiently put in issue by a replication alleging that defendants did not lend or advance a large sum of money or any sum of money to the bankrupts, as the giving of credit was part of the same transaction as the lending and advancing. Alsager v. Currie, 11 Mees. & W. 14, 12 Mees. & W. 751, 13 L. J. Exch. N. S. 203, 12 L. J. Exch. N. S. 164.

Where the provisional assignee of bankrupt bankers, knowing that the bankrupts and another banking firm held each other's securities for nearly the same amount, and that a slight balance would be due to the other firm on balancing the accounts between them, presents and obtains payment of the notes of such other firm, the latter may, in an action for money had and received, recover the amount so received from the provisional assignee, as under 5 Geo. II. chap. 30, § 28, the balance of the accounts between the two firms constituted the real debt. Edmeads v. Newman, 1 Barn. & C. 418, 2 Dowl. & R. 568.

Where bankers were accustomed to exchange notes of one who becomes bankrupt received by them for their own notes received by the bankrupt, and just before the commission in bankruptcy issued the bankrupt's clerk absconded with the banker's notes which the bankrupt then had and other property of the bankrupt, and the assignees in bankruptcy compromised with such clerk, the bankers may set off notes of the bankrupt held by them against the amount received on the compromise with the clerk in the proportion that their notes taken by him bore to the entire property taken. *Ex parte* Huckey, 1 Madd. 577.

And where bankers are in the habit of exchanging with the agent of a second banker notes of the latter banker taken up by the former, receiving in exchange their own notes taken up by such agent, and the second banker becomes bankrupt while the agent has notes of the former bankers which he refuses to exchange for notes of the bankrupt taken up by them, and the assignees in bankruptcy in settling with such agent permit him to retain such notes on the ground that he has a lien on all the bankrupt's effects in his hands, such bankers may recover the amount of such notes from the assignees, as they constituted mutual credits which might have been set off by them against the notes of the bankrupt in their own hands. *Ex parte* National Bank, 4 Deacon & C. 32, 1 Mont. & A. 644, 3 Deacon & C. 58.

But a stockholder in a bankrupt insurance company cannot, when sued on a note given to it for unpaid shares, set off against it a debt due him from the corporation under the act of 1867, § 20, as the fund arising from unpaid shares constitutes a trust fund devoted to the payment of all its creditors. Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731, Affirming 3 Biss. 293, Fed. Cas. No. 12,400; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483, Reversing on another point 5 Biss. 431, Fed. Cas. No. 12,435.

The bankruptcy of the payee of a note taken for a debt due to his principal will not deprive the maker of the right to such offsets as he acquired under the honest belief that the payee was the real party in interest instead of a mere agent. Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

One holding the legal title to a note against a bankrupt as trustee for another cannot set it off against a debt due from him to the bankrupt for goods sold to him. *Re* Lane, 2 Low. Dec. 305, Fed. Cas. No. 8,043.

In *Re* Kaufman, 8 Ben. 390, Fed. Cas. No. 7,626, one who had filed a proof of claim on a bill of exchange drawn by the bankrupt, and had received a dividend on the whole amount of the bill, was permitted to withdraw the proof after the assignees in bankruptcy had commenced a suit for the balance on an account due to the bankrupt for an amount exceeding the bill of exchange, on the ground that he had mistakenly supposed that the amount of such balance had been deducted, and that he had never intended to claim any more than the difference.

Where a debtor of the bankrupt has given him a note payable to the order of a certain bank which the trustee in bankruptcy cannot find, the debtor cannot set off such note against the debt, where it has not been indorsed by the bank, and no notice of its assignment has been given to the maker, but the bank will be restrained from indorsing it. *Re* Jackson, 94 Fed. 797.

For cases of joint or partnership notes, see *supra*, I. f, 2.

For bankruptcy of third persons, see *infra*, V.

For cases where the bills or notes are given or the debts against which they are sought to be set off are created after the bankruptcy, see *infra*, II. e.

For cases where the bills or notes or debts sought to be set off are not mature at the time of the bankruptcy, see *infra*, III. g.

For cases of assignments, see *infra*, IV. d.

For set-off of bills or notes against deposits in bank, see *supra*, I. h; *infra*, II. d; III. f; IV. c.

In case of particular directions or agreements, see *supra*, I. e, 3; *infra*, III. d, 2.

As to extent of set-off allowed, see *infra*, VIII.

j. Insurance matters.

The amount of a loss occurring and adjusted before the bankruptcy of the company may ordinarily be set off against a debt due it, but not against a liability for unpaid stock of the company.

Thus, a claim for losses by fire due from a bankrupt insurance company may be set off by the insured against a claim of the company for money deposited by the company before its bankruptcy with the insured as a private banker. Scammon v. Kimball, 92 U. S. 362, 23 L. ed 483, Reversing 5 Biss. 431, Fed. Cas. No. 12,435.

And a borrower from an insurance company may set off against it a claim for a loss on a policy issued to him by the company, even though the debt to the company is not due at the time of its bankruptcy, as it is a case of mutual debt and credit, within the act of 1867, § 20. Drake v. Rollo, 3 Biss. 273, Fed. Cas. No. 4,066.

Where the property of an insolvent insurance company has been sequestered and placed in the hands of receivers, under Mass. Gen. Stat. chap. 58, § 6, which contains no provisions as to set-off, the same rule will be applied as in proceedings instituted under the bankruptcy laws, and the amount of a loss sustained before that time under a policy may be set off under the act of 1867, § 20, against a debt due from the policy holder to the company, even if the company holds collateral security for such

debt. Com. v. Shoe & Leather Dealers' F. Ins. Co. 112 Mass. 131.

But a stockholder in a bankrupt insurance company cannot set off, against a note given for unpaid shares, a debt due from him to the company under the act of 1867, § 20, as the fund arising from unpaid shares constitutes a trust fund devoted to the payment of all its credits. Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731, Affirming 3 Biss. 293, Fed. Cas. No. 12,400; Scammon v. Kimball, 92 U. S. 362, 23 L. ed. 483, Reversing on another point 5 Biss. 431, Fed. Cas. No. 12,435.

Nor can one of two joint and several makers of a note to a bankrupt insurance company set off against his liability thereon an indebtedness of the company to him and a third person jointly on an insurance policy, even though such third person consents to the set-off, as the debts are not mutual within the act of 1867, § 20, nor are there mutual credits within such section, the note having been given and the insurance taken without reference to each other. Gray v. Rollo, 18 Wall. 629, 21 L. ed. 927, Affirming 9 Nat. Bankr. Reg. 337.

For losses occurring or adjusted after the bankruptcy, see *infra*, III. h.

For matters of assignments, see *infra*, IV. e.

For insurance brokers, see *supra*, I. f, 4, *b*; *infra*, III. e, 2, *b*.

For the right of set-off on settlement of claims of insolvent insurance companies generally, see *note* to Boston & A. R. Co. v. Mercantile Trust & Deposit Co. (Md.) 38 L. R. A. 105.

k. *Landlord and tenant.*

Where a mill and machinery are leased under an agreement that at the termination of the lease the lessor shall pay for any increase in the value of the machinery during the term and the lessee for any decrease, and the lessee becomes bankrupt and his assignees elect not to take the lessee's interest, the lessor may set off an amount due for rent against a demand against him for increased value of the machinery. *Ex parte* Hope, 3 De G. & J. 92, 27 L. J. Bankr. N. S. 40, 4 Jur. N. S. 464, 6 Week. Rep. 789.

Upon the termination of the tenancy of a farm by notice to quit twelve days after a receiving order is granted against the tenant, the landlord has no right, under 46 & 47 Vict. chap. 52, § 38, to set off a claim for rent against the sum found due by him on a valuation of the growing crops, the custom of the country as to the valuation to the out-going tenant being to fix the value of the crops after deducting any arrears of rent, instead of fixing their absolute value. *Ex parte* Hastings, 62 L. J. Q. B. N. S. 628, 10 Morrell, 219.

As to set-off in case of breach of covenants in a lease, see Booth v. Hutchinson, L. R. 15 Eq. 30, 42 L. J. Ch. N. S. 492, 27 L. T. N. S. 600, 21 Week. Rep. 116; *Ex parte* Dyke, L. R. 22 Ch. Div. 410, 52 L. J. Ch. N. S. 570, 48 L. T. N. S. 303, 31 Week. Rep. 278; *supra*, I. d. See also *infra*, II. f; III. i.

l. *Overpayment in composition proceedings.*

An amount paid by one compounding with creditors to one creditor in excess of the rate of payment to other creditors in accordance with an agreement to that effect will, upon his subsequently becoming bankrupt, be set off against a debt due such creditor.

Thus, payments made to one of the creditors by one compounding with creditors in excess of the amount of composition in accordance with an agreement executed by him as a condition of signing the composition deed are fraudulent, and where the debtor subsequently becomes bankrupt his assignees may set off the amount of such payments against a debt subsequently contracted which the creditor undertakes to prove, as such payments are within 6 Geo. IV. chap. 16, § 50, relating to mutual credits. *Ex parte* Minton, 3 Deacon & C. 688, 1 Mont. & A. 440.

Where one enters into a composition with creditors, inducing some of them to enter into the agreement by promising to pay them in full, which payment is made after the composition from the property of the debtor's wife for whom he was acting as agent, the payment being made without her knowledge, the creditors having actual or constructive notice of the facts, and the wife subsequently becomes bankrupt, owing them a less amount than was thus paid to them from her estate, the amount so paid to them may be set off by her trustees in bankruptcy. *Re* Knox, 98 Fed. 585.

II. *Debts created, or claims arising, after insolvency.*

a. *In general.*

The act of 5 Geo. II. chap. 30, § 28, provides for set-off in case of mutual debts or mutual credits between the bankrupt and another person at any time before he becomes bankrupt. This was changed in 46 Geo. III. chap. 135, § 3, so as to provide for set-off in case of mutual debts or credits, notwithstanding any prior act of bankruptcy, if the credit was given to the bankrupt two months before the issuing of the commission. And in 6 Geo. IV. chap. 16, § 50, a change was again made which has been preserved in the later English bankruptcy acts so as to provide for set-off in case of mutual debts or credits, notwithstanding any prior act of bankruptcy before the credit was given or the debt contracted, provided that the person claiming the benefit of the set-off had no notice at the time when the credit was given of an act of bankruptcy committed by the bankrupt.

The Federal bankruptcy act of 1800, § 42, contained a provision similar to that of 5 Geo. II. chap. 30, § 28, *supra*, for set-off in case of mutual debts or credits between the bankrupt and any other person at any time before such person became bankrupt. Under the act of 1867, § 20, a set-off was to be allowed in case of mutual debts or credits provided that no set-off should be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition in bankruptcy, and by the act of June 22, 1874, 18 Stat. at L. 178, chap. 390, § 6, § 20, was amended by adding "or in cases of compulsory bankruptcy after the act of bankruptcy upon or in respect of which the adjudication shall be made and with a view of making such set-off." And the act of 1898, § 68, provides for allowing a set-off in case of mutual debts or credits provided that no set-off shall be allowed of a claim purchased by or transferred to the bankrupt's debtor after the filing of the petition or within four months before such filing with a view to its use as a set-off and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy.

In Shepherd v. Turner, 3 McCord, L. 249, 15 Am. Dec. 631, the court said, *obiter*, that to entitle a person to a set-off in bankruptcy his demand must be an existing one at the time the bankruptcy happens.

And Barclay v. Carson, 3 N. C. (2 Hayw.) 243, holds that a demand against a bankrupt acquired by the defendant after the bankruptcy cannot by the express words of the act of 1800, § 42, be set off against the assignees in bank-

ruptcy, among which class of demands it places a debt arising by delivery of goods to the bankrupt by the defendant after the act of bankruptcy.

And in *Re* Crystal Springs Bottling Co. 100 Fed. 265, 4 Am. Bankr. Rep. 55, the court says that the provision of the act of 1898, § 68, for a set-off in cases of mutual debts and mutual credits between the estate of a bankrupt and a creditor, would seem to include a liability that has accrued to a trustee in bankruptcy which had not accrued to the bankrupt if the claim and liability are mutual.

And a claim against a bankrupt for keeping live stock of the bankrupt before the bankruptcy cannot be set off against an indebtedness for live stock purchased of the assignee in bankruptcy, but a claim for keeping them after the assignee's appointment may be set off against such indebtedness. Moran v. Bogert, 14 Nat. Bankr. Rep. 393, 3 Hun, 603, 16 Abb. Pr. N. S. 303.

In trover for a ship against the captain by the assignees in bankruptcy of the owner, the captain cannot set off a claim for wages nor one for amounts paid by him after the bankruptcy for stores and repairs for which he, as well as the owner, was liable, as the ship remained *in specie* till after the bankruptcy, and the conversion arose from an act on the property of the assignees, and not of the bankrupt. Wilkins v. Carmichael, 1 Dougl. 101.

A creditor of a bankrupt who, after an act of bankruptcy but more than two months before the date of the commission in bankruptcy, purchases goods of the bankrupt, may, in an action by the assignee for the price of the goods, set off the amount of his claim as a mutual credit, under 46 Geo. III. chap. 135, § 3, authorizing a set-off where there has been mutual credit between the "bankrupt" and any other person, as, under § 1, providing that all dealings with any bankrupt entered into more than two months before the date of the commission shall, notwithstanding any prior act of bankruptcy, be as good and effectual as if it had not taken place, the debt for the goods was contracted with the bankrupt instead of the assignee. Southwood v. Taylor, 1 Barn. & Ald. 471.

A creditor who has proved his claim in the bankruptcy, and is being sued by the bankrupt, or by his executor after his death, for a debt due to the bankrupt on a contract entered into after the commencement of the bankruptcy, the bankrupt not having obtained an order of discharge, cannot, during the period of three years after the close of the bankruptcy, set off the unpaid balance of his proved debt against the amount sued for, under 32 & 33 Vict. chap. 71, § 54, which forbids any creditor obtaining any advantage over others during such period. *Re* Smith, L. R. 22 Ch. Div. 586, 52 L. J. Ch. N. S. 411, 48 L. T. N. S. 254, 31 Week. Rep. 413.

Where the declaration of assignees in bankruptcy is to the effect that the defendant is indebted to them in a certain amount for money before then received by defendant for their use as assignees, a plea that the bankrupt before and at the time of bankruptcy was indebted to the defendant in a specified larger amount upon an account before then stated between them, which amount defendant offers to set off, is bad for failure to allege that the sum for which plaintiffs sue was received by the defendant before the bankruptcy. Groom v. Mealey, 2 Bing. N. C. 138, 2 Scott, 171, 1 Hodges, 212, 4 L. J. C. P. N. S. 274.

And in an action of assumpsit by assignees in bankruptcy for money had and received by defendant to their use, a plea that, although the money mentioned remained and was in defendant's possession after the bankruptcy, yet it was in fact received before the bankruptcy and from thence continually remained in defendant's possession, and that before and at the time of the bankruptcy the defendant was indebted to him in a larger amount, and that at the time defendant gave the credit to the bankrupt he had no notice of any act of bankruptcy, is bad as confessing that the money was received to the use of the assignees before the bankruptcy, and attempting to set off against it a debt due from the bankrupt. Wood v. Smith, 4 Mees. & W. 522, 8 L. J. Exch. N. S. 57.

b. Agreement to pay cash or by bill of exchange.

Where property is purchased by a creditor of the bankrupt with knowledge of his insolvency under an agreement to pay cash therefor or give a bill of exchange, he cannot, when sued for the purchase price, set off the amount of his debt.

Thus, a creditor of a bankrupt who, for the purpose of obtaining an unlawful preference over other creditors, has a third person purchase property of the bankrupt agreeing to pay cash in thirty days, and then has such purchaser tender payment in notes due from the bankrupt to such creditor, cannot, when sued by the assignees in bankruptcy for the value of the property sold, set off the debt due him from the bankrupt, whether the complaint is regarded as one in tort or on account, as the creditor ought not to be permitted to obtain a preference by such a trick. Fleming v. Andrews, 3 Fed. 632.

And where one takes from third persons the acceptance of one known to be in bad circumstances with the purpose of making a purchase of goods from such acceptor for which he agrees to pay by his bill at three months, and without disclosing that he holds such acceptance, and with the intention of setting off such acceptance, which he simply holds in trust for such third persons against the purchase price, he cannot set it off, in an action by the assignees in bankruptcy of such acceptor, as he is not a bona fide holder of the acceptance, and there was no mutual credit between him and the bankrupt at the time of the bankruptcy. Fair v. McIver, 16 East, 130.

And where the drawer of a bill of exchange accepted by the bankrupt indorses it without consideration after its dishonor for the purpose of having the indorsee purchase a phaeton from the bankrupt and set off the acceptance, the indorsee having agreed to pay for the phaeton in cash on delivery, the indorsee when sued for the purchase price cannot set off the amount of the acceptance, under 6 Geo. IV. chap. 16, § 50, as there is no debt between the bankrupt and such indorsee arising out of the acceptance, and the latter had no interest in it. Lackington v. Combes, 6 Bing. N. C. 71, 9 L. J. C. P. N. S. 101, 8 Scott, 312.

For other cases of directions or agreements as to payment, see *supra*, I. e; *infra*, III. d.

2. Debtors and creditors in same right.

1. Agents and factors.

Where a trader after committing an act of bankruptcy continued dealings with his factor who did not know of such act, his assignees in bankruptcy may recover all payments made to the factor within two months before the issuing of the commission, as they are not protected by 46 Geo. III. chap. 135, § 3, and the factor cannot set off any indebtedness incurred during such period, although he did not know of the act of bankruptcy. Kinder v. Butter-

worth, 6 Barn. & C. 42, 9 Dowl. & R. 47, 5 L. J. K. B. 23.

Where a trader commits a secret act of bankruptcy by leaving his house, leaving his foreman in charge of the business during his absence, who receives several sums of money for debts due the bankrupt and for goods sold after the act of bankruptcy, paying out the amounts so received, most of them being made in good faith without notice of the act of bankruptcy, he cannot, when sued by the assignees for the money so received as having been received for their use, set off any of the payments made by him. Kynaston v. Crouch, 14 Mees. & W. 266, 14 L. J. Exch. N. S. 324, 9 Jur. 584. The court, however, while stating that they did not express an opinion as to whether the defendant might not have protected himself by a proper allegation of having made the payments without notice of any act of bankruptcy, intimated that such was their opinion.

See also Hankey v. Vernon, 3 Bro. Ch. 313, *infra*, II. e.

For cases where debts or claims are existing and mature at the time of the insolvency, see *supra*, I. f, 4.

For cases where the debts are existing but immature at the time of the insolvency, see *infra*, III. e, 2.

2. *Executors and administrators.*

Where the testator dies after a legatee becomes bankrupt, the executors are not permitted to set off a debt due from the legatee against the legacy, where it appears that the testator did not intend to claim the debt.

Thus, where one indebted to his sister becomes bankrupt, and she subsequently makes a will making certain bequests, the interest thereon to be paid to him freed from liability for his debts and giving him the power of appointment, and in default of appointment giving the bequests to his executors for his and their own use and benefit, and dies without proving her debt, the bankrupt subsequently dying without having exercised the power of appointment and without having obtained his certificate, the executors of the sister's estate cannot, when sued by the assignee in bankruptcy for the legacy, set off the debt due the sister from the bankrupt under the statutes relating to mutual debts and credits, as the executors never became entitled to receive more than their dividends on the debt, and the bankrupt never became entitled to the legacy at all. Cherry v. Boultbee, 4 Myl. & C. 442, 9 L. J. Ch. N. S. 118, 3 Jur. 1116, Affirming 2 Keen, 319.

Executors are not entitled to set off against or retain from the share of a residuary legatee who became bankrupt a week before the death of the testatrix the amount of a debt due from him to the testatrix, where the debt had not been acknowledged for more than six years before her death, and had not been proved in the bankruptcy, and no dividend had been declared thereon. *Re* Hodgson, L. R. 9 Ch. Div. 673, 48 L. J. Ch. N. S. 52, 27 Week. Rep. 38.

Where a composition is accepted, and the bankruptcy annulled without the father of the bankrupt proving a debt due him or being paid the composition, and the father subsequently dies leaving a share of the estate to such bankrupt, the executors are not entitled to the right of set-off or retainer against the legacy for the whole debt, but only for the composition on the debt and interest. *Re* Orpen, L. R. 16 Ch. Div. 202, 29 Week. Rep. 467, 50 L. J. Ch. N. S. 25, 43 L. T. N. S. 728.

Where a testator who left a bequest for a bankrupt died within three years after the bankruptcy had been closed and the trustee released, but before the bankrupt's discharge, the testator not having received any dividend on the debt which he had proved against the bankrupt's estate, the executors cannot retain or set off the amount of the debt as against a legacy, as, under 32 & 33 Vict. chap. 71, § 54, debts proved against the bankrupt's estate cannot be enforced by action until the expiration of three years, and accordingly they cannot be relied on as a set-off. *Re* Rees, 60 L. T. N. S. 260.

Ex parte Man, 1 Mont. & M. 210, as digested in 2 Mews' Digest, col. 867, holds that where one proves a debt against the estate of the bankrupt, and dies before the latter obtains his discharge, leaving him a legacy of an amount less than the debt, the legacy will be deducted from the debt proved. The court, however, refused to follow this case in Cherry v. Boultbee, 3 Jur. 1116, 9 L. J. Ch. N. S. 118, 4 Myl. & C. 442, *supra*.

Where the mother of a voluntary bankrupt dies intestate pending the bankruptcy the administrator may set off or deduct the amount of a debt due from the bankrupt to his mother against the claim of the assignee for the bankrupt's distributive share in her estate. *Ex parte* Newhall, 2 Story, 360, Fed. Cas. No. 10,159. In this case the court, Story, J., says that the case may not be one of mutual debts or mutual credits within the act of 1841, chap. 9, § 5, but that the assignee in bankruptcy could not claim a distributive share in the mother's assets without making all equitable allowances attached to it.

For cases where the testator dies before the bankruptcy, see *supra*, I. f, 6.

For cases where the legatee does not become entitled to the legacy until after the bankruptcy, see *infra*, III. e, 3.

d. *Bank deposits.*

1. *Deposits by trustee in bankruptcy in bank which subsequently becomes bankrupt.*

Where a bank becomes bankrupt while a trustee in bankruptcy has a deposit therein it is not entitled to any part of a debt against the bankrupt until it has paid the amount of the deposit in full.

Thus, a bank in which the funds of a bankrupt estate are deposited which thereafter becomes bankrupt cannot receive any dividend on its debt from the bankrupt until reimbursement in full of the entire amount deposited with it less the amount coming to it by way of dividend on such debt. *Ex parte* Graham, 3 Ves. & B. 130, 2 Rose, Bankr. 74; *Ex parte* Debb, 19 Ves. Jr. 222.

Where a trustee in bankruptcy makes a deposit to the credit of the bankrupt's estate in a bank which has proved for a debt due it from such estate, and the bank thereafter becomes bankrupt, the amount for which the bank has proved cannot be set off against the amount due from the bank on such deposit, as there is no mutual credit between the two estates, within 32 & 33 Vict. chap. 71, § 39. *Ex parte* Young, 41 L. T. N. S. 40, 27 Week. Rep. 942.

But the amount deposited in a bank by a trustee in bankruptcy may be set off as a mutual credit under such section, where the adjudication in bankruptcy against the one for whom the deposit was made was annulled soon after the bankruptcy of the bank in a proceeding for that purpose which had then been commenced. Bailey v. Johnson, L. R. 7 Exch. 263, 20 Week. Rep. 1013, 41 L. J. Exch. N. S. 211, Affirming L. R. 6 Exch. 279, 24 L. T. N. S. 711, 40 L. J. Exch. N. S. 189, 19 Week. Rep. 1069.

For matters of deposits in bank generally, see *supra*, I. h; *infra*, III. f; IV. c.

2. Bankruptcy of depositor.

Where a deposit is made after the depositor's insolvency, but without notice of such fact on the part of the bank, the latter may set off against it a debt due from the depositor.

Thus, bankers, who have accepted bills for the accommodation of a trader, who, after committing an act of bankruptcy but before a commission is sued out, lodges money with them to take up such bills which fall due after the commission is taken out and are then paid by them, have no right of set-off when sued by the assignees for the money so lodged with them, under 5 Geo. II. chap. 30, § 28, confining the right of set-off to mutual credits and mutual debts at any time before such person became bankrupt. Tamplin v. Diggins, 2 Campb. 312.

Where a deposit is made by the bankrupt four days before his failure, which the bank receives without knowledge of his insolvency, bankruptcy proceedings being commenced about a month thereafter, the bank may set off against such deposit a draft which had been accepted by the bankrupt, and which it held at its maturity a few days after the failure but before the commencement of the bankruptcy proceedings. *Re* Petrie, 5 Ben. 110, Fed. Cas. No. 11,040.

And where a bank shortly before the failure of one owing it a demand note, but while he is still in good credit, receives from him several drafts for collection, the custom being to pass to his credit on the general balance the proceeds of drafts when paid, it may set off under the act of 1867, § 20, the note against the proceeds of such drafts when collected, although after the filing of a petition in bankruptcy, as the giving of the drafts for collection was a method of giving him credit with the bank, and the transaction was one which could ripen into a debt or demand in his favor against the bank. *Re* Farnsworth, 5 Biss. 223, Fed. Cas. No. 4,673.

For other cases of bankruptcy of depositor, see *supra*, I. h, 2; *infra*, III. f, 2; IV. c, 2.

e. Other banking transactions and commercial paper.

Under 6 Geo. IV. chap. 16, § 50, and subsequent English bankruptcy acts a set-off is allowed in case of mutual debts and mutual credits, notwithstanding any prior act of bankruptcy, provided the one claiming the benefit of the set-off at the time of giving credit had no notice of such act of bankruptcy; and in such cases bills or notes received by the bankrupt after an act of bankruptcy may be set off if the one receiving them had no notice of the bankruptcy.

Thus, one who takes notes from a bank after it has committed an act of bankruptcy may set them off against a debt due from him to the bank if he did not know of the act of bankruptcy, although he knew that it had stopped payment, under 6 Geo. IV. chap. 16, § 50. Hawkins v. Whitten, 10 Barn. & C. 217, 5 Moody & R. 219, 8 L. J. K. B. 135.

And in an action on a bond given to the members of a banking firm which had become bankrupt the defendant may set off the amount of notes issued by the firm and taken in payment by him after he knew that the bankers were in a state of insolvency or had suspended payment, but before he knew that any members of the firm had committed an act of bankruptcy, but not the amount of notes received after he knew that three of the four members of the firm had committed an act of bankruptcy, under 6 Geo. IV. chap. 16, § 50, giving the right of set-off in cases of mutual debts and credits, provided that the person claiming the benefit of the set-off had not, at the time the credit was given, notice of an act of bankruptcy by such "bankrupt" committed, as the provision is the same as if it read "provided he had no notice of any act of bankruptcy by any of the bankrupts." Dickson v. Cass, 1 Barn. & Ad. 343.

One sued by assignees in bankruptcy for the amount of bills of exchange received by him from the bankrupt before notice of any act of bankruptcy and before the issuing of the fiat, to recover the amounts thereof for the use of the bankrupt, which amounts he received after the bankruptcy but before the fiat, may set off an amount paid by him before the commencement of the action on a bill accepted by him for the accommodation of the bankrupt before he had any notice of an act of bankruptcy and before the fiat, as the acceptances constituted mutual credits, within 6 Geo. IV. chap. 16, § 50. Bittleston v. Timmis, 1 C. B. 389, 2 Dowl. & L. 817.

Where bankers with notice of an act of bankruptcy on the part of a depositor receive money from her and pay out a larger amount for her, some of which is on debts due before the act of bankruptcy and which accordingly the creditors would have been allowed to prove, the bankers cannot, even in equity, in an action by the assignees in bankruptcy for the money so received by the bankers, set off any part of the money paid out. Hankey v. Vernon, 3 Bro. Ch. 313.

On a former hearing in the same case, Vernon v. Hankey, 2 T. R. 113, the holding of the court was to the same effect.

A creditor of a bankrupt, who, with knowledge of the bankruptcy, accepts a bill in favor of the bankrupt claiming the right to set off the amount payable on the bill against the bankrupt's indebtedness to him, cannot set off the amount of indebtedness to him against the amount of such acceptance, under 46 & 47 Vict. chap. 52, § 38, relating to mutual credits and mutual dealings, as the line as to set-off will, as a general rule, in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy. *Ex parte* Reid, L. R. 14 Q. B. Div. 963, 54 L. J. Q. B. N. S. 342, 52 L. T. N. S. 602, 33 Week. Rep. 707, 2 Morrell, 100.

Where one assigns his property to trustees by deed registered under 24 & 25 Vict. chap. 134, by which it is provided that the property is to be distributed as if the debtor had been adjudged bankrupt at the date of the deed, a bill of exchange accepted by the bankrupt before such deed was executed cannot be set off against a bill in favor of the bankrupt accepted by the holders of the former bill after the date of the deed, but before its registration, as there was no mutual credit on the day the deed was executed, at which time the debtor is regarded as having become bankrupt. *Ex parte* Ryder, L. R. 6 Ch. 413, 40 L. J. Bankr. N. S. 63, 24 L. T. N. S. 80, 19 Week. Rep. 554.

Where one draws a bill upon another which the latter accepts, subsequently drawing a bill on the former for the difference between the former bill and the indebtedness of the acceptor to the drawer, the latter bill being sold before acceptance for full value, and its drawer becoming bankrupt before its acceptance, the bankrupt stating to the purchaser before acceptance that he would not be called on for the purchase price, and the acceptance being made without knowledge of the drawer's bankruptcy, the acceptor subsequently paying the purchaser its amount on an agreement by the latter to resist any claim of the assignees in bankruptcy, such purchaser, when sued by the assignees, may set off the indebtedness of

the bankrupt on the former bill to the drawer of it, as it is a case of mutual credit as to the acceptor, and the purchaser stands in the same position. Sheldon v. Rothschild, 8 Taunt. 156, 2 J. B. Moore, 43.

Where one accepts a bill of exchange for one who has committed a secret act of bankruptcy and who immediately pays a creditor with it, and later in the same day the bankrupt agrees to sell the acceptor some horses as security for part of the amount of the acceptance, and the horses are subsequently delivered and the acceptor pays the acceptance, the acceptor cannot, in trover by the assignee in bankruptcy for the horses, set off the amount paid on the acceptance, under 6 Geo. IV. chap. 16, § 82, on the ground that the sale was a payment *pro tanto*, as no effect can be given to a set-off in consequence of a subsequent sale which was not thought of at the time of the acceptance. Carter v. Breton, 6 Bing. 621, 4 Moore & P. 424, 8 L. J. C. P. 224, 31 Revised Rep. 507.

The holder of a bill accepted by a bankrupt, which he had indorsed away at the time of the bankruptcy, but subsequently took up, cannot set it off against a bill accepted by him for the bankrupt after the bankruptcy. *Ex parte* Hall, 27 Viner, Abr. 51.

In an action by an assignee in bankruptcy on a note executed after the commission in bankruptcy and assigned to the assignee in bankruptcy the defendant cannot set off a bond given before the bankruptcy by the bankrupt to the defendant and another who is dead, as there was not a mutual credit before the bankruptcy within the bankruptcy act of 1800, § 42. McIver v. Wilson, 1 Cranch, C. C. 423, Fed. Cas. No. 8,833.

In *Ex parte* Harding, Buck, Bankr. 24, an amount due from the solicitor of the bankrupt to the latter was set off against a note given by the bankrupt to the solicitor for his bill of costs in connection with the bankruptcy.

Where a bank makes collections of drafts placed by bankrupts in its hands in the ordinary course of business within four months before the petition in bankruptcy was filed, the question of its right to set them off against a claim against the bankrupt for money obtained under an illegal judgment by confession rendered against the bankrupts within such four months does not arise where it delivered such collections to the sheriff and he levied on them under the executions on such judgment. Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832.

And where a bank takes a check from one largely indebted to it, knowing him to be insolvent, and indorses the amount of it as payment on a note which the bank had compelled him to give the day before, such payment by check constitutes a fraudulent preference, and the right to set it off in an action by assignees against the bank for the amount realized by it under a judgment improperly obtained on such note does not arise. *Ibid.*

In Billon v. Hyde, 1 Atk. 126, 1 Ves. Sr. 327, where a set-off of an amount paid to one for a bankrupt had been refused in a court of law in assumpsit by the assignees of the bankrupt for money paid by the bankrupt after a private act of bankruptcy to one with whom he had had various transactions in indorsing bills of exchange, Lord Chancellor Hardwicke allowed the set-off on the ground that the defendant had acted in good faith, and that the assignees in bankruptcy, by bringing assumpsit, had affirmed the bankrupt's contract.

For debts created and matured before the bankruptcy, see *supra*, I. i.

For debts maturing after the bankruptcy, see *infra*, III. g.

For matters as to assignments, see *infra*, IV. d.

As to setting off commercial paper against bank deposits, see *supra*, I. h; II. d; *infra*, III. f; IV. c.

As to particular directions or agreements as to commercial paper, see *supra*, I. e, 3; *infra*, III. d, 2.

f. Landlord and tenant.

Where a trustee in bankruptcy continues a lease to the bankrupt from year to year, the landlord cannot, in an action by the trustee in bankruptcy for the value of the tillage and cultivation by him, set off rent which had accrued before the bankruptcy, as there are no mutual dealings, within 32 & 33 Vict. chap. 71, § 39.

See also *supra*, I. k; *infra*, III. l.

g. Expenses of, or payments by, assignees for creditors.

An assignee for creditors will be allowed to set off, in an action by the assignee in bankruptcy for the value of the property transferred to him, the value of property distributed in good faith *in specie* to preferred creditors before the bankruptcy. Jones v. Kinney, 5 Ben. 259, Fed. Cas. No. 7,473.

And an assignee for creditors of one who is adjudged a bankrupt on the ground that the assignment was an act of bankruptcy may set off a claim for his services as assignee before the petition in bankruptcy against a claim for money received by him as assignee and not paid to or for the bankrupt or his assignee in bankruptcy, under the act of 1867, § 20, authorizing the set-off of mutual credits if the claim was provable against the estate, and containing no provision that notice of an act of bankruptcy will prevent a set-off. Catlin v. Foster, 1 Sawy. 37, Fed. Cas. No. 2,519.

But in *Re* Cohn, 6 Nat. Bankr. Reg. 379, Fed. Cas. No. 2,967, an assignee for creditors, who was required to surrender the assignor's property to an assignee in bankruptcy, although permitted to set off the expense of making a sale of the property on the ground that the sale was a good one, was not permitted to set off an attorney's fee paid by him, nor another attorney's fee which he thought he might be adjudged to pay, the court expressly disapproving the preceding case of Catlin v. Foster, 1 Sawy. 37, Fed. Cas. No. 2,519, and holding that such § 20 referred only to creditors of the bankrupt before the act of bankruptcy.

And an assignee for creditors cannot set off against a claim of the assignee in bankruptcy for accounts collected by the former his expenses incurred as such assignee, as the assignment was an attempt to defeat the provisions and operation of the bankrupt law. *Re* Stubbs, 4 Nat. Bankr. Reg. 376, Fed. Cas. No. 13,557.

h. Payments by bankrupt.

Cash payments made within four months before the bankruptcy cannot be set off, under the act of 1898, § 68.

Thus, cash payments made within four months of the filing of the petition in bankruptcy are not mutual debts or mutual credits within such section so as to entitle the creditor to set off such payments and prove for the balance of the account. *Re* Ryan, 105 Fed. 730, 5 Am. Bankr. Rep. 396, Reversing 2 N. B. N. Rep. 693.

And payments in money intended to be applied upon an existing open account do not create a case of mutual debts or mutual credits between the bankrupt and the creditor within such

section so as to entitle the creditor to prove up a claim for the balance due on the account after allowing credit for all sums paid, in an action by the trustee to recover back as a preference the amounts so paid by the bankrupt. *Re* Christensen, 101 Fed. 802, 4 Am. Bankr. Rep. 202, Affirming 2 N. B. N. Rep. 695.

The preceding case was followed with approval in *Re* Thompson, 2 N. B. N. Rep. 1016.

But in *Re* Stoever, 3 N. B. N. Rep. 242, the referee says that while payments by the bankrupt may not be technically embraced within the terms "mutual debts and mutual credits" within such § 68 they have the same effect on the result of the transactions, and that it is obvious that an insolvent debtor might readily give a preference to one of his creditors within four months of his bankruptcy in various ways by which mutual debts and mutual credits would be maintained, as by selling merchandise or lending money to the creditor which would constitute an offset to the claims of the bankrupt, unless the creditor was aware of the insolvency.

A mortgagee under a chattel mortgage which is void in Illinois because it authorizes the mortgagor to sell the property mortgaged, and because the mortgagee delayed in taking possession after condition broken, cannot set off the mortgage debt against an amount received by him for goods sold, such goods having been taken possession of by him nearly three months after the note secured fell due, and a bill of sale of the goods having been given to him a day or two thereafter, as such transaction merely gives the mortgagee a fraudulent preference. *Re* Forbes, 5 Biss. 510, Fed. Cas. No. 4,922.

The assignees in bankruptcy of the drawer of a bill of exchange cannot recover back money voluntarily given by the bankrupt a few days before the bankruptcy to the accommodation acceptor of a bill of exchange which fell due after the issue of the fiat in bankruptcy, the payment not being made in contemplation of bankruptcy. Yates v. Hoppe, 9 C. B. 541, 14 Jur. 372, 19 L. J. C. P. N. S. 180.

But where a trader after stopping payment generally but before his bankruptcy sent a note to a particular creditor stating that it was to help him over his payments, his assignees in bankruptcy may recover such money in assumpsit, although at the time of the payment a bill for a larger amount was coming due which had been accepted by the creditor for the bankrupt's accommodation, and for which the bankrupt had promised to provide. Guthrie v. Crossley, 2 Car. & P. 301.

Where, after a trader commits an act of bankruptcy, he continues dealing with his factor who does not know of such act, the assignees in bankruptcy may recover all payments made to the factor within two months before the issuing of the commission, as they are not protected by 46 Geo. III. chap. 135, § 3, and the factor cannot set off any indebtedness incurred during such period, although he did not know of the act of bankruptcy. Kinder v. Butterworth, 6 Barn. & C. 42, 9 Dowl. & R. 47, 5 L. J. K. B. 23.

See also Hankey v. Vernon, 3 Bro. Ch. 313; Carter v. Breton, 6 Bing. 617, 4 Moore & P. 424, 8 L. J. C. P. 224, 31 Revised Rep. 507; Traders' Nat. Bank v. Campbell, 14 Wall. 87, 20 L. ed. 832, *supra*, II. e; Winslow v. Bliss, 3 Lans. 222, *infra*, III. f, 1.

As to the effect of the form of action on the right of set-off, see *infra*, VI.

As to giving of check by bankrupt to bank for amount of deposit as payment, see *infra*, III. f, 2.

For deposit by bankrupt after insolvency, see *supra*, II. d, 2.

55 L. R. A.

l. Set-off of costs.

Where costs are allowed on refusing a petition to have a debtor adjudged a bankrupt, or on the annulment of an adjudication of bankruptcy, the creditor cannot have the debt due to him from the bankrupt set off against the costs.

Thus, where a petition in involuntary bankruptcy is dismissed with costs against the petitioner, he cannot have his debt against the bankrupt set off against the costs. *Re* Lowenstein, 3 Ben. 422, Fed. Cas. No. 8,572.

And the debt due a petitioning creditor from the alleged bankrupt cannot be set off against costs awarded to the bankrupt against such creditor on annulling the adjudication of bankruptcy, under 12 & 13 Vict. chap. 106, § 171, where the solicitor has not been paid and claims his lien. *Ex parte* Cleland, L. R. 2 Ch. 808, 36 L. J. Bankr. N. S. 45, 17 L. T. N. S. 187, 15 Week. Rep. 1,160.

And in *Ex parte* Greenstock, De G. Bankr. Cas. 230, 10 Jur. 122, 15 L. J. Bankr. N. S. 5, the court, on annulling the fiat with costs on the ground that no act of bankruptcy had been committed, stated that he would be glad to allow a set-off of the costs against the debt due from the alleged bankrupt if any precedent therefor could be found, but as none was found the order was in the usual form.

And costs ordered to be paid by the petitioning creditor on superseding a commission in bankruptcy cannot be set off against the debt due from the bankrupt to the creditor where they were not taxed until after the issuing of a new commission under which the offset was sought to be made, as a debt due from the bankrupt before his bankruptcy cannot be set off against a debt due to him after the commission issues. *Ex parte* Rhodes, 15 Ves. Jr. 539.

And *Ex parte* Whitehead, 1 Glyn & J. 39, as digested in 2 Mews' Digest, col. 1235, holds that where a creditor of the bankrupt assigns his estate and the debts due to him to trustees to pay his creditors, and afterwards proves his debt under the commission, the assignees under the commission are not entitled to deduct from the dividend on that proof a sum due from the creditor to them for costs upon the dismissal of a bill filed by such creditor and dismissed subsequent to the assignment and prior to the proof.

And the costs of judgment as in case of nonsuit entered up against the plaintiff after he has become bankrupt cannot be set off in an action by the assignees of the bankrupt against the same defendant, as there is no mutual credit. West v. Pryce, 2 Bing. 455.

Where costs of, and incidental to, a special case are awarded to a bankrupt against a petitioning creditor, costs previously awarded against the bankrupt in favor of such creditor will be set off against them. *Ex parte* Hawley, 4 Deacon & C. 572, 2 Mont. & A. 59, 4 L. J. Bankr. N. S. 17.

In *Ex parte* Harding, Buck, Bankr. 24, an amount due from the solicitor of the bankrupt to the latter was set off against a note given by him to the solicitor for his bill of costs incurred in connection with the bankruptcy.

And in *Ex parte* Munk, 2 Deacon & C. 120, costs awarded to a bankrupt on refusal of a petition before hearing to compel him to give security for costs of an action by him to try the validity of the commission were directed to be set off against costs awarded against him on the refusal of a prior petition by him to supersede the commission.

The court of bankruptcy will not allow costs of proceedings in the high court to be set off against costs of proceedings in bankruptcy to

the prejudice of the solicitor's lien. *Ex parte* Griffin, 42 L. J. Bankr. N. S. 28, L. R. 14 Ch. Div. 37, 42 L. T. N. S. 704, 28 Week. Rep. 714.

And costs of proceedings in bankruptcy cannot be set off in the common pleas against damages and costs recovered in that court, but the application should be addressed to the court of bankruptcy. Woodroffe v. Wootton, 4 Scott, 364.

And on a petition by a creditor for a supersedeas the court of review has no jurisdiction of the question as to the creditor's right to set off a debt due to him by the bankrupt against the costs of a prior petition to the Lord Chancellor for a supersedeas to which he was held entitled. *Ex parte* Thomas, 1 Deacon & C. 443.

j. Set-off after discharge.

The obligation of a bankrupt before his discharge cannot be set off against a claim in his favor contracted since his discharge. Petitpain v. Redeau, 6 La. Ann. 411.

And a debt due from a bankrupt at the time of his bankruptcy cannot be set off in an action commenced by the bankrupt after obtaining his certificate for the price of goods sold by him after the bankruptcy and before obtaining the certificate, as such old debt is barred by the certificate. Hayllar v. Sherwood, 2 Nev. & M. 401.

But one sued for the conversion of parts of a steam engine repaired by him is not prevented from recouping a claim for work in repairing the engine by the fact that before the action was commenced he had made an assignment in bankruptcy and had obtained his discharge, as, although his claims passed to his assignees in bankruptcy, they passed subject to the right of set-off or recoupment, which right existed in the bankrupt as well as in his assignee. Stow v. Yarwood, 20 Ill. 497.

III. *Immaturity of debts or claims at time of insolvency.*

a. In general.

The immaturity of a debt or claim at the time of the bankruptcy has not generally been held to prevent a set-off under the bankruptcy statutes relating to set-off of mutual debts and mutual credits, provided the claim is of such a nature that it must terminate in a debt.

Thus, in Follett v. Buyer, 4 Ohio St. 586, the court remarks, *obiter*, that the bankruptcy statutes have generally permitted a set-off of mutual credits whether due or not, and have therefore administered a much broader equity than the ordinary law of set-off.

And a debtor of a bankrupt may set off a debt due him from the bankrupt, although the former debt was not due at the time of the bankruptcy. *Re* City Bank of Savings, L. & Discount, 6 Nat. Bankr. Reg. 71, Fed. Cas. No. 2,742.

To permit a set-off on the ground of "mutual credits" under the act of 1867, § 20, the claim or demand must be such that it will terminate in a debt. Libby v. Hopkins, 104 U. S. 303, 26 L. ed. 769.

And in Rose v. Hart, 8 Taunt. 499, 2 J. B. Moore, 547, Gibbs, Ch. J., says that something more is meant by mutual credits than the words "mutual debts" import, and yet upon the final settlement it is only enacted that one debt shall be set off against another, which shows that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party and credit given by him to the other for a sum of money payable at a future day and which will then become a debt, or where there is a debt on one side and a delivery of property with directions to turn it into money on the other, in which case the credit so given must in its nature terminate in a debt, and the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute.

And in Van Wagoner v. Paterson Gaslight Co. 23 N. J. L. 283, which was an action by the receivers of an insolvent bank under the New Jersey statute authorizing receivers to allow a set-off in case of "mutual dealings," the court makes quite extensive remarks on the question of set-off in bankruptcy cases, and states that set-off was allowed in such cases before the passage of 4 & 5 Anne, chap. 17, which was the first statute authorizing a set-off, and that the greater extent to which set-off was allowed in bankruptcy cases was doubtless owing to the natural equity of the practice and the injustice of compelling one of two mutual debtors to pay in full and then receive only a dividend on the debt due to him.

Where a creditor of the bankrupt for a certain amount already due is a debtor to him on a bond for a larger amount not yet due he may have the amount due him from the bankrupt deducted from the amount of the bond, under 5 Geo. II. chap. 30, § 28, as, although it is not strictly a mutual debt, both debts not being due, it is a mutual credit, the bankrupt giving a credit in consideration of the bond, and the other party giving the bankrupt credit for the debt he owes on simple contract. *Ex parte* Prescot, 1 Atk. 230.

And *Re* Rose, 1 Manson, 218, as digested in 2 Mews' Digest, col. 890, holds that a bare authority to a shopkeeper by a customer to sell chattels deposited with him for safe custody, if executed, gives the shopkeeper a right of set-off on the customer's bankruptcy.

And where pearls are purchased by two persons with money advanced by one of them, the profit and loss to be equally divided, and the other becomes bankrupt before the goods are sold by the one advancing the money, the latter may, when sued by the assignee in bankruptcy for the bankrupt's share of the profits, set off an indebtedness due from the bankrupt at the time of the bankruptcy, as there is a case of mutual credit within 5 Geo. II. chap. 30, § 28, and although the debt had not yet arisen at the time of the bankruptcy it would arise when the pearls were sold. French v. Fenn, 3 Dougl. 237.

The preceding case was distinguished in Young v. Bank of Bengal, 1 Deacon, Bankr. 622, 1 Moore, P. C. 150, *infra*, III. d, 2, with the statement that it goes farther than any preceding case except *Ex parte* Deeze, 1 Atk. 228, *supra*, I. e, 2, which case is disapproved therein.

Where, on the dissolution of a partnership, the continuing partner agrees to pay the retiring partner a certain amount, which amount is not to be paid until the satisfaction of certain mortgages on the premises, and the continuing partner becomes bankrupt and his assignees pay the mortgages before the retiring partner proves his debt, the assignees are entitled to deduct the sums so paid by them from the dividend on the sum due to the retiring partner at the time of the bankruptcy. Rowe v. Anderson, 4 Sim. 267. But see Abbott v. Hicks, 5 Bing. N. C. 578, 7 Scott, 715, *infra*, III. b.

A judgment obtained by an assignee in bankruptcy against a bank for the penalty for vio-

lating the usury law and the unsecured claim of the bank against the bankrupt for the debt in which the usury was charged do not constitute mutual debts within the act of 1867, § 20, entitling the assignee to set off the judgment against the debt due the bank, as the judgment was not a debt existing at the time of the bankruptcy. Wilson v. National Bank, 1 McCrary, 538, 3 Fed. 391.

Where the directors of a company assign their salaries and shares to the company to secure debts due from them on their private accounts, and empower the company to direct a committee of the treasury to retain such salaries and dividends and sell their shares for payment of their debts, but direct that until an order is passed to that effect it shall be lawful for each director to receive his salary and dividends, and one of the directors becomes bankrupt before such order is made and while the shares are still in his name owing a debt to the company, his assignee in bankruptcy is entitled to the shares as against the company, but the latter has the right to set off against the debt due it the dividends and salary due the director at the time of the bankruptcy. Nelson v. London Assur. Co. 2 Sim. & Stu. 292.

And Howe v. Snow, 3 Allen, 111, which was a case under the Massachusetts insolvency law, holds that where a stockholder of an insolvent corporation has been compelled to pay debts of the corporation subsequent to the commencement of insolvency proceedings, he cannot set off the amount so paid in an action by the assignee in insolvency against him to recover a debt due the corporation, as there are no mutual debts or mutual credits within Mass. Gen. Stat. chap. 130, §§ 1-8.

A judge's order made by consent acknowledging a reference pending, and agreeing that in case the arbitrator finds any amount due from the plaintiff to the defendant it shall be set off against a sum awarded to the plaintiff, amounts to an agreement by the plaintiff to allow the defendant a right of set-off of the amount to be thus ascertained, which is binding upon his assignees on his subsequently becoming bankrupt, although the amount had not been ascertained at the time of the bankruptcy. *Ex parte* Michie, 1 Mont. D. & De G. 181.

For effect of immaturity of claim at the time insolvency occurs upon the right of set-off generally, see *note* to Fera v. Wickham (N. Y.) 17 L. R. A. 456.

b. *Uncertainty or contingency of claims.*

No set-off is allowable where the claim sought to be used for that purpose is uncertain or contingent at the time of the suit; and under the earlier cases the set-off was not allowed if it was contingent at the time of the bankruptcy.

Thus, in *Ex parte* Groome, 1 Atk. 115, Lord Chancellor Hardwicke, putting a supposed case under 5 Geo. II. chap. 30, § 28, providing for a set-off in case of mutual credit or mutual debts by the bankrupt and another person "at any time before such person became bankrupt," asked if it would not be a great hardship upon the other creditors if one owing a debt to the bankrupt might set off a debt due him from the bankrupt on a bond upon a contingency which took place after the bankruptcy.

And a contract to indemnify upon a contingency one who subsequently becomes bankrupt from any loss which might accrue from his retaining in his magazine powder sold by the guarantor to a third person, no loss on such guaranty occurring to the bankrupt until after his bankruptcy, does not constitute a mutual credit under 5 Geo. II. chap. 30, § 28, so as to entitle the guarantor, when sued by the assignees, to set off a balance on account due him from the bankrupt. Sampson v. Burton, 2 Brod. & B. 50, 4 J. B. Moore, 515.

And a claim against the bankrupt supercargo of a ship for failing to keep the vessel insured cannot be set off in an action by the assignees in bankruptcy against the owners of the vessel for money expended in repairs and supplies, as such claim is uncertain and contingent in its nature. Brown v. Cuming, 2 Cai. 33.

Defendants, in a suit by assignees in bankruptcy for a debt due the bankrupt, cannot set off a demand arising under an agreement between them and the bankrupt, stating that in order to end all controversy between them as to the amount of a loss to the defendants from the bankrupt's misconduct it should be fixed at a specified amount, and that in payment thereof the bankrupt should recommend parcels of cotton during the period of four years, the bankrupt undertaking that the clear profits during such period should be the amount fixed on, and agreeing that if they were not he would pay the difference at the end of that period, where the bankruptcy occurred before its termination, as the demand is not one payable at all events, but depends upon a contingency. Hancock v. Entwhistle, 3 T. R. 435.

Where, on the dissolution of a firm, the retiring partner agrees to pay the continuing partners a specified amount as his share of the liabilities, and the continuing partners agree to pay a debt of a specified larger amount due from the firm, and they become bankrupt without having paid such debt, the retiring partner, when sued for the amount he has agreed to pay, cannot set off the debt which the bankrupts agreed to pay and on which he is contingently liable, as it is not certain that he will ever have to pay it, and it is not a mutual credit, debt, or demand within 6 Geo. IV. chap. 16, § 50. Abbott v. Hicks, 5 Bing. N. C. 578, 7 Scott, 715, 8 L. J. C. P. N. S. 314, 3 Jur. 871. But see Rowe v. Anderson, 4 Sim. 267, *supra*, III. a.

And in MORGAN v. WORDELL the court states that under the English bankruptcy acts the provision as to mutual credits did not extend to claims which, when the moment of set-off arrived, were still wholly contingent and uncertain, such as a claim on a covenant by a partner to save his copartners harmless from partnership debts, none of which the covenantee had been called upon to pay at the time of the suit, but that if payment had been made before suit the set-off would be allowable, although at the time of the bankruptcy the claim was still contingent.

Where two parties are by agreement jointly entitled to the benefits of a charter party, and one of them, after assigning his interest and giving notice to the other, becomes bankrupt, and the assignees of the charter party sue upon it in the name of the assignor, the other party cannot rely on a set-off on the ground of mutual credit between him and the assignor, under 6 Geo. IV. chap. 16, § 50, as all the assignor's interest in the charter party had passed away before the bankruptcy, and consequently the contingency on which mutual accounts were to be taken never arose. Boyd v. Mangles, 16 Mees. & W. 337.

See also Brandon v. Brandon, 3 Swanst. 312, 2 Wils. 14, *infra*, III. e, 1.

As to right of set-off on a note or bill paid by the debtor of the bankrupt after the insolvency, see *infra*, III. d, 2; III. g.

As to right of set-off in case of a loss on an insurance policy occurring after the bankruptcy, see *infra*, III. e, 2, b; III. h, 2.

As to right of set-off in case of an endowment

policy maturing after the bankruptcy, see *infra*, III. h.

As to right of set-off of a surety who is compelled to pay the obligation of the bankrupt after the bankruptcy, see *infra*, III. j.

c. Breach of contract.

Damages from a breach of contract other than as to the payment or application of the particular fund in question may be set off.

Thus, a debtor of a bankrupt may, under the act of 1867, § 20, set off an amount paid by him after the bankruptcy to redeem from a tax sale land sold to him by the bankrupt before the bankruptcy by a deed containing the usual covenants of warranty. *Re* Carrier, 39 Fed. 193.

And where a company has a contract for paving a street, one of the provisions of which requires it to keep the street in repair for a specified period at a specified price, and before the paving is entirely completed the company goes into liquidation rendering it impossible for it to perform its contract to keep the street in repair, the commissioners of sewers can set off against the claim of the liquidator for work done the damages resulting from the company's inability to carry out its contract, under 32 & 33 Vict. chap. 71, § 39, the amount of which can be proved in the winding up of the company; but no right of set-off on the ground of mutual credits exists under such section in favor of the commissioners as against one to whom the company had, before the commencement of the liquidation, assigned its rights under the contract. Lee & Chapman's Case, L. R. 30 Ch. Div. 216, 54 L. J. Ch. N. S. 450, 53 L. T. N. S. 65, 33 Week. Rep. 513.

As to where the claims mature before the insolvency occurs, see *supra*, I. d.

For breach of agreement as to payment or application of the particular fund in question, or to pay cash for goods purchased, see *supra*, I. e; II. b; *infra*, III. d.

d. Security for particular debt or special directions or agreements as to application or payment of funds.

1. *In general.*

Although the decisions on this question are quite conflicting the weight of authority seems to be that the set-off will not be allowed except in cases where property is intrusted to the creditor with irrevocable power to sell and apply the proceeds on the debt, in which case any surplus arising on a sale after the bankruptcy occurs may be set off against other indebtedness of the bankrupt, even though the particular debt had been paid in full before the sale.

Thus, where a debtor owes the same creditor a debt secured by mortgage and one on account, and pays him the amount of the mortgage debt with the direction that it be applied on such debt, and the creditor wrongfully refuses to so apply it but retains the money, and the debtor within four months thereafter becomes bankrupt, the creditor cannot, as against the assignees in bankruptcy, set off the debt on account against the money so received, as it is not a case of mutual debts or mutual credits within the act of 1867, § 20, the money having been sent for a specific purpose. Stewart v. Hopkins, 30 Ohio St. 502.

But in *Ex parte* Caylus, 1 Low. Dec. 550, Fed. Cas. No. 2,534, the court stated that under the rule as stated by Rose v. Hart, 8 Taunt. 499, 2 J. B. Moore, 547, *supra*, I. e, 2, one to whom goods were consigned for sale on commission by the bankrupt before his bankruptcy might set off, under the act of 1867, § 20, the proceeds of a sale after the appointment of an assignee in bankruptcy against a larger amount due him from the bankrupt as the original purchase price of the goods by the bankrupt from such consignee.

Where a creditor of one known to be financially embarrassed agrees to receive his goods for sale and treat the same as a special and independent account and in settlement turn over the cash or notes received, he cannot after his debtor's bankruptcy set off his old indebtedness against a claim for money received on such sales, as in regard thereto he is a trustee for all the creditors. *Re* Troy Woolen Co. 8 Nat. Bankr. Reg. 412, Fed. Cas. No. 14,203.

One having securities for specified advances to a bankrupt cannot set off another debt due from such bankrupt against a claim of the assignees in bankruptcy for money collected on such securities after the filing of the petition in bankruptcy in excess of the amount of the advances for which the securities were given. Clark v. Iselin, 10 Blatchf. 204, Fed. Cas. No. 2,825, Reversed, but not as to this point, in 21 Wall. 360, 22 L. ed. 568.

Where a contract with improvement commissioners provides that the plant of the contractor used in performing the contract shall be deemed the property of the commissioners for the time being, and shall not be removed during the progress of the work, and shall be subject to be used, although the contract is taken out of the contractor's hands, and the contractor becomes bankrupt before the completion of the work, there is no such mutual dealing between him and the commissioners, within 32 & 33 Vict. chap. 71, § 39, as will entitle the commissioners to set off against an amount received by them on the sale of such plant a debt due to them from the bankrupt. *Ex parte* Lolland, L. R. 8 Ch. Div. 225, 47 L. J. Bankr. N. S. 52, 38 L. T. N. S. 362, 26 Week. Rep. 512.

Where cigars are deposited by a company with one of its creditors as security for a specific debt to be retained until the debt is paid, with directions to the creditor to sell the cigars, if possible, and apply the proceeds on the debt, and an order for the winding up of the company is afterwards made, and the liquidator, after paying the specific debt in full and demanding the return of the cigars which have not been sold brings an action of detinue for them, the defendant cannot set off another debt due him from the company, under 46 & 47 Vict. chap. 52, § 38, which is made applicable by the English judicature act of 1875, § 10, to cases of winding up, providing that where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt, an account shall be taken of what is due from one party to the other, and the balance of the account, and no more, shall be paid, as such section applies only where the claims are such as result in pecuniary liability on each side, and not where the claim of one party is for the return of the goods. Eberle's Hotel Co. v. Jones, L. R. 18 Q. B. Div. 459, 56 L. J. Q. B. N. S. 278, 35 Week. Rep. 467.

But where pictures are deposited with auctioneers for sale at prices to be approved by the owner, who becomes bankrupt while such authority is unrevoked, the auctioneers may set off, against the trustee's right to recover the proceeds of a subsequent sale of the pictures, an amount due them from the bankrupt at the time of the bankruptcy for a sale of furniture and an attempted sale of a house for the bankrupt under such § 38, as there are mutual credits and mutual dealings, there being a debt due from the bankrupt, and a delivery of property by the bankrupt with directions to turn it into money, the dealings being consequently such

as would end on each side in a money claim. Palmer v. Day [1895] 2 Q. B. 618, 64 L. J. Q. B. N. S. 807, 2 Manson, 386, 44 Week. Rep. 14.

For cases in which the debt or claim is mature before the bankruptcy occurs, see *supra*, I. e.

For cases in which goods are purchased after the bankrupt's insolvency with an agreement to pay cash, which was not carried out, see *supra*, II. b.

2. *Banking and commercial paper.*

Where goods are shipped under an agreement by the consignees to accept bills of exchange drawn on them for a specified part of the value of the cargo, and to waive any lien they may have on such goods on account of prior indorsements of other bills for the benefit of other shippers, and the consignees refuse to accept the bills and subsequently sell the goods shipped to them, after which the shippers become bankrupt, the consignees may, notwithstanding their agreement, set off against the proceeds of such goods an indebtedness due to them from the bankrupt because of payments which they were required to make after the bankruptcy because of such indorsements. Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096.

Where one agrees to indorse an accepted bill to another in consideration that the latter shall accept and deliver to the former a bill for a specified larger amount, which is done, the former cannot, in an action by the assignees in bankruptcy of the latter to compel him to indorse the bill as agreed, set off the amount of the bill accepted by the bankrupt, as it is not a case of mutual credit within 6 Geo. IV. chap. 16, § 50, the provision as to mutual credits being confined to debts between the bankrupt and other parties or transactions necessarily ending in debts, and not to a cause of action for nonperformance of a contract. Rose v. Sims, 1 Barn. & Ad. 521, 9 L. J. K. B. 85.

But in an action by assignees in bankruptcy for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold by the bankrupt to defendant, the latter may set off a debt due him from the bankrupt for money lent to, paid out and expended for, the bankrupt at his request, under such section, as the claims may be considered as "mutual credits" so that "one debt or demand" may be set off against the other, the claim against the bankrupt being a debt, or demand which must necessarily terminate in a debt, the amount of which, though unliquidated, is capable of reduction to certainty by a simple calculation. Gibson v. Bell, 1 Bing. N. C. 743, 1 Scott, 712, 1 Hodges, 136, 4 L. J. C. P. N. S. 242.

In this case the case of Rose v. Sims, 1 Barn. & Ad. 521, 9 L. J. K. B. 85, *supra*, was distinguished on the ground that that was an agreement to indorse, instead of to accept, the bill of exchange.

Where goods are purchased on two different occasions, and the purchaser accepts bills of exchange payable in six months, and when the first falls due the purchaser gives in payment a bill for a larger amount accepted by a third person, the seller promising to pay the balance to the purchaser when the bill is paid, and the latter becomes bankrupt two days after the bill is paid, the seller, in an action by the assignees in bankruptcy for such balance, may set off the acceptance given for the second purchase, although it is not yet due and notwithstanding the agreement to turn over the balance, as it is a case of mutual credit within 5 Geo. II. chap. 30, § 28. Atkinson v. Elliott, 7 T. R. 378.

Where one accepts bills of exchange for one who consigns goods to foreign merchants to be sold on commission, the acceptor being a member of such firm, on an agreement by the consignor that the proceeds of the goods consigned shall be applied to the liquidation of advances on the goods made by such acceptances, the acceptor may, when sued by the assignees in bankruptcy of the consignors for the proceeds of the sale of goods so consigned, received by him from the consignees for the consignor after the bankruptcy, set up that they had been applied in payment of his acceptances given for the bankrupt before his bankruptcy in accordance with the specific appropriation. Thomas v. Da Costa, 8 Taunt. 345.

And where the bankrupt has accepted bills of exchange for a large amount, which are not due at the time of the bankruptcy, and the holder of such bills owes the bankrupt a small amount for which he has a lien on goods of the holder of the bills in his possession, such holder may, under 32 & 33 Vict. chap. 71, § 39, set off one claim against another, and is not required to pay the debt due the bankrupt in full in order to obtain possession of the goods. *Ex parte* Barnett, L. R. 9 Ch. 293, 43 L. J. Bankr. N. S. 87, 29 L. T. N. S. 858, 22 Week. Rep. 283.

And where bills receivable are transferred to a surety on a bond by the principal obligors to indemnify him against liability as such surety, and both parties believe them to be sufficient for that purpose, but they prove insufficient because of a set-off to one of the bills of which the surety has no knowledge, and on the following day the principal obligors borrow marketable securities from the surety to enable them to borrow money, they delivering other securities to the surety and there being no express restriction against the surety using the latter securities to indemnify him against liability on the bond, the surety acting gratuitously in both transactions, and the principal obligors subsequently become bankrupt, the surety may apply the proceeds of the latter securities to reimburse himself for an amount he was compelled to pay on the bond in excess of the amount received from the securities given expressly to indemnify him against loss thereon, even if it should be conceded that the case was not strictly one of mutual credits, within the act of 1867, § 20. *Re* McVay, 12 Fed. 443.

Where one indorses and deposits bills of lading for cotton and coffee with another as collateral for acceptances by the latter, the former agreeing to provide funds to meet them before their maturity, there is no mutual credit within 12 & 13 Vict. chap. 106, § 171, entitling the acceptor to set off, after the indorser's bankruptcy, any balance remaining from the proceeds of the cotton and coffee after paying the acceptances against a general debt due from the bankrupt to the acceptor; but where the bankrupt, before the bankruptcy and before the maturity of the acceptances, authorized the acceptor to sell the cotton and coffee and receive the proceeds, thus raising the inference of an assent to an application from the acceptor for his authority to sell for his security and reimbursement, in which case the power to sell would be irrevocable, there was a mutual credit entitling the acceptor to sell either before or after the bankruptcy, and to set off, in an action to recover any surplus, a general indebtedness from the bankrupt, as in such case the credit given by the authority to sell must terminate in a debt to the bankrupt. Astley v. Gurney, L. R. 4 C. P. 714, 38 L. J. C. P. N. S. 357, 18 Week. Rep. 44. Kelly, C. B., dissented in this case on the ground that there was simply authority to sell to meet the acceptances, and that sufficient had been realized for that

purpose from a sale of the cotton alone before the maturity of the acceptances, making a subsequent sale of the coffee unauthorized.

Where the owner of goods pledges them to secure, by the proceeds of their sale, certain bills of exchange accepted by the owner and held by the pledgee, and such bills are paid in full before the goods are sold, the pledgee cannot set off the amount of their proceeds against advances subsequently made by him with notice of acts of insolvency on the part of the owner, who subsequently becomes bankrupt. Birdwood v. Raphael, 5 Price, 593.

And where one borrows from a bank, depositing collateral securities, with an agreement authorizing the bank in case of default in repayment to sell such collateral for reimbursement, restoring any surplus to the borrower, and the latter before default is declared insolvent, under 9 Geo. IV. chap. 73, which contains provisions as to set-off similar to those contained in 6 Geo. IV. chap. 16, § 50, and provides for the proving of all such debts, dues, and claims as may be proved under the bankruptcy act, and the bank on the maturity of the loan sells the collateral, it cannot set off, in an action by the assignees to recover the surplus, the amount of two notes of such borrower discounted by the bank before the insolvency, as the borrower had not given credit as to such surplus, and it is not certain that it ever will become a debt; although, if the collateral had been sold and the surplus received before the insolvency, it would have been otherwise. Young v. Bank of Bengal, 1 Deacon, Bankr. 622, 1 Moore, P. C. C. 150.

In Naoroji v. Chartered Bank, L. R. 3 C. P. 444, 16 Week. Rep. 791, 18 L. T. N. S. 358, 37 L. J. C. P. N. S. 221, *infra*, III. f, 2, the preceding case is distinguished and stated to be of very doubtful authority, but is again affirmed in the subsequent case of Astley v. Gurney, L. R. 4 C. P. 714, 38 L. J. C. P. N. S. 357, 18 Week. Rep. 44, *supra*.

In an action by assignees in bankruptcy against a bank for damages from its failure to use for the purpose intended money paid to the bank by the bankrupt before his bankruptcy to pay an acceptance of the bankrupt at such bank subsequently coming due, the defendant cannot rely on a plea of mutual credit by way of set-off, under 6 Geo. IV. chap. 16, § 50. Bell v. Carey, 8 C. B. 887, 19 L. J. C. P. N. S. 103.

Analogous cases.

Where the maker of a demand note secured by a transfer of corporate stock made an assignment to a trustee for the benefit of creditors containing a provision that no creditor holding security should, by signing, impair his right to security, but if the security would be applicable to the assignor's liability under the insolvency laws of Massachusetts the dividends should be paid only on the part of the debt remaining after deducting the amount realized from the sale of the security, and authorizing the trustee to pay off liens on the property, and the creditor had, three days before the assignment, demanded payment of the note, but had not given notice of an intention to sell the security, and after the assignment the creditor sold such security with the trustee's consent, the creditor could not set off other debts due from the insolvent against a surplus arising from the sale, under Mass. Gen. Stat. chap. 118, § 26, as there was no mutual credit, the stock not being held by the creditor to be converted into money, so that the liability to account for it would ultimately become a debt. Brown v. New Bedford Inst. for Savings, 137 Mass. 262.

And in Tallman v. New Bedford Five Cents Sav. Bank, 138 Mass. 330, the court, approving the preceding case, held that where a real estate mortgage with power to sell had been given to secure one of two notes of the mortgagor held by the mortgagee, and the mortgagor made an assignment in insolvency after the first publication of the time and place of sale under the mortgage, the sale not being made until after the publication of the petition in insolvency, the mortgagee could not set off the surplus on the sale to the payment of the unsecured note, as, until the sale was actually made, the mortgagee held the land for the purpose of converting it into money only in case the debt was not paid, which might be done at any time before the sale actually took place.

Where debt or claim has matured before insolvency, see *supra*, I. e, 3.

e. *Debtors and creditors in same right.*

1. *In general.*

Where a marriage settlement provides that if the wife dies during the husband's lifetime one half of a trust fund created by the wife shall go to her husband and the other half to her next of kin, and also contains a covenant by the husband that if she dies in his lifetime he will pay a specified amount to her next of kin, and the wife dies during his lifetime and more than twenty years after his bankruptcy, his assignees are entitled to the entire half of the trust fund without any deduction of the amount which he covenanted to pay to her next of kin, as it is not a case of mutual debt or mutual credit within 5 Geo. II. chap. 30, § 28, the debt from the husband being contingent at the time of the bankruptcy and the trust fund moving from the wife, while the debt, if it ever became due, was to go to her next of kin. Brandon v. Brandon, 3 Swanst. 312, 2 Wils. 14.

As to right of set-off in cases of endowment policies payable to the insured if living at the maturity of the policy, and to specified persons in case of his death before that time, which are not yet mature at the time of the bankruptcy, see *infra*, III. h, 1.

2. *Agents, factors, and brokers.*

a. *In general.*

In *Ex parte* Caylus, 1 Low. Dec. 550, Fed. Cas. No. 2,534, the court stated that under the rule as established by Rose v. Hart, 8 Taunt. 499, 2 J. B. Moore, 547, *supra*, I. e, 2, one to whom goods were consigned for sale on commission by the bankrupt before his bankruptcy might set off, under the act of 1867, § 20, in a suit for the proceeds of a sale after the appointment of an assignee in bankruptcy, a larger amount due him from the bankrupt as the original purchase price of the goods by the bankrupt from such consignee.

And where authority had been given to an agent in the course of mutual dealings before the principal's bankruptcy to receive the purchase money for an estate sold by the agent and to place it to the principal's account, and the money was received by the agent after the principal had filed a petition for liquidation but before the agent had had any notice of an act of bankruptcy on the principal's part, the amount so received becomes a debt and an item in the account between the agent and his principal, and he may set off against it a larger debt due from the principal to him, under 32 & 33 Vict. chap. 71, § 39. Elliot v. Turquand, L. R. 7 App. Cas. 79, 45 L. T. N. S. 771, 51 L. J. P. C. N. S. 1, 30 Week. Rep. 477.

Where there have been mutual dealings between a bankrupt and his brokers, and the

latter, before the bankruptcy, give a check for stock sold by them, the proceedings being commenced after the bankrupt's death under 46 & 47 Vict. chap. 52, § 125, the brokers may, in an action by the trustee in bankruptcy on the check which the brokers dishonored when presented after the bankrupt's death and the institution of the proceedings, set off a debt due from the bankrupt, although it did not ripen into a debt until after his death, under § 38, authorizing a set-off in cases of mutual debts and mutual credits. Watkins v. Lindsay, 67 L. J. Q. B. N. S. 362.

Where a factor makes advances in an amount less than the value of goods consigned to him, and subsequently makes an assignment for creditors, and the consignor demands the return of the goods from the assignee, who refuses to deliver them without payment of the amount advanced, the consignor claiming a reduction of the amount of unmatured notes indorsed by him for the accommodation of the factor who is primarily liable thereon and which are in the hands of third persons, but finally repays the entire amount of advances under protest, after which the factor is adjudicated a bankrupt, the consignor is not entitled to a preference on the notes on the ground that they would have been allowed as a set-off if the advances had not been returned before the bankruptcy, even if such set-off would have been allowed under the circumstances, if the advances had not been repaid. *Re* Meyer, 106 Fed. 828, 5 Am. Bankr. Rep. 596.

As to debts or claims mature at the time of the insolvency, see *supra*, I. f, 4, *a*.

As to debts created or claims arising after the insolvency, see *supra*, II. c, 1.

b. Insurance brokers.

Where a broker adjusts a loss with an underwriter, and his name is afterwards struck out of the policy and adjustment, the broker becoming bankrupt within a month after the adjustment, the underwriter cannot set off as against the assured the balance due to him from the broker at the time of adjusting the policy, even though such balance might exceed the amount of the loss. Todd v. Reed, 3 Starkie, 16.

Claims between broker and assured.

Where a merchant employs a broker to effect policies and sell goods, and trusts him with the possession of the policies, and becomes bankrupt while indebted to him for insurance premiums and for advances upon a pledge of goods placed in his hands for sale, the broker may retain a sum received on a policy for a loss occurring after the bankruptcy in liquidation of his advances, as well as of the balance due for premiums, as they constitute mutual credits within 5 Geo. II. chap. 30, § 28. Olive v. Smith, 5 Taunt. 56, 2 Rose, Bankr. 122.

In Young v. Bank of Bengal, 1 Deacon, Bankr. 622, 1 Moore. P. C. 150, *supra*, III. d, 2, it was stated that this case was decided on the assumption that *Ex parte* Deeze, 1 Atk. 228, *supra*, I. e, 2, was a binding authority, and that the latter case as there reported is no longer binding law.

An insurance broker who seeks in an action by assignees in bankruptcy of one for whom he had effected insurance to set off a balance due from the bankrupt resulting from mutual credits does not sufficiently show that the mutual credits were given before the bankruptcy, so as to make the balance claimed a balance due at the time of the bankruptcy by an allegation that the bankrupt was indebted to him in such balance at the time of the request for and refusal to deliver the insurance policy sued for, and of its supposed conversion. Hewison v. Guthrie, 2 Bing. N. C. 755, 2 Hodges, 51, 3 Scott, 298.

Claims between brokers and underwriters.

The broker is generally allowed to set off losses which he was required to pay to the insured on the bankruptcy of the underwriter if he took out the policies in his own name and was acting under a *del credere* commission, but no set-off is allowed if he was not acting under such a commission.

Thus, in an action by the assignees of a bankrupt underwriter against an insurance broker for premiums due the bankrupt, the broker cannot set off a loss on a policy effected by him as agent without a *del credere* commission occurring before the bankruptcy, where there had been no adjustment of the loss, although the broker has since paid the amount of the loss and obtained possession of the policy. Baker v. Langhorn, 4 Campb. 396, 6 Taunt. 519, 2 Marsh. 215, 2 Rose, Bankr. 471, 16 Revised Rep. 662.

And an insurance broker sued by the assignees in bankruptcy of the underwriter for premiums due on policies issued before the bankruptcy cannot set off against a claim for premiums due the underwriter an amount due from the underwriter for return of premiums on such policies on the arrival of ships insured, whether such arrival took place before or after the bankruptcy, where the broker had no *del credere* commission in procuring the insurance, as he is not an agent for the assignees in bankruptcy for the purpose of detaining money to be paid by the bankrupt to the insured. Minett v. Forrester, 4 Taunt. 541, note, 13 Revised Rep. 676.

And this is true as to returns accruing after the bankruptcy, although by the course of dealing between the broker and the bankrupt all returns of premiums were deducted from the amount of premiums payable on the same policies before the premiums were paid over, and the premiums were taken in the broker's name as agent, and he had a lien on the goods insured and on the policies for money advanced to the owners of the goods. Goldschmidt v. Lyon, 4 Taunt. 534, 13 Revised Rep. 670.

And in an action for the balance of an adjusted account between the brokers and the bankrupt underwriter, and for premiums on policies subsequently underwritten by the bankrupt before the bankruptcy, the brokers who have no *del credere* commission and are not personally in any of the insurances are not entitled to deduct the amount of returns on policies, the premiums of which formed part of the adjusted account, where the events entitling to the returns were not known till after the adjustment; nor can they deduct the amount of returns on policies issued after the adjustment, where the events entitling to such return happened before the bankruptcy, but the returns were never settled or adjusted by the bankrupt; nor can they deduct for returns in other policies when the events entitling to the return happened after the bankruptcy but before the commencement of the action. Parker v. Smith, 16 East, 382.

But an insurance broker who takes out insurance in his own name for foreign correspondents from whom he has a *del credere* commission, the underwriter charging the premiums to him, and the correspondents being unknown to the underwriter, may, in an action by the assignees in bankruptcy of such underwriter for premiums on various policies, set off as a mutual credit, under 5 Geo. II. chap. 30, § 28, a loss occurring on such a policy before the bankruptcy, which loss the broker pays after

the bankruptcy, as under his *del credere* commission he is absolutely liable for the loss. Grove v. Dubois, 1 T. R. 112, 16 Revised Rep. 664, note.

The preceding case was criticised in Baker v. Langhorn, 2 Marsh. 215, 4 Campb. 396, 6 Taunt. 519, 2 Rose, Bankr. 471, 16 Revised Rep. 662, *supra*, by Gibbs, Ch. J., who says that he has often endeavored, but in vain, to discover the principle on which it was decided, and that the fallacy therein consists in considering the broker the principal debtor when in fact he would become a debtor only on the failure of the underwriter.

The case of Grove v. Dubois, 1 T. R. 112, 16 Revised Rep. 664, note, *supra*, was followed in Bize v. Dickason, 1 T. R. 285, the facts of which were similar except that the broker had, under a mistaken idea, paid the entire amount of the premiums to the assignee in bankruptcy without making any deduction for losses, and the court permitted him to recover back the amount of such losses which had been paid by him.

And in an action against insurance brokers for premiums by the assignees in bankruptcy of the underwriter, the broker may set off as a mutual credit, under 5 Geo. II. chap. 30, § 28, losses occurring, but not adjusted before the bankruptcy, on policies issued by the bankrupt which had been effected by the brokers in their own names and on their own account, and also similar losses on other policies in their own names but on account of their principals, if they have a lien on the policies or have paid the losses; but they cannot set off losses occurring on policies effected by them in the names and on account of their principals, although they were acting on a *del credere* commission, where the bankrupt had no knowledge of such fact,—especially if they have merely given their principals credit for the losses on such policies, instead of actually paying them. Koster v. Easton, 2 Maule & S. 112, 14 Revised Rep. 603.

And where an insurance broker acts under a *del credere* commission, taking out policies in his own name as agent and being liable to the underwriters for premiums; or where, although not acting under such commission, he pays a loss pursuant to authority given by the underwriter upon receiving abandonments, taking and holding the policies as his vouchers and for his security within the general scope of his authority, and the underwriter becomes bankrupt, the broker having a balance in his favor which he does not prove; and a sum of money is afterwards paid to the broker as agent as a remuneration for losses covered by the insurance under a treaty with a foreign country,—he has a lien on such amount for the balance due him from the bankrupt, and may set off such balance in an action by the assignee in bankruptcy for the money so paid to him. Moody v. Webster, 3 Pick. 424.

In an action by the trustee in bankruptcy of an underwriter to recover money received after the bankruptcy by insurance brokers by way of salvage as to losses on policies effected by them in their own name and for their principals to whom they guaranteed the solvency of the underwriter, which losses had been paid by the underwriter before his bankruptcy, the brokers cannot set off losses on other similar policies which they had been obliged to make good to their principals, as the sums received as salvage were part of the bankrupt's estate which never belonged to the underwriter, and as to which no mutual credit or dealings ever existed. Elgood v. Harris [1896] 2 Q. B. 491, 75 L. T. N. S. 419, 45 Week. Rep. 158, 66 L. J. Q. B. N. S. 53.

For cases where the loss occurs and is adjusted before the bankruptcy, see *supra*, I. f, 4, *b*.

For matters of insurance generally, see *supra*, I. j; *infra*, III. b.

3. *Executors and administrators.*

Executors may set off a debt due the testator from a bankrupt legatee against the amount of a legacy which becomes payable after the bankruptcy occurs.

Thus, where a bequest is made to the wife of one who owed the testatrix a much larger amount, and the wife dies without asserting a claim on the legacy, the husband having previously become bankrupt, the executors may set off the amount due from the bankrupt to the testatrix against a claim by his assignees in bankruptcy for the legacy, a legacy to the wife being at law a legacy to the husband, subject only to the wife's claim for a provision out of it. Ranking v. Barnard, 5 Madd. 32.

Where executors leave a portion of the testator's estate invested in a banking firm of which all but one of the executors are members, there being other members of the firm, and such firm, on the credit of an amount so invested by the executors in trust for a residuary legatee, loan the latter a less amount, and the firm becomes bankrupt before the residuary legatee attains the age when he will be entitled to the legacy, the debt from him may be set off against the amount of the investment. Fairlie v. Hartwell, 3 Jur. 791.

Where a surety for a mortgagor bequeaths to him a share of his residuary estate, subject to the life interest of the testator's widow, and the mortgagor becomes bankrupt after the testator's death, and the executors make payments to the mortgagees in pursuance of the testator's liability as surety, no proof having been made in the bankruptcy by either the executors or the mortgagees, and the bankruptcy not being closed, the executors may, on the death of the tenant for life, retain out of the bankrupt's share of the residue the amount of payments thus made on the mortgage, notwithstanding the bankruptcy. *Re* Watson [1896] 1 Ch. 925, 74 L. T. N. S. 453, 65 L. J. Ch. N. S. 553.

But where the testator had made a deposit in a bank as a continuing security for any amount which might be owing to the bank from a firm composed of the testator's two sons to whom he gave legacies and shares of the residue of his estate, the firm being indebted to the bank in an amount greatly exceeding the amount of the deposit, and the members being soon after adjudged bankrupt, the trustees under the will cannot set off or retain from the trustees in bankruptcy the legacies and shares given the sons against the liability of the testator's estate as surety to the bank, where it is admitted that the bank will probably appropriate ultimately the entire amount of the deposit. *Re* Binns [1896] 2 Ch. 584, 75 L. T. N. S. 99, 65 L. J. Ch. N. S. 830.

For cases in which the testator dies before the bankruptcy occurs, see *supra*, I. f, 6.

For cases in which the testator dies after the bankruptcy occurs, see *supra*, II. c, 2.

f. *Bank deposits.*

1. *Bankruptcy of bank.*

On the bankruptcy of a bank the depositor may set off his deposit against a debt due the bank, although such debt is not yet mature.

Thus, in *Ex parte* Burton, 1 Rose, Bankr. 320, as digested in 2 Mews' Digest, col. 862, the assignees in bankruptcy of a banker were restrained from suing a drawer and acceptor of a bill of exchange discounted by the banker who

became bankrupt before the maturity of the bill on being paid the difference between the bill and a cash balance of the drawer in the banker's hands at the time of the bankruptcy.

And where a banker makes an assignment for creditors containing a provision that the assignee shall use the fund to pay debts in the manner provided by the bankrupt act of 1867, a debtor of the banker may set off, under § 20, the amount of a deposit with the banker, payable on demand, although no demand had been made before the bankruptcy, as such claim was provable, even though it was not due at the time of the assignment, and the case was one of mutual credits. Fort v. McCully, 59 Barb. 87.

And where a banker on the day before he suspends payment and is declared bankrupt applies the amount of a deposit in his bank upon a note which he had discounted for the depositor, the maker and prior indorser having previously failed, the transaction amounts to exactly what the court would have done after the bankruptcy under the act of 1867, § 20, if it had not been done before, and the assignee in bankruptcy consequently cannot recover on the note; and the fact that the depositor subsequently collected it from the maker or prior indorser does not change the matter in any way. Winslow v. Bliss, 3 Lans. 220.

And where bills of exchange are accepted by one person for the accommodation of another, who discounts them with his bankers, who become bankrupt before the maturity of the bills while indebted to the depositor, the latter may have the cash balance due him set off against the bills, thereby destroying the right to that extent of the bankrupts against the acceptor. *Ex parte* Hippins, 4 L. J. Ch. 195, 2 Glyn & J. 93.

Analogous cases.

In an action by the receivers of an insolvent bank on a draft given by the defendant which was not yet due at the time of the bank's failure, the defendant can set off in equity a deposit in the bank against a debt due the bank, under the New Jersey statute, authorizing the receivers to allow a set-off in case of "mutual dealings," which the court held to be equivalent to the term "mutual credits" occurring in bankruptcy statutes. Van Wagoner v. Paterson Gaslight Co. 23 N. J. L. 283. The court also states that such set-off might be allowed in the absence of statute, because insolvency had intervened and it would be just and equitable to allow it.

And where, at the time of the failure of a bank and the appointment of a receiver for it, it owned a note of a depositor which became due a few days thereafter, the depositor may set off the amount of the deposit against the amount of the note, the case being one of "mutual credits" within 2 N. Y. Rev. Stat. 47, § 36. Jones v. Robinson, 26 Barb. 310; *Re* Van Allen, 27 Barb. 225.

For cases where the debt is mature at the time of the bankruptcy, see *supra*, I. h, 1.

For deposits by trustee in bankruptcy in bank which subsequently becomes bankrupt, see *supra*, II. d, 1.

For cases of assignment of deposit or of debt due from depositor, see *infra*, IV. c, 1.

2. *Bankruptcy of depositor.*

A bank may set off against the deposit of a bankrupt depositor a debt from the depositor not yet mature, unless the deposit was made after the bankruptcy or within four months before the filing of the petition, and the bank knew of the depositor's insolvency.

Thus, in Boatmen's Sav. Bank v. State Sav. Asso. 114 U. S. 265, 29 L. ed. 174, 5 Sup. Ct. Rep. 878, the court said that the right of a bank to apply whatever credit there might be in its accounts in favor of bankrupt depositors to the reduction of the amount of a draft of the depositor which had not matured at the time of the bankrupt's failure was not denied.

And a bankrupt's balance of deposit in a bank may be set off against a note against him held by the bank and maturing after the filing of the petition under the act of 1898, § 68, authorizing the set-off of mutual debts and mutual credits and the payment of the balance only, provided that no set-off shall be allowed of a claim which is not provable. *Re* Kalter, 2 N. B. N. Rep. 264. The court in this case says that under such § 68 the provability of the debt which is not affected by the time of its maturity seems to be the criterion of its availability for the purposes of set-off.

And where a bank holds several notes against a bankrupt, some maturing before and some after the bankruptcy, a deposit of the bankrupt should be set off under the act of 1867, § 20, against the aggregate amount of the notes, instead of against those first maturing. *Ex parte* Howard Nat. Bank, 2 Low. Dec. 487, Fed. Cas. No. 6,764.

And where a bank has discounted bills of exchange for a depositor, placing the amount to his credit, and the depositor becomes bankrupt before their maturity, the bank may, in an action by the assignees in bankruptcy against it for a balance on the account of the bankrupt, set off the amount of such bills, although they were not due at the commencement of the action, as there is a mutual credit within 6 Geo. IV. chap. 16, § 50, the bills of exchange being provable under the commission. Alsager v. Currie, 12 Mees. & W. 751, 13 L. J. Exch. N. S. 203, 11 Mees. & W. 14, 12 L. J. Exch. N. S. 164.

And where merchants are in the habit of handing to bankers in London bills drawn upon firms in Bombay for collection by the Bombay branch of their bank, the proceeds when received being transmitted to the bankers for delivery to such merchants, and the merchants become bankrupt while the bankers have in their hands a certain amount of the proceeds of bills so collected, and also hold bills of exchange for a larger amount accepted by the merchants, the bankers may set off the amount due them on the acceptances against the amount due from them for such proceeds, as there is a mutual credit within 12 & 13 Vict. chap. 106, § 171, which must, in its nature, terminate in a debt. Naoroji v. Chartered Bank, L. R. 3 C. P. 444, 37 L. J. C. P. N. S. 221, 18 L. T. N. S. 358, 16 Week. Rep. 791.

And where a bank discounts bills of exchange for a customer, and gives him credit for their amount minus the discount, and, on the day after the depositor commits an act of bankruptcy but before the issuance of a commission, the bank balances his account, giving him credit for the discounted bills, the acceptors of which are insolvent, the bank, when sued by the assignees for such balance, may set off the amount of the bills as a mutual credit under 5 Geo. II. chap. 30, § 28. Arbouin v. Tritton, Holt, N. P. 408.

And where a bank, knowing of the insolvency of a depositor who owes it a note exceeding the amount of his deposit, obtains a check from him for the amount of the note, and applies it on such note on the day it would have been due but for the three days of grace allowed, and a few days before the depositor was adjudged a bankrupt, the transaction is merely an adjustment of mutual debts which is permitted by the act of 1867, § 20, after the bankruptcy, and therefore the fact that it took place before such

bankruptcy does not make it illegal. Hough v. First Nat. Bank, 4 Biss. 349, Fed. Cas. No. 6,721.

And in Robinson v. Wisconsin Marine & F. Ins. Co. Bank, 9 Biss. 117, Fed. Cas. No. 11,969, the deposit exceeded the amount of the note, and the check was given and applied the day before the maturity of the note, and the parties at the time of the transaction spoke of it as a payment of the note, but the court held that it was a mere adjustment of mutual debts, and not an illegal preference.

But in *Re* Tacoma Shoe & Leather Co. 3 N. B. N. Rep. 9, the court held that a bank which had a deposit in favor of the bankrupt at the commencement of the bankruptcy proceedings, and had before that time received from the bankrupt for collection a draft which it subsequently collected, charging the amount of the deposit and of the collection to the account of the bankrupt, who owed it a larger amount, several days after the collection and three weeks after the commencement of the bankruptcy proceedings, was put upon inquiry from the facts within its knowledge, so as to prevent it from setting off the deposit and collection against the bankrupt's note to it, which it had renewed less than four months before the commencement of the bankruptcy proceedings, under the act of 1898, § 68*b*, providing that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which was transferred to him after the filing of the petition or within four months before such filing with knowledge or notice that the bankrupt had committed an act of bankruptcy.

Where an insolvent firm after a general assignment draws a check in favor of the assignee for the amount of its credit in bank, and the bank, in ignorance of the assignment, pays the check by giving its duebill, but on learning the facts threatens to stop payment of the duebill, when it is agreed that the amount shall be placed on deposit subject to the bank's rights, and the firm is subsequently adjudged bankrupt, the bank is entitled to a return of the money, and to hold the same under the bankruptcy act as an offset against unmatured notes of the bankrupt in excess of the deposit. *Re* Meyer, 107 Fed. 86, 5 Am. Bankr. Rep. 593.

A bank which, at the time of making a loan of $6,000 to one who became bankrupt more than four months thereafter, had $2,000 of his money on deposit, which deposit, although subsequently diminished, was again increased to that amount at the maturity of one of two notes given in renewal of the original note within such four months' period, may, under the act of 1898, § 68, apply the deposit on the notes, unless it has notice of the bankrupt's insolvency at the time of such application, the mere renewal of the note not being such notice. *Re* Hays F. & W. Co. 3 N. B. N. Rep. 301.

Analogous cases.

Where the makers of a note which has been discounted at a bank become insolvent, having money on deposit in the bank, the amount of the note may be set off by the bank in an action by the assignee for the amount of the deposit if the note at the time of the insolvency is due absolutely without condition or contingency, although not yet payable, under Mass. Stat. 1838, chap. 163, § 3, providing for the set-off of mutual debts and credits. Demmon v. Boylston Bank, 5 Cush. 194.

And a bank is entitled to set off the amount of the note of an insolvent held by it against the amount on deposit in the insolvent's favor at the commencement of the insolvency proceedings, unless the deposits were received in violation of Mass. Stat. chap. 157, §§ 96, 98, relating to fraudulent preferences, because the bank knew that the business of the insolvent was being carried on with a view to convert its assets into cash for the benefit of creditors, and that he must effect a compromise with creditors or go into insolvency. Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108.

For the right to set off a deposit made after the depositor's insolvency in a bank which had no notice at the time of the insolvency against bills or notes due the bank maturing after the insolvency, see *supra*, II. d, 2.

For cases where the debt is mature at the time of the bankruptcy, see *supra*, I. h, 2.

For cases of assignment of deposit or debt due from depositor, see *infra*, IV. c, 2.

For right to set off unmatured claim against the deposit account of an insolvent debtor generally, see *note* to Nashville Trust Co. v. Fourth Nat. Bank (Tenn.) 15 L. R. A. 710.

g. *Other banking transactions and commercial paper.*

1. *In general.*

Bills and notes, although maturing after the bankruptcy, are available as set-offs.

Thus, in *Ex parte* Hastie, 1 Fonb. N. R. 59, as digested in 2 Mews' Digest, col. 860, where persons claimed to prove on bills accepted by the bankrupt which came into their hands and were discounted by the bank at their request, and which they paid on their dishonor by the bankrupt, the assignees were allowed a set-off as to acceptances of such claimants in the hands of third parties which had been proved against the bankrupt's estate.

And a creditor of a bankrupt on mutual account may set off as a mutual credit a debt from the bankrupt against a bill accepted by him for the bankrupt before the bankruptcy, which matured and was paid by him after the bankruptcy. *Ex parte* Wagstaff, 13 Ves. Jr. 65.

In an action in England by trustees of a bankrupt in Scotland, a plea that, before the defendant had notice of the bankruptcy and before the sequestration, he gave credit to the bankrupt by becoming the indorsee and holder bona fide of an acceptance of the bankrupt which became due after the bankruptcy, which credit was of a nature likely to end in a debt from the bankrupt to him, and the amount of such acceptance was, at the beginning of the suit, and still is, due him, and that the bankrupt gave credit to the defendant by consigning to him the goods sued for on the terms that the proceeds should be paid to the bankrupt in Scotland, and such sale was of a nature likely to end in a debt from the defendant to the bankrupt, and that the defendant is willing and offers to set off one claim against the other,—is a good one. Macfarlane v. Norris, 2 Best & S. 783, 9 Jur. N. S. 374, 31 L. J. Q. B. N. S. 245, 6 L. T. N. S. 492.

Ex parte Boyle, cited in Young v. Bank of Bengal, 1 Deacon, 688, 1 Moore, P. C. 150, holds that where a client is indebted to a solicitor for work done and money lent, and gives the solicitor his notes for a larger amount, part of which notes were not due or paid by him until after the solicitor's bankruptcy, he may set off the amounts so paid on the notes against his indebtedness to the solicitor as a mutual credit, as nothing could prevent the client's liability from ending in a debt except the solicitor himself repaying the money advanced upon the notes.

Where the maker of a note executes at the payee's request a bond to a third person as surety of such payee for a less amount than is due on the note, and the payee agrees that a balance shall remain unpaid on the note which

shall not be claimed by the payee if the maker shall be obliged to pay the bond, such payment is a good defense *pro tanto* to an action by the assignee in bankruptcy, even though, because of the contingency of the debt on the bond, it could not be set off under a commission in bankruptcy under the act of 1800, § 42. Ward v. Winship, 12 Mass. 480.

In an action by assignees in bankruptcy on a bill of exchange, the defendant may set off the value of an annuity purchased by him from the bankrupt, and such annuity creditor may, on submitting to the jurisdiction of the court of review, have the whole matter referred to the commissioner, and have the action on the bill of exchange stayed. *Ex parte* Law, 1 De G. Bankr. Cas. 378, 11 Jur. 112.

Where there had been mutual dealings between a bankrupt and his brokers, and the latter before the bankruptcy gave a check for stock sold by them, proceedings being commenced after the death of the bankrupt, under 46 & 47 Vict. chap. 52, § 125, the brokers may, in an action by the trustee in bankruptcy on the check which the brokers dishonored when presented after the death of the bankrupt and the institution of the proceedings, set off a debt due from the bankrupt, although it did not ripen into a debt until after his death, under § 38, authorizing a set-off in cases of mutual debts and mutual credits. Watkins v. Lindsay, 67 L. J. Q. B. N. S. 362.

Where a contributory of a company in the process of winding up has executed an inspectorship deed, the effect of which is to import the mutual credit clause of 12 & 13 Vict. chap. 106, § 171, the inspectors cannot prove against the company bills of exchange held by such contributory at the date of the deed, which had been accepted by the company and were indorsed to an agent for collection soon after their date, but they must be set off against a call exceeding their amount, made on such contributory after he became the holder of the bills and before their maturity. *Re* Anglo-Greek Steam Nav. & Trading Co. L. R. 4 Ch. 174, 17 Week. Rep. 244.

Where the acceptor of a bill indorsed to one who subsequently becomes bankrupt receives from and credits to the bank drawing it, in which he has extensive dealings, a bill for a less amount drawn by the bankrupt which falls due the day of the bankruptcy and is dishonored, such acceptor cannot, in an action by the assignees in bankruptcy on his acceptance, set off the amount of the bill drawn by the bankrupt, where, in accordance with an existing custom, he had applied in payment of it assets of the bank in his possession, thereupon returning the bill to the bank with a receipt, although the bank subsequently returned the bill with a request to have him set it off against the bill accepted by him. Belcher v. Lloyd, 10 Bing. 310, 3 Moore & S. 822.

Analogous cases.

In Van Wagoner v. Paterson Gaslight Co. 23 N. J. L. 283, the court held that, in an action by the receivers of an insolvent bank on a draft given by the defendant which was not due at the time of the bank's failure, the defendant could set off bills of the bank received by him in good faith before the failure of the bank, under the New Jersey statute authorizing receivers to allow a set-off in case of "mutual dealings," which the court held to be equivalent to the term "mutual credits," occurring in bankruptcy statutes.

And where, at the time of appointing a receiver for an insurance company, it holds a note which is not yet due, against a policy holder whose losses had been adjusted before the insolvency of the company, such losses may be set off against a debt due on the note as a mutual credit, under 2 N. Y. Rev. Stat. 47, § 36. Berry v. Brett, 6 Bosw. 627.

And where one taking out a marine insurance policy gives his note for a premium which does not fall due until after the insolvency of the company and the commencement of proceedings for the appointment of receivers for it, and a loss occurs before such insolvency, which is adjusted subsequent thereto, the loss may be set off against the note as a mutual credit within such section. Osgood v. De Groot, 36 N. Y. 348; Pardo v. Osgood, 5 Robt. 348.

And in an action by an assignee in insolvency for work and material performed and furnished by the insolvent for the defendant, the latter may set off as a mutual credit, under Mass. Stat. 1838, chap. 163, § 3, notes of the insolvent purchased by the defendant in good faith for value before the first publication of the notice in insolvency and before notice of the commencement of the suit, even though such notes had not matured at the time of the insolvency. Aldrich v. Campbell, 4 Gray, 284.

But one who, while a note is in the hands of the indorsee and at the request and for a consideration moving solely from the latter, and without any request express or implied from the first indorser, puts his name on the back of the note waiving demand and notice, and who pays the note after the insolvency of such first indorser, cannot set off, under such circumstances, the amount so paid in an action by the assignee in insolvency of the first indorser for a debt due from him to the insolvent. Nelson v. Harrington, 16 Gray, 139.

As to right to set off commercial paper where the debt matures before the bankruptcy, see *supra*, I. i.

As to right of set-off where the bills or notes are given or the debt created after the bankruptcy, see *supra*, II. e.

For cases of assignment of commerciail paper, see *infra*, IV. d.

For set off of commercial paper against deposits in bank, see *supra*, I. h; II. d; III. f; *infra*, IV. c.

For cases of particular agreements or directions as to commercial paper, see *supra*, I. e, 3; III. d, 2.

2. *Accommodation acceptor or indorser.*

One sued by assignees in bankruptcy may set off an amount paid after the bankruptcy on a bill accepted or note indorsed before the bankruptcy for the bankrupt's accommodation.

Thus, the indorser of a bill of exchange, who pays the bill after the bankruptcy of the drawer, may set off the same against the assignees of the drawer, under the act of 1800, § 42, as it is a mutual credit given before the bankruptcy, although not paid until after. Marks v. Barker, 1 Wash. C. C. 178, Fed. Cas. No. 9,096.

In an action by assignees for goods sold and delivered by the bankrupt before any act of bankruptcy, the defendants may set off a bill of exchange accepted by them before the bankruptcy, although maturing and paid by them thereafter, as it is a mutual credit within 5 Geo. II. chap. 30, § 28. Smith v. Hodson, 4 T. R. 211.

And where the drawer of a bill of exchange hands over, a few days before his bankruptcy and shortly before the maturity of the bill, to the accommodation acceptor the money to pay the same, such act being voluntary, but not in contemplation of bankruptcy, the assignees cannot, on the issue of a fiat before the maturity of the bill, recover back the money in an action for money had and received for their use.

Yates v. Hoppe, 9 C. B. 541, 14 Jur. 372, 19 L. J. C. P. N. S. 180.

But where a trader, after stopping payment generally but before his bankruptcy, sends a note to a particular creditor stating that it is to help him over his payments, his assignees in bankruptcy may recover such money in assumpsit, although at the time of the payment a bill for a larger amount was coming due, which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide. Guthrie v. Crossley, 2 Car. & P. 301.

In assumpsit by assignees in bankruptcy for money had and received by the defendant to their use since the bankruptcy, the defendant may plead that the bankrupt drew and delivered a bill of exchange in his favor for the amount before his bankruptcy by way of a loan to defendant, thereby giving him credit, and that afterwards, and before the bankruptcy, defendant presented the bill, and received payment thereon after the bankruptcy but before the commencement of the action, and offer to set off against it the amount of a bill indorsed by him for the bankrupt's accommodation before the bankruptcy, and which defendant paid on its dishonor after the bankruptcy, and also the amount of another bill discounted by the defendant for the bankrupt before the bankruptcy, which the defendant also paid on its dishonor after the bankruptcy. Hulme v. Muggleston, 3 Mees. & W. 31, Murph. & H. 344, 7 L. J. Exch. N. S. 20, 6 Dowl. P. C. 112.

In an action by assignees in bankruptcy for goods sold and delivered a plea alleging that defendant, before notice of any act of bankruptcy and before the issue of the fiat, accepted bills of exchange for the accommodation of the bankrupt which he had negotiated before defendant had any notice of his bankruptcy; and that the credits so given were of a nature extremely likely to end in debts from the bankrupt to him; and that before the commencement of the suit defendant had been compelled to pay them, the amounts of which he was willing and offered to set off,—states a good plea of set-off under 6 Geo. IV. chap. 16, § 50. Russell v. Bell, 1 Dowl. N. S. 107, 8 Mees. & W. 277.

See also Ouchterlony v. Easterby, 4 Taunt. 888, 2 Rose, Bankr. 272, *infra*, IV. d.

In *Ex parte* Read, 1 Glyn & J. 224, as digested in 2 Mews' Digest, col. 861, a creditor of the bankrupt on a cash balance, who was under acceptances for the bankrupt's accommodation which were not paid at the time of the bankruptcy, and who had received from the bankrupt bills and notes to a larger amount than the cash balance which the creditor had negotiated, was not allowed to prove the cash balance on the principle of excluding the dishonored paper on both sides or otherwise.

One who consigns goods to a factor who makes advances in an amount less than the value of the goods, and subsequently makes an assignment for creditors, who repays the entire amount under protest after a refusal by the assignees to reduce the amount of unmatured notes indorsed by him for the accommodation of the factor, after which the latter is adjudicated a bankrupt, is not entitled to a preference on such notes on the ground that they would have been allowed as a set-off if the advances had not been returned before the bankruptcy, even if such set-off would have been allowed under the circumstances if the advances had not been repaid. *Re* Meyer, 106 Fed. 828, 5 Am. Bankr. Rep. 596.

A debtor of a bankrupt cannot set off against his debt a liability as surety for the bankrupt on a note which such debtor as surety was required to pay after the filing of the petition in bankruptcy, under the act of 1898, § 68, by which the provability of all claims turns upon their status at the time of such filing. *Re* Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223.

The holding in the preceding case is contrary to that of MORGAN v. WORDELL, which holds that the provability of the claims turns upon their status at the time suit is brought, and which seems to be in accord with the weight of authority.

h. *Insurance matters.*

1. *Life insurance.*

In cases of endowment policies not yet mature at the time of the bankruptcy it seems, according to the best considered cases, that a set-off will be allowed,—especially if the period has nearly arrived.

Thus, where, at the time of presenting a petition for the winding up of an insurance company, a policy holder is indebted to the company in a specified amount for loans to him, and the policies have less than a year to run before maturing, at which time an amount in excess of the indebtedness of the insured will be payable if the premiums are all paid up to that time, and the winding-up order is not made until after the maturity of the policies, all the premiums on which have then been paid, and an arrangement to which the insured does not consent is subsequently made by which another company agrees to pay a reduced amount to the policy holders, the result of which is to prevent any policy holder from suing the original insurer, such policy holder may, in an action by the liquidator of the original insurer to recover the loans, set off the amounts due on his policies, under 46 & 47 Vict. chap. 52, § 38, authorizing a set-off in case of mutual credits or other mutual dealings. Sovereign Life Assur. Co. v. Dodd [1892] 1 Q. B. 405.

A similar holding was made on appeal in [1892] 2 Q. B. 573, 62 L. J. Q. B. N. S. 19, 67 L. T. N. S. 396, 41 Week. Rep. 4.

But *Ex parte* Price, L. R. 10 Ch. 648, 33 L. T. N. S. 113, 23 Week. Rep. 844, holds that where a policy holder borrows from the company on the security of his policies and afterwards becomes bankrupt, the company having been previously ordered to be wound up, the trustee in bankruptcy of the policy holder cannot set off the value of the policies as estimated on the winding up against the debt due the company, as there are no mutual credits, mutual debts, or mutual dealings, within 32 & 33 Vict. chap. 71, § 39.

Analogous cases.

In Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295, the court, relying upon different cases of set-off in bankruptcy, and speaking of the principle of setting off mutual debts and mutual credits in all cases under the bankruptcy laws, both of England and of this country, held that where one holding an endowment policy payable to himself if living at the end of the endowment period, and to his children if he died sooner, had given a mortgage to the company, and the latter became insolvent five years before the end of the endowment period, the present value of the interest of the insured in the policy to be found by the life tables should be set off against the mortgage debt. In this case the court speaks of Newcomb v. Almy, 96 N. Y. 308, which holds that where the policy is payable to the insured if living at the end of the endowment period, and to his wife if he dies within such period, the insured cannot set off its reserved value as a mutual credit against a debt due from him

to the company within 2 N. Y. Rev. Stat. 47, § 36, and states that the decision would probably have been different if the court's attention had been called to the fact that the reserve value of each person's interest was payable to him, and that the court improperly assumed that the interests of the insured and his wife were so involved together that they could not be separated.

2. *Fire and marine insurance.*

In this country the right to set-off seems to have been allowed in cases of losses occurring or adjusted after the bankruptcy, and also where the debt against which the loss is sought to be set off is not due at the time of the bankruptcy, while in England the right to set off a loss occurring after the bankruptcy has generally been denied.

Thus, Drake v. Rollo, 3 Biss. 273, Fed. Cas. No. 4,066, holds that a borrower from an insurance company may set off against the debt, even though it is not due at the time of the bankruptcy, a claim for a loss on a policy issued to him by the company, as it is a case of mutual debt and credit, within the act of 1867, § 20.

But *Ex parte* Herbert, 2 Rose, Bankr. 249, as digested in 2 Mews' Digest, col. 865, holds that where a loss attaches on a policy of insurance after the bankruptcy of the insured it constitutes a cause of action in the assignees in bankruptcy, and not an interest in the bankrupt admitting a set-off.

And in *Ex parte* Blagden, 19 Ves. Jr. 465, 2 Rose, Bankr. 249, Lord Eldon holds that a debt due from the bankrupt before his bankruptcy cannot be set off against the bankrupt's share of insurance on a vessel captured after the bankruptcy, as the cause of action on the policy was in the assignees instead of the bankrupt.

And an underwriter sued by the assignees in bankruptcy of the assured for a loss occurring after the bankruptcy cannot set off, under 5 Geo. II. chap. 30, § 28, a debt due from the bankrupt to the underwriter for premiums, the bankrupt having acted as his own broker in taking out the policies, as the amount which might become due on the policy was only a possible debt. Glennie v. Edmunds, 4 Taunt. 775.

But Graham v. Russell, 2 Marsh. 561, 5 Maule & S. 498, 3 Price, 227, 17 Revised Rep. 414, holds that in an action by assignees in bankruptcy of an assured upon a loss which happened after the bankruptcy, the underwriter may set off a sum due to him for premiums on a balance of accounts between him and the bankrupt, as 9 Geo. II. chap. 32, § 2, allows a set-off in the case of a bankrupt underwriter, and there ought to be a similar allowance in case the assured becomes bankrupt.

An underwriter cannot, where a broker adjusts a loss with him, and the broker's name is afterwards struck out of the policy and adjustment, the broker becoming bankrupt within a month after the adjustment, set off as against the assured the balance due him from the broker at the time of adjusting the policy. Todd v. Reed, 3 Starkie, 16.

Analogous cases.

Where at the time of appointing a receiver for an insurance company it held a note not yet due against a policy holder whose losses had been adjusted before the insolvency of the company, such policy holder may set off the losses against the amount due on the note as a mutual credit, under 2 N. Y. Rev. Stat. 47, § 36. Berry v. Brett, 6 Bosw. 627.

Where one taking out a marine insurance policy gives his note for the premium, which does not fall due until after the insolvency of the company and the commencement of proceedings for the appointment of receivers, and a loss occurs before such insolvency, which is adjusted subsequent thereto, the loss may be set off against the note as a mutual credit within such § 36. Osgood v. DeGroot, 36 N. Y. 348; Pardo v. Osgood, 5 Robt. 348.

And a borrower from an insurance company, who is rendered insolvent by a fire in which property of the borrower insured in such company is destroyed, is entitled to have the amount coming to him on his policy set off by the receiver against his debt to the company as a mutual credit, within such § 36, although the receiver has refused to adjust the loss, as it is a claim which must ultimately terminate in a debt, even though it has not yet been liquidated. Holbrook v. American F. Ins. Co. 6 Paige, 220; *Re* Globe Ins. Co. 2 Edw. Ch. 625.

But in *Re* United Ports & General Ins. Co. 46 L. J. Ch. N. S. 403, 36 L. T. N. S. 457, 25 Week. Rep. 580, the court said that in winding up, as in bankruptcy, which was said to be very analogous, there is no set-off of mutual debts and mutual credits, as to transactions subsequent to the commencement of the winding up, and held that an insurance company taking the funds of another insurance company which was subsequently wound up could not set off against funds so received payments made by it on losses of the other company after the commencement of the winding up.

For losses occurring and adjusted before the bankruptcy, see *supra*, I. j.

For matters of assignment of the policy or of the debt against which it is sought to be set off, see *infra*, IV. e.

For matters as to insurance brokers, see *supra*, I. f, 4, *b*; III. e. 2, *b*.

l. *Landlord and tenant.*

Where a creditor levying an execution upon goods on which the landlord of the debtor distrains for rent while they are in the creditor's possession pays the rent in the debtor's presence without objection from him, to relieve the goods from the distress, and the debtor becomes bankrupt, having committed an act of bankruptcy before the levy, causing such levy to be defeated, the creditor may, in an action by the assignees to recover an amount received by the creditor on a sale of part of the goods, set off the amount so paid for rent, the right to recover which was paramount to the act of bankruptcy. *Ex parte* Elliott, 3 Deacon, Bankr. 343, 3 Mont. & A. 664.

On a former hearing in the same case, 2 Deacon, Bankr. 179, the court, while holding that the amount so paid for rent did not constitute a debt due the creditor from the bankrupt, said that the creditors would do no more than justice if they permitted him to retain the amount received for the goods sold, which was much less than the amount paid for rent.

But where the lessee of premises from two different persons leases the same to another person for specified amounts as to each portion, and becomes bankrupt while a half year's rent is due from the sublessee, and the assignees in bankruptcy elect to take the property under one lease and not under the other, and the owner of the latter property subsequently distrains on the goods of the sublessee for rent for three fourths of a year, including the half year's rent due at the time of the bankruptcy, and the sublessee to relieve himself from the distress pays such rent, he cannot, in an action by the assignees for the half year's rent for the entire property and for one quarter's rent for the

part retained by them, set off the amount so paid, as he was absolutely liable for such rent at the time of the bankruptcy, and the assignees were under no obligation to protect him from the original lessor's demand, although the bankrupt would have been so liable except for his bankruptcy. Graham v. Allsop, 3 Exch. 186, 18 L. J. Exch. N. S. 85.

For other cases as to landlord and tenant, see *supra*, I. k; II. f.

j. Principal and surety.

On the question as to the right of set-off as to amounts which one is compelled to pay after the bankruptcy as surety for the bankrupt the decisions are conflicting, but the weight of authority seems to be in favor of allowing the set-off.

One who signs as surety an administrator's bond under a representation by the members of a firm of which the administrator is a member that the administration is to be a matter of partnership business cannot, when sued by the assignees in bankruptcy of the firm for a debt due to it, set off a loss incurred by him as surety on such bond, as an arrangement of the firm to take the assets of the decedent's estate into its possession and share in the disposition of them is against public policy. Forsyth v. Woods, 11 Wall. 484, 20 L. ed. 207.

A demand against a bankrupt acquired by the defendant since the bankruptcy, such as a debt paid by him since the bankruptcy as a surety before, cannot be set off against the assignees in bankruptcy, under the act of 1800, § 42. Barclay v. Carson, 3 N. C. (2 Hayw.) 243.

But Ward v. Winship, 12 Mass. 480, holds that where the maker of a note executes a bond to a third person as payee for the surety at the latter's request for a less amount than is due on the note, and the payee agrees that a balance shall remain unpaid on the note which shall not be claimed by him if the maker is obliged to pay the bond, and the payee becomes bankrupt, after which the maker pays the bond, such payment is a good defense *pro tanto* to an action on the note, even though because of the contingency of the debt on the bond it could not be set off under a commission in bankruptcy under such § 42.

Sampson v. Burton, 2 Brod. & B. 89, 4 J. B. Moore, 515, however, holds that a contract to indemnify one who subsequently became bankrupt from any loss which might accrue from retaining in his magazine powder sold by the guarantor to a third person does not constitute a mutual credit, within 5 Geo. II. chap. 30, § 28, entitling him to a set-off, where no loss accrues thereon to the bankrupt until after the bankruptcy.

In Dobson v. Lockhart, 5 T. R. 133, a sale of goods was made to the surety on a bond of the seller on the condition that they should not be paid for till the bond was discharged, and that he should retain from the purchase price any amount he might be compelled to pay on the bond. The seller became bankrupt and the surety was subsequently compelled to pay the bond. In an action for the purchase price by the assignees of the bankrupt, the majority of the court held that the question did not arise on a set-off, but on the plaintiff's demand, which, in fact, never became due under the agreement, and Ashhurst, J., held that it was a case of mutual credit within 5 Geo. II. chap. 30, § 28, and that the fact that the defendant did not pay the bond until after the bankruptcy did not prevent the set-off, as the agreement for retaining the purchase money took the case out of the general rule that a creditor could not prove upon a debt which did not become due before the bankruptcy.

As to the right of set-off on the part of executors, where the testator was a surety for the legatee who became bankrupt, see *Re* Watson [1896] 1 Ch. 925, 74 L. T. N. S. 453, 65 L. J. Ch. N. S. 553; *Re* Binns [1896] 2 Ch. 584, 65 L. J. Ch. N. S. 830, 75 L. T. N. S. 99, *supra*, III. e, 3.

On the question whether the claim of the surety is provable entitling him to set it off, see *supra*, I. b.

For set-off of claim of accommodation acceptor or indorser paying after the bankruptcy a bill or note on which the bankrupt was primarily liable, see *supra*, III. g, 2.

k. Annuities.

Ex parte Whittaker, 1 Rose, Bankr. 301, 1 Glyn & J. 213, as digested in 2 Mews' Digest, col. 863, holds that where the grantor of an annuity for a consideration to be paid after his death becomes bankrupt during the annuitant's lifetime, owing her more than such consideration, the annuitant cannot set off the consideration against the debt due from the grantor, as the latter could not compel payment before the annuitant's death, and therefore should not be required to accept payment in advance.

The preceding case holds that there was no case of mutual credit, as the balance could not be ascertained by computation. It also holds that the personal representative of the annuitant after her death could not set off the consideration of the annuity against a claim for money misappropriated as her agent during her lifetime.

But *Ex parte* Law, De G. Bankr. 378, 11 Jur. 112, holds that in an action by the assignees in bankruptcy on a bill of exchange the defendant may set off the value of an annuity purchased by him from the bankrupt, and may, on submitting to the jurisdiction of the court of review, have the whole matter referred to the commissioner, and have the action on the bill of exchange stayed.

IV. *Debts or claims assigned.*

a. *In general.*

By the act of 5 Geo. II. chap. 30, § 28, provision is made for set-off in case of mutual debts or mutual credits between the bankrupt and another "at any time before such person became a bankrupt." This was changed by 46 Geo. III. so as to authorize a set-off in case of mutual debts or credits, notwithstanding any prior act of bankruptcy, provided the credit was given to the bankrupt two months before the issuing of the commission. A further change is made in 6 Geo. IV. chap. 16, § 50, so as to provide for set-off notwithstanding any prior act of bankruptcy, providing the person claiming the benefit of the set-off had no notice of any act of bankruptcy when the credit was given.

The Federal bankruptcy act of 1800, § 42, provided simply for set-off in case of mutual debts or credits between the bankrupt and another at any time before such person became bankrupt. The act of 1867, § 20, provided that no set-off of mutual debts or credits should be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him "after the filing of the petition." This provision was amended in 1874, p. 179, § 6, chap. 390, by adding "or in cases of compulsory bankruptcy after the act of bankruptcy upon or in respect of which the adjudication shall be made and with a view of making such set-off."

The present act of 1898, § 68, provides that

no set-off or counterclaim shall be allowed in favor of any debtor of the bankrupt which was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.

Several cases were decided under the act of 1867, § 20, before the amendment of 1874, and according to the weight of authority the right of set off was not taken away by the fact that the assignee of the claim knew at the time of the assignment of the bankrupt's insolvency, if the petition in bankruptcy had not been actually filed at that time.

Thus, *Re* City Bank of Savings, L. & Discount, 6 Nat. Bankr. Reg. 71, Fed. Cas. No. 2,742, holds that a creditor of an insolvent, who has reasonable grounds to believe him to be such, may assign his demand to a debtor of such insolvent before the filing of the petition in bankruptcy to enable him to use it as an offset against his own debt under such § 20.

And in Mattocks v. Lovering, 1 Law & Eq. Rep. 401, Fed. Cas. No. 9,299, the court held that a creditor of a bankrupt, knowing of the latter's insolvency and contemplated bankruptcy, might sell his claim to the debtor of the bankrupt, but said that a court of equity would not permit a debtor buying a claim after such known insolvency and contemplated bankruptcy to set it off against his debt, but could only prove his claim and receive a dividend in the same manner as his assignor.

But on a rehearing in Mattocks v. Lovering, 3 Fed. 212, the court expressed its opinion that the debt so purchased would be available as a set-off.

And in Mattox v. Cady, 7 Am. Law Rec. 613, Fed. Cas. No. 9,301, which was an action directly involving the point incidentally considered in the preceding case, the court held that the defendant in an action by an assignee in involuntary bankruptcy on an account due from the defendant might set off, under such § 20, notes of the bankrupt purchased in good faith for value before the filing of the petition, although he knew of the bankrupt's insolvency at the time of the purchase.

And one indebted to a bankrupt corporation engaged in storing grain in an elevator may set off, in an action for the debt, the value of wheat covered by a storage receipt of the bankrupt purchased by him before the bankruptcy without knowledge of the insolvency of the corporation, which has refused a demand for delivery of the wheat. McCabe v. Winship, 17 Nat. Bankr. Reg. 113, Fed. Cas. No. 8,668.

And a claim against a bankrupt purchased before the filing of the petition, but with full notice of the bankrupt's insolvency, and with intent to use the claim as a set-off, is available for that purpose in a case of voluntary bankruptcy, under the act of 1867, § 20, as amended in 1874, providing that in cases of "compulsory bankruptcy" no offset shall be allowed of a claim purchased after the act of bankruptcy in respect to which the adjudication is made with a view to making it a set-off. Lloyd v. Turner, 5 Sawy. 463, Fed. Cas. No. 8,436.

But a court of equity will not interfere by injunction to aid a debtor to a bankrupt's estate to set off debts bought by him after the bankrupt's insolvency upon a speculation as to the probable dividends on the estate. Hunt v. Holmes, 16 Nat. Bankr. Reg. 101, Fed. Cas. No. 6,890. In this case the court says that under the act of 1867, § 20, as amended in 1874, Congress seems to intend to allow the set-off of debts bought after insolvency, unless they are bought after the very act of bankruptcy which is the foundation of the decree, and with a view to such set-off, but that the denial of the right of set-off in such a case as that before it was grounded in a clear and strong equity which could not be disregarded when the discretionary action of the court was invoked.

A judgment obtained in a state court against a bankrupt during the pendency of the bankruptcy proceedings and assigned by the plaintiff is not available as a set-off in an action by the bankrupt against the assignee of the judgment during the pendency of the proceedings on an account set off to the bankrupt as exempt. Weaver v. Volls, 68 Ind. 191.

Where debts are proved against a company ordered to be wound up, and assigned bona fide for value to one who subsequently assigns them for value to one knowing nothing of a claim of the company against the first assignee, which he is subsequently ordered to pay, immediate notice of the second assignment having been given the company, the second assignee is entitled to the dividend declared on the debts proved, and the claim against the first assignee cannot be set off against it, under 32 & 33 Vict. chap. 71, § 39, made applicable in winding up, as that section relates to the state of things at the time of the bankruptcy, and no right of set-off existed against the first assignee until the order to pay was made. *Re* Milan Tramways Co. L. R. 25 Ch. Div. 587, 53 L. J. Ch. N. S. 1008, 50 L. T. N. S. 545, 32 Week. Rep. 601.

Where one of two persons jointly entitled to the benefits of a charter party becomes bankrupt after assigning his interest and giving notice to the other, and the assignees of the charter party sue upon it in the name of the assignor, the other party cannot rely on a set-off on the ground of a mutual credit between him and the assignor, as all the assignor's interest in the charter party had passed away before the bankruptcy, and consequently the contingency on which mutual accounts were to be taken never arose. Boyd v. Mangles, 16 Mees. & W. 337.

Where a company having a contract for paving a street, one of the provisions of which require it to keep the street in repair for a specified period at a specified price, goes into liquidation before the paving is entirely completed, rendering it impossible to perform its contract to keep the street in repair, the commissioners of sewers have no right to set off, under 32 & 33 Vict. chap. 71, § 39, the damages resulting from the company's inability to carry out its contract as against one to whom the company had, before the commencement of the liquidation, assigned its rights under the contract. Lee & Chapman's Case, L. R. 30 Ch. Div. 216, 54 L. J. Ch. N. S. 460, 53 L. T. N. S. 65, 33 Week. Rep. 513.

Analogous case.

Debts purchased with knowledge of the debtor's insolvency and reason to believe that he is about to go or be driven into insolvency, notice of which purchase is given to the debtor, cannot be set off under Mass. Stat. 1838, chap. 163, § 3, in an action by the assignee in insolvency upon a debt from the purchaser to the debtor. Smith v. Hill, 8 Gray, 572.

For right to set off against insolvent generally claims purchased after the insolvency, see *note* to Stone v. Dodge (Mich.) 21 L. R. A. 280.

b. *Partnership.*

In an action by a solvent partner and the assignees of bankrupt partners to recover back from a creditor the amount of a bill indorsed by one of the bankrupt partners after an act of

bankruptcy and paid to such creditor by the acceptor, the latter cannot set off a larger demand which he has against the joint firm, as there are no mutual debts or credits. Thomason v. Frere, 10 East, 418. The judges in this case expressed a doubt as to the correctness of their decision, and directed another trial that it might be more carefully considered.

In *Ex parte* Twogood, 11 Ves. Jr. 517, trustees in bankruptcy of one member of a firm presented a petition asking that they might be permitted to set off against a debt due from the bankrupt individually, which debt had been assigned after the bankruptcy, a debt due from the assignor to the firm, but Lord Eldon refused the petition on the ground that it would disturb all the habitual arrangements in bankruptcy.

Where a firm is indebted to a bank on an account with it, and one member of the firm has a separate account on which the bank is indebted to him for a greater amount, and after the bank has suspended payment, but before it has committed an act of bankruptcy, he assigns the balance due on his account to the firm, and directs the bank to place the balance to the firm account, which the bank does not do, the firm cannot set off in equity the amount of the separate account in an action by the assignees in bankruptcy of the bank for the amount due from the firm. Watts v. Christie, 11 Beav. 546, 18 L. J. Ch. N. S. 173, 13 Jur. 244, 845.

But in Gray v. Rollo, 18 Wall. 629, 21 L. ed. 927, Affirming 9 Nat. Bankr. Reg. 337, the court states that if one interested in an insurance policy issued by a bankrupt company jointly with defendant sued on a note given to the company had assigned his interest to defendant in good faith before the bankruptcy the liability on the policy would have been available as a set-off against the note.

For cases of partnership generally, see *supra*, I. f, 2.

c. *Bank deposits.*

1. *Bankruptcy of bank.*

A debtor of a banker cannot set off against the debt deposits of third persons in such bank transferred by them to him after he knew of the banker's failure and after the creditors had determined to put him into bankruptcy, although the banker assented to the transfer of the deposits, as the case is not one of mutual credits, within the act of 1867, § 20 (U. S. Rev. Stat. § 5073), as amended in 1874. Rollins v. Twitchell, 2 Hask. 66, Fed. Cas. No. 12,027.

And where the holder of a certificate of deposit of a bank gives a note to the bank, the one transaction not taking place in any way because of or in reliance on the other, and no agreement being made that one should stand against the other, and the bank transfers the note before maturity and subsequently becomes bankrupt, the depositor has no right to set off his deposit against the note, there being no case of mutual credit within the act of 1867, § 20, as the note was not the property of the bank at the time of the bankruptcy. Munger v. Albany City Nat. Bank, 85 N. Y. 580.

Where a bank advances money to a depositor on bills accepted by him and transferred by the bank to one who, after the bankruptcy of the bank and the refusal of the acceptor to pay, paid himself out of funds of the bank in his hands, transferring the bills to the assignees of the bank, the depositor in an action by the assignees in bankruptcy on the bills may set off the amount of his deposit, as there was a mutual credit within 5 Geo. II. chap. 30, § 28. Rolland v. Nash, 8 Barn. & C. 105, 6 L. J. K. B. 244, 2 Moody & R. 189.

Analogous cases.

A debtor of an insolvent banker, who, with knowledge of the banker's insolvency, purchases the deposit of a third person after the doors of the bank have closed, but before the filing of the petition in voluntary insolvency, may set off such deposit against his debt to the banker, under the California insolvency act 1880, § 43, providing that in all cases of mutual debts and mutual credits one debt shall be set off against the other, provided that no set-off shall be allowed in favor of a debtor of an insolvent of a claim purchased by him after the filing of the petition by or against him for the purpose of making such set-off. Conroy v. Dunlap, 104 Cal. 133, 37 Pac. 887.

Where debts are due an insolvent bank from several persons jointly, and the credit belongs to an individual, there are no mutual debts or mutual credits, within 2 N. Y. Rev. Stat. 47, § 36, so as to give the right of set-off, even though all interest in the claim against the bank is assigned to the person indebted to it after the appointment of the receiver. *Re* Van Allen, 37 Barb. 225.

For cases where there has been no assignment, see *supra*, I. h, 1; II. d, 1; III. f, 1.

2. *Bankruptcy of depositor.*

The mutual debts and mutual credits referred to in the act of 1867, § 20, are such as are in existence at the time of proving the debts against the bankrupt estate, and consequently the question whether a part of the balance of the account of the bankrupt in a bank had been assigned by the depositor's giving a check more than two months before the commencement of the proceedings in bankruptcy, which check was not presented until after the commencement of such proceedings, does not depend on the bankruptcy law so as to give the United States Supreme Court jurisdiction. Boatmen's Sav. Bank v. State Sav. Asso. 114 U. S. 265, 29 L. ed. 174, 5 Sup. Ct. Rep. 878.

It is the duty of an assignee in bankruptcy to disclose to creditors upon inquiry by them as to the value of their claims that the bank in which there is a large amount of the bankrupt's money on deposit claims and is purchasing set-offs against such deposit, where he knows such fact, and a failure to perform such duty is ground for his removal. *Ex parte* Perkins, 5 Biss. 254, Fed. Cas. No. 10,982.

Where one member of a firm having a separate account assigns his individual deposit in a bank to the firm after the bank has suspended payment but before it has committed an act of bankruptcy, and directs the bank to place such deposit to the firm account, which the bank fails to do, the firm cannot set off such deposit in equity in an action by the assignees in bankruptcy of the bank for an amount due from the firm. Watts v. Christie, 11 Beav. 546, 18 L. J. Ch. N. S. 173, 13 Jur. 244, 845.

For cases where there has been no assignment, see *supra*, I. h, 2; II. d, 2; III. f, 2.

d. *Other banking transactions and commercial paper.*

The assignee or trustee in bankruptcy has the right of set-off in case of a transfer of commercial paper after the bankruptcy or other time fixed by the bankruptcy statutes as that after which a transfer will not be held valid.

Thus, the indorsement of a bill against the bankrupt after the bankruptcy cannot alter the state of mutual credit between the bankrupt and the holder at the time of the bankruptcy, and the assignees may set off any amount due from such holder. *Ex parte* Deey, 2 Cox, Ch. Cas. 423.

And one who takes an assignment of a note executed by one against whom a commission of bankruptcy had been issued before the assignment must allow all just offsets existing at the time of the bankruptcy and which must have been admitted if the assignment had not been made, under the act of 1800, providing that where mutual debts have existed between the bankrupt and any other person at any time before he becomes bankrupt, no more shall be paid than the balance due after an adjustment of the accounts. Humphreys v. Blight, 1 Wash. C. C. 44, Fed. Cas. No. 6,870, Affirmed in 4 Dall. 370, 1 L. ed. 870.

And where, under the laws of the state, the assignee of a non-negotiable note takes it subject to all the equities and defenses available against it in the hands of the assignor, he will not be entitled to prove it as a claim against the maker's estate in bankruptcy unless the assignor could have done so. *Re* Wiener & G. Shoe Co. 96 Fed. 949, 3 Am. Bankr. Rep. 200.

And in assumpsit by assignees in bankruptcy for a debt due the bankrupt the defendant cannot set off a note indorsed to him after the bankruptcy under 5 Geo. II. chap. 30, § 28, authorizing the set-off of mutual debts before the bankruptcy. Marsh v. Chambers, 2 Strange, 1234.

The burden of proving that the transfer took place before the time fixed by statute rests on the one relying on the set-off.

Thus, one sued by the assignees of a bankrupt cannot, even in a court of law, rely upon cash notes issued by the bankrupt before his bankruptcy payable to bearer as a set-off without showing that the notes came into his hands before the bankruptcy, under 5 Geo. II. chap. 30, § 28, relating to cases of mutual credit, or debts "at any time before" the bankruptcy. Dickson v. Evans, 6 T. R. 57, 3 Revised Rep. 119.

And in an action by assignees of a bankrupt, on a note due the bankrupt's estate, the defendant cannot set off, under the act of 1800, § 42, a check issued by the bankrupt payable to bearer, though bearing date before the bankruptcy, without further proving that it came into his hands prior to the bankruptcy. Ogden v. Cowley, 2 Johns. 274.

But where the defendant in an action by assignees in bankruptcy for a debt due the estate gives notice of set-off of the bankrupt's notes in his possession, it is sufficient to authorize the jury to infer that they were still in his possession at the time of the bankruptcy, without proving that he kept them in his possession up to the moment of the bankruptcy. Moore v. Wright, 2 Marsh. 209, 6 Taunt. 517, 2 Rose, Bankr. 470.

Notice of the bankrupt's insolvency at the time of the transfer has been held fatal to the right of set-off in some cases, and is especially made so by 6 Geo. IV. chap. 16, § 50, and subsequent English statutes, and also by the present bankruptcy law, § 68, in case of a purchase or transfer within four months before the filing of the petition with a view to use as a set-off.

Thus, *Ex parte* Stone, 1 Glyn & J. 191, as digested in 2 Mews' Digest, col. 861, holds that where a debtor to a bankrupt's estate acquires a bill with the bankrupt's name thereon which he knows forms no demand upon the bankrupt's estate, (after notice of the bankrupt's insolvency and with a view to set it off), he is not a bona fide holder.

And a note purchased by a debtor of the bankrupt after a petition to be declared a bankrupt and to be discharged from his debts had been presented to the court, although before he was declared a bankrupt, cannot be set off against the debt under the act of 1841, § 5, as he cannot be deemed a bona fide purchaser, being charged with constructive notice of the bankruptcy. Smith v. Brinkerhoff, 6 N. Y. 305, Affirming 8 Barb. 519.

But a set-off to a note against the payee acquired bona fide before notice of its assignment to a third person is not defeated by the payee's bankruptcy, as the set-off would be available against the bankrupt or his assignee under the act of 1841, § 5, and Clay's (Ala.) Digest, 382, § 6, provides that defendant is to be allowed a set-off in the same manner as if he had been sued by the payee or obligee. Harwell v. Steel, 17 Ala. 372.

And merchants to whom manufacturers of goods are in the habit of consigning them for sale may set off the notes of the manufacturer purchased for value in good faith before the latter's bankruptcy and without a suspicion of their insolvency, against a claim of the assignees for a balance remaining from the proceeds of a sale of goods in the hands of the consignees at the time of the bankruptcy, after applying a sufficient amount to pay in full cash advances previously made to the bankrupts. Goodrich v. Dobson, 43 Conn. 576, Fed. Cas. No. 18,297.

There is a conflict of authorities as to the right of an indorser of a note or bill to set it off on taking it up after the bankruptcy.

Thus, if the indorser of a bill becomes a party to it before the bankruptcy of the acceptor in England or the sequestration in Scotland, he may set it off against a debt due the bankrupt on becoming the holder after the bankruptcy or sequestration. M'Kinnon v. Armstrong Bros. L. R. 2 App. Cas. 531, 36 L. T. N. S. 482.

And where a bank discounts a note for one who at the same time takes an acceptance of the bank for a smaller amount, which after depositing with his bankers he is obliged to pay, he may set it off against the note when the bank becomes bankrupt, although it was with his bankers when the commission of bankruptcy issued, under 6 Geo. IV. chap. 16, § 50, authorizing a set-off where there "has been" mutual credit, or where there "are" mutual debts, provided the person claiming the set-off had no notice of the act of bankruptcy when the credit was given. Collins v. Jones, 10 Barn. & C. 777.

But *Ex parte* Hall, 27 Viner, Abr. 51, holds that the holder of a bill accepted by the bankrupt, which he had indorsed away at the time of the bankruptcy, but subsequently took up, cannot set it off against a bill accepted by him for the bankrupt after the bankruptcy.

And *Ex parte* Hale, 3 Ves. Jr. 304, holds that one who had, before the bankruptcy, indorsed a bill accepted by the bankrupt, cannot on subsequently taking it up set it off against a debt due from him to the bankrupt, as it is not a case of mutual credit, the note not having been due to him at the time of the bankruptcy. This case was criticised, however, in Collins v. Jones, 10 Barn. & C. 777, *supra*.

And in an action by assignees in bankruptcy on a bill of exchange accepted by defendant for the bankrupt's accommodation the defendant cannot set off as a mutual credit, under 5 Geo. II. chap. 30, § 28, other bills of exchange in his favor accepted by the bankrupt and overdue and unpaid, where they are in no way connected with the bill on which the action is brought, and were not in the defendant's hands at the time of the bankruptcy, but were subsequently taken up by him from the holder, the bankrupt having also accepted a bill at the time of, and as a part of, the same transaction as that sued on. Ouchterlony v. Easterly, 4 Taunt. 888, 2 Rose, Bankr. 272.

And in London, B. & M. Bank v. Narraway,

L. R. 15 Eq. 93, 42 L. J. Ch. N. S. 329, 27 L. T. N. S. 572, 21 Week. Rep. 318, a bank had sold its acceptances to a firm partly in consideration of acceptances of the firm, and one member of the firm became bankrupt while its acceptances, which were not yet due, were in the hands of third parties, who subsequently reassigned them to the bank that it might set them off against its own acceptances, under an agreement for a division of any money thereby recovered, in specified proportions between the bank and the holders. The court held that the bank held the acceptances as trustee only, and expressed a serious doubt against its right to set them off as a mutual credit on that ground, but decided against the right to set-off on another ground.

In an action by the assignees of a bankrupt bank for money due the bankrupt before the bankruptcy on the balance of defendant's banking account, the defendants cannot set off, under 6 Geo. IV. chap. 16, § 50, notes of the bank received by the defendants from persons not indebted to them after the bank had suspended payment but before they had notice of any act of bankruptcy, for which they were to pay so much only as they should receive from the assignees in bankruptcy for the notes, as they are only trustees as to such notes, and can have no beneficial interest in them; but they can set off other notes of the bank received from their debtors under an agreement requiring them to apply on the debts so much only as they received from the assignees. Forster v. Wilson, 12 Mees. & W. 191, 13 L. J. Exch. N. S. 209.

See also Thomason v. Frere, 10 East, 418, *supra*, IV. b.

For cases where an accommodation acceptor or indorser is required to pay after the bankruptcy, see *supra*, III. g, 2.

A plea in an action in England by trustees of a bankrupt in Scotland alleging that defendant gave credit to the bankrupt before notice of the bankruptcy and before the sequestration, by becoming the bona fide holder of an acceptance of the bankrupt which became due after the bankruptcy, which credit was of a nature likely to end in a debt from the bankrupt to him, the amount of which was, at the beginning of the suit, and still is, due him, and that the bankrupt gave credit to the defendant by consigning to him the goods sued for on the terms that the proceeds should be paid to the bankrupt in Scotland, which sale was of a nature likely to terminate in a debt from the defendant to the bankrupt, and that the defendant is willing and offers to set off one claim against the other, is a good one. MacFarlane v. Norris, 2 Best & S. 783, 9 Jur. N. S. 374, 31 L. J. Q. B. N. S. 245, 6 L. T. N. S. 492.

The inspectors in an inspectorship deed executed by a contributory of a company in the process of winding up cannot prove against the company bills of exchange held by such contributory at the date of the deed accepted by the company, which had been indorsed to an agent for collection soon after its date, but such bills of exchange must be set off against a call exceeding their amount made on such contributory after he became the holder of the bills and before their maturity. *Re* Anglo-Greek Steam Nav. & Trading Co. L. R. 4 Ch. 174, 17 Week. Rep. 244.

In an action by assignees for goods sold and delivered by the bankrupt, defendants may set off, as a mutual credit, under 5 Geo. II. chap. 30, § 28, a bill of exchange accepted by the bankrupt and taken by the defendants before the bankruptcy, although the bankrupt did not know that the defendants had the acceptance at the time of selling the goods, as the bankrupt gave credit to defendants by selling them the goods, and the defendants gave credit to the bankrupt by taking the acceptance. Hankey v. Smith, 3 T. R. 507, note.

Where a borrower from a bank gives his note as security, and the bank pledges such note to its correspondent as security for advances from it, and becomes bankrupt while the borrower has its notes for an amount exceeding that of the note, and the correspondent holds notes and bills of the bank to a greater amount than the balance due it from the bank, but the correspondent refuses to permit the borrower to set off the notes of the bank against his note, and he pays it in full in ignorance of the fact that the correspondent is otherwise fully secured for its debt from the bank and proves his debt against the bank, and the assignees pay the correspondent its debt and take all the remaining securities out of its hands, the borrower has the right of set-off on the ground of mutual credit, under 6 Geo. IV. chap. 16, § 50, on the withdrawal of his proofs of which he is not deprived by his payment of the note to the correspondent in ignorance of the facts. *Ex parte* Staddon, 3 Mont. D. & De G. 256, 12 L. J. Bankr. N. S. 39, 7 Jur. 358.

Analogous case

In an action by an assignee for work and materials furnished by an insolvent for the defendant, the latter may set off, under Mass. Stat. 1838, chap. 163, § 3, notes of the insolvent purchased by the defendant in good faith for value before the first publication of the notice in insolvency and before notice of the commencement of the suit, even though such notes had not reached their maturity at the time of the insolvency. Aldrich v. Campbell, 4 Gray, 284.

For the right of set-off where a creditor of the bank transfers bills to a third person, who, after purchasing goods from the bankrupt for which he agrees to pay in cash, offers such bills or notes in payment, see *supra*, II. b.

For the right of set-off where there has been no assignment, see *supra*, I. e, 3; I. i; II. e; III. d, 2; III. g.

For set-off of commercial paper against deposit in bank, see *supra*, I. h; II. d; III. f; IV. c.

e. *Insurance matters.*

In several cases under the act of 1867, § 20, the right to set off a loss on a policy acquired with notice of the insolvency of the insurance company arose, and while the decisions were conflicting the weight of authority was in favor of the right of set-off, notwithstanding such notice.

Thus, Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535, holds that a borrower from an insurance company whose debt is not due at the time of its bankruptcy cannot set off against the debt a claim for losses on policies assigned to him with knowledge of the company's insolvency, although before the commencement of proceedings in bankruptcy, as there are no mutual debts or mutual credits, within such § 20.

But in Lloyd v. Turner, 5 Sawy. 463, Fed. Cas. No. 8,436, *supra*, IV. a, it is said that *Re* City Bank of Savings, L. & Discount, 6 Nat. Bankr. Reg. 71, Fed. Cas. No. 2,742, *supra*, IV. a, and Hovey v. Home Ins. Co. 10 Nat. Bankr. Reg. 224, Fed. Cas. No. 6,743, *infra*, hold the other way and the court, while admitting the force of the arguments in Hitchcock v. Rollo, 3 Biss. 276, Fed. Cas. No. 6,535, *supra*, refuses to follow it.

But it was again followed in Rollins v. Twitchell, 2 Hask. 66, Fed. Cas. No. 12,027,

supra, IV. c, 1, rather than the cases holding the other way.

Hovey v. Home Ins. Co. 10 Nat. Bankr. Reg. 224, Fed. Cas. No. 6,743, holds that an insurance company reinsuring risks may, where the company making the original insurance becomes insolvent and claims for losses against it are selling for 25 per cent, purchase such claims itself before the filing of a petition in bankruptcy against the original insurer for the purpose of setting them off against its claims for reinsurance, and may set off the claims so purchased, notwithstanding knowledge of the company's insolvency at the time of the purchase.

And where an insurance company reinsures some of its risks, and afterward makes an assignment for creditors, after which a petition in bankruptcy is filed against it, the company reinsuring the risks may use as a counterclaim against its liability to the bankrupt on its reinsurance contracts claims against the bankrupt on which it was a reinsurer, to the extent of its liability as such reinsurer, as such counterclaim is not within the act of 1867, § 20, but is a mere payment of its liability releasing the bankrupt to the same extent; but it cannot set off against its liability on such reinsurance contracts, claims for losses against the bankrupt on other policies on which it was not liable as reinsurer under the law as it exists in Ohio, denying to insurance companies corporate power to purchase claims against those to whom they are indebted for losses to be used as set-offs in order to satisfy and pay them. *Re* Cleveland Ins. Co. 22 Fed. 200.

In Gray v. Rollo, 18 Wall. 629, 21 L. ed. 927, Affirming 9 Nat. Bankr. Reg. 337, the court stated that if one jointly interested with defendant in an insurance policy of a company which had since become bankrupt had assigned his interest to defendant in good faith before the bankruptcy, the defendant could have set off the liability on the policy against his liability on a note to the company.

Analogous cases.

Where an insured assigns his policies to mortgagees of the property and borrows money from the company, giving mortgages back on other property, and the company is rendered insolvent by a fire in which the property covered by the first mortgage is destroyed, the insured is not entitled to set off, in an action by the receivers of the company to foreclose the mortgages to it, the amount due on the policies, under 2 N. Y. Rev. Stat. 47, § 36, as the provision therein as to mutual debts and mutual credits is confined to the party claiming the set-off before the appointment of the receiver, and the insured, having assigned the policies, was not the owner of them at such time. Swords v. Blake, 3 Edw. Ch. 112. In this case the company had issued negotiable certificates in substitution for the policies, in accordance with a statute authorizing the same, to the insured, who had indorsed and transferred them to the mortgagees in place of the policy.

As to right to set off insurance policies securing a trust created by a marriage settlement and afterwards assigned by the assignee in bankruptcy to his wife's father, who had also executed a marriage settlement deed, see Burridge v. Row, 8 Jur. 299, 13 L. J. Ch. N. S. 183, *supra*, I. f, 5.

For set-off in a suit by a bankrupt on a policy for the benefit of one to whom he had assigned it, see De Mattos v. Saunders, L. R. 7 C. P. 570, 27 L. T. N. S. 120, 20 Week. Rep. 801, *infra*. V.

For cases where there has been no assignment, see *supra*, I. j; III. h.

For cases relating to insurance brokers, see *supra*, I. f, 4, *b*; III. e, 2, *b*.

55 L. R. A.

V. *Bankruptcy of third persons.*

The provision for set-off in case of mutual debts, mutual credits, or mutual dealings applies only in actions in which the bankrupts or their assignees or their trustees are parties.

Thus, in an action for damages for not accepting or paying for goods bought, the defendant cannot claim a set-off on the ground that he purchased of an agent of the plaintiff, who was the apparent owner and whom defendant believed to be the owner, and that such agent was afterwards adjudicated a bankrupt, and that before the bankruptcy mutual credit had been given between the defendant and such agent in respect to the sale of goods and as to money payable by the agent to the defendant, as 32 & 33 Vict: chap. 71, § 39, relating to mutual dealings, mutual credit, and mutual debts "between the bankrupt and any other persons" does not apply in the case of a third person (the principal in this case), who cannot have the same benefits under the act which the bankrupt himself would have. Turner v. Thomas, L. R. 6 C. P. 610, 40 L. J. C. P. N. S. 271, 24 L. T. N. S. 879, 19 Week. Rep. 1170.

But where the indorsee of bills of exchange sues the acceptor for the entire amount of the bills, having received a dividend thereon from the bankrupt estate of the drawers, for the amount of which dividend he sues as trustee for the drawers, the defendant may set off as a mutual credit a claim which he has against the estate of the drawers, as it is a settlement of the affairs of the bankrupts themselves, and not of the affairs of solvent persons, as in the preceding case. Thornton v. Maynard, L. R. 10 C. P. 695, 44 L. J. C. P. N. S. 382, 33 L. T. N. S. 433.

In an action, by one who has executed a deed of inspectorship placing him in the same condition as a bankrupt, on a marine policy for the benefit of one to whom he had assigned the policy before executing such deed as security for advances, the defendant cannot set off the amount of a debt due to it from the plaintiff, under the mutual credit clause of 12 & 13 Vict. chap. 106, § 171, as such clause applies only to the winding up of the estate between the bankrupt and a creditor, and the bankrupt in this case is bringing the suit for the benefit of his assignee, instead of for his own benefit. De Mattos v. Saunders, L. R. 7 C. P. 570, 27 L. T. N. S. 120, 20 Week. Rep. 801.

And where a broker adjusts a loss with an underwriter, and his name is afterwards struck out of the policy and adjustment, the broker becoming bankrupt within a month after the adjustment, the underwriter cannot set off, as against the assured, the balance due to him from the broker at the time of adjusting the policy, even though such balance might exceed the amount of the loss. Todd v. Reed, 3 Starkie, 16.

Nor does such provision apply in case of the bankruptcy of one or more members of a firm.

Thus, where partners deliver bills to a given person that he may procure them to be discounted for the use of the partners, two of whom subsequently become bankrupt, the third not being made such, the person to whom the bills were delivered cannot, in an action by the solvent partner and the assignees of the bankrupts for the proceeds of the bills, set off a debt due him from the three partners, under 5 Geo. II. chap. 30, § 28, which relates to mutual credits between bankrupts and other persons, and not to credits between bankrupts and a solvent person on one side and another person on the other. Staniforth v. Fellowes, 1 Marsh. 184, 2 Rose, Bankr. 151, 15 Revised Rep. 673.

And the provisions as to set-off of mutual

credits in 12 & 13 Vict. chap. 106, § 171, do not apply where one of several partners is bankrupt, and the members of the firm when sued seek to set up the set-off, but only to cases in which the sole debtor, or an entire firm, becomes bankrupt. New Quebrada Co. v. Carr, L. R. 4 C. P. 656, 38 L. J. C. P. N. S. 283, 17 Week. Rep. 859; London, B. & M. Bank v. Narraway, L. R. 15 Eq. 93, 42 L. J. Ch. N. S. 329, 27 L. T. N. S. 572, 21 Week. Rep. 318.

And in an action by a solvent partner and the assignees of bankrupt partners to recover back from a creditor the amount of a bill indorsed by one of the bankrupt partners after an act of bankruptcy and paid to such creditor by the acceptor, the latter cannot set off a larger demand which he has against the joint firm, as there are no mutual debts or credits. Thomason v. Frere, 10 East, 418. The judges, however, in this case expressed a doubt as to the correctness of their decision.

VI. *Form of action.*

Where a sale of goods or payment is made to be applied on the debt due from the bankrupt, the right of set-off depends in some cases on the form of the action, the set-off being allowed where the contract is affirmed and assumpsit brought for the money paid or the price of the goods sold, and being disallowed where the contract is disaffirmed and an action of trover brought.

Thus, where a bankrupt just before his bankruptcy delivers goods to one of his creditors, the latter may, in an action by the assignees in bankruptcy for the purchase price, set off the debt due him from the bankrupt, although if the assignees had disaffirmed the contract, and brought an action of trover for the goods the debt could not have been set off. Smith v. Hodson, 4 T. R. 211; Benoist v. Darby, 12 Mo. 196.

And where a purchaser of goods from an auctioneer wrongfully removes them without paying the purchase price, the owner subsequently becoming bankrupt, such purchaser may, in an action by the assignees for the purchase price set off an indebtedness to him from the bankrupt; but if the assignees were to bring an action for the wrongful conversion of the goods, such indebtedness could not be set off. Holmes v. Tutton, 5 El. & Bl. 65, 1 Jur. N. S. 975, 24 L. J. Q. B. N. S. 346.

And in Billon v. Hyde, 1 Atk. 126, 1 Ves. Sr. 327, the assignees of a bankrupt brought assumpsit in a court of law for money paid by him after a private act of bankruptcy to one with whom he had had various transactions in indorsing bills of exchange, and the court refused to allow a set-off of a smaller amount which the latter had paid to and for the bankrupt, but Lord Chancellor Hardwicke allowed the set off in his court on the ground that he had acted in good faith, and that the assignees, by bringing assumpsit, had affirmed the bankrupt's contract.

And Hill v. Smith, 12 Mees. & W. 618, 13 L. J. Exch. N. S. 243, 8 Jur. 179, holds that where one pays money to a bank to be applied in payment of specified bills of exchange, and the bank, in violation of its agreement, applies such money to its credit on a debt due from the one paying it who subsequently becomes bankrupt, the bills of exchange being dishonored, the bank cannot, in an action of special assumpsit by the assignees in bankruptcy for breach of such agreement, set off as a mutual credit the debt due from the bankrupt, although if the action had been for money had and received the set-off would have been allowed.

And Colson v. Welsh, 1 Esp. 378, holds that a purchaser of goods who promises the seller that after paying certain of his debts, including a certain amount of indebtedness to himself, he will pay over the balance to the purchaser cannot, in an action by the assignees in bankruptcy of such purchaser for damages for refusing to pay over such balance according to agreement, set off the debt due him from the bankrupt, although he might have set it off if the action had been for money had and received.

But Fleming v. Andrews, 3 Fed. 632, holds that where a creditor of the bankrupt has a third person purchase property of the bankrupt, agreeing to pay cash in thirty days, and then has such purchaser tender payment in notes due from the bankrupt to such creditor, he cannot, when sued by the assignees in bankruptcy for the value of the property sold, set off the debt due him from the bankrupt, whether the complaint is regarded as one in tort or on contract, as the creditor ought not to be permitted to obtain a preference by such a trick.

VII. *Effect of proving claim.*

The act of 1867, § 21, to which § 11 of the present act corresponds to some extent, provided that no creditor proving his claim should be allowed to maintain any suit therefor against the bankrupt, but should be deemed to have waived all right of action against him. Under this provision it is held that the right of set-off is lost by proving for the entire claim without showing in any way that the bankrupt has any claim against him, the set-off being considered as equivalent to an original suit, although where such course was due to a mistake the creditor has been allowed to withdraw his proof and rely on the set-off.

Thus, a bank which proves its entire debt against a bankrupt depositor without offering to abate its claim by the amount of the deposit is thereby prevented from setting of any part of the debt proved when sued by the assignee in bankruptcy for the amount of the deposit, as a plea of set-off is equivalent to an original suit on the debt, within the prohibition of such § 21. Brown v. Farmers' Bank, 6 Bush, 198.

And a creditor of a bankrupt, who, in making proof of his claim before the register, fails to show that the bankrupt has an unsatisfied claim against him, cannot, in an action by the assignee in bankruptcy for such claim, plead as a set-off on the ground of mutual debts or mutual credits the amount allowed by the register as the balance due him, under such § 21, Russell v. Owen, 61 Mo. 185.

But Harmanson v. Bain, 1 Hughes, 391, Fed. Cas. No. 6,073, holds that the filing of a plea in set-off in an action at law by an assignee in bankruptcy is not the maintaining of a suit at law against the bankrupt, such as is forbidden by such § 21, and if it could be so considered the leave given to the assignee by the bankruptcy court to bring the suit implies a contemporaneous permission to the defendant to avail himself of the right of set-off in the action at law; and even if he could not plead it, and judgment for the full amount were rendered against him, it would be the duty of the bankruptcy court to apply the rule as to set-off of mutual debts and mutual credits, and set the judgment and defendant's claim off against each other.

Where a receiver appointed for the estate of a testatrix proves a debt in bankruptcy against a firm of which a specific and residuary legatee is a member, and receives a dividend thereon, the right to set off such debt against the amount of the legacy is lost. Armstrong v. Armstrong, L. R. 12 Eq. 614, 25 L. T. N. S. 199, 19 Week. Rep. 971.

And the proof in bankruptcy by an executor of a debt due from the bankrupt (one of the

residuary legatees) to the testator's estate is an abandonment as to the other legatees of the right of the executor to retain the amount of such debt out of the direct residuary share of the bankrupt or the amount coming to him as next of kin of other residuary legatees. Stammers v. Elliott, L. R. 3 Ch. 195, 37 L. J. Ch. N. S. 353, 18 L. T. N. S. 1, 16 Week. Rep. 489, Reversing on this point, L. R. 4 Eq. 675, 15 Week. Rep. 618.

But *Ex parte* Man, 1 Mont. & M. 210, as digested in 2 Mews' Digest, col. 867, holds that where one proves a debt against the bankrupt's estate, and dies before the bankrupt obtains his discharge, leaving him a legacy of an amount less than the debt, the legacy will be deducted from the debt proved. The court, however, refused to follow this case in Cherry v. Boultbee, 3 Jur. 1116, 4 Myl. & C. 442, 9 L. J. Ch. N. S. 118, *supra*, II. c, 2.

The right to enforce a set-off against a bankrupt executing a composition agreement is waived by accepting a dividend under such agreement with knowledge of all the facts, without applying for a set-off. Hunt v. Holmes, 16 Nat. Bankr. Reg. 101, Fed. Cas. No. 6,890.

And a debtor by bond to the separate estate of a deceased partner cannot set off in equity, in an action on the bond, acceptances on which he had become liable to the partnership and which he had proved under a joint commission of bankruptcy, the assignees in bankruptcy having already filed a bill against the executors of the deceased partner for the balance due to creditors after exhausting the partnership estate and that of the surviving partner. Addis v. Knight, 2 Meriv. 117.

But Bradley v. Millar, 1 Rose, Bankr. 273, as digested in 2 Mews' Digest, col. 866, holds that where partners give a joint and several bond to one who subsequently becomes indebted to one of them, and the other partner afterwards becomes bankrupt, and the obligee proves his bond under the commission and then brings a joint action against both partners, to which the bankrupt pleads his certificate, the solvent partner may enjoin the obligee from proceeding with the joint action, as it precludes him from setting off his joint debt.

In assumpsit for a creditor's share proved under a commission in bankruptcy the assignees cannot set off a debt due from such creditor to the bankrupt; but as the commissioners have the power of setting off mutual debts the sum proved must be taken to be the balance due, and the only way of litigating the matter after the liquidation of the debt is by application to the great seal. Brown v. Bullen, 1 Dougl. 407.

In *Re* Kaufman, 8 Ben. 394, Fed. Cas. 7,626, one who had filed a proof of claim on a bill of exchange drawn by the bankrupt, and had received a dividend on the whole amount of the bill, was permitted to withdraw the proof after the trustees in bankruptcy had commenced a suit for a balance on account due to the bankrupt for an amount exceeding the bill of exchange, on the ground that he had mistakenly supposed that the amount of such balance had been deducted, and that he had never intended to claim any more than the difference, and he was permitted to file a new proof on the bill of exchange as a claim secured by the debt due the bankrupt, the question of the right to set off one debt against the other being left to future determination.

And in *Ex parte* Staddon, 3 Mont. D. & De G. 256, 12 L. J. Bankr. N. S. 39, 7 Jur. 358, *supra*, IV. d, a borrower from a bank which subsequently became bankrupt was permitted to withdraw a proof for his entire claim against the bank and set off a balance due him from the bank because of his ignorance of certain facts entitling him to set-off at the time he proved his claim.

Where a bankrupt has not obtained an order of discharge, a creditor who has proved in the bankruptcy, and who is being sued by the bankrupt or by his executor after his death for a debt due to the bankrupt on a contract entered into after the commencement of the bankruptcy, cannot, during the period of three years after the close of the bankruptcy, set off the unpaid balance of his proved debt against the amount sued for, under 32 & 33 Vict. chap. 71, § 54, which forbids any creditor obtaining any advantage over others during such period. *Re* Smith, L. R. 22 Ch. Div. 586, 52 L. J. Ch. N. S. 411, 48 L. T. N. S. 254, 31 Week. Rep. 413.

And where a testator who left a bequest for a bankrupt died within three years after the bankruptcy had been closed and the trustee released, but before the bankrupt's discharge, the testator not having received any dividend on a debt which he had proved against the bankrupt's estate, the executors cannot retain or set off the amount of the debt as against the legacy, as, under 32 & 33 Vict. chap. 71, § 54, debts proved against the estate cannot be enforced by action until the expiration of three years, and accordingly they cannot be relied on as a set-off. *Re* Rees, 60 L. T. N. S. 260.

An order of the register expunging from the list of debts a claim which has been proved against the bankrupt's estate from which no appeal is taken does not prevent the claimant from relying on such claim as a set-off when sued by the assignee in bankruptcy, although it would prevent him from maintaining an independent suit thereon. Catlin v. Foster, 1 Sawy. 37, Fed. Cas. No. 2,519.

Analogous cases.

One is not barred from relying on a claim against an insolvent as a set-off in a suit by the assignee by the fact that he had unadvisedly proved his claim before the master, where he has not received any dividend thereon, and has tried to withdraw the claim, which the master has refused to allow. Bemis v. Smith, 10 Met. 194.

But in Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084, Reversing in banc 56 Pac. 1110, the court held that a creditor of an insolvent by proving the whole of his claim before the assignee in insolvency and receiving a dividend thereon was prevented from setting off the debt due him when sued by the assignee in insolvency for a smaller debt due from him to the insolvent under the California insolvent act, § 45, providing that no creditor proving his claim shall be allowed to maintain any suit at law or in equity against the debtor therefor, but shall be deemed to have waived all right of action and suit.

VIII. *Extent of set-off.*

In *Re* Orpen, L. R. 16 Ch. Div. 202, 50 L. J. Ch. N. S. 25, 43 L. T. N. S. 728, 29 Week. Rep. 467, the court held that where a composition was accepted and the bankruptcy annulled without the father of the bankrupt proving a debt due him or being paid the composition, and the father subsequently died leaving a share of the estate to such bankrupt, the executors were not to be entitled to the right of set-off or retainer against the bequest for the whole debt, but only for the composition on the debt and interest.

Where a bankrupt had given a creditor his accommodation notes to an amount larger than the claims of such creditor, which were discounted and afterwards proved against the bankrupt's estate by the holders, the assignees

in bankruptcy, or, in case of composition, the bankrupt himself, may, under U. S. Rev. Stat. § 5073, set off the dividend paid on such notes against the dividend due to such creditor, instead of setting off the dividend on the notes against the entire claim of the creditor. *Re* Purcell, 18 Nat. Bankr. Reg. 447, Fed. Cas. No. 11,470.

And where bankers had been accustomed to exchange notes of one who became bankrupt received by them for their own notes received by the bankrupt, and just before the commission in bankruptcy issued the clerk of the bankrupt absconded with the banker's notes which the bankrupt then had and other property, and the assignees in bankruptcy compromised with such clerk, the bankers were allowed to set off notes of the bankrupt held by them against the amount received on the compromise with the clerk in the proportion that their notes taken by him bore to the entire property taken. *Ex parte* Huckey, 1 Madd. 577.

Where the maker of a note to a savings fund society agreed that the note should be payable in greenbacks, he is entitled, on the society becoming bankrupt, to set off against the note depreciated certificates of the indebtedness of the society held by him at their market value at the maturity of the note before the bankruptcy, and is not required to set off simply the amount of the dividend allowed on the certificates; but he will not be allowed to set such certificates off at their full face value. Harmanson v. Bain, 1 Hughes, 391, Fed. Cas. No. 6,073.

Where assignees in bankruptcy bring suit against an agent of the bankrupt for money of the bankrupt in his hands at the time of the bankruptcy, the defendant may set off the full amount of bills drawn upon him by the bankrupt and accepted by him and paid out by the bankrupt, although the holders of such bills, in order to relieve him from his responsibility to them, have taken from him a composition upon the acceptances and delivered them to him, as it is a gift to him by the holders if the composition was fair, and he is still liable for the balance if it was not fair. Stonehouse v. Read, 3 Barn. & C. 669, 5 Dowl. & R. 603.

IX. *Conclusion.*

In all the bankruptcy statutes, both in this country and in England, since the beginning of the eighteenth century there has been a provision for set-off in case of mutual debts or mutual credits. The earliest statutory provision on the subject was that contained in 4 & 5 Anne, chap. 17, § 11, but even before that time in the reign of Chas. II. decisions had been rendered permitting a set-off in case of mutual debts. Under the provision for set-off in case of "mutual credits" much greater freedom has been allowed in permitting set-offs than under the ordinary statutes of set-off. The reason for this seems to be that it revolted against the sense of natural justice that one of two mutual debtors should be compelled to pay his debt in full and then receive a dividend only on the debt due to him.

Another provision in the present bankruptcy act which was also in the previous act of 1867 is that the claim sought to be set off must be one that is provable against the bankrupt estate. According to the weight of authority it would seem that it does not require that the debt should necessarily be one that could be proved against the bankrupt's estate under every circumstance, but it would be available as a set-off if it was provable in its nature at the commencement of the suit, as where one secondarily liable on a debt on which the bankrupt is primarily liable pays the same after the bankruptcy, although the decisions directly on this point are very few.

That the damages are unliquidated at the time of the bankruptcy does not prevent their availability as a set-off provided they have been liquidated at the time of the action, and in some cases the liquidation has been permitted in the action itself.

A claim for damages for breach of contract is now generally allowed to be set off except in cases where there has been an agreement to pay cash for goods purchased of the bankrupt for which suit is brought or to apply a fund on a particular debt, in which case the right of set-off is usually disallowed.

If the claim is wholly uncertain or contingent at the time of the bankruptcy a set-off is not usually permitted, although it has been allowed in some cases where the contingency has occurred and payment has been made before the suit is brought, as where an accommodation indorser or acceptor or a surety for the bankrupt has, since the bankruptcy, paid the debt.

Where security is given for a particular debt a set-off of the surplus arising from the sale of such security is not generally allowed,— especially if the sale is not made until after the bankruptcy occurs, unless an irrevocable power to sell and apply the proceeds of the debt secured had been given before the bankruptcy, and such debt had not been paid at the time of the sale.

The weight of authority seems to be to the effect that a set-off of a joint or partnership debt due from the bankrupt will not ordinarily be permitted to be made against a debt due to them individually, and *vice versa*, although the cases are conflicting on this point.

The right of set-off exists in case of a loss of insured property, whether the loss occurs before or after the bankruptcy, and the same is generally held to be true, even though the claim for such loss was acquired from a third person with notice of the company's insolvency, where the bankruptcy statutes contain no provision that notice of insolvency will prevent a set-off. The present bankruptcy statute, however, expressly provides that such notice shall prevent a set-off of a claim obtained within four months of the filing of the petition. A set-off has been allowed also of the present value of an endowment policy not yet mature at the time of the bankruptcy. In suits by assignees in bankruptcy of underwriters against insurance brokers the latter have ordinarily been permitted to set off losses occurring and adjusted either before or after the bankruptcy if the policies were taken out in their own name for the parties insured, and they were acting for them under a *del credere* commission, or had some other special interest in the policy.

Where bankrupt legatees are indebted to the testator the executors have usually been permitted to set off the debt against the amount of the legacy if the testator died before the bankruptcy, even though the legatee was not, at that time, yet entitled to the enjoyment of the legacy; but where the testator dies after the bankruptcy the set-off is not permitted if it appears that the testator did not intend to claim the debt.

A stockholder in a bankrupt corporation is not permitted to set off a debt due from the corporation against his indebtedness to it for unpaid stock, although such set-off has been permitted in England in case the stockholder is himself a bankrupt.

A deposit in a bank will be set off against a debt due from the depositor on the bankruptcy of either the bank or the depositor, whether or not the debt due from the depositor is mature

at the time of the bankruptcy. But where a trustee in bankruptcy makes a deposit in a bank which subsequently becomes bankrupt, the trustee in bankruptcy of the bank cannot prove for any part of a debt due the bank from such bankrupt until it has paid the amount of the deposit in full.

The right of set-off exists in case of bills and notes executed before the bankrupt's insolvency whether or not they are mature at the time of the bankruptcy, and the set-off will also be allowed although they were executed by the bankrupt after the insolvency but before the filing of the petition or the act of bankruptcy, if the one receiving them had no notice of the insolvency. Where an accommodation indorser or acceptor for the bankrupt is required to pay the bill or note after the bankruptcy, the amount paid is usually allowed as a set-off, but where an ordinary indorser takes up the bill or note after the bankruptcy the weight of authority seems to be against the right of set-off on the ground that there was no mutual credit at the time of the bankruptcy, as the debt was not at such time due to the indorser, but to the indorsee.

Where a cash payment is made by the bankrupt on a debt within four months before the filing of the petition in bankruptcy, the creditor cannot set off the debt in an action to recover the amount of such payment.

The immaturity of a debt or claim at the time of the bankruptcy has generally been held insufficient of itself to preclude a set-off provided the claim was of such a nature that it must terminate in a debt, or if the liability was absolute at the time of the bankruptcy, and according to § 63*a* of the present act a fixed liability as evidenced by a judgment or instrument in writing absolutely owing at the time of the filing of the petition, whether then payable or not, is provable against the bankrupt's estate, and therefore, of course, would be available as a set-off.

In case of claims against the bankrupt which have been purchased or transferred after the insolvency there is not entire uniformity among the decisions, and the provisions of the bankruptcy statutes on the subject have also been quite dissimilar. Under the act of 1867, § 20, no set-off was allowed on a claim purchased by or transferred to the one seeking to set it up after the filing of the petition, and according to the weight of authority notice of the bankrupt's insolvency at the time of the transfer did not, in such case, preclude its availability if the transfer took place before the petition was filed. The present act provides that no set-off or counterclaim shall be allowed which was purchased by or transferred to the one seeking to make use of it after the filing of the petition or within four months before such filing with a view to such use and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy, and, of course, under such provision notice of the insolvency would be fatal to the right of set-off.

Where the petition in bankruptcy is refused, or the adjudication is set aside with costs against the petitioning creditor, the latter cannot set off debts due from the alleged bankrupt against such costs.

A debt due from the bankrupt before his discharge cannot be set off against a claim in his favor arising after such discharge.

The bankruptcy of a third person or of some, but not all, the members of a partnership does not render applicable the provisions for set-off of mutual debts or mutual credits under the bankruptcy acts which always refer to such debts or credits between "the bankrupt" and another person.

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The right of action also depends, to some extent, on the form of action, the set-off being allowed in some cases where the contract of the bankrupt is affirmed by his assignees or trustees in bankruptcy and an action is brought for the purchase price of the goods sold by the bankrupt to the creditor, and disallowed where the contract is disaffirmed and an action of trover brought.

The right of set-off is lost by proving for the entire claim without any offer to deduct the amount of the debt due the bankrupt, although the creditor has been allowed in some cases to withdraw the proof and avail himself of the set-off on the ground that the proof was made under a mistake of facts.

For the right of a creditor receiving a preference within four months before the filing of the petition in bankruptcy to set off a new credit subsequently given to the bankrupt, see *note* to Peterson v. Nash Bros. (Minn.) 55 L. R. A. —.

For right to set off the obligation of insolvents generally upon a claim in the hands of the receiver or assignee or trustee for creditors, see *note* to Merrill v. Cape Ann Granite Co. (Mass.) 23 L. R. A. 313. J. H. H.

John J. CADIGAN
v.
Lotta M. CRABTREE.

(.....Mass.....)

1. **No compensation can be recovered by a broker** employed to procure offers for real estate upon which no price is fixed, in case all offers are rejected and his authority is revoked, although he has not been given a reasonable time in which to procure an acceptable offer.
2. **That work has been done by a real-estate broker** in reliance upon a promise to pay a commission in case a purchaser is found for certain property at a price stated will not prevent the revocation of his authority without liability for any compensation, at any time before a purchaser is found at the price named.
3. **A recovery of a commission for procuring a person willing to take a lease** of property on terms fixed by the owner cannot be had on proof of procuring an offer for a lease the terms of which were subsequently accepted and the contract executed through another broker.
4. **A commission is not earned by a real-estate broker** from the owner of property who leases it to one who has been approached by the broker to take the lease on the terms of a lease which has been prepared for another person, on substantially the terms of such lease, where, prior to the revocation of the broker's authority, the intending lessee has not agreed to take the lease on the terms proposed, although the broker has informed the owner that the customer "is ready to hire" on the terms proposed.

(September 5, 1901.)

NOTE.—As to when real-estate broker is considered as the procuring cause of a sale or exchange effected, see Hoadley v. Savings Bank (Conn.) 44 L. R. A. 321, and *note*.

As to performance by a real-estate broker of his contract to find a purchaser, or effect an exchange, of his principal's property, see Lunney v. Healey (Neb.) 44 L. R. A. 593, and *note*.

EXCEPTIONS by both plaintiff and defendant to rulings of the Superior Court for Suffolk County in an action brought to recover commissions for selling and leasing certain property belonging to defendant; the plaintiff excepting to rulings which resulted in a verdict in defendant's favor on the claim for commissions for sale; and defendant excepting to rulings which resulted in a verdict in plaintiff's favor on the claim for effecting the lease. *Plaintiff's exceptions overruled. Defendant's exceptions sustained.*

The facts are stated in the opinion.

Messrs. **Whipple, Sears, & Ogden,** for plaintiff:

That a broker may have devoted his best energies for months to a large transaction, and yet be deprived of any compensation for his effort, and of the reward conditioned on achievement, by the employer coolly saying at the last moment, "I have changed my mind; I will make no sale or trade,"—is a proposition that certainly involves serious injustice to the broker.

Glover v. *Henderson,* 120 Mo. 367, 25 S. W. 175.

No one can doubt that damages could be recovered for the violation of an agreement whereby an owner placed his property in the hands of a broker for sale, giving the broker a limited time—say six months or a year—to effect the sale.

Blumenthal v. *Goodall,* 89 Cal. 251, 26 Pac. 906; *Harrell* v. *Zimpleman,* 66 Tex. 292, 17 S. W. 478; *Attix* v. *Pelan,* 5 Iowa, 336; *Glover* v. *Henderson,* 120 Mo. 367, 25 S. W. 175.

When, in a similar employment, no time is fixed, the law would allow the broker a reasonable time, having reference to the magnitude of the transaction and the other business conditions to be encountered in the community.

If a broker were employed to sell real estate, and a selling price fixed, the broker would be entitled to his commission if he produced a customer willing to take the property at that price, without regard to whether the owner carried out the trade or not.

Holden v. *Starks,* 159 Mass. 503, 34 N. E. 1069.

How, then, as to the case where the seller may foresee from the broker's negotiations that the price fixed is to be accepted? Can he then prevent the broker's earning a commission by stopping the negotiations?

Gleason v. *McKay,* 37 Ill. App. 464; *Heaton* v. *Edwards,* 90 Mich. 500, 51 N. W. 544; *Lane* v. *Albright,* 49 Ind. 279; *Knox* v. *Parker,* 2 Wash. 34, 25 Pac. 909.

Even though an employer may always revoke the authority of his servant or agent when it has not been acted upon by a third party, yet such revocation cannot affect the right of the servant or agent to his wages or compensation for service rendered.

Chapin v. *Bridges,* 116 Mass. 105.

Mr. **Frank Paul,** for defendant:

In order to recover a commission upon the lease given by the defendant to Gould & Pollo, it was incumbent upon the plaintiff to satisfy the jury that his services were the really effective means, the predominating efficient cause, of bringing about the making of that lease.

Plaintiff could not recover by showing merely that he interested Gould & Pollo in the property, and procured them to be ready and willing to take, and perhaps to make an offer for, a lease; he would have to go farther than that, and show that they were ready and willing to take a lease upon the defendant's terms.

Loud v. *Hall,* 106 Mass. 404; *Ward* v. *Fletcher,* 124 Mass. 224; *Gleason* v. *Nelson,* 162 Mass. 245, 38 N. E. 497; *Dowling* v. *Morrill,* 165 Mass. 491, 43 N. E. 295; *Hiltz* v. *Williams,* 167 Mass. 454, 45 N. E. 762; *Crowninshield* v. *Foster,* 169 Mass. 237, 47 N. E. 879; *Whitcomb* v. *Bacon,* 170 Mass. 479, 49 N. E. 742; 2 Am. & Eng. Enc. Law, pp. 582, 583.

If this court is of opinion "that the offer which was accepted was substantially different from the offer procured by the plaintiff, and that the difference between them was not sufficiently pointed out to the jury, and that the offer so accepted could not properly be treated or considered as substantially the same as the previous offer, and that the jury may have been misled in their verdict by the manner in which this aspect of the case was submitted to them, then the defendant's exceptions must be sustained."

Crowninshield v. *Foster,* 169 Mass. 237, 47 N. E. 879.

There was not evidence sufficient to warrant the jury in finding that plaintiff was the predominating, efficient cause of the lease that was given to Gould & Pollo, within the meaning of the rules of law governing his right to a commission upon that lease.

Evidence which merely raises a suspicion, or a surmise, or a conjecture, is not enough to be entitled to be submitted to the jury.

Hillyer v. *Dickinson,* 154 Mass. 502, 28 N. E. 905; *Buswell* v. *Fuller,* 156 Mass. 309, 31 N. E. 294; *Sprow* v. *Boston & A. R. Co.* 163 Mass. 330, 39 N. E. 1024.

Loring, J., delivered the opinion of the court:

1. *The presiding judge was right in directing a verdict for the defendant on the fifth and sixth counts.* There was no evidence which would have warranted a verdict for the plaintiff. The most that could have been found in favor of the plaintiff was that the defendant employed him as a broker, in September, 1898, to find for her a purchaser for the Hotel Reynolds, and that it was then stated that he was the only broker in the matter. The plaintiff's employment in the matter was brought about by one Gilman, the agent in Boston of the defendant, who did not live in that city. The plaintiff testified that Gilman "said that he thought that Miss Crabtree, from his conversation with her, would sell the property for $800,000. Under a suggestion that I ask $815,000, I started out." The plaintiff got sev-

eral offers,—one for $750,000 in cash, and another for $750,000, part in cash and part in "other property in trade." These offers were reported to the defendant personally between November 7th and November 11th of the same year, and were refused. The defendant then fixed her price at $1,100,000, which the plaintiff testifies "practically stopped the negotiations." On February 25, 1899, the defendant notified the plaintiff that she was willing to take $850,000 for the property; but on March 1st following she revoked the plaintiff's authority to sell the estate at all, and notified him that she had put the property in the hands of another broker for sale, to the exclusion of the plaintiff and everyone else. No sale of the property has been made. It appears that the defendant has paid the plaintiff the amount he was out of pocket in the matter. The plaintiff's contention is that he is entitled to recover damages from the defendant for preventing him from earning a commission by finding a person who would buy the estate, and on the ground that he was entitled to a reasonable time in which to find a customer, and his authority to do so was revoked before that time had passed.

Until February 25th, when the defendant put a price upon the property, it is plain that the defendant could revoke the plaintiff's employment without coming under any liability to the plaintiff for so doing. We take February 25th as the date when a price was put upon the property, because the plaintiff's contention was that the price of $1,100,000 put upon the property in the early part of November could not seriously be regarded as a price that could be obtained for the property. Where the owner of property employs a broker to bring him an offer for the purchase of it, without naming a price at which he is willing to sell,—that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him,—there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer. In such a case the owner has a right to reject every offer brought to him, as was held in *Walker* v. *Tirrell*, 101 Mass. 257, 3 Am. Rep. 352; and it is plain that under those circumstances he could decide not to accept any offer, and to dismiss the broker altogether. But the right of an owner to put an end to the broker's employment is based on a consideration which goes deeper than that, and includes the case where a price is named by the owner at which he is willing to sell his property. That consideration is the nature of a brokerage commission. The very essence of a brokerage commission is that it is dependent upon success, and that it is in no way dependent upon, or affected by, the amount of work done by the broker. A brokerage commission is earned if the broker, without devoting much or any time to hunting up a customer, succeeds in procuring one; and it is equally true, on the other hand, not only that no commission is earned if a broker is not successful, but a broker is not entitled to any compensation, no matter how much time he has devoted to finding a customer, provided a customer is not found. See, in this connection, *Sibbald* v. *Bethlehem Iron Co.* 83 N. Y. 378, 383, 38 Am. Rep. 441. The promise to pay a brokerage commission if a customer is found to purchase at a stated price is not the ordinary employment of labor, but is more in the nature of an offer, namely, an offer to pay a commission if a person is produced who buys at the price named; and, like any other offer, it can be withdrawn at any time, without regard to the fact that work has been done by a person in reliance on it, provided the work done has not brought the person within the terms of the offer. A broker who has not been successful in procuring a customer for his principal is never entitled to recover on a *quantum meruit* for work done. Where a broker has done work, but another broker has closed the trade, it was held that, under the peculiar circumstances of *Dowling* v. *Morrill*, 165 Mass. 491, 43 N. E. 295, not that he could recover on a *quantum meruit* for work done, but that a commission was earned if his work was in fact the efficient and predominating cause of the sale; and so, where a customer is found to purchase property, but the trade is not made or is not carried through because the broker's principal is not able, or does not choose, to convey the property for which he employed the broker to find a purchaser, it is now settled that the broker's remedy is to sue his principal for a commission, and that in such an action he can recover his commission (see *Fitzpatrick* v. *Gilson*, 176 Mass. 477, 57 N. E. 1000, and cases there cited), although at one time countenance was given to the proposition that in such a case the remedy of the broker was on a *quantum meruit* for work done. See *Drury* v. *Newman*, 99 Mass. 256, 258; also *Walker* v. *Tirrell*, 101 Mass. 257, 258, 3 Am. Rep. 352, citing with approval *Prickett* v. *Badger*, 1 C. B. N. S. 296.

2. The defendant's exception to the refusal of the court to direct a verdict for the defendant upon the fourth count must be sustained. It appears that on or about November 2, 1898, the plaintiff was asked, as a broker, to find a tenant for the Hotel Reynolds, the property which he had been trying to sell for the defendant in the two previous months of September and October. The hotel was then under lease to one Reynolds, and that lease apparently ran out on January 1, 1899. In the latter part of November the plaintiff brought the matter to the attention of Gould & Pollo. Gould & Pollo then suggested that they might take a lease at $25,000 a year, the hotel being put in running order at the expense of the lessor. This was rejected by the defendant. Later the plaintiff secured a proposal from one Mann to take a lease of the hotel. This was accepted by the defendant, and a lease was drawn up. This lease, however, fell through on December 20, 1898, for some reason not disclosed. The terms of this lease were $25,000 for the first five years, and $30,000 for

the next five years, the lessor to lay out $35,000 in repairs and alterations, and to receive 6 per cent interest on that expenditure. On December 22d or 23d, a few days after the negotiations for the Mann lease had fallen through, the plaintiff again approached Gould & Pollo on the subject, and they came to his office and saw there some plans of the hotel sent to the plaintiff's office by Mr. Gilman, the defendant's agent, for that purpose. We understand that these plans were plans showing the alterations to be made in the hotel under the Mann lease. Gould & Pollo were then told by the plaintiff what the terms of the Mann lease were. On December 29th, acting under instructions from the defendant, the defendant's agent, Gilman, directed the plaintiff to take down his sign, which was then hanging in the window of the hotel, as she had decided to sell the property, "if it took a year or even more than a year to do it." On January 2, 1899, the plaintiff called on the defendant at a hotel in Boston where she was then stopping, but "she said she was going away, and would do nothing about letting the Reynolds until she got back." She then left Boston, and did not return until after the conclusion of the matters which gave rise to this litigation. On February 8th she wrote the plaintiff that the hotel was "for sale only," and there was evidence that this was in answer to an inquiry from the plaintiff about letting it. On March 3d the defendant notified the plaintiff in writing that she had decided not to sell the hotel, and had placed it in the hands of one Fitzpatrick to be let, and added that he was her "sole agent, and he only has authority to negotiate for me." On March 12th, Fitzpatrick took Gould to New York, and in an interview then had between Gould and the defendant a lease from the defendant to Gould & Pollo was agreed upon. This was a lease for ten years, the lessee paying $25,000 a year for the first five years, and $30,000 a year for the second five years; the lessor putting in the necessary plumbing and doing outside repairs. It appeared that the plumbing cost about $15,000, and that about $75,000 was voluntarily spent by Gould & Pollo, the lessees, in alterations and repairs.

The presiding justice instructed the jury that, in order to recover, the plaintiff must satisfy them that on January 2, 1899, when the defendant changed her mind, and decided not to lease the hotel, the plaintiff had gone so far in his negotiations with Gould & Pollo that they had agreed to take a lease of the hotel on the terms of the Mann lease, and that Miss Crabtree, on being told of that, had elected not to lease the hotel to them, and afterwards had made substantially the same trade with them through another broker; but, on the other hand, if, on the 2d of January, when she notified him (the plaintiff) that she was not going any further with the thing, if at that time negotiations had not reached such a stage as to constitute an agreement on the part of Gould & Pollo to take that property on substantially the same terms on which it was afterwards leased by her through the agency of Mr. Fitzpatrick, then the plaintiff has not made out his case, and he was not entitled to recover. In addition to this, the jury were distinctly told that if the plaintiff failed to get Gould & Pollo to take a lease, and afterwards Fitzpatrick succeeded in procuring a lease from them, the plaintiff was not entitled to a commission.

We are of opinion that the Mann lease and the Gould & Pollo lease were not so far different, one from the other, as to prevent the plaintiff from recovering a commission if his services resulted in an offer from Gould & Pollo to take a lease on the terms of the Mann lease, and if the jury were satisfied that the plaintiff was the efficient cause of the lease to Gould & Pollo; that in that case the jury were justified in finding that the plaintiff's services brought the mind of the lessees to accept the terms finally agreed upon. Had there been any evidence to go to the jury that Gould & Pollo had agreed to take a lease of the hotel on the terms of the Mann lease prior to January 2d, there would have been no error in these instructions; but we are of opinion that there was no evidence on which the jury were warranted in finding that the negotiations between the plaintiff and Gould & Pollo had gone so far as to result in an agreement on the part of Gould & Pollo to take the hotel on the terms of the Mann lease before January 2d.

Before disposing of this matter, we will deal with the rulings set forth in the twelfth and thirteenth requests made by the defendant. In these requests the defendant asked the court to rule, in substance, that to recover on the third count the plaintiff had to prove that he procured an offer from Gould & Pollo in January to lease the hotel on terms fixed by the defendant, but that the defendant did not avail herself of that offer. This ruling the court refused to give, and instructed the jury that if the plaintiff procured an offer from Gould & Pollo to lease the hotel in January, and the defendant subsequently leased the hotel to them through another broker in March, on substantially the same terms, they might find that the plaintiff was the efficient cause of the lease which was made, and if they so found they might render a verdict for the plaintiff on the third count. This was wrong. The case stated in the third count is a different case from that stated in the fourth count. The difference between the two cases is that in the first case the plaintiff was entitled to his commission on submitting the offer in January; in the second case, he was not entitled to a commission until the lease was made in March. The ground of recovery in the first case is that the broker procured a customer on the terms fixed by the defendant. In such a case, he earns a commission, even though the defendant neglects to avail herself of the bargain which has been secured by the broker. *Fitzpatrick* v. *Gilson*, 176 Mass. 477, 57 N. E. 1009. The ground of recovery in the second case is that the offer procured in January

did not, of itself, entitle the plaintiff to a commission because the defendant had not then fixed the terms on which she would lease the hotel, and the commission was not earned until the defendant availed herself of the plaintiff's services by closing a trade through another broker in March, on substantially the terms of the January offer. The issues in the two cases are quite different. The presiding justice ruled that the plaintiff was not entitled to recover on either count unless he proved that he was the efficient cause of the lease which was made in March. This was, in effect, a ruling that the plaintiff had not made out the case set forth in his third count.

We are of opinion that, under the defendant's general request that there was no evidence to go to the jury on the fourth count, it is open to her to contend that, even if it was not necessary for him, in order to maintain the action set forth in that count, to prove that Gould & Pollo made an offer to take the hotel on the terms of the Mann lease (upon which we express no opinion), yet, inasmuch as the presiding justice ruled that unless they proved that such an offer had been made they had not made out their case, if there was no evidence that such an offer had been made, they are entitled to have their general exception sustained. We are of opinion, on a fair construction of the testimony set forth in the bill of exceptions, that the jury were not warranted in finding that such an offer had been made. On the direct examination, the plaintiff testified that "Mr. Gould was very anxious at the time to hire the hotel." When asked by his own attorney as to what was said at that time, he testified: "They were ready to talk and do business; they came down and looked the plans over." The defendant's attorney at that point interrupted the plaintiff's examination with the question, "What did they say?" and the plaintiff answered: "They were ready to take the hotel, from what they talked with me. I told Miss Crabtree that I had talked with them, and that they were anxious to get the hotel. She said she was tired out, and was going to New York, and would not do anything about it until she came back. That was about January 2, 1899." On cross-examination the plaintiff testified, in answer to the question, "Did you ever get any offer from Gould & Pollo for that property?" "No; because I gave them the terms at the time,—the same terms given to Mann,—and just at that time Miss Crabtree said she would not do anything about the property." He also testified, on cross-examination, that he never got from Gould & Pollo any offer, and never communicated to Miss Crabtree or to Mr. Gilman any offer from Gould & Pollo, and that "they always talked about hiring it on the same plan that Mann hired it on." This testimony falls short of proving an offer to take the hotel on the terms of the Mann lease, and there is nothing in the rest of the cross-examination, which need not be repeated here, which brings this testimony up to being evidence of that fact. On redirect examination the plaintiff testified: "I told her [Miss Crabtree] they were ready to hire on the same terms as the Mann lease." On a fair construction of this testimony as a whole, we are of opinion that the jury were not warranted in finding that Gould & Pollo offered to take the hotel before January 2d on the terms of the Mann lease. The jury were justified in finding that the plaintiff told the defendant that Gould & Pollo were ready to take the hotel on those terms; but taking into account the refusal of the plaintiff to testify that any such offer was made, when he was asked on direct examination what was said by Gould & Pollo to him, and taking into account the explicit statement, on cross-examination, that no direct proposition was ever made by Gould & Pollo, we think that all the jury would have been justified in finding was that Gould & Pollo were believed by him to be ready to take the hotel on the terms of the Mann lease, but that they never said so, and never made an offer to that effect.

Exceptions to the ruling on the fifth and sixth counts overruled. Exception to the ruling on the fourth count sustained.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Rector, etc., of CHURCH OF HOLY COMMUNION, *Plffs. in Err.*,

v.

PATERSON EXTENSION RAILROAD COMPANY *et al.*

(.....N. J.....)

1. A receipt given by a church to a railroad company which has laid its tracks in a cut alongside of the church property, causing the church walls to crack, after the railroad company has refused to pay a gross sum in satisfaction of past and future damages, and has agreed to pay for past damages and build a retaining wall, which reads: "Received . . . in full settlement and discharge of all damages done . . . against our church. Railroad company to pay for all work in process,"—will

NOTE.—For other cases in this series as to right to maintain successive suits for a continuing injury to real property, see Aldworth v. Lynn (Mass.) 10 L. R. A. 210; St. Louis, I. M. & S. R. Co. v. Riggs (Ark.) 6 L. R. A. 804; Lamm v. Chicago, St. P. M. & O. R. Co. (Minn.) 10 L. R. A. 269; Willitts v. Chicago, B. & K. C. R. Co. (Iowa) 21 L. R. A. 608; Watts v. Norfolk & W. R. Co. (W. Va.) 23 L. R. A. 674; and Ridley v. Seaboard & R. R. Co. (N. C.) 32 L. R. A. 708.

As to rule that limitation begins to run from the time the damage is suffered, and not from the time of the doing of the act from which the injury arises, see Fremont, E. & M. Valley R. Co. v. Harlin (Neb.) 36 L. R. A. 417, and Smith v. Sedalia (Mo.) 48 L. R. A. 711.

not include future injuries caused by the insufficiency of the retaining wall.

2. **The statute of limitations begins to run against an action for injuries** by the settling of church walls because of insufficiency of a retaining wall built by a railroad company when constructing its tracks in a cut alongside of the property, when the injury occurs, and not at the time of the completion of the wall.

(Van Syckel, Gummere, Fort, Garretson, and Hendrickson, JJ., dissent.)

(August 7, 1901.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Passaic County Circuit in favor of defendants in an action brought to recover damages for injury to plaintiffs' building, which resulted from an excavation made by defendants on adjoining property. *Reversed.*

The facts are stated in the opinion.

Mr. **Francis Scott,** for plaintiffs in error:

As to land in its natural condition, there is a right to support from the adjoining land; as to a building on or near the boundary line injured, there is no right of action in the absence of improper motives or carelessness in the execution of the work.

McGuire v. *Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Schultz* v. *Byers*, 53 N. J. L. 442, 13 L. R. A. 569, 22 Atl. 514.

Defendants agreed to support the church walls. Their duty to take care of the church property not only rests on the common law and their agreement, but is also imposed upon them by the statute. An independent contract for the work was not a defense, because defendant could not thus get rid of a statutory duty. The character of the work itself tended to injure plaintiffs' property, was a sort of nuisance, and defendants could not get rid of it by contract with a third party.

23 Am. & Eng. Enc. Law, p. 994; *Hilliard* v. *Richardson*, 3 Gray, 364, 63 Am. Dec. 743; *Bailey* v. *New York*, 3 Hill, 531, 38 Am. Dec. 669, 2 Denio, 433; *Conners* v. *Hennessey*, 112 Mass. 96; *State, Redstroke, Prosecutor,* v. *Swayze*, 52 N. J. L. 129, 18 Atl. 697.

The nature and character of the injury are such that it is continuous and the damages intermittent and periodic, for which successive suits may be brought.

Any release can only refer to damage done up to its date, unless the language of the release expressly covers the future, and the statute of limitations cannot bar damage done within six years before the beginning of the suit.

Brewster v. *Sussex R. Co.* 40 N. J. L. 57.

A suit for damages up to the commencement of the suit, and successive suits for future damage, can be brought.

Fowle v. *New Haven & N. Co.* 112 Mass. 334, 17 Am. Rep. 106; *Klein* v. *Jewett*, 26 N. J. Eq. 474.

A release must, in the case of a continuous injury, expressly cover future damage, or it cannot be so construed.

Brewster v. *Sussex R. Co.* 40 N. J. L. 57; *Mitchell* v. *Darley-Mains Colliery Co.* L. R. 14 Q. B. Div. 125.

Where an act not in itself wrongful is done, the consequence of which is that after an interval of time one is injured, the cause of action accrues at, and the statute of limitations runs from, the time when actual damage becomes manifest.

Backhouse v. *Bonomi*, 16 English Ruling Cases, p. 215; *New Salem* v. *Eagle Mill Co.* 138 Mass. 8; *Bank of Hartford County* v. *Waterman*, 26 Conn. 324; *McConnel* v. *Kibbe*, 29 Ill. 485; *Delaware & R. Canal Co.* v. *Wright*, 21 N. J. L. 469; *Delaware & R. Canal Co.* v. *Lee*, 22 N. J. L. 243.

Mr. **John W. Griggs** for defendants in error.

Depue, Ch. J., delivered the opinion of the court:

This was a suit brought by the plaintiffs in error against the two railroad companies named as defendants in error. The action is in tort. At the trial in the circuit the court directed a verdict for the defendants on the ground that the receipt of January 9, 1882, hereinafter referred to, was a conclusive acquittance of the damages sued for. The judgment entered upon that verdict was affirmed in the supreme court, from which judgment of affirmance the plaintiffs brought this writ of error. The construction of the railroad in question was contracted for by the Paterson Extension Railroad Company, which, pending the construction of the railroad, was consolidated, with other companies, into the New York, Susquehanna, & Western Railroad Company. In 1881 the road was located, not upon, but near, the line of the church property on which the church edifice was erected. The railroad was projected and constructed in the early part of 1881. In constructing it along the church property, the company made an excavation of from 16 to 19 feet below the level of the street on which the church fronted. In the process of excavation the earth on the south side of the church was almost entirely removed, and the foundation wall of the church for a considerable distance exposed, and the church on that side began to shows signs of deterioration and damage. In that situation negotiations were commenced. They were conducted between Mr. Wurts, representing the church, and Mr. Hobart, representing the railroad company. These negotiations began before the 5th of December, 1881. On that date a proposition was sent to Mr. Hobart by the officers of the church, containing an estimate of damages amounting to $3,500, and offering for that sum to release the railroad company "from all responsibility for present repairs and future damage by reason of constructing and operating said railway." That proposition the company declared could not be entertained. Mr. Wurts testified: "We finally agreed that the railroad company should put the outside of the building in repair, and the foundations and adjoining walls in repair, and make it safe, which they promised to do; and the church would, at the expense of

the railroad company, improve and refit the interior wall,—that is, the plaster, the windows, etc." The railroad company did all the work outside. The inside work was done by the church. It cost $1,000, and the bills were presented by the church to the railroad company, and the money paid. This agreement between the church and the railroad company, although in parol, was competent evidence. During the progress of the work of inside repairing, money was advanced by Mr. Hobart as a favor to the church, $500 of which was advanced by his check on the 29th of December, 1881. On the 9th of January, 1882, the church gave a receipt to Mr. Hobart in these words:

Jan. 9, 1882.

Received from G. A. Hobart, Pt. Pat. Extension, one thousand dollars, in full settlement and discharge of all damages done by Railroad Co. against our church. Railroad Co. to pay for all work in process.

$1,000.00. H. A. Collins, Treas.

This receipt was unquestionably a discharge of all damages sustained by the church up to its date. The cut in the vicinity of the church is 19 feet in depth, and the wall built by the railroad company is 19 feet high, and is tapering, being 8 feet wide at the bottom and 18 inches at the top. At the top of the wall the face is clear of the church property, but at the bottom it is 5 feet upon the church property, leaving the wall at the base 3 feet in width on the property of the railroad company. In the early part of 1886 further damage to the church building was sustained, which, as appears by the correspondence between Mr. Hobart and Mr. Wurts, ended in the payment by the company of $100. Mr. Hobart, in his letter of March 22, 1886, says that Mr. Potts, the president of the company, "would like to know in some definite shape that the payment which I proposed—$100—would be the end of their being called upon hereafter to pay for such repairs. I told him I would see you in reference to the matter again." A blank form of release was prepared by the railroad company, and sent to the church. The vestry, by resolution, declined to execute the release, and under date of April 21, 1886, Mr. Wurts wrote to Mr. Hobart, as follows: "I inclose you a copy of resolution of vestry. I do not find any signs of settlement or damages since the last repairs, for which we now seek reimbursement, were made several months ago; and I think we are safe. Except in the event of some formidable damages or collapse,—which we do not in the least anticipate,—we shall not trouble the company again." In 1887 the south wall of the church had settled about 8 inches, the floors had gone down, and the gables had cracked, so that there was a large opening in each gable, involving a considerable outlay for reparation. The testimony on the part of the plaintiffs showed that the damage sustained in 1887 was the outcome of defects in the wall erected by the company in 1881, arising from a failure to properly secure the foundation to sustain the vibration caused by the running of the company's trains. For the damage thus sustained in 1887 this suit was brought. The suit was commenced in 1891. In the supreme court the ruling at the circuit was sustained on the ground that the cause of action, if any, accrued as early as 1881, and was discharged by the receipt given to Mr. Hobart on the 9th of January, 1882; and that the plaintiffs' suit was also barred by the statute of limitations.

It will be observed that the proposition of the church authorities to the railroad company was for the settlement of all damages, present and prospective, for $3,500, and that proposition was declined by the company, and, instead of it, the agreement was for the doing by the railroad company of certain specified work; and that the receipt given to Mr. Hobart is expressly made to be in full settlement and discharge of all damages done by the railroad company. Interpreted by the language of the receipt itself, as well as in view of the negotiations that preceded the giving of it, the receipt will not bear the construction that it was intended to cover damages to be sustained thereafter. Such a construction could be made possible only by inserting words in the body of the receipt. Furthermore, the acts of the company in making payments for subsequent damages and the correspondence between Mr. Hobart and Mr. Wurts in April, 1886, are in conformity with the construction that the receipt of January 9, 1882, applied only to damages up to that time sustained.

Two questions were presented on the argument of this case and in the opinion of the supreme court: First, whether the damages sustained in 1887 were compensated for by the payment of 1882, as evidenced by the receipt to Mr. Hobart; and, secondly, the application of the statute of limitations to this cause of action. Both of these questions, though apparently distinct, rest upon the solution of the first proposition; for, if the injury sustained in 1887 was compensated for by the payment made in 1882, the application of the statute of limitations is immaterial; and, on the other hand, if the damages sustained in 1887 were not embraced in the settlement of 1882, then, the injury being a continuing injury, the statute of limitations would not begin to run until the damages were sustained. The only case cited to sustain the view of the supreme court that the injury sustained in 1887 was included in the payment made in 1882 was *Squires* v. *Amherst*, 145 Mass. 192, 13 N. E. 609. In that case the plaintiff's suit was for personal injuries, which he had sustained by reason of a defect in a highway. At the time the plaintiff was injured, he received, not only a personal injury, but sustained damages to his horse, wagon, and harness by the horse and wagon going off the end of a culvert on the highway. Prior to bringing the suit, the plaintiff, for the consideration of $50, had given a receipt to the town "in full for all demands for damages sustained on the highway." The court held

that oral evidence was inadmissible to show that the plaintiff understood the sum paid as intended in settlement of the damage to his property only, and that it was agreed between him and the selectmen that, if it appeared that he had been injured in his person, he should be paid something more. In that case the personal injuries sued for were sustained before the receipt was given, and oral evidence was properly excluded tending to show that he understood that the sum paid was intended as a settlement of the damage to his property only, and that it was agreed that, if it appeared that he had been injured in his person, he should be paid something more. In *McGuire* v. *Grant*, 25 N. J. L. 356, 67 Am. Dec. 49, the action was brought by the plaintiff to recover damages to his lot arising from an excavation by the defendant on his own premises, which caused the falling in of a part of the plaintiff's lot. The entire damage had been sustained upon the removal of the soil by the defendant from the adjoining property, and the cause of action was then complete. It was held by the supreme court that the measure of damages recoverable was the diminution in value of the plaintiff's lot by reason of the excavation. No new or independent cause of action had intervened to occasion further injury. The only allusion to the subject of damages is found on page 368, 25 N. J. L. and page 56, 67 Am. Dec., in which Chief Justice Green says: "The measure of damages in such case is not what it would cost to restore the lot to its former situation, or to build a wall to support it, but what is the lot diminished in value by reason of the acts of the defendant?" Neither of these cases has any relevancy to the case now before the court. The damage sued for in this case did not result from an unlawful act of the defendants in making the excavation in 1881. The digging out of the cut was the occasion for requiring the erection of a wall for the protection of the church property, but was not the cause of the injury which was subsequently sustained. Nor did the damages result from the building of the wall, which was done by agreement between the parties. The agreement was that the company was to build the wall at its own expense, and make it safe. The wall contracted for was for the protection of the church property in the future, and not a mere temporary expedient. The location, dimensions, and construction of the wall, and the character of its foundation, were committed to the exclusive control of the railroad company. The church officers did not in any way participate in or supervise the work of construction. It is manifest that the company assumed responsibility for the protection of the church edifice from injury which might follow from the running of its trains. The first proposition in the course of negotiations was made by the officers of the church offering, for the sum of $3,500, to release the railroad company from all responsibility for present repairs and future damages by reason of constructing and operating the railroad. The company declined that proposition, and instead chose to resort to the erection of a wall of the dimensions and construction that in the judgment of its officials would be sufficient to accomplish the purpose, paying the church for past injury to its property not a penny beyond the amount expended for reparation. The wall was located by the company within 4½ feet of the track on which the company was to run its trains. The projection of the ties brought the force of the vibrations caused by the running of trains nearer to the wall. The evidence at the trial was that the wall was not properly underpinned, and the jarring of the trains passing kept jarring and settling it all the time. Thereafter, from time to time, injury was done to the church property. The injury and the cause of it continued until 1887, when the damages sued for in this case were sustained. The injury for which this suit was brought is entirely distinct from the injury arising from the first excavation, which was settled by the receipt of 1882. The injury which was embraced in that settlement was caused by the original excavation. The injury now sued for resulted from the defects in the wall as constructed in 1882. The wall did not become the property of the plaintiffs. It was a retaining wall, extending beyond the church property a considerable distance in both directions. No action could have been maintained by the plaintiffs to recover damages by reason of its defective construction until damage actually occurred; for neither negligence, nor fraud, nor other wrong, nor immoral conduct or intent, will give rise to a cause of action, unless it has resulted in legal damage. 1 Cyc. Law & Proc. p. 667. It is a fundamental principle of law, applicable alike to breaches of contract and to torts, that, in order to found a right of action, there must be a wrongful act done, and a loss resulting from that wrongful act. *Warwick* v. *Hutchinson*, 45 N. J. L. 61. The injury sustained by reason of the defective construction of the wall as it was located was a continuing injury. It is quite clear that, if a suit had been brought in 1882, the plaintiffs could not have recovered in such a suit for the damages which would be sustained in 1887. It would have been impossible at that time to have anticipated the future deterioration in the wall, and the damages arising therefrom, and to have made an estimate of the amount thereof as the basis of computation. Compensation in such a suit must be sought after the damages are sustained. *Brewster* v. *Sussex R. Co.* 40 N. J. L. 57. In such cases the cause of action depends upon the actual damage, and the statute of limitations begins to run from the time when such damage is sustained. In 1886 an injury did occur which might have been made the basis of a suit at law. It was compensated for by the payment of $100. In a suit brought at that time the plaintiffs could not have recovered damages for the injury which would be sustained in 1887. The injury for which this suit was brought was a new cause of action, which

arose in 1887. The statute of limitations, therefore, began to run from that date, and this suit was brought within six years from the time these damages were sustained.

In the leading case of *Backhouse* v. *Bonomi*, reported in the exchequer chamber in El., Bl. & El. 622, and in the House of Lords in 9 H. L. Cas. 503, and also in 16 Eng. Ruling Cas. 216, the plaintiff was the owner of certain houses standing on land which was surrounded by the lands of B, C, and D. E was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B, C, and D sank in; and after more than six years' interval their sinking occasioned an injury to the houses of A. It was held that a right of action accrued to A when this injury actually occurred, and that his right was not barred by the statute of limitations. This case was decided in the House of Lords by the concurrence of every member of the court, upon the unanimous opinion of the judges who were in attendance, for the reasons that were given in the judgment of the court of exchequer chamber. The grounds of decision were stated by the Lord Chancellor in these words: "I think it is abundantly clear, both upon principle and authority, that, when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and that the action may then be maintained." Lord Cranworth said: The right of the plaintiff "is a right to the ordinary enjoyment of his land, and, till that ordinary enjoyment is interfered with, he has nothing of which to complain. That seems to be the principle on which this case ought to be disposed of." In the exchequer chamber (El., Bl. & El. 655), Willes, J., delivering the opinion of the court, used this language: "The contention on the part of the . . . defendant is that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would have, therefore, to decide upon the speculative question whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage, which in point of fact never might arise. This is certainly not a state of law to be desired." El., Bl. & El. 657. In *Darley Main Colliery Co.* v. *Mitchell*, L. R. 11 App. Cas. 127, the defendants had, by mining, taken away the substratum supporting the plaintiff's land with some cottages on it. A subsidence having taken place, the defendants, by agreement, repaired the damage. This was in or about 1871. No further working was done, but in 1882 a further subsidence took place, causing further injury. In an action brought for the damage in 1882 the defendants pleaded the statute of limitations. It was held in the House of Lords, by Lord Halsbury, Lord Bramwell, and Lord Fitz Gerald, *dissentiente* Lord Blackburn, affirming the judgment of the court of appeal, that a fresh cause of action arose when the further damage occurred in 1882, and that the action for this was not barred, although more than six years had elapsed since the damage first caused by the defendant's workings, and although more than six years had elapsed since the last workings by the defendant. The decision of the court was based upon the principle that every new subsidence, although proceeding from the same original act or omission of the defendant, was a new cause of action, for which damages may be recovered. In the course of his opinion, Lord Fitz Gerald used this language, which is specially appropriate to this case: "There was a complete cause of action in 1868 [when the first subsidence took place], in respect of which compensation was given; but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action." Page 151. Similar remarks were made by Lord Halsbury and Lord Bramwell. Pages 133, 146. In *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389, the court of Queen's Bench, by a majority (Mellor and Manisty), decided that where the foundations of the plaintiff's land and buildings had been undermined by the removal of lateral support through mining operations carried on by the defendant on his own land adjoining, and damage had manifested itself, a cause of action had completely arisen, both for apparent damage and for all future damage that might ensue from the original act. This decision was based upon the assumption that no fresh cause of action would arise when fresh damages might arise. This judgment was dissented from by Cockburn, Ch. J., who contended that the decision in *Backhouse* v. *Bonomi*, in the exchequer chamber and the House of Lords, established conclusively that it is not the withdrawal of the support previously afforded by the adjacent strata, but the actual disturbance of the plaintiff's enjoyment of his property, which constitutes a wrong and gives a legal ground of complaint; and, the damage being the gist of the action, only the damage actually accrued could be recovered in the action, and any further damage must be recovered when it actually accrued, in a subsequent action. The views of the lord chief justice were approved in *Darley Main Colliery Co.* v. *Mitchell*, and *Lamb* v. *Walker* was there expressly overruled. In *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389, Lord Chief Justice Cockburn says: "Of course, I do not lose sight of the rule that damages resulting from one and the same cause of action must be assessed and recovered once and for all. But the rule seems to me to have no application in the present case, it being,

in my view of the effect of *Backhouse* v. *Bonomi*, a mistake to say that the plaintiff had a right to the support of the adjacent strata, and that the removal of these constituted a violation of this right, by reason of which, when damage supervened, a cause of action arose." Following the *Colliery Case*, in the subsequent case of *Crumbie* v. *Wallsend Local Board* [1891] 1 Q. B. 503, an excavation was made by the local authorities under a street for the purpose of laying a sewer. It was not properly filled in, and, in consequence, subsidence of the plaintiff's land, with injury to houses, took place thereon, which began at a period more than six months before (that being the period of limitation of such an action), and went on continuously to the commencement of an action by the plaintiff in respect of such subsidence. It was held that the further subsidence which took place within six months before action constituted a distinct cause of action, in respect of which the action was maintainable. Lord Esher, M. R., in delivering the opinion of the court, said: "There is no cause of action for any such damage to the plaintiff's property until it has occurred. When a certain amount of such damage has occurred, there is only a cause of action in respect of that amount. Afterwards other damage may occur; that is to say, more of such damage may occur. There is no cause of action in respect of such further damage until it has occurred." Numerous cases to the same effect as the cases above cited are cited in 16 English Ruling Cases, 215–250.

The cases in the courts of this state are in line with the decisions of the English courts on this subject. The leading case is *Delaware & R. Canal Co.* v. *Wright*, 21 N. J. L. 469, which is reproduced in *Delaware & R. Canal Co.* v. *Lee*, 22 N. J. L. 243. The facts in that litigation were these: Wright was the owner of a tract of land over which the canal company located and constructed its canal. For the land taken for that purpose Wright was paid, and by a deed conveyed the same to the canal company. Beyond the line of the tract so conveyed the company had constructed a culvert over Watson's creek. The culvert was insufficient to discharge the water which should arise from rains or freshets, but was sufficient to discharge the water from springs and all ordinary sources. By reason of a freshet, the land of Wright was overflowed, and suit was brought for damages. The culvert was constructed in 1833. The suit was commenced in 1845. The defendants pleaded, among other pleas, the statute of limitations. The judge at the trial charged the jury that the statute was no bar, and that the plaintiff was entitled to recover all damages proved to have been sustained by him at any time within six years next before the commencement of the suit. A verdict was found for the plaintiff, on which judgment was entered. The ruling of the trial judge was brought before the supreme court by a writ of error on exception taken. On error the judgment was affirmed on the ground that the damage was the cause of action, and that in such cases the statute begins to run from the time of the injury, and not from the doing of the act which occasioned the injury, which gave no cause of action until damage ensued. On the 1st of April, 1836, Wright conveyed the farm to Lee. There being a further overflow of the premises after that conveyance, Lee brought suit against the company for damages. His action was commenced in June, 1848. The statute of limitations was again pleaded and made a substantive defense at the trial. The trial court disregarded the statute of limitations, and instructed the jury that the plaintiff was entitled to recover all damages he had sustained within six years before the commencement of the suit. The plaintiff had a verdict, and the cause was brought to the supreme court on writ of error, and the instruction of the trial judge was held to be correct. The first of these cases is reported in 21 N. J. L. 469, and the other case in 22 N. J. L. 243. These cases were cited with approbation in *Brewster* v. *Sussex R. Co.* 40 N. J. L. 57. That suit was brought to recover damages for the destruction by the defendant of the plaintiff's right of way to a lot of land in which she had a life estate. At the trial the jury was instructed to assess damages just as much as they thought the life estate was lessened in value by reason of having the access to the land cut off. The supreme court held that this instruction was erroneous, and that damages could be recovered only up to the time of the commencement of the suit, on the principle that the injury was a continuous injury, and that compensation for subsequent loss must be sought in another suit after the damage was sustained.

The building of this retaining wall by the company was a lawful act. So far as the foundation rested upon the church property, it had the consent of the church. The duty of making it safe for the protection of the church, and also of reparation, devolved upon the company. The church had no power or duty in that respect; nor had it power to control the running of trains on the adjacent track. The wall gave evidence of deterioration shortly after it was built, and its incapacity to answer the purpose which it was designed to fulfil was demonstrated as early as 1886. Damage from time to time resulting to the church property from the condition of the wall, a new cause of action arose, which gave the plaintiffs the right to maintain an action and recover such damages as had arisen within six years. No steps were taken by the defendants to remedy the defects, or to strengthen the wall. Adopting and applying to this case the language of Lord Fitz Gerald, in *Darley Main Colliery Co.* v. *Mitchell*, 9 H. L. Cas. 503: "There was a complete cause of action . . . [when the first subsidence took place], in respect of which compensation was given; but there was a liability to further disturbance. The defendants permitted the state of things to continue, without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took

place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action." The direction of a verdict for the defendants was erroneous. The case made by the plaintiffs should have gone to the jury.

For this error *the judgment should be reversed.*

Van Syckel, Gummere, Fort, Garretson, and **Hendrickson,** JJ., dissent.

Frank L. JACKSON
v.
PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.

(.....N. J.....)

*An accord between the plaintiff and a third person as to the subject-matter of suit, and a satisfaction moving from such third person to the plaintiff, who accepts and retains it, are available in bar of the action if the defendant has either authorized or ratified the settlement.

(June 18, 1901.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **David F. Edwards** for plaintiff in error.

Mr. **James B. Vredenburgh** for defendant in error.

Adams, J., delivered the opinion of the court:

The plaintiff, a driver employed by the Adams Express Company, was injured on October 18, 1899, at the Pennsylvania Railroad depot in Jersey City, while transferring goods from his wagon to a freight car. He brought suit against the railroad company and recovered a verdict. Exceptions were taken to the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendant, and on these exceptions error has been assigned. The question of negligence is in the case, but need not be considered, as the defense of accord and satisfaction is decisive. This defense is presented by a special plea, which alleges that the said grievances, etc., if any such there were, were committed jointly by the defendant and by the Adams Express Company, and that the plaintiff, after the committing of the said alleged grievances, and before the commencement of the suit, did accept and receive from the said Adams Express Company the sum of $30 in full satisfaction and discharge of any and all claims accrued or to accrue in respect of all injury or injurious results, direct or indirect, arising or to arise by reason of the said grievances, and did, by his certain writing of release, acknowledge the receipt of the said $30 in full satisfaction of all such claims, and release unto the said Adams Express Company all claims and demands for damages occasioned by said supposed grievances. To this plea the plaintiff replied that the trespasses complained of were not committed jointly by the defendant and the Adams Express Company. In other words, the defendant by its special plea invoked the rule that the release of one of two joint trespassers discharges both, and the plaintiff, not denying the payment in satisfaction, and not denying the execution of the release in writing, took issue merely upon the allegation of a joint trespass. It is plain that there was no joint trespass, for the evidence shows that the Adams Express Company was at the depot by invitation, and not in its own wrong. The place where the accident occurred had been appointed and set apart by the railroad company for the use of the express company in delivering goods upon cars owned by or assigned to it. Thither its wagons went every day. The plaintiff was injured while at the accustomed place at the usual time. Consequently the legal rule invoked by the plea is not available to the defendant. If this court could not look beyond the pleadings, it would be necessary to dismiss the defense of accord and satisfaction with the remark that the proof does not support the plea. But our inquiry is not restricted to the narrow issue framed by the special plea and replication. The liberal policy declared by our practice act not merely empowers the court, but makes it its duty, to determine the real merits of the controversy. The payment and release are admitted, since they are not denied, and they are therefore in the case, for whatever, in any aspect of the proof, they may be worth.

The defendant, to support the plea of accord and satisfaction, proved the facts hereinafter stated. At the time of the accident there was in force a written agreement between the Pennsylvania Railroad Company and the Adams Express Company, providing that the express business transported on the trains of the railroad company should be done by the express company under the terms of said agreement. Among these terms are the following: That the express company should pay the railroad company for the transportation of its express business 48 per centum of the gross receipts therefrom, of which 8 per centum should be compensation to the railroad company for furnishing to the express company free transportation over all ferries and lighters, the necessary switching service for express cars on its tracks, the permitting of said cars to pass on foreign lines, and the use of telegraph and telephone lines controlled by the railroad company; also that under certain circumstances the express company

*Headnote by ADAMS, J.

NOTE.—For effect of payment of a debt by a volunteer or stranger to the original undertaking as an accord and satisfaction, see Crumlish v. Central Improv. Co. (W. Va.) 23 L. R. A. 120, and note.

would be permitted to occupy space free of charge in stations already constructed, as long as the same should not be needed for other railway purposes. The 10th paragraph of this agreement binds the express company "to assume all risk of loss or damage that may arise out of or result from its operations under this agreement, and to save and hold harmless the railroad company against the same, and especially to protect the railroad company against claims that may be made upon it for loss or damage either to the employees of the express company or the property in its charge, whether the same may occur through the gross negligence of the railroad company or its employees, or otherwise." This agreement, it will be perceived, made the express company primarily liable, as between it and the railroad company, for any damage for which the plaintiff might have a right of action against the railroad company, arising out of the accident before mentioned. The plaintiff testified that he had no knowledge of the existence of this agreement. The accident wholly incapacitated the plaintiff for about eight weeks. He then again went to work for the express company, but could do only light duty. In February, 1900, he quit service with the express company. His account of the matter is that he was discharged because he brought suit against the railroad company. The plaintiff's wages had been $60 per month before the accident, and these wages were continued to him to the end of his employment, and were regularly paid every two weeks. The accident, as above mentioned, took place on October 18, 1899. There was due to the plaintiff on the 1st day of November, 1899, at the rate of $60 per month, the sum of $25.16, calculated from the date of the accident. This amount was paid him, and he signed and delivered to the express company a document of which the following is a copy:

Received of Adams Express Company, this fourth day of November, 1899, the sum of twenty-five $\frac{16}{100}$ dollars, in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 18th day of October, 1899, while in the employment of the above.

$25.16.

On the 30th day of November another payment of $30, covering the latter half of that month, was made to the plaintiff, who thereupon signed and delivered to the express company another document of which the following is a copy (this is the "writing of release" on which the special plea is founded):

Received of Adams Express Company this thirtieth day of November, 1899, the sum of thirty 00-100 dollars in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 18th day of October, 1899, while in the employment of the above.

$30.00.

The case is free from any charge of fraud and from any suggestion that the plaintiff did not comprehend the documents that he signed. It is to be observed, also, that, inasmuch as the plaintiff had received no injury from the express company, it must be true that the "claims accrued or to accrue," referred to in these documents, mean claims that the plaintiff might assert against the Pennsylvania Railroad Company. Another preliminary question of importance is whether there was a new consideration to support the accord and satisfaction. If not, this defense fails. It is true that the plaintiff remained in the service and on the pay roll of the express company from the date of the accident until early in February, 1900, and that in the meantime he got nothing but his wages. On the other hand, he was totally disabled for about eight weeks, and never was able to do full work, notwithstanding which the express company continued to give him full pay. Fairly regarded, the arrangement evidently was that, at least until further notice, he should have full pay, without regard to his capacity to earn it. This formed a new and valid consideration sufficient to support an accord and satisfaction.

It remains to consider the real question in controversy, which is as to the effect of an accord and satisfaction entered into, not with the person against whom a claim is asserted, but with a third person. In this case the third person is a corporation, which, between itself and the person against whom the claim is asserted, has made itself primarily liable by an agreement undisclosed to the claimant. An early authority as to accord and satisfaction with a third person is *Grymes* v. *Blofield*, Cro. Eliz. pt. 2, p. 541, which reads as follows: "Debt upon an obligation of twenty pounds. The defendant pleads that F. S. surrendered a copyhold tenement to the use of the plaintiff in satisfaction of that twenty pounds, which the plaintiff accepted. It was thereupon demurred. Popham and Gawdy held it to be no plea; for F. S. is a mere stranger, and in no sort privy to the condition of the obligation, and, therefore satisfaction given by him is not good. *Vide* 36 Hen. VI. *Barr*, 166; 7 Hen. IV. pl. 31. Afterwards, in Easter term, 31 Eliz., by Popham and Clench, *ceteris justiciariis absentibus*, it was adjudged for the plaintiff." In *Edgcumbe* v. *Rod*, 1 Smith, 515, reported, also, in 5 East, 294, the case of *Grymes* v. *Blofield*, was discussed; Lawrence, J., remarking that it was quite unreasonable to doubt the authority of that case. In *Jones* v. *Broadhurst*, 9 C. B. 193, Mr. Justice Cresswell commented upon *Grymes* v. *Blofield*, and pointed out its inconsistency with an earlier case, which is thus stated in Fitzherbert's Abr. title *Barr*, pl. 166 (Hilary, 36 Hen. VI.): "If a stranger does trespass

to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*" A course of decision ensued, which Baron Parke summed up in *Simpson* v. *Eggington*, 10 Exch. 845, in the following words: "The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, has been fully considered in the cases of *Jones* v. *Broadhurst*, 9 C. B. 193, *Belshaw* v. *Bush*, 11 C. B. 191, and *James* v. *Isaacs*, 22 L. J. C. P. N. S. 73; and the result appears to be that it is not sufficient to discharge a debtor unless it is made by the third person as agent for and on account of the debtor, and with his prior authority or subsequent ratification. In the first of these cases, in an elaborate judgment delivered by Mr. Justice Cresswell, the old authorities are cited, and the question whether an unauthorized payment by and acceptance in satisfaction from a stranger is a good plea in bar is left undecided. It was not necessary for the decision of that case. In *Belshaw* v. *Bush* it was decided that a payment by a stranger, considered to be for the defendant and on his account, and subsequently ratified by him, is a good payment; and in the last case, of *James* v. *Isaacs*, a satisfaction from a stranger, without the authority, prior or subsequent, of the defendant, was held to be bad. We consider, therefore, the law as fully settled by these cases." The English cases justify the observation of Wales, J., in *Snyder* v. *Pharo*, 25 Fed. 398, at page 401, that none of the later decisions adhere with any strictness to the rule laid down in *Grymes* v. *Blofield*, and that it is evident from an examination of them that a plea of satisfaction by a stranger, when properly averred, would be held good. In the United States the case of *Grymes* v. *Blofield* has been to some extent followed, notably in the state of New York. The earliest case is *Clow* v. *Borst*, 6 Johns. 37, which, like *Grymes* v. *Blofield*, arose upon a point of pleading. It was there held, on demurrer, in an action of covenant, that a plea of the acceptance of a satisfaction by the plaintiff from a third person or stranger is not good. This case was followed in *Daniels* v. *Hallenbeck*, 19 Wend. 408; *Bleakley* v. *White*, 4 Paige, 654; *Atlantic Dock Co.* v. *Learitt*, 54 N. Y. 35; and *Muller* v. *Eno*, 14 N. Y. 597, 605. To the same effect is *Armstrong* v. *School Dist. No. 3*, 28 Mo. App. 169. These cases are not, on the whole, inconsistent with the idea that this defense may be made if it be properly pleaded. The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person, when such person either had authority to make it, or the act was followed by ratification, and the article received in satisfaction was retained. In *Learitt* v. *Morrow*, 6 Ohio St. 72, 67 Am. Dec. 334, the supreme court of Ohio (Bartley, Ch. J., reading the opinion) held, after a vigorous discussion of the doctrine, that an accord with and satisfaction coming from a stranger having no pecuniary interest in the subject-matter are, if accepted in discharge of the debt, a perfect defense to a subsequent action against the debtor. Another valuable case is *Snyder* v. *Pharo*, 25 Fed. 398, 401, where, in an opinion written by Wales, J., all the leading cases are cited. The headnote reads as follows: "Satisfaction of a debt by the hands of a stranger is good when made by the authority of, or subsequently ratified by, the defendant, and the fact of pleading it will be sufficient evidence of ratification." In Beach, Modern Law of Contracts, p. 542, it is said that an accord with and satisfaction moving from a stranger or person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitute a good defense to an action to enforce the liability against the debtor. In the note to *Cumber* v. *Wane*, 1 Smith, Lead. Cas. 9th ed. p. 624, the same conclusion is reached. The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it and his retention of it operate to extinguish his right. As was said in *Hawkshaw* v. *Rawlings*, 1 Strange, 23: "Although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is." In 2 Parsons, Contr. 8th ed. p. 688, the same rule is stated, with the remark that the defense is clearly available when the debtor and the stranger are principal and agent. In 2 Chitty, Contr. 11th ed. p. 1133, this is said to be correct doctrine. This is true because the nature of the relation of principal and agent is such that proof of its existence necessarily shows that the person against whom the claim is asserted has made the accord and satisfaction his own. In the case in hand the express company was not an agent of the railroad company. It was its indemnitor. This does not weaken the defense. The express company is bound by contract to answer for just such damages as these. As the plaintiff is no party to this contract, and so is not bound by it, the performance by the express company of its obligation goes in exoneration of the railroad company. To use the language of Baron Parke, its payment is "for the defendant and on its account," since the plaintiff's right of action against the railroad company is one of which nothing but his own consent can deprive him. Moreover, the plea recognizes and adopts the settlement. There are present here original authority, action beneficial to the defendant, founded on a new consideration, ratification, and retention by the plaintiff of the payment received in satisfaction. These are the elements that bring a case within the rule. It follows that the defense of accord and satisfaction was sustained by the proof, and that it was error to refuse to direct a verdict for the defendant.

The judgment is reversed.

NEW MEXICO SUPREME COURT.

TERRITORY of New Mexico
v.
Thomas KETCHUM, *Appt.*

(.....N. M.....)

***Section 1151 of the Compiled Laws of 1897, prescribing the death penalty for assault upon a train with intent to commit robbery or other felony, does not prescribe a cruel and unusual punishment, within the meaning of the 8th Amendment to the Constitution of the United States.**

(February 25, 1901.)

APPEAL by defendant from a judgment of the District Court for Union County sentencing him to death for train robbery. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William B. Bunker** and **John R. Guyer,** for appellant:

This act is repugnant to the spirit of the Constitution. It is repugnant to those principles which lie at the foundation of every free government. The same penalty is here inflicted upon all who commit the offense, whatever may be the extenuating circumstances, whatever may be the character of the individual committing it, whether he be a beardless youth who is misguided by the seductive dime novel, or the hardened criminal who has murder in his heart and upon his hands.

The death penalty, even against the gravest crimes, is deemed by many to be against the spirit of our institutions.

Can it be fairly said that death is a proportionate punishment to an intent to rob an express company?

It would seem to be a matter of great doubt, certainly on rational grounds, whether the legislature had the power to provide capital punishment for the commission of a crime which is only a *malum prohibitum*, an act which by the laws of nature is not a violation of human rights.

Tiedeman, Pol. Power, p. 20.

Mr. **Edward L. Bartlett,** for appellee:

The word "cruel" as used in the amendatory article of the Constitution was no doubt intended to prohibit a resort to the practices of torture resorted to so many centuries as a means of extracting confessions from suspected criminals under the sanction of the civil law. It was never designed to abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment and suppression of crime. However averse the court may be to this mode of punishment, it cannot authorize the court to disregard and annul the law providing for the punishment of this crime, and, until repealed, it is the duty of the court to enforce it.

Garcia v. *Territory*, 1 N. M. 418; *Foote* v. *State*, 59 Md. 267; *State* v. *Williams*, 77 Mo. 312; *James* v. *Com.* 12 Serg. & R. 220; *Wilkerson* v. *Utah*, 99 U. S. 130, 25 L. ed. 345; Cooley, Const. Law, 36; 2 Cooley's Story, Const. §§ 1903, 1904; Tiedeman, Pol. Power, pp. 23, 24, and note.

Under the United States Constitution the punishment must be both cruel and unusual, to be prohibited.

The question whether the punishment is too severe, and disproportionate to the offense, is for the legislature to determine.

Com. v. *Hitchings*, 5 Gray, 486; *State* v. *Williams*, 77 Mo. 312; *State* v. *Becker*, 3 S. D. 40, 51 N. W. 1018; *Garcia* v. *Territory*, 1 N. M. 418; *Luton* v. *Newaygo County Circuit Judge*, 69 Mich. 610, 37 N. W. 701; *People* v. *Morris*, 80 Mich. 634, 8 L. R. A. 685, 45 N. W. 591; *State* v. *Fackler*, 91 Wis. 418, 64 N. W. 1029; 1 Bishop, Crim. Law, §§ 933, 947; 4 Bl. Com. p. 237; *Re Kemmler*, 136 U. S. 446, 34 L. ed. 523, 10 Sup. Ct. Rep. 930.

Mr. **L. C. Fort** also for appellee.

Parker, J., delivered the opinion of the court:

The appellant was convicted in Union county, in the fourth judicial district, under § 1151 of the Compiled Laws of 1897, which is as follows: "If any person or persons shall wilfully and maliciously make any assault upon any railroad train, railroad cars, or railroad locomotive within this territory, for the purpose and with the intent to commit murder, robbery, or any other felony upon or against any passenger on said train or cars, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train, or cars, or upon or against any express messenger, or mail agent on said train, or in any of the cars thereof, on conviction thereof shall be deemed guilty of a felony, and shall suffer the punishment of death." Judgment was rendered upon the verdict, and the appellant sentenced to death by hanging, as provided by § 1067, Id. The case is here on appeal, and presents the single question whether the death penalty, as applied to this offense, is a cruel and unusual punishment, within the prohibition of the 8th Amendment to the Constitution of the United States. It may be assumed that the death penalty, in a proper case, is not cruel, within the prohibition of the Constitution. *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930. And it is a matter of common knowledge that it is not unusual; it being employed in nearly all the states, as well as by the United States, as a punishment for crime. But it is contended

*Headnote by PARKER, J.

NOTE.—For other cases in this series as to what is a cruel and unusual punishment, see State *ex rel.* Garvey v. Whitaker (La.) 35 L. R. A. 561, and *note;* Miller v. State (Ind.) 40 L. R. A. 109; State v. Foster (R. I.) 50 L. R. A. 339; and Stoutenburgh v. Frazier (D. C.) 48 L. R. A. 220.

by counsel for appellant that the death penalty is such an excessive punishment in degree for the offense of which the defendant stands convicted as to be within the prohibition of the Constitution. Much difficulty has been expressed by both courts and text writers in attempting to define the scope of this constitutional provision. Some courts have thought that it was never intended as a limitation upon legislative discretion in determining the severity of punishment to be inflicted, but, rather, refers to the mode of infliction. Thus, in *Aldridge* v. *Com.* 2 Va. Cas. 447, 449, it is said: "That provision was never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment." In *Com.* v. *Hitchings*, 5 Gray, 482, 486, it is said: "The question whether the punishment is too severe and disproportionate to the offense is for the legislature to determine." In *Sturtevant* v. *Com.* 158 Mass. 598, 33 N. E. 648, it is said: "This article is directed to courts, not to the legislature." It may be, however, that the decisions in Massachusetts are based upon the peculiar language of their Constitution, which is: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." In *State* v. *Williams*, 77 Mo. 310, 312, it is said: "The interdict of the Constitution against the infliction of cruel and unusual punishments would apply to such punishments as amount to torture, or such as would shock the mind of every man possessed of common feeling,—such, for instance, as drawing and quartering the culprit, burning him at the stake, cutting off his nose, ears, or limbs, starving him to death, or such as was inflicted by an act of Parliament as late as 22 Hen. VIII., authorizing one Rouse to be thrown into boiling water and boiled to death for the offense of poisoning the family of the bishop of Rochester. . . . If, under the statute in question [defining and providing punishment for the crime of obtaining money under false pretenses], a punishment by imprisonment for life of one who is convicted of the offense therein defined should be inflicted, it might well be said that such punishment would be excessive, or, rather, entirely disproportioned to the magnitude of the offense, yet, notwithstanding this, there is high authority for saying that 'the question whether the punishment is too severe and disproportionate to the offense is for the legislature to determine.'" In *People* v. *Morris*, 80 Mich. 634, 638, 8 L. R. A. 685, 686, 45 N. W. 591, 592, it is said: "The difficulty in determining what is meant by 'cruel and unusual punishments' as used in our Constitution, is apparent. Counsel for defendants claims that, as properly understood, it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. When, in England, concessions against cruel and unusual punishments were first wrested from the Crown, slight offenses were visited with the most extreme punishment and no protest was made against it." In *Garcia* v. *Territory*, 1 N. M. 415, 418, this court said: "The word 'cruel,' as used in the amendatory article of the Constitution, was, no doubt, intended to prohibit a resort to the process of torture, resorted to so many centuries as a means of extorting confessions from suspected criminals under the sanction of the civil law. It was never designed to abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment and suppression of crime." This provision of the Constitution was before the Supreme Court of the United States in *Wilkerson* v. *Utah*, 99 U. S. 130, 25 L. ed. 345. In that case the question was whether a judgment directing the infliction of the death penalty by shooting was cruel and unusual. The court said: Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to (4 Bl. Com. 377), where the prisoner was drawn or dragged to the place of execution, in treason; where he was emboweled alive, beheaded, and quartered, in high treason; cases of public dissection, in murder; and of burning alive, in treason committed by a female,—and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. In *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, the question was whether the method adopted by the New York statute of inflicting the death penalty, which was by electrocution, was cruel and unusual. The court said: "This declaration of rights [act of Parliament of 1688; 1 Wm. & Mary, chap. 2] had reference to the acts of the executive and judicial departments of the government of England; but the language in question, as used in the Constitution of the state of New York, was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the 8th Amendment, in its application to Congress. . . . Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." It is true that, in both of the cases quoted from, the Supreme Court had before them for consideration, not the question of the severity of a punish-

ment, but simply the question of the method of inflicting the death penalty; but in both those cases the court limits the meaning of the word "cruel," as used in the Constitution, to something which involves torture. If this be the test in all cases, then it must be clear that legislative discretion in determining the severity of punishment for crime is not to be interfered with by the courts, so long as all forms of torture are avoided. In 1 Bishop, Crim. Law, § 947, it is said: "Evidently, in reason, the punishments commonly inflicted at the time when the Constitution was adopted could not be deemed 'unusual,' and no punishment is 'cruel' simply because it is severe, or 'cruel and unusual' because it is disgraceful. But mere torture, however slight, would be within the prohibition." Mr. Tiedeman, in his work on Limitations of Police Power (p. 21), says: "But would the infliction of capital punishment for offenses not involving the violation of the right to life and personal security be such a 'cruel and unusual' punishment as that it would be held to be forbidden by this constitutional provision? It would seem to me that the imposition of the death penalty for the violation of the revenue laws, i. e., smuggling or the illicit manufacture of liquors, or even for larceny or embezzlement, would properly be considered as prohibited by this provision, as being 'cruel and unusual.' But, if such a construction prevailed, it would be difficult to determine the limitations to the legislative discretion." It would, indeed, seem to be a matter of great doubt, in view of the foregoing expressions of opinion on this subject, whether the courts, in any case, have the power to review legislative discretion in determining the severity of punishment for crime, so long as all forms of torture have been avoided. Judge Cooley, however, in his work on Constitutional Limitations, draws a distinction which seems not to have been usually recognized. He says: "It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments which in any state had become obsolete before its existing Constitution was adopted, we think, may well be held forbidden by it, as cruel and unusual." Cooley, Const. Lim. 3d ed. 329. If we understand the language of the learned author, a punishment provided by statute for an offense, of a kind as, for example, death by hanging, or imprisonment, is not prohibited by the constitutional provision, if at common law a like kind of punishment was authorized for offenses of a similar nature. If this be the test, then it is clear that the penalty prescribed in the case at bar is within the rule laid down; for assault with intent to rob was a felony at common law, or at least was made so by Stat. 7 Geo. II., chap. 21 (1 Jacob, Dict. title *Assault;* 1 Hawk. P. C. chap. 15, p. 113), and as such punishable with death, unless otherwise provided by statute (1 Jacob. Dict. title *Felony;* 1 Bishop, Crim. Law, § 935). It is thought however, by some of the courts, that the constitutional provision under consideration is broad enough to confer upon the court the power to review legislative discretion concerning the adequacy of punishment. Thus, in *State* v. *Becker*, 3 S. D. 29, 41, 51 N. W. 1018, 1022, it is said: "It is a very noticeable fact that this question has seldom been presented to the courts, and we take this fact to signify that it has been the common understanding of all that courts would not be justified in interfering with the discretion and judgment of the legislature, except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." This doctrine has been recognized in a number of cases, some of which we cite: *Re McDonald*, 4 Wyo. 150, 33 Pac. 18; *Re Bayard*, 63 How. Pr. 73, 76; *Thomas* v. *Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 18 S. W. 854. See also *State* v. *Driver*, 78 N. C. 423; also dissenting opinions of Justices Field, Harlan, and Brewer in *O'Neil* v. *Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

While we have arrived at a conclusion that the discretion of the legislature in determining the adequacy of the punishment for crime is almost, if not quite, unlimited, yet such a conclusion is entirely unnecessary to an affirmance of this judgment. Assuming, for the sake of argument, that the courts may, in extreme cases, review the discretion of the legislature in determining the severity of punishment, still we see no reason why this statute under consideration should be held to be unconstitutional by reason of its severity. The act under which the defendant was convicted was passed in 1887, and has been upon the statute books, unchallenged by the people of the territory, ever since that time. It has evidently met with the approval of the people, and has not been deemed by them cruel on account of its severity. It is hardly necessary to recall the incidents attending the ordinary train robbery, which are a matter of common history, to assure everyone that the punishment prescribed by this statute is a most salutary provision, and eminently suited to the offense which it is designed to meet. Trains are robbed by armed bands of desperate men, determined upon the accomplishment of their purpose; and nothing will prevent the consummation of their design,—not even the necessity to take human life. They commence their operations by overpowering the engineer and fireman. They run the train to some suitable locality. They prevent the interference of any person on the train by intimidation or by the use of deadly weapons, and go so far as to take human life in so preventing that in-

terference. They prevent any person from leaving the train for the purpose of placing danger signals upon the track to prevent collisions with other trains, thus wilfully and deliberately endangering the life of every passenger on board. If the express messenger or train crew resist their attack upon the cars, they promptly kill them. In this and many other ways they display their utter disregard of human life and property, and show that they are outlaws of the most desperate and dangerous character. In the case at bar, while the record of the testimony is not before us, it is a matter of current history that, while he was the lone robber, the defendant shot the mail clerk through the face, and the conductor through the arm, and only desisted from his attack upon the train when he was shot through the arm by the conductor. His manner of conducting this business of train robbery was but a sample of what is being done by those engaged in that business in all parts of the country, except that he undertook the business single-handed. It is true that this statute makes an attempt at train robbing the offense for which the death penalty is to be inflicted. It is also true that in this case the offense of the defendant was but an attempt, he having failed to accomplish his purpose. Ordinarily the death penalty for an attempt to commit an act would be a most severe punishment; but, taking into consideration all the circumstances usually attending a train robbery or an attempted train robbery, we cannot say that we deem the death penalty in any degree excessive, as compared with the gravity of the offense, if the death penalty is to be inflicted for any violation of the criminal laws.

We conclude, therefore, that the statute in question is not in violation of the 8th Amendment to the Constitution of the United States, and, there being no error in the record, *the judgment of the Lower Court will be affirmed*, and the judgment and sentence of the District Court shall be executed on Friday, March 22, A. D. 1901; and it is so ordered.

Crumpacker, McFie, and **McMillan,** JJ., concur. **Mills,** Ch. J., did not sit, he having tried the case below.

Robert APPLETON

v.

W. A. MAXWELL, *Appt.*

(.....N. M.....)

*Where money is loaned or advanced, with the understanding between the parties that it shall be used in gambling, or where the party advancing the money participates and shares in the gambling transaction thus promoted by his act, such party becomes *particeps criminis*, and cannot recover in a suit for the money loaned or advanced under such circumstances.

(February 26, 1901.)

APPEAL by defendant from a judgment of the District Court for Bernalillo County in favor of plaintiff in an action brought to recover money loaned. *Reversed.*

The facts are stated in the opinion.

Messrs. **Johnston & Finical,** for appellant:

Wagering contracts are void both at common law and by statute.

Irwin v. *Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Eldred* v. *Malloy*, 2 Colo. 321, 20 Am. Rep. 752; *Love* v. *Harvey*, 114 Mass. 82; *Bernard* v. *Taylor*, 23 Or. 416, 18 L. R. A. 859, 31 Pac. 968; *Hoit* v. *Hodge*, 6 N. H. 104, 25 Am. Dec. 451; *West* v. *Holmes*, 26 Vt. 530; *Gilmore* v. *Woolcock*, 69 Me. 118, 31 Am. Rep. 255; *Jeffrey* v. *Ficklin*, 3 Ark. 227; *Cleveland* v. *Wolff*, 7 Kan. 184; *Wilkinson* v. *Tousley*, 16 Minn. 299, Gil. 263, 10 Am. Rep. 139; *Shannon* v. *Baumer*, 10 Iowa, 210; *Deaver* v. *Bennett*, 29 Neb. 812, 46 N. W. 161; *Joseph* v. *Miller*, 1 N. M. 621.

This suit is an attempt to collect winnings at the card table.

Loans of this kind are but a thin and very common disguise to enable winners to recover. Courts easily see through such a veil.

14 Am. & Eng. Enc. Law, 2d ed. p. 642.

A loan made for gambling purposes cannot be recovered where the party making the loan was a participant in the gambling transaction.

Ibid.; *Waugh* v. *Beck*, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; *Morgan* v. *Groff*, 5 Denio, 364, 49 Am. Dec. 273; *Williamson* v. *Baley*, 78 Mo. 636; *Raymond* v. *Learitt*, 46 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; *Higgins* v. *McCrea*, 116 U. S. 671, 29 L. ed. 764, 6 Sup. Ct. Rep. 557; *Irwin* v. *Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Embrey* v. *Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; *Shaffner* v. *Pinckback*, 133 Ill. 410, 24 N. E. 867; *Tyler* v. *Carlisle*, 79 Me. 210, 9 Atl. 356; *White* v. *Wilson*, 100 Ky. 367, 37 L. R. A. 197, 38 S. W. 495; *Plank* v. *Jackson*, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1117.

Mr. **Horton Moore,** for appellee:

Money loaned to pay loss already incurred at gambling can be recovered by the lender in the absence of a special statute to the contrary.

14 Am. & Eng. Enc. Law, 2d ed. p. 642.

The mere knowledge of the lender that the money is to be used for gambling purposes

*Headnote by McFIE, J.

NOTE.—For other cases in this series as to right to recover on gambling contracts generally, see Sprague v. Warren (Neb.) 3 L. R. A. 679, and *note*; Harvey v. Merrill (Mass.) 5 L. R. A. 200; Sneddy v. American Nat. Bank (Tenn.) 7 L. R. A. 705; Jackson v. City Nat. Bank (Ind.) 9 L. R. A. 657; White v. Wilson (Ky.) 37 L. R. A. 197; and Olson v. Sawyer Goodman Co. (Wis.) 53 L. R. A. 648.

As to recovery for goods sold to aid gambling, see *note* to Graves v. Johnson (Mass.) 15 L. R. A. 836.

does not prevent his recovery, in the absence of a special statute.

14 Am. & Eng. Enc. Law, 2d ed. p. 640.

McFie, J., delivered the opinion of the court:

Appellee brought suit in the court below for the sum of $105, and interest at 6 per centum, alleged to be due thereon. Jury being waived, trial was had before the court May 25, 1900, and judgment was rendered for the plaintiff for the sum of $105 and costs. From this judgment an appeal was taken to this court by the defendant. The complaint is in the usual form, and alleges money loaned to the defendant, and the answer is general issue. The court below made no findings of fact, so far as the record discloses, but the judgment recites that the court found the issues for the plaintiff. The facts disclosed by the record wholly fail to sustain the judgment of the court below in this case. The plaintiff below, appellee in this case, seeks to recover from the defendant $105 and interest, upon the ground that he loaned the defendant that amount to pay an existing indebtedness to other parties, and while, upon direct examination, he testified to this effect, upon cross-examination he admits that this was the amount found due him upon a settlement at the close of a night's gambling at cards, in which plaintiff, defendant, and two others participated. He also admits that the money advanced by him was used in the game, thus destroying his claim that the money was used to pay a preexisting indebtedness to third parties. These are admissions against interest, which bind the appellee, so that his own testimony destroys his claim that the transaction was a loan, and sustains the defense that it was a gambling transaction, in violation of the statute, and for which there could be no recovery. There were only two additional witnesses who testified in the cause, both of which testified that the money was used in the game, and the money sued for was the amount found due on settlement, at the end of the game. The defendant denied that he borrowed the money, but admits that when he and the plaintiff settled at the end of the game the amount sued for was the balance due the plaintiff. Upon these facts, it is idle to call the transaction a loan, in a legal sense. It was nothing more nor less than a gambling transaction, in violation of the statute, and any implied contract or obligation to pay was not a legal obligation, enforceable in the courts of this territory. To call this matter a loan is clearly a device to avoid the provisions of the statute concerning gambling, and the law will not tolerate subterfuges for this purpose. As was said in 14 Am. & Eng. Enc. Law, 2d ed. p. 642: "This lending money must not be a device of one of the parties to the contract to enable the winner to sue the loser for his losses, for the law pierces disguises of this sort, and will not allow the winner to recover from the loser by subterfuge."

The first assignment of error is: "The court erred in holding that a gambling contract could be enforced at law." The second is: "The court erred in rendering judgment in favor of the plaintiff, Appleton, and against the defendant, Maxwell." As to the law of this case, there is little, if any, controversy between counsel for appellant and appellee. At common law certain wagering contracts were held valid, and the early English precedents sustained such contracts, with few exceptions. Some of the American courts followed the early English precedents, but, while these early English precedents were in many instances followed, regret was expressed on the part of some of the judges that they felt constrained, out of respect for precedent, to sustain such a doctrine. After the enactments of the statutes of Car. II. and 9 Anne, the doctrine announced by the English courts based upon these statutes was entirely different from that announced in the early cases, and gaming, gambling, and wagering contracts were held void by these courts. Owing to the regret expressed by different courts that they felt constrained to sustain the doctrine of the early English decisions in deference to precedent, many years ago, and prior to the enactment of statutes by the different states, the courts began to repudiate the doctrine of the common law as to gambling and wagering contracts; and upon examination it will be found that the New England states, Pennsylvania, South Carolina, Massachusetts, Vermont, Minnesota, and other states, repudiated the common-law doctrine. In the case of *Amory v. Gilman*, 2 Mass. 6, the court said: "It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two." A leading case, and one which gives the reason for the repudiation of the common-law rule more fully than the others, is the case of *Wilkinson v. Tousley*, 16 Minn. 299, Gil. 263, 10 Am. Rep. 139, in which case the authorities are collated and examined, which states the case as follows: "From the foregoing citations from the statutes which have of late years been enacted in England and in the various states of this country against bets and wagers, as well as from the common knowledge of the prevailing public sentiment on this subject, we think the remark found in [*Dalby v. India & L. Life Assur. Co.*] 2 Smith, Lead. Cas. 6th Am. ed. 343, *306, that 'the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interest of the community, and at variance with the laws of morality,' is abundantly justified. . . . In determining, then, what is the law upon this subject here, we are free to lay down such rules as are most in accordance with general principles, and with the best-considered and most wholesome views which have been expressed by other tribunals. . . . In announcing a rule where none has been before announced, the question is whether we shall blindly adopt a doctrine which is admitted to have been origin-

ally wrong, both in morals and in law, and from which the courts of England would gladly escape were they not hampered by precedents, or whether we shall give full scope to the broad principle that contracts contrary to good morals and sound public policy are invalid, and that, therefore, wagers as contracts of that character are not to be sustained. We have no hesitancy in adopting the latter course." Numerous other cases might be cited to the same effect, but it is not deemed advisable to multiply them here. In 1876 this court was called upon to consider this subject in the case of *Joseph* v. *Miller*, 1 N. M. 621. This was a suit to collect a note, the consideration of which was a bet upon a horse race. The court, in an elaborate opinion by Associate Justice Bristol, sustained the lower court in holding that the wager was not a valid consideration for a contract, and, referring to the case of *Wilkinson* v. *Tousley*, held that the collection of the note could not be enforced in the courts of this territory. "Being untrammeled by precedents, this being the first adjudication of the kind in this territory, we do not hesitate to lay down the same rule as to wagering contracts here. Not only do we hold that wagering contracts are void on sound principles of law, as being opposed to public policy and good morals, but we hold, also, that contracts of this kind are void under the statute. Section 4 of chapter 36 (p. 246) of the Compiled Laws of New Mexico provides that 'all judgments, securities, bonds, bills, notes, or conveyances, when the consideration is money or property won at gambling, or at any game or gambling device, shall be void,' etc. The word 'gambling' is a word of very general application, and is not restricted to wagering upon the result of any particular game or games of chance. In the adjudicated cases on this subject, we find that judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction, in general principles, between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet,—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case, it is gambling. This is the popular understanding of the term 'gambling device,' and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse race, when adopted for such a purpose, is a 'gambling device,' there can be no doubt."

It will thus be seen that this court, as early as 1876, announced the doctrine that contracts originating in gambling devices of all kinds were contrary to public policy, and would not be enforced by the courts. But the court in the same case also declares that the same are void under the statute of this territory which was in force at the time this decision was rendered. In addition to the provisions of the statute quoted by the court in the case of *Joseph* v. *Miller*, we find that numerous provisions have been added to the statute, all tending to destroy contracts or obligations tainted or in any way connected with gambling devices. Section 3199 provides that any person who shall lose money or property at any game at cards or any other gambling device may recover the same back by an action at law. Not only may the person himself recover money or property lost by him through gambling devices, but § 3201 provides that the wife, children, executors, administrators, and creditors of the person losing may also recover back money or property lost at gambling. Section 3203 provides that the assignment of any bond, bill, note, judgment, conveyance, or other security shall not affect the defense of the person executing the same. And there are numerous other provisions of the statutes of this territory which show conclusively that gambling devices are illegal, and that the courts will not aid the winner in the enforcement of contracts, or in the recovery of money or property won through gambling devices or wagers, in violation of the statute. The section of the statute construed by this court in the case of *Joseph* v. *Miller* was enacted in 1857, and, although the section does not specifically mention horse racing, the court held that money won in betting upon a horse race placed the transaction in the category of gambling. The case of *Joseph* v. *Miller* was not as strong as the case at bar, in this: that gambling, such as the evidence shows in this case, is expressly within the terms of the statute. The statute of this territory just referred to is almost identical with the statute of Missouri, which was construed by the supreme court of that state in the case of *Shropshire* v. *Glascock*, 4 Mo. 536, 31 Am. Dec. 189. About the only material difference between these statutes was the insertion of the word "gambling" in two places by our statute in the section, instead of one, as in the Missouri statute, so that the statute of this territory is more forcible in its terms than that of Missouri. Betting upon a horse race was not specifically mentioned in the Missouri statute, but the court held it to be equally prohibited with other forms of gambling, such as with cards, dice, etc., and that the term "other game or games" was sufficiently broad to include horse racing, and was intended to prohibit all kinds and modes of gaming.

Counsel for appellee did not seriously question the law as contended for by the counsel for appellant, but insisted upon two propositions, which, he contended, were supported by the facts: First, that money loaned to pay a loss already incurred at gambling can be recovered by the lender in the absence of a special statute to the contrary; and, second, that the mere knowledge of the lender that the money is to be used for gambling purposes does not prevent him from recovering, in the absence of a special statute; and counsel refers the court to 14 Am. & Eng. Enc. Law, 2d ed. pp. 640–642, and the cases there cited. The facts do not sustain the first proposition of

counsel for appellee, that this money was loaned to pay a loss already incurred. Therefore the first proposition of counsel is not in point. It is true, as stated in the second proposition, that the mere knowledge of the lender that the money is to be used for gambling purposes does not prevent a recovery, in the absence of special statute. This proposition is supported by very respectable authority, but it is not supported nor is it applicable to the facts in this case, as we have arrived at the conclusion that the money advanced to the appellant in this case was not a loan, nor was it so understood at the time. But where money is loaned or advanced with the understanding and agreement between the parties that it shall be used in gambling, or where the party advancing, or even loaning, the money participates and shares in the gambling transaction thus promoted by his act, he thereby becomes a *particeps criminis*, and cannot recover for money loaned or advanced under such circumstances. In the case of *Oliphant* v. *Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363, the court held that, while simple knowledge of what the borrower was going to do with the money would not defeat the lender's right to recover, he could not recover if he had taken any active part in the gambling contract, such as depositing the loan as margins, bringing the parties together, etc. In the case of *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432, 18 N. E. 687, the court upon this subject says: "In order to invalidate a note or other security in the hands of one who advanced money which the borrower intended to and did employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise, as that the former became *particeps criminis*." See also *Irwin* v. *Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Embrey* v. *Jemison*, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776. In the case at bar the proof shows that the money advanced by the appellee was put up from time to time during the progress of a gambling game, in which he participated as one of the principals; the testimony of all the witnesses being to the effect that the money advanced was used during the progress of the game. It will not do for the appellee in this case to say that he did not know that this money was to be used for gambling purposes, because he participated in the game, and in its use for that very purpose: and, while possibly the simple knowledge that it was to be used for gambling purposes might not be sufficient to defeat a recovery, the participation of the appellee in the unlawful purpose for which the money was advanced, and to be used in his presence, is quite sufficient to make him *particeps criminis* in law, and as such he cannot recover. Indeed, he participated in another way. It is reasonable to believe that the production of this money by the appellee, after the appellant's money was exhausted, had the effect of continuing and prompting the gambling being carried on at the time, and the continued participation of the appellant in the game; and in this way, also, while it may not be said that the appellee was instrumental in bringing the parties together for the unlawful purpose of gambling, it is undoubtedly true that his participation had the effect of continuing the illegal transaction in which the parties were engaged at the time. The appellant admits in his own testimony that he was a winner to some extent during the game, the exact amount he does not state. Undoubtedly, however, the money won by him during the progress of the game constituted at least part, if not all, of the balance which he claimed to be due him from the appellant. Therefore the entire indebtedness claimed arose out of a gambling transaction, in violation of the statutes of this territory, and the courts will not lend aid to a winner whose alleged claim arose out of a gambling transaction in which the creditor participated.

From the views above expressed, it follows that the assignments of error numbered 1 and 2 above quoted in this opinion, were well assigned, and that the court below erred in rendering judgment for appellee, and *the judgment of the court below will therefore be reversed*, and judgment for appellant for costs.

Mills, Ch. J., and **Parker** and **McMillan**, JJ., concur. **Crumpacker**, J., having tried the case below, took no part in this decision.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina
v.
Amos MOORE *et al.*, *Appts.*

(.....N. C.....)

1. An indictment for larceny is not insufficient for including among the articles specified as having been stolen one not the subject of larceny, nor for failure to specify the value of each article mentioned, if a gross valuation is named, and the specified articles have some value and the value assigned could attach to them.

2. Failure to specify the quantity stolen, in an indictment for receiving stolen goods, does not render the indictment insufficient.

NOTE.—As to evidence of trailing of criminal by bloodhound, see Pedigo v. Com. (Ky.) 42 L. R. A. 432, and *note*.

53 L. R. A.

3. Evidence of the conduct of a bloodhound in baying the accused is not admissible upon trial of an indictment for larceny, in corroboration of a confession of an alleged accomplice, where, before the hound was put upon the trial, accused were in and about the premises where the crime was committed.

(September 18, 1901.)

APPEAL by defendants from a judgment of the Superior Court for Pitt County convicting them of larceny. *Reversed.*

Statement by **Cook, J.:**

The defendants Amos Moore, Ashley Dixon, Jesse Edwards, and Joseph Edwards were tried and convicted upon the following bill of indictment, *viz.:* "The jurors for the state upon their oath present: That Albert Rountree, Amos Moore, Ashley Dixon, Jesse Edwards, Joseph Edwards, John Smith, late of Pitt county, on the 9th day of February, 1901, with force and arms, in said county, 50 lbs. of meat, 20 lbs. flour, 10 lbs. sugar, 4 boxes tobacco, 6 pair drawers, 6 undershirts, of the value of $50, the goods and chattels of J. C. Gaskins, then and there being found, then and there feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, in said county, the said Albert Rountree, Amos Moore, Ashley Dixon, Jesse Edwards, Joseph Edwards, John Smith, the said meat, flour, sugar, tobacco, drawers, undershirts, of the value of $50, the goods and chattels of J. C. Gaskins, then and there being found, feloniously did have and receive, well knowing the same to have been feloniously stolen, taken, and carried away, contrary to the statute in such case made and provided, and against the peace and dignity of the state." In apt time defendants' counsel moved to quash. Motion overruled, and defendants excepted. After verdict they moved in arrest of judgment upon the following grounds: (1) That it appeared upon the face of the bill of indictment that there was a fatal defect in the first count, in that it charged the larceny of 50 pounds of meat, 20 pounds of flour, 10 pounds of sugar, 4 boxes of tobacco, 6 pairs of drawers, 6 undershirts, and also that it failed to state the value of each article which it alleges to have been stolen; (2) that the second count charges that the defendants received the said meat, flour, sugar, tobacco, drawers, and undershirts without specifying the quantity and value of each article,—which motion was overruled, and defendants excepted. The state then introduced Albert Rountree, an accomplice, who testified that defendants and himself committed the crime; that on the night of the store-breaking and larceny the defendant Jesse Edwards broke the first window of the store with a piece of scantling, and then ran across the bridge; that witness was at the time of the breaking standing near the store; that defendants Ashley Dixon, Amos Moore, and Joseph Edwards were outside of the store; that Jesse Edwards came back, and went into the store through the window; that no one went into the store except Jesse Edwards; that Jesse Edwards came out with a sack on his shoulder, divided up what he had in his sack, and gave witness a sack of flour, and divided out the things among the others, and then he left, and did not know what became of the others. It was also in evidence that the next morning several persons, including Moore and Dixon, went to the store, and walked around and inside, viewing the premises from which the articles were stolen. In order to corroborate the witness Rountree (whose evidence was impeached by reason of confession of guilt, and in whose possession alone stolen goods were found, and which was further impeached by reason of his admission upon cross-examination that after his arrest on the Wednesday following, and before he confessed, the magistrate, Sam Laughinghouse, before whom he was taken for trial, gave him whiskey, and told him they would turn him loose if he would tell on the other boys, and that Gaskins, the prosecuting witness, had told him afterwards, while in jail, to stick to what he had said, and gave him 10 cents in money and some tobacco, and promised him more money if he would stick to what he had sworn to in the magistrate's court) the state introduced, after exception by defendants, the conduct of a dog called a bloodhound, as testified to by Brinson and Gaskins. That some time during the next day Brinson arrived from Kinston with his dog, and carried him to the window, where he smelt in a basket, and was then carried inside, where he smelt at the window, and around the counters, and when he reached the meat block he barked, and then went to the back door, and smelt the steps, and went to the creek, 18 or 20 feet away, and barked and came back, and then trailed about the door and steps and up the street, going into divers places, and finally went up to Dixon, one of the defendants, and bayed him, and then trailed about, and afterwards went up to defendant Moore, and bayed him. It was also in evidence that said Moore and Dixon were present all the while in the crowd while the dog was trailing, and frequently near the dog, and that the other two defendants Jesse and Joseph Edwards were also there in the crowd near the dog at the time. After verdict of guilty defendants moved for new trial, assigning, among others, as error, the admission as evidence of the conduct of the dog, either to establish a circumstance or to corroborate Rountree. Motion overruled, and defendants appealed.

Messrs. **Swift Galloway** and **A. M. Moore** for appellants.

Mr. **R. D. Gilmer,** Attorney General, for the State.

Cook, J., delivered the opinion of the court:

While the bill of indictment is inartifi-

cially and carelessly drawn, yet no such defect appears upon its face as would authorize the court in quashing it or arresting judgment after verdict. In the first count several articles are alleged to have been stolen, and the valuation placed upon them all is fixed at $50. Among the articles appears one not the subject of larceny,—meat; but all the others are, and are of substantial value, to all or any one of which, if shown to have been stolen, the valuation assigned would attach, and proof of larceny of any one is sufficient. *State* v. *Martin*, 82 N. C. 672. In the second count the same articles are alleged to have been received, and the same valuation assigned, but the quantity and number of pounds are not stated. Defendants' contention upon that point cannot be sustained, because the quantity does not enter into the element of the crime, nor could it in any way prejudice the defendants' defense. So it is held that charging the larceny of a "parcel of oats" is sufficiently certain. *State* v. *Brown*, 12 N. C. (1 Dev. L.) 137, 17 Am. Dec. 562.

We think the objection taken to the introduction of the conduct of the dog should have been sustained by his honor, and that he erred in admitting it as evidence. We do not base our opinion upon the ground that the dog, being an animal of instinct, and not possessed of reason, and *ergo*, his conduct would not be a circumstance to be considered in connecting a person with an act, or in corroborating a statement made by a witness, but upon the ground that we fail to see that it was a circumstance which would tend to connect the defendants with the larceny, or that it in any way corroborated the testimony of the witness Rountree. It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their respective kind,—the pointer and setter take instinctively to hunting birds; the hound to foxes, deer, and rabbits,—but we know of no breed which instinctively hunts mankind. Yet we do know that dogs are capable of running the tracks of human beings, as is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him; which demonstrates the further fact that some distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well-known fact that the bloodhound can be trained to run the tracks of strangers, and in this the training consists only in being taught to pursue the human track. The gifts or powers or instincts being already inherent in the animal, he is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends, not upon his training, but upon the degree of capacity bestowed upon him by nature. Experience and common observation show that among dogs of the full blood and full brothers or sisters one or more may be highly proficient, while others will be inefficient, unreliable, and sometimes worthless. Some may be acute to scent, while others will be dull to scent, and incapable of running a "cold" track. Then, again, we may find the most reliable and favorite hound taking the fresher track which crosses his trail, or quitting the "cold" trail of a fox, and following the "hot" track of a deer which he may strike. Likewise the pointer or setter may abandon a "cold" trail of a covey of birds, and follow a "warmer" one upon which he may happen to run. Or the squirrel dog may leave the tree at which he has taken his stand and barked, and go to another, or quit entirely. So it does no violence to common experience to assume that dogs are liable to be deficient in their instincts. Therefore, we frequently hear huntsmen speak of some dogs as "true" and "staunch," while others will be denounced as "unreliable" or "liars." It sometimes happens that the best trained fox hounds will lead their master into a rabbit chase, or a pointer will hold his master with trembling excitement while he "points" a terrapin. Applying common knowledge and experience, of which the court is justified in taking notice, in connection with the evidence, to the case at bar, we are led to consider whether there is any evidence tending to show that Brinson's dog pursued either one of the tracks made upon the premises at the time of the commission of the crime. After scenting at the window and in and around the store and upon the steps leading to the ground, he went 18 or 20 feet to the creek, and then barked and turned back, which is understood by all followers of hounds to mean that he found he was going the wrong direction, or the track was so "cold" he could not follow it, or that he was scenting for a track, and had failed to find one. In either event it fails to be any evidence that Jesse's track had been identified, or that the dog had discovered any track at all, or, if he had detected a track, it would not follow that it was not made by some person other than Jesse. And if it be that he did discover a track, and it was too cold to follow, a like condition would exist as to the tracks of others, made at or about the same time. This incident tends rather to discredit than corroborate Rountree, for he said Jesse went across the bridge, while the dog went 18 or 20 feet to the creek. Had the dog been trailing Jesse's track, and had Jesse crossed the bridge, the dog would also have gone there, and taken the track back, provided it had not become too cold to follow; or if for any reason he had lost the trail, having once positively identified Jesse's track, then surely Jesse would have been the person recognized and bayed by the dog, to the exclusion of others; while, on the contrary, he bayed two of the persons who did not go in the direction of the creek or bridge, or, if they did, there is no evidence of it, and who were shown to have been on the premises whence the trail was made that morning a few hours before the dog arrived, and it is not improbable that, had he been pressed or urged, he would have identified each and

every one of the persons present at the store that morning. This is a novel feature of evidence in our jurisprudence, and is attended with some danger, and is calculated to excite the superstition of some people that the exercise of that instinctive power, not possessed by human beings, is a supernatural agency in the aid of human justice, to which too great importance may be attached, and against which courts will have to guard when the occasion arises.

There are only three cases cited by the attorney general (and we are satisfied that had there been others they would not have escaped his diligent eye) in which the conduct of a dog has been used as evidence. One is *Hodge* v. *State*, 98 Ala. 10, 13 So. 385, in which it appears that tracks of a peculiar character, and easily identified, were found near the rear of the house in which the murder was committed; that a dog trained to follow human tracks was put upon them, and trailed by him to defendant's house; that the tracks found at the house of deceased were followed by several persons to the defendant's house, being measured at various points along the route, and at each of such points identified as being made by the same shoes as were the tracks at the place of murder; that the route thus traced by them was precisely that taken by the dog throughout; and that when defendant was soon captured, he had on shoes that made tracks precisely corresponding to those traced by the dog. In that case the court held that the conduct of the dog was competent to go to the jury for their consideration, in connection with all the other evidence, as a circumstance tending to connect the defendant with the crime. In another case, *Pedigo* v. *Com.* found in 103 Ky. 41, 42 L. R. A. 432, 44 S. W. 143, from Kentucky, the court held (Guffy, J., dissenting): "That in order to make such testimony [the trailing of a track by a dog] competent, even where it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." The third is *Simpson* v. *State*, 111 Ala. 6, 20 So. 572, in which the evidence of trailing by the dog was admitted without objection. In this case there is no evidence to connect the circumstance of the baying of the two defendants, or either of them, with the making of tracks at the time the larceny was committed nor is there any evidence that the dog scented any that were then made by either of the defendants, nor is there any way to ascertain that fact.

The evidence admitted failing to become a circumstance to connect the defendants with the crime, and failing to become a circumstance in corroboration of Rountree's testimony, there was error in admitting it, and *there must be a new trial.*

OHIO SUPREME COURT.

WELLSTON COAL COMPANY, *Plff. in Err.*,
v.
Frank SMITH.

(65 Ohio St. 70.)

*1. **A mine boss who has control of a mine**, with power to hire and discharge employees, stands for and in place of the owner or operator of such mine as to matters between such employees and owner or operator in the operation of such mine; and the owner or operator is chargeable with whatever such boss knows or ought to know in the operation of such mine.

2. **Such mine boss ought to know every fact** which he would know if he used ordinary care and diligence in performing his duties in the operation of such mine.

3. **Where such mine boss, instead of performing his duties** in and about the operation of such mine himself, enjoins the performance of such duties upon a miner in his employ in such mine, such miner, as to the performance of such duties, is not the fellow servant of other miners, but, as to

*Headnotes by the COURT.

NOTE.—For a case in this series holding that the negligence of a shift boss or mine foreman causing injury to a miner is that of a fellow servant, see Petaja v. Aurora Iron Min. Co. (Mich.) 32 L. R. A. 435.

As to liability of master for negligence of mine boss required by statute to be employed, see Durkin v. Kingston Coal Co. (Pa.) 29 L. R. A. 809.

As to assignability of master's duty of inspection, see *note* to Walkowski v. Penokee & G. Consol. Mines (Mich.) 41 L. R. A. on page 109.

For vice principalship as determined with reference to the character of the act which caused the injury, see Lafayette Bridge Co. v. Olsen (C. C. App. 7th C.) 54 L. R. A. 33, and *note*.

them, stands in the same relation as the mine boss; and the mine boss is chargeable with whatever notice such miner has or ought to have while so performing the duties of such boss.

4. **In the business of mining coal,** it is the duty of the owner or operator of a mine to furnish reasonably safe entries for the ingress and egress of those employed in such mine, and to keep such entries in a reasonably safe condition, and the miners may rely and presume that this duty has been properly performed.

5. **It is the duty of a miner,** as to such entries, to use ordinary care for his own safety, in view of what he knows or ought to know as to the condition of such entries; and he ought to know every fact which he would know if he exercised ordinary care to keep himself informed as to matters concerning which it is his duty to inquire in the employment in which he is engaged.

(Davis and Shauck, JJ., dissent.)

(June 25, 1901.)

ERROR to the Circuit Court for Jackson County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the defendant's negligence. *Affirmed.*

Statement by **Burket, J.**:

The coal company is a corporation owning and operating a coal mine, and has in its employ what is known as a bank boss or mine boss, and employed many men to operate its mine, one being Frank Smith, the defendant in error. There is an entry or passageway into the mine, and Mr. Smith was assigned by the mine boss to work in a room of the mine adjoining this entry. About October, 1895, he was employed by said company as a miner, and on November 6, 1896, he claims to have drilled two holes into the face of the coal and charged them with powder, and fired one off, and then returned and fired the fuse of the other, and ran into the entry to a place about 60 feet from the fuse, when a part of the roof of the entry fell upon him before this last shot was discharged, and he was severely injured. He sued the coal company for damages. He averred, in substance, in his petition, that the roof of the entry became greatly out of repair and dangerous several months before his injury, by reason of a large, heavy piece of slate becoming loose and liable to fall; that the condition of the roof of the entry was well known to the company, its agents and servants who were his superiors, and who were in charge and control of the entry; and that the condition of the entry could have been known to the company, its said agents and servants, by the exercise of reasonable care, prudence, and caution; and that the condition of the roof of the entry was unknown to him, and could not have been known to him by the exercise of ordinary care, prudence, and caution, in time to have prevented his injury; and that he did not have equal means with the company of knowing the unsafe and dangerous condition of the roof of the entry. He further avers that the company negligently and carelessly failed and refused to repair the roof of the entry, and that his injury was directly caused by the negligence of the company in so permitting the said roof to so become and remain out of repair, without warning to him of its dangerous condition, and that he was without fault or negligence in the matter. The answer admits the corporate character of the company, that it was operating the coal mine, that it employed more than twenty-five miners, that Smith was so employed and assigned to a room to work and had to pass through the entry, and was injured in the mine at the date named; and denies all and singular the other allegations of the petition, and then denies some of the allegations specially, but these special denials are not broader than the general denial. The answer further pleads contributory negligence of Smith in this: that "without making a cutting or 'bearing in' of the coal in his said room, he drilled a hole of the diameter of more than 2 inches, and the depth of 7 feet, into the face of the coal, and placed therein a great quantity, to wit, 4 pounds or more, of blasting powder, tamped it, and, after firing the fuse, went a short distance, and not to exceed 60 feet away, and stopped to await the result of the shot, and defendant says that the injury to plaintiff, if any he received, was the direct result of the explosion of said shot, which took place immediately before plaintiff's alleged injury and the concussion from which caused said slate to fall upon plaintiff, without any wrong, fault, or negligence of this defendant, but solely because and on account of the carelessness, negligence, and want of caution of plaintiff in putting in said shot to the depth and in the manner hereinbefore alleged, and using said very great and excessive amount of powder therein, and failing and neglecting to go far enough away, and staying within the said short distance from said shot. Defendant further says that if said slate was loose prior to the date of its alleged fall, it had no knowledge thereof, and the same was caused by plaintiff and others, coservants with him, in theretofore using an excessive amount of powder in shooting said coal from the solid, and without making any cutting or 'bearing in,' and thus causing a greater concussion from the shooting of said coal than was necessary, and which could easily be avoided by the use of less powder and the exercise of more labor by plaintiff and his said coservants, all of which plaintiff knew and in which he participated." The reply is in legal effect a general denial of the answer. Upon the trial to a jury the following admission was made and carried into the record as an agreement between the parties: "That, at and before the date of the injury to said Smith, defendant had in its employ at all times a sufficient number of careful and competent persons, whose duty it was to look after the safety of all entries in its mine,

including the entry in which plaintiff was injured."

The jury brought in a verdict in favor of the company. A motion for a new trial was overruled, and judgment entered upon the verdict, to all of which proper exceptions were saved. The circuit court reversed the judgment of the common pleas, for the following reasons, as shown by its judgment of reversal: First. The court erred in refusing to admit the evidence of Robert Pope upon cross-examination on page 7 of the bill of exceptions. Second. The court erred in its general charge to the jury as excepted to and set forth on page 15 of said bill of exceptions, in the use of the words "slightest degree" in describing the character or amount of contributory negligence that would defeat a recovery. Third. The court erred in refusing to give the fourth special charge as requested by the plaintiff below. Fourth. The court erred in giving special charges numbered 8, 10, 12, 17, and 2*a*, as requested by the defendant below. Thereupon the company filed its petition in error in this court seeking to reverse the judgment of the circuit court, and asking an affirmance of the judgment of the common pleas.

Mr. **J. M. McGillivray,** for plaintiff in error:

The mine boss was the only personal representative in the mine, and the drivers, tracklayers, day men, and the like, to whom was referred the duty of looking after and reporting upon the condition of entry roofs, were coservants with the miners and with plaintiff, and no recovery could be had for their negligence under the issues made, nor except defendant was charged with the hiring or retention of incompetent or careless servants.

Road men, as were the drivers, trackmen, and day hands in this mine, are fellow servants of the miner.

Troughear v. *Lower Vein Coal Co.* 62 Iowa, 576, 17 N. W. 775; *Columbus & X. R. Co.* v. *Webb*, 12 Ohio St. 475.

One who enters or remains in the room of a coal mine, knowing the roof thereof to be unsafe, or having the means at hand of knowing the unsafety of such roof, is guilty of such negligence as will prevent recovery for any injury he may sustain by the falling of such roof.

Pittsburgh & W. Coal Co. v. *Eisticrenard*, 53 Ohio St. 44, 40 N. E. 725.

Messrs. **Powell & Eubanks** and **C. C. McCormick,** for defendant in error:

The master is bound to use reasonable care to furnish his servants a safe place in which to perform his labor, and the same care in making their access and departure safe.

Shearm. & Redf. Neg. § 190.

The duty cannot be delegated to any servant, no matter what may be his rank or station, so as to absolve it from the consequences of the negligence of the servant intrusted with the duty.

Western Coal & Min. Co. v. *Ingraham*, 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; *Crispin* v. *Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Shearm. & Redf. Neg. §§ 231-233; Beach, Contrib. Neg. §§ 328, 329; Wood, Mast. & S. §§ 436, 438, 452; *Walkowski* v. *Penokee & G. Consol. Mines*, 115 Mich. 629, 41 L. R. A. 33, 73 N. W. 895; *Elledge* v. *National City & O. R. Co.* 100 Cal. 282, 34 Pac. 720.

A corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank of the agent intrusted with their performance.

Berea Stone Co. v. *Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Dick* v. *Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *New York, C. & St. L. R. Co.* v. *Lambright*, 5 Ohio C. C. 433; *Cleveland, C. & C. R. Co.* v. *Keary*, 3 Ohio St. 202.

Burket, J., delivered the opinion of the court:

The coal company operated its mine by means of a mine boss who had authority to hire and discharge employees. In the operation of a coal mine, such a mine boss stands for and in place of the company, and his acts and omissions in the operation of the mine are the acts and omissions of the corporation. He is not a fellow servant with the miners employed by him. And, if he directs one of the miners under his employ to perform some of the duties of the mine boss, such miner, while so performing such duties, is not the fellow servant of the other miners, but, while not so performing the duties of the mine boss, he would be such fellow servant. The mine boss cannot delegate his duties to a miner under his employ, so as to relieve the company from responsibility for negligence in the discharge of the duties of the mine boss, whether such negligence arises from the acts or omissions of the mine boss, or of some miner under his employ, and by him directed to perform the duties of such boss. The entry in which Mr. Smith was injured was not a room that he was required to keep in a safe condition himself, as was the case in *Coal & Min. Co.* v. *Clay*, 51 Ohio St. 542, *sub nom. Consolidated Coal & Min. Co.* v. *Floyd*, 25 L. R. A. 848, 38 N. E. 610, but, on the contrary, the entry was a place furnished to the miners by the company, through its mine boss, and the duty devolved upon the mine boss to use ordinary care in making and keeping the entry in a reasonably safe condition for the protection of miners passing in and out through and along the same; and this duty could not be shifted by the mine boss to one of his employees so as to relieve the company from liability for the negligence of such employee while in the performance of the duties of the mine boss as to keeping such entry in a safe condition. The principles as to inspectors, as in *Columbus & X. R. Co.* v. *Webb*, 12 Ohio St. 475, are not applicable to the relations existing between

a mine boss and his employees, because the miners are completely under his control, and their safety depends upon his vigilance and the proper discharge of his duties. Our statutes on the subject of mining (Rev. Stat. § 6871) indicate a public policy to the effect that mine owners shall be charged with the duty of making their mines reasonably safe for miners, and miners themselves are also required in certain cases to look out for their own safety, as in propping the roofs of the rooms in which they work, the duty of furnishing the timbers being cast upon the company; but there is no provision requiring the miners to prop or look after the safety of entries. That duty rests, therefore, on the owners of the mines. The case of *Troughear* v. *Lower Vein Coal Co.* 62 Iowa, 576, 17 N. W. 775, is cited by counsel for plaintiff in error to sustain his contention. In that case there was a pit boss who had no authority to hire or discharge employees, that power being vested in a superintendent. The pit boss discovered that the roof of the mine was unsafe, and it was the duty of the road men to put it in proper and safe condition, and two of them undertook to do so, and while so doing one of them was injured by the negligence of the other. The road men were not performing the duties of the pit boss or superintendent, but, on the contrary, were performing their own duties, and were clearly fellow servants; and, of course, one could not recover against the company for an injury caused by the negligence of his fellow servant. There are many cases in which it has been held that duties of officers and agents cannot be delegated so as to relieve the principal from liability, and among them are the following: *Fones* v. *Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Pullman Palace Car Co.* v. *Lauck*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285; *Capper* v. *Louisville, E. & St. L. R. Co.* 103 Ind. 305, 2 N. E. 749; *Lindvall* v. *Woods*, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. 1020; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Wooden* v. *Western N. Y. & P. R. Co.* 43 N. Y. S. R. 218, 16 N. Y. Supp. 840; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Knahtla* v. *Oregon Short Line & U. N. R. Co.* 21 Or. 136, 27 Pac. 91; *Brabbits* v. *Chicago & N. W. R. Co.* 38 Wis. 289; *Pike* v. *Chicago & A. R. Co.* 41 Fed. 95; *Stockmeyer* v. *Reed*, 55 Fed. 259; *Madden* v. *Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695; *Lewis* v. *St. Louis & I. M. R. Co.* 59 Mo. 495, 21 Am. Rep. 385; *Colorado Midland R. Co.* v. *Naylon*, 17 Colo. 501, 30 Pac. 249; *Elledge* v. *National City & O. R. Co.* 100 Cal. 282, 34 Pac. 720; *Justice* v. *Pennsylvania Co.* 130 Ind. 321, 30 N. E. 303; *Loughlin* v. *State*, 105 N. Y. 159, 11 N. E. 371; *Indiana Car Co.* v. *Parker*, 100 Ind. 181; *Hannibal & St. J. R. Co.* v. *Fox*, 31 Kan. 586, 3 Pac. 320; *Atchison, T. & S. F. R. Co.* v. *McKee*, 37 Kan. 592, 15 Pac. 484; *Dares* v. *Southern P. Co.* 98 Cal. 19, 32 Pac. 708; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Fisher* v. *Oregon Short Line & U. N. R. Co.* 22 Or. 533, 16 L. R. A. 519, 30 Pac. 425; *Brown* v. *Minneapolis & St. L. R. Co.* 31 Minn. 553, 18 N. W. 834; *Mobile & M. R. Co.* v. *Smith*, 59 Ala. 245; *Miller* v. *Southern P. Co.* 20 Or. 285, 26 Pac. 70; *Moon* v. *Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Baltimore & O. R. Co.* v. *McKenzie*, 81 Va. 71.

Plaintiff in error urges that it was entitled to a peremptory instruction for a verdict in its favor, in view of the admission on the trial "that, at and before the date of the injury to said Smith, defendant had in its employ, at all times, a sufficient number of careful and competent persons, whose duty it was to look after the safety of all entries in its mine, including the entry in which plaintiff was injured," and in view of the further fact, as it claims, that there was no statement of any evidence tending to prove knowledge of the defect on the part of the superintendent or mine boss, nor that the defect was open, obvious, apparent, and dangerous, or of common knowledge among the employees in the mine, and no other or further evidence concerning it than that of Edward Gordon, who says that he did not consider the matter of sufficient importance to call the attention of the mine boss to it. A sufficient answer to this claim may be found in the fact that the record fails to show that any such instruction was asked by the plaintiff in error, or refused by the court. Again, assuming that the above admission concedes that the mine boss and the track layer, Edward Gordon, who had the duty enjoined upon him, in addition to his duty as track layer, to inspect and keep in repair the entry in question, were careful and competent persons, whose duty it was to look after the safety of said entry, yet it may be that they were negligent in the performance of their said duty of looking after the safety of said entry. The evidence tended to prove that the mine boss was not observed by anyone testing the roof of that entry for three months before the accident. It is urged that there is no evidence tending to prove that he knew the unsafe condition of the entry, but his want of inspection for three months while blasts of powder in the adjoining room were of frequent, if not daily, occurrence, tended to show that he ought to have known its unsafe condition. Masters are charged with notice, not only of what they know, but also of what they ought to know, that is, of every fact which they would have known had they used ordinary care and diligence in performing their duties. Shearm. & Redf. Neg. § 206. Again the evidence tended to show that this Edward Gordon, while assisting the mine boss in the performance of his duty of looking after the safety of the roof of this entry, discovered that it was unsafe, but he did not report it to the boss, because he did not consider it very dangerous, and did not think it worth while to tell him. This knowledge, so obtained by Edward Gordon while performing the duties of the mine boss, is the same as if the knowledge had been obtained by the boss himself, and binds the company. There was therefore sufficient testimony of

knowledge of the unsafe condition of the roof of the entry, and of negligence in not repairing it, to submit to the jury, and the company was not entitled to a direction for the jury to bring in a verdict in its favor.

Robert Pope was a boss driver, and the mine boss, Thomas Stiff, enjoined upon him, in addition to his duty as such driver, the duty of inspecting and keeping in repair the entry in question, thus performing one of the duties of said mine boss. The defendant company offered Mr. Pope as a witness in its behalf, and the following question was asked and answer given:

Q. What, if any, knowledge at the time did you have that the slate in the roof of the entry at the point where plaintiff was injured was loose, defective, or liable to fall?

A. I had no knowledge whatever.

On cross-examination, he was asked the following question by counsel for plaintiff below:

Q. When, if at any time, while you were working under Thomas Stiff as mine boss, did you inspect, by the use of ordinary means used for that purpose, the entry at the point where plaintiff was injured, or elsewhere in said entry?

Objection being made to this question by counsel for the company, the objection was sustained and an exception taken. The circuit court held this ruling to be error. While we do not regard this as of much importance, we think that the holding of the circuit court was right. The answer would tend to show whether or not Mr. Pope had used sufficient diligence in the performance of the duties of the mine boss.

The court charged the jury as follows: "I instruct you that the plaintiff in his work had the right to assume that the roof where the slate is alleged to have fallen was in a reasonably safe condition. If the plaintiff, acting upon this assumption, used a greater quantity of powder in shooting the coal than a reasonably prudent miner, under the same conditions and circumstances, would have used, and said charge or shot produced a concussion that in the slightest degree contributed to produce the alleged fall of slate, he cannot recover in this case, because such act would constitute negligence upon his part." The circuit court held this part of the charge erroneous, by reason of the words "in the slightest degree." This holding of the circuit court was in accordance with the holding of this court in *Schweinfurth* v. *Cleveland, C. C. & St. L. R. Co.* 60 Ohio St. 215, 54 N. E. 89, and was right. The fourth special charge requested by the plaintiff below, and refused by the court, and which refusal the circuit court held to be error, is as follows: "If you find from the evidence that the roof of the entry at the place mentioned had become out of repair and dangerous, and that its condition was known to the defendant, or that the same could have been known to said defendant, its servants and agents, who had charge and control of said entry, in time to have prevented said injury complained of, by the exercise of reasonable care, prudence, and caution, and if you should further find that the condition of said roof was unknown to plaintiff, and that he had not equal means with the defendant of knowing of the unsafe and dangerous condition of said roof, and you should further find that, while he (the plaintiff) was passing through and along said entry a piece of slate which had become loose fell upon and injured him, then your verdict must be for the plaintiff." This request is too broad, as it allows the plaintiff below to recover even though he was at fault himself. The limitation that if he was without fault on his part should have been incorporated into the request, to make it sound law. True, this limitation is found in the general charge, but that cannot have the legal effect of making this request sound so as to constitute its refusal reversible error. To make the refusal of a request to charge reversible error, the request must be sound law throughout, and lacking no required limitation. Again, the general charge fully and carefully covers the phase of the case included in this request, and incorporates the limitation as to the plaintiff being without fault, and, the proposition having been correctly given in the general charge, there was no error in refusing a special charge on the same subject, even if correct. Knowledge of the unsafe condition of the roof of the entry on part of the servants and agents who had charge and control of the entry would be notice to the company, whether such servants and agents were or were not the superiors of the plaintiff and in authority over him in other matters. In that regard the request was not defective, but for the reasons above given the reversal founded upon the refusal of the request is not approved by this court. The second request of plaintiff should have been given without modification, because notice to the servants and agents who had control of the entry, and cared for and inspected it, was notice to the mine boss and company, and whether they were "superior to plaintiff and in authority over him" or not in other matters could make no difference.

The court charged the eighth special request of the defendant below as follows: "If you find from the evidence that plaintiff, at the time of and before his injury, knew that the roof of said entry was unsafe, or had the means and opportunity to ascertain its defective condition, and did not avail himself of such opportunity, or use the means at hand, then he was guilty of such negligence as will prevent his recovering in this action for any injury he may have received, and your verdict must be for the defendant." The circuit court held this to be error, and we concur in that holding. If the plaintiff below knew the roof of the entry to be unsafe, and entered notwithstanding such knowledge, he was negligent and ought not to recover; but, as it was the duty of

the mine boss to furnish a reasonably safe entry, and to keep it in a reasonably safe condition, the miners could rely upon that duty being performed, and were not required to test and inspect the roof of the entry themselves, and were not charged with knowledge of its unsafe condition, further than the knowledge they would ordinarily obtain in the proper discharge of the work they were employed to perform. The law is stated thus by Shearm. & Redf. Neg. § 217: "A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire." A miner is required by Rev. Stat. § 6871, to prop the room in which he works and keep it in a safe condition, and therefore he must use the means at hand to ascertain its safety before entering, but no such duty is enjoined upon him as to an entry. The court also erred in giving the seventh special charge asked by defendant in so far as regards the means and opportunity of plaintiff to ascertain the condition of the roof of the entry.

Special charge No. 10, given at request of defendant below, is as follows: "That if you find from the evidence that the fall of slate upon plaintiff was caused by the jar or concussion from the shot fired by plaintiff in an adjacent room, and that such slate fall did not extend into the middle of the entry, where drivers, miners, and other employees walked while going to and from their work, then your verdict must be for the defendant, for the reason that the plaintiff was not injured at a point or place where defendant had any reason to expect that any of its employees would pass." The giving of this charge the circuit court held to be error, and we think rightly. It was the duty of the company to keep the roof of the whole entry in a reasonably safe condition. Miners passing in and out would often meet cars, and would be compelled to turn aside, and they had a right to be protected while doing so. On the occasion of the injury in question, there was a car on the track which compelled plaintiff below to take to the side of the entry, and while so doing he had a right to be reasonably protected, and the company should have anticipated such occurrences.

The seventeenth special charge is in substance the same as the tenth, and is open to the same objection.

The twelfth special charge on behalf of defendant below is as follows: "If you find from the evidence that the fall of slate which injured plaintiff was simultaneous with the explosion of the shot by him fired in an adjacent room, or very shortly thereafter, it is your duty to inquire whether the said slate would have fallen at said time but for the concussion of said shot, and, if you find that the said shot was excessively large, then your verdict must be for the defendant." The circuit court properly held the giving of this to be error. Under this charge the jury might find that the slate would have fallen at the time it did without the concussion of the shot, and yet if they should find that the shot was excessively large, even though it did not cause the slate to fall, they must bring in a verdict for the defendant. If the shot was excessive, and not such as was ordinarily used, and caused the slate to fall, the roof being in a reasonably safe condition, the plaintiff caused his own injury and should not recover. And if the shot was not excessive, and was such as is ordinarily used, and still caused the slate to fall, the roof being in a reasonably safe condition, the falling of the slate was what is known as an inevitable accident, for which there could be no recovery, and a charge along those lines would be proper, but the special charge as given was error.

Special charge No. 2*a*, given at the request of defendant below, is as follows: "If you find from the evidence that there was a fall of slate in front of the room in which Smith worked some time prior to the date of alleged injury, which was cleaned up by defendant's employees, who were competent for the purpose, and who, at said time, put the roof of said entry at said point in such condition that they considered it reasonably safe, then plaintiff cannot recover in this action, even though you should find that said work was not properly done, or said roof made reasonably safe, and the defendant could not in the exercise of ordinary care have known that it was improperly done." The circuit court held this to be error, in which holding we concur. The fall of slate in front of Smith's room was some four months before the accident, and not at the place in the entry where the slate fell upon Mr. Smith, and what was done at that place could not rule the law as to the place in the entry where Smith was injured.

It seems that the circuit court was of opinion that Edward Gordon and Robert Pope, upon whom was enjoined the duty of performing the duties of the mine boss as to looking after the safety of the roof of said entry, in addition to their other duties, were, while so performing the duties of the mine boss, the fellow servants of plaintiff below and the other miners, and therefore held several charges good which were clearly erroneous, among them being special charge 1*a*, which was, in effect, that knowledge on the part of Gordon of the defect in the roof of the entry could not charge the defendant with notice of such defective condition, either actual or constructive.

Upon a retrial of the case, the charge, and especially that part covered by the request of defendant, should be recast, so as to conform as near as may be to this opinion.

The judgment of the Circuit Court is affirmed.

Minshall, Ch. J., and **Williams** and **Spear**, JJ., concur. **Davis** and **Shauck**, JJ., dissent.

STATE of Ohio *ex rel.* HYGEA MEDICAL COLLEGE

v.

N. R. COLEMAN *et al.*, as Ohio State Board of Medical Registration and Examination.

(64 Ohio St. 377.)

*The writ of mandamus will not issue on the relation of a medical college to compel the state board of medical registration and examination to recognize the college as a medical institution in good standing, nor to compel the board to issue certificates to practise medicine in this state, to holders of diplomas from such college.

(March 26, 1901.)

ON DEMURRER to an application for a writ of mandamus to compel respondents to recognize relator as a legally chartered medical institution in good standing. *Sustained.*

Statement by the **Court:**

This action is brought to compel the State Board of Medical Registration and Examination to recognize the relator as a "legally chartered medical institution in good standing," and to issue to its graduates who may hereafter apply to the board for that purpose certificates authorizing them to engage in the practice of medicine in this state. The petition is as follows:

"The plaintiff says that the defendants constitute the Ohio State Board of Medical Registration and Examination, under the provisions of Ohio Rev. Stat. § 4403, as amended February 27, 1896 (92 Ohio Laws, p. 44).

"(1) Plaintiff further says: That the relator was duly incorporated under the laws of the said state of Ohio on the 4th day of October, 1893, as a medical college, at Cincinnati, Ohio, and thereafter at once fully perfected its organization, acquired property, and on the 6th day of November, 1893, its trustees filed in the office of the secretary of state of Ohio a schedule of the kind and value of a part of its property in value over five thousand dollars ($5,000), which schedule was verified by the oaths of its trustees; and thereupon said trustees appointed a president, professors, tutors, and other agents and officers, as provided in Ohio Rev. Stat. § 3726, which was then and is now as follows: 'Sec. 3726. The trustees of a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, which has acquired real or personal property of the value of $5,000, and which has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of the trustees, may appoint a president, professors, and tutors, and any other necessary agents and officers, and fix the compensation of each, and may enact such by-laws, not inconsistent with the laws of this state or of the United States, for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary; and may, on the recommendation of the faculty, confer all such degrees and honors as are conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student as they may deem proper.' That thereupon this relator became vested with the certain rights granted in said section, and has sought to enjoy the same ever since, as it lawfully might. That among said vested rights is the right to carry on a medical college, and the right to grant diplomas to, and confer the degree of doctors of medicine upon, its regular graduates, and the right to enter into various contracts necessary and proper for such purposes; which said relator has done. That said law of February, 1896 (92 Ohio Laws, 44, Rev. Stat. § 4403c), under which said board was organized, required a graduate of medicine or surgery, before practising either, to present his diploma to said board 'for verification.' That said law further provided: 'Accompanying such diploma the applicant shall file his affidavit, duly attested, stating that the applicant is the person named in the diploma and is the lawful possessor of the same, and giving his age and the time spent in the study of medicine. If the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing, as determined by the board, and the person named therein be the person holding and presenting the same, the board shall issue its certificate to that effect, signed by its president and secretary.' That the provision of said law, 'in good standing as determined by the board,' gives to said board an unlimited power and discretion by adverse action to render totally useless and valueless the valuable franchises granted by the state to this relator, which impairs and destroys its vested rights aforesaid, imposes new and unreasonable burdens upon it, puts within the uncontrolled power of said board (without the right of appeal to this relator) its very existence, and is, therefore, in this particular, in conflict with § 28, art. 2, of the Constitution of Ohio, as being retroactive, and impairing the obligation of contracts; and in conflict with § 10, art. 1, of the Constitution of the United States, and also the 5th and 14th Amendments thereto, as impairing the obligation of contracts, and depriving the relator of its property without due process of law.

"(2) Plaintiff further says: That said law of February 27, 1896, recognized all schools of medicine then existing in this state, of which this relator was one, and

*Headnote by the COURT.

NOTE.—As to power of courts to review determination of board of medical commissioners as to standing of medical college, see Iowa Eclectic Medical College Asso. v. Schrader (Iowa) 20 L. R. A. 355, with *note* as to judicial power to review action of boards in respect to licenses of physicians, dentists, etc., generally, including mandamus to compel action thereby.

provided for their proportionate representation on said board; but that this relator was ignored in the formation of said board, because of the unreasonable antagonism and prejudice against it, as a new school of medicine, by the older school followers and graduates, who secured all the appointments thereon, as was arranged by them while the law was pending, and before its final passage. That this relator was organized, and has been conducted as, in effect, a new school of medicine, along progressive, modern, and logical lines of thought, involving, in brief, the treatment of diseases by the use primarily of strictly hygienic measures, and discouraging and minimizing the use of drugs, especially those of a poisonous character, although fully teaching in the regular way their uses and abuses; and in this it was and is the only school of its kind in Ohio, and has received at the hands of other schools and their graduates and adherents the usual unfair, one-sided, and sometimes malicious treatment accorded a new school by those that are older, and established upon different lines of thought and practice. That the members of said board are adherents and graduates of other schools of medicine, and are not free from the prevailing prejudice existing among them against this relator as a new school, and that the president of said board has been especially hostile, illiberal, and arbitrary towards this relator, without cause therefor. That the first session of this relator commenced on the 4th day of January, 1894, and that regular sessions have been held each year since up to the time of the first adverse action of said board hereinafter set forth, and since then in all classes having students in attendance. That in length of sessions, number of years for graduation, curriculum, equipment, entrance qualifications, final examinations, recommendation of faculty to graduate, and in all other essential matters connected with the conduct of a medical college, this relator has always conformed to the law, the practice of reputable medical colleges in Ohio, and the suggestions of the American Association of Medical Colleges of the United States. That its students have been fully and carefully prepared and instructed in all the branches of medical study, by able and competent professors and teachers, with facilities ample for that purpose, and have been given diplomas only when thoroughly qualified for the responsible duties of doctors of medicine; and that this relator is now, and since its first incorporation has been, 'a legally chartered medical institution in good standing' in this state. That said board, in 1896, adopted resolutions defining what medical colleges must teach in order that they might be recognized by the board as 'in good standing,' and that this relator has at all times taught its students all and more than the terms of said resolutions expressed, and in every respect has not been deficient thereunder. That full information of the work and purposes of this relator has been from time to time furnished said board, and that nothing has been misrepresented or concealed. That since 1896 the faculty of the relator has been composed of reputable physicians, in active practice, duly registered by said board, except as to a small minority thereof, who resided in Kentucky and Indiana, who were reputable, in full practice, and registered in their respective states. That the board of trustees of the relator are well-known business men in Cincinnati, who have confidence, from actual experience, in the school of medicine adopted by the relator, as said defendants have been repeatedly informed. That said defendant board has never made a full, careful, and impartial investigation of this relator, has never, by committee or otherwise, attended any of its lectures, but has simply contented itself with a show of fairness to cover a tacitly predetermined adverse decision. That in the summer of 1896 said board examined under oath certain of the then faculty of this relator, whose testimony clearly affirmed its good character, and plainly described its policy as a school. That at about the same time said board appointed a committee of Cincinnati physicians, not on said board, to examine and report upon the equipment of this relator, and that said committee did examine the same, and reported the relator as well equipped for a small college. That this plaintiff is informed and believes the members of the board at the same time and at other times did covertly and secretly, without notice to or the knowledge of this relator, interview and examine other witnesses as to the character of this relator, who were prejudiced against it, thus depriving the relator of the opportunity to know and rebut the evidence against it. That after this hearing the board decided that this relator was not a 'legally chartered medical institution in good standing,' and so notified it, whereupon the relator requested said board to specify in what particulars it was deficient, which specifications the board declined to give. That said board has never given this relator a fair hearing with knowledge of what was claimed against it, nor an opportunity to hear, know, and rebut evidence adverse to it; nor has said board ever advised the relator of its objections, and given an opportunity to fairly hear and overcome the same. That three (3) members of the board, in 1896, being the president thereof and the two (2) members from Cincinnati, were connected with and interested in competing medical colleges, and endeavored to prevent, and have prevented, physicians from accepting places on the faculty of the relator, and have discouraged and discountenanced those already serving in that capacity; and that three (3) members of said board are a controlling number thereof, under the terms of said law making the concurrence of five (5) out of the seven (7) members thereof necessary for legal action. That in July, 1898, the relator filed an application with said board for a reversal of its previous action, and recognition of the relator as 'in good standing,' and at the same time four (4) of its five (5) graduates of 1898 filed in due form of law, with said

board, applications for certificates to practise medicine; and pending these various applications the trustees and faculty of the relator presented to said board a statement in writing of its proper conduct in the past, and a pledge of its future adherence to reputable methods and work. That said board filed said application, and, seeking to harass, vex, and delay, and thus destroy the relator, inspired a suit in quo warranto in this court (No. 6,199) against the relator, without probable cause, and with malice, to oust it from its franchises, which suit was promptly dismissed on hearing. That in July, 1899, after a full year of unnecessary and vexatious delays, the relator meantime urging fair hearing and action, said applications were rejected on the sole ground that the board had found that the relator was not 'a legally chartered medical institution in good standing,' and again no specifications were furnished against the relator, nor any fair and impartial hearing had thereon, although often requested; and that in the various particulars aforesaid said board has acted in gross abuse of the discretion vested in it by the law of its creation. That the turning down of this relator by said board was given by it to the public press, and heralded to the world, and resulted in crippling and practically destroying the business of the relator since 1896. That only five (5) persons have graduated and received diplomas since 1896, being those of 1898 aforesaid; and that others who had matriculated have dropped out by reason of the action of said board aforesaid, so that only two (2) of its many students now remain with the relator. That some years since 1896 have been entirely without a class and the growing classes and patronage with which it was favored up to 1896 have been swept away by the adverse actions of said board, to the damage of this relator in the sum of $25,000. Wherefore plaintiff prays a writ of mandamus requiring said board to recognize the relator as a 'legally chartered medical institution in good standing,' and to issue its certificates to the holders of diplomas from this relator who may apply to it in proper form of law, and that this relator may recover damages in the sum of $25,000, and costs."

The defendants have filed a general demurrer to the petition, upon which the cause is submitted to the court for final disposition.

Mr. **R. E. Westfall,** with *Mr.* **F. S. Monnett,** Attorney General, for defendant in support of demurrer:

The degree of interest shown by the applications to be in the plaintiff is not sufficient to make it a proper party plaintiff.

State ex rel. Meyer v. *Henderson*, 38 Ohio St. 644; *State ex rel. Oshkosh Bd. of Edu.* v. *Haben*, 22 Wis. 660; *Stoddard* v. *Benton*, 6 Colo. 508.

A sweeping order covering future or present graduates of the Hygea College should not be made by this court on the application of the college, but each applicant must be required to prosecute his own claim to a certificate by a separate writ.

14 Am. & Eng. Enc. Law, p. 19.

The Ohio State Board of Medical Registration and Examination is invested with discretionary, deliberative, and quasi-judicial duties and powers.

Rev. Stat. §§ 4403*a*, *c*; *State ex rel. Atty. Gen.* v. *Hygeia Medical College*, 60 Ohio St. 122, 54 N. E. 86; *France* v. *State*, 57 Ohio St. 1, 47 N. E. 1041.

If such is the status of the board, and it is invested with such powers and duties, mandamus does not lie to control the exercise of its discretion and deliberations.

2 Spelling, Extraordinary Relief, ¶¶ 1384, 1394, 1433, 1459, 1467, 1476, 1481, 1519, 1556, 1577; Ohio Rev. Stat. § 6742; *Ex parte Black*, 1 Ohio St. 30; *State ex rel. Whitman* v. *Chase*, 5 Ohio St. 526; *State ex rel. Fornoff* v. *Nash*, 23 Ohio St. 568; *Lake County* v. *Ashtabula County*, 24 Ohio St. 401; *State ex rel. Geering* v. *Henry County*, 31 Ohio St. 211; *Rutter* v. *State*, 38 Ohio St. 496; *State* v. *Crites*, 48 Ohio St. 460, 28 N. E. 176; *State ex rel. Emerson* v. *Hamilton County*, 49 Ohio St. 301, 30 N. E. 785; *State ex rel. Granville* v. *Gregory*, 83 Mo. 123, 53 Am. Rep. 565; *State ex rel. State Journal Co.* v. *McGrath*, 91 Mo. 386, 3 S. W. 846.

Simply to say in a petition that the officer abused his discretion is merely to apply an epithet without defining the act.

Merrill, Mandamus, § 41.

The action of an officer in a matter which calls for the exercise of his discretion or judgment will not be reviewed by the writ of mandamus unless he has been guilty of a clear and wilful disregard of his duty.

State ex rel. Foreign Ins. Co. v. *Benton*, 25 Neb. 834, 41 N. W. 793; *Davis* v. *York County*, 63 Me. 396; *Vincent* v. *Bowers*, 78 Mich. 315, 44 N. W. 276; *Hoxie* v. *Somerset County*, 25 Me. 333; Moses, Mandamus, 19.

The facts which go to constitute the duty, the omission to perform the duty, that the omission is without excuse, that the relator is clearly entitled to performance, that he will be prejudiced by its non-performance, and that he has no other adequate remedy, —must be pleaded distinctly and issuably.

High, Mandamus, ¶¶ 10, 12, 536, 537; *The King* v. *Bishop of Oxford*, 7 East, 345; *Illinois & Michigan Canal Trustees* v. *People ex rel. Hoes*, 12 Ill. 254; *McKenzie* v. *Ruth*, 22 Ohio St. 371; *People ex rel. Lorillard* v. *Westchester County*, 15 Barb. 607; 2 Kinkead, Code Pl. 2d ed. § 800.

Where the gravamen of an action is the defendant's failure to perform a duty, the declaration must allege the facts from which the legal liability results; and the pleading is bad in substance if the duty does not in all cases result from the facts stated in it.

Black v. *Auditor of State*, 26 Ark. 237; *People ex rel. Chamberlain* v. *Chicago*, 25 Ill. 483; *Potts* v. *State ex rel. Ogg*, 75 Ind. 336.

Mr. **A. M. Warner,** for relator, *contra:*

That the relator is "beneficially interested" in having the writ of mandamus finally issued in this case is too apparent for

successful dispute. Its business has been ruined by the acts of the defendant board in refusing it just recognition. It cannot get students. They will not matriculate with a college not recognized by the board. It cannot fulfil the purposes for which it was incorporated. Its life depends on proper recognition by said board, which has been arbitrarily withheld.

The court will review on mandamus discretionary acts when bad faith, fraud, or abuse of discretion is alleged.

State ex rel. Insurance Co. v. *Moore*, 42 Ohio St. 103; Merrill, Mandamus, § 40.

Per Curiam:

The two specific acts, performance of which the court is asked to require of the board of medical examinations, are: (1) The recognition, by the board, of the relator as a legally chartered medical institution in good standing; and (2) the issuance of certificates to practise medicine to holders of diplomas from the relator, who may hereafter make application to the board for that purpose. One of the grounds upon which this relief is sought is that the provision of § 4403c of the Revised Statutes, as amended February 27, 1896 (92 Ohio Laws, 4445), which confers on the state board the power to determine whether a diploma, presented for its action, is one issued by a legally chartered medical institution "in good standing," and, if determined not to be so, to refuse to the holder of the diploma a certificate to practise medicine, is in conflict with § 28 of article 2 of the Constitution of this state, and of § 10 of article 1 of the Federal Constitution, being, it is claimed, retroactive in its operation, and in impairment of the obligation of contracts; and also in conflict with the 14th article of Amendment to the Federal Constitution, in that it denies to parties due process of law. It would seem to be a sufficient answer to this ground of complaint that, if the statutory provision which confers on the state board the power to determine whether a medical institution whose diploma is presented for its action is void, as alleged, because repugnant to so many constitutional inhibitions, it would be highly improper for the court to compel the board to exercise that power by recognizing the relator as a medical institution of the character required by the statute. However, it was held in *France* v. *State*, 57 Ohio St. 1, 47 N. E. 1041, that the statute was not obnoxious to the constitutional provisions referred to.

The other ground on which the writ demanded is sought is, briefly stated, that the refusal of the medical board to recognize the relator as an institution of the required standard is purely arbitrary, and the result of prejudice because the system taught by it is new and different from that adopted by other medical colleges. This does not appear to be a sufficient ground for granting the writ at the relator's instance. The proper scope of a proceeding in mandamus against an official board is to command the performance of acts which the law has specifically enjoined upon it as a duty resulting from the office. Rev. Stat. § 6741. Unless the duty is so enjoined, the remedy is inappropriate. A careful examination of the statutes fails to discover any provision authorizing an application to the board by a medical institution to obtain official recognition of its good standing, or any provision requiring of the board any official action, in that behalf upon such an application. And such official action, not being enjoined by statute, cannot be required by writ of mandamus. Nor do we find any provision which makes it the duty of the board to determine in advance of an application for a certificate to practise medicine whether a person holds a diploma from a medical institution of the proper standing. It is only when a diploma is presented upon such application that the action of the board can be invoked. Whether, upon the refusal of the board to grant a certificate to an applicant, mandamus will lie on his relation, must depend upon the facts of each case. Such cases cannot be covered by a general order to grant certificates to the graduates of any particular college or institution, for, until an application is actually made by one who then shows himself entitled to a certificate, the duty of the board to grant it does not arise. And then, for a refusal to perform that duty, the remedy belongs to the applicant, as the party directly interested, and not to the college on whose diploma the application was made, and whose interest is only remotely affected. The statute does not define what shall constitute a medical institution "in good standing." Its language is that, "if the board shall find the diploma to be genuine, and from a legally chartered medical institution in good standing, as determined by the board," etc., thus leaving the standing of the institution whose diploma is presented by an applicant to be determined according to the best judgment of the board. It is unnecessary to inquire here whether there may be cases in which the courts would undertake to correct or control the judgment of the board on this question. It is clear that the standing of a medical college within the meaning of the statute is not to be determined alone from the course of study it has prescribed for graduation. The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession; and the board should not be required to recognize one that, from the brief period of its existence, or the novelty of its system of treatment, has not yet acquired such reputation, but might, in the judgment of the board, be considered as still in an experimental state. The statute has undoubtedly left much in this respect to the sound discretion of the members of the board, who, in passing upon the various applications presented to them, it must be assumed, will act as their official position requires,—fairly, impartially, and justly to all concerned.

Demurrer sustained, and petition dismissed.

OKLAHOMA SUPREME COURT.

UNION CENTRAL LIFE INSURANCE COMPANY, *Plff. in Err.*,
v.
Edward R. CHAMPLIN *et al.*

(.....Okla.....)

*1. **Any stipulation, agreement, or contract which forbids the debtor** from discharging his obligation by borrowing money, in whole or in part, except from the creditor, is subversive of the rights of the citizen, injurious to the general welfare of the public, and is therefore void on the high ground of public policy.

2. **Hence the provision or stipulation contained in the note** sued on in this action, to the effect that the right of the maker to make payment at any time is waived, providing the money tendered is borrowed in whole or in part elsewhere, is contrary to public policy, and is therefore void.

(July 6, 1901.)

ERROR to the District Court for Logan County to review a judgment in favor of plaintiffs in an action brought to compel the release and discharge of a note and mortgage. *Affirmed.*

Statement by **Hainer, J.:**

This was an action brought by Edward R. Champlin and Grace A. Staples against the Union Central Life Insurance Company, a corporation, to release and discharge a certain note and real-estate mortgage upon a certain tract of land in Logan county, Oklahoma, and to quiet the title thereto. On March 14, 1898, one Oscar R. Champlin conveyed by warranty deed a certain tract of land situated in Logan county to Edward R. Champlin and Grace A. Staples, defendants in error, plaintiffs in the court below. It appears from this deed that the defendants in error assumed and agreed to pay a certain note executed by said Oscar R. Champlin to the Union Central Life Insurance Company, plaintiff in error, and defendant in the court below, on the 1st day of March, 1898, a copy of which is as follows:

$350.00. Guthrie, Oklahoma Territory, March 1, 1898.

Ten years after date, for value received, we promise to pay to the order of the Union Central Life Insurance Company of Cincinnati, O., three hundred and fifty and no/100 ($350.00) dollars, at the home office of said company, in Cincinnati, Ohio, with interest at the rate of ten per centum per annum from date until maturity, and twelve per centum per annum after maturity, until paid, payable annually on November first of each year, excepting the last instalment, which shall be due and payable with the principal. If this note is sent to Guthrie National Bank, at Guthrie, Oklahoma Territory, or to any other bank, for collection, we agree to pay exchange and collection expenses, and this note shall not be deemed paid until the funds are actually transmitted to and received by payee. Interest coupons are hereto attached, representing the interest from date to maturity, which, with this principal note, are secured by a mortgage deed of even date herewith. If any instalment of interest is not paid at maturity, this principal note and all interest due thereon shall become due and payable at once, at the option of the holder of this note; notice of such option being hereby waived. This note is executed upon the condition that partial payments in any amount at any time after one year will be received at the home office of said company, in Cincinnati, Ohio, and that the interest will be rebated from the date of such payments, provided each matured interest note has been paid on or before maturity. This condition is waived, provided the maker's total indebtedness is not being reduced, or providing the money tendered is borrowed in whole or in part, elsewhere.

Oscar R. Champlin.

Postoffice address: ——.

To secure the payment of the said note the said Oscar R. Champlin executed to the Union Central Life Insurance Company a certain real-estate mortgage upon the land subsequently deeded to the defendants in error. On July 24, 1899, the defendants in error made a tender of the full amount due on the note and mortgage, together with the interest which had accrued from date to that time, to the plaintiff in error, which tender the said plaintiff in error refused to accept unless the defendants in error made an affidavit that the money which was tendered for such payment had not been borrowed in whole or in part elsewhere, which affidavit the defendants in error refused to make. This action was then brought to have said mortgage released and discharged of record, and defendants in error tendered in court the full amount of the indebtedness. To the petition of the plaintiffs the defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The court overruled the demurrer to the petition, and the defendant, having elected to stand upon said demurrer, declined to plead further, and judgment was entered in favor of the plaintiffs. From this judgment the defendant appeals.

Messrs. **J. C. Strang** and **Charles H. Woods,** for plaintiff in error:

Public policy is in its nature so uncertain,

*Headnotes by HAINER, J.

NOTE.—The validity of a stipulation in a note or mortgage, allowing payment at any time after a certain date, only if made with money that has not been borrowed from another creditor, seems to be a novel question. The decision that such stipulation is against public policy is believed to be one of first impression.

fluctuating, varying with the habits and fashions of the day, with the growth of commerce and usages of trade, that it is difficult to determine its limits with any degree of exactness.

Story, Confl. L. § 546; Greenhood, Pub. Pol. p. 2; *Metzger* v. *Cleveland*, 3 Ind. Law Mag. 50.

What is the public policy of a state or territory must be determined in each individual instance from the Constitution, laws, and judicial decisions of that state or territory, taken in connection with the circumstances surrounding the particular case.

United States v. *Trans-Missouri Freight Asso.* 24 L. R. A. 73, 19 U. S. App. 36, 58 Fed. 58; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497.

Any contract made by a competent party upon valuable consideration, when made freely and intelligently, is valid, unless it binds the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interests, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times.

Greenhood, Pub. Pol. p. 1.

The design to prejudice public interest must clearly appear, to warrant the court in denouncing a contract as void.

Richmond v. *Dubuque & S. C. R. Co.* 26 Iowa, 191; *Kellogg* v. *Larkin*, 3 Pinney, 123, 56 Am. Dec. 164; *Swann* v. *Swann*, 21 Fed. 299; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

Freedom of contract is as essential to unrestricted commerce as freedom of competition.

United States v. *Trans-Missouri Freight Asso.* 24 L. R. A. 73, 19 U. S. App. 36, 58 Fed. 58; *Curtis* v. *Gokey*, 68 N. Y. 300; *Swann* v. *Swann*, 21 Fed. 299; *Malli* v. *Willett*, 57 Iowa, 705, 11 N. W. 661.

Every contract which subserves the performance of duty may be rightfully made.

United States v. *Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747; *Richmond* v. *Dubuque & S. C. R. Co.* 26 Iowa, 191.

Agreements by those engaged in private business, owing no duty to the public, securing a monopoly to one, are not invalid.

Greenhood, Pub. Pol. Rule 555, p. 670, Rule 558, p. 676; *Sharp* v. *Whiteside*, 19 Fed. 156; *Ward* v. *Hogan*, 11 Abb. N. C. 478; *Gale* v. *Reed*, 8 East, 80; *Palmer* v. *Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Thornton* v. *Sherratt*, 8 Taunt. 529; *Brown* v. *Rounsavell*, 78 Ill. 589; *Erie R. Co.* v. *Union Locomotive & Exp. Co.* 35 N. J. L. 240; *Lenz* v. *Brown*, 41 Wis. 172; *Clark* v. *Crosby*, 37 Vt. 188; *Olmstead* v. *Distilling & Cattle Feeding Co.* 77 Fed. 265; *Taunton Copper Mfg. Co.* v. *Cook*, 24 Rep. 547; *Oakes* v. *Cattanuga Water Co.* 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; *Lightner* v. *Menzel*, 35 Cal. 452; *Chappel* v. *Brockway*, 21 Wend. 157.

This contract is not in restraint of trade; but if it were, not every contract which restrains trade is frowned upon by the courts.

Hedge v. *Lowe*, 47 Iowa, 137; *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 22 L. ed. 315; *Hodge* v. *Sloan*, 107 N. Y. 244, 17 N. E. 335; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 408, 32 L. ed. 984, 9 Sup. Ct. Rep. 553; *Ellerman* v. *Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; *Grasselli* v. *Lowden*, 11 Ohio St. 349; *Holmes* v. *Martin*, 10 Ga. 503; *Chappel* v. *Brockway*, 21 Wend. 157; *California Steam Nav. Co.* v. *Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Palmer* v. *Stebbins*, 3 Pick. 192, 15 Am. Dec. 204; *Manderville* v. *Harman*, 42 N. J. Eq. 185, 7 Atl. 38; *Angier* v. *Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Wallis* v. *Day*, 2 Mees. & W. 273; *Morris* v. *Colman*, 18 Ves. Jr. 437; *Lumley* v. *Wagner*, 13 Eng. Law & Eq. 252; *Van Marter* v. *Babcock*, 23 Barb. 633; *Schwalm* v. *Holmes*, 49 Cal. 665; *Roller* v. *Ott*, 14 Kan. 609; *Keith* v. *Herschberg Optical Co.* 48 Ark. 139, 2 S. W. 777; *Guerand* v. *Dandelet*, 32 Md. 561, 3 Am. Rep. 164; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490; *Turner* v. *Johnson*, 7 Dana, 435; *Whittaker* v. *Howe*, 3 Beav. 383; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351; *Curtis* v. *Gokey*, 68 N. Y. 300; *Crystal Ice Mfg. Co.* v. *San Antonio Brewing Asso.* 8 Tex. Civ. App. 1, 27 S. W. 210; *United States Chemical Co.* v. *Provident Chemical Co.* 64 Fed. 949; *Watertown Thermometer Co.* v. *Pool*, 51 Hun, 157, 4 N. Y. Supp. 861; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Carter* v. *Alling*, 43 Fed. 208; *Ferris* v. *American Brewing Co.* 155 Ind. 539, 52 L. R. A. 305, 58 N. E. 701; *Ainscorth* v. *Bentley*, 14 Week. Rep. 630; *Stiff* v. *Cassell*, 2 Jur. N. S. 348; *Ingram* v. *Stiff*, 5 Jur. N. S. 947; *Re Greene*, 52 Fed. 104.

Messrs. **Dale & Bierer** for defendants in error.

Hainer, J., delivered the opinion of the court:

The only question involved in this case is the validity of that provision of the note which provides that the right to make payment of said note at any time is waived if the money tendered is borrowed, in whole or in part, elsewhere. It is contended by the appellant that this provision in the note is a valid and binding agreement on the mortgagor, and that the court erred in holding said agreement to be void for being contrary to public policy. The record in this case shows that the debtor tendered to the creditor the full amount of the principal and interest that was due upon his obligation, and the sole objection made by the creditor for not receiving the amount tendered was because the debtor had refused to make an affidavit that he did not borrow the money, in whole or in part, elsewhere. We think it is clear that the creditor has no right to impose such a condition upon the debtor. It is sufficient if the debtor tendered the amount of money that was due. It is true that a creditor has a right to stipulate in a contract any particular kind of

money to discharge an indebtedness,—for instance, as gold coin of a certain weight and fineness; but he has no power to stipulate the source from whence the money is obtained to discharge the debt. It could not affect the rights of the creditor if the debtor borrowed the money elsewhere, unless it was intended by the creditor to compel the debtor to borrow from the creditor in the event he desired to discharge the debt. To uphold such an agreement would be equivalent to holding that the debtor must borrow from the creditor, and not elsewhere, if he desires to discharge the indebtedness before the loan matures. Mr. Story, in his work on Conflict of Laws (§ 546), after reviewing the authorities, deduces the following rule: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down: That whenever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." Mr. Greenhood, in his work on Public Policy [p. 2] says: "By 'public policy' is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense. The courts will never, therefore, recognize any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare." In 15 Am. & Eng. Enc. Law, 2d ed. p. 934, the rule is thus stated: "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract, and not its actual result." The principle deducible from the authorities is that any stipulation, agreement, or contract which forbids the debtor from discharging his obligation by borrowing money, in whole or in part, except from the creditor, is subversive of the rights of the individual, injurious to the public at large, and is therefore void on the high ground of public policy. We therefore hold that the stipulation in the note sued on in this action, which forbids the maker from discharging his obligation by tendering to the payee money which was borrowed, in whole or in part, elsewhere, is in clear contravention of public policy, and is therefore null and void.

For the reasons herein stated, *the judgment of the District Court is affirmed*, at the costs of the plaintiff in error.

All the Justices concur, except **Burford**, Ch. J., who presided in the court below, not sitting.

PENNSYLVANIA SUPREME COURT.

John H. GUILLE *et al.*, *Appts.*,
v.
George CAMPBELL *et al.*

(200 Pa. 119.)

A motion by a servant employed to drag bales of cotton from a sidewalk into a warehouse, as if to throw the iron hook furnished him to aid in the work at some boys playing upon the bales, but who are in no way interfering with the prosecution of his work, to frighten them away, does not fairly tend to effectuate the discharge of his duty so as to render his master liable for an injury to a bystander caused by the slipping of the hook from his hand.

(July 17, 1901.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of defendants in an action brought to recover damages for personal injuries to plaintiffs' son, which were alleged to have been caused by negligence for which defendants were responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Samuel M. Clement, Jr.,** and **P. F. Rothermel, Jr.,** for appellants.

Messrs. **James Wilson Bayard** and **Frank P. Prichard,** for appellees:

In order to recover, it must be shown that the act committed was within the scope of the servant's employment. Beyond the scope of his authority he is as much a stranger to

NOTE.—As to whether act causing injury to third person is within scope of servant's authority as test of master's liability, see, in this series, Ewing v. New York C. & H. R. R. Co. (N. Y.) 8 L. R. A. 224; Davis v. Houghtelin (Neb.) 14 L. R. A. 737; Stephenson v. Southern P. Co. (Cal.) 15 L. R. A. 475; Staples v. Schmid (R. I.) 19 L. R. A. 824; Farber v. Missouri P. R. Co. (Mo.) 20 L. R. A. 350; Ritchie v. Waller (Conn.) 27 L. R. A. 161, and *note*; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan (Ind.) 27 L. R. A. 840; Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) 28 L. R. A. 433; Western & A. R. Co. v. Volls (Ga.) 35 L. R. A. 655; Pierce v. North Carolina R. Co. (N. C.) 44 L. R. A. 316; Baltimore Consol. R. Co. v. Pierce (Md.) 45 L. R. A. 527; Nelson Business College Co. v. Lloyd (Ohio) 46 L. R. A. 314; and Galveston, H. & S. A. R. Co. v. Zantzinger (Tex.) 47 L. R. A. 282.

55 L. R. A.

his master as any third person, and his act not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. And if the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is his own.

14 Am. & Eng. Enc. Law, p. 804; 2 Thomp. Neg. p. 884.

Where the act complained of could not be regarded as fairly tending toward the performance of the servant's duties, the master is not liable.

Towanda Coal Co. v. *Heeman*, 86 Pa. 418; *Pittsburg, A. & M. Pass. R. Co.* v. *Donahue*, 70 Pa. 119; *Scanlon* v. *Suter*, 158 Pa. 275, 27 Atl. 963; *Rudgeair* v. *Reading Traction Co.* 180 Pa. 333, 36 Atl. 859; *M'Kenzie* v. *M'Leod*, 10 Bing. 385; *Lyons* v. *Martin*, 8 Ad. & El. 512; *Richards* v. *West Middlesex Waterworks Co.* L. R. 15 Q. B. Div. 660; *Walker* v. *Southeastern R. Co.* L. R. 5 C. P. 640; *Allen* v. *London & S. W. R. Co.* L. R. 6 Q. B. 65; *Higgins* v. *Chesapeake & D. Canal Co.* 3 Harr. (Del.) 411; *Mali* v. *Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Mulligan* v. *New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791, 29 N. E. 952; *Little Miami R. Co.* v. *Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 273; *Golden* v. *Newbrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Marion* v. *Chicago, R. I. & P. R. Co.* 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415; *Dolan* v. *Hubinger*, 109 Iowa, 408, 80 N. W. 514; *Georgia R. & Bkg. Co.* v. *Wood*, 94 Ga. 124, 21 S. E. 288.

Potter, J., delivered the opinion of the court:

Where an injury is caused by a servant in the use of means fairly adapted to accomplish the purpose of his employment, the master is responsible. This is true even though the act of the servant is wrongful or unauthorized. But, where the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed, the master is not liable. In the present case, Fitzgerald, the servant of the appellees, was employed to drag bales of cotton from the sidewalk into the warehouse. A short iron hook was given him for use in handling the bales. While coming out from the warehouse, Fitzgerald saw some boys playing on and around the bales. He made a motion as if to throw the hook at them, in order to frighten them. The hook slipped from his hand, and struck Alfred Guille in the eye, destroying the sight. This boy who was injured was not on the bales, but was standing on the sidewalk near by. There was no evidence that he was making any attempt to trespass upon the property of the appellees, or to interfere therewith in any manner. Neither does it appear that there was any malice upon the part of Fitzgerald; but, even if there was, the master would not be relieved of responsibility if the act was done in the line of duty for which the servant was employed. The test then is: First. What purpose did Fitzgerald intend to accomplish by the act which caused the injury? Second. Was this purpose a matter of his own, or was it part of his employment? The act causing the injury was the waving by Fitzgerald of the iron hook, and allowing it to slip from his hand. His purpose was manifestly to frighten the boys, and drive them away from the bales. But at the time it does not appear that any of the boys were in any way obstructing Fitzgerald, or interfering with him in the accomplishment of his work. The boy was struck with the iron hook which had been given to Fitzgerald to use in pulling the bales around, but this use of the hook in converting it into a missile was entirely foreign to that for which it was intended by the master in giving it to the servant. The accident occurred while Fitzgerald was walking from the warehouse out to the bales. But suppose, for the purpose of illustration, that Fitzgerald had been sent from the office to drag the bales at a point a few blocks distant, and while upon the way thither had met a crowd of boys upon the sidewalk, and had waved the hook at them to clear a passageway for himself. If, under such circumstances, the hook had slipped from his hands, striking a boy standing at one side, surely it would not be contended that his employer was responsible for that act. So here we are not able to say that the act causing the injury was done in carrying out the duty to which the servant was assigned. His duty was simply to lay hold of the bales, and drag them, one by one, from the sidewalk into the warehouse. In performing this duty he used the hook to grapple more securely with the bale, and this was the only use for which it was intended, or for which it was supplied by the master. The request to drag the bales of cotton from the sidewalk cannot be held to imply authority to injure a boy standing on the sidewalk, looking on at the work. The act of violence by which the injury was occasioned was not done in execution of the authority given, but was quite beyond it, and must be regarded as the unauthorized act of the servant, for which he himself, and not the defendants, must be answerable. Whether his action was simply careless, or whether it was malicious, it was his own, and was not an incident to the authority granted. The facts of the case are undisputed. The deviation from the line of the servant's duty was, in this case, we think, sufficiently marked to justify the learned trial judge in determining as a matter of law that the servant was not doing the business of the master in the performance of the act causing the injury.

The assignments of error are all overruled, *and the judgment is affirmed.*

RHODE ISLAND SUPREME COURT.

Clarence T. GARDNER
v.
PROVIDENCE TELEPHONE COMPANY.

(.....R. I.....)

A telephone company, although having a monopoly of the business in a particular city, may deprive a customer of service upon his refusal to discontinue the use, in connection with its wires on his premises, of extension instruments not furnished by it, where it is able and willing to furnish such instruments as efficient and convenient as the state of the art affords, upon reasonable terms.

(Stiness, Ch. J., dissents.)

(July 26, 1901.)

SUIT to restrain defendant from depriving complainant of telephone service at his residence and office. *Injunction refused.*

The facts are stated in the opinion.

Messrs. **Comstock & Gardner,** for complainant:

The defendant corporation, being a legal monopoly using for the purposes of its business the public streets and highways, is subject to the obligation of furnishing its facilities to every person who offers to pay the regular charges therefor, and who complies with its reasonable regulations concerning the use thereof.

Croswell, Electricity, § 18; Joyce, Electric Law, § 275; *State ex rel. Baltimore & O. Teleg. Co.* v. *Bell Teleph. Co.* 23 Fed. 539; *State ex rel. Postal Teleg. Cable Co.* v. *Delaware & A. Teleg. & Teleph. Co.* 47 Fed. 633, 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677; *State, Duke, Prosecutor,* v. *Central New Jersey Teleph. Co.* 53 N. J. L. 341, 11 L. R. A. 664, 21 Atl. 460.

The fact that a telephone company does not own the instruments which it furnishes to its subscribers, but is licensed to use them by another corporation which does own them and the patents under which they are operated, and that the contract between the owner and the licensee limits the use of such instruments, cannot be set up by the telephone company, if such limitation violates the rules of law.

State ex rel. Postal Teleg. Cable Co. v. *Delaware & A. Teleg. & Teleph. Co.* 47 Fed. 633, 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677; *State, Duke, Prosecutor,* v. *Central New Jersey Teleph. Co.* 53 N. J. L. 341, 11 L. R. A. 664, 21 Atl. 640; *Chesapeake & P. Teleph. Co.* v. *Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; *State ex rel. American U. Teleg. Co.* v. *Bell Teleph. Co.* 36 Ohio St. 296, 38 Am. Rep. 583; *Commercial U. Teleg. Co.* v. *New England Teleph. & Teleg. Co.* 61 Vt. 241, 5 L. R. A. 161, 17 Atl. 1071.

The rules made by a public telephone company, obedience to which is made a condition of enjoying the facilities which it furnishes, must not only be uniform in their application, but must be reasonable in their character.

Atlantic & P. Teleg. Co. v. *Western U. Teleg. Co.* 4 Daly, 527; *Central U. Teleph. Co.* v. *Scoveland,* 14 Ind. App. 341, 42 N. E. 1035; Joyce, Electric Law, § 727.

The rule in question, which forbids any subscriber to use, in connection with the telephone instrument placed on his premises by the telephone company, any other telephone instrument not furnished by the telephone company, is not a reasonable rule.

Mr. **Dexter B. Potter,** with *Mr.* **David S. Baker,** for respondent:

After a telephone system is established; after its electrical engineers have constructed and adjusted its delicate mechanism; after rates have been established upon the basis of the care of one instrument to each subscriber,—the subscribers cannot add as many more as they please.

Lake Shore & M. S. R. Co. v. *Smith,* 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *People's Teleph. & Teleg. Co.* v. *East Tennessee Teleph. Co.* 43 C. C. A. 185, 103 Fed. 212.

The companies have a right to the control and management of their properties.

Oregon Short Line & U. N. R. Co. v. *Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *People* v. *Jackson & M. Pl. Road Co.* 9 Mich. 285; *Com.* v. *Pennsylvania Canal Co.* 66 Pa. 41, 5 Am. Rep. 329; *People ex rel. Cairo Teleph. Co.* v. *Western U. Teleg. Co.* 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731; *Pittsburgh, C. & St. L. R. Co.* v. *Morton,* 61 Ind. 539, 28 Am. Rep. 682; *Grinnell* v. *Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Express Cases,* 117 U. S. 1, *sub nom. Memphis & L. R. R. Co.* v. *Southern Exp. Co.* 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Kirby* v. *Western U. Teleg. Co.* 7 S. D. 623, 30 L. R. A. 621, 623, 65 N. W. 37; *Denver & N. O. R. Co.* v. *Atchison, T. & S. F. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 400.

Douglas, J., delivered the opinion of the court:

There is little, if any, dispute as to the facts of this case, which are set forth by the complainant as follows: "This is a bill in equity brought by Clarence T. Gardner, of the city of Providence, against the Providence Telephone Company, a corporation engaged in the business of renting telephone instruments and affording means of communication by electric telephones in Providence and elsewhere, in the state of Rhode

NOTE.—For some cases in this series as to right to shut off supply of water or gas to compel payment of arrears in rents, see *note* to Tacoma Hotel Co. v. Tacoma Light & Water Co. (Wash.) 14 L. R. A. 669; also Wood v. Auburn (Me.) 29 L. R. A. 376.

Island, to restrain said corporation from depriving him of telephone service at his residence and office. The bill sets forth the business of the respondent corporation, and that for the purpose of said business it is authorized by its charter to use, and does use, the public streets and highways; that it rents telephones to its customers, which are connected with a central exchange, and that by means thereof such customers or subscribers are enabled to communicate with the defendant's other subscribers and also with persons in other cities; and that the respondent is the only person or corporation which can legally carry on such business in said city of Providence; that the plaintiff is now and has been for many years a customer of the defendant, renting a telephone instrument both at his office and residence; that he has paid all rentals demanded by the defendant, and has used his telephone properly and in accordance with all reasonable rules and regulations of the defendant, and is willing to pay such rentals and comply with such rules; that he is a physician in active practice both in Providence and throughout the state; that a large proportion of the calls for his services as a physician are received over the telephone, and that deprivation of telephone service would be detrimental to his practice; that the defendant on the 23d day of February, 1897, notified the plaintiff that it would at the expiration of one month from the date of said notice cut off his telephone service, refuse to answer his calls, and refuse to connect him with other subscribers. The bill, as heretofore stated, prays that the defendant may be enjoined from taking such action. The answer of the defendant admits that it is a corporation carrying on the business described in the bill, that it uses for the purposes of such business the public streets and highways, and that it is the only person or corporation which can legally carry on such business in the city of Providence. It admits that the plaintiff is one of its customers, and has paid all charges made against him for telephone service. The answer denies that the plaintiff has used his telephone properly and has complied with all reasonable rules and regulations of the defendant, and alleges that he has violated a regulation of the defendant which provides that no telephone or telephonic instrument shall be used by any customer except such as may be furnished by the company; that the defendant itself furnishes extension sets, so called, as a valuable part of its business; that such extension sets consist of a second telephone and transmitter, connected by wire with the original telephone and transmitter placed in the subscriber's premises, the second set being in another part of such premises; and that the plaintiff, in violation of such rule (claimed by the defendant to be reasonable), has installed both in his office and his residence an extension set not furnished by the defendant. The answer admits that by reason of this alleged violation of a regulation of the defendant the defendant did threaten to deprive the plaintiff of telephone service, and would have done so had not this bill been filed, and claims that it has the legal and equitable right so to do. The answer also contains an extended argument as to the reasonableness of this regulation forbidding the use of private extension sets, based upon the following claims, to wit: (1) That it has expended large sums of money in license fees paid to a parent company for certain portions of its apparatus, in constructing poles and underground lines, in putting up wires and cables, and for other purposes, and that the furnishing of extension sets is a valuable and legitimate part of its business, by means of which, in part, it receives a return for these expenditures; that it is willing to furnish such extension sets to all its customers; and that the use of private extension sets is a destruction of its legitimate income and vested rights. (2) That, by attaching the wires connecting his private extension set (called by the defendant a 'clandestine instrument') to the wires placed by the company on the customer's premises, the subscriber or customer trespasses upon the company's property. (3) That the wires of the extension sets are hidden from view of the company's inspectors to avoid detection, and the company's property is endangered by the possible presence of strong currents coming over such wires, and the company is made liable for the destruction thereby of other property and injury to persons. (4) The answer does not allege, but much testimony has been introduced in the attempt to show, that the use by a subscriber of a private extension set is liable to interfere with the working of the company's system. The testimony shows that the plaintiff is a physician with a large practice in Providence and vicinity; that in 1879 or 1880 he had put in both at his office and at his residence a telephone instrument furnished by the defendant company, and connected with its exchange. These were grounded-circuit instruments; that is, they were connected with the defendant's exchange by a single wire, the current returning through the ground. These telephones are on a private line; that is, there are no other subscribers having instruments connected with the wire which connects the plaintiff's office and residence with the defendant's exchange. The instruments furnished by the defendant are of the Blake transmitter type, so called, consisting of a board about 20 inches in length, to which is attached the transmitter, a box with a pressed carbon attached to a spring, and a bell, and also, beneath, a large box containing a battery, all these being attached to the wall of the subscriber's premises. At the plaintiff's office this instrument is attached to the wall about 20 feet from the plaintiff's desk. At his residence it was placed on the wall of his bedroom. For the use of these instruments the plaintiff has paid and now pays to the defendant the sum of $32 per annum. About the year 1896 the plaintiff purchased two extension

instruments, and paid for them $50 each. These he connected with the defendant's wires inside the complainant's premises at office and residence. The one at the office is placed upon the plaintiff's desk; that at the house, in his lower hall. These instruments are of what is called the 'long-distance type,' consisting of a shaft placed upon a standard with a switch on which hangs a watch-case receiver, a granular carbon transmitter, and a platinum diaphragm not differing materially, except in superior lightness and elegance of construction, from the long-distance extension instruments chiefly used by the defendant. The plaintiff testifies that by use of these instruments the convenience and effectiveness of his telephone service has been greatly increased, and that he has had less occasion than ever before to call upon the defendant to remedy defects in the service. The defendant shows that there have been during the past five years some half dozen complaints of bad service at the plaintiff's office and residence, and that on some of these occasions the trouble has been traced to these extension instruments. These instruments, after five years' use, are in as good condition as when they were purchased. The same instruments for which the plaintiff paid $50 in 1896, or the very best type of long-distance extension instrument, as good and effective in every way as the instruments furnished by the company, can now be purchased outright for $12.50 at retail. There has been no attempt on the part of the plaintiff to conceal the use of these extension sets. The instruments and the wires connecting them are at all times in plain sight, and the attention of the defendant's agents has been called to them whenever they visited the plaintiff's premises. Up to 1896 or 1897 there were no extension sets except those manufactured by the Bell Telephone Company, and it was, of course, unnecessary to make any rules with reference to their use. Indeed, no rule with reference to their use has ever been promulgated. A prohibition against the use of such instrument was printed in the revised form of application and contract adopted by the defendant in 1896 or 1897, and subscribers who have attached such instruments were notified that the telephone company forbade their use, and were required to remove them. The question which thus arises for the decision of the court is whether a corporation having a monopoly of the telephone business in a community can deprive a subscriber of telephone service for the reason that he refuses to discontinue the use, in connection with the wires of the company on the subscriber's premises, of an extension set not furnished by the company."

The general principles of law upon which the complainant relies are well settled. The telephone company has rights granted by the city in pursuance of legislative authority to make certain uses of the highways of the city, and no other company has similar rights. By municipal action therefor, invoked by the defendant, the complainant is forced to deal with the defendant if he desires telephonic srvice. Undoubtedly it is a condition of such a grant that the grantee shall furnish to such of the public as desire it complete service of the kind in which it deals, with such appliances for use and convenience as the state of the art affords from time to time. And it cannot be disputed that the company may impose such reasonable rules for the use of its appliances as are required to insure efficiency and safety, and that no unreasonable rule or requirement can be enforced as a condition of furnishing equal service to the whole public. The service which a telephone company undertakes to render, and which it receives special privileges from the public that it may render, is analogous to that of a common carrier, and its obligations to the public are to be determined upon the same principles which have long been settled with reference to persons or corporations engaged in business which requires special public concessions. The general principle is laid down in *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77. The application to telephone companies is made in many cases. In *State ex rel. American U. Teleg. Co.* v. *Bell Teleph. Co.* 36 Ohio St. 296, 38 Am. Rep. 583, McIlvane, Ch. J., says: "It appears to us as a proposition too plain to admit of argument that, where the beneficial use of patented property or of any species of property requires public patronage and government aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the state may impose such conditions and regulations as in the judgment of the lawmaking power are necessary to promote the public good." In *State ex rel. Postal Teleg. Cable Co.* v. *Delaware & A. Teleg. & Teleph. Co.* 47 Fed. 633, 640, Wales, J., after commenting upon many decisions, says: "From the foregoing review of the law it follows that the respondent is a common carrier which has offered to the public the use of a telephonic system for the rapid conveyance of oral messages from one point to another; that one of the most important duties of a common carrier is that it shall serve all persons alike, impartially and without unreasonable discrimination," etc.; and the decision proceeds to declare a contract contrary to this duty to be void as against public policy. To the same effect as to the general relations of a telephone company to the public are *Atlantic & P. Teleg. Co.* v. *Western U. Teleg. Co.* 4 Daly, 527; *Chesapeake & P. Teleph. Co.* v. *Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; *State ex rel. Baltimore & O. Teleg. Co.* v. *Bell Teleph. Co.* 23 Fed. 539; *Delaware & A. Teleg. & Teleph. Co.* v. *State ex rel. Postal Teleg. Cable Co.* 2 C. C. A. 1, 3 U. S. App. 30, 50 Fed. 677; and other cases which assume the principles above stated as settled law, and discuss various applications of them.

The defendant does not argue against these general propositions of law, but insists that it is reasonable for it to claim the right to furnish and control the whole tele-

phonic plant on the premises of a subscriber which shall be connected with its lines. We cannot assent to all the reasoning of the defendant's counsel in support of this proposition. We are inclined to believe that his apprehension of danger from other electric conductors on the subscriber's premises is exaggerated. The fact that the company has submitted to a *modus vivendi* with the complainant since it first knew of his use of an extension set, which has continued the attachment till the present time without any serious accident, indicates that in this instance safety is not a controlling consideration. And we cannot agree that any slight modification by the subscriber of the use of the instrument placed in his house, as, *e. g.*, by the attachment of a funnel for magnifying the sound, would constitute a trespass on the property of the company, in the technical meaning of the word. Neither does it appear that the addition of an extension set to a customer's circuit increases the labor of the operator at the switchboard. So long as the subscriber is entitled to the use of the line as often as his business requires, and but one person can use the line at a time either through the main telephone or the extension set, there can be no more calls sent in than the rates already established have contemplated. Indeed, the saving of time to the central office by reason of the superior accessibility of the customer who has an extension set nearer than the telephone is an advantage to the company. But we do believe that the claim finds justification and support in the nature of the service and the agencies employed in it. The telephone circuit includes delicate instruments actuated by currents of electricity of feeble power. The introduction into a circuit of extension sets requires technical skill to secure perfect adaptation to the original circuit and its appliances. It seems plain to us that this should be the work of the same party which builds and operates the original circuit, and subject to the same routine of inspection. The original circuit and the additions to it should be a unit in construction, operation, and management. The circulation of the electric current by which the telephone is operated differs essentially from the distribution of illuminating gas, though both are supplied from a central source and used upon the premises of a customer. The gas which is supplied through a meter is forever after beyond any control of the producer. No use that the customer makes of it can react so as to affect the company or its distributing system. Whether a cubic foot of gas is used for light by means of one burner or another, or for heating by one system of stove or furnace or another, can make no possible difference to the manufacturer, and hence it would be unreasonable for a gas company to insist upon supplying stoves or burners, or to dictate in what position on the premises the gas should be finally consumed. An electric current, on the contrary, does not terminate in, but passes through, the customer's premises. The circuit must be complete, either wholly along a metallic conductor, or partly through the earth. The current while passing from as well as to the premises of the customer exerts its natural influence upon conductors and resistances which it encounters. Any resistance or interruption affects or is liable to affect the whole system. Any appliance introduced anywhere to modify the action of the current may produce results at any other point in the circuit. When the telephone is in use the subscriber's circuit is conected with that which includes his correspondent, and in practice may be connected with one circuit after another throughout the whole system. A company, therefore, furnishing the use of an electric current generated by its own apparatus may reasonably require that it shall not be diverted over other channels, and used to actuate other appliances with which the company is not familiar, and which have not received its approval. Now, the best adaptation of an extension set to the system to which it is added, and the best supervision of such a set and system, and the best service to a customer, may reasonably be expected when the whole system and its extensions are installed and controlled by the company. It is therefore reasonable that the company should insist upon the right to furnish extension sets when they are desired, or in the alternative refuse to give or continue its service. In the words of the supreme court of Illinois in *People ex rel. Cairo Teleph. Co.* v. *Western U. Teleg. Co.* 166 Ill. 15, 36 L. R. A. 637, 46 N. E. 731, it "has a right to choose its own agencies for the performance of its duties." But this right is contingent and not absolute. It is subject to the obligation we have alluded to above, viz. that the company shall be able and willing to furnish extension sets as efficient and convenient as the state of the art affords. It is the duty of the company to keep abreast of the march of improvement, so as to serve its customers as conveniently as they can provide for themselves from the market. Such improvements and extensions as are offered must not be accompanied with extortionate demands for compensation, so as to render the offer nugatory. The price charged for the extra accommodation must bear some proportion to the actual cost of it, and the additional burden of care and maintenance. While the court exercises no supervision over the prices fixed by a telephone company generally, it must consider the amount charged for the performance of a duty to a customer, in deciding upon the reasonableness in any particular case of requiring the customer to seek such service exclusively of the company. So long as the company observes these equitable principles in acting under its rule, the court will consider its action reasonable and will sustain it. If, however, the company neglects its duty to the public, and is not provided with the means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them, except at exorbitant rates, we cannot question

the right of the customer to supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation. We think, however, that before a customer is justified in such an invasion of the prima facie rights of the company he must apply to the company to furnish the additional accommodation desired, and if the company refuses or couples its consent with unreasonable conditions he must be prepared to show affirmatively that the appliance which he annexes to the company's system is not injurious to the system or its operation before he can have the assistance of a court of equity to compel the company to include his device in their service. The complainant does not bring himself within these limitations. He began by annexing to the defendant's circuit an apparatus of his own selection, without first requesting the company to furnish him with an extension set, or asking their terms for such extension of their service. In regard to the set which he uses he has not made it clear that it is suitable for use with the grounded circuit which he hires of the company. The company itself does not use this apparatus in connection with grounded circuits. It is plain that the complainant has no right to insist upon a particular form of apparatus if the company are ready to furnish one which will substantially accomplish the same purpose, and which is adapted to the circuit they operate. It does not appear from any evidence in the case that they have not been, and are not now, ready and willing to do this for a reasonable compensation. On the contrary, they say they are willing and offer to do so.

In these circumstances, *an injunction must be refused.*

Stiness, Ch. J., dissenting:

Agreeing with the general statements of law in the foregoing opinion, I am unable to agree with its conclusion, which, to my mind, is inconsistent with it. Having said that the defendant's proposition, that it should have the right to furnish and control the whole telephonic plant on the premises of a subscriber, cannot be assented to in full, and, further, that "such improvements as are offered must not be accompanied with extortionate demands for compensation, so as to render the offer nugatory," and that "if, however, the company neglects its duty to the public, and is not provided with means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them, except at exorbitant rates, we cannot question the right of the customer to supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation," the logical result from the facts in this case is a decree for the complainant.

55 L. R. A.

The opinion asserts the right of a subscriber to supplement the service of the company under two conditions, both of which appear in this case. First. If the company demands exorbitant rates. The complainant now receives satisfactory service for $82 per year, and the company demands $220 for the same service. The extension instrument costs $12.50 at retail, and the company charges $18 per year for the use of it,—at least 150 per cent of its cost. The additional charge is made for a metallic circuit, which is neither shown to be necessary nor of advantage to the subscriber or to the company, except in the matter of income to the company. Under these circumstances, the company's demand is manifestly exorbitant. Second. No detriment to the company is shown by the complainant's use of the extension set, either in its demand upon service or in safety. On the contrary, the opinion is in favor of the complainant on both of these grounds. I am therefore unable to see any sufficient reason for refusing the complainant's prayer for an injunction.

A petition for rehearing having been filed, the following **Per Curiam** response was handed down on September 20, 1901:

The evidence shows, as stated by the complainant, that the defendant refuses to furnish a long-distance extension set in connection with a grounded telephone circuit. The evidence does not convince a majority of the court that such a combination can be made generally without impairment of the service. The uniform practice of the company is against this contention. The company offers to annex to the complainant's grounded circuit, for a reasonable price, such an extension set as is appropriate for the circuit, and which, it contends, will give satisfactory service. This is all that the complainant can demand. He is in default in not requesting the company to provide what it says it is willing to give him, and in insisting on the exact form of apparatus which he has installed. It is for the company, not for the subscriber, to determine the type of apparatus it shall use; and there is no evidence that the type it offers is inadequate. These points were fully considered by the court upon the former hearing, as a careful examination of the opinion will show. It may further be observed that in this case there is no evidence that the defendant's charge for a metallic circuit combined with a long-distance set is exorbitant. The well-known superiority of a metallic circuit to a grounded one in all essential features, and the greater cost of construction, make it reasonable to charge more for the use of the metallic circuit than for the other. The question of price is not strictly before the court, for the complainant does not desire this kind of service, and the defendant will not tolerate the combination which the complainant has made, at any price.

The motion for reargument is denied.

Patrick GORMAN, as Next of Kin of Patrick Gorman, Jr., Deceased,

v.

Robert E. BUDLONG.

(.....R. I.....)

A child has no right of action for injuries to its mother which cause its premature birth, so that in case death results a cause of action will survive under a statute giving a right of action for wrongful death caused by negligence, where it is such as would, had death not resulted, have entitled the person injured to maintain an action.

(July 9, 1901.)

ON DEMURRER by defendant to a declaration filed to recover damages for the alleged negligent killing of plaintiff's intestate. *Sustained.*

The facts are stated in the opinion.

Mr. **Frederick A. Jones,** for defendant, in support of demurrer:

Plaintiff's intestate could not have maintained an action for damages against the defendant had he survived.

An action for damages does not lie for injuries received while *en ventre sa mère.*

Dietrich v. *Northampton,* 138 Mass. 14, 52 Am. Rep. 242; *Allaire* v. *St. Luke's Hospital,* 184 Ill. 359, 48 L. R. A. 225, 56 N. E. 638; *Walker* v. *Great Northern R. Co.* Ir. L. R. 28 C. L. 69.

As an unborn child is a part of its mother, any injury to it, inflicted before birth, can be recovered for by its mother.

Dietrich v. *Northampton,* 138 Mass. 14, 52 Am. Rep. 242.

The fiction of equity, of the civil and criminal law, and of ecclesiastical and admiralty courts, that an unborn child is *in esse* for certain purposes, has not been extended by the common law to civil actions.

Walker v. *Great Northern R. Co.* Ir. L. R. 28 C. L. 69; *Allaire* v. *St. Luke's Hospital,* 184 Ill. 359, 48 L. R. A. 225, 56 N. E. 638.

The alleged contract to repair did not include the plaintiff's intestate.

A contract to keep premises in a safe condition for persons *in esse* is an entirely different thing from keeping premises in a safe condition for an unborn child.

Walker v. *Great Northern R. Co.* Ir. L. R. 28 C. L. 69; *Hart* v. *Cole,* 156 Mass. 476, 16 L. R. A. 557, 31 N. E. 644.

The causes of premature birth are innumerable, and in many cases it occurs without any apparent cause. In the present case it would be necessary for the plaintiff to show the condition of the infant in its mother's womb prior to the accident, before it could satisfy the jury that the falling of the plaster was the proximate cause of the premature birth. This would be impossible.

Walker v. *Great Northern R. Co.* Ir. L. R. 28 C. L. 81; *Bannon* v. *Baltimore & O. R. Co.* 24 Md. 108; *Joliet* v. *Conway,* 119 Ill. 489, 10 N. E. 223; 1 Wharton, Ev. 2d ed. 441; American Text Book of Obstetrics, 272.

Children born dead, or who die as a result of premature birth, are considered as if they had never been born or conceived, and are not recognized as persons in equity, ecclesiastical, or admiralty courts. If not in these courts they certainly have no standing in common-law courts.

Dietrich v. *Northampton,* 138 Mass. 14, 52 Am. Rep. 242; *Marsellis* v. *Thalheimer,* 2 Paige, 35, 21 Am. Dec. 66; *Harper* v. *Archer,* 4 Smedes & M. 99, 43 Am. Dec. 472.

Mr. **Leonard W. Horton,** for plaintiff, *contra:*

The plaintiff's intestate could have maintained an action for damages against the defendant had he survived.

The child was born alive but prematurely, survived his birth three days, and then, on account of the premature birth, died.

If the negligence of a person is the proximate cause of an injury to a mother, which results in an injury to an unborn child which is so far advanced in pregnancy as to be capable of independent and separate existence from the mother, the mother being in the exercise of due care at the time of receiving the injury, then the child has a right of action against that person to recover damages for the injury inflicted upon it.

Com. v. *Parker,* 9 Met. 263, 43 Am. Dec. 396; *State* v. *Cooper,* 22 N. J. L. 52, 51 Am. Dec. 248; 1 Bl. Com. 129, 130; American Text Book of Obstetrics, ed. 1895, p. 925; 2 Witthaus & B. Med. Jurisp. 1894, pp. 378 *et seq.*; *Thellusson* v. *Woodford,* 4 Ves. Jr. 227.

Life begins, in contemplation of law, as soon as the infant is able to stir in its mother's womb.

1 Bl. Com. 130.

A child *in utero* is considered as living for its own benefit, but not to a fixed period of time.

Blasson v. *Blasson,* 2 De G. J. & S. 665.

A child quick *in utero* is a person in being.

Phillips v. *Herron,* 55 Ohio St. 478, 45 N. E. 720; *Turley* v. *Turley,* 11 Ohio St. 173; *McArthur* v. *Scott,* 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

When a woman is eight months advanced in pregnancy there are two lives,—the life of the mother and the life of the child, and, if two beings and two lives, each should have a cause of action for injuries inflicted upon it.

The mother, being still alive, cannot recover for her own death or for the death of a part of herself.

Thellusson v. *Woodford,* 4 Ves. Jr. 227; American Text Book of Obstetrics, ed. 1895, p. 925; 2 Witthaus & B. Med. Jurisp. 1894, pp. 378, 378 *et seq.*; *Allaire* v. *St. Luke's Hospital,* 184 Ill. 359, 48 L. R. A. 225, 56 N. E. 638.

An unborn child is *in esse* for many purposes in civil actions at common law.

Thellusson v. *Woodford,* 4 Ves. Jr. 334;

NOTE.—As to child's right to recover for injuries inflicted before birth, see, in this series, Allaire v. St. Luke's Hospital (Ill.) 48 L. R. A. 225

Doe ex dem. Clarke v. *Clarke*, 2 H. Bl. 399; *Scatterwood* v. *Edge*, 1 Salk. 229; *Trower* v. *Butts*, 1 Sim. & Stu. 181; *Wallis* v. *Hodson*, 2 Atk. 115; *Snow* v. *Tucker*, Sid. 153; *Millar* v. *Turner*, 1 Ves. Sr. 85; *Burnet* v. *Mann*, 1 Ves. Sr. 156; *Beale* v. *Beale*, 1 P. Wms. 244; *Burdet* v. *Hopegood*, 1 P. Wms. 486; *Clarke* v. *Blake*, 2 Bro. Ch. 320; *Crook* v. *Hill*, L. R. 3 Ch. Div. 773; *Gillespie* v. *Nabors*, 59 Ala. 441, 31 Am. Rep. 20; *Morrow* v. *Scott*, 7 Ga. 535; *Groce* v. *Rittenberry*, 14 Ga. 232; *Detrick* v. *Migatt*, 19 Ill. 146, 68 Am. Dec. 584; *McConnell* v. *Smith*, 23 Ill. 611; *Haskins* v. *Spiller*, 1 Dana, 170; *Crisfield* v. *Storr*, 36 Md. 129, 11 Am. Rep. 480; *Hall* v. *Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Harper* v. *Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Marsellis* v. *Thalheimer*, 2 Paige, 35, 21 Am. Dec. 66; *Jenkins* v. *Freyer*, 4 Paige, 47; *Hawley* v. *James*, 5 Paige, 318; *Mason* v. *Jones*, 2 Barb. 229; *Hone* v. *Van Schaick*, 3 Barb. Ch. 489; *Steadfast* v. *Nicoll*, 3 Johns. Cas. 18; *Picot* v. *Armistead*, 37 N. C. (2 Ired. Eq.) 226; *Hill* v. *Moore*, 5 N. C. (1 Murph.) 233; *Petway* v. *Powell*, 22 N. C. (2 Dev. & B. Eq.) 308; *Barker* v. *Pearce*, 30 Pa. 173, 72 Am. Dec. 691; *Laird's Appeal*, 85 Pa. 339; *Swift* v. *Duffield*, 5 Serg. & R. 38; *Pearson* v. *Carlton*, 18 S. C. 47; *Smart* v. *King*, Meigs, 149, 33 Am. Dec. 137.

A child quick *in utero* is a person in being, and if the plaintiff's intestate was a person in being, then it was a member of the plaintiff's family, and, if a member of the plaintiff's family, then entitled to the benefits of the contract between plaintiff and defendant, landlord and tenant.

Swords v. *Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Timlin* v. *Standard Oil Co.* 126 N. Y. 514, 27 N. E. 786; *Beck* v. *Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Learoyd* v. *Godfrey*, 138 Mass. 315,

Rogers, J., delivered the opinion of the court:

This case is before us upon demurrer to the plaintiff's declaration. It is an action of trespass on the case, for negligence, brought by the plaintiff, as father and next of kin of Patrick Gorman, Jr., and the facts, as alleged, are that the plaintiff was a tenant from week to week of a tenement of the defendant; that the plaster of the ceiling of the kitchen in said tenement became loose and liable to fall; that on or about November 15, 1900, and again on or about December 1, 1900, the plaintiff notified the defendant, his agents and servants, of the defective and dangerous condition of said ceiling; that in consideration that said plaintiff and the members of his family would continue in said tenement as his tenants, and in consideration that said plaintiff would and did continue to pay, or become liable to pay, the weekly rent for the same, as he had previously been accustomed to do, said defendant, his agents and servants, promised to have said tenement repaired and said ceiling replastered so as to make the same safe for said plaintiff and the members of his family to live in, and not subject him, them, or any of them, to great danger of serious injury, whereupon it became and was the duty of said defendant to make or cause to be made the repairs necessary to make said tenement safe for said plaintiff and the members of his family to live in, and not subject him, them, or any of them, to great danger of serious injury, and to put said tenement in a tenantable condition, yet said defendant, in violation of his said duty, wholly neglected to make said necessary repairs, and that thereafterwards, on, to wit, January 22, 1901, in consequence of said plaintiff's neglecting to make said necessary repairs, said ceiling fell upon Eliza Gorman, the plaintiff's wife, while she was engaged in her household duties and in the exercise of due and reasonable care and caution on her part, severely injuring and bruising her, and that, from and on account of the injuries and shock occasioned by said ceiling falling upon her, the said Eliza Gorman was caused to give birth to a child prematurely, which said child afterwards, on, to wit, January 25, 1901, on account of said premature birth, died; that on account of said premature birth of said child, and the weakness and illness resulting therefrom, said plaintiff was obliged to, and did, pay, lay out, and expend large sums of money, to wit, the sum of ——— dollars, for medical attendance and nursing and medicines in the proper care and treatment of said child; that on account of said death of said child, occasioned as aforesaid, said plaintiff was obliged to, and did, pay, lay out, and expend large sums of money, to wit, the sum of ——— dollars, in the burial of said child and other necessary funeral expenses, to the plaintiff's damage $5,000, etc. The action was brought to recover for the death of the child, under R. I. Gen. Laws, chap. 233, § 14, which is as follows, viz.: "Sec. 14. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. Every such action shall be brought by and in the name of the executor or administrator of such deceased person, whether appointed or qualified within or without the state, and the amount recovered in every such action shall one half thereof go to the husband or widow, and one half thereof to the children of the deceased, and if there be no children the whole shall go to the husband or widow, and if there be no husband or widow, to the next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate: provided that every such action shall be

commenced within two years after the death of such person. If there is no executor or administrator, or if, there being one, no action is brought in his name within six months after the death, one action may be brought in the names of all the beneficiaries, either by all, or by part stating that they sue for the benefit of all, and stating their respective relations to the deceased; provided, that if all do not bring such suit, only those bringing it shall be responsible for costs; but judgment shall be for the benefit of all, and shall be entered as several judgments for each in his proportion as aforesaid, and executions thereon shall issue in favor of each respectively; provided, further, that if such action shall be brought by the beneficiaries, no action shall thereafter be brought by the executor or administrator. There shall be but one bill of costs in favor of the plaintiffs' which shall inure equally for the benefit of those bringing the suit, and of them only." The defendant demurred to the declaration, which consists of one count only, on the following grounds, *viz.*: (1) That the plaintiff's intestate could not have maintained an action for damages against the defendant had he survived, and therefore the plaintiff in this case has no right of action against said defendant; (2) that said action is improperly brought under chapter 233, § 14, of the General Laws; (3) that said plaintiff's intestate, not being recognized by the law as a person capable of having a standing in court, cannot be represented by the plaintiff in this case; (4) that said plaintiff, who sues in his representative capacity as next of kin of Patrick Gorman, Jr., seeks to recover for money expended in his individual capacity.

Inasmuch as, to enable the plaintiff to recover, the act, neglect, or default must have been such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the question at once presenting itself is, Can one maintain an action for injuries received by him while in his mother's womb? The plaintiff has prepared an ingenious brief, and lays great stress upon the acts an unborn child can do, citing many authorities, and seeking by analogy to reach the conclusion to which he would have the court arrive. Unquestionably, an unborn child has many rights and privileges, but it matters not what rights and privileges it has if it had not the right, had it lived, to maintain an action for the injury alleged to have been suffered in this case. In *Walker* v. *Great Northern R. Co.* (decided in 1891) Ir. L. R. 28 C. L. 69, the plaintiff, an infant of a few months of age, brought an action for personal injuries against the defendant for injuries sustained by her while *en ventre sa mère*, whereby she was permanently crippled and deformed. The child's mother was a passenger on the defendant's railroad, and suffered injuries during her pregnancy, and brought action and recovered damages for her own injury. The infant plaintiff also brought suit, which is the one referred to. The case was learnedly argued and considered, and the judges delivered the opinions *seriatim*, and were unanimous that the action could not be maintained. The question, however, whether such an action could be maintained under any circumstances by an infant who was in its mother's womb at the time of the alleged injury, was discussed elaborately and with great learning both by court and counsel. O'Brien, Ch. J., after discussing the question, expressly declined to commit himself, leaving it, as far as he was concerned, "an open question." The other judges treated the matter in a broader and more comprehensive manner. Johnson, J., discussed the matter with great affluence of learning, and said, on page 84, *inter alia:* "As a matter of fact, when the act of negligence occurred the plaintiff was not *in esse*,—was not a person or a passenger or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action. Lord Coke says: 'Although *filius in utero matris est pars viscerum matris*, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth.' *Bedford's Case*, 7 *Coke*, 8*b*. This imputed existence *in esse* to an unborn child is a fiction of the civil law, which regards an unborn child as born for some (not for all) purposes connected with the acquisition and preservation of real or personal property. . . . Thus it would appear that according to this fiction an unborn child may in the civil law at the same moment be regarded as *in esse* and not *in esse;* for its own benefit *in esse*, to its prejudice not *in esse;* and, unless for the benefit of itself, not *in esse*. As the civil law prevailed in the ecclesiastical and admiralty courts, and also entered largely into the jurisprudence administered in the court of chancery, most of the authority by which an unborn child is for its own benefit regarded as born is to be found in the decisions of those courts." After referring to a number of authorities, he proceeds as follows (p. 87): "These authorities appear to me to show that the doctrine which regards an unborn child as born for its own benefit (which is the utmost limit of the doctrine) is a fiction adopted from the civil law by the courts of equity for some, but not for all, purposes, and far more seldom recognized in the courts of law. The present is and always was a common-law action for personal injuries caused by the negligence or breach of duty of the defendants, and it lies for the plaintiff to show what was this duty of the defendants towards the plaintiff, and how it arose. 'Negligence' and 'duty' are, respectively, relative, not absolute, terms. It is not contended that the duty arose out of contract. The contract was between the defendants and Mrs. Walker, and, so far as contract is concerned, it was to Mrs. Walker the defendants were liable for breach of it. If it did not spring out of contract, it must, I apprehend, have arisen (if at all) from the relative situation and circumstances of the defendants

and plaintiff at the time of the occurrence of the act of negligence. But at that time the plaintiff had no actual existence, was not a human being, and was not a passenger, —in fact, as Lord Coke says, the plaintiff was then *pars viscerum matris;* and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not *in esse* in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of that duty." As to analogies drawn from the criminal law, the learned judge says (p. 88): "Then it is contended that this action lies in analogy to the criminal law,—that if a child born alive afterwards dies of injuries received while *in utero*, this is murder in the person who inflicted them (1 Russell, Crimes, 5th ed. chap. 2, 646, note *e*); but I think that there is no true analogy between crime and tort in this case. Crimes are offenses against the public. They are those acts or attempts which tend to the prejudice of the whole community, and as a general rule the criminal intent and the act charged to be criminal must concur, to constitute a crime. Tort, on the other hand, is a private wrong sustained by some person or body of persons. The sanction of the one is punishment. The result of the other is compensation. . . . In early times the criminal law as to the infant *in utero*, just born alive, was far more stringent and severe, as stated by Bracton, than it is at present. . . . This may be accounted for on principles of public policy, by the stern severity of the criminal law in the supreme exigencies of public safety, where the offense is prosecuted by the Crown on behalf of the entire community, for the security of society, the preservation of infant life, and the Queen's peace, in order that (as Lord Coke says, 3 Inst. 50), 'so horrible a crime should not go unpunished.'" In *Dietrich* v. *Northampton* (decided in 1884), 138 Mass. 14, 52 Am. Rep. 242, the mother of the deceased slipped upon a defect in a highway of the defendant town, fell, and had had a verdict for her damages. At the time she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in fetal life to survive its premature birth. There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Administration was taken out and the administrator brought action, upon the Public Statutes of Massachusetts (chap. 52, § 17), for the further benefit of the mother, in part or in whole as next of kin. The court, speaking through Holmes, J., in delivering the opinion, says: "The court below ruled that the action could not be maintained, and we are of the opinion that the ruling was correct. . . . Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. . . . But no case, so far as we know, has ever decided that if the infant survived it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment." After considering various cases and arguments, the learned judge concludes as follows: "Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning, and have not found it necessary to consider the question of remoteness, or the effect of those cases which declare that the statute liability of towns for defects in highways is more narrowly restricted than the common-law liability for negligence." In *Allaire* v. *St. Luke's Hospital* (decided in 1900), 184 Ill. 359, 48 L. R. A. 225, 56 N. E. 638, the plaintiff, an infant of tender age, brought suit by his next friend against the defendant for injuries sustained while in the womb of his mother, alleged to have been caused by the negligence of the defendant in an elevator accident on February 2, 1896, whereby the mother was much injured and thereby the plaintiff was also greatly injured, so that when said plaintiff was born, on February 6, 1896, he was permanently crippled and deformed. The mother settled with the defendant for a valuable consideration, and in the suit brought by the plaintiff the defendant filed a general demurrer, which was sustained by the trial court. Upon an appeal to the appellate court of the first district, the judgment of the lower court was affirmed (reported in 76 Ill. App. 441), and from that judgment of affirmance an appeal was taken to the supreme court of the state. The opinion of the appellate court, which was adopted by the supreme court, concluded as follows: "The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."

The counsel for the plaintiff has called our attention to R. I. Gen. Laws, chap. 203, § 23, which provides that a child of a testator, born after his father's death, for whom no provision was made by his father by will or otherwise, shall take the same share of his father's estate that he would have been entitled to if his father had died intestate, and also to chapter 210, § 21, by which it is

provided that in proceedings in the probate court the interests of a person unborn may be represented by a guardian *ad litem* or next friend to be appointed by the court. These statute provisions, however, furnish no analogies for guidance in the case at bar, in our opinion; for a statute only governs the cases to which it was designed to apply, and if chapter 233, § 14, under which this action was brought, was intended to apply to injuries to unborn infants, such intention should have been expressed in its provisions. The statute in question is drawn from an English statute (Lord Campbell's act; 9 & 10 Vict. chap. 93, § 1), and the English common law is the foundation of our system of jurisprudence; and for those feeling there is a hardship in the principle of law as hereinbefore laid down, as an occasional dissenting judge has expressed himself as feeling, we borrow these words of Mr. Associate Justice O'Brien in *Walker* v. *Great Northern R. Co.* Ir. L. R. 28 C. L. 69, *viz.*: "We have to see whether the right claimed exists in the English legal system, or flows out of any admitted principles in that system. The law is in some respects a stream that gathers accretions with time from new relations and conditions. But it is also a landmark that forbids advance on defined rights and engagements; and, if these are to be altered,—if new rights and engagements are to be created,—that is the province of legislation, and not of decision."

In our opinion, one cannot maintain an action for injuries received by him while in his mother's womb; and consequently his next of kin, under the statute, after his death, cannot maintain an action therefor, and so the demurrer must be sustained on this ground. As sustaining the demurrer on this ground is conclusive against maintaining the action, it is unnecessary to consider what damages could have been obtained were the suit maintainable.

Demurrer sustained, and case remitted to the Common Pleas Division, with directions to enter judgment for the defendant for costs.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

SECURITY MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,
v.
WEBB *et al.*

(45 C. C. A. 648, 106 Fed. 808.)

1. **The refusal of an applicant for insurance to furnish a sample of urine** to the medical examiners after answering the required questions in the application blank, because of which the application is rejected, does not annul the negotiations so as to justify a statement in an application to another company that no proposal or application for insurance has ever been made upon which a policy has not been issued.

2. **A statement by an applicant for life insurance that no physician has ever given an unfavorable opinion** upon his life with reference to insurance cannot be held to be false because of a confidential communication from a medical examiner to the medical director, of which he had no knowledge, stating that he could not recommend applicant without further examination.

(March 11, 1901.)

NOTE.—*Forfeiture of life insurance by false representations with respect to previous applications for insurance.*

I. *Rule where the statement is a mere representation.*
  a. *Generally.*
  b. *Proof of materiality.*
II. *Rule as to statements made material by agreement.*
III. *Rule as to warranties.*
IV. *Construction with reference to distinction between representations and warranties.*
V. *Falsity which will work forfeiture.*
  a. *General rules.*
  b. *Omission to state all other insurance.*
  c. *Waiver by receipt of defective answer.*
  d. *Wrong answers by agent.*
  e. *What constitutes failure or refusal to issue.*
  f. *Effect of qualification as to knowledge or belief.*
VI. *Waiver of forfeiture.*
  a. *By acting with knowledge of falsity.*
  b. *Notice from taking previous application.*
  c. *Preparation to pay as a waiver.*
  d. *Attempted rescission on other grounds as waiver.*
VII. *Statutes prohibiting forfeiture for immaterial misrepresentations.*
VIII. *Application to mutual aid and benefit societies.*
IX. *Conclusion.*

I. *Rule where the statement is a mere representation.*

a. *Generally.*

The rule has been laid down by a number of the cases that insurance companies have the right to be truthfully informed whether an applicant for insurance has before applied for insurance and been rejected, and to know whether a medical examiner has declined to give a favorable opinion upon the application for insurance of the applicant, so that the person whose duty it is to act upon the subsequent application upon the part of the company may act intelligently. Ferris v. Home Life Assur. Co. 118 Mich. 485, 76 N. W. 1041; Wyman v. Fidelity Mut. Life Asso. 17 Pa. Co. Ct. 259.

And that a false answer in a written application for life insurance to a question as to whether any other company had declined to grant a policy on the applicant's life is a material misrepresentation which will avoid the policy. American Mut. Aid Soc. v. Bronger, 11 Ky. L. Rep. 902, Affirmed in 12 Ky. L. Rep. 284;

ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of life insurance. *Reversed.*

The facts are stated in the opinion.

Before *Caldwell*, *Sanborn*, and *Thayer*, Circuit Judges.

Messrs. **F. W. Jenkins** and **A. C. Phelps** for plaintiff in error.

Mr. **Granville I. Chittenden**, for defendants in error.

Thayer, Circuit Judge, delivered the opinion of the court:

This is an action upon a policy of life insurance dated June 18, 1897, which was issued by the Security Mutual Life Insurance Company, a New York corporation, the plaintiff in error, upon the life of Elias H. Webb, of Denver, Colorado, who was the father of the beneficiaries in whose behalf the action was instituted. The policy was for the sum of $10,000, and by its terms made the application therefor a part of the policy. The application which was thus made a part of the policy contained the statement that the insured warranted each and every statement and answer to the interrogatories therein contained to be "full complete, and true," and an agreement on the part of the insured that, "if any statement or answer made as aforesaid is not full and complete, or is untrue in any respect, then the policy of insurance issued hereon shall be null and void." In and by said application the insured further agreed that the answers and explanations given to the various questions propounded in the ap-

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Union Casualty & Surety Co. v. Bailey (Kan. App.) 61 Pac. 452; Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1084; Bernard v. United L. Ins. Asso. 11 Misc. 441, 32 N. Y. Supp. 223, Reversed on other grounds in 12 Misc. 10, 33 N. Y. Supp. 22; Scottish Equitable L. Ins. Co. v. Buist, 4 C. S. C. 4th Series, 1076.

Or at least the insurance company would prima facie not be liable on the policy. Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1084.

And the rule is the same when the representation was that he had not applied for restoration of a lapsed policy with that or any other company without having led to restoration. Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1084.

Other cases, however, seem to treat such statements, where they are merely representations and not warranties or agreed upon as being material, as not being necessarily so, but as being material or not according to the nature of the statement and the circumstances of the case, absolute truth not being required unless they are deemed material; and in such case the question of the knowledge of the applicant as to the falsity and his fraudulent intent in concealing the previous applications would seem to be of weight.

Thus, in Mutual Ben. L. Ins. Co. v. Wise, 34 Md. 583, it was held that a failure upon the part of an applicant for insurance in answer to a question, whether any company had declined to insure him and if so what company, when and for what reason, to disclose all the facts connected with an application made by him to another company and its return to him, does not alone entitle the defendant, in an action upon a policy issued upon such application, to a verdict. It should be left to the jury to find whether or not, upon all the evidence, the assured knew of the facts connected with such application and its return, and, knowing them, concealed them.

And New York L. Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742, holds that the rejection of a prayer to charge the jury in an action upon an insurance policy, that the plaintiff could not recover if they found a statement in the application that no proposal for insuring the applicant's life had been made at any other office and declined, and that the facts stated were material to be disclosed, and the statement was false, is not error, where previous prayers were granted which told the jury that if they should find his declarations in any material respect untrue he was not entitled to recover, and that if he had made a prior proposal to another company there could be no recovery.

So, in Semm v. Supreme Lodge K. of H. 29 Fed. 895, it was held that an applicant for insurance was under contract to answer the question in the application, "Have you been rejected by the medical examiner of any lodge or society?" according to his knowledge or reasonable means of belief, and not to misrepresent or suppress known facts, but that he does not warrant the absolute truth of his answers, the court basing its opinion upon the applicant's agreement in his printed application for membership; but the substance of that application does not appear in the case.

The position that such misrepresentations are not necessarily material, and are not, therefore, necessarily fatal to the policy, is also sustained by cases set forth *infra*, I. b, with reference to proof of materiality.

b. *Proof of materiality.*

The burden rests with the insurer, in an action on an insurance policy, to show the materiality of a concealment, by an applicant for life insurance, of other policies held by him, as well as a fraudulent intent in omitting such other policies from his answer to the question in the application, for the purpose of avoiding the policy. Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 414, 38 L. R. A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 653.

And an insurance company is not entitled to an instruction to the jury, in such an action, that the failure of the applicant for insurance to mention a policy held by him in another company, in answer to questions about other insurance in the application, raises the presumption that the omission was fraudulent. *Ibid.*

Questions, however, as to the materiality and good faith of answers to questions propounded in an application for insurance, as to previous applications for insurance and their result, and as to unfavorable opinions of physicians on the life of the applicant with reference to insurance, are not always to be left to the consideration of the jury, in an action on the policy. When such materiality is obvious, and the answers in the application are expressly made the basis of the contract, it is a matter for the court to pass upon; but when the materiality depends upon disputed facts, it should be determined by the jury. Fidelity Mut. Life Asso. v. Miller, 34 C. C. A. 211, 63 U. S. App. 717, 92 Fed. 63.

Whether such a misrepresentation is material

plication, including those propounded by the medical examiner, should form "the only basis of the agreement between" him and the defendant company, and that each and every statement and answer made by him in the agreement was "material to the risk." The defenses that were interposed by the defendant company which we deem it necessary to state were as follows: The application for the policy contained, among others, the following question: "Has any proposal or application to insure your life ever been made to any company, association, or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higehr rate than that applied for? If so, state full particulars, to what company or association, when, etc.?" This question was answered as follows: "No." He was further asked the following questions, and answered them as indicated:

Has any physician ever given an unfavorable opinion upon your life with reference to insurance?

A. No.

How long since were you attended by a physician or consulted one?"

A. Six months.

For what difficulty or disease?"

A. Slight attack of indigestion.

By three separate pleas it was alleged that the answers to the aforesaid questions were false, and that the policy, for that reason, was null and void.

Inasmuch as the trial court, after hearing all the evidence in support of the afore-

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is a question of fact if it depends upon inferences to be drawn from circumstances, but is a question of law when the facts are ascertained. American Mut. Aid Soc. v. Bronger, 12 Ky. L. Rep. 284.

And a defense in an action on a policy of life insurance, that the insured represented, in his written application for the policy, that he had never proposed and been declined insurance by any accident insurance company, and that this was not true, is eliminated from consideration on appeal from an order denying a new trial, where the verdict of the jury was against the insurance company, and the evidence bearing upon that defense was materially conflicting; and in such case the verdict cannot be disturbed on that ground. Bayley v. Employers' Liability Assur. Corp. 125 Cal. 345, 58 Pac. 7.

II. *Rule as to statements made material by agreement.*

Whether there is other insurance on the same person, or whether such insurance has been applied for and refused, are material facts, when statements regarding them are required by the insured as part of the basis of the contract. Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553.

And a statement in an application for insurance, by the applicant, that no company had declined to insure his life, the declaration providing that the answers of the assured and those of his physician and friend should be the basis of the contract between himself and the company, and if any untrue or fraudulent allegation should be contained in such answers or in the declaration all moneys which should have been paid to the company on account of the insurance made in consequence thereof should be forfeited to the company, though not a warranty, is a representation made material by the agreement of the parties, and its truth alone is open to the consideration of the jury in an action on the policy. Mutual Ben. L. Ins. Co. v. Wise, 34 Md. 582.

So, an agreement by the parties to a contract of insurance that a statement in the application, that the applicant had never applied to any other company or agent for insurance without receiving a policy of the exact kind and amount applied for, is true, and that its falsity, in any respect, should avoid the policy, removes the question of materiality from the consideration of the court and jury in an action on the policy, and the falsity of the statement will invalidate the policy without reference to its materiality. Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833.

And a declaration issued by an applicant for insurance upon the life of another to the same effect upon which a policy was issued containing a proviso that if the declaration delivered as the basis of the insurance is not in every respect true then the insurance shall be void, avoids the insurance, where it appears that the life of the insured had been proposed in two other offices, and had been declined by both, though the party procuring the insurance and making the declaration did not know that it was untrue. Macdonald v. Law Union Fire & Life Ins. Co. L. R. 9 Q. B. 328, 43 L. J. Q. B. N. S. 131, 30 L. T. N. S. 545, 22 Week. Rep. 530.

So, where, in a paper signed by an applicant for insurance, agreed to be the basis of the contract between the applicant and the insurance company, the applicant stated that insurance on his life had not been accepted or refused at any other office, and the answer was false, and the policy mentioned several other things which were warranted, but such answer was not included in the warranty; and it also contained a proviso that if anything so warranted shall not be true, or if any circumstance material to the insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting of the insurance, the policy shall be void,—the substance of the stipulation is that if the applicant does not answer these questions accurately the policy will be void, and it should not be left to the jury to say whether the statement was material as well as false, since, such answer being a part of the contract, its truth, and not its materiality, is the question. Anderson v. Fitzgerald, 4 H. L. Cas. 484, 17 Jur. 995.

And where a member of a beneficiary society holding a certificate of membership which embraced a policy of insurance by the society upon his life made two subsequent applications for membership in the same society, and in each of them made representations that he was not a member of that society, and thus obtained on each application a separate certificate of membership and policy of insurance, each of which declared upon its face that if the representations upon which it was granted were not true it should be void, both of the certificates subsequently obtained will, after the death of the member, be treated as void and of no effect, unless the company had notice at some time before receiving the last dues upon some one of the three certificates that he was a member when he applied for and received one or both of the additional certificates. Home Friendly Soc. v. Berry, 94 Ga. 606, 21 S. E. 583.

But see, on this subject, cases with relation

said defenses and in opposition thereto, directed the jury to return a verdict in favor of the plaintiffs for the full amount of the policy, it becomes necessary to state certain facts which were established at the trial and are not disputed: Some time in January, 1897, Elias H. Webb the deceased, entered into negotiations with the Denver agent of the Mutual Reserve Fund Life Association of New York for the issuance by that company of a policy on his life in the sum of $10,000. The negotiations proceeded so far that on January 23, 1897, Webb appeared before the Denver agent of the last-named company and signed an application for a policy in that company, wherein he answered all the questions contained in the application which the agent was authorized and required to propound. This paper was delivered to the agent when completed, and was by him forwarded to the home office in the city of New York, according to the usual course of business. It was received at the home office on January 28, 1897. After the agent's examination was completed, as aforesaid, Webb appeared on the same day before Dr. McLauthlin, the company's medical examiner at Denver, and answered such questions as were asked by him. The blank which was used by the medical examiner was not attached to the blank that had been used by the agent, but was a separate paper, and bore the following caption: "Part II. of Application in Mutual Reserve Fund Life Association." According to the regulations of the company, the medical examiner was required to propound the questions contained in this latter blank, take down the answers of the applicant, and, when completed, transmit

to notice of forfeiture by false statement from taking the previous application, *infra*, VI. b.

And see also Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500, *infra*, IV.

III. *Rule as to warranties.*

The prevailing, if not the universal, rule is that a false answer to a question in an application for insurance whether any proposition, negotiation, or examination for life insurance has been made in this or any other company on which a policy has not been issued, the answer to which is warranted to be true, constitutes a breach of warranty which will invalidate the policy. Mutual L. Ins. Co. v. Nichols (Tex. Civ. App.) 24 S. W. 910, Affirmed in 26 S. W. 508; Clapp v. Massachusetts Ben. Asso. 146 Mass. 519, 16 N. E. 433; Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Hambrough v. Mutual L. Ins. Co. 72 L. T. N. S. 140; Bennett v. Anderson, 1 Irish Jur. 245, 3 Bigelow, Life & Acci. Ins. Rep. 342.

And the rule is the same though the statement was made by mistake, through inadvertence, carelessness, or ignorance. Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361.

And whether the party making it believed in its truthfulness or not. Clemans v. Supreme Assembly R. S. of G. F. 131 N. Y. 485, 16 L. R. A. 113, 30 N. E. 496; Elliot v. Mutual Ben. Life Asso. 76 Hun, 378, 27 N. Y. Supp. 696.

And though there was no downright misrepresentation with a view of gaining an advantage or to commit a fraud, and though the applicant had the best grounds to believe that he was absolutely without physical infirmity. Union Nat. Bank v. Manhattan L. Ins. Co. 52 La. Ann. 36, 26 So. 859.

In Aufderheide v. German American Mut. Life Asso. 68 Mo. App. 285, however, it was held that a statement in an application for insurance that the applicant has no other insurance on his life, made a warranty by the policy, embraces all insurance upon the applicant's life which is known to him, but does not signify a denial of other insurance of which he is unaware; and such a statement will not invalidate a policy because of the existence of other insurance procured by the applicant's wife without his knowledge, she having signed his name to the application therefor. But attention is here called to the fact that this was industrial insurance obtained on application of a third person, and to the fact that probably in no other class of insurance could a policy have been obtained without a medical examination.

So, a warranty in an application for insurance as to the postponement or refusal of insurance previously applied for must be strictly complied with without reference to the question of materiality or immateriality. Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553.

And a statement by an applicant in an application for insurance that no proposal or application to insure his life has ever been made to any company or agent upon which a policy has not been issued, followed by a warranty that the statements therein are true, the certificate or policy being issued on condition that statements and declarations made by and on behalf of the member in his application, which are thereby referred to as the basis of the contract and as a part thereof, and on the faith of which the certificate is issued, are in all respects true, must be treated as a part of the contract, and must be literally true, whether material or immaterial to the risk. Clapp v. Massachusetts Ben. Asso. 146 Mass. 519, 16 N. E. 433.

And where, in an application for a certificate or policy of insurance in a mutual benefit association, the applicant stated that no life insurance company had declined to grant a policy on his life, and that his statements were to be deemed warranties, and it appeared by satisfactory and uncontradicted evidence that two years prior to the application he made an application to another benefit association, which was rejected, the question is one of law, as to whether or not there was a breach of warranty invalidating the policy in an action thereon, and not one of fact; and hence it is the duty of the court to dispose of it accordingly. Kemp v. Good Templars' Mut. Ben. Asso. 46 N. Y. S. R. 429, 19 N. Y. Supp. 435.

A special finding by the jury, however, in an action on an insurance policy that the representation that no other insurance had been applied for by the applicant and been refused, which was made a warranty, was not true, controls a general finding for the plaintiff; and the insurance company in such case is entitled to judgment. Gessel v. Republic L. Ins. Co. 1 Ohio L. J. 182.

So, a statement by an applicant for insurance to an insurance association that no physician had given an unfavorable opinion upon the life of the applicant with reference to life insurance or otherwise, which by the terms of the policy was warranted to be true and made a part of the contract, but which was false, avoids the contract. Stuart v. Mutual Reserve

the same directly to the home office. The deceased answered all the questions that were propounded by the medical examiner, signed the paper after his answers had been reduced to writing, and delivered it to or left it with the examiner; the same being complete and ready for transmission to the home office. There was yet another blank, bearing the caption "Part III. of Application," containing questions addressed to the medical examiner, which he alone was instructed to answer for the information of the company. One question in this blank related to the condition of the applicant's urine, which question the examiner was unable to answer on January 23, 1897, because the applicant was unable on that day to submit a sample of his urine. The examiner retained the papers marked "Part II." and "Part III." until February 24, 1897. On February 13, 1897, Dr. McLauthlin wrote to the medical examiner in chief as follows:

Denver, Colo., Feb. 13th, 1897.

Dear Doctor Bowden:—

On Jan. 23rd I examined Elias H. Webb, Denver county sheriff, (—) $10,000. At that time he could not furnish the sample of urine. Otherwise examination complete with his signature. He then changed his mind, and would not furnish urine, although agent is still hopeful. Since that time he has been, by report, quite ill, the disease being unknown to me. Shall I insist on complete re-examination if he still desires insurance? Please advise. Also shall I forward examination minus urine exam. if he refuses to consider the matter further?

Yours, truly,

H. W. McLauthlin.

Fund Life Asso. 78 Hun, 191, 28 N. Y. Supp. 944.

An infant is not bound by false warranties that no previous application for insurance has been made by him and rejected, or other false warranties in an application for insurance, and the insurance company cannot defend against an action on the policy on the ground of their falsity, and the beneficiary in the policy is not bound, in the absence of fraud, by such false warranties, since in legal effect they are not a part of the contract, and may plead the infancy in answer to the company's defense of false warranty; and where evidence of the beneficiary's knowledge of the false warranties is submitted to the jury, and a verdict is rendered for the beneficiary, the court will assume on appeal that the beneficiary had no knowledge of the contents of the application. O'Rourke v. John Hancock Mut. L. Ins. Co. (R. I.) 30 Atl. 834.

An insurance company setting up a breach of warranty in an application for insurance that no proposition, negotiation, or examination for life insurance has ever been made by the applicant in that or any other company or association on which a policy has not been issued, in an action on the policy, assumes the burden of proving it. Mutual L. Ins. Co. v. Nichols (Tex. Civ. App.) 24 S. W. 910, Affirmed in 26 S. W. 998.

IV. *Construction with reference to distinction between representations and warranties.*

The court, in construing a statement in an application for insurance that no company or association has declined to grant a policy on the life of the applicant, will lean, if at all, against the warranty, rather than in favor of it. White v. National L. Ins. Co. 30 Ohio L. J. 237.

And where answers and questions in an application for insurance with reference to previous applications for insurance by the applicant and the result thereof are nowhere called warranties, or made a part of the contract, but are referred to as declarations or statements, upon the faith of which the policy is issued, and are declared to be fair and true answers to the questions, and to form the basis of the contract, they must be considered, not as warranties which are a part of the contract, but as representations collateral to it, and on which it is based. Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500.

Such answers, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required. *Ibid.*

So, to constitute a warranty an answer must be responsive; and where, in answer to a question in an application for accident insurance, "Have you any other accident insurance?" the applicant stated: "Atlas, $5,000; Star, $10,000, comb.; will drop Star July 15, '96," which question and answer were by the terms of the certificate made a part of the contract, the words "will drop Star July 15, '96" not being responsive to the specific question asked, can in no sense be regarded as a warranty of any existing fact, but constitute a mere promise to do a particular thing in the future, which, if unperformed, subjects the promisor to such liability as might follow the breach of any other ordinary promise, but would not have the effect of rendering the entire contract nugatory. Commercial Mut. Acci. Co. v. Bates, 176 Ill. 194, 52 N. E. 49, Affirming 74 Ill. App. 335.

And where in such case the policy was placed in the hands of an agent with instructions not to deliver until the applicant had procured the cancelation of the Star policy, and the applicant procured the delivery by falsely representing that the Star insurance had been canceled, the answer being true as to the two policies, an attempt to show fraud on the part of the applicant in that he had represented that he dropped the Star insurance when in fact he had not, and thus to evade the policy on the ground that it had been forfeited by a breach of warranty, would be to evade the familiar rule of law that a contract cannot exist partly in writing and partly in parol. If insurance companies would protect themselves from other insurance they must do so by their contracts. *Ibid.*

And the word "comb.," in such case, which is an abbreviation for the word "combination," meaning a policy or certificate providing for double benefits, not being responsive to the question may be regarded as surplusage, where it appears that the company referred to issued no such certificates, and the falsity of the statement cannot be availed of by the company for the purpose of defeating the policy. *Ibid.*

So, where, in an application for insurance, the applicant stipulated that he would report to the insurer any other insurance taken out by him and a policy issued thereon warranted the statement therein to be true, the obligation not to take out additional insurance in other companies without notice to the insurance company cannot be held to be a warranty impos-

Dr. Bowden, on receipt of the aforesaid letter, directed that the two blanks be forwarded to the home office, and in obedience to such direction they were forwarded on February 24, 1897. At the time of transmitting the same the medical examiner at Denver appended to the document entitled "Part III." of the application the following statement, under the head "Confidential Communications:"

Feb. 24th, 1897.

Mr. Webb declines to complete the examination by furnishing sample of urine. He claims to have been misinformed of certain facts concerning company's policy by the agent writing him. He has been sick since my examination, confined to house, but the disease is unknown to me. At the time of examination he seemed a first-class risk, although I failed to understand his long confinement in hospital in 1864 for hernia. I cannot recommend him without examination of urine; also on account of his recent illness. H. W. M.

It appeared further from the testimony of Dr. McLauthlin that after receiving directions from the home office to forward the documents in his hands he called on the deceased to obtain a sample of his urine for examination, that the deceased at that time expressed some dissatisfaction with the statements that had been made to him in regard to the policy which the company proposed to issue, and that he did not furnish a sample of his urine as requested. On receipt of the papers Part II. and Part III., which had been forwarded by Dr. McLauthlin, Webb's application for insurance was

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ing forfeiture for its breach. Fidelity & C. Co. v. Carter, 23 Tex. Civ. App. 339, 57 S. W. 315. In this case, however, it was said that this defense was pleaded only as a breach of warranty, and not as a failure to comply with the contract in a matter material to the loss, thus inferring that it might have been a good defense if asserted as a breach of contract, instead of as a breach of warranty.

And where an applicant for insurance stated in his application that he held another policy in the "Mutual Reserve Company," and it appears that he had a policy in the "Mutual Reserve Fund Life Association," which was void because of failure to pay the premium thereon, no breach of warranty appears, in the absence of averment in the pleadings that the Mutual Reserve Fund Life Association and the Mutual Reserve Company mentioned in the application were the same. Kansas Mut. L. Ins. Co. v. Coulson, 22 Tex. Civ. App. 64, 54 S. W. 388.

Where a life insurance policy contains a reference to other papers incident to the issuance thereof, however, such as a health certificate and an application for insurance, such papers are to be considered with the policy as constituting the contract, so that a statement in them that the assured had never applied to any other company or agent for insurance without receiving a policy of the exact kind and amount applied for, and a warranty that the statements therein were in all respects true, would be a part thereof. Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361.

And where a policy of insurance recites that it is issued in consideration of answers and statements and agreements contained in the application, and the application signed by the applicant contains an agreement that the answers and statements therein are warranted to be full, complete, and true, and that if any are not full, complete, and true the policy issued thereon shall be null and void, answers to questions propounded in the application as to the postponement or refusal of other insurance are warranties and made a part of the contract, and are of the same significance as if contained in the policy, though the word "warranty" is not used therein. Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553.

And a statement in an application for insurance that the applicant had not made any application for life insurance which had been rejected, together with a paper presented to the agent termed "Supplementary application, statements made to the medical examiner as part of the application," containing an agreement upon the part of the applicant that if, during his lifetime, any statements therein or in the original application are alleged to be untrue, or if he fails when called upon to furnish to the company satisfactory evidence of their truth, the policy issued upon the faith of such statements and answers shall be *ipso facto* void, constitutes an express warranty by the insured of the truth of that statement. Tarpey v. Security Trust Co. 80 Ill. App. 378.

So, a statement made by an applicant for insurance in an application to a mutual benefit association that he had applied to another insurance company for insurance, but had not been rejected, is a warranty, where the application and answers thereto were made a part of the contract of insurance by the certificate, the falsity of which will avoid the contract. Clemans v. Supreme Assembly R. S. of G. F. 131 N. Y. 485, 16 L. R. A. 33, 30 N. E. 496.

And a statement by an applicant for insurance in a mutual benefit association that no physician for a life insurance company or order has declined to recommend the applicant's application, followed by a warranty that the answers in the application are true, and an agreement that the literal truth of each shall be a condition precedent to any binding contract, if untrue will avoid the policy issued upon the faith of such answers. Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104.

And in Silverman v. Empire L. Ins. Co. 24 Misc. 399, 53 N. Y. Supp. 497, it was held that a false statement in an application for insurance that no proposal to insure the applicant's life had ever been postponed or declined by any company, association, or society, and that no proposal or application to insure his life, or for membership, had ever been made to any company, association, society, or agent, upon which a policy or certificate of membership had not been received by him in person for the full amount, kind, and rate applied for, and no physician had ever given an unfavorable opinion upon his life with reference to life insurance,—is such a breach of warranty as will avoid the policy.

So, while a warranty in an application for insurance will be held to bind the applicant to the letter of his undertaking, the rule that neither presumptions, nor the apparent spirit of the undertaking, would authorize an extension of its meaning beyond its clear import, is applicable in each direction, and though a breach would be beneficial instead of detrimental to the company, the policy is nevertheless avoided: and a statement made a warranty and a part of the contract, that other insurance exists, when in fact it does not exist, is a breach as well as a false denial of the existence of other