RECENT CASES

BANKS AND BANKING—BANK'S RIGHT TO SET-OFF—NOTES NOT YET DUE.—HAYDEN ET AL. V. CITIZENS' BANK OF BALTIMORE ET AL., 87 ATL. REP., 672 (MD.),—*Held,* that a bank holding unmatured notes of a corporation when it goes into a receiver's hands may set off the notes against the deposit to the corporation's credit in the bank.

The general rule is that a bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. *Marsh v. Oneida Bank,* 34 Barb. (N. Y.), 298; *Scott v. Franklin,* 15 East, 427. This is true not only of the general deposit of the customer, but also of any business papers, as notes or bills, belonging to him, which he has intrusted to the bank for collection. *Ex parte Pease,* 1 Rose, 232. But funds deposited for a special purpose, known to the bank, cannot be withheld from that purpose and applied to a debt due the bank from the depositor. *Brown v. Sav. Inst.,* 137 Mass., 262; *Wyckoff v. Anthony,* 90 N. Y., 442; *First Nat'l Bank v. Peltz,* 176 Pa. St., 513. The decisions are in conflict as to the right of a bank to assert a lien for the benefit of notes which it holds, but which are not yet due. In some jurisdictions, if the depositor becomes insolvent before the maturity of the debt, the bank may, as against him or his assignee, apply the deposit to the payment of its claim. *Georgia Seed Co. v. Talmadge,* 96 Ga., 254; *Ky. Flour Co. v. Bank,* 90 Ky., 225; *Demmon v. Bank,* 5 Cush. (Mass.), 194. In Pennsylvania the right of lien in such cases is sustained on the ground that the insolvency operates to mature all debts. *Stewart v. Bank,* 6 Wkly. Notes Cas., 399. This doctrine has received the approval of the Supreme Court of the United States. See *Schuler v. Israel,* 120 U. S., 506, 510. A *contra* rule prevails in other jurisdictions, where it is held that, in order to assert such lien or set-off, the debt must be due. *Bank v. Proctor,* 98 Ill., 558; *Bradley v. Smiths' Sons,* 98 Mich., 449; *Kortjohn v. Bank,* 63 Mo. App., 166; *Bank v. Mahon,* 78 S. C., 408; *Oatman v. Bank,* 77 Wisc., 501. This is on the ground that at law a debt *in futuro* cannot be set off against a debt *in praesenti. Nat'l Bank v. Ritzinger,* 20 Ill. App., 27. In New York this broad rule is qualified, and it is held that insolvency sometimes moves equity to grant a set-off which would not be allowed at law. *Jordan v. Bank,* 74 N. Y., 467. The same conflict of authority exists as to the right of a bank to apply a deceased depositor's account to a note not due at the time of the death of such depositor. See *Nat'l Bank v. Green,* 45 N. J. Eq., 546, and *Hodgin v. Bank,* 124 N. C., 540, where such application is allowed where the depositor's estate is insolvent, and for the *contra* rule see *Appeal of Farmers' and Mechanics' Bank,* 48 Pa. St., 57. Under section 68 of the Bankruptcy Law of 1898, unmatured claims against a bankrupt are the subject of set off in favor of the holder thereof. *Frank v. Nat'l Bank,* 182 N. Y., 264; *Re Glass Co.,* 135 Fed., 77. *Contra, Irish v. Citizens' Trust Co.,* 163 Fed., 880. Where courts of law and equity have been combined, the better rule would seem to be that laid down in the

principal case, even though technically the debt is not due, on the ground that equitable considerations require such off-sets.

BILLS AND NOTES—TRANSFER—CONSIDERATION—PRE-EXISTING INDEBTEDNESS.—MALONE V. NATIONAL BANK OF COMMERCE OF KANSAS CITY, Mo., 162 S. W. (TEX.), 369.—The Sheffield Gas Power Co. was indebted to appellee and indorsed over to appellee appellant's notes in part payment of the debt and was given credit for the amount by appellee. *Held,* that there was sufficient consideration to make appellee a *bona fide* holder for value.

The rule of the law merchant was that one who took negotiable paper in discharge of a pre-existing debt was deemed a holder for value and in due course. *Swift v. Tyson,* 41 U. S., 1; *May v. Quimby,* 66 Ky., 96; *Brown v. Leavitt,* 31 N. Y., 113. A limitation was imposed in a few jurisdictions to the effect that one who took in part payment of a pre-existing debt was not deemed a *bona fide* holder for value. *Lyon v. Fitch,* 18 N. Y. Supp., 867. It was also held that the discharge of the debt was essential, the taking as mere security did not constitute value. *Bay v. Coddington,* 5 Johns. Ch. (N. Y.), 54; *Martin v. Banks,* 94 Tenn., 176. But the better rule was that it made no difference whether note was taken as security or in discharge. *Brooklyn City & N. R. Co. v. National Bank of Republic,* 102 U. S. ,14. Art. III, sec. 51, of the Negotiable Instruments Law, under which the principal case is decided, says that "an antecedent or pre-existing debt constitutes value." Under this clause the decisions are almost uniform in holding not only the discharge of the debt to be value but also the taking as security. *Williams v. Usher,* 123 Ky., 696; Brooks v. Sullivan, 129 N. C., 190. But New York would yet limit the holding of the principal case to a case of absolute discharge of the antecedent debt. *Sutherland v. Mead,* 80 N. Y. Supp., 504.

FRAUDS, STATUTE OF—SALE OF LAND.—NICHOLS V. BURCHAM ET AL., 143 N. W. (MICH.), 647.—*Held,* that a receipt given to the purchaser for a sum received on the purchase price of land, is not sufficient under the statute of frauds as a memorandum of the sale of land, where it did not fix a time for making payments.

The fourth section of the English Statute of Frauds provides that no action shall be brought on the contracts enumerated, "unless the agreement * * * or some memorandum or note thereof shall be in writing." See 29 Car. II (1676), c. 3. Similar provisions are to be found in the statutes of the different states in this country. As to the memorandum required, the rule is that it need not formally recite its purpose as a note of the agreement. It is sufficient if it states the agreement with clearness. *Davenport First Church v. Swanson,* 100 Ill. App., 39; *McManus v. Boston,* 171 Mass., 152; *Wade v. Curtiss,* 96 Me., 309. So, a receipt for money paid may be a sufficient memorandum. *Williams v. Norris,* 95

U. S., 444; *Evans v. Prothero,* 1 De G., M. & G., 572. But it is the general rule that to satisfy the statute a memorandum must state the contract with such certainty that its essentials can be known from the note itself, or by a reference contained in it to some other writing, without recourse to parol proof. *Oakman v. Rodgers,* 120 Mass., 214; *Gault v. Stormont,* 51 Mich., 636; *Browne, Stat. of Fr.* (5th ed.), sec. 371 a. The express stipulations of the oral contract must appear. Thus, the price agreed to be paid for the property must be stated, where the oral contract contained such a term. *Grace v. Denison,* 114 Mass., 16; *McElroy v. Buck,* 35 Mich., 434; *Williams v. Norris, supra.* So, too, where credit is given, it must be set out, as it has been held to be an essential term of the contract of sale. *Morton v. Dean,* 13 Met. (Mass.), 385; *Davis v. Shields,* 26 Wend. (N. Y.), 341. The memorandum need not state any time or place for the performance of the contract, in the absence of such stipulation in the oral contract. *Salmon Falls Mfg. Co. v. Goddard,* 14 How. (U. S.), 446; *Kriete v. Myer & Co.,* 61 Md., 558. It would seem from the above that the rule in the principal case is based on sound logic, for the purpose of the statute, viz., to prevent fraud and perjury, can best be accomplished when all the essential terms of oral contract are stated in the written memorandum. That time of payment is such an essential term of a contract, see *Nelson v. Shelby Mfg. & Impr. Co.,* 96 Ala., 515; *Elliot v. Barrett,* 144 Mass., 256; *O'Donell v. Leeman,* 43 Me., 158; *Harvey v. Burhans,* 91 Wis., 348.

INSURANCE—LIFE INSURANCE—CONDITIONS.—EDMONDS V. MUTUAL LIFE INSURANCE CO., 144 N. W. (S. D.), 718.—The application for a life insurance policy provided that for the period of one year following the date of issue the insured should not engage in certain extra hazardous occupations. The policy provided that it was free from restrictions after one year from date of issue. The insured engaged in a prohibited occupation before the expiration of one year. *Held,* such occupation did not wholly avoid the policy, but merely suspended it while the insured was engaged in the extra-hazardous occupation, or, if the prohibited occupation continued, up to the time when by the terms of the policy the restriction was removed.

Forfeitures of insurance policies are not favored and conditions which work forfeitures should be strictly construed against the party making them. *May on Insurance* (3rd ed.), sec. 367. They are enforced only when there is the clearest evidence that a forfeiture was meant by the stipulation of the parties. *Helme v. Phila. Ins. Co.,* 61 Pa., 107; *Phenix Ins. Co. v. Holcombe,* 57 Neb., 622. A more liberal construction will be given in favor of the beneficiary with respect to conditions subsequent than to conditions precedent to the loss. *Woodmen Accd. Ass'n v. Pratt,* 62 Neb., 673. If under all the circumstances the insured has exercised due diligence to comply with conditions subsequent and has not been negligent, by the great weight of authority the policy continues in force and the insured or beneficiary may recover. *Simmons v. Traveller's Ass'n,* 112 N. W. (Neb.), 365; *Foster v. Fidelity & Casualty Co.,* 75 N. W.

(Wis.), 69; *Simmons v. Traveller's Ass'n,* 71 N. W. (Ia.), 254. There are however some authorities *contra. Gamble v. Accident Ins. Co.,* 4 Ir. R. C. L., 204; *Patton v. Employer's Assn. Corp.,* 20 Law Rep. (Irish), 93. In policies containing a forfeiture clause, if the insured committed suicide the courts have very generally refused to enforce the forfeiture clause on the ground that such could not have been intended by the parties. *Lewine v. Supreme Lodge of K. of P.,* 122 Mo. App., 547; *K. T. & M. Indemnity Co. v. Jarmon,* 104 Fed., 638 There is a conflict of authority as to the effect on an insurance policy of a temporary breach of condition. Some courts hold that the policy is merely suspended during a temporary breach, provided the breach did not contribute to the loss. *Worthington v. Bearse,* 12 Allen (Mass.), 382; *Lane v. Ins. Co.,* 12 Me., 44. This class of cases seems to follow the equitable doctrine that equity abhors forfeitures. There is another class of cases which hold that any breach of condition absolutely defeats all rights under the policy provided there has not been a waiver of breach of conditions by the insurer. *Mead v. Ins. Co.,* 7 N. Y., 530; *Kyte v. Assurance Co.,* 149 Mass., 116. In this class of cases the courts enforce the contract according to the intent of the parties as expressed in the contract. This appears to be the better view and the one followed by the weight of authority.

PARENT AND CHILD—PROSECUTION FOR NON-SUPPORT—DEFENSE.—STATE V. BESS, 137 PAC. (UTAH), 829.—*Held,* in a prosecution of a father for failure to support his minor children, in violation of a statute which provided "that any person who shall without just excuse desert or wilfully neglect or refuse to provide for the support of his or her minor child or children under the age of sixteen years, in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor," etc., it was no defense that the destitution of the children was relieved by the charitable acts of third persons. It appeared that the complaining witness, wife of the defendant, had obtained custody of the children by a decree of divorce, which was granted for the fault of the defendant and which made no provision for support.

It may be remarked that the father's primary civil liability to support minor children remains unchanged by a divorce decree, unless there be a specific order of court, *Gilley v. Gilley,* 79 Me., 292; *Zilley v. Dunwiddie,* 98 Wis., 428, and by the weight of authority this is true though the wife accepts custody. *Spencer v. Spencer,* 97 Minn., 56; *Gilson v. Gilson,* 18 Wash., 489; *Pretzinger v. Pretzinger,* 45 Ohio St., 452; *Zilley v. Dunwiddie, supra; Peck on Dom. Rel.,* par. 110; see *Finch v. Finch,* 22 Conn., 411, *contra; Mall v. Green,* 82 Me., 122; *Brow v. Brightman,* 136 Mass., 187. Also, the prevailing rule accords with the principal case and holds that it is a violation of such statutes to fail to support minor children (or a wife) regardless of whether they are supported and kept from actual destitution by the labor of the wife or by charity. *Poole v. People,* 24 Colo., 510; *People v. Malsch,* 119 Mich., 112; *State v. Witham,* 70 Wis., 473; *Burton v. Comm.,* 109 Va., 800; *State v. Waller,* 90 Kan., 829; *State v. Stouffer,*

65 Ohio St., 47; *State v. Sutcliffe,* 18 R. I., 53; *Beilfus v. State,* 142 Wis., 665. The phrase "destitute and necessituous circumstances" has been held to mean not only things absolutely indispensible to human existence, but things in fact necessary to the particular person. See *State v. Waller, supra; Burton v. Comm., supra.* And it has been held that even though the wife agrees to support the minor children for a valuable consideration, yet this is no defense to an action against the father for non-support; *Bowen v. State,* 56 Ohio St., 235; nor does the fact that he agrees to support them if the wife will deliver up custody relieve him, though they were improperly detained by the wife. *State v. Sutcliffe, supra; Beilfus v. State, supra.* These courts consider that the purpose of the statute is to secure the performance of the husband's or father's obligation and to provide a remedy for the wife or children in addition to those afforded by civil proceedings. *State v. Waller, supra; Burton v. Comm., supra.* "Thus," says the Michigan court, "they are clearly distinguishable from statutes which are designed to redress public grievances." *People v. Malsch, supra.* In these latter statutes an injury to the public (*i. e.,* in leaving the children actually destitute) is an essential ingredient of the offense. See *People v. Walsh,* 11 Hun., 292; *Bayne v. People,* 14 Hun., 181; *State v. Watson,* 58 N. J. L., 499. And since such statutes are highly penal, they are to be strictly construed. *Goetting v. Normoyle,* 191 N. Y., 368. Other courts, notably those of Georgia, have adopted a contrary view to that of the case under discussion, and hold that actual deprivation of food and clothing is a prerequisite to the father's liability; *Dalton v. State,* 188 Ga., 196; *Williams v. State,* 126 Ga., 637; *Baldwin v. State,* 188 Ga., 328; *Richie v. Comm.,* 44 S. W., 979; *State v. Thornton,* 232 Mo., 298; and that articles of necessity are what the child actually needs, not what may be classed as *per se* a necessity. *State v. Thornton, supra.* This difference of opinion seems to arise from the question as to whether these statutes are to be regarded as penal and consequently strictly construed; see *Morin v. Newberry,* 79 Conn., 338; *Schulte v. Menke,* 111 Ill. App., 212; *People v. Weinstock,* 193 N. Y., 481; or as remedial, and for the protection of rights, in which case a more liberal interpretation should be given. See *Harrison v. Monmouth Bank,* 207 Ill., 630; *Wolcott v. Pond,* 19 Conn., 597; *Boston Mill Corp v. Gardner,* 2 Pick., 33. It is submitted that the latter view, that of the principal case, is correct, and that the purpose of these statutes is not so much the punishment of the father as the support of the child. A liberal construction will aid in attaining the this object.

RAILROADS—ACTIONS FOR INJURIES—EVIDENCE.—CHABOTT V. GRAND TRUNK RY. CO., 88 ATL. (N. H.), 995.—Evidence that a person injured was in the habit of looking and listening before stepping upon or walking along a railroad track is admissible to show whether he looked and listened at a particular time, upon the ground that a person is more apt to do a thing in the manner in which he is in the habit of doing it.

Habit is customary conduct, to pursue which a person has acquired a tendency, from frequent repetition of the same act. *Insurance Co. v. Foley,*

105 U. S., 350. Evidence of a custom on the part of pedestrians to walk on the railroad is not admissible as evidence against the railroad company in an action to recover for the death of a person who was killed while on the track. *M. & C. R. R. Co. v. Womack, Admrx.,* 84 Ala., 149. But the fact that inmates of dwelling houses along a railroad are in the habit of using the tracks as a public walk to and from their homes is evidence tending to charge the company with notice that the tracks opposite these dwellings are in use as a walk by those who have occasion to use them. *Wabash R. Co. v. Jones,* 53 Ill. App., 125; *Eckert v. St. Louis & R. R. Co.,* 13 Mo. App., 352. Where there is conflicting testimony whether a certain act was or was not done evidence of the person's habits with respect to acts of that particular character is admissible as to whether an attorney did or did not give certain instructions to the sheriff to whom he delivered a writ to be served, the uniform habit and course of business of the attorney before and at the time of issuing writs was admissible as evidence that the attorney did not give the instructions. *Hine v. Pomeroy,* 39 Vt., 211. Evidence of the usual custom of a notary in cases of protest to send written notice of dishonor by mail where the parties lived at a distance. was sufficient to support the averment of due notice of dishonor to the endorsee. *Miller v. Hackley,* 5 Johns, 375. The invariable custom of a clerk to mail letters copied into a letter book, was sufficient evidence of sending the letter. *Thollhimer v. Buncherhoff,* 9 Cow., 90. The invariable practice of a porter to present checks for payment and to return those dishonored on the same day he received them is sufficient proof of presentment to authorize the submission of the case to the jury. *Merchants Bank v. Spicer,* 6 Wend. (N. Y.), 443. While the rule has been followed in New Hampshire, it has not been so widely followed in other jurisdictions. The theory of the rule is doubtless sound, and when wisely applied serves to do justice between the parties.