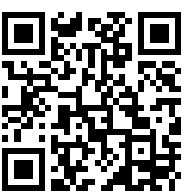

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By JAMES KENT.

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LECTURE XLII.

OF THE HISTORY OF MARITIME LAW.

BEFORE we enter more at large upon the subject of commercial and maritime law, it may tend to facilitate and enlighten our inquiries, if we take a brief view of the origin, progress, and successive improvements of this branch of legal learning. This will accordingly be attempted in the present lecture.

The marine law of the United States is the same as the marine law of Europe. It is not the law of a particular country, but the general law of nations; and Lord Mansfield applied to its universal adoption the expressive language of Cicero, when speaking of the eternal laws of justice: Nec erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit. (*a*)

* In treating of this law, we refer to its pacific character *2 as the law of commerce and navigation in time of peace. The respective rights of belligerents and neutrals in time of war constitute the code of prize law, and that forms a distinct subject of inquiry, which has already been sufficiently discussed in a former volume. When Lord Mansfield mentioned the law-merchant as being a branch of public law, it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of any particular country,

(*a*) Frag. de Repub. lib. 3.

but consisted of certain principles of equity and usages of trade, which general convenience and a common sense of justice had established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. (*a*)

1. **Of the Maritime Legislation of the Ancients.** — Though the marine law of modern Europe had its foundations laid in the jurisprudence of the ancients, there is no certain evidence that either the Phœnicians, Carthaginians, or any of the states of Greece, formed any authoritative digest of naval law. Those powers were distinguished for navigation and commerce, and the Athenians in particular were very commercial, and they kept up a busy intercourse with the Greek colonies in Asia Minor, and on the borders of the Euxine and the Hellespont, in the islands of the Ægean sea, and in Sicily and Italy. They were probably the greatest naval power in all antiquity. Themistocles had the sagacity to discern the wonderful influence and controlling ascendency of naval power. It is stated by Diodorus Siculus, that he persuaded the Athenians to build twenty new ships every year. He established the Piræus as a great commercial emporium and arsenal for Athens, and the cultivation of her naval superiority and glory was his favorite policy; for he held the proposition which Pompey afterwards adopted, that the people who were masters of the sea would be masters of the world. (*b*) The Athenians encouraged, by their laws, navigation and trade; *3 and there * was a particular jurisdiction at Athens for the cognizance of contracts, and controversies between merchants and mariners. There were numerous laws relative to the rights and interests of merchants, and of their navigation; and in many of them there was an endeavor to remove, as much as possible, the process and obstacles which afflicted the operations of commerce. Each state had its consul to protect and advance the interests of commerce; and when a trader died abroad, it

(*a*) The law-merchant, says Blackstone, Comm. iv. 67, is a branch of the law of nations, and is regularly and constantly adhered to. It is a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and found to be of public use, have been adopted as part of it for the benefit of trade and commerce, and are binding on all without proof. Lord Denman, in Barnett *v.* Brandao, 6 Mann. & Gr. 665. The usage of merchants is alluded to in sacred writ, as early as the time of Abraham, upwards of 1800 years before the Christian era. He purchased the cave of Machpelah for four hundred shekels of silver, *current money with the merchant.* Gen. xxiii. 16.

(*b*) Themist. Hist. lib. 1; Cic. Epist. ad Atticum, lib. 10, epist. 8.

was part of the consul's duty to take charge of his property, and transmit an account to his friends at Athens. In a pleading of Demosthenes against Lacritus, we find the substance of a loan upon bottomry, with all the provisions and perils appertaining to such a contract carefully noted. (*a*) As a consequence of the commercial spirit and enterprise of the Greeks, their language was spoken throughout all the coasts of the Mediterranean and Euxine seas. Cicero was struck with the comparison between the narrow limits in which the Latin language was confined and the wide extent of the Greek. (*b*) The universality and stability of the Greek tongue were owing, no doubt, in a considerable degree, to the conquests of Alexander, to the loquacity of the Greeks, and the inimitable excellence of the language itself; but it is essentially to be imputed to the commercial genius of the people, and to the colonies and factories which they established, and the trade and correspondence which they maintained throughout the then known parts of the eastern world.

The Rhodians were the earliest people that actually created, digested, and promulgated a system of marine law. They obtained the sovereignty of the seas about nine hundred years before the Christian era, and were celebrated for their naval power and discipline. Their laws concerning navigation were received at Athens, and in all the islands of the Ægean sea, and throughout the coast of the Mediterranean, as part of the law of nations. Cicero, who in early life studied rhetoric *at *4 Rhodes, says, (*a*) that the power and naval discipline of that republic continued down within his time of memory, in vigor and with glory. We are indebted to the Roman law for all our knowledge of the commercial jurisprudence of the Rhodians. No only their arts and dominion have perished, but even their nautical laws and usages would have entirely and for ever disappeared in the wreck of nations had it not been for the superior wisdom of their masters, the Romans; and one solitary title in

(*a*) Potter's Greek Antiq. i. 84; Voyage du jeune Anacharsis, v. c. 55; Mitf. Hist. ii. 182–185. The profession of merchandise, says Plutarch, in his life of Solon, was honorable in Greece. St. John's History of the Manners and Customs of Ancient Greece, iii. c. 9, on the commerce of Attica, and c. 10, on Navigation.

(*b*) Græca leguntur in omnibus fere gentibus: Latina suis finibus, exiguis, sane, continentur. Orat pro Archia Poeta, s. 5.

(*a*) Orat. pro Lege Manilia, c. 18.

the Pandects (*b*) contains all the fragments that have floated down to modern times of their once celebrated maritime code. The collection of laws, under the title of Rhodian laws, published at Basle, in 1561, and at Frankfort in 1596, was cited as genuine by such civilians as Cujas, Godefroi, Selden, Vinnius, (*c*) and Gravina; and yet it has since been discovered and declared by equally learned jurists, as Bynkershoek, (*d*) Heineccius, (*e*) Emerigon, (*f*) and Azuni, (*g*) that the collection of laws which had been thus recognized as the ancient Rhodian laws (and * 5 of which a translation was given in the collection of * sea laws published at London in the reign of Queen Anne) are not genuine, but spurious. The emperor Augustus first gave a sanction to the laws of the Rhodians, as rules for decision in maritime cases at Rome; and the emperor Antoninus referred one of his subjects, aggrieved by the plunder of his shipwrecked property, to the maritime laws of Rhodes, as being the laws which, he said, were the sovereign of the sea. (*a*) The Rhodian laws, by this authoritative recognition, became rules of decision in all maritime cases in which they were not contrary to some express provision of the Roman law. They were truly, as Valin has observed, the cradle of nautical jurisprudence.

We are, therefore, to look to the collections of Justinian for all that remains to us of the commercial law of the ancients.

(*b*) Dig. 14. 2; De Lege Rhodia de Jactu. This law, De Jactu, is the only rule that can be distinctly and authoritatively traced to the institutions of Rhodes.

(*c*) Peckii, Com. ad rem nauticam cum notis Vinnii. Lugd. 1647.

(*d*) Opera, ii De Lege Rhodia, c. 8.

(*e*) Hist. Jur. Civ. Rom. ac Germ. lib. 1, s. 296.

(*f*) Traité des Assurances, Pref.

(*g*) Maritime Law of Europe, i. 277–295, N. Y. ed. In the note to p. 286, William Johnson, Esq, the learned translator of Azuni, detects many gross errors in the pretended collections of Rhodian laws, contained in the English "Complete Body of Sea Laws." Mr. Johnson's opinion is, of itself, of great authority; and his notes to his translation of Azuni show a familiar and accurate acquaintance with legal and classical antiquities. Yet, notwithstanding all the authority against the authenticity of that collection, M. Boulay-Paty, in his Cours de Droit Commercial Maritime, i. 10–21, does not hesitate to give a succinct analysis of that collection, as containing *at least* the sense and spirit of the original laws, and as being an exposition of the true text. M. Pardessus, in his Lois Mar. i. 336, has shown that this compilation of the Rhodian laws belongs to the middle ages, and is a genuine compilation of the laws and usages in the Mediterranean at that period.

(*a*) Dig. 14. 2. 9. Lord Stair, in his Institutions, says that the Lex Rhodia has become by custom a law of nations, for its expediency to prevent shipwreck, and to encourage merchants to throw out their goods.

The Romans never digested any general code of maritime regulations, notwithstanding they were preëminently distinguished for the cultivation, method, and system which they gave to their municipal law. They seem to have been contented to adopt as their own the regulations of the republic of Rhodes. The genius of the Roman government was military, and not commercial. Mercantile professions were despised; nothing was esteemed honorable but the plough and the sword. They encouraged corn merchants to import provisions from Sardinia, Sicily, Africa, and Spain; but this was necessary for the subsistence of the inhabitants of Rome, as the slaves of Italy (and who were almost exclusively the cultivators of the soil) did not afford a sufficient supply for the city. The Romans prohibited commerce to persons of birth, rank, and fortune; (*b*) and no senator was allowed to own a vessel larger *than a boat sufficient to *6 carry his own corn and fruits. (*a*) The navigation which the Romans cultivated was for the purposes of war, and not of commerce, except so far as was requisite for the supply of the Roman market with provisions. (*b*) This is the reason, that

(*b*) Code, 4. 63. 3. The decree in the code speaks contemptuously of commerce, and as being fit only for plebeians, and not for those who were *honorum luce conspicuos, et patrimonio ditiores.* Even Cicero regarded commerce as being inconsistent with the dignity of the masters of the world: *nolo eundem populum imperatorem, et portitorem esse terrarum.* The *liberti* or freedmen carried on the lucrative and mechanical trades and arts.

(*a*) Livy, lib. 21, c. 63; Dig. 50. 5. 3; Cicero, Orat. in Verrem, lib. 5, s. 18.

(*b*) Huet, Histoire du Com. et de la Navig. des Anciens, p. 278, 279. Polybius, in his General History, b. 3, c. 3, gives the substance of a very remarkable commercial treaty between Rome and Carthage, made the *very first year after the banishment of the Tarquins.* It goes to prove that the Romans were then a great commercial people. Polybius says he translated it from the original brazen tables existing in the capitol in the apartment of the ædiles, and in a language so very obsolete as to be difficult of interpretation. By that treaty neither the Romans nor their allies were to sail beyond the far promontory which forms the eastern boundary of the Gulf of Carthage. If forced beyond it, they were not allowed to take or purchase any thing, except necessaries for refitting their vessels, and for sacrifice, and they were to depart within five days. The object of this provision was to exclude the Romans and their allies from trading with Egypt and the countries on the lesser Syrtis. But the Roman merchants were to have free access to Sardinia, Sicily, Carthage, and the western coast of Africa, and to pay no customs, but only the usual fees to the scribe and crier. The sale of their cargoes was to be effected by public auction, and the public faith of Carthage was pledged to the foreign merchant for his payment of the amount of such sales. The Carthaginians engage, on their part, not to offer any injury to the Roman allies in Italy, nor build any fortresses in the Latin territory. This treaty, as Niebuhr sagaciously observes (History of Rome, i. 468), divulges the fact of the commercial

amidst such a vast collection of wise regulations as are embodied in the Roman law, affecting almost every interest and relation of human life, we meet with only a few brief and borrowed details on the interesting subject of maritime affairs. But those
* 7 titles atone for * their brevity by their excellent sense of practical wisdom. They contain the elements of those very rules which have received the greatest expansion and improvement in the maritime codes of modern nations. Whatever came from the pens of such sages as Papinian, Paul, Julian, Labeo, Ulpian, and Scævola carried with it demonstrative proofs of the wisdom of their philosophy and the elegance of their taste. (*a*)

greatness of Rome before the expulsion of Tarquin; but the liberal and enlarged spirit of commerce which inspired the Romans, under their kings, was soon after lost in the passion for war and conquest. Mr. Hooke, in his Dissertation on the Credibility of the History of the First Five Hundred Years of Rome, very plausibly suggests, that Polybius was probably mistaken in the date of this commercial treaty with Carthage, and it was made after the year 415, instead of the year 244, A. U. C. But as Niebuhr and Mitford (Hist. of Greece, ii. 151), and Heeren, in his Reflections, &c., i. 485, assume the antiquity of the treaty, as stated by Polybius, to be correct, no higher modern authority for that point can be produced. There was a second commercial treaty between Rome and Carthage, 161 years after the other, and which is also mentioned by Polybius, and it contains cautionary restrictions, and some fair and liberal terms of commerce between those two great rival republics.

(*a*) It may be useful to cast the eye for a moment over the most material principles and provisions in the Roman law, relative to maritime rights.

The title Nautæ, caupones, stabularii, ut recepta restituant (Dig. 4. 9), related to the responsibility of mariners, inn and stable keepers; and we meet here with the principle which pervades the maritime law of all modern nations, for it has been as generally adopted and as widely diffused as the Roman law. Masters of vessels were held responsible, as common carriers, for every loss happening to property confided to them, though the loss happened without their fault, unless it proceeded from some peril of the sea or inevitable accident; *nisi si quid damno fatali contingit, vel vis major contigerit.* Ulpian placed the rule on the ground of public policy, as it was necessary to confide largely in the honesty of such people, who have uncommon opportunity to commit secret and impenetrable frauds. The master was responsible for the acts of his seamen, and each joint owner of the vessel was answerable in proportion to his interest.

The title Furti adversus nautas, caupones, stabularios (Dig. 47. 5), related to the same subject; and the owners and masters were therein held answerable for thefts committed by any person employed under them in the ship. But the law distinguished between thefts by mariners and by passengers, and the master was not liable for thefts by the latter.

The title De exercitoria actione (Dig. 14. 1) treated of the responsibility of shipowners for the acts of the master. This, said Ulpian, was a very reasonable and useful provision, for as the shipper was obliged to deal with masters of vessels, it was right that the owner who appointed the master, and held him out to the world as an agent worthy of confidence, should be bound by his acts. This responsibility extended to every thing that the master did in pursuance of his power and duty as master. It

2. Of the Maritime Legislation of the Middle Ages. — Upon the revival of commerce, after the destruction of the Western Empire

extended to his contracts for wages, provisions, and repairs for the ship, and for the loan of money for the use of the ship. The owner was not responsible, except for acts done by the master in his character of master; but if he took up money for the use of the ship, and afterwards converted it to his own use, the owner was bound to respond, for he first gave credit to the master. A case of necessity for the money must have existed; and in that case only, the power to borrow came within the master's general authority. The lender was obliged to make out, at his peril, the existence of such necessity; and then he was entitled to recover of the owner, without being obliged to prove the actual application of the money to the purposes of the voyage. So, if the master went beyond his ordinary powers, as, for instance, if he was appointed to a vessel employed to carry goods of a particular description, as hemp or vegetables, and he took on board shafts of granite or marble, the owner was not answerable for his acts; for there were vessels destined on purpose to carry such articles, and others to carry passengers, and some to navigate on rivers, and others to go to sea. If several owners were concerned in the appointment of the master, they were each responsible *in solido* for his contracts.

The title De Lege Rhodia de jactu (Dig. 14. 2) is the celebrated fragment of the Rhodian law on the subject of jettison.

It was ordained that if goods were thrown overboard, or a mast cut away in a storm, or other common danger, to lighten and save the vessel, and the vessel be saved by reason of the sacrifice, all concerned must contribute to bear the loss, as it was incurred voluntarily for the good of all, and it was extremely equitable that all should ratably bear the burden according to the value of their property. There were some reasonable limitations to the rule. It did not apply to the *persons* of the free passengers on board, for the body of a freeman was said not to be susceptible of valuation; and it did not apply to the provisions which were used in common. The goods sacrificed were to be estimated at their actual value, and not at the anticipated profit; but the goods saved were to be estimated, for the sake of the contribution, not at the price for which they were bought, but at that for which they might sell.

The title De nautico fœnore (Dig. 22. 2; Code, 4. 33) regulated maritime loans. The lender was allowed to take extraordinary interest, because he staked his principal on the success of the voyage and the safety of the vessel, and took as his security a pledge of the ship or cargo. The maritime interest ceased upon the arrival of the vessel; and if she was lost by reason of seizure, for having contraband goods of the debtor on board, the lender was still entitled to his principal and interest, because the loss arose from the fault of the debtor.

The title De incendio, ruina, naufragio, rate, nave expugnata (Dig. 47. 9) related to the plunder of vessels in distress; and it did great honor to the justice and humanity of the Roman law. The edict of the prætor gave fourfold damages to the owner, against any person who, by force or fraud, plundered a ship in distress. The guilty persons were liable, not only to be punished criminally on behalf of the government, but to make just retribution to the aggrieved party; and the severity of the rule, said Ulpian, was just and necessary, in order to prevent abuses in cases of such calamity. The same provision was extended to losses by those means during a calamity by fire. The law applied equally to the fraudulent receiver and original taker of the shipwrecked articles, and he was held to be equally guilty.

This cursory view of the leading doctrines of the Roman maritime law (for I have not thought it necessary to take notice of all the refined and intelligent distinctions)

of the Romans, maritime rules became necessary. The
*9 earliest code of modern sea laws was compiled *for the free and trading republic of Amalphi, in Italy, about the time of the first crusade, towards the end of the eleventh century. This compilation, which has been known by the name of the Amalphitan Table, superseded the ancient laws; and its authority and equity were acknowledged by all the states of Italy, though the whole work has now passed into irretrievable oblivion. (a) Other states and cities began to form *collec-
*10 tions of maritime law; and a compilation of the usages and laws of the Mediterranean powers was made and published under the title of the Consolato del Mare. This commercial code is said to have been digested at Barcelona, in the Catalan tongue, during the middle ages, by order of the kings of Arragon. The Spaniards vindicated the claim of their country to the honor of this compilation; and the opinion of Casaregis, who published an Italian edition of it at Venice, in 1737, with an excellent commentary, and of Boucher, who, in 1808, translated the Consolato into French from an edition printed at Barcelona in 1494, are in favor of the Spanish claim. (a) But the origin of the work is so far involved in the darkness of those ages, as to render the source of it very doubtful; and Azuni, in a labored article, (b) endeavors to prove that the Consolato was compiled by the Pisans, in Italy, during the period of their maritime prosperity. Grotius, (c) on the other hand, and Marquardus, in his work, De Jure Mercatorum, hold it to be a collection made in the time of

is sufficient to show how greatly the maritime codes of the moderns are indebted to the enlightened policy and cultivated science of the Roman lawyers. The spirit of equity, in all its purity and simplicity, seems to have pervaded those ancient institutions.

(a) Azuni's Maritime Law, i. 376. Mr. Swinburne, who visited Amalphi, on his excursion to the ruins of Pæstum, in 1779, found the city in great decay, with only the wrecks of its former grandeur. Its trade withered with the loss of its liberty, and passed to Pisa, Genoa, and Venice. It was conquered by the Normans, and plundered by the Pisans, who carried away a copy of the Pandects found there, and we hear no more of the Amalphitan Table, or of the high reputation of the maritime tribunals of Amalphi. Swinburne's Travels in the Two Sicilies, ii. 138–150.

(a) Hallam, in his View of Europe during the Middle Ages, ii. 278, thinks the reasoning of Boucher, in his Consulat de la Mer, i. 70–76, to be inconclusive, and that Pisa first practised those usages, which a century or two afterwards were formally digested and promulgated at Barcelona.

(b) Maritime Law, i. 326–372. Ed. New York.

(c) De Jure Belli et Pacis, lib. 3, c. 1, s. 5, note.

the crusades, from the maritime ordinances of the Greek emperors, of the emperors of Germany, the kings of France, Spain, Syria, Cyprus, the Baleares, and from those of the republics of Venice and Genoa. (*b*) It was probably a compilation made by private persons; but whoever may have been the authors of it, and at whatever precise point of time the Consolato may have been compiled, it is certain that it became the common law of all the commercial powers of Europe. * The marine *11 laws of Italy, Spain, France, and England were greatly affected by its influence; and it formed the basis of subsequent maritime ordinances. (*a*) It has been translated into the Castilian, Italian, German, and French languages; and an entire translation of it into English has long been desired and called for by those scholars and lawyers who were the most competent to judge of its value. (*b*)

We are naturally induced to overlook the want of order and system in the Consolato, and the severity of some of its rules, and to justify Emerigon and Boucher in their admiration of the good sense and spirit of equity which dictated its decisions upon contracts, when we consider that the compilation was the production of a barbarous age. (*c*) It is, undoubtedly, the most authentic and venerable monument extant of the commercial usages of the middle ages, and especially among the people who were concerned in the various branches of the Mediterranean trade. It was as comprehensive in its plan as it was liberal in its principles. It treated of maritime courts, of shipping, of the ownership and equipment of ships, of the duties and responsibilities of the owners and master, of freight and seamen's wages, of the duties and government of seamen, of ransoms, salvage,

(*d*) Boulay-Paty, in his Cours de Droit Commercial Maritime, i. 60, insists that Azuni has refuted Grotius and the other publicists on this point in a triumphant manner.

(*a*) Casaregis, who was one of the most competent and learned of commercial lawyers, says, in one of his discourses (Dis. 213, n. 12), that the Consolato had, in maritime matters, by universal custom, the force of law among all provinces and nations.

(*b*) There has been a translation of two chapters on prize by Dr. Robinson, and of some chapters on the ancient or commercial courts, and on recaptures, inserted in the 2d, 3d, and 4th volumes of Hall's American Law Journal.

(*c*) Bynkershoek, in his Questiones Jur. Pub. lib. 1, c. 5, praises the justice of some of its rules, while he, at the same time, speaks disrespectfully and unjustly of the work at large, as a *farrago legum nauticarum*.

jettisons, and average contributions. It treated also of
*12 maritime captures, and of the mutual *rights of neutral and belligerent vessels; and, in fact, it contained the rudiments of the law of prize. Emerigon very properly rebukes Hubner for the light and frivolous manner in which he speaks of the Consolato; and he says in return, that its decisions are founded on the law of nations, and have united the suffrages of mankind. (*a*)

The laws of Oleron were the next collection in point of time and celebrity. (*b*) They were collected and promulgated in the island of Oleron, on the coast of France, in or about the time of Richard I. The French lawyers in the highest repute, such as Cleirac, Valin, and Emerigon, have contended, that the laws of Oleron were a French production, compiled under the direction of Queen Eleanor, Duchess of Guienne, in the language of Gascony, for the use of the province of Guienne, and the navigation on the coasts of the Atlantic; and that her son, Richard I., who was King of England as well as Duke of Guienne, adopted and enlarged this collection. Selden, Coke, and Blackstone, on the other hand, have claimed it as an English work, published by Richard I. in his character of King of England. (*c*) It is a proof of the obscurity that covers the early history of the law, that the author of such an important code of legislation as the laws of Oleron should have been left in so much obscurity as to induce profound antiquaries to adopt different conclusions, in like manner as Spain and Italy have asserted rival claims to the origin of the Consolato. The laws of Oleron were borrowed

(*a*) Traité des Assurances, Pref.

(*b*) Mr. Justice Ware (Ware, 201) says that the laws of Oleron, at least in the form in which we now have them, were a code earlier than the Consulate. But Cleirac says, that when Queen Eleanor, on her return from the Holy Land, prepared the project of the Laws of Oleron, the Customs of the Sea of the Levant, inserted in the Consulate, were *at the same time* in vogue and in credit in all the East. Les Us et Coutumes de la Mer, p. 2. The great authority and influence of the laws of Oleron, as being the foundation of the maritime legislation and jurisprudence of the western nations of Europe, have been illustrated with much ability by Mr. Justice Ware, in his learned opinion in the case of the Dawn, as reported in the Am. Jurist for October, 1841 [xxvi. 216].

(*c*) The question is of no sort of moment to us at the present day; but it is quite amusing to observe the zeal with which Azuni, Boucher, and Boulay-Paty engage in the contest. They insist that the pretension, as they term it, of such men as Selden and Blackstone was founded on a desire to flatter the English nation, and to deprive the French of the glory of the composition of those nautical ordinances.

from the Rhodian laws, and the Consolato, with alterations and additions, adapted to the trade of Western Europe. They
* have served as a model for subsequent sea laws, and *13
have at all times been extremely respected in France, and perhaps equally so in England, though not under the impulse of the same national feeling of partiality. They have been admitted as authority on admiralty questions in the courts of justice in this country. (*a*)

The laws of Wisbuy were compiled by the merchants of the city of Wisbuy, in the island of Gothland, in the Baltic sea, about the year 1288. It has been contended by some writers, that these laws were more ancient than those of Oleron, or even than the Consolato. But Cleirac says, they were but a supplement to the laws of Oleron, and constituted the maritime law of all the Baltic nations north of the Rhine, in like manner as the laws of Oleron governed in England and France, and the provisions of the Consolato on the shores of the Mediterranean. They were, on many points, a repetition of the judgments of Oleron, and became the basis of the ordinances of the Hanseatic League. (*b*)

(*a*) See Walton *v.* The Ship Neptune, 1 Peters Adm. 142; Natterstrom *v.* Ship Hazard, in the District Court of Massachusetts, 2 Hall's L. J. 359; Sims *v.* Jackson, 1 Peters Adm. 157, all of which were decided on the authority of the laws of Oleron. In 1647 it was resolved, by the popular government of Rhode Island, that the laws of Oleron should be in force for the benefit of seamen. (Pitkin's History, i. 49.) Cleirac published, in the middle of the seventeenth century, the laws of Oleron, in his work entitled Les Us et Coutumes de la Mer, with an excellent commentary. They were translated into English, with the notes of Cleirac, considerably abridged, and published in the collection of sea laws made in the reign of Queen Anne. They have likewise been published in this country, in the appendix to the first volume of Peters's Admiralty Decisions, from the copy in the Sea Laws. There is likewise annexed to these reports a copy of the laws of Wisbuy, of the Hanse Towns, and of the marine ordinances of Louis XIV., and they have given increased interest to a valuable publication.

(*b*) Cleirac, in his preamble to the ordinances of Wisbuy (Les Us et Coutumes de la Mer, 136), gives from Johannes Magnus, and his brother, Olaus, the historians of Sweden and the Goths, a very glowing account of the former wealth and commercial prosperity of Wisbuy, the ancient capital of Gothland, and then a free and independent city. In the eleventh and twelfth centuries it was the most celebrated and flourishing emporium in Europe, and merchants from all parts came there to traffic, and had their shops and warehouses, and enjoyed the same privileges as the native inhabitants. In Cleirac's time, this bright vision had vanished, and the town, with its trade and riches, was destroyed, and little was to be seen but heaps of ruins, — the sad evidence of its former splendor and magnificence. Here is one ground for the melancholy admonition of the poet, "That trade's proud empire hastes to swift decay." But the logic of the muse is entirely refuted by the stability of commercial

*14 *The renowned Hanseatic association was begun at least as early as the middle of the thirteenth century, and it originated with the cities of Lubeck, Bremen, and Hamburg. The free and privileged Hanse Towns became the asylum of commerce and the retreats of civilization, when the rest of Europe was subjected to the iron sway of the feudal system, and the northern seas were infested by "savage clans and roving barbarians." Their object was mutual defence against piracy by sea and pillage by land. They were united by a league offensive and defensive, and with an intercommunity of citizenship and privileges. The association of the cities of Lubeck, Brunswick, Dantzic, and Cologne commenced in the year 1254, according to Cleirac, and in 1164, according to Azuni; and it became so safe and beneficial a confederacy, that all the cities and large towns on the Baltic, and on the navigable rivers of Germany, acceded to the union. (*a*) One of the means adopted by the confederates to insure prosperity to their trade, and to protect them from controversies with each other, was the formation of a code of maritime law. The consuls and deputies of the Hanseatic League, in a general convention at Lubeck, in 1614, added to their former ordinances of 1597, (or 1591, as Azuni insists), from the laws of Oleron and of Wisbuy, and established a second and larger Hanseatic *15 ordinance, under the * title of the *Jus Hanseaticum Maritimum*, and which was published at Hamburg, in 1667, with a commentary by Kuricke.

This digest of nautical usages and regulations was founded evidently on those of Wisbuy and Oleron; and from the great

power in other illustrious examples. The ancient paved streets, walls, towers, churches, and other public edifices of Wisbuy, — the sure evidence of the great commerce, prosperity, wealth, taste, and splendor of this city of the middle ages, still partly exist in considerable preservation, and are objects of deep curiosity and veneration. Mr. Laing, who recently visited this "mother of the Hanseatic cities," gives a very interesting account (Tour in Sweden in 1838) of its present desolate condition, and of its varied and majestic ruins. Wisbuy has long been so insignificant, and so little visited by travellers, that it had almost disappeared from modern geography; and Mr. Laing's account of it strikes us with somewhat of the freshness and novelty of the discoveries of magnificent ruins in the midst of Syrian and Arabian deserts.

(*a*) The origin of the union of the Hanseatic League, others say, goes as far back as 1241, when the free cities of Lubeck, Hamburg, and Bremen entered into a compact to protect their political and commercial privileges. Lubeck was the capital of the confederacy.

influence and character of the confederacy, it has always been deemed a compilation of authority. (a)

3. **Of the Maritime Legislation of the Moderns.** — But all the former ordinances and compilations on maritime law were in a great degree superseded in public estimation, their authority diminished, and their lustre eclipsed, by the French ordinance upon commerce in 1673, which treated largely of negotiable paper; and more especially by the celebrated marine ordinance of 1681. This monument of the wisdom of the reign of Louis XIV., far more durable and more glorious than all the military trophies won by the valor of his armies, was erected under the influence of the genius and patronage of Colbert, who was not only the minister and secretary of state to the king, but inspector and general superintendent of commerce and navigation. It was by the special direction of that minister, and with a view to illustrate *the advantages of the commerce of the Indies, that Huet *16 wrote his learned history of the commerce and navigation of the ancients. (a) The vigilance and capacity of the ministry of Louis communicated uncommon vigor to commercial inquiries. They created a marine which shed splendor on his reign, and corresponded in some degree with the extent of his resources. It required such a work as the ordinance to which I have referred to consolidate the establishment of the maritime power which had been formed by the sagacity of his counsels.

(a) Les Us et Coutumes de la Mer, 157–165. Ward, in his History of the Law of Nations, ii. 276–290, adduces proofs that the Hanseatic League exercised the rights of sovereignty as a federal republic, and with considerable strength and vigor, until the fifteenth century. No less than four commercial treaties were concluded between England and the Hanse Towns in the space of three years, from the year 1472 to 1474. But the league was dissolved as soon as the great powers of Europe withdrew their cities from the association; and the members of this confederacy are now reduced to the cities of Lubeck, Hamburg, and Bremen. Rym. Fœd. tom. ix. cited in Henry's Hist. of Great Britain, b. 5, c. 6; Putter's Constitutional History of Germany, ii. 208. Those Hanseatic cities had a diplomatic representative at Washington, in 1827, and in the year following a Convention of "Friendship, Commerce, and Navigation between the United States and the free Hanseatic Republics of Lubeck, Bremen, and Hamburg," was concluded. Those free cities, including Frankfort-on-the-Main, were recognized by the Congress of Vienna, in 1815, as having political existence, and on the principle that they were to be free emporiums, open to the trade of all the world, on equal terms. But the growth and influence of the new German Tariff League are now (1848) so rapid and preponderating, that it is very possible the Hanse Towns may, erelong, be induced to join the Germanic League. Frankfort is already included in the union.

(a) Hist. du Comm. et de la Navig. des Anciens, Pref.

That ordinance, says Valin, was executed in a masterly manner. It was so comprehensive in its plan, so excellent in the arrangement of its parts, so just in its decisions, so wise in its general and particular policy, so accurate and clear in its details, that it deserves to be considered as a model of a perfect code of maritime jurisprudence. The whole law of navigation, shipping, insurance, and bottomry was systematically collected and arranged. It required the greatest extent of knowledge, and the most correct discernment and liberality of views, to form and execute such a work. It was necessary to examine the commercial usages of all other nations, and select from amidst a contrariety of practice the most approved rules. It was necessary to retrench that which was superfluous, to enlighten that which was obscure, and to supply those things which had escaped the observation of the earlier founders of nautical law, or been recommended by the lights of experience. It is, however, an extraordinary fact, that the able civilians, and perhaps the distinguished merchants, who assumed the task of legislators, and compiled this ordinance, are unknown to fame; and though the event be of so recent a date, and occurred at the most polished and literary era in French history, neither letters nor gratitude nor national vanity have been able to rescue their names from oblivion. (*b*)

*17 *Valin supposed he had discovered the source of the materials of the ordinance in a curious and vast compilation of ancient maritime laws, among the manuscript collections in the library of the Duke of Penthievre. The compilation consisted of the Rhodian and Roman law; of the Consolato, and of the Use and Customs of the Sea; of the ordinances of Charles V. and Philip II., kings of Spain; of the Judgments of Oleron; of the ordinance of Wisbuy, and of the Teutonic Hanse; of the insurance codes of Antwerp and Amsterdam; of the Guidon, and of all the French ordinances prior to the year 1660. This magnificent repository of commercial science is supposed to have been the true and solid foundation of the fabric erected by artists who had too much modesty to make their work the vehicle of their own immortality. Every commercial nation has rendered homage to the wisdom and integrity of the French Ordinance of the Marine; and they have regarded it as a digest of the mari-

(*b*) Valin's Com sur l'Ord. Pref. 4.

time law of civilized Europe. Valin has written a commentary upon every part of it; and it almost rivals the ordinance itself in the weight of its authority, as well as in the equity of its conclusions. (a)

*In addition to these general codes of commercial legis- *18
lation, there have been a number of local ordinances of distinguished credit, relating to nautical matters and marine insurance, such as the ordinances of Barcelona, Florence, Amsterdam, Antwerp, Copenhagen, and Königsberg. There have also been several treatises on nautical subjects by learned civilians in the several countries of Europe, which are of great authority and reputation. (a)

The English nation never had any general and solemnly enacted code of maritime law, resembling those which have been mentioned as belonging to the other European nations, and promulgated by legislative authority. This deficiency was supplied, not only by several extensive private compilations, (b) but it has been more eminently and more authoritatively supplied by a series of judicial decisions, commencing about the middle of the last cen-

(a) The ordinance has been translated and printed in England, and published in the collection entitled Sea Laws; and it is annexed to the second volume of Judge Peters's Admiralty Decisions in the District Court of Pennsylvania. It has been redigested, with some few modifications and additions, in the new Commercial Code of France of 1807; and that code was translated by Mr. Rodman, and published in the city of New York in 1814. The commercial code was presented to the French legislative body by the counsellors of state in 1807, as having been conceived, meditated, discussed, and established, *by the inspiration of the greatest man in history, the Hero-Pacificator of Europe, while he was bearing his triumphant eagles to the banks of the astonished Vistula;* and yet, in contradiction to much of this adulation and incense, the code will be found, upon sober examination, to be essentially a republication, in a new form, of the ordinance of 1673, relative to negotiable paper, and of the maritime ordinance of 1681, digested under the orders of Colbert, and illustrated by the commentaries of Valin. It is entitled, however, to the merit of some improvements on the former ordinances, and of being more comprehensive in its plan and execution; for it embraces the subjects of partnership, common carriers, bankruptcy, insolvency, and stoppage *in transitu*.

(a) These ordinances are collected by Magens, in the second volume of his Essay on Insurances; and Mr. C. Cushing, in a learned note to his translation of Pothier on Maritime Contracts of Letting to Hire, published at Boston in 1821, has alluded to the most distinguished writers in Italy, Spain, Portugal, France, Holland, Germany, and Sweden, on maritime law.

(b) Among the private treatises, the most distinguished are those of Malynes, Molloy, Beawes, Postlethwayt, Magens, Wesket, Millar, Park, Marshall, Abbott, Chitty, Holt, Lawes, and Benecke.

tury. These decisions have shown, to the admiration of the world, the masterly acquaintance of the English judiciary with the principles and spirit of commercial policy and general jurisprudence, and they have afforded undoubted proofs of the entire independence, impartiality, and purity of the administration of justice. The numerous cases in the books of reports which have arisen upon maritime questions resemble elementary treatises in the depth, extent, and variety of their researches, while *19 they *partake, at the same time, of the precision and authority of legislative enactments. Lord Mansfield, at a very early period of his judicial life, introduced to the notice of the English bar the Rhodian laws, the Consolato del Mare, the laws of Oleron, the treatises of Roccus, the laws of Wisbuy, and, above all, the marine ordinances of Louis XIV., and the commentary of Valin. These authorities were cited by him in *Luke* v. *Lyde*, (*a*) and from that time a new direction was given to English studies, and new vigor and more liberal and enlarged views communicated to forensic investigations. Since the year 1798, the decisions of Sir William Scott (now Lord Stowell) on the admiralty side of Westminster Hall, have been read and admired, in every region of the republic of letters, as models of the most cultivated and the most enlightened human reason. The English maritime law can now be studied in the adjudged cases with at least as much profit, and with vastly more pleasure, than in the dry and formal didactic treatises and ordinances professedly devoted to the science. The doctrines are there reasoned out at large, and practically applied. The arguments at the bar, and the opinions from the bench, are intermingled with the gravest reflections, the most scrupulous morality, the soundest policy, and a thorough acquaintance with all the various topics that concern the great social interests of mankind.

Nor has our learned profession in this country been wanting in the study and cultivation of maritime law. Our improvement has been rapid and our career illustrious since the adoption of the present Constitution of the United States. There have been several respectable treatises on subjects of commercial law, some of which we may notice when we are upon the branches to which

(*a*) 2 Burr. 882.

they are applied. The decisions in the federal courts, in commercial cases, have done credit to the moral and intellectual character of the nation; and the admiralty courts in particular have displayed great *research, and a familiar knowledge *20 of the principles of the marine law of Europe. But I should omit doing justice to my own feelings, as well as to the cause of truth, if I were not to select the decisions in Gallison's and Mason's Reports, as specimens of preëminent merit. They may fairly be placed upon a level with the best productions of the English admiralty for deep and accurate learning, as well as for the highest ability and wisdom in decision.

The reports of judicial decisions in the several states, and especially in the states of Massachusetts, New York, and Pennsylvania, evince great attention to maritime questions; and they contain abundant proofs that our courts have been dealing largely with the business of an enterprising and commercial people. Maritime law in these states became early and anxiously an object of professional research. If we take the reports of New York in chronological order, we shall find that the first five volumes occupy the period when Alexander Hamilton was a leading advocate at our bar. That accomplished lawyer (for it is in that character only that I am now permitted to refer to him) showed, by his precepts and practice, the value to be placed on the decisions of Lord Mansfield. He was well acquainted with the productions of Valin and Emerigon; and if he be not truly one of the founders of the commercial law of this state, he may at least be considered as among the earliest of those jurists who recommended those authors to the notice of the profession, and rendered the study and citation of them popular and familiar. His arguments on commercial as well as on other questions were remarkable for freedom and energy; and he was eminently distinguished for completely exhausting every subject which he discussed, and leaving no argument or objection on the adverse side unnoticed and unanswered. He traced doctrines to their source, or probed them to their foundations, and at the same time paid the highest deference and respect to sound authority. The reported cases do no kind of justice to his close and accurate logic; to his powerful and comprehensive intellect, *to *21 the extent of his knowledge, or the eloquence of his illus-

trations. We may truly apply to the efforts of his mind the remark of Mr. Justice Buller, in reference to the judicial opinions of another kindred genius, that "principles were stated, reasoned upon, enlarged, and explained, until those who heard him were lost in admiration at the strength and stretch of the human understanding."

LECTURE XLIII.

OF THE LAW OF PARTNERSHIP.

PARTNERSHIP contracts have been found by experience to be convenient to persons engaged in trade, and useful to the community. Merchants are thereby enabled to consolidate their credit and extend their business. With the aid of joint counsel and accumulated capital, a spirit of enterprise is sensibly awakened, and boldness of plan and vigor of exertion communicated to mercantile concerns. Partnerships have grown with the growth and multiplied with the extension of trade; and the law by which they are regulated has been improved by the study and adoption of the best usages which the genius of commerce has introduced. It has also been cultivated and greatly enlarged, under a course of judicial decisions, until the law of partnership has at last attained the precision of a regular branch of science, and forms a distinguished part of the code of commercial jurisprudence.

In treating of this subject, I shall consider, (I.) The nature, creation, and extent of partnerships; (II.) The rights and duties of partners, in their relation to each other and to the public; (III.) The dissolution of the contract.

I. **Of the Nature, Creation, and Extent of Partnerships.** — (1) *Partnership in General.* — Partnership is a contract of two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and *bear the loss, in certain proportions. (*a*) The two leading principles of the contract are *24

(*a*) Puffendorf, Droit de la Nat. liv. 5, c. 8, sec. 1; Pothier, Traité du Contrat de Société, n. 1; Répertoire de Jurisprudence, art. Société; Story on Partn. pp. 8, 10–19, [§ 2, 7–15.] The French ordinance of 1673 required the contract of partnership to be reduced to writing and registered; but that was the introduction of a new rule; and the regulation had gone into disuse at the time of Pothier, though he considered it to be a sage provision. (Pothier, ib. n. 79, 82, 98.) The new French commercial code has retained the regulation of the ordinance, and it requires an abstract of the articles of partnership to be attested, and publicly registered; but the

a common interest in the stock of the company, and a personal responsibility for the partnership engagements. The common interest of the partners applies to all the partnership property, whether vested in the first instance by their several contributions to the common stock, or acquired afterwards in the course of the partnership business; and *that* property is first liable for the debts of the company; and after they are paid, and the partnership dissolved, then it is subject to a division among the members, or their representatives, according to agreement. If one person advances funds, and another furnishes his personal services or skill, in carrying on a trade, and is to share in the profits, it amounts to a partnership. (*b*) But each party must engage to bring into the common stock something that is valuable; and a mutual contribution of that which has value, and can be * 25 appreciated, is * of the essence of the contract. (*a*) It would be a valid partnership, notwithstanding the whole capital was, in the first instance, advanced by one party, if the other contributed his time and skill to the business, and although his proportion of gain and loss was to be very unequal. It is sufficient that his interest in the profits be not intended as a mere substitute for a commission, or in lieu of brokerage, and that he be received into the association as a merchant, and not as an agent. (*b*) [1] A joint possession renders persons tenants in

omission, though injurious to the parties as between themselves, does not affect the rights of third persons. (Code de Com. art. 39–44.) So, by the commercial ordinances of Bilboa, confirmed by Philip V. in 1737, ed. N. Y. 1824, c. 10, sec. 4, it was made necessary, in every partnership, to reduce the articles to writing, and acknowledge them before a notary, and file a copy with the university and house of trade. This would seem not to be now the general law in Spain; for it is admitted that partnerships may be formed, as in the English law, tacitly as well as expressly. (Institutes of the Civil Law of Spain, by Asso & Manuel, b. 2, c. 15, translated by Johnston, London, 1825.) In Missouri, no person or copartnership shall deal as a merchant without a license. R. S. of Missouri, 1835, p. 408.

(*b*) Dob *v.* Halsey, 16 Johns. 34; Story on Partn. 19, 89, [§ 15; Dale *v.* Hamilton, 5 Hare, 369, 393]

(*a*) Pothier, Traité du Con. de Soc. n. 8, 9, 10; Ferrière, sur Inst. 3, 26; Code Napoleon, No. 1833.

(*b*) Reid *v.* Hollinshead, 4 B. & C. 867. The test of partnership is a community of profit, a specific interest in the profits, *as profits*, in contradistinction to a stipulated

[1] *Partnership as to Third Persons.* — The test of partnership as to third persons, and the reasons given in Waugh *v.* Carver, *post*, 27, n. (*d*), 32, n. (*c*), 1 Sm. L. C. *ad f.*, have been much discussed and broken in upon, if not overthrown in England. It is very truly said that creditors neither do nor can rely on profits for payment, for

common, but it does not, of itself, constitute them partners, and, therefore, surviving partners and the representatives of a deceased

portion of the profits as a compensation for services. Loomis *v.* Marshall, 12 Conn. 69; Champion *v.* Bostwick, 18 Wend. 175; Vanderburgh *v.* Hull, 20 id. 70; Lord Eldon, *Ex parte* Hamper, 17 Ves. 404. See *post*, 84. Mr. Justice Story, on Partnership, p. 51 [§ 34,] considers that a share in the *net*, and not in the *gross profits*, is here meant, to constitute a partner. S. P. in Dry *v.* Boswell, 1 Camp. 330. To be a partner, one must have such an interest in the profits as will entitle him to an *account*, and give him a specific lien or preference in payment over other creditors. It is not essential to a partnership that there should be a communion of interest in the capital stock, and also in the profit and loss. If there be a community of profit, or of profit and loss, in the adventure or business between the parties, they will be partners in the profit and loss, though not partners in the capital stock. If, however, there be no agreement between the parties on the point, the presumption will be a community of interest in the property as well as in the profit and loss. *Ex parte* Hamper, 17 Ves. 404; Story on Partn. 41, 42, 45, [§§ 27–29;] Reid *v.* Hollinshead, 4 B. & C. 867. The Roman law made the same distinction between a partnership in the capital stock and a partnership in the profit and loss arising from the sale. Dig. 17. 2. 58; Vinnius, ad Inst. 3. 26. 2, n. 3. There is also a distinction between a stipulation for a compensation for labor, proportioned to the profits, without any specific lien upon such profits, and which does not make a person a partner, and a stipulation for an interest in such profits, which entitles the party to an account as a partner. 1 Rose, 91; Carey on Partn. 11, n. 1; and this Mr. Chancellor Walworth held to be a sound distinction as regards the rights of third persons. 18 Wend. 184, 185; and Mr. Justice Wilde, in Denny *v.* Cabot, 6 Met. 82. See also Story on Partn. pp. 49, 56–59, [§§ 32, 38 *et seq.*] It is further a general principle in partnerships, that no one partner is entitled to compensation for his services to the firm, nor for interest upon moneys advanced to or deposited with the firm, for its use, without a special agreement, or some very peculiar circumstances to justify it. Lee *v.* Lashbrooke, 8 Dana, 214, and *infra*, p. 37, n.

profits do not exist until creditors are paid. In fact, what a creditor does rely on as a fund for payment are the gross returns, not the net profits. Yet it has been declared, that one who shares gross returns is not, while one who shares net profits is, a partner. See Mr. Gray's notes to Story on P., § 86 and § 49. Testimony of Mr. Commissioner Fane before a committee of the House of Commons; Lindley on P., 40, n. (*l*), 1st ed. It has been said that the true question is, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in profits being a most important element in determining that question, but not being in itself decisive. The test is whether it is such a participation of profits as to constitute the relation of *principal and agent* between the person taking the profits and those actually carrying on the business. Cox *v.* Hickman, 8 H. L. C. 268, 306, 318; Bullen *v.* Sharp, L. R. 1 C. P. 86, 112; Kilshaw *v.* Jukes, 3 Best & S. 847; *Re* English & Irish Church & Un. Ass. Soc., 1 Hem. & M. 85, 106; Shaw *v.* Galt, 16 Ir. C. L. 357. In Holme *v.* Hammond, L. R. 7 Ex. 218, *post*, 83, n. 1, however, some of the judges expressed dissatisfaction with this test also, considering that the agency is to be deduced from the partnership, and not the partnership from the agency. See, further, Heap *v.* Dobson, 15 C. B. N. S. 460; Easterbrook *v.* Barker, L. R. 6 C. P. 1, 11.

Arrangements for pooling profits, that is, for putting the net profits of different

partner are not partners, notwithstanding they have a community of interest in the joint stock. (*c*) There must be a communion of profit to constitute a partnership as between the parties, though it is not necessary that there should be a community of interest in the property itself. They must be not only jointly concerned in the purchase, but jointly concerned in the future sale. A joint purchase, with a view to separate and distinct sales by each person on his own account, is not sufficient. If several persons, who have never met and contracted together as part-

(*c*) Pearce *v.* Chamberlain, 2 Ves. 33. But a stipulation at the commencement of the partnership, that the personal representatives of a partner should succeed him in the partnership, is held to be valid and binding by the common law, and by the French and Scotch law. Collyer on Partn. b. 1, c. 1, pp. 5, 6; Code Civil Franc. de Société, 433, 434, [n. 1868;] Bell's Com. 620; though it was otherwise in the Roman law. Dig. lib. 17, tit. 2. 1. 35; Story on Partn. p. 7, [§ 5.]

concerns together at the end of a certain time, and dividing them in a certain proportion irrespective of the amounts contributed, have been held not to create partnerships. And this seems to be best explained by the modern English doctrines, on the ground that the several parties continue to carry on their business on their own behalf alone, although they have bound themselves to pay over a part of what they make. Fay *v.* Davidson, 13 Minn. 523; Smith *v.* Wright, 5 Sandf. 113; Connolly *v.* Davidson, 15 Minn. 519; Snell *v.* De Land, 43 Ill. 323. See Merrick *v.* Gordon, 20 N. Y. 93 (distinguishing Champion *v.* Bostwick, *sup.* n. (*b*).) So a loan stipulating for a share of profits, if the business proves profitable, in lieu of interest, or for a commission on profits, has been held not to create a partnership. Gibson *v.* Stowe, 43 Barb. 285; Williams *v.* Soutter, 7 Iowa, 435; St. 28 & 29 Vict. c. 86, § 1. See Lintner *v.* Milliken, 47 Ill. 178. But there are strong decisions the other way. Sheridan *v.* Medara, 2 Stockt. 469; McDonald *v.* Millaudon, 5 La. (Miller) 403; Wood *v.* Vallette, 7 Ohio St. 172; Pierson *v.* Steinmyer, 4 Rich. 309; Parker *v.* Canfield, 37 Conn. 250.

See, further, Owens *v.* Mackall, 28 Md. 382; *post*, 33, n. 1, on executors. Also, Edwards *v.* Tracy, 62 Penn. St. 374, 381; *post*, 34, n. 1, on agents.

In many American cases, however, it is laid down that although a person not actually a partner cannot be held liable as such to third persons who know that he is not a partner, he is liable as a partner to third persons who do not know the facts, if by the agreement under which the business is carried on he has an interest in a certain share of the profits as profits, *and a lien* on the whole profits as security for his share. *Supra*, n. (*b*); Pratt *v.* Langdon, 97 Mass. 97, 12 Allen, 544; Holmes *v.* Old Colony R.R., 5 Gray, 58; Berthold *v.* Goldsmith, 24 How. 536, 543; (compare Bigelow *v.* Elliot, 1 Cliff. 28, 37;) Catskill Bank *v.* Gray, 14 Barb. 471; Manhattan B. & M. Co. *v.* Sears, 45 N. Y. 797; Voorhees *v.* Jones, 5 Dutch. 270; Reynolds *v.* Hicks, 19 Ind. 113; Wright *v.* Davidson, 13 Minn. 449; Chapline *v.* Conant, 8 W. Va. 507. And see Niehoff *v.* Dudley, 40 Ill. 406, 409; Hallet *v.* Desban, 14 La. An. 529; Fay *v.* Davidson, 13 Minn. 523. The cases which seem to go farthest are Bromley *v.* Elliot, 38 N. H. 287; Bigelow *v.* Elliot, *sup.* Wood *v.* Vallette, 7 Ohio St. 172. See Pierson *v.* Steinmyer, 4 Rich. (S. C.) 309, 319.

ners, agree to purchase goods in the name of one of them only, and to take *aliquot* shares of the purchase, and employ a common agent for the purpose, they do not, by that act, become partners, or answerable to the seller in that character, provided they are not to be jointly concerned in the resale of their shares, and have not permitted the agent to hold them out as jointly answerable with himself. (*d*) The same distinction was known in the civil law; *qui nolunt inter se contendere, solent per nuntium rem emere in commune; quod a societate longe* * *remotum.* (*a*) *26 It has been repeatedly recognized in this country, and may be considered as a settled rule. (*b*)

If the purchase be on separate and not on joint account, yet if the interests of the purchasers are afterwards mingled with a view to a joint sale, a partnership exists from the time that the shares are brought into a common mass. (*c*) A participation in the loss or profit, or holding himself out to the world as a partner, so as to induce others to give credit on that assurance, renders a person responsible as a partner. (*d*) A partnership necessarily implies a union of two or more persons; and if a single individual, for the purpose of a fictitious credit, was to assume a copartnership name or firm, the only real partnership principle that could be applicable to his case would be the preference to be given to creditors dealing with him under that description, in the distribution of his effects. But that would be inadmissible, and contrary to the grounds upon which partnerships are created and sustained; and so the law on this point has, in another country, been understood and declared. (*e*) If the partnership consists of a large unincorporated association, or *joint-stock company*, trading upon a joint stock, it is usually regulated by special agreement; but the established law of the

(*d*) Hoare *v.* Dawes, Doug. 371; Coope *v.* Eyre, 1 H. Bl. 37; Gibson *v.* Lupton, 9 Bing. 297.

(*a*) Dig. 17. 2. 33.

(*b*) Holmes *v.* United Insurance Company, 2 Johns. Cas. 329; Post *v.* Kimberly, 9 Johns. 470; Osborne *v.* Brennan, 2 Nott & M'Cord, 427; Harding *v.* Foxcroft, 6 Greenl. 76.

(*c*) Sims *v.* Willing, 8 Serg. & R. 103. [Compare Heap *v.* Dobson, 15 C. B. N. S. 460.]

(*d*) Lord Ellenborough, M'Iver *v.* Humble, 16 East, 173; Olmstead *v.* Hill, 2 Ark. 346.

(*e*) Nairn *v.* Sir William Forbes, Bell's Commentaries on the Law of Scotland, ii. 625

land, in reference to such partnerships, is the same as in ordinary cases, and every member of the company (whatever private arrangement there may be to the contrary between the members, and which is only a mischievous delusion) is liable for all the debts of the concern. (*f*) It is, however, the judicial lan-
* 27 guage * in some of the cases, (*a*) [1] that the members of a

(*f*) The King *v.* Dodd, 9 East, 516; Holmes *v.* Higgins, 1 B. & C. 74; Hess *v.* Werts, 4 Serg. & R. 356; Carlen *v.* Drury, 1 Ves. & B. 157; Keasley *v.* Codd, cited in a note to the case of Perring *v.* Hone, 2 Carr. & P. 401; Vigers *v.* Sainet, 18 La. 300; Williams *v.* Bank of Michigan, 7 Wend. 542; Walburn *v.* Ingilby, 1 My. & K. 61; The Douglas Bank, 2 Bell's Comm. 628. Lord Ch. Hart observed, in *Ex parte* Sneyds, 1 Molloy, 261, that joint-stock companies were bodies of comparatively modern invention, to which statute gives the right to sue and be sued by their officers; and now, by the statute of 1 Vict. c. 73, authorizing the formation of joint-stock companies, the crown in England is authorized, by letters patent, to grant to companies, though not incorporated, the privileges of incorporated companies, and suits may be carried on in the name of one of the officers of the company. The patent may declare the individual responsibility of the members for contracts to the extent of their shares. Again, by the statute of 7 and 8 Vict. c. 110, 111, and 113, provision is made for the registration of all joint-stock companies, by a registrar at the board of trade, with the qualities and incidents of corporations; and such companies may, in cases of insolvency, wind up their concerns, as in cases of bankruptcy. Joint-stock *banks* must be created by letters patent; and if such companies be incorporated, the liability of the shareholders is not to be limited thereby. By the statute of 7 Geo. IV. c. 46, for regulating copartnerships of certain *bankers*, it was declared, that on judgment against a registered officer of the company, execution may issue against any members for the time being; and if the debt cannot be levied on them, the former members may be subjected to execution by leave of the court, by process of *scire facias*, and they are only secondarily liable. Eardley *v.* Law, 12 Ad. & El. 802.

(*a*) Gibson, J., Hess *v.* Werts, 4 Serg. & R. 361; Platt, J., Skinner *v.* Dayton, 19 Johns. 537.

[1] *Joint Stock Companies.* — The Lord Justice James in Baird's Case, L. R. 5 Ch. 725, 784, explains the difference between these companies and partnerships.

It may be mentioned in this connection that in England companies are authorized to be formed by executing and registering a deed under the hand and seal of the members, which determines the objects of the company, and the extent of its powers and of the members' liability. It is well settled that parties dealing with these companies are bound to know the contents of their deed of settlement. Kearns *v.* Leaf, 1 Hem. & Mil. 681, 706; 5 Am. Law Rev. 286, 287; Royal British Bank *v.* Turquand, 6 El. & Bl. 327, 332; Balfour *v.* Ernest, 5 C. B. N. S. 601, 623; *Ex parte* Chippendale, *Re* German Mining Co., 4 De G., M. & G. 19, 51; *Ex parte* Eagle Ins. Co., 4 Kay & J. 549; Ernest *v.* Nicholls, 6 H. L. C. 401, 419; *In re* London, Hamburgh, & Continental Exch. Bank, L. R. 9 Eq. 270. But how far the members' liability to strangers for acts within the powers of the directors can be limited, is a more difficult question. It was thought that it could not be limited in Greenwood's Case, 3 De G., M. & G. 459, 476; which was decided before the above principle was settled, but is cited Hill's Case, Jones's Case, L. R. 9 Eq. 605, 611; and it seems to be approved in Lind. on P. 2d ed. 339; Gordon *v.* Sea

private association may limit their personal responsibility, if there be an explicit stipulation to that effect made with the party with whom they contract, and clearly understood by him at the time. But stipulations of that kind are looked upon unfavorably, as being contrary to the general policy of the law; and it would require a direct previous notice of the intended limitation to the party dealing with the company, and his clear understanding of the terms of the limitation. (*b*) Incorporated companies, though constituted expressly for the purposes of trade, are not partnerships, or joint traders, within the purview of the law of partnership, and the stockholders are not personally responsible for the company's debts or engagements, and their property is affected only to the extent of their interest in the company. To render them personally liable requires an express provision in the act of incorporation; and a disposition to create such an extended responsibility seems to be increasing in our country, and is calculated to check the enterprise of such institutions, and impair the credit and value of them as safe investments of capital.

A contract of partnership need not be in writing. Though there be no express articles of copartnership, the obligation of a partnership engagement may equally be implied in the acts of

(*b*) It seems to be still an unsettled point, whether a stipulation in the articles of association, limiting the responsibility of the members to the mere joint funds, or to a qualified extent, be binding upon the creditors dealing, with notice of the stipulation. Mr. Justice Story inclines to the opinion, that the creditor acting with the knowledge of it would be bound by it. Story on Partn. [§ 164]. Unless the creditor has previous notice of the stipulation, he certainly would not be bound by it. Blundell *v.* Winsor, 8 Sim. 601; Walburn *v.* Ingilby, 1 My. & K. 61, 76. If he has that notice, I think he ought, on general principles, to be bound by it.

In joint-stock companies in Scotland, the law in relation thereto is, that each partner is liable only to the extent of his shares, and not *in solido*. 2 Bell's Comm. 627, 628. This was the doctrine in the Roman law as to all partnerships, and is also the rule in France, except as to commercial partnerships. Dig. 45. 2. 11. 1, and 2; Pothier, de Société, n. 96, 103, 104. In a private commercial association, where it is agreed that the business shall be conducted by a president and directors, and they be chosen, no individual partner can bind the firm, for he has no authority. Lambeth *v.* Vawter, 6 Rob. (La.) 128. But generally, in the case of joint contracts, a release or settlement of the debt by one, is good as against all the creditors, in cases free from fraud. Wallace *v.* Kelsall, 7 M & W. 264.

Fire Life Ass. Co., 1 Hurlst. & N. 599. But compare Bromley *v.* Elliot, 38 N. H
See Hallett *v.* Dowdall, 18 Q. B. 2; 287, 303.
Forbes *v.* Marshall, 11 Exch. 166, 179.

the parties; and if persons have a mutual interest in the profits and loss of any business carried on by them, or if they hold themselves out to the world as joint traders, they will be held responsible as partners to third persons, whatever may be the real nature of their connection, or of the agreement under which they act. Actual intention is requisite to constitute a partnership *inter se*. (*c*) If a person partakes of the profits, he is answerable as a partner for losses, on the principle that, by taking a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts. (*d*) [2]

* 28 * It is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage-coaches, artisans, or farmers, as well as between merchants and bankers. (*a*) The essence of the association is, that they may be jointly concerned in profit and loss, or in profit only, in some honest and lawful business, not immoral in itself, nor prohibited by the law of the land; and this is a principle of universal reception. (*b*) The contract must be for the common benefit of all the parties to the association; and though the shares need not be equal, yet, as a general rule, all must partake of the profit in some ratable proportion; and that proportion, as well as the mode of conducting the business, may be modified and regulated by private agreement, at the pleasure of the parties. (*c*) If there be no such agreement on the subject, and no evidence to the contrary, the general conclusion of the law is, that the part-

(*c*) Hazard *v.* Hazard, 1 Story, 871.

(*d*) Voet, Com. ad Pand. 17. 2. 1; De Grey, C. J., Grace *v.* Smith, 2 W. Bl. 998; Eyre, C. J., Waugh *v.* Carver, 2 H. Bl. 247; Cheap *v.* Cramond, 4 B. & Ald. 663; Peacock *v.* Peacock, 16 Ves. 49; Spencer, J., Dob *v.* Halsey, 16 Johns. 40. *Supra*, 26, n.

(*a*) Willett *v.* Chambers, Cowp. 814; Gould, J., Coope *v.* Eyre, 1 H. Bl. 43; Pothier, Traité de Soc. n. 55; Fromont *v.* Coupland, 2 Bing. 170. Associations for buying or selling personal property as factors or brokers, or for carrying personal property for hire in ships, are in the Louisiana Code, art. 2796, termed commercial partnerships. There *may* be a partnership to trade in land, and limited to purchasing, and the profit and loss divisible as stock. This result does not necessarily follow from a joint purchase. Campbell *v.* Colhoun, 1 Penn. 140.

(*b*) Dig. 18. 1. 35. 2; Pothier, Traité du Con. de Soc. n. 14; Biggs *v.* Lawrence, 3 T. R. 454; Aubert *v.* Maze, 2 Bos. & P. 371; Griswold *v.* Waddington, 16 Johns. 489.

(*c*) Collyer on Partn. 11; Gow on Partn. 9; Story on Partn. [§§ 23, 24.]

[2] *Ante*, 25, n. 1.

nership losses are to be equally borne, and the profits equally divided; (*d*)[1] and this would be the rule, *even *29 though the contribution between the parties consisted entirely of money by one, and entirely of labor by another. In equity, according to Pothier, each partner should share in the profit in proportion to the value of what he brings into the common stock, whether it be money, goods, labor, or skill; and he should share in the loss in a ratio to the gain to which he would, in a prosperous issue to the business, have been entitled. He admits, however, that the proportion of gain and loss may be varied by agreement; and the agreement may render the extra labor of one of the concern equal to the risk of loss, and a substitute for his share of loss. (*a*)

It is not necessary that every member of the company should, in every event, participate in the profits. It would be a valid partnership, according to the civil law, if one of the members had a reasonable expectation of profit, and was, in consequence of his particular art and calling, employed to sell, and to have a share of the profits if they exceeded a certain sum, provided this was granted to him by reason of his pains and skill, and not as a gratuity. (*b*) So one partner may retire under an agreement to abide his proportion of risk of loss, and take a sum in gross for his share of future uncertain profits; or he may take a gross sum as his share of the presumed profit, with an agreement that the remaining partners are to assume all risks of loss. (*c*) But a partnership, in which the entire profit was to belong to some of them, in exclusion of others, would be manifestly unjust; and as between the parties themselves, it would not be a proper partner-

(*d*) Inst. 3. 26. 1; Pothier, *ub. sup.* n. 73; Peacock *v.* Peacock, 16 Ves. 49; Gould *v.* Gould, 6 Wend. 263; Parke, B., in Farrar *v.* Beswick, 1 Mood. & Rob. 527; Story on Partn. [§§ 20–26;] Code of Louisiana, art. 2896. Mr. Justice Story has fully examined this point.

(*a*) Pothier, *ub. suv.* n. 15–19, 25.

(*b*) Dig. 17. 2. 44; Pothier, *ub. sup.* n. 18.

(*c*) Pothier, Traité de Soc. n. 25, 26

[1] Robinson *v.* Anderson, 7 De G., M. & G. 239; s. c. 20 Beav. 98; Collins *v.* Jackson, 31 Beav. 645; Webster *v.* Bray, 7 Hare, 159; Stewart *v.* Forbes, 1 Macn. & G. 137, 146; Warner *v.* Smith, 1 De G., J. & S. 337; Nowell *v.* Nowell, L. R. 7 Eq. 588; Donelson *v.* Posey, 13 Ala 752; Roach *v.* Perry, 16 Ill. 37; Farr *v.* Johnson, 25 Ill. 522; Moore *v.* Bare, 11 Iowa, 198. See Hasbrouck *v.* Childs, 3 Beaw. 105; Jackson *v.* Crapp, 32 Ind. 422

ship. (*d*) It would be what the Roman lawyers called *societas leonina*, in allusion to the fable of the lion, who, having
* 30 entered into * a partnership with the other animals of the forest, in hunting, appropriated to himself all the prey. (*a*)

There may be a general partnership at large, or it may be limited to a particular branch of business, or to one particular subject. (*b*) There may be a partnership in the goods in a particular adventure, or it may be confined to the profits thereof. (*c*) [1] If two persons should draw a bill of exchange, they are considered as partners in respect to the bill, though in every other respect they remain distinct. By appearing on the bill as partners, the person to whom it is negotiated is to collect the relation of the parties from the bill itself, and they are not permitted to deny the conclusion. (*d*) This principle has not been extended to the

(*d*) Lowry *v.* Brooks, 2 M'Cord, 421; Bailey *v.* Clark, 6 Pick. 372.

(*a*) Dig. 17. 2. 29. 2; Pothier, *ub. sup.* n. 12; Institutes of the Laws of Holland, by J. Van der Linden, translated by J. Henry, Esq., 571; 2 Bell's Comm. 615.

(*b*) Lord Mansfield, Willett *v.* Chambers, Cowp. 816; Code Napoleon, n. 1841.

(*c*) Salomons *v.* Nissen, 2 T. R. 674; *Ex parte* Gellar, 1 Rose, 297; Holmes *v* Higgins, 1 B. & C. 74; Meyer *v.* Sharpe, 5 Taunt. 74; Pothier, Traité du Con. de Soc. n. 54.

(*d*) Carvick *v.* Vickery, Doug. 653, note; De Berkom *v.* Smith, 1 Esp. 29. The doctrine in Carvick *v.* Vickery was afterwards repudiated, and it is since held, that codrawers, or copayees, or indorsers, not being commercial partners, must each indorse the bill as a joint contract, and each receive notice of default, and demand of payment on each must be made. Willis *v.* Green, 5 Hill (N. Y.), 234; Sayre *v.*

[1] *Partnership in Profits.* — See Lindley on P., 2d ed. 22. French *v.* Styring, 2 C. B. N. S. 357; Howe *v.* Howe, 99 Mass. 71; Meserve *v.* Andrews, 104 Mass. 360; Brigham *v.* Dana, 29 Vt. 1; Stevens *v.* Faucet, 24 Ill. 483; Robbins *v.* Laswell, 27 Ill. 365; Fawcett *v.* Osborn, 32 Ill. 411; Bromley *v.* Elliot, 38 N. H. 287, 309; Meaher *v.* Cox, 37 Ala. 201; Ward *v.* Thompson, 22 How. 330; Greenham *v.* Gray, 4 Ir. C. L. 501. But see Dwinel *v.* Stone, 30 Me. 384; Conklin *v.* Barton, 43 Barb. 435; Ogden *v.* Astor, 4 Sandf. 311, 321.

But when one is to have a share of the profits only, and has no interest in the principal stock, it may be sometimes difficult to say whether he is a partner or only a servant compensated in that way. *Post*, 33, 34, n. 1; Greenham *v.* Gray, *sup.* (compare Shaw *v.* Galt, 16 Ir. C. L. 357, 378); Conklin *v.* Barton, *sup.*; Ogden *v.* Astor, *sup.*; Parker *v.* Fergus, 43 Ill. 437; Braley *v.* Goddard, 49 Me. 115; Ryder *v.* Wilcox, 103 Mass. 24; Parker *v.* Canfield, 37 Conn. 250, 265.

See, as to agreements between authors and publishers, Reade *v.* Bentley, 4 Kay & J. 656, 662.

An example is to be found of a somewhat similar partnership to that mentioned at the beginning of note (*f*), between the members of a society called "Separatists." Their articles contained a renunciation of individual property, but the society was afterwards incorporated. Goesele *v.* Bimeler, 14 How. 589; iv. 441, n.

case of two persons signing a joint note, (*e*) though it is not easy to perceive a distinction between the cases. (*f*)

(2) *Of Dormant Partners.* — *There is no difficulty, *31 in the ordinary course of business, with the case of an actual partner, who appears in his character of an *ostensible* partner. The question as to the person on whom the responsibility of partner ought to attach in respect to third persons, arises in the case of *dormant* partners who participate in the profits of the trade, and conceal their names. They are equally liable, when

Frick, 7 Watts & S. 388. So, by statute, in Mass. R. S. 700, sec. 14, one or two or more joint contractors cannot, by promise or acknowledgment, take a case out of the statute of limitations. [Tappan *v.* Kimball, 30 N. H. 136; Sage *v.* Ensign, 2 Allen, 245.]

(*e*) Hopkins *v.* Smith, 11 Johns. 161.

(*f*) The Roman law, which has been followed in France, distinguished between two kinds of universal partnership, the one *universorum bonorum*, and the other *universorum quæ ex quæstu veniunt*. By the first, the parties put into common stock all their property, real and personal, then existing or thereafter to be acquired. All future acquisitions, by purchase, gift, legacy, or descent, went into this partnership as of course, without assignment, unless the gift or legacy was declared to be under the condition of not being placed there. Such a partnership was charged with all the debts of the parties at its commencement, and with all the future debts, and personal and family expenses. The validity of such a partnership was not questioned, notwithstanding it might be extremely unequal, and one might bring much more property into it than another, and acquire ten times as much by gift, purchase, or succession, and notwithstanding one partner might have a family of children, and another be destitute of any. (Pothier, Traité du Con. de Soc. n. 28–42.) We need not be apprehensive that such a partnership will become infectious, for it appears to be fruitful in abuse and discord; and in the Code Napoleon, No. 1837, the more forbidding features of the connection are removed. Though it embraces all the existing property of the parties, and every species of gains, it does not, under the code, extend to property to be acquired by gift, legacy, or inheritance, and every stipulation to that effect is prohibited. The Civil Code of Louisiana, which has throughout closely followed the Code Napoleon, has recognized these universal partnerships applying to all existing property; but they must be created in writing, and registered, and they are under the checks mentioned in the French Code. Civil Code of Louisiana, Nos. 2800–2805.

The other species of universal partnership applies only to future profits, from whatever source they may be derived; and it is formed when the parties agree to a partnership without any further explanation. In this case, the separate acquisitions of each, by legacy or inheritance, are kept separate, and do not enter into the common mass; nor does it embrace present real property, but only the future issues and profits of it; and it is not, of course, chargeable with existing debts, though it was formerly chargeable with them when made in that part of France under the *Droit Coutumier* (Pothier, *ub. sup.* n. 48–52; Code Napoleon, n. 1838.) The same kind of general partnerships, embracing all the present and future property of the parties, is known in the laws of Spain and of Holland. Institutes of the Civil Law of Spain, by Doctors Asso and Manuel, b. 2, 15; Institutes of the Laws of Holland, by J. Van der Linden, translated by J. Henry, Esq., 578.

discovered, as if their names had appeared in the firm, and although they were unknown to be partners at the time of the creation of the debt. (*a*)[1] The question arises, also, in

(*a*) Robinson *v.* Wilkinson, 8 Price, 538; Lord Loughborough, 1 H. Bl. 48; Pitts *v.* Waugh, 4 Mass. 424; Duncan, J., 8 Serg. & R. 55; Porter, J., 5 La. 406, 408; Swan *v.* Steele, 7 East, 210; Winship *v.* United States Bank, 5 Peters, 529, 561. A judgment against an ostensible partner, and not knowing of a dormant partner, is no bar to an action against all the partners. A judgment being a mere security, does not change any other collateral security, until satisfaction. Watson *v.* Owens, 1 Rich. (S. C.) 111; Robinson *v.* Wilkinson, 8 Price, 538; Drake *v.* Mitchell, 8 East, 251. In Beckham *v.* Drake, 9 M. & W. 79, A, B, & C were partners, and the latter a dormant partner, and the first two entered into a written contract without the other being named or signing the contract; it was held, that a suit lay against all the three partners, — the dormant partner not being known as such to the plaintiff when the contract was made. The partners who signed the contract had authority to bind the dormant partner by parol contract, whether with or without writing, though it would be different in the case of sealed instruments. The decision in Beckham *v.* Knight, in the C. B., was overruled, after much discussion and consideration on this point.

If partners agree that the business shall be carried on in the name of one of them, or of some other person only, such name becomes the copartnership name, and all the members are bound by it. Bank of Rochester *v.* Monteath, 1 Den. 402; Palmer *v.* Stephens, ib. 471. The law as to dormant partners is confined to commercial partnerships. Pitts *v.* Waugh, 4 Mass. 424; Smith *v.* Burnham, 3 Sumner, 435. A dormant partner cannot join as plaintiff in an action, for there is no privity of communication between him and the party who contracted with the firm. He is, nevertheless, suable as a defendant, because he participated in the profits of the contract. Lloyd *v.* Archbowle, 2 Taunt. 324; Boardman *v.* Keeler, 2 Vt. 65. If one partner borrows money in his individual name, a dormant partner is equally liable, if the borrower represented it to be for the use of the partnership; though without such a representation, the creditor must prove that the money went to a partnership use. Etheridge *v.* Binney, 9 Pick. 272; Lloyd *v.* Ashby, 2 Carr. & P. 138; Story on Part. [§ 139.] The statute law of New York, of 1833, (Laws, N. Y., sess. 56, c. 281,) has checked the use of fictitious firms, by declaring that no person shall transact business in the name of a partner not interested in his firm; and that where the designation "and company" or "& Co." is used, it shall represent an actual partner or partners, and the violation of the provision is made a penal offence. A similar provision is in Georgia. Hotchkiss's Code, 377.

[1] *Parties to Actions.* — A dormant partner need not join as a plaintiff; Wait *v.* Dodge, 34 Vt. 181; Wood *v.* O'Kelley, 8 Cush. 406; Rogers *v.* Kichline, 36 Penn. St. 293; or be joined as defendant. Hopkins *v.* Kent, 17 Md. 72; North *v.* Bloss, 30 N. Y. 374; Jackson *v.* Alexander, 8 Texas, 109; Chase *v.* Dening, 42 N. H. 274; Page *v.* Brant, 18 Ill. 37. And a nominal partner need not join, *a fortiori*. Hatch *v.* Wood, 43 N. H. 633. See Bishop *v.* Hall, 9 Gray, 480.

But a dormant partner may join as plaintiff; 1 Lind. on P. 2d ed. 476; Cottray *v.* Fennell, 10 B. & C. 671; Rogers *v.* Kichline, *sup.*; Hilliker *v.* Loop, 5 Vt. 116; see Secor *v.* Keller, 4 Duer, 416; or be joined as defendant, as stated in the text. Griffith *v.* Buffum, 22 Vt. 181; Smith *v.* Smith, 27 N. H. 244; Brooke *v.*

the case of a *nominal* or implied *partner, who has no *32 actual interest in the trade or its profits, and he becomes responsible as a partner, by voluntarily suffering his name to appear to the world as a partner, by which means he lends to the partnership the sanction of his credit. (*a*) There is a just and marked distinction between partnership as respects the public, and partnership as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. (*b*) Though the law allows parties to regulate their concerns as they please in regard to each other, they cannot, by arrangement among themselves, control their responsibility to others; and it is not competent for a person, who partakes of the profits of a trade, however small his share of those profits may be, to withdraw himself from the obligations of a partner. (*c*) Each individual member is answerable *in solido* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. Even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute either money or labor, or to receive any part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it *would not receive, nor perhaps deserve. This principle *33

(*a*) Guidon *v.* Robson, 2 Camp. 802; Young *v.* Axtell, cited in 2 H. Bl. 242; Porter, J., 5 La. (Miller), 408, 409; Fox *v.* Clifton, 6 Bing. 776.

(*b*) Barry *v.* Nesham, 3 C. B. 641. It was held, that a participation in the profits, *qua* profits, created a partnership as to third persons, whatever the stipulation may be as between themselves. [But see 25, n. 1.]

(*c*) Waugh *v.* Carver, 2 H. Bl. 235; Hesketh *v.* Blanchard, 4 East, 144. Nor can a partner exonerate himself from personal responsibility for the existing engagements of the company, by assigning or selling out his interest in the concern. Perring *v.* Hone, 2 Carr. & P. 401.

Washington, 8 Gratt. 248; Hill *v.* Voorhies, 22 Penn. St. 68; Lea *v.* Guice, 13 Sm. & Marsh. 656; Wood *v.* Cullen, 13 Minn. 394.

Mr. Lindley thinks that when a nominal partner need not join as plaintiff, he ought not to do so; for *ex hypothesi* he is no party to the contract sought to be enforced, and he has no interest in its subject-matter. Lind. on P. 2d ed. 479. See Waite *v.* Dodge, 34 Vt. 181, 183. A nominal partner may be joined as defendant, as stated in the text. Smith *v.* Smith, 27 N. H. 244.

of law inculcates good faith and ingenuous dealing, and is now regarded by the English courts as a fundamental doctrine. (*a*) It has been explicitly asserted with us, and is now incorporated in the jurisprudence of this country. (*b*) So strict is the law on this point, that even if executors, in the disinterested performance of a trust, continue the testator's share in a partnership concern in trade, for the benefit of his infant children, they may render themselves personally liable as dormant partners. (*c*)[1]

(3) *Of Sharers in Profits.* — A person may be allowed, in special cases, to receive part of the profits of a business, without becoming a legal or responsible partner. (*d*) Thus a party may by agreement receive, by way of rent, a portion of the profits of

(*a*) Hoare *v.* Dawes, Doug. 371; Grace *v.* Smith, 2 Wm. Bl. 998; Waugh *v.* Carver, 2 H. Bl. 235; Baker *v.* Charlton, Peake N. P. 80; Hesketh *v.* Blanchard, 4 East, 144; *Ex parte* Hamper, 17 Ves. 404; *Ex parte* Langdale, 18 Ves. 300; Carlen *v.* Drury, 1 Ves. & B. 154; Cheap *v.* Cramond, 4 B. & Ald. 663; Best, J., Smith *v.* Watson, 2 B. & C. 419; Lacy *v.* Woolcott, 2 Dowl. & Ry. 458.

(*b*) Purviance *v.* M'Clintee, 6 Serg. & R. 259; Gill *v.* Kuhn, ib. 333; Thompson, J., in Post *v.* Kimberly, 9 Johns. 489; Dob *v.* Halsey, 16 Johns. 40; Shubrick *v.* Fisher, 2 Desaus. Ch. 148; Osborne *v.* Brennan, 2 Nott & M'Cord, 427. Mr. Justice Story (Partn. [§§ 36, 37]) prefers the Roman law, which did not create a partnership between the parties as to third persons, without their consent, or against the stipulations of their own contract. He is of opinion that the common law has pressed its principles on this subject to an extent not required by, even if it is consistent with, natural justice; and that it would have been better if no partnership should be deemed to exist, even as to third persons, unless such were the intention of the parties, or unless they had so held themselves out to the public. For the Roman law, see Dig. 17. 2. 44; Voet, ad Pand. 17. 2. 2. But if a dormant partner, when his name has not been announced, and no credit given to him personally, as a supposed member, he may withdraw without giving any notice to the public. Lacaze *v.* Sejour, 10 Rob. (La.) 144.

(*c*) Wightman *v.* Townroe, 1 Maule & Selw. 412. The better way would be for the executors, in such cases, to have the trade carried on for the benefit of the infants, under the direction of the court of chancery, as has frequently been done in England. See 4 Johns. Ch. 627.

(*d*) See *supra*, 25, n. (*b*) [& 1], as to a sharer of profits.

[1] *Executors.* — Labouchere *v.* Tupper, 11 Moo. P. C. 198. See Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24; Lucas *v.* Williams, 3 Giff. 150. But it has been thought that none of the cases sustain the proposition that the execution of an article of partnership by an executor or trustee *ipso facto* renders him personally responsible without reference to other circumstances; Owens *v.* Mackall, 33 Md. 382, 394; and in England it has been held not enough to charge executors personally that they had received payments which were made partly on account of net profits due to their testator's estate, when it appeared that there was no capital employed in the business. Holme *v.* Hammond, L. R. 7 Ex. 218, *ante*, 25, n. 1. As to liability of assets, *post*, 57, n. (*a*).

a farm or tavern, without becoming a partner. (*e*) So, to allow a clerk or agent a portion of the profits of sales as a compensation for labor, or a factor a percentage on the amount of sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an *interest in the profits in the character of profits, and *34 there is no mutuality between the parties. A person in business may employ another as a subordinate, and agree to pay him a share of the profits, if any shall arise, without giving him the rights or liabilities of a partner. (*a*) So, seamen take a share, by agreement with the ship-owner, in the profits or gross proceeds of a whale fishery or coasting voyage, by way of compensation for their services; and shipments from this country to India upon half profits are usual, and the responsibility of partners has never been supposed to flow from such special agreements. (*b*) This distinction seems to be definitely established by a series of decisions, and it is not now to be questioned; and yet Lord Eldon regarded the distinction with regret, and mentioned it frequently, with pointed disapprobation, as being too refined and subtle, and the reason of which, he said, he could not well comprehend. (*c*)[1]

(*e*) Perrine *v.* Hankinson, 6 Halst. 181.

(*a*) Burckle *v.* Eckart, 1 Denio, 337.

(*b*) Dixon *v.* Cooper, 3 Wils. 40; Cheap *v.* Cramond, 4 B. & Ald. 670; Benjamin *v.* Porteus, 2 H. Bl. 590; Meyer *v.* Sharpe, 5 Taunt. 74; Hesketh *v.* Blanchard, 4 East, 144; Dry *v.* Boswell, 1 Camp. 329; Wilkinson *v.* Frasier, 4 Esp. 182; Mair *v.* Glennie, 4 Maule & Selw. 240; Geddes *v.* Wallace, 2 Bligh, 270; Muzzy *v.* Whitney, 10 Johns. 226; Rice *v.* Austin, 17 Mass. 206; Lowry *v.* Brooks, 2 M'Cord, 421; Baxter *v.* Rodman, 3 Pick. 435; Cutler *v.* Winsor, 6 Pick. 335; Hardin *v.* Foxcroft, 6 Greenl. 76; The Crusader, Ware, 437; Coffin *v.* Jenkins, 3 Story, 108, 112. See also *supra*, 25, n. (*b*) [& 1]; Loomis *v.* Marshall, 12 Conn. 69; Hazard *v.* Hazard, 1 Story, 371. See, also, Story on Partn. [§§ 41–49,] who has analyzed the principal cases on the subject. See, also, Pardessus, Droit Com. ii. n. 560; iii. n. 702; iv. n. 969; and Duvergier, Droit Civ. Franc. v. n. 48 to n. 56, for the French law as to the cases in which an agency, as distinct from a partnership, is within the intention of the parties.

(*c*) *Ex parte* Hamper, 17 Ves. 404; *Ex parte* Rowlandson, 1 Rose, 89; *Ex parte* Watson, 19 Ves. 459; Miller *v.* Bartlett, 15 Serg. & R. 137. Mr. Carey, in his recent

[1] It is intelligible, however, on the doctrine of the later English cases, stated *ante*, 25, n. 1; and it is recognized in many American cases; *ante*, 30, n. 1, and cases cited; Edwards *v.* Tracy, 62 Penn. St. 374, 381; Burckle *v.* Eckhart, *sup.* n. (*a*). affirmed 3 Comst. 132; Felch *v.* Hall, 25 Barb. 13; Crawford *v.* Austin, 34 Md. 49; McMahon *v.* O'Donnell, 5 C. E. Green (N. J.), 306; Stocker *v.* Brockelbank, 3 Macn. & G. 250.

(4) *Of Limited Partners.* — The English law does not admit of partnerships with a restricted responsibility. In many parts of Europe, limited partnerships are admitted, provided they be entered upon a register. (*d*) Thus in France, by the ordinance of 1673, limited partnerships (*la Société en commandité*) were established, by which one or more persons, responsible *in solido* as general partners, were associated with one or more sleeping partners, who furnished a certain proportion of capital, and were liable only to the extent of the funds furnished. This kind of partnership has been continued and regulated by the new Code of Commerce; (*e*) and it is likewise introduced into the
* 35 * Louisianian code, under the title of partnership *in commendam.* (*a*) It is supposed to be well calculated to bring dormant capital into active and useful employment; and this species of partnership has, accordingly, been authorized by statute in Massachusetts, Rhode Island, Connecticut, Vermont, New Jersey, Pennsylvania, Maryland, South Carolina, Georgia, Alabama, Florida, Mississippi, Indiana, and Michigan, as well as in New York.[1] It is declared, in the latter state, (*b*) that a limited partnership for the transaction of any mercantile, mechanical, or manufacturing business within the state, (*c*) may consist of one or more persons jointly and severally responsible according to the existing laws, who are called *general* partners, and one or more persons who furnish certain funds to the common stock, and whose liability shall extend no further than the fund furnished, and who are called *special* partners. The names of the special

treatise on the Law of Partnership, p. 11, vindicates the principle on which the above distinction is founded, and insists that it is perfectly clear and just. Collyer, also, in a still more recent treatise on the Law of Partnership, p. 17, is in favor of the reasonableness of the distinction in the cases where there is, and where there is not a mutual interest in the profits.

(*d*) Lord Loughborough, 1 H. Bl. 48.

(*e*) Répertoire de Jurisprudence, par Merlin, tit. Société, art. 2; Code de Commerce, b. 1, tit. 3, sec. 1.

(*a*) Civil Code of Louisiana, art. 2810.

(*b*) Laws of N. Y. April, 1822, sess. 45, c. 244, and sess. 50, c. 288; reënacted by N. Y. Revised Statutes, i. 764, with some slight variations.

(*c*) In New York, New Jersey, Pennsylvania, Maryland, South Carolina, Alabama, Georgia, Florida, Mississippi, Connecticut, and Vermont, the business of banking and insurance is specially excepted.

[1] The student must be referred to the statutes of the several states mentioned in the text, as well as of many others, for the present law on this subject.

partners are not to be used in the firm, which shall contain the names of the general partners only, without the addition of the word *company*, or any other general term; nor are they to transact any business on account of the partnership, or be employed for that purpose as agents, attorneys, or otherwise; but they may, nevertheless, advise as to the management of the partnership concern. Before such a partnership can act, a registry thereof must be made in the clerk's office of the county, with an accompanying certificate, signed by the parties, and duly acknowledged, and containing the title of the firm, the general nature of the business, the names of the partners, the amount of capital furnished by the special partners, and the period of the partnership. The capital advanced by the special partners must be in cash, and an affidavit filed stating the fact. Publication must likewise be made for at least six weeks of the terms of the partnership, and due publication for four weeks of the dissolution of the partnership by the act of the parties prior to the time specified in the certificate. No such partnership can make assignments or transfers, or create any lien, with the intent to give preference to creditors. The special partners may receive an annual interest on the capital invested, provided there be no reduction of the original capital; but they cannot be permitted * to claim as creditors, in case of the insolvency of the *36 partnership. (*a*) It is easy to perceive, that the provisions of the act have been taken, in most of the essential points, from the French regulations in the commercial code; and it is the first instance in the history of the legislation of New York, that the statute law of any other country than that of Great Britain has been closely imitated and adopted. The provision for limited partnerships in the other states (and which were subsequent in point of time to that in New York) is essentially the same. (*b*)

It is a general and well-established principle, that when a per-

(*a*) It has been ruled, in Hubbard *v.* Morgan, U. S. D. C. for N. Y., May, 1839, that the special partner must, at his peril, see that the law is complied with in all its essentials, or he will be liable as a general partner. [Haggerty *v.* Foster, 103 Mass. 17; 7 Am. L. Rev. 177; Haviland *v.* Chace, 39 Barb. 283; Richardson *v.* Hogg, 38 Penn. St. 153.]

(*b*) If the partnership be a particular one, being formed for some business not of a commercial nature, such partnerships are called particular or ordinary partnerships in the Civil Code of Louisiana, art. 2806, 2807; and the partners are not bound *in solido* for the debts of the firm, unless such power be specially given; but each partner is bound for his share of the partnership debt. Ib. art. 2843, 2844; 12 Rob. (La.) 247.

son joins a partnership as a member, he does not, without a special promise, assume the previous debts of the firm, nor is he bound by them. To render persons jointly liable upon a contract as partners, they must have a joint interest contemporary with the formation of the contract. (*c*) If, however, goods are purchased in pursuance of a previous agreement between two or more persons, that one of them should purchase the goods on joint account, in a foreign adventure, they are all answerable to the seller for the price, as partners, even though their names were not announced to the seller; for the previous agreement made the partnership precede the purchase, and a joint interest attached in the goods at the instant of the purchase. (*d*)

II. Of the Rights and Duties of Partners in their Relation to each Other, and to the Public. — (1) *Of the Interest of Partners in their Stock in Trade.* — Partners are joint tenants of their stock in trade, but without the *jus accrescendi*, or right of survivorship; and this, according to Lord Coke, (*e*) was part of the law merchant, for the advancement and continuance of commerce and trade. It would seem, however, to have been a point of some doubt as late as the middle of the seventeenth century, whether the doctrine of survivorship did not apply; for the Lord * 37 Keeper, * in *Jeffereys* v. *Small*, (*a*) observed that it was common, at that time, for traders, in articles of copartnership, to provide against survivorship, though he declared that the provision was clearly unnecessary. On the death of one partner, his representatives become tenants in common with the survivor; and with respect to *choses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor, for the benefit of all the parties in interest. (*b*)[1] But no partner has an exclusive right to any part of

(*c*) Saville *v.* Robertson, 4 T. R. 720; Young *v.* Hunter, 4 Taunt. 582; Poindexter *v.* Waddy, 6 Munf. 418; Gow on Partn. 150–152; Collyer on Partn. 735–743. Mr. Justice Story, in his Comm. on Partn. [§§ 147–153,] has examined the cases replete with complex and refined discussions, as to the acts preliminary to the formation of a partnership, which do or do not bind the partnership when consummated. The general doctrine, as the learned judge observes, is well summed up by Mr. Collyer.

(*d*) Gouthwaite *v.* Duckworth, 12 East, 421; Collyer on Partn. 357–360; Story on Partn. [§ 148.] (*e*) Co. Litt. 182 a. (*a*) 1 Vern. 217.

(*b*) Martin *v.* Crompe, 1 Ld. Raym. 340; Daniel, J., in Jarvis *v.* Hyer, 4 Dev. (N. C.) 869.

[1] An exhaustive discussion of the law as to chattels in possession where the authorities are collected by Mr. Baron Parke, and the doctrine in the text con-

the joint stock, until a balance of accounts be struck between him and his copartners, and the amount of his interest accurately ascertained. The interest of each partner in the partnership property is his share in the surplus, after the partnership accounts are settled and all just claims satisfied; and it follows, that no suit at law can be maintained by one partner against his copartner, until a final settlement has been made, and the balance ascertained, and a promise contracted to pay it. (*c*)[2]

(*c*) Nicoll *v.* Mumford, 4 Johns. Ch. 522; Fox *v.* Hanbury, Cowp. 445; Taylor *v.* Fields, 4 Ves. 396; 15 Ves. 559, note, s. c.; Parsons, C. J., in Pierce *v.* Jackson, 6 Mass. 242; Holmes *v.* Higgins, 1 B. & C. 74; Killam *v.* Preston, 4 Watts & S. 14; Foster *v.* Allanson, 2 T. R. 479; Fromont *v.* Coupland, 2 Bing. 170 One partner having only his separate interest in the surplus, cannot, of course, sell or mortgage an undivided interest in a specific part. Morrison *v.* Blodgett, 8 N. H. 238; Lovejoy *v.* Bowers, 11 id. 406. Though each partner is bound to bestow his services and labor with due diligence and skill, he is not entitled to any reward or compensation, unless there be an express stipulation between the partners for that purpose. The law does not undertake to measure between the partners the relative value of their services bestowed on the joint business. Thornton *v.* Proctor, 1 Anst. 94; Caldwell *v.* Leiber, 7 Paige, 483; Anderson *v.* Taylor, 2 Ired. Eq. (N. C.) 420; Burden *v.* Burden, 1 Ves. & B. 170; Story on Partn. [§ 182;] Franklin *v.* Robinson, 1 Johns. Ch. 157, 165; Bradford *v.* Kimberly, 3 Johns. Ch. 433; Whittle *v.* McFarlane, 1 Knapp, P. C. 311.

firmed will be found in Buckley *v.* Barber, 6 Exch. 164. See, also, Holden *v.* M'Makin, 1 Pars. Eq. 270, 277. As to choses in action at law, see Holbrook *v.* Lackey, 13 Met. 132; Stearns *v.* Houghton, 38 Vt. 583; Felton *v.* Reid, 7 Jones, N. C. 269; Rice *v.* Richards, 1 Busb. Eq. 277; Daby *v.* Ericsson, 45 N. Y. 786; *post*, 58, n. (*a*); in equity, *post*, 58, n. 1.

[2] *Suits between Partners.* — Holyoke *v.* Mayo, 50 Me. 385; Ryder *v.* Wilcox, 103 Mass. 24; Harris *v.* Harris, 39 N. H. 45; Ordiorne *v.* Woodman, ib. 541; White *v.* Harlow, 5 Gray, 463; Crottes *v.* Frigerio, 18 La. An. 283; De Jarnette *v.* McQueen, 21 Ala. 230; Ives *v.* Miller, 19 Barb. 196; Drew *v.* Ferson, 22 Wisc. 651; Page *v.* Thompson, 33 Ind. 137; Farrar *v.* Pearson, 58 Me. 561.

It is laid down that the promise need not be express, in Van Amringe *v.* Ellmaker, 4 (Barr) Penn. St., 281; Knerr *v.* Hoffman, 65 Penn. St. 126; Wycoff *v.* Purnell, 10 Iowa, 332; Wray *v.* Milestone, 5 M. & W. 21. See especially Sikes *v.* Work, 6 Gray, 433; Shattuck *v.* Lawson, 10 Gray, 405; Wright *v.* Cumpsty, 41 Penn. St. 102; Finlay *v.* Stewart, 56 Penn. St. 183; but compare Harris *v.* Harris, 39 N. H. 45, 50. *Contra*, Chadsey *v.* Harrison, 11 Ill. 151; Pattison *v.* Blanchard, 6 Barb. 537; and some earlier cases.

The rule stated in the text does not apply to all cases. For instance, where the contract, debt, or security is a separate not a partnership contract, &c. Crater *v.* Bininger, 45 N. Y. 545; Gridley *v.* Dole, 4 Comst. 486; Chamberlain *v.* Walker, 10 Allen, 429; Wright *v.* Michie, 6 Gratt. 854; Edens *v.* Williams, 36 Ill. 252; Elder *v.* Hood, 38 Ill. 533; Caswell *v.* Cooper, 18 Ill. 532; Collamer *v.* Foster, 26 Vt. 754; Cross *v.* Cheshire, 7 Exch. 43; Sedgwick *v.* Daniell, 2 Hurlst. & N. 319. See Coleman *v.* Coleman, 12 Rich. 183. So a contract in contemplation of partnership merely, and preliminary to it. Currier *v.* Webster, 45 N. H. 226; Currier *v.* Rowe, 46 N. H. 72; French *v.* Styring, 2 C. B. N. S. 357; Vance *v.* Blair

(2) *Stock in Land.* — If partnership capital be invested in land for the benefit of the company, though it may be a joint tenancy in law, yet equity will hold it to be a tenancy in common, and as forming part of the partnership fund; and the better opinion would seem to be, that equity will consider the person in whom the legal estate is vested as trustee for the whole concern, and the property will be entitled to be distributed as personal estate. (*d*) The point has been extensively discussed and
*38 *considered in this country, and the cases are not inconsistent with this principle, when they admit, upon grounds of reason and policy, that real estate, acquired with partnership funds, and held by partners in common, may be conveyed or charged by one partner, on his private account, to the extent of his legal title, whether that legal title covers the whole or a part

(*d*) Thornton *v.* Dixon, 3 Bro. C. C. 199; Lord Loughborough, in Smith *v.* Smith, 5 Ves. 189; Ripley *v.* Waterworth, 7 Ves. 425; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Lord Eldon, in Townsend *v.* Devaynes, cited in Gow on Partn. 54, ed. Phil. 1825; in Selkrig *v.* Davis, 2 Dow, 242, and in Crawshay *v.* Maule, 1 Swanst. 521; Sigourney *v.* Munn, 7 Conn. 11; Hoxie *v.* Carr, 1 Sumner, 182–186; *Ex parte* Banks, Newfoundland R. 396. *Contra*, Sir William Grant, in Bell *v.* Phyn, 7 Ves. 453; and Balmain *v.* Shore, 9 Ves. 500; Gow on Partn. 54, 55. In Sigourney *v.* Munn, the English and American authorities were fully examined, and the subject discussed; and the doctrine declared, that real estate acquired with partnership funds, for partnership purposes, would be regarded in equity as partnership stock, and liable to all the incidents of partnership property. It might, also, by agreement of the parties, be regarded as personal stock of the company. The English Vice-Chancellor, in Randall *v.* Randall, 7 Sim. 271, reviewed, among others, the cases of Thornton *v.* Dixon, Ripley *v.* Waterworth, Bell *v.* Phyn, Balmain *v.* Shore, and Crawshay *v.* Maule, above mentioned, together with the cases of Phillips *v.* Phillips, 1 My. & K. 649, and Broom *v.* Broom, 3 id. 443, and came to the conclusion declared in Sigourney *v.* Munn, that the English chancery doctrine, considering real estate as personal property, was applicable only to lands purchased with partnership capital, for the purposes of a partnership trade.

18 Ohio, 532; Terry *v.* Carter, 25 Miss. 168.

The principles stated in note (*c*), and more fully *ante*, 25, n. (*b*), *ad fin.*, are confirmed in Hutcheson *v.* Smith, 5 Ir. Eq. 117; Coursen *v.* Hamlin, 2 Duer, 513; Day *v.* Lockwood, 24 Conn. 185; Lyman *v.* Lyman, 2 Paine, 11; King *v.* Hamilton, 16 Ill. 190. So as to services of surviving partner in winding up. Brown *v.* McFarland, 41 Penn. St. 129; Piper *v.* Smith, 1 Head, 93; Stocken *v.* Dawson 6 Beav. 371. Compare Featherstonhaugh *v.* Turner, 25 Beav. 382, 392. As to interest, see *In re* German Mining Co., *Ex parte* Chippendale, 4 De G., Macn. & G. 19; 19 Eng. L. & Eq. 591; 27 id 158; Hill *v.* King, 9 Jur. N. S. 527; Wood *v.* Scoles, L. R. 1 Ch. 369; Watney *v.* Wells, L. R. 2 Ch. 250; Gyger's Appeal, 62 Penn. St. 73; Morris *v.* Allen, 1 McCarter, 44; Millar *v.* Craig, 6 Beav. 433; Desha *v.* Smith, 20 Ala. 747. It may be allowed when such is the usage of trade.

of the estate; provided the purchaser or mortgagee dealt with him *bona fide*, and without notice of the partnership rights, and there was nothing in the transaction from which notice might reasonably be inferred. (*a*) In Tennessee, an estate so held in joint tenancy by partners for the purposes of trade, descends and vests in the heirs at law of a deceased partner as real estate. (*b*) In New York, the Supreme Court, upon the strength of the ultimate opinion of Lord Thurlow, in *Thornton* v. *Dixon*, and of the opinion of the Master of the Rolls, in *Balmain* v. *Shore*, declared, in *Coles* v. *Coles*, (*c*) that the principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, did not apply to real estates; and that *in the absence of special covenants between the parties*, real estate owned by partners was to be considered and treated as such, without any reference to the partnership. The language of the Supreme Court of Massachusetts, *in *39 *Goodwin* v. *Richardson*, (*a*) is nearly to the same effect; and it seemed to be considered, that partners purchasing an estate out of the joint funds, and taking one conveyance to themselves as tenants in common, would hold their undivided moieties in separate and independent titles, and that the same would go, on the insolvency of the firm, or on the death of either, to pay their respective creditors at large.

These latter cases, and particularly the one in New York, go to the entire subversion of the equity doctrine now prevalent in

(*a*) Forde *v.* Herron, 4 Munf. 316; M'Dermot *v.* Laurence, 7 Serg. & R. 438. In Hoxie *v.* Carr, 1 Sumner, 173, it was held, that where a purchaser of real estate has actual, or is chargeable with constructive notice, that it was partnership property, the estate is chargeable in his hands with the payment of the partnership debts, even though he had no notice of the partnership debts.

(*b*) M'Allister *v.* Montgomery, 3 Hayw. 96. In Yeatman *v.* Woods, 6 Yerg. 20, real estate held by partners, for partnership purposes, was held to descend and vest, upon the death of one of the partners, in his heirs at law, *as real estate*. This was upon the strength of the case in 3 Haywood, but with an evident reluctance in the court to depart from the English rule in equity which now holds such estate to be *personal* stock, and distributable as such. In South Carolina one party cannot transfer the real estate of the firm, and used for its business, by deed, unless it be in a case in which the buying and selling of real estate is the object of the partnership. Robinson *v.* Crowder, 4 M'Cord, 519. The deed can convey only his individual share or title. Story on Partn. [§ 119.] The partners hold real estate as joint tenants, or tenants in common, as the case may be, and one partner cannot, by virtue of the partnership power, sell for the other. He must be specially authorized. Lawrence *v.* Taylor, 5 Hill (N. Y.), 107.

(*c*) 15 Johns. 159. (*a*) 11 Mass. 469.

England; but the other American decisions are more restricted in their operation, and are not inconsistent with the more correct and improved view of the English law. Their object is to secure the rights of purchasers and encumbrancers without notice from being affected by a claim of partnership rights of which they were ignorant. In *Edgar* v. *Donnally*, (*b*) a right to land had

(*b*) 2 Munf. 387. But in Deloney *v.* Hutcheson, 2 Rand. 188, the appropriation of partnership lands, as assets to partnership debts, in preference to other debts, was denied; and it was held that lands purchased by partners, for partnership purposes, was an estate in common, both at law and equity; and that a surviving partner had no other remedy as a creditor than any other creditor. In Blake *v.* Nutter, 19 Maine, 16, this was declared to be the rule at law, but no opinion was expressed as to the rule in equity. Other American cases hold a different language; thus, in Winslow *v.* Chiffelle, [Harper (S. C.), 25,] it was held, that lands held and used by partners, in the business of a mill, were copartnership property, and subject to be applied, like other partnership property, to the payment of partnership debts, in preference to the claims of separate creditors. So, in Greene *v.* Greene, 1 Ohio, 249, it was held, that lands purchased with partnership funds, for partnership purposes, and under articles that the partnership property should be sold for the payment of debts, were to be considered and applied as personal assets of the partnership as between the partners and their creditors, and were not subject to the dower of the widow of a deceased partner as against partnership debts. And again, in Marvin *v.* Trumbull, Wright (Ohio), 886, real estate, purchased and held as partnership property, was held to be subjected to the debts of the firm, in preference to the debt of an individual member of it, the creditor having notice. And in Hoxie *v.* Carr, 1 Sumner, 173, it was declared, that real estate purchased for partnership purposes, and on partnership account, would in equity be deemed partnership property and personal estate, though at law it would be dealt with according to the legal title. The general principle now declared in the English law is, that real estate acquired for the purpose of a trading concern, is to be considered as partnership property, and to be first applied in satisfaction of the demands of the partnership. Fereday *v.* Wightwick, 1 Russ. & My. 45. The Chief Justice of Massachusetts, in Burnside *v.* Merrick, 4 Met. 541, says, the prevailing judicial opinion now is, that real estate purchased by partners, with partnership funds, for partnership purposes, though at law it may be held by them as tenants in common, yet in equity it is considered as held in trust as part of the partnership property, applicable in the first place exclusively to pay the partnership debts. Dyer *v.* Clark, and Howard *v.* Priest, 5 Met. 562, 582; Divine *v.* Mitchum, 4 B. Mon. 488, s. p. The prevalence and the correctness of this opinion appear to be incontestable. It is taken to be personal estate, and retains that character as between the real and personal representatives of a deceased partner. Townsend *v.* Devaynes, Crawshay *v.* Maule, and Selkrig *v.* Davies, cited *supra*, 37, note; Phillips *v.* Phillips, 1 My. & K. 649; Story, J., in Hoxie *v.* Carr, 1 Sumner, 183–186. The Vice-Chancellor in New York, in Smith *v.* Jackson, 2 Edw. Ch. 28, reviews all the conflicting cases on this point; and he follows the Supreme Court of New York, and holds, that though real estate be purchased with joint funds for partnership purposes, there is no survivorship as to the real estate, and the share of a deceased partner, as a tenant in common, descends to his heirs, unless there be an *agreement* among the partners that the lands so purchased shall be considered as personal property; and that then, upon the foot of that agreement, and not without it, equity would apply the lands to

been acquired with partnership stock and a title taken in the name of the surviving partner, and a claimant under the deceased partner was held entitled in equity to a moiety of the land, against a purchaser, from the survivor, with notice of the partnership right. This was a recognition of the true rule of equity on the subject.[1]

pay partnership debts. Nay, he gives the wife her dower in the partnership share of the husband so descended. The decisions on this side of the question appear to me to be a sacrifice of a principle of policy, and, above all, a principle of justice, to a technical rule of doubtful authority. There is no need of any other agreement than what the law will necessarily imply, from the fact of an investment of partnership funds, by the firm, in real estate, for partnership purposes. If the partners mean to deal honestly, they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts. Mr. Collyer, in his treatise on the Law of Partnership, first published in London in 1832, concludes his review of the cases with holding it to be the better opinion, that although the legal estate in freehold property purchased by partners, for the purposes of their trade, will go in the ordinary course of descent without survivorship, yet the equitable interest in such property will be held to be part of the partnership stock, and distributable as personal estate. Collyer on Partn. 76.

[1] *Partnership Lands.* — It is generally admitted that real estate bought with partnership funds, for partnership purposes, is partnership property, whether the legal title is taken in the name of one or of all the partners. Putnam *v.* Dobbins, 38 Ill. 394; Buchan *v.* Sumner, 2 Barb. Ch. 165; Crooker *v.* Crooker, 46 Me. 250; Buffum *v.* Buffum, 49 Me. 108; Jarvis *v.* Brooks, 7 Fost (27 N. H.) 87; Willis *v.* Freeman, 35 Vt. 44; Abbott's Appeal, 50 Penn. St. 234; Erwin's Appeal, 39 Penn. St. 535; Uhler *v.* Semple, 5 C. E. Green (20 N. J. Ch.), 288; Tillinghast *v.* Champlin, 4 R. I. 173; Richards *v.* Manson, 101 Mass. 482, 485; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Robertson *v.* Baker, 11 Fla. 192, 228; Buck *v.* Winn, 11 B. Mon. 320. Compare Galbraith *v.* Gedge, 16 B. Mon. 631, 636; Bank of England Case, 3 De G., F. & J. 645, 658; Seward *v.* Blakeway, L. R. 4 Ch. 603; L. R. 6 Eq. 479. Compare Brooke *v.* Washington, 8 Gratt. 248; Dewey *v.* Dewey, 35 Vt. 555; North Penn. Coal Co.'s Appeal, 45 Penn. St. 181; Boyers *v.* Elliott, 7 Humph. 204. And the partnership equities are enforced against the heirs, devisees, or widow of the partner who held the legal title, as in other trusts. Smith *v.* Jackson, *sup.* n. (*b*), is said in Mr. Gray's very valuable note to Story on P. § 93 to stand alone. Duhring *v.* Duhring, 20 Mo. 174; Galbraith *v.* Gedge, 16 B. Mon. 631; Shearer *v.* Shearer, 98 Mass. 107, 111; Wilcox *v.* Wilcox, 13 All. 252, 254; Goodburn *v.* Stevens, 1 Md. Ch. 420; Matlock *v.* Matlock, 5 Ind. 403; Loubat *v.* Nourse, 5 Fla. 350. In like manner the partnership creditors are preferred in equity to separate creditors, in their claim on the partnership land. Collumb *v.* Read, 24 N. Y. 505; Jones *v.* Neale, 2 Patt. & Heath, 339; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Crooker *v.* Crooker, 46 Me. 250; Reeves *v.* Ayers, 38 Ill. 418; Boyers *v.* Elliott, 7 Humph. 204. But see Ridgway's Appeal, 15 Penn. St. 177, criticised in Gray's note, *sup.* But the creditors have no equity to prevent partners from *bona fide*, and for a valuable consideration, changing its character from joint to separate property (even if the firm and both partners are insol-

(3) *As Ship-owners.* — In *Nicoll* v. *Mumford*, (*c*) it was held, that ship-owners were tenants in common, and were not to be considered as partners, nor liable each *in solido*, nor entitled *40 in the settlement of * accounts, on the principle of partnership. The doctrine of Lord Hardwicke on this point, in *Doddington* v. *Hallet*, (*a*) was considered to be overruled by the modern decisions in chancery; (*b*) and by the universal understanding in the commercial world. But when the case of *Nicoll* v. *Mumford* was reviewed in the Court of Errors, (*c*) the doc-

(*c*) 4 Johns. Ch. 522. See, also, *post*, 154, 155. [& n. 1.]

(*a*) 1 Ves. 497.

(*b*) See 5 Ves. 575; 2 Ves. & B. 242; 2 Rose, 76, 78; 1 Montague on Partn. 102, note; Merrill *v.* Bartlett, 6 Pick. 47. In this last case it was declared, that part ship-owners had no lien upon the part of a bankrupt companion for his proportion of the advances of the outfit. Part owners, or tenants in common, are not answerable for each other's debts.

(*c*) 20 Johns. 611. In Hewitt *v.* Sturdevant, 4 B. Mon. 458, 459, the Court of Appeals in Kentucky adhered to the doctrine of Lord Hardwicke, that a joint owner of a ship was entitled to a *lien* as against the administrator or general creditor, upon the share of his intestate, a cobuilder and fitterout of the vessel for excess of advances over his aliquot part.

vent). Richards *v.* Manson, 101 Mass. 482, 487; *post*, 65, n. 2.

When the land is not purchased with partnership funds, and there is therefore no resulting trust, the better opinion seems to be that in general, to make land partnership property, a memorandum in writing is necessary under the Statute of Frauds. Gray's note, *sup.* Bird *v.* Morrison, 12 Wisc. 138, 155 (where the exceptions are stated); Caddick *v.* Skidmore, 2 De G. & J. 52. See Dale *v.* Hamilton, 2 Ph. 266, 273. But see s. c. 5 Hare, 369; Hanff *v.* Howard, 8 Jones, Eq. 440.

The authorities are divided on the question whether partnership land is to be regarded in equity as personal estate as between the real and personal representatives of the partners. Mr. Lindley thinks that in England it is to be deemed personalty. Lind. on P. 2d ed. 670; Darby *v.* Darby, 3 Drew. 495, 506; Essex *v.* Essex, 20 Beav. 442; Wild *v.* Milne, 26 id. 504; see Steward *v.* Blakeway, L. R. 4 Ch. 603, 609; L. R. 6 Eq. 479; and compare Pierce *v.* Trigg, 10 Leigh, 406, 424, with Davis *v.* Christian, 15 Gratt. 11, 36; Gray's note, *sup. ad fin.* So *a fortiori* when there is an agreement that it shall be considered as personal property. Ludlow *v.* Cooper, 4 Ohio St. 1; Galbraith *v.* Gedge, 16 B. Mon. 631, 636. The English doctrine does not prevail in all of the United States. Buchan *v.* Sumner, 2 Barb. Ch. 165, 201; Buckley *v.* Buckley, 11 Barb. 43, 75; Wilcox *v.* Wilcox, 13 Allen, 252; Goodburn *v.* Stevens, 1 Md. Ch. 420, 5 Gill, 1; Hale *v.* Plummer, 6 Ind. 121; Piper *v.* Smith, 1 Head, 93; Dilworth *v.* Mayfield, 36 Miss. 40; Lang *v.* Waring, 25 Ala. 625, 640; Tillinghast *v.* Champlin, 4 R. I. 173, 207. And some cases lay down the rule that conversion into personalty takes place only when required for the payment of claims against the partnership which are in the nature of debt, even when the interest of the deceased partner is only equitable. Shearer *v.* Shearer, 98 Mass. 107, 112.

trine of Lord Hardwicke was considered by the majority of the judges to be the better doctrine; and there is no doubt but that there may be a special partnership in a ship, as well as in the cargo, in regard to a particular voyage or adventure. (*d*) It was assumed by the court, in *Lamb* v. *Durant*, (*e*) that vessels, as well as other chattels, might be held in strict partnership, with all the control in each partner incident to commercial partnerships. But this must be considered an exception to the general rule; and the parties to property in a ship, however that property may be acquired, are entitled as tenants in common, and each party can sell only his own share, and the right of survivorship does not apply to the case. (*f*)[1]

(4) *Acts by which One Partner may bind the Firm.* — The act of each partner, in transactions relating to partnership, is considered the act of all, and binds all. He can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, * and draw and *41 indorse, and accept bills and notes, and assign choses in action. Acts in which they all unite differ in nothing, in respect to legal consequences, from transactions in which they are concerned individually; but it is the capacity by which each partner is enabled to act as a principal, and as the authorized agent of his copartners, that gives credit and efficacy to the association. The act of one partner, though on his private account, and contrary to the private arrangement among themselves, will bind all the parties, if made without knowledge in the other party of the arrangement, and in a matter which, according to the usual

(*d*) See *infra*, 154, 155.

(*e*) 12 Mass. 54. So, also, in Seabrook *v.* Rose, 2 Hill, Ch. (S. C.) 555, 556. Ch. De Saussure held, according to the doctrine in the N. Y. Court of Errors, that owning a ship, employed in trade by several persons, in distinct shares, constituted a partnership, with all its legal incidents; but the Court of Appeals (558), while they admitted that every species of property might be held in partnership, gave no opinion on the question whether a ship owned in distinct shares, and employed in trade, was, as between the owners, partnership property, or liable to be so regarded by creditors, beyond certain specified limits.

(*f*) Story on Partn. [§ 417.]

[1] *Post*, 155, n. 1; Doddington *v.* Hallet is overruled in England. Green *v.* Briggs, 6 Hare, 395, 401, and other cases cited, 155, n. 1. And where no special relation exists, but the parties are merely part owners, and, as such, tenants in common, one has no lien on the share of another for advances. Ib.; The Larch, 2 Curt. 427.

course of dealing, has reference to business transacted by the firm. (*a*)

The books abound with numerous and subtle distinctions on the subject of the extent of the power of one partner to bind the company; and I shall not attempt to do more than select the leading rules, and give a general analysis of the cases.

In all contracts concerning negotiable paper, the act of one partner binds all, and even though he signs his individual name, provided it appears, on the face of the paper, to be on partnership account, and to be intended to have a joint operation. (*b*)[1] But if a note or bill be drawn, or other contract be made, by one partner in his name only, and without appearing to be on partnership account, or if one partner borrow money on his own security, the partnership is not bound by the signature, even though it was made for a partnership purpose, or the money applied to a partnership use. (*c*) The borrowing partner is the creditor of the firm, and not the original lender, and the money was advanced

(*a*) Hope *v.* Cust, cited in 1 East, 53; Swan *v.* Steele, 7 East, 210; Rothwell *v.* Humphreys, 1 Esp. 406; Abbott, C. J., Sandilands *v.* Marsh, 2 B. & Ald. 673; *Ex parte* Agace, 2 Cox, 312; Shippen, J., Gerard *v.* Basse, 1 Dall. 119; Parker, C. J., in Lamb *v.* Durant, 12 Mass. 57, 58; Mills *v.* Barber, 4 Day, 428; United States Bank *v.* Binney, 5 Mason, 187, 188; Etheridge *v.* Binney, 9 Pick. 272, 275; Winship *v.* United States Bank, 5 Pet. 529; Le Roy *v.* Johnson, 2 Pet. 186; Pothier, Traité du Con. de Soc. n. 96–105; Story on Partn. [§ 102]; Everit *v.* Strong, 5 Hill (N. Y.), 168; Gano *v.* Samuel, 14 Ohio, 592. One partner may be restrained by injunction from accepting and indorsing bills, the produce of which is intended to be applied to other than partnership purposes. Lord Ch. Brougham, 2 Russ. & My. 470, 486. An ordinary partnership, under the Louisianian Code, art. 2843, 2845, differs in this respect from commercial partnerships, under the law-merchant, for in that code ordinary partners are not bound *in solido* for the debts of the partnership; and no one partner can bind the others, unless they have given him power to do so, either specially or by the articles of partnership, though the other partners may be bound ratably, if the partnership was benefited by the act.

(*b*) Mason *v.* Rumsey, 1 Camp. 384. In the case of commercial partnerships there is a general authority by the law-merchant for each partner to bind the firm in its ordinary business; but partners in other business, as attorneys, for instance, have no such general authority, and cannot bind the firm by negotiable paper without special authority. Hedley *v.* Bainbridge, 2 G. & D. 483; Levy *v.* Payne, 1 Carr. & M. 453.

(*c*) In Hall *v.* Smith, 1 B. & C. 407, it was held, that if one partner only signed a note on behalf of himself and the other partners, he was liable at law to be sued singly. But that case is overruled, and the partnership is liable as for a joint note. *Ex parte* Buckley, 15 L. J. N. S. By. 8; 5 N. Y. Leg. Obs. 82.

[1] Hill *v.* Voorhies, 22 Penn. St. 68; Hamilton *v.* Summers, 12 B. Mon. 11 Crozier *v.* Kirker, 4 Texas, 252. See But see Heenan *v.* Nash, 8 Minn. 407.

solely on the security of the borrower. (*d*)[2] If, however, * the bill be drawn by one partner, in his own name, upon * 42 the firm or partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. (*a*) And though the partnership be not bound at law in such a case, it is held that equity will enforce payment from it, if the bill was actually drawn on partnership account. (*b*) Even if the paper was made in a case which was not in its nature a partnership transaction, yet it will bind the firm if it was done in the name of the firm, and there be evidence that it was done under its express or implied sanction. (*c*) But if partnership security be taken from one partner, without the previous knowl edge and consent of the others, for a debt which the creditor knew at the time was the private debt of the particular partner, it would be a fraudulent transaction, and clearly void in respect to the partnership. (*d*) So, if from the subject-matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge of that fact, the partnership is not liable. (*e*) There is no distinction in principle upon this point between general and special partnerships; and the question, in all cases, is a question of notice, express or constructive. All partnerships are more or less limited. There is none that embraces, at the same time, every branch of business;

(*d*) Siffkin *v.* Walker, 2 Camp. 308; Ripley *v.* Kingsbury, 1 Day, 150, note; Emly *v.* Lye, 15 East, 7; Loyd *v.* Freshfield, 2 Carr. & P. 325; Bevan *v.* Lewis, 1 Sim. 376; Faith *v.* Richmond, 11 Ad. & El. 339; Foley *v.* Robards, 3 Ired. (N. C.) 179, 180; Jaques *v.* Marquand, 6 Cowen, 497; Willis *v.* Hill, 2 Dev. & Batt. 231; Pothier, de Société, n. 100, 101.

(*a*) Dougal *v.* Cowles, 5 Day, 511.

(*b*) Van Reimsdyk *v.* Kane, 1 Gall. 630. (*c*) *Ex parte* Peele, 6 Ves. 602.

(*d*) Arden *v.* Sharpe, 2 Esp. 524; Shirreff *v.* Wilks, 1 East, 48; *Ex parte* Bonbonus, 8 Ves. 540; Livingston *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Baird *v.* Cochran, 4 Serg. & R. 397; Chazournes *v.* Edwards, 3 Pick. 5; Cotton *v.* Evans, 1 Dev. & Batt. Eq. 284; Spencer, J., Dob *v.* Halsey, 16 Johns. 34, 38; Frankland *v.* M'Gusty, 1 Knapp P. C. 301, 306; Story on Partn. [§§ 130–133]

(*e*) Green *v.* Deakin, 2 Stark. 347; New York Firemen Insurance Company *v.* Bennett, 5 Conn. 574.

[2] Farmers' Bank of Mo. *v.* Bayless, 35 Mo. 428; Logan *v.* Bond, 13 Ga. 192; Holmes *v.* Burton, 9 Vt. 252; Hammond *v.* Aiken, 3 Rich. Eq. 119; Hogan *v.* Reynolds, 8 Ala. 59; Nicholson *v.* Ricketts, 2 El. & El. 497. But compare Beebe *v.* Rogers, 3 G. Greene (Iowa), 319; Pearce *v.* Wilkins, 2 Comst. 469; Folk *v.* Wilson, 21 Md. 538.

and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law *43 *will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. (*a*)[1] The conclusion is otherwise if the subject-matter of the contract was consistent with the partnership business; and the defendants in that case would be bound to show that the contract was out of the regular course of the partnership dealings. (*b*) When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership, to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals; and when a person takes a partnership engagement, without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority or its regular course of dealing, he is, in

(*a*) *Ex parte* Agace, 2 Cox, 312; Livingston *v.* Roosevelt, 4 Johns. 251, 277, 278; Spencer, J., Dob *v.* Halsey, 16 Johns. 38; Foot *v.* Sabin, 19 id. 154; Laverty *v.* Burr, 1 Wendell, 529; U. S. Bank *v.* Binney, 5 Mason, 176; Davenport *v.* Runlett, 3 N. H. 886; Thicknesse *v.* Bromilow, 2 Crompt. & Jerv. 425–435. The presumption of fraud in the creditor taking partnership security or credit from one partner for his private debt may be rebutted, but the burden of proof rests on the creditor. Frankland *v.* M'Gusty, 1 Knapp P. C. 305; Gansevoort *v.* Williams, 14 Wend. 133; Story on Partn. [§ 133;] Mauldin *v.* Branch Bank, 2 Ala. 502, 512.

(*b*) Doty *v.* Bates, 11 Johns. 544.

[1] *The rule as to the burden of proof* stated in note (*a*) is sustained by Leverson *v.* Lane, 13 C. B. N. S. 278; correcting a *dictum* in Ridley *v.* Taylor, *inf.* 44, n. (*a*). See, also, King *v.* Faber, 22 Penn. St. 21; Clay *v.* Cottrell, 18 Penn. St. 408; Robinson *v.* Aldridge, 34 Miss. 852; Powell *v.* Messer, 18 Tex. 401; Miller *v.* Hines, 15 Ga. 197; Williams *v.* Brimhall, 13 Gray, 462; Venable *v.* Levick, 2 Head, 351. But where the security of one firm is given to pay the debt of another by one who is a common member of both, this rule has been held not to apply. Murphy *v.* Camden, 18 Mo. 122; Tutt *v.* Addams, 24 Mo. 186. The reasons for applying it, however, seem to be as strong as in the former case. See McQuewans *v.* Hamlin, 35 Penn. St. 517; Rollins *v.* Stevens, 31 Me. 454.

judgment of law, guilty of a fraud. (*c*) It is a well established doctrine, that one partner cannot rightfully apply the partnership funds to discharge his own preëxisting debts, without the express or implied assent of the other partners. This is the case even if the creditor had no knowledge at the time of the fact of the fund being partnership property. (*d*) The authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the partnership business, though in the case of *bona fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner. (*e*)

But if the negotiable paper of a firm be given by one partner on his private account, and that paper, issued within the general scope of the authority of the firm, passes into the hands of a *bona fide* holder, who has no notice, either actually or constructively, of the consideration of the instrument; or if one partner should purchase, on his private account, an article in which the firm dealt, or which had an immediate *connection with *44 the business of the firm, a different rule applies, and one which requires the knowledge of its being a private and not a partnership transaction to be brought home to the claimant. These are general principles, which are considered to be well established in the English and American jurisprudence. (*a*)[1]

(*c*) Abbott, C. J., and Bayley, J., Sandilands *v.* Marsh, 2 B. & Ald. 673; Dickinson *v.* Valpy, 1 Lloyd & Wels. 6; s. c. 10 B. & C. 128; Livingston *v.* Roosevelt, 4 Johns. 278, 279; Crosthwait *v.* Ross, 1 Humph. (Tenn.) 28; Story on Partn. [§§ 112, 130–133.]

(*d*) Rogers *v.* Batchelor, 12 Peters, 229; Dob *v.* Halsey, 16 Johns. 34; Evernghim *v.* Ensworth, 7 Wend. 326. The true principle, says Mr. Justice Story (on Partnership, p. 212, note), to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt, without their consent, and that, without their consent, their title to the property is not diverted in favor of such separate creditor, whether he knew it to be partnership property or not. His right depends, not upon his knowledge that it was partnership property, but upon the fact, whether the other partners had assented to such disposition of it or not.

(*e*) *Ex parte* Goulding, before Sir John Leach, and confirmed on appeal by Lord Lyndhurst, Collyer on Partn. 283, 284; Dob *v.* Halsey, 16 Johns. 34; Evernghim *v* Ensworth, 7 Wend. 326; Rogers *v.* Batchelor, 12 Peters, 221; Story on Partn. p. 205

(*a*) Ridley *v.* Taylor, 13 East, 175; Williams *v.* Thomas, 6 Esp. 18; Lord Eldon,

[1] Gildersleeve *v.* Mahony, 5 Duer, 383, 388; Roth *v.* Colvin, 32 Vt. 125; Babcock *v.* Stone, 3 McL. 172; Duncan *v.* Clark, 2 Rich. 587; *post*, 64, n. 1. But compare Cooper *v.* McClurkan, 22 Penn. St. 80; Roth *v.* Colvin, *sup.*, as to when a party is put on inquiry.

With respect to the power of each partner over the partnership property, it is settled, that each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts. This power results from the nature of the business, and is indispensable to the safety of the public, and the successful operations of the partnership. He is an agent of the whole for the purpose of carrying on the business. (*b*)[2] A like power in each partner exists

Ex parte Peele, 6 Ves. 604, and *Ex parte* Bonbonus, 8 Ves. 544; Arden *v.* Sharpe, 2 Esp. 524; Wells *v.* Masterman, ib. 731; Bond *v.* Gibson, 1 Camp. 185; Usher *v.* Dauncey, 4 id. 97; Livingston *v.* Roosevelt, 4 Johns. 251, 265; New York Firemen Insurance Company *v.* Bennett, 5 Conn. 574; Rogers *v.* Batchelor, 12 Peters, 221.

(*b*) Fox *v.* Hanbury, Cowp. 445; Best, J., in Barton *v.* Williams, 5 B. & Ald. 395; Pierson *v.* Hooker, 3 Johns. 68. It is a point not quite settled, whether one partner, without the knowledge or consent of his copartner, though under circumstances, may not assign over all the partnership effects and credits in the name of the firm, to pay the debts of the firm, and where all the creditors are admitted to an equal participation, the conclusion is that he may. Harrison *v.* Sterry, 5 Cranch, 289; Mills *v.* Barber, 4 Day, 428; Lamb *v.* Durant, 12 Mass. 54; Pothier, Traité du Con. de Soc. n. 67, 69, 72, 90; Robinson *v.* Crowder, 4 M'Cord (S. C.), 519; Hodges *v.* Harris, 6 Pick. 360; Deckard *v.* Case, 5 Watt. 22; Hitchcock *v.* St. John, 1 Hoff. Ch. 511; Anderson *v.* Tompkins, 1 Brock. 456. He may give a preference to one creditor over another; though whether it might be made to a trustee for that purpose, against the known wishes of the copartner, so as to terminate the partnership, was left an unsettled point in Egberts *v.* Wood, 3 Paige, 517. Same doubt expressed in Williams *v.* Roberts, 6 Coldw. 498. On the other hand, the power of two of three partners to make an assignment of all the firm property to a trustee for the payment of debts giving preferences, without the knowledge or consent of the third, has been denied by courts which affirmed the power to make such a transfer to the creditor directly. Welles *v.* March, 30 N. Y. 344 (citing Robinson *v.* Gregory, in the same court, Dec. 1863, which seems to have reversed s. c. 29 Barb. 560); Kirby *v.* Ingersoll, 1 Doug. (Mich.) 477; s. c. Harr. Ch. 172; Ormsbee *v.* Davis, 5 R. I. 442. See Bull *v.* Harris, 18 B. Mon. 195. But it is affirmed in M'Cullough *v.* Sommerville, 8 Leigh, 415. (In this case the other partner lived in another State.)

[2] *Power to transfer all the Firm Property.* — It has been held that one partner has power, in the absence of fraud, to transfer all the property of the partnership in payment of one or more of its debts, without the knowledge or consent of the other; Mabbett *v.* White, 12 N. Y. (2 Kern.) 442; Graser *v.* Stellwagen, 25 N. Y. 315; but see Sloan *v.* Moore, 37 Penn. St. 217; or to a trustee for the same purpose, without preferences, if the other partner is absent; Lasell *v.* Tucker, 5 Sneed, 1; Barcroft *v.* Snodgrass, 1 Coldw. 430; Forbes *v.* Scannell, 13 Cal. 242; Kemp *v.* Carnley, 3 Duer, 1; Kelly *v.* Baker, 2 Hilton, 531; but it has been said to be otherwise if the other could have been consulted. Fisher *v.* Murray, 1 E. D. Smith 341. See Hughes *v.* Ellison, 5 Mo 463; Stein *v.* La Dow, 13 Minn. 412.

in respect to purchases on joint account; and it is no matter with what fraudulent views the goods were purchased, or to what purposes they are applied by the purchasing partner, if the seller be clear of the imputation of collusion. A sale to one partner, in a case within the scope and course of the partnership business, is, in judgment of law, *a sale to the partnership. (*a*) *45 But if the purchase be contrary to a stipulation between the partners, and that stipulation be made known to the seller, or if, before the purchase or delivery, one of the partners expressly forbids the same on joint account, it has been repeatedly decided, that the seller must show a subsequent assent of the other partners, or that the goods came to the use of the firm. (*b*)[1] This salutary check to the power of each partner to bind the firm was derived from the civil law. In re pari potiorem causam esse prohibentis constat. (*c*) It has been questioned, however, whether the dissent of one partner, where the partnership consists of more than two, will affect the validity of a partnership contract in the usual course of business, and within the scope of the concern, made by the majority of the firm. The efficacy of the dissent was, in some small degree, shaken by the Court of Exchequer, in *Rooth* v. *Quin;* (*d*) and in *Kirk* v. *Hodg-*

Pearpoint *v.* Graham, 4 Wash. 232. But that point was afterwards settled in Havens *v.* Hussey, 5 Paige, 30; and it was decided, that there was no implied authority in one partner, without the consent of the others, to appoint a *trustee* for the partnership, by a general assignment of the partnership effects for the benefit of creditors, and giving preferences. Such an assignment would be illegal, inequitable, and void. The other copartners have a right to participate in the selection of the trustee, and in the creditors to be preferred. Hitchcock *v.* St. John, 1 Hoff. Ch. 516; Kirby *v.* Ingersoll, Harr. Ch. (Mich.) 174; Dana *v.* Lull, 17 Vt. 390; Gibson, C. J., 8 Watts & S. 63, s. p. There is no small difficulty, says Mr. Justice Story, in supporting the doctrine, even under qualifications, that one partner may make a general assignment of all the partnership property, so as to break up its operations. Story on Partn. [§ 101.] This I consider to be the soundest conclusion to be drawn from the conflicting authorities.

(*a*) Willett *v.* Chambers, Cowp. 814; Rapp *v.* Latham, 2 B. & Ald. 795; Bond *v.* Gibson, 1 Camp. 185; Baldwin, J., 5 Day, 515; Spencer, J., 15 Johns. 422.

(*b*) Willis *v.* Dyson, 1 Starkie, 164; Galway *v.* Matthew, 1 Camp. 403; 10 East, 264, s. c.; Leavitt *v.* Peck, 8 Conn. 124; Gow on Partn. 48, 49, 54–56; Feigley *v.* Sponcbeyer, 5 Watts & S. 566.

(*c*) Dig. 10. 3. 28; Pothier, Traité du Con. de Soc. n. 90.

(*d*) 7 Price, 198.

[1] But a payment to one partner is good although forbidden by the other. Noyes *v.* New Haven, &c., R.R., 30 Conn. 1. See Granger *v.* McGilvra, 24 Ill. 152.

son, (*e*) it was considered that the act of the majority, done in good faith, must govern in copartnership business, and control the objection of the minority, unless special provision in the articles of association be made to the contrary. But this last decision related only to the case of the management of the interior concerns of the partners among themselves, and to that it is to be confined. (*f*) The weight of authority is in favor of the power of a majority of the firm, acting in good faith, to bind the minority in the ordinary transactions of the partnership, and when all have been consulted. (*g*)[2] It seems, also, to be the better opinion, that it is in the power of any one partner to interfere and arrest the firm from the obligation of an inchoate purchase which is deemed injurious. (*h*) This is the rule in ordinary cases by the civil law, and in France, (*i*) and yet, if by the terms *46 of the partnership, the *management of its business be confided to one of the partners, the exercise of his powers in good faith will be valid, even against the will, and in opposition to the dissent of the other members. (*a*)

A partner may pledge, as well as sell, the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and in relation to the trade in which the partners are engaged, or when the pawnee had no knowledge that the property was partnership property. (*b*) But this principle does not extend to part-owners engaged in a particular purchase; for they are regarded as tenants in common, and no member can convey

(*e*) 3 Johns. Ch. 400.

(*f*) The rule of the common law was, that in associations of a public or general nature, the voice of the majority governed, but in private associations the majority could not conclude the minority. Co. Litt. 181, b; Viner, tit. Authority, B.; Livingston *v.* Lynch, 4 Johns. Ch. 573, 597. See Story on Partn. [§ 125.]

(*g*) Const *v.* Harris, Turner & Russ. 517, 525; Collyer on Partn. 105; Story on Partn. [§ 128.]

(*h*) Willis *v.* Dyson, 1 Starkie, 164; Leavitt *v.* Peck, 3 Conn. 124.

(*i*) Dig. 10. 2. 28; Pothier, de Société, n. 87 to n. 91; Story on Partn. [§§ 124, 427.]

(*a*) Pothier, Traité du Con. de Soc. n. 71, 90. This is also the rule in Louisiana. Code, art. 2838, 2839, 2841.

(*b*) Raba *v.* Ryland, Gow, 132; Tupper *v.* Haythorne, in chancery, reported in a note to the case in Gow.

[2] Johnston *v.* Dutton, 27 Ala. 245; Western Stage Co. *v.* Walker, 2 Iowa, 504. But if a majority undertake to act contrary to the stipulations of written partnership articles, the others may withdraw from the firm. Abbot *v.* Johnson, 32 N. H. 9. See note on *ultra vires*, *ante*, ii. and 5 Am. Law Rev. 272, 287.

to the pawnee a greater interest than he himself has in the concern. (*c*) And if one partner acts fraudulently with strangers in a matter within the scope of the partnership authority, the firm is, nevertheless, bound by the contract. The connection itself is a declaration to the world of the good faith and integrity of the members of the association, and an implied undertaking to be responsible for the acts of each within the compass of the partnership concerns. (*d*) [1]

(5) *How far by Guaranty.* — It was formerly understood that one partner might bind his copartners by a guaranty, or letter of credit, in the name of the firm; (*e*) and Lord Eldon, in the case *Ex parte Gardom*, (*f*) considered the point too clear for argument. But a different principle seems to have been adopted; and it is now held, both in England and in this country, that one partner is not authorized to bind the partnership by a guar-

(*c*) Barton *v.* Williams, 5 B. & Ald. 395.

(*d*) Willet *v.* Chambers, Cowp. 814; Rapp *v.* Latham, 2 B. & Ald. 795; Longman *v.* Pole, Danson & Lloyd, 126; Bond *v.* Gibson, 1 Camp. 185. Hume *v.* Bolland, 1 Ryan & Moody, 871; 6 B. & C. 561; M. & M. Bank *v.* Gore, 15 Mass. 75; Hadfield *v.* Jameson, 2 Munf. 53. But a tort, or even a fraud, committed by one of the partners, will not bind the partnership, if it be not in the matter of contract, and there be no participation in it. Parsons, C. J., Pierce *v.* Jackson, 6 Mass. 245; Sherwood *v.* Marwick, 5 Greenl. 295. There are exceptions, however, to this rule. Partners are responsible for the tortious acts of a copartner in the prosecution of the copartnership business, as well as for the tortious acts and negligences of their servants, and a partner himself may sometimes act in that capacity. Moreton *v.* Hardern, 4 B. & C. 223; Attorney General *v.* Stannyforth, Bunb. 97; Collyer on Partn. 252–254, 296, 297, 305, 306, 307; Story on Partn. 257–260. But the servant must be employed by one of them in the prosecution of the business of the partnership. Waland *v.* Elkins, 1 Starkie, 272; Bostwick *v.* Champion, 11 Wend. 571.

(*e*) Hope *v.* Cust, cited in 1 East, 53.

(*f*) 15 Ves. 286.

[1] Blair *v.* Bromley, 5 Hare, 542, affirmed, 2 Ph. 354; Sadler *v.* Lee, 6 Beav. 324; De Ribeyre *v.* Barclay, 23 Beav. 107; Eager *v.* Barnes, 31 Beav. 579; Alliance Bank *v.* Tucker, 15 W. R. 992; Earl of Dundonald *v.* Masterman, L. R. 7 Eq. 504; St. Aubyn *v.* Smart, L. R. 8 Ch. 646; L. R. 5 Eq. 183; Griswold *v.* Haven, 25 N. Y. 595; French *v.* Rowe, 15 Iowa, 568; Pierce *v.* Wood, 3 Fost. (23 N. H.) 519. But the act must be within the scope of the partnership business. Harman *v.* Johnson, 2 El. & Bl. 61; Sims *v.* Brutton, 5 Exch. 802; Bishop *v.* Countess of Jersey, 2 Drew. 143; Bourdillon *v.* Roche, 27 L. J. N. S. Ch. 681; Hutchins *v.* Turner, 8 Humph. 415; Alliance Bank *v.* Kearsley, L. R. 6 C. P. 433. See also Coomer *v.* Bromley, 5 De G. & Sm. 532; 12 Eng. L. & Eq. 307. Instances in which the members have been held liable for a tort committed by one of their number without their participation are Lloyd *v.* Bellis, 27 L. T. 203; 87 Eng. L. & Eq. 545; Linton *v.* Hurley, 14 Gray, 191. See Castle *v.* Bullard, 23 How. 172; McKnight *v.* Ratcliff, 44 Penn. St. 156.

*47 anty of the debt * of a third person, without a special authority for that purpose, or one to be implied from the common course of the business, or the previous course of dealing between the parties, unless the guaranty be afterwards adopted and acted upon by the firm.[1] The guaranty must have reference to the regular course of business transacted by the partnership, and be confined to advances made or credit given to the partnership as then constituted, and not extended to new advances or credits, after a change of any of the original partners by death or retirement, and then it will be obligatory upon the company; and this is the principle on which the distinction rests. (*a*) The same general rule applies when one partner gives the copartnership as a mere and avowed surety for another, without the authority or consent of the firm, for this would be pledging the partnership responsibility in a matter entirely unconnected with the partnership business. (*b*)[2]

(6) *How far by Deed.* — Nor can one partner charge the firm by deed, with a debt, even in commercial dealings. It would be inconsistent with technical rules, and contrary to the general policy of the law; for the execution of a deed requires a special authority; and such a power has been deemed by the English courts to be of dangerous tendency, as it would enable one partner to give to a favorite creditor a mortgage or a lien on the real estates of the other partners. (*c*) But one partner, by the spe-

(*a*) Duncan *v.* Lowndes, 3 Camp. 478; Sandilands *v.* Marsh, 2 B. & Ald. 673; Crawford *v.* Stirling, 4 Esp. 207; Sutton *v.* Irwine, 12 Serg. & R. 13; *Ex part* Nolte, 2 Glyn & J. 295; Hamill *v.* Purvis 2 Penn. 177; Story on Partn. [§§ 127, 244, 251;] Cremer *v.* Higginson, 1 Mason, 323; Myers *v.* Edge, 7 T. R. 254; Strange *v.* Lee, 3 East, 490; Weston *v.* Barton, 4 Taunt. 673, 682; Pemberton *v.* Oakes, 4 Russ. 154; Dry *v.* Davy, 10 Ad. & El. 30.

(*b*) Foot *v.* Sabin, 19 Johns. 154; New York Firemen Insurance Company *v.* Bennett, 5 Conn. 574; Laverty *v.* Burr, 1 Wendell, 531. See, also, the same point, 7 Wend. 158; 14 id. 146; 15 id. 364; Andrews *v.* Planters' Bank, 7 Smedes & Marsh. 192.

(*c*) Collyer on Partn. 308–312; McNaughten *v.* Partridge, 11 Ohio, 223. A custom-house bond for duties given by one partner will not bind the firm. Metcalfe *v.* Rycroft, 6 Maule & Selw. 75; Elliot *v.* Davis, 2 Bos. & P. 338. The act of Congress of 1st March, 1823, c. 149, sec. 25, has, however, rendered such bonds, given in

[1] Brettel *v.* Williams, 4 Exch. 623; Hasleham *v.* Young, 5 Q. B. 833. See Alliance Bank *v.* Tucker, 15 W. R. 992; Sweetser *v.* French, 2 Cush. 309; Selden *v.* Bank of Commerce, 8 Minn. 166.

[2] Rollins *v.* Stevens, 31 Me. 454, Langan *v.* Hewett, 13 Sm. & Marsh. 122; McQuewans *v.* Hamlin, 35 Penn. St. 517.

cial authority of his copartners under seal, and, if in their presence, by parol authority, may execute a deed for them in a transaction in which they were all interested. It amounts, in judgment of law, to an execution of the deed by all the partners, though sealed by one of them only; and this is the case, if the other partners, by assent or acts, subsequently ratify the deed. (*d*) The general doctrine of the English law on this point has been clearly recognized and settled by numerous decisions in our *American courts. (*a*) [1] The more recent cases have very *48 considerably relaxed the former strictness on this subject; and while they profess to retain the rule itself, they qualify it exceedingly, in order to make it suit the exigencies of commer-

this country, binding upon the firm. Harrison *v.* Jackson, 7 T. R. 207; Montgomery *v.* Boone, 2 B. Mon. 244; Turbeville *v.* Ryan, 1 Humph. (Tenn.) 118; Story on Partn. [§ 117.]

(*d*) Ball *v.* Dunsterville, 4 T. R. 313; Williams *v.* Walsby, 4 Esp. 220; Steiglitz *v.* Egginton, 1 Holt N. P. 141; Brutton *v.* Burton, 1 Chitty, 707; Swan *v.* Stedman, 4 Met. 548.

(*a*) Gerard *v.* Basse, 1 Dall. 119; Green *v.* Beals, 2 Caines, 254; Clement *v.* Brush, 3 Johns. Cas. 180; Mackay *v.* Bloodgood, 9 Johns. 285; Anon. 2 Hayw. (N. C.) 99; Mills *v.* Barber, 4 Day, 428; Garland *v.* Davidson, 3 Munf. 189; Hart *v.* Withers, 1 Penn. 285; Posey *v.* Bullitt, 1 Blackf. (Ind.) 99: Skinner *v.* Dayton, 19 Johns. 513; 1 Wendell, 326; 9 id. 439; Nunnely *v.* Doherty, 1 Yerg. (Tenn.) 26; Swan *v.* Stedman, 4 Met. 548.

[1] *Instruments under Seal.* — Schmertz *v.* Shreeve, 62 Penn. St. 457. It is admitted in Schmertz *v.* Shreeve, that if one partner is expressly authorized to make a certain executory contract, and makes it by an instrument under seal, the seal is surplusage, and that the other will be liable as on a simple contract; (citing Baum *v.* Dubois, 43 Penn. St. 260; Jones *v.* Horner, 60 Penn. St. 214.) And the same doctrine has been applied by other courts to contracts not specially authorized, which, but for the seal, would bind the firm. Purviance *v.* Sutherland, 2 Ohio St. 478; Human *v.* Cuniffe, 32 Mo. 316. See *Ex parte* Bosanquet, De Gex, 432, 439; Daniel *v.* Toney, 2 Metcalfe, (Ky.) 523. And when there is an executed transaction which is within the power of the partner, such as the sale and delivery of merchandise, it will not matter if a bill of sale under seal is added, because that is only evidence of the act, and does not change its nature. Schmertz *v.* Shreeve, *sup.*, and cases cited; Dubois's Appeal, 88 Penn. St. 231; Sweetzer *v.* Mead, 5 Mich. 107; *Ex parte* Bosanquet, De Gex, 632.

Other cases confirming the text as to the sufficiency of a parol ratification or authority are Johns *v.* Battin, 80 Penn. St. 84; Smith *v.* Kerr, 3 Comst. 144; Gwinn *v.* Rooker, 24 Mo. 291; Ely *v.* Hair, 16 B. Mon. 230. Gram *v.* Seton, *inf.* n. (*b*), seems to be sustained by McDonald *v.* Eggleston, 26 Vt. 154; Drumright *v.* Philpot, 16 Ga. 424; Worrall *v.* Munn, 1 Seld. 229, 240. *Contra*, Little *v.* Hazzard, 5 Harringt. 291. So in case of instruments affecting real estate. Wilson *v.* Hunter, 14 Wis. 683; Haynes *v.* Seachrest, 13 Iowa, 455; Lowery *v.* Drew, 18 Tex. 786; Herbert *v.* Hanrick, 16 Ala 581.

cial associations. An absent partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous parol authority or a subsequent parol adoption of the act. (*b*)

One partner may, by deed, execute the ordinary release of a debt belonging to the copartnership, and thereby bar the firm of a right which it possessed jointly. This is within the general control of the partnership funds, and within the right which each partner possesses, to collect debts and receive payment, and to give a discharge. The rule of law and equity is the same; and it must be a case of collusion for fraudulent purposes, between the partner and the debtor, that will destroy the effect of *49 the release. (*c*) A release by one partner, to a *partnership debtor, after the dissolution of the partnership, has been held to be a bar of any action at law against the debtor. (*a*) So also in bankruptcy, one partner may execute a deed, and do any other act requisite in proceedings in bankruptcy, and thereby bind the partnership. This is another exception to the general rule, that one partner cannot bind the company by deed. (*b*) Nor can one partner bind the firm by a submission to arbitration, even

(*b*) Skinner *v.* Dayton, 19 Johns. 513; Anderson *v.* Tompkins, 1 Brock. 462; Story on Partn. [§§ 119–122;] Cady *v.* Shepherd, 11 Pick. 405, 406; Bond *v.* Aitkin, 6 Watts & S. 165. In Jackson *v.* Porter, 20 Martin (La.), 200, it was admitted that where a deed was executed by one partner in the name of the firm, parol evidence was receivable to show the *written* assent of the other partner. The case of Gram *v.* Seton & Bunker, in the city of New York, 1 Hall (N. Y.), 262, goes a great deal further, and holds that one partner may execute, in the name of the firm, an instrument under seal, necessary in the usual course of business, which will be binding upon the firm, provided the partner had previous authority for that purpose; and such *authority need not be under seal, nor in writing, nor specially communicated for the specific purpose, but it may be inferred from the partnership itself, and from the subsequent conduct of the copartner implying an assent to the act.* In Tennessee, the doctrine that a subsequent ratification or a parol authority will render valid the act of one partner to bind the other by deed is rejected, as being contrary to their established decisions. Turbeville *v.* Ryan, 1 Humph. 113. This was adhering to the stern doctrine of the common law, that it required a prior authority, under seal, or a subsequent ratification, under seal, to make a sealed instrument, executed by one partner only, binding on the firm, and which doctrine has become essentially relaxed in the commercial states.

(*c*) Tooker's Case, 2 Co. 68; Ruddock's Case, 6 Co. 25; Lord Kenyon, in Perry *v.* Jackson, 4 T. R. 519; Stead *v.* Salt, 3 Bing. 101; Hawkshaw *v.* Parkins, 2 Swanst. 539; Pierson *v.* Hooker, 3 Johns. 68; Bruen *v.* Marquand, 17 Johns. 58; Salmon *v.* Davis, 4 Binney, 375; Halsey *v.* Whitney, 4 Mason, 206, 232; Smith *v.* Stone, 4 Gill & Johns. 310.

(*a*) Salmon *v.* Davis, 4 Binney, 375.

(*b*) *Ex parte* Hodgkinson, 19 Ves. 291.

of matters arising out of the business of the firm. The principle is, that there is no implied authority, except so far as it is necessary to carry on the business of the firm. (*c*) It would also go to deprive the other parties of their legal rights and remedies in the ordinary course of justice. (*d*)

(7) *How far by Admission of a Debt.* — The acknowledgment of an antecedent debt by a single partner, during the continuance of the partnership, will bind the firm equally with the creation of the debt in the first instance; and it will take the case out of the statute of limitations, if it be a clear and unqualified acknowledgment of the debt. (*e*) Whether any such acknowledgment, or promise to pay, if made by one partner after the dissolution of the partnership, will bind a firm, or take a case out of the statute as to the other partners, has been for some time an unsettled and quite a vexed question, in the books. In *Whitcomb* v. *Whiting*, (*f*) it was held, that the admission of one joint maker of a note took the case out of the statute as to the other maker, and that decision has been followed in this country. (*g*) The doctrine of that case has even been extended to acknowledgment by a partner after this dissolution of the partnership, in relation to antecedent transactions, on the *ground that, *50 as to them, the partnership still continued. (*a*) But there

(*c*) Stead *v.* Salt, 3 Bing. 101; Karthaus *v.* Ferrer, 1 Peters, 222; Buchanan *v.* Curry, 19 Johns. 137; Lumsden *v.* Gordon, cited in 1 Stair's Institutions of the Law of Scotland, 141, edit. by More, 1832. *Contra*, Taylor *v.* Coryell, 12 Serg. & R. 243; Southard *v.* Steele, 3 Monroe, 443.

(*d*) Story on Partn. [§ 114.] By the civil and the French law, one partner cannot compromise a suit, or submit a controversy to arbitration, without the consent of his associates. Dig. 3. 3. 60; Pothier, de Société, n. 68. Nor can one partner retain an attorney, with power to appear and act for the firm in an action against it, for this would be beyond the ordinary duties of the relationship, and would expose the innocent partner to judgment and execution without his knowledge or consent. Hambidge *v.* De la Crouée, 3 C. B. 742.

(*e*) Pittam *v.* Foster, 1 B. & C. 248; Burleigh *v.* Stott, 8 id. 36; Collyer on Partn. 286–290. The same principle applies as to the admission or misrepresentation of facts by one partner relative to a partnership transaction. Collyer on Partn. 290; Story on Partn. [§ 107.]

(*f*) Doug. 652.

(*g*) Bound *v.* Lathrop, 4 Conn. 336; Hunt *v.* Bridgham, 2 Pick. 581; Ward *v.* Howell, 5 Harr. & J. 60; Walton *v.* Robinson, 5 Ired. (N. C.) 341. By Mass. R. S. c. 120, sec. 14, one joint promisor is not affected by the admission of the other.

(*a*) Wood *v.* Braddick, 1 Taunt. 104; Lacy *v.* M'Neile, 4 Dowl. & Ryl. 7; Cady *v.* Shepherd, 11 Pick. 408; Austin *v.* Bostwick, 9 Conn. 496; Hendricks *v.* Campbell,

have been qualifications annexed to the general principle; for after the dissolution of a partnership, the power of the members to bind the firm ceases, and an acknowledgment of a debt will not, of itself, be sufficient, inasmuch as that would, in effect, be keeping the firm in life and activity. (*b*) To give that acknowledgment any force, the existence of the original partnership debt must be proved, or admitted *aliunde;* and then the confession of a partner, after the dissolution, is admissible, as to demands not barred by the statute of limitations. (*c*) Of late, however, the decision in *Whitcomb* v. *Whiting* has been very much questioned in England; and it seems now to be considered as an unsound authority by the court which originally pronounced it. (*d*) And we have high authority in this country for the conclusion, that the acknowledgment by a partner, after the dissolution of the partnership, of a debt barred by the statute of limitations, will be of no avail against the statute, so as to take the debt out of it as to the other partner, on the ground that the power to create a new right against the partnership does not exist in any partner after the dissolution of it; and the acknowledgment of a debt, barred by the statute of limitations, is not the mere continuation of the original promise, but a new contract, springing out of and supported by the original consideration. This is the doctrine, not only in New York, Indiana, Pennsylvania, Tennessee, Georgia, and Louisiana, but in the Supreme Court of

* 51 the United * States; (*a*) and the law in England and in

1 Bailey (S. C.), 522; Simpson *v.* Geddes, 2 Bay, 533; Fisher *v.* Tucker, 1 M'Cord Ch. 190; Fellows *v.* Guimarin, Dudley (Ga.) 100; Brewster *v.* Hardeman, ib. 140; Greenleaf *v.* Quincy, 8 Fairfield, 11.

(*b*) Hackley *v.* Patrick, 3 Johns. 536; Walden *v.* Sherburne, 15 id. 409; Baker *v.* Stackpole, 9 Cowen, 420; Shelton *v.* Cocke, 3 Munf. 191; Chardon *v.* Colder, 2 Const. (S. C.) 685; Fisher *v.* Tucker, 1 M'Cord Ch. 177, 179; Walker *v.* Duberry, 1 A. K. Marsh. 189; Lachomette *v.* Thomas, 5 Rob. (La.) 172.

(*c*) Smith *v.* Ludlows, 6 Johns. 267; Johnson *v.* Beardslee, 15 id. 3; Cady *v.* Shepherd, 11 Pick. 400; Brisban *v.* Boyd, 4 Paige, 17; Greenleaf *v.* Quincy, 8 Fairfield, 11.

(*d*) Brandram *v.* Wharton, 1 B. & Ald. 463; Atkins *v.* Tredgold, 2 B. & C. 23. But in Perham *v.* Raynall, 9 Moore C. B. 566, the authority of the case of Whitcomb *v.* Whiting is reinstated; and it was held to contain sound doctrine, to the extent that an acknowledgment within the six years, by one of two makers of a joint and several note, revives the debt against both, though the other had signed the note as a surety. Pease *v.* Hirst, 10 B. & C. 122; Pritchard *v.* Draper, 1 Russ. & Myl. 191, S. P.

(*a*) Bell *v.* Morrison, 1 Peters, 351; Levy *v.* Cadet, 17 Serg. & R. 126; Searight

this country seem equally to be tending to this conclusion. (*b*) [1] But there is a distinction between an acknowledgment which goes to create a new contract, and the declarations of a partner, made after the dissolution of the partnership, concerning facts which transpired previous to that event; and declarations of that character are held to be admissible. (*c*)

If, however, in the terms of dissolution of a partnership, one partner be authorized to use the name of the firm in the prosecution of suits, he may bind all by a note for himself and his partners, in a matter concerning judicial proceedings. (*d*)

(8) *Dealing on Separate Account.* — The business and contracts of a partner, distinct from and independent of the business of the partnership, are on his own account; and yet it is said

v. Craighead, 1 Penn. 135; Yandes *v.* Lefavour, 2 Blackf. (Ind.) 371; Hopkins *v.* Banks, 7 Cowen, 650; Baker *v.* Stackpoole, 9 id. 420; Brewster *v.* Hardeman, Dudley, 138; Lambeth *v.* Vawter, 6 Rob. (La.) 128; Van Wyck *v.* Norvell, 2 Humph. 192; [ib. 166, 529;] Bispham *v.* Patterson, 2 McL. 87. In this last case, Mr. Justice McLean considers the English rule, that the admission of one partner, made after the dissolution of the partnership, and even of a payment made to him after the dissolution, is good evidence to bind the other partners, to be well settled and upon sound principles; but he yields his better judgment to the contrary doctrine, settled by the weight of American authority.

(*b*) This is contrary to a decision in North Carolina, in M'Intire *v.* Oliver, 2 Hawks, 209, and recognized in Willis *v.* Hill, 2 Dev. & Bat. 234, and in Walton *v.* Robinson, 5 Ired. 341; but it may now be considered as the better and more authoritative, and perhaps the settled doctrine. By the English statute of 9th May, 1828, entitled "An act rendering a written memorandum necessary to the validity of certain promises and engagements," it is declared, in reference to acknowledgments and promises offered in evidence to take cases out of the statute of limitations, that joint contractors, or executors, or administrators of any contractor, shall not be chargeable in respect of any written acknowledgment of his cocontractor, &c., though such cocontractor, his executors, &c., may be rendered liable by virtue of such new acknowledgment or promise. The like law in Mass. R. S. c. 120, sec. 14, Gay *v.* Bowen, 8 Met. 100; Cady *v.* Shepherd, 11 Pick. 400.

(*c*) Parker *v.* Merrill, 6 Greenl. 41; Mann *v.* Locke, 11 N. H. 246.

(*d*) Burton *v.* Issit, 5 B. & Ald. 267.

[1] Van Keuren *v.* Parmalee, 2 Comst. 523; Shoemaker *v.* Benedict, 1 Kern. (11 N. Y.) 176; Payne *v.* Slate, 39 Barb. 634; Reppert *v.* Colvin, 48 Penn. St. 248; Exeter Bank *v.* Sullivan, 6 N. H. 124; Pennoyer *v.* David, 8 Mich. 407; Myatts *v.* Bell, 41 Ala. 222. See Bateman *v.* Pinder, 3 Q B. 574. But a partial payment to a creditor without notice of the dissolution has been held to take the case out of the statute. Tappan *v.* Kimball, 10 Fost. (30 N. H.) 136; Sage *v.* Ensign, 2 Allen, 215; Myers *v.* Standart, 11 Ohio St. 29. And Whitcomb *v.* Whiting, *sup.* 50, seems still to be followed in Connecticut. Bissell *v.* Adams, 35 Conn. 299, and earlier cases cited; Beardsley *v.* Hall, 36 Conn. 270.

As to the next proposition in the text, see Ide *v.* Ingraham, 5 Gray, 106.

that one partner cannot be permitted to deal on his own private account in any matter which is obviously at variance with the business of the partnership, and that the company would be entitled to claim the benefit of every such contract. (*e*)[2] The object of this rule is to withdraw from each partner the temptation to bestow more attention, and exercise a sharper sagacity in respect to his own purchases and sales, than to the concerns *52 of the partnership * in the same line of business. The rule is evidently founded in sound policy; and the same rule is applied to the case of a master of a vessel, charged with a cargo for a foreign market, and in which he has a joint concern. (*a*) But a person may become a partner with one individual of a partnership, without being concerned in that partnership; for though A. & B. are mercantile partners, A. may form a separate partnership with C., and the latter would have no right to a share in the profits, nor would he be bound for the engagements of the house of A. & B., because his partnership would only extend to the house of A. & C. (*b*)[1] But such involved partner-

(*e*) Pothier, Traité du Con. de Soc. n. 59; Glassington *v.* Thwaites, 1 Sim. & Stu. 133; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Burton *v.* Wookey, Mad. & Geld. (6 Mad.) 367; Russell *v.* Austwick, 1 Sim. 52; Fawcett *v.* Whitehouse, 1 Russ. & My. 132, 148. In the case from Vesey, one partner had secretly, for his own benefit, obtained a renewal of the lease of the premises where the joint trade was carried on, and the lease was held to be a trust for the benefit of the copartnership. See *infra*, iv. 371.

(*a*) Boulay-Paty, Cours de Droit Com. ii. 94. [See Gardner *v.* M'Cutcheon, 4 Beav. 534.]

(*b*) *Ex parte* Barrow, 2 Rose's Cases in Bankr. 252; Glassington *v.* Thwaites, 1 Sim.

[2] Bentley *v.* Craven, 18 Beav. 75; Love *v.* Carpenter, 30 Ind. 284; Herrick *v.* Ames, 8 Bosw. 115. An injunction was granted in England *v.* Curling, 8 Beav. 129; Marshall *v.* Johnson, 33 Ga. 500.

As to leases, see Clegg *v.* Fishwick, 1 Macn. & G. 294; Clements *v.* Hall, 2 De G. & J. 173; Anderson *v.* Lemon, 4 Seld. 236.

For the limits of the doctrine, see Lock *v.* Lynam, 4 Ir. Ch. 188; Wheeler *v.* Sage, 1 Wall. 518; Westcott *v.* Tyson, 38 Penn. St. 389; American Bank Note Co. *v.* Edson, 1 Lans. 388; 56 Barb. 84.

[1] *Sub-partners.* — Mr. Lindley thinks that before the case of Cox *v.* Hickman, *ante*, 25, n. 1, a subpartner might perhaps have been liable to the creditors of the principal firm by reason of his participation in the profits thereof, but that since that decision such a liability cannot attach to him. See Fairholm *v.* Marjoribanks, Mor. Dec. (Scotch), 14558; 3 Ross. L. C. on Comm. Law, 697 (published in Law Library). Where the rule established in Massachusetts prevails, *ante*, 25, n. 1, the liability has been thought to exist. Fitch *v.* Harrington, 13 Gray, 468. But see Story on P., § 70, Gray's note; Reynolds *v.* Hicks, 19 Ind. 118.

As to suits between firms with a common member, see Cole *v.* Reynolds, 18 N. Y. 74; 5 Am Law Rev. 47; Rogers *v.* Rogers, 5 Ired. Eq. 81.

ships require to be watched with a jealous observation, and especially if they relate to the business of the same kind, inasmuch as the attention of the person belonging to both firms might be distracted in the conflicts of interest, and his vigilance and duty in respect to one or the other of the concerns become much relaxed. Partners are bound to conduct themselves with good faith, and to apply themselves with diligence in the business of the concern, and not to divert the funds to any purpose foreign to the trust. (*c*)

III. Of the Dissolution of Partnership. — If a partnership be formed for a single purpose or transaction, it ceases as soon as the business is completed; and nothing can be more natural and reasonable than the rule of the civil law, that a partnership in any business should cease when there was an end put to the business itself. (*d*) If the * partnership be for a definite *53 period, it terminates of course when the period arrives. But in that case, and in the case in which the period of its duration is not fixed, it may terminate from various causes which I shall now endeavor to explain, as well as trace the consequences of the dissolution.

A partnership may be dissolved by the voluntary act of the parties, or of one of them, and by the death, insanity, or bank-

& Stu. 124, 133. Lord Eldon there refers to the case of Sir Charles Raymond, as containing the doctrine. It was also the doctrine of the civil law, and is the law of those countries which follow the civil law. Socii mei socius, meus socius non est. Dig. 17. 2. 20; Pothier, Traité du Con. de Soc. n. 91; Ersk. Inst. ii. 6, 8, sec. 22; Bell's Comm. ii. 654; Civil Code of Louisiana, art. 2842. There can be no doubt, said Lord Ch. J. Eyre, 1 Bos. & P. 546, that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners, having their separate estate engaged in some joint concern, in which the general partnership is not interested; and that they may convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. See, also, Gow on Partn. 75; Collyer on Partn. 175–178; Story on Partn. [§ 219.]

(*c*) Stoughton *v.* Lynch, 1 Johns. Ch. 470; Long *v.* Majestre, ib. 805; Fawcett *v.* Whitehouse, 1 Russ. & My. 132; Collyer on Partn. 96. If the partnership suffers loss from the gross negligence, unskilfulness, fraud, or wanton misconduct of a partner, in the course of their business, or from a known deviation from the partnership articles, he is ordinarily responsible over to the other partners for all losses and damages sustained thereby. Maddeford *v.* Austwick, 1 Sim. 89; Pothier, de Société, n. 133; Story on Partn. [§§ 169–173.]

(*d*) Inst. 3. 26. 6. Extincto subjecto, tollitur adjunctum. Pothier, Traité du Con. de Soc. n. 140–143, illustrates this rule in his usual manner, by a number of plain and familiar examples. 16 Johns. 491, s. p.

ruptcy of either, and by judicial decree, or by such a change in the condition of one of the parties as disables him to perform his part of the duty. It may also be dissolved by operation of law, by reason of war between the governments to which the partners respectively belong, so as to render the business carried on by the association impracticable and unlawful. (*a*)

(1) *Of Dissolution by Voluntary Act.* — It is an established principle in the law of partnership, that if it be without any definite period, any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership. (*b*)[1] The civil law contains the same rule on the subject. (*c*) The existence of engagements with third persons does not prevent the dissolution by the act of the parties, or either of them, though those engagements will not be affected, and the partnership will still continue as to all antecedent concerns, until they are duly adjusted and settled. (*d*) A reasonable notice of the dissolution might be very *advantageous to the company, but it is not requisite; and a partner may, if he please, in a case free from fraud, choose a very unseasonable moment for the exercise of his right. A sense of common interest is deemed a sufficient security against the abuse of the discretion. (*a*) Though the partnership be constituted by deed, a notice in the gazette by one partner is evidence of a dissolution of the partnership

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(*a*) Inst. 3. 26, sec. 7, 8; Vinnius, h. t. 3. 26. 4; Hub. in Inst. lib. 3, tit. 26, sec. 6; Pothier, Traité du Con. de Soc. n. 147, 148; 11 Ves. 5; 1 Swanst. 480, 508, 16 Johns. 491.

(*b*) Peacock *v.* Peacock, 16 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Lord Eldon, in 1 Swanst. 508.

(*c*) Inst. 3. 26. 4; Code, 4. 37. 5.

(*d*) Pothier, Traité du Con. de Soc. n. 150, says, that the dissolution by the act of a party ought to be done in good faith, and seasonably, — *debet esse facta bona fide et tempestive.* He states the case of an advantageous bargain for the partners being in contemplation, and one of them, with a view to appropriate the bargain to himself, suddenly dissolves the partnership. A dissolution at such a moment, he justly concludes, would be unavailing. This general rule was also the doctrine of the civil law. Inst. 3, tit. 26; Dig. 17. 2. 65. 4; Domat, b. 1, tit. 8, sec. 5; Code Civil of France, art. 1869, 1870, 1871; Code of Louisiana, art. 2855 to 2859; 2 Bell's Comm. 532, 533; United States *v.* Jarvies, [Daveis, 274.]

(*a*) 17 Ves. 308, 309.

[1] Skinner *v.* Tinker, 34 Barb. 333; Beaver *v.* Lewis, 14 Ark. 138. For some qualifications, even when the partnership is not for a definite period, or when a power of expulsion is reserved, see Blisset *v.* Daniel, 10 Hare, 493; Featherstonhaugh *v.* Turner, 25 Beav. 382; Allhusen *v.* Borries, 15 W. R. 739.

as against the party to the notice, even if the partnership articles require a dissolution by deed. (*b*)

But if the partners have formed a partnership by articles for a definite period, in that case, it is said, that it cannot be dissolved without mutual consent before the period arrives. (*c*)[1] This is the assumed principle of law by Lord Eldon, in *Peacock* v. *Peacock*, (*d*) and in *Crawshay* v. *Maule*, (*e*) and by Judge Washington, in *Pearpont* v. *Graham*; (*f*) and yet, in *Marquand* v. *New York Man. Company*, (*g*) it was held that the voluntary assignment by one partner of all his interest in the concern dissolved the partnership, though it was stipulated in the articles that the partnership was to continue until two of the partners should demand a dissolution, and the other partners wished the business to be continued, notwithstanding the assignment. And in *Skinner* v. *Dayton*, (*h*) it was held by one of the judges, (*i*) that there was no such thing as an indissoluble partnership. It was revocable in its own nature, and each party might, by giving *due notice, dissolve the partnership as to all future *55 capacity of the firm to bind him by contract; and he had the same legal power, even though the parties had covenanted with each other that the partnership should continue for such a period of time. The only consequence of such a revocation of the partnership power in the intermediate time would be, that the partner would subject himself to a claim of damages for a breach of the covenant. (*a*) Such a power would seem to be implied in the capacity of a partner to interfere and dissent from a purchase or contract about to be made by his associates; and

(*b*) Doe dem. Waithman *v.* Miles, 1 Starkie, 181; Collyer on Partn. 154; Story on Partn. [§ 271.]

(*c*) Gow on Partn. 303, 305, ed. Phil. 1825.

(*d*) 16 Ves. 56.

(*e*) 1 Swanst. 495.

(*f*) 4 Wash. 234.

(*g*) 17 Johns. 525; 1 Whart. 381, 388, S. P.

(*h*) 19 Johns. 538.

(*i*) Mr. Justice Platt.

(*a*) In Bishop *v.* Breckles, 1 Hoff. Ch. 534, it was considered to be rather doubtful whether either party might dissolve the partnership at pleasure, upon due notice, and yet the rule of the civil law was deemed the most reasonable. But Mr. Justice Story, in his Commentaries on Partnership, [§ 275,] considers it quite unreasonable to allow a partner to dissolve the partnership *sua sponte* from mere caprice and to the great injury of the concern, and that it ought not to be done, except under reasonable circumstances. See *infra*, 61.

[1] Smith *v* Mulock, 1 Robertson, (N.Y.) 569. As to the principle of *Marquand's* case, mentioned in the text, see the cases cited 59, n. 1.

the commentators on the Institutes lay down the principle as drawn from the civil law, that each partner has a power to dissolve the connection at any time, notwithstanding any convention to the contrary, and that the power results from the nature of the association. They hold every such convention null, and that it is for the public interest that no partner should be obliged to continue in such a partnership against his will, inasmuch as the community of goods in such a case engenders discord and litigation. (*b*)

The marriage of a *feme sole* partner would likewise operate as a dissolution of the partnership; because her capacity to act ceases, and she becomes subject to the control of her husband; and it is not in the power of any one partner to introduce, by his own act, the agency of a new partner into the firm. (*c*)

(2) *By Death.* — The death of either party is, *ipso facto*, from the time of the death, a dissolution of the partnership, however numerous the association may be. The personal qualities of
* 56 each partner enter into the consideration * of the contract, and the survivors ought not to be held bound without a new assent, when, perhaps, the abilities and skill, or character and credit, of the deceased partner, were the inducements to the formation of the connection. (*a*) Pothier says, that the representatives of the deceased partner are bound by new contracts made in the name of the partnership by the survivor, until notice be given of the death, or it be presumed to have been received. (*b*) But Lord Eldon was of opinion that the death of the partner did, of itself, work the dissolution; and he was not prepared to say, notwithstanding all he had read on the subject, that a deceased partner's estate became liable to the debts of the continu-

(*b*) Adeo autem visum est ex natura esse societatis unius dissensu totam dissolvi, ut quamvis ab initio convenerit, ut societas perpetuo duraret, aut ne liceret ab ea resilire invitis cæteris; tamen tale pactum, tanquam factum contra naturam societatis, cujus in æternum nulla coitio est, contemnere licet. Vinnius, in Inst. 3. 26. 4, pl. 1; Ferrière, ib. v. 156; Dig. 17. 2. 14; Domat, b. 1, tit. 8, sec. 5, and art. 1 to 8, by Strahan.

(*c*) Nerot *v.* Burnand, 4 Russ. 260.

(*a*) Pothier, Traité du Con. de Soc. n. 146; Inst. 3. 26. 5; Vinnius, h. t.; Pearce *v* Chamberlain, 2 Ves. Sen. 33; Lord Eldon, Vulliamy *v.* Noble, 3 Meriv. 614; Crawshay *v.* Maule, 1 Swanst. 509, and note, ib.

(*b*) Pothier, Traité du Con. de Soc. n. 156, 157. The Roman law also required notice to the surviving partners of the death of any partner, before that event dissolved the partnership. Dig. 17. 2. 65. 10.

ing partners, for want of notice of such dissolution. (*c*) [1] In the Roman law, and in the commentaries of the civilians, every subject connected with the doctrine of partnership is considered with admirable sagacity and precision; but, in this instance, the rule was carried so far, that even a stipulation that, in the case of the death of either partner, the heir of the deceased should be admitted into the partnership, was declared void. (*d*) The provision in the Roman law was followed by Argou, in his Institutes of the old French law. (*e*) Pothier was of opinion, however, that the civil law abounded in too much refinement on this point; and that if there be a provision in the original articles of partnership for the continuance of the rights of partnership in the representatives of the deceased, it would be valid. (*f*) His opinion has been followed in the Code Napoleon; (*g*) and in the English law, such a provision in the articles of partnership for * the benefit of the representatives of a deceased partner, *57 is not questioned; and it was expressly sustained by Lord Talbot. (*a*)

(*c*) Crawshay *v.* Collins, 15 Ves. 228; Kidder *v.* Taylor, cited in Gow on Partnership, 250; Vulliamy *v.* Noble, 3 Meriv. 614. The laws of Louisiana do not recognize any authority in a surviving partner, and he cannot administer the effects of the partnership until duly appointed administrator. Notrebe *v.* McKinney, 6 Rob. (La.) 13.

(*d*) Dig. 17. 2. 35, 52, 49. [52, § 9?]

(*e*) Inst. au Droit François, 1, 3, c. 23.

(*f*) Pothier, *ub. sup.* n. 145.

(*g*) Art. 1868.

(*a*) Wrexham *v.* Huddleston, 1 Swanst. 514, note; Crawshay *v.* Maule, 1 Swanst. 521; Collyer on Partn. 5, 6. See, also, Pearce *v.* Chamberlain, 2 Ves. Sen. 33; Balmain *v.* Shore, 9 Ves. 500; Warner *v.* Cunningham, 3 Dow, 76; Gratz *v.* Bayard, 11 Serg. & R. 41; Scholefield *v.* Eichelberger, 7 Peters, 586. If one partner, by will, continues his share of stock in a partnership for a definite period, and the partnership be continued after his death, and becomes insolvent, the partnership creditors have no claim over the general creditors to the assets in the hands of the representatives of the deceased, except as to the assets vested in the partnership funds. *Ex parte* Garland, 10 Ves. 110; Pitkin *v.* Pitkin, 7 Conn. 307; Thompson *v.* Andrews, 1 My. & Keen, 116. In the case of The Louisiana Bank *v.* Kenner's Succession, 1 La. 384, after an extensive examination of the commercial laws and usages of Europe and the United States, it was considered to be a doubtful point, whether stipulations in contracts of partnership, that they may be continued after the death of one of the part-

[1] And it was directly decided that it did not in Marlett *v.* Jackman, 3 Allen, 287; see Bilton *v.* Blakely, 7 Grant, Ch. (U. C.) 214, 216; (as to cases of simple agency, *ante*, ii. 646, n. 1; Jacques *v.* Worthington, 7 Grant, U. C. 192,) death being said to be a public fact of which all must take notice. But compare Bank of New York *v.* Vanderhorst, 32 N. Y. 553. And as to the effect of the death of a member of a joint-stock company, see Baird's Case, L. R. 5 Ch. 725, 784. As to the power of the survivors to sell firm property, *post*, 64, n. 1.

A community of interest still exists between the survivor and the representatives of the deceased partner; and those representatives have a right to insist on the application of the joint property to the payment of the joint debts, and a due distribution of the surplus. So long as those objects remain to be accomplished, the partnership may be considered as having a limited continuance. If the survivor does not account in a reasonable time, a court of chancery will grant an injunction to restrain him from acting, and appoint a receiver, and direct the accounts to be taken. (*b*) [1] If the surviving partner be insolvent, the effects in the hands of the representatives of the deceased partner are liable, in equity, for the partnership debts; and it is no objection to the claim that the creditor has not used due diligence in *58 prosecuting the surviving partner before *his insolvency; for the debt is joint and several, and equally a charge upon the assets of the deceased partner and against the person and estate of the survivor. (*a*) [1]

ners for the benefit of the heirs, were binding on the latter without their consent. They were not so binding in Louisiana at the time of the adoption of the code of 1808. The better opinion is, that they are not anywhere absolutely binding. It is at the option of the representatives; and if they do not consent, the death of the party puts an end to the partnership. If no notice or dissent be given, it is said that a continuation of the partnership will be presumed. Pigott *v.* Bagley, M'Clel. & Y. 569; Kershaw *v.* Matthews, 2 Russ. 62; Collyer on Partn. 120–122. If the survivor carries on the business without the assent of the representatives of the deceased partner, they have their election to take a share of the profits or interest on the amount of their share. Millard *v.* Ramsdell, Harr. Ch. (Mich.) 873. [Bernie *v.* Vandever, 16 Ark. 616.] The general principle is, that the assets of a deceased partner are not liable for debts contracted after the testator's death, except under the direction of his will, authorizing such continuance of the trade; and new creditors are confined to the funds embarked in such trade, and to the personal responsibility of the party who continues the trade, whether as executor, trustee, or partner, unless the testator had, by will, bound his general assets. Burwell *v.* Mandeville, 2 How. 560.

(*b*) *Ex parte* Ruffin, 6 Ves. 126; Hartz *v.* Schrader, 8 Ves. 317; *Ex parte* Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 Ves. 57; Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, ib. 506; Murray *v.* Mumford, 6 Cowen, 441; 16 Johns. 493.

(*a*) Hamersley *v.* Lambert, 2 Johns. Ch. 508; Miss Sleech's Case, in Devaynes *v.* Noble, 1 Meriv. 539. The creditors of the firm may sue the surviving partner, and

[1] *Post*, 61, n. 1; 63; Madgwick *v.* Wimble, 6 Beav. 495; Walker *v.* House, 4 Md. Ch. 39; Bilton *v.* Blakely, 7 Grant, Ch. (U. C.) 214, 216; Horrell *v.* Witts, L. R. 1 P. & D. 108.

See on the point to which *Ex parte* Garland is cited, in note (*a*), *sup.* Cutbush *v.* Cutbush, 1 Beav. 184; M'Neillie *v.* Acton, 4 De G., M. & G. 744; Scott *v.* Izon, 34 Beav. 434; Richter *v.* Poppenhusen, 89 How. Pr. 82.

See as to the personal liability of the executor or trustees, *ante*, 83, n. 1.

[1] See Brown *v.* Douglas, 11 Sim. 283;

(3) *By Insanity.* — Insanity does not work a dissolution of partnership, *ipso facto*. It depends upon circumstances under the sound discretion of the Court of Chancery. But if the lunacy be confirmed, and duly ascertained, it may now be laid down as a general rule, notwithstanding the decision of Lord Talbot to the contrary, that as partners are respectively to contribute skill and industry, as well as capital, to the business of the concern, the inability of a partner, by reason of lunacy, is a sound and a just cause for the interference of the Court of Chancery to dissolve the partnership, and have the accounts taken, and the property duly applied. (*b*) [2]

(4) *By Bankruptcy.* — Bankruptcy or insolvency, either of the whole partnership or of an individual member, dissolves a partnership; and the assignees become, as to the interest of the bankrupt or insolvent partner, tenants in common with the solvent partners, subject to all the rights of the other partners; and a community of interest exists between them until the

the representatives of the deceased partner, for payment out of the assets of the deceased, and without showing that the surviving partner was insolvent. Wilkinson *v.* Henderson, 1 My. & Keen, 582. A surviving partner may set off a debt of the partnership against a demand against him in his own right, for he has the exclusive control and settlement of the business. Slipper *v.* Stidstone, 5 T. R. 493; Craig *v.* Henderson, 2 (Barr) Penn. St. 261.

(*b*) Wrexham *v.* Huddleston, cited in 1 Swanst. 514, note; Sayer *v.* Bennet; 1 Cox, 107; Waters *v.* Taylor, 2 Ves. & B. 301; Jones *v.* Noy, 2 My. & Keen, 125; Milne *v.* Bartlett, Atkin & Wyatt, April, 1839. See ii. lec. 41, *ad finem*. The general rule mentioned by Spencer, J., in 15 Johns. 57, that insanity works a dissolution of a partnership, must be taken with the limitations in the text. Story on Partn. [§ 295.]

Kimball *v.* Whitney, 15 Ind. 280; Vance *v.* Cowing, 13 Ind. 460; Camp *v.* Grant, 21 Conn. 41; Fillyau *v.* Laverty, 3 Fla. 72.

In New York the English doctrine stated in note (*a*) is not followed, but it is held that the joint creditors have no claim in equity against the estate of the deceased partner, except when the surviving partners are insolvent, or have been proceeded against to execution at law. Patterson *v.* Brewster, 4 Edw. Ch. 352; Lawrence *v.* Trustees of Orphan House, 2 Den. 577; *post*, 64, n. (*c*); Voorhis *v.* Childs, 17 N. Y. 354; Bennett *v.* Woolfolk, 15 Ga. 218.

The doctrine of Slipper *v.* Stidstone, note (*a*), is not followed in equity, and the case is criticised in Lindley on P. 2d ed., 517, 524, citing Addis *v.* Knight, 2 Mer. 117.

[2] Leaf *v.* Coles, 1 De G., M. & G. 171; Anon., 2 K. & J. 441; Rowlands *v.* Evans, 30 Beav. 302. But see Davis *v.* Lane, 10 N. H. 156, 161. In Isler *v.* Baker, 6 Humph. 85, it was held that an inquisition of lunacy found against a partner *ipso facto* dissolved the partnership, which seems to be contrary to the English cases.

affairs of the company are settled. The dissolution of the partnership follows necessarily under those statutes of bankruptcy which avoid all the acts of the bankrupt from the day of his bankruptcy, and from the necessity of the thing, as all the *59 property of the bankrupt is vested in *his assignees, who cannot carry on the trade. (*a*) A voluntary and *bona fide* assignment by a partner of all his interest in the partnership stock has the same effect, and dissolves the partnership. This is upon the principle that a partnership cannot be compelled by the act of one partner to receive a stranger into an association which is founded on personal confidence. Socii mei socius, socius meus non est. (*b*)[1] The dissolution takes place, and the joint tenancy is severed, from the time that the partner, against whom the commission issues, is adjudged a bankrupt, and the dissolution relates back to the act of bankruptcy. The bankruptcy operates to prevent the solvent partner from dealing with the partnership property as if the partnership continued;[2] but in respect to the past transactions, he has a lien on the joint funds for the purpose of duly applying them in liquidation and payment of the partnership debts, and is entitled to retain them until the partnership accounts be taken. (*c*) If all the interest of a partner be seized

(*a*) Fox *v.* Hanbury, Cowp. 445; Lord Eldon, *Ex parte* Williams, 11 Ves. 5; Wilson *v.* Greenwood, 1 Swanst. 482; Marquand *v.* N. Y. Man. Co., 17 Johns. 525; Gow on Partn. 304–306.

(*b*) Inst. 3. 26. 8; Dig. 17. 2. 20; ib. 50. 17. 47; Pothier, Traité de Société, n. 67, 91; Marquand *v.* N. Y. Man. Co., 17 Johns. 525; *Ex parte* Barrow, 2 Rose, 255; Murray *v.* Bogert, 14 Johns. 318; Mumford *v.* McKay, 8 Wend. 442; Kingman *v.* Spurr, 7 Pick. 235; Crawshay *v.* Maule, 1 Swanst. 509; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417; Ketcham *v.* Clark, 6 Johns. 144; Story on Partn. [§§ 307, 308.] *Supra*, 52, n.

(*c*) Harvey *v.* Crickett, 5 M. & S. 336; Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* Morrison, 17 Ves. 193. The doctrine in equity, apart from any statutes of bankruptcy,

[1] Horton's Appeal, 18 Penn. St. 67. But this must be taken with some caution See Taft *v.* Buffum, 14 Pick. 322; Simmons *v.* Curtis, 41 Me. 378, 377; Renton *v.* Chaplain, 1 Stockt. 62, 66; State *v.* Quick, 10 Iowa, 451; Buford *v.* Neely, 2 Dev. Eq. 481; Bank of N. C. *v.* Fowle, 4 Jones, Eq. 8; *ante*, 54.

As to involuntary transfer by the sale on execution of the interest of a partner, the text is confirmed by Habershon *v.* Blurton, 1 De G. & Sm. 121; Aspinwall *v.* London & N. W. R. Co., 11 Hare, 325; Renton *v.* Chaplain, 1 Stockt. 62. See Perens *v.* Johnson, 3 Sm. & G. 419. Mere insolvency, without any stoppage of payment, assignment, or legal proceedings, does not operate *per se* as a dissolution. Arnold *v.* Brown, 24 Pick. 89, 94; *post*, 65, n. 2; Siegel *v.* Chidsey, 28 Penn. St. 279.

[2] But see *post*, 64, n. 1.

and sold on execution, that fact will likewise terminate the partnership, because all his share of the joint estate is transferred, by act of law, to the vendee of the sheriff, who becomes a tenant in common with the solvent partners. I have not met with any adjudication upon the point in the English law, though it is frequently assumed; (*d*) but it follows, as a necessary consequence, from the sale of his interest, and it is equivalent, in that respect, to a voluntary assignment. (*e*) It was also a rule of the civil law, that the partnership was dissolved by the insolvency of one of the members, and an assignment of his property to his creditors, *or by a compulsory sale of it by judicial process on behalf *60 of his creditors. (*a*)

(5) *By Judicial Decree.* — We have seen that the partnership may be dissolved by the decree of the Court of Chancery, in the case of insanity. It may also be dissolved at the instance of a member, and against the consent of the rest, when the business for which it was created is found to be impracticable, and the property invested liable to be wasted and lost. (*b*) It may be dissolved when the whole scheme of the association is found to

is, that upon insolvency of a firm, the effects are considered a trust fund for the payment of partnership debts, ratably, and either party may apply to have the funds so appropriated. A bill filed for an account and dissolution, and the appointment of a receiver, by a partner, is in equity equivalent to an actual assignment, and the appointment of a receiver arrests the power to give preferences, which remains until then. Egberts *v.* Wood, 3 Paige, 521; Waring *v.* Robinson, 1 Hoff. Ch. 524.

(*d*) So stated, *arguendo*, in Sayer *v.* Bennet, 1 Montagu on Partn. note 16; Gow on Partn. 310.

(*e*) Mr. Justice Story (on Partnership, [§§ 311, 312]) considers it to follow, of course, that by the sale the partnership is dissolved *to the extent of the right and interest levied on and sold.* The sale subrogates the purchaser to the rights of the debtor partner, and he becomes a tenant in common, and not a partner. [See n. 1.]

(*a*) Dict. du Digest, par Thevenot, Dessaules, art. Société, n. 56, 70. A discharge of one partner under a bankrupt commission is no discharge of the other; and the creditor can sue the other partner for the balance of his debt, notwithstanding he proves his debt under the bankrupt commission. 2 M. & S. 25, 444; Mansfield, C. J., in 4 Taunt. 328. Even a release to one partner will not deprive the creditor of his remedy against the other, if attended with a proviso that it should not affect his remedy against the other. Solly *v.* Forbes, cited by Bayley, J., in Twopenny *v.* Young, 8 B. & C. 208. Though an absolute technical release of one joint debtor releases all, yet a mere covenant, not to sue one, does not so operate. 7 Johns. 207; 4 Greenl. 421; 6 Taunt. 289; 9 Cowen, 37. A creditor may, therefore, unite in a petition for a discharge of one joint partner, under the insolvent acts in this country, without destroying his right of action against a solvent partner. A judgment against one partner, or a substitution of an obligation of a higher nature against a partner, extinguishes the partnership debt of an inferior degree. Moale *v.* Hollins, 11 Gill & J. 11.

(*b*) Baring *v.* Dix, 1 Cox, 218.

be visionary, or founded upon erroneous principles. (*c*) So, if the conduct of a partner, as by habitual drunkenness or other vices, be such as renders it impracticable to carry on the business, or there be a gross abuse of good faith between the parties, the Court of Chancery, on the complaint of a partner, may, in its discretion, appoint a receiver, and dissolve the association, notwithstanding the other members object to it. (*d*) But the court will require a strong case to be made out, before it will dissolve a partnership, and decree a sale of the whole concern. It may restrain a single partner from doing improper acts in future, or enforce the due observance of negative duties and obligations; (*e*) but the parties, as in another kind of partnership, enter into it for better and worse; and the court has no jurisdiction to make a separation between them for trifling causes, or for fugitive or temporary grievances, involving no permanent mischiefs, or because one of them is less good tempered or accommodating than the other. The conduct must amount to an exclusion of one partner from his proper agency in the house, or be such as ren-
*61 ders it impossible to carry on the business upon the * terms stipulated. (*a*)[1] A breach of covenants in articles which is

(*c*) Buckley *v.* Cater, and Pearce *v.* Piper, referred to for that purpose by Lord Eldon, in 3 Ves. & B. 181. See, also, to the same point, Reeve *v.* Parkins, 2 Jac. & W. 390. In these cases of a bill in chancery, for the dissolution of a partnership, all the members, however numerous, must be parties to the bill, for they all have an interest in the suit. Long *v.* Yonge, 2 Sim. 369.

(*d*) Gow on Partn. 114.

(*e*) Collyer on Partn. 238–240; Kemble *v.* Kean, 6 Sim. 333; Story on Partn. [§§ 224, 225.]

(*a*) Waters *v.* Taylor, 2 Ves. & B. 299; Goodman *v.* Whitcomb, 1 Jac. & W. 589, 592; Collyer on Partn. 236; Story on Partn. [§§ 225, 226, 229;] Gow on Partn. 111, 112, 114, 116.

[1] *Dissolution. — Injunction. — Receiver.* The text is confirmed by Anderson *v.* Anderson, 25 Beav. 190; Hall *v.* Hall, 3 Macn. & G. 79, 86. See, generally, Hynes *v.* Stewart, 10 B. Mon. 429; Fogg *v.* Johnston, 27 Ala. 432; Essell *v.* Hayward, 30 Beav. 158.

A partnership for a certain term may be dissolved against the will of one of the members if mutual confidence is at an end, or if mutual illfeeling makes it impossible to carry on the business beneficially. Smith *v.* Jeyes, 4 Beav. 503; Harrison *v.* Tennant, 21 Beav. 482; Watney *v.* Wells, 30 Beav. 56; Leary *v.* Shout, 33 Beav. 582; Baxter *v.* West, 1 Dr. & Sm. 173; Blake *v.* Dorgan, 1 Greene (Iowa), 537; Slemmer's Appeal, 58 Penn. St. 168; Sieghortner *v.* Weissenborn, 5 C. E. Green (20 N. J. Ch.) 172 See Meaher *v.* Cox, 37 Ala. 201.

In some cases where a dissolution is not sought, an injunction may be granted, for instance, to restrain other members from preventing one partner's taking part in the business of the firm, or to restrain

important in its consequences, or when there has been a studied and continued inattention to a covenant, and to the application of the associates to observe it, will be sufficient to authorize the court to interfere by injunction to restrain the breach of the covenant, or, under circumstances, to dissolve the partnership. (*b*) The French law also allowed of a dissolution within the stipulated period, if one of the parties was of such bad temper that the other could not reasonably live with him, or if his conduct was so irregular as to cause great injury to the society. (*c*) A mere temptation to abuse partnership property is not sufficient to induce the court to interfere by injunction; but when a partner acts with gross impropriety or folly, and there is a strong probability that the safety of the firm, and the rights of creditors, depend upon the interference of chancery, it forms a proper case for the protection of that jurisdiction to be thrown over the concern. (*d*)

In some instances, chancery will restrain a partner from an unreasonable dissolution of the connection, and on the same principle that it will interfere to stay waste and prevent an irreparable mischief; and such a power was assumed by Lord Apsley, in 1771, without any question being made as to the fitness of the exercise of it. (*e*) In the civil law, it was held by the civilians to be a clear point, that an action might be instituted by, or on behalf of the partnership, if a partner, in a case in which no provision was made by the articles, should undertake to dissolve the partnership at an unseasonable moment; * and they went on the ground that the good of the association *62

(*b*) Marshall *v.* Colman, 2 Jac. & W. 266.

(*c*) Inst. au Droit François, par Argou, ii. 249.

(*d*) Glassington *v.* Thwaites, 1 Sim. & Stu. 124; Miles *v.* Thomas, 9 Sim. 606; Tilghman, C. J., 11 Serg. & R. 48; Story on Partn. [§ 227;] Lord Eldon, in Hood *v.* Aston, 1 Russ. 412, 415. Mr Justice Story, [§§ 285, 292,] and Collyer on Partn. 195, 196, have summed up the whole doctrine on the causes proper for dissolution of partnership by a decree in equity.

(*e*) Chavany *v.* Van Sommer, cited in 3 Wood. Lec. 416, and 1 Swanst. 512, note.

one who has misconducted himself from interfering further. Anon., 2 K. & J. 441; Hall *v.* Hall, 3 Macn. & G. 79; England *v.* Curling, 8 Beav. 129. But ordinarily a receiver will not be appointed unless with a view to dissolving the partnership. *Ante*, 57, *post*, 63; Hall *v.* Hall, *sup.*; Roberts *v.* Eberhardt, Kay, 148; Henn *v.* Walsh, 2 Edw. Ch. 129; Walker *v.* House, 4 Md. Ch. 39; Speights *v.* Peters, 9 Gill, 472; Madgwick *v.* Wimble, 6 Beav. 495; Sloan *v.* Moore, 37 Penn. St. 217. See Sheppard *v.* Oxenford, 1 Kay & J. 491 Renton *v.* Chaplain, 1 Stockt. 62, 70.

ought to control the convenience of any individual member. (*a*) But such a power, acting upon the strict legal right of a party, is extremely difficult to define, and I should think rather hazardous and embarrassing in its exercise.

(6) *By the Inability of the Parties to act.* — Pothier says, that if a partnership had been contracted between two persons, founded on the contribution of capital by the one and of personal labor and skill by the other, and the latter should become disabled by the palsy to afford either the labor or skill, the partnership would be dissolved, because the object of it could not be fulfilled. (*b*) This conclusion would be extremely reasonable, for the case would be analogous in principle to that of insanity, and equally proper for equitable relief. The same result would arise if one of the partners had lost his capacity to act *sui juris*, by conviction and attainder of treason, or by absconding for debt, or crime, or felony, or any state-prison offence. (*c*)

If the partners were subjects of different governments, a war between the two governments would at once interrupt and render unlawful all trading and commercial intercourse, and, by necessary consequence, work a dissolution of all commercial partnerships existing between the subjects of the two nations residing within their respective dominions. A state of war creates disabilities, imposes restraints, and exacts duties, altogether inconsistent with the continuance of every such relation. This subject had been largely discussed, and the doctrine explicitly settled and declared by the courts of justice in New York. (*d*) [1]

(7) *Consequences of the Dissolution.* — When a partnership is actually ended by death, notice, or other effectual mode, no *63 person can make use of the joint *property in the way of trade, or inconsistently with the purpose of settling the affairs of the partnership, and winding up the concern. The power of one partner to bind the firm ceases immediately on its

(*a*) Dig. 17. 2. 65. 5; Pothier, Traité du Con. de Soc. n. 150, 151, 154. By the Roman law, says Mr. Justice Story (Comm. on Partn. [§ 276]), a partner might, by his own act, primarily insist upon a dissolution, which, however, would not be valid unless for just cause, and affirmed to be so by a court of justice.

(*b*) Traité du Con. de Soc. n. 142, 152; Bell's Comm. ii. 634, 635.

(*c*) Story on Partn. [§ 304;] Whitman *v.* Leonard, 3 Pick. 177.

(*d*) Griswold *v.* Waddington, 15 Johns. 57; s. c. 16 Johns. 438.

[1] *Ante*, i. 67, n. 1; Woods *v.* Wilder, 43 N. Y. 164; The William Bagaley, 5 Wall. 377, 407.

dissolution, provided the dissolution be occasioned by death, or bankruptcy, or by operation of law, though in cases of a voluntary dissolution, due notice is requisite to prevent imposition on third persons who might continue to deal with the firm. (*a*) The partners, from that time, become distinct persons, and tenants in common of the joint stock. One partner cannot indorse bills and notes previously given to the firm, nor renew a partnership note, nor accept a bill previously drawn on it, so as to bind it. He cannot impose new obligations upon the firm, or vary the form or character of those already existing. (*b*)[1] If the paper was even indorsed before the dissolution, and not put into circulation until afterwards, all the partners must unite in putting it into circulation, in order to bind them. (*c*) But until the purpose of finishing the prior concerns be accomplished, the partnership, as we have already seen, may be said, in a qualified sense, to continue; and if the object be in danger of being defeated, by the unjustifiable acts or conduct of any of the partners, a court of equity will interfere, and appoint a manager or receiver to conduct and settle the business. (*d*) A dissolution is, in some respects, pro-

(*a*) Story on Partn. [§ 386.] [*Ante*, 57, n. 1.]

(*b*) Torrey *v.* Baxter, 13 Vt. 452; Woodworth *v.* Downer, ib. 522. But a retired partner may give authority even by parol to a continuing partner, who is winding up the concern, to indorse bills in the partnership name, after a dissolution of the partnership. Smith *v.* Winter, 4 M. & W. 454. But after the dissolution, one partner cannot give a *cognovit* for the firm. Rathbone *v.* Drakeford, 6 Bing. 375.

(*c*) Kilgour *v.* Finlyson, 1 H. Bl. 155; Abel *v.* Sutton, 3 Esp. 108; Lansing *v.* Gaine, 2 Johns. 300; Sanford *v.* Mickles, 4 id. 224; Foltz *v.* Pourie, 2 Desaus. Ch. 40; Fisher *v.* Tucker, 1 M'Cord Ch. 173; Poignand *v.* Livermore, 17 Martin, 324; Tombeckbee Bank *v.* Dumell, 5 Mason, 56; Woodford *v.* Dorwin, 3 Vt. 82; National Bank *v.* Norton, 1 Hill (N. Y.), 572; Dickerson *v.* Wheeler, 1 Humph. 51; Story on Partn. [§ 322.]

(*d*) Wilson *v.* Greenwood, 1 Swanst. 480; Crawshay *v.* Maule, ib. 506, 528; Gowan *v.* Jeffries, 2 Ashmead, 296; Peacock *v.* Peacock, 16 Ves. 49, 57; *Ex parte* Ruffin, 6 Ves. 119, 126; Murray *v.* Mumford, 6 Cowen, 441; Crawshay *v.* Collins, 15 Ves. 226; Story on Partn. 463–470, 475, 476; *Ex parte* Williams, 11 Ves. 5; Gow on Partn. 114, 231, 232, 356; Collyer on Partn. 226, 240–244. After the dissolution, each partner becomes a *trustee* for the others, as to the partnership funds in his hands, in order

[1] See, generally, Fellows *v.* Wyman, 33 N. H. 351; Bower *v.* Douglass, 25 Ga. 714; Cunningham *v.* Bragg, 37 Ala. 486; Myatts *v.* Bell, 41 Ala. 222; White *v.* Tudor, 24 Tex. 639; Lumberman's Bank *v.* Pratt, 51 Me. 563; Lusk *v.* Smith, 8 Barb. 570; Hurst *v.* Hill, 8 Md. 399; Parker *v.* Cousins, 2 Gratt. 372; Palmer *v.* Dodge, 4 Ohio St. 21; Fowler *v.* Richardson, 3 Sneed, 508; Van Valkenburg *v.* Bradley, 14 Iowa, 108; Lange *v.* Kennedy, 20 Wis. 279; Long *v.* Story, 10 Mo. 636. But see Robinson *v.* Taylor, 4 (Barr) Penn. St. 242.

spective only, and either of the former solvent and competent partners can collect and receive payment of debts due to the firm, (*e*) and adjust unliquidated accounts, and give acquittances and discharges. (*f*) On the dissolution by death, the surviving partner settles the affairs of the concern, and the Court of Chancery will not arrest the business from him, and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct. (*g*) The surviving partner (or partners, as the case may be) is alone suable at law, and he is entitled to the pos-
*64 session and disposition of the assets, to enable *him to discharge the debts and settle the concern. (*a*)[1] But relief may

to effect a fair settlement and just distribution of the effects. But if any one pays over the funds in his possession to the *acting partner*, or general receiver of the trust, he is not liable for the insolvency of the latter, if the payment was not made in bad faith. Allison *v.* Davidson, 2 Dev. Eq. 79, 84.

(*e*) Platt, J., 19 Johns. 143; King *v.* Smith, 4 Carr. & P. 108. By the New York statute of April 18, 1838, c. 257, entitled "An act for the relief of partners and joint debtors," on the dissolution of any copartnership firm, by consent or otherwise, any individual thereof may make a compromise with all or any of the creditors, and obtain a discharge, as far as respects himself only; but such composition or compromise shall not impair the right of the creditor making it to his remedy against the other members of the firm, nor impair the right of the other copartners to call on such partner for his ratable proportion of such partnership debt. This statute provision extends equally to joint debtors, any one of whom may compound for his joint indebtedness, under the same limitations. The proper remedy for one partner against the other, is by a bill in chancery, or an action of account at law.

(*f*) Fox *v.* Hanbury, Cowp. 445; Smith *v.* Oriell, 1 East, 363; Harvey *v.* Crickett, 5 M. & S. 336–344; 2 Bell's Comm. 643; Story on Partn. [§§ 328, 341.]

(*g*) Philips *v.* Atkinson, 2 Bro. C. C. 272; Evans *v.* Evans, 9 Paige, 178.

(*a*) Barney *v.* Smith, 4 Harr. & J. 485; Murray *v.* Mumford, 6 Cowen, 441; 2 Bell's Comm. 645. In Louisiana, the surviving partner does not possess the right, until he is authorized by the Court of Probates, to sue alone for, or receive partnership debts. Flower *v.* O'Conner, 7 La. 194; Connelly *v.* Cheevers, 16 id. 30; 19 id. 402, 404, s. p. This is an anomaly in the English law of partnership; but it follows the doctrine of the French law, which will not allow the surviving partners, after the dissolution of the partnership, to administer the concerns of the partnership, nor even to receive payment of debts due to the same. They must apply to the courts of justice for power. Pothier, de Société, n. 157, 158, 160; Civil Code of France, art. 1865, 1872; Story on Partn. [§ 333;] Code of Louisiana, art. 2852, 2858.

[1] *As to the powers of a partner after dissolution*, see, generally, Butchart *v.* Dresser, 10 Hare, 453; 4 De G., Macn. & G. 542; Robbins *v.* Fuller, 24 N. Y. 570; Gannett *v.* Cunningham, 34 Me. 56; Milliken *v.* Loring, 37 Me. 408; Ide *v.* Ingraham, 5 Gray, 106; Johnson *v.* Totten, 3 Cal. 343; Bass *v.* Taylor, 34 Miss. 342; Renton *v.* Chaplain, 1 Stockt. 62.

It has been doubted whether the surviving members after the death of one partner could sell and give a good legal title to his share, even when they sell in order to pay the debts of the deceased

be had in equity against the representatives of the deceased partner having assets, if the surviving partner be insolvent; (*b*) and it is now held, that a partnership contract, upon the death of a partner, is in equity to be considered joint and several, and to be treated as the several debt of each partner. (*c*) Each party may insist on a sale of the joint stock; and when a court of equity winds up the concerns of a partnership, it is done by a sale of the property, real and personal, and a conversion of it into money. (*d*) If, however, before a sale or a settlement of the

(*b*) Simpson *v.* Vaughan, cited in 2 Ves. 101; Jenkins *v.* De Groot, 1 Caines's Cas. 122; Van Reimsdyk *v.* Kane, 1 Gallison, 371, 630; Hamersley *v.* Lambert, 2 Johns. Ch. 508; Gow on Partn. 358, 359.

(*c*) Vulliamy *v.* Noble, 3 Meriv. 593; Wilder *v.* Keeler, 3 Paige, 167. A joint creditor may file a bill against the representatives of a deceased partner, though the survivor be not insolvent; and if the survivor be insolvent, he may do it without regard to the state of accounts as between such deceased partner and the surviving partners. Devaynes *v.* Noble, 2 Russ. & My. 495. He is not compelled to sue the survivor in the first instance separately, as at law, but he must be joined in a suit in equity against the estate of the deceased partner, because interested in taking the account. Wilkinson *v.* Henderson, 1 My. & Keen, 582; Devaynes *v.* Noble, 1 Meriv. 529; Sleech's Case, ib. 563; Collyer on Partn. 343–346; Sumner *v.* Powell, 2 Meriv. 37; Story on Partn. [§ 362.] But the doctrine in these latter cases of Wilkinson *v.* Henderson, and Devaynes *v.* Noble, allowing the partnership creditor to seek satisfaction out of the estate of the deceased partner, without regard to the partnership fund, and without first resorting to the surviving partner, and exhausting the remedies against him, or showing him insolvent, though strongly sanctioned by Judge Story, is pointedly condemned in Lawrence *v.* Trustees, &c., 2 Denio, 577. [*Ante*, 58, n. 1; Voorhis *v.* Childs, 17 N. Y. 354; Bennett *v.* Woolfolk, 15 Ga. 218.]

(*d*) Gow on Partn. 234–237; Sir John Leach, in Fereday *v.* Wightwick, Tamlyn, 261; Collyer on Partn. 146, 204–214; Crawshay *v.* Collins, 15 Ves. 218, 227; Crawshay *v.* Maule, 1 Swanst. 495, 506; Cook *v.* Collinridge, Jacob, 607. Mr. Justice Story, in his Commentaries, [§ 355,] very justly prefers the English to the Roman or French law on this point, where the division and distribution of the partnership assets

and themselves. Buckley *v.* Barber, 6 Exch. 164, 182. But Mr. Lindley thinks that notwithstanding the bankruptcy of one partner, the solvent partners can deal with the partnership property as if no bankruptcy had intervened, and can confer a title to the whole of the property which they assume to dispose of in the ordinary way of business, and to persons dealing with them *bona fide*. Lind. on P. 2d ed. 1122; Fraser *v.* Kershaw, 2 Kay & J. 496, 501; Morgan *v.* Marquis, 9 Exch. 145, 148; *Ex parte* Robinson, 3 Deac. & Ch. 376, 392; Butchart *v.* Dresser, 4 De G., M. & G. 542, 544; *vide ante*, 59; Robbins *v.* Fuller, 24 N. Y. 570; Bennett *v.* Buchan, 53 Barb. 578, 583; Milliken *v.* Loring, 37 Me. 408.

An acceptance in the firm name by a solvent partner in respect of a partnership liability, will be valid in the hands of a *bona fide* holder, notwithstanding a previous act of bankruptcy by the other partner, on which a commission subsequently issues. *Ex parte* Robinson, 3 Deac. & Ch. 376; *ante*, 44, n. 1; Merrit *v.* Pollys, 16 B. Mon. 355. Compare additional cases cited *post*, 66, n. (*a*)

joint concern, the partner in possession of the capital continues the trade with the joint property, he will do it at his own risk, and will be bound to account with the other partner, or the representatives of a deceased partner, for the profits of the trade, subject to just allowances. (*e*) The good-will of a trade is not partnership stock. It has been decided to be the right of the survivor, and which the law gives him, to carry on the trade, and that the representatives of a deceased partner cannot compel a division of it. (*f*) But it was afterwards doubted whether the good-will did survive, and could be separated from the lease of the establishment, and especially if the survivor continued the trade with the joint funds. (*g*)[2]

among the partners were by valuation and lot, and in specie. Dig. 10. 2. 4; Pothier, de Société, n. 169 to 173. In Scotland, the English and not the civil law prevails. 2 Bell's Comm. 632, 633.

(*e*) Brown *v.* Litton, 1 P. Wms. 140; Hammond *v.* Douglas, 5 Ves. 539; Crawshay *v.* Collins, 15 Ves. 218; Featherstonhaugh *v.* Fenwick, 17 id. 298, 309, 310; Sigourney *v.* Munn, 7 Conn. 11. The surviving partner or partners who collect the debts, adjust accounts, and wind up the concern, have no compensation for trouble or services, unless the same be stipulated. The same rule applies as if the original partnership had continued. See *supra*, 37; Story on Partn. [§ 331.] But the new transactions will not bind the firm, if they be not within the scope and business of the original partnership, or the third person had notice of the dissolution, or in the case of a dormant partner who had already retired. Story on Partn. [§ 334.]

(*f*) Hammond *v.* Douglas, 5 Ves. 539; Farr *v.* Pearce, 3 Mad. 74; Lewis *v.* Langdon, 7 Sim. 421. But see Crawshay *v.* Collins, 15 Ves. 227, a doubt expressed as to the survivorship of a good-will, and that doubt overruled in 7 Sim. 421.

(*g*) Lord Eldon, in Crawshay *v.* Collins, 15 Ves. 224, 227. The *good-will* of a business has been recognized in equity as a valuable interest. Kennedy *v.* Lee, 3

[2] *Good-will.* — The good-will does not survive, but the estate of a deceased partner participates in it. Smith *v.* Everett, 27 Beav. 446, and cases cited below; Holden *v.* M'Makin, 1 Pars. Eq. C. 270, 281. In some cases it has been sold as part of the partnership assets. Williams *v.* Wilson, 4 Sandf. Ch. 379; Johnson *v.* Helleley, Cook *v.* Collingridge, Hall *v.* Barrows, *infra;* Mellersh *v.* Keen, 28 Beav. 453; Turner *v.* Major, 3 Giff. 442. So has the right to use the name of a periodical, when the partnership which carried it on was dissolved. Bradbury *v.* Dickens, 27 Beav. 58. See Holden *v.* M'Makin, 1 Pars. Eq. C. 270; Dayton *v.* Wilkes, 17 How. Pr. 510. In one or two cases the former owners have been restrained from pursuing the same business in such a way as to render the purchase valueless. Williams *v.* Wilson, 4 Sandf. Ch. 379. See Turner *v.* Major, 3 Giff. 442.

But it is settled that the sale of the good-will of a business, without more, does not preclude the vendor or surviving partner from carrying on a precisely similar business next door, so long as he does not hold himself out as continuing the identical business sold. Churton *v.* Douglas, H. R. V. Johns. 174; Hall *v.* Barrows, 33 L. J. N. S. Ch. 204; 10 Jur. N. S. 55; Smith *v.* Everett, 27 Beav. 446; Cook *v.* Collingridge, ib. 456; Johnson *v.* Helleley, 34 Beav. 63; 2 De G., J. & S. 446; Davies *v.*

The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts.

*The equity of the rule, on the other hand, equally requires *65 that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied. (*a*) The basis of the general rule is, that the funds

Meriv. 452, 455. By the conveyance of a shop, the good-will passes, though not specifically mentioned. Chissum *v.* Dewes, 5 Russ. 29. A defendant may be enjoined from assuming the plaintiff's name in a business concern, for the fraudulent purpose of imposing upon the public, and supplanting the plaintiff in the good will of that concern, provided the name be used in such a manner as to be calculated to deceive or mislead the public. Hogg *v.* Kirby, 8 Ves. 215; Knott *v.* Morgan, 2 Keen, 213; Bell *v.* Locke, 8 Paige, 75. The good-will of a trade is, said Lord Eldon, the probability that the old customers will resort to the old place. But in Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 68, it was declared that this good-will was partnership property, and did not survive; and if not disposed of by consent, the lease and good-will would be sold like other partnership effects. See, on this point, Story on Partn. [§ 99.]

(*a*) Wilder *v.* Keeler, 3 Paige, 167; Morgan *v.* His Creditors, 20 Martin (La.), 599; M'Culloh *v.* Dashiell, 1 Harr. & G. 96; Payne *v.* Matthews, 6 Paige, 19; Hall *v.* Hall, Hodgson, 25 Beav. 177; White *v.* Jones, 1 Beav. 566. The general rule is the other way. Churton *v.* Douglas, and other cases, *sup.*; Bininger *v.* Clark, 60 Barb. 113. The value of the good-will is usually estimated at so many years' purchase upon the amount of the profits of the business. Austen *v.* Boys, 2 De G & J. 626, 636; Mellersh *v.* Keen, 28 Beav. 453 Abb. Pr. 328. And there are instances in which a partner, after the expiration or dissolution of the partnership, has been allowed to carry on business in the firm name on his own account, under somewhat special circumstances. Musselman's Appeal, 62 Penn. St. 81; Banks *v.* Gibson, 34

are to be liable on which the credit was given.[1] In contracts with the partnership, the credit is supposed to be given to the

2 M'Cord Ch. 302; Bowden *v.* Schatzell, 1 Bailey Eq. 360; Cammack *v.* Johnson, 1 Green Ch. (N. J.) 168.

[1] *Partnership and Separate Funds.* — The text is confirmed by Murrill *v.* Neill, 8 How. 414; Weyer *v.* Thornburgh, 15 Ind. 124; Walker *v.* Eyth, 25 Penn. St. 216; Crockett *v.* Crain, 33 N. H. 542; Rodgers *v.* Meranda, 7 Ohio St. 179, 187; Bridge *v.* McCullough, 27 Ala. 661; Smith *v.* Mallory, 24 Ala. 628, (explaining Emanuel *v.* Bird, 19 Ala. 596;) Moline Water P. Co. *v.* Webster, 26 Ill. 233; Pahlman *v.* Graves, ib. 405; Toombs *v.* Hill, 28 Ga. 371; Ridgway *v.* Clare, 19 Beav. 111; Lodge *v.* Prichard, 1 De G., J. & S. 610; s. c. 4 Giff. 294; U. S. Bankrupt Act of March 2, 1867, § 36. But see Camp *v.* Grant, 21 Conn. 41; Bardwell *v.* Perry, 19 Vt. 292; Shedd *v.* Wilson, 27 Vt. 478, 481. Equity courts have refused to supersede the legal lien of a prior judgment recovered by a partnership creditor, upon the separate estate of one of the firm in some cases. Meech *v.* Allen, 17 N. Y. 300; Straus *v.* Kerngood, 21 Gratt. 584. See Miles *v.* Pennock, 50 N. H. 564.

The exclusion of the joint creditors from the separate fund in case of the death of one partner has been thought to rest on the ground that the law cast all the firm obligations on the survivor, and the partnership creditors had no claim against the estate of the deceased member except in equity, wherefore they were postponed to the separate creditors who had a right at law. Arnold *v.* Hamer, Freem. (Miss.) Ch. 509, 516; Silk *v.* Prime, 2 Lead. Cas. in Eq., American note, 8d ed. 313; Story on P., § 363, Gray's note.

As stated below in the text, 65, partnership creditors have no equity to prevent partners from transferring their property to each other, or changing its character from joint to separate property, provided it is done in good faith. See, generally, *ante*, 39, n. 1; Richards *v.* Manson, 101 Mass. 482, 487; Allen *v.* Centre Valley Co., 21 Conn. 130; Siegel *v.* Chidsey, 28 Penn. St. 279; Richardson *v.* Tobey, 8 Allen, 81; Robb *v.* Mudge, 14 Gray, 534; Dimon *v.* Hazard, 32 N. Y. 65; Potts *v.* Blackwell, 4 Jones Eq. 58; Marks *v.* Hill, 15 Gratt. 400; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Mandel *v.* Peay, 20 Ark. 325; Waterman *v.* Hunt, 2 R. I 298; Wilson *v.* Bowden, 8 Rich. 9. Accordingly, when, by an agreement made *bona fide* and for value, the assets of the partnership are vested in one of the partners in consideration of his promising to pay the firm debts, the partnership creditors will not have any prior claim or lien upon such assets, either apart from or by reason of the promise. Rankin *v.* Jones, 2 Jones Eq. 169; Hapgood *v.* Cornwell, 48 Ill. 64; Robb *v.* Mudge, 14 Gray, 534; Baker's Appeal, 21 Penn. St. 76. But see Tenney *v.* Johnson, 43 N. H. 144; Ferson *v.* Monroe, 1 Fost. (21 N. H.) 462.

In some cases it has been held to make no difference that the firm and both partners were insolvent at the time of the transfer, and it is said that joint estate is not, so far as the rights of creditors are concerned, that which was such at the time of dissolution, but that in which the partners are jointly interested for the purposes of the partnership and the settlement of its concerns at the time of the institution of proceedings in insolvency. Howe *v.* Lawrence, 9 Cush. 553, 557. See Robb *v.* Mudge, 14 Gray, 534, 537; Dimon *v.* Hazard, 32 N. Y. 65, 79; Siegel *v.* Chidsey, 28 Penn. St. 279, 287; Jones *v.* Lusk, 2 Metc. (Ky.) 356, 361. It must be remembered that mere insolvency does not always work a dissolution. *Ante*, 59, n. 1.

firm, but those who deal with an individual member rely on his sufficiency. Partnership effects cannot be taken by attachment, or sold on execution, to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such separate partner in the effects, after settlement of all accounts. The sale is made subject to the partnership debts, and is in effect only a sale of the undefined surplus interest of the partner defendant, after the partnership debts are paid. (*b*) In pursuance of this

(*b*) Heydon *v.* Heydon, 1 Salk. 392; Fox *v.* Hanbury, Cowp. 445; Wilson *v.* Conine, 2 Johns. 280; Matter of Smith, 16 Johns. 102; Moody *v.* Payne, 2 Johns. Ch. 548; Jarvis *v.* Hyer, 4 Dev. (N. C.) 367; Tappan *v.* Blaisdell, 5 N. H. 190. For the general doctrine laid down in the text, see, at large, Emerig. Traité des Con. à la Grosse, c. 12, sec. 6; *Ex parte* Cook, 2 P. Wms. 499; West *v.* Skip. 1 Ves. Sen. 456; *Ex parte* Elton, 3 Ves. 238; Taylor *v.* Fields, 4 Ves. 396; *Ex parte* Abell, 4 Ves. 837; *Ex parte* Kensington, 14 Ves. 447; *Ex parte* Taitt, 16 Ves. 198; Ch. De Saussure, in Woddrop *v.* Ward, 3 Des. Ch. 208, and in 2 M'Cord, [Ch.] 302; M'Culloh *v.* Dashiell, 1 Harr. & G. 96; Barber *v.* Hartford Bank, 9 Conn. 407; Witter *v.* Richards, 10 id. 37; Pierce *v.* Jackson, 6 Mass. 242; Allen *v.* Wells, 22 Pick. 450; Wilder *v.* Keeler, 3 Paige, 167; Lyndon *v.* Gorham, 1 Gallison, 367; Taylor *v.* Fields, in Exch., 4 Ves. 396; 15 id. 559, s. c.; Story on Partn. pp. 516–521. This rule is said to be a rule of convenience merely, and that it is a rule in bankruptcy, and not a rule of general equity. The rule in bankruptcy, in the time of Lord Hardwicke (*Ex parte* Baudier, 1 Atk. 98; *Ex parte* Voguel, 1 Atk. 132), was, to permit joint creditors to prove their debts, under a separate commission against one partner, or under separate commissions against all the partners, but only in reference to the certificate; and the joint creditors were considered to have an equitable right to any surplus of the separate estates, *after payment of the separate creditors.* But the joint property was distributed under a *joint* commission. Lord Thurlow broke in upon the rule, and allowed joint creditors to prove and *take dividends* under a *separate* commission, and held, that a commission of bankruptcy was an execution for all the creditors, and that no distinction ought to be made between joint or separate debts, and they ought to be paid ratably out of the bankrupt's property. (*Ex parte* Hayden, 1 Bro. C. C. 454; *Ex parte* Copland, 1 Cox, 420; *Ex parte* Hodgson, 2 Bro. C. C. 5.) Lord Rosslyn restored Lord Hardwicke's rule (*Ex parte* Elton, 3 Ves. 242; *Ex parte* Abell, 4 Ves. 837), and Lord Eldon also followed the same rule. (*Ex parte* Clay, 6 Ves. 813; *Ex parte* Kensington, 14 Ves. 447; *Ex parte* Taitt, 16 Ves. 198.) If, therefore, there be a joint fund, or a solvent partner, a *joint* creditor is not entitled to prove his debt under a separate commission, *for the purpose of receiving a dividend,* without an order in chancery. Mr. Justice Story, in his full discussion of the subject, concludes that the old rule, now reinstated by Lord Rosslyn and Lord Eldon, rests on as questionable and unsatisfactory a foundation as any rule in the whole system of our jurisprudence, while he admits it is not now to be disturbed, as it would be difficult to substitute any other rule that would work with perfect equality and equity. Story on Partnership, [§§ 376–382.] For my part, I am free to confess that I feel no hostility to the rule, and think that it is upon the whole reasonable and just. The history of the rule and its fluctuations was noted in the case of Murray *v.* Murray, 5 Johns. Ch. 73–77. In Pennsylvania the rule has been discarded, after great consideration, as not being a general rule in equity, but one founded on the statutes of bankruptcy; and joint and separate creditors are allowed

principle, it is held, that the creditor of an ostensible partner, and who gave him credit as a single individual, is not to be post-

to come in under their insolvent laws, *pari passu*, for a distributive share of the estate of an insolvent partner, whether the fund be a separate or partnership fund. Bell *v.* Newman, 5 Serg. & R. 78; In the Matter of the Estate of Sperry, 1 Ashm. 847. So in Georgia, a judgment creditor of a partner, in his individual capacity, may levy on the partnership effects, and sell his debtor's undivided interest therein, *without reference to the claims of the creditors of the firm; Ex parte* Stebbins & Mason, R. M. Charlton, 77; and in Vermont it has been held, that partnership creditors have no priority over a creditor of one of the partners, even as to the partnership effects. Reed *v.* Shepardson, 2 Vt. 120. In South Carolina, a copartnership creditor has a right to resort either to the partnership property, or to the separate property of the partners. He has two funds, and may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of the individual partner. But the private creditors of a partner have but one fund, and cannot go against the partnership funds beyond the debtor's interest in the balance left, after the payment of the partnership debts. Wardlaw *v.* Gray, Dudley Eq. 88, 113. In Massachusetts, the general doctrine relative to the claims of copartnership and separate creditors in matters of partnership is considered to be one in equity, and not at law; and it was decided, in Allen *v.* Wells, 22 Pick. 450, that the attachable interest of one of the copartners, by a separate creditor, is the surplus of the joint estate remaining, after discharging all joint demands upon it; and this necessarily creates a preference in favor of the partnership creditors in the application of the partnership property. See, also, to this point, Marshall, C. J., in Tucker *v.* Oxley, 5 Cranch, 39; M'Culloh *v.* Dashiell, 1 Harr. & G. 96; 1 Story Eq. Jur. 625. It is to be observed, however, that Lord Rosslyn, in 8 Ves. 240, declared the rule, as stated in the text, to be settled by a variety of cases, not only in bankruptcy, but upon general equity. The rule in equity is, that the joint estate is first applicable to partnership debts, and the separate estate to the separate debts; and the weight of authority, if not of convenience and equity, seems to be decidedly in its favor. Mr. Justice Rose, in *Ex parte* Moult, 1 Deac. & Chit. 44, 73; s. c. 1 Montagu, 292, declared it to be a universal maxim in the administration of assets in equity, that the separate estate should be applied in the first instance to the separate creditors, and the joint estate to the joint creditors. The joint creditors must go first to the joint estate, and the separate creditors first to the separate estate; and if there be a surplus of the joint estate, it is carried to the respective separate estates; or if a surplus of the separate estates, it is carried to the joint estate. In Massachusetts, a statute in 1838, c. 163, enacted for the relief of insolvent debtors, adopted as the rule for distributing the effects of insolvent debtors, that the net proceeds of the joint property should be appropriated to pay the joint creditors, and the net proceeds of the separate estate of each partner should be appropriated to pay his separate debts. This is precisely the English rule in equity on the subject.

The history and fluctuations of the remedy at law of the creditor, against the estate of an individual partner, are calculated to throw light on this vexatious subject; and the cases have been collected and ably reviewed in the note of the reporter to the case of Smith, in 16 Johns. 102, and still more elaborately in art. 3, in the American Jurist for October, 1841 [xxvi. 55.] It may be observed summarily, that before Lord Mansfield's time, the rule was, that on an execution at law against a partner for his individual debt, the sheriff levied on all the tangible property of the partnership, because it was joint and undivided property, and he sold only the undivided

poned in his attachment upon the stock in trade, to another creditor, who may subsequently attach the same stock for a debt

share or interest of the defendant; and the joint tenancy between the partners was severed by the sale, and the vendee became tenant in common with the other partners, without reference to the partnership accounts. To levy on the entire share of one partner, it was deemed necessary to seize all the effects of the partnership, and to restore to the other partner his share or moiety, because, by seizing the debtor's share only, say a moiety, and selling that, the other partner would have a right, as a joint tenant, to a moiety of that moiety. Heydon *v.* Heydon, 1 Salk. 392; Jacky *v.* Butler, 2 Ld. Raym. 871; Pope *v.* Haman, Comb. 217; Hankey *v.* Garratt, 1 Ves. 240; Eddie *v.* Davidson, Doug. 650. There was a vast inconvenience and uncertainty, if not injustice, in that practice, for it was impossible to know what was the value, if any, of the debtor's interest in the partnership, until a liquidation of the partnership accounts. Lord Mansfield undertook to correct this practice upon equity principles, and it became the doctrine that the creditor could not take an undivided moiety of the partnership effects for the séparate debt of that partner, without having regard to the partnership accounts. He could only take the interest of the debtor partner in the partnership effects; and that interest was only the share remaining due after the partnership debts were settled and the accounts adjusted. This principle was announced in Fox *v.* Hanbury, Cowp. 445. And afterwards, in Eddie *v.* Davidson, the K. B. undertook to carry into effect the equities between the parties, by ordering a partnership account of the partnership effects to be taken by reference to a master. This was afterwards repeated, as stated by counsel in Chapman *v.* Koops, 3 Bos. & P. 289. It was assuming equity powers in a court of law; and Lord Eldon held, that a court of law was incompetent to take partnership accounts, and that it belonged to a court of equity to take the account and ascertain what the sheriff ought to have sold. Waters *v.* Taylor, 2 Ves. & B. 299, 301. In the Matter of Wait, 1 Jac. & W. 588, it is now considered to be settled, that courts of law cannot take partnership accounts. Parker *v.* Pistor, 3 Bos. & P. 288; Chapman *v.* Koops, ib. 289. The Supreme Court of Pennsylvania, in M'Carty *v.* Emlen, 2 Dall. 278, followed the English rule; but Mr. Justice Yeates, in that case, held to the more modern doctrine; and in Church *v.* Knox, 2 Conn. 514, the modern rule was followed, though strongly opposed by the minority of the court. The doctrine of moieties is now exploded, and the creditors under execution or process of foreign attachment, or assignees of a partner, or purchasers on sheriff's sales, can take only the interest of the debtor in the partnership funds, *subject to the accounts of the partnership*. That interest, and not the partnership effects, is sold, and that interest is merely the share found to belong to the debtor upon an adjustment in equity of the partnership accounts. Taylor *v.* Fields, 4 Ves. 396; s. c. 15 Ves. 559, note; Goss *v.* Du Fresnoy, 1 Cooke's B. L. 589; Young *v.* Keighly, 15 Ves. 557; Lord Eldon, in the Matter of Wait, 1 Jac. & W. 608; Pierce *v.* Jackson, 6 Mass. 242; Fisk *v.* Herrick, ib. 271; In the Matter of Smith, 16 Johns. 102; Winston *v.* Ewing, 1 Ala. 129; Scrugham *v.* Carter, 12 Wend. 131; Doner *v.* Stauffer, 1 Penn. 198; Barber *v.* Hartford Bank, 9 Conn. 407; Witter *v.* Richards, 10 id. 87. [Filley *v.* Phelps, 18 Conn. 294; Sutcliffe *v.* Dohrman, 18 Ohio, 181; Baker's Appeal, 21 Penn. St. 76; Haskins *v* Everett, 4 Sneed, 581.] In Burrall *v.* Acker, in the N. Y. Court of Errors, 23 Wend. 606, the Chancellor, in behalf of the court, declared that the interest of a member in partnership property might be levied upon and sold under execution at law, and before the sale the sheriff may take a *joint* possession with the other members of the firm, but whether he could take *exclusive* possession was left undecided.

created equally upon the same credit, though he should have discovered a concealed partner, and set up his claim as a partnership

The vendee takes as a tenant in common, subject to the incumbrance of the partnership account, and the account may be taken in equity at the instance of any party in interest. Bevan *v.* Lewis, 1 Sim. 376. This whole subject, relative to the adjustment of partnership accounts, is properly, and ought to be exclusively, of equity jurisdiction. The authorities and the doctrine on this subject were learnedly and ably discussed by Mr. Justice Cowen, in Phillips *v.* Cook, 24 Wend. 359; and the court decided, that on execution at law against one of two partners, the sheriff might lawfully seize, not merely the moiety, but the *corpus* of the joint estate, or the whole, or so much of the entire partnership effects as might be necessary to satisfy the execution, and sell the interest of the (defendant) partner therein, and deliver the property sold to the purchaser. The purchaser becomes thereby a tenant in common with the other partner, and if he purchases with notice of partnership, he takes subject to an account between the partners, and to the equitable claims of the partnership creditors. The same point was again so decided in Birdseye *v.* Ray, 4 Hill (N. Y.), 161. But see Story on Partn. [§§ 261–264.] Mr. Justice Story [§ 264] concludes, that the sheriff ought to be enjoined on execution at law from a sale of the separate interest of the partner defendant in the partnership property, until the account be taken on a bill in chancery, and the share of the debtor partner ascertained; and that the decision in Moody *v.* Payne, 2 Johns. Ch. 548, denying the injunction, was not founded on the true result of the English decisions. As I have already observed, the more fit and suitable rule of practice would seem to be, to have the adjustment of the partnership account to precede the sale. But the current of the authorities, as I read them, is the other way, and they are emphatically so in New York. In the case last cited from Wendell, the decision in Moody *v.* Payne was referred to and approved. Mr. Justice Story himself, in a subsequent part of his Commentaries on Partnership, [§ 811,] admits the established rule and practice at law to be, that on execution at law, the creditor of the debtor partner may seize and sell the tangible goods and effects of the partnership, or a part thereof, and that the sale would be good to the extent of the judgment debtor's right, title, and interest therein, to be afterwards adjusted. In the Court of Chancery in New Jersey, the Chancellor was of opinion with Judge Story, as respects the sale of personal property. Cammack *v.* Johnson, 1 Green Ch. (N. J.) 168; while in Massachusetts, in Reed *v.* Howard, 2 Met. 36, it was held that the sheriff might seize and take the whole personal property held by A and B in common, on process of attachment against A only, though he could only sell an undivided moiety on execution, and the purchaser would become a part-owner. If the sheriff was to sell the entire property on an execution against one cotenant or partner, he would be a trespasser. Waddell *v.* Cook, 2 Hill, 47. Again, in Moore *v.* Sample, 8 Ala. 319, it was held that the sheriff on execution against A might levy on the goods of the firm of A & B, and take exclusive possession, and sell the interest of A therein, and this proceeding could only be arrested by equitable interposition. On this litigious subject Ch. J. Tindal said, in Johnson *v.* Evans, 7 Mann. & Gr. 249, that the general rule of law was, that the judgment creditor of any partner might take an execution against that partner, as well his separate property as his share or interest in all the personal property of the partnership that was capable of being seized. The sheriff must seize the whole, the shares of two partners being undivided. (Heydon *v.* Heydon, *supra.*) This arises from the necessity of the case. But taking possession of the whole does not convey any interest on property in the other part-owner's share. The judgment creditor becomes tenant in

creditor. (*c*) This claim of the joint creditors is not such a lien upon the partnership property but that a *bona fide* alienation to a purchaser for a valuable consideration by the partners, or either of them, before judgment and execution, will be held valid. Upon a dissolution of the partnership, each partner has a lien upon the partnership effects, as well for his indemnity as for his proportion of the surplus. (*d*) But creditors have no lien upon the partnership effects for their debts.[2] Their equity is the equity of the partners operating to the payment of the partnership debts. These are just and obvious principles of equity, on which we need not enlarge, and they have been recognized and settled by a series of English and American decisions. (*e*)

*To render the dissolution safe and effectual, there must *66 be due notice given of it to the world; and a firm may be bound, after the dissolution of a partnership, by a contract made by one partner in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. (*a*) The principle on which this responsibility proceeds is the negligence of the partners in leaving the world in ignorance of the fact of the dissolution, and leaving strangers to conclude that the partnership

common with the other partner. The sheriff can only sell the moiety. Jacky *v.* Butler, 2 Ld. Raym. 871.

(*c*) Lord *v.* Baldwin, 6 Pick. 348; French *v.* Chase, 6 Greenl. 166.

(*d*) Lord Eldon, *Ex parte* Williams, 11 Ves. 5; Story on Partnership [§§ 326, 441.] It has been adjudged, on good consideration, in the case of Jackson *v.* Cornell, 1 Sandf. Ch. 348, that on a general assignment of his separate property by an individual partner, though before a lien attaches by judgment, execution, or creditor's bill, he has no right to give preferences to the creditors of the firm, in exclusion of his individual creditors. Nor, on the other hand, can the partnership, by a general assignment of the partnership effects, give preference to the creditors of the individual partners over those of the firm. All such assignments are held to be fraudulent and void.

(*e*) West *v.* Skip, 1 Ves. Sen. 456; *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Fell, 10 Ves. 347; *Ex parte* Williams, 11 id. 8; *Ex parte* Kendall, 17 id. 526; The Master of the Rolls, in Campbell *v.* Mullett, 2 Swanst. 551; *Ex parte* Harris, 1 Mad. 583; Murray *v.* Murray, 5 Johns. Ch. 60; Woddrop *v.* Ward, 3 Desaus. (S. C.) 203; Bell *v.* Newman, 5 Serg. & R. 78; Doner *v.* Stauffer, 1 Penn. 198; White *v.* Union Insurance Company, 1 Nott & M'Cord, 557; Ridgeley *v.* Carey, 1 Har. & McH. 167; M'Culloh *v.* Dashiell, 1 Har. & Gill, 96; Story, J., in Hoxie *v.* Carr, 1 Sumner, 181, 182.

(*a*) Le Roy *v.* Johnson, 2 Peters, 186; Brisban *v.* Boyd, 4 Paige, 17. [City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Martin *v.* Searles, 28 Conn. 43; Grady *v.* Robinson, 28 Ala. 289; Merrit *v.* Pollys, 16 B. Mon. 355. See Holdane *v.* Butterworth, 5 Bosw. 1.]

[2] *Supra*, n. 1.

continued, and to bestow faith and confidence on the partnership name in consequence of that belief.

What shall be sufficient constructive or implied notice of the dissolution has been a vexed question in the books. A notice in one of the public and regular newspapers of the city or county where the partnership business was carried on is the usual mode of giving the information, and may, in ordinary cases, be quite sufficient. But even the sufficiency of that notice might be questioned in many cases, unless it was shown that the party entitled to notice was in the habit of reading the paper. Public notice given in some such reasonable way would not be actual and express notice; but it would be good presumptive evidence for a jury to conclude all persons who have not had any previous
* 67 dealings with the * firm. As to persons who have been in the habit of dealing with the firm, it is requisite that actual notice be brought home to the creditor, or, at least, that it be given under circumstances from which actual notice may be inferred. (*a*) If the facts are all found or ascertained, the reasonableness of notice may be a question of law for the court, and so it was held in *Mowatt* v. *Howland;* (*b*) but generally it will be a mixed question of law and fact, to be submitted to a jury under the direction of the court, whether notice in the particular case, under all the circumstances, has been sufficient to justify the inference of actual or constructive knowledge of the fact of the dissolution. The weight of authority seems now to be, that notice in one of the usual advertising gazettes of the place where the business was carried on, and published in a fair and usual manner, is of itself notice of the fact as to all persons who have not been pre-

(*a*) Vernon *v*. The Manhattan Company, 17 Wend. 526; s. c. 22 Wend. 183; Watkinson *v*. Bank of Pennsylvania, 4 Whart. 482; Mitchum *v*. The Bank of Kentucky, 9 Dana, 166; Mauldin *v*. Bank of Mobile, 2 Ala. 502; Rowley *v*. Horne, 8 Bing. 2. [Little *v*. Clark, 36 Penn. St. 114; Reilly *v*. Smith, 16 La. An. 31; Kirkman *v*. Snodgrass, 8 Head, 870; Devin *v*. Harris, 8 Greene (Iowa), 186; Johnson *v*. Totten, 3 Cal. 343; Pope *v*. Risley, 23 Mo. 185.] The doctrine seems to be, that merely taking a newspaper, in which a notice is contained, is not sufficient to charge a party, for it is not to be contended that he reads the contents of all the notices in the newspapers which he may chance to take. The inference of constructive notice from such a source was pretty strongly exploded in some of these cases. [A single previous dealing is sufficient to give the dealer the protection of the rule. Lyon *v*. Johnson, 28 Conn. 1. But it seems that the previous dealings must have involved giving credit to the firm, and that sales for cash would not be sufficient. Clapp *v*. Rogers, 2 Kern. (12 N. Y.) 283.]

(*b*) 8 Day, 353.

vious dealers with the partnership. (*c*) [1] Nor is notice, in fact, requisite when a partnership is dissolved by operation of law. A declaration of war puts an end to the continuance of commercial partnership, between subjects of the two countries, having each his domicile in his own country; and such an official, solemn act of government is notice to all the world of the most authentic and monitory kind, and supersedes the necessity of any other. (*d*)

When a single partner retires from the firm, the same notice * is requisite to protect him from continued respon- *68 sibility; and even if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, or in the title of the firm over the door of the shop or store, he will still be holden. (*a*) But if the use of the name of the former firm be continued without his authority, and the retiring partner had given due notice of the dissolution of the connection, he is not responsible for the use of his name without his consent or authority, and without any act to warrant it; and he is not bound to take legal measures to have the use of the former name of the firm discontinued. Persons must inquire, and know at their peril, who are truly designated by the firm. (*b*) [1] A dormant partner may withdraw without giving public notice of the dissolution of the partnership; for, being unknown as a partner, the firm was not trusted on his account, and he is chargeable only for debts

(*c*) Godfrey *v.* Turnbull, 1 Esp. 371; Parkin *v.* Carruthers, 3 id. 248; Gorham *v.* Thompson, Peake, 42; Graham *v.* Hope, ib. 154; Leeson *v.* Holt, 1 Starkie, 186; Jenkins *v.* Blizard, ib. 420; Williams *v.* Keats, 2 Starkie, 290; Wright *v.* Pulham, 2 Chitty, 121; Rooth *v.* Quin, 7 Price, 193; Lansing *v.* Gaine, 2 Johns. 300; Ketcham *v.* Clark, 6 id. 144; Graves *v.* Merry, 6 Cowen, 701; Martin *v.* Walton, 1 M'Cord, 16; Bank of South Carolina *v.* Humphreys, ib. 388; Whitman *v.* Leonard, 3 Pick. 177; Prentiss *v.* Sinclair, 5 Vt. 149; Watkinson *v.* Bank of Pennsylvania, 4 Whart. 482; Shurlds *v.* Tilson, 2 McL. 458.

(*d*) Griswold *v.* Waddington, 15 Johns. 57; 16 Johns. 494.

(*a*) Williams *v.* Keats, 2 Starkie, 290; Brown *v.* Leonard, 2 Chitty, 120; Dolman *v.* Orchard, 2 Carr. & P. 104.

(*b*) Newsome *v.* Coles, 2 Camp. 617; Story on Partn. [§ 160.]

[1] See, generally, Boyd *v.* McCann, 10 Md. 118; Amidown *v.* Osgood, 24 Vt. 278; Wait *v.* Brewster, 31 Vt. 516; Pratt *v.* Page, 32 Vt. 13; American Linen Thread Co. *v.* Wortendyke, 24 N. Y. 550; Williamson *v.* Fox, 38 Penn. St. 214; Clapp *v.* Upson, 12 Wis. 492; and additional cases cited *ante*, 66, n. (*a*), 67, n. (*a*). As has already been said, *ante*, 56, n. 1, notice is not necessary when a partnership is dissolved by death. Marlett *v.* Jackman, 3 Allen, 287.

[1] But compare the additional cases cited *ante*, 66, n. (*a*).

contracted during the time he was actually a partner. (*c*) If a partner retires without notice, he is not liable for a partnership debt contracted afterwards with a person who never knew he was a partner, and when he was not so notorious as a partner as to raise a presumption of that knowledge. (*d*) In the case of an infant partner, his acts and contracts are of course voidable; but if, on arriving at full age, the infant does not disaffirm the partnership, and give notice of it to those with whom the partnership have had dealings, he will be responsible for subsequent debts contracted on the credit of the partnership. The ground of the rule is, that the infant acted as partner during his infancy, and when he comes of age he neglects to inform the world that

* 69 * he is not a partner, and suffers it to deal under mistake and delusion. (*a*) Having thus far collected and reviewed the general principles which constitute the law of partnership, and followed those principles into their practical details, the plan of these lectures will not permit me to go more minutely into the subject, or to consider the legal and equitable remedies which exist between partners, and between them and third persons in relation to the various rights and duties which belong to the association. The questions arising upon those remedies, and particularly in respect to the settlement of the partnership estate, in the various cases of dissolution, and especially of dissolution by bankruptcy, are subtle and numerous. The decrees in equity under this head abound with minute and refined distinctions, and they form a comprehensive and very complicated part of this branch of the commercial law. (*b*)

(*c*) Evans *v.* Drummond, 4 Esp. 89; Armstrong *v.* Hussey, 12 Serg. & R. 315; Heath *v.* Sansom, 1 Nev. & Mann. 104; 4 B. & Ad. 172, s. c. [Deford *v.* Reynolds, 36 Penn. St. 325; Warren *v.* Ball, 37 Ill. 76; Ayrault *v.* Chamberlin, 26 Barb. 83, 89; Grosvenor *v.* Lloyd, 1 Met. 19; Edwards *v.* McFall, 5 La. An. 167.] It seems to be the doctrine of the case of Evans *v.* Drummond, and especially of that of Thompson *v.* Percival, 3 Nev. & Mann. 167, that if a creditor of a dissolved partnership accepts for his debt the negotiable paper of the acting partner who continues the business, and who has charge of the effects and of the settlement of the concern, it is evidence of an agreement to discharge the retiring partner. [Harris *v.* Farwell, 15 Beav. 31; Lyth *v.* Ault, 7 Exch. 669; Yarnell *v.* Anderson, 14 Mo. 619.]

(*d*) Carter *v.* Whalley, 1 B. & Ad. 11; 1 Lloyd & Wels. 297, s. c.; Story on Partn. [§ 160, n.] [Chamberlain *v.* Dow, 10 Mich. 319; Cregler *v.* Durham, 9 Ind. 375. But see Western Bank of Scotland *v.* Needell, 1 Fost. & F. 461.]

(*a*) Goode *v.* Harrison, 5 B. & Ald. 147.

(*b*) Among those English treatises which enter more at large on the law of partnership, I would refer the student to a valuable summary of the law of partners, in the

third volume of Mr. Chitty's large treatise on the Laws of Commerce and Manufactures, and the Contracts relating thereto; and, more especially, to the American edition of Mr. Gow's practical treatise on the Law of Partnership, from which I have derived great assistance. The American editor, Mr. Ingraham, has enriched the work with a series of learned notes, in which the American cases are diligently collected, and the force and application of them ably considered; and I think the book is to be preferred to the more recent treatise of Mr. Carey, which has nothing in particular to recommend it, except it be the addition of new cases, arising since the publication of Mr. Gow. Since the third edition of this work, a new treatise on the Law of Partnership, by Mr. Collyer, appeared, with notes of American cases by Mr. Phillips and Mr. Pickering, of Boston. Commentaries on the Law of Partnership, by Mr. Justice Story, have also been published since the fourth edition. The last two are works of great merit, and the latter pre-eminently so, and they have stated fully the principles and distinctions, and given the learning and cases which belong to the subject. An able treatise on the Law of Partnership, Railway and other Joint-stock Companies, by Andrew Bisset, was published at London, in 1847.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

1. Of the History of Bills and Notes. — It is the general opinion that the commerce of the ancients was carried on without the use of bills of exchange, and there is no vestige of them in the Roman law. A passage in the Pandects (*a*) shows it to have been the practice with the creditor who lent money on bottomry, or respondentia, to a foreign merchant, to send his slave to receive the loan, with maritime interest, on the arrival of the vessel at the foreign port. This certainly would not have been necessary, says Pothier, (*b*) if bills of exchange had been in use. But however the fact may have been with the Romans, it would seem, from a passage in one of the pleadings of Isocrates, that bills of exchange were sometimes resorted to at Athens as a safe expedient to shift funds from one country to another. (*c*)

*72 Bills * of exchange are of such indispensable use in the remittance of the value of money between distant places, without risk and expense, that foreign commerce cannot conveniently be carried on without them. They grew into use on the coasts of the Mediterranean, in the fourteenth century. (*a*)

(*a*) Dig. 22. 2. 4. 1. (*b*) Traité du Con. de Change, n. 6.

(*c*) See the pleading of Isocrates, entitled Trapeziticus. (Isocratis Scripta Omnia, ed. H. Wolfius, Basle, 1587.) In that interesting forensic argument which Isocrates puts into the mouth of a son of Sopæus, the governor of a province of Pontus, in his suit against Pasion, an Athenian banker, for the grossest breach of trust, it is stated that the son, wishing to receive a large sum of money from his father, applied to Stratocles, who was about to sail from Athens to Pontus, to leave his money and take a draft upon his father for the amount. This, said the orator, was deemed a great advantago to the young man, for it saved him the risk of remittance from Pontus, over a sea covered with Lacedæmonian pirates. It is added, that Stratocles was so cautious as to take security from Pasion for the money advanced upon the bill, and to whom he might have recourse if the governor of Pontus should not honor the draft, and the young Pontian should fail.

(*a*) In 1394, the city of Barcelona, by ordinance, regulated the acceptance of bills of exchange; and the use of them is said to have been introduced into Western

As they serve the purposes of cash, and facilitate commerce, and are the visible representatives of large masses of property, they may truly be said to enlarge the capital stock of wealth in circulation, as well as increase the trade of the country.

Promissory notes are governed by the rules that apply to bills. The statute of 3d and 4th Anne made promissory notes payable to a person, and to his order, or bearer, negotiable like inland bills, according to the custom of merchants, and by the statutes of 9 and 10 Wm. III. c. 17, and 3 and 4 Anne, inland bills are put upon the footing of foreign bills, except that no protest is requisite. These statutes have been generally adopted in this country, either formally or in effect, and promissory notes are everywhere negotiable. (*b*) The effect of the statute * is *73

Europe by the Lombard merchants, in the thirteenth century. Bills of exchange are mentioned in a passage of the Jurist Baldus of the date of 1328. Hallam's Introduction to the Literature of Europe, i. 68. M. Boucher received from M. Legou-Deflaix, a native of India, a memoir showing that bills of exchange were known in India from the most high antiquity. But the ordinance of Barcelona is, perhaps, the earliest authentic document in the middle ages of the establishment and general currency of bills of exchange. (Consulat de la Mer, par Boucher, i. 614, 620.) The first bank of exchange and deposit in Europe was established at Barcelona, in 1401, and it was made to accommodate foreigners as well as citizens. Prescott's Ferdinand and Isabella, Int. 112. M. Merlin says the edict of Louis XI., of 1462, is the earliest French edict on the subject; and he attributes the invention of bills of exchange to the Jews, when they retired from France to Lombardy. The Italians and merchants of Amsterdam first established the use of them in France. Répertoire de Jurisprudence, tit. Lettre et Billet de Change, sec. 2. In England, reference was made, in the statute of 5 Rich. II. c. 2, to the drawing of foreign bills. This was in the year 1381.

(*b*) By the N. Y. Revised Statutes, i. 768, secs. 1–6, promissory notes payable in money to any person, or to the order of any person, or to bearer, are negotiable in like manner as inland bills of exchange, according to the custom of merchants. The payee and indorsee of every such note, payable to them or their order, and the holder of every such note, payable to bearer, may sue thereon in like manner as in cases of inland bills of exchange. If such notes are made payable to the order of the maker, or to the order of a fictitious person, and are negotiated by the maker, they have the same effect and validity as if made payable to bearer. [See Brown *v.* De Winton, 6 C. B. 336; Hooper *v.* Williams, 2 Exch. 13; Wood *v.* Mylton, 10 Q. B. 805; Miller *v.* Weeks, 22 Penn. St. 89; Muldrow *v.* Caldwell, 7 Mo. 563; Woods *v.* Ridley, 11 Humph. 194; Smalley *v.* Wight, 44 Me. 442; *post*, 78, n. 1.] Promissory notes are negotiable throughout the Union, and the indorsee can sue in his own name. Notes negotiable where made, are negotiable everywhere. This is so held in England and in this country, under the statute of 3 and 4 Anne, and its substitute. Milne *v.* Graham, 1 B. & C. 192; Hatcher *v.* McMorine, 4 Dev. (N. C.) 122. So, if a note or debt be assigned or indorsed abroad, and be suable in the name of the assignee by the law of the country where it was assigned or indorsed, it would seem to be the better opinion in England, that the assignee might sue there in his own name, upon the

to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one apply to the other. (*a*) It was a question much discussed before the statute of Anne, whether notes were not, by the principles of the law-merchant, to be treated as bills; and Lord Holt vigorously and successfully resisted every such attempt. (*b*) The history of that struggle is no longer interesting; but there is no doubt that

assignment as creating a right of action in him, and which it does upon the application of the doctrine of the *lex loci contractus*. Innes *v.* Dunlop, 8 T. R. 595; O'Callaghan *v.* Thomond, 3 Taunt. 82. [But see Foss *v.* Nutting, 14 Gray, 484; Richardson *v.* N. Y. C. R.R., 98 Mass. 85, 92.] In Massachusetts, Connecticut, Vermont, Ohio, North Carolina, South Carolina, Alabama, Mississippi, Illinois, Michigan, Missouri, and most of the states, the indorsee has all the privileges of an indorsee under the law-merchant. But in New Jersey, Pennsylvania, Virginia, Kentucky, and Indiana, his rights, under the law-merchant, are to be taken with some qualification. See Griffith's Law Register, *passim*. Minor (Ala.), 5, 296; Revised Statutes of North Carolina, 1837, i. 93; Revised Statutes of Vermont, 1839, 886; Revised Code of Mississippi, 1822, 464. In Georgia, notice to the indorser of nonpayment of a promissory note by the maker is declared to be unnecessary, and every such indorser is held to be bound as security, and in that character may require the holder to proceed against the maker. Hotchkiss's Code of Laws, 441. Notes or bills discounted at a bank, or deposited for collection, are placed by statute in Pennsylvania on the footing of foreign bills of exchange as to payment and remedy. Purdon's Dig. 108. As the English statute has not been adopted in Virginia, the last assignee of a promissory note cannot maintain an action against a remote indorser, there being neither consideration nor privity. Dunlop *v.* Harris, 5 Call, 16. In New Hampshire the statutes of 9 and 10 William III. and 3 and 4 Anne, respecting inland bills, and promissory notes, were reënacted during the colony administration. In Indiana, promissory notes, *payable at a chartered bank within the state*, are, by statute, placed on the same footing as inland bills of exchange by the law-merchant. Revised Statutes of Indiana, 1838, 119. But other promissory notes are not governed by the law-merchant, which has never been applied in that state by statute to them. Bullitt *v.* Schribner, 1 Blackf. (Ind.) 14. The *lex mercatoria*, applicable to foreign and inland bills of exchange, is considered to be adopted in Indiana as part of the common law of England, which has been adopted by statute. Piatt *v.* Eads, ib. 81. In Pennsylvania, Virginia, Georgia, Arkansas, Missouri, and Mississippi, sealed instruments, as well as notes, are made negotiable by statute; and in Arkansas, all agreements and contracts in writing, for the payment of money or property, are made assignable. But these assignments, in some of these last mentioned states, expressly reserve to the debtor all matters of defence existing prior to the notice of the assignment. This is the case in Mississippi. Allein *v.* The Agricultural Bank, 8 Smedes & M. 48. In Georgia, by statute of 1799, promissory notes are made negotiable, though given for specific articles. And so are specialties and liquidated demands negotiable by act of 1799. Broughton *v.* Badgett, 1 Kelly, 75; Daniel *v.* Andrews, Dudley, 157; Gamblin *v.* Walker, 1 Ark. 220; Hening's Statutes, xii.; Block *v.* Walker, 2 Ark. 7; Revised Statutes of Arkansas, 107; Revised Code of Mississippi, 1824, 464.

(*a*) Heylin *v.* Adamson, 2 Burr. 669; Brown *v.* Harraden, 4 T. R. 148.

(*b*) Clerke *v.* Martin, 2 Ld. Raym. 757.

promissory notes were recognized as mercantile instruments, and a species of bills of exchange, by the canon law and the usage of trade; and even by the *French ordinance of *74
1673, long before Lord Holt asserted them to be of late English invention. (*a*)

My object in the present lecture is to endeavor to take a comprehensive, and at the same time precise and accurate view of the general doctrine and most material rules relative to bills and notes; and to effect this purpose, I shall point out their essential qualities; the rights of the holder; the negotiation of them, and the requisite steps to fix the responsibility of the several parties whose names are upon the paper.

2. Of the Essential Qualities of Negotiable Paper, as Bills, Notes, and Checks. — A bill of exchange is a written order or request, and a promissory note a written promise, by one person to another, for the payment of money, at a specified time, absolutely, and at all events. (*b*) [1] If A, living in New York, wishes to receive one thousand dollars, which await his orders in the hands of B, in London, he applies to C, going from New York to London, to pay him one thousand dollars, and take his draft on B, for that sum payable at sight. This is an accommodation to all parties. A receives his debt by transferring it to C, who carries his money across the Atlantic in the shape of a bill of exchange, without any danger or risk in the transportation; and on his arrival at London, he presents the bill to B, and is paid. This is the *plain and familiar illustration of this mode of remittance, *75
given by Sir William Blackstone; and the practice is so very convenient, and suggests itself so readily, and gives such extension to credit and circulation to capital, that it would seem almost impossible that it should not have been in use in the ear-

(*a*) The pragmatic of Pope Pius V., De Cambiis, as early as 1571, is mentioned by Mr. Du Ponceau, in his dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, 122, as proof of the early recognition of notes as negotiable instruments within the custom of merchants. I would also refer to the Appendix to 1 Cranch's Reports, for a very elaborate argument in favor of the position, that at common law, and before the statute of Anne, an indorsee of a promissory note could sue a remote indorser.

(*b*) This definition is taken from Bayley on Bills, 1, which is a concise, clear, and accurate production. The American edition, published at Boston in 1826, is enriched with all the English and American decisions in its very copious notes.

[1] See 76, n. 1.

liest periods of commerce. A, who draws the bill, is called the *drawer*. B, to whom it is addressed, is called the *drawee*, and, on acceptance, he becomes the *acceptor*. C, to whom the bill is made payable, is called the *payee*. (*a*) As the bill is payable to C, or his order, he may, by indorsement, direct the bill to be paid to D; and in that case, C becomes the *indorser*, and D, to whom the bill is indorsed, is called the *indorsee* or *holder*. A check upon a bank partakes more of the character of a bill of exchange than of a promissory note. It is made payable to bearer, or to order, and transferable by delivery or indorsement like a bill of exchange. It is not a direct promise by the drawer to pay, but it is an implied undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange. (*b*)[1]

A bill or note is not confined to any set form of words. A promise to *deliver*, or to be *accountable*, or to be *responsible* for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money. (*c*) In England, negotiable paper must be for the payment of money in specie, and

(*a*) An instrument may be a bill of exchange, though the drawer and drawee be the same person. Harvey *v.* Kay, 9 B. & C. 356; Randolph *v.* Parish, 9 Porter (Ala.), 76; Potter *v.* Tyler, 2 Met. 58. In Miller *v.* Thomson, 3 Mann. & Gr. 576, Ch. J. Tindal said that two distinct parties, as drawer and drawee, were essential to the constitution of a bill of exchange; and as the instrument in that case was drawn by one of the company upon the firm, and on its behalf, it was good as a promissory note.

(*b*) See *infra*, 104, note; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, ib. 259; Woods *v.* Schroeder, 4 Harr. & J. 276; Lord Kenyon, in Boehm *v.* Sterling, 7 T. R. 430; Walker *v.* Geisse, 4 Whart. 252. In the late case in England, of Serle *v.* Norton, 9 M. & W. 309, a post-dated check was held altogether void. [Taylor *v.* Sip, *post*, 88, n. 1.] We may well demur to that decision. In Wookey *v.* Pole, 4 B. & Ald. 1, it was held that exchequer bills pass by delivery to the *bona fide* [holder] for value, because they were negotiable securities, and represented money. The statute of 48 Geo. III. c. 6, directed them to be circulated.

(*c*) Morris *v.* Lee, 2 Ld. Raym. 1396; 8 Mod. 362; Str. 629; Martin *v.* Chauntry, Str. 1271; Thomas *v.* Roosa, 7 Johns. 461. [Barnes *v.* Gorman, 9 Rich. 297; Austin *v.* Burns, 16 Barb. 643; Dodge *v.* Emerson, 34 Me. 96. The student should be warned that the law-merchant is more or less modified by statute in the different states, *e.g.* Muhling *v.* Sattler, 3 Met. (Ky.) 285.] The initials of the maker's name will bind him as the maker of a promissory note. Palmer *v.* Stephens, 1 Denio, 471. So, I O. U. £10, is a promissory note. 1 Carr. & K. 35.

[1] See, as to checks, *post*, 88, n. 1; 76, n. 1; 78, n. 1.

not in bank-notes. (*d*) In this country it has been held, that a note payable in bank-bills was a good negotiable note within the statute, if confined to a species of paper universally *current as cash. (*a*) But the doctrine of these cases has been met and denied, (*b*) and I think the weight of argument is against them, and in favor of the English rule.[1] It is essential

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(*d*) Bayley on Bills, ed. Boston, 1826, 6; Story on Bills, [§ 43]; s. p. Whiteman v. Childress, 6 Humph. 308.

(*a*) Keith v. Jones, 9 Johns. 120; Judah v. Harris, 19 id. 144.

(*b*) M'Cormick v. Trotter, 10 Serg. & R. 94; Gray v. Donahoe, 4 Watts, 400; Hasbrook v. Palmer, 2 McL. 10.

[1] *Essential Qualities.* — The English rule prevails in Hasbrook v. Palmer, 2 McL. 10; Fry v. Rousseau, 3 McL. 106; Simpson v. Moulden, 3 Coldw. 429; McDowell v. Keller, 4 Coldw. 258; Rindskoff v. Barret, 11 Iowa, 172; Collins v. Lincoln, 11 Vt. 268; Farwell v. Kennett, 7 Mo. 595; Warren v. Brown, 64 N. C. 381; Bank of Mobile v. Brown, 42 Ala. 108. But see Swetland v. Creigh, 15 Ohio, 118; White v. Richmond, 16 Ohio, 5. So instruments in the form of bills or notes for a certain sum payable in specified merchandise, are not bills of exchange or promissory notes, and are not negotiable. Gushee v. Eddy, 11 Gray, 502; Sears v. Lawrence, 15 Gray, 267; Corbitt v. Stonemetz, 15 Wis. 170. See Branning v. Markham, 12 Allen, 454; Easton v. Hyde, 13 Minn. 90. (But this has been changed by statute in some states. 72, n. (*b*); 79, n. (*a*).) Nor are those payable only out of a particular fund. Worden v. Dodge, 4 Denio, 159; Harriman v. Sanborn, 43 N. H. 128; Averett v. Booker, 15 Gratt. 163; Kinney v. Lee, 10 Texas, 155; Raigauel v. Ayliff, 16 Ark. 594; Dyer v. Covington, 19 Penn. St. 200; Wheeler v. Stone, 4 Gill, 38, 48. But a mere reference to the consideration of the order or to a fund out of which a drawee may reimburse himself, will not affect negotiability. Griffin v. Weatherby, L. R. 3 Q. B. 753. See Coursin v. Ledlie, 31 Penn. St. 506; Lowery v. Steward, 8 Bosw. 505; Arnold v. Rock R. V. Union R.R., 5 Duer, 207.

The general principle is that the sum of money must be certain, and on this ground a promise to pay a certain amount *with current exchange*, has been held not to be a promissory note. Lowe v. Bliss, 24 Ill. 168; Palmer v. Fahnestock, 9 Upper Can. C. P. 172. *Contra*, Smith v. Kendall, 9 Mich. 241; Leggett v. Jones, 10 Wis. 34.

With regard to certainty of time, it has been held that a promise to pay a certain sum with interest when the payee is twenty-one years old, is not a promissory note, as the time may never arrive. Kelley v. Hemmingway, 13 Ill. 604. See, generally, Brooks v. Hargreaves, 21 Mich. 254.

Examples of notes which have been held not negotiable on the ground that the promise to pay was not absolute, but was subject to a contingency, will be found in American Exchange Bank v. Blanchard, 7 Allen, 333; Grant v. Wood, 12 Gray, 220. Examples of instruments held negotiable notwithstanding some ambiguous words, besides Coursin v. Ledlie and other cases cited *sup.*, are Jury v. Barker, El., Bl. & El. 459; Hereth v. Meyer, 33 Ind. 511; Hodges v. Shuler, 22 N. Y. 114; Zimmerman v. Anderson, 67 Penn. St. 421.

The holder of an instrument made in terms so ambiguous that it is doubtful whether it be a bill of exchange or a promissory note, may treat it as either at his election. Peto v. Reynolds, 9 Exch. 410; Armfield v. Allport, 27 L. J. N. S.

that the bill carry with it a personal credit, given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event or fund. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument. (*c*) It would perplex the commercial transactions of mankind, if paper securities of this kind were encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire when those uncertain events would probably be reduced to a certainty. But if the event on which the instrument is to become payable be fixed and certain,

(*c*) Dawkes *v.* De Lorane, 8 Wils. 207; Beardesley *v.* Baldwin, 2 Str. 1151; Roberts *v.* Peake, 1 Burr. 323; Cook *v.* Satterlee, 6 Cowen, 108; Van Vacter *v.* Flack, 1 Smedes & M. 393. In Palmer *v.* Pratt, 9 Moore C. B. 858, it was held, that a bill of exchange drawn upon a contingency was void; but a bill may be accepted upon a contingency. A draft on the P. M. General is not a negotiable bill of exchange, because it is understood to be drawn against a contingent public fund, under the control of the post-office department. 2 Whart. 233.

Exch. 42; Fielder *v.* Marshall, 9 C. B. N. S. 606; Lloyd *v.* Oliver, 18 Q. B. 471; Burnheisel *v.* Field, 17 Ind. 609. But when the instrument is only inchoate it cannot be recovered on, as in the case of an acceptance without the name of a drawer attached to it. Stoessiger *v.* South-Eastern R. Co., 3 El. & Bl. 549; M'Call *v.* Taylor, 34 L. J. N. S. C. P. 365; Goldsmid *v.* Hampton, 5 C. B. N. S. 94, 107. See *Ex parte* Hayward, L. R. 6 Ch. 546.

As to what are negotiable words, see Raymond *v.* Middleton, 29 Penn. St. 530. The payee of a bill or note must be a person capable of being ascertained at the time the bill is accepted or the note made. Yates *v.* Nash, 8 C. B. N. S. 581; Storm *v.* Stirling, 3 El. & Bl. 832; S. C. *nom.* Cowie *v.* Stirling, 6 El. & Bl. 333. (See M'Call *v.* Taylor, 34 L. J. N. S. C. P. 365); Osgood *v.* Pearsons, 4 Gray, 455; Musselman *v.* Oakes, 19 Ill. 81. (Compare Bennington *v.* Dinsmore, 2 Gill, 348; Lyon *v.* Marshall, 11 Barb. 241; Tibble *v.* Thomas, 30 Miss. 122; Bowles *v.* Lambert, 54 Ill. 237; with Moody *v.* Threlkeld, 13 Ga. 55; Adams *v.* King, 16 Ill. 169; Knight *v.* Jones, 21 Mich. 161.) But compare with Yates *v.* Nash, &c., *sup.*; Holmes *v.* Jaques, L. R. 1 Q. B. 376; Davis *v.* Garr, 2 Seld. 124. Checks may be made payable to order as well as to bearer, and may be indorsed like other negotiable instruments. Keene *v.* Beard, 8 C. B. N. S. 372.

With regard to the signature, it was held in Bartlett *v.* Tucker, 104 Mass. 336, by a majority of the court, that a party who had signed a note with a name which was either fictitious or which he had no authority to use, and which he had never held out as his own, was not liable to one who purchased it as the business paper of the payees, and who did not know that the defendant signed it or give him any credit thereon. But it was admitted that a party might be held who signed, with intent to bind himself thereby, his initial, or a mark, or any name under which he was proved to have held himself out to the world and carried on his business. See, also, 75, n. (*c*); 78, n. (*c*); Fuller *v.* Hooper, 3 Gray, 334; Willoughby *v.* Moulton, 47 N. H. 205; Weston *v.* Myers, 33 Ill. 424.

As to sealed instruments, see 89, n. 2.

and must happen, as if the bill be drawn payable six weeks after the death of the maker's father, it is a good bill, and it is of no consequence how long the payment is to be postponed. (*d*) Nor is it necessary *that the note should be made at home. *77 Foreign as well as inland notes are equally negotiable within the statute of Anne; (*a*) and a promissory note made in England, and transferred by indorsement or delivery in a foreign country, to a party taking it there for value, gives a title which may be asserted in England. (*b*)

The instrument must be made payable to the payee, or to his *order* or *assigns*, or to *bearer*, in order to render it negotiable. It must have negotiable words on its face, showing it to be the intention to give it a transferable quality. Without them, a promissory note is a valid instrument within the statute of 3 and 4 Anne, as between the parties, and is entitled to the allowance of the three days of grace, and may be declared on as a promissory note within the statute. (*c*) [1] But if it wants negotiable words, it cannot be transferred or negotiated so as to enable the assignee to sue upon it in his own name. (*d*) If the name of the payee

(*d*) Cook *v.* Colehan, Str. 1217. It is even held, that a note payable within two months after such a ship is paid off, is a good negotiable note, as the event is morally certain (Andrews *v.* Franklin, Str. 24); but I should think such a reference was not sufficiently certain, and that the case might well have been questioned, if it had not been subsequently confirmed in 1 Wils. 282; 8 id. 213. The numerous English and American cases all going to the support of this one general proposition, that the money mentioned in the instrument must be payable absolutely, and at all events, and not made to depend on any uncertainty or contingency, are diligently and accurately collected in Bayley on Bills, ed. Boston, 1826, pp. 8–15, and Chitty on Bills, ed. Phil. 1826, pp. 42–50, and by Mr. Justice Story, in Story on Bills, [§§ 46, 47.] In Moffatt *v.* Edwards, 1 Carr. & M. 16, it was held by Mr. Justice Patteson, that a promissory note must specify a particular time of payment. But the case of Ellis *v.* Mason, in a note to that case, seems to be otherwise.

(*a*) Milne *v.* Graham, 1 B. & C. 192; Bentley *v.* Northouse, Mood. & M. 66. *Vide* s. p. *supra*, 72, note *b*.

(*b*) De la Chaumette *v.* The Bank of England, 9 B. & C. 208. But this point seems to be still contested. See a discussion of it in the London Law Magazine, [iii.] 117; [*post*, 95, n. 1.]

(*c*) Story on Bills, [§ 60]; id. on Promissory Notes, p. 8; Duncan *v.* Maryland Savings Institution, 10 Gill & J. 299.

(*d*) Hill *v.* Lewis, 1 Salk. 132; Burchell *v.* Slocock, 2 Ld. Raym. 1545; Smith *v.* Kendall, 6 T. R. 123; Rex *v.* Box, 6 Taunt. 325; Moyser *v.* Whitaker, 9 B. & C. 409; *Ex parte* Robinson, 1 Deac. & Ch. 275; Gerard *v.* La Coste, 1 Dallas, 194; Downing

[1] See Wells *v.* Brigham, 6 Cush. 6. See, also, 76, n. 1.

or indorser be left blank, any *bona fide* holder may insert his own name as payee. (*e*)

It is usual to insert the words *value received*, in a bill or note, but they are unnecessary, and value is implied in every negotiable bill, note, acceptance, and indorsement. The burden of proof rests upon the other party to rebut the presumption of validity and value, which the law raises for the protection and support of negotiable paper. (*f*) These words are not usual in checks, which are negotiable, like inland bills, and are *78 *governed by the same rules. (*a*) Nor is it necessary that the maker should subscribe his name at the bottom of the note; and it is sufficient if the maker's name be in any part of the note, as if it should run, *I, A. B., promise to pay C. D., or order, one hundred dollars.* (*b*) This is, however, so much out of the common course, that a note wanting the usual subscription would be deemed imperfect, and it would, in point of fact, destroy its currency, and the public would very reasonably conclude that the note had been left unfinished, and had got into circulation by fraud or mistake. If the note be payable to B., *or bearer*, it need not be indorsed; and it is the same, in effect, as if the name of B. had been omitted. The bearer may sue in his own name; and if his right and title, or the consideration,

v. Backenstoes, 8 Caines, 137. In Aldis *v.* Johnson, 1 Vt. 136, it was held, that the indorsee of a note not negotiable was nevertheless bound to follow the rules of the law-merchant, in making the demand of payment, and giving notice of non-payment. The modern French commercial code requires bills and notes to be made payable to order. Code de Comm. arts. 110, 188; whereas, in Scotland, a bill of exchange is good, and negotiable, and assignable, though it does not contain any words making it payable to order or to bearer. Bell's Comm. i. 401.

(*e*) Cruchley *v.* Clarance, 2 Maule & S. 90; 5 Taunt. 529, s. p. If there be no payee to whom the bill is payable, it cannot be sued upon by a third person as bearer. Prewitt *v.* Chapman, 6 Ala. 86.

(*f*) Hatch *v.* Trayes, 11 Ad. & El. 702; Story on Bills, [§§ 63, 178;] Grant *v.* Da Costa, 3 M. & S. 352; Whitaker *v.* Edmunds, 1 Mood. & R. 366; Knight *v.* Pugh, 4 Watts & S. 445; Beltzhoover *v.* Blackstock, 3 Watts, 27; Benjamin *v.* Tillman, 2 McL. 213. In the State of Missouri, by statute (R. Code, 1835), to make a promissory note negotiable, it must contain the words "for value received, negotiable and payable without defalcation." 6 Mo. 265. So in France, and in some parts of Germany, by positive regulation, the omission to state the value received on the face of the bill vitiates it. Code de Comm. art. 110; Heineccius, Elem. de Camb. c. 4, secs. 13, 14.

(*a*) Poplewell *v.* Wilson, 1 Str. 264; Emery *v.* Bartlett, 2 Ld. Raym. 1555; Boehm *v.* Sterling, 7 T. R. 423; White *v.* Ledwich, cited in Bayley on Bills, [c. 1, § 13.]

(*b*) Taylor *v.* Dobbins, 1 Str. 399; Elliot *v.* Cooper, 2 Ld. Raym. 1376.

be called in question, he must then show that he came by the note *bona fide*, and for a valuable consideration. (*c*) So a bill or note, payable to a fictitious person, may be sued by an innocent indorsee, as a note payable to bearer; and such a bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payee was fictitious was known to the acceptor. (*d*) [1]

3. Of the Rights of the Holder. — Possession is *prima facie* evidence of property in negotiable paper, payable to bearer, or indorsed in blank, and the bearer, though a mere agent, or the original payee, when the indorsement is in blank, may sue on it in his own name, without showing title, unless circumstances appear creating suspicion. (*e*) [2] The *bona fide* holder can re-

(*c*) Grant *v.* Vaughan, 3 Burr. 1516; Bowen *v.* Viel, 18 Martin (La.), 565; Matthews *v.* Hall, 1 Vt. 316, where the cases on the subject are thoroughly considered.

(*d*) Collis *v.* Emett, 1 H. Bl. 313; Minet *v.* Gibson, 3 T. R. 481; 1 H. Bl. 569; Tatlock *v.* Harris, 3 T. R. 174; Hunter *v.* Blodget, 2 Yeates, 480; Foster *v* Shattuck, 2 N. H. 446. The general rule is, says Mr. Justice Story (Story on Bills, 524), that payment of a forged bill will have no effect to charge other parties therewith, who, if it had been genuine, would have been liable therefor, unless they have given currency to the bill, by adopting, or passing, or accepting it as genuine.

(*e*) Mauran *v.* Lamb, 7 Cowen, 174; Pearce *v.* Austin, 4 Whart. 489; Barbarin *v.* Daniels, 7 La. 481; Denton *v.* Duplessis, 12 id. 92; Hill *v.* Holmes, ib. 96. Story on Promissory Notes, [§ 381.] If a negotiable note be assigned and delivered for a valuable consideration without any indorsement, the right passes, and the assignee may recover in the name of the payee. Jones *v.* Witter, 13 Mass. 304. So it has been held, that the figures 128, put on the back of a bill of exchange as a substitute for the name of the indorser, and intended as such, is good and obligatory as an indorsement, but a dissenting judge strongly held otherwise. Butchers & Drovers' Bank *v.* Brown, 1 New York Legal Observer, 149. [Affirmed on error in Supreme Court, 6 Hill, 443. See 76, n. 1.]

[1] *Post*, 114, 115; Mechanics' Bank *v.* Straiton, 5 Abb. Pr. N. S. 11; 8 Keyes, 365; Farnsworth *v.* Drake, 11 Ind. 101. So a check made payable to words without meaning, *e. g.*, "to the order of bills payable," or, "of 1658," is payable to bearer. Willets *v.* Phœnix Bank, 2 Duer, 121; Mechanics' Bank *v.* Straiton, 8 Keyes, 365; *ante*, 72, n. (*b*).

An acceptor *supra protest* for the honor of the drawer will be bound by his acceptance, although he had no notice that the payee was fictitious, at the time of his acceptance. Phillips *v.* Im Thurn, 18 C. B. N. S. 694; L. R. 1 C. P. 463.

[2] *Rights of Holder.* — The text is confirmed by James *v.* Chalmers, 2 Seld. 209; Seeley *v.* Engell, 17 Barb. 530; Lemon *v.* Temple, 7 (Port.) Ind. 556; Shelton *v.* Sherfey, 3 Greene (Iowa), 108; Wilson *v.* Lazier, 11 Gratt. 477; Pettee *v.* Prout, 3 Gray, 502; Bush *v.* Seaton, 4 Ind. 522. But see Richardson *v.* Gower, 10 Rich. 109.

It may be mentioned here that an innocent holder of a negotiable instrument, taken with no other knowledge than the

*79 cover upon the paper, though it *came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration, and not overdue, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised. (*a*) This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. Suspicion must be cast upon the title of the holder, by showing that the instrument had got into circulation by force of fraud, before the *onus* is cast upon the

(*a*) Miller *v.* Race, 1 Burr. 452; Grant *v.* Vaughan, 3 id. 1516; Peacock *v.* Rhodes, Doug. 633; King *v.* Milsom, 2 Camp. 5; Solomons *v.* The Bank of England, 13 East, 135, *in notis*; Paterson *v.* Hardacre, 4 Taunt. 114; Bleaden *v.* Charles, 7 Bing. 246; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, ib. 259; Thurston *v.* M'Kown, 6 Mass. 428; Wheeler *v.* Guild, 20 Pick. 545; Aldrich *v.* Warren, 16 Me. 465; Lapice *v.* Clifton, 17 La. 152; Story on Promissory Notes, 469. A statute of Illinois declared, that if any fraud or circumvention be used in obtaining the making or executing a note, it should be void, not only between the maker and payee, but also in the hands of every subsequent holder; and in Woods *v.* Hynes, and Mulford *v.* Shepard, 1 Scam. 103, 588, it was held, that the fraud that would vitiate the note in the hands of the innocent assignee must be in *obtaining the making or executing* the note, and that fraud in relation to the consideration, or in the contract upon which it was given, would not be sufficient to affect its negotiability and validity in the hands of the innocent assignee. In Illinois, the commercial law as to negotiable paper seems to be well established. The statute of that state goes further, and makes notes assignable that promise to pay money, *or articles of personal property, or any sum of money in personal property.* R. L. 482; Ransom *v.* Jones, 1 Scam. 293. Again, in Mississippi, it is held that if a person about to purchase a promissory note before due, inquires of the maker if the note be good, who said it was, and would be paid at maturity, he could not afterward set up a failure of consideration against the assignees, although he was ignorant at the time of such failure when he gave the assurance. Hamer *v.* Johnston, 5 How. 698; Marshall *v.* Morton, 1 Smedes & M. Ch. 563, s. p. The case which held that the maker, by giving such assurance, had waived his defence, was correctly and justly decided, notwithstanding that by statute in Mississippi the general rule is, that the maker of a promissory note, after assignment, is entitled to the same defence against subsequent indorsees as against the original payee.

paper furnishes, has a right to treat the parties to it as liable to him in the same manner and order and to the same extent as they appear to be on the instrument, although the relations of the parties may be different as between themselves. Knowledge subsequently acquired by the holder does not affect his rights. Hoge *v.* Lansing, 35 N. Y. 136; Farmers & Mechanics' Bank *v.* Rathbone, 26 Vt. 19. The rule is stated more strongly in Manley *v.* Boycot, 2 El. & Bl. 46; Strong *v.* Foster, 17 C. B. 201; Yates *v.* Donaldson, 5 Md. 389, 399; Hansbrough *v.* Gray, 3 Gratt. 356; Watson *v.* Shuttleworth, 53 Barb. 357; *post*, 86, 1, case first cited. But see Adle *v.* Metoyer, 1 La. An. 254; Parks *v.* Ingram, 2 Fost. (22 N. H.) 283.

holder of showing the consideration he gave for it. (*b*)[1] So much protection, for the sake of trade, is given to the holder of negotiable paper, who receives it fairly in the way of business, that he can recover upon it, though it has been paid, if he received it be-

(*b*) Collins *v.* Martin, 1 Bos. & P. 648; Reynolds *v.* Chettle, 2 Camp. 596; Munroe *v.* Cooper, 5 Pick. 412; Story on Bills, [§ 193;] Bailey *v.* Bidwell, 13 M. & W. 73. So, if there was no original consideration for the bill, the holder must show that either he or the original indorsee gave value for it. Thomas *v.* Newton, 2 Carr. & P. 606. But if the note be payable to B or order, and be lost or stolen, in that case the maker pays at his peril, for he is bound to ascertain the identity of the party to whom he pays. Pardessus, Droit Com. ii. art. 197; Story on Promissory Notes, p. 470.

[1] *Effect of Fraud, &c.* — The text is confirmed by Smith *v.* Braine, 16 Q. B. 244, 250; Fitch *v.* Jones, 5 El. & Bl. 238; Mather *v.* Lord Maidstone, 1 C. B. N. S. 273; Hall *v.* Featherstone, 8 Hurlst. & N. 284; Smith *v.* Sac County, 11 Wall. 139; Clark *v.* Pease, 41 N. H. 414; Perrin *v.* Noyes, 39 Me. 384; Gallagher *v.* Black, 44 Me. 99; Bissell *v.* Morgan, 11 Cush. 198; Sistermans *v.* Field, 9 Gray, 331; Tucker *v.* Morrill, 1 Allen, 528; Ross *v.* Bedell, 5 Duer, 462; McKesson *v.* Stanberry, 8 Ohio St. 156; Bertrand *v.* Barkman, 13 Ark. 150; Hutchinson *v.* Boggs, 28 Penn. St. 294; Merchants' Exch. N. Bank *v.* New Brunswick S. Inst., 4 Vroom (33 N. J.), 170, 172; Farmers' & Cit.'s Bank *v.* Noxon, 45 N. Y. 762. Paton *v.* Coit, 5 Mich. 505, and some of the above cases show that the same is true when the consideration between the original parties was illegal. See Baxter *v.* Ellis, 57 Me. 178. So when the note was obtained by duress. First N. Bank of Cortland *v.* Green, 48 N. Y. 298.

But it is otherwise when a mere want of consideration as between the original parties is shown. Fitch *v.* Jones, 5 El. & Bl. 238; Ellicott *v.* Martin, 6 Md. 509; Ross *v.* Bedell, 5 Duer, 462; Sloan *v.* Union B. Co., 67 Penn. St. 470; Wilson *v.* Lazier, 11 Gratt. 477. See Woodman *v.* Churchill, 52 Me. 58.

In some cases it has been held that fraud will invalidate a negotiable instrument, even in the hands of an innocent transferee, for value. If a party is induced to sign it by a fraudulent representation that the contract is of an entirely different nature, such as a guarantee, and is guilty of no negligence in doing so, he will not be held. Foster *v.* Mackinnon, L. R. 4 C. P. 704; Whitney *v.* Snyder, 2 Lansing, 477; Roberts *v.* Hall, 37 Conn. 205, 211; Gibbs *v.* Linabury, 22 Mich. 479. Nance *v.* Lary, 5 Ala. 370, may be called the leading case. But see Douglass *v.* Matting, 29 Iowa, 498. Compare ii. 482, n. 1; Schuylkill Cy. *v.* Copley, 67 Penn. St. 386; Commonwealth *v.* Sankey, 22 Penn. St. 390; Caulkins *v.* Whisler, 29 Iowa, 495. And if the maker has never delivered the note to any one, or done any thing which estops him to deny that he delivered it, it has been held on very strong reasoning that he is not liable even to an innocent holder. Burson *v.* Huntington, 21 Mich. 415 (distinguishing Worcester Bank *v.* Dorchester & Milton Bank, 10 Cush. 488, the case of bank-bills, and declining to follow the ill-considered case of Shipley *v.* Carroll, 45 Ill. 285). See, also, Hall *v.* Wilson, 16 Barb. 548; Awde *v.* Dixon, 6 Exch. 869. But the opposite doctrine has been maintained on grounds of public policy. See Ingham *v.* Primrose, 7 C. B. N. S. 82, 85; Swan *v.* North B. A. Co., 2 Hurlst. & Colt. 175, 185; (qualified, however, by the same judge, L. R. 4 C. P. 709;) Clarke *v.* Johnson, 54 Ill. 296. Awde *v.* Dixon is thought not to be followed in America, Spitler *v.* James, 32 Ind. 202.

fore it fell due. Where one has done a mercantile act, said Lord Ch. Baron Gilbert, he subjects himself to mercantile law. (*c*) If, however, it appears by proof or admission, that the agent to whom a negotiable note is indorsed for the use of his principal has no interest in it, he cannot sue and recóver upon it in his own name. (*d*) There are but few cases in which a bill or note is void in the hands of an innocent indorsee for valuable consideration; * 80 such cases are, when the consideration in the * instrument is money won at play, or it be given for a usurious debt. The English statutes against usury and gaming (and which have been adopted generally throughout the United States) are peremptory, and make the bill or note absolutely void. (*a*) [1] The

(*c*) Gilbert's Lex Prætoria, 288, 289. The holder will hold it unaffected as to any antecedent equities between the parties, if he takes it without notice of any facts which implicate its validity as between the prior parties, and in payment of a precedent debt; and he is not bound to prove, in the first instance, that he is a *bona fide* holder for a valuable consideration, for the law will presume it, until the presumption be rebutted by contrary proof. Swift *v.* Tyson, 16 Peters, 1; Carlisle *v.* Wishart, 11 Ohio, 172; Brush *v.* Scribner, 11 Conn. 888; Bank of Salina *v.* Babcock, 21 Wend. 499; Bank of Sandusky *v.* Scoville, 24 id. 115; Mohawk Bank *v.* Corey, 1 Hill (N. Y.), 513; Riley *v.* Anderson, 2 McL. 589.

(*d*) Thatcher *v.* Winslow, 5 Mason, 58. The soundness of this decision has been questioned.

(*a*) Bowyer *v.* Bampton, Str. 1155; Lord Mansfield, in Peacock *v.* Rhodes, Doug. 636; Lowe *v.* Waller, ib. 736; Ackland *v.* Pearce, 2 Camp. 599. Since the above decisions, the statute of 58 Geo. III. c. 98, was passed, which protects bills and notes, in the hands of an indorsee, for valuable consideration, and without notice, though founded on usury; and as there seems to be a strong disposition, at the present day, to free usury from civil impediments, it is probable there is a relaxation on this point in some parts of this country. The provisions of that statute on this point have been adopted in the N. Y. Revised Statutes, i. 772, sec. 5. By the

[1] Mordecai *v.* Dawkins, 9 Rich. 262; Unger *v.* Boas, 13 Penn. St. 601; Kendall *v.* Robertson, 12 Cush. 156; Sylvester *v.* Swan, 5 Allen, 184. The tendency toward the repeal of usury laws, mentioned in note (*a*), continues, and the subject is becoming less important. See Flight *v.* Reed, 1 Hurlst. & C. 703, 715. As to wagers, see Fitch *v.* Jones, 5 El. & Bl. 238.

If the note is not declared void by statute, illegality in the consideration will not avoid it in the hands of a *bona fide* holder for value without notice of the consideration. Cazet *v.* Field, 9 Gray, 329; Great Falls Bank *v.* Farmington, 41 N. H. 32, 40; Norris *v.* Langley, 19 N. H. 423; Converse *v.* Foster, 32 Vt. 828; Meadow *v.* Bird, 22 Ga. 246; Thorne *v.* Yontz, 4 Cal. 321; Johnson *v.* Meeker, 1 Wis. 486; Cobb *v.* Doyle, 7 R. I. 550; Hall *v.* Ayling, 16 Q. B. 423, 431; Fitch *v.* Jones, 5 El. & Bl. 238. Neither will the fact that it was made on Sunday. State Capital Bank *v.* Thompson, 42 N. H. 369.

As to the validity of negotiable paper issued by corporations, see the note on *ultra vires*, *ante*, ii.; 5 Am. Law Rev. 282.

same rule would, of course, apply to every case in which the contract is by statute declared absolutely void. (*b*)

As between the original parties to negotiable paper, these provisions in favor of the *bona fide* assignee do not apply, and the consideration of a bill, note, or check may be inquired into. It may be inquired into between the maker and payee, and between the indorser and indorsee; the consideration of the indorsement also may be shown, for the latter are, in this view, treated as original parties. (*c*) The rule equally applies when the indorsee took the paper with notice of an illegal, or of the want of any consideration, or of any circumstances which would have avoided the note in the hands of the indorser; (*d*) or when taken not in the ordinary course of *business, or after it was due, *81 or under circumstances which ought to have led to an inquiry. (*a*) It was admitted, in *Bay* v. *Coddington*, (*b*)[1] that

statute of 7 Wm. IV., 1 Vict. 80, and 2 Vict. 87, bills and notes are not affected by usury laws, if payable at or within twelve months, and not secured by mortgage, and the interest not to be above five per cent, unless otherwise agreed.

(*b*) Story on Bills, [§ 189.] Though a note be valid between the original parties, yet the indorse[e] cannot sue the maker, if the indorsement was on an usurious consideration. Gaither *v.* F. & M. Bank, 1 Peters, 37. But in New York, if the note be good in its inception, yet if the payee transfer it at a discount exceeding the legal rate of interest, it is regarded as a valid sale. Jones *v.* Hake, 2 Johns. Cases, 60; Wilkie *v.* Roosevelt, 3 id. 66; Munn *v.* Commission Co., 15 Johns. 49.

(*c*) De Bras *v.* Forbes, 1 Esp. 117; Ashhurst, J., 2 T. R. 71; Herrick *v.* Carman, 10 Johns. 224; Hill *v.* Ely, 5 Serg. & R. 363; Johnson *v.* Martinus, 4 Halst. 144; Hill *v.* Buckminster, 5 Pick. 391; Lawrence *v.* Stonington Bank, 6 Conn. 521. In this last case it was held, that if the holder received the bill without consideration, as where successive indorsees were merely agents of the drawer, for the collection and transmission of the money, he is said to be in privity with the first holder, and is accountable for the proceeds of the bill.

(*d*) Steers *v.* Lashley, 6 T. R. 61; Wiffen *v.* Roberts, 1 Esp. 261; Perkins *v.* Challis, 1 N. H. 254.

(*a*) Brown *v.* Davis, 3 T. R. 80; Down *v.* Halling, 4 B. & C. 330; Ayer *v.* Hutchins, 4 Mass. 370; Thompson *v.* Hale, 6 Pick. 259; Littell *v.* Marshall, 1 Rob. (La.) 51.

(*b*) 5 Johns. Ch. 56; s. c. 20 Johns. 637; Swift *v.* Tyson, 16 Peters, 15. The Supreme Court of Tennessee, in Kimbro *v.* Lytle, 10 Yerger, 428, says that this

[1] *The doctrine of Swift* v. *Tyson*, stated in note (*b*), is followed, and it is thought that a party taking a negotiable instrument as collateral security for a preëxisting debt is a holder for value to the extent necessary to secure him, in McCarty *v.* Roots, 21 How. 432, 439; Bridgeport City Bank *v.* Welch, 29 Conn. 475; Osgood *v.* Thompson Bank, 30 Conn. 27; Roberts *v.* Hall, 37 Conn. 205, 211; Naglee *v.* Lyman, 14 Cal. 450; Stoddard *v.* Kimball, 6 Cush. 469; Fisher *v.* Fisher, 98 Mass. 303; Allaire *v.* Hartshorne, 1 Zabr. 665; Bank of the Republic *v.* Carrington, 5 R. I. 515;

negotiable paper could be assigned or transferred by an agent, or any other person, fraudulently, so as to bind the true owner, as against the holder, if it was taken by him in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But it was held, that if the paper be not negotiated in the usual course of business, nor in payment of any antecedent debt, nor for cash, or property advanced upon it, nor

case has carried the restrictions upon the negotiability of commercial paper to where the Tennessee court is willing to carry it, and where it is disposed to leave it. In Wormley *v.* Lowry, 1 Humph. (Tenn.) 470, it was held, that if a note be assigned for a preëxisting debt, it is not negotiated in the due course of trade, and a failure of consideration may be shown. The case of Bay *v.* Coddington was reconsidered, and its principles acknowledged and asserted, in Stalker *v.* M'Donald, in the New York Court of Errors, in 6 Hill, 93. But it was declared that it was not sufficient to protect the note in the hands of the purchaser, that he received it merely as a security, or nominally in payment of a preëxisting debt, *unless* he had given money or some new consideration for it, *or given up a security which he held for the payment of the antecedent debt*. If he obtains the note as a mere security or payment of an antecedent debt, without parting with any thing of value, in that case he is not entitled to hold the property against the prior equitable owner. Mr. Chancellor Walworth gave an elaborate discussion to this point; and he held that the decision of the Supreme Court of the United States, as delivered by Mr. Justice Story, in Swift *v.* Tyson, 16 Peters, 1, was not correct in the opinion that a preëxisting debt was of itself, and without any other circumstances, a sufficient consideration to entitle the *bona fide* holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. Mr. Justice Story, on Promissory Notes, p. 215, note 1 repeats and sustains the decision in Swift *v.* Tyson; and I am inclined to concur in that decision, as the plainer and better doctrine. The decision in Williams *v.* Little, 11 N. H. 66, is to the same effect, and Ch. J. Parker sustained the decision with force.

Cobb *v.* Doyle, 7 R. I. 550; Atkinson *v.* Brooks, 26 Vt. 574; Manning *v.* McClure, 36 Ill. 490; Valette *v.* Mason, 1 Smith (Ind.), 89, 1 Carter, 288; Bank of Charleston *v.* Chambers, 11 Rich. (S. C.) 657; Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49; Outhwite *v.* Porter, 13 Mich. 533. See Brown *v.* Leavitt, 31 N. Y. 113; Park Bank *v.* Watson, 42 N. Y. 490; Chrysler *v.* Renois, 43 N. Y. 209; Goodman *v.* Simonds, 20 How. 343, 371; Cecil Bank *v.* Heald, 25 Md. 562.

But see Fenouille *v.* Hamilton, 35 Ala. 319; Lee *v.* Smead, 1 Met. (Ky.) 628; (but compare May *v.* Quimby, 8 Bush, 96;) Bertrand *v.* Barkman, 13 Ark. 150; Bramhall *v.* Beckett, 31 Me. 205; Nutter *v.* Stover, 48 Me. 163; Ryan *v.* Chew, 13 Iowa, 589; Roxborough *v.* Messick, 6 Ohio St. 448; King *v.* Doolittle, 1 Head, 77; Prentice *v.* Zane, 2 Gratt. 262; (compare Davis *v.* Miller, 14 Gratt. 1, 15;) Jenkins *v.* Schaub, 14 Wis. 1.

But if the party receiving the bill as security is guilty of laches when it matures, and omits duly to present it and give notice of its dishonor, the bill, if not paid, will be treated as money in his hands as between him and the person from whom he received it. Peacock *v.* Purcell, 14 C. B. N. S. 728; Jennison *v.* Parker, 7 Mich. 355; Darnall *v.* Morehouse, 45 N. Y. 64, 69. And see, further, Lamberton *v.* Windom, 12 Minn. 232; *post*, 83 n. (*a*)

for any debt created, or responsibility incurred, upon the credit of the note, but was taken from the agent of the owner of the note after he had stopped payment, and as security against contingent responsibilities previously incurred, the rights of the true owner were not barred. Such a case did not come within the reason or necessity of the rule which protects the purchaser of paper fraudulently assigned, because it was not a case in the course of trade, nor was credit given, or responsibility assumed, on the strength of the paper. In any case in which the indorsee takes the paper under circumstances which might reasonably put the holder upon inquiry, and create suspicions that it was not good, he takes it at his peril. The rule is usually applied to the case of notes overdue, but the principle is of general application. (*c*) In *Gill* v. *Cubitt*, (*d*) the Court of K. B. made a strong application of the principle, and held, that if an indorsee takes a bill heedlessly, and without due caution, and under circumstances which ought to have excited the suspicions *of a *82 prudent and careful man, the maker or acceptor may be let into his defence. It was deemed material for the interests of trade, that a person should be deemed to take negotiable paper at his peril, if he takes it from a stranger without due inquiry how he came by the bill. He is bound to exercise a reasonable caution, which prudence would dictate in such a case; and it is a question of fact for a jury, whether the owner of the lost or stolen bill had used due diligence in apprising the public of the loss, and whether the purchaser of the paper had, under the circumstances of the case, exercised a reasonable discretion, and acted with good faith and sufficient caution in the receipt of the bill. The doctrine of Lord Kenyon, in *Lawson* v. *Weston*, (*a*) that the *bona fide* purchaser of a lost bill was at all events to recover, is expressly overruled. This new doctrine, imposing upon the owner due diligence in giving to the public notice of the loss, and upon the purchaser of the bill due caution and inquiry, is supposed to be calculated to increase the circulation and

(*c*) Ayer *v.* Hutchins, 4 Mass. 370; Napier *v.* Elam, 6 Yerger (Tenn.), 108; Hunt *v.* Sandford, ib. 387.

(*d*) 3 B. & C. 466. See also, to the same point, Beckwith *v.* Corrall, 2 Carr. & P. 261; Snow *v.* Peacock, 3 Bing. 406; Strange *v.* Wigney, 6 id. 677; Slater *v.* West, 1 Danson & L. 15; Easley *v.* Crockford, 10 Bing. 248; Nicholson *v.* Patton, 13 La. 213, 216. In this last case the court said, they took the case of Gill *v.* Cubitt for their guide.

(*a*) 4 Esp. 56.

security of negotiable paper, and to render it more difficult for thieves and robbers to pass it off. (*b*) [1]

4. Of the Acceptance. — There is no precise time fixed by law in which bills payable at sight, or a certain number of days after sight, must be presented to the drawee for acceptance, though there must not be any unreasonable delay, for that might discharge the drawer and indorser. (*c*) A bill payable on a day certain after date, or on demand, need not be presented for ac-

(*b*) In Backhouse *v.* Harrison, 8 Nev. & M. 188, the case required the indorser, who lost his bill by accident, to show in his defence *gross negligence*, imputable to the holder as evidence of *mala fides*, in order to impeach his title. The same principle was followed in Crook *v.* Jadis, 8 Nev. & M. 257; Goodman *v.* Harvey, 6 Nev. & M. 872; so that the case of Gill *v.* Cubitt seems to be somewhat weakened, if not destroyed, as an authority. Mr. Justice Story (Story on Bills, 216) considers the doctrine in Gill *v.* Cubitt as absolutely overruled and abandoned; and he cites, in support of his conclusion, Goodman *v.* Harvey, *ub sup.*; Uther *v.* Rich, 10 Ad. & El. 784; Stephens *v.* Foster, 1 Cr. M. & R. 849.

If a check be so filled up, through ignorance or carelessness, as to enable the holder conveniently to insert three hundred before fifty, and the banker is thereby misled to pay the inserted sum, the loss must fall on the drawer of it, and not on the banker. Pothier, Traité du Con. de Change, part 1, c. 4, sec. 99; Young *v.* Grote, 4 Bing. 253. With respect to bank-bills absolutely *destroyed* by accident, the banker, on due proof thereof, must pay the owner who held them when destroyed. But if only *lost*, by theft, &c., and are in existence, the bank must pay the *bona fide* holder. Shaw, C. J., in Whiton *v.* Old Colony Ins. Co., 2 Met. 6.

(*c*) It is settled by the Supreme Court of the United States, that the payee or indorsee of a bill of exchange may maintain an action of debt against the acceptor, if the bill be expressed for value received. Raborg *v.* Peyton, 2 Wheat. 385.

[1] *The doctrine of Gill* v. *Cubitt* is denied in the later cases, as is intimated in note (*b*). Goodman *v.* Simonds, 20 How. 343, 369; Murray *v.* Lardner, 2 Wall. 110; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65, 68; Welch *v.* Sage, 47 N. Y. 143, 147; Phelan *v.* Moss, 67 Penn. St. 59; Spooner *v.* Holmes, 102 Mass. 503, 508; Bank of Bengal *v.* Fagan, 7 Moore P. C. 61, 72; Carlon *v.* Ireland, 5 El. & Bl. 765; Raphael *v.* Bank of England, 17 C. B. 161.

In some cases it has been left for the jury to say whether the facts were not sufficient to put the purchaser on inquiry. Gould *v.* Stevens, 43 Vt. 125. See Commercial & Farmers' N. Bank *v.* First N. Bank, 30 Md. 11, 26.

Young v. *Grote*, *sup.*, n. (*b*), seems to be doubted in Worrall *v.* Gheen, 39 Penn. St. 388. See Foster *v.* Mackinnon, 38 L. J. N. S. C. P. 310, 312; Gumm *v.* Tyrie, 4 Best & S. 680, 713; Wade *v.* Wittington, 1 Allen, 561. But the principle on which it was decided is approved, with a reservation as to whether the conclusion in point of fact was well warranted, in Orr *v.* Union Bank of Scotland, 1 Macq. 513; 29 Eng. L. & Eq. 1. See also Ingham *v.* Primrose, 7 C. B. N. S. 82, 87; *Ex parte* Swan, ib. 400, 445; Bank of Ireland *v.* Trustees of Evans' Charities, 5 H. L. C. 389, 410, 413; Garrard *v.* Haddan, 67 Penn St. 82 (explaining Worrall *v.* Gheen, *sup.*, and criticising Wade *v.* Wittington, *sup.*); Ives *v.* Farmers' Bank, 2 Allen, 236, 241. See Belknap *v.* National Bank of N. A. 100 Mass. 376.

ceptance before the day of payment or demand; and if not presented previously for acceptance, the right to require acceptance becomes merged in, or, as Pardessus says, confounded with, the right to demand payment; but if presented before it becomes due, and acceptance be refused, it is dishonored, and notice must then be given forthwith to the parties whom it is intended to charge. (*d*) There is a distinction made in the cases between the owner of the bill and his agent on this point. Though the owner is not bound to present the bill payable at a day certain, for acceptance before the day, the agent employed to collect the bill, or to get it accepted and paid, or accepted, must act with due diligence to have the bill accepted as well as paid. He has not the discretion and latitude of time given to the owner, and for any unreasonable delay on his part he would be held responsible for all damages which the owner may have sustained by reason thereof. (*e*) A bill payable at sight, or so many days after sight, *as well as a bill payable on demand, must be pre- *83 sented in a reasonable time, or the holder will have to bear the loss proceeding from his default. (*a*) [1]

(*d*) Bank of Washington *v.* Triplett, 1 Peters, 25; Townsley *v.* Sumrall, 2 id. 170; Pardessus, Cours de Droit Com. ii. secs. 358, 359; Walworth, Ch., in Allen *v.* Suydam, 20 Wend. 328, 324; Story on Bills, 252; [*post*, 95; Smith *v.* Roach, 7 B. Mon. 17; Walker *v.* Stetson, 19 Ohio St. 400.]

(*e*) Allen *v.* Suydam, 17 Wend. 368, s. c. 20 id. 321; Van Wart *v.* Wooley, 5 Dowl. & Ry. 374; 3 B. & C. 439; Chitty on Bills, 300; Pothier, Traité du Contrat de Change, n. 128; The Bank of Scotland *v.* Hamilton, Bell's Comm. i. 409, note.

(*a*) Marius on Bills, 19; Smith *v.* Wilson, Andrews, 187; Chamberlyn *v.* Delarive, 2 Wils. 353; Muilman *v.* D'Eguino, 2 H. Bl. 565; Aymar *v.* Beers, 7 Cowen, 705. If the holder of a draft or bill omits due diligence, without just cause, in obtaining payment, or in giving notice of non-payment, he makes the bill his own. Tobey *v.* Barber, 5 Johns. 68; Jones *v.* Savage, 6 Wend. 658; Dayton *v.* Trull, 23 id. 345; Fry *v.* Hill, 7 Taunt. 397; Wallace *v.* Agry, 4 Mason, 336. In this last case the bill was drawn in Havana, upon London, at sixty days' sight, and it was held that it might be sent for sale to the United States, according to the course of

[1] The rule is not changed by the continued solvency of the drawers and the want of proof of actual loss to them by laches. Ramchurn Mullick *v.* Luckmeechund Radakissen, 9 Moore P. C. 46, 68; 28 Eng. L. & Eq. 86 (explaining Robinson *v.* Hawksford, 9 Q. B. 52, on the ground that the rule as to checks is different. *Post*, 88, and n. 1). See, generally, Bank of Van Diemen's Land *v.* Bank of Victoria, L. R. 3 P. C. 526. But mere detention of the bill by the acceptor, or of a check by the bank drawn upon, for an unreasonable time, is not of itself equivalent to acceptance. Overman *v.* Hoboken City Bank, 2 Vroom, 563, affirming s. c. 1 Vroom, 61. Compare Merchants' National Bank *v.* National Eagle Bank, 101 Mass. 281.

The acceptance may be by parol or in writing, and is general or special. (*b*) Though a bill comes into the hands of a person with parol acceptance, and he takes it in ignorance of such an acceptance, he may avail himself of it afterwards. If the acceptance be special, it binds the acceptor *sub modo*, and according to the acceptance. But any acceptance varying the absolute terms of the bill, either in the sum, the time, the place, or
* 84 the mode of payment, is a * conditional acceptance, which

trade, and need not be sent from Cuba directly to London. But in Camidge *v.* Allenby, 6 B. & C. 373, the vendee paid vendor of goods in notes of a country bank, payable on demand to bearer. The bank, at the time, had stopped payment, but the fact was unknown to both parties. The vendor had kept the notes for a week, without circulation or demand of payment, and it was held that he made the notes his own by this negligence. The French Commercial Code requires a bill, drawn from the continent or isles of Europe, and payable within the European possessions of France, to be presented within six months from the date, and in default, the holder loses all recourse over. Code de Com. liv. 1, tit 8. sec. 11. There is no such fixed rule in the English law. In Mellish *v.* Rawdon, 9 Bing. 416, it was held, that there must be no unreasonable delay in forwarding for acceptance a bill drawn on a person abroad, and payable at so many days' sight. What would amount to an unreasonable delay, so as to cast upon the holder the loss arising from the failure of the drawee before acceptance, would depend upon the circumstances of the case, and was a question of fact for a jury. See also Story on Bills, [§§ 231, 237.] The rule is, that an inland bill or check, payable on demand, held by the payee, need not be presented for payment on the day he receives it. The usual business hours, or seasonable time of the next day of business, is sufficient. Chitty on Bills, 414, 421; Story on Bills, [§§ 471–473.] If the bill or check has been put in circulation, each party may perhaps be allowed a day as between him and the party from whom he receives the check. But see Story on Bills, [§ 472 *et seq.*], as to the difficult point as to what is reasonable time to present the bill or check, when it passes through several hands. It cannot with safety be kept by a succession of persons long in circulation. The general rule is, that the drawee has twenty-four hours to consider whether he will accept the bill or not. Chitty on Bills, c. 7.

(*b*) Lumley *v.* Palmer, Str. 1000; Powell *v.* Monnier, 1 Atk. 612; Walker *v.* Lide, 1 Rich. (S. C.) 249. By statute 1 and 2 Geo. IV. c. 78, no acceptance of any inland bill of exchange is sufficient to charge any person, unless such acceptance be in writing on the bill; and this is the statute law in Georgia; Hotchkiss's Code. So, by the N. Y. R. S. i. 768, secs. 6, 9, no person within the state is chargeable as an acceptor on a bill of exchange, unless his acceptance be in writing, signed by himself, or his lawful agent; and the holder may require the acceptance to be upon the bill, and a refusal to comply will be a refusal to accept. An acceptance in writing, if not on the bill, does not bind, except it be in favor of the person who, on the faith of it, received the bill. (Ib. sec. 7.) So an unconditional promise in writing to accept the bill, before it be drawn, is an acceptance in favor of the person who receives the bill on the faith of it, for a valuable consideration. (Ib. sec. 8.) And every drawee who refuses to return a bill, within twenty-four hours, to the holder, shall be deemed to have accepted it. (Ib. sec. 11.) See also Bank of Michigan *v.* Ely, 17 Wend. 508. The statute law of Missouri has followed the provisions in the N. Y. statute as to acceptance. Revised Statutes of Missouri, 1835, p. 97.

the holder is not bound to receive; and if he does not [does] receive it, the acceptor is not liable for more than he has undertaken. The doctrine of qualified acceptances as to part of the money is spoken of in Marius and Molloy; (*a*) and in the case of *Rowe* v. *Young*, in the House of Lords, it was established to be the true construction of the contract, and the true rule of the law-merchant, that if a bill be accepted, payable at a particular place, the holder is bound to make the demand at that place. (*b*) [1] The rule is also settled, that a promise to accept, made before the acceptance of the bill, will amount to an acceptance in favor of the person to whom the promise was communicated, and who took the bill on the credit of it. (*c*) In *Coolidge* v. *Payson*, (*d*) all the cases were reviewed, and it was held that a letter, written within a reasonable time before or after the date of the bill, describing it, and promising to accept of it, is, if shown to the person who afterwards takes the bill upon the credit of that letter, a virtual acceptance, and binding upon the person who makes the promise. The same doctrine was also held by the Supreme Court of New York, in *Goodrich* v. *Gordon;* (*e*) and it

(*a*) Marius, 17, 21; Molloy, b. 2, c. 10, sec. 21.

(*b*) 2 Brod. & B. 165.

(*c*) Miln *v.* Prest, 4 Camp. 393. So, a *letter of credit*, addressed to any person who should make the advance upon the faith of the letter, is an available promise in favor of the person making the advance; and it is considered as available if it be a general letter of credit in favor of any person who makes the advance on the faith of it. These letters of credit are treated as in the nature of negotiable instruments, and the party giving such a letter holds himself out to all persons who should advance money on bills drawn on the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. Lawrason *v.* Mason, 3 Cranch, 492; Boyce *v.* Edwards, 4 Peters, 121; Adams *v.* Jones, 12 id. 207; Carnegie *v.* Morrison, 2 Met. 381; Story on Bills, 538 to 555; 1 Bell's Comm. 371. [In re Agra & Masterman's Bank, L. R. 2 Ch. 391; Lowry *v.* Adams, 22 Vt. 160, 167; Barney *v.* Newcomb, 9 Cush. 46; Exchange Bank of St. Louis *v.* Rice, 98 Mass. 288, 293; Savannah N. Bank *v.* Haskins, 101 Mass. 870, 875; Cassel *v.* Dows, 1 Blatchf. 335; Barney *v.* Worthington, 37 N. Y. 112, 115; Union Bank of La. *v.* Coster, 3 Comst. 203, 214. The letter of credit is an offer to any person who will advance money on the faith of it. When money is advanced on the faith of the offer there is a binding contract on sufficient consideration, on the same principle as that on which an offer of a reward becomes binding. *Post*, 89, n. 2; 85, n. 1.]

(*d*) 2 Wheat. 66. See, also, to s. p. 1 Peters, 264, 284, and 4 id. 111, 121; 2 Gallison, 233; Bayard *v.* Lathy, 2 McL. 462.

(*e*) 15 Johns. 6; s. p. in Parker *v.* Greele, 2 Wend. 545; Kendrick *v.* Campbell, 1 Bailey (S. C.), 522; Carnegie *v.* Morrison, 2 Met. 381; Read *v.* Marsh, 5 B. Mon. 10

[1] *Post*, 97, n. 1; 99, n. 2.

was there decided, that if a person, in writing, authorizes another to draw a bill of exchange, and stipulates to honor the bill, and the bill be afterwards drawn, and taken by a third party, on the credit of that letter, it is tantamount to an acceptance of the bill. The doctrine rests upon the decision of Lord Mansfield in *Pillans and Rose* v. *Van Mierop and Hopkins*, and in *Pierson* v. *Dunlop*, (*f*) where he laid down the broad principle, that a
* 85 promise to accept, previous to the existence of the * bill, amounted to an acceptance. It is giving credit to the bill, and which may be done as entirely by a letter written before as by one written after the date of the bill. A parol promise to accept a bill already drawn, or thereafter to be drawn, is binding, if the bill be purchased in consideration of the promise. It is an original promise, not coming within the objects or the mischiefs of the statute of frauds; but whether such a valid *parol* promise to accept a non-existing bill would, in the view of the law-merchant, amount to an acceptance of the bill when drawn, is a question not necessarily connected with the validity of the promise. (*a*) [1]

(*f*) 8 Burr. 1663; Cowp. 571.

(*a*) Townsley *v.* Sumrall, 2 Peters, 170. The former English authorities on this point are overruled; and in The Bank of Ireland *v.* Archer, 11 M. & W. 883, the judgment was, that a promise to accept a bill not yet drawn was not an acceptance, even though the bill be discounted for the drawer, on the faith of such promise. The settled American rule is the former one, declared in the time of Lord Mansfield, and by Mr. Justice Story, in Russell *v.* Wiggin, 2 Story, 213. Judge Story is of opinion that the doctrine of the Supreme Court of the United States, in Coolidge *v.* Payson, only applies to bills of exchange payable on demand, or at a fixed time after date, and does not apply to a bill drawn payable at or after sight, for in the latter case a presentment is indispensable, since the time the bill has to run cannot otherwise be ascertained. Story on Bills, [§ 249.]

[1] *Promise to accept.* — Barnet *v.* Smith, 10 Fost. (30 N. H.) 256; Stockwell *v.* Bramble, 3 Ind. 428; Mason *v.* Dousay, 35 Ill. 424.

An oral promise to accept a bill not yet drawn was held void in Plummer *v.* Lyman, 49 Me. 229. But see Nelson *v.* First Nat. Bank of Chicago, 48 Ill. 36.

Some of the American cases come so near to the English doctrine, as stated in note (*a*), as to hold that the promise to accept will not be treated as an acceptance unless it definitely describes the bill to be drawn; taking a distinction between a binding promise to accept and an acceptance. Cassel *v.* Dows, 1 Blatchf. 335; Ulster Co. Bank *v.* McFarlan, 3 Den. 558. And it is admitted in England that a promise to accept contained in a letter of credit will bind the promisor to persons who, on the faith of it, discount bills drawn in pursuance of its terms, at least in equity, according to the doctrine stated 84, n. (*a*). Cassel *v.* Dows, 1 Blatchf. 335. But a general promise seems to have been thought to be equivalent to an acceptance

Every act giving credit to the bill amounts to an acceptance. (*b*) There is no doubt that an acceptance, once fairly and fully made

(*b*) Powell *v.* Monnier, 1 Atk. 611; Wynne *v.* Raikes, 5 East, 514; Fairlee *v.* Herring, 3 Bing. 625.

in Bissell *v.* Lewis, 4 Mich. 450, 464; Nelson *v.* First National Bank of Chicago, 48 Ill. 36, 39; Naglee *v.* Lyman, 14 Cal. 450; Beach *v.* State Bank, 2 Cart. (Ind.) 488. Those American cases which hold that a promise to accept a bill not yet drawn may operate as an acceptance, seem to confine the rule to those cases where the bill is taken on the faith of the promise. Nelson *v.* First N. Bank of Chicago, 48 Ill. 36, 38; Steman *v.* Harrison, 42 Penn. St. 49; Burns *v.* Rowland, 40 Barb. 368; Crowell *v.* Van Bibber, 18 La. An. 637; Lewis *v.* Kramer, 3 Md. 265, 289; Bissell *v.* Lewis, 4 Mich. 450, 456. In Exchange Bank of St. Louis *v.* Rice, 98 Mass. 288, it was held that a promise to accept an existing bill, contained in a letter from the drawee to the drawer written after the holder took the bill, did not make the drawee liable as acceptor, as the bill was not taken on the faith of the promise. The rule of liability was thought to be analogous to that concerning the signer of a letter of credit; *ante*, 84, n. (*c*); and it seems to be doubted whether the decision in Powell *v.* Monnier, 85, n. (*b*), went as far as has been understood in the later English cases. Overman *v.* Hoboken City Bank, 1 Vroom, 61, 68; Howland *v.* Carson, 15 Penn. St. 453; Steman *v.* Harrison, 42 Penn. St. 49. *Contra*, Read *v.* Marsh, 5 B. Mon. 8; Jones *v.* Council Bluffs Branch Bank, 84 Ill. 318.

Effect of Acceptance or Payment. — It has been held that the estoppel of the acceptor to deny the drawer's signature, mentioned *post*, 86, n. (*b*), and 114, stands on somewhat similar ground, and that when the holder took the bill before the acceptance, and did not appear to have altered his position on the faith of it, the estoppel did not exist. McKleroy *v.* Southern Bank of Kentucky, 14 La. An. 458. See Irving Bank *v.* Wetherald, *post*, 88, n. 1. Phillips *v.* Im Thurn, L. R. 1 C. P. 463; 18 C. B. N. S. 694; M'Neil *v.* Hill, 1 Woolw. 96; Bartlett *v.* Tucker, 104 Mass. 336, 342. It may be doubted how far such decisions are consistent with other cases, where, in order to found an estoppel, it has been presumed that the holder of an order for barley, for instance, who had paid for it before acceptance, was induced by the acceptance to refrain from taking any steps. Knights *v.* Wiffen, L. R. 5 Q. B 660. (But this case has been doubted in America. See Langdell on Sales, 1028, Index, *Estoppel*, 39, and *ante*, ii. 492, n. 1 (*d*). It would seem that at least as strict a rule of liability should be applied to negotiable instruments, which have been treated more like writings under seal than ordinary parol contracts. Oddie *v.* Nat. City Bank of New York, 45 N. Y. 735, 742. However this may be, when the holder has himself done acts which naturally put the drawee off his guard and induce him to accept or pay, such as indorsing a check payable to the holder's order, which he received without inquiry from a stranger, and which turns out to be forged, it is supposed that the acceptance would not be binding, and it has been held that payment is not, and that the money can be recovered back. National Bank of North America *v.* Bangs, 106 Mass. 441.

It may be mentioned further in this connection that acceptance also admits the competency of the payee to indorse at the time of the acceptance. Byles on B. Ch. 13, *ad finem*; *post*, 114; Smith *v.* Marsack, 6 C. B. 486, 503; Hallifax *v.* Lyle, 3 Exch. 446, 453; Hardy *v.* Waters, 38 Me. 450. See Ashpitel *v.* Bryan, 3 Best & S. 474; 5 id. 723.

When the bill purports to be drawn payable to the drawer's own order and

and consummated, cannot be revoked; but to render it binding the acceptance must be a complete act, and an absolute assent of

indorsed by him before acceptance, it has been held that the acceptor could deny that indorsement, as he could any other, under ordinary circumstances. Williams *v.* Drexel, 14 Md. 566. For it is to be remembered that he is bound to ascertain that the person to whom he makes payment is the genuine payee or is authorized by him to receive it, unless the instrument is drawn payable to bearer or indorsed in blank by a genuine indorsement. Graves *v.* American Exch. Bank, 17 N. Y. 205; Dodge *v.* National Exchange Bank, 20 Ohio St. 234; Vanbibber *v.* Bank of Louisiana, 14 La. An. 481; Robarts *v.* Tucker, 16 Q. B. 560, 579. See Shaffer *v.* McKee, 19 Ohio St. 526; Dodge *v.* National Exch. Bank, 20 id. 234. But when the draft and indorsement were made in the name of a dead person by agreements between the indorsee and the acceptor, and the latter received value for his acceptance, he was held to be estopped by his agreement, in a suit by the first indorsee. Ashpitel *v.* Bryan, 3 Best & S. 474; 5 id. 723.

The acceptor is held to be at liberty to show a forgery in the body of the paper, and if he has paid the forged amount may recover it back from the person to whom he has paid it, provided he has been guilty of no negligence in failing to detect the forgery, and has given notice of the forgery as soon as discovered. Bank of Commerce *v.* Union Bank, 3 Comst. 230; National Park Bank *v.* Ninth National Bank, 55 Barb. 87; Canal Bank *v.* Bank of Albany, 1 Hill, 287, 293. See Worrall *v.* Gheen, 39 Penn. St. 388; Belknap *v.* National Bank of N. A., 100 Mass. 376; Ellis *v.* Ohio L. Ins. & T. Co., 4 Ohio St. 628, 657; Shaffer *v.* McKee, 19 Ohio St. 526 (in this case it does not appear when notice was given that the payee's indorsement was forged). There is nothing inconsistent with this doctrine in Hall *v.* Fuller, 5 B. & C. 750. But as to the time within which notice must be given, compare with the more liberal rule stated above, and also applied in McKleroy *v.* Southern Bank of Kentucky, 14 La. An. 458, the English doctrine that the holder is entitled to know whether the bill is honored or dishonored on the day it falls due, provided he would sustain any prejudice from not knowing, which may be the case, perhaps, if there are prior parties entitled to notice. Cocks *v.* Masterman, 9 B. & C. 902; Pollard *v.* Ogden, 2 El. & Bl. 459, 463, 465; Mather *v.* Lord Maidstone, 18 C. B. 273, *infra;* Irving Bank *v.* Wetherald, 36 N. Y. 335; Ellis *v.* Ohio L. Ins. & T. Co., 4 Ohio St. 628, 655

It would seem from the principle of Young *v.* Grote, and other cases cited, *ante*, 82, n. (*b*) and 1, that when the forgery is made possible by the drawer's negligence, inasmuch as a payment of the forged amount will be a credit to the acceptor as against him, the acceptor should not be allowed to set up the forgery in a suit by an innocent indorsee. This reason has been applied with this result in the case of the drawer putting a bill into circulation with a forged indorsement of the payee's name. Hortsman *v.* Henshaw, 11 How. 177; Burgess *v.* Northern Bank of Kentucky, 4 Bush, 600. See Coggill *v.* American Exch. Bank, 1 Comst. 113, 118. See also Orr *v.* Union Bank of Scotland, 1 Macq. 513, 522; 29 Eng. L. & Eq. 1, 10. (See, further, *post*, 115, n. 1.)

As to the estoppel of an alleged acceptor to deny his own signature after having recognized it, it has been held that one who has paid a forged acceptance of his own cannot recover back the money; and if, instead of paying money, he takes the bill, examines it, and gives another acceptance in lieu of it, and does not discover the forgery for a month afterwards, he cannot escape liability on the renewed acceptance. Mather *v.* Lord Maidstone, 18 C. B. 273. See Bartlett *v.* Tucker, 104 Mass. 336; *ante*, 76, n. 1. A drawee who

the mind; for though the drawee writes his name on the bill, yet, if before he has parted with the bill, or communicated the fact, he changes his mind, and erases his acceptance, he is not bound. (*c*) The acceptance may be impliedly as well as expressly given. It may be inferred from the act of the drawee, in keeping the bill a great length of time, contrary to his usual mode of dealing; for this is giving credit to the bill, and inducing the holder to consider it accepted. (*d*) If the bill be accepted in a qualified degree only, * and not absolutely, according to the tenor * 86 of it, the holder may assent to it, and it will be a good acceptance, *pro tanto;* or he may insist upon an absolute acceptance, and for the want of it protest the bill. It is in the discretion of the holder whether or no he will take any acceptance varying from the terms of the bill. This doctrine was settled in England upwards of a century ago, and in opposition to the distinguished argument of Sir John Strange, and it has continued unshaken to this day. (*a*)

(*c*) Cox *v.* Troy, 5 B. & Ald. 474. Emerigon, i. 45, cites Dupuy de la Serra, art. des Lettres de Change, c. 10, as laying down the maxim, that while the acceptor is master of his signature, and before he has parted with the bill, he can cancel his acceptance. This doctrine of La Serra is cited with particular approbation by Pothier, Traité du Con. de Change, n. 44, and his opinion was mentioned with great respect by the K. B. in the case last referred to; and there is now entire harmony on the point in the jurisprudence of the two nations. [Bank of Van Diemen's Land *v.* Bank of Victoria, L. R. 8 P. C. 526.]

(*d*) Harvey *v.* Martin, 1 Camp. 425, note; Story on Bills, [§ 246; *ante*, 88, n. 1.]

(*a*) Wegersloffe *v.* Keene, 1 Str. 214; Smith *v.* Abbott, 2 id. 1152.

pays on the faith of forged bills of lading attached to a draft in the hands of an innocent holder cannot recover as having paid under a mistake of fact. Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Leather *v.* Simpson, L. R. 11 Eq. 398. This is on the ground that there is no representation that the bill of lading is genuine.

As to the provisional statements of account or payments between banks in a clearing house, which may remain subject to revocation up to a certain moment, see Warwick *v.* Rogers, 5 Man. & Gr. 340; Pollard *v.* Bank of England, L. R. 6 Q. B. 623; Merchants' National Bank *v.* National Eagle Bank, 101 Mass. 281. The arrangement may be made that up to a certain hour of the day the banks shall not alter their position by paying the money collected over to their customers, and in that case, if the bank from which the money was collected has paid by mistake, it may demand it back of the collecting bank within that time, without being encountered by the principle which has been laid down, that where money has been paid under a mistake of fact to an agent, and he has paid his principal or done something equivalent to payment to him, the recourse of the party who has paid the money is against the principal only. L. R. 6 Q. B. 630. A somewhat different arrangement is shown in Overman *v.* Hoboken City Bank, 2 Vroom, 563; *ante*, 88, n. 1.

The acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or a release. He is bound to an innocent indorsee, though he accepted without consideration, and for the sole accommodation of the drawer. (*b*)[1] Accommodation paper is now governed by

(*b*) A plea that the acceptance was without consideration, held bad on demurrer. Lowe *v.* Chifney, 1 Bing. N. C. 267. An accommodation bill or note is a mercantile term, and means a bill on which the drawer has no right to sue the acceptor of such a bill. It is a note without consideration, and for which the payee is to provide when due, and not to call on the maker for payment. King *v.* Phillips, 12 M. & W. 705; Thompson *v.* Clubley, 1 M. & W. 212. The acceptor of a forged bill is bound by his acceptance, for that act precludes him from afterwards disputing the bill, as he is bound to know, and is presumed to know, his drawer's hand. Price *v.* Neal, 3 Burr. 1354; Buller, J., 1 T. R. 655; Levy *v.* Bank U. S., 1 Binney, 27; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Robinson *v.* Reynolds, 2 Ad. & El. N. S. 196. So, if a bank pay a forged check, the holder being innocent, the bank must bear the loss, on the principle that the bank is bound to know the hand of its own customers, and a want of due diligence and caution exists. Levy *v.* Bank U. S., 1 Binney, 27; Smith *v.* Mercer, 6 Taunt. 76; Bank of St. Albans *v.* F. & M. Bank, 10 Vt. 141. The courts consider the case of Price *v.* Neal as decisive. So payment to a bank innocently in its own forged paper binds the bank. It is bound to know its own

[1] *Ante*, 78, n. 2; *post*, 91, n. 1; Cronise *v.* Kellogg, 20 Ill. 11; Diversy *v.* Loeb, 22 Ill. 393; Farmers & Mechanics' Bank *v.* Rathbone, 26 Vt. 19; Howard Banking Co. *v.* Welchman, 6 Bosw. 280. As to the maker of an accommodation note, Manley *v.* Boycot, 2 El. & Bl. 46, approving Fentum *v.* Pocock, *inf.* n. (*c*); Hansbrough *v.* Gray, 3 Gratt. 356; Yates *v.* Donaldson, 5 Md. 389. But see Adle *v.* Metoyer, 1 La. An. 254; Parks *v.* Ingram, 2 Fost. (22 N. H.) 288.

The word "release" in the text must not be taken in the sense of a technical release under seal. The obligation on a bill of exchange or promissory note may be discharged by express words unaccompanied by satisfaction or by any solemn instrument. There is an exception introduced by the law-merchant to the rule that, *after breach*, a simple contract can only be discharged by deed or upon sufficient consideration. Foster *v.* Dawber, 6 Exch. 839, 851; *post*, 114. See Dobson *v.* Espie, 2 Hurlst. & N. 79.

It is perhaps a general doctrine that payment by the drawer is no plea to an action against the acceptor. Jones *v.* Broadhurst, 9 C. B. 173; Randall *v.* Moon, 12 C. B. 261; Agra & Masterman's Bank *v.* Leighton, L. R. 2 Ex. 56. See Howard Banking Co. *v.* Welchman, 6 Bosw. 280. But see Cook *v.* Lister, 13 C. B. N. S. 543, 591, 594; *ante*, ii. 616, 617. And as to the right of the drawer to put the bill into circulation again, Gardner *v.* Maynard, 7 Allen, 456. If the acceptance is for the accommodation of the drawer, and the holder has notice of that fact when he receives the bill, payment by the drawer is a complete discharge of the bill, and it may be so even if the holder has not notice. Byles on B. ch. 15; 9th ed. 215; Cook *v.* Lister, 13 C. B. N. S. 543; Lazarus *v.* Cowie, 3 Q. B. 459. But see Howard Banking Co. *v.* Welchman, 6 Bosw. 280. Discounting a bill is not paying it. Attenborough *v.* Mackenzie, 25 L. J. N. S. Ex. 244; 36 Eng. L. & Eq. 562. But see Beebe *v.* Real Est. Bank, 4 Pike, (Ark.) 546.

As to some of the various questions treated in note (*b*), see 85, n. 1; *post*, 88 n. 2.

the same rules as other paper. This is the latest and the best doctrine, both in England and in this country. (*c*) These are the strict obligations of the acceptor in relation to the other parties

paper. U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333. On the other hand, the general rule is, that payment of a debt in a forged note, both parties being innocent, is no payment, and the same rule applies if a forged note be discounted. Markle *v.* Hatfield, 2 Johns. 455; Young *v.* Adams, 6 Mass. 182; Eagle Bank *v.* Smith, 5 Conn. 71; Jones *v.* Ryde, 5 Taunt. 488; United States Bank *v.* Bank of Georgia, 10 Wheat 333; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287. In this last case the plaintiffs paid a draft, when the name of the payee or first indorser was forged, and the defendants were held bound to refund, as they had no title to the instrument or money obtained under it. None but the payee can assert any title to a negotiable bill or note without his indorsement, but the loser cannot recover back, unless he uses diligence to detect the forgery, and give notice, and there be no unreasonable delay after the discovery of the forgery. Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Pope *v.* Nance, Minor (Ala.), 299; Canal Bank *v.* Bank of Albany, *sup.* Nor can he recover, if he agrees at the time of the bargain and sale to receive certain notes, drawn and indorsed by third persons in payment, for he took the risk. Ellis *v.* Wild, 6 Mass. 321. It is held in one case (Ontario Bank *v.* Lightbody, 13 Wend. 101), that payment of a debt in bills of an insolvent bank, both parties being ignorant of the fact, is no payment. See, also, Wainright *v.* Webster, 11 Vt. 576; Gilman *v.* Peck, ib. 516; Fogg *v.* Sawyer, 9 N. H. 365; Frontier Bank *v.* Morse, 22 Me. 88, to s. p. But there are decisions in other cases (Lowrey *v.* Murrell, 2 Porter (Ala.), 280; Scruggs *v.* Gass, 8 Yerg. 175) directly to the contrary, and the point remains unsettled in our American law. In Bayard *v.* Shunk, 1 Watts & S. 92, the decision agrees with those in the two last cases; and Chief Justice Gibson gives a strong and vigorous opinion, that a payment (not in forged notes, but in current bank-notes) discharges the debt, though the notes were of no value, as the bank had previously failed, of which both parties were ignorant. Mr. Justice Story (Story on Bills [§ 225, n.]; Story on Promissory Notes, 477) says, that this disputed point resolves itself more into a question of intent than of law, and that is, whether, taking all the circumstances together, the bill was taken as absolute payment by the holder, at his own risk, or only as conditional payment, he using due diligence to demand and collect it. And he concludes that the weight of reasoning and authority are in favor of the payment in such cases being considered as null. Story on Promissory Notes, 125, 477, 641.

(*c*) Fentum *v.* Pocock, 5 Taunt. 192; The Governor and Company of the Bank of Ireland *v.* Beresford, 6 Dow, 284; Bank of Montgomery County *v.* Walker, 9 Serg. & R. 229; Murray *v.* Judah, 6 Cowen, 484; Clopper *v.* The Union Bank of Maryland, 7 Harr. & J. 92; Church *v.* Barlow, 9 Pick. 547; Grant *v.* Ellicott, 7 Wend. 227; Marr *v.* Johnson, 9 Yerg. 1; Wilde, J., in Comm. Bank *v.* Cunningham, 24 Pick. 274. Indorsers for the *accommodation* of the maker of a note do not stand in the relation of cosureties to each other, so as to create between them a liability to contribution, though they may engage between themselves for contribution. Aiken *v.* Barkley, 2 Speer (S. C.), 747. It is also settled that the drawer is not entitled to notice of non-payment by the acceptor, if the bill was accepted merely for his accommodation. Story on Bills, [§§ 310, 311, 312]. But as the making of *accommodation indorsements* is out of the scope of the partnership business in a mercantile house, they are not binding upon it, unless done with the express or implied assent of all the members of the firm, except where the paper comes into the hands of a *bona fide* holder. Austin *v.* Vandermark, 4 Hill (N. Y.), 259.

to the bill, and they do not apply in all their extent as between the drawer and the party who indorses or lends his name to the bill as surety for the accommodation of the drawer. In such a case, the party who indorses is not entitled to damages from the drawer beyond what he has actually sustained. (*d*) If the acceptor alters the bill on acceptance, he vacates it as against the drawer and indorsers; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor. (*e*)

A third person, after protest for non-acceptance by the
* 87 * drawee, may intervene, and become a party to the bill, in a collateral way, by accepting and paying the bill for the honor of the drawer, or of a particular indorser. His acceptance is termed an acceptance *supra protest*, and he subjects himself to the same obligations as if the bill had been directed to him; but the bill must be duly presented to the drawee at maturity, and if not paid, it must be duly protested for non-payment, and due notice given to the acceptor *supra protest*, to make his liabilities as such acceptor absolute. He has his remedy against the person for whose honor he accepted, and against all the parties who stand prior to that person, on giving due notice of the dishonor of the bill. If he takes up the bill for the honor of the indorser, he stands in the light of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties, and he can, of course, sue the drawer and indorser. (*a*)[1] The acceptance *supra protest* is good,

(*d*) Dorsey *v.* His Creditors, 19 Mart. (La.) 498.

(*e*) Paton *v.* Winter, 1 Taunt. 420.

(*a*) Mutford *v.* Walcot, 1 Ld. Raym. 574; Mertens *v.* Winnington, 1 Esp. 112; Bayley on Bills, 209; Story on Bills, [§§ 122-125, 452;] Goodall *v.* Polhill, 1 C. B. 233. The rights and remedies growing out of acceptances *supra protest* are equally recognized in the foreign commercial law of Europe; and the authorities for that purpose, such as Straccha, Heineccius, Pothier, Pardessus, and the French Ordi-

[1] *Acceptance supra Protest.* — It is laid down that the person who takes up a bill *supra protest* for t e honor of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot himself indorse it over. For instance, a person paying a dishonored acceptance for the honor of the drawer, but for his own benefit, to an innocent indorsee, has the rights of the holder against the acceptor, and is not affected by the state of accounts between drawer and acceptor at the time of the acceptance. *Ex parte* Lambert, 13 Ves. 179, is said to be overruled. *Ex parte* Swan, L. R. 6 Eq. 344. See, further, *ante*, 78, n. 1.

though it be done at the request and under the guaranty of the drawee, after his refusal, and the party for whose honor it is paid is equally liable. (*b*) The policy of the rule granting these privileges to the acceptor *supra protest*, is to induce the friends of the drawer or indorser to render them this service, for the benefit of commerce and the credit of the trader, and a third person interposes only when the drawee will not accept. There can be no other acceptor after a general acceptance by the drawee. A third person may become liable on his collateral undertaking, as guaranteeing the credit of the drawee, but he will not be liable in the character of acceptor. It is said, however, that when the bill has been accepted *supra protest*, for the honor of one party to the bill, it may, by another individual, be accepted *supra protest*, for the honor of another. (*c*) The holder is not bound to take an acceptance *supra protest*, (*d*) but he would be bound to accept an offer to pay *supra protest*. *The protest is necessary, and should precede the collateral acceptance or payment; (*a*) and if the bill, on its face, directs a resort to a third person, in case of a refusal by the drawee, such direction becomes part of the contract. (*b*) *88

As between the holder of a check and the indorser, it ought to be presented for acceptance with due diligence; (*c*) but as

nances, are referred to in Mr. Justice Story's thorough treatise. The person who pays a protested bill *supra protest*, for the honor of the indorser, has no remedy against the indorser, if the latter was already discharged by reason of the want of notice of the non-acceptance. Chitty on Bills, 213, 4, 234, 257, 330; Higgins *v.* Morrison, 4 Dana (Ky.), 102. The payer *supra protest* must give reasonable notice to the party that he has made such payment for his credit, otherwise that party will not be obliged to refund. Wood *v.* Pugh, 7 Ohio, part 2, 164. He cannot sue the drawer without proving demand on the drawee, and non-acceptance or non-payment by him, and notiee to the drawer. Baring *v.* Clark, 19 Pick. 220.

(*b*) Konig *v.* Bayard, 1 Peters, 250. [*Ante*, 78, n. 1.]

(*c*) Beawes, tit. Bills of Exchange, sec. 42; Jackson *v.* Hudson, 2 Camp. 447

(*d*) Mitford *v.* Walcot, 12 Mod. 410. (*a*) Pothier, h. t. n. 170.

(*b*) Pothier, h. t. n. 137; Holland *v.* Pierce, 14 Mart. (La.) 499. An acceptance for honor is not an absolute but a conditional acceptance, and an averment of presentment to the drawee for payment is necessary. Williams *v.* Germaine, 7 B. & C. 468. This acceptance *supra protest* does not apply by the commercial law to promissory notes. Story on Promissory Notes, 557.

(*c*) Rickford *v.* Ridge, 2 Camp. 537; Beeching *v.* Gower, 1 Holt, 313, note of the reporter; Clark *v.* Stackhouse, 2 Mart. (La.) 327; Mohawk Bank *v.* Broderick, 10 Wend. 304; Mohawk Bank *v.* Broderick, 13 Wend. 133; Parke, B., 9 M. & W. 18; [Saul *v.* Jones, 1 E. & E. 59.] Where the parties reside in the same place, six days' delay was held to discharge the indorser. Gough *v.* Staats, 13 Wend. 549. In Bod-

between the holder and drawer, a demand at any time before suit brought will be sufficient, unless it appears that the drawee has failed, or the drawer has, in some other manner, sustained injury by the delay. (*d*)[1] The drawee ought to accept or refuse

ington *v.* Schlencher, 1 Nev. & M. 540, s. c. 4 B. & Ad. 752, it was held, that the holder was bound to present it for payment on the day following that on which he receives it. Moule *v.* Brown, 4 Bing. N. C. 266; Smith *v.* Janes, 20 Wend. 192, s. p. If a check be received, say on Monday, the holder may present it at any time during banking hours on Tuesday. But if he pays it to his own banker on Tuesday, that banker, as his agent, must present it to the drawee on Tuesday, and has not till Wednesday to present it. That would be good as to *notice* of dishonor, but not as to *presentment;* and as the drawee failed on Wednesday, the holder was in default. Alexander *v.* Burchfield, 1 Carr. & M. 75; s. c. 7 Man. & G. 1061. The holder of a check is not entitled, because he passes it through his banker, to one day more for presenting it. The time is the same whether the presentment be made by himself or through his banker, *i. e.* the day following that in which he receives it.

(*d*) Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, ib. 259; Rothschild *v.* Corney, 9 B. & C. 388; Sutherland, J., in Murray *v.* Judah, 6 Cowen, 490, and Savage, C. J., in Mohawk Bank *v.* Broderick, 10 Wend. 306.

[1] *Checks.* — *Ante*, 88, n. 1. Keene *v.* Beard, 8 C. B. N. S. 372, 381; Smith *v.* Miller, 43 N. Y. 171; Howes *v.* Austin, 85 Ill. 396; Willetts *v.* Paine, 48 Ill. 432; Pack *v.* Thomas, 13 Smedes & M. 11.

The reasonable time within which a check must be presented is defined to be at any time between the receipt of the check and the last moment of the ordinary business hours of the next secular day, if the parties reside in the same town, or until post time of such next secular day if the check is to be presented elsewhere. O'Brien *v.* Smith, 1 Black, 99; Smith *v.* Miller, 43 N. Y. 171, 176; Taylor *v.* Sip, 1 Vroom, 284; Ritchie *v.* Bradshaw, 5 Cal. 228; Bickford *v.* First N. Bank of Chicago, 42 Ill. 238; Veazie Bank *v.* Winn, 40 Me. 60. See Bailey *v.* Bodenham, 16 C. B. N. S. 288; Brady *v.* Little Miami R. R., 34 Barb. 249. And a person not a party to a check received on account of his debt is discharged by a failure to present it within a reasonable time, if his position is thereby altered for the worse. Hopkins *v.* Ware, L. R. 4 Ex. 268; Smith *v.* Mercer, *post*, 105, n. 1. Hare *v.* Henty, 10 C. B. N. S. 65, lays it down that the fact that a banker receives a check without advancing any thing on it, and therefore holds it for his customer, makes no difference in respect of the time allowed for presentment. If the check is drawn on a banker residing in a different town, the holder for collection has until post time of the day after he receives it for transmitting it, as between his customer and himself. Presentment through the post-office is a reasonable mode of presentment. See, also, Prideaux *v.* Criddle, L. R. 4 Q. B. 455.

When a check is certified "good" on its face by the cashier of the bank on which it is drawn, the bank becomes absolutely bound to the holder as acceptor, and it is settled that the cashier of a national bank has power to make such a certificate *virtute officii*. Merchants' Bank *v.* State Bank, 10 Wall. 604, 650; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Meads *v.* Merchants' B. of Alb., 25 N. Y. 148; Irving Bank *v.* Wetherald, 36 N. Y. 335; Smith *v.* Miller, 43 N. Y. 171, 177; Rounds *v.* Smith, 42 Ill. 245; Bickford *v.* First Nat. B. of C., ib. 238; Brown *v.* Leckie, 43 Ill. 497; Girard Bank *v.* Bank of Penn. Township, 39 Penn. St. 92; Barnet *v.*

acceptance, as soon as he has had a reasonable opportunity to inform his judgment. If he cannot be found at the proper place, the holder may cause the bill to be protested; and if the drawee

Smith, (10 Fost.) 80 N. H. 256, 265. But see Mussey *v.* Eagle Bank, 9 Met. 306. But the case in 36 N. Y. 335 should be compared with McKleroy *v.* Southern Bank of Kentucky, *ante*, 85, n. 1, in the opinion intimated that a certification under a mistake of fact may be revoked if done before the holder has altered his position or lost any of his remedies. As to negligence of the holder in inducing the bank to pay, see Nat. Bank of North America *v.* Bangs, *ante*, 85, n. 1.

It has been held by courts of the greatest authority that the holder of a check not certified or otherwise accepted by the bank on which it is drawn, could not maintain an action of contract against the bank for the amount. Bank of the Republic *v.* Millard, 10 Wall. 152; Bullard *v.* Randall, 1 Gray, 605; Dana *v.* Third Nat. Bank in Boston, 13 Allen, 445; Chapman *v.* White, 2 Seld. 412; Dykers *v.* Leather Manuf. Bank, 11 Paige, 612; Lunt *v.* Bank of North America, 49 Barb. 221; Loyd *v.* McCaffrey, 46 Penn. St. 410. See also Bellamy *v.* Marjoribanks, 7 Exch. 389, 404; *ante*, 83, n. 1. The language of the cases was general, but many of the decisions do not necessarily go farther than to hold that the action was not maintainable in that form. It is perhaps still open to inquiry whether a liability is not imposed by custom, just as it was formerly said that the custom of merchants did not extend so far as to create a debt on the part of the acceptor of a bill of exchange, but only made him *onerabilis* to pay the money. Hardres, 485, 487. See Munn *v.* Burch, 25 Ill. 35; Vanbibber *v.* Bank of Louisiana, 14 La. An. 481, 482; Fogarties *v.* State Bank, 12 Rich. 518; Roberts *v.* Corbin, 26 Iowa, 315; National Bank *v* Eliot Bank, 5 Am. Law Reg. 711, 717.

An order on a bank for the whole sum due, given in good faith for a valuable consideration, has been held to be an equitable assignment which prevailed over a subsequent trustee process served on the bank; Kingman *v.* Perkins, 105 Mass. 111; compare Witte *v.* Vincenot, 7 Am. L. R. 169; and so may be an order of the same sort by any creditor on his debtor. Macomber *v.* Doane, 2 Allen, 541; Edwards *v.* Daley, 14 La. An. 884. But the mere fact that a bill of exchange is drawn for the whole amount due the drawer has not necessarily that effect, so as to entitle the holder to proceed in equity against the drawee. Bank of Commerce *v.* Bogy, 44 Mo 18. As to when a gift of a sum made by drawing a check is complete, compare Bromley *v.* Brunton, L. R. 6 Eq. 275, with Hewitt *v.* Kaye, ib. 198. *Ante*, ii. 448, n. 1.

Whatever may be the liability to the holder of a check, it is clear that the banker, having in his hands effects of his customer, is liable to an action at the suit of the latter, for refusing to pay the latter's checks. Rolin *v.* Steward, 14 C. B. 595.

Checks are not entitled to days of grace; and a draft on a bank is *prima facie* at least not a check unless made payable on demand. Andrew *v.* Blachly, 11 Ohio St. 89; Morrison *v.* Bailey, 5 Ohio St. 13; Bowen *v.* Newell, 4 Selden, 190; 3 Kern. 290; Taylor *v.* French, 4 E. D. Smith, 458; Minturn *v.* Fisher, 4 Cal. 35. See Henderson *v.* Pope, 39 Ga. 361; Ivory *v.* Bank of State of Missouri, 36 Mo. 475. But see *In re* Brown, 2 Story, 502; Westminster Bank *v.* Wheaton, 4 R. I. 30. But post-dated checks are very common, and are payable on the day of their date, although negotiated beforehand. Taylor *v.* Sip, 1 Vroom, 284.

See further, as to checks, *ante*, 78, n. 1; *post*, 91, n. 1.

be dead, the bill may be presented to his executor or administrator. (*e*)

5. **Of the Indorsement.** — A valid transfer may be made by the payee, or his agent, and the indorsement is an implied contract that the indorser has a good title, and that the antecedent names are genuine, that the bill or note shall be duly honored or paid, and if not, that he will, on due protest and notice, take it up. (*f*)[2]

(*e*) Molloy, b. 2, c. 10, sec. 84; Bayley on Bills, 128.

(*f*) Ogden *v.* Saunders, 12 Wheat. 213, 341; Pardessus, Droit Com. 2, art. 347; Story on Prom. Notes, 145.

[2] *Vendor's Liability.* — As to the text see Turnbull *v.* Bowyer, 40 N. Y. 456. The indorser also guarantees the competency of the makers to contract. Erwin *v.* Downs, 15 N. Y. 575; *ante*, 85, n. 1.

When a bill is merely sold by one who is not a party to it, and who gives no warranty, and who therefore is not responsible for the quality of the bill or the solvency of the parties, the price may still be recovered back on the ground of failure of consideration or as money paid under a mistake of fact, if the bill turns out to be different in kind from the thing described in the agreement, as when that which is sold as a foreign bill turns out not to be one, or when the acceptance is forged. See note on sales, *ante*, ii.; Gompertz *v.* Bartlett, 2 El. & Bl. 849; Gurney *v.* Womersley, 4 El. & Bl. 133; Merriam *v.* Wolcott, 3 Allen, 258, overruling Ellis *v.* Wild, *sup.*, 86, n. (*b*); Thompson *v.* McCullough, 31 Mo. 224; Parlange *v.* Faurès, 14 La. An. 444; Terry *v.* Bissell, 26 Conn. 23; Aldrich *v.* Jackson, 5 R. I. 218; Dumont *v.* Williamson, 18 Ohio St. 515; Swanzey *v.* Parker, 50 Penn. St. 441. But see Hinckley *v.* Kersting, 21 Ill. 247.

Similar principles would apply, it is supposed, when the bill is received in payment. Bell *v.* Cafferty, 21 Ind. 411. See, as to bank-notes, Baker *v.* Bonesteel, 2 Hilton, 397; *sup.*, 86, n. (*b*). And it has been doubted whether a person receiving payment in forged bank-notes is bound to return them before he can maintain an action on his original demand. Burrill *v.* Watertown Bank & L. Co., 51 Barb. 105. But see Kenny *v.* First Nat. Bank of Albany, 50 Barb. 112; Simms *v.* Clark, 11 Ill. 137; Magee *v.* Carmack, 13 Ill. 289; and, generally, Pooley *v.* Brown, 11 C. B. N. S. 566; *post*, 105, n. 1.

In this connection it should be mentioned that the doctrine of Bayard *v.* Shunk, *sup.*, 86, n. (*b*), as to the notes of an *insolvent* bank sold or received in payment, is disapproved by some later cases. Westfall *v.* Braley, 10 Ohio St. 188; Townsends *v.* Bank of Racine, 7 Wis. 185; Magee *v.* Carmack, 13 Ill. 289. See Timmins *v.* Gibbins, 18 Q. B. 722; Turner *v.* Stones, 1 Dowl. & L. 122; *post*, 105, n. 1. But it seems to be the general rule in England, and a distinction is taken between bank-notes and ordinary notes and bills Lichfield Union *v.* Greene, 1 Hurlst. & N. 884; Byles on B., 10th ed. 159; Smith *v.* Mercer, L. R. 3 Ex. 51; Woodland *v.* Fear, 7 El. & Bl. 519, 520; Bicknall *v.* Waterman, 5 R. I. 43, 51; Ware *v.* Street, 2 Head, 609. See Renton *v.* Marryott, 6 C. E. Green (21 N. J. Eq.), 128. It might be otherwise if the party making the transfer knew that the maker of the instrument was insolvent, for it has been said that he warrants that he has no knowledge of any facts which prove the paper to be worthless, on account of the failure of the makers, or by its being already paid, or otherwise to have become void or defunct. 1 H. & N. 890; Brown

In the case of a bill made or indorsed to a *feme covert* or to a *feme sole*, who afterwards marries, the right to indorse it belongs to the husband. So, the assignee of an insolvent payee, or the executor or administrator of a deceased payee, are entitled to indorse the paper. (*g*) And if a bill be made payable to a mercantile *house consisting of several partners, an indorsement by *89 any one of the partners is deemed the act of the firm. If the bill be made payable to A, for the use of B, the legal title is in A, and he must indorse it. So an infant payee or indorsee may, by his indorsement, transfer the interest in the bill to any subsequent holder, against all the parties to the bill except himself; and if a third person other than the payee guarantees, by indorsement, previous to delivery to the payee, the payment of the note, he is held to be an indorser, under the New York statute. (*a*)[1]

(*g*) Parker, C. J., in 1 P. Wms. 255; Conner *v.* Martin, cited in 3 Wils. 5; Rawlinson *v.* Stone, ib. 1. In Harper *v.* Butler, 2 Peters, 239, it was admitted, that an indorsement of a negotiable note by the executor of the payee, and good in the state where he was appointed and indorsed it, will enable the indorsee to sue in his own name in any other state. But a contrary doctrine was held in Stearns *v.* Burnham, 5 Greenl. 261, and Thompson *v.* Wilson, 2 N. H. 291. These last decisions are questioned in the case of Rand *v.* Hubbard, 4 Met. 259, and the doctrine in the other cases sustained; and I think the better opinion to be, that if the holder of the note dies before the note becomes due, his executor or his administrator, if one be appointed, may make the demand, and give notice so as to fix the prior parties [Malbon *v.* Southard, 36 Maine, 147; Dwight *v.* Newell, 15 Ill. 333.]

(*a*) Prosser *v.* Luqueer, 4 Hill, 420. An indorsement by the cashier of a bank for the bank passes the title. Story on Promissory Notes, p. 132.

v. Montgomery, 20 N. Y. 287; Delaware Bank *v.* Jarvis, ib. 226; Byrd *v.* Hall, 2 Keyes, 646, 647. But the contrary is held in Bartle *v.* Saunders, 2 Grant (Penn.), 199.

[1] *Indorsement before Delivery.* — In some states a stranger indorsing a note before delivery to the payee is *prima facie* liable as an original promisor. Sylvester *v.* Downer, 20 Vt. 355; Schneider *v.* Schiffman, 20 Mo. 571; Childs *v.* Wyman, 44 Me. 433; Perkins *v.* Barstow, 6 R. I. 505; Currier *v.* Fellows, 7 Fost. (27 N. H.) 366; Carpenter *v.* Oaks, 10 Rich. 17; Wetherwax *v.* Paine, 2 Mich. 555; Cecil *v.* Mix, 6 Ind. 478; Carr *v.* Rowland, 14 Texas, 275; Peckham *v.* Gilman, 7 Minn. 446; Collins *v.* Trist, 20 La. An. 348. See Rey *v.* Simpson, 22 How. 341, 350; Vore *v.* Hurst, 13 Ind. 551, 556; Orrick *v.* Colston, 7 Gratt. 189, 199. In Massachusetts, and perhaps in some of the above states, the rule is even stricter. Essex Co. *v.* Edmands, 12 Gray, 273; Brown *v.* Butler, 99 Mass. 179; Wright *v.* Morse, 9 Gray, 337. Compare Patch *v.* Washburn, 16 Gray, 82.

In other states he is *prima facie* a guarantor. Camden *v.* McKoy, 3 Scammon, 437; Webster *v.* Cobb, 17 Ill. 459; Blatchford *v.* Milliken, 35 Ill. 434; Ranson *v.* Sherwood, 26 Conn. 437; Riddle *v.* Stevens, 32 Conn. 378; Rhodes *v.* Seymour, 36 Conn. 1; Seymour *v.* Leyman, 10 Ohio St. 283, 286; Greenough *v.* Smead, 3 Ohio St. 415. See Orrick *v.* Colston, 7 Gratt. 189, 199.

In other states he is held to be only an

The bill cannot be indorsed for a part only of its contents, unless the residue has been extinguished; for a personal contract cannot be apportioned, and the acceptor made liable to separate actions by different persons.

Blank indorsements are common, and they may be filled up at any time by the holder, even down to the moment of trial in a suit to be brought by him as indorsee; but no other use can be made of a blank indorsement in filling it up than to point out the person to whom the bill or note is to be paid. A note indorsed in blank is like one payable to bearer, and passes by delivery; and the holder may constitute himself, or any other person, assignee of the bill. The courts never inquire whether he sues for himself, or as trustee for some other person. (*b*) Even a bond made payable to bearer has been held to pass by delivery, in the same manner as a bank-note payable to bearer, or a bill of exchange indorsed in blank. (*c*)[2] The holder may strike out the indorse-

(*b*) Peacock *v.* Rhodes, Doug. 633; Francis *v.* Mott, cited in ib. 634; Bull. N. P. 275; Livingston *v.* Clinton, and Cooper *v.* Kerr, cited in 8 Johns. Cas. 264; Lovell *v.* Evertson, 11 Johns. 52; Duncan, J., in 18 Serg. & R. 315; Kiersted *v.* Rogers, 6 Harr. & J. 288; Evans *v.* Gee, 11 Peters, 80. In Sprigg *v.* Cuny, 19 Mart. (La.) 253, it was held, that the holder of a negotiable note, indorsed in blank, might sue on it, without filling it up to himself. Under the French law, an indorsement in blank, of a promissory note, is not valid. Code de Comm. art. 137, 138. The law is the same in Germany. Heinec. de Camb. c. 2, secs. 10, 11. Nor can the holder of a bill drawn and indorsed in France, in blank, recover against the acceptor in the English courts, for such an indorsement was not a valid contract by the *lex loci contractus*. Trimbey *v.* Vignier, 1 Bing. N. C. 151. [But see 95, n. 1.]

(*c*) Gorgier *v.* Mieville, 8 B. & C. 45

indorser. Spies *v.* Gilmore, 1 Comst. 321; Ellis *v.* Brown, 6 Barb. 282; Waterbury *v.* Sinclair, 26 Barb. 455; Cottrell *v.* Conklin, 4 Duer, 45; Slack *v.* Kirk, 67 Penn. St. 380, and cases cited; Clouston *v.* Barbiere, 4 Sneed, 336; Fear *v.* Dunlap, 1 Greene (Iowa), 331; Pierce *v.* Kennedy, 5 Cal. 138; Jones *v.* Goodwin, 39 Cal. 493; Jennings *v.* Thomas, 13 Smedes & M. 617. See Vore *v.* Hurst, 13 Ind. 551, 557.

But in most jurisdictions except New York and Massachusetts parol evidence is admissible to show that some other contract was intended. See, further, *infra*, n. (*k*), and especially Rey *v.* Simpson, 22 How. 341, 350.

[2] *Negotiable Bonds.* — The American cases generally treat such bonds as negotiable. Mercer County *v.* Hacket, 1 Wall. 83, 95; Gelpcke *v.* Dubuque, ib. 175, 206; Murray *v.* Lardner, 2 Wall. 110; Smith *v.* Sac County, 11 Wall. 139; Texas *v.* White, 7 Wall. 700, 735; Craig *v.* Vicksburg, 31 Miss. 216; Morris Canal & B. Co. *v.* Fisher, 1 Stockt. 667; Ide *v.* Passumpsic & Conn. R. R.R., 32 Vt. 297; Mechanics' Bank *v.* N. Y. & N. H. R.R., 3 Kern. (13 N. Y.) 599, 625; Connecticut Mut. L Ins. Co. *v.* Cleveland, C. & C. R.R., 41 Barb. 9, 22; Clark *v.* DesMoines, 19 Iowa, 199, 213; Porter *v.* McCollum, 15 Ga. 528. But see Helfer *v.* Alden, 8

ment to him, though full, and all prior indorsements in blank, except the first, and charge the payee or maker. (*d*) When the indorser takes up the note, he becomes the holder as entirely as though he had never parted with it. (*e*) There is no necessity

(*d*) Dollfus *v.* Frosch, 1 Denio, 367.

(*e*) Smith *v.* Clarke, Peake, 225; United States *v.* Barker, 1 Paine, 156; M'Donald *v.* Magruder, 3 Peters, 474; Conant *v.* Wills, 1 McLean, 427; Leidy *v.* Tammany, 9 Watts, 359.

Minn. 332. So even a bond with a blank for the name of the payee. White *v.* Vt. & Mass. R.R., 21 How. 575; *infra*, n. (*e*); Chapin *v.* Vt. & Mass. R.R., 8 Gray, 575.

The coupons annexed to them, also, may be detached and negotiated separately, like other negotiable instruments payable to bearer, and the holder may recover upon them without producing the bonds. National Exch. Bank *v.* Hartford, Pr. & F. R.R., 8 R. I. 375; Spooner *v.* Holmes, 102 Mass. 503, 507; Beaver County *v.* Armstrong, 44 Penn. St. 63; Thomson *v.* Lee Cy., 3 Wall. 327, 332; Knox Cy. Commissioners *v.* Aspinwall, 21 How. 539; Arents *v.* Commonwealth, 18 Gratt. 750, 767; San Antonio *v.* Lane, 32 Texas, 405. When, as is usually the case, the bond also contains a promise to pay interest, and the coupons refer to the bond, the coupons have been treated as a mere repetition of the contract contained in the bond, for the convenience of the holder, so far as to hold that a suit upon them is not barred by the statute of limitations until one upon the undertaking in the bond would be also. City *v.* Lamson, 9 Wall. 477. On the other hand, interest on them after demand and refusal to pay has been allowed by the supreme courts of the United States and of some of the states; Aurora City *v.* West, 7 Wall. 82; North Penn. R.R. *v.* Adams, 54 Penn. St. 94; Mills *v.* Jefferson, 20 Wis. 50; San Antonio *v.* Lane, 32 Tex. 405; and they are treated as overdue the day after they become payable, in Arents *v.* Commonwealth, *sup.*; Union Bank of La. *v.* New Orleans, 5 Am. Law Reg. N. S. 555. And if the coupon is a mere repetition of the promise to pay interest in the bond, and if the latter contract can be sued on apart from the obligation for the principal sum, this would be right. See Robbins *v.* Cheek, 32 Ind. 328.

The modern English cases in chancery hold that such bonds are either promissory notes or else analogous to the letter of credit, *ante*, 84, n. (*c*), an offer to all the world; and *quacunque via*, not subject to the equities between the original parties. *In re* Imperial Land Co. of Marseilles, *Ex parte* Colborne & Strawbridge, L. R. 11 Eq. 478, 491; *In re* Blakely Ordnance Co., *Ex parte* New Zealand Banking Co., L. R. 8 Ch. 154; *In re* General Estates Co., *Ex parte* City Bank, ib. 758; (explaining *In re* Natal Investment Co., Claim of Financial Co., ib. 355.)

A guaranty is held to be assignable in equity on similar grounds in Arents *v.* Commonwealth, 18 Gratt. 750, 769.

The liability of a corporation for allowing stock to be transferred to other parties while the certificates are outstanding in the hands of *bona fide* holders, has been put on somewhat similar ground. There is an offer to all the world on the face of the certificate, and under the seal of the company, that whoever in good faith will buy the stock and produce to the corporation the certificates, regularly assigned, with power to transfer the stock on the books of the corporation, shall be entitled to have the stock transferred to him. Bank *v.* Lanier, 11 Wall. 369, 378; citing Bridgeport Bank *v.* New York & N. H. R.R., 30 Conn. 270; Bridgeport Bank *v.* Schuyler, 34 N. Y. 30.

for any negotiable words in the indorsement. An indorsement to A. B., without adding "or order," is a good general indorsement. (*f*) But to give effect to an indorsement, there must be delivery. (*g*) A bill originally negotiable continues so in the hands of the indorsee, unless the general negotiability be restrained * 90 by a special indorsement * by the payee. He may stop its negotiability by a special indorsement, but no subsequent indorsee can restrain the negotiable quality of the bill. (*a*) The first indorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged or fraudulently circulated. (*b*) If a blank note or check be indorsed, it will bind the indorser to any sum, or time of payment, which the person to whom he intrusts the paper chooses to insert in it. (*c*) [1] This only applies

(*f*) Bayley on Bills, 128; Story on Promissory Notes, 150.

(*g*) Marston *v.* Allen, 8 M. & W. 494. [Lloyd *v.* Howard, 15 Q. B. 995; Denton *v.* Peters, L. R. 5 Q. B. 475; Dann *v.* Norris, 24 Conn. 388; Kirkpatrick *v.* Wolfe, 17 Ark. 96.]

(*a*) Edie *v.* East India Company, 2 Burr. 1216; Ancher *v.* The Bank of England, Doug. 637; Smith *v.* Clarke, 1 Esp. 180; [Walker *v.* Macdonald, 2 Exch. 527; Mitchell *v.* Fuller, 15 Penn. St. 268; Savannah Nat. Bank *v.* Haskins, 101 Mass. 370, 377;] Story on Promissory Notes, p. 136, n. 2. Restrictive indorsements are also allowed in France and Germany. Pothier, de Change, n. 23, 42, 89; Heineccius, de Camb. c. 2, sec. 10.

(*b*) Lambert *v.* Pack, 1 Salk. 127; Putnam *v.* Sullivan, 4 Mass. 45; Codwise *v.* Gleason, 3 Day, 12; Herbert *v.* Huie, 1 Ala. 18. Where several successive indorsees have advanced money on the draft, the first indorsement being a forgery, each may recover from his immediate indorser. Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287. The indorsement of a bill implies an undertaking, that all the antecedent parties upon the bill are persons competent to draw and indorse the same, and that the indorser has, in virtue thereof, a good title to the bill, and to convey the same by indorsement. Story on Bills, [§§ 108, 110.] An indorser of a promissory note does not stand in the situation of a maker of it, whether he be the payee, or indorsee, or a third person. But Mr. Justice Story considers him to stand in the same situation as the drawer or indorser of a bill, and a collateral liability is created. Story on Promissory Notes, 134, 135.

(*c*) Russel *v.* Langstaffe, Doug. 514; Violett *v.* Patton, 5 Cranch, 142; Johnson *v.* Blasdale, 1 Smedes & M. 1. The doctrine in several cases now is, that *a deed* executed *in blank*, with parol authority to a third person to fill it up afterwards, will be binding. Texira *v.* Evans, cited by Wilson, J., in 1 Anst. 229; Wiley *v.* Moor, 17 Serg. & R.

[1] Fullerton *v.* Sturges, 4 Ohio St. 529; Holland *v.* Hatch, 15 Ohio St. 464; Orrick *v.* Colston, 7 Gratt. 189; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Spitler *v.* James, 32 Ind. 202; (compare Luellen *v.* Hare, ib. 211;) Michigan Bank *v.* Eldred, 9 Wall. 544; Smith *v.* Wyckoff, 3 Sandf. Ch. 77; Torrey *v.* Fisk, 10 Smedes & M. 590; *Ex parte* Bartlett, 3 De G. & J. 378; Montague *v.* Perkins, 22 L. J. N. S. C. P. 187; 22 Eng. L. & Eq. 516. But see Awde *v.* Dixon, 6 Exch. 869; *ante*, 79, n. 1. See as to n. (c), 89, n. 2

to the case in which the body of the instrument is left blank. If negotiable paper, regularly filled up, be indorsed in blank, the indorser is holden only in the character of indorser, and according to the terms and legal operation of the instrument. (*d*)

In the case of blank indorsements, possession is evidence of title; but if the indorsements be all filled up, the first indorsee cannot sue without showing that he had taken up the bill or note. (*e*) The acceptor or maker is liable only to the last indorsee. The prior indorsers have parted with their interest in the paper, and are presumed to have received a valuable consideration for it. But if the last indorsee protests the bill for nonpayment, and it be paid by a prior indorser, the *latter acquires, by such payment, a new title to the instrument. (*a*) *91

Though the holder of paper fairly negotiated be entitled to recover, and to shut out almost every equitable defence, yet the rule applies only to the case of negotiable paper, taken *bona fide* in the course of business before it falls due. If taken after it is due and payable, the presumption is against the validity of the demand, and the purchaser takes it as a dishonored bill, at

438; Woolley *v.* Constant, 4 Johns. 60; *Ex parte* Kerwin, 8 Cowen, 118. The ancient cases were otherwise, and so are some of the modern American cases; as, see 1 Yerger, 69, 149; 2 Dev. (N. C.) 379; 3 Bibb, 361; 1 Hill (S. C.), 267; United States *v.* Nelson, 2 Brock. 64; Williams *v.* Crutcher, 5 How. (Miss.) 71. In Indiana, the indorser of a note is understood to warrant two things: 1. That the note is valid, and the maker *liable* to pay it; 2. That the maker is solvent, and *able* to pay it. Howell *v.* Wilson, 2 Blackf. 418.

(*d*) See Jackson *v.* Richards, 2 Caines, 343. In Beckwith *v.* Angell, 6 Conn. 315, it was held, that if a promissory note be indorsed in blank, under a parol promise to guarantee the payment, the holder may fill up the blank, pursuant to the special agreement, and prove that agreement by parol. The indorser will be liable, under such circumstances, without proof of the demand and notice requisite in other cases. There have been decisions to the same effect, in Josselyn *v.* Ames, 3 Mass. 274; Ulen *v.* Kittredge, 7 id. 233; Moies *v.* Bird, 11 id. 436; Upham *v.* Prince, 12 id. 14. See, also, Story on Bills, [§ 215;] Nelson *v.* Dubois, 13 Johns. 175; Campbell *v.* Butler, 14 id. 349. But the indorser of a negotiable note cannot be treated as a *guarantor*, provided he could, by the holder, have been charged as indorser. The prior cases in Johnson are considered as erroneous on this point. Seabury *v.* Hungerford, 2 Hill, 84; Hall *v.* Newcomb, 3 id. 233. In Parker *v.* Riddle, 11 Ohio, 102, it was held, that if a note not negotiable be indorsed, it is a collateral undertaking, and payment must be demanded, and notice given to the indorser, as upon negotiable paper.

(*e*) The rule now is, that the holder of a negotiable note by a blank indorser may sue upon it without filling up the blank. Chitty on Bills, ed. 1839, 255; 2 La. 192; Chewning *v.* Gatewood, 5 How. (Miss.) 552. The presumption of title in the holder is good until the contrary be established.

(*a*) Mendez *v.* Carreroon, 1 Ld. Raym. 742; Gorgerat *v.* M'Carty, 2 Dallas, 144.

his peril, and subject to every defence existing against it before it was negotiated. (*b*) [1] But it has been a question, when a note

(*b*) Brown *v.* Davies, 3 T. R. 80; Lee *v.* Zagury, 8 Taunt. 114; Tinson *v.* Francis, 1 Camp. 19; Sargent *v.* Southgate, 5 Pick. 312, 317, 319; Andrews *v.* Pond, 13 Peters, 65. A stricter course is observed in the case of bills and notes than in that of checks; and a party taking a check overdue does not necessarily take it subject to all the infirmities of the previous title, provided he exercises a reasonable caution in taking it; and that is a question of fact for a jury. Rothschild *v.* Corney, 1 Danson & Ll. 325; Mohawk Bank *v.* Broderick, 13 Wend. 133. A bill may be indorsed after it is due, for it continues negotiable *ad infinitum* until paid or discharged, provided the subsequent circulation does not prejudice any of the indorsers. Bayley on Bills, 5th ed. 156, 158; Hubbard *v.* Jackson, 4 Bing. 390; Callow *v.* Lawrence, 3 M. & S. 95. In Burrough *v.* Moss, 10 B. & C. 558, and in Hughes *v.* Large, 2 Barr [2 Penn. St.] 103, the rule in the text was restricted to all equities arising out of the note transaction itself; and it was held not to extend to protect a set-off, in respect of a debt due from the indorser to the maker, arising out of collateral matters. It extends only to matters of set-off existing *at the time* of the indorsement. Baxter *v.* Little, 6 Met. 7.

[1] *Overdue Paper.* — The text is confirmed by Foley *v.* Smith, 6 Wall. 492; Kellogg *v* Barton, 12 Allen, 527; Vinton *v.* King, 4 Allen, 562. See especially Texas *v.* White, 7 Wall. 700, 735; s. c. *sub nom.* Texas *v.* Hardenberg, 10 Wall. 68, 90.

This principle has been applied when the defence was that the defendant became a party to the instrument for the accommodation of the person who transferred it after maturity to the plaintiff. Bower *v.* Hastings, 36 Penn. St. 285; Chester *v.* Dorr, 41 N. Y. 279. See Jewell *v.* Parr, 16 C. B. 684. But see Charles *v.* Marsden, 1 Taunt. 224; Stein *v.* Yglesias, 1 Cr., M. & R. 565; Sturtevant *v.* Ford, 4 Man. & G. 101; Carruthers *v.* West, 11 Q. B. 143; *Ex parte* Swan, L. R. 6 Eq. 344, 358. Even if a note is taken innocently before maturity, but by mistake the indorsement is omitted until the note becomes overdue, and the indorsee has received notice of facts making it invalid in the hands of the indorser, it has been held that the indorsement will not relate back so as to cut out the defence. Lancaster National Bank *v.* Taylor, 100 Mass. 18; Clark *v.* Whitaker, 50 N. H. 474; Haskell *v.* Mitchell, 53 Me. 468; Whistler *v.* Forster, 14 C. B. N. S. 248. See, further, as to relation, *Ex parte* Hayward, L. R. 6 Ch. 546, 549. But as mentioned at the end of note (*b*), the rule in the text is restricted to the equities arising out of the original transaction. Davis *v.* Miller, 14 Gratt. 1; Oulds *v.* Harrison, 10 Exch. 572, 578; Holmes *v.* Kidd, 3 Hurlst. & N. 891, 893; *Ex parte* Swan, L. R. 6 Eq. 344, 359; Renwick *v.* Williams, 2 Md. 356; Gullett *v.* Hoy, 15 Mo. 399; Hawkins *v.* Shoup, 2 Cart. (Ind.) 342; Tinsley *v.* Beall, 2 Kelly (Ga.), 134.

Notes payable on Demand. — The principle of Wethey *v.* Andrews, *inf.*, n. (*c*), was approved on different reasoning in Merritt *v.* Todd, 23 N. Y. 28, and such a note was thought to be a continuing security on which the *indorser* remains liable until actual demand, and on which demand need not be made within any particular time. (But see Goodwin *v.* Davenport, 47 Me. 112.) And it is intimated that if it is otherwise when interest is not payable, the time within which demand must be made in order to charge collateral parties is the same as in the case of checks. Ib. 85; *ante*, 88, n. 1. See Lockwood *v.* Crawford, 18 Conn. 361, 372. It was said, however, in Merritt *v.* Todd, at p. 35, that lapse of time or nonpayment of interest may perhaps be sufficient to put the purchaser on inquiry, or to justify a

payable upon demand is to be deemed a note out of time, so as to subject the indorsee, upon a subsequent negotiation of it, to the operation of the rule. When the facts and circumstances are ascertained, the reasonableness of time is a matter of law, and every case will depend upon its special circumstances. Eighteen months, eight months, seven months, five months, even two months and a half, have been held, when unexplained by circumstances, an unreasonable delay; and if the demand be not made in a reasonable time by the holder, the indorser is discharged. (*c*) On the other hand, in *Thurston* v.

(*c*) Furman *v.* Haskin, 2 Caines, 369; Losee *v.* Dunkin, 7 Johns. 70; Field *v.* Nickerson, 13 Mass. 131; Sice *v.* Cunningham, 1 Cowen, 397; Martin *v.* Winslow, 2 Mason, 241. In Brooks *v.* Mitchell, 9 M. & W. 15, a note payable on demand, with interest, and indorsed a number of years after its date, was held, under circumstances, not to be overdue, so as to affect the indorsee with the equities; the court say it is intended to be a continuing security. This appears to be rather an extravagant indulgence of delay. But in Wethey *v.* Andrews, 3 Hill, 582, it was held, that presumption that the instrument was dishonored before transfer, so as to allow the *maker* to introduce a defence existing against the first holder; and this is so held in Herrick *v.* Woolverton, 41 N. Y. 581, where the note was payable on demand with interest, and some dissatisfaction with the other case is shown. Morey *v.* Wakefield, 41 Vt. 24; Arents *v.* Commonwealth, 18 Gratt. 750, 782. An action against the maker of a note payable on demand with interest is barred in six years. Wheeler *v.* Warner, 47 N. Y. 519. But in Chartered Mercantile Bank of India, London, and China *v.* Dickson, L. R. 3 P. C. 574, a reasonable time with reference to the circumstances of the case was allowed, as against the indorser, for presentment of a note payable on demand without (?) interest. The result of the later New York cases, Goodwin *v.* Davenport, *sup.*, and Chartered Bank of India *v.* Dickson, *sup.*, seems to be that the principle of Merritt *v.* Todd, if law, is not to be extended.

Some cases as to the reasonableness of particular times will be found *post*, 102. The lapse of time which would have the effect of letting the maker in to his defences, as in Herrick *v.* Woolverton, would probably have to be greater than that which would discharge the indorser under the rule in Merritt *v.* Todd. Thus the holder of a check who takes it in good faith and for value several days after it is drawn, receives it without being subject to defences on the part of the maker, of which he has no notice before or at the time his title accrues. Ames *v.* Meriam, 98 Mass. 294. See Lancaster Bank *v.* Woodward, 18 Penn. St. 357; Serrell *v.* Derbyshire R. Co., 9 C. B. 811; Poorman *v.* Mills, 39 Cal. 345; *sup.* n. (*b*).

It has been held that a note payable on a certain day is overdue on the last day of grace, so that if transferred then it is taken subject to defences available against it in the hands of the payee, by an extension of the doctrine, to which additional cases are cited, *post*, 102, n. (*b*). Pine *v.* Smith, 11 Gray, 38. (But it is to be observed that in this case no demand appears to have been made, and that therefore, even by the Massachusetts doctrine, the maker was not suable at the time of transfer. Estes *v.* Tower, 102 Mass. 65.) *Contra*, Crosby *v.* Grant, 38 N. H. 273.

M'Kown, (*d*) a note payable on demand, and indorsed within seven days after it was made, was held to be indorsed in sea-
* 92 son to close all inquiry into the origin of the * note. And when a note is negotiated in season, it may afterwards pass from one indorsee to another, after it is due, and the holder will be equally with the first indorsee protected in his title. (*a*) There is no certain time in which a bill or note, payable at sight, or a given time thereafter, or on demand, must be presented for acceptance. It must not be locked up for any considerable time; it must be presented for payment within a reasonable time; but if put into circulation, the courts are very cautious in laying down any rule as to the time in which it must be presented; and, in one case, it was allowed to be kept in circulation, without acceptance, so long as the convenience of the successive holders might require. (*b*) That was the case of a foreign bill; and an inland bill may also be put in circulation before acceptance, and it may be kept a reasonable time before acceptance; but what would be a reasonable time cannot be precisely defined, and depends upon the particular circumstances of each case. (*c*) If a bill or note be absolutely assigned, so as to pass the whole instrument to the indorsee, its negotiable quality would pass with it; and the better opinion would seem to be, that its negotiability could not be impeded by any restriction contained in the indorsement. (*d*) But where the indorsement is a mere authority to receive the money for the use, or according to the directions of the indorser, it would be evidence that the indorsee did not give a valuable consideration, and was not the absolute owner. (*e*) A negotiable instrument may be indorsed with a restriction, qualification, or condition. It may be indorsed so as to exempt the indorser from liability, as if the indorser should add, *at his own risk*, or *without recourse*. In that case, the maker or acceptor, and prior indorsers, and
* 93 subsequent indorsers, would * be holden, according to the rules and usages of commercial paper, but the immediate

a note payable on demand, *with interest*, was not out of time four or five weeks after its date, but would have been if not on interest.

(*d*) 6 Mass. 428.

(*a*) Chalmers *v.* Lanion, 1 Camp. 383.

(*b*) Goupy *v.* Harden, 7 Taunt. 159.

(*c*) Fry *v.* Hill, 7 Taunt. 396; Muilman *v.* D'Eguino, 2 H. Bl. 565.

(*d*) Parsons, C. J., 3 Mass. 228.

(*e*) Sigourney *v.* Lloyd, 8 B. & C. 622; 1 Danson & Lloyd, 182, s. c.; 1 Atk. 249; 2 Burr. 1229, s. p.

indorser would be exempted from responsibility by the special contract. (*a*)[1]

If the bill or note be negotiated after it is due, and be thereby opened to every equitable defence, yet a demand must be made upon the drawee or maker within a reasonable time, and notice given to the indorser, in order to charge him, equally as if it had been a paper payable at sight, or negotiated before it was due. (*b*)

6. **Of the Demand and Protest.** — The demand of acceptance of a foreign bill is usually made by a notary, and in case of non-acceptance he protests it, and this notarial protest receives credit in all courts and places by the law and usage of merchants, without any auxiliary evidence; and it is a requisite step, by the custom of merchants, in the case of the non-acceptance or non-payment of a foreign bill, and must be made promptly upon refusal. It must be made at the time, in the manner, and by the persons prescribed, in the place where the bill was payable. (*c*) It is sufficient, however, to note the protest on the day of the demand, and it may be drawn up in form at a future period. The protest is necessary for the purpose of prosecution, and it must be stated and proved in a suit on the bill. (*d*) On

(*a*) Dallas, J., in Goupy *v.* Harden, 7 Taunt. 168; Rice *v.* Stearns, 8 Mass. 225, Welch *v.* Lindo, 7 Cranch, 159; Ersk. Inst. of the Scotch Law, ii. 468; Bell's Comm. on the Scotch Law, i. 402; Story on Bills, [§§ 214–216.]

(*b*) M'Kinney *v.* Crawford, 8 Serg. & R. 351; Berry *v.* Robinson, 9 Johns. 121; Bishop *v.* Dexter, 2 Conn. 419; Dwight *v.* Emerson, 2 N. H. 159; Rugely *v.* Davidson, 2 Const. (S. C.) 33; Allwood *v.* Haseldon, 3 Bailey (S. C.) 457. [Patterson *v.* Todd, 18 Penn. St. 426; Tyler *v.* Young, 30 Penn. St. 143; Levy *v.* Drew, 14 Ark. 334.]

(*c*) Gale *v.* Walsh, 5 T. R. 239; Story on Bills, [§§ 176, 278.] It is held that a notarial certificate is good without a seal, though it be the usual practice to affix one. Lambeth *v.* Caldwell, 1 Rob. (La.) 61. In Kentucky, by statute, in 1798, protested foreign bills are accounted, after the death of the drawer or indorser, of equal dignity with a judgment; and executors and administrators of every such drawer or indorser are compelled to suffer judgment to pass against them, before any bond, bill, or other debt of equal or inferior dignity. In France, a protest, though usual, is not necessary to enable the holder of a *note* to sue the maker. The law was satisfactorily shown to be so by proof, in Trimbey *v.* Vignier, 6 Carr. & P. 25. The duty of the notary in making the demand for acceptance or payment is personal, and cannot be performed by his clerk or a third person, and his notarial certificate must show it. Onondaga County Bank *v.* Bates, 3 Hill, 53; Chitty on Bills, 8th ed. 217, 493.

(*d*) Tassel *v.* Lewis, 1 Ld. Raym. 743; Rogers *v.* Stevens, 2 T. R. 713; Buller,

[1] He would not, however, be exempted from his liability as vendor, explained *ante*, 88, n. 2. Dumont *v.* Williamson, 18 Ohio St. 515.

inland bills, no protest was required by the common law, and it was only made necessary in England, in certain cases, by the

J., 4 T. R. 175; Gale *v.* Walsh, 5 T. R. 239; Chaters *v.* Bell, 4 Esp. 48; Townsley *v.* Sumrall, 2 Peters, 170; Chitty on Bills, h. t.; Bryden *v.* Taylor, 2 Harr. & J. 396. The certificate of a foreign notary, under his hand and seal of office, of the presentment by him of a bill or note for acceptance or payment, and of his protest thereof for nonacceptance or nonpayment, is received in all courts by the usage and under the courtesy of nations, as presumptive evidence of the facts. Chitty on Bills, ed. 1836, 642; Halliday *v.* McDougall, 20 Wend. 85. In New York, Kentucky, and Mississippi, a similar certificate of having given the requisite notice of such presentment, demand, and default, to the parties to be charged, is also made, by statute, presumptive evidence of the fact. Laws of N. Y. sess. 56, c. 271, sec. 8; Laws of Mississippi, 1833, c. 70; Statute of Kentucky of 1837. If the notary omits to give the requisite notice, the bank who employed him is not responsible for his negligence; for their agency in the case of notes deposited with them for collection merely is gratuitous. Bellemire *v.* Bank U. S., 4 Whart. 105; East Haddam Bank *v.* Scovil, 12 Conn. 303; Hyde *v.* Planters' Bank, 17 La. 560. So, in Fabens *v.* The Mercantile Bank, 23 Pick. 330, if a note be deposited in a bank for collection, and the drawer resides in another place, and no agreement is made as to compensation for collecting, and the bank seasonably transmits the note to a suitable bank in such other place for collection, it is not responsible for the misfeasance or negligence of the bank in such other place. The owner has, however, his remedy against the guilty bank. But in the New York Court of Errors, in December, 1839, in the case of Allen *v.* The Merchants' Bank of New York, 22 Wend. 215, it was decided differently. In that case a bill drawn by a New York merchant upon a Philadelphia house was deposited with the defendants for collection, who transmitted it to their correspondent bank in Philadelphia, and, acceptance being refused, the notary of the Philadelphia bank neglected to give notice to the holder and indorser at New York, in consequence of which payment was lost. The court held, that the defendants were liable for the loss or damage arising from the default of their Philadelphia agent, and that there was an implied undertaking by a bank or banker, receiving negotiable paper deposited for collection, to take the necessary measures to charge the drawer, maker, or other proper parties, upon the default or refusal to accept or pay. This was so decided in Smedes *v.* Bank of Utica, 20 Johns. 372; M'Kinster *v.* The Same, 9 Wend. 46; 11 id. 473. So, in the case of The Bank of Orleans *v.* Smith, 3 Hill (N. Y.), 560, it was held, that if a note be deposited with a bank for collection, and the latter transmit it to another bank for the same purpose, both are to be regarded as agents of the holder, and liable for negligence. The use of the funds, thus temporarily obtained, formed a valuable consideration for the undertaking. The court declared, that whether the note or bill was received for collection in the same or a distant place, the bank was liable for neglect, omission, or misconduct of the bank or agent it employed in the collection, unless there was some express or implied agreement to the contrary. It is to be observed, however, that this decision was against the opinion of the Chancellor and a considerable minority of the Senate, and that it reversed the judgment of the Supreme Court and of the Superior Court in the City of New York. This does not destroy the authority, while it lessens the weight and value of the decision. In South Carolina, the rule of law is in conformity with that declared in New York; and a bank who receives a note for collection is liable for any neglect by which the indorsers are discharged. The use of the moneys collected is deemed a sufficient consideration for the undertaking. The bank must, therefore, see to the demand of pay-

statutes of 9th and 10th William III., *and 3d and 4th *94
Anne; (*a*) and it has long been the settled rule and practice not to consider the protest of an inland bill or promissory note by a notary as necessary or material. (*b*)[1] Nor is a protest of an

ment of the maker, and to the giving due notice of nonpayment to the indorsers. If the note be placed in the hands of a notary, he is to be regarded as the agent of the bank, and for whose neglects and mistakes the bank is liable. Thompson *v.* The Bank of the State of South Carolina, 8 Hill (S.C.), 77. If a bank, having a note for collection, places it in the hands of a notary, who is negligent, the bank has, in Mississippi, been held not liable for his negligence, as subagent, if the bank has used reasonable diligence and skill in the selection of the notary. Agricultural Bank *v.* Commercial Bank, 7 Smedes & M. 592.

(*a*) By the statute of Wm. III. no inland bill can be protested until the expiration of the days of grace, and, therefore, not until the day after the bill falls due, and then the protest, with notice, is to be forwarded, within fourteen days after it is made, to the proper parties. Without protest of an inland bill, the holder is entitled to his principal and interest, and only loses his costs and damages on the bill. Brough *v.* Parkins, 2 Ld. Raym. 992; s. c. 6 Mod. 80; Windle *v.* Andrews, 2 B. & Ald. 696.

(*b*) Bayley on Bills, 167, ed. Boston, 1826; Windle *v.* Andrews, 2 B. & Ald. 696; Rice *v.* Hogan, 8 Dana, 135. By the general law-merchant, a protest is exclusively confined to foreign bills of exchange. Burke *v.* McKay, 2 How. 66; Young *v.* Bryan, 6 Wheat. 146; Union Bank *v.* Hyde, ib. 572. The statute law of New York (N. Y. R. St. ii. 283) provides that notaries public *may* demand acceptance of foreign and inland bills, and payment of them and promissory notes, but the notarial protest in the case *of inland bills and promissory notes* shall not be evidence of the fact, unless the personal attendance in court of the notary cannot be procured. Kaskaskia Bridge *v.* Shannon, 1 Gilm. (Ill.) 15, s. p. In Louisiana, a notarial demand and protest in the case of promissory notes seem to be in use, if not required by statute. Bullard &

[1] *Notary's Protest.* — A protest is not necessary on a foreign promissory note at common law; Bonar *v.* Mitchell, 5 Exch. 415; and has been held not admissible. Kirtland *v.* Wanzer, 2 Duer, 278. But the tendency of the cases, or at least of the legislation in several states, seems to be the other way, and even to make the notary's certificate evidence as to domestic bills and notes. See Simpson *v.* White, 40 N. H. 540, 544; Ticonic Bank *v.* Stackpole, 41 Me. 302; Loud *v.* Merrill, 45 Me. 516; Baumgardner *v.* Reeves, 35 Penn. St. 250; Ricketts *v.* Pendleton, 14 Md. 320; Adams *v.* Wright, 14 Wis. 408; Brooks *v.* Day, 11 Iowa, 46; Jones *v.* Berryhill, 25 Iowa, 289; Reapers' Bank *v.* Willard, 24 Ill. 439; O'Neil *v.* Dickson, 11 Ind. 253; Gillespie *v.* Neville, 14 Cal. 408; and many other cases.

By the common law the duties of a notary must be performed by himself personally, and not by a clerk or deputy. Hunt *v.* Maybee, 8 Seld. 266; Cribbs *v.* Adams, 18 Gray, 597; Ocean National Bank *v.* Williams, 102 Mass. 141; Carter *v.* Union Bank, 7 Humph. 548; Sacrider *v.* Brown, 8 McLean, 481; Ellis *v.* Commercial Bank of Natchez, 7 How. (Miss.) 294, 302; Chenowith *v.* Chamberlain, 6 B. Mon. 60.

After the death of a notary public his protest of a promissory note, authenticated in the usual way by his signature and official seal, is good secondary evidence. Porter *v.* Judson, 1 Gray, 175; Austin *v* Wilson, 24 Vt. 680.

inland bill or promissory note generally deemed necessary in this country, though the practice is to have bills drawn in one state on persons in another protested by a notary, and the act of the state of Kentucky of 1798, c. 57, seemed to require it. (*c*) It is also necessary in Virginia, and the omission to give notice of the protest of an inland bill causes the loss of interest and damages. (*d*) After the protest for nonacceptance, immediate notice must be given to the drawer and indorser, in order to fix them, and the omission would not be cured by the bill being presented for payment, and subsequent notice of the nonpayment as well as nonacceptance. (*e*) The drawer or indorser may be sued forthwith upon the protest for nonacceptance, without
* 95 waiting until the bill is also presented * for payment, and

Curry's Digest, i. 40. In Georgia, the notarial protest of inland bills for nonacceptance or nonpayment is required, if the amount of the bill be £20 sterling or upwards. Hotchkiss's Code of Statute Law, 437, 488.

(*c*) Townsley *v.* Sumrall, 2 Peters, 170; Nicholls *v.* Webb, 8 Wheat. 326. But in Rice *v.* Hogan, 8 Dana, 135, it was held, that a protest was not necessary, even in the case of a foreign bill, as between the drawer and acceptor, under the act of Kentucky, of 1837; Miller *v.* Hackley, 5 Johns. 375. In this last case, it was said that a bill drawn in New York on Charleston, or any other place within the United States, was an inland bill. A protest is not necessary in Connecticut, in the case of a bill drawn in one state and payable in another. Bay *v.* Church, 15 Conn. 15. Nor in New Jersey on inland bills. Sussex Bank *v.* Baldwin, 2 Harr. 487. But in South Carolina and in Pennsylvania, a bill drawn in one state, upon a person residing in another, is considered in the light of a foreign bill, requiring a protest. (Duncan *v.* Course, 1 Const. (S. C.) 100. Cape Fear Bank *v.* Stinemetz, 1 Hill, 44; Lonsdale *v.* Brown, 4 Wash. 148.) The opinion in New York was not given on the point on which the decision rested; and it was rather the opinion of Mr. Justice Van Ness than that of the court; but he was supported by Mr. Tucker, (see Tucker's Blackstone, ii. 467, note 22,) and also by Marius on Bills, 2, who held that bills between England and Scotland were inland bills. The decision in South Carolina was a solemn adjudication, after argument, on the very question; and the weight of American authority is, therefore, on that side. In Buckner *v.* Finley, 2 Peters, 586, it was decided, that bills of exchange drawn in one state, on persons living in another, were to be treated as foreign bills; and this decision, I apprehend, puts the point at rest. See, also, Phœnix Bank *v.* Hussey, 12 Pick. 483; Brown *v.* Ferguson, 4 Leigh, 37; Dickins *v.* Beal, 10 Peters, 573; Bank of U. S. *v.* Daniel, 12 Peters, 54; Rice *v.* Hogan, 8 Dana, 134; Halliday *v.* McDougall, 20 Wend. 81; Carter *v.* Burley, 9 N. H. 558. This is also the rule as between England and Scotland, and England and Ireland. Mahoney *v.* Ashlin, 2 B. & Ad. 478. Every bill, says Mr. Justice Story, (Com. on Bills of Exchange, [§ 22],) ought to be treated as a foreign bill, which is drawn in one country upon another country, not governed throughout by the same homogeneous or municipal laws.

(*d*) Willock *v.* Riddle, 5 Call, 358.

(*e*) Roscow *v.* Hardy, 2 Camp. 458; United States *v.* Barker, 4 Wash. 464; Thompson *v.* Cumming, 2 Leigh, 321.

refused, and the holder will be entitled to his interest and costs, and like damages as in case of nonpayment. (*a*) The English law requiring protest and notice of nonacceptance of foreign bills has been adopted and followed as the true rule of mercantile law in the states of Massachusetts, Connecticut, New York, Maryland, Virginia, North Carolina, and South Carolina. (*b*) But the Supreme Court of the United States, in *Brown* v. *Barry*, (*c*) and in *Clarke* v. *Russell*, (*d*), held, that in an action on a protest for nonpayment on a foreign bill, protest for nonacceptance, or a notice of the nonacceptance, need not be shown, inasmuch as they were not required by the customs of merchants in this country, and those decisions have been followed in Pennsylvania; protest for nonpayment is sufficient. (*e*) It becomes, therefore, a little difficult to know what is the true rule of the law-merchant of the United States on this point, after such contradictory decisions. The Scotch law is the same as the English; (*f*) and it appears to me that the English rule is the better doctrine, and the most consistent with commercial policy.

(*a*) Milford *v.* Mayor, Doug. 55; Ballingalls *v.* Gloster, 3 East, 481; Wallace *v.* Agry, 4 Mason, 336; Evans *v.* Gee, 11 Peters, 80; Evans *v.* Bridges, 4 Porter (Ala.), 348; Whitehead *v.* Walker, 9 M. & W. 506; Mason *v.* Franklin, 3 Johns. 202; Story on Bills, [§ 321.] In Mississippi, by statute, no suit lies on protest for nonacceptance merely, before the maturity of the bill. Sadler *v.* Murrah, 3 How. [Miss.] 195. So, by the French law, the holder of a bill is bound to present it for payment at its maturity, though already protested for nonacceptance. The protest for nonacceptance only obliges the drawer and indorsers, on due notice, to give security for payment of the bill when due, if not then paid. Code de Com. art. 120; Pothier, de Change, n. 133. But if a bill be drawn on France and indorsed in New York, the indorser is liable forthwith on protest for nonacceptance, though never presented for payment in France. The law of the place of the indorsement governs the liability of the indorser. Aymar *v.* Sheldon, 12 Wend. 439; Pardessus, Droit Com. v. art. 1488–1499; Chitty on Bills, 505, 506; Story on Promissory Notes, 404–408. This is the true rule, though the case of Rothschild *v.* Currie, 1 Q. B. 43, is to the contrary.

(*b*) Watson *v.* Loring, 8 Mass. 557; Sterry *v.* Robinson, 1 Day, 11; Mason *v.* Franklin, 3 Johns. 202; Weldon *v.* Buck, 4 id. 144; Winthrop *v.* Pepoon, 1 Bay, 468; Phillips *v.* M'Curdy, 1 Harr. & J. 187; Thompson *v.* Cumming, 2 Leigh, 321; 1 Hawks, 195. The French and German law is the same. Heineccius and Pardessus, cited in Story on Bills, [§ 274. But see Walker *v.* Stetson, 19 Ohio St. 400; Smith *v.* Roach, 7 B. Mon. 17.]

(*c*) 3 Dallas, 365. (*d*) Cited in 6 Serg. & R. 358.

(*e*) Read *v.* Adams, 6 Serg. & R. 356. Mr. Justice Story (Story on Bills, [§ 278, n.]) says that the early decisions of the Supreme Court, if now held to be law, would be so held *only* on the ground of the local law of Pennsylvania, as to bills drawn or payable there. (*f*) 1 Bell's Comm. 408.

If the bill has been accepted, demand of payment must be made on the day when the bill falls due; and it must be made by the holder or his agent upon the acceptor, at the place appointed for payment, or at his house or residence, or regular known place of his moneyed business, or upon him personally if no particular place be appointed; and it cannot be made by letter through the post-office. (*g*) [1] In default of payment, in whole or in part, pro-

(*g*) Saunderson *v.* Judge, 2 H. Bl. 509; Stedman *v.* Gooch, 1 Esp. 8; Berkshire Bank *v.* Jones, 6 Mass. 524; State Bank *v.* Hurd, 12 id. 172; Mason *v.* Franklin, 8 Johns. 202; Whittier *v.* Graffam, 3 Greenl. 82; Stuckert *v.* Anderson, 3 Whart. 116; Lenox *v.* Roberts, 2 Wheat. 378; Mills *v.* Bank of U. S. 11 id. 431; Chitty, on Bills, 402; Code de Com. art. 161; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487. The rule in general is, unless otherwise required by statute that the place of payment need not be expressly stated in the bill; and it will be implied, in the absence of all controlling circumstances, to be by law the place of residence of the drawee,

[1] *Lex Loci.* — The rule approved by the author in note (*a*) is applied in England to the liability of the drawer. Allen *v.* Kemble, 6 Moore, P. C. 314; Gibbs *v.* Fremont, 9 Exch. 25. See, also, Conahan *v.* Smith, 2 Disney, 9; Hunt *v.* Standart, 15 Ind. 33; ib. 49, 160; Artisans' Bank *v.* Park Bank, 41 Barb. 599; Short *v.* Trabue, 4 Met. (Ky.) 299; Trabue *v.* Short, 18 La. An. 257; Trabue *v.* Short, 5 Coldw. 293; Lee *v.* Selleck, 33 N. Y. 615. See Vanzant *v.* Arnold, 31 Ga. 210. But Rothschild *v.* Currie may be still law in England, on the ground that the place where the bill is payable governs as regards protest and notice of dishonor. Hirschfeld *v.* Smith, L. R. 1 C. P. 340, 351; Ellis *v.* Commercial Bank of Natchez, 7 How. (Miss.) 294, 303.

It has been held that the drawer of a bill upon a New York drawee, drawn and indorsed in New Granada, is liable to the indorsee if the indorsement is good by the law of New York, although invalid by that of New Granada. If this case is rightly decided, the operation of the indorsement as a contract, and the extent of the liability which it imposes on the indorser, will be determined by one law, as shown by the cases cited above, and its operation as a conveyance will be determined by another, and this seems to be the opinion of the Court of Appeals. Everett *v.* Vendryes, 19 N. Y. 436; 25 Barb. 383. See Ives *v.* Farmers' Bank, 2 Allen, 236.

With regard to the liability of the acceptor, it is held that an indorsee of a bill drawn, accepted, and payable in England, can sue the acceptor there if the indorsement was valid by English law, although it was made in France and invalid there. Lebel *v.* Tucker, L. R. 3 Q. B. 77; Everett *v.* Vendryes, 25 Barb. 383. But when a bill was drawn in France and accepted in England, and indorsed in blank in France, it was held by the Court of Common Pleas that the acceptor's contract was only to pay the drawer or the person to whom the drawer had made a valid transfer of his rights; and that as, according to Trimbey *v.* Vignier, the indorsement did not transfer the drawer's right of action or to the bill, the indorsee could not sue in his own name. The decision was reversed in the Exchequer Chamber on the sole ground that Trimbey *v.* Vignier took a wrong view of the French law. Bradlaugh *v.* DeRin, L. R. 3 C. P. 538; L. R. 5 C. P. 478.

See Ives *v.* Farmers' Bank, 2 Allen, 236.

test must be forthwith made, by a notary, at the place of payment, and under the formalities prescribed at that place, as in the case of protest for nonacceptance, and it must be made on the last day of grace. (*h*) But there is a great deal * of per- * 96 plexity and confusion in the cases on this subject, arising from refined distinctions and discordant opinions; and it becomes very difficult to know what is precisely the law of the land as to the sufficiency of the demand upon the maker of the note, or the acceptor of the bill. If there be no particular and certain place identified and appointed, other than the city at large, and the party has no residence there, the bill may be protested in the city on the day without inquiry, for that would be an idle attempt. (*a*) The general principle is, that due diligence must be used to find out the party and make the demand; and the inquiry will always be, whether, under the circumstances of the case, due diligence has been used. The agent of the holder in one case used the utmost diligence for several weeks to find the residence of the indorser, in order to give him notice of the dishonor of the bill, and then took a day to consult his principal before he gave the notice, and it was held sufficient. (*b*) If the party has absconded, that will, as a general rule, excuse the demand. (*c*) [1] If

or where his address is on the face of the bill. Story on Bills, [§ 48.] He says, again, at [§ 235,] the general rule is, that *presentment* of a bill must be made at the place of the domicile of the drawee, without any regard to its being drawn payable generally, *or payable at a particular place specified.*

(*h*) Union Bank *v.* Hyde, 6 Wheat. 572; Bank of Rochester *v.* Gray, 2 Hill, 227; 1 Bell's Comm. [414], 415; Story on Bills, [§ 379.]

(*a*) Boot *v.* Franklin, 3 Johns. 207.

(*b*) Firth *v.* Thrush, 8 B. & C. 387. Delay in presentment or giving notice will be excused, if produced by inevitable accident or obstruction. Story on Bills, [§§ 231, 234.]

(*c*) Anon., 1 Ld. Raym. 743; Putnam *v.* Sullivan, 4 Mass. 45; 4 Serg. & R. 480; Lehman *v.* Jones, 1 Watts & S. 126.

[1] *Place of Presentment.* — The text is confirmed by Ratcliff *v.* Planters' Bank, 2 Sneed, 425. But see Pierce *v.* Cate, 12 Cush. 190; (where Putnam *v.* Sullivan, *sup.* n. (*c*), is treated as overruled by Sandford *v.* Dilloway, *post*, 110, n. (*d*);) Grafton Bank *v.* Cox, 13 Gray, 508; Sands *v.* Clarke, 8 C. B. 751; *post*, 109, n. 1, & 110. In the case of a mere removal out of the state, it has been held that presentment at the payer's former place of residence is unnecessary. Gist *v.* Lybrand, 8 Ohio, 308; Foster *v.* Julien, 24 N. Y. 28; Adams *v.* Leland, 30 N. Y. 309, 312. But the fact that a note, made and indorsed by persons residing, *and known* by the holder to reside, in a foreign country, is dated in New York, does not dispense with demand at the maker's place of residence and notice to the indorser. Spies *v.* Gilmore, 1 Comst.

he has changed his residence to some other place within the same state or jurisdiction, the holder must make endeavors to find it, and make the demand there; though if he has removed out of the state subsequent to the making of the note or accepting the bill, it is sufficient to present the same at his former place of residence. (*d*) If there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of the date; (*e*) and the presumption is, that

(*d*) Anderson *v.* Drake, 14 Johns. 114; M'Gruder *v.* Bank of Washington, 9 Wheat. 598; Bayley on Bills, ed. Boston, 126; Gillespie *v.* Hannahan, 4 M'Cord, 503; Reid *v.* Morrison, 2 Watts & S. 401; Story on Bills, [§§ 346, 352;] Wheeler *v.* Field, 6 Met. 290.

(*e*) Fisher *v.* Evans, 5 Binney, 541; Lowery *v.* Scott, 24 Wend. 358; [White *v.* Wilkinson, 10 La. An. 394; Smith *v.* Philbrick, 10 Gray, 252.] And if the

821; affirming s. c. 1 Barb. 158; Bank of Orleans *v.* Whittemore, 12 Gray, 469. Compare the cases added to note (*e*).

With regard to the requirement to prove demand at a particular place, the distinction taken by the American cases is that indicated in 99, n. (*d*), that in an action against the acceptor or maker, no demand at that place need be proved, and if the promisor was present there with the money, it is matter of defence. Carter *v.* Smith, 9 Cush. 821; McKenzie *v.* Durant, 9 Rich. 61; New Hope Del. B. Co. *v.* Perry, 11 Ill. 467; Hunt *v.* Divine, 87 Ill. 137; Wood *v.* Merchants' S. L. & T. Co., 41 Ill. 267; Games *v.* Manning, 2 Greene (Iowa), 251; Eaton & Hamilton R.R. *v.* Hunt, 20 Ind. 457; Andrews *v.* Hoxie, 5 Tex. 171; Thiel *v.* Conrad, 21 La. An. 214. But see Sands *v.* Clarke, 8 C. B. 751. But to charge a drawer or indorser presentment and demand at the place specified is necessary. *Inf.* 99 & n. (*d*); Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, 648; Magoun *v.* Walker, 49 Me. 419; Moore *v.* Britton, 22 La. An. 64; Goodlet *v.* Britton, 6 Blackf. 500; Seneca County Bank *v.* Neass, 5 Denio, 329. See Harwood *v.* Jarvis, 5 Sneed, 875, 878, questioned 1 Pars. N. & B. 545, n. (*m*). When, however, the instrument is made payable at any bank in a certain place, presentment at any such bank is sufficient to charge the indorser, without notice to the maker of the bank selected. Langley *v.* Palmer, 80 Me. 467; Malden Bank *v.* Baldwin, 13 Gray, 154.

A presentment for payment of a bill accepted generally, at the place of business of a merchant acceptor is sufficient, and if his counting-room is closed during business hours of the day when the bill falls due, it is presumed to be done intentionally, and the bill may be protested for nonpayment without inquiries elsewhere. Wiseman *v.* Chiappella, 23 How. 368. See West *v.* Brown, 6 Ohio St. 542; Grafton Bank *v.* Cox, 13 Gray, 503; and compare Allen *v.* Edmundson, 2 Exch. 719, 723, as to the similar duty of a merchant to be ready at his place of business to receive notice of dishonor. *Post*, 109, n. 1.

With regard to the rule stated at the beginning of p. 98, see Gillett *v.* Averill, 5 Denio, 85; Merchants' Bank *v.* Elderkin, 25 N. Y. 178; Bank of Syracuse *v.* Hollister, 17 N. Y. 46; Hallowell *v.* Curry, 41 Penn. St. 322; Browning *v.* Andrews, 8 McL. 576. But the physical presence of the bill at a bank where it is payable will not amount to a demand if the fact was never known by the bank. Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641.

the maker resides where the note is dated, and that he contemplated payment at that place. (*f*) But it is presumption
* only; and if the maker resides elsewhere within the state * 97
when the note falls due, and that be known to the holder, demand must be made at the maker's place of residence. (*a*)

The rule in the English law is, that if a bill or promissory note be made payable at a particular place, the demand must be made at the place, because the place is made part and parcel of the contract. (*b*) If, however, the place appointed be deserted or shut up, it amounts to a refusal to pay, and a demand would be inaudible and useless; (*c*) [1] or if the demand be made upon the maker elsewhere, and no objection be made at the time, it will be deemed a waiver of any future demand. (*d*)

In New York it has been decided, that though a bill or note be made payable at a particular place, it is not requisite for the holder to aver or prove a demand of payment *at the place.* (*e*)

domicile of the maker be in one state, and he dates and makes the note in another, payment may be demanded at the place of date, if the maker has no known place of business in the state. Story on Promissory Notes, 282, § 286; Taylor *v.* Snyder, [3 Denio, 145.]

(*f*) Stewart *v.* Eden, 2 Caines, 127; Duncan *v.* M'Cullough, 4 Serg. & R. 480; Lowery *v.* Scott, 24 Wend. 358.

(*a*) Anderson *v.* Drake, 14 Johns. 114; Galpin *v.* Hard, 3 M'Cord, 394. In North Carolina, indorsers of promissory notes are held liable as sureties, and no previous demand on the maker is requisite. But this provision does not apply to inland or foreign bills of exchange. Revised Statutes of N. C. 1837, i. 95.

(*b*) Saunderson *v.* Judge, 2 H. Bl. 509; Sanderson *v.* Bowes, 14 East, 500; Dickinson *v.* Bowes, 16 id. 110; Butterworth *v.* Le Despencer, 8 M. & S. 150; Gibb *v.* Mather, 8 Bing. 214; Hart *v.* Long, 1 Rob. (La.) 83, s. P.; ib. 311.

(*c*) Howe *v.* Bowes, 16 East, 112.

(*d*) Herring *v.* Sanger, 3 Johns. Cas. 71; Mason *v.* Franklin, 3 Johns. 202; Boot *v.* Franklin, ib. 208. [King *v.* Holmes, 11 Penn. St. 456.]

(*e*) Wolcott *v.* Van Santvoord, 17 Johns. 248; Caldwell *v.* Cassidy, 8 Cowen, 271; Haxtun *v.* Bishop, 3 Wend. 13. But if the maker was ready to pay at the time and place specified, that would be matter of defence. The same doctrine is held in Carley *v.* Vance, 17 Mass. 389; Bacon *v.* Dyer, 3 Fairfield, 19; Remick *v.* O'Kyle, ib. 340; Weed *v.* Van Houten, 4 Halst. 189; Conn *v.* Gano, 1 Ohio, 483; M'Nairy *v.* Bell, 1 Yerger, 502; Mulherrin *v.* Hannum, 2 id. 81; Irvine *v.* Withers, 1 Stewart (Ala.), 234, and in Wallace *v.* M'Connell, 13 Peters, 136. And it is so declared by statute in Indiana, in 1836. But in Louisiana, after a full discussion, the English rule mentioned in the text has been adopted as most convenient and most agreeable to the contract. Mellon *v.* Croghan, 15 Martin, 423; 12 La. 454; Carillo *v.* Bank of U. S., 10 Rob. 533. See, also, in the case of The Bank of Wilmington *v.* Cooper, in Delaware, the English rule was followed; 1 Harr. 10. Mr. Justice McLean, in Thompson

[1] DeWolf *v.* Murray, 2 Sandf. 166; *ante*, 96, n. 1.

This would appear to be contrary to the rule as now understood and established in the English law; and it would seem to be contrary to the opinion of the Court of Errors of New York, in the case of *Woodworth* v. *The Bank of America*, (*f*) where the rule of the English law was recognized, that if the place of payment be designated in the note, demand must be made there.

* 98 But if the person at whose * place or house the note or bill is made payable be the holder of the paper, in that case it has been held, by the Supreme Court of the United States, (*a*) to be sufficient for the holder to examine the accounts, and ascertain that the party who is to pay there has no funds deposited. The maker or acceptor is in default by not appearing and paying, and no formal demand is necessary. The cases of *Saunderson* v. *Judge* and *Berkshire Bank* v. *Jones* (*b*) were deemed to be controlling authorities on the point. If the defendant was ready to pay at the time and place designated in the note for payment, it is a matter of defence, and will go to discharge him from interest and costs. (*c*) The case of *Caldwell* v. *Cassidy* (*d*) adopted a further distinction on this already subtle and embarrassing point, and held, that though, in the case of a note payable *at a particular place*, demand at that place need not be averred, yet if the note be made payable *on demand at a particular place*, a demand must be made at the place before suit brought. With respect to the addition of memoranda to a bill or note, designating the place of payment, there have been much litigation and difficulty in the cases. It is stated as a general rule, (*e*) that a memorandum

v. Cook, 2 McL. 125, considered the law to now be well settled, that where a note was payable at a particular place, it was not necessary to aver in the declaration, or prove at the trial, a demand of payment at the place.

(*f*) 19 Johns. 391.

(*a*) United States Bank *v.* Smith, 11 Wheat. 171; United States Bank *v.* Carneal, 2 Peters, 543.

(*b*) 2 H. Bl. 509; 6 Mass. 524; Rahm *v.* Philadelphia Bank, 1 Rawle, 335, s. p. The note itself must be present, ready for surrender, when the demand for payment is made, and in default of it the demand will be insufficient to fix the indorser. Eastman *v.* Potter, 4 Vt. 313.

(*c*) Haxtun *v.* Bishop, 3 Wend. 13. So, if the holder was ready at the place to receive payment, no further demand is necessary to charge the indorser. Jenks *v.* Doylestown Bank, 4 Watts & S. 505.

(*d*) 8 Cowen, 271. [State Bank *v.* Cape Fear Bank, 13 Ired. 75.]

(*e*) Bayley on Bills, 25. [Masters *v.* Baretto, 8 C. B. 488. See Bowling *v.* Harrison, 6 How. 248, 259; Troy City Bank *v.* Lauman, 19 N. Y. 477, 480; Bailey *v.* Bodenham, 16 C. B. N. S. 288, 297. As to the effect of "mem." on the face of a

upon a note, as to where it should be payable, was not a part of it; and in *Exon* v. *Russell*, (*f*) such a memorandum at the bottom of the note was held to be no part of it. On the other hand, in *Cowie* v. *Halsall*, (*g*) after a bill had been accepted generally, the drawer, without the consent of the acceptor, added a place of payment; and it was held, that the condition *was *99 a material variation, and discharged the acceptor. In the case of *The Bank of America* v. *Woodworth*, (*a*) a note was indorsed for the accommodation of the maker, and returned to him to be negotiated. It had no place of payment, and before the maker had parted with it he added in the margin a place of payment, and negotiated it, and the *bona fide* holder made the demand there. The Supreme Court held, that the memorandum was no part of the contract, but merely an intimation to the holder where to look for the maker and his funds. But the Court of Errors decided otherwise, and overturned this very reasonable, and established the very rigorous doctrine, that the memorandum was, in that case, a material alteration of the contract, which discharged the indorser. The Supreme Court of New York have since decided, (*b*) that where the indorser commits a negotiable note to the maker, with a blank for the date, or sum, or time of payment, there is an implied agency given by the indorser to the maker to fill up the blanks. The principle of the decisions in Massachusetts is, that if the indorsement be made at the time of making the note, the indorser is to be treated as an original promisor, because he is supposed to participate in the consideration. (*c*)[1]

If a bill of exchange, though drawn generally, be accepted, payable at a particular place, it is a special or qualified acceptance, which the holder is not bound to take; but if he does take it, the demand must be made at the place appointed, and not elsewhere, in order to charge the drawer or indorser. This is

check, compare Skillman v. Titus, 8 Vroom, 96, with Dykers v. Leather Man. Bank, 11 Paige, 612.]

(*f*) 4 M. & S. 505; Williams v. Waring, 10 B. & C. 2, s. p.

(*g*) 4 B. & Ald. 197; Desbrowe v. Wetherby, 1 Moody & R. 438, s. p.; Nazro v. Fuller, 24 Wend. 374, s. p. (*a*) 18 Johns. 315; s. c. 19 Johns. 391.

(*b*) Mitchell v. Culver, 7 Cowen, 336; Mechanics & Farmers' Bank v. Schuyler, ib. 337, note.

(*c*) Parker, C. J., in Tenney v. Prince, 4 Pick. 385.

[1] *Ante*, 89, n. 1.

the plain sense of the contract, and the words *accepted payable at a given place* are equivalent to an exclusion of a demand elsewhere. (*d*)[2]

(*d*) Mullen *v.* Croghan, 15 Martin, 424; Gale *v.* Kemper, 10 La. 208; Warren *v.* Allnutt, 12 id. 454. But see *supra*, 97, and *infra*, 101, where the weight of American decisions is otherwise. If, however, a demand be made of payment at the place designated in the bill or note, and refused, it is sufficient. Story on Bills, pp. 419, 420. This point has been the subject of great litigation and discussion in the English courts, and judges of high professional character, and of great professional learning, have entertained directly opposite opinions on the question. In Ambrose *v.* Hopwood, 2 Taunt. 61, the C. B. held, that the bill must be presented at the place specified in the acceptance, and not elsewhere. This was in 1809. In Callaghan *v.* Aylett, 3 Taunt. 397, in 1811, the same court followed the same doctrine, and, after more discussion, declared that where the bill was accepted, payable at a particular place, it was a qualified acceptance, and the presentment must be averred and proved to have been made there. There may, in the act of acceptance, be a qualification of the *place*, as well as of the *time* of acceptance. In Fenton *v.* Goundry, 13 East, 459, in 1811, the same question arose in the K. B., and was decided differently; and it was held, that though the bill was accepted payable at a place certain, it was still to be taken to be payable generally and universally, and wherever demanded. Afterwards, in Gammon *v.* Schmoll, 5 Taunt. 344, the Court of C. B., notwithstanding the decision of the K. B., adhered with determined purpose to their former doctrine; and in Bowes *v.* Howe, on error from the K. B., into the Exchequer Chamber, 5 Taunt. 30, the doctrine of the C. B. was established. It being of great importance to the mercantile world that the law on this subject should be fixed and known, the same point was brought into review before the House of Lords, in 1820, in the case of Rowe *v.* Young, 2 Brod. & B. 165, and the opinions of the twelve judges were taken for the information of the Lords. The point was elaborately discussed in the separate opinions of the judges, which displayed all the learning and acuteness of investigation of which such a narrow and dry question was susceptible. A majority of the judges were in favor of the opinion of the K. B., and they held, that such a special acceptance need not be averred and proved in the first instance, and that the nonpresentment at the place was matter of defence, and to be taken advantage of in pleading. But Lord Eldon and Lord Redesdale, and four out of the twelve common-law judges were of opinion that such a qualified acceptance must be averred, and presentment according to it proved; and that opinion prevailed. The House of Lords reversed the judgment of the K. B., and overthrew their doctrine, and established the rule, that if a bill of exchange be accepted, payable at a particular place, it was necessary to aver and prove presentment of the bill at that place, and the party so accepting is not liable to pay on a demand made elsewhere. The defendant was not to be subjected to the inconvenience of pleading a tender, and bringing the money into court. Lord Eldon's opinion, in the House of Lords, was distinguished for being clear, nervous, pertinent, logical, and conclusive; and he very well observed, that he could not understand the good sense of the distinction of the K. B., that if a promissory note be payable at a particular place, the demand must be made there, because the place, being in the note, is a part of the contract; but if a bill be accepted, payable at a particular place, it is not part of the acceptance, and the presentment need not be made there. Soon

[2] Troy City Bank *v.* Lauman, 19 N. Y. 447; Myers *v.* Standart, 11 Ohio St. 29. As to the matters discussed in the note (*d*), see 96, n. 1.

*Three days of grace apply equally, according to the *100 custom of merchants, to foreign and inland bills and

after this decision was made, the statute of 1 and 2 George IV. c. 77, was passed, declaring that an acceptance, payable at a particular place, had the effect of a general acceptance, and the holder was not bound to present the bill at any particular place, and the acceptor might be called on elsewhere, as well as at the place indicated. So far the rule was thrown back by statute into the situation in which it was placed by the K. B.; but the statute further provided, that if the bill was accepted, payable at a specified place *only, and not elsewhere*, it was then to be considered a qualified acceptance, and demand must be made at the specified place. The Supreme Court of the United States, in the U. S. Bank *v.* Smith, 11 Wheat. 171, were inclined to think that, as against the acceptor of a bill, or maker of a note, no averment or proof of demand of payment at the place designated in the instrument was necessary. They withheld a decided opinion on the point. But as against the indorser, such demand and proof were held to be indispensable. Afterwards, in Wallace *v.* M'Connell, 13 Peters, 136, the Supreme Court discussed the point upon a full examination of the American as well as English authorities, and settled the question. They held, that where a bill or note was made payable at a specified time and place, it was not necessary to aver in the declaration, or prove at the trial, that a demand for payment was made *at the time and place*. If the maker or acceptor was ready at the time and place to pay, that was matter of defence. This may now be considered as the law on the subject throughout the United States, (see *supra*, 97, and note (*e*); and also Eldred *v.* Hawes, 4 Conn. 465; Payson *v.* Whitcomb, 15 Pick. 212; Waite, J., in Jackson *v.* Packer, 13 Conn. 358; Sumner *v.* Ford, 8 Ark. 389,) though Mr. Justice Story (Story on Bills, [§ 356, n.]) thinks that it is difficult to maintain the doctrine upon principle; and in his Commentaries on Promissory Notes, p. 274, he says, that as a judge he dissented from the opinion of the Supreme Court, in 13 Peters, 136. In Fayle *v.* Bird, 2 Carr. & P. 303, it was held, that on a bill drawn, payable in London, presentment must be made at some place there; but it is stated in Selby *v.* Eden, 11 Moore, 518, that presentment need not be averred in the declaration. In Indiana they follow the rule, that if a promissory note be payable at a particular place, a demand of payment at that place must be averred and proved. 1 Blackf. 328. As evidence of the endless refinements and distinctions on this subject, we may refer to the case of Mitchell *v.* Baring, (4 Carr. & P. 35; 10 B. & C. 4, s. c.) where it was held, that if a bill, payable in London, be accepted for honor, to be paid if protested and refused when due, it must be protested at Liverpool, where the drawee resided. This decision led to the statute of 2 & 3 Wm. IV. c. 98, by which protest for nonacceptance of bills payable at any place other than the place therein mentioned as the residence of the drawee, may, without further presentment to the drawee, be protested for nonpayment in the place expressed by the drawer to be payable. In Picquet *v.* Curtis, 1 Sumner, 478, Mr. Justice Story considered the principle settled by the decision in the House of Lords, in the case of Rowe *v.* Young, as irresistible, and that in the case of foreign or inland bills made payable at a particular place, the demand and the dishonor must be there. But the decision in 13 Peters, above cited, settled the question the other way, and the whole current of American authorities, as referred to in that decision, are on the same side. In Folger *v.* Chase, 18 Pick. 63, it was held, that if a note be payable on demand at a specified bank, no demand need be made at any other place; and if left at the bank for collection, no specific demand is necessary. S. P. Bank U. S. *v.* Carneal, 2 Peters, 543; State Bank *v.* Napier, 6 Humph. 270. No demand

promissory notes, and as between the indorser and indor-
*101 see of a negotiable *note; (a) and the acceptor or maker has, within a reasonable time of the end of business, or bank hours of the third day of grace (being the third day
*102 after the paper falls due) *to pay. It has been said, (a) that the acceptor was bound to pay the bill on demand, on any part of the third day of grace, provided the demand be made within reasonable hours. Lord Kenyon thought otherwise. The question will be governed, in a degree, by the custom of the place; and if, in a commercial city, payments are made at banks, they must be made within bank hours. The maker or acceptor is entitled to the uttermost convenient time allowed by the custom of business of that kind, in the place where the bill is

need be made even at the place, to charge the maker of a note payable at a particular place, according to the law as declared in Arkansas. McKiel v. Real Estate Bank, 4 Pike, 592.

(a) Brown v. Harraden, 4 T. R. 148; Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beall, ib. 104; Crenshaw v. M'Kiernan, Minor (Ala.), 295; Fleming v. Fulton, 6 How. (Miss.) 473. The period of grace varies in different countries. In France, by the ordinance of 1673, tit. 5, art. 4, it was ten days; but by the new code, art. 135, all days of grace are abolished. In Massachusetts, a promissory note was held not entitled to grace, unless it be an express part of the contract. Jones v. Fales, 4 Mass. 245. But in 1824, by statute, the days of grace were given on all bills of exchange payable at sight, or on a future day certain, within the state, and on promissory negotiable notes, orders, and drafts, payable at a future day certain, within the state, in like manner as on foreign bills by the custom of merchants. The provision does not extend to bills, notes, or drafts payable on demand. The law was reënacted in the Revised Statutes of 1836. See, also, Perkins v. Franklin Bank, 21 Pick. 483. In the State of Maine, by statute of 1824, c. 272, the drawer of inland bills of exchange, and the indorser of a promissory note, as well as the acceptor and maker, are entitled to three days of grace, if the bill or note be discounted by a bank, or left there for collection. Foreign bills are governed by the usage of merchants, and the acceptor has the three days of grace without any statute provision. In Vermont, on the other hand, the days of grace were taken away, by statute, in 1833. In New Hampshire, the three days of grace are allowed to the maker of a negotiable note. Dennie v. Walker, 7 N. H. 199. In Broddie v. Searcy, Peck (Tenn.), 183, the law-merchant and the three days of grace were considered applicable to negotiable promissory notes, and applied with as much accuracy and strictness as in the most commercial states. The period of the days of grace is determined by the usage of the place on which the bill is drawn, and where payment is to be made. Story on Bills, [§§ 177, 334;] 1 Bell's Comm. 411. And it may be considered as the common law-merchant throughout the United States, in the absence of any particular or special usage to the contrary, that three days of grace are allowed on bills of exchange and promissory notes. This was so declared in Wood v. Corl, 4 Met. 203.

(a) Buller, J., 4 T. R. 174. The opinion of Buller, J., has been adopted in Greeley v. Thurston, 4 Greenl. 479. See, also, Story on Bills, [§§ 286, 328;] Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 Maule & S. 28; Chitty on Bills, 421.

presented, and he is not entitled to any further time. (*b*) If the third day of grace falls on Sunday, or a great holiday, as the Fourth of July, or a day of public rest, the demand must be made on the day preceding. (*c*) The three days of grace apply equally to bills payable at sight,[1] or at a certain time; (*d*) but a bill,

(*b*) It was held, in Osburn *v.* Moncure, 8 Wend. 170, that the maker had the whole of the third day of grace to make payment, if he thinks proper to seek the holder. So, if a presentment of a bill for payment be to a private individual, and not to a bank or banker, it is sufficient to make the demand in the evening of the day of payment. Triggs *v.* Newnham, 10 Moore, 249; Cayuga County Bank *v.* Hunt, 2 Hill, 635; Story on Bills, [§ 349.] It is settled in Massachusetts, after a full discussion, that the maker of a promissory note is bound to pay it upon demand made at any seasonable or reasonable hour of the last day of grace, and may be sued on that day if he fail to pay on such demand. The court, upon an examination of authorities, say, that the weight of them is in favor of this conclusion. Staples *v.* Franklin Bank, 1 Met. 43. This is also the settled rule in Maine, New Hampshire, and South Carolina. [McKenzie *v.* Durant, 9 Rich. 61; Ammidown *v.* Woodman, 31 Me. 580; Veazie Bank *v.* Paulk, 40 Me. 109; Pine *v.* Smith, 11 Gray, 38, 40; *ante*, 91, n. 1. (See Gordon *v.* Parmelee, 15 Gray, 413; Estes *v.* Tower, 102 Mass. 65.) *Contra*, Wiggle *v.* Thomason, 11 Smedes & M. 452.] This is equally the case as to inland bills. Chitty on Bills, c. 9, p. 432; *Ex parte* Moline, 19 Ves. 216; Burbridge *v.* Manners, 3 Camp. 193.

(*c*) Tassell *v.* Lewis, 1 Ld. Raym. 743; Jackson *v.* Richards, 2 Caines, 343; Lewis *v.* Burr, 2 Caines Cas. 195; Bussard *v.* Levering, 6 Wheat. 102; Fleming *v.* Fulton, 6 How. (Miss.) 473; Statute of Massachusetts, 1838, c. 182; Act of Louisiana, 1838, No. 52. The usage is settled in commercial matters, that if the day of payment falls on Sunday, payment is to be made on Saturday; and in Kilgour *v.* Miles, 6 Gill & Johns. 268, it was held that the same rule applied to all other contracts. But the weight of authority is the other way, and in all contracts, except where the three days of grace are allowed by the custom of merchants, if the day of performance falls on Sunday, the performance may be on Monday. Avery *v.* Stewart, 2 Conn. 69; Salter *v.* Burt, 20 Wend. 205. By statute in Vermont, 1837, if a contract falls due on Sunday, it is payable on Monday; and though a paper be not entitled to grace, and falls due on Sunday, yet if by *usage of the place* such a note becomes payable on the preceding Saturday, that usage prevails and governs. Osborne *v.* Smith, N. Y. Superior Court, December, 1836; Kilgore *v.* Bulkley, 14 Conn. 362. Though the days of grace may be shortened by the falling of the last day of grace on Sunday or other holiday, they are never protracted by the intervention of such days. Story on Bills, [§ 338.]

(*d*) Coleman *v.* Sayer, 1 Barnard. 303; Bayley on Bills, 151; Chitty on Bills, 344, 345; Dehers *v.* Harriot, 1 Show. 163; J'Anson *v.* Thomas, cited in Chitty on Bills, [377.] On the other hand, though the weight of authority would seem greatly to preponderate in favor of the rule as laid down in the text, yet it may be consid-

[1] Hart *v.* Smith, 15 Ala. 807; Knott *v.* Venable, 42 Ala. 186; Craig *v.* Price, 23 Ark. 633, Cribbs *v.* Adams, 18 Gray, 597. *Contra*, Trask *v.* Martin, 1 E. D. Smith, 505. See Nimick *v.* Martin, 7 West. L. J. 380. The allowance of days of grace on bills payable at sight is regulated by statute in many states. Walsh *v.* Dart, 12 Wis. 635; Ball *v.* Sackett, 38 Cal. 407; Spooner *v.* Rowland, 4 Allen, 485, 487.

*103 note, or check payable on demand, * or where no time of payment is expressed, is payable immediately on presentment, and is not entitled to the days of grace. (*a*) A bill, payable at so many days' sight, means so many days after legal sight or acceptance; (*b*) and when the time is to be computed by days, as so many days after date, or after sight, the day of the date of the instrument is, by the modern practice, excluded from the computation. (*c*)

It is equally unseasonable to demand payment before the expiration of the third day of grace, as after the day. (*d*) The demand must be made on the third day of grace, or on the second, if the third day be a day of public rest; and in default of such demand, the drawer of the bill and the indorser of the note are discharged. (*e*) If, however, a note be made for negotiation, at a

ered as a point not entirely settled, and a different rule is laid down in Beawes's L. M. pl. 256; and in Kyd on Bills, 10. In France, while days of grace were allowed under the ordinance of 1673, Pothier agreed with M. Jousse, in his commentary, that a bill payable at sight had no days of grace; and he justly observed, that it would be unreasonable and inconvenient for a person who takes a draft, for his accommodation, on a journey, payable at sight, to be obliged to wait the days of grace for his money. Traité du Con. de Change, art. 172.

(*a*) Cammer *v.* Harrison, 2 M'Cord, 246; Bayley on Bills, 141; Chitty on Bills, 5th ed. 336, 345; Sommerville *v.* Williams, 1 Stewart (Ala.), 484. So if a note be payable on 1st May *fixed*, it means that no days of grace are intended, and there are none allowed. Durnford *v.* Patterson, 7 Martin (La.), 460.

(*b*) Mitchell *v.* Degrand, 1 Mason, 176. If a bill payable at so many, say sixty days' sight, *be accepted, payable on a given day, say November 8d*, in which the three days of grace were in fact included, though the day of acceptance did not appear on the bill, the demand is to be made on the day specified in the acceptance. The acceptor is bound to that day, and it being, in point of fact the true day, the drawer and indorsers would also be bound, on protest and due notice of default of payment on that day. Kenner and Others *v.* Their Creditors, 20 Martin (La.), 86; 1 La. 280, s. c.

(*c*) Bayley on Bills, 155; Chitty on Bills, 406, 412; Story on Bills, [§§ 329, 335.] A note payable by instalments is a good negotiable note, and the maker is entitled to the days of grace upon the falling due of each instalment Oridge *v.* Sherborne, 11 M. & W. 374.

(*d*) No usage or agreement, tacit or express, of the parties to a note, will accelerate the time of payment, and bind the maker to pay it at an *earlier* day than that fixed by law. Mechanics' Bank *v.* Merchants' Bank, 6 Met. 18.

(*e*) Coleman *v.* Sayer, Str. 829; Wiffen *v.* Roberts, 1 Esp. 261; Leavitt *v.* Simes,

As to checks, see 88, n. 1. As to the effect of lapse of time without demand on paper payable on demand, see 91, n. 1. Keyes *v.* Fenstermaker, 24 Cal. 329; Goodwin *v.* Davenport, 47 Me. 112; Chartered Merc. Bank of India, L., and China *v.* Dickson, L. R. 8 P. C. 574.

bank whose custom is to demand payment, and to give notice on the fourth day, that custom forms a part of the law of the contract, and the parties are presumed to agree to be governed, in that case, by the usage. (*f*) The *same rule applies *104 when a bank, by usage, treats a particular day as a holiday, though not legally known as such, and make demands, and gave notice, on the day preceding; the parties to a note discounted there, and conusant to usage, are bound by it. (*a*) Though a bill, payable at a given time, has never been presented to the drawee for acceptance, the demand upon the drawee for payment is to be made on the third day of grace; for, by the usage of the commercial world, which now enters into every bill and note of a mercantile character, except where it is positively excluded, a bill does not become due on the day mentioned on its face, but on the last day of grace. (*b*)

7. **Of Notice to Drawer and Indorser.** — There is no part of the learning relating to negotiable paper that has been more critically discussed, or in which the rules are laid down with more precision, than that which concerns the acts requisite to fix the responsibility of the drawer and indorsers, and the acts and omissions which will operate to discharge them. True policy consists in establishing some broad, plain rules, easy to be understood, and steady in their obligation.

The holder must not only show a demand, or due diligence to get the money of the acceptor of the bill or check, and of the maker of the note, but he must give reasonable notice of their default to the drawer and indorsers, or to their regularly author-

3 N. H. 14; Mills *v.* United States Bank, 11 Wheat. 431. A bill, payable at so many days after date, must be presented by the period of its maturity. If payable on demand, or at sight, or at so many days after sight, it must be presented in a reasonable time, under the circumstances. Story, J., 4 Mason, 345; Story on Bills, [§ 325.] In Grant *v.* Long, 12 La. 402, it was held, that a bill of exchange, payable ninety days after date, must be presented for payment the day it became due, or the drawer would be discharged. The court held to the rule so strictly, as not even to admit any excuse, even of two days from the last day of grace, derived from the irregularities of the mail. See *supra*, p. 82.

(*f*) Renner *v.* Bank of Columbia, 9 Wheat. 581; Mills *v.* United States Bank, 11 id. 431; Bank of Washington *v.* Triplett, 1 Peters, 25; Bank of Columbia *v.* Fitzhugh, 1 Harr. & G. 239; Planters' Bank *v.* Markham, 5 How. (Miss.) 397; s. p. 6 Harr. & J. 180; 14 Mass. 303; 17 id. 452; 3 Conn. 489.

(*a*) City Bank *v.* Cutter, 3 Pick. 414.

(*b*) Bank of Washington *v.* Triplett, 1 Peters, 25.

ized agent, to entitle himself to a suit against them. (c)
*105 The indorser, to whom notice *is duly given, is liable, although notice be not given by the holder to the drawer, or a prior indorser, and this is the case equally as to foreign and inland bills and checks. The indorsement is equivalent to making a new bill, and the holder may resort to him, without calling on any of the other parties; and it is the business of the indorser, on receiving notice, to give like notice to the drawer, and all

(c) Heylyn *v.* Adamson, 2 Burr. 669; Rushton *v.* Aspinall, Doug. 679; Williams *v.* United States Bank, 2 Peters, 96. The demand and notice to the indorser are equally requisite, though he indorse the note after it is due. Stockman *v.* Riley, 2 M'Cord, 398; Poole *v.* Tolleson, 1 id. 199. Notice to an agent having general power to transact the business of his principal is good, if the principal be abroad, but not if the agent has only certain special powers. De Lizardi *v.* Pouverin, 4 Rob. (La.) 394. Notice to the *legal representative* is good, if the party be dead, and the notary does not know who is the executor or administrator. Pillow *v.* Hardeman, 8 Humph. 538. Notice is not good unless a protest of the bill or note precede the not[ic]e. Union Bank of Louisiana *v.* Fonteneau, 12 Rob. (La.) 120. In Harker *v.* Anderson, 21 Wend. 372, Mr. Justice Cowen concludes upon a critical examination of the cases, that a *check* is, to all essential purposes, a bill of exchange, and that the holder must use due diligence to present it to the drawee for payment, before he can charge either the drawer or indorser, both of whom stand in the light of sureties; that nothing would excuse the want of this diligent presentment but the absence of funds in the hands of the drawee when the check was drawn, or fraud in the drawer in abstracting the funds. The court itself gave no opinion on the point. But I apprehend that this doctrine as to checks may be questioned. A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case, the holder takes the risk of the failure of the person or bank on which the check is drawn. This is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser. See Story on Promissory Notes, [§§ 490, 498, n.] to the same point. It is true, however, that there is so much analogy between checks and bills of exchange, and negotiable notes, that they are frequently spoken of without discrimination, as see *ante*, 75, 77, 78, 104. Since the above case in 21 Wendell, the distinction between checks and notes has been judicially settled in Little *v.* Phœnix Bank, 2 Hill (N. Y.), 425, and held, that as between drawer and holder of a check, delay in presenting it did not discharge the maker, unless loss be shown; but that between the holder and indorser of a check, the usual diligence was requisite. The case of Kemble *v.* Mills, 1 Mann. & G. 757, is to the same effect, and that want of notice of the dishonor of a check is excused, if the maker had no right to draw, or *the holder had received no damage from want of notice.* S. P. Robinson *v.* Hawksford, [9 Q. B. 52.[1]]

[1] As to the law of checks, see 88, n. 1; 78, n. 1; 91, n. 1.

persons to whom he means to resort. (*a*) The object of the notice is to afford an opportunity to the drawer and indorsers to obtain security from those persons to whom they are entitled to resort for indemnity. Notice to one of several partners, or to one of several joint drawers or indorsers, is notice to them all. (*b*) [1]

(*a*) Bomley *v.* Frazier, Str. 441; Heylyn *v.* Adamson, 2 Burr. 669; Rickford *v.* Ridge, 2 Camp. 539; Chitty on Bills, c. 10, 580.

(*b*) Porthouse *v.* Parker, 1 Camp. 82; Harris *v.* Clark, 10 Ohio, 5. Judge Story, in his Treatise on Bills, [§§ 305, 362, 389,] says, that notice to each joint drawer or indorser, if they be not partners, is requisite to bind them, and that notice to one is not sufficient for all. The case before Lord Ellenborough is one where the bill was accepted by one of three defendants, who do not appear by the case to be mercantile partners, and the dishonor of it was of course known to him, and the Chief Justice said, that the knowledge of one was the knowledge of all. The case is very brief and loose; but the decision in Ohio was to the very point, and on due consideration, the court said, that the three joint and several promisors were in the light of partners in that particular transaction. But still I think it may be questioned whether the better doctrine be not in favor of notice to each joint maker or drawer, when they are not regular partners. That is the judgment, after an elaborate discussion in Shepard *v.* Hawley, 1 Conn. 367; and see, also, Bank of Chenango *v.* Root, 4 Cowen, 126; Willis *v.* Green, 5 Hill (N.Y.), 232; Union Bank *v.* Willis, 8 Met. 504; Dabney *v.* Stidger, 4 Smedes & M. 749, to the s. p.; Story on Promissory Notes, [§ 256]. The holder of the bill or note is not bound to give notice of nonpayment to any of the indorsers, except those he intends to charge, and the indorser who has notice must give his prior indorsers notice, if he intends to look to them for indemnity. Bayley on Bills, 228; Valk *v.* Bank of the State, McMullan, Eq. 414; Carter *v.* Bradley, 19 Me. 62. Mr. Justice Story (Story on Bills, [§ 272]) is of opinion that in the case of a qualified or conditional acceptance, a due protest and notice to the antecedent parties is still requisite in order to bind them, though the conditions be complied with before the bill becomes payable. For this he cites Pothier, (De Change, n. 47, 48,) in opposition to Bayley and Chitty on Bills.

[1] *Notice. — Who should receive.* — The text is confirmed as to partners by Bouldin *v.* Page, 24 Mo. 594; and if one dies, notice should be given to the survivor to bind the firm; Slocomb *v.* Lizardi, 21 La. An. 855; and to the executor of the deceased to bind him. Cocke *v.* Bank of Tennessee, 6 Humph. 51. But as suggested in note (*b*), it is held that joint owners of a note, not partners, who jointly indorse the same, must both have notice, to charge both, and perhaps to charge either. State Bank *v.* Slaughter, 7 Blackf. 133; Miser *v.* Trovinger, 7 Ohio St. 281. (So demand must be made on all the joint makers of a note, in order to charge the indorser. Arnold *v.* Dresser, 8 Allen, 435.) And if one partner is the maker and another the indorser of a note, the latter must have notice. Foland *v.* Boyd, 28 Penn. St. 276.

The indorser of an overdue note is as much entitled to notice as if it had been indorsed before maturity. Tyler *v.* Young, 30 Penn. St. 143. And one who has transferred a note without becoming liable as indorser, but who is chargeable on the ground of failure of consideration, &c., stated *ante*, 88, n. 2, has been thought entitled to notice of dishonor. Byles on B. 10th ed. 290; Turner *v.* Stones, 1 Dowl. & Lowndes, 122, 131. See Smith *v.* Mercer, L. R. 3 Ex. 51; Hopkins *v.* Ware, *ante*, 88, n. 1. At least the note must not be kept for an unreasonable

What is reasonable notice to the drawer or indorser is sometimes said to be a question of law, and at other times to be a question

time after discovery of its worthlessness, to the prejudice of the vendor's position in respect of other parties. Pooley *v.* Brown, 11 C. B. N. S. 566; Robson *v.* Oliver, 10 Q. B. 704.

When and to what Place to be sent. — The doctrine of the text, 106 and note (*c*), is sustained by Prideaux *v.* Criddle, L. R. 4 Q. B. 455, 461; Fitchburg Bank *v.* Perley, 2 Allen, 433; True *v.* Collins, 3 Allen, 438; West River Bank *v.* Taylor, 34 N. Y. 128. But the safest course is for the holder to give notice himself to all the parties against whom he may wish to proceed; in which case he must give it within the time allowed him for giving it to his immediate indorser. Rowe *v.* Tipper, 18 C. B. 249; Byles on Bills, ch. 22, at that case. The general rule is the same although the paper is indorsed from one to another agent for collection merely. Farmers' Bank of Bridgeport *v.* Vail, 21 N Y. 485; Woodland *v.* Fear, 7 El. & Bl. 519, 522. Cf. Hare *v.* Henty, *ante*, 88, n. 1; and the same principle is applied in determining who is holder for the purpose of giving notice. Bowling *v.* Harrison, 6 How. 248; West River Bank *v.* Taylor, 34 N. Y. 128; Manchester Bank *v.* Fellows, 8 Fost. (28 N. H.) 802, 811; Greene *v.* Farley, 20 Ala. 822; Wamesit Bank *v.* Buttrick, 11 Gray, 887; *post*, 108, n. (*d*). But see *In re* Leeds Banking Co., L. R. 1 Eq. 1, as to which Mr. Justice Byles observes that the earlier decisions were not brought under the notice of the Vice-Chancellor; and United States *v.* Barker, 2 Paine, 340.

The question of what is a reasonable time is said (in Byles on Bills, ch. 22, 5th Am. ed. [274]) to be a question of law depending on the facts of each particular case, and the American note states that the American cases go the same way with remarkable unanimity. Walker *v.* Stetson, 14 Ohio St. 89; Linville *v.* Welsh, 29 Mo. 203. See Wiggins *v.* Burkham, 10 Wall. 129. So as to due diligence in general, Lambert *v.* Ghiselin, 9 How. 552; Bennett *v.* Young, 18 Penn. St. 261; Smith *v* Fisher, 24 Penn. St. 222; Bell *v.* Hagerstown Bank, 7 Gill, 216, 231; Hunt *v.* Maybee, 8 Seld. (7 N. Y.) 266, 274; Brighton Market Bank *v.* Philbrick, 40 N. H. 506, 509. See Porter *v.* Judson, 1 Gray, 175; Gray *v.* Bell, 2 Rich. 67, 72. But compare Wyman *v.* Adams, 12 Cush. 210; Burmester *v.* Barron, 17 Q. B. 828. See 109, n. 1, and note on negligence, *ante*, ii. The rule is said to be that if the parties do not reside in the same place, and notice is sent by mail, it may be sent on the day of the default, and it must be put into the post-office in time to go by one of the mails which leave the next secular day after dishonor, provided the mail of that day is not closed at an unreasonably early hour. But it need not necessarily be sent in time for the first one, and if the mail be closed before a reasonable time after early business hours on the day after dishonor, or if there be no mail sent out on that day, then the notice must be deposited in time for the next possible post thereafter. Lawson *v.* Farmers' Bank, 1 Ohio St. 206; Stephenson *v.* Dickson, 24 Penn. St. 148; Mitchell *v.* Cross, 2 R. I. 437; Manchester Bank *v.* Fellows, 8 Fost. (28 N. H.) 802; Burgess *v.* Vreeland, 4 Zabr. 71; Knott *v.* Venable, 42 Ala. 186; West River Bank *v.* Taylor, 34 N. Y. 128, 136; Haskell *v.* Boardman, 8 Allen, 38. See Gladwell *v.* Turner, L. R. 5 Ex. 59. When both parties live in the same place, notice must be given in time *to be received* in the course of the day following the day of dishonor. Byles on B. ch. 22, 10th ed. 281, citing Scott *v.* Lifford, 9 East, 347, and other cases. It has been held that in a large commercial city, at least when the distance is considerable, it is sufficient to put the notice into the post, if in the ordinary course it would arrive within the required time, although it is not

of fact. The question of reasonable notice is usually compounded of law and fact, and is a matter dependent upon the circumstances

in fact received. Walters *v.* Brown, 15 Md. 285; Paton *v.* Lent, 4 Duer, 231; Shoemaker *v.* Mechanics' Bank, 59 Penn. St. 79. See Shaylor *v.* Mix, 4 Allen, 351, 352; Foster *v.* Sineath, 2 Rich. 338; Costin *v.* Rankin, 3 Jones (N. C.), 387, 390; Remington *v.* Harrington, 8 Ohio, 507, 510; Shelburne Falls N. Bank *v.* Townsley, 102 Mass. 177; Gladwell *v.* Turner, L. R. 5 Ex. 59. But see Hunt *v.* Maybee, 8 Seld. 266, 271, and cases cited below. This is sometimes regulated by statute. Randall *v.* Smith, 34 Barb. 452. And notice may be left at the post-office to which it is addressed, if the person to whom it is addressed does not live in the place, but only receives his letters there. Barret *v.* Evans, 28 Mo. 331; Nevins *v.* Bank of Lansingburgh, 10 Mich. 547; Bondurant *v.* Everett, 1 Met. (Ky.) 658; New Orleans Canal & B. Co. *v.* Barrow, 2 La. An. 326. But it is generally thought not to be sufficient, in the case of the smaller towns, to leave notice at the post-office of the town in which the person to whom it is addressed resides, especially when there does not appear to have been a penny-post, unless the notice was actually received, and in season. Manchester Bank *v.* Fellows, 8 Fost. (28 N. H.) 302, 310; Bowling *v.* Harrison, 6 How. 248; Hyslop *v.* Jones, 3 McL. 96; Shaylor *v.* Mix, 4 Allen, 351; Cabot Bank *v.* Warner, 10 Allen, 522; Vance *v.* Collins, 6 Cal. 435; Davis *v.* Bank of Tennessee, 4 Sneed. 390; Costin *v.* Rankin, *sup.*; Bowling *v.* Arthur, 34 Miss. 41. See, further, Van Vechten *v.* Pruyn, 3 Kern. (13 N. Y.) 549. The language of some of the above cases is very strong, and hardly leaves room for the exception of large cities above indicated.

The holder may avail himself of notice sent through the post to an indorser living in the same place with himself, by an intermediate indorser living elsewhere. West River Bank *v.* Taylor, 34 N. Y. 128; True *v.* Collins, 3 Allen, 438.

The cases on the points mentioned *post*, 107, n. (*d*), are numerous. As to what distance of the post-office from the party's residence is not too great, see Foster *v.* Sineath, 2 Rich. 338. As to what post-office notice may be sent to, Van Vechten *v.* Pruyn, 3 Kern. (13 N. Y.) 549; Seneca Bank *v.* Neass, 5 Denio, 330; 3 Comst. 442; Montgomery County Bank *v.* Marsh, 3 Seld. (7 N. Y.) 481; Morton *v.* Westcott, 3 Cush. 425; Cabot Bank *v.* Russell, 4 Gray, 167; Manchester Bank *v.* White, 10 Fost. (30 N. H.) 456; Woods *v.* Neeld, 44 Penn. St. 86; Bank of La. *v.* Tournillon, 9 La. An. 132.

When the indorser writes the name of a place after his signature, it is taken as a direction to send notice to that address; and it is sufficient, and perhaps necessary, to follow the direction. Bartlett *v.* Robinson, 9 Bosw. 305; Baker *v.* Morris, 25 Barb. 138; Morris *v.* Husson, 4 Sandf. 98; Davis *v.* Bank of Tennessee, 4 Sneed, 390. So as to prior parties, at least if the direction does not cause a loss of time and put them in a worse situation. Shelton *v.* Braithwaite, 8 M. & W. 252, 255. So, sending notice to a drawer, addressed as the bill is dated, is at least evidence from which a jury may find due diligence, unless the holder knows that the drawer lives elsewhere. Burmester *v.* Barron, 17 Q. B. 828; Pierce *v.* Struthers, 27 Penn. St. 249. But see Carroll *v.* Upton, 3 Comst. 272; Runyon *v.* Montfort, Busbee, 371.

Sufficiency of the Contents. — The true rule is thought to be that where a notice of dishonor conveys expressly or impliedly an intimation intelligible to ordinary understandings of dishonor, and of demand of payment, the notice is sufficient. Byles on Bills, ch. 22, 10th ed. 275 (after commenting on Solarte *v.* Palmer, 108 (*c*), & 1 Bing. N. C. 194); Paul *v.* Joel, 4 Hurlst. & N. 355; 8 id. 455; Burkam *v.* Trowbridge, 9 Mich. 209; Burgess *v.* Vreeland, 4 Zabr. 71.

The notice must not so misdescribe

of each particular case, and proper for the decision of a jury, under the advice and direction of the court; and the mixed question requires the application of the powers of the court and jury. (*c*) The elder cases did not define what amounted to due diligence in giving notice of the dishonor of a bill, with that exactness and certainty which practical men and the business of life required. According to the modern doctrine, the notice must be given by the first direct and regular conveyance; and if to the drawer, it must be according to the law of the place where the bill was drawn, and if to the indorsers, according to the law of the place where the respective indorsements *106 were made. (*d*) This means the first *mail that goes

(*c*) Tindal *v.* Brown, 1 T. R. 167; Darbishire *v.* Parker, 6 East, 3; Hilton *v.* Shepard, 6 East, 14, *in notis*; Bateman *v.* Joseph, 12 East, 433; Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 273; Mar. Ins. Co. *v.* Ruden, ib. 338; Taylor *v.* Bryden, 8 Johns. 173; Story on Bills, [§ 286.] In Brahan *v.* Ragland, Minor (Ala.), 85, what is reasonable notice to an indorser was held to be a question of fact for a jury. In Aymar *v.* Beers, 7 Cowen, 705; The Bank of Columbia *v.* Lawrence, 1 Peters, 578; and Remer *v.* Downer, 23 Wend. 620, it was held, that the reasonableness of notice, or demand, or due diligence, when the facts were settled, was a question of law for the court, and not a question of fact for a jury. But the question is so mixed up with circumstances, and is so compounded of the ingredients of law and fact, that it will be found, in practice, very difficult to retain on the bench the exclusive jurisdiction of the question. In Ohio, by act of 1820, bonds, bills, and notes for money, and payable to order or bearer or assigns, are declared to be negotiable by indorsement thereon, so as to enable the assignee to sue in his own name; and if demand be made at the time the same becomes due, or *within a reasonable time thereafter*, it shall be adjudged *due diligence*, sufficient to charge the indorser. Statutes of Ohio, 1831; Chase's Statutes of Ohio, ii. 1187.

(*d*) Story on Bills, [§ 285.] Until an act of the Assembly, since 1828, in Louisiana, the post-office was not, in that state, a proper place of deposit for notice to indorsers.

the instrument that the defendant may be led to confound it with some other. Cook *v.* Litchfield, 5 Seld. (9 N. Y.) 279. Compare Hodges *v.* Shuler, 22 N. Y. 114; Bank of Cooperstown *v.* Woods, 28 N. Y. 545, 561; Artisans' Bank *v.* Backus, 36 N. Y. 100, 104. And it must reasonably apprise the party of the particular paper on which he is sought to be charged. Thus the omission of the maker's name has been held to invalidate it. Home Ins. Co. *v.* Green, 19 N. Y. 518. But a misdescription or other error which does not mislead is immaterial. Bromage *v.* Vaughan, 9 Q. B. 608; Mellersh *v.* Rippen, 7 Exch. 578; Dennistoun *v.* Stewart, 17 How. 606; Tobey *v.* Lennig, 14 Penn. St. 488; Gill *v.* Palmer, 29 Conn. 54. A notice without date and not stating the day of protest has been held sufficient. Artisans' Bank *v.* Backus, 36 N. Y. 100; see Youngs *v.* Lee, 12 N. Y. 551. But see Wynn *v.* Alden, 4 Denio, 163. But a notice stating that the note was protested for nonpayment at a date which was before the note fell due has been held insufficient. Etting *v.* Schuylkill Bank, 2 (Barr) Penn. St. 355; Townsend *v.* Lorain Bank, 2 Ohio St. 345. See further Armstrong *v.* Thruston, 11 Md. 148, 157.

after the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice *may*, indeed, be sent on Thursday, but *must* be put into the post-office or mailed on Friday, so as to be forwarded as soon as possible thereafter; and if the parties live in the same town, the rule is the same, and the notice must be sent by the penny-post, or placed in the office on Friday. (*a*) The law does not require excessive diligence, or that the holder should watch the post-office constantly, for the purpose of receiving and transmitting notices. Reasonable diligence and attention is all that the law exacts; (*b*) and it seems to be now settled, that each party successively, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice. (*c*) [1] If the demand be made on Saturday, it is

19 Martin, 491. It is not now, in those post-towns where the indorser lives within three miles of the post-office, and there is no penny-post establishment. Louisiana State Bank *v.* Rowel, 18 id. 506; Clay *v.* Oakley, 17 id. 137. This is also the rule in Tennessee, and notice through the post-office is not sufficient under like circumstances. Bank *v.* Bennett, 1 Yerg. 166. In Louisiana, if the residence of the party to be charged cannot be found, after due inquiry, notice lodged at the nearest post-office, addressed to the party at the place where the contract was made, is sufficient. Preston *v.* Daysson, 7 La. 7.

(*a*) Corp *v.* M'Comb, 1 Johns. Cas. 328; Bussard *v.* Levering, 6 Wheat. 102, 104; Johnson *v.* Harth, 1 Bailey (S. C.), 482; Shed *v.* Brett. 1 Pick. 401; Osborn *v.* Moncure, 8 Wend. 170; Minor (Ala.), 295; Talbot *v.* Clark, 8 Pick. 54; Bixby *v.* Franklin Ins. Co., ib. 86; United States *v.* Barker, 4 Wash. 464; Townsley *v.* Springer, 1 La. 122, 515; Williams *v.* Smith, 2 B. & Ald. 496; Farmers' Bank of M. *v.* Duvall, 7 Gill & J. 78; Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487; Carter *v.* Burley, 9 N. H. 558.

(*b*) In North Carolina the rule respecting notice is made to vary with the pursuits of the parties, and the same strictness is not required between farmers in the country as between merchants in town. The reasonableness of notice, or due diligence, is to be left to the jury, under the direction of the court. Brittain *v.* Johnson, 1 Dev. (N. C.) 298.

(*c*) Bray *v.* Hadwen, 5 Maule & S. 68; Flack *v.* Green, 3 Gill & J. 474; Brown *v.* Ferguson, 4 Leigh, 37; Williams *v.* Smith, 2 B. & Ald. 500, 501; Langdale *v.* Trimmer, 15 East, 291; Farmer *v.* Rand, 16 Me. 453; Carter *v.* Bradley, 19 Me. 62; Carter *v.* Burley, 9 N. H. 558; Johnson *v.* Harth, 1 Bailey (S. C.), 482; Grand Gulf R.R. & Banking Company *v.* Barnes, 12 Rob. (La.) 127. In this last case it is adjudged that it is sufficient for the holder to give notice to his immediate indorser, or the one whom he intends to hold liable, leaving it to the latter to notify the next indorser, and so on to the drawer, one day being allowed to each party to notify his immediate indorser or the drawer. The same rule exists if the bill or note be sent by the holder to his agent for collection, and it is sufficient if the latter gives timely notice of its dishonor to his principal, and a notice from the principal, seasonably sent, will be sufficient to charge any prior indorser.[1]

[1] See 105, n. 1.

sufficient to give notice to the drawer or indorser on Monday; (*d*) and putting the notice by letter into the post-office is suf-

(*d*) Jackson *v.* Richards, 2 Caines, 343; [Williams *v.* Matthews, 3 Cowen, 252;] Lord Alvanley, in Haynes *v.* Birks, 3 Bos. & P. 601. Notice may be given on Sunday, but the indorser is not bound to open the letter or act on it until the next day. Bayley on Bills, ed. 1836, 265, 266. In Hawkes *v.* Salter, 4 Bing. 715, and Bray *v.* Hadwen, 5 Maule & S. 69, and Geill *v.* Jeremy, 1 Moody & M. 61, it was held, that the holder had, in such a case, *the whole* of Monday to write the notice, and that a letter by the Tuesday morning post was sufficient. This is now the English rule, and it appears to be a more definite construction, or else a relaxation of the strictness required by the former rule. See Haynes *v.* Birks, 3 Bos. & P. 599; Jameson *v.* Swinton, 2 Taunt. 224. See, also, *supra*, 88, n. (*c*); Smith's Compendium of Mercantile Law, 147. The latter says, that if A draws a bill in favor of B, who indorses to C, and demand and refusal be made on Monday, C has all Tuesday to give notice to B; and if there had been a prior indorser, B has all Wednesday to give notice to him, and Sunday is not included in any of the computations. In Lenox *v* Roberts, 2 Wheat. 373, the rule was laid down too strictly, when it stated that the demand of payment should be made upon the last day of grace, and notice of the default be put into the post-office *early enough to be sent by the mail of the succeeding day*. This rule is mentioned, and, as it would seem, with approbation by the court, in the case of the Bank of Alexandria *v.* Swann, 9 Peters, 33; but the decision only is, that notice need not be put in the post-office *on the day of default*, and it is sufficient to send it by the mail on the next day. This leaves the point to rest on the former decision; and yet the principle declared is, that ordinary reasonable diligence is sufficient, and the *law does not regard the fractions of the day in sending notice*. This principle will sustain the rule as it is now generally and best understood in England and in the commercial part of the United States, that notice put into the post-office on the next day, *at any time of the day*, so as to be ready for the first mail that goes *thereafter*, is due notice, though it may not be mailed in season for to go by the mail *of the day after the default*. So, in Firth *v.* Thrush, 8 B. & C. 387, an attorney was employed to give notice. He was not informed of the indorser's residence for several weeks after the bill was dishonored, though he had used due diligence. He then took a day to consult the holder before he sent the notice; and it was held to be a valid notice. In Downs *v.* Planters' Bank, 1 Smedes & M. 261, the strict rule is declared to be, that if notice is to be sent by the mail, it must be put into the post-office in time to go by the mail the day next succeeding the protest, if a mail goes on that day, unless it leaves the place at an unreasonable early hour, and that a large majority of the cases above cited in this note support that rule. According to this decision, and for which I feel great respect, I have perhaps given too much latitude in the preceding part of this note to some of the cases. Wemple *v.* Dangerfield, 2 id. 445, S. P. See, also, Beckwith *v.* Smith, 22 Me. 125 to S. P. This last case required that the notice of the dishonor of a bill should be placed in the post-office in season to be carried by the mail of the next day after the bill was dishonored. See, also, Darbishire *v.* Parker, 6 East, 3–10. This vexed question, as to the reasonableness of notice, was largely discussed in Chick *v.* Pillsbury, 24 Me. 458, and it was decided that the law allowed *a convenient time after business hours of the day next succeeding* that of the dishonor of the bill. Mr. Justice Shepley made an elaborate and able argument against this relaxation of the rule, and he supported the doctrine laid down in Bayley on Bills, 2 Am. ed. 362, and in Chitty on Bills, 8th Am. ed. 514, in favor of the rule that notice must be given by the expiration of the day following that of the refusal or dishonor of the bill, whether the post sets off early or

ficient, though the letter *should happen to miscarry. If *107 the holder uses the ordinary mode of conveyance, he is not required to see that the notice is brought home to the party. (*a*) Nor is it necessary to send by the public mail. The notice may be sent by a private conveyance, or special messenger; and it would be good notice, though it should happen to arrive on the same day, a little behind the mail. (*b*) Where the parties live in the same town, and within the district of the letter-carrier, it is sufficient to give notice by letter through the post-office. If there be no penny-post that goes to the quarter where the drawer lives, the notice must be personal, or by a special messenger sent to his dwelling-house or place of business, and the duty of the holder does not require him to give him notice at any other place. (*c*) The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still the notice may be left there. If the parties live in different towns or states, the letter must be

late, and that *the entire day*, without regard to the departure of the mail, is an unwarrantable extension of the rule. If the party resides in the same place, the notice must be given at the proper hour of that day, and if in another place, then *by the post of that day*. He says that the opinion of Ch. J. Best, in 4 Bing. 715, is the only one that sustains the rule I have suggested in this note, and that the observations of Mr. Justice Story were too latitudinary in allowing *the entire whole day* next after the dishonor. It is to be regretted that the time of giving the notice is not more uniformly, certainly, and definitively defined. I apprehend that the weight of authority is in favor of the view of the rule as taken by Mr. Justice Shepley.

(*a*) Dickins *v.* Beal, 10 Peters, 572; [Mt. Vernon Bank *v.* Holden, 2 R. I. 467; Renshaw *v.* Triplett, 23 Mo. 213; Windham Bank *v.* Norton, 22 Conn. 213.]

(*b*) Story on Promissory Notes, [§§ 338, 341.] Where the usual communication from one place to another is by post or mail by land, that mode of notice cannot safely be omitted by the holder, unless under special circumstances. See Chitty on Bills, c. 10; Bayley on Bills, c. 7, sec. 2; Story on Bills, [§§ 287, 295;] Story on Promissory Notes, [§ 341;] Thompson on Bills. [ch. 6, § 4, art. 3,] which is cited by Mr. Justice Story, and contains the condensed law on the subject.

(*c*) Ireland *v.* Kip, 10 Johns. 490; Ransom *v.* Mack, 2 Hill (N. Y.), 587; Peirce *v.* Pendar, 5 Met. 356, Shaw, C. J.; Sheldon *v.* Benham, 4 Hill (N. Y.), 129, 133. The last case states that the post-office is not a place of deposit for notices, where the parties live in the same village, and the notice does not go by mail to another office. But the penny-post establishment must qualify this rule as in the text. In Alabama, the rule is, that if the holder of the paper and the party sought to be charged reside in the same place, the notice must be given personally. Foster *v.* McDonald, 3 Ala. 34. The English rule is, that if there be a penny-post establishment in the city, notice through the post-office in the same city or town is sufficient. Chitty on Bills, 504. And this is the convenient and the reasonable rule.

forwarded to the post-office nearest to the domicile of the party, though under certain circumstances a more distant post-office may do; but the cases have not defined the precise distance from a post-office at which the party must reside, to render the service of notice through the post-office good. (*d*)[1] The law does not

(*d*) Grose, J., and Lawrence, J., in Darbishire *v.* Parker, 6 East, 10; Scott *v.* Lifford, 9 id. 347; Smith *v.* Mullett, 2 Camp. 208; Hilton *v.* Fairclough, ib. 633; Williams *v.* Smith, 2 B. & Ald. 496; Bancroft *v.* Hall, 1 Holt N. P. 476; Bray *v.* Hadwen, 5 M. & S. 68; Jackson *v.* Richards, 2 Caines, 343; Stewart *v.* Eden, ib. 121; Corp *v.* M'Comb, 1 Johns. Cas. 328; Ireland *v.* Kip, 10 Johns. 490, and 11 id. 231; Lenox *v.* Roberts, 2 Wheat. 373; Bussard *v.* Levering, 6 id. 102; Lindenberger *v.* Beall, ib. 104; Shed *v.* Brett, 1 Pick. 401; Mead *v.* Engs, 5 Cowen, 303; Whittier *v.* Graffam, 8 Greenl. 82; Bank of Columbia *v.* Lawrence, 1 Peters, 578; Williams *v.* United States Bank, 2 Peters, 96; United States Bank *v.* Carneal, ib. 543; Gallagher *v.* Roberts, 2 Wash. 191; Davis *v.* Williams, Peck (Tenn.) 191; Remer *v.* Downer, 23 Wend. 620; Story on Bills, [§§ 285–291.] When it is said that notice must be sent by the mail to the post-office *nearest* to the party to be charged, as was declared in Ireland *v.* Kip, 11 Johns. 231, and in other cases, it is only stated as a *general* rule, and does not exclude modifications of it. Spencer, C. J., in Reid *v.* Payne, 16 Johns. 218. It is not the universal rule; and if the party be in the habit of receiving letters through a post-office more distant from his residence, and that be known to the holder, notice sent there is good. Thompson, J., in Bank of Columbia *v.* Lawrence, 1 Peters, 578; Story on Bills, [§ 297;] Sutherland, J., in 4 Wend. 331. Reid *v.* Payne, *sup.*; Cuyler *v.* Nellis, 4 Wend. 398; Weakly *v.* Bell, 9 Watts, 273; Bank of U. S. *v.* Carneal, 2 Peters, 543; Ransom *v.* Mack, 2 Hill (N. Y.), 587; Farmers' & M. Bank *v.* Baffle, 4 Humph. 86. If the party be accustomed to receive his papers and letters at two several post-offices, even if they be in different towns, and not equidistant from the residence of the party, notice directed to either office is good. Story on Bills, *sup.*; Sutherland, J., *supra*; Bank of Geneva *v.* Howlett, 4 Wend. 328; Story, J., in the case of The Bank of the United States *v.* Carneal, *sup.* It would not comport with practical convenience, as Judge Thompson observed, to fix any precise distance from the post-office, within which the party must reside, to make the notice good. Judge Story observed in one of the above cases (2 Peters, 543) that the difference of a mile between the two post-offices and the residence of the party was too trifling to afford any just ground of preference. In the case from 4 Wendell, 328, a difference of two miles was adjudged to make no difference; and in the case in Watts, a difference of eight miles, in that case, made no alteration, and notice directed to the most distant post-office was held good. The general rule is under the control of circumstances, and the policy and reason of the rule is to bring home the notice to the party with reasonable diligence, and such is the language and authority of the cases. A literal adherence to the admeasurement of distances in sustaining the general rule would produce the utmost uncertainty and injustice; and I cannot but think, with great respect, that the Supreme Court of Louisiana, in Mechanics' and Traders' Bank of N. O. *v.* Compton, and in Nicholson *v.* Marders, 3 Rob. (La.) 4, 242, laid down the general rule with far too much severity, and contrary to all the authorities, when they required notice to be sent to the nearest post-office, though the party received his letters and papers at each of

[1] See 105, n. 1, as to several of the points treated in the text and notes of this page.

presume that the holder of the paper is acquainted with the residence of the indorsers; and if the holder or notary, after diligent inquiry as to the residence of the indorser, cannot ascertain it, or mistakes it, and gives the notice a wrong direction, the remedy against the indorser is not lost. (*e*)[2]

*The notice must specify that the bill is dishonored; *108 and the design of it is, that the drawer may be enabled to secure his claim against the acceptor, and the indorser against the maker, and the notice may come from any person who is a party to the bill; and it will enure to the benefit of every other party, and operate as a notice from each indorser. (*a*) So, any

two offices, and had a letter box in the most distant office; and when witnesses differed in one of the cases as to the fact which office was nearest. See Story on Promissory Notes, [§ 348 and n.], for a collection of the general rules on the subject. In the case of New Orleans and C. R.R. Comp. *v.* Robert, 9 Rob. (La.) 180, the true rule was restored and declared; and in Jones *v.* Lewis, 8 Watts & S. 14, notice in the post-office where the party receives his letters and papers is good, unless the party lives in the post-town. The N. Y. Revised Statutes, i. 769, 770, secs. 12–17, make provision for presentments and notices on negotiable paper, in special cases, as when part of the city of New York is the seat of an infectious disease, and the residence of parties becomes disturbed. By act of N. Y. April 23, 1835, c. 141, notice of nonacceptance of a bill, or of nonpayment of a bill, note, or other negotiable instrument, may be directed to the city or town where the person to be charged resided at the time of drawing, making, or indorsing the same, unless the person, at the time of his signature, specify the post-office to which notice is to be addressed.

(*e*) Chapman *v.* Lipscombe, 1 Johns. 294; Barr *v.* Marsh, 9 Yerger, 258. Diligent inquiry is requisite as to the residence of the party to be charged, even though the note be dated at a particular place; and if the holder of the bill knows the residence of the drawer, a mistake of the notary or clerk who gives the notice of the dishonor of the drawer's place of residence through ignorance of it will not excuse the holder, who ought to have informed his agent of the place of residence. Fitler *v.* Morris, 6 Wharton, 406. Where the indorser's domicile was at Boston, and he had an agent there who had charge of his business in his absence, and the note was made and payable at New York, notice of default to the indorser by mail, at Washington, where he was residing as a member of Congress, then in session, held sufficient. Chouteau *v.* Webster, 6 Met. 1.

(*a*) Jameson *v.* Swinton, 2 Camp. 373; Solarte *v.* Palmer, 7 Bing. 530; Chanoine *v.* Fowler, 3 Wend. 173; Bayley on Bills, pp. 254–256; Story on Promissory Notes, [§ 302;] Chapman *v.* Keane, 4 Nev. & M. 607; 3 Ad. & El. 193, s. c.; and it overrules Tindall *v.* Brown, in 1 T. R., on the point as to the person giving the notice. Marr *v.* Johnson, 9 Yerg. 6. Mr. Justice Cowen, in Halliday *v.* McDougall, 20 Wend. 85, considers it to be *the duty* of the notary to give the notice. It is no part of the duty of a notary to give notice of a protest. Bank of Rochester *v.* Gray, 2 Hill (N. Y.), 227. See Story on Bills, [§§ 303, 304.] Though it is usual for a notary

[2] It was held in Lambert *v.* Ghiselin, 9 How. 552, that the holder who had sent notice to the wrong place after using due diligence, was not bound to give any further notice on discovering his mistake. But see Beale *v.* Parrish, 20 N. Y. 407.

agent, having possession of the bill, may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill. (*b*) There is no precise form of the notice. It is sufficient that it state the fact of nonpayment and dishonor of the bill, and it is not necessary for the holder to state expressly, when it may be justly implied, that the holder looks to the indorser. (*c*) [1] It is sufficient for an agent to give notice to his principal of the dishonor of a bill, and he is not bound to give notice to all the prior parties; and it then becomes necessary for the principal to give the requisite notice, with due diligence, to the parties to be fixed. (*d*) The party receiving notice is bound to give notice likewise to those who stand behind him, and to whom he means to resort for indemnity; and if a second in-

public to demand payment of a promissory note, and to give notice of the default, this is a matter of convenience, and not an official duty required by law. Burke *v.* McKay, 2 How. 66; Story on Promissory Notes, [§ 302.]

(*b*) The decision in Chapman *v.* Keane, mentioned in the preceding note, establishes the doctrine, that the party entitled as holder to sue may avail himself of notice given in due time by any other party to the bill, against any other person on the bill, who would be liable to the holder if he had given the notice. The notice enures to the benefit of all the other parties to the bill, whether antecedent or subsequent to the party giving the notice. Story on Bills, [§ 304, note; *ante*, 105, n. 1.] But notice given by a third person, or by a mere stranger, not a party to the bill, and not authorized, amounts to a mere nullity. Chanoine *v.* Fowler, 3 Wend. 173; Story on Promissory Notes, [§ 301;] Hartley *v.* Case, 4 B. & C. 339.

(*c*) Shed *v.* Brett, 1 Pick. 401; Mills *v.* United States Bank, 11 Wheat. 431; United States Bank *v.* Carneal, 2 Peters, 543; Cooke *v.* French, 10 Ad. & El. 131; Gilbert *v.* Dennis, 3 Met. 495; Solarte *v.* Palmer, 7 Bing. 530, 533; Strange *v.* Price, 10 Ad. & El. 125; Furze *v.* Sharwood, 2 Q. B. 388; King *v.* Bickley, ib. 419. In the case of Furze *v.* Sharwood, Lord C. J. Denman went fully and clearly through all the cases, and exposed their unsteady and conflicting interpretations of the rule of notice relative to the statement of dishonor, and that the holder looked to the party for payment. It appears to me, that the law in the text is according to the latest rule adopted in the English and American cases, and this seems to be the conclusion of Mr. Justice Story. Story on Promissory Notes, [§ 353.] The three facts requisite to due notice of the dishonor of a bill are, — 1. That the bill was presented when due; 2. That it was dishonored; 3. That the party to whom the notice is addressed is to be held liable for the payment of it; and if all these facts appear in the notice, either expressly or by necessary or reasonable implication or intendment, it is good notice. Hedger *v.* Steavenson, 2 M. & W. 799; Lewis *v.* Gompertz, 6 id. 399. [*Ante*, 105, n. 1.]

(*d*) Haynes *v.* Birks, 3 Bos. & P. 599; Bank of U. S. *v.* Goddard, 5 Mason, 366; Phipps *v.* Milbury Bank, 8 Met. 79; Tunno *v.* Lague, 2 Johns. Cas. 1; Colt *v.* Noble, 5 Mass. 167; Firth *v.* Thrush, 8 B. & C. 387. An agent of the holder is allowed one day to give notice to his principal of a default, and the principal one day thereafter to give notice to the drawer or prior indorser. Ibid. [105, n. 1.]

[1] See 105, n. 1.

dorser, on receiving notice of the dishonor of the bill, should *neglect to give the like notice, with due dili- *109
gence to the first indorser, the latter would not be liable to him. (a) It is not necessary, in the case of notice of the non-acceptance or nonpayment of a bill, that a copy of the bill and protest should accompany the notice. It is sufficient to give notice of the fact. (b) If several parts, as is usual, of a bill of exchange, be drawn, they all contain a condition to be paid, provided the others remain unpaid, and they collectively amount to one bill, and a payment to the holder of either is good, and a payment of one of a set is payment of the whole. The drawer or indorser, to be charged on nonacceptance or nonpayment, is entitled, in the case of a foreign bill, to call for the protest, and the identical bill, or number of the set protested, before he is bound to pay; and it would be sufficient to produce it at the trial, or account for its absence. (c) His rights attach to the bill that has been dishonored, and he is entitled to call for it. He may want it for his own indemnity, and without it he might be exposed to claims from some *bona fide* holder or person, who had paid it *supra protest*, for his honor. He is not bound to produce the other parts of the set, or to account for their nonproduction. (d)

There are many cases in which notice is not requisite, or the want of it waived.

If the party be absent, or has absconded, or his place of resi-

(a) Morgan v. Woodworth, 3 Johns. Cas. 89; Pothier, Traité du Con. de Change, n. 153. But if the first indorser has, in point of fact, had due notice from any subsequent holder, it is sufficient. Stafford v. Yates, 18 Johns. 327; Stanton v. Blossom, 14 Mass. 116; Bayley on Bills, 4th ed. 163. Each successive indorser, who receives notice of the dishonor, is entitled to the whole day on which he receives notice, and need not give notice to the antecedent indorsers until the next day after receiving notice, even if they live in the same city or town; and if they live in different places, it will be sufficient if he sends notice by the post of the next day after the notice. Story on Promissory Notes, [§§ 331–335.]

(b) Cromwell v. Hynson, 2 Esp. 511; Chaters v. Bell, 4 id. 48; Robins v. Gibson, 1 Maule & S. 289; Lenox v. Leverett, 10 Mass. 1; Wallace v. Agry, 4 Mason, 336; Goodman v. Harvey, 6 Nev. & M. 372; s. c. 4 Ad. & El. 870. The notarial protest of a foreign bill must set forth, specifically, the fact that the bill was exhibited to the acceptor when payment was demanded. Musson v. Lake, 4 How. 262.

(c) Powell v. Roach, 6 Esp. 76; Beawes, 420, 424, sec. 74; Kenworthy v. Hopkins, 1 Johns. Cas. 107; Wells v. Whitehead, 15 Wend. 527. [*Post*, 115, n. 1.]

(d) Downes v. Church, 13 Peters, 205. See Story on Bills, [§§ 382–393,] where the cases and the rules as to notice are diligently and fully noted.

dence be unknown, and due and diligent inquiry be made, or he have no residence, or giving notice be physically or morally impossible, as by the operation of the *vis major*, the want of notice will be dispensed with, but it must be given as soon as the impediment is removed. (*e*) [1] If the drawee refuses to accept, because

(*e*) Chitty on Bills, c. 8, 360; c. 9, 389, 422; c. 10, 486–488; Tunno *v.* Lague, 2 Johns. Cas. 1; Hopkirk *v.* Page, 2 Brock. 20; Tunstall *v.* Walker, 2 Smedes & M. 638; Story on Bills, [§§ 307–309;] Story on Promissory Notes, [§§ 258–263;] Pardessus, Droit Com. ii. arts. 426, 434. Between the immediate parties who have transferred and received the note, if receiving the note so near the time of its maturity renders it impracticable to present it in due season, it forms a valid excuse for nonpresentment in proper time. But this does not apply to other parties who are held to a strict compliance, and numerous exceptions are collected and stated. Story on Promissory Notes, [§ 265.]

[1] *Excuses for not giving Notice. — Waiver of Want of Notice.*

(1) *Excuses.* — See, as to what is due diligence when the residence is unknown, Lambert *v.* Ghiselin, 9 How. 552; Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Hunt *v.* Maybee, 8 Seld. 266; Porter *v.* Judson, 1 Gray, 175; Bird *v.* Doyal, 20 La. An. 541; Tate *v.* Sullivan, 30 Md. 464; Berridge *v.* Fitzgerald, L. R. 4 Q. B. 639. See Ward *v.* Perrin, 54 Barb. 89; *ante*, 105, n. 1; 107, n. 2.

A merchant who puts his name to a bill engages that he will, by himself or his servant, be ready at his place of business to receive notice of dishonor. Allen *v.* Edmundson, 2 Exch. 719, 723; *ante*, 96, n. 1. See Bliss *v.* Nichols, 12 Allen, 443; Berridge *v.* Fitzgerald, L. R. 4 Q. B. 639.

Cases arising out of the rebellion will be found in the reports of the southern states, in which notice was made impossible by the parties being on opposite sides of the opposing lines, and was therefore excused for the time being, but was required to be given within a reasonable time after the opening of communication. Citizens' Bank *v.* Pugh, 19 La. An. 48; Durden *v.* Smith, 44 Miss. 548; Peters *v.* Hobbs, 25 Ark. 67. See Billgerry *v.* Branch, 19 Gratt. 393.

Waiver. — Demand and notice may be waived before maturity and after indorsement, without any consideration. Coddington *v.* Davis, 3 Den. 16; s. c. 1 Comst. 186; Sheldon *v.* Horton, 43 N. Y. 93, 97; Wall *v.* Bry, 1 La. An. 312; (see Guyther *v.* Bourg, 20 La. An. 157;) Barclay *v.* Weaver, 19 Penn. St. 396. And a waiver, even if contemporaneous with the making of the note, may be proved by parol, or may be inferred from acts and circumstances. Keyes *v.* Winter, 54 Me. 399. An agreement between the holder and indorser that the time of payment may be extended will have this effect. Ridgway *v.* Day, 13 Penn. St. 208; Amoskeag Bank *v.* Moore, 37 N. H. 539; Sheldon *v.* Horton, 43 N. Y. 93. A waiver of protest has been held to be a waiver of demand and notice. Coddington *v.* Davis, 1 Comst. 186; (cited in many subsequent New York cases with seeming approval.) *Contra*, Wilkins *v.* Gillis, 20 La. An. 538; Ball *v.* Greand, 14 La. An. 305. See further Scott *v.* Greer, 10 Penn. St. 103. A waiver of notice is held not to be a waiver of demand. Buchanan *v.* Marshall, 22 Vt. 561; Drinkwater *v.* Tebbetts, 17 Me. 16; Low *v.* Howard, 11 Cush. 268, 270.

Demand and notice are not necessary when the drawer of a check or bill stops payment or acceptance. Jacks *v.* Darrin, 3 E. D. Smith, 557; Purchase *v.* Mattison, 6 Duer, 587; Sutcliffe *v.* M'Dowell, 2

he has no effects of the drawer in hand, and the drawer had no right to draw, and no right to expect his bill would be paid, pro-

Nott & M'C. 251; Lilley *v.* Miller, ib. 257.

When Drawer has no Right to draw. — The principle of Bickerdike *v.* Bollman, *inf.* n. (*f*), (2 Sm. L. C.), is followed often with expressions of unwillingness. Case *v.* Morris, 31 Penn. St. 100; Wollenweber *v.* Ketterlinus, 17 Penn. St. 389; Coyle *v.* Smith, 1 E. D. Smith, 400; Allen *v.* King, 4 McLean, 128; Oliver *v.* Bank of Tenn., 11 Humph. 74; Orear *v.* McDonald, 9 Gill, 350; Durrum *v.* Hendrick, 4 Tex. 495; Blankenship *v.* Rogers, 10 Ind. 333; Mehlberg *v.* Fisher, 24 Wis. 607. See Walker *v.* Rogers, 40 Ill. 278. See, also, Harwood *v.* Jarvis, 5 Sneed, 375, questioned in 1 Pars. N. & B. 545, n. (*m*). It applies to the drawer or indorser of a bill for his own accommodation; Torrey *v.* Foss, 40 Me. 74; Barbaroux *v.* Waters, 3 Met. (Ky.) 304; *Ex parte* Swan, L. R. 6 Eq. 344, 356; Maltass *v.* Siddle, 6 C. B. N. S. 494, 500; but not to persons drawing for the accommodation of another. Sleigh *v.* Sleigh, 5 Exch. 514; Miser *v.* Trovinger, 7 Ohio St. 281; Merchants' Bank *v.* Easley, 44 Mo. 286; Carter *v.* Flower, 16 M. & W. 743. See 110 as to indorsers in general.

In case of the drawee absconding, the rule laid down in the text, *ante*, 96, may be true as to demand, ib. n. 1, but it is pretty certain that, so far as notice is concerned, what is said on p. 110 is correct. Michaud *v.* Lagarde, 4 Minn. 43; Pierce *v.* Cate, 12 Cush. 190; Ratcliffe *v.* Planters' Bank, 2 Sneed, 425; Foster *v.* Julien, 24 N. Y. 28, 37; *Ex parte* Rohde, Mont. & M. 430. So as to the insolvency or bankruptcy of the acceptor. *Ex parte* Swan, L. R. 6 Eq. 344, 357; Benedict *v.* Caffe, 5 Duer, 226, 232; Bruce *v.* Lytle, 13 Barb. 168. See Taylor *v.* French, 4 E. D. Smith, 458.

(2) *Waiver of Want of Notice.* — Loose *v.* Loose, 86 Penn. St. 538, 545. Confirms 118, at n. 1.

It has been held that there is no presumption raised by a subsequent promise to pay that the party knew of a presentment for acceptance before the bill fell due, and dishonor. Landrum *v.* Trowbridge, 2 Met. (Ky.) 281.

Mr. Justice Byles takes a distinction between the effect of a subsequent promise as a *waiver*, and an acknowledgment of liability, part payment, or even a promise, as *evidence* of notice. Byles on B. ch. 22, 5th Am. ed. (291); 10th ed. 298

Cases of the first sort are Sigerson *v.* Mathews, 20 How. 496; Edwards *v.* Tandy, 36 N. H. 540; Byram *v.* Hunter, 36 Me. 217; Morgan *v.* Peet, 32 Ill. 281; Blodgett *v.* Durgin, 32 Vt. 361; Golladay *v.* Bank of the Union, 2 Head, 57; Campbell *v.* Varney, 12 Iowa, 43; Harvey *v.* Troupe, 23 Miss. 538; Meyer *v.* Hibsher, 47 N. Y. 265. Evidence from which jury might infer waiver; Woods *v.* Dean, 8 Best & S. 101; Harrison *v.* Bailey, 99 Mass. 620; Lary *v.* Young, 13 Ark. 401.

Illustrations of the second principle are harder to find. A promise has been sometimes treated as evidence of notice. Dorsey *v.* Watson, 14 Mo. 59; Jones *v.* O'Brien, 2 Com. Law, 853; 26 Eng. L. & Eq. 283; Loose *v.* Loose, 86 Penn. St. 538, 545. See Harvey *v.* Troupe, 23 Miss. 538. But ambiguous language is used in Oglesby *v.* The D. S. Stacy, 10 La. An. 117; Loose *v.* Loose, 86 Penn. St. 538, 545; Sigerson *v.* Mathews, 20 How. 496, 500. And part payment has been treated as a waiver. Sherer *v.* Easton Bank, 33 Penn. St. 184, 141.

The statement in the text, 113, as to the effect of taking security is true when the security in question is sufficient to cover the whole liability of the indorser, or consists of all the property, real and personal, of the maker, and is taken before the maturity of the note. Walters *v.* Munroe, 17 Md. 154; Lewis *v.* Kramer, 8 Md. 265; Seacord *v.* Miller, 8 Kern.

test and notice to the drawer are not necessary. (*f*) This exception to the general rule proceeds on the ground of fraud in
*110 the drawer, or that notice to him would be useless; * but the courts have regretted the existence of the exception, and they confine it strictly to the case of want of effects, and where the drawee is not indebted to the drawer, and to other cases in which the drawer had no right to expect that his bill would be honored, and in fact when the drawing of the bill amounted to fraud. (*a*) Notice is requisite, if the want of it would produce detriment; as if, in case notice had been given, and the bill taken up, the drawer would have had his remedy over against some third person; or if it was drawn with a *bona fide* expectation of assets in the hands of the drawee, as upon the faith of consignments not come to hand, or upon the ground of some mercantile agreement. (*b*) The exception applies only to the drawer, and not to the indorser of a bill drawn without funds, for he is presumed to know nothing of the arrangements between the drawer and drawee; (*c*) and it is now settled in Eng-

(*f*) Bickerdike *v.* Bollman, 1 T. R. 405; French *v.* Bank of Columbia, 4 Cranch, 153, 164; Dickins *v.* Beal, 10 Peters, 572; Kemble *v.* Mills, 2 Scott N. R. 121; Williams *v.* Brashear, 19 La. 370. In Alabama, the rule is declared to be, that if the drawee had no effects of the drawer in hand, from the time the bill was drawn up to the time of its maturity, presentment and notice need not be proved, *notwithstanding the bill may be drawn in good faith, and if duly presented would have been honored.* Foard *v.* Womack, 2 Ala. 368. This appears to be contrary to the general rule.

(*a*) The English judges have expressed strong dissatisfaction with the doctrine that exempts the holder from giving notice on any pretence whatever. This was the case with Lord C. J. Eyre, 1 Bos. & P. 654; Lord Alvanley, 3 id. 241; Lord Ellenborough, in 7 East, 359; Ch. J. Abbott, in 3 B. & Ald. 623; Ch. J. Tindal, in 6 Bing. 626, and they resist the extension of the principle.

(*b*) Rogers *v.* Stephens, 2 T. R. 713; Corney *v.* Da Costa, 1 Esp. 302; Staples *v.* Okines, ib. 332; Clegg *v.* Cotton, 3 Bos. & P. 239; Brown *v.* Maffey, 15 East, 216; Rucker *v.* Hiller, 16 id. 43; Cory *v.* Scott, 3 B. & Ald. 619; French *v.* Bank of Columbia, 4 Cranch, 141; Cathell *v.* Goodwin, 1 Harr. & G. 468; Eichelberger *v.* Finley, 7 Harr. & J. 381; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Norton *v.* Pickering, 8 B. & C. 610; Lafitte *v.* Slatter, 6 Bing. 623; Dickins *v.* Beal, 10 Peters, 572.

(*c*) Wilkes *v.* Jacks, Peake, 202; Leach *v.* Hewitt, 4 Taunt. 781; Ramdulollday Seacord *v.* Miller, *sup.* Neither is taking any assignment of property after the maturity of the note. Otsego County Bank *v.* Warren, 18 Barb. 290; Walters *v.* Munroe, 17 Md. 154; Gawtry *v.* Doane, 48 Barb. 148.

(18 N. Y.) 55; (approving Kramer *v.* Sandford, 113, n. (*e*).) See Taylor *v.* French, 4 E. D. Smith, 458. But taking security of less amount is not a waiver. Marshall *v.* Mitchell, 34 Me. 227; Lewis *v.* Kramer, 3 Md. 265, (but see ib. 291);

land, in France, and in this country, that neither the death nor the insolvency of the drawer or drawee, or acceptor, nor the fact that the drawee had absconded, does away the necessity of a demand of payment, and notice to the drawer or indorser; nor does knowledge in the indorser, when he indorsed the paper, of the insolvency of the maker of the note, or drawee of the bill, do away the necessity of notice in order to charge him. (*d*) It was left undecided in *Rohde* v. *Proctor*, (*a*) whether in *111 the case of the bankruptcy of the party entitled to notice, the holder was bound to give notice to the assignees; though the intimation in that and other cases is, and it is clearly the better opinion, that the notice to the assignees would be proper, if assignees had been chosen when notice was to be given. (*b*) If a bank check be taken in the ordinary course of business, it is not an absolute payment, but only the means to procure the money; and the holder is bound to present it for payment with ordinary diligence, and the next day will be in season. But if the bank be totally prohibited, by process of law, from the exercise of its functions, before the check can, with due diligence, be presented, no demand need be made or notice given; and the holder may waive the check altogether, and resort to his original demand. (*c*) So, if the maker of the check has no funds in the bank at the date of

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v. Darieux, 4 Wash. 61; Story on Bills, [§ 314; Carter *v.* Flower, 16 M. & W. 743, 747.]

(*d*) Nicholson *v.* Gouthit, 2 H. Bl. 609; Esdaile *v.* Sowerby, 11 East, 114; Bowes *v.* Howe, 5 Taunt. 30; Rohde *v.* Proctor, 4 B. & C. 517; Jackson *v.* Richards, 2 Caines, 343; French *v.* Bank of Columbia, 4 Cranch, 141; Sandford *v.* Dillaway, 10 Mass. 52; Buck *v.* Cotton, 2 Conn. 126; Juniata Bank *v.* Hale, 16 Serg. & R. 157; Groton *v.* Dallheim, 6 Greenl. 476; Hill *v.* Martin, 12 Mart. (La.) 177; Jervey *v.* Wilbur, 1 Bailey (S. C.), 453; Hightower *v.* Ivy, 2 Porter (Ala.), 308; Denny *v.* Palmer, 5 Ired. 623. Mr. Bell, in his Commentaries, i. 413, mentions a number of Scotch decisions to the same effect. See, also, Pardessus, ii. art. 424, part. 2, tit. 4, c. 8, sec. 2, and Story on Bills, [§§ 279, 318, 326;] Code de Com. art. 168, to the same point.

(*a*) 4 B. & C. 517.

(*b*) See *Ex parte* Moline, 19 Ves. 216, and Thompson on Bills, [ch. 6, § 4, art. 8,] as cited to that point by Mr. Justice Bayley, in Rohde *v.* Proctor. See, also, Bell's Comm. i. 421.

(*c*) Cromwell *v.* Lovett, 1 Hall (N. Y.), 56. A promissory note, taken for a prior debt, may operate as a payment of it, but it is a conditional payment only, if not intended for an absolute payment, and the intention one way or the other is matter of presumption and proof. Story on Promissory Notes, [§ 438;] and see the numerous cases there collected.

the check, it need not be presented for payment previous to a suit upon it. (*d*)

Giving time by the holder to the acceptor of a bill or maker of a note will discharge the other parties; but the agreement for delay must be one having a sufficient consideration, and binding in law upon the parties; mere indulgence will work no prejudice. (*e*) If the holder gives time to the indorser, knowing that the note was made for his accommodation, he does not *112 thereby discharge * the drawer. (*a*) Simply forbearing to sue the acceptor, or taking collateral security from him, is no discharge; but giving him new credit and time, or accepting a composition in discharge of the acceptor, will produce that result. The principle is, that the drawer and indorser are in the light of sureties for the acceptor; and the holder must do nothing to impair the right which they have to resort by suit to the acceptor for indemnity, or which would amount to a breach of faith in him towards the acceptor. (*b*) If the liability of the surety be varied, it discharges him; or if he can sue the acceptor, in consequence of the resort over to him by the holder, notwithstanding the time given to or the composition made with the acceptor, by the holder, the latter is enabled indirectly to violate his contract with the acceptor. (*c*) But receiving part of the debt from the acceptor of a bill or maker of a note, works no prejudice to the holder's right

(*d*) Franklin *v.* Vanderpool, 1 Hall, 78.

(*e*) M'Lemore *v.* Powell, 12 Wheat. 554; Planters' Bank *v.* Sellman, 2 Gill & J. 230; [Hoffman *v.* Coombs, 9 Gill, 284;] Bank *v.* Myers, 1 Bailey (S. C.), 412; Greely *v.* Dow, 2 Met. 178; Clarke *v.* Henty, 3 Younge & Coll. 187; Story on Bills, [§ 426;] Frazier *v.* Dick, 5 Rob. (La.) 249. Giving indulgence to the acceptor, after judgment against the drawer, does not discharge him. Pole *v.* Ford, 2 Chitty, 125; Huie *v.* Bailey, 16 La. 213.

(*a*) Walker *v.* Bank of Montgomery County, 12 Serg. & R. 382; s. c. 9 id. 229. [See some of the cases cited at the beginning of 86, n. 1. Lambert *v.* Sandford, 2 Blackf. 137. The general rule seems not to be followed in Louisiana, nor perhaps in New Hampshire. *Ante*, 86, n. 1.]

(*b*) Philpot *v.* Briant, 4 Bing. 717; Planters' Bank *v.* Sellman, 2 Gill & J. 230; Nolte *v.* His Creditors, 19 Martin (La.), 9. Same law in respect to the indorser of a note. Couch *v.* Waring, 9 Conn. 261. Mere delay by the payee of a note due, in enforcing payment against the principal, does not discharge the surety. Freeman's Bank *v.* Rollins, 18 Me. 202.

(*c*) *Ex parte* Smith, 3 Bro. C. C. 1; Walwyn *v.* St. Quintin, 1 Bos. & P. 652; English *v.* Darley, 2 id. 61; Clark *v.* Devlin, 3 id. 363; *Ex parte* Wilson, 11 Ves. 410; Gould *v.* Robson, 8 East, 576; Pring *v.* Clarkson, 1 B. & C. 14. [Pring *v.* Clarkson is denied in Michigan State Bank *v.* Leavenworth, 28 Vt. 209, 215. But compare Pitts *v.* Congdon, 2 Comst. 352; Hurd *v.* Little, 12 Mass. 502.]

against the drawer or indorsers, for it is in aid of all parties who are eventually liable. (*d*) All that the rule requires is, that the holder shall not so deal with the acceptor of the bill or maker of the note, by giving time, or compounding, or giving credit, as to prejudice the right of the other parties to the bill, without their assent,[1] in the exercise of their right of recourse against the maker or acceptor. The holder may give time to an immediate indorser, and proceed against the parties behind him. A prior party to a bill is not discharged by a release of a subsequent party. But the holder cannot reverse this order, and compound with prior parties without the consent of subsequent ones, for it varies the rights of the subsequent parties, and *discharges them. *113 The release or discharge of a prior indorser discharges all subsequent indorsers. The parties to a bill are chargeable in different order. The acceptor is first liable, and the indorsers in the order in which they stand on the bill; and taking new security, or giving time, or discharging or compounding with a subsequent indorser, cannot prejudice a prior indorser, because he has no rights against a subsequent indorsee. (*a*) The acceptor, whether for accommodation or for value, is not discharged by time given to or security taken from other parties to the bill. (*b*)

If due notice of nonacceptance or nonpayment be not given, or a demand on the maker of a promissory note be not made, yet a subsequent promise to pay, by the party entitled to notice, be he either drawer or indorser, will amount to a waiver of the want of demand or notice, provided the promise was made clearly and unequivocally, and even under a mistake of the law, if it was with full knowledge of the fact of a want of due diligence on the part of the holder. (*c*) The weight of authority is, that this

(*d*) Lynch *v.* Reynolds, 16 Johns. 41.

(*a*) English *v.* Darley, 3 Esp. 49; s. c. 2 Bos. & P. 61; Smith *v.* Knox, 3 Esp. 46; Sargent *v.* Appleton, 6 Mass. 85; Clopper *v.* Union Bank of Maryland, 7 Harr. & J. 100; Hawkins *v.* Thompson, 2 McL. 111.

(*b*) Story on Bills, [§ 268;] Chitty on Bills, c. 7, 9; Wallace *v.* M'Connell, 13 Peters, 136.

(*c*) Chitty on Bills, c. 10, 538–586; Goodall *v.* Dolley, 1 T. R. 712; Hopes *v.* Alder, 6 East, 16 *in notis;* Borradaile *v.* Lowe, 4 Taunt. 93; Stevens *v.* Lynch, 2 Camp. 332; 12 East, 38, s. c.; Miller *v.* Hackley, 5 Johns. 375; Martin *v.* Winslow, 2 Mason,

[1] Eldrege *v.* Chacon, Crabbe, 296. See Lime Rock Bank *v.* Mallett, 42 Me. 349; Wright *v.* Storrs, 6 Bosw. 600. *In re* Blakely, *Ex parte* Harvey, 4 De G., M. & G. 881, 899.

knowledge may be inferred as a fact from the promise, under the attending circumstances, without requiring clear and affirmative proof of the knowledge. (*d*) [1] So, if the indorser, before or at the maturity of the bill, has protected himself from loss by taking sufficient collateral security of the maker of the note, or an assignment of his property, it is a waiver of his legal right to require proof of demand and notice. (*e*)

241; Fotheringham *v.* Price, 1 Bay, 291; Thornton *v.* Wynn, 12 Wheat. 183; Pate *v.* M'Clure, 4 Rand. 164; Otis *v.* Hussey, 8 N. H. 346; Reynolds *v.* Douglass, 12 Peters, 497; Farrington *v.* Brown, 7 N. H. 271; Story on Bills, [§ 320;] Sussex Bank *v.* Baldwin, 2 Harr. (N. J.) 487; Robbins *v.* Pinckard, 5 Smedes & M. 51; Brooklyn Bank *v.* Waring, 2 Sandf. Ch. 1; Moore *v.* Tucker, 8 Ired. 447. Mr. Justice Story questions the soundness of the doctrine, holding a promise to pay under a knowledge of facts and mistake of law binding, though he considers it as now established both in England and America. Story on Promissory Notes, [§§ 275, 862.] The Irish Court of Exchequer, in Donnelly *v.* Howie, Hayes & Jones, 436, plainly and forcibly denies the validity of the rule, and holds that a new promise to pay, after a full knowledge of all the facts, but without any new consideration to support it, was a *nudum pactum*, and not binding. I think it is too late to call in question the validity of the promise founded on a waiver of a technical rule established for the benefit of the indorser. The original consideration remains after the waiver to sustain the promise, and it is a great and universal principle of jurisprudence, that every man is bound to know the law. But on the other hand, if the indorser does waive the want of notice, and pays, he cannot affect the rights of antecedent indorsers, and he cannot recover of them if he does pay. Chitty on Bills, 458; Story on Promissory Notes, [§ 386.]

(*d*) Lundie *v.* Robertson, 7 East, 231; Piersons *v.* Hooker, 3 Johns. 68; Hopkins *v.* Liswell, 12 Mass. 52; Breed *v.* Hillhouse, 7 Conn. 523; Williams *v.* Robinson, 13 La. 421; Tebbetts *v.* Dowd, 23 Wend. 379. In this last case Mr. Justice Cowen learnedly reviewed the whole series of decisions on the subject. Ch. J. Sharkey, in 5 Smedes & M. 72, says that the question was examined by Mr. Justice Cowen, "with an ability and research unsurpassed."

(*e*) Mead *v.* Small, 2 Greenl. 207; Bond *v.* Farnham, 5 Mass. 170; Prentiss *v.* Danielson, 5 Conn. 175; Duvall *v.* Farmers' Bank, 9 Gill & J. 47; Corney *v.* Da Costa, 1 Esp. 302; Perry *v.* Green, 4 Harr. (N. J.) 61; Story on Bills of Exchange, [§ 374;] Mechanics' Bank *v.* Griswold, 7 Wend. 165. In Kramer *v.* Sandford, 4 Watts & S. 328, the Supreme Court of Pennsylvania held, on a review of the American authorities, and in qualification of the doctrine in the text, that the indorser was not exempted from the obligation of giving notice by taking security or indemnity, where the obligation of taking up the note remained with the maker, and was not assumed by the indorser. Ch. J. Gibson observed further, that the doctrine of waiver, in consideration of a security, had no footing in Westminster Hall. And in Denny *v.* Palmer, 5 Ired. 610, Ch. J. Ruffin learnedly discussed the authorities, and his conclusion is strict in favor of notice to the indorser, *unless* the indorser has become bound to take up the note by an agreement with the maker for that purpose, or by receiving in hand effects to meet the note, or by taking a general assignment of the drawer's estate and effects. The learned American author [James P. Holcombe] of

[1] Loose *v.* Loose, 36 Penn. St. 538, 545; *ante*, 109, n. 1.

*If the indorser comes again into possession of the bill, *114 he is to be regarded *prima facie* as the owner, and may sue and recover as against prior parties, though there be on it subsequent indorsements, and no receipt or indorsement back to him, and he may strike out the subsequent names. (*a*) To maintain a suit against the indorser, the holder must show, as we have seen, due demand of the maker or acceptor, or a presentment for acceptance, and due notice to him of the default; and he need not prove any prior indorsement, nor the hand of the drawer. An indorsement of a note impliedly admits the signatures of the antecedent indorsers to be genuine. (*b*) But in the suit against the acceptor, the holder need not show notice to any other person. The acceptor is liable at all events. Receiving part from the drawer or indorser is no discharge of the acceptor. Giving time to the drawer will not discharge the acceptor of an accommodation bill. Nothing short of the statute of limitations, or payment, or a release or an express declaration of the holder, will discharge the acceptor.[1] He is bound, like the maker of a

the Selection of Leading Cases upon Commercial Law, p. 827, considers that Ch. J. Gibson has laid down the true principle in those cases. I incline to the opinion, though with great respect, that the Chief Justice pushes his objection to an unreasonable length, and that when as a matter of fact the indorser has protected himself by sufficient collateral security, he has no reason or justice in setting up the objection of want of notice, and he ought not to be permitted to rid himself of his obligation to pay the note, by the interposition of the technical rule.

(*a*) Dugan *v.* United States, 3 Wheat. 172; Norris *v.* Badger, 6 Cowen, 449; Huie *v.* Bailey, 16 La. 213. [Eaton *v.* McKown, 34 Me. 510; Glasgow *v.* Switzer, 12 Mo. 395.]

(*b*) Critchlow *v.* Parry, 2 Camp. 182; Story on Promissory Notes, [§ 387,] and cases there cited. By the law of Virginia, Kentucky, Indiana, and Illinois, the holder of a promissory note must make every reasonable effort and due and legal diligence to recover of the drawer, before he can sue the indorser, on the ground of nonpayment and notice. Demand on drawer, and due notice to indorser, is not sufficient. The legal means against drawer must first be resorted to. In Georgia the indorser is held bound as a surety without any previous demand and notice, though this departure from commercial usage is not to apply to notes negotiated at any incorporated bank, or deposited there for collection. The indorser is likewise discharged, if, after a request upon the holder for that purpose, he does not, within three months, proceed to collect the debt. Statute of Georgia, December 26, 1826; 2 Peters, 888, note; ib. 345. See, also, to the same point, United States Bank *v.* Tyler, 4 id. 366; Johnson *v.* Lewis, 1 Dana (Ky.), 182; Saunders *v.* O'Briant, 2 Scam. 369.

[1] *Ante*, 86, n. 1. As to the order of liability to an innocent holder, *ante*, 78, n. 2. As to accommodation acceptors and makers, *ante*, 78, n. 2, 86, n. 1, cases first cited; 112, n. (*a*).

note, as a principal debtor. His acceptance is evidence that the value of the bill was in his hands, or had been received by him from the drawer. He is liable to the payee, to the drawer, and to every indorser. (*c*) He is the first person, and the last person liable, and there is no difference in this respect between an acceptance given for accommodation, and one given for value. He is liable to an innocent holder, though the drawer's hand be forged; and in the suit against him it is not necessary to prove any hand but that of the first indorser. (*d*) Though a bill *115 payable to a fictitious *payee be strictly void, yet, if the fact was known to the acceptor, he may be sued by an innocent indorsee, equally as upon a note payable to bearer. (*a*) And if the holder of a bank-bill cuts it into two parts, for the sole purpose of transmitting it by mail with greater safety, this does not affect his rights upon the bill, and he may recover upon the production of only one of the parts, provided he shows that he is owner of the whole, and accounts for the absence of the other part. The parts of a divided bank bill are not separately negotiable. (*b*) [1]

(*c*) The acceptor cannot set up as a defence, that when he accepted the bill the drawer was an uncertificated bankrupt, and that all his property had passed to his assignees. Pitt *v.* Chappelow, 8 M. & W. 616.

(*d*) Simmonds *v.* Parminter, 1 Wils. 185; Dingwall *v.* Dunster, Doug. 247; Smith *v.* Chester, 1 T. R. 654; Fentum *v.* Pocock, 5 Taunt. 192; Farquhar *v.* Southey, 2 Carr. & P. 497; Lambert *v.* Sandford, 2 Blackf. (Ind.) 137.

(*a*) Gibson *v.* Minet, 1 H. Bl. 569; s. c. 3 T. R. 481. [See 78 & n. 1; Phillips *v.* Im Thurn, L. R. 1 C. P. 463; 18 C. B. N. S. 694.]

(*b*) Patton *v.* Bank of S. C., 2 Nott & M'Cord, 464; Martin *v.* United States Bank, 4 Wash. 253; United States Bank *v.* Sill, 5 Conn. 106; Farmers' Bank *v.*

[1] *Lost and Destroyed Bills.*—In England it seems to be a general rule, that if a negotiable bill, note, or check be lost, although only negotiable by indorsement and not yet indorsed, the loser cannot recover at law against any one of the parties to the instrument, either on the instrument itself or on the consideration. Byles on B. ch. 28, 10th ed. 378; Ramuz *v.* Crowe, 1 Exch. 167; Crowe *v.* Clay, 9 Exch. 604; Price *v.* Price, 16 M. & W. 232, 243. Perhaps the same rule would be applied in its full extent in America. Savannah Nat. Bank *v.* Haskins, 101 Mass. 370, 376; Tuttle *v.* Standish, 4 Allen, 481; Tower *v.* Appleton Bank, 8 Allen, 387. But see Aborn *v.* Bosworth, 1 R. I. 401. The matter is regulated by statute in some states.

But relief will be given in equity on a lost negotiable instrument when it is within the power of the court to secure the defendant from all appreciable injury. Savannah N. Bank *v.* Haskins, *sup.*; Wright *v.* Lord Maidstone, 1 Kay & J. 701, 709.

Equity has refused to interfere with regard to instruments which have been destroyed, on the ground that there is a complete remedy at law. Wright *v.* Lord

8. **Of the Measure of Damages.** — The engagement of the drawer and indorser of every bill is, that it shall be paid at the proper time and place; and if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract. The general law-merchant of Europe authorizes the holder of a protested bill immediately to redraw from the place where the bill was payable, and in the same direct or circuitous way, as the case may be or require, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.

Reynolds, 4 Rand. 186; Bullet *v.* Bank of Pennsylvania, 2 Wash. 172; Hinsdale *v.* Bank of Orange, 6 Wend. 378. *Contra*, Mayor *v.* Johnson, 3 Camp. 324. The owner of the two parts of a note cut in two for transmission was allowed to recover in equity the whole amount, upon producing one half part, and showing the other lost, and offering an indemnity. Allen *v.* State Bank, 1 Dev. & Batt. Eq. 1. See Story on Promissory Notes, [§ 111,] where the conflicting authorities on this point are noted. In Scotland, a very summary remedy is given to the holder of bills of exchange and promissory notes, protested for nonpayment, by allowing the protest to be recorded under an implied consent of the debtor. This authorizes a decree by consent, called a decree of registration, and a summary execution. 1 Bell's Comm. 4, 387. If a negotiable bill be lost, the acceptor or indorser is not bound at law to pay without the production of the bill, even though an indemnity be offered. He is entitled to the actual possession of the bill for his own security. This rule applies equally to the case of promissory notes. But the tender of a sufficient indemnity would enable the holder to recover in equity. Hansard *v.* Robinson, 7 B. & C. 90; Macartney *v.* Graham, 2 Sim. 285; Davis *v.* Dodd, 4 Taunt. 602; 4 Price, 176; Smith *v.* Rockwell, 2 Hill (N. Y.), 482; Smith *v.* Walker, 1 Smedes & Marsh. Ch. 432; Story on Bills, [§ 449;] Story on Promissory Notes, [§§ 108, 445, *et seq.*] The same necessity of indemnity is required by the French law, in the case of a lost or missing bill. Code de Com. art. 151, 152. Mr. Justice Story shows the diversity of opinion in the United States, in the courts of law, as to the remedy at law on a lost note, but the weight of authority is in favor of the exclusive remedy in equity.

Maidstone, 1 Kay & J. 701. And an action at law was maintained in Des Arts *v.* Leggett, 16 N. Y. 582; Moore *v.* Fall, 42 Me. 450. See Dean *v.* Speakman, 7 Blackf. 317; Aborn *v.* Bosworth, 1 R. I. 401. A different rule is laid down in Byles on B. *ubi sup.*; and the cases last cited seem to be inconsistent with the reason given for denying an action on lost bills, which is, that by the custom of merchants the acceptor on paying the bill has a right to it for his own security and as a voucher, &c. But if those cases are right, then a distinction which has been taken, allowing an action on bills lost after maturity, would seem to be sound. Thayer *v.* King, 15 Ohio, 242. And it would seem to follow also that where, as in Ramuz *v.* Crowe, *sup.*, the instrument was payable to the payee's own order and unindorsed, the plaintiff ought to recover, although the contrary was there decided. Wade *v.* Wade, 12 Ill. 89; Moore *v.* Fall, 42 Me 450, 455; Torrey *v.* Foss, 40 Me. 74; Branch Bank at Mobile *v.* Tillman, 12 Ala. 214; Depew *v.* Wheelan, 6 Blackf. 485.

His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and broker's commission, and the current rate of exchange at the place where the bill was to be demanded *116 or * payable, on the place where it was drawn or negotiated.

The law does not insist upon an actual redrawing, but it enables the holder to recover what would be the price of another new bill, at the place where the bill was dishonored, or the loss on the reëxchange; and this it does by giving him the face of the protested bill, with interest according to the law of the place where the bill was drawn, and the necessary expenses, including the amount or price of the reëxchange. (*a*) But the indorser of a bill is not entitled to recover of the drawer the damages incurred by the nonacceptance of the bill, unless he has paid them, or is liable to pay them. (*b*) Nor is the acceptor liable in ordinary cases for the extra charges on the reëxchange. He is only chargeable for the sum specified in the bill, with interest according to the rate established at the place of payment.[1] The claim

(*a*) Mellish *v.* Simeon, 2 H. Bl. 378; De Tastet *v.* Baring, 11 East, 265; Parsons, C. J., in Grimshaw *v.* Bender, 6 Mass. 157; Code de Commerce, b. 1, tit. 3, art. 177, 186; Pardessus, Droit Com. ii. art. 437; Van Leeuwen's Commentaries, 440; Story on Bills, [§§ 400–404.] The price of reëxchange by the purchase of a new bill would sometimes render the damages enormous, as fifty per cent or two hundred per cent. 2 H. Bl. 378; 3 Bos. & P. 335.

(*b*) Kingston *v.* Wilson, 4 Wash. 310. Taney, C. J., in the case of the Bank of the United States *v.* The United States, 2 How. 764, 765, 767, s. p.

[1] *Damages.* — The liabilities incurred by becoming a party to a negotiable instrument are strictly limited by the law merchant, but it should be understood that different rules may be applied to parties to a special contract not negotiable, and not constituting the relation of debtor and creditor. There is some uncertainty as to the exact form of the rule, but it would seem that special damages may be given in respect of any consequences reasonably or probably arising out of the breach complained of, *e.g.*, not honoring drafts according to the promise contained in a letter of credit to the drawers and plaintiffs. Prehn *v.* Royal Bank of Liverpool, L. R. 5 Ex. 92. See Ilsley *v.* Jones, 12 Gray, 260. So substantial damages may be recovered against a banker for dishonoring a customer's checks, having sufficient assets in his hands to meet them. Rollin *v.* Steward, 14 C. B. 595. See Marzetti *v.* Williams, 1 B. & Ad. 415; 88, n. 1.

Reëxchange. — It has been held that however the law may be in cases between the holder and acceptor, or on a claim for reëxchange, a drawer who has been compelled, under the law governing his contract, to pay a liquidated sum in lieu of reëxchange, on accepted bills dishonored for nonpayment, can prove against the acceptor for that sum in addition to the amount of the bills. Walker *v.* Hamilton,

for the reëxchange is against the drawer, who undertakes to indemnify the holder if the bill be not paid, and the reëxchange is the purchase of a new bill on the country where the drawer of the protested bill lives. (*c*)

In this country a different practice from that of reëxchange was introduced while we were English colonies, and it has con-

(*c*) Woolsey *v.* Crawford, 2 Camp. 445; Napier *v.* Schneider, 12 East, 420; Sibely *v.* Tutt, McMullan, Eq. 320. In France, the claim for the reëxchange is deemed good against the acceptor. Pothier, Traité du Con. de Change, n. 117. See Story on Bills, [§ 398, n.] Each successive party to a bill is liable for damages on its dishonor, according to the law of the place where his contract was made; the drawer according to the law of the place where he drew the bill, and each indorser according to the law of the place of their respective indorsements; for each indorsement is a new contract. Story on Bills, [§ 397.]

1 De G., F. & J. 602, approving Francis *v.* Rucker, Amb. 672, and explaining and qualifying the English cases cited 116, n. (*c*).

The liability of the drawer and indorsers for reëxchange is well settled. And although in the English practice a reëxchange bill is seldom drawn, the principle on which the damages are computed, remains the same, and an indorsee is not allowed an option to recover the amount which he gave for the bill instead. Evidence of a custom giving the holder such an election has been held inadmissible. Suse *v.* Pompe, 8 C. B. N. S. 538.

It is common in America to allow a fixed percentage in lieu of reëxchange. The laws of the several states must be consulted for the statutes later than those mentioned by the author. There are usages to a similar effect in other states where the legislature has not interfered. Wood *v.* Watson, 58 Me. 300.

Interest. — The rate of interest to be allowed on dishonored bills, if any, as an express or implied term of the contract, is universally admitted to depend on the law governing the contract; as to which, see 95, n. 1; cases *infra*, and Wharton Confl. of L. § 503; Stickney *v.* Jordan, 58 Me. 106. And the law is the same as to reëxchange or a liquidated sum payable in lieu of it. Walker *v.* Hamilton, 1 De G., F. & J. 602. It has been held that the *lex fori* will prevail when the interest is allowed as damages independent of any agreement. Ayer *v.* Tilden, 15 Gray, 178; Ives *v.* Farmers' Bank, 2 Allen, 236, 239. But see 117, n. (*c*); *In re* State Fire Ins. Co., *Ex parte* Meredith, 9 Jur. N. S. 298; Gibbs *v.* Fremont, 9 Exch. 25, 31. Compare Porter *v.* Munger, 22 Vt. 191; Lougee *v.* Washburn, 16 N. H. 134; Chumasero *v.* Gilbert, 24 Ill. 293.

Currency. — The law governing the contract determines the currency in which it is payable, and, in the absence of special difficulties created by statute, such as the Legal Tender Act, and the questions raised in Adams *v.* Cordis and other cases mentioned *inf.* 117, n. (*c*), if the contract is sued on in a court rendering judgments in a different currency, the judgment will be for such a sum in the latter currency as most nearly approximates to the value of the amount contracted for. *Inf.* 117, n. (*c*); Benners *v.* Clemens, 58 Penn. St. 24. Compare Cary *v.* Courtenay, 103 Mass. 316.

Adams *v.* Cordis is still followed in Massachusetts. Hussey *v.* Farlow, 9 Allen, 263; Bush *v.* Baldrey, 11 Allen, 367, 369; Burgess *v.* Alliance Ins. Co., 10 Allen, 221, 226; (compare Nickerson *v.* Soesman, 98 Mass. 364, 371;) Chumasero *v.* Gilbert, 24 Ill. 651. But see Wood *v.* Kelso, 27 Penn. St. 241.

tinued to this day. Our usages on this subject form an exception to the commercial law of Europe, and the established rates of damages fixed by usage or by statute in lieu of reëxchange, prevent the necessity and difficulty of proving the price of re-exchange. They avoid the fluctuations of exchange, and the occasional rigor of the law-merchant.

In New York, the rule had uniformly been, to allow twenty per cent damages on the return of foreign bills protested for nonacceptance or nonpayment; and the damages were computed on the principal sum, with interest on the aggregate amount of the bill and damages, from the time that notice of the protest was duly given to the drawer or indorser. The mercantile usage was, to consider the twenty per cent an indemnity for consequential damages, and to require the bill *117 *to be paid at the rate of exchange at the time of return, or a new bill to be furnished upon the same principles. But the Supreme Court (*a*) considered the twenty per cent to be in lieu of damages in case of reëxchange, and the demand, with that allowance, was to be settled at the par of exchange. This doctrine was overturned by the Court of Errors, (*b*) and the holder was held to be entitled to recover, not only the twenty per cent damages, together with interest and charges, but also the amount of the bill liquidated by the rate of exchange, or price of bills on England, or other place of demand in Europe, at the time of the return of the dishonored bill, and notice to the party to be charged; and this rule was subsequently followed in the courts of law. (*c*)

(*a*) Hendricks *v.* Franklin, 4 Johns. 119; Welden *v.* Buck, ib. 144.

(*b*) Graves *v.* Dash, 12 Johns. 17.

(*c*) Denston *v.* Henderson, 13 Johns. 822. The general rule, independent of statute, is, that damages on protested bills are governed by the *lex loci contractus*, and consequently the drawer is responsible for damages according to the law of the place where the bill is drawn, and the indorsers according to the law of the place where their respective indorsements were made. See [*supra*,] ii. 460. The proper rule, in cases of debts payable in a foreign country, in England, for instance, and sued in the United States, is to allow that sum in the currency of the country which approximates most nearly to the amount to which the party is entitled in the country where the debt is payable, and calculated by the real or established, and not by the nominal par of exchange. Mr. Justice Story (Story on Bills, [§ 150]) says that for ordinary commercial purposes, the par of exchange between England and America is to estimate the pound sterling at four dollars and forty-four cents. This is the legal rule; but for revenue purposes, by the act of Congress, of July 27, 1842, c. 66, it was declared, that in all payments by or to the treasury, whether made in the

The rate of damages on bills drawn and payable within the United States, or other parts of North America, was, in 1819, regulated in New York by statute, (*d*) and the damages fixed at five, seven and a half, or ten per cent, according to the distance or situation of the place on which the bill was drawn. But by the new Revised Statutes, which went into operation on the 1st of January, 1830, the damages on bills, foreign and inland, were made the subject of a more extensive regulation. They provide, (*e*) that upon bills drawn or negotiated within the state, upon any person, at any place within the six states east of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages to be allowed

United States or in foreign countries, where it becomes necessary to compute the value of the pound sterling, it should be deemed equal to four dollars and eighty-four cents; and that the same rule should be applied in appraising merchandise imported, where the value is by invoice in pounds sterling. The creditor is entitled to have an amount equal to what he must pay, in order to *remit* the debt to the place where it was payable. He ought to have just as much allowed him where he sues as he could have had if the contract had been duly performed. He ought to have the rate of exchange allowed, if the exchange be above par, and a proportionate deduction made if the exchange be below par, in order to have his money replaced, in England, at exactly the same amount which he would have been entitled to receive in a suit there. This is the manifest equity and the better law of the case. All advances of money or property, and sales of goods, are to be accounted for, if there be no agreement to the contrary, at the place where they are made, or authorized to be made. Scott *v.* Bevan, 2 B. & Ad. 78. Lord Eldon, in Cash *v.* Kennion, 11 Ves. 316; Story on the Conflict of Laws, [§§ 283–286;] Smith *v.* Shaw, 2 Wash. 167; Grant *v.* Healey, 3 Sumner, 523; Consequa *v.* Fanning, 3 Johns. Ch. 587, 610; s. c. 17 Johns. 511; Weed *v.* Miller, 1 McLean, 423; Story on Bills, [§ 151;] Story on Promissory Notes, [§ 399, n.] The cases of Martin *v.* Franklin, 4 Johns. 124; Scofield *v.* Day, 20 id. 102; Adams *v.* Cordis, 8 Pick. 260, declared a contrary rule, and that a debt payable in England, and recovered in the courts of this country, was to be paid at the par, and not at the rate of exchange. But the weight of authority, if we connect the English and American cases together, as well as the justice of the point, is, however, in favor of the claim of a foreign creditor to be paid at the rate of exchange. See *supra*, Smith *v.* Shaw, 2 Wash.; and Grant *v.* Healey, 3 Sumner, and the other cases. Upon this rule only can the creditor be put in the same situation as if the debtor had punctually complied with his contract, and paid at the place where he had contracted to pay. The *par of exchange* between two countries is the equivalency of a certain amount of the currency of the one in the currency of the other, supposing the currency of both to be of the precise weight and purity fixed by their respective mints. M'Culloch's Com. Dictionary, tit. Par of Exchange. If not, it is the amount which the standard coin of either country would produce when coined at the mint of the other. By this rule, the par of exchange between England and the United States, taking the English sovereign of 1839 as a standard, is $4 86.01, because it will produce that amount at the mint.

(*d*) Laws of New York, sess. 42, c. 84.

(*e*) New York Revised Statutes, i. 770, 771.

and paid upon the usual protest for nonacceptance or nonpayment, to the holder of the bill, a purchaser thereof, or of some interest therein for a valuable consideration, shall be
*118 *three per cent upon the principal sum specified in the bill; and upon any person at any place within the states of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent; and upon any person in any other state or territory of the United States, or at any other place on or adjacent to this continent, and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the Western Atlantic Ocean, or Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of nonacceptance or nonpayment. But the holder will be entitled to demand and recover interest upon the aggregate amount of the principal sum specified in the bill, and the damages, from the time of notice of the protest for nonacceptance, or notice of a demand and protest for nonpayment. If the contents of the bill be expressed in the money of account of the United States, the amount due thereon, and the damages allowed for the nonpayment are to be ascertained and determined, without reference to the rate of exchange existing between New York and the place on which the bill is drawn. But if the contents of the bill be expressed in the money of account or currency of any foreign country, then the amount due, exclusive of the damages, is to be ascertained and determined by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment.

The laws and usages of the other states vary essentially on the subject of damages on protested bills. (*a*) In some cases the regulations of states approximate to each other, while in others they are widely different. In some cases the law or rule is unlike, but the result is nearly similar; while between other states the result varies from four and a half to fifteen per cent.

(*a*) The general rule is, that the drawer of a bill is liable to the damages provided by the laws of the country in which it is drawn, and to no other. Astor *v.* Benn, Stuart's Lower Canada. 69; [Price *v.* Page, 24 Mo. 65.] But this must be taken with some explanation; for the holder of a *foreign* bill, protested for nonacceptance or nonpayment, is entitled by the law-merchant to the settled rule of damages, (when none other is agreed to,) on reëxchange *at the place* where the bill was dishonored *Vide supra*, 115, 116, and Bank of U. S. *v.* Daniel, 12 Peters, 33, 54.

In Massachusetts, the usage was to recover the amount of the protested bill, at the par of exchange and interest, as in England, from the time payment of the dishonored bill was demanded of the drawee, and the charges of the protest, and ten per cent damages in *lieu of the price of exchange. (*a*) But *119 this rule was changed by statute, in 1825, and now, by the revised code of 1835 and 1837; and bills drawn or indorsed in that state, and payable without the limits of the United States, and duly protested for nonacceptance or nonpayment, are now settled at the current rate of exchange and interest, and five per cent damages; and if the bill be drawn upon any place beyond the Cape of Good Hope, twenty per cent damages. The rate of damages in Massachusetts, on inland bills, payable out of the state, and drawn or indorsed within the state, and duly protested for nonacceptance or nonpayment, is two per cent in addition to the contents of the bill, with interest and costs, if payable in any other New England state or New York; and three per cent if payable in New Jersey, Pennsylvania, Delaware, and Maryland; and four per cent if payable in Virginia, District of Columbia, North Carolina, South Carolina, or Georgia; and five per cent if payable in any other of the United States or the territories thereof.

In Rhode Island, the rule formerly was, according to the revised code in 1776, on bills returned from beyond sea, protested for nonacceptance or nonpayment, ten per cent damages, besides interest and costs.

The rule of damages in Connecticut, on bills returned protested, and drawn on any person in New York, is two per cent upon the principal sum specified in the bill; on New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (city of New York excepted), New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or territory of Columbia, three per cent; on North Carolina, South Carolina, Ohio, or Georgia, five per cent; on any other part of the United States, eight per cent upon such principal sum, and to be in lieu of interest and all other charges, and without any reference to the rate of exchange. (*b*)

In Pennsylvania, the rule, for a century past, was twenty per cent damages in lieu of reëxchange; but by statute, in 1821,

(*a*) Grimshaw *v.* Bender, 6 Mass. 157.
(*b*) Statutes of Connecticut, 1838, 477.

five per cent damages were allowed upon bills drawn upon any person in any other of the United States, except Louisiana; if on Louisiana, or any other part of North America, except the northwest coast and Mexico, ten per cent; if on Mexico, the Spanish Main, or the islands on the coast of Africa, fifteen per cent; and twenty per cent upon protested bills on Europe, and twenty-five per cent upon other foreign bills, in lieu of all charges, except the protest, and the amount of the bill is to be ascertained and determined at the rate of exchange.

In Maryland, the rule, by statute in 1785, is fifteen per cent damages, and the amount of the bill ascertained at the current rate of exchange, or the rate requisite to purchase a good bill of the same time of payment upon the same place.

In Virginia and South Carolina, the damages, by statute, are fifteen per cent. (*c*)

In North Carolina, by statute, in 1828, and revised in 1837, damages on protested bills, drawn or indorsed in that state, and payable in any other part of the United States, except Louisiana, are six per cent; payable in any other part of North America, except the northwest coast of America, or in the West India Islands, ten per cent; payable in South America, the African Islands, or Europe, fifteen per cent; and payable elsewhere, twenty per cent.

The damages in Georgia, by statute, in 1827, on bills drawn on a person in another state, and protested for nonpayment, are five per cent; and on foreign bills protested for nonpayment, are ten per cent, together with the usual expenses and interest, and the principal is to be settled at the current rate of exchange. (*d*)

The damages on bills drawn in the state of Alabama, on any person resident within the state, are ten per cent; and on any person out of it, and within the United States, are fifteen per cent; and on persons out of the United States, twenty per cent

(*c*) Revised Statutes of Virginia, ed. 1814, i. 158.

(*d*) See Griffith's Law Register, *passim*, under the head of "Bills of Exchange and Promissory Notes;" Revised Laws of Illinois, 1833; Prince's Dig. of Statutes of Georgia, 1837, 2d ed. 454, 462; Revised Statutes of Indiana, 1838 And see Report of Mr. Verplanck, from the select Committee in the House of Representatives of the Congress of the United States on the subject of foreign bills, made March 22d, 1826. American Jurist, No. 4, p. 398; id. No. 6, 398; Merchants' Magazine, New York, September, 1841, 265.

on the sum drawn for, together with incidental charges and interest. (*e*)

In Louisiana, in 1838, the rate of damages upon protest for nonacceptance or nonpayment of bills of exchange drawn on and payable in foreign countries, was declared by statute to be ten per cent; and in any other state in the United States, five per cent, together with interest on the aggregate amount of principal and damages. On protested bills, drawn and payable within the United States, the damages include all charges, such as premiums and expenses, and interest on those damages, but nothing for the difference in exchange. (*f*)

The damages in Tennessee, by statute in 1827, on protested bills, over and above the principal sum, and charges of protest, and interest on the principal sum, damages and charge of protest from the time of notice, are three per cent on the principal sum, if the bill be drawn upon any person in the United States; and fifteen per cent if upon any person in any other place or state in North America bordering on the Gulf of Mexico, or in the West Indies; and twenty per cent *if upon a person in *120 any other part of the world. These damages are in lieu of interest, and all other charges, except the charges of protest. to the time of notice of the protest and demand of payment.

In Kentucky, the damages on foreign bills protested for non acceptance or nonpayment are ten per cent. (*a*)

In Mississippi, the damages on inland bills within the state protested for nonpayment are five per cent; if drawn on any person resident out of the United States, ten per cent; no damages on protested bills drawn on a sister state. (*b*)

In Missouri, the damages on bills of exchange drawn or negotiated within the state, and protested for nonacceptance or nonpayment, as against the drawer and indorser, are four per cent on the principal sum; if drawn on any person out of the state,

(*e*) Aikin's Alabama Dig. 2d ed. 328.

(*f*) Robert *v.* Comm. Bank, 13 La. 528.

(*a*) There have been conflicting decisions in Kentucky, under their act of 1798, as to the character of the bills to which the ten per cent damages applied; and the Supreme Court of the United States, in the case of The Bank of the U. S. *v.* Daniel, 12 Peters, 88, 58, felt itself bound reluctantly to follow the narrowest of the decisions.

(*b*) Digest of the Laws of Mississippi, ed. 1837, 834; Sadler *v.* Murrah, 8 How [Miss.] 195; Act of Mississippi, 1887.

but within the United States, ten per cent; if out of the United States, twenty per cent; the same rate of damages as against the acceptor on nonpayment. (*c*)

The damages in Indiana and Illinois on foreign bills are ten per cent; and on bills drawn on any person out of the state, and within the United States, are five per cent, in addition to the costs and charges.

In Ohio, the damages on protested bills drawn on persons residing within the United States, but not in Ohio, are six per cent; and if out of the United States, twelve per cent over and above the principal and interest of the bill. (*d*)

The inconvenience of a want of uniformity in the rule of damages in the laws of the several states is very great, and has been strongly felt. The mischiefs to commerce, and perplexity to our merchants, resulting from such discordant and shifting regulations, have been ably, justly, and frequently urged upon the consideration of Congress; and the right of Congress to regulate, by some uniform rule, the rate and rule of recovery of damages upon protested foreign bills, or bills drawn in one state upon another, under the power in the Constitution "to regulate commerce with foreign nations, and among the several states," and the expediency of the exercise of that right, have been well, and, I think, conclusively shown, in the official documents which have been prepared on that subject. (*e*)

* 121 **9. Of Mercantile Guaranties.** — * A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who, in the first instance, is liable. As this engagement is a common one in mercantile transactions, and analogous, in many respects, to that of indorser of negotiable paper,

(*c*) Revised Statutes of Missouri, 1835, 98.

(*d*) Statutes of Ohio, 1831.

(*e*) See the Report of Mr. Verplanck, from the select committee already referred to, and the Report of a Committee of the Chamber of Commerce of New York, in February, 1828. In that last document, the Committee of the Chamber of Commerce approve of the principle of damages on foreign bills returned under protest, and they state that the practice of reëxchanges, which are so easily made between the great capitals of Europe, does not exist between Europe and the United States; nor do our business operations require them; and, until some safe and satisfactory substitute is established, the usage, in this country, of allowing damages on protested bills, ought to be continued.

a few remarks concerning its creation and validity will not be altogether inapplicable to the subject. (*a*)

In *Pillans* v. *Van Mierop*, (*b*) it was held that a note of guaranty, being in writing, and in a mercantile case, came within the reason of a bill or note, and did not require a consideration to appear upon the face of it. But there was a sufficient apparent consideration in that case, and the *dicta* of the judges were afterwards considered as erroneous, in *Rann* v. *Hughes*, before the House of Lords. (*c*) The doctrine in the latter case was, that all contracts, if merely in writing, and not specialties, were to be considered as parol contracts, and a consideration must be proved.

The English statute of frauds, (*d*) which has been adopted throughout this country, requires, that, "upon any special promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum or note thereof, must be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." An agreement to become a guarantor or surety for another's engagement is within the statute; and if it be a guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration for it, must appear in the writing. The word *agreement*, in the statute, includes the consideration for the promise, as well as the promise itself, for without a consideration *there is no valid agreement. This was the *122 decision in the case of *Wain* v. *Warlters*; (*a*) and though that decision has been frequently questioned, (*b*) it has since received the decided approbation of the courts of law; (*c*) and the Ch. J. of the C. B. observed, that he should have so decided if he had never heard of the case of *Wain* v. *Warlters*. The English construction of the statute of frauds has been adopted in New York and South Carolina, and rejected in several other states. (*d*)

(*a*) The character of letters of guaranty as commercial instruments, and the liberal manner in which they are dealt with by the courts, are stated by Mr. Justice Story in Lawrence *v.* McCalmont, 2 How. 426.

(*b*) 3 Burr. 1663.

(*c*) 7 Brown P. C. 550.

(*d*) 29 Charles II. c. 8, sec. 4.

(*a*) 5 East, 10.

(*b*) See *Ex parte* Minet, 14 Ves. 190; *Ex parte* Gardom, 15 id. 286.

(*c*) Saunders *v.* Wakefield, 4 B. & Ald. 595; Jenkins *v.* Reynolds, 3 Brod. & B. 14; Morley *v.* Boothby, 3 Bing. 107; Newbury *v.* Armstrong, 6 Bing. 201.

(*d*) Sears *v* Brink, 3 Johns. 210; Leonard *v.* Vredenburgh, 8 id 29; 2 Nott & M'Cord, 372, note; Packard *v.* Richardson, 17 Mass. 122; Levy *v.* Merrill, 4 Greenl. 180; *s. p.* ib. 387; Sage *v.* Wilcox, 6 Conn. 81; Miller *v.* Irvine, 1 Dev. & Batt.

The decisions have all turned upon the force of the word *agreement;* and where, by statute, the word *promise* has been introduced, by requiring *the promise or agreement* to be in writing, as in Virginia, Tennessee, and Mississippi, the construction has not been so strict, and the consideration of the promise need not be in writing. (*e*)

Where the guaranty or promise, though collateral to the principal contract, is made at the same time with the principal contract, and becomes an essential ground of the credit given to the principal debtor, the whole is one original and entire transaction, and the consideration extends to and sustains the promise of the principal debtor, and also of the guarantor. No other consideration need be shown than that for the original agreement, upon which the whole debt rested, and that may be shown by parol proof, as not being within the statute. (*f*) If, however, * 123 the guaranty be of a previously existing * debt of another, a consideration is necessary to be shown, and that must appear in writing, as part of the collateral undertaking; for the consideration for the original debt will not attach to this subse-

(N. C.) 108. The point was extensively discussed in this last case; and the majority of the court, under the act of 1819, which followed the English statute of frauds, held, that it was not requisite under that statute that the consideration of the contract should be set forth in the written memorandum of it, and that the consideration might be shown by parol proof. The N. Y. Revised Statutes, ii. 135, require the special promise to answer for the debt, default, or miscarriage of another person, to be in writing, and the *consideration*, as well as the agreement, to be expressed.

(*e*) Marshall, C. J., 5 Cranch, 151, 152; Taylor *v.* Ross, 8 Yerger, 330; Wren *v.* Pearce, 4 Smedes & M. 91. The decisions in South Carolina have changed, and the latest doctrine overrules the case of Wain *v.* Warlters, and the written agreement need not contain the consideration, (Fyler *v.* Givens, 3 Hill (S.C.), 48,) and if it was required, the words *value received* were held to imply it sufficiently. Woodward *v.* Pickett, 1 Dudley Law and Eq. [S. C.] 30. So it is now held in New York, that in a promise to pay for the debt, default, or miscarriage of another, the words *value received* is a sufficient expression of the consideration. Douglass *v.* Howland, 24 Wend. 35; Watson *v.* M'Laren, 19 id. 557; [Miller *v.* Cook, 23 N. Y. 495.] The principle is, that the consideration must clearly appear upon the guaranty itself, either by express statement, or by necessary implication, or just inference from the language used. The English courts have latterly very much weakened the authority of the case of Wain *v.* Warlters, and they have been disinclined to take the rule very strictly, and have considered many loose expressions as implying a consideration on the face of the instrument. Newbury *v.* Armstrong, *supra;* Davies *v.* Wilkinson, [3 Jur. 405; 8 L. J. N. s. Q. B. 228; 2 Per. & D. 256.] The weight of American authority does not coincide with the rule. See How *v.* Kemball, 2 McLean, 103.

(*f*) Leonard *v.* Vredenburgh, 8 Johns. 29; D'Wolf *v.* Rabaud, 1 Peters, 476. The doctrine in 8 Johns. is confirmed in 11 id. 221, and 13 id. 175; and in Peters's Rep. the doctrine is said to be founded in good sense and convenience.

quent promise; and to such a case the doctrine in *Wain* v. *Warlters* applies. (*a*) [1] But if the promise to pay the debt of another arises

(*a*) Manrow *v.* Durham, 8 Hill, 584. The words *value received* have been held to be a sufficient expression of consideration in a guaranty. Watson *v.* M'Laren, 19 Wend. 557. But this appears to reduce the statute requisition of the setting forth a consideration to a mere formality.

[1] *Guaranty.—Statute of Frauds.*—"The question [in determining whether a case is within the statute or not] is, What is the promise, . . . not what the consideration for that promise is; for it is plain, that the nature of the consideration cannot affect the terms of the promise itself, unless . . . it be an extinguishment of the liability of the original party." 1 Wms. Saund. 211 d, note (*l*). See Browne, St. of Fr. § 214 *a*, *et seq.*, criticising Furbish *v.* Goodnow, 98 Mass. 296; Fullam *v.* Adams, 37 Vt. 391, an able opinion to the effect that an oral promise to pay the debt of another who still remains liable is only binding when by the arrangement the promisor becomes the holder of a fund or security which is appropriated to the payment of the debt, and clothed with a duty or trust in respect thereto, which the law will enforce in favor of the party to whom the promise is made. See, further, Stoudt *v.* Hine, 45 Penn. St. 30; Maule *v.* Bucknell, 50 Penn. St. 39. No attempt is made to collect all the authorities in this note.

The statute applies, wherever the contract, according to the intention of the parties, is a contract of suretyship, although in fact the principal is not legally bound. Mountstephen *v.* Lakeman, L. R. 5 Q. B. 613.

The doctrine of Wain *v.* Warlters was followed in England (Powers *v.* Fowler, 4 El. & Bl. 511), until it was expressly enacted by St. 19 & 20 Vict. c. 97, § 8, that the consideration need not appear in writing. Similar acts have been passed in some of the United States, and for various reasons the doctrine of Wain *v.* Warlters is not of general application in America. It is therefore not advisable to do more than mention a question which has been much debated in New York, whether, when a negotiable instrument expresses a consideration, a memorandum of a guaranty of the instrument must express the consideration of the guaranty. The tendency of the later cases seems to be that when the same consideration supports the note and the guaranty, a reference to the note is sufficient. Howland *v.* Aitch, 38 Cal. 133; Church *v.* Brown, 21 N. Y. 315, 329; Cardell *v.* McNiel, 21 N. Y. 336; Brewster *v.* Silence, 4 Seld. (8 N. Y.) 207; Draper *v.* Snow, 20 N. Y. 331; Fowler *v.* Clearwater, 35 Barb. 143; Dunning *v.* Roberts, 35 Barb. 463.

Negotiability. — Whether a guaranty written on the back of a negotiable instrument is itself negotiable is perhaps still not wholly settled. The principle applied to letters of credit, &c., *ante*, 84, n. (*c*); 85, n. 1; 89, n. 2, would seem to have some application here. Such guaranties are treated as negotiable in the absence of words implying a restriction to the first taker in Partridge *v.* Davis, 20 Vt. 499; Jones *v.* Berryhill, 25 Iowa, 289. See Nevius *v.* Bank of Lansingburgh, 10 Mich. 547, 549. But see True *v.* Fuller, 21 Pick. 140; Tuttle *v.* Bartholomew, 12 Metc. 452; Belcher *v.* Smith, 7 Cush. 482; Irish *v.* Cutter, 31 Me. 536; Tinker *v.* McCauley, 8 Gibbs (Mich.), 188; Ten Eyck *v.* Brown, 4 Chandler (Wis.), 151; Gallagher *v.* White, 31 Barb. 92; Beckley *v.* Eckert, 8 (Barr) Penn. St. 292; *post*, 124, n. (*c*).

Notice. — The rule of the text, 123, 124, as to notice of liability under a guaranty of negotiable paper is confirmed by Vinal *v.* Richardson, 13 Allen, 521, 530; Parkman *v.* Brewster, 15 Gray, 271,

out of some new and original consideration of benefit or harm moving between the newly contracted parties, it is then not a case within the statute. (*b*)

(*b*) Leonard *v.* Vredenburgh, 8 Johns. 29; Bailey *v.* Freeman, 11 id. 221; Hunt *v.* Adams, 5 Mass. 358; Williams *v.* Leper, 3 Burr. 1886; Atkinson *v.* Carter, 2 Chitty, 408; Clark *v.* Small, 6 Yerger (Tenn.), 418.

272; Bickford *v.* Gibbs, 8 Cush. 154; Woodstock Bank *v.* Downer, 27 Vt. 589; Bull *v.* Bliss, 30 Vt. 127; Bashford *v.* Shaw, 4 Ohio St. 268; Farrow *v.* Respess, 11 Ired. 170. In some cases notice is said to be unnecessary in general terms. Brown *v.* Curtiss, 2 Comst. 225; Donley *v.* Camp, 22 Ala. 659.

See, as to notice of acceptance of a guaranty, Woodstock Bank *v.* Downer, 27 Vt. 589; Walker *v.* Forbes, 25 Ala. 139; Bell *v.* Kellar, 13 B. Mon. (Ky.) 881; Lawton *v.* Maner, 9 Rich. (S. C.) 335. But see Bright *v.* McKnight, 1 Sneed, 158; Yancey *v.* Brown, 3 Sneed, 89. In Parkman *v.* Brewster, 15 Gray, 271, 272, it is said that when the guaranty is of a debt which is subsequently to be created, — when the party cannot know beforehand whether he is ultimately to be liable or not, nor to what extent, it is necessary, in order to charge him, that he should have reasonable notice of the amount of indebtedness incurred by the principal debtor, and of his failure to pay it. See Vinal *v.* Richardson, 13 Allen, 521, 527; Whiting *v.* Stacy, 15 Gray, 270; Louisville Manuf. Co. *v.* Welch, 10 How. 461; Beebe *v.* Dudley, 6 Fost. (26 N. H.) 249, 255; McDougal *v.* Calef, 34 N. H. 534; Cahuzac *v.* Samini, 29 Ala. 288; Long *v.* Beckwith, 14 B. Mon. (Ky.) 184. But see Yancey *v.* Brown, 3 Sneed, 89, 96. In Vinal *v.* Richardson, 13 Allen, 521, 532, guaranties seem to be regarded as standing on the same footing with other contracts where the right of action accrues upon the performance or nonperformance of some act by a third party. When an absolute guaranty is given for the performance of a specific act by another, the ground on which the guarantor is discharged for want of notice of nonperformance by the principal, is negligence on the part of the holder of the guaranty in permitting the claim to slumber, when the guarantor might reasonably suppose it had been paid when due, or in the usual course of business. It is delay without notice, and not the bringing of a suit without notice, that is fatal to the holder. See Protection Ins. Co. *v.* Davis, 5 Allen, 54; and the note to Lent *v.* Padelford & Douglass *v.* Reynolds, 2 Am. L. C.

When Liable. — It has been held that one who guarantees the collection of a certain sum as it becomes due is not liable unless the principal debtor is first sued to judgment and execution with due diligence, even when the latter is insolvent. Craig *v.* Parkis, 40 N. Y. 181; Mosier *v.* Waful, 56 Barb. 80. But see Janes *v.* Scott, 59 Penn. St. 178; Bashford *v.* Shaw, 4 Ohio St. 263; Louisville Manuf. Co. *v.* Welch, 10 How. 461, 474; Cahuzac *v.* Samini, 29 Ala. 288; Donley *v.* Camp, 22 Ala. 659; Jones *v.* Greenlaw, 6 Coldw. 342; Salem Manuf. Co. *v.* Brower, 4 Jones (N. C.), 429; Woodstock Bank *v.* Downer, 27 Vt. 539; Bull *v.* Bliss, 30 Vt. 127; Dana *v.* Conant, 30 Vt. 246; Harris *v.* Pierce, 6 Ind. 162; Sanford *v.* Allen, 1 Cush. 473; and dissenting opinion in Craig *v.* Parkis, *sup.*

Construction. — It must not be inferred from the text, 124, that a guaranty is to be construed strictly; it is to be interpreted in the same way as other contracts. Wood *v.* Priestner, L. R. 2 Ex. 66, 70; ib. 282; Rindge *v.* Judson, 24 N. Y. 64. Subject to this explanation the text is sustained by the later cases.

Discharge. — It is impossible in this note to go into the cases as to discharge

There are no such words in the statute of frauds as original and collateral. The promise referred to is to answer for the debt or default of another. The term *debt* implies that the liability of the principal had been precedently incurred; but a *default* may arise upon an executory contract; and a promise to pay for goods to be furnished to another is a collateral promise to pay on the other's default, provided the credit was in the first instance given solely to the other. If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral, and must be in writing. (*c*) If the original debt remains a subsisting debt, a promise by a third person to pay it, in consideration of forbearance, is a collateral promise. (*d*)

After a valid guaranty has been made, the rights of the parties, in the relative character of principal and surety, afford an interesting subject of inquiry, and the doctrine in the case of negotiable paper, as to demand and notice, has only a qualified application to the guarantor. Thus it has been held, that the guarantor of a note could be discharged by the laches of the holder, as by neglect

(*c*) Leland *v.* Creyon, 1 M'Cord, 100.
(*d*) Watson *v.* Randall, 20 Wend. 201.

of guarantors and sureties. The general principle is, that if the person secured does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Watts *v.* Shuttleworth, 5 Hurlst. & N. 235. The rights of the surety depend rather on a principle of equity than upon contract, — for instance, the right of subrogation mentioned in the text, 124, which is said not to be affected by the surety's ignorance of the existence of the securities. Pearl *v.* Deacon, 24 Beav. 186, 191; 1 De G. & J. 461; Newton *v.* Chorlton, 10 Hare, 646, 651; Lake *v.* Brutton, 8 De G., M. & G. 440, 452; 39 Eng. L. & Eq. 486. Hidden *v.* Bishop, 5 R. I. 29. See Kramer's Appeal, 37 Penn. St. 71. A subsequent material variation of the contract with the principal will discharge the surety; General Steam Nav. Co. *v.* Rolt, 6 C. B. n. s. 550; unless the surety concurs. Cases cited *ante*, 112, n. 1. But mere delay of a creditor in enforcing payment will not. Price *v.* Kirkham, 3 Hurlst. & Colt. 437; Pittsburg, Fort Wayne, & Chicago R. Co. *v.* Shaeffer, 59 Penn. St. 350.

The doctrine of Pain *v.* Packard, 124, n. (*c*), is said in the note to that case, 2 Am. L. C. 5th ed. 415, to stand on the loss of the debt through the delay and subsequent insolvency of the principal, where it is adopted, but to be generally repudiated in this country, except when a statute gives the surety the right to require the creditor to proceed against the principal on pain of forfeiting his remedy against the surety. See, further, the note to United States *v.* Howell; Harris *v.* Brooks, &c., 2 Am. L. C.

A continuing guaranty until notice to the contrary is not revoked by the death of the guarantor. Bradbury *v.* Morgan, 1 Hurlst. & C. 249. But see Harriss *v.* Fawcett, L. R. 15 Eq. 311.

to make demand of payment of the maker, and to give notice of nonpayment to the guarantor, *provided the maker was solvent when the note fell due*, and became insolvent afterwards. The *124 rule is not *so strict as in the case of mere negotiable paper, and the neglect to give notice must have produced some loss or prejudice to the guarantor. (a) The indorser of negotiable paper is entitled to strict notice, but the guarantor is only entitled to notice when he may be prejudiced by the want of it. (b) And in the case of the absolute guaranty of the act of another, as of his promise to pay a debt, or perform a special

(a) A commercial guaranty is not a negotiable paper. See *supra*, ii. 549.

(b) Oxford Bank v. Haynes, 8 Pick. 423; Talbot v. Gay, 18 Pick. 534. The opinion of Duncan, J., in Gibbs v. Cannon, 9 Serg & R. 202, is to the same point. See, also, Philips v. Astling, 2 Taunt. 206; Warrington v. Furbor, 8 East, 242; Ruffin, J., in Grice v. Ricks, 3 Dev. (N. C.) 65; Wildes v. Savage, 1 Story, 26. A guarantor not being a party to a promissory note, and who guarantees its payment if not paid at maturity, is not entitled to demand or notice of its dishonor. Walton v. Mascall, 13 M. & W. 72, 452; Cooper v. Page, 24 Me. 78. The cases are somewhat contradictory on this point; but in Lewis v. Brewster, 2 McLean, 21, and in Foote v. Brown, ib. 369, the cases were reviewed by Judge McLean; the rule was considered as settled, that the guarantor of a promissory note was entitled to notice of nonpayment by the drawer [holder] unless the drawer was insolvent at the time the note became due, and the declaration must aver it. It was held, in Edmondston v. Drake, 5 Peters, 624; Douglass v. Reynolds, 7 Peters, 113; Adams v. Jones, 12 Peters, 207; Craft v. Isham, 13 Conn. 28; Mussey v. Rayner, 22 Pick. 223; Lawson v. Townes, 2 Ala. 873; Oaks v. Weller, 13 Vt. 106; and in Sollee v. Meugy, 1 Bailey (S. C.), 620, that the party giving a letter of guaranty has a right to know, by notice in a reasonable time, whether it is accepted or acted upon, and the amount of goods or credit given on the faith of it, and more especially if it be a continuing guaranty. Upon a guaranty for future advances, the party making the advances is bound to give notice to the guarantor of his acceptance thereof, unless the agreement to accept be contemporaneous with the guaranty. Wildes v. Savage, 1 Story, 26; Lane v. Levillian, 4 Ark. 76; Howe v. Nickels, 22 Me. 175. In the case of a guaranty limited to a single transaction, the guarantor is entitled to notice of the advance or credit given under it, within a reasonable time; whereas, in the case of a continuing guaranty, in which a series of transactions is in contemplation, it will be sufficient to give notice of the amount for which the guarantor is responsible, within a reasonable time after the transactions are closed, and notice of each successive transaction as it arises need not be given. Reasonable diligence to make demand, and, in case of nonpayment, to give notice of nonpayment, is required, in the case of the guaranty of a debt, or the guarantor will be discharged to the amount only of the loss or damage he may have sustained from the want of such demand and notice. Douglass v. Reynolds, *supra*; Bradley v. Cary, 8 Greenl. 234, s. p.; Adcock v. Fleming, 2 Dev. & Batt. 225; 16 La. 543, s. p. On the other hand, the surety in a bond for the fidelity of a party for an indefinite period cannot determine his liability at pleasure by giving notice; and this is the English rule both at law and in equity Calvert v. Gordon, 8 Mann. & R. 124; 2 Sim. 253; 4 Russ. 581.

agreement, the doctrine of notice applicable to negotiable paper does not apply. The guarantor must inquire of his principal, or take notice of his default at his peril, unless notice be required by the contract of guaranty, or there has been a negligence on the part of the holder, and the guarantor has sustained damage to himself. (*c*) But when the contract of a guarantor or surety is duly ascertained and understood, by a fair and liberal construction of the instrument, the principle is well settled that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication. (*d*)

(*c*) Somersall *v.* Barneby, Cro. Jac. 287; Brookbank *v.* Taylor, ib. 685; Birks *v.* Trippet, 1 Saund. 32; Allen *v.* Rightmere, 20 Johns. 866; Douglass *v.* Howland, 24 Wend. 35; Whitney *v.* Groot, ib. 82; Breed *v.* Hillhouse, 7 Conn. 523; Thrasher *v.* Ely, 2 Smedes & M. 139. A guaranty is not separately negotiable. It is a special contract, which can be enforced only by a party to it. Gibson, C. J., in M'Doal *v.* Yeomans, 8 Watts, 361; Watson *v.* M'Laren, 19 Wend. 557; s. c. 26 Wend. 425. The guaranty is not negotiable so as to entitle an assignee to sue in his own name, unless it be written upon the note, or be on a separate paper attached to it. As to a guaranty on the face of a bill of exchange, not limited to any particular person, but to the payee or his order, or to bearer, Mr. Justice Story (Story on Bills [§ 458]) thinks the better doctrine to be, that it is, upon general principles, as well as upon the usage of the commercial world, a complete guaranty to every successive person who shall become the holder of the bill. Many of the authorities go so far as to maintain that the same doctrine applies to such a guaranty upon a separate paper. Adams *v.* Jones, 12 Peters, 207; Walton *v.* Dodson, 3 C. & P. 163; Bradley *v.* Cary, 8 Greenl. 284; Verplanck, Senator, in M'Laren *v.* Watson, 26 Wend. 425. A surety, after being sued, and *before payment*, may bring a suit for indemnity. So he may, if the debtor is in a state of insolvency, or if the debt has become due and remains unpaid. These are statute and just provisions in the Louisiana Civil Code, art. 3026. See also, Webb *v.* Pond, 19 Wend. 423, s. P.; and by statute, in 1821, in Alabama, the surety may require the creditor to put his bond in suit forthwith, and proceed therein with due diligence, and in default thereof, the surety will be discharged. So in Arkansas, by statute, the creditor must sue the principal debtor within thirty days after notice, or the surety will be exonerated. This is an alteration of the general rule, that a surety cannot require the creditor to sue the principal debtor before resorting to him for payment. His remedy is to pay the debt, and take the creditor's rights against the debtor by subrogation. Griffing *v.* Caldwell, 1 Rob. (La.) 15. This is the settled English equity doctrine; and the cases of Pain *v.* Packard, 18 Johns. 174, King *v.* Baldwin, 17 id. 384, were evidently a departure from it, and they have been followed by some other of the American cases. [Remsen *v.* Beekman, 25 N. Y. 552.]

(*d*) In Birckhead *v.* Brown, 5 Hill (N. Y.), 635, it was held, that there must not be any departure whatever from the strict terms of the contract, as regards a surety or guarantor, and if he agreed to sustain drafts at sixty days' sight he is not bound by drafts at ninety days' sight; and if the creditor by any valid agreement disables himself from suing the debtor even for a single day, the surety is released. On the other hand, a creditor is not bound to active diligence to preserve his rights. He may merely remain passive. Theobald on Principal and Surety, 80; King *v.* Baldwin, 2 Johns.

The claim against a surety is *strictissimi juris;* and it is a well-settled principle, that a surety who pays the debt of his principal will, in a clear case in equity, be substituted in the place of the creditor to all liens held by him to secure the payment of his debt, and the creditor is bound to preserve them unimpaired when he intends to look to the surety for payment. (*e*) But a further pursuit of this subject of guaranty would not strictly appertain to the doctrine of negotiable paper; (*f*) and I shall conclude the present general outline of that subject with some notice of the principal publications on bills and notes.

Ch. 559; Johnson *v.* The Planters' Bank, 4 Smedes & M. 165. This is the true principle to be extracted from all the cases. 8 Meriv. 272-279; 8 Bing. 156; 17 Wend. 179. But for the better protection of the surety, it is a general rule that there can be no recovery against him, where his character appears on the face of the instrument, without declaring specially on the contract. Bronson, C. J., 1 Denio, 106. It was adjudged in the above case of Johnson *v.* The Planters' Bank, that the surety was not discharged by a failure of the creditor to present his claim to the administrator of the principal in due season.

(*e*) Bacon *v.* Chesney, 1 Stark. 192; Myers *v.* Edge, 7 T. R. 254; Combe *v.* Woolf, 8 Bing. 156; Walsh *v.* Bailie, 10 Johns. 180; Lanuse *v.* Barker, ib. 827, 828; Dobbin *v.* Bradley, 17 Wend. 422; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 413; Goswiler's Estate, 8 Penn. 208; Hereford *v.* Chase, 1 Rob. (La.) 212; Wade *v.* Green, 8 Humph. (Tenn.) 547. See, also, *infra*, iv. 877; Bell's Principles of the Law of Scotland, 77. But the substitution or subrogation exists, not in favor of all who pay a debt, but only of those who, being bound for it, discharge it. Harrison *v.* Bisland, 5 Rob. (La.) 204.

There seems to be some confusion in the cases as to the construction and effect of the word *guaranty*. It may be considered, as Mr. Justice Story observed, a clear principle, that the contract of guaranty is not an absolute but a conditional contract, and this strict construction is not to be departed from unless the contract requires it, and the guarantor is entitled to demand and notice within a reasonable time, as in common cases of guaranty. See Story on Promissory Notes, [§§ 470-474,] where the modern American cases are criticised and examined. And on this subject of surety it is adjudged, that a judgment obtained against him does not change the character of his debt, nor his relation to his principal debtor, and delay granted to the latter will release the former, in the same manner as if no judgment had been obtained. Gustine *v.* Union Bank, 10 Rob. (La.) 412. But though the principal debtor be discharged from his obligation by some personal disability, as coverture, infancy, the surety will be held bound. Kimball *v.* Newell, 7 Hill (N. Y.), 116. This was also the conclusion of the civil law. Domat, b. 3, iv. sec. 1, art. 10.

(*f*) The student will find the law concerning mercantile guaranties, and of principal and surety, fully examined, and the substance of the numerous cases well digested, in Fell's Treatise on Mercantile Guaranties, and in Theobald's Treatise on the Law of Principal and Surety, published at London, in 1832, and at Philadelphia, in 1833. Mr. Sedgwick, in his Treatise on the Measure of Damages, devotes a whole chapter (ch. 11) to the rule of damages growing out of the contract of principal and surety, and the numerous cases are fully and critically examined, with his usual acuteness and candor.

10. **Of the Principal Treatises on Bills and Notes.** — It would have been impossible to enter into greater detail of the distinctions and minute provisions which apply to negotiable paper, without giving undue proportion to this branch of these elementary disquisitions. The treatises and leading *cases must be *125 thoroughly understood before the student can expect to be master of this very technical branch of commercial law; and a brief notice of the best works on the subject will serve to direct his inquiries.

The earliest English work on bills is in Malynes's Lex Mercatoria. The author was a merchant, and the work was compiled in the reign of King James I., and dedicated to the king. That part relating to bills of exchange is brief, loose, and scanty, but it contains the rules and mercantile usages then prevailing in England and other commercial countries. It was required, at that early day, that the bill should be presented for acceptance, and again for payment, with diligence, and at seasonable hours, and on proper days; and the default in each case was to be noted by a notary, and information of it sent to the drawer with all expedition, to enable him to secure himself. If the drawee would not accept, any other person was allowed to accept for the honor of the bill. Malynes takes no notice of promissory notes or checks, and he even laments that negotiable notes were unknown to the law of England.

The next English treatise on the subject was that by Marius, published in the year 1651, and that treatise has been referred to by Lord Holt and Lord Kenyon, as a very respectable work. *Marius followed the business of a notary public *126 at the Royal Exchange, in London, for twenty-four years, and he had, of course, perfect experience in all the mercantile usages of the times. His work is far more particular, formal, and exact than that of Malynes. The three days of grace were then in use; and Marius decides the very point which has been again and again decided, and even in our own courts, that if the third day of grace falls on Sunday, or a holiday, or on no day of business, the money must be demanded on the second day, and he lays down the rule of diligence in giving notice with more severity than is consistent with the modern practice; (*a*) for he stated, that the notice of the default of payment must be sent off

(*a*) See *ante*, 106.

by the very first post after the bill falls due. He says, likewise, that verbal acceptances were good, and that you may accept for part, and have the bill protested for the residue. It is quite amusing to perceive that many of the points which have been litigated, or stated in our courts, within the last thirty years, are to be found in Marius; so true it is, that case after case, and point after point, on all the branches of the law, are constantly arising in the courts of justice, and discussed as doubtful or new points, merely because those who raise them are not thorough masters of their profession. (*b*) The next writer who treats on the subject of bills is Molloy. He was a barrister in the reign of Charles II.; and in his extensive compilation, De Jure Maritimo, which was first published in 1676, he cast a rapid glance over the law concerning bills of exchange; but that part of his work is far inferior to the treatise of Marius.

Beawes's Lex Mercatoria Rediviva is a much superior work to that of Malynes, and it appears, by its very title, to have been intended as a substitute. It contains a full and very valuable collection of the rules and usages of law on the subject of bills of exchange. Promissory notes were then taken notice of, though they had not been so much as alluded to in the formal and didactic treatise of Marius. They were not introduced into general use until near the close of the reign of Charles II., and for this we have the authority of Lord Holt in *Buller* v. *Crips*. (*c*)

*127 Beawes is frequently cited in our *books as an authority on mercantile customs; and a new and enlarged edition of his work was published by Mr. Chitty, in 1813. The next work on the subject of bills and notes was by Cunningham, and it was published about the middle of the last century. It consisted chiefly of a compilation of adjudged cases, without much method and observation. It was mentioned by the English judges as a very good book; but it fell into perfect oblivion as soon as Kyd's treatise on bills and notes appeared, in the year 1790. Mr. Kyd made free use of Marius and Beawes, and he engrafted into his work the substance of all the judicial decisions down to that time. His work became, therefore, a very valuable digest to the practising lawyer, and particularly as during the times of Lord

(*b*) Multa ignoramus, quæ nobis non laterent si veterum lectio nobis esset familiaris. 2 Inst. 166.

(*c*) 6 Mod. 29.

Holt and Lord Mansfield the law concerning negotiable paper was extensively discussed and vastly improved. Mr. Bayley, afterwards a judge of the K. B., published in 1789, a little before the work of Kyd, a small manual or digest of the principles which govern the negotiability of bills and notes. As a collection of rules, expressed with sententious brevity and perfect precision, it is admirable. In a subsequent edition, he stated also the cases from which his principles were deduced. A work of more full detail and of a more scientific cast seemed to be still wanting on the subject, and that was well supplied by Mr. Chitty's treatise on bills, notes, and checks, first published in 1799. He had recourse, though in a sparing degree, to the treatise of Pothier, for illustration of the rules of this part of the general law-merchant. (*a*) It is obvious that a more free and liberal spirit of inquiry distinguishes the professional treatises of the present age from those of former periods. The works of Park and Marshall on Insurance, and Abbott on Shipping, and Chitty and Story on Bills, and Jones and Story on Bailment, have all been enriched by the profound and classical productions of continental Europe on commercial jurisprudence.

The treatise of Pothier on bills is finished with the same order and justness of proportion, the same comprehensiveness of plan and clearness of analysis which distinguish his other * treatises on contracts. His work is essentially a *128 commentary upon the French ordinance of 1673; and he had ample materials in the commentary of M. Jousse, and in the treatises on the same subject by Dupuy de la Serra, and by Savary, to which he frequently refers. He also cites two foreign works of learning, on the doctrine of negotiable paper, and those are Scacchaia de Commerciis et Cambio, and Heineccius's treatise, entitled Elementa Juris Cambialis. The latter work contains very full and satisfactory evidence of the professional erudition of the Germans on subjects of maritime law. (*a*) Heineccius refers

(*a*) The Treatise on Bills of Exchange, by Mr. Justice Story, which appeared since the fourth edition of this work, has copied largely from Chitty, and it is full and methodical, and executed with his masterly ability.

(*a*) Mr. Justice Story, in his Treatise on Bills of Exchange and Promissory Notes, has enriched his work with copious citations and illustrations drawn from Heineccius, as well as from other continental civilians; and they are undoubtedly the most elaborate and complete treatises extant on the elementary principles of the subject.

to the ordinances of various German states, and of several of the Hanse towns, relating to commercial paper, and he cites eight or ten professed German treatises on bills of exchange. (*b*)

It has been a frequent practice on the European continent, to reduce the law concerning bills, as well as concerning other maritime subjects, into system, by ordinance. The commercial ordinance of France, in 1673, digested the law of bills of exchange, and it was, with some alterations and amendments, incorporated into the commercial code of 1807. Since the publication of the new code, M. Pardessus has written a valuable commentary on this, as well as on other parts of the code. He writes without any parade of learning, and with the clearness, order, and severe simplicity of Pothier. There is also a clear and concise summary of the law concerning negotiable paper in M. Merlin's Répertoire de Jurisprudence, under the title of Lettre et Billet de Change. Thompson's treatise on the law of bills and notes in Scotland combines the Scotch and English law upon the subject, and is spoken of in very high terms by persons entirely competent to judge of its value. The law concerning negotiable paper has at length become a science, which can be studied with infinite advantage in the various codes, treatises, and judicial decisions; for, in them, every possible view of the doctrine, in all its branches, has been considered, its rules established, and its limitations accurately defined.

(*b*) See Heineccii Opera, vi. *in fine*.

LECTURE XLV.

OF THE TITLE TO MERCHANT VESSELS.

THE utility of an outline of the code of maritime law must consist essentially in the precision, as well as in the perspicuity, with which its principles are illustrated by a series of positive rules. Every work on this subject will unavoidably become, in a degree, dry and minute in the detail; but it would be destitute of real value, unless it were practical in its design and application. The law concerning shipping and seamen, negotiable paper, and marine insurance, controls the most enterprising and the most busy concerns of mankind; and it consists of a system of principles and facts, in the shape of usages, regulations, and precedents, which are assimilated in the codes of all commercial nations, and are as distinguished for simplicity of design and equity of purpose as they are for the variety and minuteness of their provisions. I have wished (and I hope not entirely without success) to be able to give to the student a faithful summary of the doctrines of commercial jurisprudence, and to awaken in his breast a generous zeal to become familiar with the leading judicial decisions, and especially with the writings of those great masters in the science of maritime law whose talents and learning have enabled them to digest and adorn it.

The law of shipping may be conveniently arranged under the following general heads: 1. Of the title to vessels. 2. Of the persons employed in the navigation of merchant ships. 3. Of the contract of affreightment. This arrangement is very nearly the same with that pursued by Lord Tenterden, in his treatise on the subject, and which, *after comparing it with *130 the method in which these various topics have been discussed by other writers, I do not think can be essentially improved. It has been substantially adopted by Mr. Holt, in his

"System of the Shipping and Navigation Laws of Great Britain;" and still more closely followed by M. Jacobsen, the Danish civilian, in his treatise on the "Laws of the Sea." The law of shipping, as thus arranged and divided, will form the subject of this, and of the two succeeding lectures.

1. Requisites to a Valid Title. — The title to a ship, acquired by purchase (for title by capture has been already considered), (*a*) passes by writing. A bill of sale is the true and proper muniment of title to a ship, and one which the maritime courts of all nations will look for, and, in their ordinary practice, require. (*b*) In Scotland, a written conveyance of property in ships has, by custom, become essential; and, in England, it is made absolutely necessary by statute, with regard to British subjects. (*c*) Possession of a ship, and acts of ownership, will, in this, as in other cases of property, be presumptive evidence of title, without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof; (*d*) and a sale and delivery of a ship, without any bill of sale, writing, or instrument, will be good at law, as between the parties. (*e*)[1] But the

(*a*) i. 101–104.

(*b*) Lord Stowell, in The Sisters, 5 C. Rob. 155; Story, J., 1 Mason, 139; Weston *v.* Penniman, ib. 306; 2 id. 435; Ohl *v.* Eagle Insurance Company, 4 id. 390; Code de Commerce, art. 195.

(*c*) Statute 34 George III. c. 68, and reënacted 3 and 4 William IV. c. 55, sec. 31. See, also, Camden *v.* Anderson, 5 T. R. 709; The Sisters, 5 C. Rob. 155; Bell's Commentaries on the Laws of Scotland, i. 152. By the act of Congress of December, 1792, c. 146, an instrument in writing is necessary to entitle the purchaser to a new register.

(*d*) Robertson *v.* French, 4 East, 130; Sutton *v.* Buck, 2 Taunt. 302. Upon indictment in the Circuit Court of the U. S. of seamen for a revolt, it was held, that the *ownership* of the vessel determined her national character, and that the ownership might be proved in the same manner as that of any other chattel. The vessel was registered as an American vessel, and was on a whaling voyage without a license, and the register was held to be sufficient evidence of title to sustain the indictment. United States *v.* Jenkins, U. S. Cir. C. for New York, August, 1838.

(*e*) Taggard *v.* Loring, 16 Mass. 336; Wendover *v.* Hogeboom, 7 Johns. 308; Bixby *v.* Franklin Ins. Co., 8 Pick. 86. The principle is, that property in a vessel may be presumptively sustained by possession, or other *indicia* of ownership than the production of the register. Abbott on Shipping, 5th Amer. ed. Boston, 1846, 113.

[1] The Amelie, 6 Wall. 18, 80; Rice *v.* Active, Olcott, 286; Fontaine *v.* Beers, McLarren, 42 Me. 157, 166; McMahon *v.* 19 Ala. 722. Davidson, 12 Minn. 357, 369, 370; The

presumption of title arising from possession may easily be destroyed; and the general rule is, that no person can convey who has no title; and the mere fact of possession by the vendor is not, of itself, *sufficient to give a title. There is no case *131 in the English law in which it has been decided that a transfer by parol is sufficient to pass the title. Though the master of a ship, as we shall presently see, be clothed with great powers, connected with the employment and navigation of the ship, he has no authority to sell, unless in a case of extreme necessity; and then he has an implied authority to exercise his discretion for the benefit of all concerned. (*a*)

It has frequently been the case, that the sale of a ship has been procured in foreign countries, by order of some admiralty court, as a vessel unfit for service. Such sales are apt to be collusively conducted; and the English courts of common law do not regard them as binding, even though made *bonâ fide*, and for the actual as well as the intended benefit of the parties in interest. They hold, that there is no adequate foundation for such authority in the legitimate powers of the admiralty courts. They have no such power by the law of nations, and no such power is exercised by the Court of Admiralty at Westminster. (*b*) Lord Stowell, on the other hand, considered the practice which obtained in the vice-admiralty courts abroad, of ordering a sale, under the superintendence of the court, to be very convenient, when the fact of necessity was proved; and he seemed to consider, that it would be a defect in the law of England, if a practice so conducive to the public utility could not legally be maintained. The Court of Admiralty, feeling the expediency of the power, would go far to support the title of the purchaser. (*c*) The proceeding, which is condemned by the courts of law, is a voluntary proceeding, instituted by the master himself on petition for a sale, founded on a survey, proof, and report of the unnavigable and irreparable condition of the vessel. It is essentially the *act of *132 the master, under the auxiliary sanction of the court, founded merely upon a survey of the ship, to see whether she

(*a*) Hayman *v.* Molton, 5 Esp. 65; Reid *v.* Darby, 10 East, 143; Robertson *v.* Clarke, 1 Bing 445. And see *infra*, 171.

(*b*) Reid *v.* Darby, 10 East, 143; Morris *v.* Robinson, 3 B. & C. 196.

(*c*) Fanny and Elmira, 1 Edw. Adm. 117; The Warrior, 2 Dods. 288, 293, 295; Story, J., in the case of the schooner Tilton, 5 Mason, 474.

be seaworthy; and it is to be distinguished from the case in which the admiralty has regular jurisdiction of the subject, by a proceeding *in rem*, founded on some adverse claim. In such cases, the power of sale, in the sound discretion of the court, is indisputable, and binds all the world. This is a proposition of universal law, founded on the commercial intercourse of states, and the *jus gentium*. (*a*) So, as we have already seen in a former volume, (*b*) capture by a public enemy devests the title of the true owner, and transfers it to the captor, after a regular condemnation by a prize court of the sovereign of the captor. (*c*)

Upon the sale of a ship in port, delivery of possession is requisite to make the title perfect. If the buyer suffers the seller to remain in possession, and act as owner, and the seller should become bankrupt, the property would be liable to his creditors, and, in some cases, also to judgment creditors on execution. The same rule exists in the case of the mortgage of a ship; but where a sale is by a part owner, it is similar to the sale of a ship at sea, and actual delivery cannot take place. (*d*) Delivery of the muniments of title will be sufficient, unless the part owner be himself in the actual possession. (*e*) If the ship be sold while abroad, or at sea, a delivery of the grand bill of sale, and other documents, transfers the property, as in the case of the delivery of the key of a warehouse. It is all the delivery that the circumstances of the case admit of; and it is giving to the buyer or mortgagee the ability to take actual possession, and which he must do as soon as *133 possible *on the return of the ship. If the buyer takes possession of a ship sold while at sea, within a reasonable time after her arrival in port, his title will prevail against that of a subsequent purchaser or attaching creditor. (*a*) But the buyer

(*a*) The Court of Admiralty has an undoubted right, in cases of bottomry, salvage, and wages, brought before the court, to sell the vessel, and to confer a good title valid against all the world, and without a delivery of the ship's register. This is the municipal law of England, and the maritime law of the civilized world. Dr. Lushington, in the case of the Tremont, Am. Jur. for April, 1841; [1 Wm. Rob Adm. 163.] (*b*) See i. 102.

(*c*) In the case of The Attorney General *v.* Norstedt, 8 Price, 97, a judicial sale of a vessel as derelict by the Instance Court of the Admiralty was held to bind even the Crown's right of seizure for a previous forfeiture.

(*d*) Winsor *v.* McLellan, 2 Story, 492.

(*e*) Addis *v.* Baker, 1 Anst. 222; Abbott on Shipping, 5th Am. ed. 1846, 34.

(*a*) *Ex parte* Matthews, 2 Ves. 272; Hall *v.* Gurney, Cooke's B. L. [ch. 8, § 11, 342;] Mair *v.* Glennie, 4 M. & S. 240; Joy *v.* Sears, 9 Pick. 4; Abbott on Shipping, 5th Am. ed. 1846, 37.

takes subject to all incumbrances, and to all lawful contracts made by the master respecting the employment and hypothecation of the ship prior to notice of the transfer. (*b*)

The English cases speak of the transfer of a ship at sea by the assignment of the grand bill of sale, and that expression is understood to refer to the instrument whereby the ship was originally transferred from the builder to the owner, or first purchaser. But the American cases speak simply of a bill of sale, and usually refer to the instrument or transfer from the last proprietor while the vessel is at sea, and which is sufficient to pass the property, if accompanied by the act of taking possession as soon as conveniently may be after the vessel arrives in port. (*c*)

2. **Who is liable as Owner.** — There is no doubt that the owner is personally liable for necessaries furnished and repairs made to a ship, by order of the master; (*d*) and the great point for discussion is, who is to be regarded as contracting party and owner, *pro hac vice*. (*e*) The ownership in relation to this subject is not determined by the register, and the true question, in matters relative to repairs, is, "upon whose credit was the work done?" (*f*)[1] Nor is a regular bill of sale of the property essential to exempt the former owner *from responsibility for supplies *134 furnished. But where the contract of sale is made, and possession delivered, the circumstance that the naked legal title

(*b*) Mair *v.* Glennie, 4 M. & S. 240; Hay *v.* Fairbairn, 2 B. & Ald. 193; Atkinson *v.* Maling, 2 T. R. 462; Portland Bank *v.* Stubbs, 6 Mass. 422; Putnam *v.* Dutch, 8 Mass. 287; Badlam *v.* Tucker, 1 Pick. 396. As to debts which are, by the French law, privileged, and liens on the ship, see *infra*, 168.

(*c*) Portland Bank *v.* Stacey, 4 Mass. 668; Wheeler *v.* Sumner, 4 Mason, 183. A bill of sale of a ship, with her apparel, appurtenances, &c., includes all things that are necessary and incidental to the working of the ship. Abbott on Shipping, 7, 8, 5th Am ed. 1846.

(*d*) Webster *v.* Seekamp, 4 B. & Ald. 352. The owner is, of course, liable, unless the credit is given to others. So, the captain is liable, if he orders the repairs, unless the credit was given to the owner. Essery *v.* Cobb, 5 C. & P. 358; Cox *v.* Reid, 1 id. 602. For necessary supplies to a vessel, the owner, master, and charterer are all liable; and the remedy against each remains good, unless credit be given to one exclusively. Henshaw *v.* Rollins, 5 La. 335. The owner, who has the mere legal title, but not the control and management of the vessel, or the right to receive her freight and earnings, is not responsible for supplies and necessaries. Duff *v.* Bayard, 4 Watts & S. 240. (*e*) Briggs *v.* Wilkinson, 7 B. & C. 30.

(*f*) Lord Tenterden, in Jennings *v.* Griffiths, Ryan & M. 43; Reeve *v* Davis 1 Ad. & El. 312.

[1] But see 188, n. 1.

remains in the vendor for his security, does not render him liable as owner on the contracts, or for the conduct of the master. (*a*)

It has been a disputed question, whether the mortgagee of a ship, before he takes possession, be liable to the burdens and entitled to the benefits belonging to the owner. In the case of *Chinnery* v. *Blackburne*, (*b*) it was held by the K. B. that the mortgagor in such a case, and not the mortgagee, was to be deemed owner, and entitled to the freight, and liable for the repairs and other expenses. The same decision was made by the C. B. in *Jackson* v. *Vernon*. (*c*) But Lord Kenyon, in *Westerdell* v. *Dale*, (*d*) entertained a different opinion, and he considered the mortgagee, whether in or out of possession, to be the owner, and entitled to the freight, and bound for the expenses of the ship. The weight of our American decisions has been in favor of the position, that a mortgagee of a ship out of possession is not liable for repairs or necessaries procured on the order of the master, and not upon the particular credit of the mortgagee, who was not in the receipt of the freight; though the rule is otherwise when the mortgagee is in possession, and the vessel employed in his service. (*e*)[1] The case of *Fisher* v. *Willing* (*f*) has a strong bearing in favor of the decisions which go to charge the mortgagor; for it was held that a mortgagee of a ship at sea did not, merely by delivery of the documents, acquire such a possession as to be liable to the master for wages accruing after the date of the mortgage. The contract was with the mortgagor, and there was no privity between the master and the mortgagee, before possession taken, sufficient to

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(*a*) Wendover *v.* Hogeboom, 7 Johns. 308; Leonard *v.* Huntington, 15 id. 298; Thorn *v.* Hicks, 7 Cowen, 697.

(*b*) 1 H. Bl. 117, note.

(*c*) 1 H. Bl. 114.

(*d*) 7 T. R. 306. In Dean *v.* M'Ghie, 4 Bing. 45; s. c. 12 J. B. Moore, 185, it was held, that on a mortgage of a ship at sea, and possession taken, the accruing freight passed to the mortgagee, as incident to the ship.[1]

(*e*) M'Intyre *v.* Scott, 8 Johns. 159; Champlin *v.* Butler, 18 id. 169; Ring *v.* Franklin, 2 Hall (N. Y.), 1; Tucker *v.* Buffington, 15 Mass. 477; Colson *v.* Bonzey, 6 Greenl. 474; Winslow *v.* Tarbox, 18 Me. 132; Cutler *v.* Thurlo, 20 id. 218; Miln *v.* Spinola, 4 Hill (N. Y.). 177.

(*f*) 8 Serg. & R. 118. A mortgagor in possession of a vessel may pledge the freight. Keith *v.* Murdoch, [2 Wash. 297.]

[1] *Post* 138, n. 1.

raise an assumption. A similar decision was made by Ch. J. Abbott in *Martin* v. *Paxton*, and cited in the Pennsylvania case. The case of *The Mohawk Insurance Company* v. *Eckford*, decided in the Court of Common Pleas in the city of New York, in 1828, and the cases of *Thorn* v. *Hicks* and *Lord* v. *Ferguson*, (*a*) show that the rule is considered to be settled in New York and New Hampshire, that a mortgagee out of possession is not liable for services rendered, or necessaries furnished to a vessel, on the credit of the mortgagor, or other person having the equitable title. The question seems to resolve itself into the inquiry, whether the circumstances afford evidence of a contract, express or implied, as regards mortgagees not in possession. If the claimant dealt with the mortgagor solely as owner, he cannot look to the mortgagee. To whom was the credit given, seems to be the true ground on which the question ought to stand. (*b*)[1] In a case before Lord Ellenborough, in 1816, (*c*) he ruled, that a mortgagee not in possession, and not known to the plaintiff, was not liable for stores supplied by the captain's order. The weight of authority is decidedly in favor of the mortgagee, who has not taken possession; and if he has left the possession and control of the ship to the mortgagor, he will not be liable to the master for wages or disbursements, or to any other person for repairs and necessaries done or supplied by the master's order, where the mortgagor has been treated as owner. If, however, there has been no such dealing with * the mortgagor, in the char- *136 acter of owner, but the credit has been given to the person who may be owner, it is a point still remaining open for discussion, whether the liability will attach to the beneficial or to the legal owner. The principle of the decision in *Trewhella* v. *Row* (*a*) was, that a vendee of a ship, whatever equitable title might exist in him, was not liable for supplies furnished before the legal title was conveyed to him, and registered in the manner prescribed by the Registry Acts, and when he was unknown to the tradesmen who supplied the materials. (*b*)

(*a*) 7 Cowen, 697; Ring v. Franklin, 2 Hall, 1, s. p.; 9 N. H. 880.
(*b*) Baker v. Buckle, 7 J. B. Moore, 349.
(*c*) Twentyman v. Hart, 1 Starkie, 366.
(*a*) 11 East, 485.
(*b*) The same principle governed the decision in Harrington v. Fry, 2 Bing. 179;

[1] But see 188, n. 1.

There are analogous cases which throw light upon this subject. Thus, in *Young* v. *Brander*, (*c*) the legal title remained for a month after the sale in the vendor upon the face of the register, because the vendee had omitted to comply with the forms prescribed by the Registry Acts. But it was held, that he was not liable during that interval for repairs ordered by the captain, under the direction of the vendee, and who had no authority, express or implied, from the legal owner. The vendee ordered the repairs in his own right, and there was no privity of interest between him and the legal owner, and the credit was actually given to the vendee. So, again, the regular registered owner of a ship was held not to be liable for supplies furnished by order of the charterer, who had chartered the ship at a certain rent for a number of voyages, the owner had divested himself, in that case, of all control and possession of the vessel during the existence of the charter party, and he had no right under
* 137 * it to appoint the captain. (*a*) [1] The question in these cases is, whether the owner, by reason of the charter party, has devested himself of the ownership *pro hac vice*, and whether there has been any direct contract between the parties, varying the responsibility.

In *Valejo* v. *Wheeler*, (*b*) the court proceeded on the ground that the charterer was owner *pro hac vice*, inasmuch as he appointed the master. The subject was much discussed in *M'Intyre* v. *Bowne*, (*c*) and it was held, that where, by the terms of the charter party, the ship-owner appoints the master and crew, and

and by the English statutes of 4 George IV. c. 41, and of 6 George IV. c. 110, on a transfer of a ship, or any interest therein, by mortgage or assignment in trust by way of *security for a debt*, the entry in the book of registry is so to state it, and the mortgagee or trustee shall not, by reason thereof, be deemed owner, nor the mortgagor cease to be owner, except so far as to render the security available. Under these statutes, the interest of the mortgagor and mortgagee are more distinctly severed than they were before, and a mortgagor does not cease to be owner. Irving *v.* Richardson, 2 B. & Ad. 193. No act of bankruptcy, committed by the mortgagor, after the registry of the mortgage or assignment, to affect the security. This provision is continued in the consolidated registry statute of 3 and 4 William IV. c. 55, secs. 42, 43.

(*c*) 8 East, 10.

(*a*) Frazer *v.* Marsh, 13 East, 238. Registered ownership is *prima facie* evidence of liability for the repairs of a ship, but it may be rebutted by showing that the credit was given elsewhere. Cox *v.* Reid, Ryan & M. 199.

(*b*) Cowp. 143. (*c*) 1 Johns. 229.

[1] *Post*, 188, n. 1.

retains the management and control of the vessel, the charter was to be considered as a covenant to carry goods. But where the whole management is given to the freighter, it is more properly a hiring of the vessel for the voyage, and in such case the hirer is to be deemed owner for the voyage. In *Hallet* v. *The Columbian Insurance Company*, (*d*) the owner of the vessel, by the charter party, let the whole vessel to the master, who was to victual and man her at his own expense, and have the whole management and control of her, and he was held to be the owner for the voyage; and a similar decision was made in *Taggard* v. *Loring*. (*e*) The case of *Fletcher* v. *Braddick* (*f*) adopted the same principle which had been laid down by Ch. J. Lee, in *Parish* v. *Crawford*, (*g*) and it was declared that the ownership, in respect to all third persons, remained with the original proprietor, when the vessel was supplied and repaired by the owner, and navigated by a master and sailors provided and paid for by him. In that case, the ship was chartered by the * commissioners of the *138 navy, who placed a commander in the navy, on board, and the master was to obey his orders; but with regard to third persons, it was still, notwithstanding that very important fact, considered to be the ship of the owners, and they were held answerable for damage done by the ship. This highly vexed question, and so important in its consequences to the claim of lien, and the responsibilities of ownership, depends on the inquiry, whether the lender or hirer, under a charter party, be the owner of the ship for the voyage. It is a dry matter-of-fact question, who, by the charter party, has the possession, command, and navigation of the ship. If the general owner retains the same, and contracts to carry a cargo on freight for the voyage, the charter party is a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. The general owner, in such a case, is entitled to the freight, and may sue the consignee on the bills of lading in the name of the master, or he may enforce his claim by detaining the goods until payment, the law giving him a lien for freight. But where the freighter hires the possession, command, and navigation of the ship for the voyage, he becomes the owner, and is responsible for the conduct of the master and mariners; and the

(*d*) 8 Johns. 272. (*e*) 16 Mass. 336.
(*f*) 5 Bos. & P 182. (*g*) Str. 1251.

general owner has no lien for the freight, because he is not the carrier for the voyage. This is the principle declared and acted upon in the greatly litigated and very ably discussed case of *Christie* v. *Lewis*; (*a*) and it is the principle declared by the Supreme Court of the United States, in *Marcardier* v. *The Chesapeake Insurance Company*, (*b*) and *Gracie* v. *Palmer*, (*c*) and followed generally by the courts of justice in this country. (*d*) It may be considered as the sound and settled law on the subject. (*e*) [1]

(*a*) 2 Brod. & B. 410. (*b*) 8 Cranch, 39. (*c*) 8 Wheat. 605.

(*d*) Pitkin *v.* Brainerd, 5 Conn. 451; Clarkson *v.* Edes, 4 Cowen, 470; Reynolds *v.* Toppan, 15 Mass. 370; Emery *v.* Hersey, 4 Greenl. 407; Lander *v.* Clark, 1 Hall, (N. Y.), 355; Lord Tenterden, in Colvin *v.* Newberry, 6 Bligh (N. S.), 189; The Schooner Volunteer and Cargo, 1 Sumner, 568, 569. In the case of Certain Logs of Mahogany, 2 Sumner, 596, 597, it was decided, that where the owner of a chartered vessel has a lien for freight, the consignee cannot, by a writ of replevin, withdraw the cargo from the jurisdiction of the admiralty court; and that the owner of the vessel is presumed to be the owner for the voyage, unless the charter party contains clear evidence of an intention to make the charterer owner for the voyage; and that the owner has a lien on the cargo for the amount due by the charter party, unless, by the terms of the instrument, delivery of the cargo is to precede payment of the freight, and the owner is devested of the possession of the goods, without the right to claim immediate payment; that a stipulation that the freight is to be paid in five days after the return and discharge of the vessel, is not a contract to give credit, so as to displace the lien; and that the stipulation to discharge the cargo is simply to unlade, and not to deliver it.

(*e*) In Massachusetts, the charterer of a vessel is declared to be the owner, in respect to the responsibility for embezzlements by the crew, in case he navigates

[1] *Liability and Rights of Owners and Ship.*—The text is confirmed by Reed *v.* United States, 11 Wall. 591, 601, Donahoe *v.* Kettell, 1 Cliff. 185; Eames *v.* Cavaroc, Newb. 528; Adams *v.* Homeyer, 45 Mo. 545; *post*, 164, n. 1.

Charterers are to be deemed owners of the vessel within the meaning of the act limiting the liability of ship owners, in case they shall man, victual, and navigate such vessel at their own expense, or by their own procurement. Act of Congress, March 3, 1851, ch. 43, § 5; 9 St. at L. 635; *post*, 217, n. 1. So when a master hires a vessel on shares, and has control of her, he becomes owner *pro hac vice*. Bonzey *v.* Hodgkins, 55 Me. 98; Sproat *v.* Donnell, 26 Me. 185; Webb *v.* Peirce, 1 Curtis, 104; Mayo *v.* Snow, 2 Curtis, 102; Baker *v.* Huckins, 5 Gray, 596; Tucker *v.* Stimson, 12 Gray, 487. See Thomas *v.* Osborn, 19 How. 22, 30; *post*, 164, n. 1; 172, n. 1.

Sandeman *v.* Scurr, L. R. 2 Q. B. 86, was decided on the ground that the charter party did not amount to a demise of the ship (p. 96), and that although the charterers might be bound by the bill of lading and liable for bad stowage (p. 91), the plaintiffs having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, were entitled to look to the owners as responsible for the safe carriage of the goods. The St. Cloud, Brown. & Lush. 4,

*3. **Of Custom-house Documents.** — The United States *139 have imitated the policy of England and other commercial

the vessel at his own expense. Revised Statutes of 1836, part 1, c. 32, sec. 8. The litigated question, who are to be considered as the responsible owners of the ship for repairs and necessaries, is considered, and the numerous authorities cited and reviewed in Abbott on Shipping, 5th Am. ed. Boston, 1846, pp. 88–70. In that same work, pp. 377–379, the learned editor, Sergeant Shee, observes, on a review of the English decisions respecting the ship-owner's lien for freight, that there is great contrariety, and almost inextricable conflict in the construction of the charter party; that the maritime law is founded upon the principle, that the master is the servant of the owner, and is intrusted with authority over the property in his charge; and by his contract with sub-freighters the owner of a chartered ship is bound, and for misconduct in him, or in the mariners engaged by him, the owners are responsible to the extent and value of the ship and freight; and yet, that by subtle distinctions, the possession of the master is made out not to be the possession of the owner, and learned judges have determined against the ship-owner's lien for freight, and against his liability for the acts of the master; that the maritime law of France and England is founded upon the civil law; and Pothier (Charte Partie, p. 1, sec. 5) holds, that in the *locatio rei et operarum* and the *locatio operis*, the obligations of the master and the merchant are the same. In the French charter party, the proprietor of the ship engages to employ her in the same service of the freighter, in the same way as the owner of a coach engages to carry goods or passengers. (Code de Commerce, art. 278.) The service of the master and mariners goes with the service of the ship, but they do not cease to be the servants of the owner, to whom the lien for freight and the responsibilities of owner attach. The learned sergeant seems to think most favorably of the latter doctrine; and for the removal of doubts, he recommends an express agreement in the charter party, as was done in the case of Small *v.* Moates, 9 Bing. 574, which avoided the vexatious question, and vested the ownership fully in the original owner, and gave him a right of lien, without considering the question whether the possession of the ship remained in him, or had passed to the charterer.

15; Figlia Maggiore, L. R. 2 Ad. & Ec. 106 (in this case the bill of lading had been assigned for value); The Patria, L. R. 3 Ad. & Ec. 436, 459; *post*, 207, n. 1.

So when a charter party does amount to a demise of a ship, it is said in this country that contracts of affreightment entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, whether the master be the agent of the general or the special owner. The Freeman *v.* Buckingham, 18 How. 182, 189. See The Canton, 1 Sprague, 437; Highlander, ib. 510; *post*, 207, n. 1; 218. So the master does not lose his power to create a lien on the vessel for necessary repairs and supplies in a foreign port, by having taken her on a "lay," and so having become owner *pro hac vice*. Thomas *v.* Osborn, 19 How. 22, 30; *post*, 164, n. 1; The City of New York, 3 Blatchf. 187; The Monsoon, 1 Sprague, 37; Fox *v.* Holt, 36 Conn. 558, 570. On the other hand, it has been held that the owners would not be personally liable although the demise was unknown to the plaintiff. Swanton *v.* Reed, 35 Me. 176; Stirling *v.* Loud, 33 Md. 436, 440. See Fox *v.* Holt; Thomas *v.* Osborn, *sup.* But see 1 Sprague, 195, note; Durst *v.* Burton, 47 N. Y. 167, 178. As to the effect of a transfer of the ship during the voyage without the master's knowledge, Mercantile & Exchange Bank *v.* Gladstone, L. R. 3 Ex. 233. In a case where the vessel was let to the master on shares

nations (*a*) in conferring peculiar privileges upon American built ships, and owned by our own citizens; and I shall now examine

(*a*) Mr. Prescott refers to a Spanish law, or pragmatic, as early as the year 1500, prohibiting all persons, whether natives or foreigners, from shipping goods in foreign bottoms from a port where a Spanish ship could be obtained. The object of the law, like the English famous navigation act, was to exclude foreigners from the carrying trade. Another pragmatic, of 1501, prohibited the sale of vessels to foreigners. Prescott's Ferdinand and Isabella, iii. 458.

Mr. Justice Ware held the general owners liable for wages to seamen who had not been informed that they were to look to the master as the only owner. Skolfield *v.* Potter, Daveis, 392. See Webb *v.* Peirce, 1 Curt. 104, 113; The Canton, 1 Sprague, 437; The Highlander, ib. 510; Giles *v.* Vigoreux, 35 Me. 300; Harding *v.* Souther, 12 Cush. 307; McCabe *v.* Doe, 2 E. D. Smith, 64.

Some of the above cases seem to be relics of the mediæval principle that the vessel was primarily liable, and that the owner was not liable at all outside of his interest in her. She was treated as a legal person. The China, 7 Wall. 53, 68, 70; Miller *v.* Woodfall, 8 El. & Bl. 493, 499, 500; *post*, 167, n. 1; 176, n. 1; 218, n. 1; 161, n. (*b*). The tendency of the English cases, perhaps under the influence of common law notions, seems to have been to reduce the power of the master to bind the vessel, as well as his power to bind the owners, to a simple question of agency in most instances. The Druid, 1 Wm. Rob. 891, 899, commented on 18 How. 189; The Troubadour, L. R. 1 Ad. & Ec. 302; The Halley, L. R. 2 P. C. 193, 201. But see 164, n. 1; 218, n. 1. And there are exceptions even in England: ib. and 232, n. 1. So it seems that a claim for salvage binds the ship only and not the owners until the property be restored. 248, n. 1.

Personal liability for supplies is now reduced to an ordinary case of agency. It would seem that the register is *prima facie* evidence that the persons in charge of the ship were employed by those whose names appear on the register as owners; Hacker *v.* Young, 6 N. H. 95; Hibbs *v.* Ross, L. R. 1 Q. B. 534; see Brooks *v.* Minturn, 1 Cal. 481; Pearson *v.* Nell, 18 W. R. 967; Lincoln *v.* Wright, 23 Penn. St. 76. *Contra*, Dyer *v.* Snow, 47 Me. 254; United States *v.* Brune, 2 Wall. Jr. 264; but the right of persons making repairs or furnishing supplies to recover payment does not depend on the registry or enrolment, but on the authority of the person with whom they deal to bind the owners by his contracts; Howard *v.* Odell, 1 Allen, 85, 87; and cases cited below; and it is said to be now settled that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship. The person ordering them must have acted as the defendant's master of the ship with his privity and consent, and they must have been furnished not merely upon the credit of the owner, by the *bona fide* orders of the master given with the privity of the owner, but as on a contract with the owner on orders given by the master *as for him*. Mitcheson *v.* Oliver, 5 El. & Bl. 419, 443, 445; Howard *v.* Odell, 1 Allen, 85, 88; Blanchard *v.* Fearing, 4 Allen, 118; Myers *v.* Willis, 17 C. B. 77, 92; Brodie *v.* Howard, ib. 109; Hackwood *v.* Lyall, ib. 124; 18 C. B. 886; Macy *v.* Wheeler, 30 N. Y. 231; Kenzel *v.* Kirk, 32 How. Pr. 269; Dorgan *v.* Pentz, 1 Chic. Leg. News, 225; Pearson *v.* Nell, 18 W. R. 967; Mackenzie *v.* Pooley, 11 Exch. 638; The Great Eastern, L. R. 2 Ad. & Ec. 88. So as to the power of one part owner to bind his coöwners, *post*, 155, n. 1.

On these principles the mortgagee of a vessel, not having her in his possession or

the acts of Congress, so far as they go, to ascertain the title to American ships, and the mode of transferring that title. The object of the registry acts is to encourage our own trade, navigation, and ship-building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries. These provisions are well calculated to prevent the commission of fraud upon individuals, as well as to advance the national policy. The registry of all vessels at the custom-house, and the memorandums of the transfers, add great security to title, and bring the existing state of our navigation and marine under the view of the general government. By these regulations, the title can be effectually traced back to its origin. (*b*)

(*b*) A historical view of the laws of England with regard to shipping and navigation, is given, with admirable clearness, method, and accuracy, by Mr. Reeves, in his "History of the Law of Shipping and Navigation," published in 1792; and the policy of that system he considers to have been vindicated and triumphantly sustained, in the increase of the English shipping, the extension of their foreign navigation and trade, and the unrivalled strength of their navy. The policy of the British statutes was to create skilful and hardy seamen, and to confine the privileges of English trade, as far as was consistent with the extent of it, to British built shipping. But the quantity of British built shipping was not at first adequate to carry on the whole trade of the country, and it became a secondary object to confer privileges on foreign built

control, is not liable for supplies and repairs furnished at the request of the master or mortgagor. Nor does the fact that he appears on the register as absolute owner of itself make him liable. Howard *v.* Odell, 1 Allen, 85, 86; Myers *v.* Willis, 18 C. B. 886; Macy *v.* Wheeler, 30 N. Y. 231; Weber *v.* Sampson, 6 Duer, 858. And even a mortgagee in possession would not, it seems, be liable unless the master in ordering the necessaries was acting as his agent. The Troubadour, L. R. 1 Ad. & Ec. 302. But see above as to the liability of the vessel. *Post*, 164, n. 1; 172, n. 1; 174, n. 1; 185, n. 1.

As to suits against masters and owners, see 161, n. 1.

The law is still perhaps a little perplexed as to the right of mortgagees of a ship to freight. It is settled that the transfer of a general ship before delivery of the cargo transfers accruing freight. Pelayo *v.* Fox, 9 (Barr) Penn. St. 489; Lindsay *v.* Gibbs, 22 Beav. 522; 3 De G. & J. 690. It is also settled that if a mortgagee takes possession before delivery of the cargo he will be entitled to the freight. The prevailing opinion seems to be that this stands on the ground that it passed by the mortgage, and that taking possession is merely a form of giving notice to the person from whom it is due, who could otherwise make a good payment to the mortgagor. Rusden *v.* Pope, L. R. 3 Ex. 269; Gardner *v.* Cazenove, 1 Hurlst. & N. 423; Gumm *v.* Tyrie, 6 Best & S. 298, 301; Brown *v.* Tanner, L. R. 3 Ch. 597; Cato *v.* Irving, 5 De G. & Sm. 210. But it has been thought to depend on freight being earned after possession taken. Bramwell, B., Rusden *v.* Pope, *sup.*

The Acts of Congress of 31st December, 1792, and 18th February, 1793, constitute the basis of the regulations in this

ships in British ownership. In proportion as British built shipping increased, the privileges conferred on foreign built ships in British ownership were from time to time restricted. The English navigation laws prior to the famous navigation act of the republican parliament of 1651, and adopted by the statute of 12 Charles II. c. 18, were crude and undigested. They commenced with the statute of 5 Richard II., and in the earlier acts, the preference of English ships and mariners, in English imports and exports, was given in simple and absolute terms, and they kept improving in accuracy of description and justness of policy, down to the time of the registry acts. The navigation act of Charles II. described what were English built and English owned ships, and in what cases a foreign built ship, owned by an English subject, should have the privileges of an English ship. The act did not require any foreign ships to be registered; but a foreign built ship, unless registered, was to be treated as an alien ship, though owned by a British subject. The statute of 26 George III. c. 60, was framed by the elder Lord Liverpool, and it gave rise to the treatise of Mr. Reeves, who dedicated his work to that distinguished nobleman. The navigation act of Charles II. only required ships to be the *property* of British subjects; but in the progress of the system, the qualification of being British *built* was added. The one encouraged British seamen and merchants, but the other encouraged also British shipbuilding. The statute of 26 George III. declared that the time had come when the policy of employing British built shipping exclusively in the commerce of that country, ought to be carried to the utmost extent; and it accordingly enacted, that no foreign built ship, except prizes, nor any ship built upon a foreign bottom, although British owned, should be any longer entitled to any of the privileges or advantages of a British built ship, or of a ship owned by British subjects. This statute likewise introduced into the European trade the necessity of a register, which had been introduced into the plantation trade by the statute of 7 and 8 William III. c. 22. The general principle established by the act of 16 George III. was, that all British ships, with some few exceptions, should be registered, and a certificate of the registry obtained in the port to which the ship belonged. All ships entitled and required to be registered were made subject to forfeiture for attempting to proceed to sea without a British register. All ships not entitled to the privileges of British built or British owned ships, and all ships not registered, although owned by British subjects, were to be deemed alien ships, and liable to the same penalties and forfeitures as alien ships. British subjects might still employ foreign ships in neutral trade, subject only to the alien duties. The statute further required that, upon every alteration of the property, an indorsement was to be made upon the registry, and a memorandum thereof entered at the custom-house; and that upon every transfer, in whole or in part, the certificate of the registry was to be set out in the bill of sale. The statute of 34 George III. c. 68 was an enlargement of the statute of 26 George III., and it contained several provisions for granting new certificates upon a transfer of property, and it regulated those cases only in which a title to a certificate had been given, and a certificate was required to be obtained; and it required all registered vessels to be navigated by a British master, and a crew of whom three fourths were British. The existing British regulations respecting the registration and enrolment of ships are embodied in the act of 8 and 4 William IV. c. 54, and the acts of 8 and 9 Victoria, c. 88, 89, *for the encouragement of British shipping and navigation*, and for the *registering of British vessels*. Vessels under fifteen tons, navigating rivers, &c., or under thirty tons, in the Newfoundland fishery, need not be registered. Foreign ships were those of

*country for the foreign and coasting trade, and for the *141
fisheries of the United States; and they correspond very closely with the provisions of the British statutes in the reign of George III.

No vessel is to be deemed a vessel of the United States, or entitled to the privileges of one, unless registered and wholly owned and commanded by a citizen of the United States. The American owner, in whole or in part, ceases to retain *his privileges as such owner, if he usually resides in a *142
foreign country, during the continuance of such residence, unless he be a consul, or an agent for and a partner in some American house, carrying on trade within the United States. (a) The register is to be made by the collector of the port to which such ship shall belong, or in which it shall be, and founded on the oath of one of the owners, stating the time and place where

the build or prize of the country, or British built, and owned and navigated by subjects of the country; and natives of India are not deemed to be British seamen. And by the act of 8 and 9 Victoria, c. 93, for regulating the trade of British possessions abroad, the Queen may grant free ports in discretion, and give or withhold the privileges of the reciprocity system.

The navigation laws of Great Britain now form a permanent and regular code; and they were involved in a labyrinth of statutes, and not easily rendered simple and intelligible to practical men, until the statutes of 4 George IV. c. 44, 6 George IV. c. 109, 110, 7 George IV. 48, and 3 and 4 William IV. c. 54, 55, successively displacing each other, reduced all the former provisions, with alterations and improvements, into one consolidated system. The registry acts have peculiar simplicity and legal precision for statute productions of that kind, and they are regarded by English statesmen and lawyers as highly honorable to the talents, experience, and vigilance of Lord Liverpool, who established on solid foundations the naval power and commercial superiority of his country. The code of laws constituting the navigation system of England may be considered as embodied in the statutes of 3 and 4 William IV., and which are said to owe much of the merit of their compilation to the industry and talents of Mr. Hume, of the Board of Trade. As the code previously existed, it was well digested, not only in the history of Mr. Reeves, to which I have alluded, but by Lord Tenterden, in his accurate and authoritative "Treatise of the Law relative to Merchant Ships and Seamen;" and still more extensively and very ably, in Holt's "System of the Shipping and Navigation Laws of Great Britain." That work contains all the laws on the subject, brought down to the year 1820. His introductory essay is a clear but brief synopsis of the history and policy of the navigation system. In the sixth and seventh chapters of the first volume of Mr. Chitty's ample "Treatise on the Laws of Commerce and Manufactures, and Contracts relating thereto," we have also a condensed digest of the same code of navigation laws. An abstract is given in the last Am. edition of Abbott on Shipping, by Sergeant Shee, pp. 75 to 128, of the enactments of the last English Registry Acts; and the American editor, Mr. Perkins, has added to the notes the corresponding sections in the American Registry and Navigation Acts.

(a) Act of Congress, 31st December, 1792, secs. 1, 2.

she was built, or that she was captured in war by a citizen, as prize, and lawfully condemned or forfeited, for a breach of the laws of the states; and stating the owners and master, and that they are citizens, and that no subject of a foreign power is, directly or indirectly, by way of trust or otherwise, interested therein. The master is, likewise, in certain cases, to make oath touching his own citizenship. (*b*) Previous to the registry, a certificate of survey is to be produced, and security given, that the certificate of such registry shall be solely used for the ship, and shall not be sold, lent, or otherwise disposed of. If the vessel, or any interest therein, be sold to any foreigner, and the vessel be within the United States, the certificate of the registry shall, within seven days after the sale, be delivered up to the collector of the district, in order to be cancelled; and if the sale be made when the vessel is abroad, or at sea, the certificate is to be delivered up within eight days after the master's arrival within the United States; (*c*) and if the transfer of a registered vessel be made to a foreigner in a foreign port, for the purpose of evading the revenue law of a foreign country, it works a forfeiture of the vessel, unless the transfer be made known within eight days after the return of the vessel to a port in the United States, by a delivery of the certificate of registry to the collector of the port. (*d*) So, *143 if a registered ship be sold in whole or in part, * while abroad, to a citizen of the United States, the vessel, on her first arrival in the United States thereafter, shall be entitled to all the privileges of a ship of the United States, provided a new certificate of registry be obtained within three days after the master makes his final report upon her first arrival. (*a*) If the vessel be built within the United States, the ship-carpenter's certificate is requisite to obtain the register; and when the ship is duly registered, the collector of the port shall grant an abstract or certificate of such registry. (*b*) There are several minute regulations respecting the change of the certificate, and the granting of a new register, which need not here be detailed; (*c*) but when a vessel, duly registered, shall be sold or transferred, in whole or

(*b*) Ib. secs. 8, 4, 11. (*c*) Ib. secs. 6, 7.

(*d*) Act of Congress, 31st December, 1792, secs. 7, 16; The Margaret, 9 Wheat 421.

(*a*) Act of the United States, March 2, 1803, sec. 8.

(*b*) Law of the United States, 31st December, 1792, sec. 9.

(*c*) Ib. secs. 12, 13.

in part, to a citizen of the United States, or shall be altered in form or burden, she must be registered anew, and her former certificate of registry delivered up, otherwise she will cease to be deemed a vessel of the United States, or entitled to any of the privileges of one. In every case of sale or transfer there must be some instrument of writing, in the nature of a bill of sale, which shall recite at length the certificate of registry, and without it the vessel is incapable of being registered anew. (*d*) Upon every change of master the owner must report such change to the collector, and have a memorandum of such change indorsed upon the certificate of registry; and if any ship so registered be sold, in whole or in part, by way of trust or otherwise, to a foreigner, and the sale be not made known as above directed, the whole, or at least the share owned by the citizen who sells, becomes forfeited. (*e*) [1]

(*d*) Ib. sec. 14.

(*e*) Law of the United States, 31st December, 1792, secs. 15, 16.

[1] *Registry and Enrolment.* — By act of Congress of July 29, 1850, c. 27, § 1, 9 St. at L. 440, "no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs, and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of customs where such vessel is registered or enrolled: *Provided*, that the lien by bottomry on any vessel created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act." There are later statutes which should be consulted. See, also, The Mohawk, 8 Wall. 566. The above act is constitutional. White's Bank v. Smith, 7 Wall. 646. And under it the record should be made in the home port of the vessel, although that is not the port of last registry. Ib. It does not apply to a sail boat of sixteen tons burden which is kept and used in connection with a hotel, and which is neither registered, enrolled, nor licensed under the laws of the United States. Veazie v. Somerby, 5 Allen, 280. By § 5 the part or proportion belonging to each owner is to be sworn to and inserted in the register.

It may as well be mentioned here as anywhere, that by the act of Feb. 10, 1866, 14 St. at L. 3, no ship or vessel, which has been recorded or registered as an American vessel, pursuant to law, and which shall have been licensed or otherwise authorized to sail under a foreign flag, and to have the protection of any foreign government during the existence of the rebellion, shall be deemed or registered as an American vessel, or shall have the rights and privileges of American vessels, except under the provisions of an act of Congress authorizing such registry.

The act of Congress of March 2, 1831, c. 98, 4 St. at L. 487, regulating the foreign and coasting trade on the northern, north-eastern, and north-western frontiers of the United States, in order to enable a class of vessels which are engaged in both the foreign and the coasting trade at the

Vessels enrolled and licensed, or licensed only, if under
*144 *twenty tons, are entitled to the privileges of vessels employed in the coasting trade or fisheries. (a) Vessels, to be enrolled, must possess the same qualifications, and the same requisites, in all respects, must be complied with, as are made necessary for the registry of ships and vessels; and the same duties are required in relation to such enrolments; and the ships enrolled, with the master and owner, are subject to the same regulations as are in those respects provided for registered vessels. (b) Any vessel may be enrolled and licensed, that may be registered, upon the registry being given up; and any vessel that may be enrolled may be registered, upon the enrolment and license being given up. (c) In order to obtain a license for carrying on the coasting trade, or fisheries, the owner, or ship's husband and master, must give security to the United States that the vessel be not employed in any trade whereby the revenue of the United States may be defrauded; and the master must make oath that he is a citizen, and that the license shall not be used for any other vessel or any other employment; and *if the vessel be less than twenty tons burden, that she is wholly the property of a citizen of the United States.* The collector of the district thereupon grants a license for carrying on the coasting trade, or fishery. (d) Vessels engaged in such a trade or business, without being enrolled and licensed, or licensed only, as the case may be, shall pay alien duties, if in ballast, or laden with goods the growth or manufacture of the United States, and shall be forfeited if laden with any articles of foreign growth or manufacture, or distilled spirits. (e) If any vessel enrolled or licensed proceed on a foreign voyage, without first surrendering up her enrolment and license, and being
*145 duly registered, *she shall, with her cargo imported into the United States, be subjected to forfeiture. (a) [1] The other general provisions relative to the rights and duties apper-

(a) Act of Congress, February 18th, 1793, sec. 1.
(b) Ib. sec. 2.
(c) Ib. sec. 3.
(d) Ib. sec. 4.
(e) [Ib.] sec. 6.
(a) Ib. sec. 6.

same time, to do so without the necessity of taking out both a register and an enrolment, makes the enrolment in those cases equivalent to both register and enrolment. In giving the enrolment this effect, it subjects the vessel to all the regulations and penalties relating to registered vessels. The Mohawk, 8 Wall. 566, 573.

[1] See 143, n. 1, *ad finem*.

taining to the coasting trade and the fisheries need not here be enumerated, as my object is to consider the subject merely in reference to the documentary title to American vessels.

It is further provided, by the act of March 2, 1797, that whenever any vessel is transferred *by process of law*, and the register, certificate of enrolment, or license is retained by the former owner, a new one may be obtained upon the usual terms, without the return of the outstanding paper. Vessels captured and condemned by a foreign power, or by sale to a foreigner, whereby there becomes an actual divesture of the title of the American citizen, are to be considered as foreign vessels, and not entitled to a new register, even though they should afterwards become American property, unless the former owner regain his title, by purchase or otherwise, and then the law allows of the restoration of her American character, by a sort of *jus postliminii*. (*b*) Every registered or unregistered vessel, owned by a citizen of the United States, and going to a foreign country, and an unregistered vessel, sailing with a sea-letter, is entitled to a passport, to be furnished by the collector of the district. (*c*) But no sea-letter, certifying any vessel to be the property of a citizen of the United States, can be issued, except to ships duly registered, or enrolled and licensed, or to vessels wholly owned by citizens of the United States, and furnished with, or entitled to, sea-letters or other custom-house documents. (*d*)

The English registry acts of 26 Geo. III. and 34 Geo. III. c. 68, required the certificate of the registry to be truly recited at length in every bill of sale of a British ship to a British subject; otherwise such bill of sale was declared to be utterly null and void to all intents and purposes; and this was held to be necessary, even though the ship was at sea at the time, and the vendee took * the grand bill of sale and possession of the *146 ship immediately on her arrival in port. (*a*) The laws of the United States do not go to that rigorous extent; and the only consequence of a transfer, without a writing containing a recital at length of the certificate of registry, is, that the vessel cannot be registered anew, and she loses her privilege as an

(*b*) Act of Congress, June 27, 1797; Op. Att. Gen., i. [528.]
(*c*) Acts of Congress, June 1, 1796, and March 2, 1808.
(*d*) Act of Congress, March 26, 1810.
(*a*) Rolleston *v.* Hibbert, 3 T. R. 406.

American vessel, and becomes subject to the disabilities incident to vessels not registered, enrolled, or licensed as the statute prescribes. But where an American registered vessel was in part sold, by parol, while at sea, to an American citizen, and again resold, by parol, to her original owner, on her return into port and before entry, that transaction was held not to deprive the vessel of her American privileges, or subject her to foreign duties, for in that case no new register was requisite. It would have been, except in date, a duplicate of the old one, and perfectly useless. (*b*)

If a ship be owned by American citizens, and be not documented according to the provisions of the registry acts, it is not liable to any forfeitures or disabilities which are not specially prescribed. The want of a register is not a ground of forfeiture, but the cause only of loss of American privileges. (*c*) Every vessel, wherever built, and owned by an American citizen, is entitled to a custom-house document for protection, termed a passport, under the act of June 1, 1796; for it applies to "every ship or vessel of the United States, going to any foreign country." As our registry acts do not declare void the sale or transfer, and every contract or agreement for transfer of property in any ship, without an instrument in writing, reciting at large the certificate of registry; and as they have not prescribed any precise form of indorsement on the certificate of registry, and *147 rendered it indispensable in every * sale, as was the case under the British statutes of 26 Geo. III. c. 60, and 34 Geo. III. c. 68, we are happily relieved from many embarrassing questions which have arisen in the English courts relative to the sale and mortgage of ships.

There have been great difficulty, and some alternation of opinion, in the English courts, in the endeavor to reconcile the strict and positive provisions of the statute with the principles of equity, and the good faith and intention of the contracting parties. (*a*) It has even been a question of much discussion,

(*b*) United States *v.* Willings, 4 Cranch, 48.

(*c*) Hatch *v.* Smith, 5 Mass. 42; Philips *v.* Ledley, 1 Wash. 226; Willing *v.* United States, ib. 125. The register is the only document which need be on board in time of peace, in compliance with a warranty of national character. Catlett *v.* Pacific Ins. Co., 1 Paine, 594.

(*a*) The cases of Rolleston *v.* Hibbert, 3 T. R. 406; Camden *v.* Anderson, 5 id.

whether the statutes of 26 and 34 Geo. III. had not destroyed the common law right of conveying a ship by way of mortgage, like other personal property, and whether the mortgagee had not a complete title beyond the power of redemption, after the transfer of the legal title according to the prescribed form of the indorsement on the certificate of registry. *The *148 language, in many of the cases, (*a*) was in favor of the conclusion, that there could be no equitable ownership of a ship distinct from the legal title, and that upon a transfer under the forms of the registry acts, the ship becomes the absolute property of the intended mortgagee, and that the terms and the policy of the registry acts were incompatible with the existence of any equity of redemption. But these opinions or *dicta* have been met by a series of adjudications, which assume the laws to be otherwise, and that the registry acts related only to transactions between vendor and vendee, and to cases of real ownership; and that an equitable interest in a ship might exist by operation of law, and by the contract of the parties, distinct from the legal estate; and that, notwithstanding the positive and absolute terms of the indorsement upon the certificate of register, a mortgage of a ship is good and valid, according to the law as it existed before the registry acts, provided the requisites of the statutes

709; Westerdell *v.* Dale, 7 id. 306; Moss *v.* Charnock, 2 East, 399; Heath *v.* Hubbard, 4 East, 110; Moss *v.* Mills, 6 id. 144; Hayton *v.* Jackson, 8 id. 511; Hibbert *v.* Rolleston, 8 Bro. C. C. 571; and the opinions of Wood, B., and Heath, J., in Hubbard *v.* Johnstone, 8 Taunt. 177, and of Lord Eldon, in *Ex parte* Yallop, 15 Ves. 60, and *Ex parte* Houghton, 17 Ves. 251, and of Sir William Grant, in 11 Ves. 642, may be selected as samples of the strictness with which the statutes are construed, and of the defeat of *bona fide* transfers of vessels, by failure to comply with the literal terms of the statutes. The cases of Rolleston *v.* Smith, 4 T. R. 161; Capadose *v.* Codnor, 1 Bos. & P. 488; Ratchford *v.* Meadows, 8 Esp. 69; Bloxham *v.* Hubbard, 5 East, 407; Kerrison *v.* Cole, 8 East, 231; Robinson *v.* Macdonnell, 5 M. & S. 228; Curtis *v.* Perry, 6 Ves. 739; Mestaer *v.* Gillespie, 11 Ves. 621, 687, may be selected, on the other hand, as containing evidence of the influence of equity upon the severity of those provisions. But the British registry act of 6 Geo. IV. c. 110, sec. 81, and again the further amended and substituted statute of 3 and 4 William IV. c. 54, mitigated the strictness of the former provision. It required the bill of sale, or other instrument of writing of the sale of a ship after registry, to contain a recital of the certificate of registry, or the principal contents thereof, to render the transfer valid; but with a proviso that no bill of sale should be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry, instead of the existing certificate.

(*a*) Lord Eldon scattered *ambiguas voces* to that effect in Curtis *v.* Perry, 6 Ves. 739; Campbell *v.* Stein, 6 Dow, 116; *Ex parte* Yallop, 15 Ves. 60; *Ex parte* Houghton 17 Ves. 251; Dixon *v.* Ewart, 3 Meriv. 333.

be complied with. (*b*) The opinion of Sir Thomas Plumer, in *Thompson* v. *Smith*, (*c*) contained a very clear and masterly vindication of the validity of the mortgage of a ship consistently with the preservation of the forms of the registry acts. He effectually put to flight the alarming proposition, that since the registry acts, there could be no valid mortgage of a ship; and he insisted that the defeasance annexed to the bill of sale ought to be fully indorsed as part of the instrument on the certificate of registry, if the ship be mortgaged in port; or if mortgaged while at sea, a copy of the whole transmitted to the custom-house; and that though the defeasance should not be *149 noticed * in any of the forms adhered to at the office of the customs, and the instrument should be registered as an absolute bill of sale, the mortgagor's right of redemption would not suffer by the omission. But as no such questions can possibly arise under the registry acts of Congress, these discussions in the English courts are noticed only as a curious branch of the history of the English jurisprudence on this subject. (*a*)

The registry is not a document required by the law of nations as expressive of a ship's national character. (*b*) The registry

(*b*) Mair *v.* Glennie, 4 M. & S. 240; Robinson *v.* Macdonnell, 5 id. 228; Hay *v.* Fairbairn, 2 B. & Ald. 193; Monkhouse *v.* Hay, 2 Brod. & B. 114. A mortgage of a ship is good as between the parties to the mortgage, without a registry, under the statute of 8 and 4 William IV. c. 55; Lister *v.* Payn, 11 Sim. 348.

(*c*) 1 Mad. 395.

(*a*) In 1828, Mr. Trollope published, at London, a distinct treatise, for the very purpose of vindicating the validity of mortgages of ships. It was entitled, "A Treatise on the Mortgage of Ships, as affected by the Registry Acts;" and it contains a view of all the discussions on the question. The same doctrine is maintained in Mr. Patch's late Practical Treatise on the Law of Mortgages, 84. Mr. Holt, in a note to his Reports of Cases at Nisi Prius, i. 605, n., fell into the current error, that upon a contract of mortgage, in respect to a British registered ship, there was no equity of redemption, and that the ship became *absolutely* the property of the mortgagee, without any relief to be afforded at law or in equity; but subsequently, in his elaborate treatise on shipping, he adopts the doctrine in Thompson *v.* Smith, as being in conformity with the letter and spirit of the registry acts. Holt on Shipping, i. 306–312. The statute of 6 George IV. c. 110, removed the difficulties which attended the doctrine of mortgages under the former statutes, by declaring that the transfer of ships, by way of mortgage, or by assignment in trust for payment of debts duly registered, should be valid, and pass the interest according to the purposes of the transfer. The act of 8 and 4 William IV. c. 54, which was a substitute for the former, has a similar provision. The treatise of Mr. Wilkinson, on "The Law of Shipping, as it relates to the Building, Registry, Sale, Transfer, and Mortgages of British Ships," &c., is recommended to the profession as a very useful work.

(*b*) Le Cheminant *v.* Pearson, 4 Taunt. 367.

acts are to be considered as forms of local or municipal institutions, for purposes of public policy. They are imperative only upon the voluntary transfer of parties, and do not apply to transfers by act or operation of law. (*c*) They are said to be peculiar to England and to the United States, whose maritime and navigation system is formed upon the model of that of Great Britain. But by various French ordinances, *between 1681 and the era of the new code, it was requisite that *150 all vessels, in order to be entitled to the privileges of French vessels, should be built in France, under some necessary exceptions, and should be owned exclusively by Frenchmen, and foreigners were prohibited from navigating under the French flag; and a Frenchman forfeited his privileges as such owner, by marrying a foreign wife, or residing abroad, unless in connection with a French house. (*a*) The register is not of itself evidence of property, unless it be confirmed by some auxiliary circumstance to show that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without proof to connect the party with the register, as being his direct or adopted act, the register has been held not to be even *prima facie* evidence to charge a person as owner; and even then it is not conclusive evidence of ownership. (*b*) The cases of *The Mohawk Insurance Company* v. *Eckford*, decided in the New York Court of Common Pleas in 1828, and of *Ring* v. *Franklin*, in the Superior Court of that city in 1829, (*c*) went upon the same ground, that the register, standing in the name of a person, did not determine the ownership of the vessel, though it might, perhaps, be presumptive evidence, in the first instance. An equitable title in one person might legally exist, consistently with the documentary title at the custom-house in another. (*d*) [1]

(*c*) 6 Ves. 789; 15 id. 68; Bloxham *v.* Hubbard, 5 East, 407.

(*a*) Pardessus, Cours de Droit Com. iii. 11, 12; Boulay-Paty, i. 257–260.

(*b*) Tinkler *v.* Walpole, 14 East, 226; M'Iver *v.* Humble, 16 id. 169; Fraser *v.* Hopkins, 2 Taunt. 5; Sharp *v.* United Insurance Company, 14 Johns. 201; Colson *v.* Bonzey, 6 Greenl. 474; Bas *v.* Steele, 3 Wash. 381; 1 Greenleaf on Evidence, sec. 494. The interest that appears upon the registry is held to estop the owner from setting up a claim to any other interest; but if he deals as owner of a larger share, he is liable to others in that proportion. This is the English rule upon the policy of the registry acts. *Ex parte* Yallop, 15 Ves. 60. (*c*) 2 Hall, 1.

(*d*) By the French law, a verbal sale of a ship may do as between the parties, but

[1] Hall *v.* Hudson, 2 Sprague, 65 As to the effect of the register as evidence of ownership, see 188, n. 1.

*151 *4. Of Part Owners. — The several part owners of a ship are not partners, but tenants in common. (a) Each has his distinct, though undivided interest; and when one of them is appointed to manage the concerns of the ship for the common benefit, he is termed the ship's husband. Valin strongly recommends the utility of these associations of part owners, in the business of navigation and maritime enterprises, in order to unite the wisdom of joint counsels, as well as to divide the risks and losses incident to a very extended maritime commerce, which is exposed to so many hazards and revolutions: *tua omnia uni nunquam navi credito.* (b) The marine law of England, respecting part owners of vessels, is distinguished for the wisdom and equity of its provisions, and it has an undoubted preëminence over the common law doctrine concerning a tenancy in common in chattels. If there be no certain agreement among themselves respecting the employment of the ship, the Court of Admiralty, under its long established and salutary jurisdiction, authorizes a majority in value of the part owners to employ the ship upon any probable adventure, and at the same time takes care to secure the interest of the dissenting minority. The admiralty *152 practice is dictated by the plain reason, * that "ships were made to plough the ocean, and not to rot by the wall." (a) Ownership in a ship is, ordinarily, not like the case of joint con-

not as respects the claims of third persons. It has been, at all times, the policy of their law to require the written evidence of a sale. Formerly, every sale was required to be attested before a notary, but now a private instrument is sufficient. But the law of France places very material checks upon the transfer of ships; for, in order to bar the rights and claims of third persons, it is requisite that the vessel make one voyage at sea at the risk of the purchaser, and without opposition from the creditors of the vendor; otherwise their claims are preferred to the title of the purchaser. If the vessel be sold while on a voyage, that voyage is not computed, and it requires a new voyage subsequent to such sale to bar the rights of privileged creditors. This privilege, under the French ordinance of 1681, applied to creditors of every description existing at the time of the sale; but under the new code of commerce it would rather seem to be confined to the specified class of privileged creditors. Ord. b. 2, tit. 10, Des Navires, art. 2, 3, and Valin's Comm. id. i. 602; Code de Com. art. 193, 194, 196; Boulay-Paty, Cours de Droit Com. i. 168, 170.

(a) *Ex parte* Young, 2 Ves. & B. 242; 2 Rose, 78, note; *Ex parte* Harrison, [ib.] 76; *Ex parte* Gibson, 1 Montagu on Partn. 102, note; Nicoll *v.* Mumford, 4 Johns. Ch. 526. See, also, *supra*, 39, 40.

(b) Valin's Comm. i. 584.

(a) In the same way the fir tree, though originally rooted in the mountain soil, was, according to the beautiful prosopopœia of the poet, destined to witness the perils of the deep, — *casus abies visura marinos.*

cern or partnership; nor does the English law, like some of the ordinances of other countries, give power to the majority in value to control, in their discretion, the whole concern. The Court of Admiralty takes a stipulation from the majority, in a sum equal to the value of the shares of the minority, either to bring back and restore the ship, or pay the minority the value of their shares. In that case, the ship sails wholly at the charge and risk and for the benefit of the majority, and they appoint the officers and crew, and it must be done in good faith. (*b*) [1] This security the minority obtain upon a warrant issued upon their application to arrest the ship. This is the only safe proceeding to the minority; for if the ship be sent to sea by the majority without this security, and she be lost without any tortious act in the majority, the minority have no remedy in law or equity. If the minority have possession of the ship, and refuse to employ her, the majority, on a similar warrant, may obtain possession, and send the ship to sea, on giving the like security. The jurisdiction of the admiralty extends to the taking a vessel from a wrong-doer, and delivering her over to the rightful owner; and this is a most useful part of the jurisdiction of the court, and one recognized in the courts of law. (*c*) The Court of Chancery exercises this sort of equitable jurisdiction in cases

(*b*) Card *v.* Hope, 2 B. & C. 661, 675.

(*c*) Graves *v.* Sawcer, T. Raym. 15; Strelly *v.* Winson, 1 Vern. 297; Anon., 2 Ch. Cas. 86; Ouston *v.* Hebden, 1 Wils. 101; Abbott on Shipping, pt. 1, c. 3; The Sisters, 4 C. Rob. 275; The New Draper, ib. 287; The Experiment, 2 Dods. 88; The John, of London, 1 Hagg. Adm. 842; The Pitt, ib. 240; The Margaret, 2 Hagg. Adm. 276, 277; In the Matter of Blanchard, 2 B. & C. 244. In Willings *v.* Blight, Peters Adm. 288, the general jurisdiction of the admiralty, as stated, seemed to have been assumed. See, also, The Apollo, 1 Hagg. Adm. 306; Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

[1] Southworth *v.* Smith, 27 Conn. 355. The practice of some of our district courts is to take security in double the estimated value of the shares of the minority. The Marengo, 1 Sprague, 506; The Lodemia, Crabbe, 271. When security is thus given to the dissenting part owner, he is not entitled to compensation for the use of his part of the vessel during the voyage, or to a share of the profits. The Marengo, 1 Am. Law Rev. 88; Davis *v.* Johnston, 4 Simons, 589; Anon., 2 Cha. Cas. 86; 2 Wynne's Life of Sir L. Jenkins, 792; Willings *v.* Blight, *inf.* n. (*c*). See Sturdivant *v.* Smith, 29 Me. 387.

The power of the majority extends to the removal of a master having an interest in the vessel. Ward *v.* Ruckman, 36 N. Y. 26; 34 Barb. 419; *post*, 162.

where the admiralty cannot, as where the shares are not ascertained. (*d*)

If the part owners be equally divided in opinion in *153 respect * to the employment of the ship, either party may obtain the like security from the other seeking to employ her. (*a*) It is said that the Court of Admiralty has no jurisdiction to compel an obstinate part owner to sell his share; (*b*) and yet it was considered, in the District Court of Pennsylvania, as still an unsettled point, whether the court might not compel a sale of the shares of the minority who unreasonably refused to act. (*c*) If a part owner sells, he can only sell his undivided right. The interest of part owners is so far distinct, that one of them cannot dispose of the share of another; and this may be considered as a settled principle. (*d*) The language in the Court

(*d*) Haly *v.* Goodson, 2 Meriv. 77.

(*a*) Abbott on Shipping, *ub. sup.* sec. 6.

(*b*) Ouston *v.* Hebden, 1 Wils. 101. In the case of the Apollo, 1 Hagg. Adm. 306, Lord Stowell vindicated the legality of the initiatory measure of arresting a ship, on the application of a part owner who dissents from her intended employment, and compelling security for the safe return of the vessel, or for the estimated value of his share. And while he was extremely cautious of enlarging his jurisdiction on this subject, he decreed immediate payment of the entire amount of the stipulated sum, upon the loss of the ship. The jurisdiction of the admiralty, in case of part owners having *unequal* interests and shares, never has been applied to direct *a sale* upon any dispute between them as to the navigation of the ship engaged in maritime voyages. The majority of the owners have a right to employ the ship, on giving the requisite stipulation in favor of the minority, if they require it. So the minority may employ the ship in like manner, if the majority decline to employ her. Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

(*c*) Willings *v.* Blight, *ub. sup.* A sale was decreed upon the petition of one part owner of a vessel against another, in the District Court of South Carolina. Skrine *v.* The Sloop Hope, Bee's Adm. 2. The remedy for the dissenting owners, in Scotland, is to compel a sale, or that the other owners shall give or take at a price put. Mr. Bell intimates that the English method is less harsh and perilous. Bell's Comm. on the Laws of Scotland, i. 503. Mr. Justice Story (Comm. on Partn. [§§ 435–439]) strenuously contends for the lawful exercise, by the courts of admiralty, of the power to decree a sale of the vessel, on a disagreement of the part owners of a ship upon a particular voyage, whether the ship be owned in equal or unequal shares. This is the rule of the maritime law abroad, and is sustained by the decision of Judge Washington, in the case cited *infra*, 154, n. *a*, and by general convenience and policy.

(*d*) It was so declared by Abbott on Shipping, part 1, c. 8; and Lord Ch. J. Dallas observed, in 8 Taunt. 774, that one part owner of a ship could not bind the rest, as in partnership cases. The general understanding at the common law is, says Mr. Justice Story, (Partn. [§§ 421, 427,]) that if there be no express or implied agreement *inter se*, one part owner of a ship cannot bind the others as to repairs and expenditures. But the continental jurists and ordinances generally follow what is deemed

of Errors of New York, in the case which has been already mentioned, does not lead to an opposite conclusion. (*e*) That *case only admitted that a ship *might* be held, not only *154 by part owners, as tenants in common, but in partnership, by partners, as any other chattel. And though a part owner can sell only his share, yet one partner can dispose of the entire subject; and the case of vessels does not form an exception, when they are owned by a partnership, in the commercial sense, and so it has frequently been held. (*a*)

The cases recognize the clear and settled distinction between part owners and partners. Part ownership is but a tenancy in common, and a person who has only a part interest in a ship, is generally a part owner, and not a joint tenant or partner. As part owner he has only a disposing power over his own interest

the more equitable doctrine, that all the part owners of a ship are bound to contribute ratably to each other for the expenses of necessary reparations incurred by one or more of them. The decisions of the Rota of Genoa, the Consolato del Mare, Straccha, Roccus, Pothier, Emerigon, Valin, Code de Com., Pardessus, &c., are referred to by Mr. Justice Story, (on Partn. [§§ 424–426, 429,]) in support of the foreign law.

(*e*) See *ante*, 40. The ordinance of Rotterdam, of 1721, gave the owners of above half the ship the power to sell the same for the general account, as well as to freight her and outfit her at the common expense, and against the consent of the minority. (Art. 171, 172; 2 Magens on Insurance, 108.) On the other hand, the French ordinance of 1681 prohibited one part owner of a ship from forcing his companions to a sale, except in case of equality of opinions upon the undertaking of a voyage, and limited the powers of the majority to matters strictly connected with the ordinary employment of the vessel. Liv. 2, tit. 8, Des Propriétaires, art. 6; Valin, ib.; Pardessus, Droit Com. iii. 47. Valin vindicates this interdiction as conducive to the benefit of the trade, though he admits it has its inconveniences, and that such is the destiny of all human laws.

(*a*) Wright *v.* Hunter, 1 East, 20; Lamb *v.* Durant, 12 Mass. 54. In the case of Davis *v.* The Brig Seneca, decided in the Circuit Court of the United States for the District of Pennsylvania, in May, 1829, on appeal from the District Court, the part owners were equally divided in opinion as to the employment of the vessel. One party, having equal interest, wished to employ her on his own terms, and by his own master, and the other party claimed the same right; and neither would recede. The District Court decided that it had no power to award a sale of the vessel. Gilpin, 10. The Circuit Court reversed that decision, and decreed a sale. Judge Washington admitted that the English Admiralty had no such jurisdiction; but he went upon broader ground, and held that the court had jurisdiction of all cases of a maritime nature, and was governed by the general maritime law of nations, and was not confined to that of England. He considered the 5th and 6th articles of the marine ordinance of Louis XIV. (2, tit. 8, Des Propriétaires), and Valin's Commentary thereon (i. 585), to be evidence of the maritime law of nations, that the court could award a sale of the ship when the part owners were equally divided, as in that case. The articles in the ordinance were agreeable to the Roman law. See the report of the case in the American Jurist for January, 1838, 486.

in the ship, and he can convey no greater title. But there may be a partnership, as well as a cotenancy, in a vessel; and, *155 in that case, one part owner, in the character of *partner, may sell the whole vessel; and he has such an implied authority over the whole partnership effects, as we have already seen. The vendee, in a case free from fraud, will have an indefeasible title to the whole ship. When a person is to be considered as a part owner or as a partner in a ship, depends upon circumstances. The former is the general relation between ship owners, and the latter the exception, and requires to be specially shown. (a)[1] But as the law presumes that the common possessors of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property,

(a) If part owners join in a particular adventure on which the ship is sent, they become *quasi* partners in the adventure. Holderness *v.* Shackels, 8 B. & C. 612; Mumford *v.* Nicoll, 20 Johns. 611. *Supra*, 40. Part owners in a cargo and common adventure have, like partners, a specific lien for their disbursements and advances, as well as for their share of the profits. Abbott on Shipping, part 1, c. 3; Holderness *v.* Shackels, 8 B. & C. 612, 618; Story on Partn. [§§ 441–444.]

[1] *Part Owners.* — The text is confirmed by Macy *v.* DeWolf, 3 Woodb. & M. 193; Merritt *v.* Walsh, 32 N. Y. 685; Hopkins *v.* Forsyth, 14 Penn. St. 34; Patterson *v.* Chalmers, 7 B. Monroe, 595; Wetherell *v.* Spencer, 8 Mich. 123.

The principles stated *ante*, 138, n. 1, apply to the case of part owners. A part owner has not a general authority to bind his coöwners; but the liability of a coowner may result either from express authority or by implication; for instance, he may so conduct himself as to have held himself out to the party contracted with as one upon whose credit the work was to be done. Brodie *v.* Howard, 17 C. B. 109, 118. See Hardy *v.* Sproule, 31 Me. 71; 29 Me. 258; Sawyer *v.* Freeman, 35 Me. 542; Patterson *v.* Chalmers, *sup.*

The managing owner may bind his coowner by a bailbond in order to obtain the release of the vessel arrested in the admiralty court, in a suit for collision. Barker *v.* Highley, 15 C. B. N. S. 27. See Merritt *v.* Walsh, 32 N. Y. 685. And he may appoint himself agent to collect and distribute the freight. Smith *v.* Lay, 8 Kay & J. 105. See further as to commissions, price of supplies furnished by him, &c., Rennell *v.* Kimball, 5 Allen, 356; Miller *v.* Mackay, 31 Beav. 77; Ritchie *v.* Couper, 28 Beav. 344; *post*, 157.

Although part owners are tenants in common of the ship, they are jointly interested in her use and employment, and the law as to her earnings, whether as freight, cargo, or otherwise, follows the law of partnership. As between the part owners, whatever expenses are properly incurred by one of them for the purposes of a joint adventure must come out of the earnings of the ship in that adventure before the earnings are divided, although the expenses have resulted in the permanent improvement of the ship. Green *v.* Briggs, 6 Hare, 395; Alexander *v.* Simms, 5 De G., M. & G. 57; Lindsay *v.* Gibbs, 22 Beav. 522, 532; 3 De G. & J. 690; Guion *v.* Trask, 1 De G., F. & J. 373; The Larch, 2 Curtis, 427, 438. See Starbuck *v.* Shaw, 10 Gray, 492; Merritt *v.* Walsh, 32 N. Y. 685.

As to power of majority, see 152, n. 1.

As to registry, see 143, n. 1.

part owners, on the spot, have an implied authority from the absent part owners, to order for the common concern whatever is necessary for the preservation and proper employment of the ship. They are analogous to partners, and liable under that implied authority for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of part owners. (*b*)

Whether part owners who render their companions liable for supplies furnished, or repairs made upon a ship, are to have their accounts taken, and the assets distributed, as if the ship was partnership property, or as if they had each a distinct, separate interest in the vessel as tenants in common, depends, as we have already seen, upon the fact, whether the ship was held by them, in the particular case, as part owners or as partners. The laws of Holland and of France consider it to be prejudicial to trade, to carry the responsibility of part owners to the extent of the English law; and the rule in those countries is, that each part owner shall be answerable in relation to the ship no further than to the extent of his share. (*c*) The English and *Scotch law, on the other hand, as well as our own, *156 render part owners, in all cases, responsible *in solido* as partners, for repairs and necessary expenses relating to the ship and incurred on the authority of the master or ship's husband. (*a*)

(*b*) Holt on Shipping, Int. 23, and i. 867–869; Wright *v.* Hunter, 1 East, 20; Scottin *v.* Stanley, 1 Dallas, 129; but see, *supra*, 153, n. *d*, where the general rule at common law is otherwise, without there be ground to infer an agreement or consent. The place where the repairs are made becomes a material circumstance; for if the repairs are made at the port where the owners reside, they are usually considered to be made upon the credit of the owners, exclusively of the master. Farrel *v.* M'Clea, 1 Dallas, 393; James *v.* Bixby, 11 Mass. 34.

(*c*) Van Leeuwen's Comm. on the Roman Dutch Law, b. 4, c. 2, sec. 9; Vinnius, not. in Comm. Peckii, tit. De Exerc. 155. The latter says, it is neither agreeable to natural equity nor public utility, that each part owner should be bound *in solido*, or beyond his share. By the French law, part owners, equally with the English and Scotch law, are liable in like manner as partners, *for their proportion* of all the necessary debts and reasonable expenses incurred for the common benefit. Pothier, de Société, n. 185, 187; Abbott on Shipping, part 1, c. 3. In Louisiana, it is held, that joint owners of a boat are not, merely from that circumstance, responsible *in solido*; though, if they be associated for the purpose of carrying goods for hire, they become responsible jointly and severally. David *v.* Eloi, 4 La. 106. The law of Louisiana follows the French law on this point. Civil Code of Louisiana, art. 2796.

(*a*) Bladney *v.* Ritchie, 1 Starkie, 338; Westerdell *v.* Dale, 7 T. R. 306; Bell's Comm. i. 520, 524; Chapman *v.* Durant, 10 Mass. 47; Schermerhorn *v.* Loines, 7

But where a ship has been duly abandoned to separate insurers, they are not responsible for each other as partners, but each one is answerable for the previous expenses of the ship, ratably to the extent of his interest as an insurer, and no further. (*b*) By the French law, the majority in interest of the owners control the rest; and in that way one part owner may govern the management of the ship, in opposition to the wishes of fifty other part owners, whose interests united are not equal to his, and make the other part owners to contribute ratably for repairs and expenses. (*c*) This control relates to the equipment and employment of the ship, and the minority must contribute; but they cannot be compelled to contribute against their will for the cargo laden on board, though they will be entitled to their portion of the freight. (*d*) If the part owners be equally divided on the subject, the opinion in favor of employing the ship prevails, as being most favorable to the interest of navigation. (*e*) Many of the foreign jurists contend, that even the opinion of the minority ought to prevail, if it be in favor of employing the ship on some foreign voyage. Emerigon, Ricard, Straccha, Kuricke, and Cleirac are of that opinion; but Valin has given a very elaborate consideration to the subject, and he opposes it on grounds that are solid, and he is sustained by the provisions of the old ordinance and of the new code. (*f*) Boulay-Paty (*g*) follows the opinion of Valin and of the codes, and says, that the contrary doctrine would enable the minority to control the majority, contrary to the law of every association, and the plainest principles of justice. The *157 majority * not only thus control the destination and equipment of the ship, but even a sale of her by them will bind the right of privileged creditors after the performance of one voyage by the purchaser, but not the other part owners. (*a*)

Johns. 311; Muldon *v.* Whitlock, 1 Cowen, 290; Thompson *v.* Finden, 4 Carr. & P. 158; Story on Partn. [§§ 420, 440.]

(*b*) The United Insurance Company *v.* Scott, 1 Johns. 106.

(*c*) 1 Valin's Comm. 575–584; Code de Com. art. 220.

(*d*) 1 Valin's Comm. 576–580.

(*e*) Abbott on Shipping, part 1, c. 8; Molloy, de Jure Marit. b. 2, c. 1, sec. 2, 308; Story on Partn. [§ 435. But see 7 Phila. 336.]

(*f*) Ord. de la Marine, 2, tit. 8, art. 5, tit. Des Propriétaires, and Valin's Comm. ib. i. 573–584; Code de Commerce, art. 220.

(*g*) Cours de Droit Commercial Maritime, i. 839–847; M. Pardessus, Cours de Droit Com. iii. 48, speaks with less decision on the question.

(*a*) Boulay-Paty, *ub. sup.* 351. [*Ante*, 152, n. 1.] Pardessus, ii. 27, is, however, of

The ship's husband may either be one of the part owners or a stranger, and he is sometimes merely an agent for conducting the necessary measures on the return of the ship to port; but he may have a more general agency for conducting the affairs of the vessel in place of the owners, and his contracts, in the proper line of a ship's husband's duty, will bind the joint owners. His duty is, generally, to see to the proper outfit of the vessel, as to equipment, provisions, and crew, and the regular documentary papers; and though he has the powers incidental and necessary to the trust, it is held that he has no authority to insure or borrow money for the owners, or bind them to the expenses of lawsuits. (*b*) [1]

The rights of tenancy in common among part owners apply to the cargo as well as to the ship, and they have not a community of interest as partners, so as to enable one to dispose of the whole interest, and bind the rights of his cotenants. (*c*)

opinion, that they are equally concluded with the creditors by the sale, after one voyage. If the ship be seized for the debt of one of the part owners, and the claim of the others be put in before judgment, the right only of the part owner can be sold; but if not until after judgment, the entire right to the ship is sold, and the other part owners reclaim their share of the proceeds. Boulay-Paty, i. 227, 228.

(*b*) French *v.* Backhouse, 5 Burr. 2727; Sims *v.* Brittain, 4 B. & Ad. 375; Bell *v.* Humphries, 2 Stark. 345; Campbell *v.* Stein, 6 Dow, 134; Bell's Comm. i. 504; Bell's Principles of the Law of Scotland, sec. 449; Collyer on Partnership, [b. 5, c. 8, § 4;] Story on Agency, [§ 35.]

(*c*) Jackson *v.* Robinson, 8 Mason, 138. The concluding part of Collyer on Partnership, and of Story on Partnership, have each a valuable chapter on the law of part owners of ships, in which the established law and doctrine of the cases on the subject are clearly and skilfully condensed.

[1] McCready *v.* Woodhull, 34 Barb. 80; *ante*, 155, n. 1.

LECTURE XLVI.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

1. **Of the Authority and Duty of the Master.** — The captain of a ship is an officer to whom great power, momentous interests, and enlarged discretion are necessarily confided; and the continental ordinances and jurists have, in a very special manner, required that he should possess attainments suitable to the dignity and the vastness of his trust. He must be a person of experience and practical skill, as well as deeply instructed in the theory of the art of navigation. He is clothed with the power and discretion requisite to meet the unforeseen and distressing vicissitudes of the voyage; and he ought to possess moral and intellectual, as well as business qualifications, of the first order. His authority at sea is necessarily summary, and often absolute; and if he chooses to perform his duties or to exert his power in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force. He should have the talent to command in the midst of danger, and courage and presence of mind to meet and surmount extraordinary perils. He should be able to dissipate fear, to calm disturbed minds, and inspire confidence in the breasts of all who are under his charge. In tempests as well as in battle, the commander of a ship "must give desperate commands; he must require instantaneous obedience." He must watch for the preservation of the health and comfort of the crew, as well as for the safety of the ship and cargo. It is necessary that he should maintain perfect order, and preserve the most exact disci-
*160 pline, under * the guidance of justice, moderation, and good sense. Charged frequently with the sale of the cargo, and the reinvestment of the proceeds, he should be fitted to superadd the character of merchant to that of commander; and he ought to have a general knowledge of the marine law, and of the rights of belligerents, and the duties of neutrals, so as not to

expose to unnecessary hazard the persons and property under his protection. (*a*)

(*a*) The master of a vessel is liable for indecent and inhuman conduct towards a passenger; and he is responsible, in damages, for injuries resulting from the want of reasonable care, prudence, and fidelity. Abbott on Shipping, 5th Amer. ed. Boston, 1846, 152, note, 218, and note; and see *infra*, 162, n. (*e*). As to his duty as master of a neutral ship in time of war, see the cases collected in Abbott on Shipping, *supra*, 221, 222, notes. The owner of a vessel carrying passengers for hire is liable for breaches of duty of the officer to the passengers, equally as he is in the case of merchandise committed to their care.[1] Keene *v.* Lizardi, 5 La. 481. Cleirac, in his Jugemens d'Oleron, c. 1, says, that the title of master of a ship implies honor, experience, and morals: *reverendum honorem sumit quisquis magistri nomen acceperit.* The French ordinances of 1584, 1681, and 1725, and the ordinances of the Hanse Towns, of Bilboa, of Prussia, and Sweden, have all required the master to be previously examined and certified to be fit by his experience, capacity, and character. He was, formerly, when trade was constantly exposed to lawless rapacity, required to possess military as well as ordinary nautical skill: *omnibus privilegiis militaribus gaudet.* Roccus de Navibus et Nauto, note 7; Emerigon, Traité des Ass. i. 192; Valin's Comm. 2, tit. du Capitaine, *passim*; Jacobsen's Sea Laws, by Frick, b. 2, c. 1; Boulay-Paty, Cours de Droit Mar. i. 368, 376, 379; Répertoire de Jurisprudence, tit. Capitaine de Vaisseau Marchand.

The English writers go directly to the discussion of these subjects, which they handle dryly and with mathematical precision; while the foreign, and especially the French jurists, not only rival their neighbors in the accuracy of their minute details of judicial proceedings and practical rules, but they occasionally relieve the exhausted attention of the reader by the vivacity of their descriptions, and the energy and eloquence of their reflections. It must be admitted, however, that the decisions of Lord Stowell are remarkable for taste and elegance, and they are particularly distinguished for the justness and force with which they describe the transcendent powers, and define the delicate and imperative duties of the master. And the duties of the master, and particularly the necessity of kind, decorous, and just conduct on the part of the captain to the passengers and crew under his charge, and the firm purpose with which courts of justice punish, in the shape of damages, every gross violation of such duties, are nowhere more forcibly stated than in Chamberlain *v.* Chandler, 3 Mason, 242, in our American admiralty. In the English statutes of 5 and 6 Wm. IV. (see *infra*, 196) the *master* is defined to mean every person having the charge or command of any ship belonging to a subject of Great Britain; and *seaman* means every person employed or engaged to serve in any capacity on board the same; and *ship* comprehends every description of vessel navigating on the sea; and steam-vessels employed in carrying passengers or goods are *trading ships*.

[1] By the act of Aug. 30, 1852, ch. 106, § 30, 10 St. at L. 72, the master, the owner, and the vessel are made liable for all damage sustained by any passenger on vessels propelled by steam, or his baggage, if it happens through neglect to comply with the provisions of that statute, or through known defects of the steaming apparatus or hull. The act of March 24, 1860, ch. 8, 12 St. at L. 8, punishes seduction of female passengers by any person employed on board any vessel of the United States; and forfeits such persons' wages to the ship for frequenting the part of the vessel assigned to emigrant passengers without orders. See 179, n. 1, for other statutes relating to passengers. See, also, 218.

(1) *His Power to bind the Owner, and the Owner's Power* *161 *over him.* — *As the master is the confidential agent of the owners, he has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of a general ship. (a) This is a reasonable rule, and founded on just principles of commercial policy. It is to be traced to the Roman law, which gave to the master, on the voyage, in whatever matter concerned the ship, the powers of the *exercitor* or employer, and he could bind him by his acts as master; and all the foreign marine ordinances give this power, but with greater precision and more exact regulation. (b) The master is appointed by the owner, and the appointment holds him forth to the public as a person worthy of trust and confidence, and the appointment may be revoked at discretion. The master is always personally bound by his contracts, and the person who deals with the captain in a matter relative to the usual employment of the ship, or for repairs or supplies furnished her, has a double remedy. He may sue the master on his own personal contract, and he may sue the owner on the contract made on his behalf, by his agent, the master.[1] The latter may, however, exempt himself from

(a) Boson *v.* Sandford, Carth. 58; Rich *v.* Coe, Cowp. 636; Ellis *v.* Turner, 8 T. R. 531; Reynolds *v.* Toppan, 15 Mass. 370; Webster *v.* Seekamp, 4 B. & Ald. 352; Abbott on Shipping, 5th Am. ed. 1846, pp. 162–166.

(b) By the civil law, the master was the *propositus*, or agent of the owner or *exercitor*, and could bind his principal in all matters relating to the employment. The *exercitor* was bound for the acts of the master *ex contractu* and *ex delicto*. Voet, Com. ad Pand. 14. 1. 7. He was the employer, or person who received the earnings of the vessel. Exercitorem autem eum dicimus ad quem obventiones et reditus omnes perveniunt. Dig. 14. 1. 1. 15; ib. 14. 1. 1. 7; ib. 14. 1. 7. The general maritime law of Europe does not allow the master to bind the owners personally at all, and only to the extent of their interest in the ship and freight. The foreign ordinances and jurists are referred to on this point by Mr. Justice Story, in the case of Pope *v.* Nickerson, 3 Story, 479, 480, where the marine law is discussed on the liabilities of the owners and power of the master, with his usual ability and learning. And when, by the charter party, the charterer takes the vessel into his own possession and control, and navigates her by his own master and crew, the liability of the general owner ceases,

[1] But when he has sued the master to judgment, he cannot afterwards sue the owners, although the judgment has not been satisfied. There is no distinction in this respect between this and other cases of principal and agent. Priestly *v.* Fernie, 3 Hurlst. & C. 977. The master is not in general liable except in case of a contract made with him, or some act done by him or the crew, for which he is responsible. Blaikie *v.* Stembridge, 6 C. B. N. S. 894, 916; Sack *v.* Ford, 13 C. B. N. S. 90; *post*, 206, n. 1.

See D. 14. 1. 1. § 24.

personal responsibility, by expressly confining the credit to the owner, and stipulating against his personal liability. (*c*)

If there was no special agreement in the case, the French law, both in the ordinance of 1681 and in the new code, gave to the owner the power to discharge the master in his discretion, and without being responsible in damages for the act. M. Delvincourt and M. Pardessus, in their commentaries on the new code, condemn the existence of such a power, while M. Boulay-Paty vindicates it on the ground that the appointment of the master is an act of pure and voluntary confidence, and * the * 162 principal necessarily has that control over an agent, for whose acts he is accountable, and it is in the power of the master to provide for the case by a special contract for indemnity in case of dismission. (*a*) In England, if the master be not an owner, the majority of the owners may remove him at pleasure; but if he be part owner, some special reason, to be judged of by the Court of Admiralty, though not minutely or severely, is requisite before the court will interpose. (*b*) In the Scottish admiralty it is also held, that ship owners may dismiss the master at any time, without cause assigned, and the majority may dismiss him in his character of master, even if he be a joint owner. (*c*)[1] The master is bound to conduct himself, in all respects, with good faith, diligence, and competent skill, and he is responsible to the owners, as

and the charterer becomes owner *pro hac vice*, and he alone is responsible for the acts of the master. Thompson *v.* Snow, 4 Greenl. 264; Emery *v.* Hersey, ib. 407; The Phebe, Ware, 265, 268.

(*c*) Hoskins *v.* Slayton, Cases temp. Hardw. 360; Lord Mansfield, Farmer *v.* Davies, 1 T. R. 108; Lord Ellenborough, Hussey *v.* Christie, 9 East, 432.

(*a*) Ord. de la Mar. des Propriétaires, art. 4; Code de Commerce, art. 218; M. Pardessus, ii. 85; M. Delvincourt, Inst. Droit Com. ii. 294; Boulay-Paty, i. 324–329. In the fourth edition of his Cours de Droit Com. iii. n. 626, M. Pardessus seems to have withdrawn his objection to the owner's discretionary power to dismiss the master.

(*b*) The New Draper, 4 C. Rob. 287; Johan & Siegmund, 1 Edw. Adm. 242.

(*c*) Bell's Comm. i. 506, 508. Mr. Curtis concludes, from an examination of the subject, that by the maritime law the owners have a right to remove the master, who is a part owner, at their pleasure, paying him for his share of the vessel; but if he be removed without good cause, after an engagement for a particular voyage, he thinks they are bound to pay him damages for his losses and responsibilities incurred as master. Treatise on the Rights and Duties of Merchant Seamen, Boston, 1841, 165.

[1] Ward *v.* Ruckman, 86 N. Y. 26; 34 Vict. c. 104, § 240; The Royalist, Brown Barb. 419; *ante*, 152, n. 1; St. 17 & 18 & Lush. 46.

their agent, for his conduct. (*d*) [2] His misconduct will subject him to the forfeiture of his wages, if it be gross in its circumstances, and attended with serious damage to the owner; and in cases of a venial nature, the damages which his unwarrantable acts may have produced will be a charge upon his wages. (*e*)

(2) *Ship and Freight.* — The master may, by a charter party, bind the ship and freight. This he may do in a foreign port in the usual course of the ship's employment; and this he may also do at home, if the owner's assent can be presumed. The ship and freight are, by the marine law, bound to the performance of the contract. (*f*) As the admiralty has no jurisdiction in this case, unless according to the unsettled doctrine laid down in *De Lovio* v. *Boit*, (*g*) [3] and as the courts of common law cannot carry into effect the principle of the marine law, by which the ship itself, in specie, is considered as security to the charterer, it was *supposed by Abbott that the owners may be made responsible for the stipulations in a charter party so made by the master, by a special action on the case, or by a suit in equity. (*a*)

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(3) *To hypothecate Ship, Cargo, and Freight.* — The master can bind the owners, not only in respect to the usual employ-

(*d*) The French law will not allow the master, in a foreign port, to pass a night from his ship, unless it be necessary in the business of his employers. Pardessus, iii. 67. The master cannot quit the vessel on the voyage, unless from necessity or on due notice. Whether he be employed for a specific voyage, or the vessel be a general trading vessel, it is his duty to perform his contract, and finish the voyage, or bring the vessel home if possible; and in cases of capture, to remain with the ship until recovery be hopeless. Willard *v.* Dorr, 3 Mason, 161. See *infra*, 213.

(*e*) Willard *v.* Dorr, 3 Mason, 161; Freeman *v.* Walker, 6 Greenl. 68. The master of a steamboat, employed in the transportation of passengers, like the master of a vessel engaged in the merchant service, can bind the owners in a contract for freight to be carried according to the usual course of the boat; and he is answerable personally for the diligence of all persons, even for a pilot appointed by the owners, and for injuries resulting from want of due care. Denison *v.* Seymour, 9 Wend. 1; Porter *v.* Curry, 7 La. 233; Patton *v.* Magrath, 1 Rice (S. C.), 162. In this respect, the master of a merchant vessel or steamboat differs from the commander of a ship of war in the public service. Nicholson *v.* Mounsey, 15 East, 384.

(*f*) Ord. de la Mar. 3, tit. 1, art. 11, and Valin, id. i. 629. But the master cannot, merely in the character of master, bind the owners by a charter party under seal, so as to subject them to an action of covenant. Pickering *v.* Holt, 6 Greenl. 160.

(*g*) See i. 867. (*a*) Abbott on Shipping, 5th Am. ed. Boston, 1846, 161.

[2] Mephams *v.* Biessel, 9 Wall. 370; The Atlantic, 9 Jur. N. S. 183.

[3] Now settled in accordance with that decision. New England Ins. Co. *v.* Dunham, 11 Wall. 1; *ante*, i. 869, n. 1.

ment of the ship, but in respect to the means of employing her. His power relates to the carriage of the goods, and the supplies requisite for the ship, and he can bind the owners personally as to the repairs and necessaries for the ship; and this was equally the rule in the Roman law. But the supplies must appear to be reasonable, or the money advanced for the purchase of them to have been wanting, and there must be nothing in the case to repel the ordinary presumption that the master acted under the authority of the owners. (*b*) If the moneys be advanced to the master while abroad, it will be incumbent on the creditor, if he means to charge the owner, to show the apparent or presumed necessity of the repairs or supplies for which the money was advanced; and this strictness, requisite to the exercise of the master's authority, arises from the facility of misapplication, and the temptation to abuse, to which the power is incident. But if the money was fairly and regularly lent to supply the necessities of the ship, the misapplication of it by the master will not affect the lender's claim upon the owner. This is equally the language of the civil law, and of all the foreign civilians. (*c*) The great case of *Cary* v. *White*, which underwent much discussion, established the principle of the personal responsibility of the owners, provided the creditor could show the actual existence of the necessity of those things which gave rise to his demand; and this *doctrine is considered to be equally *164 well established in the jurisprudence of this country. (*a*) Under the French ordinance of 1681, the master might hypoth-

(*b*) Dig. 14. 1. [§§] 8, 10, 11; Speerman *v.* Degrave, 2 Vern. 648; Samsun *v.* Braggington, 1 Ves. 448; Ross *v.* The Ship Active, 2 Wash. 226; Abbott on Shipping, 5th Amer. ed. 1846, 169; Webster *v.* Seekamp, 4 B. & Ald. 352; The Ship Fortitude, 8 Sumner, 228; The Law Reporter, i. [124.] But it is an established principle that the authority of the master as to the employment of the ship, or repairing the ship, or supplying the ship with provisions, abroad as well as at home, is limited by the express or implied authority of the laws of his own country, or the usage of trade, or the business of the ship, or the instructions of the owner, and he cannot bind the ship or owner beyond these limits. Story, J., Pope *v.* Nickerson, 8 Story, 477, 480. Judge Story, in this case, after citing and reasoning on the foreign authorities, arrives at the conclusion that the master can make no contract in a *foreign* country which shall bind the owners of a ship, except as to what they expressly authorize, or the general law of his own country has recognized, and that then it will bind them no further than that law binds them, whether it be *in personam* or *in rem*.

(*c*) Dig. 14. 1. 9; Loccenius, lib. 2, c. 6, n. 12; 2 Emerig. 440; Boulay-Paty, Cours de Droit Com. i. 119; Roccus, de Navibus, not. 23, 24. See, *infra*, 171, 172, n.

(*a*) 1 Bro. P. C. 284, ed. 1784; s. c. Abbott on Shipping, 5th Am. ed. 1846, 178;

ecate the ship and freight, and sell the cargo to raise moneys for the necessities of the ship in the course of the voyage, but he could not charge the owners personally.[1] He could only bind

Rocher *v.* Busher, 1 Starkie, 27; Wainwright *v.* Crawford, 4 Dallas, 225; Milward *v.* Hallett, 2 Caines, 77; James *v.* Bixby, 11 Mass. 84; The Jane, 1 Dods. 461; The Ship Fortitude, 3 Sumner, 228; The Law Reporter, i. 124. Good faith and an apparent necessity, under the exercise of the judgment at the time, are sufficient to justify the bottomry loan. This mitigated necessity was allowed by Mr. Justice Story in the case last cited, after great research, to be sufficient.

[1] *Power of the Master.* — (*a*) *Agency.* — It has already been intimated that under our admiralty law the master may bind the vessel in some cases where he could not have bound the general owners; The Freeman *v.* Buckingham, 18 How. 182, 189, and other cases, *ante*, 138, n. 1, qualifying the language of some English cases; The City of New York, 3 Blatchf. 187; Fox *v.* Holt, 36 Conn. 558, 572. See also the act of March 3, 1851, ch. 43, 9 U. S. St. at L. 636, § 5, *ad finem*. But the power of the master to bind his owners personally has been shown to be only a branch of the general law of agency. 138, n. 1. See 172, n. 1.

(*b*) *Law of the Flag.* — The flag of the ship is thought to be notice to all the world that the master's authority is that conferred by the law of that flag. *Post*, 174, n. 1. That law governs, as between the parties to a contract of affreightment, in respect of sea damage and its incidents, unless the contract provides otherwise. Lloyd *v.* Guibert, 6 Best & S. 100, 117, 142; L. R. 1 Q. B. 115, citing 163, note (*b*), and approving Pope *v.* Nickerson. See 217, n. (*e*). But compare The Hamburg, *infra*. The same principles were applied to the case of a bottomry bond given under peculiar circumstances to raise money to pay for necessary supplies. The Karnak, L. R. 2 P. C. 505, affirming L. R. 2 Ad. & Ec. 289. See, further, The Bahia, Brown. & Lush. 292; 11 Jur. N. S. 90. *Ante*, ii. 459, n. 1. In The Hamburg, 2 Moore, P. C. N. S. 289, Brown. & Lush. 253, the validity of a bottomry bond on a foreign ship, freight, and English cargo, and payable in England, was said to be determined, so far as the *cargo* was concerned, not by the law of the ship or of the port where the bond was given, but by the general maritime law as administered in England. This was explained by Willes, J., in giving the judgment of the Exchequer Chamber in Lloyd *v.* Guibert, as only meaning that the rule of evidence by which the necessity of the bond was to be shown was to be determined by the *lex fori*. But see The Patria, L. R. 3 Ad. & Ec. 436, 461.

(*c*) *As to Necessary Supplies.* — When a material man asserts a claim against the owners only, the necessity of repairs need not be shown affirmatively, and in any case a material man is not held to the same diligence in inquiry concerning the necessity of them as the lender on bottomry. The Grapeshot, 9 Wall. 129, 136, 140; *post*, 172, n. 1. *Contra*, Ford *v.* Crocker, 48 Barb. 142; Whitten *v.* Tisdale, 43 Me. 451. Even if a lien upon the vessel is asserted by an admiralty proceeding *in rem*, the presumption is that the ship, as well as master and owner, is liable, and that credit to the vessel was necessary, when it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the furnisher or lender knew it, or knew other facts sufficient to put him on inquiry. The

their property under his charge; and the new code of commerce has followed the same regulation. It declares, that the owner is civilly responsible for the acts of the master, in whatever relates to the vessel and the voyage, but the responsibility ceases on the abandonment of the vessel and freight. The power of the master is limited to raise money for the necessities of the voyage, by borrowing on bottomry, or pledging, or selling goods to the amount of the sum wanted. (*b*) The French civilians are zealous in the vindication of the equity and wisdom of their law, which, on abandonment of the ship and freight, discharges the owners as to the contracts, as well as to the defaults of the master. Emerigon has bestowed an elaborate discussion on the point; and this was equally the maritime law of the middle ages. (*c*) The law on this

(*b*) Ord. liv. 2, tit. 8, Des Propriétaires, art. 2; Code de Commerce, art. 216, 234.

(*c*) Code, art. 216; Emerigon, Cont. a la Grosse, c. 4, sec. 11; Boulay-Paty, i. 272-278.

Lulu, 10 Wall. 192, 203; The Kalorama, ib. 204; The Grapeshot, *sup.*, qualifying the language of Thomas *v.* Osborn, 19 How. 22; Pratt *v.* Read, ib. 359. See The Washington Irving, 2 Benedict, 318; The Sarah Starr, 1 Sprague, 453; The A. R. Dunlap, cited 4 Am. Law Rev. 673; The Perla, Swabey, 353; 4 Jur. N. S. 741. The necessity for the supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship. The Lulu, 10 Wall. 192, 201; The Grapeshot, *sup.*; *post*, 172, n. 1. See Bliss *v.* Ropes, 9 Allen, 339; Negus *v.* Simpson, 99 Mass. 388; Whitten *v.* Tisdale, 43 Me. 451. Indeed, it is said, 9 Wall. 141, that the necessity for them is proved by the master's ordering them on the credit of the ship, in favor of the material man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith. Compare 172, n. 1, as to bottomry.

(*d*) *When Owners are present.* — It has been held that the owners of a ship though in a home port (*i. e.* generally the port of the owner's residence; White's Bank *v.* Smith, 7 Wall. 646, 651; Hill *v.* Steamer Golden Gate, Newb. Adm. 308; Donnell *v.* The Starlight, 108 Mass. 227, 231; compare Weaver *v.* The S. G. Owens, 1 Wall, Jr. 359, 366, with Thomas *v.* Osborn, 19 How. 22, 29) are responsible for necessary supplies furnished on the order of the captain, unless it should appear that they were so furnished exclusively on his credit. Provost *v.* Patchin, 5 Seld. 235; Glading *v.* George, 3 Grant's Cases, 290; Winsor *v.* Maddock, 64 Penn. St. 231. *Contra*, Dyer *v.* Snow, 47 Me. 254. And it is laid down by the Supreme Court of the United States that although the presence of the owner in a foreign port (*i.e.* of another state than that to which the vessel belongs; The Lulu, 10 Wall. 192, 200; ib. 218; Negus *v.* Simpson, 99 Mass. 388) defeats the implied authority of the master, it would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the perils of the seas. The Kalorama, 10 Wall. 204, 214. See The Guy, 9 Wall. 758; 5 Blatchf. 496; 1 Ben. 112.

As to master's power to give a bottomry bond, see 172, n. 1.

subject is the same in Holland as in France; (*d*) and the learned Grotius, in a work where we should hardly have expected to find such a municipal provision, (*e*) condemns the rule in the Roman law making part owners personally bound, *in solido*, for these pecuniary contracts of the master, as very improperly introduced, and as being equally contrary to natural equity and public utility.

*165 *Sir William Scott, in the case of the *Gratitudine*, (*a*) doubts whether the master has authority, even in a case of consummate distress, and in a foreign port, to bind the owners beyond the value of the ship and freight. But he admits, in that case, after an admirable discussion of the principles and authorities in the marine law on the subject, that the master has power to hypothecate the cargo in a foreign port, in a case of severe necessity, for the repairs of the ship, and that the Court of Admiralty would enforce the lien. However, from the cases already referred to, it would seem to be settled in the English and American law, that the owner may be personally bound by the act of the master, in respect to the repairs and supplies necessary for the ship while abroad, and without other means to procure them; and if the owner be personally bound, it must be, as it was in the Roman law, to the extent of the requisite advances. Emerigon, while he admitted that the master might hypothecate the ship and sell the cargo, to raise money to meet the necessities of the ship, denied that he could bind the owners personally by a bill of exchange drawn on them for the moneys raised. But Valin held otherwise; and Boulay-Paty is of opinion that the new code gives the captain a discretion on this point, and he concurs with Valin and the ancient nautical legislation. (*b*)

(*d*) Van Leeuwen's Comm. on the Dutch Law, b. 4, c. 2, sec. 9.

(*e*) Grot. de Jure Belli et Pacis, b. 2, c. 11, sec. 18.

(*a*) 3 C. Rob. 240, 274.

(*b*) 2 Emerigon, 468; Valin, Comm. tit. du Capitaine, art. 19; Boulay-Paty, ii. 73, 74. There is a difference in the foreign ordinances and among the foreign jurists on the question whether the owners of the goods sold during the voyage, for the necessaries of the ship, when the ship subsequently perishes in the voyage, by reason of which all remedy upon the ship is gone, have a remedy against the master or owners of the ship personally. Mr. Justice Story, in Pope *v.* Nickerson, 3 Story, 493, 494, concludes, that in justice the owners ought to be personally bound for the contracts of the master, not exceeding their interest in the ship and freight.

(4) *Lien in England for Wages and Expenditures.* — It has been a question of some doubt, and even contrariety of opinion in the books, whether the master had a lien on the ship or freight for his wages, supplies, or advances on account of the ship, either at home or abroad. But the question appears to be now clearly and definitely settled in England, that the master contracts upon the credit of the owners, and not of the ship, and he has no lien on the ship, freight, or cargo, for any debt of his own, as for wages, or stores furnished, or repairs done at his expense, either at home or on *the voyage. The principle was set- *166 tled by Lord Mansfield, in the case of *Wilkins* v. *Carmichael*, (*a*) against the master's claim to a lien on the ship for wages, or money expended for stores, or repairs done in England, and it was there shown to have been the previous law and usage. (*b*) It was afterwards solemnly adjudged, in *Hussey* v. *Christie*, (*c*) that the master had no lien on the ship for money expended, or debts incurred, for repairs made to it on the voyage; and in *Smith* v. *Plummer*, (*d*) it was decided by equal authority, that the master had no lien on the freight for his wages or disbursements on account of the ship during the voyage, or for the premiums paid by him abroad for the purpose of procuring the cargo. The captain is distinguished from all other persons belonging to the ship, and he is considered as contracting personally with the owner, while the mate and mariners contract with the master on the credit of the ship. The rule has its foundation in policy and the benefit of navigation, and it would be a great inconvenience, if, on the change of captain for misbehavior, or any other reason, he would be entitled to keep possession of the ship until he was paid, or to enforce the lien while abroad, and compel a sacrifice of the ship. (*e*) Sir William Scott, in the case of the *Favorite*, (*f*) observed, that it had been repeatedly decided, that the master could not sue in the admiralty for his wages, because he stood on the security of

(*a*) Doug. 101.

(*b*) Ragg *v.* King, Str. 858; Read *v.* Chapman, ib. 987.

(*c*) 9 East, 426. *Contra*, Watkinson *v.* Bernardiston, 2 P. Wms. 367, and Lord Eldon's opinion; Abbott on Shipping, 5th Am. ed. Boston, 1846, 185; but see *infra*, 169, 171.

(*d*) 1 B. & Ald. 575. See, also, to the same point, Atkinson *v.* Cotesworth, 5 Dowl. & Ry. 552; [Gibson *v.* Ingo, 6 Hare, 112, 122.]

(*e*) Lord Mansfield, in Wilkins *v.* Carmichael, Doug. 105.

(*f*) 2 C. Rob. 232.

his personal contract with his owner, not relating to the bottom of the ship. The language of the case of *Smith* v. *Plummer* was equally that he had no lien on the cargo for money expended, or debts incurred by him for repairs, or the necessary pur-
*167 poses of the voyage. He * can hypothecate and create a lien in favor of others, but he himself must stand on the personal credit of his owners.[1]

(5) *Lien in the United States.* — The doctrine before us in the English law remains yet to be definitely declared and settled in this country.

The case of the ship *Grand Turk* (*a*) is a decision in the

(*a*) 1 Paine, 78.

* *Master's Lien.* — In Bristow *v.* Whitmore, 4 De G. & J. 825, 834, the reasons for denying the master's lien are thought to be, that he is only the servant of the owner, and cannot, as against him, have any possession of the ship or the freight; (but it should be remembered that admiralty liens do not depend on possession;) the inconvenience of depriving the owner of his ship and his freight until he has first settled all accounts with the master, and the power which the master has of pledging the credit of the owner and of hypothecating the vessel, together with the fact that he might have protected himself by bargain with the owners. These principles were admitted in the House of Lords, but the decision was reversed on the ground that in the particular case the contract was *prima facie* unauthorized, and that, therefore, the ordinary rules between principal and agent applied, and that if the owner adopted the special contract by which the master incurred special expenses, he must bear the burdens of it also, in equity, and was only entitled to the net freight. 9 H. L. C. 391. See The Larch, 2 Curtis, 427, 432. By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, § 191), the master is given the same lien for wages that seamen have. And this lien has been enforced in the admiralty courts of the United States. The Havana, 1 Sprague, 402. On the other hand, in England, this section has been treated as only regulating the remedy, and has on that ground been applied in favor of the master of an American vessel. The Milford, Swabey, 362; 4 Jur. N. S. 417; *post*, 170, n. 1.

The later American cases deny that the master has a lien on the ship for wages. The Dubuque, 2 Abbott, U. S. 20, *Ex parte* Clark, 1 Sprague, 69, 70; Revens *v.* Lewis, 2 Paine, 202; Tisdale *v.* Grant, 12 Barb. 411. And the same was held as to advances and disbursements abroad in The Larch, 2 Curtis, 427; but the lien was recognized in *Ex parte* Clark, *sup.* & note; Kelly *v.* Cushing, 48 Barb. 269; Sorley *v.* Brewer, 18 How. Pr. 276; Sturtevant *v.* Brewer, 4 Bosw. 628, 630.

As the master has no lien for his wages on the one hand, so the maxim that freight is the mother of wages does not apply to him on the other, and the owners are liable for them up to the time of the dissolution of the contract by capture or shipwreck. Moore *v.* Jones, 15 Mass. 424; Hawkins *v.* Twizell, 5 El. & Bl. 883; McGilvery *v.* Stackpole, 38 Me. 283. The explanation is to be found *sup.* 166; 138, n. 1. Miller *v.* Woodfall, 8 El. & Bl. 493, 499, 500. And he is entitled to reasonable compensation for services necessarily rendered after the wreck. Duncan *v.* Reed, 39 Me. 415.

Circuit Court of the United States for New York, on the point that the master's wages and perquisites were no lien on the ship; and it was so ruled, also, in *Fisher* v. *Willing*. (*b*) In those cases, the English authorities were reviewed and cited by the court, and the principle advanced in them was not questioned, and seemed to be assumed as settled law. But in the case of *Gardner* v. *The Ship New Jersey*, (*c*) it was rather loosely mentioned, that the master's claim for disbursements abroad was a lien on the ship; and more recently, in the Circuit Court of the United States for Massachusetts, (*d*) the rule was laid down that the master had a lien upon the freight for all his advances and responsibilities abroad upon account of the ship, and it seemed to be the strong inclination of the court to acknowledge the master's lien on the ship for the same object. The question, therefore, though considered to be settled in England, is still a vexed and floating one in our own maritime law. (*e*)

(*b*) 8 Serg. & R. 118. (*c*) 1 Peters Adm. 227.

(*d*) Ship Packet, 3 Mason, 255.

(*e*) In the case of the Ship Packet there is no reference to the decision in Smith v. Plummer, though that decision contained a critical review of all the authorities, and put at rest, in Westminster Hall, the very point as to the lien on freight, and in opposition to the rule laid down in The Ship Packet. In Ingersoll *v.* Van Bokkelin, 7 Cowen, 670, 5 Wend. 315, s. c., it was decided, after a review of the American authorities, that a master had a lien on the freight and cargo for his necessary advances made, and responsibilities incurred, for the use of a ship in a foreign port. The same principle had been previously assumed and declared by the Supreme Court of Massachusetts, in Lane *v.* Penniman, 4 Mass. 92; Lewis *v.* Hancock, 14 id. 72; Cowing *v.* Snow, ib. 415; and was also declared by the Supreme Court of New Hampshire, in Shaw *v.* Gookin, 7 N. H. 19. The general current and language of the American cases seem now to have settled the question, that the master has such a lien for his advances and responsibilities as against the owner, though there should be no question as to the owner's solvency and personal responsibility. The American cases have taken the most reasonable side of the question. In Drinkwater *v.* Brig Spartan, Ware, 149, it was adjudged, in the District Court of Maine, after a full and learned examination of the cases, that the master had a lien on the freight for his necessary disbursements for incidental expenses, and the liabilities which he contracts for these expenses during the voyage, and also *for his own wages*. But, by the case of Ingersoll *v.* Van Bokkelin, as settled in the Court of Errors of New York, the English law was recognized, that the master had no lien on the freight, nor on the vessel, for his *wages*. See, also, to s. p., Phillips *v.* Scattergood, Gilpin, 1; Steamboat Orleans *v.* Phœbus, 11 Peters, 175. By the *general maritime law*, every contract of the master within the scope of his authority, as the contract of affreightment by charter party, or bill of lading, binds the vessel, and gives the creditor a lien upon it for his security. The Paragon, Ware, 322. It seems at length to be the established doctrine in this country, that the master can sue in the admiralty *in personam*, and, to a qualified extent, *in rem*, when he has a

*168 (6) *Lien of Material Men.* — *The civil law, and the law of those countries which have adopted its principles, give a lien upon the ship, without any express contract for such a claim, to the person who repairs or fits out the ship, or advances money for that purpose, whether abroad or at home. (*a*) *169 The English law allows of such *a lien, from the necessity of the case, for repairs and necessaries while the ship is abroad; but it has not adopted such a rule as to repairs made, and necessaries furnished to the ship while at home, (*a*) except it be in favor of the shipwright who has repaired her, and has not parted with the possession. In that case, he is entitled to retain possession until he is paid for his repairs. But if he has once parted with the possession of the ship, or has worked upon it without taking possession, he is not deemed a privileged creditor having a claim upon the ship itself. (*b*) In this country, it

lien on the freight, or on any fund in court. Willard *v.* Dorr, 8 Mason, 91; Hammond *v.* Essex F. & M. Ins. Co., 4 id. 196; The Brig George, 1 Sumner, 151, 157; Drinkwater *v.* The Brig Spartan, Ware, 149; Abbott on Shipping, 5th Am. ed. Boston, 781.

(*a*) Dig. 14. 1. 1; ib. 42. 5. 26, 34; 1 Voet's Comm. 20, 2, 29; Casaregis, Disc. 18; 1 Valin's Comm. 868, 867. The new French code, art. 191, gives the order of privileged debts which are liens upon the ship, and take preference of each other, and to all other debts, in the order in which they are placed. The first four items which have preference, relate to costs of suit and port charges, as, (1.) Legal costs; (2.) Pilotage; (3.) Expenses of guarding the vessel; (4.) Storage. Then follow, (5.) The expenses of repairing the vessel at the last port; (6.) Wages of the master and crew in the last voyage; by the Consolato, and the ordinances of Oleron, and of 1681, the wages of sailors, for the last voyage, had the preference over all other claims; (7.) Moneys borrowed by the captain in the last voyage for the necessary expenses of the ship, and the reimbursement of the price of the goods sold by him for the same object; if the captain made successive loans, or sales of cargo, from necessity, the last loan and sale, in point of time, is preferred, if made at a different port; (8.) Debts due to the vendor, material men and shipwrights, if the ship has not made a voyage, and to those who furnish stores and necessary supplies before her departure, if she had already made a voyage; the Consolato and the ordinance of 1681 gave those creditors a preference to all others; the vendor loses his preference after the ship has sailed; (9.) Sums lent on bottomry for the reparation and equipment of the vessel before her departure; (10.) Premiums of insurance on the ship for the last voyage. Code de Commerce, art. 191; Pardessus, Droit Com. iii. n. 954; Boulay-Paty, Cours de Droit Com. i. 110–124. When the master is ready to sail, the ship is not liable to attachment, except for debts relative to the voyage about to be commenced. Pardessus, Droit Com. iii. 82.

(*a*) Watkinson *v.* Bernardiston, 2 P. Wms. 367; Buxton *v.* Snee, 1 Ves. 154; *Ex parte* Shank, 1 Atk. 234; Wilkins *v.* Carmichael, Doug. 101; Hussey *v.* Christie, 13 Ves. 594; s. c. 9 East, 426.

(*b*) Franklin *v.* Hosier, 4 B. & Ald. 341; *Ex parte* Bland, 2 Rose, 91. Abbott on

was formerly, and rather loosely declared, in some of the admiralty courts of the United States, that the person who repaired, or furnished supplies for a ship, had a lien on the ship for his demand. (*c*) But the doctrine was examined, and the rule declared, with great precision, by the Supreme Court of the United States, in the case of the *General Smith*, (*d*) and reasserted in the case of the *St. Jago de Cuba*. (*e*) The rule of the English common law (*f*) is explicitly adopted, that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself, or its proceeds, in court, under a decree and sale, for the recovery of their demands, with the exception of the shipwright who has possession of the ship. As long as he retains possession, he has a lien for his repairs. The distinction is, that if repairs have been made, or *necessaries furnished, to a foreign ship, or to a *170 ship in the port of a state to which she does not belong, the general marine law, following the civil law, gives the party a lien on the ship itself for its security, and he may maintain a suit *in rem*, in the admiralty, to enforce his right. (*a*) But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed by the municipal law of that state, and no lien is implied, unless it has been recognized by that law. (*b*) If a material man gives personal credit, even

Shipping, part 2, c. 3, secs. 9–14, contains a history of the English cases on the point. The rule is settled in Scotland in perfect conformity to the English law. See Hamilton *v.* Wood, and Wood *v.* Creditors of Weir, 1 Bell's Commentaries, 527, who says that the deviation in England from that maritime rule which prevails with other nations has proceeded rather from peculiar notions of jurisdiction than from any general principle of law or expediency, and that it has been established in Scotland by mere adoption.

(*c*) Stevens *v.* The Sandwich, District Court for Maryland, 1 Peters Adm. 238, note; Gardner *v.* The Ship New Jersey, ib. 228.

(*d*) 4 Wheat. 438.

(*e*) 9 Wheat. 409. See, also, Peyroux *v.* Howard, 7 Peters, 824, s. p.

(*f*) Buxton *v.* Snee, 1 Ves. 154; 8 Knapp, 95.

(*a*) The Ship Fortitude, 3 Sumner, 228; Law Reporter, i. 124. It has been suggested in some of the cases, that any place where the vessel and the owner are not together is to be deemed a foreign port, in respect to the power of the master, in a proper case, to subject the vessel to a lien. 6 Dana (Ky.), 27, 28.

(*b*) The General Smith, 4 Wheat. 438; Story, J., in the case of the Brig Nestor, 1 Sumner, 74, 79; The Schooner Marion, 1 Story, 68; Read *v.* The Hull of a New Brig, ib. 216. See, also, *supra*, i. 379, 380. The question concerning the extent of the admiralty jurisdiction in the United States, in the case of service bestowed, and supplies or moneys furnished for a vessel, was elaborately and interestingly consid-

in the case of materials furnished to a foreign ship, he loses his lien so far as to exclude him from a suit *in rem*, yet he will be entitled, upon petition, to be paid out of the remnants and surplus remaining in the registry. (*c*) This rule is subject to the qualification that an express contract for a stipulated sum is not of itself a waiver of the lien, unless the contract contain some

ered in Davis *v.* Child, in the District Court of Maine. 8 N. Y. Leg. Obs. 147, [Daveis, 71.] It was declared that by the general maritime law of Europe material men had a privileged lien on a vessel for repairs and supplies, but that in this country they had no such lien for repairs made or supplies furnished, *in a port of the state to which the vessel belonged*, unless allowed by the local law; though, if the vessel was in the port of a state to which she did not belong, she was considered a *foreign vessel*, and the general maritime law applied. It was further adjudged, that the lender of money, or one whose goods were sold in the course of the voyage for the necessary wants of the vessel, had the same privilege as the material men, and the ship stood hypothecated for his security. They were considered as giving credit to the vessel and to the owner, and could maintain a libel in the Admiralty *in rem* against the vessel, and *in personam* against the owner. References were made to the civil law and to the foreign maritime jurists in support of these established positions, by the learned judge; but it was further observed, that the admiralty had no direct jurisdiction over *trusts*, nor as to *matters of accounts*, merely as accounts, even in maritime affairs. The admiralty takes cognizance of accounts only as incidental to other matters within its jurisdiction. Nor could the admiralty enforce the *specific performance of any agreement* relative to maritime affairs. These are matters of equity jurisdiction. This declaration as to the limitations of admiralty jurisdiction is important, and clears doubts and difficulties that may have been loosely started on the point. State laws frequently make provision for the security of material men. Thus, in Illinois, boats, and vessels of all descriptions, built or repaired or equipped in that state, are liable to be attached for debts contracted by the owner, master, supercargo, or assignee, for work and supplies by mechanics, tradesmen, &c. Revised Laws of Illinois, ed. 1833, 95. A similar law exists in Indiana, Revised Statutes of Indiana, 1838, 120; and in Pennsylvania, Purdon's Dig. 79; and in Missouri, by statute, in 1838, and in Maine, by statute of 19th February, 1839, and in England, by statute, in 1840. In Connecticut no such lien exists by their municipal law. Buddington *v.* Stewart, 14 Conn. 404. A specific lien on chattels, in the hands of a tradesman, or artificer, or bailee, for the labor and skill bestowed on them, was a part of the common law. Chapman *v.* Allen, Cro. Car. 271; Jackson *v.* Cummins, 5 M. & W. 349; M'Intyre *v.* Carver, 2 Watts & S. 392. The Supreme Court of the United States has, in the cases above cited, assumed, that the port of another state was, as respects this rule, a home port. The Court of Sessions, in Scotland, has also held, that Hull, in England, was, in respect to Scotch owners, a foreign port. Stewart *v.* Hall, 1 Bell's Comm 525, note. But that decision was reversed in the House of Lords, as being a point unnecessary; and the question is still open, as to what shall be deemed a home port in respect to repairs. Mr. Bell suggests that the natural course would be, to adopt the rule of the navigation laws, and to hold all British ports as home ports, because access to the custom house title and communication with the owners are so easy, and may be so prompt. See *supra*, 94.

(*c*) Zane *v.* The Brig President, 4 Wash. 458.

stipulations inconsistent with the continuance of the lien. (*d*) [1] In New York, by statute, (*e*) shipwrights, material men, and

(*d*) Peyroux *v.* Howard, 7 Peters, 324. In the case of the Brig Nestor, 1 Sumner, 78, it was held, that giving credit for a fixed time for supplies did not extinguish the lien for the supplies. A lien may exist for a debt *solvendum in futuro*, and many instances of the kind were stated in the case. Nor does the fact that the master and owner are personally liable for the supplies destroy the lien. In the case of the Waldo, in the District Court of Maine, 1841, [Daveis, 161,] it was held, that the shipper may not only sue the owners for the injury to goods for the defaults of the master, but he has a lien on the ship.

(*e*) By the New York Revised Statutes, debts contracted within the state by the master, owner, agent, or consignee of every vessel are a lien when contracted for

[1] *Lien for Supplies to Domestic Ships.*— Some of the states have given materialmen a lien for repairs and supplies to vessels at their home ports by statute; and the question has been much mooted how far such liens are to be enforced in the Admiralty, and how far they *can* be in the state courts.

It may sometimes be hard to decide whether the so-called lien is more analogous to a maritime lien or to an attachment at common law, Leon *v.* Galceran, 11 Wall. 185, 189; Williamson *v.* Hogan, 46 Ill. 504, 518; and it has been laid down that there is a clear distinction between a maritime lien and a right to a proceeding *in rem;* The Mary Ann, L. R. 1 Ad. & Ec. 8, 11; The Two Ellens, L. R. 4 P. C. 161; see The Maggie Hammond, 9 Wall. 435, 456; so that a statute merely giving a proceeding *in rem* in a state court where there is no such proceeding in the Admiralty, and not assuming to create a maritime lien, may perhaps take effect without encountering the decisions mentioned *ante*, i. 369, n. 1, or raising the above questions.

If, however, the statute purports to create a lien analogous to a maritime lien, and independent of special statutory process by which the state courts are empowered to enforce it, the question arises whether the lien does not follow the nature of the service or contract to which it is annexed, and is not to be enforced in the admiralty, and there only, by a proceeding *in rem*, just as the claim could previously have been recovered there by a proceeding *in personam*. Between 1859 and 1872 this was forbidden by the 12th Admiralty Rule; but before that, such suits were entertained in The St. Lawrence, 1 Black, 522. and The Potomac, 2 Black, 581, on the ground that the court might entertain them in its discretionary power to regulate its own practice. See, also, The America, 1 Lowell, 176; 2 Am. Law Rev. 458; Brookman *v.* Hamill, 43 N. Y. 554, 561; The Harrison, 2 Abbott U. S., 74; The Milford, *ante*, 167, n. 1. It was maintained in two able articles, 5 Am. Law Rev. 581, 604, 7 id. 1, that the Rule referred to was in substance the denial of a right, and not simply a regulation of procedure, on the ground that the statutory lien was maritime and a substantive right, and that the only method of enforcing it was by a proceeding *in rem*. It is assumed in this argument that a right to a proceeding *in rem* and a maritime lien are convertible terms, and that to deny either is to deny the other. 7 Am. Law Rev. 9. If this be so, it is not perceived why a state law purporting to give a maritime lien is not in substance an attempt to impose a new process on a court outside of its jurisdiction. If, on the other hand, the state law is not to be so considered, it must be on the ground that the lien and the right to the proceeding are distinguishable, in which case the latter seems to be within the power of the court to regulate. If it should be admitted that a distinction exists between the lien and the right to a proceeding *in rem* as the

*171 suppliers of ships * have a lien for the amount of their debts, whether the ship be owned within the state or not:

work done or materials furnished for building, repairing, fitting, or equipping the vessel, or for provisions and stores furnished, or for wharfage, and expenses of keeping the vessel in port. The lien is preferred to any other lien, except mariners'

authorities cited show, but should be argued that to deny the latter is substantially to render the former worthless, it is nevertheless not wholly clear why the United States courts may not decline to apply a new process for the purpose of enhancing the value of the right, and stop short at recognizing the right when brought before them by means of existing processes; just as the English Admiralty will not give a proceeding to enforce a common law possessory lien, but, on the other hand, will not enforce a subsequent maritime lien until the party entitled to the former is satisfied. Cargo *ex* Galam, 2 Moore, P. C. N. S. 216, 286.

Whatever may be the duty of the admiralty courts as to enforcing a lien created and annexed to a maritime service by state laws, the opinion of the Supreme Court on the kindred subject of the right of state courts to enforce such a lien seems to be that although common law courts are not competent to enforce a maritime lien by a proceeding *in rem*, a lien annexed to maritime services by statute, and not arising independent of it, is not a maritime lien, and therefore is not within the exclusive jurisdiction of the admiralty, but may be enforced by the state courts by such a proceeding. The Belfast, 7 Wall. 624, 645; Leon *v.* Galceran, 11 Wall. 185, 191; The Steamboat Victory, 40 Mo. 244; The Steamboat Magnolia, 45 Mo. 67; Donnell *v.* The Starlight, 103 Mass. 227; Williamson *v.* Hogan, 46 Ill. 504; Southern Dry Dock Co. *v.* Gibson, 22 La. An. 628; 4 Am. Law Rev. 664. See Vose *v.* Cockcroft, 44 N. Y. 415. *Contra*, The Harrison, 2 Abbott, U. S. 74, 79; The Josephine, 39 N. Y. 19, explained, however, in Sheppard *v.* Steele, 43 N. Y. 52, and in Brookman *v.* Hamill, ib. 554. In the latter case the statement in The Belfast, *supra*, is supposed to refer only to those contracts which are not maritime, and over which the admiralty has no jurisdiction of any sort. In such cases, of course, a lien and process *in rem* may be given in the state courts. Sheppard *v.* Steele, *sup.*; Foster *v.* The Richard Busteed, 100 Mass. 409. But the statement of the Supreme Court does not seem to be limited to such contracts. *Ante*, i. 869, n. 1. (*cf.* Edith, 11 Am. L. Reg. N. S. 214.)

When the discussion had reached this point, the New York Pilot case, *Ex parte* McNiel, 13 Wall. 236, sanctioned the principle that if a transaction and the obligation arising out of it are of admiralty jurisdiction, so that a suit *in personam* may be maintained, and there is attached thereto a valid lien, in its nature enforceable by admiralty process, it is no objection to the jurisdiction of the federal courts that the lien was created solely by a state statute. 7 Am. Law Rev. 17, 18. Soon after this decision, the 12th Admiralty Rule was amended so as to read, "In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." 13 Wall. xiv.; *cf.* 7 Am. L. R. 19. On the question whether domestic material men have a lien by our admiralty law, the probable origin of the maritime lien as an offshoot from what is stated 218, n. 1; ii. 260, n. 1, may affect the weight of European precedents. As to later invented reasons of policy (*cf.* ii. 451, n. 1, (*b*),) our policy of recording incumbrances raises a doubt whether secret liens are to be more favored in this than in other cases where the debtor can be sued.

but the lien ceases after due security is given, or when the vessel leaves the state. (*a*)

It is very clearly settled, that the master, when abroad and in the absence of the owner, may hypothecate the ship, freight, and cargo, to raise money requisite for the completion of the voyage. (*b*) This authority is, however, limited to objects connected

wages, and it ceases after twelve days from the departure of the vessel from the port at which she was when the debt was contracted, to some other port in the state, and immediately on the vessel leaving the state. Every such vessel, unless she be under seizure at the time, by virtue of process from an admiralty court of the United States, or had been sold by order of such court, and the debt contracted prior to such sale, may be attached and sold to satisfy the claim, together with all other claims of the like kind, duly exhibited and verified. The proceedings under the process of attachment, the sale of the vessel, and distribution of the proceeds are specially detailed and prescribed. N. Y. Revised Statutes, ii. 493–500. In several of the other states, the lien is equally extended, by statute, to repairs made in a home port. In Louisiana, the workmen who repair vessels have a lien on them, though there be no contract in writing; but the privilege is lost if they suffer the vessel to depart. Civil Code, art. 2748.

(*a*) In the case of The United States *v.* Wilder, 3 Sumner, 308, it was considered and held, that sovereignty did not necessarily imply an exemption of its property from the process and jurisdiction of the courts of justice. Liens of material men, salvors, wages, and for average, &c., exist against government property as well as the property of individuals. There is no exception, in this respect, between public property of a commercial character, and private property, either upon general principles of justice or *jure gentium*. United States *v.* Wilder, 3 Sumner, 308.[1]

(*b*) Lord Mansfield, in Wilkins *v.* Carmichael, Doug. 101; The Gratitudine, 3 C. Rob. 240; Sir Joseph Jekyl, in Watkinson *v.* Bernardiston, 2 P. Wms. 367; The case of the Ship Fortitude, in the C. C. U. S. for Mass. decided in August, 1838, 3 Sumner, 228, contains a learned confirmation of the doctrine of the maritime law, that *the master* of a ship has authority in a foreign port to procure supplies and repairs necessary for the safety of the ship and performance of the voyage. The necessaries, though not such as are absolutely indispensable, must be reasonably fit and proper; and if the master has not suitable funds, or cannot obtain money on the personal credit of the owner, he may raise it on bottomry. The *lender* is bound to exercise a reasonable diligence to ascertain that the supplies and repairs are necessary, or apparently so; and it is sufficient if he acts with good faith; and so will the master if he acts with reasonable diligence, discretion, and skill. A regular survey is *prima facie* evidence of the necessity of the repairs, so as to justify the master and the lender. The presumption is in favor of the master and the lender; and the *onus probandi* to the contrary lies on the owner

[1] A distinction has been taken between the right of detention and the right of process *in rem* as against the sovereign, and the latter has been denied, where the sovereign has taken possession of the *res*. Briggs *v.* Life Boats, 11 Allen, 157, 183. But when the sovereign has not yet taken actual possession, and there is therefore no danger of his possession being invaded by the process of the court; or when the sovereign voluntarily places the *res* in the possession of the court, as in the case of prize brought in for condemnation, the lien may be enforced against the property. The Davis, 10 Wall. 15; 6 Blatchf. 138; The Siren, 7 Wall. 152. *Cf.* i. 297, n. 1.

with the voyage; and it must appear, in this case, as well as when he binds the owner personally, that the advances were made for repairs or supplies necessary for the voyage or the safety of the ship, and that the repairs and supplies could not be procured upon reasonable terms, or with funds within the master's control, or upon the credit of the owner, independent of the hypothecation. The master's right exists only in cases of necessity, and when he cannot otherwise procure the money, and has no funds of the owner or of his own, which he can command, and apply to the purpose. (*c*) He is to act with reasonable discretion, and is not absolutely bound to apply the money of others in hand, except it belong to the owner, in preference to a resort to bottomry; and it has been suggested by very high authority, that there may be special cases in which the master may raise money by hypothecation, even though he has his own money on board. But if he should raise money by bottomry in such a case, the admiralty will marshal the assets in favor of the shippers of the cargo, so as to bring their property last into contribution. (*d*) The power of the master to charge the owners relative to the repairs and freight of the ship does not exist when the owners are present, or when the ship is at their resi-
* 172 dence. (*e*)[2] * But if only a minority of the owners are

who resists the bottomry bond. In that case, all the foreign civilians are examined in relation to the degree of necessity that will justify the hypothecation.

(*c*) The Aurora, 1 Wheat. 102; The Ship Fortitude, *supra*. The necessity that will justify the resort to a bottomry bond is more pressing and commanding than the necessity which will justify the master in resort to an ordinary contract for repairs.

(*d*) The Ship Packet, 3 Mason, 255. The lien of the master for repairs made by his means at a foreign port may exist without any express hypothecation. Ib. American Insurance Company *v.* Coster, 8 Paige, 323. It is clearly the rule of the maritime law, supported by the foreign authorities, that the owner of the cargo, sold by the master for the necessities of the ship, has an implied lien upon the ship for his indemnity, though there be no express hypothecation. The owners are liable to pay the shippers the full amount of the proceeds of the ship appropriated by the master, within the scope of his authority, for the use of the ship. Abbott on Shipping, part 3, c. 5.

(*e*) Code de Commerce, art. 232; Ord. de la Marine, 2, tit. 1; Patton *v.* The Randolph, Gilpin, 457. In the case of The Ship Lavinia *v.* Barclay, 1 Wash. 49, it was held that the captain could not raise money by hypothecation, when one of the owners resided at the port. But in a home port, the master may bind the owner for necessary and ordinary repairs and equipments under a presumed authority. Webster *v.* Seekamp, 4 B. & Ald. 352. This is likewise the rule in the Scotch law. 1 Bell's Comm. 524. It is held, that a port in a state in which the owner does

[2] See 164, n. 1.

present, or reside at the place, then the captain's power remains good. (*a*)[1] It is incumbent upon the creditor who claims an

not reside is not a *home port* in the maritime law, as applicable to the United States; and the master of a vessel may in such a port hypothecate the vessel by a bottomry bond for necessary repairs, if the owner has no agent there, though he reside in another state. Selden *v.* Hendrickson, 1 Brock. 396. Perhaps, however, the distinction between *foreign and home ports*, in relation to the master's power in these cases, ought to rest not in relation to the government of the country, but to the proximity or remoteness, the facility or difficulty of communication between the place where the master acts and the place where the owner resides. This was the doctrine declared in the case of Hooper *v.* Whitney, in the Commercial Court at New Orleans, 1889, and it is reasonable and just; and the other rule would be very unreasonable in many cases, as, for instance, between the city of New York and Jersey City. [164, n. 1; 172, n. 1.] In Johns *v.* Simons, 2 Q. B. 425, held, that in a home as well as in a foreign port, the master has an implied authority to pledge the credit of the owner, and borrow money for the use of the ship, if the owner be absent, and no reasonable communication with him. Eleven miles distant are not sufficient to imply the power. Arthur *v.* Barton, 6 M. & W. 138, s. p.; Abbott on Shipping, 5th Am. ed. Boston, 1846, 178, 179.

(*a*) Boulay-Paty, Cours de Droit Com. ii. 271.

[1] *Bottomry.* — As has already been said 138, n. 1, (164, n. 1, where the law which governs the transaction is explained,) the power of the master for most purposes is only a branch of the general law of agency. It is held to be absolutely necessary, that he should communicate or attempt to communicate with the owners of the ship and cargo respectively before hypothecating them by a bottomry bond, if it is reasonable to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case. For it is on the ground that the owners have no means of expressing their wishes that the master is invested with authority by a presumption of law arising out of the necessity of the case. The Panama, L. R 3 P. C. 199; The Hamburg, 2 Moore P. C. N. S. 289, 320; Brown. & Lush. 253; 10 Jur. N. S. 600; The Oriental, 7 Moore P. C. 398, 410; The Bonaparte, 8 Moore P. C. 459; affirming S. C., 3 W. Rob. 298; The Olivier, Lush. 484; The Lizzie, L. R. 2 Ad. & Ec. 254; The Panama, ib. 390; Australasian S. N. Co. *v.* Morse, L. R. 4 P. C. 222; 174, n. 1. But the law was formerly less strict in England, for as late as 1847 the Lord Chancellor said there was no authority for the doctrine; and there are American cases which treat facility of communication with the owners as no more than a circumstance for the jury to consider in determining whether the loan was necessary. Glascott *v.* Lang, 2 Phillips, 310, 321; The Royal Arch, Swabey, 269, 276; Stearns *v.* Doe, 12 Gray, 482. On the other hand, if there be no power of communication with them correspondent with the necessity, the authority to borrow money exists, although they are in the same country. And in a great emergency, if the master cannot raise the money on the credit of the owners, he may raise it on bottomry. The Oriental, 7 Moore P. C. 398, 410. See Australasian S. N. Co. *v.* Morse, L. R. 4 P. C. 222, 232.

In the absence of proof that repairs or supplies could have been obtained on the personal credit of the owners without bottomry, a necessity for credit is established by proving the necessity for repairs. But, as has been said (164, n. 1), Chief Justice Chase suggests in The Grapeshot, 9 Wall. 129, 140, that greater diligence is required of the lender on bottomry than of the material man in inquiry concerning the

hypothecation, to prove the actual existence of the necessity, or of an apparent necessity, of those things which gave rise to his demand, and which are reasonably fit and proper for the ship, or for the voyage, under the circumstances of the case; and he must have acted, after he has used reasonable diligence, with good faith in his inquiries, though he need not see to the actual and *bona fide* application of the money. (*b*) The loan must not exceed the necessity, and it must be made, and under circumstances to afford relief. (*c*) This power of the master to borrow money on bottomry, and hypothecate the ship for the repayment, may exist as well at the port of destination as at any other foreign port, when the necessity for the exercise of the right becomes manifest. (*d*) A doubt has been raised whether an hypothecation would be valid when made to the consignee of the owner. The power in that instance would be very liable to abuse and collusion, and the averment of the necessity and integrity of the transaction ought to undergo a severer scrutiny, but the weight of authority seems to be, that, under circumstances, a consignee may take a bottomry bond. (*e*)

(*b*) The Ship Fortitude, C. C. U. S. for Mass., August, 1838, [8 Sumner, 228;] Story on Agency, § 122; [*ante*, 164, n. 1.]

(*c*) Rucher *v.* Conyngham, Peters Adm. 295; Cupisino *v.* Perez, 2 Dallas, 194; The Aurora, 1 Wheat. 96; Rocher *v.* Busher, 1 Stark. 27; Roccus, de Navibus, not. 23.

(*d*) Reade *v.* Commercial Insurance Company, 3 Johns. 352.

(*e*) See Rucher *v.* Conyngham, Peters Adm. 307; and Abbott on Shipping, 5th Am. ed. Boston, 1846, 207. See *infra*, 361, to the S. P. to that point. The power given to the master to raise money while abroad, for the necessities of the ship, is the most dangerous form in which his authority can be exerted, and all the foreign authorities

necessity of repairs. He also lays it down that the bottomry bondholder must give evidence of actual necessity for repairs and supplies; "and if the fact of necessity be left unproved, evidence is also required of due inquiry, and of reasonable grounds of belief that the necessity was real and exigent." See The Royal Arch, Swabey, 269, 275.

When a debt has already been contracted for such supplies, which constitutes a lien on the vessel or cargo, capable of immediate enforcement in a foreign court, the master may raise money to pay it by pledging the credit of the owners, or by a bottomry bond. Stearns *v.* Doe, 12 Gray, 482, 487; The Yuba, 4 Blatchf. 352; The Karnak, L. R. 2 P. C. 505, 512, where the necessity which will authorize an hypothecation by the master is described; *ante*, 164, n. 1. See also The Albert Crosby, L. R. 3 Ad. & Ec. 37. It seems that the master can pledge the personal credit of the owners, and also give a bottomry bond as collateral security, provided the two things are done by separate and distinct instruments. Stainbank *v.* Shepard, 13 C. B. 418, 443; Willis *v.* Palmer, 7 C. B. N. S. 340, 360; Bristow *v.* Whitmore, 4 De G. & J. 325, 334. But compare The Atlantic, Newb 514; *post*, 358.

(7) *Power to sell Ship or Cargo.* — *The master in the *173 course of the voyage, and when it becomes necessary, may also sell part of the cargo, to enable him to carry on the residue; and he may hypothecate the whole of it, as well as the ship and freight, for the attainment of the same object. (*a*) The law does not fix any aliquot part or amount of cargo which the master may sell; nor could any restraint of that kind be safely imposed. The power must, generally speaking, be adequate to the occasion. The authority of the master must necessarily increase in proportion to the difficulties which he has to encounter. There is this limitation only to the exercise of the power, that it cannot extend to the entire cargo; for it cannot be presumed to be for the interest of the shipper, that the whole should be sold, to enable the ship to proceed empty to her port of destination. The hypothecation of the whole may, however, be for the benefit of the whole, because it may enable the whole to be conveyed to the proper market. (*b*) This power of the master to pledge

have recommended and enforced the same precautions, and which have been universally adopted. (Casaregis, Disc. 71; Roccus, de Navibus, n. 23; Vinnius ad Peck.) In Boyle *v.* Adam, in the Scotch Admiralty, in 1801, the rule that the lender, on an hypothecation bond, was not bound to see to the application of the money, was qualified in a case where the expenditure was enormous, and the master a weak man. Bell's Comm. i. 529, note. The question respecting the lien of the master on the ship, for necessary expenditures, has been extensively litigated and discussed in the English and American courts, as has been already shown; and for a more full view of some of the cases, see Abbott on Shipping, 5th Am. ed. Boston, 1846, 181–192. The American editor of Abbott on Shipping, 5th ed. Boston, 1846, 200–202, has industriously classified the most material cases in the American admiralty courts, on the power of the master to borrow money on bottomry. (1.) It must be in cases of necessity, where he has no other adequate funds in his power, and can obtain none upon the personal credit of the owner. (2.) If the necessity existed, and the advances were *bona fide* made, any subsequent misapplication of them by the master will not vitiate the hypothecation. (3.) There must have been an inability to procure the funds on the personal credit of the owner. (4.) The credit must have been given to the ship as security. (5.) The master cannot give a bottomry bond for antecedent advances, or for other debts due from the owner to his creditor. (6.) The master cannot pledge the ship or freight for his own private interests, or hypothecate the ship for the benefit of the cargo. (7.) The master may hypothecate the ship, although the ship be hired upon charter, and the master has been appointed by the charterers. (8.) The owner is not personally bound by the bottomry bond. (9.) A bottomry bond may be given to pay off a former bottomry bond on the same foreign voyage.

(*a*) Story, J., in Pope *v.* Nickerson, 3 Story, 491, and the authorities, foreign and domestic, there cited.

(*b*) The Gratitudine, 3 C. Rob. 240, 268; The United Insurance Company *v.* Scott, 1 Johns. 115; Freeman *v.* The East India Company, 5 B. & Ald. 617; Ross *v.* Ship Active, 2 Wash. 226.

or sell the cargo is only to be exercised at an intermediate port, for the prosecution of the voyage; and if he unduly breaks up the voyage, he cannot sell any part of the cargo for repairs for a new voyage, and the power is entirely gone. (*c*) In cases of capture by an enemy or pirate, the master may redeem the vessel or cargo by a ransom contract for money, or part of the cargo, and the whole cargo, as well as the ship, will be bound by the contract made under the authority of the necessity of the case. (*d*) But if the voyage is broken up in the course of it by ungovernable circumstances, the master, in that case, may even sell the ship or cargo, provided it be done in good faith, for the good of all concerned, and in a case of supreme necessity, which *174 sweeps all ordinary rules before it. (*e*)[1] The * merely acting

(*c*) Watt *v.* Potter, 2 Mason, 77.

(*d*) The Gratitudine, 3 C. Rob. 240; Maisonnaire *v.* Keating, 2 Gallison, 325. See, also, *supra*, i. 104, 106.

(*e*) Hayman *v.* Molton, 5 Esp. 65; Milles *v.* Fletcher, Doug. 231; Idle *v.* The Royal Exchange Assurance Company, 8 Taunt. 755; Freeman *v.* The East India Company, 5 B. & Ald 617; Cannan *v.* Meaburn, 1 Bing. 248; Robertson *v.* Clarke, ib. 445; Fanny and Elmira, Edw. Adm. 117; Read *v.* Bonham, 3 Brod. & B. 147; Soames *v.* Sugrue, 4 Carr. & P. 276, Tindal, C. J.; Scull *v.* Briddle, 2 Wash. 150; The Schooner Tilton, 5 Mason, 475, 477; Jordan *v.* Warren Ins. Co., 1 Story, 342. In the case of The American Insurance Company *v.* Center, 4 Wend. 45, it was held, that in this country the master's right to sell was more extensive than in England; for here, if there existed a *technical total loss*, and the master has reason to believe the owner would elect to abandon, he might sell the ship. The English rule is more strict, and it is the duty of the master to repair the vessel, unless there be an *actual total loss*, or he has no means of repairing, and cannot procure any by the hypothecation of the ship or cargo. The earlier English cases, as well as the foreign ordinances, denied to the master the authority to sell the ship. 1 Sid. 452; 2 Ld. Raym. 934. But though such a power is not given to the master by the general maritime law, yet the modern cases have, in some degree, yielded that power to the master in a case of strong necessity. Abbott on Shipping, 5th Am. ed. Boston, 1846, 10–26. In this last work, in the notes of the learned English and American editors, all the authorities on the question of the power of the master to sell the ship are collected and critically examined. In the cases of Gordon *v.* The Mass. F. & M. Ins. Co., 2 Pick. 249, and of Hall *v.* The Franklin Insurance Company, 9 Pick. 466, the strict doctrine of the English law was asserted and maintained. The master's authority to sell the vessel was confined to cases of extreme necessity, and where he acts with the most perfect good faith for the interest of the owner, and when he has no opportunity to consult the owner or insurer, and the necessity leaves him no alternative. This strict rule is the one best supported by reason and authority. See, also, to the same point, the case of the Brig Sarah Ann, 2 Sumner, 206, where it was held, that in a case of urgent necessity, the master had a right to sell the vessel, as well on a home as on a foreign shore, and whether the owner's residence be near or at a distance. Also the cases of The New England Insurance Company *v.* The Sarah Ann, 18 Peters, 387; and of

[1] 172, n. 1; 174, n. 1.

in good faith, and for the interest of all concerned, is not sufficient to exempt the sale of goods from the character of a tortious conversion, for which the ship owner and the purchaser are responsible, if the absolute necessity for the sale be not clearly made out. Nor will the sanction of a vice-admiralty court aid the sale when the requisite necessity was wanting. (*a*)[1] All the cases are decided and peremptory, and upon the soundest principles, in the call for that necessity. The master is employed only to navigate the ship; and the sale of it is manifestly beyond his commis-

Robinson *v.* Commonwealth Ins. Co., 8 Sumner, 220; and of Hunter *v.* Parker, 7 M. & W. 322, where the power of the master to sell, in a case of extreme necessity, and acting in good faith, is fully sustained.

(*a*) Van Omeron *v.* Dowick, 2 Camp. 42; Morris *v.* Robinson, 3 B. & C. 196. The French code allows the master to sell the ship in the single case of innavigability; but by the ancient ordinances the prohibition was entire and absolute. The innavigability of the ship ought, however, to be first ascertained and declared by the local magistrate of the place; or, if in a foreign country, by the French consul. Code de Commerce, art. 237; Ord. de la Marine, tit. Du Capitaine, art. 19; Valin's Comm. i. 444; Pardessus, Droit Com. iii. 26; Boulay-Paty, ii. 85.

[1] *Sale by the Master.* — See The Bonita, Lush. 252; 30 L. J. N. S. Adm. 145.

The necessity is a question of fact, to be in each case by the circumstances in which the master is placed, and the perils to which the property is exposed. The cases sustain the strict rules of the text. The Amelie, 6 Wall. 18, 27; s. c. 2 Cliff. 440; The Australia, 18 Moore P. C. 132, 144; Post *v.* Jones, 19 How. 150; Stephenson *v.* Piscataqua Ins. Co., 54 Me. 55, 77; Prince *v.* Ocean Ins. Co., 40 Me. 481; Brightman *v.* Eddy, 97 Mass. 478. Cases as to cargo are Tronson *v.* Dent, 8 Moore P. C. 419; Myers *v.* Baymore, 10 Penn. St. 114. And if it is possible to communicate with the owners without a delay destructive of their interests, it is the master's duty to do so, on the grounds already stated in the case of bottomry, *ante*, 172, n. 1. The Bonita, Lush. 252, 262; 30 L. J. N. S. Adm. 145, 151; The Amelie, 6 Wall. 18, 27; Star of Hope, 9 Wall. 203, 237; The Uniao Vencedora, otherwise The Gipsy, 33 L. J. N. S. Adm. 195; Butler *v.* Murray, 30 N. Y. 88, 99; Australasian St. N. Co. *v.* Morse, L. R. 4 P. C. 222, 282.

The authority of the master to make the sale may perhaps depend on the law of the flag, on the same principle with the cases cited *ante*, 164, n. 1. But it has been held that a sale of a cargo, valid by the law of the place where it was made, bound the property (in a case where the court below thought the parties concluded by a judgment rendered in that place). Cammell *v.* Sewell, 5 Hurlst. & N. 728; 8 id. 617. See, however, the remarks of Willes, J., in Lloyd *v.* Guibert, *ante*, 164, n. 1. And it has been intimated in an earlier case that the validity of the sale of a ship depends on the general maritime law, a doctrine abandoned in the latest common law cases cited *ante*, 164, n. 1, so far as it affects them; Segredo, otherwise Eliza Cornish, 17 Jur. 738; 1 Ec. & Ad. (Spinks) 86, criticised also in Cammell *v.* Sewell, but seemingly adhered to in some admiralty cases. The Patria, L. R. 3 Ad. & Ec. 436, 461.

If the sale is lawful, it devests all liens from the ship and transfers them to the proceeds. The Amelie, 6 Wall. 18; 2 Cliff. 440. But see The Catherine, 16 Jur. 231; 1 Eng. L. & Eq. 679; and *cf.* Charles Amelia, L. R. 2 Ad. & Ec. 330.

sion, and becomes the unauthorized act of a servant, disposing of property which he was intrusted only to carry and convey.
*175 The * master in such a case acts, *virtute officii*, as master. His agency arises by operation of law, from the necessity of the case, to prevent a total loss of the property, and the law treats him as one capable of selling in his own name, but for the benefit of the owner. He can give a sufficient title in his own name, as being by operation of law substituted owner, *pro hac vice*. This was the view of the subject taken in the case of the *Schooner Tilton*, (*a*) and the doctrine appears to rest on clear and solid principles of law and policy.

When part of the cargo is sold by the master at an intermediate port, to raise money for the necessities of the voyage, the general rule has been to value the goods at the clear price they would have fetched at the port of destination. But in *Richardson* v. *Nourse*, (*b*) the price which the goods actually sold for at the port of necessity was adopted, and the court did not think that such a criterion of value was clearly erroneous in point of law; and with respect to these contracts of hypothecation for necessaries, made by the master in a foreign port, it is the universal understanding and rule, that they are to be made in the absence of the owner, and not at his place of residence, where he may exercise his own judgment. If the liens be created at different periods of the voyage, and the value of the ship be insufficient to discharge them all, the last loan is entitled to priority in payment, as having been the means of saving the ship. The contract does not transfer the property of the ship, but it gives the creditor a privilege or claim upon it, which may be enforced with all the expedition and efficacy of the admiralty process. (*c*)

(8) *Duty to employ a Pilot.* — It is the duty of the master engaged in a foreign trade to put his ship under the charge of a pilot, both on his outward and homeward voyage, when
*176 *he is within the usual limits of the pilot's employment. (*a*) The pilot, while on board, has the exclusive

(*a*) 5 Mason, 481. (*b*) 3 B. & Ald. 237.

(*c*) Abbott on Shipping, part 2, c. 3, secs. 20, 22; Chase, J., Blaine *v.* The Ship Charles Carter, 4 Cranch, 328. See *infra*, 358, s. P.

(*a*) Law *v.* Hollingsworth, 7 T. R. 160; The William, 6 C. Rob. 316. But if the master, at a foreign port, attempts to get a pilot, and fails, and then, in the exercise of his best discretion, endeavors to navigate himself into port, and grounds, the underwriter is not discharged, but remains liable for the injury. Phillips *v.* Headlam,

control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel

2 B. & Ad. 880. If he attempts to enter a port without a pilot, and without endeavors to procure one, and a loss happens, the underwriters would not be responsible. It would be the fault of the master, and the owners would be liable. But if the loss happens at a point beyond which the pilot's service was necessary, it would be otherwise. M'Millan *v.* U. Ins. Co., Rice (S.C.), 248. A vessel is not *seaworthy* within the implied warranty, if she proceeds without one in navigating a river, where it is the custom to take on board a licensed pilot. If there be no such custom, the captain, mate, or other person, possessing the requisite skill, may act as pilot. Keeler *v.* Fireman's Ins. Co., 8 Hill, 250. In the case of Bolton and others *v.* American Insurance Company, tried before Ch. J. Jones, in the Superior Court of New York, in November, 1835, it was held, that in every well appointed port, where pilots were to be had, a vessel arriving upon pilot ground was bound to take a pilot, and the ground was to be approached carefully; and if in the night, the master was bound to hold out a light for a pilot, and to wait a reasonable time for one, and to approach one if he can do it with safety. If he attempted to enter the port without a pilot, or steered negligently or rashly in approaching the ground where it was unsafe to navigate without a pilot, and damages ensued, the nnderwriters would not be responsible for them. The duty of the master is the more imperative on the approach to New York, which is of dangerous access, as the channel is only a mile and a half wide between the bars, and the coast is lined with shifting sand-bars. In cases of great danger, as in the case of a storm, if the captain cannot wait with safety for a pilot, he must come in without one. The system of pilotage in New York is excellent. Branch pilots were formerly appointed by the governor and senate, and had to perform an apprenticeship of five years before they could become deputy pilots, and three years before they became branch or licensed pilots. They underwent examination before the wardens of the port, and gave security. See Laws of New York, February 19, 1819, c. 18, and particularly secs. 7 and 12; April 12, 1822, c. 196; April 16, 1880, c. 207; March 30, 1831, c. 98. In 1837, the statute laws of New York, relative to pilots, were redigested and essentially amended, and all former statutes repealed. A board of five commissioners was established for licensing, regulating, and governing pilots and deputy pilots, and they were clothed with large powers. Applicants for license were to be examined before the commissioners as to their fitness, skill, and character, and they were to enter into recognizances with sureties for the faithful execution of their trust. Laws of New York, 1837, c. 184. Further regulations were made, and the mode and rate of compensation for pilotage established, by the act of New York of April 12, 1838, c. 197. Fourteen pilots are directed to be appointed by the governor and senate, upon the recommendation of the board of wardens, for the channel of the East River, called Hell-gate. N. Y. R. S. 8d ed. i. 119. In England, the statute of 6 Geo. IV. c. 125, consolidated all the prior English laws, with respect to the licensing and employment of pilots; and an abridged view of its provisions is given in M'Culloch's Com. Dict. tit. Pilots. In Massachusetts, the law of pilotage is as well and carefully digested as anywhere else. The governor appoints the pilots for the several harbors and coasts of the state, under certain exceptions. Rev. Sts. c. 82; Smith *v.* Swift, 8 Met. 882. Every branch pilot may nominate his deputy pilots for the approbation of the governor, and they all give bond, with sureties, for their faithfulness. Revised Statutes of Massachusetts, part 1, tit. 12, c. 82. Every Boston pilot who offers his services to an inward bound vessel, before she has passed a designated line, and they are not accepted, is neverthe-

while under the charge of the pilot, he is answerable as strictly as if he were a common carrier, for his default, negligence, or

less entitled to full fees of pilotage. The master may pilot his own vessel into Boston harbor, but it is at the peril of the owners, and he must pay the pilotage fees, if a pilot seasonably offers his services. But, in such case, if he employs a person not authorized as a pilot, such person subjects himself to a penalty. Commonwealth *v.* Ricketson, 5 Met. 412; Martin *v.* Hilton, 9 Met. 371. The Revised Statutes of Massachusetts, of 1836, c. 82, contain their pilot regulations. The governor and council appoint the pilots for the state, with the exception of pilots for the harbors and ports of Boston, New Bedford, and Fairhaven, where special provisions for those harbors are made. The case of Martin *v.* Hilton contains a well-digested view of the statute law of Massachusetts on the subject. The pilot regulations in the other great commercial states are doubtless of the same efficient character, and the general commercial law on the subject applies equally to all the states. Though Congress may establish a system of pilotage in ports and harbors within the United States, and give the district courts jurisdiction of the same, yet they have not done it. In Georgia pilots are licensed by a permanent board of commissioners, and they are required to give bonds, with sureties, for the due execution of their duty, and to take a special oath in relation to the same; and the commissioners are to settle all disputes between pilots and masters of vessels, and with power to revoke licenses for incompetency, negligence, or misbehavior. Prince's Dig. 1837, 759; Hotchkiss's Code of Georgia Statute Laws, 1845, 279. The only congressional provision on the subject is contained in the act of Congress of August 7, 1789, c. 9, sec. 4, which still remains in force, and in which it is declared, that "All pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively thereafter enact for the purpose, until further legislative provision shall be made by Congress." The police regulations of ports and harbors, in respect to pilots, are left by Congress to the states. By a resolution of the legislature of New York, on the 10th of March, 1846, the members of Congress from the state were requested to endeavor to procure an act of Congress to regulate and establish the pilot system of the United States, and to give to each state the power to pass laws for the appointment and regulation of the pilots for themselves. Cognizance of the cases under state laws as to pilotage belongs at present to state courts. Marshall, C. J., in Gibbons *v.* Ogden, 9 Wheat. 207; The Schooner Wave *v.* Hyer, on appeal to the Circuit Court of the United States for the Southern District of New York, 2 Paine, [131]; Low *v.* Commissioners of Pilotage, R. M. Charlton (Ga.) 314. But in the case of Hobart *v.* Drogan, 10 Peters, 108, it was held, that suits for pilotage on the high seas and on tide waters were within the admiralty jurisdiction, and the state courts had only *concurrent* jurisdiction with the district courts in suits for pilotage. The act of Congress of 2d of March, 1837, c. 22, declared that it should be lawful for the master or commander of any vessel, coming into or going out of any port situate upon the waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either state bounded upon said waters. Concurrently in point of time with this act of Congress, the statute of New Jersey was passed for establishing and regulating pilots for the ports of that state, within Sandy Hook. Elmer's Dig. 400. The ordinance of the city of Charleston, in S. C., of 1842, founded on state authority, respecting pilotage, declared that every coaster, or commander of any vessel, bearing towards the coast or harbor of Charleston, should pay a pilot-fee to the first pilot who should offer to

unskilfulness; and the owner would also be responsible to the party injured for the act of the pilot, as being the act of his agent. (*b*)[1] Though some doubt had been raised by the *dictum* of Ch. J. Mansfield, in *Bowcher* v. *Noidstrom*, (*c*) yet the weight of authority and the better reason is, that the master, in such a case, would not be responsible as master, though on board, provided the crew acted in regular obedience to the pilot. (*d*)

go on board and take charge of the vessel, and the pilot-fee should be due and recoverable, even on refusal to receive on board a licensed pilot. All steamboats carrying United States mails, and *all vessels trading between any of the ports of South Carolina, and wholly owned in the state*, were declared to be exempted from pilotage. But this *discrimination* between coasters wholly owned in the state, and coasters owned in whole or in part in other states, and employed with the Carolina coasters, was declared void by the Court of Appeals, in the case of Chapman *v.* Miller, 2 Speer (S. C.), 769. It was in conflict with the act of Congress of 1793, regulating the coasting trade, and giving equal privileges to licensed coasting vessels of every state. The regulation of the coasting trade was a power vested exclusively in Congress, as being a regulation of commerce and navigation; and this doctrine was fully declared in Gibbons *v.* Ogden, in 9 Wheat. 1. The decision in South Carolina is perfectly sound and conclusive.

(*b*) Bussy *v.* Donaldson, 4 Dallas, 206; Huggett *v.* Montgomery, 5 Bos. & P. 446; Yates *v.* Brown, 8 Pick. 23; Pilot-boat Washington *v.* Ship Saluda, U. S. District Court, S. C., April, 1831; Williamson *v.* Price, 16 Martin (La.), 399; the Neptune the 2d, 1 Dods. 467. But in the case of the Agricola, 2 Wm. Rob. 10, it was considered (and certainly with good reason), that if the master of a vessel be bound to take a pilot, and a collision arises from the fault of the pilot, the owners are not responsible for his conduct. By the English statute law, as declared by their adjudications, the master or owner of a vessel trading to or from the port of Liverpool, is not answerable for damages occasioned by the fault of the pilot. Carruthers *v.* Sydebotham, 4 Maule & S. 77; The Maria, 1 Wm. Rob. 95; The Protector, ib. 45.

(*c*) 1 Taunt. 568.

(*d*) In the case of the Portsmouth, 6 C. Rob. 317, n.; Snell *v.* Rich, 1 Johns. 305. By the statute of 6 Geo. IV. c. 125, sec. 53, owners and masters of ships are exempted

[1] *Compulsory Pilot.* — The *ship* has been held liable in such cases. The China, 7 Wall. 53; The Carolus, 2 Curtis, 69; Smith *v.* The Creole, 2 Wall. Jr. 485. In the latter case the pilot was employed under a statute which certainly seemed to make it a legal duty to take him on board, although the court treated it as optional, on the ground that what the statute called the "penalty" of paying half pilotage in case of failure to do so was really nothing more than the assessment of a tax for the support of the system. (*Ante*, i. 467, n. 1.) But perhaps The China, *sup.*, leaves it still doubtful whether the owner would be liable (7 Wall. 68, 70) on grounds stated *ante*, 138, n. 1. See, also, 218, n. 1.

In England it would seem that apart from statute the tendency is to exonerate the vessel. The Maria, 1 Wm. Rob. 95; The Annapolis, Johanna Stoll, Lush. 295, 312; *post*, 218, n. 1; The Halley, L. R. 2 P. C. 193, 201, 202, stated in a subsequent note, 232, n. 1 (*c*).

For other statutory exemptions besides those mentioned in note (*d*), when the employment of the pilot is compulsory, see the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), § 388. But in order

(9) *Authority and Duty of the Mate.* — The mate is the next officer to the master on board, and upon his death or absence, the mate succeeds, *virtute officii*, to the care of the ship and the government and management of the crew. He does not cease to be mate in such cases, but has thrown upon him cumulatively the duties of master. He is *quasi* master, with the same general powers and responsibilities, *pro hac vice*, and with the preservation of his character and privileges as mate. He may sue in the admiralty for his wages as mate, and is entitled in that character to be cured, if sick, at the expense of the ship. (*e*) The master, and even the consignees, may appoint a substitute in a foreign port, in cases of necessity. (*f*) Even a supercargo, in cases of necessity, and acting with reasonable discretion, may bind the owner. (*g*)

2. **Of the Rights and Duties of Seamen.** — We come next to treat of the laws applicable to seamen; and it will appear, for obvious reasons, that in the codes of all commercial nations they are objects of great solicitude and of paternal care. They are usually a heedless, ignorant, audacious, but most useful class of men, exposed to constant hardships, perils, and oppression. From the nature of their employment, and their "home on the deep," they are necessarily excluded, in a great degree, from the benefits of civilization, and the comforts and charities of domestic life. Upon their own element they are habitually buffeted by winds and waves, and wrestling with tempests; and in time of war *177 they * are exposed to the still fiercer elements of the human passions. In port they are the ready and the dreadful victims of temptation, fraud, and vice. (*a*) It becomes, therefore,

from liability for any damage arising from the want of a licensed pilot, unless the want arose from a refusal to take one on board, or from wilful neglect in not using all due means to take one on board who may offer. He is equally exempted from the responsibility for the incapacity or defaults of the pilot.

(*e*) Read *v.* Chapman, Str. 937; Orne *v.* Townsend, 4 Mason, 548; The Brig George, 1 Sumner, 151; United States *v.* Taylor, 2 Sumner, 585; U. S. *v.* Roberts, 2 N. Y. Leg. Obs. 99.

(*f*) Pothier, Charte-Partie, n. 49; The Alexander, 1 Dods. 278.

(*g*) Forrestier *v.* Bordman, 1 Story, 48.

(*a*) The recklessness with which sailors dissipate their wages, and the facility with which they are cheated out of them, are proverbial; and those persons who have the

to entitle the owners to the benefit of the exemption from liability provided by the English statutes, it is not enough for them to prove that there was negligence on the part of the pilot; they must prove that the damage for which it is sought to make them liable was occasioned exclusively by his default. The Iona, L. R. 1 P. C. 426; The Minna, L. R. 2 Ad. & Ec. 97.

a very interesting topic of inquiry, to see what protection the laws have thrown around such a houseless and helpless race of beings, and what special provisions have been made for their security and indemnity.

(1) *Shipping Articles.* — The seamen employed in the merchant service are made subject to special regulations, prescribed by acts of Congress for their government and protection. (*b*) Shipping articles are contracts in writing, or in print, declaring the voyage and the term of time for which the seamen are shipped, and the rate of wages, and when the seamen are to render themselves on board; and the articles are to be signed by every seaman or mariner, on all voyages from the United States to a foreign port, and, in certain cases, to a port in another state, other than an adjoining one. (*c*) If there be no such contract, the master is bound to pay to every seaman who performs the voyage the highest wages given at the port for a similar voyage, within the three next preceding months, besides forfeiting for every seaman a penalty of twenty dollars. The seamen are made subject to forfeitures if they do not render themselves on board according to the contract, or if they desert the service; and they are liable to summary imprisonment for desertion, and to be detained until the ship be ready to sail. (*d*) If the mate and a majority

superintendence of marine hospitals well know how severely and extensively sailors are afflicted, beyond all other classes of men, by those odious diseases which so terribly chastise licentious desire. Such a scourge is far worse to them than the storms and the monsters of the ocean; than either the *præcipitem Africum decertantem aquilonibus*, the *rabiem noti*, the *monstra natantia*, or the *infames scopulos, acroceraunia*.

(*b*) Acts of the United States, 20th July, 1790, c. 29; 28th May, 1796, c. 36; 16th July, 1798, c. 94; 3d May, 1802, c. 51; 28th February, 1803; 2d March, 1805, c. 88; 3d March, 1813, c. 184; 19th June, 1818, c. 2; 2d March, 1819, c. 170; 3d March, 1829, c. 202; 20th July, 1840, c. 23.

(*c*) A *foreign* voyage, in the language of trade and commerce, means a voyage to some port or place within the territory of a foreign nation. The *terminus* of the voyage settles the description. In this view neither fishing nor whaling voyages are strictly foreign voyages. This is the sense in which foreign voyages are understood in the Duties Collection Act of 1799, c. 128, and in the acts of 1790, c. 56, and of 1813, c. 2, relative to shipping articles; and the above act of 1799 still constitutes the leading statute to regulate our commercial intercourse with foreign nations. Taber *v.* United States, C. C. U. S. for Mass. October, 1839; 1 Story, 1. The shipping contract in the whale fishery is universally reduced to writing, though such voyages are not in terms within the statute. The New Bedford whalemen's shipping paper, Mr. Curtis says, (Treatise on the Rights and Duties of Merchant Seamen, 1841, p. 60,) is the best constructed instrument of the kind in use in the United States.

(*d*) The authority given by the act of Congress of 20th July, 1790, to arrest

of the crew, after the voyage has begun, but before the vessel has left the land, deem the vessel unsafe, or not duly provided, *178 and *shall require an examination of the ship, the master must proceed to or stop at the nearest or most convenient port, where an inquiry is to be made, and the master and crew must conform to the judgment of the experienced persons selected by the district judge or a justice of the peace. If the complaint shall appear to have been without foundation, the expenses and reasonable damages, to be ascertained by the judge or justice, are to be deducted from the wages of the seamen. But if the vessel be found or made seaworthy, and the seamen shall refuse to proceed on the voyage, they are subjected to imprisonment until they pay double the advance made to them on the shipping contract. (a)[1] Fishermen engaged in the fisheries are liable to the

deserters by a magistrate's warrant, does not supersede the authority which the master has under the general maritime law to retake a deserting seaman and confine him on board. Turner's Case, Ware, 83.

(a) Act of Congress, July 20th, 1790, c. 29, secs. 1, 2, 3, 5, 7. The act of Congress of 1829, c. 202, provided for the apprehension of deserters from certain foreign vessels in the ports of the United States. The act of Congress of July 20th, 1840, c. 23, authorizes an examination by the consul or commercial agent in a foreign port, into the complaints of the mariners, and a copy of the shipping articles shall be produced by the master to the consul, and if the complaints are well founded, he may discharge the seamen on terms; and it is made the duty of the consuls to reclaim deserters by every means within their power, and lend their aid to the local authorities for that purpose. They are, upon complaint, to examine into the seaworthiness of the vessel when she left home, and, if found deficient, they may discharge the crew with additional wages, except in cases free from neglect or blame. This act has much enlarged the discretionary power of consuls and commercial agents in foreign ports. In the state of Missouri, there are statute provisions for the regulation of *boatmen* on the navigable waters of that state, their contracts, their duties, their protection, and

[1] *Seaworthiness.* — See, also, the act of July 29, 1850, ch. 27, § 6, 9 U. S. St. at L. 441, amending the act of 1840 referred to in note (a); and Jordan v. Williams, 1 Curtis, 69.

If seamen have reason to believe, and do believe, a vessel is unseaworthy before the voyage is begun, they may lawfully refuse to go to sea in her. But they must prove these facts. United States v. Nye, 2 Curtis, 225; The Moslem, Olcott Adm. 289, 297. See The Hibernia, 1 Sprague, 78; United States v. Givings, ib. 75; Turner v. Owen, 3 F. & F. 176; *post*, 199, n. 1.

It has been held that the law does not imply a warranty that the vessel is seaworthy from the relation of ship owner and seaman, on which the latter can sue without showing knowledge or deceit on the part of the owners, or an express contract Couch v. Steel, 3 El. & Bl. 402. But this is inconsistent with the language of some American cases; Dixon v. The Cyrus, 2 Pet. Adm. 407, 411; Rice v. The Polly and Kitty, ib. 420, 421; Savary v Clements, 8 Gray, 155; and of Sir A. Cockburn at *nisi prius*. Turner v. Owen, 3 F. & F 176; *post*, 186, n. 1.

like penalties for desertion; and the fishing contract must be in writing, signed by the shipper and the fishermen, and countersigned by the owner. (*b*) The articles do not determine exclusively who are the owners, and the seamen may prove, by other documents, the real and responsible owners. The object of the articles is to place the crew of a fishing vessel upon a footing with seamen in the merchant service, and to make them liable to the same restrictions, and entitled to the same remedies. (*c*) Provision is made for the prompt recovery of seamen's wages, of which one third is due at every port at which the vessel shall unlade and deliver her cargo, before the voyage be ended; and at the end of the voyage, the seamen may proceed in the district court, by admiralty process, against the ship, if the wages be not paid within ten days after they are discharged. (*d*) The seamen having like cause of complaint may all join in one suit, and they may proceed against the vessel within the ten days, if she be about to proceed to sea; but this remedy, *in rem*, does not deprive the seamen of their remedy at common law for the *recovery of their wages. (*a*) The statutes further *179 provide for the safety and comfort of the seamen, by requiring that every ship belonging to a citizen of the United States, of the burden of one hundred and fifty tons or upwards, navigated by ten or more persons, and bound to a foreign port, or of the burden of seventy tons or upwards, and navigated with six or more persons, and bound from the United States to any port in the West Indies, shall be provided with a medicine chest, properly supplied with fresh and sound medicines; and if bound on a voyage across the Atlantic Ocean, with requisite stores of

the remedies against them, as in analogous cases of seamen on the high seas. Revised Statutes of Missouri, 1835, 99.

(*b*) Act of Congress, June 19, 1813, c. 2, secs. 1, 2.

(*c*) Wait *v.* Gibbs, 4 Pick. 298.

(*d*) The voyage is ended when the vessel has arrived at her last port of destination and is safely moored at the wharf. But the seamen may, by the terms of the contract or the usage of the port, be bound to remain by the vessel after the voyage is ended, and assist in discharging the cargo, and their wages will be continued until that takes place. The Mary, Ware, 454.

(*a*) Act of Congress, July 20th, 1790, c. 29, sec. 6. The statute of 59 Geo. III. c. 58, provided, also, an expeditious remedy for the recovery of seamen's wages, by allowing them to apply to the summary jurisdiction of a justice of the peace when the wages do not exceed £20.

water, and salted meat, and wholesome ship-bread, well secured under deck. (*b*) [1]

(2) *Charitable Relief.* — It is further provided by statute, for the just and benevolent purpose of affording certain and permanent relief to sick and disabled seamen, that a fund be raised out of their wages, earned on board of any vessel of the United States, and be paid by the master to the collector of the port, on entry from a foreign port, at the rate of twenty cents per month for every seaman. The like assessment is to be made and paid on the new enrolment or license for carrying on the coasting trade, and also by persons navigating boats and rafts on the Mississippi. The moneys so raised are to be expended for the temporary relief and maintenance of sick and disabled seamen, in hospitals or other proper institutions established for such purposes; and the surplus moneys, when sufficiently accumulated, shall be applied to the erection of marine hospitals, for the accommodation of sick and disabled seamen. These hospitals, as far as it can be done with

(*b*) Act of Congress, July 20th, 1790, c. 56, secs. 8, 9, and ib. March 2d, 1805, c. 88; act of Congress, March 2d, 1819, c. 170. The act of Congress of July 20th, 1790, sec. 9, gives to the seamen double wages for every day that they are put on short allowance, and the vessel has not the quantity and quality of provisions required. The British statute of 43 Geo. III. c. 56, has another very humane provision for the health and security of the passengers and crew. It provided that no British ship should clear out from a British port with a greater number of persons on board, including children and the crew, than in the proportion of one person for every two tons of the burden of the ship, as appearing in the certificate of registry, or of that part of the ship unladen. A penalty of £50 is forfeited for each extra person.

[1] *Further Legislation.*

A seaman cannot maintain an action for extra wages, under the act mentioned in note (*b*), on the fact alone that he was put on short allowance. It is equally an essential ingredient that the ship had not on board the stores required by law when she sailed on the voyage. The Elizabeth *v.* Rickers, 2 Paine, 291; Ferrara *v.* The Talent, Crabbe, 216. Compare The Childe Harold, Olcott Adm. 275, with The Elizabeth Frith, Bl. & How. 195. See the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 221 *et seq.*; The Josephine, Swabey, 152.

As to passengers in vessels propelled by steam, see act of Aug. 30, 1852, ch. 106, especially § 30, 10 St. at L. 61. See, also, act of March 8, 1855, ch. 213, 10 St. at L. 715, regulating the carriage of passengers in vessels generally. (Compare the Passengers Act, 1855, 18 & 19 Vict. c. 119, amended in 1863 by 26 & 27 Vict. c. 51.) Compare act of Feb. 19, 1862, ch. 27, § 5, 12 St. at L. 341, with act of March 3, 1855, § 19.

The act of March 24, 1860, ch. 8, 12 St. at L. 3, punishes seduction of female passengers by any person employed on board any vessel of the United States; and forfeits such persons' wages to the ship for frequenting the part of the vessel assigned to emigrant passengers without orders. See 160, n. 1.

convenience, are to receive sick foreign seamen, on a charge of seventy-five cents * per day, to be paid by the master of *180 the foreign vessel. (a) And to relieve American seamen who may be found destitute in foreign places, and as evidence of the constant and paternal solicitude of the United States for the preservation and protection of their seamen abroad, it is made the duty of the American consuls and commercial agents to provide for those who may be found destitute within their consular districts, and for their passages to some port in the United States, in a reasonable manner, at the expense of the United States; and American vessels are bound to take such seamen on board, at the request of the consul, but not exceeding two men to every hundred tons burden of the ship, and transport them to the United States on such terms, not exceeding ten dollars for each person, as may be agreed on. So if an American vessel be sold in a foreign port, and her company discharged, or a seaman be discharged with his consent, the master must pay to the consul or commercial agent at the place, three months' pay over and above the wages then due, for every such seaman, two thirds of which is to be paid over to every seaman so discharged, upon his engagement on board of any vessel to return to the United States; and the other third to be retained for the purpose of creating a fund for the maintenance and return of destitute American seamen in such foreign port. (b) [1]

The act of Congress of March 3, 1813, c. 184, declared that no seaman who was not a native or naturalized citizen of the United States, should be employed on board of any public or private vessel of the United States. But the provision against the employment of foreign seamen is probably without any efficacy, for it

(a) Acts of Congress, July 16th, 1798, March 2d, 1799, and May 3d, 1802. By the act of March 1, 1848, c. 49, the provision in the act of 1798 for hospital money is extended to the masters, owners, and seamen of registered vessels employed in carrying on the coasting trade.

(b) Act of Congress, February 28th, 1803, c. 62. The three months' extra wages, under the act of Congress, applies only to a voluntary sale of the vessel in a foreign port, and not when the sale is rendered necessary by shipwreck. The Dawn, Ware, 485.

[1] See, also, the act of July 20, 1840, ch. 48, § 9, 5 St. at L. 395. The Atlantic, Abbott Adm. 451; Tingle *v.* Tucker, ib. 519; Miner *v.* Harbeck, ib. 546.

When a seaman is disabled and necessarily left abroad, the payment by the master of three months' extra wages does not exonerate the vessel from the obligation to pay for his return. Brunent *v.* Taber 1 Sprague, 248.

applies only to those nations who shall, in like manner, have prohibited the employment of American seamen. There is no other act of Congress which prohibits the employment of foreign seamen in our ships; and while foreigners are employed as seamen in our merchant ships, they are deemed mariners and seamen within the act of Congress of 1803, c. 62, respecting provision for them by consuls when destitute abroad. (c) And in the navigation act of 1st March, 1817, c. 204, a discrimination is made in favor of American citizens as seamen, relative to the fishing bounty and to foreign tonnage.

Greenwich Hospital, in England, is a noble asylum for
* 181 decayed * and disabled seamen belonging to the royal navy; but another national establishment was wanting for seamen maimed or disabled by sickness or accidental misfortunes, or worn out by age, in the merchant service. This was provided for by the statute of 20 Geo. II. c. 38, which created a corporation attached to Greenwich Hospital, and laid the foundations of a magnificent charity, with liberal, careful, and minute provisions, some of which have been copied into our own statutes; and it is sustained by an assessment similar to our own, of sixpence sterling per month, out of seamen's wages. In one respect, the English charity is much broader than ours, for it reaches to the poor widow and infant children of every seaman who perishes in the service, and who shall be found to be proper objects of charity. (a)

(c) Matthews v. Offley, 3 Sumner, 115.

(a) The contributions from merchant ships to the trustees of Greenwich Hospital, in 1828 and 1829, exceeded £20,000 sterling a year, and yet there was not on the establishment a single individual who had been *exclusively* employed in the merchant service. The statute of 4 and 5 Wm. IV. c. 34 directed, therefore, that the contribution of sixpence per month by seamen in the merchant service should cease from 1st January, 1835, and that £20,000 a year should be advanced from the consolidated fund to the hospital to make good the deficiency. The act of Wm. IV. repealed the statute of 20 George II., except so far as it related to the establishment of the corporation; and it repealed so much of the act of 37 Geo. III. c. 73 as related to the wages of seamen dying while employed in the West India trade, and it introduced a new system. This system provides contributions for a new fund; and every master and owner of a British merchant ship or vessel is to pay 2*s.* per month, and every seaman serving on board such ship or vessel, 1*s.* per month; and the institution is to provide in its hospital for seamen becoming incapable by sickness, wounds, or other accidental misfortunes, or worn out by age, and in certain cases for their widows and children. The masters and owners, and their widows and children, being objects of charity as aforesaid, are to partake of the bounty; the contributions to the fund are estimated to amount hereafter to £50,000 sterling a year. M'Culloch's Com. Dict.

(3) *Punishments.* — With respect to the behavior of the master and seamen, and the discipline on board of merchant ships, it is held, that the master is personally responsible in damages for any injury or loss to the ship or cargo by reason of his negligence or misconduct. Being responsible over to others for his conduct as master, the law, as well on that account as from the necessity of the case, has intrusted him with great authority over the mariners on board. Such authority is requisite to the safe navigation of the ship, and the preservation of good order and discipline. He may imprison, and also inflict reasonable corporal punishment upon a seaman, for disobedience to reasonable commands, or for disorderly, riotous, or insolent conduct; and his authority, in that respect, is analogous to *that of *182 a master on land over his apprentice or scholar. (*a*) The

tit. Seamen. A summary of the acts of Congress for the protection and relief of seamen, and the decisions of the federal courts in relation thereto, is given in the notes to Abbott on Shipping, 5th Am. ed. Boston, 1846, pp. 257 to 264.

The Athenians had humane institutions for the relief and support of disabled soldiers, and which afterwards embraced the aged, the sick, the blind, and infirm, of every description; and this charitable provision has been attributed to Solon. St. John's History of the Manners and Customs of Ancient Greece, iii. 69–74. The ancient Romans never provided any asylum for the poor. Humanity was no part of their national character. Its cultivation, as a public duty, is one of the inestimable blessings of the introduction of Christianity. Constantine, the first Christian Cæsar, founded the first public system of relief of pauperism. There did not exist in the Roman legislation any provision for the poor, unless, says Hugo, (History of the Roman Law, sec. 154,) we may consider the law of the twelve tables, which regulated funeral expenses, to have been introduced in their favor, as a means to prevent the ruin of families. But there was a provision in favor of the Roman soldiers, which shows the wise policy, if not humanity, of the Roman discipline. Half of the donatives of the soldiers was withdrawn and placed in security in camp for their use, to prevent its being wasted in extravagance and debauchery. Vegetius considered it a *divine* institution. There was likewise a contribution by each soldier, to a common fund in camp, to defray his funeral expenses. Vegetius, de Re Militari, l. 2, c. 20. Chelsea Hospital, in England, for the reception of sick and superannuated soldiers, has infinitely better pretensions than the Roman provision to be regarded as *divinitus institutum*.

(*a*) Molloy, b. 2, c. 3, sec. 12; Thorne *v.* White, Peters Adm. 168; Rice *v.* The Polly and Kitty, ib. 420; The United States *v.* Smith, 8 Wash. 525; Michaelson *v.* Denison, 3 Day, 294; Comersford *v.* Baker, before Lord Stowell, June, 1825; The United States *v.* Dewey, New York Circuit, June, 1828; Lord Stowell, in the case of the Agincourt, 1 Hagg. Adm. 272; The Lowther Castle, ib. 384; The United States *v.* Freeman, 4 Mason, 512; Turner's Case, 1 Ware, 83; Butler *v.* McLellan, District Court of Maine, ib. 220; Bangs *v.* Little, ib. 506; Carleton *v.* Davis, id. N. Y. Legal Observer, iii. 86; Fuller *v.* Colby, C. C. U. S. Mass. 1846, [3 Woodb. & M. 1.] Though the maritime codes of continental Europe, such as the Consolato, the laws of Oleron, of Wisbuy, of the Hanse Towns, and of Denmark, carefully avoid the direct mention of

books unite in the lawfulness and necessity of the power. Without it, authority could not be maintained nor navigation made safe. Subordination is essential to be strictly enforced among a class of men whose manners and habits partake of the attributes of the element on which they are employed. Disobedience to lawful commands is a more noxious offence, and the most dangerous in its nature, for it goes at once to the utter annihilation of all authority. But care must be taken that the punishment be administered with due moderation. The law watches the exercise of discretionary power with a jealous eye. If the

any legal authority of the captain to correct by corporal chastisement the misbehavior of mariners; yet, as the learned judge of the District Court of Maine observed, in the case above mentioned, this power in the master seems either to have been inferred, or to have become silently established by usage. Casaregis (Disc. 136, n. 14) admits that the master may inflict slight chastisement, by analogy to the power of a father or domestic master; and the ordinance of Louis XIV. (liv. 2, tit. 1, art. 22) confers a strong power of personal punishment on the captain, in aggravated cases, and acting under the advice of the mate and pilot. The act of Congress, 3d March, 1835, c. 40, sec. 3, makes it an indictable offence, punishable by fine and imprisonment, for the master or other officer of any American vessel, on the high seas or other waters, within the admiralty and maritime jurisdiction of the United States, from malice, hatred, or revenge, and without justifiable cause, to beat, wound, or imprison any of the crew, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment. In the case of The United States *v.* Proctor, in the Circuit Court of the United States for the Southern District of New York, in November, 1835, it was held, that, as a general rule, seamen must obey the *last* order coming from any officer, as it may arise from some sudden emergency requiring it; and that for unjustifiable disobedience, moderate personal punishment might be inflicted. Again, in the Circuit Court U. S. for Massachusetts, in 1841, in the case of United States *v.* Hunt, [2 Story, 120,] it was held, that the right of the *mate* to inflict punishment on the seamen, when the master is on board and at hand, is justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehavior on the part of the seamen, or to compel obedience to pressing orders. In the case of The United States *v.* Colby, District Court U. S. for Massachusetts, (the Law Reporter for March, 1846,) it was decided, that if the master of a ship at sea, in the exercise of a sound and honest judgment, believes danger to be imminent, and to require the use of a dangerous weapon (a loaded pistol, for instance) to reduce to obedience a seaman in open mutiny, with deadly weapons in his hand, and threatening the lives of the officers, and the master should use such a weapon from honest motives, he would be justified.[1]

[1] S. C., 1 Sprague, 119. See 3 Woodb. & M. 1.

Flogging in the navy, and on board vessels of commerce, was abolished by the act of Sept. 28, 1850, ch. 80, § 1, 9 St. at L. 515. See, also, art. 8 of the rules for the government of the navy in the act of July 17, 1862, ch. 204, § 1, 12 St. at L. 600. By the Act of July 27, 1866, ch. 286, 14 St. at L. 304, the navy regulation prohibiting the wearing of sheath knives on shipboard is made applicable to all seamen in the merchant service.

correction be excessive or unjustifiable, the seaman is sure to receive compensation in damages on his return to port, in an action at common law. (*b*) And it must be an extreme case that will justify a master to confine a seaman in a common jail in a foreign port. He cannot do * it as a punishment, but *183 only by way of precaution under the existing circumstances. (*a*) The master may also restrain or even confine a passenger who refuses to submit to the necessary discipline of the ship. (*b*)

The master has also the right to discharge a seaman for just cause, and put him ashore in a foreign country; but the causes must be, not slight, but aggravated, such as habitual disobedience, mutinous conduct, theft, or habitual drunkenness;[1] and he is responsible in damages if he discharges him without just cause. (*c*) This power of discharge extends to the mate and subordinate officers, as well as to the seamen, for the master must be supreme in the ship, and subordination and discipline are indispensable to the safety and welfare of the service. But it would require a case of flagrant disobedience, or gross negligence, or palpable want of skill, to authorize the captain to displace a mate, who is generally chosen with the consent of the owners, and with a view to the better safety of the ship, and the security of their property. (*d*) The marine law requires the master to receive back a seaman whom he has discharged, if he repents and offers to return to his duty

(*b*) Watson *v.* Christie, 2 Bos. & P. 224.

(*a*) United States *v.* Ruggles, 5 Mason, 192; Magee *v.* Ship Moss, Gilpin, 219, 233; Wilson *v.* Brig Mary, Gilpin, 31. [Johnson *v.* The Coriolanus, Crabbe, 289.] The subordinate officers have no authority to punish a seaman when the master is on board, unless by his orders. Elwell *v.* Martin, Ware, 53; Butler *v.* McLellan, ib. 219; United States *v.* Hunt, *supra*.

(*b*) Boyce *v.* Bayliffe, 1 Camp. 58; Prendergast *v.* Compton, 8 Carr. & P. 454. See, also, the remarks of Mr. Justice Story, on the duty of decorous deportment to passengers by the master. Chamberlain *v.* Chandler, 3 Mason, 242.

(*c*) Relf *v.* The Ship Maria, Peters Adm. 186; Black *v.* The Ship Louisiana, ib. 268; Hulle *v.* Heightman, 2 East, 145; Sir William Scott, in the case of the Exeter, 2 C. Rob. 261. The French law affords peculiar protection to seamen; and among other things, in this, that it prohibits the master from discharging a seaman, in any case, in a foreign country. This was by a royal declaration of 18th December, 1728, art. 1, mentioned in 1 Valin's Comm. 734; and it is adopted in the Code de Commerce, art. 270.

(*d*) Atkyns *v.* Burrows, 1 Peters Adm. 244; Thompson *v.* Busch, 4 Wash. 338.

[1] Or attempting a rape on a female passenger. Nieto *v.* Clark, 1 Cliff. 145. See, further, Jones *v.* Sears, 2 Sprague, 48.

and make satisfaction; and if the master refuses, or if the seaman has been unduly discharged, he may follow the ship, and *184 recover his wages for the voyage, and * the expenses of his return. (a) The laws of the United States make it highly penal, and subject the master to fine and imprisonment, if, without justifiable cause, he maliciously forces an officer or mariner on shore while abroad, or leaves him behind in any foreign port or place, or refuses to bring home those whom he took out, and who are in a condition and willing to return. (b)

It was a question which received a profound discussion, and led to a learned research in *Harden* v. *Gordon*, (c) whether a seaman, who became sick and disabled on the voyage, was entitled to medical advice and aid, such as medicine, sustenance, and attendance, at the expense of the ship. It was there shown and decided, that the expense of curing a sick seaman in the course of the voyage was a charge upon the ship, according to the maritime law of Europe, (d) and the rule recommended itself as much by its intrinsic equity and sound policy as by the sanction of its general authority. Such an expense was in the nature of additional wages during sickness, and it constituted a material ingredient in the just remuneration of seamen for their labor and services. The statute law of the United States (e) has not changed the maritime law and exempted the vessel, except so far as respects medicines and medical advice, and which must be borne by the seamen and not by the owner, when there was a proper medicine chest and medical directions on board the ship; and it does not apply to nursing, diet, and lodging, or even medical advice, if the seamen be carried ashore, and which, under the general maritime law, are to be borne by the vessel. (f) The claim for such expenses, equally with a claim for wages, may be enforced in the courts of admiralty; and Judge Story, in the case of *Harden*

(a) Laws of Oleron, art. 13; Laws of Wisbuy, art. 25; Code de Commerce, art. 270; Relf v. The Ship Maria, Peters Adm. 193, 194; Hutchinson v. Coombs, District Court of Maine, Ware, 65; The Nimrod, ib. 9.

(b) Act of Congress, 3d March, 1825, c. 67, sec. 10. So, by the statutes of 5 and 6 Wm. IV. c. 19, the master of a merchant ship is indictable, if he wilfully and wrongfully leaves a seaman behind, before the termination of the voyage.

(c) 2 Mason, 541.

(d) Laws of Oleron, art. 7; Laws of Wisbuy, art. 19; Laws of the Hanse Towns, art. 45; Code de Commerce, art. 262, 268.

(e) *Vide supra*, 179.

(f) The Nimrod, Ware, 19; The Forest, ib 420.

v. *Gordon*,[1] with great force, and moving on solid principles, vindicated the admiralty jurisdiction over the whole *compensation, in all its varied forms, when due to seamen for their maritime services. (*a*) *185

The act of Congress requires, that in seamen's shipping articles, the voyage and term of time for which the seamen may be shipped be specified. (*b*) The regulation relates to voyages *from* a port in the United States, and it does not apply to a voyage commencing from a foreign port to the United States. The voyage, within the intendment of the statute, means one having a definite commencement and end, and a general coasting and trading voyage from state to state is within the statute. (*c*) The *terminus a quo*, and the *terminus ad quem*, must be stated precisely; and in a case of a general adventure, the term of service must be specified. A voyage from New York to Curaçoa, *and elsewhere*, means, in shipping articles, a voyage from New York to Curaçoa, and the word elsewhere is rejected as being void for uncertainty. (*d*) [1]

(*a*) This subject received ample discussion in Reed *v.* Canfield, 1 Sumner, 195, and it was shown to be a settled principle of maritime policy, that a seaman was entitled to be cured, at the expense of the ship, of all sickness and all injuries sustained in the service of the ship. The rule applied not only during the voyage, but when the vessel was in her home port, either at the commencement or termination of the voyage, so long as the seaman was in the service of the ship, and as one of the crew. The acts of Congress, *supra*, 179, for the relief of sick and disabled seamen, were deemed to be auxiliary to the maritime law.

(*b*) Act of Congress, 20th July, 1790, c. 29. This principle, as Mr. Curtis observes, (Treatise on Seamen, 106,) may be traced, with remarkable uniformity, through the marine laws and ordinances of all maritime states. It has been recognized as a universal rule by the text-writers of France and England, and fully carried into effect by the courts in this country.

(*c*) The Crusader, Ware, 444.

(*d*) Decision in the District Court of Maryland, by Judge Winchester, 1 Hall's L. J. 209; Magee *v.* The Moss, Gilpin, 219.

[1] Morgan *v.* The Ben Flint, 6 Am. L. Reg. N. S. 707; The Atlantic, Abbott Adm. 451; Knight *v.* Parsons, 1 Sprague, 279; Nevitt *v.* Clarke, Olcott, 316, present various interesting applications of the principle. See, also, Croucher *v.* Oakman, 8 Allen, 185; The Brig George, 1 Sumner, 154; Brunent *v.* Taber, *ante*, 180, n. 1; 1 Sprague, 248; Brown *v.* Overton, ib. 462.

But if it is not necessary to the prosecution of the voyage that the seaman should be cured, it has been held not within the general authority of the master to pledge the credit of the owners for provisions, or even for medicines. Organ *v.* Brodie, 10 Exch 449; *ante*, 164, n. 1.

[1] *Shipping Articles.* — See Brown *v.* Jones, 2 Gall. 477; Ely *v.* Peck, 7 Conn. 239; Gifford *v.* Kollock, 19 Law Rep. 21.

By the act of July 20, 1840, ch. 48, § 10, 5 St. at L. 395, articles not complying with the requirements of the act of

(4) *Wages.* — Seamen in the merchant service are usually hired at a certain sum, either by the month or for the voyage. The ancient form of the mariner's contract was for one entire sum for the voyage, and the modifications of the entirety of the contract, by apportionment, when the services of the seamen have been interrupted pending the voyage, are distinguished by equitable and minute provisions in the foreign ordinances and codes. The modern mode of hiring is at monthly wages. The contract is for a definite voyage, at the rate of so much per month for the whole time that the voyage continues. (*e*) In the fishing trade, the seamen usually serve under an engagement to receive a portion of the profits of the adventure.[2] The share, or profits of the voyage, are a substitute for regular wages, and are treated as stipulated wages are treated, and the mariners are not partners

(*e*) Pothier, Louage des Matelots, n. 172; Walton *v.* The Ship Neptune, Peters Adm. 142.

1790 are void. Snow *v.* Wope, 2 Curtis, 801, affirming Wope *v.* Hemenway, 1 Sprague, 800. Other cases on the validity of articles under the American law are Douglass *v.* Eyre, Gilpin, 147; The Gem, U. S. D. C. Mass. said in 2 Pars. Ship. 87, note, to throw doubt on U. S. *v.* Staly, 1 Woodb. & M. 338.

The British Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, § 149, requires the articles to contain, among other things, "the nature, and, as far as practicable, the duration of the intended voyage or engagement." In The Westmoreland, 1 W. Rob. 216, Dr. Lushington admits that the words "nature of the voyage" relax the strictness of the obligation before imposed, but expresses the opinion that they entitle the mariner to a fair intimation of the nature of the service in which he is to engage, as, for instance, whether he is to winter in arctic or tropic regions. And this opinion has been taken in America to express the present state of the English law. Roberts *v.* Knights, 7 Allen, 449; The Kingbird, U. S. D. C. Mass. See, also, The Varuna, 18 Law Rep. 487, 489. However, in The Westmoreland, as well as in the earlier case of the George Home, 1 Hagg. Adm. 370, the port of unlivery might be anywhere in the continent of Europe, as was pointed out in The Triumph, 5 Ir. Jur. N. S. 381; and in that case articles for a voyage, if required, to any port in the North and South Pacific oceans, Indian and China seas, and several other specified places, for a period not exceeding two years, the port of final discharge being in the United Kingdom, were held good. The voyage in Roberts *v.* Knights is in a form frequently used in the British shipping offices, and the practice which allows a good deal of laxity as to the intermediate ports which may be visited, if the *terminus ad quem* is fixed, seems to be justified now that submarine telegraphs make it possible for the owners to change the destination of a vessel after she has left port. See, further, Frazer *v.* Hatton, 2 C. B. N. S. 512. In Button *v.* Thompson, L. R. 4 C. P. 330, the articles were very wide, and The Westmoreland was cited in argument, yet there was no suggestion that they were invalid. Burton *v.* Pinkerton, L. R. 2 Ex. 340.

[2] Jay *v.* Almy, 1 Woodb. & M. 262; Reed *v.* Hussey, Bl. & Howl. 525, 537.

with the owners in the profits of the voyage. The act of Congress (*f*) extends the admiralty jurisdiction to the cognizance of suits for shares in whaling voyages, in the same form and manner as in ordinary cases of wages in the merchant service. (*g*)

Every seaman engaged to serve on board a ship is bound, from the nature and terms of the contract, to do his duty in the service to the utmost of his ability; and, therefore, a promise made by the master, when the ship is in distress, to pay extra wages, as an inducement to extraordinary exertion, is illegal and void. It would be the same if some of the crew had deserted, or were sick, or dead, and peculiar efforts * became requisite; *186 for the general engagement of the seamen is to do all they can for the good of the service, under all the emergencies of the voyage. Lord Kenyon puts the illegality of such a promise on the ground of public policy, and Lord Ellenborough on the want of consideration. (*a*) [1] It requires the performance of some service not within the scope of the original contract, as by becoming a voluntary hostage upon capture, to create a valid claim, on the part of the seamen, to compensation, on a promise by the master, beyond the stipulated wages. (*b*) So, no wages can be recovered when the hiring has been for an illegal voyage, or one in viola

(*f*) Act of Congress, 19th June, 1813, c. 2, secs. 1, 2.

(*g*) In whaling voyages from the New England states, three tenths of the earnings of the ship are the share of the seamen.

(*a*) Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Camp. 317. The same rule applies to a promise by a passenger to any of the crew of a wrecked vessel. Mesner *v.* Suffolk Bank, Mass. U. S. D. C. 1838.

(*b*) Yates *v.* Hall, 1 T. R. 73.

[1] *Wages.* — See, also, Harris *v.* Carter, 8 El. & Bl. 559; The Araminta, 1 Spinks, Ec. & Ad. 224; 18 Jur. 793; 29 Eng. L. & Eq. 582.

If, after the seaman has signed articles in a foreign port, he finds the ship is unseaworthy, there is consideration for a new contract. Turner *v.* Owen, 8 F. & F. 176; *ante*, 178, n. 1

To prevent a recovery of wages for an illegal voyage, the seaman must have known of the illegality. The Mary, 1 Sprague, 204; Malta, 2 Hagg Adm. 158; The Mary Ann, Abbott Adm. 270; The St. Jago de Cuba, 9 Wheat. 409, 414 The seaman's right to sue the master has been held to exist as against a mate who took the master's place, in a case where the articles contained a promise of obedience to successors in the office. But the principle of Priestly *v.* Fernie, *ante*, 161, n. 1, was applied. Fitzsimmons *v.* Baxter, 8 Daly, 81.

By statute 17 & 18 Vict. c. 104, § 185, when the seaman's service terminates before the period contemplated in the agreement by reason of his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage granted as mentioned in the act, he is entitled to wages for the time of service prior to such termination only.

See 188, n. 1; 199 n. 1.

tion of a statute. The law will not countenance a contract *ex turpi causa*, nor permit any one to lay claim to the wages of iniquity. (*c*)

A seaman is entitled to his whole wages for the voyage, even though he be unable to render his service by sickness or bodily injury, happening in the course of the voyage, and while he was in the performance of his duty. This is not only the invariable usage in the English admiralty, but a provision of manifest justice, pervading all the commercial ordinances. (*d*) But if the seaman, who enters himself as competent, fails in his duty from the want of competent knowledge or health, the master may make a reasonable deduction from his wages. (*e*) He will be entitled to his wages to the end of the voyage, when wrongfully discharged by the master in the course of it. (*f*) The marine law very *187 equitably distinguishes * between the cases in which seamen's services are not rendered in consequence of a peril of the sea, and in which they are not rendered by reason of some illegal act, or misconduct, or fraud, of the master or owner, interrupting and destroying the voyage. In the latter case, the seamen are entitled to their wages, (*a*) and the rule of the French ordinance is just and reasonable. It declares, that if the seamen be hired for the voyage, they shall, in such case, be paid the entire wages for the voyage, and if they be hired by the month, they shall be paid for the time they served, with the allowance of a reasonable time for their return to the port of departure. (*b*)

(*c*) The Vanguard, 6 C. Rob. 207.

(*d*) Chandler *v.* Grieves, 2 H. Bl. 606, note; Abbott on Shipping, part 5, c. 2, sec. 1; Williams *v.* The Brig Hope, Peters Adm. 138. [Shakerly *v.* Pedrick, Crabbe, 63; Nevitt *v.* Clarke, Olcott, 316.]

(*e*) Atkyns *v.* Burrows, Peters Adm. 247; Mitchell *v.* The Ship Orozimbo, ib. 250; Sherwood *v.* McIntosh, Ware, 109.

(*f*) Robinett *v.* The Ship Exeter, 2 C. Rob. 261; The Beaver, 3 id. 92; Keane *v.* The Brig Gloucester, 2 Dall. 86; Peters Adm. 403; Rice *v.* The Polly and Kitty, ib 420. In this last case, the seamen were forced to quit the ship by the cruelty and dangerous threats of the master, and their wages were allowed. If the seaman be wrongfully discharged after he had signed the shipping articles, and before the voyage begins, the rule has been asserted of allowing his wages for the whole voyage, deducting the wages earned elsewhere in the mean time. He is entitled to a complete indemnity for his illegal discharge. Case of the City of London in the English Admiralty, November, 1839; [1 W. Rob. 88.] See note to Curtis's Treatise on the Rights and Duties of Merchant Seamen, 299; Emerson *v.* Howland, 1 Mason, 53; Curtis, *ub. supra*, 299, 300, 301.

(*a*) Wells *v.* Osman, 2 Ld. Raym. 1044; Herron *v.* The Peggy, Bee Adm. 57.

(*b*) Ord. des Loyers des Matelots, art. 3; Pothier's Louage des Matelots, n. 203

But if a loss in respect to ship or cargo arises from the gross negligence of a mariner, the damage may be set off in the admiralty against a claim for wages. (*c*) If a seaman be wrongfully discharged on the voyage, the voyage is then ended with respect to him, and he is entitled to sue for his full wages for the voyage. (*d*)

The general principle of the marine law is, that freight is the mother of wages, and if no freight be earned, no wages are due. This principle protects the owner, by making the right of the mariner to his wages commensurate with the right of the owner to his freight; but that the rule may duly apply, the freight must not be lost by the fraud or wrongful act of the master. The policy of the rule applies to cases of loss of freight by a peril of the sea; and it was truly and distinctly stated by the Court of K. B. in the time of Charles *II., (*a*) that if the ship *188 perished by tempest, fire, enemies, &c., the mariners lose their wages; "for if the mariners were to have their wages in such cases, they would not use their endeavors, nor hazard their lives for the safety of the ship."[1] If the voyage and the freight

Cushing's Translation, 123; Roccus, de Nav. et Naulo, n. 43; Ingersoll's Translation, 46; Hoyt *v.* Wildfire, 8 Johns. 518.

(*c*) Abbott on Shipping, 472; The New Phœnix, 2 Hagg. Adm. 420.

(*d*) Sigard *v.* Roberts, 3 Esp. 71; [Brown *v.* The Independence, Crabbe, 54.] In the case of the Castilia, 1 Hagg. Adm. 59, a seaman who had left the ship in the course of the voyage, tho master failing to supply him with provisions, was held not to have forfeited his wages. And in The Elizabeth, 2 Dodson's Adm. 403, it was held, that though a master be not at liberty, by the general rule, to discharge his crew in a foreign port without their consent, yet that circumstances, as a case of *seminaufragium*, where repairs may be doubtful or difficult, might vest in him an authority to do so, *upon proper conditions*, as by providing and paying for their return passage, and their wages up to the time of their arrival at home. Curtis on the Rights of Seamen, 301, s. c.

(*a*) Anon., 1 Sid. 179.

[1] *Freight the Mother of Wages.* — This does not apply to the master, *ante*, 167, n. 1, and although in Hawkins *v.* Twisell, 5 El. & Bl. 883, decided in 1856, the general rule of the marine law was said to be that freight is the mother of wages, earlier cases in the admiralty had at least established an exception in the case of shipwreck. So long as any portion of the ship was saved, although by the exertions of others than the crew, the proceeds were held liable for the crew's wages. The Reliance, 2 Wm. Rob. 119 (May 26, 1843); *post*, 196, n. 1; The Florence, 16 Jur. 572, 573; 20 Eng. L. & Eq. 607, 609; Worth *v.* Mumford, 1 Hilton, 1, 25; The John Perkins, 21 Law Rep. 87, 91. See 188, n. 1; 166; 218, n. 1.

The Reliance, *sup.*, was followed in the next year by 7 & 8 Vict. c. 112, § 17, which is now superseded by 17 & 18 Vict. c. 104, § 188. By the latter the seaman's right to wages is not dependent on the earning of freight; but in all cases of

be lost, because the ship was seized for debt, or for having contraband or prohibited goods on board, or for any other cause proceeding from misconduct in the master or owner, it would be unreasonable and unjust that the innocent seamen should be deprived of compensation for their services, and the marine law holds them still entitled to their wages. (*b*) The wages are, in such cases, allowed *pro tanto* to the time of the loss of the voyage, and with such additional allowance as shall be deemed reasonable under the circumstances. (*c*)

(*b*) Malynes's Lex Mercatoria, 105; Molloy, de Jure Maritimo, b. 2, c. 3, sec. 7; Hoyt *v.* Wildfire, 3 Johns. 518; Jacobsen's Sea Laws, b. 2, c. 2; The Malta, 2 Hagg. Adm. 158.

(*c*) In Woolf *v.* The Brig Oder, Peters Adm. 261, where the voyage was broken up by seizure for debt, wages up to the time were allowed, and one additional month's wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores shall bar his claim. This brings the law nearer to the doctrine contended for by Mr. Dana in The Niphon, 13 Law Rep. 266. In that case the vessel was abandoned at sea, and set fire to by order of the master, and no part of the vessel itself was saved, or any thing but a few articles of small value. It was learnedly argued that by the early codes and on principle, if the seamen are bound to labor in salvage as part of their original contract, their claim for wages does not depend upon their lien on the materials of the vessel saved; and that on the other hand when, as in France, a loss of the vessel and cargo is followed by a loss of wages, the wreck dissolves the contract, and the seamen are not bound to labor in saving vessel or cargo. But the argument did not prevail, and would not have done so elsewhere. The Florence, *sup.*; Henop *v.* Tucker, 2 Paine, 151; *post*, 196, n. 1.

When the seaman dies during the voyage, it is the settled practice in the Massachusetts district to allow wages only to the time of the death. Hanson *v.* Rowell, 1 Sprague, 117, 118. And see Maclachlan on Shipping, c. 5, p. 209, n. 8, citing the better text of the laws of Oleron in Pardessus, 1 Lois Maritimes, ch. 8, art. 7. It is equally settled in the Pennsylvania E. district to allow them for the whole voyage. Johnson *v.* The Coriolanus, Crabbe, 239, 242. The question seems to be still unsettled in England.

If a ship is lost on a seeking voyage, after she has carried cargoes, in the course of it, between several ports, wages are allowed, at least in respect of those trips in which freight has been earned. Hicks *v.* Walker, 4 W. R. 511; 37 Eng. L. & Eq. 542. See Smith *v.* The Stewart, Crabbe, 218. So, when by the construction of the articles the wages become vested and a debt at the end of each month of service. Button *v.* Thompson, L. R. 4 C. P. 330. Capture does not extinguish the master's right to wages already earned. 167, n. 1.

By 17 & 18 Vict. c. 104, § 142, no seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.

See further, as to seamen's claim for salvage, 196, n. 1; as to time for enforcing their lien, 196, n. 2; as to forfeiture of wages, 199, n. 1.

(5) *Pro Rata Wages.* — * Seamen's wages, in trading *189 voyages, are due *pro rata itineris*. This has been so decided in the Scottish courts, and upon principles of controlling equity. (*a*)

If the seaman dies on the voyage, there is no settled English rule on the subject of his wages. In one case, the court intimated, that his representatives might be entitled to a proportion of the wages up to his death, when the hiring was by the month, and there was no special contract in the way; (*b*) and a similar opinion was mentioned by one of the judges of the C. B. in another case. (*c*) In a still later case (*d*) it was assumed by the Court of C. B., that wages of a seaman, who died on the voyage in which wages arose, were due to his representatives; but the case was silent as to the precise time to which they were to be computed. In this country, there have been contradictory decisions on the point. In the Circuit and District Courts of the United States, in Pennsylvania, it was decided, upon the authority of the laws of Oleron, that the representatives of the seamen, dying during the voyage, were entitled to full wages to the end of the voyage. (*e*) On the other hand, it was subsequently decided,

pay. Wages are not lost if the voyage be broken up by reason of civil process against the vessel, on a claim of ownership. If the claim be unfounded, adequate damages are presumed to be awarded for the unfounded libel, and if well founded, the wages are lost by the default of the shipper. Van Beuren *v.* Wilson, 9 Cowen, 158. In Hoyt *v.* Wildfire, where the seamen were hired for a voyage from New York to the East Indies, and back to New York, and the vessel was captured and condemned on the outward voyage for having contraband goods on board, wages, according to the rate of the contract, were allowed from the commencement of the voyage until the return of the seamen, with reasonable diligence, to New York, deducting wages received while in other service, on the circuitous return. The court observed, that the rule in the French law (Ord. des Loyers des Matelots, art. 3; Pothier, Louage des Matelots, n. 208) ordained, that if the seamen were hired for the voyage, they should, in such a case, be paid their entire wages for the voyage; and if hired by the month, the wages due for the time they had served, and for the time necessary to enable them to return to the port of departure; and that there was no reason to question the soundness of the rule, or the propriety of following it in that case.

(*a*) Ross *v.* Glassford, and Morrison *v.* Hamilton, cited in 1 Bell's Comm. 515. But the rule may be varied by agreement. Appleby *v.* Dods, 8 East, 300.

(*b*) Cutter *v.* Powell, 6 T. R. 320; [2 Sm. L. C. 1.] In this case the sailor took a note from his employer for a certain sum for the voyage, provided he continued to do his duty, and he died on the voyage. It was held, that being an entire contract, it could not be apportioned, and no wages could be claimed either on the contract or on a *quantum meruit*. [See Button *v.* Thompson, L. R. 4 C. P. 330, 340.]

(*c*) Heath, J., in Beale *v.* Thompson, 3 Bos. & P. 425.

(*d*) Armstrong *v.* Smith, 4 Bos. & P. 299.

(*e*) Walton *v.* The Ship Neptune, Peters Adm. 142; Sims *v.* Jackson, ib. 157; note; 1 Wash. 414, s. c.

in the District Court of the United States for South Carolina, (*f*) and in the District Court in Massachusetts, (*g*) that full wages, by the marine law, meant only full wages up to the death of the mariner; and in this last case, a very able and elab-
*190 orate review was taken of *all the marine ordinances and authorities applicable to the subject. The court examined critically the provisions in the Consolato del Mare, and in the laws of Oleron, of Wisbuy, and of the Hanse Towns, the ordinances of Charles V. and Louis XIV., the commentaries of Cleirac, Valin, and Pothier, and all that had been said and decided in England or Massachusetts in relation to the question. If the two decisions in Pennsylvania outweigh in point of American authority, the opposite adjudications are best supported in the appeal to those ordinances of European wisdom and policy in which we discern the deep foundations of maritime jurisprudence. (*a*) [1]

As the payment of wages, in general, depends upon the earning of freight, if a ship delivers her outward cargo, and perishes on her return voyage, the outward freight being earned, the seamen's wages on the outward voyage are consequently due. (*b*) By the custom of merchants, seamen's wages are due at every delivering port; and their wages are not affected, without their special agreement, by any stipulation between the owners and the charterer, making the voyages out and home one entire voyage, and the freight to depend on the accomplishment of the entire voyage out and in. (*c*) [1] The owners may waive or modify their

(*f*) Carey *v.* The Schooner Kitty, Bee Adm. 255.

(*g*) Natterstrom *v.* The Ship Hazard, 2 Hall's L. J. 359.

(*a*) If the seaman be hired *by the voyage*, and die during it, the standard books of maritime law, says Mr. Bell, seem to give the outward wages, if he dies during the outward voyage, and the whole, if he dies during the homeward voyage. But if he be hired *by the month*, it rather seems that wages will be due only to the time of his death. Bell's Comm. i 514.

(*b*) Anon., Holt, C. J., 1 Ld. Raym 639.

(*c*) Notes of Judge Winchester's decisions, 1 Peters Adm. 186, note; Abbott on Shipping, pt. 5, c. 2, sec. 3; Blanchard *v.* Bucknam, 8 Greenl. 1. In Thompson *v.* Faussat, 1 Peters C. C. 182, where the vessel was lost on her homeward voyage, full wages were held due to the seamen up to the arrival at the last port of delivery of the outward cargo; and half wages from that time until her departure from the last port at which the return cargo was taken on board. This rule was elaborately supported by Mr. Justice Story, in the C. C. U. S. for Massachusetts, 1868, in the case of Pitman *v.* Hooper, 8 Sumner, 50, 286, 298, 299, in opposition to the decision of Judge Hopkinson, in Bronde *v.* Haven, Gilpin, 606, 613; and he considers it to be the settled rule,

[1] See 188, n. 1.

claim to freight as they *please, but their acts cannot *191
deprive the seamen, without their consent, of the rights belonging to them by the general principles of the marine law. The doctrine of wages was discussed at the bar and upon the bench in the case of the *Two Catharines*, (*a*) with distinguished force and research; and it was held, that where a ship sailed from the United States to Gibraltar, and there landed her cargo, and went in ballast to Ivica, and, after taking in a return cargo, was lost on the voyage back to the United States, the seamen were entitled to wages up to the arrival and stay at Ivica. It made no difference that the vessel was in ballast in the intermediate voyage. The voluntary neglect of the owner will not operate in such a case to the injury of the seamen. They are entitled to wages, not only when the owner earns freight, but when, unless for his own act, he might earn it. The wages are due by an arrival at a port of destination, when no cargo is on board, or when the owner chooses to bring the cargo back again, and when the port of destination be not, in point of fact, the port of delivery. Even if the ship perishes on the outward voyage, yet, if part of the outward freight has been paid, the seamen are entitled to wages in proportion to the amount of the freight advanced, for there is an inseparable connection between freight and wages. (*b*)[1] Capture by an enemy extinguishes the contract for seamen's wages; and Sir William Scott, in the case of the *Friends*, (*c*) held that the recapture of the vessel did not revive the right, or restore him to his connection with the ship, inasmuch as he was not on board at the recapture, and did not render any subsequent service. The doctrine of this case was overruled in *Bergstrom* v. *Mills*; (*d*) and the American decisions have fully discussed the question, and they lay down

that when the ship is lost in her homeward voyage, the seamen are to be paid their wages up to the last port of discharge, and for half the time the ship lay there. Half the time passed in port is attributed in practice to the concerns and business of the discharge of the outward voyage, and half the time to employment by the seamen, in preparations or business connected with the homeward voyage; and it is considered to be an equitable and just apportionment, and the wages for that last half or period of time are deemed lost by the loss of the ship on the homeward voyage.

(*a*) 2 Mason, 319.

(*b*) Anon. 2 Show. 291; Brown *v.* Lull, 2 Sumner, 443.

(*c*) 4 C. Rob. 143. (*d*) 3 Esp. 86.

[1] See 188, n. 1.

*192 *a different rule, and proceed on the just principle, that the owner recovers his freight, and that is the parent of wages. They accordingly allow to the seamen taken prisoners by the captor, and detained, their wages for the whole voyage, if the same be afterwards performed, with a ratable deduction for the expenses of salvage. The like rule applies to the case of a vessel captured, and afterwards ransomed, and enabled to arrive at her port of destination. (*a*) Nothing can be more equitable than the rule which allows to seamen, suffering in the service, their compensation, when the fund out of which it was to arise is ultimately recovered and enjoyed by the owner. (*b*) And, upon the same principle, if a foreign power seizes the ship and imprisons the seamen, and they be afterwards released, and reassume and complete the voyage, and earn freight, their wages are continued during the interruption of the voyage, in like manner as in a case of capture and recapture. The Court of K. B. declared the law to this effect in *Beale* v. *Thompson*, (*c*) and they proceeded on the sound and incontestable principle of the marine law, that the title to wages depended on the ship earning her freight for the voyage, connected with the further fact, that the mariners were not guilty of any breach of duty. If a neutral ship be captured, and even condemned, and the sentence be afterwards reversed, and freight for the voyage allowed in damages, the seamen are entitled to their wages. (*d*) So, in the case of shipwreck, if any part of the cargo be saved, the wages of the seamen are to be paid without any deduction. (*e*)

(6) *Protection.* — Whenever freight is earned, wages are *193 due, and must be paid, and *every agreement that goes to separate the validity and equity of the demand for wages, from the fact of freight being earned, is viewed with distrust and jealousy, as being an encroachment on the rights of seamen. The courts of maritime law extend to them a peculiar protecting favor and guardianship, and treat them as

(*a*) Girard *v.* Ware, 1 Peters C. C. 142.

(*b*) Hart *v.* The Ship Littlejohn, Peters Adm. 115; Howland *v.* The Brig Lavinia, ib. 123; Singstrom *v.* The Schooner Hazard, ib. 384; Brooks *v.* Dorr, 2 Mass. 39; Wetmore *v.* Henshaw, 12 Johns. 324; Brown *v.* Lull, 2 Sumner, 443.

(*c*) 4 East, 546.

(*d*) Willard *v.* Dorr, 3 Mason, 161; Brown *v.* Lull, 2 Sumner, 443 s. p. See *post*, 299, n. (*c*).

(*e*) Pitman *v.* Hooper, 3 Sumner, 50, 61, 67.

wards of the admiralty; and though they are not incapable of making valid contracts, they are treated in the same manner that courts of equity are accustomed to treat young heirs dealing with their expectancies, wards with their guardians, and *cestuis que trust* with their trustees. They are considered as placed under the influence of men who have naturally acquired a mastery over them. Every deviation from the terms of the common shipping paper (which stands upon the general doctrines of maritime law) is rigidly inspected; and if additional burdens or sacrifices are imposed upon the seamen without adequate remuneration, the courts will interfere and moderate or annul the stipulation. (*a*) It has accordingly, under the influence of these just and humane considerations, been held, that an additional clause to the shipping articles, by which the seamen engaged *to pay for all medicines and medical aid further than the medical chest afforded*, was void, as being grossly inequitable, and contrary to the policy of the act of Congress. (*b*) It has likewise been decided, that a stipulation that the wages of the seamen, earned in the intermediate periods, should depend upon the ulti-

(*a*) The Minerva, 1 Hagg. Adm. 347; The George Home, ib. 370. Shipping articles are only conclusive as to the amount of wages and the voyage. On all collateral points the courts of admiralty will consider how far the stipulations in regard to seamen are reasonable and just. The Prince Frederick, 2 id. 394; Brown *v.* Lull, 2 Sumner, 443, s. p. The voyage must be designated with as much particularity and precision as the case admits of, and the articles must not be so loosely drawn as to leave the seamen exposed to unanticipated and experimental voyages. *Vide* 1 Hagg. *supra*. [*Ante*, 185, n. 1.] The English statute of 6 Wm. IV. c. 19 has made new and more strict regulations relative to shipping articles for the greater protection of the rights of the seamen. It is a point not precisely settled, how far the duty of obedience on the part of the seamen extends beyond the service of their own ship. The contract does not extend to any other service. But the Consolato, c. 148, par Boucher, ii. 224, allows the master to order the seamen, in certain cases, to help another vessel in distress; and it is said, in the case of the Centurion, Ware, 482, that if a wreck be met with on the voyage, the master may send his seamen to attempt to save it. So, according to the sense and usages of the general maritime law, the master may employ his vessel and crew in rescuing life, and even property, from destruction, under certain circumstances. 1 Sumner, 336. See *infra*, 313. The learned author of the Treatise on the Rights and Duties of Merchant Seamen, Boston, 1841, 35, seems to conclude, that the seamen are not bound, *stricto jure*, to obey orders for services not within the contract. But in my view of the subject, a strict construction of the articles must in many cases give way to a larger construction, founded on the necessities of mankind, the controlling influences of the moral sense, and the imperative duties of humanity.

(*b*) Harden *v.* Gordon, 2 Mason, 541; [Freeman *v.* Baker, Blatchf. & How. 372; see The Cypress, ib. 83; The Sarah Jane, ib. 401; *ante*, 188, n. 1.]

mate successful termination of a long and divided voyage, was inoperative and void. (*c*)

*194 (7) *Embezzlements.* — * Mariners are bound to contribute out of their wages for embezzlements of the cargo, or injuries produced by the misconduct of any of the crew. But the circumstances must be such as to fix the wrong upon some of the crew; and then, if the individual be unknown, those of the crew upon whom the presumption of guilt rests, stand as sureties for each other, and they must contribute ratably to the loss. Some of the cases in the books have established a general contribution from all the crew for such embezzlements, even when some of them were in a situation to repel every presumption of guilt; but neither public policy, nor principles of justice, extend the contribution or forfeiture of wages for such embezzlements, beyond the parties immediately *in delicto*. This just limitation of the rule was approved of by the English court of C. B. in *Thompson* v. *Collins*, (*a*) in their construction of the clause in the usual shipping articles, inserted to enforce this regulation of the marine law. It was also adopted by the Supreme Court of New York, in *Lewis* v. *Davis*, (*b*) and afterwards ably and thoroughly vindicated, even against the high authority of Valin, by the Circuit Court of the United States for the District of Massachusetts, in the case of *Spurr* v. *Pearson*. (*c*) The doctrine of that case is so moral and so just, that it may be said to rest on immovable foundations. The substance of it is, that where the embezzlement had arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation

*195 * of the loss, in proportion to their wages. If the embez-

(*c*) The Juliana, 2 Dods. 504; Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 748. See, also, to the same effect, Judge Winchester's decision in the District Court of Maryland, in 1 Peters Adm. 187, note; Millet *v.* Stephens, in Mass. 1800, cited in Abbott on Shipping, 5th Am. ed. 743, 745. The decision of Lord Stowell, in The Juliana, is made with great force and spirit. He took a wide view of the subject, and concluded, on the authority of the Court of Admiralty, of the Court of Chancery, and of the courts of common law, that where a voyage was divided by various ports of delivery, a proportional claim for wages attached at each of such ports; and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds, or by contracts inserted in the body of the shipping articles, were ineffectual and void. The statute of 6 Wm. IV. c. 19, sec. 5, has declared all such clauses in the articles of shipment to be inoperative and void. Abbott on Shipping, 5th Am. ed. 749.

(*a*) 4 Bos. & P. 347. (*b*) 3 Johns. 17.

(*c*) 1 Mason, 104. See, also, Edwards *v.* Sherman, Gilpin, 461.

element be fixed on any individual, he is solely responsible;[1] and where it was made by the crew, but the particular offender is unknown, and from the circumstances of the case strong presumptions of guilt apply to the whole crew, all must contribute. Where no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master. In no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and in case of uncertainty, the burden of the proof of innocence does not rest on the crew, but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded.

[(8) *Salvage.*] — In case of shipwreck, and there be relics or materials of the ship saved, many of the old ordinances, as well as the new commercial code of France, allow a compensation to the seamen, out of the remains which they had, by their exertions, or as salvors, contributed to preserve. (*a*) There were no English decisions on the point when Lord Tenterden published the third edition of his work; but some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of the seamen's wages, and for their expenses home; and Lord Stowell has, since the Pennsylvania decisions, allowed to the sea men, by whose exertions part of a vessel had been saved, the payment of their wages, as far as the fragments of the materials would form a fund, although there was no freight earned by the owners. (*b*) In such cases, where the voyage is broken up by *vis major*, *and no freight earned, no wages, *eo nomine*, are *196 due; and the equitable claim which seamen may have upon the remains of the wreck is rather a claim for salvage, and seems to be incorrectly denominated in the books a title to wages. Wages, in such cases, would be contrary to the great principle in marine

(*a*) The Laws of Oleron, art. 8; of Wisbuy, art. 15; the Hanseatic Ord. art. 44; the Ord. of Philip II. tit. Average, art. 12; the Ord. of Rotterdam, art. 219, and the French Ord. of the Marine, liv. 3, tit. 4, des Loyers des Matelots, art. 9; Code de Commerce, art. 259.

(*b*) The Neptune, 1 Hagg. Adm. 227; 1 Peters Adm. 54, 195; 2 id. 426; Frothingham *v.* Prince, 3 Mass. 563; Lewis *v.* The Elizabeth and Jane, Ware, 49. In Adams *v.* The Sophia, Gilpin, 77, and in Brackett *v.* The Hercules, ib. 184, Judge Hopkinson held, that where a portion of the vessel or her cargo was saved by the meritorious exertions of the seamen, a new lien arose thereon for their wages, though the freight be lost.

[1] Joy *v* Allen, 2 Woodb. & M. 304. A premeditated theft by a mariner will forfeit his whole wages. Alexander *v.* Galloway, 1 Abbott Adm. 261.

law, that freight is the mother of wages, and the safety of the ship the mother of freight. (a)[1] If, however, the seamen abandon the wreck of a ship as being a hopeless case, and without the

(a) Dunnett v. Tomhagen, 3 Johns. 154; The Saratoga, 2 Gall. 164. The opinion of Judge Story in the case of the Two Catharines, 2 Mason, 339, concludes with the declaration, that his "review of American judicial decisions establishes it as a common and received doctrine, that the wages recovered in cases of shipwreck are recovered in the nature of salvage, and as such form a lien on the property saved. And in this view they are perfectly consistent with the rule that makes the earnings of freight generally a condition of the payment of wages." But in the case of the Massasoit, U. S. District Court, Mass. 1844, 7 Law Rep. 522 [1 Sprague, 97], the allowance of claim to mariners as *salvors* in the case of shipwreck is considered as a startling violation of a principle of maritime policy. So Lord Stowell, in the case of the Neptune, 1 Hagg. Adm. 227, rejected the claim to the seamen as *salvage*, and said that it rested on the ground of *wages*, and indeed it is said that they are nailed to the last plank of the ship, and the last fragment of the freight. See the cases examined, and the discussions referred [to,] in Abbott on Shipping, 5th Am. ed. Boston, 750–756. The question seems to be rather one of verbal discussion and criticism, than of a substantial distinction.

[1] *Salvage.* — It has been said in reply to the author's suggestion at the end of note (a), that there are cases where the compensation wholly depends on the distinction between wages and salvage,— as, for example, where the ship perishes, and cargo alone is saved, with no freight due upon it. 1 Sprague, 103, note. See Mr. Dana's argument in The Niphon, stated *ante*, 188, n. 1. If the compensation is given as wages, it is an exception to the general rule mentioned in the text. On the other hand, the objection to treating the sailors as salvors is that their services are not voluntary. Dr. Lushington has followed Lord Stowell's doctrine that the mariners' compensation is allowed as wages and not as salvage, in a case where the portions of the wrecked vessel which were preserved were saved not by the exertions of the crew, but by third parties. The Reliance, 2 Wm. Rob. 119. See Worth v. Mumford, 1 Hilton, 1, 25; The John Perkins, 21 Law Rep. 87, 91; The Holder Borden, 1 Sprague, 144; Reed v. Hussey; The Franklin, Bl. & Howl. 525, 543. But see The John Taylor, Newb. 341.

But if the crew rightfully abandon the ship *at sea*, under circumstances putting an end to their contract, and to their right to wages (of which circumstances the command of the master is thought to be an important element), they may earn salvage if they subsequently fall in with her again. The Florence, 16 Jur. 572; 20 E. L. & Eq. 607. In The Triumph, 1 Sprague, 428, salvage was allowed when the ship was abandoned near the shore by all but one seaman, the salvor. *Post*, 246; 248, n. 1. In The John Perkins, *sup.*, the ship was left near the shore, with the intention of watching her, and returning to her if practicable, and the sailors were held not to be discharged from their contract so as to be entitled to salvage. The contract of the crew may be terminated by a discharge given by the master after a wreck, although given in disregard of the owners' interest, if there was no fraud on the sailors' part, and they may then earn salvage. The Warrior, Lush. 476. And salvage has been allowed *eo nomine* for services exceeding the duty owed to the ship. The Mary Hale, Marvin on Salvage, § 149, p. 161.

intention of returning to possess and save it, the contract between them and the owners is dissolved, and they lose their lien or privilege for any equitable compensation, whether as wages or salvage. Their claim is extinguished, and though other persons may possess the property which had become derelict, it belongs to the original owner, burdened with their claim for salvage. (*b*)

[9] *When Wages are due.* — By the act of Congress, (*c*) one third of the seamen's wages is due at every port where the ship

(*b*) Lewis *v.* The Elizabeth and Jane, District Court of Maine, Ware, 41.

(*c*) Act of Congress, 20th July, 1790, c. 29, sec. 6. The English statute law relative to seamen in the merchant service has been revised and improved by the statute of 5 and 6 Wm. IV. c. 19, which has greatly bettered the condition, and secured the protection of the rights of seamen. The provisions of the statute are commented upon with learning, candor, and strong approbation, in the Law Magazine, No. 30, art. 3, an article well worthy of the student's perusal. The act is entitled "An act to amend and consolidate the laws relating to the merchant seamen of the United Kingdom, and for forming and maintaining a register of all the men engaged in that service." It repeals the acts of 2 and 3 Anne, 2 Geo. II., 2 Geo. III., 31 Geo. III., 37 Geo. III., 45 Geo. III., 58 Geo. III., 59 Geo. III., 4 Geo. IV., and 3 and 4 Wm. IV. By sec. 2, no seamen to be taken to sea, without a written agreement signed by the master and seamen. (3.) Form prescribed. (4.) Penalty for taking seamen to sea without such articles. (5.) Agreement not to affect the seamen's lien for wages, and all agreements contrary to the act void. (6.) If the seaman shall refuse to join the ship or go to sea, or absent himself, he may be apprehended by warrant, and committed to the house of correction, at hard labor, for thirty days; though if he and the master consent, he may be delivered on board, paying costs, to be abated from his future wages. (7.) After the voyage has commenced, if the seaman wilfully absents himself, he forfeits a ratable share of wages. (8.) Mode of ascertaining it when the seaman contracts for the voyage. (9.) Forfeiture for absolute desertion. (10.) Penalty for harboring deserters. (11.) Periods for payment of wages. (12.) Payments valid, and no assignment or bill of sale of wages valid. (13.) When discharged, the master to give a certificate of his service and discharge. (14.) Remedy for wages by summons, &c., and the master forfeits £5 for default in prompt payment. (15.) Summary mode of recovery of wages not exceeding £20. (16.) When no costs. (17.) If ship be sold in a foreign port, the crew to be sent home at the expense of the master or owner. (18.) If hurt in the service, to be helped gratis. (19.) A register office is established. (21.) Masters of ships trading abroad, and in the home trade, to deliver list of their crews on their return. (23.) Return to be made in cases of ship lost or sold abroad. (25.) The consul takes charge of their effects, dying abroad. (26 to 37.) Regulations as to parish boys put out apprentices in the sea service. (40.) A misdemeanor to force on shore, or leave behind any of the crew. (41.) Seamen not to be discharged abroad but under the sanction of a public functionary. (42.) Not to be left abroad on any plea without such sanction. (44.) When allowed to be left behind, to be paid their wages. (48.) Ship's agreement, on arrival at a foreign port, to be left with the consul. (49.) No seaman to be shipped at a foreign port without the privity of the consul. A corresponding summary is given of the American regulations in Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 223, note (1). The substance of those regulations has been already mentioned in this volume, *ante*, 177–180. [A later English act is the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.]

unlades and delivers her cargo, unless there be an express stipulation to the contrary; and when the voyage is ended, and the cargo or ballast fully discharged, the wages are due, and if not paid within ten days thereafter, admiralty process may be instituted *in rem* against the ship. (*d*) But there is no fixed period of time by the marine law within which mariners must proceed to enforce their lien for wages, though the lien may be lost to the seamen and other privileged creditors by unreasonable delay, and suffering the vessel to pass into the hands of a *bona fide* purchaser ignorant of the claim. (*e*)[2] It does not,

(*d*) The law of England, in ordinary cases, requires the mariner to stay by the ship till the discharge of the cargo, when the other party has done nothing to supersede the existing contract. The Baltic Merchant, Edw. Adm. 86; The Cambridge, 2 Hagg. Adm. 245, 246. In Cloutman *v.* Tunison, 1 Sumner, 378, Mr. Justice Story declared the same general principle; but Judge Peters, in Hastings *v.* The Ship Happy Return, 1 Peters Adm. 253, was inclined to the opinion that the seamen were not bound to unlade the ship after the voyage is ended, unless specially bound by the articles. A spontaneous deviation of importance will entitle the seamen to their discharge; but by the Danish and Dutch Marine Codes, though the master enlarges or alters the voyage, he may compel the seamen to remain in the service, on a reasonable addition to their wages. This is not the English law. Jacobsen's Sea Laws, 142; Institutes of the Laws of Holland, by Vander Linden, 629. The usage in the United States is to discharge the crew before unlading the vessel, and to employ other persons to perform that service. It has now become one of the implied terms of the contract. The voyage is ended when the vessel is safely moored at the wharf, and then the ten days for the payment of the wages begin to run. But if, by the terms of the contract or usage of the port, the seamen are bound to remain and assist in discharging the cargo, then the ten days only begin to run from the discharge of the cargo. When, in either case, the seamen are discharged, the wages are due. The Mary, D. C. U. S. Maine District, August, 1888, Ware, 454. Judge Peters, in the case of Edwards *v.* The Ship Susan, 1 Peters Adm. 167, adopted fifteen working days as a reasonable time from the end of the voyage for the unlading of the cargo and the payment of wages.

(*e*) Ware, 186, 212.

[2] *Time for enforcing Liens.* — The text is confirmed by The Scow Bolivar, Olcott, 474, 480. See The Lillie Mills, 1 Sprague, 307; *post*, 232, n. 1, (c). In the case of sea going vessels it has been thought that the lien should not generally be extended beyond the next voyage as against innocent purchasers. Leland *v.* The Medora, 2 Woodb. & M. 92, 100; The Dubuque, 2 Abbott, U. S. 20; 2 Chicago Legal News, 381. See The Boston, Bl. & How. 309. With regard to vessels on the great lakes, it has been thought a reasonable rule to limit them to the season of navigation, and not to extend them beyond one year. The Buckeye State, Newb. 111; The Dubuque, *sup.* But the lien may be enforced after considerable lapse of time if no third person has acquired any right to the vessel, and the owner has not been injured by the delay. The Canton, 1 Sprague, 437; Fisher *v.* The Galloway C. Morris, 27 Leg. Int. 204 (July 1, 1870). Bottomry liens are required to be enforced within a reasonable time in like manner. Royal Arch, Swabey, 269, 284. [See 14 Wall 653.]

like other liens, depend upon possession. Seamen's wages are hardly earned, and liable to many contingencies, by which they may be entirely lost, without any fault on their part. Few claims are more highly favored and protected by law, and when due, the vessel, owners, and masters are all liable for the payment of them. (*f*) The seamen need not libel the vessel, at the intermediate port where they are discharged. They may disregard bottomry bonds, and pursue their lien for *wages afterwards, even against a subsequent *bona fide* purchaser. It follows the ship and its proceeds, into whose hands soever they may come, by title or purchase, from the owner. Their demand for wages takes precedence of bottomry bonds, and is preferred to all other demands, for the same reason that the last bottomry bond is preferred to those of a prior date. Their claim is a sacred lien; and as long as a single plank of the ship remains, the sailor is entitled, as against all other persons, to the proceeds, as a security for his wages, for by their labor the common pledge for all the debts is preserved. (*a*) The seamen's lien exists to the extent of the whole compensation due them. There is no difference between the case of a vessel seized abroad and restored in specie or in value; the lien reattaches to the thing, and to whatever is substituted for it. This is not only a principle of the admiralty, but it is found incorporated into the doctrines of the courts of common law. (*b*)[1] In the French law, the seamen's lien upon the vessel is extinguished after a sale and a voyage, in the name and at the risk of the purchaser; and the preference of the seamen's claim is confined to the wages of the seamen employed in the last voyage. (*c*) *197

(*f*) Pothier, Louage des Matelots, sec. 226; Abbott on Shipping, part 4, c. 4, sec. 10; Wysham *v.* Rossen, 11 Johns. 72; Valin, i. 751; Walt *v.* Gibbs, 4 Pick. 298. In the case of the Betsey and Rhoda, in the District Court of Maine, 8 N. Y. Leg. Obs. 215, [Daveis, 112,] very marked protection was thrown over the wages of seamen. It was held, that a negotiable note, taken by a seaman for his wages, will not extinguish his claim for wages, nor his lien against the ship, unless he be distinctly informed at the time that such would be the effect, and some additional security or advantage be given him for renouncing his lien on the ship.

(*a*) Consulat de la Mer, c. 188; Valin's Comm. 2, 12; Madonna d'Idra, 1 Dods. 37; Sydney Cove, 2 id. 11; The Ship Mary, 1 Paine, 180; Sheppard *v.* Taylor, 5 Peters, 675; Brown *v.* Lull, 2 Sumner, 448, 452; Pitman *v.* Hooper, 3 id. 51.

(*b*) Sheppard *v.* Taylor, 5 Peters, 675.

(*c*) Ord. de la Mar. tit. De la Saisie des Navires, art. 16; De l'Engagement, art.

[1] The Amelie, 6 Wall. 18, 30; *ante*, 174, n. 1.

*198 [10] *Desertion and Forfeiture of Wages.* — * Desertion from the ship without just cause, and *animo non revertendi*, or the justifiable discharge of a seaman by the master for bad conduct, will work a forfeiture of the wages previously earned; and this is a rule of justice and of policy which generally pervades the ordinances of the maritime nations. By the English statute law, (*a*) and by the act of Congress, (*b*) desertion is accompanied

19; Code de Commerce, arts. 191, 198. The Commercial Code of Napoleon settles the order and rights of privileged debts much more fully and precisely than the marine ordinance of Louis XIV.; and this priority in favor of seamen's wages pervades both the maritime ordinances. See *supra*, 168. The venerable code of the Consolato del Mare, c. 138, expressed itself on the subject with the energy of Lord Stowell, when it declared, that mariners must be paid before all mankind, and that *if only a single nail of the ship was left*, they were entitled to it. Consulat de la Mer, par Boucher, ii. 205. See also Cleirac upon the Judgments of Oleron, art. 8, n. 31; and Boulay-Paty, Cours de Droit Com. i. 115. The preference given to seamen for their wages, over all other claims, upon the ship and freight, is the universal law of maritime Europe. The wages of seamen are a lien on the vessel and freight, and *even on the cargo to the amount of the freight due upon it.* The seaman has no lien on the cargo as cargo, — it is on the *ship*, and on the *freight* as appurtenant thereto; and so far as the *cargo* is subject to freight, he may attach it as security for the freight that may be due. The Lady Durham, 3 Hagg. Adm. 200. When the general owner, and when the hirer of the ship for the voyage, are personally liable to the mariners for their wages, see the cases, and the examination of them, in Curtis's Treatise on the Rights and Duties of Merchant Seamen, 826–836. The master has his lien on the cargo for his freight. The cargo is hypothecated for the freight, and the freight is hypothecated for the seaman's wages. The lien on the freight is not taken away by the statute of the United States, allowing to seamen process against the vessel. See Poland *v.* The Brig Spartan, in the District Court of Maine, 1 Ware, 134, and The Paragon, ib. 330, 331, where the question as to the extent of the lien of seamen for their wages is learnedly discussed.

(*a*) 11 and 12 William III. c. 7, and 2 George II. c. 36. See, also, The Jupiter, 2 Hagg. Adm. 221.

(*b*) Act of Congress, 20th July, 1790, c. 29, secs. 2, 5. In Cloutman *v.* Tunison, 1 Sumner, 373, Judge Story held, that by the maritime law, the voyage is ended when the ship has arrived at her port of destination, and is safely moored, though her cargo be not delivered, and desertion afterwards does not forfeit the wages at large, but a partial forfeiture may be decreed by way of compensation for breach of duty. So, in another case, Judge Hopkinson held, that if a seaman leaves the vessel after she is moored at the wharf, at the last port of delivery, and *before the discharge of the cargo*, he forfeits a ratable deduction from his wages. To subject the seaman to the forfeiture of his wages, under the act of Congress of 1790, the entry in the log book, on the day of the absence, is indispensable. Knagg *v.* Goldsmith, Gilpin, 207; ib. 219; Cloutman *v.* Tunison, 1 Sumner, 373; The Rovena, Ware, 309; The Bulmer, 1 Hagg. Adm. 163; The Pearl, 5 C. Rob. 224; The Baltic Merchant, Edw. Adm. 86. Quitting the ship before the voyage is ended is desertion; but quitting her afterwards, and before the unlivery of the cargo, is a mere absence. The forfeiture of wages is not so absolute and total in the one case as in the other. The act

with a forfeiture of all the wages that are due, and an absence of forty-eight hours without leave is made conclusive evidence of desertion; and whatever unjustifiable conduct will warrant the act of the master in discharging a seaman during the voyage will equally deprive the seaman of his wages. But the forfeiture is saved if the seaman repents, makes compensation or offer of amends, and is restored to his duty. (*c*) Public policy and private justice here move together, and the maritime ordinances unite in this conclusion. The master has power to remit a forfeiture, and the penalty of forfeiture is not applied to slight faults, either of neglect or disobedience. There must be either an *habitual* neglect, or disobedience, or drunkenness, (*d*) or else a single act of gross dishonesty, or some other act of a heinous and aggravated nature, to justify the discharging a seaman in a foreign port, or the forfeiture of wages; nor will the admiralty courts, except in cases of great atrocity, visit the offences of seamen with the cumulated load of forfeiture of wages and compensation in damages. They stop at the forfeiture of the wages antecedently earned, and in the application of the forfeiture, the advance wages are made a charge on the * forfeited wages, but the hospital *199 money is apportioned ratably on the wages for the whole voyage. In these regulations the moderation of the courts, and the solicitude which the peculiar condition and character of seamen excite, are equally manifest. (*a*) So, if the seaman quits the ship involuntarily, or is driven ashore from necessity, from

of Congress of 20th July, 1790, c. 56, secs. 2, 5, 7, makes a distinction between wilful absence of a seaman after he has signed the articles, and before the commencement of the voyage, and the like absence after the voyage has commenced. In the first case he forfeits wages, clothing, and damages, and in the latter case he is liable to be arrested as a deserter, and to be imprisoned. Cotel *v.* Hilliard, 4 Mass. 664; Curtis's Tr. on Seamen in the Merchant Service, 132-136, 140, 141.

(*c*) The master is bound, in such a case, to receive back the seaman, as a case fit for condonation, unless his previous misconduct would justify a discharge. Cloutman *v.* Tunison, 1 Sumner, 378, s. p.; Coffin *v.* Jenkins, 3 Story, 108.

(*d*) Lady Campbell, 2 Hagg. Adm. 5; The Malta, ib. 168; The Blake, before Dr. Lushington, July, 1839, [1 Wm. Rob. 73;] Am. Jurist for April, 1841, 205.

(*a*) Whitton *v.* The Brig Commerce, 1 Peters Adm. 160; Thorne *v.* White, ib. 175; Relf *v.* The Maria, ib. 186; The Ship Mentor, 4 Mason, 84, 102; The Malta, 2 Hagg Adm. 159; The Susan, ib. 229, note; Hutchinson *v.* Coombs, District Court of Maine, 1 Ware, 65. In the case of the Ship Mentor, Mr. Justice Story made some practical regulations as to the disposition of the forfeited wages, and he did not consider it to be a settled rule, that even the commission of the offence of endeavoring to make a revolt was in all cases to be visited with a total forfeiture of wages. Though a sea-

want of provisions, or by reason of cruel usage and for personal safety, the wages are not forfeited, and he will be entitled to receive them in full to the prosperous termination of the voyage. (*b*) [1] On the other hand, it is the duty of the seamen to abide by the vessel as long as reasonable hope remains; and if they desert the ship under circumstances of danger or distress

man be justly discharged during the voyage for disobedience of orders, it was said, by Dr. Lushington, in the case of the Blake, in the Admiralty (July, 1839), [1 W. Rob. 73,] to be a very infirm test of the fitness of depriving him of his wages. Wages may be forfeited where the disobedience of orders is to such an extent as to render the discharge of the seaman imperatively necessary to the safety of the ship, and the due preservation of discipline. Where a seaman was sent home from a foreign port, in irons, by order of the American consul, for bad conduct of an aggravated character, and was therefore disabled, by his own fault, from the performance of his duty, his wages were deemed forfeited. Smith *v.* Treat, District Court of Maine, 1845. [Daveis, 266; 4] New York Legal Observer for January, 1846.

(*b*) Jugemens d'Oleron, art. 13; Limland *v.* Stephens, 3 Esp. 269; The Favorite, 2 C. Rob. 232; Bell's Comm. c. 4, secs. 1, 4; Sherwood *v.* McIntosh, Ware, 109; Rice *v.* The Polly and Kitty, Peters Adm. 420; Magee *v.* The Moss, Gilpin, 219. Refusal to proceed on a voyage not designated by the articles is not such a desertion as works a forfeiture. 1 Hagg. [Adm.] 182, 248, 347. So, if the master has an avowed intention to go on a different voyage previous to the completion of a voyage for which a seaman had signed the shipping articles, such an intended departure will be sufficient to justify the seaman leaving the ship and suing for his wages during the time he served on board. Hayward *v.* Maine, Kerr, N. B. 292.

[1] *Desertion and Forfeiture of Wages.* — The text is confirmed by Edward *v.* Trevellick, 4 El. & Bl. 59; Bush *v.* The Alonzo, 2 Clifford, 548; Knowlton *v.* Boss, 1 Sprague, 163; Hunt *v.* Colburn, ib. 215; Sheffield *v.* Page, ib. 285; 2 Curtis, 377; The America, Blatchf. & H. 185; Fitzsimmons *v.* Baxter, 3 Daly, 81. So in case of deviation, *sup.*, note (*b*); see The Brig Cadmus *v.* Matthews, 2 Paine, 229; The Mary Ann, Abbott Adm. 270; Piehl *v.* Balchen, Olcott, 24; The Becherdass Ambaidass, 1 Lowell, 569, 6 Am. Law Rev. 74 (commenting on Bucker *v.* Klorkgeter, Abbott Adm. 409); or provisions so bad as to be positively unfit for the men's support; Ulary *v.* The Washington, Crabbe, 204; or unseaworthiness of the ship; Savary *v.* Clements, 8 Gray, 155; *ante*, 178, n. 1; which the seamen may prove, notwithstanding the fact that when they demanded to leave on that ground, she was reported seaworthy by marine surveyors. Bucker *v.* Klorkgeter, Abbott Adm. 402.

The defence of desertion often depends on the validity of the articles, and as British shipping articles generally give a very loose description of the nature of the voyage, and the American courts construe the requirements of British law pretty strictly, desertion from British ships is very common in some of the ports on the Atlantic coast. *Ante*, 185, n. 1. In some cases the British consul has interposed and protested against the court's taking jurisdiction; and it has been held in the admiralty that when the sailor shipped for a voyage ending in a home port, his protest would be respected in the absence of special circumstances, such as a clear deviation, cruelty, or the breaking up of the voyage, although the court might doubt the validity of the articles. The Becherdass Ambaidass, 1

from perils of the sea, when their presence and exertions might have prevented damage, or restored the ship to safety, they forfeit their wages, and are answerable in damages. (*c*) And even when a seaman might well have been discharged in the course of the voyage, for gross misbehavior, if the master refuses to discharge him, and leaves him in imprisonment abroad, he will, in that case, be entitled to his wages until his return to the United States after deducting from the claim his time of imprisonment. (*d*)

(*c*) Sims *v.* Mariners, Peters Adm. 895; The Dawn, in the District Court of Maine, February, 1841, reported in [Daveis, 121;] American Jurist for October, 1841, 216.

(*d*) Buck *v.* Lane, 12 Serg. & R. 266. If a seaman leaves the ship without just cause, the master may enter the desertion in the log book, under the act of Congress of 1790, which will work a forfeiture of wages antecedently due; or he may have the seaman imprisoned until the vessel is ready to sail, and then the contract continues, and the wages go on. The imprisonment is the punishment. Brower *v.* The Maiden, Gilpin, 294. By the Treaty of Commerce and Navigation between the United States and the Kingdom of Hanover, May 20, 1840, art. 6, and between United States and Portugal, of 23d April, 1841, art. 11, consuls, vice-consuls, and commercial agents were authorized to require the assistance of the local authorities for the search, arrest, and imprisonment of deserters from the ships of war and merchant-vessels of their country. Application is to be made in writing, with the exhibition of the registers of the vessels, muster-rolls, or other official documents, proving that such individuals formed part of the crews; and then the surrender is not to be refused. The deserters to be placed at the disposal of the consuls, &c., and confined in the public prisons, at the request and cost of those claiming them, in order to be sent to the vessels, &c.; no such imprisonment to exceed four months.

In the examination of the maritime law concerning seamen, I have been led to consult, very frequently, the admiralty decisions in the District Court of Pennsylvania; and I feel unwilling to take my leave of this branch of the subject without expressing my grateful sense of the obligation which the profession and the country

Lowell, 569; 6 Am. Law Rev. 74; The Robert Ritson, ib. 79, note. See The Nina, L. R. 2 P. C. 38; s. c., L. R. 2 Ad. & Ec. 44; The Maggie Hammond, 9 Wall. 435, 452, 457.

In the Nina, *sup.*, there was an express agreement to be bound by the law of the ship, according to which the controversy should have been referred to the consul for determination. See Freeman *v.* Baker, Blatchf. & How. 372, 380. So, again, agreements not to sue except in a home court have been held good. Gienar *v.* Meyer, 2 H. Bl. 603; Johnson *v.* Machielsen, 3 Camp. 44; Olzen *v.* Schierenberg, 8 Daly, 100; in this case it seems to be considered that courts of common law have the same discretion as the admiralty court has always exercised, with regard to taking jurisdiction of suits between foreign seamen and masters for acts done on the high seas. What would be the effect of a statute like 17 & 18 Vict. c. 104, § 190 (prohibiting seamen engaged for a voyage which terminates in the United Kingdom to sue abroad, except, &c.), in foreign courts, when not expressly incorporated in the articles, remains to be determined. It is not wholly clear why the law under which the contract is made is not as much a part of the contract as a custom would be. But see Maclachlan on Shipping, 235; Madonna D'Idra, 1 Dods. 37, 41.

at large are under to the venerable author of those decisions. They discover a familiar acquaintance with the maritime ordinances of continental Europe, those abundant fountains of all modern nautical jurisprudence. They have investigated the sound principles which those ordinances contain, in a spirit of free and liberal inquiry; and they have uniformly discussed the rights and claims of mariners, under the influence of a keen sense of justice, a strong feeling of humanity, and an elevated tone of moral sentiment.

LECTURE XLVII.

OF THE CONTRACT OF AFFREIGHTMENT.

1. Of the Charter Party and its Conditions. — A charter party is a contract of affreightment in writing, by which the owner of a ship lets the whole, or a part of her, to a merchant, for the conveyance of goods on a particular voyage, in consideration of the payment of freight.

All contracts under seal were anciently called charters, and they used to be divided into two parts, and each party interested took one, and this was the meaning of the *charta partita*. It was a deed or writing, divided, consisting of two parts, like an indenture at common law. (*a*) Lord Mansfield observed, that the charter party was an old informal instrument, and by the introduction of different clauses at different times, it was inaccurate, and sometimes contradictory. But this defect has been supplied, by giving it, as mercantile contracts usually receive, a liberal construction, in furtherance of the real intention and the usage of trade.

* This mercantile lease [1] of a ship describes the parties, * 202 the ship, and the voyage, and contains on the part of the

(*a*) Butler, n. 188, to lib. 3, Co. Litt.; Pothier's Charter Party, by C. Cushing, n. 1; Valin's Comm. i. 617. The translation of Pothier's Treatise on Maritime Contracts, by Mr. C. Cushing, and published at Boston, in 1821, is neat and accurate, and the notes which are added to the volume are highly creditable to the industry and learning of the author. But the work was limited to the treatises on Charter Party, Average, and Hiring of Seamen. It would contribute greatly to the circulation and cultivation of maritime law in this country, if some other treatises of Pothier, and also the Commentaries of Valin, could appear in an English dress.

Since the third edition of this work, Mr. L. S. Cushing has published, at Boston, a translation of Pothier's Treatise on the Contract of Sale; and if duly encouraged, as we hope and trust he will be, he promises a translation of the other excellent treatises of Pothier on the various commercial contracts.

[1] As to when it is a lease and when not, see 188 and n. 1.

owner a stipulation as to seaworthiness, and as to the promptitude with which the vessel shall receive the cargo and perform the voyage; and the exception of such perils of the sea for which the master and ship owners do not mean to be responsible. (*a*) On the part of the freighter, it contains a stipulation to load and unload within a given time, with an allowance of so many lay, or running days, for loading and unloading the cargo, and the rate and times of payment of the freight, and rate of demurrage beyond the allotted days. (*b*)

When the goods of several merchants, unconnected with each other, are laden on board, without any particular contract of affreightment with any individual for the entire ship, the vessel is called a *general* ship, because open to all merchants; but when one or more merchants contract for the ship exclusively, it is said to be a *chartered* ship. The ship may be let in whole or in part, and either for such a quantity of goods by weight, or for so much space in the ship, which is letting the ship by the ton. She may also be hired for a gross sum as freight for the voyage, or for a particular sum by the month, or any other determinate period, or for a certain sum for every ton, cask, or bale of goods put on board; and when the ship is let by the month, the time does not begin to run until the ship breaks ground, unless it be otherwise agreed. (*c*) The merchant who hires a ship may either lade it with his own goods, or wholly underlet it upon his own terms; and if no certain freight be stipulated, the owner will be entitled to recover, upon a *quantum meruit*, as much freight as is usual under the like circumstances, at the time and place of the shipment. (*d*)

(*a*) The usual form of the charter party contains the *exception* to the owner's and master's responsibility, of the "acts of God, or public enemies, detentions and restraints of kings, princes, rulers, and republics, fire, the dangers and accidents of the seas, rivers, and navigation, and all other unavoidable dangers and accidents."

(*b*) Abbott on Shipping, 5th Am. ed. Boston, 1846, part 4, c. 1 secs. 1, 2, 3, 5. The master may let the ship by charter party in a foreign port, as agent of the owner, and without his knowledge; but in the home port, or residence of the owners, their assent is requisite to bind. It is not an incident to the general authority as master, and there must be peculiar circumstances to presume such a superadded agency. Pothier, Charte-Partie, n. 48. The Schooner Tribune, 8 Sumner, 144, 149.

(*c*) Pothier, Charte-Partie, n. 4; Abbott on Shipping, 5th Am. ed. part 4, c. 1.

(*d*) Pothier, Charte-Partie, n. 8; Abbott on Shipping, ib.; Hunter *v.* Fry, 2 B. & Ald. 421.

* It is the duty of the owner of the ship not only to see * 203 that she is duly equipped, and in a suitable condition to perform the voyage, but he is bound to keep her in that condition throughout the voyage, unless he be prevented by perils of the sea. (*a*) If, in consequence of a failure in the due equipment of the vessel, the charterer does not use her, he is not bound to pay any freight; but if he actually employs her he must pay the freight, though he has his remedy on the charter party for damages sustained by reason of the deficiency of the vessel in her equipment. (*b*) The freighter is bound on his part not to detain the ship beyond the stipulated or usual time, to load, or deliver the cargo, or to sail. The extra days beyond the lay days (being the days allowed to load and unload the cargo) are called days of *demurrage;* and that term is likewise applied to the payment for such delay, and it may become due by the ship's detention, for the purpose of loading or unloading the cargo, either before, or during, or after the voyage, or in waiting for convoy. (*c*) If the claim for demurrage rests on express contract, it is strictly enforced, as where the running days for delivering the cargo under the bill of lading had expired, even though the consignee was prevented from clearing the vessel of the goods by the default of others. (*d*) [1]

The old and the new French codes of commerce require the charter party to be in writing, though Valin holds that the contract, if by parol, would be equally valid and binding. (*e*)

(*a*) Putnam *v.* Wood, 3 Mass. 481; Ripley *v.* Scaife, 5 B. & C. 167.

(*b*) Havelock *v.* Geddes, 10 East, 555.

(*c*) Lawes on Charter Parties, 130. Sunday is included (in the absence of custom) in the computation of the lay days at the port or discharge. Brown *v.* Johnson, 10 M. & W. 331. The running days in charter parties mean consecutive days, and include Sundays and holidays. But if the contract speaks of working days, Sundays and holidays are excluded. Cochran *v.* Retberg, 3 Esp. 121; Brown *v.* Johnson, *sup.*; Field *v.* Chase, Sup. Court, N. Y. 1844, 8 N. Y. Legal Observer, 8.

(*d*) Leer *v.* Yates, 8 Taunt. 887; Harman *v.* Gandolph, Holt N. P. 85. The argument is fairly stated, and this rigorous rule ably vindicated, by Mr. Holt, in a note to the case last referred to, and that note was afterwards transferred to his Treatise on Shipping, ii. 17, note.

(*e*) Ord. de la Mar. liv. 3, tit. Des Charte-Parties, art. 1, and Valin's Comm. ib. Code de Commerce, art. 278. The contract for demurrage beyond the lay days is frequently an express covenant in a charter party, binding the cargo for the performance of the covenant to pay demurrage, as well as of the covenant to pay freight; and

[1] See 206, n. 1.

* 204 * In the English law, the hiring of ships without writing is undoubtedly valid;[1] but it would be a very loose and dangerous practice, at least in respect to foreign voyages. In the river and coasting trade there is less formality and less necessity for it; and the contract is, no doubt, frequently without the evidence of deed or writing. (*a*)

If either party be not ready by the time appointed for loading the ship, the other party, if he be the charterer, may seek another ship, or, if he be the owner, another cargo. This right arises from the necessity of precision and punctuality in all maritime transactions. By a very short delay, the proper season may be lost, or the object of the voyage defeated.[2] And if the ship be loaded only in part, and she be hired exclusively for the voyage, and to take in a cargo at certain specified rates, the freighter is entitled to the full enjoyment of the ship; for he is answerable to the owner for freight, not only for the cargo actually put on board, but for what the vessel could have taken, had a full cargo been furnished. (*b*) The master has no right to complete the lading with the goods of other persons without the consent of the charterer; and if he grants that permission, the master must account to him for the freight. He has no right to complain, if the charterer refuses to grant the permission, or complete the lading, provided he has cargo enough to secure his freight. This was the regulation of the French ordinance, and it has been adopted into the new code. (*c*)

By the contract, the owner is bound to see that the ship be seaworthy, which means that she must be tight, stanch, and strong, well furnished, manned, victualled, and, in all

* 205 * respects, equipped in the usual manner for the merchant service in such a trade. (*a*) The ship must be fit and

the lien is the same in both cases, unless subsequently waived by some explicit act on the part of the owner. See the case of the Volunteer, 1 Sumner, 551. [*Post*, 206 n. 1.]

(*a*) Molloy, de Jure Mar. b. 2, c. 4, sec. 8; Boulay-Paty, ii. 268, 269.

(*b*) Duffie *v.* Hayes, 15 Johns. 827.

(*c*) Ord. du Fret, art. 2; Pothier, Charte-Partie, n. 20, 21, 22, 24, 25; Code de Commerce, n. 287.

(*a*) Emerigon, i. 378, 374, 375; Abbott on Shipping, 5th Am. ed. Boston, 1846, pp. 417–421. [See The Sarah, 2 Sprague, 31.]

[1] Lidgett *v.* Williams, 4 Hare, 456, 462.

[2] 206, n. 1.

competent for the sort of cargo and the particular service for which she is engaged. If there should be a latent defect in the vessel, unknown to the owner and undiscoverable upon examination, yet the better opinion is, that the owner must answer for the damage occasioned by the defect. It is an implied warranty in the contract, that the ship be sufficient for the voyage, and the owner, like a common carrier, is an insurer against every thing but the excepted perils. (*b*) [1] To this head of seaworthiness may be referred the owner's obligation to see that the ship is furnished with all the requisite papers according to the laws of the country to which she belongs, and according to treaties and the laws of nations. Such documents are necessary to secure the vessel from disturbance at home, on the high seas, and in foreign ports. (*c*) If the charter party contains any stipulation on the part of the owner to keep the ship in good order during the voyage, the entire expense of the repairs requisite in the course of the voyage are then to be borne by the owner, and are not, in that case, the *subject of general average *206 or contribution. (*a*) But the owner does not insure the cargo against the perils of the sea. He is answerable for his own fault or negligence, or those of his agents, and for defects in the ship or her equipments, and generally, as a common carrier, he is answerable for all losses other than what arise from the excepted cases of the act of God and public enemies. (*b*) The responsibility of the owner begins where that of the wharfinger ends, and when the goods are delivered to some accredited person on board

(*b*) Lyon *v.* Mells, 5 East, 428; Putnam *v.* Wood, 3 Mass. 481; Silva *v.* Low, 1 Johns. Cas. 184; Whitall *v.* The Brig William Henry, 4 La. 223; Ord. de la Mar. iv. 3, tit. 3, Du Fret, art. 12; Pothier, Charte-Partie, n. 27. Valin, Comm. h. t., says (and in this he agrees with the English law), that the owner is answerable, on his contract, for latent defects, even though the ship had been previously visited by experienced shipwrights, and the defect had escaped detection; though Pothier (Charte-Partie, n. 30) dissents from this opinion of Valin, so far as it relates to latent defects unknown to the owner.

(*c*) Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 427; Baring *v.* The Royal Exchange Assurance Company, 5 East, 99; The Same *v.* Christie, ib. 398; Baring *v.* Claggett, 3 Bos. & P. 201; Lothian *v.* Henderson, ib. 499; Ord. de la Mar. liv. 3, tit. 1, Charte-Parties, art. 10; Valin, Comm. h. t. The ship must be provided with a bill of health, when it is requisite, at the port of destination. Levy *v.* Costerton, 4 Camp. 389; s. c. 1 Starkie, 212.

(*a*) Jackson *v.* Charnock, 8 T. R. 509.

(*b*) See ii. 597–607.

[1] See 217, n. 1.

the ship. (c) [1] The cargo must be taken on board with care and skill, and be properly stowed, and the contract by the bill of

(c) Cobban *v.* Downe, 5 Esp. 41.

[1] *The Charter Party.* — (*a*) *Beginning of the Risk.* — The owner's liability attaches if the goods are delivered to the owner's servants alongside the vessel. British Columbia Saw Mill Co. *v.* Nettleship, L. R. 3 C. P. 499. And the liability of the vessel begins at the same moment. The Bark Edwin, 1 Sprague, 477; s. c. 24 How. 386; The Pacific, 1 Blatchf. 569, 586; The Cordillera, 5 Blatchf. 518; (for the limit, see The Lady Franklin, 8 Wall. 325; and the *point decided* in The General Sheridan, 2 Benedict, 294.) Although, of course, neither owner nor vessel will be liable if the goods are delivered without any previous understanding or contract to a servant who has no real or apparent authority to make one or to receive the goods. Trowbridge *v.* Chapin, 23 Conn. 595. See Grosvenor *v.* N. Y. C. R.R., 39 N. Y. 34. See, further, The Keokuk, 9 Wall. 517.

(*b*) *Stevedore.* — It is a very common stipulation that the charterer's stevedore shall be employed by the ship. This gives the charterers an option, and if they choose to exercise it, it is the master's duty to employ and pay the stevedore so appointed; if they do not, the master is not on that account discharged from his duty to properly load the ship. Anglo-African Co. *v.* Lamzed, L. R. 1 C. P. 226; Har. & Ruth. 216. In one case where the charterers did appoint him it was held that the master was not liable to a merchant sending goods on board a general ship for damage by the stevedore's negligence. Blaikie *v.* Stembridge, 6 C. B. N. S. 894; *ante*, 161, n. 1. So the ship has been exonerated from liability for damage done to the cargo in discharging it by the stevedore, on the ground that he was the agent of the shippers. The Miletus, 5 Blatchf. 335. But the owners have been held liable on the construction of the charter party. Sack *v.* Ford, 13 C. B. N. S. 90.

(*c*) *Time in Charter Parties.* — Demurrage means the additional period during which the vessel may remain by agreement of the parties, and does not include the time during which she is detained contrary to agreement, according to Gray *v.* Carr, L. R. 6 Q. B. 522, 528, 544. See Clendaniel *v.* Tuckerman, 17 Barb. 184; Morse *v.* Pesant, 2 Keyes, 16; but see Sprague *v.* West, Abbott, Adm. 548. The whole doctrine of the English courts was criticised by Judge Lowell, in The Hyperion's Cargo, 2 Lowell, ; and a proceeding against the cargo for unliquidated damages by way of demurrage was sustained.

When the charter party is silent, as it rests exclusively on the merchant to procure the cargo, the law would imply a contract to do so within a reasonable time after the vessel is ready to receive cargo; and unless the contract is framed with reference to a peculiar state of things (Harris *v.* Dreesman, 23 L. J. N. S. Ex. 210), reasonable time means what would be such under ordinary circumstances, and peculiar difficulties which may have arisen from the mode in which the merchant has procured the cargo are not to be considered. Ford *v.* Cotesworth, L. R. 4 Q. B. 127, 135; (citing Adams *v.* Royal M. S. P. Co., 5 C. B. N. S. 492; Kearon *v.* Pearson, 7 Hurlst. & N. 386.) When a time is mentioned, it is a question of construction whether it is of the essence of the contract, or, in other words, a warranty, and therefore a condition precedent. *Post*, 282, n. 1; MacAndrew *v.* Chapple, L. R. 1 C. P. 643, 647; Seeger *v.* Duthie, 8 C. B. N. S. 45, 64.

As to contracts on the part of the owner, see Tarrabochia *v.* Hickie, 1 Hurlst. & N. 183; Behn *v.* Burness, 3 Best & S.

lading imports that the goods are to be safely stowed under deck, and if they are stowed on deck without the consent of the shipper, or without the sanction of custom, they are at the risk of the ship owner or master, and he and the owners of the vessel would not be protected from liability for their loss by the exception in the bill of lading of the *dangers of the seas.* (*d*) If the ship had been advertised by the agent of the owner for freight as a general ship, and the notice had stated that she was to sail with convoy, this would amount to an engagement to that effect; and if she sails without convoy and be lost, the owner becomes

(*d*) Code de Commerce, art. 229; Valin, Comm. i. 397; The Paragon, Ware, 322; The Waldo, District Court of Maine, 1841, [Daveis, 161]; Gould *v.* Oliver, 2 Mann. & G. 208; The Rebecca, Ware, 188; Barber *v.* Brace, 3 Conn. 9; Dorsey *v.* Smith, 4 La. 211; Shackleford *v.* Wilcox, 9 La. 33. If goods are put on board a vessel without the knowledge of the master, he may put them ashore, for there is no implied contract of affreightment. But if they are not discovered until he sails, the better opinion is,

751; Lowber *v.* Bangs, 2 Wall. 728; Dimech *v.* Corlett, 12 Moore, P. C. 199; Yates *v* Duff, 5 C. & P. 869; Cranston *v.* Marshall, 5 Exch. 395; Cobb *v.* Howard, 3 Blatchf. 524; Ollive *v.* Booker, 1 Exch. 416; *infra*, n. 2.

As to the law by which charter parties are construed, see 164, n. 1.

Delivering cargo is as much the duty of the ship owner as of the merchant; and, consequently, the contract implied by the law, in the absence of any stipulation, in a charter party, is that each party shall use reasonable diligence in performing his part of delivery at the port of discharge, not that either shall perform his part within a fixed or reasonable time. There is no contract implied by law on the part of the ship owner to allow his vessel to be kept there for the usual time, if by reasonable diligence on the part of the merchant the cargo might be sooner taken away, and none on the part of the merchant to take the cargo out within such usual time, if he could not by reasonable diligence perform it. In a case where, after a ship had begun to discharge, the authorities had refused to allow any more of the cargo to be landed for several days, on account of a threatened bombardment, and nothing was said in the charter party about the time to be occupied in the discharge, it was held that the owner could not recover of the charterer for the delay. Ford *v.* Cotesworth, L. R. 4 Q. B. 127, 134; L. R. 5 Q. B. 544. Compare Clendaniel *v.* Tuckerman, 17 Barb. 184; Morse *v.* Pesant, 2 Keyes, 16; Cross *v.* Beard, 26 N. Y. 85.

(*d*) *Obligations.* — The owners are not bound to take goods of such a condition or character that they cannot be carried without damage to the cargo already on board; and all that is required of a master competent for his office in determining whether they are of that character is that he shall exercise an honest and reasonable judgment. Boyd *v.* Moses, 7 Wall. 816; citing Weston *v.* Minot, 3 Woodb. & M. 436; Weston *v.* Foster, 2 Curtis, 119; *post*, 217, n. 1; 218, n. 2. See Parrott *v* Barney, 2 Abbott, U. S. 197, 222.

(*e*) *Discharge.* — In a charter party by which a ship is to proceed to a certain place, and load for the specified voyage, it is said that both parties are discharged if the ship perishes on her way to fetch the cargo. Potter *v.* Rankin, L. R. 5 C. P. 341, 371; but not by a change of military operations which defeats the purpose of the intended voyage. The Harriman, 9 Wall. 161; *post*, 224. *Cf.* ii. 468, n. 1.

answerable to the shipper in damages for the breach of that representation. (e)[2]

2. **Of the Bill of Lading.** — In execution of the contract of charter party, the master of the ship signs a bill of lading, which is an acknowledgment of the receipt of the goods on board, and of the conveyance of them which he assumes. The bill of lading contains the quantity and marks of the merchandise, the names
* 207 of the * shipper and consignee, the places of departure and discharge, the name of the master and of the ship, with the price of the freight. The charter party is the contract for the hire of the ship, and the bill of lading for the conveyance of the cargo; and though it be signed by the master, he does it as agent for the owners, and it is a contract binding upon them. (a)[1]

that the master is not to leave them at an intermediate port without necessity, but to carry them to the port of destination. Ord. du Fret, art. 7; Pothier, de Charte-Partie, n. 10–12. Code de Commerce, n. 292; Boulay-Paty, ii. 373; The Huntress, District Court of Maine, 1840, [Daveis, 82.]

(e) Runquist v. Ditchell, 3 Esp. 64; Magalhaens v. Busher, 4 Camp. 54.

(a) Beawes's Lex Mercatoria, 133, 142; Ferguson v. Cappeau, 6 Harr. & J. 394. See Abbott on Shipping, 5th Am. ed. Boston, 1846, 396–417, the cases cited and considered at large on this subject.

[2] *Sup.* n. 1. Other cases on warranty are Hurst v. Usborne, 18 C. B. 144; Barker v. Windle, 6 El. & Bl. 675; Routh v. Macmillan, 2 Hurlst. & C. 750.

[1] *The Bill of Lading.* — The effect of a bill of lading as a contract, when it contains terms not authorized by the charter party, has already been considered as between the original parties to it. 188, n. 1.

If a bill of lading comes to the hands of an assignee for value, he is entitled to have the goods delivered to him on the terms mentioned in it, and is not bound to refer to the charter party, unless the bill of lading shows a clear intention to include some of the terms of the charter party. Fry v. Chartered Mercantile Bank of India, L. R. 1 C. P. 689; Chappel v. Comfort, 10 C. B. N. S. 802, 810, per Willes, J.; Foster v. Colby, 3 Hurlst. & N. 705; The Norway, Brown. & Lush. 226, 239; Gray v. Carr, L. R. 6 Q. B. 522, 538; Bags of Linseed, 1 Black, 108. As to the effect of a receipt indorsed on the bill upon the lien for freight, see 228, n. 1, (d).

The master's declarations in a bill of lading as to the apparent nature, quality, and condition of goods on board, estop the owners as against a consignee who is not a party to the contract, and as against an assignee of the bill for value, as this is within the scope of his agency. Sears v. Wingate, 3 Allen, 103, 107; Bradstreet v. Heran, 2 Blatchf. 116; Abbott, Adm. 209; Nelson v. Woodruff, 1 Black, 156. See The Freedom, L. R. 3 P. C. 594.

But as between the original parties, the bill of lading is only a receipt so far as it relates to these matters, and is open to contradiction. Ib.; Ellis v. Willard, 5 Seld. (9 N. Y.) 529; Meyer v. Peck, 28 N. Y. 590, 596; Tarbox v. Eastern Steamb. Co., 50 Me. 339; Zerega v. Poppe, Abbott, Adm. 397. And if the master signs a bill of lading for goods not on board (or at least delivered alongside, which, perhaps, is enough, 206, n. 1), he is not acting within the apparent scope of his author-

By the bill of lading, the master engages as a common carrier to carry and deliver the goods to the consignee, or his order, dangers of the sea excepted; (*b*) and, by the common law, owners were responsible for damages to goods on board, to the full extent of the loss. But in England, by the statute of 53 Geo. III. c. 159, owners and part owners of ships are not liable beyond the value of the ship and freight, even though the loss was occasioned by the misconduct of the master and a part owner. (*c*) This statute

(*b*) This was formerly the only exception in bills of lading; but in later times, says Lawes, Treatise on Charter Parties, 817, captains and ship owners have wisely extended the exception to the acts of God, public enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation. Piracy is deemed a peril of the sea, as see *post*, 216.

(*c*) The statutes of Massachusetts in 1818, c. 122, and of 1885, c. 82, are to the same purport.

ity, *ante*, 164, n. 1; and will not make the owners or the ship liable even to an indorsee of the bill for value. Grant *v.* Norway, 10 C. B. 665; Hubbersty *v.* Ward, 8 Exch. 330; Jessel *v.* Bath, L. R. 2 Ex. 267; Sears *v.* Wingate, *sup.*; The Freeman *v.* Buckingham, 18 How. 182; The Loon, 7 Blatchf. 244. See The Lady Franklin, 8 Wall. 325. So it is not within the usual authority of the master to bind the owners by a bill of lading making the freight payable to a third person, or by an engagement to carry goods free of freight. Reynolds *v.* Jex, 7 Best & S. 86. See Mercantile Bank *v.* Gladstone, L. R. 8 Ex. 233, 240.

In the absence of a statute like 18 & 19 Vict. ch. 111, § 1, although indorsement of the bill of lading may pass the property in the goods, it does not transfer the contract, so as to enable the indorsee to sue upon the bill of lading in his own name in courts of common law. Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 297; Dows *v.* Cobb, 12 Barb. 310; Blanchard *v.* Page, 8 Gray, 281, 298. But the assignee of a chose in action may sue in his own name in the American admiralty courts. Cobb *v.* Howard, 3 Blatchf. 524; Mutual Safety Ins. Co. *v.* Cargo of Brig George, Olcott, 89. See ib. 498. See especially the learned argument in Swett *v.* Black, 1 Sprague, 574. And the indorsee might sue at common law in respect of his property in the goods for detaining or converting them, and the *master*, it is said, would be estopped from denying that he had the goods after the declaration in the bill of lading, on the faith of which the indorsee had bought and paid for them. Tindall *v.* Taylor, 4 El. & Bl. 219, 229; Howard *v.* Shepherd, 9 C. B. 297.

So it seems that a consignee to whom by the bill of lading the goods are to be delivered, has *prima facie* such a property in the goods as will enable him to sue the master. Tronson *v.* Dent, 8 Moore, P. C. 419, 438; Coleman *v.* Lambert, 5 M. & W. 502, 505; Lawrence *v.* Minturn (The Hornet), 17 How. 100. See Seagrave *v.* Union N. Ins. Co., L. R. 1 C. P. 305, 319; The Freedom, L. R. 3 P. C. 594. See the note, ii. 549, n. 1, as to whether property passes or not.

As to the liability of the consignee and indorsee to be sued, see 222 & n. 1.

As to what is or has the effect of a bill of lading, see Rawls *v.* Deshler, 3 Keyes, 572; Coosa R. St. Co. *v.* Barclay, 30 Ala. 120. *Cf.* ii. 547, n. (*d*); 549, n. 1.

assimilated the common law of England to the maritime law of France, and other commercial countries; and the great principle was, to limit the responsibility of part owners to the amount of their respective capitals embarked in the ship. The value of the ship was to be calculated at the time of the loss, and the freight, in the statute, means all the freight, whether paid in advance or not. (*d*) [2]

There are commonly three bills of lading; one for the freighter, another for the consignee, factor or agent abroad, and a third is usually kept by the master for his own use. It is the document and title of the goods sent; and, as such, if it be to order or assigns, is transferable in the market. The indorsement and delivery of it transfers the property in the goods from the time of the delivery. (*e*) The *bona fide* holder of the bill of lading, indorsed by the consignee, is entitled to the goods, if he purchased the bill for a valuable consideration.

* 208 * Where there are several bills of lading, each is a contract in itself as to the holder of it, but the whole make only one contract as to the master and owners. If the several parts of the bill of lading be indorsed to different persons, a competition may arise for the goods; and the rule generally is, that if the equities be equal, the property passes by the bill first indorsed. (*a*)

3. Of the Carriage of Goods. — When the ship is hired, and the cargo laden on board, the duties of the owner, and of his agent, the master, arise in respect to the commencement, progress, and termination of the voyage. Those duties are extremely important to the interests of commerce, and they have been well and accurately defined in the marine law. (*b*)

(*d*) Wilson *v.* Dickson, 2 B. & Ald. 2.

(*e*) See ii. 548–550. This is also the law in France. Code de Commerce, art. 281. A *shipping note* of goods at sea does not amount to a bill of lading, and it is not indorsable so as to effect a change of property, and arrest the right of stoppage *in transitu* by the consignor. Akerman *v.* Humphery, 1 Carr. & P. 53.

(*a*) [Barber *v.* Meyerstein, L. R. 4 H. L. 317;] Caldwell *v.* Ball, 1 T. R. 205; 1 Bell's Comm. 545. When goods are sent by a ship hired by a charter party, the bills of lading are delivered by the master to the person by whom the ship is chartered. But if they are sent by a *general ship*, employed as a general carrier, each individual who sends goods on board receives a bill of lading for the same.

(*b*) See Abbott on Shipping, 5th Am. ed. Boston, 1846, c. 5, part 4, p. 417, for a

[2] See now the act of March 3, 1851, ch. 43, 9 U. S. St. at L. 635; *post*, 217, n. 1.

*When the voyage is ready, the master is bound to sail *209 as soon as the wind and tide permit; but he ought not to set out in very tempestuous weather. (a) If, by the charter party, the ship was to sail by a given day, the master must do it, unless prevented by necessity; and if there be an undertaking to sail with convoy, he is bound to go to the place of rendezvous, and place himself under the protection and control of the convoy, and continue, as far as possible, under that protection during its course. (b) He is bound, likewise, to obtain the requisite sailing instructions for the convoy; (c) but these covenants to sail with the first fair wind, and with convoy, are not conditions precedent to the recovery of freight, and a breach of them only goes to the question of damages. (d)

The master is bound, likewise, to proceed to the port of delivery

view of the authorities and the law, on the general duties of the master and owners on this very interesting head, respecting the preparation, the commencement, the course, and the completion of the voyage. The duties of the captain are described minutely in the French statute codes. Every ship must be inspected by the captain, under the forms prescribed, before she sails, and if he has no such official report of the vessel, he becomes responsible for every accident. He must keep a regular journal of events on the voyage; and the ordinances prescribe very sage regulations in case of the death of any seaman on board, touching his effects. He must be exact in providing the requisite ship's papers before he sails; such as the bill of sale, register, *rôle d'équipage*, bill of lading, and charter party, process verbal, clearance at the customs, and a license to sail. He must be on board when the vessel breaks ground. He is answerable for damages even by *cas fortuit*, when the goods were on deck, unless he had the consent of the owner in writing, or it was a coasting voyage; and if he sails not in conformity to the regulations of the ordinances, he becomes responsible for all damages, and cannot invoke the exception of *force majeure*, when those regulations have not been observed. (Ord. de la Mar. art. 10, tit. Testament, art. 4; Ord. 1720, 1739, 1779; Code de Com. art. 224, 225, 226, 228, 229; Code Civil, art. 59, 86; 1 Emerigon, 374; Boulay-Paty, ii. 1–35.) The foreign marine ordinances usually make special provision for the proper storage of the cargo. We have seen in the preceding part of these lectures, that the master was responsible, as a common carrier, for the carriage and safe delivery of the goods; and in the case of Sprott *v.* Brown, in the Scottish Courts, (Bell's Comm. i. 557, note,) a large mirror was shipped from London to Edinburgh, in a case marked *glass*, and the master had assumed to carry it safe, and it was found broken, on delivery, without any known cause, and the master was held responsible.

(a) Roccus, note 56; Ord. of Rotterdam, art. 128; Abbott on Shipping, 5th Am. ed. Boston, 431.

(b) Gordon *v.* Morley, Strange, 1265; Lilly *v.* Ewer, Doug. 72; Jefferies *v.* Legendra, Carth. 216.

(c) Webb *v.* Thompson, 1 Bos. & P. 5; Anderson *v.* Pitcher, 2 id. 164; Victorin *v.* Cleeve, Strange, 1250.

(d) Constable *v.* Cloberie, Palmer, 397; Davidson *v.* Gwynne, 12 East, 381.

without delay, and without any unnecessary deviation from the direct and usual course. If he covenants to go to a loading port by a given time, he must do it, or abide the forfeiture; (*e*) and if he be forced by perils out of his regular course, he must regain it with as little delay as possible. Nothing but some just and necessary cause, as to avoid a storm, or pirates, or enemies, or to procure requisite supplies or repairs, or to relieve a ship in
* 210 distress, will justify a deviation * from the regular course of the voyage. (*a*) If he deviates unnecessarily from the usual course, and the cargo be injured by tempest during the deviation, the deviation is a sufficiently proximate cause of the loss to entitle the freighter to recover; though if it could be shown that the same loss not only *might* but *must* have happened if there had not been any deviation, the conclusion might be otherwise. (*b*) Nor has the captain any authority to substitute another voyage in the place of the one agreed upon between his owners and the freighters of the ship. Such a power is altogether beyond the scope of his authority as master. (*c*) In cases of necessity, as where the ship is wrecked, or otherwise disabled, in the course of the voyage, and cannot be repaired, or cannot, under the circumstances, be repaired without too great delay and expense, the master may procure another competent vessel to carry on the cargo and save his freight. If other means to forward the cargo can be procured, the master must procure them, or lose his freight; and if he offers to do it, and the freighter will not consent, he will then be entitled to his full freight. (*d*) The Rhodian law (*e*) exempted the master from his contract to carry the goods, if the ship became unnavigable by the perils of the sea. Faber and Vinnius were of opinion, that by the Roman law the master was *not bound*, in such a case, to seek another ship, because
* 211 the contract related only to the * ship that was disabled. (*a*)

(*e*) Shubrick *v.* Salmond, 3 Burr. 1637; [Higginson *v.* Weld, 14 Gray, 165.]

(*a*) Roccus on Ins. n. 52; Patrick *v.* Ludlow, 3 Johns. Cas. 10; Post *v.* Phœnix Ins. Co., 10 Johns. 79; Reade *v.* Com. Ins. Company, 8 id. 352; Suydam *v.* Marine Ins. Company, 2 id. 138; Marshall, C. J., Mason *v.* The Ship Blaireau, 2 Cranch, 257, note. (*b*) Davis *v.* Garrett, 6 Bing. 716.

(*c*) Burgon *v.* Sharpe, 2 Camp. 529.

(*d*) Molloy, b. 2, c. 4, sec. 5; Griswold *v.* New York Insurance Company, 3 Johns. 321; Bradhurst *v.* Columbian Insurance Company, 9 id. 17; Schieffelin *v.* New York Insurance Company, ib. 21. (*e*) Dig. 14. 2. 10. 1.

(*a*) Vinnius, notæ ad Com. Peckii, ad Rem Nauticam, 294, 295, and Anthony Faber, Com. ad Pand., whom Vinnius cites and follows.

The laws of Oleron, and the ordinances of Wisbuy, gave the *power* to the master to hire another vessel, if he chose to do so, and earn freight; but the marine ordinance of Louis XIV. declared it to be *the duty* of the master to hire another ship in such a case, if it be in his power. (*b*) The French jurists differ in opinion in respect to the obligation of the master to hire another vessel to carry on the cargo, when his own becomes irreparable. Valin and Pothier contend, that the master is no further bound to procure another vessel, than by losing his freight for the entire voyage, if he omits to do it; for, by the contract of affreightment, he only engaged to furnish his own vessel, and when, by the perils of the sea, or by some superior force, for which he is not responsible, he becomes unable to furnish it, all that he is bound to do, by the principles of the contract, is to discharge the freighter from the freight for the residue of the voyage. But Emerigon insists that they are mistaken in their construction of the ordinance, and that the master is guilty of a breach of duty, if he refuses to procure another vessel, and take on the cargo, if it be in his power, and that this duty results from the nature of his trust. (*c*)

The new French code has followed the words of the ordinance, and declared, that if the vessel becomes disabled, and the master can have her repaired, the freighter is bound to wait, or pay the whole freight; and that if the vessel cannot be repaired, the master is bound to hire another, and if he cannot hire another, the freight is due only in proportion to the voyage performed. Boulay-Paty, in his commentaries *on the new code, *212 adopts the construction of Emerigon, and holds his reasoning to be conclusive. (*a*) Pardessus is also of the opinion, that if the vessel in the course of the voyage becomes unnavigable, the master is bound, if it be in his power, to procure another. (*b*)

The English rule undoubtedly is, that if the ship be disabled from completing the voyage, the ship owner may still entitle himself to the whole freight by forwarding the goods by some other

(*b*) Jugemens d'Oleron, art. 4; Laws of Wisbuy, art. 16; Ord. de la Mar. tit. Du Fret, art. 11.

(*c*) Valin, tit. Du Fret, art. 11, i. 618; Pothier, Charte-Partie, n. 68; Emerigon, i. 428, 429.

(*a*) Code de Commerce, art. 296; Boulay-Paty, Cours de Droit Com. ii. 400-406.

(*b*) Cours de Droit Com. iii. n. 644.

means to the place of destination; and he has no right to any freight, if they be not so forwarded, unless it be dispensed with, or there be some new contract upon the subject. (c)[1] In this country we have followed the doctrine of Emerigon and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and dis-

(c) Lord Ellenborough, 10 East, 393. The English law has gone no further with the case than to state that the master is *at liberty* to procure another ship to transport the cargo to the place of destination, and earn his full freight, according to the original contract. Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 446. In Shipton *v.* Thornton, 9 Ad. & El. 814, the Court of K. B. leave it as a doubtful point whether it be the *duty* as well as the right of the master to procure another vessel, if he can, and carry on the cargo.

[1] *Right to forward in another Vessel.*— The British cases still go no farther than the statement in note (c), according to The Bahia, Brown. & Lush. 292, 305; 11 Jur. N. S. 90; Tronson *v.* Dent, 8 Moore, P. C. 419, 455; Kidston *v.* Empire Ins. Co., L. R. 2 C. P. 357, 365; Notara *v.* Henderson, L. R. 7 Q. B. 225, 231. But compare Lee *v.* Southern Ins. Co., L. R. 5 C. P. 397, 405. The language of the American cases agrees with the text, and concedes the master's power to charge the cargo with the increased freight. The Maggie Hammond, 9 Wall. 435, 459; The Niagara *v.* Cordes, 21 How. 7, 24; Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595, 609; Crawford *v.* Williams, 1 Sneed, 205. But when the owner of a vessel, by reason of the perils of the sea, ceases to have any interest, either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, the master's authority to bind the owner is at an end. Thwing *v.* Washington Ins. Co., 10 Gray, 443, 460; Lemont *v.* Lord, 52 Me. 365, 399. See De Cuadra *v.* Swann, 16 C. B. N. S. 772. If, under such circumstances, the master sends on the cargo, he does it as agent *ex necessitate* for the owners of the cargo; *ante*, 172, n. 1; and his duty in such an emergency, if he can have no correspondence with them, is to put himself in their place, and do what they as prudent men would do for their own interest if they were present. Lemont *v.* Lord, *sup.*; Crawford *v.* Williams, 1 Sneed, 205; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 323; L. R. 5 Q. B. 353.

However the English law may be as to the last proposition, it recognizes a duty on the master, as representing the ship owner, to take reasonable care of the goods intrusted to him, not merely by preserving them while sound, but by taking such active measures as are reasonably practicable, to arrest the damage resulting to them from accidents, although the ship owner is exempted from the proximate effects of such accidents by the terms of the bill of lading. This duty is distinguished from the authority to transship, (which is spoken of as a power for the benefit of the ship owner only, to secure his freight, L. R. 7 Q. B. 235, citing De Cuadra *v.* Swann, 16 C. B. N. S. 772,) and is held to be one for a breach of which the ship owner is liable to the owners of the cargo. The presence of the owners of the cargo, moreover, makes no difference, as the master is entitled to withhold the goods for the purpose of earning freight. Notara *v.*

cretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel, in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case. He may transship the cargo, if he has the means, or let it remain. He may bind it for repairs to the ship. He may sell part, or hypothecate the whole. If he hires another vessel for the completion of the voyage, he may charge the cargo with the increased freight, arising from the hire of the new ship; and this power is expressly given him by the old and the new ordinances of France, and it is established by decisions in New York. (*d*) The master may refuse to hire another vessel, and insist on repairing his own; and whether the freighter be bound to wait for the time to repair, or becomes entitled to his goods without any charge of freight, will depend upon circumstances. * What would be a rea- * 213 sonable time for the merchant to wait for repairs cannot be defined, and must be governed by the facts applicable to the place and the time, and to the nature and condition of the cargo. A cargo of a perishable nature may be so deteriorated as not to endure the delay for repairs, or may be too unfit and worthless to be carried on. (*a*) The master is not bound to go to a distance to procure another vessel, and encounter serious impediments in

(*d*) Mumford *v.* The Commercial Insurance Company, 5 Johns. 262; Searle *v.* Scovell, 4 Johns. Ch. 218. Lord Denman, in Shipton *v.* Thornton, 9 Ad. & El. 314, said, that no case of that sort had occurred in England; and he seemed to suppose, that in a case where the transshipment could not be made but at the charge of an *increased freight*, and when it would be greatly for the benefit of the freighter that the goods should be sent forward, the master, in his character of agent of the owner, ought to do it. If the cargo be charged with the increased freight, it becomes an average loss to be borne by the insurer.

In Shultz *v.* Ohio Ins. Co., 1 B. Mon. (Ky.) 839, it was held, that the insurer was not chargeable with such *extra* freight. Ib. 839, 843. He only guarantees the safe arrival of the goods.

(*a*) Herbert *v.* Hallett, 3 Johns. Cas. 93; Clark *v.* Mass. F. & M. Ins. Co., 2 Pick. 104; Hunt *v.* Royal Exchange Assurance, 5 Maule & S. 47.

Henderson, L. R. 7 Q. B. 225; compare s. c. L. R. 5 Q. B. 346. But it is said that he cannot insist on carrying on the cargo in a perishing condition for the sole purpose of earning full freight, when it may be saved by a different course; L. R. 5 Q. B. 354; and, on the other hand, he is not bound to delay the voyage for the sake of the goods, ib. See, further, 228.

As to the law by which the power of the master is determined, see 164, n. 1.

the way of putting the cargo on board another vessel. His duty is only imperative when another vessel can be had in the same or in a contiguous port, or at one within a reasonable distance, and there be no great difficulties in the way of a safe reshipment of the cargo. (*b*)

In the course of the voyage, the master is bound to take all possible care of the cargo, and he is responsible for every injury which might have been prevented by human foresight and prudence, and competent naval skill. He is chargeable with the most exact diligence. (*c*) If the ship be captured during the voyage, the master is bound to render his exertions to rescue the property from condemnation, by interposing his neutral claims, and exhibiting all the documents in his power for the protection of the cargo. (*d*) We have already seen in what cases and to what extent the master may hypothecate or sell the cargo at a port of necessity;[1] and if the ship, relieved at the expense of the goods pledged or sold, should afterwards perish with the residue of the cargo on board, before arrival at the port of destination, the better opinion is, that the owner is not entitled to payment for the goods sold. The merchant is not * 214 placed in a worse situation by the sale of the goods * than if they had remained on board the ship. But the foreign

(*b*) Saltus *v.* Ocean Ins. Co., 12 Johns. 107; Treadwell *v.* Union Ins. Co., 6 Cowen, 270. See *infra*, 821.

(*c*) Roccus, n. 40, 55; Dale *v.* Hall, 1 Wils. 281; Vinnius, notæ ad Peckium, 259; 1 Emerigon, 378; Proprietors of the Trent Navigation *v.* Wood, 3 Esp. 127. The master, on his arrival in port, in case of a disaster, is bound to give, in writing, a verified statement of the circumstances attending the voyage, and the loss. The French law requires the master, within twenty-four hours after his arrival in port, to make his report (*rapport*, and which, in the language of the English and American mercantile law, is termed a *protest*), containing the place and time of his departure, the course he has kept, the dangers he has run, the accidents and all the remarkable circumstances of the voyage. The report is to be made to the Tribunal of Commerce, and, if in a foreign port, before the French consul, or, in the absence of either, before a magistrate, and the report is to be verified by the master, and under circumstances, together with the crew. Code de Commerce, art. 242–248. By the English practice, the master's protest is made before a notary, and, since the English statute of 6 Wm. IV. verification is made by solemn declaration instead of an oath. Abbott on Shipping, by Shee & Perkins, 465, ed. Boston, 1846. Though the protest is not evidence for the master or his owners, yet it is evidence against them, and is received as evidence in foreign courts, and it is of great utility in matters of adjustment of losses, and much consideration is given to it by merchants. Abbott, ib. 466.

(*d*) Cheviot *v.* Brooks, 1 Johns. 864.

[1] 172, n. 1; 174, n. 1.

authorities are very much at variance on the point, and it remains yet to be settled in the English and American law. (*a*)

4. **Of the Delivery of Goods.** — On the arrival of the ship at the place of destination, the cargo is to be delivered to the consignee, or to the order of the shipper, on production of the bill of lading and payment of the freight. The English practice is, to send the goods to the wharf, with directions to the wharfinger not to part with them until the freight and other charges are paid, provided the master be doubtful of the payment; for by parting with the possession, the master loses his lien upon them for the freight. (*b*) The cargo is bound to the ship as well as the ship to the cargo; but the master cannot detain the goods on board the ship until the freight be paid, for the merchant ought to have an opportunity to examine the condition of them previous to payment. (*c*) The foreign ordinances of Wisbuy, and of Louis XIV., allow the master to detain the goods, while in the lighter or barge, on the passage to the quay, for they are still
* in his possession. (*a*) The manner of delivery, and the * 215
period at which the responsibility of the owners and master ceases, will much depend upon usage. (*b*) The general rule is, that delivery at the wharf (when there are no special directions to the contrary) discharges the master. (*c*) But the very reasonable qualification of the rule is, that there must be a delivery at the wharf to some person authorized to receive the goods, or due previous notice must have been given to the consignee of

(*a*) Emerigon has collected all the authorities, *pro* and *con*, on this very debatable question. See Hall's Emerigon on Maritime Loans, 92. Non nostrum tantas componere lites. In favor of the right of the merchant to be paid, see the Laws of Wisbuy, art. 68; Valin, Comm. tit. Du Fret, art. 14, i. 665; Cushing's Pothier on Maritime Contracts, 19, Charte-Partie, n. 84, and Cleirac, Jugemens d'Oleron, art. 22, n. 2. In opposition to such a claim, Emerigon reasons from the provisions and omissions in the Consolato del Mare and the Ordinances of Oleron and Antwerp, that the merchant is not entitled to pay. Pothier also admits that experienced persons, whom he consulted on the subject, were against his opinion. Abbott, in his Treatise on Shipping, 5th Am. ed. Boston, 1846, p. 456, is also against the claim of the shipper to be paid for the goods sold.

(*b*) Abbott on Shipping, pt. 3, c. 3, sec. 11; [4th Am. ed., ch. on Duties of Master and Owners.] Sodergren *v.* Flight, cited in 6 East, 622.

(*c*) Abbott on Shipping, *sup.*

(*a*) Laws of Wisbuy, art. 57; Ord. de la Mar. liv. 3, tit. Du Fret, art. 23.

(*b*) Wardell *v.* Mourillyan, 2 Esp. 693; Heran *v.* Ship Grafton, N. Y. D. Court, U. S. *infra.*

(*c*) Hyde *v.* Trent and Mersey Navigation Company, 5 T. R. 389; Chickering *v.* Fowler, 4 Pick. 371; Cope *v.* Cordova, 1 Rawle, 203; Fox *v.* Blossom, New York Common Pleas, October, 1828.

the time and place of delivery; and the master cannot discharge himself, by leaving them naked and exposed at the wharf. So, if the master gives a receipt for goods for shipping left on the dock, they are as much at the risk of the ship as if actually put on board. (*d*) His responsibility will continue until there is actual delivery, or some act which is equivalent, or a substitute for it, unless the owner of the goods, or his agent, had previously assumed the charge of the goods; (*e*) or at least until the consignee has had notice of the place and time of delivery, and the goods have been duly separated and designated for his use. (*f*)

It is often difficult for the master of a vessel to know to whom he can safely deliver the goods, in case of conflicting claims between consignor and consignee, or consignor and the assignee of the consignee. Prudence would dictate that he deliver the goods to the party upon whose indemnity he can most safely rely. But he ought not to be put to the peril and necessity of indemnity; and it is desirable that he should know to whom of right he can deliver the goods. If the consignee has failed, he
* 216 ought to deliver to the claimant on * behalf of the consignee; and if the consignee has assigned the bill of lading, and the rights of the consignor be still interposed and contested, it is safest for the master to deposit the goods with some bailee, until the rights of the claimants are settled, as they can always be, upon a bill of interpleader in chancery, to be filed by the master. (*a*) Having made a consignment, the consignor or seller has not an unlimited power to vary it at pleasure. He may do it only for the purpose of protecting himself against the insolvency of the buyer or consignee. (*b*)

(*d*) Fisher *v.* Brig Norval, 8 Martin (La.), N. S. 120.

(*e*) Strong *v.* Natally, 4 Bos. & P. 16; Ostrander *v.* Brown, 15 Johns. 39.

(*f*) Chickering *v.* Fowler, Cope *v.* Cordova, and Fox *v.* Blossom, *supra*; 1 Valin's Comm. 636. See ii. 604, 605, S. P. In Heran *v.* The Ship Grafton, (District Court of U. S., N. Y., November, 1844,) Judge Betts held. that according to the well settled course and usage of trade, delivery of goods on freight at the dock, with notice to the consignee of the time and place, discharges the ship owner or common carrier from liability, and that the rule applied equally to the coasting and the foreign trade. But uniform usage will control and regulate the mode of delivery; and an exception to the general rule would also exist, if a reasonable discretion was not exercised by the carrier, and perishable goods be put on the dock in hazardous or improper weather, against the consent of the consignee. Ostrander *v.* Brown, 15 Johns. 39; Cope *v.* Cordova, 1 Rawle, 208, S. P.

(*a*) Abbott on Shipping, pt. 4, c. 10, sec. 24.

(*b*) The Constantia, 6 C. Rob. 321; 1 Emerigon, des Ass. 317. The master may

5. Of the Responsibility of the Ship Owner. — The causes which will excuse the owners and master for the nondelivery of the cargo must be events falling within the meaning of one of the expressions, act of God, and public enemies; or they must arise from some event expressly provided for in the charter party. It is well settled in the English and in our American law, that carriers by water (and whether the carriage relates to foreign or inland navigation), are liable as common carriers, in all the strictness and extent of the common law rule, unless the loss happens by means of one of the excepted perils. (*c*) Perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be *quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The only exception to this definition is, the case of a vessel captured and plundered by pirates, and that has been adjudged to be a peril of the *sea. (*a*) A loss *217 by lightning is within the exception of the act of God; but a loss by fire, proceeding from any other cause, is chargeable upon the ship owner. (*b*) The moment the goods are transferred from the ship or the lighter to the warehouse, this extraordinary responsibility ends, and the warehouseman is not so responsible. (*c*)

It is often a difficult point to determine, whether the disaster

unite in himself the character of consignee as well as master, and in that case he stands in the relation of agent to two distinct principals. In the safe custody and delivery of the cargo he is the agent of the ship owner; and in the sale of it after the cargo has arrived at the place of destination, he is the agent of the shipper or consignor. Thompson, J., and Kent, C. J., in U. Ins. Co. *v.* Scott, 1 Johns. 111, 115; Williams *v.* Nichols, 13 Wendell, 58; The Waldo, U. S. District Court of Maine, 1841, [Davels, 161.]

(*c*) See ii. 598–600.

(*a*) Pickering *v.* Barkley, Style, 132; Barton *v.* Wolliford, Comb. 56.

(*b*) Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent and Mersey Navigation Company, 5 id. 389; Gilmore *v.* Carman, 1 Smedes & M. 279. In Hunt *v.* Morris, 6 Martin (La.), 676, it was held, that the owners of a steamboat destroyed by fire were not liable to the freighters, if proper diligence was used. But that decision was according to the civil law, which is not so strict on this point. But the owner is liable to the freighter for damages arising from fire to the ship, occasioned by gross and culpable negligence in the mode of fitting up the ship, or otherwise. Hunters *v.* The Owners of the Morning Star, Newfoundland, 270.

(*c*) Garside *v.* Trent and Mersey Navigation Company, 4 T. R. 581.

happened by a peril of the sea, or unavoidable accident, or by the fault, negligence, or want of skill of the master.[1] If a rock

[1] *Owner's Liability.* — (*a*) *Common Carriers.* — It has been commonly assumed that a general ship is a common carrier. Laveroni *v.* Drury, 8 Exch. 166, 170; Gage *v.* Tirrell, 9 Allen, 299, 302; Clark *v.* Barnwell, 12 How. 272, 280; Garrison *v.* Memphis Ins. Co., 19 How. 312, 315; The Zenobia, Abbott, Adm. 80. The contrary is argued by Mr. Parsons (1 Ship. 248, & n. 2), on the ground that it is not bound to receive all goods offered. The question, if there is any, is made less important by the fact that a bill of lading is generally given by which the liability is expressly fixed. See, also, Kay *v.* Wheeler, L. R. 2 C. P. 302, 304; Allen *v.* Sackrider, 37 N. Y. 341, (but in this case the ship was not employed as a general ship).

Sea Perils, &c. — The text, 216, is confirmed as to pirates by Gage *v.* Tirrell, 9 Allen, 299, 310. As to fire, by Garrison *v.* Memphis Ins. Co., 19 How. 312, 315; Airey *v.* Merrill, 2 Curtis, 8; Slater *v.* Hayward Rubber Co., 26 Conn. 128; Miller *v.* Steam Nav. Co., 6 Seld. (10 N. Y.) 431. Other perils of the sea are hidden obstructions in a river, recently brought there by the current. Redpath *v.* Vaughan, 52 Barb. 489; Turney *v.* Wilson, 7 Yerg. 340. But see Friend *v.* Woods, 6 Gratt. 189. Restraints of princes and rulers are not perils of the sea. Spence *v.* Chadwick, 10 Q. B. 517; Howland *v.* Greenway (The Griffin), 22 How. 491, 502; Parkhurst *v.* Gloucester M. Fishing Ins. Co., 100 Mass. 301, 305. But the judgment of a foreign court is not one of those restraints, which are confined to interference with a strong hand. Finlay *v.* Liverpool & G. W. Steamship Co., 23 L. T. N. S. 251. Rats and other vermin are not a peril of the sea or within the usual exceptions of a bill of lading. Kay *v.* Wheeler, L. R. 2 C. P. 302; The Miletus, 5 Blatchf. 335.

When the loss would not have happened but for the unseaworthiness of the ship, or other negligence or breach of contract of the owners or master, it would seem that the owners are not exonerated by the fact that the proximate cause of the loss is a jettison on account of a peril of the sea. Schloss *v.* Heriot, 14 C. B. N. S. 59; *post*, 234, n. 1, (*a*); The Portsmouth, 9 Wall. 682, 684; The Norway, 3 Moore, P. C. N. S. 245, 262; Bazin *v.* Richardson, 20 Law Rep. 129; 5 Am. Law Reg. 469. See Tuckerman *v.* Stephens & Condit Transp. Co., 3 Vroom, 320. But compare Memphis & C. R.R. *v.* Reeves, 10 Wall. 176, 191. But when the owners show that the loss was occasioned by one of the excepted risks, the burden of proof is on the plaintiff to show that it might have been avoided but for their negligence. Western Transp. Co. *v.* Downer, 11 Wall. 129; Czech *v.* General Steam Nav. Co., L. R. 3 C. P. 14; 5 Am. Law Rev. 205.

Other Damage. — A vessel is liable *in rem* for damage caused to goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board. The Bark Cheshire, 2 Sprague, 28; *ante*, 206, n. 1; *post*, 218, n. 2. The owners are also liable personally. Gillespie *v.* Thompson, 6 El. & Bl. 477, n. (*a*) to Brass *v.* Maitland. Compare Clark *v.* Barnwell, 12 How. 272; Rich *v.* Lambert, ib. 347; Baxter *v.* Leland, Abbott, Adm. 348; Parrott *v.* Barney, 2 Abbott, U. S. 197, 228. As this is not a peril of the sea, when the ordinary bill of lading is given there is a liability on the contract apart from negligence. The Freedom, L. R. 3 P. C. 594.

(*b*) *Statutory Limitations.* — The owners' liability is now limited in the United States by the act of Congress of March 3, 1851, ch. 43, 9 U. S. St. at L. 635. This statute is carefully discussed in an article, 1 Am. Law Rev. 597, by Mr. Lathrop, of the Boston

or a sand bar be generally known, and the ship be not forced upon it by adverse winds or tempests, the loss is to be imputed

bar, and is said (p. 604) to be taken principally from the English act of 26 Geo. III., and ch. 47 of Maine R. S. 1840. The first section exempts the owners from liability for loss by fire, unless such fire is caused by their design or neglect. This only applies to goods actually on board the vessel. Salmon Falls Manuf. Co. *v.* The Tangier, 21 Law Rep. 6, and next two cases; Morewood *v.* Pollok, 1 El. & Bl. 743. It extends to passengers' baggage. Chamberlain *v.* Western T. Co., 44 N. Y. 305. And the neglect meant is that of the owners personally, and not that of the officers and crew, for which the owners are not liable. Walker *v.* Western Transp. Co., 3 Wall. 150. An amendment was added to the section as first reported (Cong. Globe, xxiii. 719, 720), allowing the parties to make such contract as they please varying the owners' liability. But a local custom making owners liable for negligence of their servants would probably not be enough without an express assumption of that liability. Ib.

The second section exempts the owners from liability for precious metals and stones, coins, jewelry, bank bills, &c., unless a note in writing of their true character and value is given at the time of shipping to the owners or their agents, and the same entered on the bill of lading. See Wattson *v.* Marks, 2 Am. Law Reg. 157. This does not apply to money sufficient for the reasonable travelling expenses of a passenger contained in the valise which he delivers as his luggage. Dunlap *v.* International Steamb. Co., 98 Mass. 371.

By the third section it is enacted "that the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending." And by the fourth, "that if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease." See 218, n. 1; ii. 260, n. 1.

With regard to the time at which the value of the ship and freight is to be estimated, it has been held, in a case of collision, that it is to be taken just before

to the fault of the master. But if the ship be forced upon such rock or shallow by winds or tempests, or if the bar was occa-

the collision occurred. Walker *v.* Boston Ins. Co., 14 Gray, 288; Barnes *v.* Steamship Co., 25 Leg. Int. 196. See African Steamship Co. *v.* Swanzy, 2 K. & J. 660; Leycester *v.* Logan, 3 K. & J. 446. So, in a case of embezzlement by the master, it has been held that the value is to be taken just before the tort was committed. Spring *v.* Haskell, 14 Gray, 309, 316, denying Wattson *v.* Marks, 2 Am. Law Reg. 157. But the latter case has received the approval of the Supreme Court of the United States, in the much contested case of Norwich T. Co. *v.* Wright, 13 Wall. 104, 127; and Walker *v.* Boston Ins. Co., *sup.*, is disapproved as depriving the owner of the right of abandonment if the ship was lost. It has been held that when there are several owners, they are jointly liable to the extent of the value of their interest. Spring *v.* Haskell, 14 Gray, 309. And no deduction is to be made in estimating that value for a mortgage, bottomry, and the like. Spring *v.* Haskell, *sup.*; Barnes *v.* Steamship Co., 25 Leg. Int. 196. The earnings of the vessel in transporting the goods of the owner are *freight*, within the meaning of the statute. Allen *v.* Mackay, 1 Sprague, 219. But if the owner of the vessel, within the meaning of the statute, is not the owner of the freight, the freight does not contribute. Walker *v.* Boston Ins. Co., 14 Gray, 288.

The right of abandonment given by section four has been thought to be allowed only in case of a loss occasioned by the first class of causes mentioned in section three. Walker *v.* Boston Ins. Co., 14 Gray, 288, 307; Barnes *v.* Steamship Co., 25 Leg. Int. 196. When Wright *v.* Norwich & N. Y. T. Co. was before the Circuit Court, the same line of reasoning, and a consideration of the whole act, were thought to lead to the conclusion that Congress only intended to limit the liability of ship owners as common carriers. The general words of the third section as to "any loss, damage, or injury by collision" were considered not to apply to damage done to another vessel; affirming s. c. 1 Benedict, 156, but on different grounds. But the Supreme Court gave the act its broadest construction. 13 Wall. 104. See The Baltimore, 8 Wall. 377, 385; Moore *v.* American Transp. Co., 24 How. 1, 39.

A loss occasioned by the unseaworthiness of the vessel (at the beginning of the voyage?) is not "without the privity of the owner." *In re* Sinclair, 8 Am. Law Reg. 206. The "appropriate proceedings in any court," mentioned in section four, may be taken in the court of admiralty. Norwich Co. *v.* Wright, 13 Wall. 104.

For section five, see 138, n. 1.

Section six preserves liabilities of and remedies against masters and mariners, even when owners or part owners of the vessel.

Section seven imposes a penalty for shipping certain inflammable and dangerous articles without delivering at the time a note of their nature and character to the person in charge of the lading; and also provides that the act shall not apply to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation. But this does not prevent its embracing vessels engaged in commerce on the great northern lakes as well as on the ocean. Moore *v.* American Transp. Co., 24 How. 1; Walker *v.* Western Transp. Co., 3 Wall. 150, 152.

Effect in a Foreign Jurisdiction. — How far such a law is applicable, or would have been applied, in the British courts, to a collision of an American with a foreign ship on the high seas, does not seem to have been considered in Walker *v*

sioned by a recent and sudden collection of sand, in a place where ships could before sail with safety, the loss is to be attributed to a peril of the sea, which is the same as the *vis major* or *casus fortuitus* of the civil law. (*d*) What is an excusable peril depends a good deal upon usage, and the sense and practice of merchants; and it is a question of fact, to be settled by the circumstances peculiar to the case. The English statute law of 26 Geo. III. c. 86, and 53 Geo. III. c. 159, has exempted ship owners in some of these hard cases; but, with the exception of a statute in Massachusetts, passed in 1818, and reënacted in the Revised Statutes of 1836, limiting the responsibility of owners for the acts of the master and mariners to the value of the ship and freight, and of a similar statute in Maine, (*e*) I do not know of any such statute exemptions in this country. (*f*) The owner is bound for the whole amount of the injury done by the master or crew, unless where ordinances or statutes have established a different rule. (*g*) Not so abroad, for by the general maritime law of Europe, the * responsibility of owners of ves- *218
sels for the wrongful acts of masters is limited to the value of the vessel and freight, and by abandoning them to the credi-

(*d*) Smith *v.* Shepherd, cited in Abbott on Shipping, pt. 8, c. 4, sec. 1, [ch. on Causes which excuse Master and Owners.]

(*e*) Laws of Maine, i. c. 14, sec. 8.

(*f*) The authority of the master to contract for and bind the owners, without some special provision to the contrary, must be measured by the laws of the country to which the ship belongs. He cannot bind the owners beyond the laws of their own country, and by the foreign law. Pope *v.* Nickerson, 3 Story, 475, 6. [See 164, n. 1.]

(*g*) See ii. 606, and *supra*, 207, where the exemptions from responsibility under the English statutes are stated. 2 Story, 471.

Boston Ins. Co., *sup.* An American ship which had injured a British ship under such circumstances was denied the protection of either the American or British act in The Wild Ranger, Lush. 553; 9 Jur. N. S. 134; 32 L. J. N. S. Ad. 49; and this would seem to have been sufficient ground for the decision of the case in 14 Gray. So the owner of one of two foreign ships which have come into collision on the high seas was not entitled to the benefit of the English statute. Cope *v.* Doherty, 2 De G. & J. 614; 4 K. & J. 367. The English act has, however, been held to apply to a collision between an English and foreign ship within three miles of the British coast, General Iron Screw Collier Co. *v.* Schurmanns, 1 J. & H. 180; and the later English act of 1862, St. 25 & 26 Vict. c. 63. § 54, has been applied in the case of a collision on the high seas between an English and a foreign vessel, in favor of the former Cail *v.* Papayanni (The Amalia), 1 Moore, P. C. N. S. 471.

tor, they may discharge themselves. (*a*) And it appears very clearly, that by the general maritime law, a lien exists in favor of the merchant who ships merchandise in a vessel on freight, against the vessel for the nonperformance of the contract of affreightment, under the bill of lading, entered into by the master in his quality of master, and that it may be enforced by process *in rem*. The ship itself, in specie, is considered as a security to the merchant who lades goods on board of her, and it makes no difference whether the vessel be in the employment of the owner directly, or be let by a charter party to a hirer, who was to have the whole control of her. *By custom*, says Cleirac, *the ship is bound to the merchandise, and the merchandise to the ship*. (*b*) [1]

(*a*) Consulat de la Mer, ii. 41; Codigo de Commercio of Spain, 1829, art. 622; Emerigon, Contrats à la Grosse, c. 4, sec. 11, who refers to the principal foreign authorities on the point; Boulay-Paty, Cours de Droit Com. i. 263–298. The latter discusses the subject with his usual comprehensive erudition. See, also, Pope *v.* Nickerson, 3 Story, 465, 474.

(*b*) Us et Coutumes de la Mer, 72; ib. 508; Navigation des Rivières, art. 18, 19; Consulat de la Mer, ii. 80, 90, 104, 455, c. 58, 63, 72, 259, 289; Ord. de la Marine, 1, 14, 16; 1 Valin's Comm. 362. Lord Tenterden, in his Treatise on Shipping, 170, admits this to be the rule of the maritime law, but denies that the Court of Admiralty, in England, has jurisdiction to enforce the lien upon the ship *in behalf of the shipper*. That principle of maritime law, therefore, lays dormant, from the want of a court of law or equity to enforce it *in rem*. But in the case of the Rebecca, in the Admiralty Court of the district of Maine, Judge Ware thought himself bound, and on solid grounds, to adopt the principle of the marine law, and he gave a remedy *in rem* against the vessel, in favor of the shipper, for the wrongful acts of the master. Ware, 188; The Phebe, ib. 263, S. P.

[1] *Liens.* — See 138, n. 1; 164, n. 1; and below, as to the ship being bound when the general owners are not. ii. 260, n. 1.

As to when the lien begins, 206, n. 1; as to time for enforcing it, 196, n. 2.

As to the extent to which the ship is bound by a bill of lading, 207, n. 1.

See, generally, The Keokuk, 9 Wall. 517, 519.

In The Maggie Hammond, 9 Wall. 435, the owner of a cargo shipped between foreign ports on a British ship, was allowed to enforce a lien on the vessel for breach of the contract of affreightment, on the ground that the English law, St. 24 & 25 Vict. c. 10, § 6, would have given him a proceeding *in rem*, although it seems that such a proceeding does not necessarily imply the existence of a lien. See The Two Ellens, L. R. 4 P. C. 161, 169; L. R. 3 Ad. & Ec. 345, 357, and cases cited; The Bold Buccleugh, 7 Moore, P. C. 267, 284; *ante*, 170, n. 1.

As to the effects of the lien for freight where it has attached, *post*, 228, n. 1.

As to the lien for contribution in general average, see 234, n. 1, (*e*); as to collision, see 232, n. 1; as to salvage, see 248, n. 1.

The original liability of the vessel for the torts of the master seems to spring from the fact that she was personified by the maritime law, and that she, not the owners, was regarded as the principal.

By the civil law, the owners were responsible *in solido*, for all the obligations of the master, in his character of master, to their full extent, whether arising *ex contractu* or *ex delicto*. But by the maritime law, the owner is not responsible for the wrongful acts of the master beyond his interest in the vessel and freight, and by abandoning them he is discharged, while the ship continues liable in specie, and the shipper has so far a privilege against it over the general creditors. (*c*)

6. Of the Duties of the Shipper.—We have seen what are the

(*c*) This, says Emerigon, (Contrats à la Grosse, c. 4, sec. 11,) was the nautical law of the middle ages, and of the north of Europe, as well as of the Ordinance of the Marine, and he refers, for the support of his assertions, to all the leading text authorities; and it is, no doubt, the settled law of the maritime nations of continental Europe. But this limitation of the owner's responsibility, so far as regards the faults of the master, has never been adopted in England, or in this country, except by special statute authority, as we have already mentioned, and the common law, like the civil law, holds the owner responsible, without any such limitation. Abbott on Shipping, part [4, ch. on Limit. of Responsibility.] Mr. Justice Ware, in the case of the Rebecca, above cited, has examined this subject with deep and accurate research, and arrives at the same conclusion with the judges in the Louisiana cases. Porter, J., in Malpica *v.* McKown, 1 La. 259; Martin, J., in Arayo *v.* Currell, ib. 589. The note of the case of the Rebecca, in the third edition of this volume, was taken from the Jurist. The opinion of the learned judge is now more fully and correctly given in his own volume of reports, and it is, as far as the subject extends, a masterly examination of the maritime jurisprudence of Europe. [*Cf.* ii. 260, n. 1.]

She might be liable when the owners were not, apart from their interest in her, because she might be in fault, when the owners, by the doctrines of agency, were not chargeable for the acts of the person controlling her. Conversely, it is laid down by Pardessus, Droit Comm. n. 961, that the lien for freight prevails even against the owner of stolen goods, as the master deals "less with the person than with the thing," &c. *Ante*, 188, n. 1; 176, n. 1; *post*, 232, n. 1. By the English law, even, it can hardly be maintained that the ship is never liable when the owners at the time the cause of action accrued are not also chargeable personally on ordinary principles of agency, as was said in The Druid, 1 Wm. Rob. 391, 399; compare the lien for salvage with the personal liability of the owners, *post*, 248, n. 1. But the responsibility of the ship seems to be mainly confined to cases where the owners have, by their voluntary act, for instance, by a demise of the ship, allowed her to get into the situation where she becomes a wrong doer. *Post*, 232, n. 1; The Ticonderoga, Swabey, 215. The principle, even when thus limited, cannot be sustained by the analogies of the common law, but involves a partial personification of the ship, and if the courts go as far as this, it is only an extension of the principle to hold her liable in case of compulsory pilotage. *Ante*, 176, n. 1. But see The Halley, L. R. 2 P. C. 193, 201, 202. *Cf.* ii. 260, n. 1; 1 Tissot, Droit Pén. p. 20; 1 Tylor, Prim. Culture, Am. ed. 285, 286.

See, generally, as to the liability of the ship, The John L. Dimmick, 9 Am. Law Reg. 224; Ralston *v.* The State Rights, Crabbe, 22; The Aberfoyle, 1 Abbott Adm. 242; 1 Blatchf. 360; McGuire *v* Golden Gate, 1 McAl. 104.

general duties of the master. Those on the part of the charterer are, to use the ship in a lawful manner, and for the purpose for which it was let. Usually, the command of the ship is reserved to the owner, and to the master by him appointed, and the merchant has not the power to detain the ship beyond the stipulated time, or employ her in any other than the stipulated service, and if he does he must answer in damages. (*d*) If the freighter puts on board prohibited or contraband goods, by means whereof the ship is subjected to detention and forfeiture, he must answer to the ship owner for the consequences of the act. (*e*)[2] And if the merchant declines to lade the ship according to contract, or to furnish a return cargo, as he had engaged to do, he must render in damages due compensation for the loss; and the English * 219 law leaves such questions at large to a jury, without * defining beforehand the rate of compensation, in imitation of some of the ordinances in the maritime codes.

7. Of the Payment of Freight.—Freight, in the common acceptation of the term, means the price for the actual transportation of goods by sea from one place to another; but, in its more extensive sense, it is applied to all rewards or compensation paid for the use of ships, including the transportation of passengers. (*a*) The personal obligation to pay freight rests either on the charter party, or on the bill of lading, by which the payment of freight is made a condition of delivery; and the general rule is, that the delivery of the goods at the place of destination, according to the charter party, is necessary to entitle the owner of the vessel to freight. The conveyance and delivery of the cargo form a con-

(*d*) Lewin *v.* East India Company, Peake, 241.

(*e*) Smith *v.* Elder, 3 Johns. 105.

(*a*) Giles *v.* The Cynthia, 1 Peters Adm. 206; [Denoon *v.* Home & Col. Ins. Co., L. R. 7 C. P. 341, 348.]

[2] *The shipper of goods on a general ship is held to undertake* that he will not deliver to be carried on the voyage packages of goods of a dangerous nature, which those employed on behalf of the ship owner may not, on inspection, be reasonably expected to know to be such, without expressly giving notice that they are of a dangerous nature, even when he is ignorant of the fact and without actual fault. The decisions are put on the ground of policy that of two innocent persons the loss should fall on the one who has generally the best means of informing himself as to the condition of the article shipped. Brass *v.* Maitland, 6 El. & Bl. 470; Pierce *v.* Winsor, 2 Cliff. 18; 2 Sprague, 85. Compare Parrott *v.* Barney, 2 Abbott, U. S. 197, 224. See Boyd *v.* Moses. 7 Wall. 316; *ante*, 206, n. 1; also 217, n. 1, (*a*), *ad finem*. As to unloading, see 206, n. 1.

dition precedent, and must be fulfilled.[1] A partial performance is not sufficient, nor can a partial payment or ratable freight be claimed, except in special cases, and those cases are exceptions to the general rule, and called for by the principles of equity. (*b*)

The amount of freight is usually fixed by agreement between the parties; and if there be no agreement, the amount is ascertained by the usage of the trade and the reason of the case. If the hiring be of the whole ship, or for an entire part of her for the voyage, the merchant must pay the freight, though he does not fully lade the ship. But if he agrees to pay in proportion to the amount of the goods put on board, and does not agree to provide a full cargo, the owner can demand payment only for the cargo actually shipped. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the freight; and this is sometimes termed dead freight, in contradistinction to freight due for the actual carriage of goods. (*c*)[2]

* It is supposed to be the doctrine of the case of *Bell* v. * 220 *Puller*, (*a*) that the master would be entitled to freight for bringing back the outward cargo, if it could not be disposed of, though the charter party was silent as to a return cargo. It would stand upon the equity of the claim to dead freight. (*b*) The French law, in such a case, allows freight for bringing back the cargo, because it could not be sold, or was not permitted to be landed. (*c*)

(*b*) Mr. Justice Story, in the case of the Ship Hooper, U. S. C. C. Mass. May, 1839, 3 Sumner, 542, laid down the general rule, that freight for the entire voyage could only be earned by a due performance of the voyage; and that the only acknowledged exception is where there is no default or inability of the carrier ship to perform the voyage, and the ship owner is ready to forward them, but there is a default on the part of the owner of the cargo, or he waives a further prosecution of the voyage.

(*c*) Roccus, note, 72, 73, 74, 75; Edwin *v.* East India Company, 2 Vern. 210; Atkinson *v.* Ritchie, 10 East, 530; Peters, J., in Giles *v.* The Brig Cynthia, Peters Adm. 207.

(*a*) 2 Taunt. 286.

(*b*) Lawes on Charter-Parties, 152.

(*c*) Boulay-Paty, ii. 391. In the case of the schooner Volunteer and Cargo, 1 Sumner, 577, Mr. Justice Story, after a skilful criticism of the English cases, was of opinion that the owner would be entitled to hold the cargo by way of lien for the freight in such a case. But the owner cannot rightfully refuse to land the cargo before the freight is paid or secured, for the shipper has a right, after the goods are unlivered,

[1] See 228, n. 1, (*a*). [2] See 228, n. 1, (*d*).

If there be no agreement in the case, the master is not bound to part with the goods until the freight be paid, for by the common law, there is a lien on the goods shipped for the freight due thereon, whether it arise under a common bill of lading, or under a charter party, though the lien may be waived or displaced by any special agreement inconsistent with the lien. (*d*) [1] But if the master refuses to deliver the goods for other cause than the nonpayment of freight, he cannot avail himself of the want of a tender. When the regulations of the revenue require the goods to be landed and deposited in a public warehouse, the master may enter them in his own name, and preserve the lien. The shipper of goods on freight has a lien on the vessel for the loss of the goods, by reason of the nonperformance of the contract entered into by the master in the bill of lading. By a common clause in charter parties, the owner binds the ship, and the charterer binds the cargo, to the performance of all the covenants in the charter party, though the right of lien for freight does not absolutely depend on any covenant to pay freight. If there be such a covenant, it creates a lien or pledge on the cargo, to be enforced by a suit *in rem*, or by detaining the cargo until the freight be paid. (*e*) The English courts of common law will not allow such a lien to be enforced by the admiralty *in rem;* but the justice and necessity of such a jurisdiction are admitted, and not invoked in vain in this country, and the lien may be enforced by process *in rem* against the vessel or the proceeds of the cargo, in the district courts. (*f*) [1] The ship owner's lien for freight is gone when the charterer is constituted owner, and takes exclusive
* 221 possession for the voyage, * or when the payment of the freight is, by agreement, postponed beyond the time, or

to examine them, and to see whether they are damaged, and to have the damages, if any, ascertained, and then, after the discharge, the owner has the right to detain the cargo in custody until payment or security of the freight. Abbott on Shipping, 5th Am. ed. Boston, 1846, 460; 1 Valin, lib. 3, tit. 8, art. 21, p. 665; Pardessus, Droit Com. part 3, tit. 4, c. 2, art. 719; Case of Certain Logs of Mahogany, 2 Sumner, 601, 602.

(*d*) The Schooner Volunteer and Cargo, 1 Sumner, 551. [See 228, n. 1, (*d*).]

(*e*) The Schooner Volunteer and Cargo, 1 Sumner, 572, 578.

(*f*) Cleirac, Us et Coutumes de la Mer, 72; Boulay-Paty, ii. 297; Crane *v.* The Rebecca, Ware, 188; The Schooner Volunteer and Cargo, 1 Sumner, 551.

[1] The Kimball, 3 Wall. 37; 2 Cliff. 4; Maggie Hammond, 9 Wall. 435; *cmte*, 2 Sprague, 33; 228, n. 1, (*d*). See The 218, n 1.

at variance with the time and place for the delivery of the goods.[1] But without a plain intent to the contrary, the ship owner will not be presumed to have relinquished his lien on the cargo for the freight, notwithstanding he has chartered the vessel to another. (*a*) The general right of the master and owner to retain the goods for the freight is equally perfect, whether the merchant takes the whole vessel by a charter party or sends his goods in a general ship. The lien applies, whether the hire of the vessel be stipulated in a charter party, or the freight be stipulated in the bill of lading. The owner is equally the carrier in both cases. But if, instead of letting the use of the ship to freight, the vessel itself be let to hire, and the charterer has the possession and right of control, he is then considered as owner for the voyage, and the general owner, who has parted with the possession, has no lien on the cargo for the hire of the ship. (*b*) When the goods are to be delivered to the consignee on payment of freight, the consignee makes himself responsible by receiving the goods under the usual condition expressed in the bill of lading. (*c*) And if the goods, by the bill of lading, were to be delivered to B., or his assigns, he or they paying freight, and the assignee receives the goods, he is responsible to the master for the freight, under the implied undertaking to pay it. (*d*) So, if the master delivers the goods without payment of the freight, he may sue the consignee to * whom the goods were * 222 to be delivered, on payment of freight, upon an implied promise to pay the freight, in consideration of his letting the goods out of his hands before payment. (*a*) [1] It was once held, that if the master parted with the goods to the consignee without securing his freight, he was deprived of all recourse to the consignor; but it is now decided otherwise. If the master cannot recover

(*a*) Chandler *v.* Belden, 18 Johns. 157; Clarkson *v.* Edes, 4 Cowen, 470; Ruggles *v.* Bucknor, 1 Paine, 358; Christie *v.* Lewis, 2 Brod. & B. 410; Pickman *v.* Woods, 6 Pick. 248; Drinkwater *v.* The Brig Spartan, Ware, 149; Fernandez *v.* Silva, 1 La. 274.

(*b*) Drinkwater *v.* The Brig Spartan, Ware, 149; Christie *v.* Lewis, 2 Brod. & B. 410; Story, J., in Kleine *v.* Catara, 2 Gal. 68.

(*c*) Roberts *v.* Holt, 2 Show. 432.

(*d*) Cock *v.* Taylor, 2 Camp. 587, afterwards affirmed in K. B., 13 East, 399. Dougal *v.* Kemble, 3 Bing. 383, s. p.

(*a*) Mansfield, C. J., in Brouncker *v.* Scott, 4 Taunt. 1.

[1] See 228, n. 1, (*d*).

[1] See 228, n. 1, (*e*).

the freight from the consignee to whom he has delivered the goods, without receiving the freight, he still has his remedy over on the charter party against the shipper, and the condition precedent to the delivery inserted in the bill of lading was intended only for the master's benefit. (*b*) The buyer of the goods from the consignee is not answerable for the freight, for that would prove to be a most inconvenient check to the transactions of business; and the buyer takes independently of the charge of freight, unless that charge forms part of the terms of sale. Nor would he be liable even if he should enter the goods at the custom-house in his own name while the freight was unpaid. (*c*)

If part of the cargo be sold on the voyage from necessity, the owner, as we have seen, pays the value at the port of delivery, deducting his freight, equally as if the goods had arrived. But if the goods be prohibited an entry by the government of the country, and such prohibition takes place after the commencement of the voyage, and the cargo be brought back, the freight for the outward voyage has been held to have been earned: and the case was distinguished (though I think the distinction is not very obvious) from that of a blockade of the port of destination, and decided on the authority of the French Ordinance of the Marine. (*d*)[2] Nothing can be more just, observes
* 223 * Valin, than that the outward freight should be allowed, in such a case, since the interruption proceeds from an extraordinary cause, independent of the ordinary marine

(*b*) Tapley *v.* Martens, 8 T. R. 451; Christy *v.* Row, 1 Taunt. 300; Shepard *v.* De Bernales, 13 East, 565; Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 513; Spencer *v.* White, 1 Iredell, (N. C.) 236; Layng *v.* Stewart, 1 Watts & S. 222; Barker *v.* Havens, 17 Johns. 234. But in this last case, the goods were owned by the consignor, and shipped on his account; and had that not been the case, the action would not have been sustained. If there be no charter party, the shipper was held, by Lord Tenterden, not to be liable in such a case. Drew *v.* Bird, 1 Moody & M. 156. In Sanders *v.* Vanzeller, 2 Gale & D. 244, s. c. 4 Ad. & El. N. s. 260, it was held, by the Q. B., that the acceptance of the goods under the bill of lading by the consignee did not raise an inference in law of a contract to pay the freight, though the bill of lading stated, *he paying freight* for the same. But it was admitted that the circumstances might be evidence to a jury of such a contract. Independent of this case, I should have thought that the law would have raised such a contract. [See 228, n. 1, (*e*).]

(*c*) Artaza *v.* Smallpiece, 1 Esp. 23.

(*d*) Morgan *v.* Insurance Company of North America, 4 Dall. 455.

[2] Compare The Teutonia, L. R. 8 Ad. & Ec. 394, 422; L. R. 4 P. C. 171; *post*, 228, n. 1, (*g*).

perils. (*a*) The case of a blockade of, or interdiction of commerce with the port of discharge, after the commencement of the voyage, is held to be different; for, in that case, the voyage is deemed to be broken up, and the charter party dissolved; and if the cargo, by reason of that obstacle, be brought back, no freight is due. (*b*) The same principle applies if the voyage be broken up and lost, by capture upon the passage, so as to cause a complete defeasance of the undertaking, notwithstanding there was a subsequent recapture, as in the case of the *Hiram*. (*c*) On the other hand, an embargo detaining the vessel at the port of departure, or in the course of the voyage, does not, of itself, work a dissolution of the contract. It is only a temporary restraint, which suspends, for a time, its performance, and leaves the rights of the parties in relation to each other untouched. (*d*) If the ship be laden, and be captured before she breaks ground, and afterwards recaptured, but the voyage broken up, the ship owners are not entitled to any freight, though, by the usage of the trade, the ship was laden at their expense. It is requisite that the ship break ground, to give an inception to freight. (*e*) It is the same thing with a blockade or hostile investment of the port of departure. Such an obstacle does not discharge the contract of affreightment because it is merely a temporary suspension of * its performance; and the ship owner may * 224 detain the goods until he can prosecute the voyage with safety, or until the freighter tenders him the full freight. This was the decision in the case of *Palmer* v. *Lorillard*, (*a*)[1] in which the doctrine was extensively examined; and it was shown, by a reference to the foreign ordinances, and the soundest classical

(*a*) Ord. tit. Du Fret, art. 15; Valin, ib.; Code de Commerce, art. 299.

(*b*) Scott *v.* Libby, 2 Johns. 336; Liddard *v.* Lopes, 10 East, 526. But in the case of the Friends, in Edw. Adm. 246, Lord Stowell allowed a *pro rata* freight, though the vessel did not reach her port of destination, owing to a blockade; though, in general, if the voyage be not performed, the rule of the admiralty, like that of the common law, is to deny freight. The Louisa, 1 Dods. 317.

(*c*) 8 C. Rob. 180.

(*d*) Hadley *v.* Clarke, 8 T. R. 259; M'Bride *v.* Marine Insurance Company, 5 Johns. 299, 308; Baylies *v.* Fettyplace, 7 Mass. 325.

(*e*) Curling *v.* Long, 1 Bos. & P. 634. (*a*) 16 Johns. 348.

[1] See 228, n. 1, (*c*); Reed *v.* United States, 11 Wall. 591, 606; The Harriman, 9 Wall. 161; Allen *v.* Mercantile Mut. Ins. Co., 44 N. Y. 437. As to perishable cargo, see Notara *v.* Henderson, *ante*, 212, n. 1.

writers on maritime law, (*b*) that the master, in the case of such an invincible obstacle of a temporary nature to the prosecution of the voyage, is entitled to wait for the removal of it, so that he may earn his freight, unless the cargo consists of perishable articles which cannot endure the delay. He stands upon a principle of equity which pervades the maritime law of Europe, if he refuses to surrender the cargo to the shipper without some equitable allowance in the shape of freight, for his intermediate service.

When the goods become greatly deteriorated on the voyage, it has been a very litigated question, whether the consignee was bound to take the goods, and pay the freight, or whether he might not abandon the goods to the master in discharge of the freight. Valin and Pothier entertained opposite opinions upon this question. (*c*) The former insists, that the regulation of the ordinance, holding the merchant liable for freight on deteriorated goods without the right to abandon them in discharge of the freight, is too rigorous to be compatible with equity. He says the cargo is the only proper fund and pledge for the freight, and that Casaregis (*d*) was of the same opinion. Pothier, on the other hand, was against the right of the owner to abandon
* 225 the deteriorated goods in discharge of the * freight; and this is the better opinion, and the one adopted in the case of *Griswold* v. *The New York Insurance Company*. (*a*) It is in accordance with the Ordinances of the Marine, and of Rotterdam, and with the new commercial code of France; and the latter puts an end to all further doubt and discussion on the subject of France. (*b*) The ship owner performs his engagement when

(*b*) Ord. de la Mar. liv. 3, tit. 3, Fret, art. 15, and tit. Charte-Partie, art. 8; Valin, h. t.; Pothier, Charte-Partie, n. 69, 100, 101; Laws of Oleron, art. 4; Consulat, par Boucher, c 80, 82, 84; Roccus, de Nav. n. 54; Jacobsen's Sea Laws, by Frick. 295.

(*c*) Valin's Comm. i. 670; Pothier, Charte-Partie, n. 59.

(*d*) Disc. 22, n. 46, and Disc. 23, n. 86, 87.

(*a*) 3 Johns. 321. Mr. Bell says it is likewise the law in Scotland. 1 Bell's Comm. 570; Jordan *v.* Warren Ins. Co., 1 Story, 342. [*Post*, 228, n. 1, (*f*).]

(*b*) Ord. tit. Du Fret, art. 25; Ord. of Rotterdam, art. 155; Code de Com. art. 305, 310; Boulay-Paty, ii. 488. The foreign ordinances and the discussions of the foreign jurists on this litigated question, whether the merchant can abandon the deteriorated goods when brought to the place of destination, and thereby discharge himself from the freight, are stated at large in Abbott on Shipping, 5th Am. ed. Boston, 1846, 516–523.

he carries and delivers the goods. The right to his freight then becomes absolute, and the carrier is no more an insurer of the soundness of the cargo, as against the perils of the sea, or its own intrinsic decay, than he is of the price in the market to which it is carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of the value of the cargo. It may impair the remedy which his lien afforded, but it does not affect his personal demand against the shipper.

If casks contain wine, rum, or other liquids, or sugar, and the contents be washed out, and wasted, and lost, by the perils of the sea, so that the casks arrive empty, no freight is due for them;[1] but the ship owner would still be entitled to his freight, if the casks were well stowed, and their contents were essentially gone by leakage, or inherent waste, or imperfection of the casks. (*c*)

Should the cargo consist of live stock, as is frequently the case in voyages from this country to the West Indies, and some of the horses or cattle, for instance, should die in the course of the voyage, without any fault or negligence of the master or crew, and there be no express agreement respecting the payment of freight, the general rule is, that the freight is to be paid for all that were put on board.[2] But if the agreement *was *226 to pay for the transportation of them, then no freight is due for those that die on the voyage, as the contract is not, in that case, performed. (*a*) The foreign marine law allows freight paid in advance to be recovered back, if the goods be not carried, nor the voyage performed, by reason of any event not imputable to the shipper. (*b*) The reason is, that the consideration for payment, which was the carriage of the goods, has failed. But the marine ordinances admit that the parties may stipulate that the freight so previously advanced, shall, at all events, be retained. In *Watson* v. *Duykinck*, (*c*) the rule of the

(*c*) Molloy, b. 2, c. 4, sec. 14; Frith *v.* Barker, 2 Johns. 327.

(*a*) Dig. 14. 2. 10; Molloy, b. 2, c. 4, sec. 8.

(*b*) Ord. de la Mar. tit. Du Fret, art. 18; Roccus, de Nav. et Naulo, n. 80; Cleirac, Les Us et Coutumes de la Mer, 42; Code de Commerce, art. 302.

(*c*) 3 Johns. 335.

[1] Duthie *v.* Hilton, L. R. 4 C. P. 138. See The Collenberg, 1 Black, 170; Gunther *v.* Colin, 3 Daly, 125; *post*, 228, n. 1, (*f*).

[2] But see Gibson *v.* Sturge, 10 Exch. 622, 639; *post*, 228, n. 1, (*f*).

marine law was recognized, though it was not applied to that case, because the contract there appeared to be that the freight was paid for receiving the passenger and his goods on board; and, in such a case, the payment is to be retained, though the vessel and cargo be lost on the voyage. The general principle of the marine law was admitted in the fullest latitude, in *Griggs* v. *Austin*; (*d*) [1] and whether the freight previously advanced is to be retained or returned becomes a question of intention in the construction of the contract. The French ordinances require a special agreement to enable the ship owner to retain the freight paid in advance; and Valin says, (*e*) that many authors on maritime jurisprudence, as Kuricke, Loccenius, and Straccha, will not allow even such a special agreement to be valid. (*f*)

*227 *The English law is not so scrupulous, and does not require any such express stipulation, and allows the intention of the parties to retain the previously advanced freight to be more easily inferred. In *De Silvale* v. *Kendall*, (*a*) the Court of K. B. adopted a directly opposite principle, and observed, that if the charter party was silent, the law would require a performance of the voyage before freight was due; but the parties

(*d*) 8 Pick. 20.

(*e*) Comm. i. 661.

(*f*) Straccha, in his Tractatus de Mercatura, tit. de Nav. part 3, n. 24, as referred to by Valin, does not support the reference. He only says it was a question whether the advanced freight was to be returned when the goods were not carried, and that a ratable freight, in such case, was equitable.

(*a*) 4 Maule & S. 37. In Saunders *v.* Drew, 3 B. & Ad. 445, the doctrine of the case of De Silvale *v.* Kendall was admitted, that freight paid in advance could not be recovered back without an agreement to that effect. The rule in this country is more reasonable, and it requires a stipulation that the freight paid in advance is not to be returned if the voyage be not performed, otherwise the shipper may recover it back. Pitman *v.* Hooper, 3 Sumner, 50.

[1] *Recovery of Prepaid Freight.* — The later American cases follow those mentioned in the text. Phelps *v.* Williamson, 5 Sandf. 578; The Kimball, 3 Wall. 37, 45; Brown *v.* Harris, 2 Gray, 359; Benner *v.* Equitable Safety Ins. Co., 6 Allen, 222; Lee *v.* Barreda, 16 Md. 190; Atwell *v.* Miller, 11 Md. 348. But in England the doctrine that freight cannot be recovered back when it has been paid in advance is regarded as too firmly settled to be departed from, even in a court of appeal. It is not thought satisfactory, however, and would probably not be extended to a case where the payment could be construed not to have been made on account of freight. For instance, where it was only intended to make good the loss of lien caused to the owners by the master's signing bills of lading at a lower rate than the charter party freight; or to be a mere loan. Byrne *v.* Schiller, L. R. 6 Ex. 319; Hicks *v.* Shield, 7 El. & Bl. 633; Jackson *v.* Isaacs, 8 Hurlst. & N. 405; De Cuadra *v.* Swann, 16 C. B. N. S. 772.

might stipulate that part of the freight be paid in anticipation, and be made free from subsequent contingency of loss, by reason of loss of the subsequent voyage. If freight be paid in advance, and there be no express stipulation that it shall be returned in the event of freight not being earned, the inference is, that the parties did not intend that the payment of the part in advance should be subject to the risk of the remainder of the voyage; and without some provision of that kind, a new implied contract to that effect could not be raised. (*b*)

The question as to the right to a ratable freight arises in two cases; (1) when the ship has performed the whole voyage, and has brought only a part of her cargo to the place of destination; (2) when she has not performed her whole voyage, and the goods have been delivered to the merchant, at a place short of the port of delivery. In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers. (*c*) [1] The contract, in such a case, is divisible in its own nature. But if the ship be chartered at a specific sum for the voyage, and she loses part of her cargo by a peril of the sea, and conveys the residue, it has been a question, whether the freight could be apportioned. The weight of authority, in the English books, is against the apportionment of freight in such a case, (*d*) and the question has been repeatedly discussed * and determined of late * 228 years. It has been held that the contract of affreightment was an entire contract; and unless fully performed by delivery of the whole cargo, no freight was due under the charter party, in the case where the ship was chartered for a specific sum for the voyage. The delivery of the whole cargo is, in such a case,

(*b*) See Abbott on Shipping, 5th Am. ed. Boston, 1846, 496, 497.

(*c*) Ritchie *v.* Atkinson, 10 East, 295.

(*d*) Bright *v.* Cowper, 1 Brownlow, 21, and this case is cited with approbation by Grose, J., in 7 T. R. 885. Malynes, in his Lex Mercatoria, 100, is of opinion that there is no freight due, though he speaks in a loose and questionable manner. But Abbott, in his Treatise on Shipping, 5th Am. ed. Boston, 524, thinks it hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them. Holt, in his System of Shipping, Int. 89, says that a partial freight is due when the ship has brought part of the goods in safety to the place of destination, for a proportionate benefit has been received.

[1] Price *v.* Hartshorn, 44 N. Y. 94; *post*, 228, n. 1, (*f*).

a condition precedent to the recovery of freight. The stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment be claimed, except in special cases. (*a*) [1]

(*a*) Post *v.* Robertson, 1 Johns. 24; The Ship N. Hooper, U. S. C. C. Mass., May, 1839, 8 Sumner, 542. See, also, Clarke *v.* Gurnell, 1 Bulst. 167; Cook *v.* Jennings, 7 T. R. 381; Osgood *v.* Groning, 2 Camp. 466; in which the necessity of a precise performance of the covenant to transport and deliver the cargo is required, before an action for the freight can be maintained.

[1] *Freight.* — (*a*) As stated, 219, delivery as well as conveyance is a condition precedent to the earning of freight. Brown *v.* Tanner, L. R. 3 Ch. 597, 603; Cato *v.* Irving, 5 De G. & Sm. 210, 224; Duthie *v.* Hilton, L. R 4 C. P. 138; Clendaniel *v.* Tuckerman, 17 Barb. 184; Brittan *v.* Barnaby, 21 How. 527; Black *v.* Rose, 2 Moore, P. C. N. S. 277; General Steam Nav. Co. *v.* Slipper, 11 C. B. N. S. 498. As to the effect of a transfer of the ship on the right to freight, see 138, n. 1; Wilson *v.* Wilson, L. R. 14 Eq. 32.

(*b*) *Lien for.* — According to Mr. Justice Sprague, the lien for freight is almost the only exception to the general rule that maritime liens do not depend upon possession. The Anna Kimball, 2 Sprague, 33; (reversed 3 Wall. 37; *inf.*) But according to Chief Justice Taney, there are other cases inconsistent with such a rule, and the rule cannot be maintained in the admiralty courts of the United States. Bags of Linseed, 1 Black, 108, 113; s. c. 1 Cliff. 68; *post*, 234, n. 1.

(*c*) A merchant who has laden goods on a general ship is not entitled at pleasure to demand them back, even before the ship has broken ground, without paying the freight that might have become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him. Tindall *v.* Taylor, 4 El. & Bl. 219; Bartlett *v.* Carnley, 6 Duer, 194; The Hermitage, 4 Blatchf. 474. Although when he had actually removed them under such circumstances, the freight which was, or by reasonable diligence might have been earned in place of the stipulated freight was deducted in measuring the damages. Bailey *v.* Damon, 3 Gray, 92. But see The Hermitage, *sup.*

(*d*) When, by the bill of lading, the sum called freight therein is to be paid by the shipper at the port of shipment one month after sailing, vessel lost or not lost, no lien can be maintained upon the goods against the consignees of the goods at the port of discharge if in fact the money has not been paid. In fact such a sum is not freight, but money paid for taking the goods on board and undertaking to carry, — not for carrying them; and as it is not freight, a lien upon the goods for it is not created by implication of law, but must be expressly contracted for, and calling the sum freight in the bill of lading does not amount to such a contract. Kirchner *v.* Venus, 12 Moore, P. C. 361, 389, 390; How *v.* Kirchner, 11 Moore, P. C. 21; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 132; Gray *v.* Carr, L. R. 6 Q. B. 522, 536, 541. This principle seems to explain Raymond *v.* Tyson (The Orphan), 17 How. 53; 1 Cal. 423. Compare Howard *v.* Macondray, 7 Gray, 516, 519; Paynter *v.* James, L. R. 2 C. P. 348; affirmed 16 W. R. 768; Duthie *v.* Hilton, L. R. 4 C. P. 138.

A lien for dead freight may be created by express contract, but there seems still to be some uncertainty in construing such contracts and determining the extent of such a lien. The point in doubt is whether

The apportionment of freight usually happens when the ship is forced into a port short of her destination, and cannot finish the

unliquidated damages for breach of a contract to load a full cargo, can be called dead freight, or whether that term must be confined to cases where there is a liability to pay for a full cargo of an ascertained quantity at a certain rate, whether a full cargo is loaded or not. Gray *v.* Carr, L. R. 6 Q. B. 522; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128; Pearson *v.* Goschen, 17 C. B. N. S. 352. But compare The Hyperion, *ante*, 206, n. 1, (*c*).

Another difficult question arises when a receipt of part of the freight is indorsed upon the bill of lading, and that document is transferred to one who takes it *bona fide* and for value, *ante*, 207, n. 1. In a case where the sum receipted for was in fact not paid in cash, but by a negotiable instrument which was not dishonored when the goods arrived, there was held to be no lien for that sum, notwithstanding a probability that the instrument would be dishonored by reason of the acceptor's insolvency. Tamvaco *v.* Simpson, L. R. 1 C. P. 363; affirming 19 C. B. N. S. 453. See Kirchner *v.* Venus, 12 Moore, P. C. 361, 399, 400. In a somewhat similar case, except that there does not appear to have been a transfer of the bill of lading to a *bona fide* holder for value, the Supreme Court of the United States held that the lien for freight was not displaced by a note having been given for part of the amount. It was considered, in accordance with the American doctrine (*ante*, 227, n. 1), that freight paid in advance could be recovered back if the vessel did not arrive, and was therefore properly called freight, and that the ordinary incidents of freight were not taken away by the receipt of a note maturing at the time of the anticipated arrival of the vessel. The note was not payment. The Kimball, 3 Wall. 37; 2 Cliff. 4; 2 Sprague, 33.

The partial delivery of the cargo does not affect the lien on what remains on board. There is a lien on the latter for the whole of the freight. Sears *v.* Bags of Linseed, 1 Cliff. 68; The Roecliff, 38 L. J. N. S. Ad. 56; Fox *v.* Holt, 36 Conn. 558, 564.

(*e*) *Personal Liability.* — The principle of Sanders *v.* Vanzeller, 222, n (*b*), as to the consignee's liability, is approved in Blanchard *v.* Page, 8 Gray, 281, 298; Gage *v.* Morse, 12 Allen, 410; see, also, Swett *v.* Black, 2 Sprague, 49; as well as in later English cases. Young *v.* Moeller, 5 El. & Bl. 755, 760; Zwilchenbart *v.* Henderson, 9 Exch 722, 728. The language of some other cases seems to support the opinion expressed by the author. Morse *v.* Pesant, 2 Keyes, 16; Shaw *v.* Thompson, Olcott, 144, 149; Philadelphia & Read. R. R. *v.* Barnard, 3 Ben. 39.

As stated in the text, 222, it is well settled that the carrier does not lose his action on the contract against the shipper by giving up his lien on the goods. Wooster *v.* Tarr, 8 Allen, 270; Holt *v.* Westcott, 43 Me. 445; Jobbitt *v.* Goundry, 29 Barb. 509. But it is now not unusual to insert a clause in the charter party to the effect that the charterer's responsibilities are to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at the port of discharge; and that the owner is to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average. Some of the cases arising upon such clauses, and the construction of them, are, Gray *v.* Carr, L. R. 6 Q. B. 522; Bannister *v.* Breslauer, L. R. 2 C. P. 497, criticised in Gray *v.* Carr; Oglesby *v.* Yglesias, E. B. & E. 930; Milvain *v.* Perez, 3 El. & El. 495. Whether and how far such a lien is retained against the bill of lading, will depend on how far the bill of lading has incorporated the terms of

voyage. In that case, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another

the charter party. *Ante*, 207, n. 1; Gray *v.* Carr, *sup.* See, also, Kirchner *v.* Venus, 12 Moore, P. C. 361, 400.

(*f*) *Deductions for Damages.* — If the goods have arrived, they cannot be abandoned by the charterer to the ship owner in discharge of freight due on the charter party because they have been so damaged as to turn out of less value than the freight, although the loss was caused by the negligence of the master and crew. In the English courts, the remedy for culpable damage must be sought in a distinct proceeding. It seems that if there is a loss of quantity or change of quality, the question is whether the thing, for the carriage of which freight was to be paid, or any and how much of it, has substantially arrived. If only a part has so arrived, it seems that freight is payable in respect of that part, unless the charter party make the carriage of the whole a condition precedent to the earning of any freight, which is not usual in England. Dakin *v.* Oxley, 15 C. B. N. S. 646, 667, 665; Meyer *v.* Dresser, 16 C. B. N. S. 646, 659; The Norway, Brown. & Lush. 877, 894; 13 W. R. 296; S. C. on appeal, Brown. & Lush. 404, 409; 8 Moore, P. C. N. S. 245, 265, 266; 11 Jur. N. S. 892, 893. See The Don Francisco, Lush. 468; 31 L. J. N. S. Ad. 14; The Salacia, Lush. 578, 582; Gibson *v.* Sturge, 10 Exch. 622; Libby *v.* Gage, 14 Allen, 261, 264. It follows, *a fortiori*, that when there is a demise of the ship for a lump sum in the nature of a rent, although improperly called freight, a deduction cannot be allowed on account of goods not delivered in consequence of sea perils. The Norway, 8 Moore, P. C. N. S. 245, 265. On the other hand, when the freight, properly so called, for a mixed cargo, was fixed at a lump sum by the bill of lading, the contract has been regarded as entire, and a loss by the fault of the carrier or his servant of any part of the goods shipped, will defeat his right to recover any freight. Sayward *v.* Stevens, 8 Gray, 97. See Libby *v.* Gage, 14 Allen, 261, 264.

The American statutes of set-off are said to be more liberal than the English, and the American admiralty courts have generally allowed damage to the cargo to be recouped from the freight money, independent of statute, on the ground that the counter claim is founded on the same charter party. But it has been said that if the damages sustained by the respondent should exceed the just claim of the libellant, not only could the court give no decree for the excess, but the respondent could not afterwards maintain a suit for such excess. Snow *v.* Carruth, 1 Sprague, 324; Bearse *v.* Ropes, ib. 331; Nichols *v.* Tremlett, ib. 361, 367; Kennedy *v.* Dodge, 1 Benedict, 311; Thatcher *v.* McCulloh, Olcott, 365; Bradstreet *v.* Heron, Abbott, Adm. 209, 214; Zerega *v.* Poppe, ib. 397. Compare O'Connor *v.* Varney, 10 Gray, 231; but see Davis *v.* Hedges, L. R. 6 Q. B. 687; *ante*, ii. 479, n. 1, *ad finem*.

(*g*) *Freight pro rata itineris.* — The principle of the text, 229, that voluntary acceptance at an intermediate port by the freighter, is the basis of a claim to *pro rata* freight is confirmed by Atlantic Mut. Ins. Co. *v.* Bird, 2 Bosw. 195; The Soblomsten, L. R. 1 Ad. & Ec. 293; The Newport, Swabey, 335; Ridyard *v.* Phillips, 4 Blatchf. 443; McKibbin *v.* Peck, 89 N. Y. 262. See, especially, Blasco *v.* Fletcher, 14 C. B. N. S. 147. In The Teutonia, L. R. 3 Ad. & Ec. 394; L. R. 4 P. C. 171, the owners of a vessel, who were prevented from completing the voyage by the breaking out of war, were held not bound to deliver the cargo at an intermediate port without some compensation. If the master sells the goods at an intermediate port where the freighter is

ship, the master will be entitled to the whole freight, because the freighter is the cause of the contract not being performed.[2] But if he consents, and the master refuses to go on, he is not entitled to freight, because he has not performed his contract. To entitle himself to freight, the master must proceed, or offer to proceed, in another vessel, or repair his own, and take on the cargo; and if he proceeds, he reassumes his usual risk of losing the freight by * the loss of the cargo in the subsequent part * 229 of the voyage, or of earning freight by its safe arrival and delivery at the port of destination. If, however, the merchant accepts the goods at the intermediate port, the general rule of the marine law is, that freight is to be paid according to the proportion of the voyage performed, and the law will imply such a contract. This doctrine pervades the marine ordinances and writers on marine law; (*a*) and it is now equally well settled in the English and American law, that freight, *pro rata itineris*, is due, when the ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods are there voluntarily accepted by the owner. Such acceptance constitutes the basis of the rule for a *pro rata* freight; and it must

(*a*) Laws of Oleron, art. 4; Ord. of Wisbuy, art. 16; Roccus, n. 81; Straccha, de Navibus, pt. 8, n. 24; Ord. de la Mar. liv. 3, tit. 3, Du Fret, art. 21, 22.

not and cannot be consulted, under circumstances in which it is the freighter's interest that they should be sold, no freight is due, although the freighter claims the proceeds of the sale. The master is agent *ex necessitate* for the freighter so far as to validate the sale, *ante*, 212, n. 1; but is held not to be agent to accept the goods on the freighter's behalf at the intermediate port, on terms of paying *pro rata* freight. The Ann D. Richardson, Abbott, Adm. 499. See Miston *v.* Lord, 1 Blatchf. 354; Richardson *v.* Young, 38 Penn. St. 169; Lord *v.* Neptune Ins. Co., 10 Gray, 109. Doubts of the soundness of this doctrine have been intimated. Notara *v.* Henderson, L. R. 5 Q. B. 346, 356. The question, whether freight can be recovered if the vessel is lost before completing the services contemplated, depends on the construction of the charter party. Whenever the payment of freight is to be made by time only, it is due and earned at each interval specified, unless otherwise expressly agreed. In such case, each of the stipulated periods of payment, if such are provided for in the charter party, is to be considered as if it were a separate voyage. McGilvery *v.* Capen, 7 Gray, 525, 528; Brewer *v.* Churchill, 45 Me. 64. Cases where the voyage contemplated in the charter party was held to be entire are Towle *v.* Kettell, 5 Cush. 18; Donahoe *v.* Kettell, 1 Cliff. 135.

[2] The Bahia, Brown. & Lush. 292, 305; 11 Jur. N. S. 90; Brown. & Lush. 167; 33 L. J. N. S. Ad. 97; Cargo *ex* Galam, 2 Moore, P. C. N. S. 216, 229; The Soblomsten, L. R. 1 Ad. & Ec. 298; Hart *v.* Shaw, 1 Cliff. 358; 1 Sprague, 567; Whitney *v.* Rogers, 2 Disney, 421. See 212, n. 1.

be a voluntary acceptance, and not one forced upon the owner by any illegal or violent proceeding. The numerous cases upon which this doctrine is sustained are all founded upon that of *Luke* v. *Lyde*, and that case rested upon the decision in the House of Lords, in 1733, in *Lutwidge & How* v. *Grey*. (*b*)[1] If the outward and homeward voyages be distinct, freight is recoverable for the one, though the other be not performed. But if, by the terms of the contract, they be one voyage, and the ship perform the outward, and fails to perform the homeward voyage, no freight is recoverable. (*c*)

* 230 *The rule by which the amount of the ratable freight is to be ascertained is, to ascertain how much of the voyage had been performed when the disaster happened which compelled the vessel to seek a port, according to the mode of adjustment pursued in *Luke* v. *Lyde*; or else to calculate how much of the voyage had been performed when the goods arrived at the port of necessity, according to the better course pursued in the cases in this country. (*a*)

8. Of Loss from Collision of Ships. — This has been a difficult subject for discussion and decision, and various opinions have been entertained by the writers on maritime law. The evidence as to the true cause of the collision is of difficult access. The accident usually happens in the darkness of night, or in a storm, and is neces-

(*b*) Cited in Abbott on Shipping, 5th Am. ed. Boston, 529, 530; Luke *v.* Lyde, 2 Burr. 883; Cook *v.* Jennings, 7 T. R. 381; Hunter *v.* Prinsep, 10 East, 378; Liddard *v.* Lopes, ib. 526; Abbott on Shipping, id. 531; Robinson *v.* Marine Insurance Company, 2 Johns. 323; Hurtin *v.* Union Ins. Company, cited in Condy's Marshall on Ins. 281, 601, [1 Wash. 530;] Caze *v.* Baltimore Insurance Company, 7 Cranch, 358; Armroyd *v.* Union Insurance Company, 3 Binney, 437; Welch *v.* Hicks, 6 Cowen, 504; Vance *v.* Clark, 1 La. 324; Tio *v.* Vance, 11 La. 199; The Ship N. Hooper, U. S. C. C. Mass. May, 1839, 3 Sumner, 542; Vlierboom *v.* Chapman, 13 M. & W. 230. In Baillie *v.* Moudigliani, Park on Ins. c. 2, p. 70, it was held by Lord Mansfield, that as between the owners of the ship and cargo, in case of a total loss, no freight is due; but if part of the cargo be saved, and the merchant takes it, freight *pro rata* is due. But as between the owners of the cargo and the insurer, the latter is not responsible for freight. See Abbott on Shipping, 5th Am. ed. Boston, 534, note 1. In this last work the learned American editor, 547–550, and ib. 564–566, has collected and summarily stated the American cases on this refined and vexatious question of a *pro rata* freight.

(*c*) Lawes on Charter Parties, 149, 150; Mackrell *v.* Simond, 2 Chitty, 666.

(*a*) Marine Insurance Company *v.* Lenox, cited and approved of in Robinson *v.* Marine Insurance Company, 2 Johns. 323; Coffin *v.* Storer, 5 Mass. 252.

[1] See 228, n. 1, (*g*).

sarily accompanied with confusion and agitation. When the fact is clear, that a fault was committed by one party, or that he was in want of due skill or care, and the disaster was the consequence thereof, the party in fault must pay all the damages. The plaintiff may be in fault to a certain extent, and yet not to such an extent as to prevent his recovering; though it would seem, that if he or his agents substantially contributed to the injury, he cannot recover. (*b*) [1] There are settled nautical rules, by which, in most cases, the want of skill or care or duty may be ascertained. Thus the vessel that has the wind free, or is sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it. (*c*) The vessel on the starboard tack has a right to keep her wind, and the vessel on the larboard tack is bound to give way to the other, or bear up or heave about to avoid danger, or be answerable for the consequences. (*d*) The vessel to windward is to keep away when both vessels are going the same course in a narrow channel, and there is danger of running afoul of each other. (*e*) [2] But in

(*b*) Raisin *v.* Mitchell, 9 Carr. & P. 613; Baron Parke, in the case of Bridge *v.* The Grand Junction Railway Company, 3 M. & W. 244; Butterfield *v.* Forrester, 11 East, 60; 38 E. C. L. R. 254, note; Sills *v.* Brown, 9 Carr. & P. 601. By whose fault the collision happened is a question of fact for a jury; and the actual damage at the time and place of the injury, and not the probable profits at the port of destination, is the measure of value in damages, in cases of collision as well as in cases of insurance. Smith *v.* Condry, 1 How. 28.

(*c*) Sills *v.* Brown, 9 Carr. & P. 601. The custom in England, in the case of carriages on land meeting each other, is, that each driver must pass to his own left hand. The rule is directly otherwise in this country, or at least in Massachusetts and New York. N. Y. R. S. 3d ed. i. 878; Kennard *v.* Burton, Law Reporter, July, 1828, [25 Me. 39.] By the New York Revised Statutes, 3d ed. i. 859, steamboats on the waters of that state meeting each other, the boats are to pass on the starboard, or right side of each other. Careful regulations are made in respect to the safe landing of passengers. When two steamboats are going in the same direction, they must not approach within twenty yards of each other; and in the night time, each boat and all vessels on the waters of the state must show good and sufficient lights.

(*d*) The Woodrop-Sims, 2 Dods. 83; The Thames, 5 C. Rob. 345; Jameson *v.* Drinkald, 12 Moore, 148; The Celt, 3 Hagg. Adm. 321; Raisin *v.* Mitchell, 9 Carr. & P. 613.

(*e*) Marsh *v.* Blythe, 1 M'Cord, 360. In many ports there are Trinity House regulations, requiring vessels at anchor in a navigable river, or port of much commerce, to have a light hung out conspicuously in dark nights. It was said, in Carsley *v.* White, 21 Pick. 254, that there was no general and absolute usage on the subject, and that the omission of the light might or might not be a fatal negligence, according

[1] See 232, n. 1, (*b*).

[2] But see 1 Pars. Shipping, 568, n. 1, which interprets the rule to be drawn from Marsh *v.* Blythe, *sup.*, differently.

* 231 the case of a steam vessel, * which has greater power, and is more under command, she is bound to give way to a vessel with sails. (*a*)[1] So a neglect of due means to check a

to the circumstances. But the Ch. J. of Pennsylvania, in Simpson *v.* Hand, 6 Wharton, 324, more justly considered, that the hoisting of a light in a river or harbor at night, amid an active commerce, was a precaution imperiously demanded by prudence, and he did not see how it could be considered otherwise than as negligence *per se*. Train *v.* Steamboat N. A., 2 N. Y. Legal Observer, 67, s. p.

(*a*) The Shannon, 2 Hagg. Adm. 173. In the case of Lowry *v.* The Steamboat Portland, in the U. S. D. C. for Mass., January, 1839, it was certified by experienced navigators, and adjudged by the court as the rule on the subject, that when two vessels approach each other, both having a free or fair wind, each vessel passes to the right; and that a steamer was considered as always sailing with a fair wind, and is bound to do whatever a sailing vessel going free, or with a fair wind, would be required to do under similar circumstances. A steamer must back her engines immediately when hailed in a fog. Case of the Perth, 3 Hagg. Adm. 414.

[1] *Rule of the Road.* — Rules concerning lights, fog signals, steering, and sailing, are laid down by the British Merchant Shipping Act Amendment Act 1862, St. 25 & 26 Vict. c. 63, § 25, and Table C., and by the Order in Council passed in pursuance thereof, Jan. 9, 1863, Lush. app. lxxii. *et seq.*; Holt's Rule of the Road; 2 Pritch. Adm. Dig. app. ccxxviii. These rules have been adopted in the United States by act of Congress of April 29, 1864, c. 69, 13 St. at L. 58; The Carroll, 8 Wall. 302; The Potomac, ib. 590; and many other cases in Wallace. By subsequent Orders in Council, the British rules are made applicable to ships belonging to the countries named therein, including most of the countries of Europe and America, whether within British jurisdiction or not, in accordance with the consent of those countries. The effect of the latter orders by § 61 of the act is, that in all cases arising in any British court, such ships are to be deemed subject to the British rules, and for the purposes of those rules to be treated as if they were British ships. In the British admiralty, therefore, the British rules would be applied to a case of collision between two foreign ships, if they belonged to countries which had acceded to those rules, and which had accordingly been included in the Orders in Council. The New Ed *v.* The Gustav, reported on this point in Holt's Rule of the Road, 28, 29.

Before the British law was thus made applicable to foreign vessels in the British courts by the consent of the foreign governments, it was held that it did not govern even British ships in cases of collision on the high seas with foreign vessels, on the ground of want of mutuality. Such cases were decided by the ordinary rules of the sea, whether the suit was brought by the foreign or by the English vessel. The Zollverein, Swabey, 96; 2 Jur. N. S. 429; 4 W. R. 555; The Saxonia, Lush. 410; The Chancellor, 14 Moore, P. C. 202; The Belle, 1 Benedict, 317. But compare the language of The Cleadon (Stevens *v.* Gourley), 14 Moore, P. C. 92, 97.

The United States statute contains no clause like § 61 of the British act, *sup.*; but in a case of collision between British and American ships, the provisions common to the law of both countries were thought in the District Court to govern the United States vessel, on the ground that those provisions had been adopted by nearly all the nations whose ships usually navigated the waters where the collision took place, and were therefore to be considered the ordinary rules of the

vessel entering a river or harbor where others lie at anchor, is a fault which creates responsibility for damages which may ensue. (*b*) Where the collision arose by *vis major*, or physical causes exclusively, *and without any negligence or fault in any one*, open or concealed, the proprietors of the ship or cargo injured must bear their own loss, and it is not the subject of apportionment, or contribution, or of general average in any form. This was the doctrine of the Roman law, and this is the rule of the maritime law of Europe. (*c*) The greatest difficulty on the subject has arisen in the cases in which the collision proceeded evidently from error, neglect, or want of sufficient precaution, but the neglect or fault was either inscrutable, or equally imputable to both parties. In this case, of *blame existing* which is undiscoverable,

(*b*) The Neptune 2d, 1 Dods. 467. But if a vessel anchors in an improper place, as in the thoroughfare pass of a river, her owner must abide the consequences of a collision, unless other circumstances alter the equity of the case. Strout *v.* Foster, 1 How. 89 The Trinity House Charter of Deptford Strong, for the London trade, was first granted by Henry VIII., and has been renewed and modified by subsequent kings. The Trinity House Rules of 1840, as stated in the case of the Friends, in the Admiralty, Hil. Term, 1843, 1 Wm. Rob. 484, declared that vessels having the wind fair shall give way to those on the wind; that when both are going by the wind, the vessel on the starboard tack shall keep the wind, and the one on the larboard tack bear up, thereby passing each on the larboard hand; that when both vessels have the wind free, large or abeam, and meet, they shall pass each other in the same way on the larboard hand, and to effect it the helm must be put to port.

Steam vessels are considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack. When steam vessels on different courses must necessarily cross so near, that by continuing their courses there would be a risk of coming in collision, each vessel should put her helm to port, so as always to pass on the larboard side of each other. A steam vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand. There must be exceptions to these rules, says Dr. Lushington, implied by common sense; and if a steamer goes with great rapidity in hazy weather or dark nights, she is responsible for collision. The Rose, Adm. Hil. Term, 1843, [2 W. Rob. 1.] See McCulloch's Dict. for the Trinity House Regulations. The difficulties occurring in the application of these general rules, and the cases which have arisen on the vexed questions, are learnedly examined in a work where we should not have expected such a discussion. Westminster Review for September, 1844, 117. See, also, the chapter on Collision, in Abbott on Shipping, 5th Am. ed. Boston, 1846, 228.

(*c*) Dig. 9. 2. 29; Consulat de la Mer, par Boucher, 200–203; Abbott on Shipping, pt. 3, c. 8, sec. 12; Marshall on Insurance, 493; Pardessus, Droit Com. iii. n. 652; Jameson *v.* Drinkald, 12 Moore, 148; The Ligo, 2 Hagg. Adm. 356; The Woodrop-

sea in that place. The Circuit Court seemed hardly prepared to go so far, but considered that the English decisions just referred to were wrong, and that the act of Congress must be taken to regulate the conduct of our vessels towards those of other countries as well as towards those of the United States. The Scotia, 7 Blatchf. 308; s. c. 14 Wall. 170.

the marine law, by à *rusticum judicium*, apportions the loss, as having arisen equally by the fault of both parties. (*d*) The rule is universally declared by all the foreign ordinances and jurists; and its equity and expediency apply equally where both parties are to blame, and where the fault cannot be detected. But, according to the English and American rule in the courts of common law, if there be fault or want of care on both sides, or without fault on either side, neither party can sue the other. (*e*) The general rule of the maritime law is, to make the ships contribute equally, without regard to their relative value, and Valin considers this to be the shorter, plainer, and better rule. (*f*) There has been much difference in the codes and authorities in
* 232 maritime law, whether the cargo, as well as the * ship, was to contribute to the loss.[1] Valin contends that the con-

Sims, 2 Dods. 85; Bell's Comm. i. 579, 580, 581; Story, J., in 2 Phillips [on Ins.] 183, 2d ed.

(*d*) Cleirac, Us et Coutumes de la Mer, 68; The Woodrop-Sims, 2 Dods. 85; The De Cock, Eng. Adm. 18 9; The Am. Jurist, January, 1840, [xxii.] 464; Le Neve *v.* Edin. and London Shipping Company, Bell's Comm. i. 581, note, 2d ed.; Reeves *v.* The Ship Constitution, Gilpin, 579; Rogers *v.* Brig Rival, District Court of Mass. Law Reporter for May, 1846, p. 28. [See 232, n. 1, (*a*).]

(*e*) Vanderplank *v.* Miller, 1 Moody & M. 169; Vennall *v.* Garner, 1 Crompt. & M. 21; Simpson *v.* Hand, 6 Wharton, 311; Story, J., in the case of the Paragon, Phillips on Ins. ii. 183; Abbott on Shipping, by Story, ed. 1829, p. 354.

(*f*) Comm. ii. 166. The Marine Ordinance of the city of Rotterdam, in 1721, declares that the damage resulting from collisions of ships shall be borne equally, unless, indeed, the collision happened by design, or any remarkable fault, and then the guilty party must bear the whole loss. Ord. of Rotterdam, secs. 255, 256. The Ordinance of Hamburg, of 1731, tit. 8, is to the same effect, though even still narrower in the exception. The loss, under that ordinance, is assessed as a common average upon both vessels, freights and cargoes, and is to be borne one half by each vessel. The foreign law and the sentence of a foreign marine court, in a case of collision within its jurisdiction, and in a proceeding *in rem*, are conclusive as to the fact and faultlessness of the collision, and of the apportionment; (2 Phillips on Ins. 2d ed. 182; Smith *v.* Condry, 1 How. 28;) and where there is no proof of negligence on the part of the master or crew of the damaged ship, the insurer is liable for damages occasioned by collision. Stevens & Benecke on Average, by Phillips, 368; Peters *v.* Warren Ins. Co., *vide infra*, 302.

[1] *Collision.* — (*a*) *With regard to the Apportionment of Loss.* — As stated on the last page, when neither party is in fault, the law leaves the parties where it finds them. Stainback *v.* Rae, 14 How. 532; The James Gray *v.* The John Frazer, 21 How. 184, 194; Union Steamship Co. *v.* New York & Va. Steamship Co., 24 How. 307. Other instances of the *rusticum judicium* in the case of undiscoverable blame mentioned, 231, will be found in Hay *v.* Le Neve, 2 Shaw's Scotch Appeals, 395; Vaux *v.* Sheffer, The Immaganda Sara Clarina, 8 Moore, P. C. 75; The Seringapatam, 2 W. Rob. 506; 3 id. 38; 5 Notes of Cases, 61; 6 id. 165; The Saxonia,

tribution is only between the ships, and that the cargoes are totally excluded from the benefit, as well as from the burden of contri-

Lush. 410; The Catherine *v.* Dickinson, 17 How. 170; Chamberlain *v.* Ward, 21 id. 548; The Gray Eagle, 9 Wall. 505; The Brig Rival, 1 Sprague, 128.

In like manner the owner of the cargo on one of the vessels in fault can recover half of his damages in a cause of collision against the other vessel; The Milan, Lush. 388; 31 L. J. N. S. Ad. 105; although the cargo is not liable to be sued, even if belonging to the owners of the vessel; The Victor, Lush. 72; see, also, Lush. 403; The Roecliff, 38 L. J. N. S. Ad. 56; further than that it is liable to be seized in order to proceed *in rem* against the freight which is a lien upon it. The Leo, Lush. 444, Stewart *v.* Rogerson, L. R. 6 C. P. 424.

(*b*) *Contributory Negligence.* — The settled form of question for the jury in the common law courts in England is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. Tuff *v.* Warman, 5 C. B. N. S. 573; Walton *v.* London, Brighton, &c., C. R. Co., Harr. & Ruth. 424, 428; 14 W. R. 895. The rule laid down in Tuff *v.* Warman has been criticised and pronounced inexact in Murphy *v.* Deane, 101 Mass. 455. There are American cases to the effect that negligence on the part of the plaintiff does not exonerate the defendant from liability for his subsequent negligent acts. Austin *v.* New Jersey St. Co., 48 N. Y. 75; Needham *v.* San Francisco & S. J. R.R., 37 Cal. 409; Flynn *v.* San Francisco & S. J. R.R., 40 Cal. 14; Fitch *v.* Pacific R.R., 45 Mo. 322. In other cases the liability exists if the defendant's negligence preponderates over that of the plaintiff. Chicago, Burlington, & Quincy R.R. *v.* Payne, 49 Ill. 499. See, generally, New Jersey Express Co. *v.* Nichols, 33 N. J. (4 Vroom) 434; Cleveland & Pittsburg R.R. *v.* Rowan, 66 Penn. St. 393; Detroit & Milwaukee R.R. *v.* Van Steinburg, 17 Mich. 99.

The rule of damages in cases of collision will be found in the Baltimore, 8 Wall. 377; where the earlier cases are cited. As to the limitation of liability by the act of March 3, 1851, see 217, n. 1, (*b*).

(*c*) *Lien.* — In cases of collision there is a maritime lien on the ship in fault for the damage. Such a lien does not include or require possession, but is a claim upon the ship to be carried into effect by legal process, and as soon as it is carried into effect by a proceeding *in rem*, it relates back to the period when it first attached. Harmer *v.* Bell, The Bold Buccleugh, 7 Moore, P. C. 267, 284; see 228, n. 1, (*b*); The Rock Island Bridge, 6 Wall. 213; Edwards *v.* The Stockton, Crabbe, 580. Compare The Two Ellens, L. R. 3 Ad. & Ec. 345, 357. Like other maritime liens, it may be lost by negligence or delay where the rights of third parties may be compromised. The Bold Buccleugh, *sup.*; *ante*, 196, n. 2; The Europa, Brown. & Lush. 89; 2 Moore, P. C. N. S. 1; The Charles Amelia, L. R. 2 Ad. & Ec. 330; The Admiral, 18 Law Rep. 91; The Stockton, *sup.* It attaches to the vessel, although the owners have divested themselves of all power, right, and authority over it for the time being by a charter party amounting to a demise of the ship. The Ticonderoga, Swabey, 215. See, also, The Ruby Queen, Lush. 266. Perhaps the only exception which has been recognized even in England is where a pilot is taken on board by compulsion. Ticonderoga, *sup.* But see 176, n. 1; 218, n. 1. In America the lien has been held to attach to a public vessel of the

bution in the case of such a disaster. But in *Le Neve* v. *Edinburgh and London Shipping Company*, the cargo of the ship that was sunk and lost by the collision received the benefit of the contribution. (*a*)

9. **Of General Average.** — The doctrine of general average grows out of the incidents of a mercantile voyage, and the duties which it creates apply equally to the owner of the ship and of the cargo. General, gross, or extraordinary average means a contribution made by all parties concerned towards a loss sustained by some

(*a*) This case was decided in the House of Lords in 1824. See Bell's Comm. i. 580–588, who has collected and digested the foreign authorities on the subject. By the English statute of 53 Geo. III. c. 159, ship owners were protected from loss by damage done to other vessels without their fault, beyond their property in the ship, freight, apparel, and furniture. The value of the ship doing the damage is the price at which she could be sold, ascertained by a valuation and appraisement. Dobree *v.* Schroder, 2 Myl. & C. 489. In the case of the Dundee, it was held, that *fishing stores* of a Greenland ship were liable to contribute in compensation for damages done to another ship by collision, as *appurtenances* to a ship of that character. The Dundee, 1 Hagg. Adm. 109.

United States, although the government is not liable for the wrongful acts of its agents. The Siren, 7 Wall. 152; The Davis, 10 Wall. 15; *ante*, 171, n. 1.

In a case where a British ship was libelled in England for a collision with a foreign vessel in the waters of Belgium, she was held not to be liable, as she was in charge of a pilot whom she was compelled by Belgian law to employ, although by the Belgian law the fact that taking the pilot was compulsory did not exonerate her. The principle of the decision as tated by the court is that an English court will not enforce a foreign municipal law, or give a remedy in the shape of damages in respect of an act which according to its own principles, *ante*, 176, n. 1, imposes no liability on the person from whom the damages are claimed. The Halley, L. R. 2 P. C. 193, 204; reversing s. c. L. R. 2 Ad. & Ec. 3. In the course of the opinion, however, something is said as to the pilot not being the agent of the owner by the English law, and it may be that the Belgian law would not be sufficient to create that relation with an owner in England; but it is to be remembered that the liability of the vessel in cases of collision does not depend on her being under the control of the owner's agents, as has just been stated.

(*d*) *Vessels in Tow.* — Many questions have arisen out of collisions between a vessel in tow of a steam tug and another vessel. It is said to be well settled that canal boats and barges in tow are considered as being under the control of the tug, and that, therefore, the tug is liable if either; The Express, 1 Blatchf. 365; The Quickstep, 9 Wall. 665, 671; although the tug is not a common carrier as regards the vessel in charge. Brown *v.* Clegg, 68 Penn. St. 51. And the same has been held with regard to larger vessels when the master of the tug has had entire control. Sturgis *v.* Boyer, 24 How. 110. In England the tow and the tug seem to be considered as one ship, of which the motive power is in the tug, and the governing power in the tow, and for the conduct of which the tow is responsible. Stevens *v.* Gourley, The Cleadon, 14 Moore, P. C. 92; Maddox *v.* Fisher, The Independence, ib. 103, 115. See The Energy, L. R. 3 Ad. & Ec. 48.

of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight. (*b*)

By the Rhodian law, as cited in the Pandects, (*c*) if goods were thrown overboard, in a case of extreme peril, to lighten and save the ship, the loss, being incurred for the common benefit, was to be made good by the contribution of all. The goods must not be swept away by the violence of the waves, *for then *233 the loss falls entirely upon the merchant or his insurer, but they must be intentionally sacrificed by the mind and agency of man, for the safety of the ship and the residue of the cargo.[1] The jettison must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies; and then, if the ship and the residue of the cargo be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice; and it has, accordingly, recommended itself to the notice and adoption of all the commercial nations of the world. The title in the Pandects, *De Lege Rhodia de Jactu*, has been the basis of the ordinances of modern Europe, on the subject of general average; and the doctrine of jettison was transplanted into the Roman law from the institutes of the ancient Rhodians. A jettison is only permitted in cases of extreme necessity; (*a*) [1] and the foreign ordinances (*b*)

(*b*) *Particular* average is the same as partial loss, and is to be borne by the parties immediately interested. *Primage and average*, which are mentioned in bills of lading, mean a small compensation or duty paid to the master, over and above the freight, for his care and trouble as to the goods. It belongs to him of right, and it is not understood to be covered by the policy of insurance. For these charges, as well as for freight, the master has a lien on the cargo. Park on Ins. c. 6, 134; Best *v.* Saunders, 1 Dans. & Lloyd, 188.

(*c*) Dig. 14. 2. 1. This Rhodian law is discussed in the Pandects by Paulus, Papinian, and other eminent lawyers. It forms the subject of the distinguished commentaries of Peckius and Vinnius, in the treatise Ad Rem Nauticam, and of a treatise of Bynkershoek; and it has received most ample illustrations in the dissertations upon it by numerous other civilians, among whom may be selected Emerigon and Abbott.

(*a*) Sir Wm. Scott, in The Gratitudine, 3 C. Rob. 240.

(*b*) Laws of Oleron, art. 8; of Wisbuy, art. 20, 21, 88. Consulat de la Mer, ii, c. 99; Code de Commerce, art. 410.

[1] See 234, n. 1.

require that the officers of the ship, and the supercargo, if on board, should, if practicable, be previously consulted; and if the master, in a case of false alarm, makes a jettison, there is no contribution. The master is responsible for the due exercise of his own judgment in the case of a jettison. He has the authority, and if he shows a necessity of the sacrifice, he will be excused, whether he follows the advice of the crew or not. The crew of a vessel are not authorized to make a jettison of any part of the cargo, even in a case of distress, without the order of the master. This is the general rule, without reference to extreme cases. (*c*) A regular jettison, says Emerigon, is that which takes place with order, and without confusion, and is founded on previous deliberation. Consultation is not indispensable previous to the sacrifice. A case of imminent danger will not permit it. But it must appear that the act occasioning the loss was the effect of judgment and will; and there may be a choice of perils when there is no possibility of safety. There must be a certain loss voluntarily
* 234 incurred for the common benefit, and it * is not necessary that the vessel should be exposed to greater danger than she otherwise would have been. To avoid an absolute shipwreck, it may sometimes be necessary to run the vessel ashore in a place which appears to be the least dangerous, and that will form a case of general average. (*a*) The irregular jettison is valid, for it takes place in the instant of a danger which is imminent and appalling, and when all formality and deliberation would be out of season, or impossible. All acts are precipitate, and commanded by that sense of self-preservation when life is in jeopardy, which is irresistible, and sways every consideration. Such a jettison is a species of shipwreck, and is called *seminaufragium*. (*b*) [1] The

(*c*) The Nimrod, Ware, 14, 15.

(*a*) Sims *v.* Gurney, 4 Binney, 518; 1 Emerigon, 408. Targa says, that during the sixty years he was a magistrate in the Consulat of the Sea, at Genoa, he met with only four or five cases of a regular jettison, and they were suspicious by reason of their very formalities.

(*b*) Consulat de la Mer, c. 284; Targa, c. 58; Casaregis, Disc. 45, n. 28.

[1] *General Average.* — (*a*) *Necessity, &c.* — If the master was competent for his place, if an emergency actually existed calling for a decision whether to make a jettison, if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the law does not seem to go behind his determination of what was necessary for the common safety. (Compare 206, n. 1, *d*.) Lawrence *v.* Minturn, 17 How. 100, 110; Dupont de Nemours *v.* Vance, 19 How. 162;

captain must first begin the jettison with things the least necessary, the most weighty, and of least value, and nothing but the

Patten *v.* Darling, 1 Cliff. 254, 264. But see Myers *v.* Baymore, 10 Penn. St. 114. In The Star of Hope, 9 Wall. 203, 231, it is said that it must be presumed that his decision was wisely made in the absence of proof to the contrary. The principle that the immediate cause of the sacrifice must be the innavigability of the vessel, and that it must be made with the object and motive of obtaining present safety, has been held to exclude a claim for contribution in a very hard case, where goods were thrown overboard to make room for persons taken on board from a sinking ship while the jettison was going on. Two judges dissented, and delivered a very convincing opinion. Dabney *v.* New England Mut. Ins. Co., 14 Allen, 300.

The seaworthiness of the ship at the commencement of the voyage is not a condition precedent to the shipper's liability for general average, although, if the loss was caused by the unseaworthiness, it would be a good defence. Schloss *v.* Heriot, 14 C. B. N. S. 59. In general, where a jettison is rendered necessary by any fault or breach of contract of the master or owners, it must be attributed to that rather than to the sea peril which concurs in producing the necessity. The Portsmouth, 9 Wall. 682, 684. Compare 217. n. 1; Lawrence *v.* Minturn, 17 How. 100, 111. The peril must be a sea peril. Slater *v.* Hayward Rubber Co., 26 Conn. 128; *infra*.

(3) *Community of Interest.* — The American and English cases agree that there must be a community of peril and benefit. And contribution would not be compelled between strangers who were not united in a common adventure. Thus, where the cable of a vessel is cut by its crew to prevent an apprehended collision with another vessel, the latter does not contribute. The principle is that the master, representing all the aggregate interests by holding that office, has the rightful power to judge as to the sacrifice of one of the interests which he thus represents, for the benefit of the others; but not for mere strangers whose property has not been confided to his care. The John Perkins, 21 Law Rep. 87. When the whole or a part of the cargo has been landed, nice questions have arisen as to when the community of interest ceased, and the American courts have carried the doctrine of general average farther than the English in these instances. It is doubtful, however, whether Bevan *v.* Bank of U. S., *inf.* 239, n. (*a*), would be followed even in America. McAndrews *v.* Thatcher, 3 Wall. 347, 373; Nelson *v.* Belmont, 21 N. Y. 36; Goodwillie *v.* McCarthy, 45 Ill. 186, 189. In England it is denied that all extraordinary expenses incurred for the purpose of continuing the voyage are to be contributed for. For instance, when the cargo has been landed and is in safety, and it is a matter of indifference to the owner of the cargo whether his goods are forwarded in the same or another ship, and it is possible to send them forward in another, it is said that no part of his adventure is in peril, and that he is not liable to general average for such expenses afterwards incurred. Walthew *v.* Mavrojani, L. R. 5 Ex. 116; Hallett *v.* Wigram, 9 C. B. 580, 601; Kemp *v.* Halliday, 6 Best & S. 723, 748; Job *v.* Langton, 6 El. & Bl. 779, 792; Moran *v.* Jones, 7 El. & Bl. 523, 533; Wilson *v.* Bank of Victoria, L. R. 2 Q. B. 203; (Power *v.* Whitmore, *post*, 235, is referred to in Dent *v.* Smith, L. R. 4 Q. B. 414, 450.) But in Nelson *v.* Belmont, *sup.*, where Job *v.* Langton and Moran *v.* Jones were considered, it was said that if the enterprise is not abandoned, and the property, although separated from the rest, is still under the control of the mas

greatest extremity would excuse the master who should commence the jettison with money, and other precious parts of the cargo. (*c*)

(*c*) Code de Commerce, art. 411. Emerigon, i. 609, has beautifully illustrated, from Juvenal, the growth and progress of an irregular jettison, and that imminent danger and absorbing terror which justify it. At first the skill of the pilot fails: —

Nullam prudentia cani
Rectoris conferret opem.

Catullus becomes restless with terror as the danger presses, and at last he cries: —

Fundite quæ mea sunt —
Præcipitare volens pulcherrima. — *Juvenal, Sat.* 12.

ter of the vessel, and liable to be taken again on board for the purpose of prosecuting the voyage, the common interest remains, and that whatever is done for the protection of that common interest, should be done at the common expense. See, also, McAndrews *v.* Thatcher, 3 Wall. 347, 376; Goodwillie *v.* McCarthy, 45 Ill. 186; Star of Hope, 9 Wall. 203, 236; Dilworth *v.* McKelvy, 30 Mo. 149.

(*c*) *Voluntary Sacrifice.* — The case of The Columbian Ins. Co. *v.* Ashby, 239, n. (*d*), as to the voluntary stranding of the ship, has been generally followed and approved in America. Merithew *v.* Sampson, 4 Allen, 192; Rathbone *v.* Fowler, 6 Blatchf. 294; Mutual Safety Ins. Co. *v.* Cargo of the Ship George, Olcott, Ad. 89, 157; Sturgess *v.* Cary, 2 Curtis, 59; Barnard *v.* Adams, 10 How. 270; Star of Hope, 9 Wall. 203, 232; Patten *v.* Darling, 1 Cliff. 254. The question is treated as open in Stephens *v.* Broomfield, The Great Pacific, L. R. 2 P. C. 516, 524; Maclachlan on Shipping, ch. 14, p. 570.

When the article sacrificed is the cause of the danger, irrespective of a peril of the sea, as in the case of cotton taking fire by spontaneous combustion from inherent defect, it would not be contributed for; and it is thought in England that what is properly called wreck should be disallowed for, and such is the practice of average staters there. Johnson *v.* Chapman, 19 C. B. N. S. 563, 581; Slater *v.* Hayward Rubber Co., 26 Conn. 128. Taking wreck in the sense of articles which have already lost all value at the moment of the sacrifice, *if saved then*, the proposition seems indisputable. But the language of the above cases, and of Duer, J., in Lee *v.* Grinnell, 5 Duer, 400, 409, extends the denial of contribution to cases where the value of the article is gone at the moment of sacrifice, only because there is no hope of saving it by any course. This line of reasoning, if carried out, would seem to exclude contribution of the cargo when the ship was voluntarily stranded, contrary to the cases above cited, and indeed all contribution except in the case where some other portion of the cargo might have been selected for jettison instead of that which was thrown overboard. The answer seems to be that the destruction of the thing for which contribution is claimed is an accomplished fact, and it was certainly brought about by a voluntary act, whereas it cannot be *certain* that it would have been destroyed if it had not been sacrificed, it is only very probable. The giving up the possibility of escape is the equity on which the claim is founded. Opinion of Hoffman, J., 5 Duer, 400, 418, and cases first cited in (*c*) of this note.

(*d*) *Sale of Cargo.* — The author's language, at the beginning of p. 242, has been thought to require the qualification that a case for general average only arises where part of the cargo has been sold in order to defray expenses or repair losses which

Before contribution takes place, it must appear that the goods sacrificed were the price of safety to the rest, and if *the ship be lost, notwithstanding the jettison, there will *235 be no ground for contribution. (a) All damage arising immediately from jettison, or other act of necessity, is to be a matter of general average, and, therefore, if, in cutting away a mast, the cargo by that means be injured, or if, in throwing over any part of the cargo, other parts of the cargo be injured, the damage goes into general average, because it is to be considered as part of the price of safety to the residue of the property. (b) [1] So, if a ship be injured by a peril of the sea, and be obliged to go into port to refit, the wages and provisions of the crew, during the

(a) Pothier, tit. Avaries, n. 113. No contribution, if at the time of sacrificing the cargo there was no possibility of saving it. Crockett *v.* Dodge, 3 Fairfield, 190. [But see 234, n. 1, (c).] No loss or expense is considered and applied as general average, unless it was intended to save the remaining property, and unless it accomplished the object. Williams *v.* Suffolk Ins. Co., U. S. C. C. Mass., May, 1839, 3 Sumner, 510.

(b) Maggrath *v.* Church, 1 Caines, 196.

are of themselves of the nature of general average; and that where a sale of part of the cargo has been effected in order to pay for the repairing particular average losses, the ship owner will alone be liable to the owners of the goods so sold. Tudor's L. C. on Merc. & Mar. Law, note to Birkley *v.* Presgrave, 94, citing Powell *v.* Gudgeon, &c., *post*, 302, n. (*b*); Hallett *v.* Wigram, 9 C. B. 580. See, also, La Constancia, 2 Wm. Rob. 488; Dyer *v.* Piscataqua F. & M. Ins. Co., 53 Me. 118; The Mary, 1 Sprague, 51; Stirling *v.* Nevassa Phosphate Co., 85 Md. 128.

(c) *Lien.* — The American and English cases agree that the master has a lien on the cargo for contribution in general average. They also agree that the lien depends upon the possession of the goods. But in America the lien, although possessory, is regarded as maritime, and is enforced in admiralty, like the lien for freight. *Ante*, 228, n. 1; Cutler *v.* Rae, 7 How. 729, 732; 8 How. 615; Bags of Linseed, 1 Black, 108, 118; Dupont de Nemours *v.* Vance, 19 How. 162, 171; Mutual S. Ins. Co. *v.* Cargo of the Ship George, Olcott, 89, 157. In Dupont De Nemours' Case, *sup.*, the owners of the cargo were allowed to maintain a libel against the vessel in admiralty for contribution, and in Fitzpatrick *v.* 800 Bales of Cotton, 3 Benedict, 42, the owners of the vessel obtained a decree against the cargo. See, also, The John Perkins, 21 Law Rep. 87, 96; Dike *v.* The St. Joseph, 6 McL. 573. The English courts, on the other hand, consider the master's lien to be a common law lien, which is not enforced in admiralty. But the admiralty courts, although they will not directly enforce it, will not set it aside and annul it when it comes before them incidentally in the progress of a cause over which they take jurisdiction, as, for instance, a libel by a respondentia bondholder. Cleary *v.* McAndrew, Cargo *ex* Galam, 2 Moore, P. C. N. S. 216, 236; (explaining Constancia, 2 W. Rob. 487; The North Star, Lush. 45;) The Soblomsten, L. R. 1 Ad. & Ec. 293, 301.

[1] Gage *v.* Libby, 14 Allen, 261, 267; Patten *v.* Darling, 1 Cliff. 254; Lee *v.* Grinnell, 5 Duer, 400; Nelson *v.* Belmont, ib. 310, (21 N. Y. 36;) The Brig Mary, 1 Sprague, 17. See 234, n. 1.

detention, constitute the subject of general average, according to the decisions in New York and Massachusetts. (*c*) Those decisions are supported by the rule as laid down in Beawes, (*d*) and they are in coincidence with the law and practice of Holland and France. (*e*) Lord Tenterden, in his treatise on shipping, (*f*) observed, that the English law books furnished no decision on this point, and he thought it susceptible of a reasonable doubt, though his opinion was evidently against the justice and policy of the charge for contribution. Since he wrote, the question has been decided in the K. B. according to his opinion, and in a case in which he sustained and enforced a contrary opinion in his character of counsel. (*g*) The result of the decisions in *Plummer* v. *Wildman* and *Power* v. *Whitmore* (*h*) is, that where the general safety requires a ship to go into port to refit, by reason of some peril, the wages and
* 236 provisions of the crew during the * detention are not the subject of general average; but the other necessary expenses of going into port, and of preparing for the refitting the ship, by unloading, warehousing, and reloading the cargo, are general average. (*a*) The costs of the repairs, so far as they accrue

(*c*) Walden *v.* Le Roy, 2 Caines, 268; Padelford *v.* Boardman, 4 Mass. 548; Potter *v.* Ocean Ins. Co., 3 Sumner, 27. In Pennsylvania, it is decided that the wages and provisions of the crew during an *embargo* go into a general average, and, as the Ch. J. observed, the criterion of general average is, when the expenses were "necessarily and unavoidably incurred for the general safety of the ship and cargo." Insurance Company of N. America *v.* Jones, 2 Binney, 547. The case of a vessel forced into port by *sea perils and damage to refit*, would doubtless be considered as equally within the principle. See *infra*, 302.

(*d*) Lex Mercatoria, i. 161.

(*e*) Ricard, Négoce d'Amsterdam, 280; Emerigon, Traité des Ass. i. 624.

(*f*) Abbott on Shipping, 5th Am. ed. 1846, p. 592.

(*g*) Power *v.* Whitmore, 4 Maule & S. 141.

(*h*) 3 Maule & S. 482; 4 id. 141, s. p. [See Dent *v.* Smith, L. R. 4 Q. B. 414, 450.] In De Vaux *v.* Salvador, 4 Ad. & El. 420, Lord Denman, in that case, relied upon the *nisi prius* case of Fletcher *v.* Pole, before Lord Mansfield, in 1769, and cited by Park on Ins. i. 70; and also in Robertson *v.* Ewer, 1 T. R. 131. He seemed to admit that the expenses of wages and provisions, in such cases, might go into contribution as between owners and freighters, though not as against underwriters. In Charleston, in South Carolina, the average of provisions and wages of the crew, while the vessel is detained in a port of necessity, is not charged to the underwriters. The English rule is the one that prevails. Union Bank *v.* Union Ins. Co., Dudley Law & Eq. 171.

(*a*) Beawes, L. M. 161; Abbott on Shipping, 280, 1st ed. Bedford Com. Ins. Company *v.* Parker, 2 Pick. 8, and Thornton *v.* U. S. Ins. Company, 3 Fairf. 150, support the position, that the necessary expenses of unloading and reloading the cargo, when a vessel is forced into a port to refit, are to be brought into general average, for all persons concerned are interested in the measures requisite to complete the voyage

to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. Yet, if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred, with safety to the ship, to a less costly port, such extra expense is general average.[1]

It has likewise been held, that the wages and provisions of the crew, during a capture and detention for adjudication, are a proper subject for general average; (*b*) while in the case of a vessel detained by an embargo, they are not so subject, and are chargeable exclusively upon the freight. (*c*) The French Ordinance of the Marine, Pothier, and Ricard, all agree, that wages and provisions are not a subject for contribution in the case of an embargo; and yet it has been held, on the other hand, by the Court of Errors in Pennsylvania, in 1807, that *they were in such case the subject of general aver- *237 age. (*a*) In respect to the wages and provisions of the crew, while the vessel was detained at an intermediate port, by fear of enemies, and waiting for convoy, they were allowed to form the subject of general average by the courts in Holland, amidst conflicting opinions, and after very protracted and exhausting litigation. (*b*) We cannot but lament the uncertainty

But again, the labor and board of the master and crew, in relieving a vessel cast ashore in a storm, are not the subject of general average, or chargeable on the insurer; though the *extra* hire and loss on the sale of outfits are general average. Giles *v.* Eagle Ins. Co., 2 Met. 140. The case of Walden *v.* Le Roy, 2 Caines, 263, assumes, that those expenses, in such a case, go into a general average; and there seems to be no doubt from the cases, that where the wages and provisions of the crew are to be borne by general contribution, those other expenses are equally a part of it. The survey to ascertain the necessity and extent of repairs at a foreign port may be ordered by a court of admiralty, or by the American consul, or by persons voluntarily appointed by the master, and if the damages were the result of a peril insured, the underwriters bear the expense of the survey. Potter *v.* Ocean Ins. Co., 3 Sumner, 27, 42. The whole subject is discussed and the authorities collected in Abbott on Shipping, 5th Am. ed. Boston, 1846, 595–602.

(*b*) Ricard, Négoce d'Amsterdam, 279; Boulay-Paty, iv. 444; Leavenworth *v.* Delafield, 1 Caines, 574; Kingston *v.* Girard, 4 Dall. 274.

(*c*) Robertson *v.* Ewer, 1 T. R. 127; Penny *v.* New York Insurance Company, 3 Caines, 155; M'Bride *v.* Marine Insurance Company, 7 Johns. 431; Harrod *v.* Lewis, 3 Martin (La.), 311.

(*a*) Insurance Company of North America *v.* Jones, 2 Binney, 547.

(*b*) Bynk. Quæst. J. Priv. lib. 4, c. 25; Bynkershoek, in one of the adjudged cases

[1] See 234, n. 1; Dyer *v.* Piscataqua Libby, 14 Allen, 261, 268; Wilson *v.* F. & M. Ins. Co., 53 Me. 118; Gage *v.* Bank of Victoria, L. R. 2 Q. B. 208.

and confusion which the contradictory rules on this subject have created. There is no principle of maritime law that has been followed by more variations in practice than this perplexed doctrine of general average; and the rules of contribution in different countries, and before different tribunals, are so discordant, and many of the distinctions are so subtle and so artificial, that it becomes extremely difficult to reduce them to the shape of a connected and orderly system. The French jurists complain that their ancient nautical legislation left the question of contribution very much at large, and subject to arbitrary discretion, and
* 238 they commend very highly the regulations * of the Ordinance and of the code as just and equitable, and marked with certainty and precision. (*a*)

If part of the cargo be voluntarily delivered up to a pirate, or an enemy, by way of ransom or contribution, and to induce them to spare the vessel and residue of the goods, the property saved must contribute to the loss, as being the price of safety to the rest. The expense, also, of unlading the goods, to repair damages to the ship, or to lighten her when grounded, must be sustained by general contribution; for all the parties concerned are interested in the measures requisite for the prosecution of the voyage. If the masts, cables, and other equipments of the vessel be cut away, to save her in a case of extremity, their value must be made good by contribution. (*b*) It was attempted, in the case of *Covington* v. *Roberts*, (*c*) to extend the application of

which he cites, complains that the existing usages had extended contribution to every kind of danger, and frequently comprehended wages and provisions of the crew as proper objects of it, and that the practice might be abused to the destruction of the merchant. His history of the vexatious litigation in these cases is quite curious. In one of them, the Maritime Court at Amsterdam, in November, 1697, and again, in November, 1698, adjudged that the wages and provisions were a proper subject for contribution. The decisions were affirmed, on appeal, in July, 1700, and reversed on a further appeal, in July, 1710. On a still further appeal to the Supreme Senate, of which Bynkershoek was a member, after great discussion and much division in opinion, the original decisions of the Amsterdam maritime judges were restored, in March, 1713. Magens, in his Essay on Insurance, i. 66–69, shows the uncertainty and difficulty abroad, as well as in England, of settling the proper items for a general average, and particularly as to the wages and provisions of the crew.

(*a*) Ord. de la Mar. tit. Avaries, art. 7; Code, art. 400, 401; Boulay-Paty, iv. 466.

(*b*) Ord. de la Mar. tit. Avaries, art. 6; Valin's Comm. ii. 165; 1 Emerigon, 620, 621; Hennen *v.* Monro, 16 Martin (La.), 449.

(*c*) 5 Bos. & P. 378; Shiff *v.* Louisiana State Ins. Co., 18 Martin [La.], 629, to s. P. Where a vessel was stranded near her port of destination, and for the purpose of relieving her, the cargo was put into lighters and forwarded to the port, and during

the general rule to the case of the loss of a mast, in carrying an unusual press of sail to escape from an enemy, and to make that the subject of general average; but the court considered that to be no more than a common sea risk. All casual and inevitable damage and loss, as distinguished from that which is purposely incurred, are the subject of particular and not of general average. (*d*)

*If the ship be voluntarily stranded, to escape danger *239 from tempests, or the chase of an enemy, the damages resulting from that act are to be borne as general average if the ship be afterwards recovered and perform her voyage. (*a*) But if the ship be wholly lost or destroyed, by the act of running her ashore, it has been a question much discussed, and different opinions entertained, whether the cargo saved was bound to contribute to bear the loss of the ship. In *Bradhurst* v. *The Columbian Insurance Company*, (*b*) the ship, in a case of extremity, was voluntarily run ashore, and lost, but the cargo was saved; and it was held that no contribution was to be levied on the cargo for the loss of the ship. The marine ordinances,

the passage in the lighters part of the cargo was injured, such a loss to the cargo was held to be a proper subject for general average. Lewis *v.* Williams, 1 Hall (N. Y.), 480.

(*d*) Emerigon, i. 622, states an interesting case to illustrate the general doctrine. A French vessel being pursued by two cruisers of the enemy, the master, as soon as it was dark, hoisted a boat into the sea, furnished with a mast and sail, and a lantern at the masthead, and then changed his course, and sailed during the night without any light on board his ship. In the morning no enemy was in sight; and the value of the boat thus voluntarily abandoned for the common safety was made good by general contribution.

(*a*) Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 587. In a case of voluntary stranding, if it be done to save the cargo, the damage to the ship and cargo is the subject of general average; but if it was resorted to in order to save the lives or liberty of the crew, it is particular average. This distinction, Mr. Benecke says, is conformable to the practice of all countries. Benecke on the Principles of Indemnity, 220, 221. The principle is, that if a vessel be run ashore voluntarily to save life, and is lost, and would unavoidably have been lost without the act, it is not a case for contribution or general average, for nothing was saved, and no property sacrificed to save property. Benecke, 219; Stevens & Benecke on Average, by Phillips, 84; Meech *v.* Robinson, 4 Wharton, 360. But when a vessel is stranded, and part of the cargo taken on shore and conveyed to the place of destination by land, and the vessel is afterwards recovered, and other parts of the cargo reshipped and carried to the port of destination, the owners of the cargo landed and conveyed by land are bound to contribute to the extra charges and expenses incurred by the master, *after the landing of such cargo*, as general average. The rule of equity, reciprocity, and equality requires it. Bevan *v.* Bank of United States, 4 Wharton, 301. See, also, Benecke, 306, 307, to the same point. [But see 234, n. 1, (*b*).]

(*b*) 9 Johns. 9; Eppes *v.* Tucker, 4 Call, 346; Scudder *v.* Bradford, 14 Pick. 18, s. p.

and writers on maritime law, were consulted, and the conclusion drawn from them was, that the cargo never contributed for the ship, if she was lost by means of the act of running her ashore. But in two subsequent cases, where the ship was lost under like circumstances, it was decided, on a like review of the European law, that the loss was to be repaired by general average. (*c*) The question, therefore, in which the foreign and domestic authorities so materially vary, remains yet to be definitely settled. (*d*) [1]

A temporary safety is all that is requisite to entitle the
* 240 *owners of the property sacrificed to contribution; and if the ship survives the disaster, and be afterwards lost by another, still the goods saved in the second disaster must be contributory to the original loss, for without that loss they would have been totally destroyed. (*a*) Goods shipped on deck, contribute, if saved, but if lost by jettison, they are not entitled to the benefit of general average, and the owner of the goods must bear the loss without contribution; for they, by their situation, increase the difficulty of the navigation, and are peculiarly exposed to peril. Nor is the carrier in that case responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss. (*b*) [1]

(*c*) Caze *v.* Reilly, 3 Wash. 298; Gray *v.* Waln, 2 Serg. & R. 229. In Scudder *v.* Bradford, 14 Pick. 18, where the masts were cut away, but the vessel afterwards, notwithstanding that sacrifice, went ashore and was lost, it was held, that the cargo saved was not liable to a general average, for the sacrifice was unavailing.

(*d*) It remains to be settled in the English law. Abbott on Shipping, 5th Am. ed. Boston, 590, 591. But this question was finally settled in the Supreme Court of the United States, in the case of The Columbian Ins. Company *v.* Ashby, 13 Peters, 331. The court reviewed the principal authorities, foreign and domestic, and decided that in a case of a voluntary stranding of the ship for the common safety, and to save the crew and cargo from impending peril, followed by a total loss of the ship, but with a saving of the cargo, a clear case of general average existed, in which the insurers of the cargo were held liable to contribute upon that principle to the loss of the ship and freight. See the cases collected and condensed in Abbott on Shipping, 5th Am. ed. Boston, 1846, 490, 491, note.

(*a*) Vinnius, in Peckium ad legem Rhodiam, 246, 250; Boulay-Paty, iv. 443.

(*b*) Consulat de la Mer, c. 188; Ord. de la Mar. 3, 8, 13; Emerigon, c. 12, sec. 42;

[1] See 284, n. 1, (*c*).

[1] Lawrence *v.* Minturn, 17 How. 100, 115; Johnson *v.* Chapman, 19 C. B. N. S. 563; Harris *v.* Moody, 30 N. Y. 266; 4 Bosw. 210; Merchants' & Man. Ins. Co. *v.* Shillito, 15 Ohio St. 559; Toledo Ins. Co. *v.* Speares, 16 Ind. 52; The Milwaukie Belle, 9 Am. Law Reg. N. S. 311; 21 L. T. N. S. 800; Miller *v.* Tetherington 7 Hurlst. & N. 954; 6 id. 278.

It becomes an important inquiry on this subject, what goods are to contribute, and in what proportions, to a loss voluntarily incurred for the common safety. The general doctrine is, that all the merchandise, of whatever kind or weight, or to whomsoever belonging, contributes. Goods of the government are liable to contribute equally with those of other shippers. The contribution is made, not on account of incumbrance to the ship, but of safety obtained, and therefore bullion and jewels put on board as merchandise contribute according to their full value.[2] By the Rhodian law, (*c*) it was deemed just that all should contribute to whom the jettison had been an advantage, and the amount was to be apportioned according to the value of the goods. It extended to the effects and clothes of every person, and even to the ring on the finger, but not to the provisions on board, nor to the persons of freemen, whose lives were of too much dignity and worth to be susceptible of valuation. The modern marine codes do not generally go to the extent of the Rhodian law, and they vary greatly on the subject. By the English law, the wearing apparel, jewels, and other things belonging to the persons of passengers or crew, and taken on board

Smith *v.* Wright, 1 Caines, 43; Lenox *v.* U. I. Company, 3 Johns. Cas. 178; Boulay-Paty, iv. 566; Code de Commerce, art. 421; Dodge *v.* Bartol, 5 Greenl. 286; The Brig Thaddeus, 4 Martin (La.), 582; Abbott on Shipping, 5th Am. ed. 578; Story on Bailments, 839; Johnston *v.* Crane, Kerr N. B. 856; Wolcott *v.* Eagle Ins. Company, 4 Pick. 429. But if they be laden on deck, *according to the custom of a particular trade*, they are entitled to contribution from the ship owners for a loss by jettison. Gould *v.* Oliver, 4 Bing. N. C. 134 [2 Mann. & Gr. 208]. In the 5th Am. ed. of Abbott, 578, there is a learned note by the English editor, Sergeant Shee, on the exclusion of goods stowed on deck from the benefit of general average; and the general rule is considered to be quite inflexible that goods so stowed do not go into general average. But the consent of the owner would undoubtedly relieve the master from the responsibility for the loss of goods so disposed. In addition to the case of Gould *v.* Oliver, the case of Milward *v.* Hibbert, in the Q. B., 2 Gale & Dav. 142, declared against any general inflexible rule of law, that for goods stowed on deck the owner should be excluded from the benefit of general average, and that the rule depended upon circumstances, and the evidence of commercial men respecting the usages of the trade. See Abbott on Shipping, 5th Am. ed. Boston, 535, 536. There is the late statute of 5 Vict. prohibiting the cargo of vessels, clearing from British North America, between September and May, to be stowed on deck, if the vessel be laden wholly or in part with timber or wood goods.

(*c*) Dig. 14. 2. 2.

[2] So do bank notes forming part of the cargo. Harris *v.* Moody, 80 N. Y. 266; 4 Bosw. 210. Compare The Emblem, Daveis, 61 (a case of salvage). As to government goods, see 171, n. 1.

* 241 for private use, and not as * merchandise for transportation, and the provisions and stores for the crew, do not contribute in a case of general average. (*a*) The common rule, according to Magens, (*b*) is, that what articles pay freight must contribute, and what goods pay no freight pay no average; and that articles contribute according to their value, and not according to weight. By the French Ordinance of the Marine, as well as by the new commercial code, provisions and the clothes of the ship's company do not contribute; but usage goes further, and does not subject to the charge of general average either clothes, jewels, rings, or baggage of the passengers, for they are considered accessory to the person. Emerigon, who has, according to his usual manner, collected and exhausted all the learning appertaining to the subject, inclines to think with Pothier, that by strict law and by equity, the clothes and jewels of passengers ought to contribute. But Boulay-Paty, in his commentaries on the new code, and in which he draws most liberally on the resources of Emerigon, thinks they ought to be exempted, and that the existing French usage is proper. (*c*)

Instruments of defence and provisions do not contribute, because they are necessary to all; and yet, if they are sacrificed for the common safety, they are to be paid for by contribution; nor do the wages of seamen contribute to the general average, except in the single instance of the ransom of the ship. They are exempted, lest the apprehension of personal loss should restrain them from making the requisite sacrifice, and the * 242 hardships and perils they endure will entitle * them to an exemption from further distress. (*a*) If part of the cargo be sold for the necessities of the ship, it is in the nature of a compulsive loan for the benefit of all concerned, and bears a resemblance to the case of jettison; and if the ship be afterwards lost, the goods saved must contribute towards the loss of the goods sold, equally as if they had been thrown overboard to

(*a*) Abbott on Shipping, part 3, c. 8, sec. 14.

(*b*) Magens on Insurance, i. 62, 63.

(*c*) Ord. de la Mar. tit. Du Fret, art. 11; Code de Commerce, art. 419; Pothier, tit. Des Avaries, n. 125; 1 Emerigon, 645; Boulay-Paty, iv. 561, 562. In Brown *v.* Stapyleton, 4 Bing. 119, 12 J. B. Moore, 334, s. c., the general rule was declared to be, that provisions for the crew on board a ship are not *merces* put on board for the purpose of commerce, and do not contribute to the general average, even when the cargo of the ship consists only of passengers.

(*a*) 1 Emerigon, 642.

lighten the vessel. In such a case, a portion of the cargo, according to Lord Stowell, is abraded for the general benefit. (*b*) [1]

Without entering minutely into the doctrine of adjusting and settling a general average, (*c*) it will be sufficient to observe, that, as a general rule, the goods sacrificed, as well as the goods saved, if the vessel arrives at the port of destination, are to be valued at the clear net price they would have yielded, after deducting freight, at the port of discharge; and this rule is founded on a plain principle of equity. (*d*) The person whose loss has procured the safe arrival of the ship and cargo, should be placed on equal ground with those persons whose goods had safely arrived, and that can only be by considering his goods to have also arrived. The owners of the ship contribute according to her value at the end of the voyage, and according to the net amount of the freight and earnings. The value of the vessel lost is estimated according *to her value at the port *243 of departure, making a reasonable allowance for wear or tear on the voyage up to the time of the disaster; [1] and the practice in this country, or at least it is the practice in Boston, (*a*) to ascertain the contributory value of the freight, by deducting one third of the gross amount. As to losses of the equipment of the ship, such as masts, cables, and sails, it is usual to deduct one third from the price of the new articles; for, being new, they will be of greater value than the articles lost. (*b*) The subject of the adjustment of a general average has been very

(*b*) Hall's Emerigon on Maritime Loans, 94; The Gratitudine, 3 C. Rob. 264.

(*c*) Mr. Benecke has discussed at large, and very ably, the complicated and difficult subject of general average, and the adjustment of it; and to him I must refer for a more minute detail of the learning and principles applicable to the case. Principles of Indemnity, c. 5, 7.

(*d*) Tudor *v.* Macomber, 14 Pick. 34. The Consolato del Mare, and the usage of divers countries, made a distinction as to the rule of valuation, and they took the value at the place of departure, if the jettison took place before the middle of the voyage, and the value at the price of discharge, if afterwards. But the Ordinance of the Marine did not make any such distinction. 1 Emerigon, 654. If the vessel returns to the port of departure, or to some neighboring port, the price of replacing the goods sacrificed, or the cost price, including charges, is the rule for settling the general average. Tudor *v.* Macomber, 14 Pick. 34.

(*a*) 3 Mason, 439.

(*b*) Abbott on Shipping, 5th Am. ed. 607; Strong *v.* Firemen Ins. Company, 11 Johns. 323; Simonds *v.* White, 2 B. & C. 805; Gray *v.* Waln, 2 Serg. & R. 229, 257, 258

[1] But see 234, n. 1, (*d*).

[1] Mutual S. Ins. Co. *v.* Cargo of Ship George, Olcott, Adm. 157.

much discussed in some of the modern cases. In *Leavenworth* v. *Delafield*, (*c*) which was the case of a vessel captured and carried in for adjudication, and where the wages and provisions of the crew went into general average, a rule of adjustment somewhat peculiar to the case was adopted; for no disaster had happened to injure the vessel or cargo. In *Bell* v. *Smith*, (*d*) the vessel had been so deteriorated by the perils of the sea as to render a sale of her abroad necessary; and the general average was calculated on the price she sold for, and not on four fifths of her original value, as in the preceding case of capture. In adjusting the difficult subject of contribution to a general average, one rule has been to take the value of the ship and cargo at the port of necessity, or place where the expense was incurred; and if there be no price of ship and cargo at such a place to be well and satisfactorily ascertained, the parties concerned may be forced to recur to the value at the port and time of departure on the voyage. (*e*) The doctrine of adjustment underwent a very
* 244 full discussion in *Strong* v. *New York Firemen* * *Insurance Company*, (*a*) and it was there declared to be the duty of the master, in cases proper for a general average, to cause an adjustment to be made upon his arrival at the port of destination, and that he had a lien upon the cargo to enforce the payment of the contribution. This was shown to be the maritime law of Europe.[1] When the general average was thus fairly settled in the foreign port, according to the usage and law of the port, it was binding and conclusive as to the items, as well as the apportionment thereof, upon the various interests, though settled differently from what it would have been in the home port. The very same principle was largely examined and recognized in *Simonds* v. *White*. (*b*) If, however, it was not a proper case for a general average, and was a partial loss only, then these cases do not apply, and a foreign adjustment, founded in mistake, and

(*c*) 1 Caines, 574. (*d*) 2 Johns. 98.

(*e*) As a general rule, the valuation of the cargo in the bill of lading is conclusive between the owner of the ship and the owner of the cargo, in the adjustment of a general average in the home port. Tudor *v.* Macomber, 14 Pick. 34.

(*a*) 11 Johns. 323; Lewis *v.* Williams, 1 Hall (N. Y.), 430; Depau *v.* Ocean Ins. Company, 5 Cowen, 63, s. P.

(*b*) 2 B. & C. 805; Dalglish *v.* Davidson, 5 Dowl. & Ry. 6; Loring *v.* Neptune Ins. Company, 20 Pick. 411; Thornton *v.* United States Ins. Company, 3 Fairfield, 153.

[1] See 234, n. 1.

assuming a case for general average when none existed, is not binding. (*c*) With respect to the payment of the average, each individual is undoubtedly entitled to sue for the amount of his share when adjusted; but the English practice usually is, in the case of a general ship, where there are many consignees, for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted. (*d*)

*[10.] **Of Salvage.** — Salvage is the compensation allowed *245 to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture; and it often forms a material ingredient in the discussions and adjustment which take place when a voyage has been disastrous. (*a*) [1] The equitable doctrine of salvage came from the Roman law; (*b*) and it was adopted by the admiralty jurisdictions in the different countries of Europe; and whether it be a civil or war salvage, it is equally founded on the principle of rewarding individual, spontaneous, and meritorious services, rendered in the protection of the lives and property of others on the sea, or wrecked on the coast of the sea. (*c*) [1] It is chargeable upon the owners, who receive benefit, and who would have sustained the loss if it had not been prevented by the exertions

(*c*) Lenox *v.* United Ins. Company, 3 Johns. Cas. 178; Power *v.* Whitmore, 4 Maule & S. 141. [See Dent *v.* Smith, L. R. 4 Q. B. 414, 450; Harris *v.* Scaramanga, L. R. 7 C. P. 481, 495, 498.]

(*d*) Abbott on Shipping, part 3, c. 8, sec. 17. The captain may make the giving of the average bond a condition of the delivery, and it is held to be a reasonable condition in support of a right founded on commercial usage. Cole *v.* Bartlett, 4 La. 130. The absolute owner of goods is liable to pay a general average; but if a mere consignee, who is not owner, receives them, and the bill of lading saying, "he paying freight and demurrage," and is silent as to general average, the consignee is not bound to pay it, though he would have been if it had been mentioned. He is liable to pay freight by reason of the condition on which he receives the goods, and which he agrees to by receiving the goods. Scaife *v.* Tobin, 3 B. & Ad. 523.

(*a*) *Salvage*, in policies of insurance, says Mr. Phillips, has a meaning somewhat different, and it applies to that part of the cargo which survives the peril and is saved, and is to be charged or credited, as the case may be, on the adjustment of total losses.

(*b*) Dig. 3. 5.

(*c*) The Calypso, 2 Hagg. Adm. 217, 218; Ware, J., in The Bee, Ware, 336; The Schooner Emulous, 1 Sumner, 207. In the case of a ship stranded on a sand-bank, in the St. Lawrence, *infra corpus comitatus*, the suit for salvage was held to be of common law, and not of admiralty jurisdiction. Stuart's Lower Canada Rep. 27.

[1] See 243, n. 1.

of the salvors. The allowance of salvage depends frequently on positive statute regulations fixing the rate, and the foreign ordinances contain precise enactments on this head, though salvage is said to be a question of the *jus gentium*, and not the creature of local institutions, like a mariner's contract. (*d*) The regulation of salvage, by the statute law of the United States, is confined to cases of recapture. In the case of shipwrecks, or derelicts at sea, and rescue, and most other cases, the law has not fixed any certain rate of salvage, and it is left to the discretion of the court of admiralty, under all the circumstances. The amount to be allowed varies according to the labor and peril incurred by the salvors, the merit of their conduct, the value of the ship and cargo, and the degree of danger from which they were rescued. (*e*) The courts are liberal in the allowance of salvage in meritorious cases, as a reward for the service, and as an incentive to effort; and the allowance fluctuates between one half, one third, and one fourth of the gross or net proceeds of the property saved, but one third has been the most usual rate. (*f*) In a case of derelict, Sir William Scott observed, that in no instance, except where the crown alone was concerned, and where no claim had been given for a private *246 owner, had more * than one half of the net proceeds of the property been decreed by way of salvage; and in that case he directed the salvage to be apportioned among the crews of the two vessels which were the salvors, according to the

(*d*) 1 C. Rob. 278. The statute of 9 and 10 Vict. c. 99, enacts regulations on the subject of *salvage*, and its unskilful enactments are exposed in the Law Magazine for February, 1847, art. 2, [vol. xxxvii. — vi. N. S. — 32.]

(*e*) The Aquila, 1 C. Rob. 37; The Two Friends, ib. 271; The Sarah, cited in a note to ib. 313; The William Beckford, 3 C. Rob. 355; Marshall, C. J., 2 Cranch, 267; Bond *v.* The Brig Cora, 2 Wash. 80; The Schooner Emulous, 1 Sumner, 207; The Elizabeth and Jane, 1 Ware, 85; Bearse *v.* 340 Pigs of Copper, 1 Story, 314. The leading authorities in respect to salvage, in the various cases of derelict, recapture, rescue, and distress, are collected and classified by Mr. Perkins, the American editor, in Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 666.

(*f*) If the owner has voluntarily and fairly entered into a contract for a fixed or reasonable compensation, the service rendered in a maritime case of distress is still a salvage service; but the contract is not held binding upon the owner, unless it appears that no advantage was taken, and that the rate of compensation was reasonable. The Schooner Emulous, 1 Sumner, 207. One sixth is the usual allowance of military salvage under the general law of nations, as practised in the English and American courts, where the case is not marked with any extraordinary circumstances of difficulty or danger. Opinion of the U. S. Attorney General, [Op. Att. Gen. i. 584.]

numbers of the crews. (*a*) The same observations were made by the court, in *Mason* v. *The Ship Blaireau*, (*b*) and no instance was found in which salvors were allowed beyond a moiety of the value.[1] The court, in that case, reduced the allowance made in the court below to the salvors, from three fifths of the net proceeds of the ship and cargo, to two fifths thereof. In general, neither the master nor a passenger, seaman, or pilot is entitled to compensation, in the way of salvage, for the ordinary assistance he may have afforded a vessel in distress, as it is no more than a duty; for a salvor is a person who, without any particular relation to the ship in distress, proffers useful service, and renders it without any preëxisting contract making the service a duty. (*c*) But a passenger, or an officer acting as such, for extraordinary exertions beyond the line of his duty, has been deemed entitled to a liberal compensation as salvage. (*d*) So,

(*a*) L'Esperance, 1 Dods. 46. But in a case of extraordinary salvage merit, in bringing in a derelict, the court have not only allowed a moiety for salvage, but they have charged the costs upon the other moiety. The Frances Mary, 2 Hagg. Adm. 89; The Reliance, ib. 90, note. In The Charlotta, ib. 361, the court gave the original salvors the salvage of two fifths of the whole value. It was a case of derelict, and of great merit. In cases of derelict, the rule limiting the salvage to a moiety seems to be the fixed rule in the English admiralty and in our own. The Fortuna, 4 C. Rob. 198, and L'Esperance, 1 Dods. 46; The Blendenhall, ib. 414, 421; The Elliotta, 2 id. 75; Rowe *v.* The Brig ——, 1 Mason, 372; The Henry Ewbank, Am. Jurist, No. xxiii. 67; 1 Sumner, 401, s. c. Property is *derelict*, in the maritime sense of the word, when it is abandoned without hope of recovery, or without an intention of returning. Ware, 48.

(*b*) 2 Cranch, 268.

(*c*) The Neptune, 1 Hagg. Adm. 236; Hobart *v.* Drogan, 10 Peters, 108, 212.

(*d*) Newman *v.* Walters, 8 Bos. & P. 612; Bond *v.* The Brig Cora, 2 Wash. 80; Case of Le Tigre, 3 id. 567; The Branston, 2 Hagg. Adm. 3, note. The general rule is, that a salvage remuneration is given only to the persons *actually* occupied in the salvage service. The Vine, ib. 1. But where the service has been performed at some risk to the property of the *owners*, a portion of the remuneration has been allotted to them. In cases of civil salvage, the courts of admiralty do not recognize the rule of proportion, but award an equitable remuneration. Though the master and crew are in strict language the only salvors, yet the *owners* of the salvor or saving ship are also allowed salvage, and one third has been established as the suitable proportion under ordinary circumstances. The Blaireau, 2 Cranch, 240; The Brig Harmony, Peters Adm. 34, note; The Cora, ib. 361; 2 Wash. 80; The Ship Henry Ewbank, 1 Sumner, 400; The Salacia, 2 Hagg. Adm. 262. Underwriters may be entitled as owners to salvage after an accepted abandonment. The Ship Henry Ewbank, *supra*. The act of New York, of February 19, 1819, c. 18, sec. 19, (and which act was not repealed by the New York Revised Statutes of 1830,) authorizes the Board of Wardens of the port of New York to allow to branch and deputy pilots a reasonable reward for extra services for the preservation of vessels in distress. *Vide supra*, 176, note.

[1] See 248, n. 1.

also, in a case of extraordinary peril, it is admitted, that great exertions and personal hazard may exalt a pilotage service into something of a salvage service, and salvage will be allowed. (*e*) And if a ship has been abandoned, so as to discharge a seaman from his contract, yet if he subsequently contributes to the preservation of the vessel, he will be entitled to salvage. (*f*)

* 247 As the * duty of the seamen ceases by capture, any exertion, subsequently and successfully made, to recover and rescue the captured ship, will entitle them to recompense. (*a*) The case will then be withdrawn from the operation of the general, if not universal principle, that so long as the person, be he a seaman, pilot, or other person, is acting within the line of his duty in the given case, he has no valid claim for a salvage remuneration.[1]

The subject of salvage was largely discussed in our courts in a case of recapture. (*b*) The District Court of New York allowed as salvage one half of the value of the ship. The Circuit Court reversed the decree, and denied all salvage. The Supreme Court of the United States corrected both decrees, and allowed one sixth part of the net value, after deducting the charges. The court, in that case, admitted the rule to be, that a neutral vessel, captured by a belligerent, was entitled to be discharged without paying salvage, on the ground that no beneficial service was thereby rendered, as the neutral, acting properly, would, of course, be discharged by the courts of the sovereign of the captor; and they admitted, likewise, the exception to the rule, when belligerent captors and courts were notorious for their unprincipled rapacity. This rule and the exception have been frequently declared in the English Admiralty. (*c*) The rule of

(*e*) Sir William Scott, in The Joseph Harvey, 1 C. Rob. 306; The Frederick, 1 W. Rob. 16.

(*f*) Mason *v.* Ship Blaireau, 2 Cranch, 240; Hobart *v.* Drogan, 10 Peters, 108. In this last case it was decided, that seamen and pilots may, in extraordinary cases, beyond the appropriate line of duty, perform salvage service, and be entitled to compensation as salvors. But pilots or engineers of steamboats do not come within the exception, though the rules of the marine law relative to disasters at sea apply generally to navigation by steamboats. Mesner *v.* Suffolk Bank, U. S. D C. Mass. 1838.

(*a*) The Two Friends, 1 C. Rob. 271; The Beaver, 3 id. 292.

(*b*) Talbot *v.* Seeman, 1 Cranch, 1.

(*c*) The War Onskan, 2 C. Rob. 299; The Carlotta, 5 id. 54.

[1] See 248, n. 1.

British jurisprudence in respect to recaptured property, and salvage thereon, is to give the benefit of the rule applicable to recaptured property of British subjects to allies, until it appears that they act upon a less liberal principle, and then the allies are treated according to their own measure of justice. (*d*) The same rule has been * adopted by statute in this * 248 country, (*a*) and is founded on the immovable basis of reciprocal justice.

Though the contract of seamen be not dissolved by shipwreck, and it be their duty to remain and labor to preserve the wreck and fragments of the ship and cargo, yet they may be entitled to recompense, by way of salvage, for their peculiar services. The wages recovered in the case of shipwreck are in the nature of salvage, and form a lien on the property saved. The character of seamen creates no incapacity to assume that of salvors; and were it otherwise, it would be mischievous to the interests of commerce, inconsistent with natural equity, and would be tempting the unfortunate mariner to obtain by plunder and embezzlement in a common calamity, what he ought to possess upon principles of justice. The allowance of salvage in such cases is and ought to be liberal; not less, in any case, than the wages would have amounted to; and even an additional recompense should be made in cases of extraordinary danger and distinguished gallantry, where the service was much enhanced by the preservation of life, and the great value of the property at stake. (*b*) [1]

(*d*) The Santa Cruz, 1 C. Rob. 50. The British editor, Sergeant Shee, in Abbott on Shipping, 5th Am. ed. p. 699, says that this case, The Santa Cruz, is a most finished model of judicial eloquence. See, also, *supra*, i. 112.

(*a*) Act of Congress, March 3, 1800, c. 14, sec. 3.

(*b*) The Two Catherines, 2 Mason, 319. The court of admiralty has no power of remunerating the mere preservation of life; but if it be connected with the pres-

[1] *Salvage.* — (*a*) *When earned.* — It is said not to be necessary that there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty and reasonable apprehension. The Phantom, L. R. 1 Ad. & Ec. 58; The Charlotte, 3 W. Rob. 68, 71; The Aztecs, 21 L. T. N. S. 797; The Joseph C. Griggs, 1 Benedict, 81; The Delphos, Newb. 412; The Independence, 2 Curtis, 350, 353. And risk to the salvor is not a necessary element, even when the service is performed by a tug under a contract to tow the rescued vessel, although it affects the *quantum* of the allowance. The Pericles, Brown. & L. 80; (explaining The Minnehaha, Lush. 335; 15 Moore, P. C. 133;) The Chetah, L. R. 2 P. C. 205, 212.

The principle that the reward is for individual services, does not exclude an allowance to absent owners whose prop-

11. Of the Dissolution of the Contract. — The contract of affreightment may be dissolved without execution, not only by

ervation of property, it forms a high ingredient of merit in the allowance of salvage. 1 Hagg. Adm. 83, 156. If the seamen remain by the ship, and exert themselves to the utmost to save as much as possible from the wreck, they are entitled to their full wages, if enough be saved for the purpose; and the law, from motives of policy, allows them a further reward in the nature of salvage. The *wages* are to be paid exclusively from the materials of the ship; but the *salvage* is a general charge upon the whole mass of property saved, and it ought not, in such cases, to be less than the expenses of their return home. The Dawn, Ware, 485, and the same case redecided and illustrated with great force in the District Court of Maine, February Term, 1841. American Jurist for October, 1841, p. 216, [Daveis, 121.]

erty suffered loss, or encountered risk in rendering the service, as is explained p. 246, n. (*d*). The Charlotte, 3 W. Rob. 68; The Camanche, 8 Wall. 448, 473; Waterbury *v.* Myrick, Bl. & Howl. 84; The Czarina, 2 Sprague, 48; The Andrina, L. R. 3 Ad. & Ec. 286. See, especially, Missouri's Cargo, 1 Sprague, 260, 271, where it is put on the use of the owner's ship, crew, and provisions, seemingly irrespective of risk. The Norden, 1 Spinks, Ec. & Ad. 185; The Ship Charles, Newb. 329, 338; The Janet Mitchell, Swabey, 111; The Sir Ralph Abercrombie, Carmichael *v.* Brodie, L. R. 1 P. C. 454, 461. And on similar grounds it is held that a corporation may promote a suit for salvage. The Camanche, 8 Wall. 448; The Blackwall, 10 Wall. 1. The owners of steamers are allowed a greater compensation than owners of sailing vessels. The Kingalock, 1 Spinks, Ec. & Ad. 263, 267; The Alfen, Swabey, 189; The Enchantress, Lush. 93, 96; The William Penn, 1 Am. Law Reg. 584; C. W. Ring, 2 Am. Law Rev. 259; Hennessey *v.* The Versailles, 1 Curtis, 353, 363; The Princess Helena, 30 L. J. N. S. Ad. 137, 139.

The services must be meritorious, in the sense that salvage is a reward for benefits actually conferred, not for a service attempted to be rendered. The Chetah, L. R. 2 P. C. 205, 212; The Zephyrus, 1 W. Rob. 329, 330; The Edward Hawkins, Lush. 512; 15 Moore, P. C. 486; The T. P. Leathers, Newb. 421, 428; The Whitaker, 1 Sprague, 282. And it is said that even when services are rendered under an agreement, compensation will be contingent on the saving of property, unless it was otherwise specified. The Brig Susan, 1 Sprague, 499, 504. But see The Undaunted, Lush. 90; The Aztecs, 21 L. T. N. S. 797. But it is not necessary that safety should be due to the exertions of the salvor alone, if they contributed to the result. The Pontiac, Newb. 131; 5 McL. 358; The Undaunted, Lush. 90; The Atlas, Lush. 518, 527; 15 Moore, P. C. 329, 339; The Island City, 1 Black, 121.

The services must be greater or other than those which it was the duty of the party to render. *Ante*, 247; The Hannibal. The Queen, L. R. 2 Ad. & Ec. 53; The Wave *v.* Hyer, 2 Paine, 131.

A tug, under a contract to tow a vessel, is not relieved of her contract because unforeseen difficulties occur in the completion of her task, but she may be if performance becomes impossible. If, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel performs services which were beyond the scope of the contract to tow, she will earn salvage, even if she runs no risk. The Pericles, Brown. & Lush. 80; The Minnehaha, Lush. 335; 15 Moore, P. C. 133; White Star, L. R. 1 Ad. & Ec. 68; The J. C. Potter, 28 L. T. N. S. 603. So as to pilots

the act of the parties, but, in many cases, by the act of the law.

Lee *v.* Ship Alexander, 2 Paine, 466. But services rendered under a contract for work and labor to be paid for at all events, whether successful or not, are not salvage services. The Independence, 2 Curtis, 350; Hennessey *v.* The Versailles, 1 id. 353. See The Brig Susan, *supra;* Parker *v.* Brig Whitaker, 18 Law Rep. 497; Coffin *v.* Schooner John Shaw, 1 Cliff. 230, 236; The Wm. Lushington, 7 Notes of Cases, 361, 368; Hope *v.* Brig Dido, 2 Paine, 243. The right of seamen to salvage has been discussed *ante*, 196, n. 1. They are not excluded from compensation for services rendered to another vessel by the fact that it belonged to the same owner with that on which they are employed. The Sappho, L. R. 3 Ad. & Ec. 142; (explaining The Maria Jane, 14 Jur. 857; 1 E. L. & Eq. 658.) It seems that officers and crews belonging to the United States navy may earn salvage for remarkable services to American merchant vessels. The Josephine, 2 Blatchf. 322, 328. See Robson *v.* The Huntress, 2 Wall. Jr. 59. Passengers were not allowed salvage in The Vrede, Lush. 322; 30 L. J. N. S. Ad. 209; but it was admitted that they might be salvors under extraordinary circumstances. It is said that their claim to salvage was allowed in The Great Eastern, N. Y. D. C. 1864, 2 Pars. Ship. 268, n. 5.

A vessel, through whose fault a collision has taken place, is not compensated for services to the other ship. She cannot profit by her own wrong, and it is for her own benefit to render them. Cargo ex Capella, L. R. 1 Ad. & Ec. 356; The Iola, 4 Blatchf. 28, 31; The Minnehaha, Lush. 335, 348; 15 Moore, P. C. 133, 155.

Salvage may be forfeited or diminished by misconduct of the salvors, such as embezzlement, in co nection with the salvage service. The Island City, 1 Black, 121; The Mulhouse, 22 Law Rep. 276; The Martha, Swabey, 489; The Lady Worsley, 2 Spinks, Ec. & Ad. 253, 256; The Magdalen, 31 L. J. N. S. Ad. 22, 24, Fielden, 11 W. R. 156; The Waterloo, Blatchf. & Howl. 114. So it may be diminished by negligence, in proportion to the negligence, but not in proportion to the damage occasioned by it. The Cape Packet, 6 Notes of Cases, 565. See The Atlas, *inf.* But the fraud of the master does not defeat the claim of the own ers and crew if the salvage is accomplished notwithstanding the fraud. The Missouri's Cargo, 1 Sprague, 260; 18 Law Rep. 88. See The Atlas, Lush. 518, 529; 15 Moore, P. C. 329, 341.

There is no distinction between river salvage in tidal water, not salt, and sea salvage, except as affecting the *quantum* of remuneration. The Carrier Dove, Trask *v.* Maddox, 2 Moore, P. C. N. S. 243; Vivien *v.* Mersey Docks Board, L. R. 5 C. P. 19, 28.

(*b*) *Quantum.* — With regar l to the amount of salvage, two thirds has been allowed, The Jubilee, 3 Hagg. Adm. 43, n. (*a*); The Waterloo, Blatchf. & Howl. 114; and the whole of a small amount has been awarded under special circumstances. The Hamilton, 3 Hagg. Adm. 168; Two Anchors & Chains, 1 Benedict, 80. There is no rule that the salvor is to have a moiety; the true principle is adequate reward, according to the circumstances of the case. Post *v.* Jones, 19 How. 150; Two Hundred and Ten Barrels of Oil, 1 Sprague, 91; The Florence, 16 Jur. 572; 20 E. L. & Eq. 607, 622. As is said in 245, n. (*f*), the amount may be fixed by contract. The Firefly, Swabey, 240; The Independence, 2 Curtis, 350, 357; The A. D. Patchin, 1 Blatchf. 414; Th H. B. Foster, Abbott, Adm. 222. As to steamers, see above in this note, (*a*).

(*c*) *Derelict* is discussed in many cases, from which it appears that a momentary abandonment of a vessel when the lives of those on board seem to be in imminent

If the voyage becomes unlawful, or impossible to be performed, or if it be broken up, either before or after it has actually commenced, by war or interdiction of commerce with the place
* 249 of destination, the contract is dissolved. (*c*) There is * no difference in principle between a complete interdiction of commerce, which prevents the entry of the vessel, or a partial one, in relation to the merchandise on board, which prevents it being landed. The contract of affreightment in respect to the goods is dissolved, for the shipper cannot demand the delivery of the goods if the landing of them would expose the vessel to seizure. (*a*) And if the voyage be broken up by capture on the passage, so as to cause a complete defeasance of the undertaking, the contract is dissolved, notwithstanding a subsequent recapture. (*b*) So, if

(*c*) Liddard *v.* Lopes, 10 East, 526.

(*a*) Patron *v.* Silva, 1 La. 277.

(*b*) The Hiram, 8 C. Rob. 180. Capture does not of itself *ipso facto* dissolve the contract of affreightment or wages. It suspends it during the prize proceedings, and it reattaches upon a recapture, which confers a title to salvage only, and restores and does not extinguish the rights of neutrals. This is the general rule, and it is well sustained by Mr. Justice Story, in the case of the ship Hooper, 3 Sumner, danger, followed, as soon as judgment can be exercised, by an intention of returning, or an abandonment for the security of the person accompanied with an intention of returning provided that life is no longer in danger, or for the definite purpose of getting aid at a specified port, with the intention of returning as soon as the aid is obtained, does not usually constitute an ordinary case of derelict. The Cosmopolitan, 6 Notes of Cases, supp. 17; The John Perkins, *ante*, 196, n. 1; The Fenix, Swabey, 13; The Champion, Brown. & Lush. 69, (distinguishing The Coromandel, Swabey, 205;) The Island City, 1 Black, 121; 1 Cliff. 221; The T. P. Leathers, Newb. 421; The George Nicholaus, ib. 449; The Pickwick, 16 Jur. 669; 20 E. L. & Eq. 628. But see The John Gilpin, Olcott, 77; The Joseph C. Griggs, 1 Benedict, 81.

In general the master of the saved vessel is entitled to control her, and the salvor cannot retain possession as against him; but in cases of absolute derelict, and some others, the salvor has a right to exclusive possession. The Champion, Brown. & Lush. 69; The Cleopatra, 37 L. J. N. S. Ad. 31; The Gertrude, 30 L. J. N. S. Ad. 130.

(*d*) *Lien.* — There is a maritime lien for salvage services which is the foundation of a proceeding *in rem* in the admiralty, and which does not depend on possession. (Compare 228, n. 1, (*b*); 234, n. 1, (*e*).) The H. D. Bacon, Newb. 274; The Missouri's Cargo, 1 Sprague, 260, 272; Cutler *v.* Rae, 7 How. 729, 731. See, also, A Box of Bullion, 1 Sprague, 57; The Lady Worsley, 2 Spinks, Ec. & Ad. 253, 255. The right to proceed *in personam* depends on the owner's having received the property; the salvor's claim being a right against the property saved. The Emblem, Daveis, 61, 68; The Independence, 2 Curtis, 350, 356. Compare 138, n. 1; 218, n. 1. Whether an action for salvage would lie at common law is perhaps doubtful in England. Lipeon *v.* Harrison, 22 L. T. 83; 24 E. L. & Eq. 208; Castellain *v.* Thompson, 13 C. B. N. S. 105.

there be a blockade of the port of destination, by means of which a delivery of the cargo becomes impossible, and the vessel returns to the port of departure, the voyage is defeated and the contract dissolved. (*c*)

But a temporary impediment of the voyage does not work a dissolution of the charter party; and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. (*d*) The same construction is given to the legal operation of a hostile blockade, or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up, or the completion of it become unlawful, before the contract will be dissolved. (*e*) If the cargo be not of a perishable nature, and can endure the delay, then the general principle applies, that nothing but occurrences which prevent absolutely the execution of the contract will discharge it. The parties must wait until those which merely retard its execution are removed. The commercial code of France (*f*) declares, that if, before the * vessel sails on *250 her voyage, an interdiction of commerce with the country to which she is bound takes place, the charter party is dissolved, though it would be otherwise if a superior force hinders, for a time, the departure of the ship, or if she were detained by superior force during the voyage.

In parting with the subject of this, and of the two preceding lectures, I readily acknowledge the free use that has been made of Lord Tenterden's excellent treatise on maritime law. It has been the basis of the compilation, and it was impossible to find any other model so perfect, or to make any material improvement upon it. It is equally distinguished for practical good sense, and for extensive and accurate learning, remarkably compressed and appropriately applied. (*a*) Another work from which

549, on the ordinary principles of commercial law, in opposition to some of the admiralty decisions of Lord Stowell, which proceed upon rather peculiar and enlarged discretion in the administration of international law and policy in prize cases. See, also, Spafford *v.* Dodge, 14 Mass. 72; The Elizabeth, 1 Peters Adm. 129.

(*c*) Scott *v.* Libby, 2 Johns. 336; The Tutela, 6 C. Rob. 177.

(*d*) Hadley *v.* Clarke, 8 T. R. 259; M'Bride *v.* Marine Ins. Company, 5 Johns. 308; Baylies *v.* Fettyplace, 7 Mass. 325.

(*e*) Palmer *v.* Lorillard, 16 Johns. 348.

(*f*) Code de Commerce, art. 276, 277.

(*a*) The 7th English ed. of Abbott on Shipping, by Sergeant Shee, and the 5th

I have derived much assistance is Mr. Holt's view of the English navigation laws and of maritime contracts. He has followed in the track of Lord Tenterden, and with great credit to himself. His work is wholly free from the incumbrance of foreign learning on the same subject. This omission gives the appearance of a dry, practical character to the work, but the reading of it becomes quite interesting by reason of the clearness of its analysis, the precision of its principles, the perspicuity of the style, and the manly good sense of the author. The introductory part is particularly excellent, for it contains a very condensed, yet comprehensive and perfectly accurate view of all the principles in the work, entirely disembarrassed from adjudged cases.

No one can observe, at first, without surprise, how extensively and closely subsequent writers follow in the footsteps of those who preceded them; but when we come to study the same topics, handled so often by master spirits, we perceive that this must necessarily be the case, in ethics and in law, where discoveries are not to be made, as in the physical sciences. The entire region of ethical and municipal jurisprudence has been amply * 251 explored, and with more than a * Denham or a Parry's success. (*a*) Panætius was the original author of the substance of Cicero's *offices*, as Cicero himself acknowledges; and that consummate work, in its turn, became the foundation of all that Grotius, Puffendorf, Cumberland, and a thousand other writers, have laid down as the deductions of right reason, concerning the moral duties of mankind. No person would think of compiling a code of ethics without at least visiting the shades of

Am. ed. by Mr. Perkins, which includes the notes of the other editions and those of the late Mr. Justice Story, contain a full and elaborate view of the law, with all its late additions and improvements, both in England and America, on this most interesting head of commercial jurisprudence. But the original text has become almost overwhelmed by annotations, and the whole subject will soon require, if such accumulations are to proceed, to be redigested. The first edition of Abbott, in 1802, was a beautiful model of conciseness and simplicity.

(*a*) In the immense collection which was published at Amsterdam in 1669, of the various works of Straccha, Santerna, and others, on nautical and maritime subjects, we have laborious essays, replete with obsolete learning, on different branches of commercial law, of no less than twenty Italian civilians, whose works are now totally forgotten, and even their very names have become obscured by the oblivion of time. Subsequent civilians may have erected stately tomes from the matter which their ruins have furnished.

Tusculum, and still less would he think of erecting a temple of jurisprudence, without adorning it with materials drawn from the splendid monuments of Justinian, or the castellated remains of feudal grandeur. The literature of the present day, "rich with the spoils of time," instructs by the aid of the accumulated wisdom of ages.

LECTURE XLVIII.

OF THE LAW OF MARINE INSURANCE.

MARINE insurance is a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils, or sea-risks, to which his ship, freight, and cargo,[1] or some of them, may be exposed, during a certain voyage, or a fixed period of time.

In the consideration of a title in the law of such extensive concern, and upon which so many learned volumes have been exhausted, it has been found difficult to bring the subject within manageable limits, and suitably restricted for the object of these lectures. It has been my endeavor to state the leading principles of the contract, and to dwell upon such parts only as are best adapted for elementary instruction.

The subject will be considered under the following arrangement: (I.) Of the formation and subject-matter of the contract. (II.) Of the voyage in relation to the policy. (III.) Of the rights and duties of the insured in case of loss.

I. Of the Formation and Subject-matter of the Contract. — (1) *Of the Parties.* — All persons, whether aliens or natives, may be insured, with the exception of alien enemies, for it is a contract authorized by the general law and usage of nations. (*a*) It
* 254 was * for a long time an unsettled question in the English law, whether the insurance of enemy's property was lawful.

(*a*) Pothier terms it a contract *du Droit des Gens.*

[1] *Definition.* — It applies to other interests besides those mentioned. Arnould, Mar. Ins. ch. 1, *ad fin.*, "Definitions;" *post*, 262, 269.

In Commonwealth *v.* Wetherbee, 105 Mass. 149, 160, a contract of insurance in general is defined as an agreement by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.

In the year 1741, a bill was brought into Parliament to prohibit insurances on the property of the subjects of France, then at war with Great Britain; and the propriety of such a restriction was much discussed, and the bill was dropped. But in 1748, such a bill passed into a law. (*a*) It prohibited, under a penalty, the assurance on ships or merchandises belonging to France; and the contracts for such policies were declared void. The statute of 33 Geo. III. c. 27, was to the same effect, though much more severe in its penalties. Those statutes were temporary, and applied only to the then existing war; and they left the question still undecided as to the legality of such insurances, independent of statute.

Lord Hardwicke, in the year 1749, declared, (*b*) that there had been no determination that such insurances were unlawful, and that it might be going too far to say, that all trading with enemies was unlawful, and that there had been several insurances of that sort during the war of 1741. But in *Brandon* v. *Nesbitt*, (*c*) the Court of K. B. gave a fatal wound to the opinion, that the insurance of enemy's property was lawful, though that opinion had received considerable currency under the sanction of the great name and influence of Lord Mansfield. (*d*) It was certainly without any just foundation, either in the English law or in the established policy and principles of the law of nations. That case was a suit on a policy of insurance, brought in the name of an English agent, for his principal, who was an alien enemy; and it was adjudged that no action could be maintained either by or in favor of an alien enemy. The case of *Bristow* v. *Towers* (*e*) was still more directly on the point, *255 and the legality and expediency of insurances of enemy's property were discussed very much at large, and with great ability and learning. The decision of the court was put upon the strict ground, that the insurance of enemy's property was illegal, and no action could be sustained on such a policy. A distinction was afterwards taken in *Bell* v. *Gilson*, (*a*) where it was held that the insurance of goods purchased in an enemy's country during

(*a*) Stat. 21 Geo. II. c. 4.
(*b*) Henkle *v.* The Royal Exchange Assurance Company, 1 Ves. 317.
(*c*) 6 T. R. 23.
(*d*) As see Planché *v.* Fletcher, 1 Doug. 251; Gist *v.* Mason, 1 T. R. 84.
(*e*) 6 T. R. 35. (*a*) 1 Bos. & P. 345.

war, by a British agent, and shipped for British subjects, was a lawful insurance. But every distinction of that kind was subsequently abandoned; (*b*) and in the case of insurances on French property previous to war, they were held not to cover a loss by British capture after the war was renewed, even though the action was not brought until after the restoration of peace. It was declared, that an insurance of enemy's property, as well as all commercial intercourse with the enemy, was, at common law, unlawful, and that an insurance, though effected before the war, made no difference, as a foreigner might otherwise insure previous to the war, against all the evils incident to the war. Insurances of enemy's property had been indulged, but never were legal. The judicial language at last was, (*c*) that such insurances were not only illegal and void, but repugnant to every principle of public policy. The former opinion in favor of the expediency of such insurances had never yet produced one single judicial determination in favor of their legality.

All the continental ordinances and jurists concur in the illegality of such insurances. (*d*) Bynkershoek, in a chapter
* 256 * devoted to the consideration of this question, concludes that the reason of war absolutely requires the prohibition of insurance of enemy's property; because by assuming such risks, we promote the maritime commerce of the enemy. Valin considered that insuring enemy's property, and trading with the enemy, was substantially the same thing; and he truly observed, that when the English, in the war of 1756, insured French ships and cargoes which were captured and condemned as prize of war, and paid for by English underwriters, the nation only took with one hand what it restored with the other. (*a*)

(*b*) Furtado *v.* Rogers, 3 Bos. & P. 191; Gamba *v.* Le Mesurier, 4 East, 407; Brandon *v.* Curling, ib. 410.

(*c*) Lord Ellenborough, Kellner *v.* Le Mesurier, 4 East, 396. Lord Erskine, *Ex parte* Lee, 18 Ves. 64. Property liable to capture and confiscation in war as belonging to the enemy, cannot be lawfully insured within the jurisdiction of the capturing power. The policy is void in its inception, or becomes so from the time the property is impressed with a hostile character. Duer on Insurance, i. 420, [lect. 4, § 9.]

(*d*) The ordinances of Barcelona, as early as 1484, declared such insurances void. Consulat de la Mer, par Boucher, ii. 717. See, also, Le Guidon, c. 2, sec. 5, in Cleirac, Us et Coutumes de la Mer, 197, ed. 1671; Ord. of Stockholm, of 1756; 2 Magens, 257; Ord. of the States General of the Netherlands, in 1622, 1657, 1665, and 1689, cited in Bynk. Q. J. Pub. lib. 1, c. 21; Emerigon, des Ass. i. 128.

(*a*) Valin's Comm. ii. 32. See vol. i. lec. iv. how far a foreign domicile communicates to a citizen the disabilities of an alien enemy.

The doctrine of the European law, on this subject, was extensively discussed and explicitly recognized in New York, in the case of *Griswold* v. *Waddington*; (*b*) and as that doctrine is founded on the same principle of general policy which interdicts all commerce and trading with the enemy in time of war, it may be considered as the established law of this country.[1]

With respect to persons who may be insurers, the rule of the common law prevails with us; and any individuals, or companies, or partnerships may lawfully become insurers; and we have no incorporated companies, like those of the Royal Exchange Assurance and the London Assurance companies, with the monopoly or exclusive right of making insurance as a company or partnership on a joint capital. Each part owner may insure for himself, and may act his pleasure as to the insurance of his individual proportion of interest. (*c*) During the colonial government of this country, as well as for the first fifteen or twenty years after the peace of 1783, the business of insurance was almost entirely carried on by *private individuals, each taking singly for *257

(*b*) 16 Johns. 438.

(*c*) A policy is not divisible, and if bad in part, it is bad *in toto*; and if void in its inception as to one of the owners, it is void as to all. Parkin *v.* Dick, 11 East, 502; Camelo *v.* Britten, 4 B. & Ald. 184; Lord Kenyon, in Bird *v.* Pigou, cited in 1 Phillips on Ins. 91; [2 Selw. N. P. 13th ed. 932;] Clark *v.* Protection Ins. Co., 1 Story, 109. In Keir *v.* Andrade, 6 Taunt. 498, it was decided, that if part of the goods were lawful, and the residue not, the goods not subject to forfeiture were protected by the policy. But the rule is too well settled to be disturbed, that the partial illegality of an entire contract renders the whole void, and it applies as well to the contract of insurance as to others. The more equitable rule, that the policy is void only as to the illegal part, prevails in France. Pothier on Ins. n. 44; Duer on Insurance, 324–327, 393. Mr. Duer is for confining the severity of the English rule to contracts of insurance necessarily entire, and not susceptible of being treated as distinct and several.

[1] *Effect of War.* — It has been held in cases arising out of the rebellion, that a contract of insurance which was made and partly executed before the war and which cannot be dissolved without loss to one party, although it would be suspended if it could not lawfully be carried into execution, (Semmes *v.* City F. Ins. Co., 36 Conn. 543), will neither be dissolved nor suspended, if it can be carried into execution consistently with the allegiance of both parties. Manhattan Life Ins. Co. *v.* Warwick, 20 Gratt. 614; New York Life Ins. Co. *v.* Clopton, 7 Bush (Ky.), 179; *ante*, i. 67, n. 1. With regard to agreements made during the war, it may be added that since the above note in vol. i. was stereotyped, a decision contrary to that of Kershaw *v.* Kelsey, there mentioned, has been reached by the Supreme Court of Iowa. Hill *v.* Baker, 32 Iowa, 302. Cases arising out of the rebellion were thought to stand on a peculiar footing in McStea *v.* Matthews, 8 Daly, 349, where it was held that a partnership between residents in the two sections was not dissolved But see Howell *v.* Gordon, 40 Ga. 302.

himself, and not *in solido*, a risk to the amount of his subscription. (*a*) But incorporated companies began to multiply and supplant private underwriters, and the business of insurance in the United States is now carried on almost exclusively by incorporated companies. Individuals and unincorporated partnership companies are still at liberty to carry on the business of insurance to any extent they please, and the success of any such competition with the incorporated companies would depend upon the ability to command confidence, and the judgment and skill with which the business was conducted. (*b*)

(2) *Of the Terms and Subject of the Policy, and the Force of Usage thereon.* — If the ship be specified in the policy, (*c*) [1] it

(*a*) As early as 1725, Francis Rawle, of Philadelphia, proposed the establishment, under legislative sanction, of a marine insurance office. This he did in a small volume printed by Dr. Franklin, and the first book he ever printed. See App. to Mr. Wharton's memoir of the late William Rawle, Esq.

(*b*) Marine insurance was formerly a lawful business in New York, equally open to all the world; but in 1829, the Legislature, by statute (Laws of New York, sess. 52, c. 336), prohibited marine insurance, or lending on respondentia or bottomry, effected within the state, to all persons and companies residing in any foreign country, acting by any agent here. Persons and associations in other states, effecting such insurances in New York, were taxed ten per cent on their premiums. The same check and prohibition applies to insurances in New York against fire. N. Y. Revised Statutes, i. 714. See, further, *infra*, 871. The statute law of Pennsylvania also prohibits all kinds of insurance by foreign corporations or companies within the state. Purdon's Dig. 545. The law in Massachusetts is more liberal, and it allows incorporated insurance companies in other states and in foreign countries to insure by their agents, upon compliance with certain conditions, intended to guard against abuse. Act of 1816, and Revised Statutes of 1836. Every incorporated insurance company in Massachusetts may insure vessels, freight, money, goods, and effects, and against captivity of persons, and on the life of any person at sea, and on money lent upon bottomry and respondentia, and against fire; on dwelling-houses and other buildings, and on merchandise or other property within the United States. Statutes, 1817, 1819. Revised Statutes, 1836, pt. 1, tit. 18, c. 87, sec. 2.

(*c*) A policy of insurance must be in writing, according to uniform usage and practice, and this is specially required by the statute of 35 George III., and by most of the

[1] *Oral and Written Policies.* — Apart from statute, a contract of insurance need not be in writing. Commercial Mut. M. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. 318; Trustees of First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305; Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Mobile Marine Dock & M. Ins. Co. *v.* McMillan, 31 Ala. 711; Constant *v.* Ins. Co., 8 Wall. Jr. 318; Sanborn *v.* Fireman's Ins. Co., 16 Gray, 448; Goodall *v.* N. E. Mut. Ins. Co., 25 N. H. 169, 198. Compare Security F. Ins. Co. of N. Y. *v.* Kentucky M. & F. Ins. Co., 7 Bush (Ky.), 81; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; with Henning *v.* U. S. Ins. Co., 47 Mo. 425. The last cited case differed from the others in hold-

becomes part of the contract, and no other ship can be substituted without necessity; but the cargo may be shifted from one ship to another, if it be done from necessity, and the insurer of it will still be liable. (*d*) An insurance on the body of a ship, except

foreign ordinances. Printed forms of policies are universally in use. Duer on Insurance, i. 60, 62, and 64, n. 8. There are said to be six essential parts to every policy: 1. The parties; 2. The premiums; 3. The subject insured; 4. The amount insured; 5. The risks; 6. The voyage or term of the risk; and by the statute of 35 Geo. III. no duration of the term of any policy can be for a longer term than twelve months. Duer, *ub. sup.* 59, 101, 107, n. 3, 4. The application for insurance is usually made in writing. The policy need only be signed by the insurer, for the obligations on the part of the assured are conditions merely on the performance of which his right to indemnity depends. The policy itself contains an acknowledgment of the premium. Ib. 65. It is perfect and binding as soon as the terms are agreed on, and the policy signed by the designated officer, without actual delivery. Kohne *v.* Ins. Co. N. America, 1 Wash. 93. Even if the terms of the policy be agreed on in writing, equity will enforce the execution of the policy or payment, though a loss occurs in the mean time. Motteux *v.* The London Ass. Co., 1 Atk. 545; Perkins *v.* Wash. Ins. Co., 4 Cowen, 646; M'Culloch *v.* Eagle Ins. Co., 1 Pick. 278. This last case allows a remedy in such case at law. Mead *v.* Davison, 3 Ad. & El. 303.

(*d*) [Salisbury *v.* Marine Ins. Co. of St. Louis, 23 Mo. 553.] The owner may change the master of the vessel insured in his discretion, without prejudice to the

ing that the charter and by-laws of the defendant company made an oral agreement to insure invalid.

In those jurisdictions where a written policy is not necessary, there is a tendency to hold that a policy made in pursuance of an oral agreement is binding as soon as executed, while still in the hands of the company, and is held by them to the use of the insured. Kohne's case, cited in the note (*c*), seems to go no further than this. Hallock *v.* Commercial Ins. Co., 2 Dutcher, 268; 3 Dutch. 645; Baxter *v.* Massasoit Ins. Co., 13 Allen, 320. See Real Est. M. F. Ins. Co. *v.* Roessle, 1 Gray, 336; (explained 16 Gray, 454;) Lindauer *v.* Delaware M. S. Ins. Co., 13 Ark. 461.

When, however, as in England, an instrument in writing is required by statute, a delivery of the instrument seems to be as necessary as in other cases. Whether it has been delivered or not is rather a question of fact than of law. A policy purporting to be signed, sealed, and delivered by an insurance company, and made in conformity to the terms assented to by the insured on a slip of the sort explained, *post*, 286, n. 1, was held binding on them by the House of Lords against the opinion of a majority of the judges, although it had never left the hands of the company; the custom being for the insurers to keep it until sent for by the assured or his broker. The grounds were that the statement on the policy was to be taken as conclusive against the company; that the policy was to be treated as delivered from the moment the parties intended it to be operative (having the custom in view); and that the practice of executing the policy in the absence of the insured, and waiting for him to *send* for it, assumes a previous assent on the part of the insured to the policy to be executed. Xenos *v.* Wickham, L. R. 2 H. L. 296; 14 C. B. N. S. 435; 13 C. B. N. S. 381; an able statement of the opposite view will be found in the judgment of Willes, J., L. R. 2 H. L. 313.

when varied by special agreement, sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship. This is the doctrine taught in all the continental writers on insurance, as well as in the English law. (*e*) An insurance on a ship means *prima facie* the legal interest in the vessel, and not the mere equitable interest, and if the policy be intended to *258 cover the equitable interest only, that *interest ought to be disclosed to the insurer. (*a*) An insurance will be valid without naming the ship, as upon goods on board *any ship or ships;* and it becomes sometimes a nice question as to the application of the loss, when there are two or more policies of that loose description on different parcels of goods. (*b*)[1] So, it will be valid if made on account of A., *or of whom it may concern.* (*c*) In England, the statute of 25 Geo. III. c. 44, prohibits insurances in blank, as to the name of the insured; and the name of the party in interest, or some agent in his behalf, must be inserted, and the policy cannot be applied to any property which does not belong to the party named, or in which he is not interested; but the suit on the policy may be brought in the name of the principal or agent. (*d*) The interest of the real owner may

insurance, provided it be done in good faith, and a substitute of competent skill be provided. Platt, J., Walden *v.* Firemen Ins. Company, 12 Johns. 128. It is immaterial whether the written words of a policy be inserted in the body of the instrument, or written on its face, or in the margin. De Hahn *v.* Hartley, 1 T. R. 343; Bean *v.* Stupart, Doug. 11; Kenyon *v.* Berthon, ib. 12, n. But Mr. Duer thinks, and justly, that a memorandum on the back of a policy, not referred to in the instrument, nor signed by the insurer, is a nullity. Duer on Insurance, i. 76. So a material alteration in a policy, without the consent of the insurer, though made in the margin or by interlineation, destroys it; if the alteration be immaterial, it is otherwise. The cases to this point are collected in Duer on Insurance, i. 143, n.; ib. 81. Insurances are to be liberally construed in favor of the assured, for that is most consonant to the intentions of the party. So an exception to the risks is to be construed strictly against the insurer, and for the same reason. Ib. 161.

(*e*) Emerigon, i. 423; Boulay-Paty, iii. 379; Pardessus, iii. n. 758; Plantamour *v.* Staples, 1 T. R. 611, note.

(*a*) Ohl *v.* Eagle Ins. Company, 4 Mason, 390. [Bailey *v.* Hope Ins. Co., 56 Me. 474.]

(*b*) Emerigon, i. 173; Kewley *v.* Ryan, 2 H. Bl. 343; Henchman *v.* Offley, ib. 345, note.

(*c*) Boulay-Paty, iii. 528, 531, iv. 28.

(*d*) Cox *v.* Parry, 1 T. R. 464. It may be brought in the name of the party by

[1] *Running Policies.* — Running policies upon goods on board ships as may be declared have become common. The assured can appropriate such a policy to goods on board any ship, and if the appropriation is made in good faith, and the ship de-

be averred and shown; but if one partner insures in his own name only, the policy will cover his undivided interest in the partnership, and no more. (*e*) If the policy has the words, *and whomsoever it may concern*, then it will cover the whole partnership interest; (*f*) and Valin and Boulay-Paty think it covers the whole, if the policy be generally on his goods. (*g*) On such a policy an action may be maintained by any one of the owners whose interest was intended to be insured by it. It will cover a person who has but a special interest, as by lien or otherwise. (*h*) Those general words, *whom it may concern*, will only apply to the person having an interest in the subject insured, and who was in the contemplation of the contract. (*i*)[2] But a policy

whom or for whom the contract was made. Bayley, J., in Sargent *v.* Morris, 3 B. & Ald. 280, 281. [Somes *v.* Equitable Safety Ins. Co., 12 Gray, 531.]

(*e*) Valin's Comm. ii. 34; 1 Emerigon, 293, 294; Graves *v.* Boston Marine Ins. Company, 2 Cranch, 419; Dumas *v.* Jones, 4 Mass. 647; Turner *v.* Burrows, 5 Wendell 541.

(*f*) Lawrence *v.* Sebor, 2 Caines, 208.

(*g*) Valin, ii. 34; Boulay-Paty, iii. 386.

(*h*) Catlett *v.* The Pacific Ins. Company, 1 Wend. 561; s. c. 4 id. 75.

(*i*) Newson *v.* Douglass, 7 Harr. & Johns. 417; Bauduy *v.* Union Ins. Company, 2 Wash. 391; De Bolle *v.* Pennsylvania Ins. Company, 4 Wharton, 68. The insured must have an interest in the property when the insurance was made, and *at the time of the loss*. Hancox *v.* Fishing Ins. Company, 3 Sumner, 132.

cared to the underwriter at the earliest convenient opportunity, he will be bound, although the ship has been lost before he is notified. Gledstanes *v.* Royal Exch. Ass., 5 Best & Sm. 797 (a strong case); E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray, 214. See Ionides *v.* Pacific Ins. Co., L. R. 6 Q. B. 674, 682. But compare Douville *v.* Sun M. Ins. Co. of N. Y., 12 La. An. 259; Hartshorn *v.* Shoe & Leather Dealers' Ins. Co., 15 Gray, 240, 246, 249; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 321; Edwards *v.* St. Louis Perpetual Ins. Co., 7 Mo. 382.

But it has been held that when the premiums, of which the receipt was acknowledged in the body of a running policy, were nominal, and were to be increased or reduced at the time of indorsement, according to the rating and nationality of the vessel, such clauses to apply as the company might insert, as the risks were successively reported, the contract did not attach to a particular shipment until this was done. Orient Mut. Ins. Co. *v.* Wright, 23 How. 401; Sun M. Ins. Co. *v.* Wright, ib. 412. See Douville *v.* Sun M. Ins. Co. of N. Y., 12 La. An. 259; Hartshorn *v.* Shoe & Leather Dealers' Ins. Co., 15 Gray, 240; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 321. But see dissenting opinion of Clifford, J., 23 How. 414; Bunten *v.* Orient M. Ins. Co., 8 Bosw. 448; 2 Keyes, 667; Rolker *v.* G. W. Ins. Co., 3 Keyes, 17, 22.

[2] Watson *v.* Swann, 11 C. B. N. S. 756; Steele *v.* Franklin F. Ins. Co., 17 Penn. St. 290; Haynes *v.* Rowe, 40 Me. 181; Augusta Ins. & B. Co. of Ga. *v.* Abbott, 12 Md. 348; Protection Ins. Co. *v.* Wilson, 6 Ohio St. 553; Duncan *v.* Sur Mut Ins. Co., 12 La. An. 486. See 872, n. 1.

may be applied to cover the interest intended to be insured, though the owner of it was not known to the parties, provided the terms of the policy will permit it. (*j*)

The form of the policy in England and the United States contains the words *lost or not lost;* and if the subject insured be lost, or has arrived in safety when the contract is made, it is still valid, if made in ignorance of the event, and the insurer must
* 259 pay the loss, or not pay it, as the * case may be. (*a*) This is laid down by the foreign jurists as a general principle of insurance, without reference to those words which are said to be peculiar to the English policies; and it is said that without them the policy would be void, if the subject was lost when the insurance was made. (*b*) There is no English adjudication to that effect; and the point may well be doubted, inasmuch as all the continental authorities hold such insurances to be valid, if made in ignorance of the existing loss. (*c*)

A policy on a voyage from abroad may be good, though it omits to name the ship, or master, or port of discharge, or consignee, or to specify and designate the nature or species of the cargo, for all these may be unknown to the insured when he applies for the insurance. (*d*) The policy, in such a case, will be good to the amount insured, if effects be laden in any ship, to any port, and to any consignee. The text-writers, however, require cargo of the same form and species, and the policy will not cover the same thing under a new modification, if the essential character of the article has changed; as a policy on a cargo of wheat will not cover a cargo of flour. (*e*) A policy on cargo or goods generally will not cover goods stowed on deck, nor live stock, unless there be some local mercantile usage to give extension to the terms. (*f*)

(*j*) Buck *v.* Chesapeake Ins. Company, 1 Peters, 151.

(*a*) A policy with those words will cover a loss if the interest was not acquired until after the loss. Sutherland *v.* Pratt, 11 M. & W. 296.

(*b*) 5 Burr. 2803, 2804; Park on Insurance, 81.

(*c*) Rota Genuæ Decisio, 42, n. 8; Roccus, de Ass. n. 51; Emerigon, ii. 121; Ruggles *v.* Gen. Int. Ins. Company, 4 Mason, 74; Kohne *v.* Ins. Company of North America, 1 Wash. 93. In Hammond *v.* Allen, 2 Sumner, 397, Mr. Justice Story thinks that the policy would be binding, though the ship was lost at the time, and though the policy had not the words *lost or not lost*, if the parties acted in mutual ignorance of that event. [It was so held in Folsom *v.* Mercantile Mut. Ins. Co., 8 Blatchf. 170.]

(*d*) Le Guidon, c. 12, art. 2; Ord. de la Mar. tit. des Assurances, art. 4; Code de Commerce, art. 337; Boulay-Paty, Cours de Droit Com. iii. 411, 412.

(*e*) Boulay-Paty, iii. 388, 389. See *infra*, 310.

(*f*) Lenox *v.* United Ins. Company, 3 Johns. Cas. 178; Allegre *v.* Maryland Ins.

And a policy may be on bills of exchange, if they truly exist. (*g*) If bottomry, or respondentia interest, be insured by the lender, it has been required to be insured *eo nomine*, and not under the general description of *goods*. (*h*) But this rule was originally adopted on the ground of mercantile usage; and where the usage was shown to be different, such an interest was allowed *to be covered by a policy on goods. (*a*) If any of the *260 terms used in a policy, or representation made to the insurer, have, by the known usage of trade, and the practice, as between the insurers and the insured, acquired an appropriate or commercial sense, they are to be construed according to that sense. All mercantile contracts, if dubious, or made with reference to usage, may be explained by parol evidence of the usage. (*b*) But the rule is checked by this limitation, that the usage, to be admissible, must be consistent with the principles of law, and not go to defeat the essential provisions of the contract. (*c*) [1] If part

Company, 2 Gill & Johns. 136; Wolcott *v.* Eagle Ins. Company, 4 Pick. 429; Smith *v.* Miss. Mar. and Fire Ins. Company, 11 La. 142; Taunton Copper Company *v.* Merchants' Ins. Company, 22 Pick. 108. A general policy on freight will only cover freight earned by carrying goods under deck. Adams *v.* Warren Ins. Company, ib. 163.

(*g*) Palmer *v.* Pratt, 2 Bing. 185. Gold and silver have been considered by the text-writers to be covered by a policy on goods, wares, and merchandise. Marshall on Ins. 327; Hughes on Ins. 128; Phillips on Ins. 66. And current bank bills have been adjudged to be covered under the generic name of property. Whiton *v.* Old Colony Ins. Co., 2 Metcalf, 1.

(*h*) Glover *v.* Black, 3 Burr. 1894; Robertson *v.* United Ins. Company, 2 Johns Cas. 250; Kenny *v.* Clarkson, 1 Johns. 385.

(*a*) Gregory *v.* Christie, 1 Condy's Marshall on Insurance, 118.

(*b*) Coit *v.* Com. Ins. Company, 7 Johns. 385; Allegre *v.* Maryland Ins. Company, 6 Harr. & Johns. 408; Robertson *v.* Clarke, 1 Bing. 445; Renner *v.* Bank of Columbia, 9 Wheat. 591; Columbian Ins. Company *v.* Catlett, 12 id. 383; Hancox *v.* Fishing Ins. Company, 3 Sumner, 132.

(*c*) Palmer *v.* Blackburn, 1 Bing. 61; Bryant *v.* Com. Ins. Company, 6 Pick. 131;

[1] *Construction.* — (*a*) *Usage.* — Some further discussion of the subject of usage will be found in Dickinson *v.* Gay, 7 Allen, 29; Bliven *v.* N. E. Screw Co., 23 How. 420; Commercial Bank of Ky. *v.* Varnum, 3 Lansing, 86. As to insurance in particular, Sweeting *v.* Pearce, 9 C. B. N. S. 534; 7 C. B. N. S. 449; Miller *v.* Tetherington, 6 Hurlst. & N. 278; 7 H. & N. 954; Hall *v.* Janson, 4 El. & Bl. 500; Mobile Marine Dock M. Ins. Co. *v.* McMillan, 27 Ala. 77; Grant *v.* Lexington F. L. & M. Ins. Co., 5 Ind. (Porter) 23; Child *v.* Sun M. Ins. Co., 3 Sandf. 26; Mut. Safety Ins. Co. *v.* Hone, 2 Comst. 235; Walsh *v.* Homer, 10 Mo. 6, 16; Warren *v.* Franklin Ins. Co., 104 Mass. 518; Seccomb *v.* Provincial Ins. Co., 10 Allen, 305; Hennessy *v.* N. Y. M. M. Ins. Co., 1 Oldright, 259; Louisiana M. Ins. Co. *v.* N. O. Ins. Co., 13 La. An. 246.

(*b*) *Writing and Print.* — As to the

of the policy should be written and part printed, and there should arise a reasonable doubt upon the meaning of the contract, the

Bankin *v.* American Ins. Company, 1 Hall (N. Y.), 619. No particular usage or custom can be admitted to alter or impair a clear and express written contract of the parties. The evidence of usage can only be admitted when the intention of the parties is indeterminate, and the language of the contract may admit of various senses. Schooner Reeside, 2 Sumner, 567. Mr. Justice Story, in that case, and in Donnell *v.* Columb. Ins. Company, 2 Sumner, 377, thought that usages among merchants ought to be very sparingly adopted as rules of law, as they are often founded in mere mistake, and in a want of comprehensive views of the full bearing of principles. So Lord Denman observed, in Trueman *v.* Loder, 11 Ad. & El. 589, that the cases on the custom of trade go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract; and the court in that case leaned strongly against the appeal to custom to explain or vary written contracts. The general rule on this subject of the admission of parol evidence to explain, by custom and usage, the meaning of the parties, is, that if the words used in the contract be *technical*, or *local*, or *generic*, or *indefinite*, or *equivocal*, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case. If there be no such ingredient of uncertainty, then the evidence is not admissible. This seems to be the result of the decisions on the subject Yates *v.* Pym, 6 Taunt. 446; Blackett *v.* The Royal Exchange Ass. Co., 2 Cr. & J. 244; Fowler *v.* The Ætna Ins. Co., 7 Wend. 270; Dow *v.* Whetten, 8 Wend. 160. Astor *v.* The Union Ins. Co., 7 Cowen, 202; Coit *v.* The Comm. Ins. Co., 7 Johns 385. A *particular word*, says the Court of Exchequer, in Mallan *v.* May, 13 M & W. 511, may be shown by parol evidence to have a different meaning in some particular place, trade, or business, from its proper and ordinary acceptation. Mr. Duer contends from a critical examination of the cases, that usage may control or supersede construction or rule of law if the usage be *general*, *uniform*, *notorious*, *reasonable*, and *consistent* with the terms of the policy, and to a certain extent with the rules of law. A valid usage is part of the contract. Duer on Insurance, i. 255–282, and the Proofs and Illustrations, 283–311. The doctrine for which Mr. Duer contends is illustrated and enforced with admirable analysis of the authorities, and with surpassing ability and force. Mr. Justice Story even states it as a general rule, that a contract is understood to contain the customary clauses, although they are not expressed, according to the known maxim, — *In contractibus tacite veniunt ea, quæ sunt moris et consuetudinis.* Story on Bills, 161. In Wallace *v.* Bradshaw, 6 Dana (Ken.), 385, it was held,

greater effect to be given to the written parts of an instrument, see Gumm *v.* Tyrie, 4 Best & Sm 680; 6 B. & S. 298; Gray *v.* Carr, L. R. 6 Q. B. 522, 536, 553, 557; (in this case, Brett, J., says that Pearson *v.* Goschen, 17 C. B. N. S. 352, points out a modification of the older rule as to giving, if possible, a meaning to every term of the contract, in cases where a modern mercantile instrument is known to be in a printed and general form, with parts of it to be filled up in writing, to apply it to particular transactions; and see Woodruff *v.* Commercial M. Ins. Co., 2 Hilton, 122;) Benedict *v.* Ocean Ins. Co., 31 N. Y. 389, 397; Goss *v.* Citizens' Ins. Co., 18 La. An. 97.

See, generally, Leeds *v.* Mechanics' Ins. Co., 8 N. Y. (4 Seld.) 351; Bryant *v.* Poughkeepsie M. F. Ins. Co., 21 Barb. 154; People *v.* Saxton, 22 N. Y. 309; Hernandez *v.* Sun M. Ins. Co., 6 Blatchf. 317, 325; Cushman *v.* N. W. Ins. Co., 34 Me. 487.

greater effect is to be attributed to the written words, for they are the immediate language selected by the parties, and the printed words contain the *formula* adapted to that and all other cases upon similar subjects. (*d*)

The ancient laws of insurance required the insured to bear the risk himself of one tenth of his interest in the voyage. This was to stimulate him, by a sense of his own interest, to watch more vigilantly for the preservation of the cargo. The Dutch ordinances of Antwerp, Middleburg, and Amsterdam, and the Le Guidon, had such provisions. (*e*) But these provisions have been omitted in all the modern codes, as being odious and useless, and the merchant can have his interest insured to the entire extent of it.

Policies are generally effected though the agency of brokers; and the insurance broker keeps running accounts with both parties, and becomes the mutual agent of both the underwriter and the insured. His receipt of the premium places him in the relation of debtor to the one party, and creditor to the other. The general rule is, that the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for the loss. The receipt of the premium in the policy is conclusive evidence of payment, and binds the insurer, unless there be fraud on the part of the insured. (*f*) [2] If the agent effects an insurance

that a commission merchant, receiving goods on general consignment from a distant owner, and making advances therefor, might, for his own interest and safety, be authorized, by the usage of the place, in certain circumstances, at his discretion, and for the benefit of himself and the consignor, *to ship the goods to a more advantageous market*, or one deemed so, especially if a sale at the place would not indemnify him for his advances; and that if such was the known custom of the place, (New Orleans), it would be reasonable to sustain the authority. Mr. Duer, in his Treatise on Insurance, i. lectures 2d and 3d, 158–812, gives a lucid and full collection and illustration of the rules of interpretation of policies of insurance under the admission and control of parol evidence and mercantile usage; and to which I refer, as well as to the very able and complete title on the admissibility of parol evidence to affect written contracts, in Professor Greenleaf's Treatise on the Law of Evidence, i. 329–374. In Finney *v.* Bedford Com. Ins. Co., 8 Met. 348, it is held, that the rule excluding parol evidence to contradict or vary a written agreement, applies as well to policies of insurance as to other agreements.

(*d*) Lord Ellenborough, 4 East, 136; Coster *v.* Phœnix Ins. Company, C. C. Penn. April, 1807 [2 Wash. 51.]

(*e*) 2 Magens, 26, 68; Le Guidon, c. 2, art. 11.

(*f*) Dalzell *v.* Mair, 1 Camp. 532; Foy *v.* Bell, 8 Taunt. 493. [*Sup.* n. 2.]

[2] *Brokers. — Effect of Receipt.* — The text is confirmed by Anderson *v.* Thornton, 8 Exch. 425; Provident L. Ins. Co. *v.* Fennell, 49 Ill. 180. The broker is considered as having paid the premium to the underwriter, and the latter as hav

for his principal without his knowledge or authority, and the principal afterwards adopts the act, the insurer is bound, *261 and cannot * object to the want of authority. (*a*) But if A. insures the property of B. without authority (and the master of a vessel, merely as master or a part owner, as such, has no such authority), and without any adoption of the act by B., the contract is not binding. (*b*) A merchant who has effects of his foreign correspondent in hand, or who is in the habit of insuring for him, is bound to comply with an order to insure, and the order may be implied in some cases from the previous course of dealing between the parties. If the agent neglects or imperfectly executes the order, he is answerable as if he himself was the insurer, and is entitled to the premium. (*c*)

If the subject matter of the policy be assigned before loss, the policy may also be assigned, so as to give a right of action to a trustee for the assignee.[1] But if there be no statute provision

(*a*) Bridge *v.* Niagara Insurance Company of New York, 1 Hall (N. Y.), 247.

(*b*) Bell *v.* Humphries, 2 Stark. 345; French *v.* Backhouse, 5 Burr. 2727; Foster *v.* United States Ins. Company, 11 Pick. 85; [Baines *v.* Ewing, L. R. 1 Ex. 320.]

(*c*) Buller, J., in Wallace *v.* Tellfair, 2 T. R. 188, note, and in Smith *v.* Lascelles, 2 T. R. 188; De Tastett *v.* Crousillat, 2 Wash. 132; Morris *v.* Summerl, ib. 208. A commission merchant is not bound to insure, for the benefit of his principal, goods consigned to him for sale, without some express or implied directions to that effect; though he has such an interest in the goods that he *may* insure them to their full value in his own name. Brisban *v.* Boyd, 4 Paige, 17. [*Cf.* 376, n. 1 (*a*).]

ing lent it to the broker again, and so becoming his creditor. Power *v.* Butcher, 10 B. & C. 329, 347. On this ground premiums are recovered by the assured under the count for money had and received, without any reference to whether the broker's credit has run out or not. Xenos *v.* Wickham, 14 C. B. N. S. 435, 456; see S. C. L. R. 2 H. L. 296, 319.

The receipt in a policy of life insurance is open to explanation when the party insured himself obtained the policy. Baker *v.* Union M. L. Ins. Co., 43 N. Y. 283; Thompson *v.* American Tontine Ins. Co., 46 N. Y. 674; and when a broker does not intervene, as explained above, it is supposed that a receipt in any policy would have only its ordinary effect.

It is not possible to go into the extent of the powers of insurance brokers. Xenos *v.* Wickham, 14 C. B. N. S. 435, 464; L. R. 2 H. L. 296, 320. As to the responsibility of agents employed to effect insurance, see Hurrell *v.* Bullard, 3 F. & F. 445; Smith *v.* Price, 2 F. & F. 748; Sawyer *v.* Mayhew, 51 Me. 398.

[1] It has been thought that so long as the party to whom the policy was issued remains the assured, a recovery on the policy will be prevented by his parting with the subject matter, although he at the same time declare a trust as to the insurance money in favor of the purchaser. See 261, n. (*e*), 376, n. 1, *b*, *h*, where the subject is discussed, and where it will be seen that what is called an assignment in some cases is a novation, or new insurance of a new party on a new interest.

(as there is in Pennsylvania), (*d*) the assignee in a case of assignment in trust must sue in the name of the assignor, who will not be permitted to defeat or prejudice the right of action of the assignee. The declaration, in such a suit, may contain the averment that the plaintiff sues as mere trustee, and that the whole interest is in others. (*e*)

*(3) *Of Insurable Interests.* — The assured must have *262 a lawful interest subsisting at the time of the loss in the subject insured, to entitle him to recover upon his policy. That interest may be absolute or contingent, legal or equitable. It may exist in him not only as absolute owner, but also in the character of mortgagor or mortgagee, borrower or lender, consignee, factor, or agent, and may arise from profits, freight, or commissions, or other lawful business. The subject will be better illustrated by considering it with its qualifications under the following heads, viz.: 1. *Illicit Trade.* 2. *Contraband of War.* 3. *Seamen's Wages.* 4. *Freight, Profits, and Commissions.* 5. *Open and Valued Policies.* 6. *Wager Policies.* I shall treat of each of them in their order.

1. (*Of illicit trade.*) — The proper subject of insurance is lawful property engaged in a lawful trade; and if the voyage, as

(*d*) 1 Binney, 429.

(*e*) 2 Condy's Marshall on Insurance, 800, 803, 805; 1 Phillips on Insurance, 11; Carter *v.* United Ins. Company, 1 Johns. Ch. 463; Wakefield *v.* Martin, 8 Mass. 558; Bell *v.* Smith, 5 B. & C. 188; Ashhurst, J., in Delaney *v.* Stoddart, 1 T. R. 22; Craig *v.* The United States Ins. Company, 1 Peters C. C. 410. A clause in a policy, that it shall be void if assigned without the consent, in writing, of the insurer, is taken strictly, and means an effectual transfer or pledge of the particular policy. In Massachusetts, it has been decided, that if there be an absolute transfer of the subject insured before loss, the contract of insurance is avoided, for the assured cannot sue, as he has not suffered any loss, and the assignee cannot sue, for he is no party to the contract. But if the assignment be in the nature of a mortgage, or in trust, the insured may nevertheless sue and recover to the extent of his residuary interest. Carroll *v.* The Boston Marine Ins. Company, 8 Mass. 515; Lazarus *v.* Commonwealth Ins. Company, 5 Pick. 76. In Delaney *v.* Stoddart, 1 T. R. 22, Ashhurst, J., said that a policy might be assigned in equity; and that in the K. B. an action would be permitted to be brought by trustees. So also in Powles *v.* Innes, 11 M. & W. 10, Parke, B., observed, that parties might sue as trustees for the purchaser. It would seem from the cases, that an assignment of a policy is only available when transferred in trust. Heath *v.* American Ins. Company, N. Y. Superior Court, May, 1841. See, also, *infra*, 371, 375, as to the assignment of policies against fire. The principle seems to be the same in both cases, that if the interest insured be assigned before loss without the consent of the insurer (and then it becomes a new contract), the policy ceases. [*Post*, 876, n. 1.]

originally insured, be lawful, a subsequent illegality does not affect it, if the loss be not tainted with such illegality. We have seen that the property of enemies, and a trade carried on with enemies, do not come within this definition. So, an insurance on a voyage, undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, is illegal, whether the policy be on the ship, freight, or goods embarked in the illegal traffic. (*a*) Any illegality in the commencement of an entire voyage will render the whole illegal, and destroy the policy intended for its protection. (*b*) [1]

It is a clear, settled, and universal principle, that an insurance on property, intended to be imported or exported, contrary to the law of the place where the policy is made, or sought to be enforced, is void. The illegality of the voyage in all cases avoids the policy, and the voyage is always illegal when the goods or trade are prohibited, or the mode of its prosecution violated the provisions of a statute. (*c*) No court, consistently with its duty, can lend its aid to carry into execution a contract which involves a violation of the laws the court is bound to administer. (*d*)

* 263 * It has been a question of great discussion, whether a trade prohibited by one country might be made the subject of lawful insurance, to be protected and enforced in the courts

(*a*) The Hurtige Hane, 3 C. Rob. 324; Dalmady *v.* Motteux, K. B. 25 George III. [1 T. R. 85, n.;] Park on Insurance, 311; Harratt *v.* Wise, 9 B. & C. 712; Medeiros *v.* Hill, 8 Bing. 231; Sir W. Scott, in The Eenrom, 2 C. Rob. 6; Hughes on the Law of Insurance, 70.

(*b*) Wilson *v.* Marryatt, 8 T. R. 31; Bird *v.* Appleton, ib. 562. But the transportation of prohibited goods ought not and does not affect a distinct policy upon the lawful goods in the same voyage, of a distinct owner. The Jonge Clara, Edw. Adm. 371; Pieschell *v.* Allnutt, 4 Taunt. 792.

(*c*) Duer on Insurance, i. See Proofs and Illustrations, 880–887.

(*d*) Johnston *v.* Sutton, Doug. 254; The United States *v.* The Paul Shearman, 1 Peters C. C. 98; 1 Phillips on Insurance, 85; 1 Emerigon, 210, c. 8, sec. 5. And see his opinion in a note to 2 Valin, 180, in which he refers to Straccha de Assecur. Glossa, 5, n. 2, 8, where we have the establishment of the above doctrine, that the insurance of prohibited goods is null and void, founded on the sound principle, that *in mercibus illicitis non sit commercium*. The same principle is in Roccus, de Assecur. n. 21, and he copied it almost verbatim from Santerna, de Assecur. et Spons Merc. pt. 4, n. 17. A policy on goods shipped in breach of municipal laws affects not only the policy upon the goods themselves, but also those upon the ship and freight, for a voluntary reception of the goods on board is a violation of law. Gray *v.* Sims, 3 Wash. 276.

[1] See Cunard *v.* Hyde, 2 El. & El. 1; 1 Q. B. 162; Kelly *v.* Home & Croton Wilson *v.* Rankin, 6 Best & S. 208; L. R. Ins. Co., 97 Mass. 288.

of another in which the prohibition does not exist. This question involves principles in politics and morals of momentous importance, and yet the jurists of England and France have differed widely in opinion upon it. Valin and Emerigon consider the insurance of goods, employed in a foreign smuggling or contraband trade, to be valid, provided the insurer was duly informed, when he entered into the contract, of the nature of the trade. The French Admiralty of Marseilles, in 1758, sustained and enforced a contract of insurance in favor of a French merchant who attempted to export silks from Spain, contrary to the law of that country, and whose vessel was, in consequence thereof, seized, and the cargo confiscated. Emerigon justified the decision in France, under the broad terms of the policy, which assumes the *aversio periculi*, and by the usage of the commercial nations, who permit their subjects to carry on, at their own risk, a smuggling trade, contrary to the revenue laws of other countries. (*a*) Valin concurs in the opinion with Emerigon; (*b*) but their conclusions were met and opposed by the manly sense and stern moral principles of Pothier, who denied that it was permitted to Frenchmen to carry on, in a foreign country, a contraband trade prohibited by the laws of the foreign country. (*c*) They who engage in foreign commerce are bound, by the law of nature and nations, to act in obedience to the laws of the country in which they transact business. Every sovereign possesses a rightful and supreme jurisdiction within his * own territory. He has a right to * 264 regulate the commerce of his subjects in his discretion; and so far as foreigners interfere with that commerce within his dominion, they are equally bound with natives to obey the laws which regulate it. If Frenchmen, trading in Spain, were not bound by the Spanish laws, the subjects of Spain are bound by them, and it is immoral for foreigners to seduce Spaniards into an illicit trade. In every view, according to Pothier, the commerce was illicit, and contrary to good faith, and the insurance of it was equally inadmissible, and created no valid obligation.

Emerigon, who was enlightened, as he admits, in the whole course of his work, by the luminous mind of Pothier, as the latter was by Valin, bows to the irresistible energy of the principles of Pothier, and concedes, that the insurance of a foreign smuggling

(*a*) 1 Emerigon, 210–215; 2 Valin, 128, note.
(*b*) Com., des Assur. ii. 127.
(*c*) Traité des Ass. n. 68.

or contraband trade is rather tolerated than justified, and allowed only because other nations have indulged in the same vicious practice. (*a*)

* 265 * In England, the law of insurance is the same as it is in France. A policy, unlawful by the law of the land where it is made, is void everywhere; but an insurance upon a smuggling voyage, prohibited only by the law of the foreign country where the ship has traded, or intends to trade, is good and valid, on the principle, which has been adopted from a motive of supposed policy, that one country does not take notice of the revenue laws of another, nor hold itself bound to repudiate commercial transactions which violate them. If the underwriter, therefore, with full knowledge that he was covering a foreign smuggling trade, makes the insurance, it is held to be a fair contract between the parties, and he is bound by it. (*a*) The decisions of Lord Mansfield on this subject must be considered as laying down an exceedingly lax morality, particularly in the case of *Planché* v. *Fletcher*, where an insurance upon a voyage in which it was intended to defraud the revenue of a foreign state was held not to be illegal, though fictitious papers were fabricated for the purpose of facilitating the fraud. Lord Hardwicke had advanced similar doctrines in *Boucher* v. *Lawson*, (*b*) when he declared, that the unlawfulness, by the Portuguese laws, of exporting gold from Portugal, made no difference in the action at London, for in England it was a lawful trade. The statute of 19 Geo. II. c. 37, was made even with a view to favor the smuggling of bullion from the Spanish and Portuguese colonies. Lord Kenyon, in the case of *Waymell* v. *Reed*, (*c*) seemed to have felt the pressure of the unsound and immoral principle involved in the doctrine of the English courts, for he purpose y waived the inquiry, whether

(*a*) It is admitted that such an insurance is not binding, if the underwriter was not informed of the prohibited trade. He must know that he was insuring a contraband or smuggling trade. Roccus, de Ass. n. 21, says, that such an insurance is not binding *ignorante assecuratore*; and Santerna, de Assecurat. pt. 4, n. 17, whom Roccus cites, uses the same words. Roccus copied from him; and yet those qualifying expressions, and which are so material to the question, do not appear in Mr. Ingersoll's translation of Roccus. I mention this without the least intended disparagement of that very useful translation, the general accuracy of which is undoubted.

(*a*) Planché *v.* Fletcher, Doug. 251; Lever *v.* Fletcher, Hil. Vac. 1780, cited Park on Insurance, 818, 6th ed.

(*b*) Cases Temp. Hard. [85, 89.]

(*c*) 5 T. R. 599.

or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue * laws of his country. The Eng- *266 lish writers on insurance have not concurred entirely in opinion on the question; for while Millar, in his essay on the Elements of Insurance, approves of the English rule, and Mr. Justice Park admits it without any complaint, there are other writers, equally intelligent, who most pointedly condemn the doctrine. (*a*)

In this country, we have followed the English rule, as declared by Lord Mansfield, to the full extent; and the underwriter is liable for losses in consequence of violations of the trade laws of foreign states, provided he was apprised of the intention, on the part of the insured, to violate such laws, either by the terms of the policy, or the standing regulations of the place to which the vessel is insured, or the known usages of the trade. But it is well understood and settled, that the underwriter is not liable for any loss arising from foreign illicit trade, unless he underwrote with full knowledge, that such a trade was the object of the voyage. An insurance to a port does not include the risk of going into the port in violation of law, unless the peril of illicit entry at the port be also within the provision or contemplation of the policy. All the authorities, foreign and domestic, recognize this doctrine. If the trade be known by the underwriter to be illicit, and he makes no exception of the risk of illicit trade, it will be presumed he intended to assume it. The implication would be very fair and just, and would supply the place of more direct proof. (*b*) It is certainly matter of surprise and regret, that in such countries as France, England, and

(*a*) Millar on Insurance, 28; Park on Insurance, 313; Condy's Marshall on Insurance, i. 60; Chitty on Commercial Law, i. 82, 84.

(*b*) Valin, ii. 127; Planché *v.* Fletcher, Doug. 251; Roccus, de Ass. not. 21; Gardiner *v.* Smith, 1 Johns. Cas. 141; Richardson *v.* Maine Ins. Company, 6 Mass. 102; Parker *v.* Jones, 13 id. 178; Andrews *v.* Essex Fire and Marine Ins. Company, 3 Mason, 18, 20; Archibald *v.* M. Ins. Company, 3 Pick. 70. It has been usual in American policies, for the assured to warrant "free from damage or loss in consequence of seizure, or detention of the property for, or on account of, any illicit or prohibited trade." But notwithstanding the warranty, the insurer is liable for loss by seizure and confiscation for an illicit traffic *barratrously* carried on by the master and crew at a foreign port, without the knowledge or privity of the owner. Suckley *v.* Delafield, 2 Caines, 222; Dunham *v.* American Ins. Company, 2 Hall (N. Y.) 422.

the United States, distinguished for a correct and enlightened administration of justice, smuggling voyages, made on purpose to elude the laws, and seduce the subjects of foreign states, *267 should be countenanced, * and even encouraged by the courts of justice. The principle does no credit to the commercial jurisprudence of the age. (a)

2. (*Of contraband of war.*) — The insurance by a neutral of goods usually denominated contraband of war, is a valid contract, for it is not deemed unlawful for a neutral to be engaged in a contraband trade. It is a commercial adventure which no neutral nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. But, on the other hand, all articles contraband of war are subject to seizure *in transitu*, by the belligerent cruisers, and so far it is a case of imperfect right. (b) Mr. Phillips, in his Treatise on the Law of Insurance, intimates, that the trading in articles contraband of war is illegal by the law of nations, which forms part of the municipal law of every state; and that the property cannot, therefore, be the lawful subject of insurance, even in a neutral state. (c) But though it may be difficult to answer this reasoning, it is certain that the established doctrine is not so rigorous. Vattel (d) admits, that it is not an act in itself unlawful or hostile for a neutral to carry on a contraband trade; and if the neutral right to carry, and the belligerent right to seize and confiscate, clash with, and reciprocally injure each other, it is a collision of rights, which happens every day in war, and flows from the *268 effect of an inevitable * necessity. The Chief Justice of Massachusetts, in *Richardson* v. *Maine Insurance Company*, (a) examined this subject with very accurate discrimination, and he considered that illicit voyages may be ranked in several classes: (1) When the sovereign of the country to which the ship belonged interdicted trade with a foreign country or port; and in that case, the voyage, for the purpose of trade,

(a) In the case of La Jeune Eugenie, 2 Mason, 459, 460, a case that pleads the cause of humanity with admirable eloquence, the rule supporting smuggling voyages is admitted, but pretty plainly condemned.

(b) See i. 142, and the authorities there cited; and in addition thereto, see Seton v. Low, 1 Johns. Cas. 1; Barker v. Blakes, 9 East, 283; Pond v. Smith, 4 Conn 297; Juhel v. Rhinelander, 2 Johns. Cas. 120, and affirmed on error, ib. 487.

(c) Phillips on Insurance, i. 101, 429, 2d ed.

(d) B. 3, c. 7, sec. 111.

(a) 6 Mass. 102.

would be illicit, and all insurances thereon void. (2) Where the trade in question is prohibited by the trade laws of a foreign state; and in that case, the voyage, in such a trade, may be the subject of insurance in any state in which the trade is not prohibited, for the municipal laws of one jurisdiction have no force in another. (3) When neutrals transport to belligerents goods contraband of war. The law of nations does not go to the extent of rendering the neutral shipper of goods contraband of war an offender against his own sovereign. While the neutral is engaged in such a trade, he is withdrawn from the protection of his sovereign, and his goods are liable to seizure and condemnation by the powers at war. To this penalty the neutral must submit, for the capture was lawful. The neutral may lawfully transport contraband goods, subject to the qualification of being rightfully liable to seizure by a belligerent power; but he is never punished by his own sovereign for his contraband shipments. In like manner the neutral may lawfully carry enemy's property, and the belligerent may lawfully interrupt him and seize it. An insurance, then, by neutrals, in a neutral country, is valid, whether it relates to an interloping trade in a foreign port, illicit *lege loci*, or to a trade in transporting contraband goods, which is illicit *jure belli*. But to render the insurance in either case valid, the nature of the trade and of the goods should be disclosed to him, or there should be just ground, * from the circumstances of the trade or otherwise, to presume that he was duly informed of the facts. (*a*) [1] *269

(*a*) Parsons, C. J., in Richardson *v.* Maine Ins. Co., *supra*. In New York, it has been held, that the underwriter is presumed to assume the risk of contraband of war, without a previous disclosure of the nature of the cargo; and on the ground of that

[1] *Contraband.* — The text is confirmed by Hobbs *v.* Henning, 17 C. B. N. S. 791, 822. This case, which has been referred to, *ante*, i. 85, n. 1, has been commented on and explained, since that note was printed, by Seymour *v.* London & Prov. M. Ins. Co., 41 L. J. N. S. C. P. 193, a case, like the former, arising out of insurance on the Peterhoff. It was held in the later decision that there was a breach of a warranty against contraband of war, when the real intention was that the goods should, in the course of the same transaction, go on to the Confederate States, and that the shippers should be paid by a share of the profits to be obtained on delivery in the Confederate States.

Pardessus (5 Droit Comm. pl. 1492) seems to think that if an insurance on contraband is made between neutral subjects, it is immaterial where it is made, and that it would be sustained in the neutral courts, although entered into within the jurisdiction of the belligerent. This seems to attribute more importance to the nationality of the parties and less to the *lex loci con-*

3. (*Of seamen's wages.*) — The commercial ordinances have generally prohibited the insurance of seamen's wages, and the expediency of the prohibition arises from the consideration, that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and disaster. Though there be no statute ordinance on the subject in the English law, yet it is everywhere assumed as a settled principle in the marine law of England, that seamen's wages are not insurable. (*b*) [2] But the goods that seamen purchase abroad with their wages do not fall within the reason, nor do wages already earned and due; and yet if a seaman, at an intermediate port, by a refusal to proceed, coerces the master to have his wages already earned insured, such a policy has been held void in the French courts. (*c*)

presumption the contraband cargo need not be disclosed. Seton *v.* Low, 1 Johns. Cas. 1; Juhel *v.* Rhinelander, 2 id. 120, 487. These cases were decided as early as 1799; but the principle does not appear to be sound, and the authority of the cases may now be considered as overruled. Right and duty are correlative. As Sir Wm. Scott observed, there are no conflicting rights between nations at peace. If trade in contraband is unlawful by the laws of war, the neutral violates his duty if he engages in it, and the belligerent exercises a lawful right when he seizes and confiscates the articles. An insurance of a voyage laden with contraband articles is insurance on an illegal voyage. Mr. Duer, in his Treatise on Insurance, i. 751–756, [lect. 8, §§ 23–25,] exposes the error of Vattel, and of the American decisions referred to in the text, with conclusive force. But though the better opinion on sound doctrine be, that such a trade is unlawful for a neutral, yet it is the prevalent rule in continental Europe, that an insurance *made in a neutral country* on articles contraband of war and destined to a belligerent power, is permitted, and seems to be an *exception* to the general principle, that an insurance in a neutral country on a trade prohibited by the law of nations, is illegal and void. This point remains, however, to be settled in the jurisprudence of England and of the United States, though it has received the sanction of the courts of law in New York and Massachusetts, already alluded to. See Duer on Insurance, i. 759–761, [lect. 8, § 27 *et seq.*]

(*b*) Magens on Insurance, 18; Lord Mansfield, in 3 Burr. 1912; Webster *v.* De Tastet, 7 T. R. 157; Lord Stowell, in 1 Hagg. Adm. 289.

(*c*) Emerigon, i. 286.

tractus than is consistent with modern views. See n. (*a*), above, and 265. The conclusion certainly does not follow from the fact that such a contract is valid if made elsewhere than within the belligerent jurisdiction. However, the same view is taken in Arnould on M. Ins. 4th ed. 634 (pt. 2, ch. 5).

The later authorities to the effect that agreements to break a blockade or carry contraband by a neutral ship are valid will be found, i. 142, n. 1.

[2] *Seamen's Wages.* — Whether the general rule would not be changed by a statute like 17 & 18 Vict. c. 104, § 183, making the right to wages independent of the earning of freight, is an open question. Mr. Maclachlan, in his edition of Arnould on Ins. pt. 1, ch. 2, thinks seamen should be allowed to insure.

4. (*Of freight, profits, and commissions.*) — In France and Spain, freight not earned cannot be insured, and for the same reason that seamen's wages are not insurable. Several of the commercial tribunals wished, however, to adopt the practice of the English, and give a greater extension to the liberty of insurance. To this it was answered, that risk was of the essence of the contract, and that there * could be no real loss of *270 that which is a nonentity, and had no certain existence, as future contingent freight and profits. (*a*) By leaving the freight to be earned uncovered, the master has stronger inducements to be vigilant in the preservation of the ship and cargo. This is the reason assigned by Cleirac; but Emerigon says, the true ground of the prohibition is, the uncertainty of the existence of any future freight. (*b*) In England and the United States, future, or expected and contingent, and even dead freight, is held to be an insurable interest. It is sufficient that the insured had an interest in the subject-matter from which the freight is to arise. It is necessary, however, that the ship should have actually begun to earn freight, in order to entitle the insure[d] to recover, for, until then, the risk on the freight does not commence. An inchoate right to freight is an insurable interest. The risk generally begins from the time the goods, or part of them, are put on board; and if the ship has been let to freight under a charter party of affreightment, the right to freight commences, and is at risk so soon as the ship breaks ground;[1] and if the

(*a*) Boulay-Paty, iii. 482, 488.

(*b*) Ord. de la Mar. du Fret, art. 15; Code de Commerce, art. 347; Cleirac, sur le Guidon, c. 15, art. 1; Emerigon, 224; Ord. of Bilboa, c. 22. But freight already earned and due may be insured, for it has then ceased to be uncertain. Pardessus, Cours de Droit Com. iii. n. 764, 765.

[1] *Insurance on Freight.* — The text is somewhat too narrow, see 311, n. 1.

The contract of insurance against loss of freight is that the ship shall not be prevented from earning it by the perils insured against. If the owner is deprived of it by other circumstances after it is earned, or if he surrenders the cargo free of freight prematurely, when he might have completed the voyage and earned the freight by a delivery of the cargo *in specie*, the insurers will not be liable. Scottish M. Ins. Co. of Glasgow *v.* Turner, 17 Jur. 631; 20 Eng. L. & Eq. 24; 1 Macq. H. L. 334; 4 H. L. C. 312; Allen *v.* Mercantile M. Ins. Co., 44 N. Y. 487. Compare Lord *v.* Neptune Ins. Co., 10 Gray, 109; Thwing *v.* Washington Ins. Co., ib. 443. See also Parsons *v.* Manufacturers' Ins. Co., 16 Gray, 463; Buffalo City Bank *v.* N. W. Ins. Co., 80 N. Y. 251.

The insurance covers freight paid in advance if the insured owner is liable to repay it. *Ante*, 226, n. 1; Benner *v.* Equitable S. Ins. Co., 6 Allen, 222; Chase *v.* Alliance Ins. Co., 9 Allen, 311. See

charterer omits to put on board the expected cargo, and the ship performs the voyage in ballast, the right to freight is perfect. But when the freight arises from the transportation of the goods, it commences when the goods are put on board, and the policy attaches to the extent of the goods on board, or ready to be shipped. (*c*)

* 271 * Profits are, equally with freight, a proper subject of insurance. The right to insure expected or contingent profits is settled in England, and has received repeated and elaborate confirmation. (*a*) [1] They are likewise, in this country, held to be an insurable interest. (*b*) The consignee of goods consigned to him for sale, has an insurable interest therein to their full

(*c*) Tonge *v.* Watts, Strange, 1251; Thompson *v.* Taylor, 6 T. R. 478; Forbes *v.* Aspinall, 13 East, 823; Davidson *v.* Willasey, 1 Maule & S. 813; Riley *v.* Hartford Ins. Company, 2 Conn. 368; Livingston *v.* Columbian Ins. Company, 3 Johns. 49; Davy *v.* Hallett, 3 Caines, 16. Mr. Benecke, in his Treatise on the Principles of Indemnity, 57, says, that the practice of insuring ship and freight separately, is attended with many difficulties, and that the best, if not the only way, to obviate them, and to put the owner, under all circumstances, in the same situation in which he would have been in case of a safe arrival, would be, *to insure the ship and freight jointly, as one individual risk, in the same policy.* In Adams *v.* Pennsylvania Ins. Company, 1 Rawle, 97, in the case of a valued policy on freight, there was specie on board belonging to the owner of the ship, and the ship was lost before any cargo was purchased, or contracted for, or procured; and it was held, that there was no claim upon the insurer, for there was only a reasonable *expectation of profit* upon a *cargo expected to be procured* and shipped. The contingency of expected freight was too remote.

(*a*) Grant *v.* Parkinson, cited in Park on Insurance, 354, 6th ed.; Le Cras *v.* Hughes, ib. 358; Craufurd *v.* Hunter, 8 T. R. 13; Barclay *v.* Cousins, 2 East, 544; Henricksen *v.* Margetson, ib. 549, note. Profits must be insured as profits. 3 Nev. & Mann. 819. An insurance on *outfits* in a whaling voyage does not terminate *pro tanto* with their consumption or distribution, but attaches to the *proceeds* of the adventure. Hancox *v.* Fishing Ins. Co., 3 Sumner, 132.

(*b*) Loomis *v.* Shaw, 2 Johns. Cas. 86; Tom *v.* Smith, 3 Caines, 245; Abbott *v.* Sebor, 3 Johns. Cas. 39; Fosdick *v.* Norwich Marine Ins. Company, 3 Day, 108.

Ogden *v.* N. Y. M. Ins. Co., 4 Bosw. 447; Howard *v.* Astor M. Ins. Co., 5 Bosw. 88. And where, as in England, such advances cannot be recovered back, the person making the advances has an insurable interest. Arnould, M. Ins. 4th ed. 57; Wilson *v.* Martin, 11 Exch. 684; Hall *v.* Janson, 4 El. & Bl. 500; De Cuadra *v.* Swann, 16 C. B. N. S. 772; Currie *v.* Bombay Nat. Ins. Co., L. R. 3 P. C. 72, 88. Compare Katheman *v.* General M. Ins. Co., 12 La. An. 35, with Minturn *v.* Warren Ins. Co., 2 Allen, 86.

See, as to what is a total loss of freight, *post*, 331, n. 1.

The rule *causa proxima spectatur*, *post*, 302, n. 1, is applied to this class of insurances as well as others. Philpott *v.* Swann, 11 C. B. N. S. 270.

As to the suing and laboring clause, see 340, n. 1.

[1] *Post*, 278, n. (*b*). As to the insurable interest of consignees and the like, see 372, n. 1.

value, and he may insure them in his own name. (*c*) Insurances on freights, profits, and commissions are required by the course and interests of trade, and have been found to be greatly conducive to its prosperity. But the doctrine that pervades the case[s] is, that the insured must have a real interest in the subject matter from which the profits are expected. There must be a substantial basis for the hope or expectation of profits, in order to prevent the policy from being considered a wager. Commissions are a species of profit expected to arise from the sale of property consigned to an agent or supercargo, and they are an insurable interest in England, and other countries, where insurances on profits are legal. (*d*)

In France, assurances on profits are unlawful, and contrary to the code, as they were also to the ordinances of the marine, *and for the same reason that insurances on freight are *272 not allowed. The subject insured must have a physical existence, and be a substance capable of being exposed to the hazards of the sea. And yet there seems to be no more objection to the insurance of a thing having only a potential existence, than to the sale of it; and it is admitted, that the sale of the proceeds of a future vintage, or of the next cast of the net by a fisherman, is a good and valid sale. The hope or expectation of profit, in these cases, is, says Pothier, (*a*) a moral entity susceptible of value, and of being sold. But in Italy, Portugal, and the Hanse Towns, they are held lawful; and Santerna, and after him Straccha, and then Roccus, all show that the profits of goods may lawfully be estimated in an insurance on goods. (*b*) The English cases have required the insured to show, in an insurance on profits, that some profit would have been produced upon the adventure, if the peril to the property from which the profits were to arise had not intervened. (*c*) I should apprehend that was the proper course, though the cases in this country have not explicitly declared that the party must show affirmatively that the goods, if they had arrived safe, would have come to a profit-

(*c*) De Forest *v.* Fulton Ins. Company, 1 Hall, 84; Brisban *v.* Boyd, 4 Paige, 17; Pouverin *v.* La. M. & F. Ins. Co., 4 Rob. (La.) 284.

(*d*) Benecke on Indemnity, 85.

(*a*) Traité du Con. de Vente, n. 5, 6.

(*b*) Roccus, n. 31, 96; Santerna, de Ass. et Spons. Merc. Tract. pt. 3, n. 40, 41; Straccha, de Ass. Gloss. 6, n. 1; Ord. of Hamburg, 2 Magens, 218; Benecke 85

(*c*) Hodgson *v.* Glover, 6 East, 316.

able market, or that the state of the foreign market was such as to have afforded, as in *Grant* v. *Parkinson*, a very strong expectation of profit. Such an expectation seems to have been assumed in the American cases.

5. (*Of open and valued policies.*) — An *open* policy is one in which the amount of interest is not fixed by the policy, but is left to be ascertained by the insured, in case a loss should happen.

A *valued* policy is where a value has been set on the ship
* 273 or goods insured, * and inserted in the policy in the nature of liquidated damages.

If a policy on profits be an open one, there must be proof given of the amount of the profits that would probably have been made. if the loss had not happened; there would not otherwise be any guide to the jury, in the computation of the loss. In *Mumford* v. *Hallett*, (*a*) it was supposed that every policy on profits must, of necessity, be a valued one, because, without the valuation, it would be extremely difficult to ascertain the amount to be recovered. A loss on the profits must be regulated by the loss of the property from which the profits were to arise. (*b*) Where the ship and cargo were lost on the voyage, the whole amount of the valued profits was held recoverable, without showing that there would have been any ultimate profit if the loss had not happened. (*c*)

The value in the policy is, or ought to be, the real value of the ship, or the prime cost of the goods, including the incidental expenses of them previous to the shipment, and the premium of insurance. (*d*) It means the amount of the insurable interest; and if the insured has some interest at risk, and there is no fraud, the valuation in the policy is conclusive between the parties; for they have, by agreement, settled the value, and not left it open to future inquiry and dispute as between themselves. (*e*) If the valuation should, however, be grossly enormous, as in the case

(*a*) 1 Johns. 433.

(*b*) Abbott *v.* Sebor, 3 Johns. Cas. 39. [M'Swiney *v.* Royal Exch. Assurance, 14 Q. B. 634; Halhead *v.* Young, 6 El. & Bl. 312; Smith *v.* Reynolds, 1 Hurlst. & N. 221; Wilson *v.* Jones, L. R. 2 Exch. 139, 146; Chope *v.* Reynolds, 5 C. B. N. S. 642. Cases which carry out the doctrine of the text, the last with some reluctance.]

(*c*) Patapsco Ins. Company *v.* Coulter, 3 Peters, 222.

(*d*) Pothier, des Ass. n. 43.

(*e*) Shawe *v.* Felton, 2 East, 109; Lord Abinger, in Young *v.* Turing, 2 Mann. & Gr. 593.

put by Lord Mansfield, where cargo was valued at £2,000, and the insured had only the value of a cable on board, there is no doubt it would raise a strong presumption of fraud; and either the valuation or the policy would be set aside. A valuation, fraudulent in fact, as respects the insurer, or so excessive as to raise a necessary presumption of fraud, entirely vacates the policy and discharges the insurer; and the English, American, and French law of insurance contain the same general doctrine on the subject. (*f*)

* There are cases which suggest that the valuation is * 274 applicable only to cases of total loss, and does not apply to average losses. (*a*) But the better opinion of the text writers is, that in settling all losses, total or partial, the valuation of the property in the policy is to be considered as correct in the adjustment of the loss, and the true measure and basis of the valuation according to the contract of indemnity.[1] The adjustment is to

(*f*) Lord Mansfield, in Lewis *v.* Rucker, 2 Burr. 1171; Shawe *v.* Felton, 2 East, 109; Feise *v.* Aguilar, 3 Taunt. 506; Haigh *v.* De la Cour, 3 Camp. 319; Lord Ellenborough, in Forbes *v.* Aspinall, 13 East, 323; Aubert *v.* Jacobs, Wightw. 118; Wolcott *v.* Eagle Ins. Company, 4 Pick. 429; Marine Insurance Company *v.* Hodgson, 6 Cranch, 206; [Hersey *v.* Merrimack Cy. M. F. Ins. Co., 7 Foster (27 N. H.), 149; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411;] Condy's Marshall, 290, 291; 1 Phillips on Insurance, 305–318, 1st ed.; Valin's Comm. ii. 147; Pothier, des Ass. n. 151, 159; Boulay-Paty, iii. 397, 398. M. Delvincourt, in his Institutes de Droit Comm. ii. 345, 346, contends, that though the valuation be made without fraud, if there be palpable evidence of mistake in the valuation, the policy may be opened; and Valin, Pothier, and Emerigon are of that opinion. But Boulay-Paty thinks that the excess in the valuation, by mistake, is not sufficient to open the policy; and there must be proof of actual fraud going to the destruction of the contract. Cours de Droit Comm. iii. 401. The Ordinance of the Marine, h. t., art. 8, and the Code de Commerce, art. 336, make fraud the basis of opening the valuation. Le Guidon, c. 2, art. 13, and Valin, Comm. ii. 52, consider an over valuation of a moiety, or one third, or even of one fourth, to be evidence of fraud; but other text writers justly conclude that every case will depend upon its own circumstances, without being governed by any such rule. Mr. Benecke has referred to the various and discordant provisions of the principal commercial nations of Europe, concerning valuations, and they are generally held to be conclusive, unless shown to be fraudulent. Benecke on Indemnity, 151, 152.

(*a*) Lord Mansfield, in Le Cras *v.* Hughes, cited in 2 East, 118; Sewall, J., 7 Mass. 370; Allegre *v.* Insurance Company, 6 Harr. & J. 408. The New York Board of

[1] *Valued Policies.* — The text is confirmed by Irving *v.* Manning, 1 H. L. C. 287; Barker *v.* Janson, L. R. 3 C. P. 303; Phœnix Ins. Co. *v.* McLoon, 100 Mass. 475.

The valuation is conclusive between the parties in respect of all rights and obligations which arise upon the policy. Thus, if the insured has received payments in respect of the loss on other policies expressing a higher value, he can only recover the excess of the defendant's

be the same as if the goods had actually cost, or the ship and freight were actually worth, the sum at which they were valued. (*b*) Mr. Benecke concludes, from a consideration of the cases, that the opinion, that in a case of a partial loss the
* 275 valuation ought to be disregarded, *is as destitute of authority as it is void of justice and sound reason.

A valuation does not preclude the inquiry, whether the whole interest valued has been at risk. If the valuation of freight of a whole cargo be made, the underwriter will not be liable beyond the extent of the freight of the goods put on board. (*a*) This doctrine applies equally to an insurance upon cargo; and the insured, on a valued policy on cargo, will not recover beyond the interest he had at risk. There must be a total loss of the whole subject matter of insurance to which the valuation applied, whether the insurance was on goods or upon freight. The valuation fixes the price of the whole subject at risk, but it does not admit that the property, on which the valuation was made, was on board the vessel. (*b*) If, therefore, certain articles be

Underwriters, May 20, 1837, resolved that in cases of a technica total loss of a *vessel*, the only basis of ascertaining her value shall be her valuation in the policy, and if not so valued, her actual value at the time of the inception of the risk at the port to which she belonged.

(*b*) Stevens & Benecke on Average and Adjustment of Losses in Marine Insurance, Boston, 1833, 48–53; Stevens on Average, pt. 2, 168; Phillips on Insurance, i. 813, 315; Benecke on Indemnity, 152, 153, 157. In the case of Allegre *v.* Insurance Company, the court considered it to be an open and unsettled question, whether, in the case of a partial loss on a valued policy, the insured was to be indemnified according to the valuation, or the actual value of the subject at the port of shipment, and they omitted to express any opinion on the point, though it had been warmly contested in the argument. Mr. Benecke says that the question, whether a valuation should be opened in cases of partial loss, had never occurred in the English courts.

(*a*) Forbes *v.* Aspinall, 13 East, 323.

(*b*) Parker, C. J., Haven *v.* Gray, 12 Mass. 71; Wolcott *v.* Eagle Ins. Company, 4 Pick. 429; Brooke *v.* Louis. Ins. Company, 4 Martin, N. s. 640, 681. If much less property was shipped than was expected to be on board, the assured, though it be a

valuation over the amount of the previous payments. Bruce *v.* Jones, 1 Hurlst. & Colt. 769. Compare Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55. (But this would not apply when the policy in question is against a different risk from the other. Lidgett *v.* Secretan, L. R. 6 C. P. 616; *post*, 281, n. 1.) On this principle, underwriters who had paid as for a total loss, were held entitled to the whole amount afterwards recovered by the owners for a collision which caused the loss, notwithstanding the fact that the valuation in the policy was much less than the actual worth of the ship. North of England Ins. Ass. *v.* Armstrong, L. R. 5 Q. B. 244.

comprised in a valuation, and part are safely landed before the ship is lost, the valuation must be opened, and the claim of the insured reduced in the proportion to which the articles actually lost bore to the valuation of the whole at the commencement of the risk. (*c*)

6. (*Of wager policies.*) — A mere hope or expectation, without some interest in the subject matter, is a wager policy, and all such marine policies are, by statute in England, declared void. (*d*) But the English courts have refined greatly, in considering what is an interest sufficient to sustain a policy, and to place it out of the reach of the prohibition. If a person be directly liable to loss in the happening of any particular event, as if he be an insurer, or * be answerable as owner * 276 for the negligence of the master, he has an insurable interest. (*a*) A creditor, to whom property is assigned as collateral security, has an insurable interest to the amount of his debt. (*b*) In the case of *Lucena* v. *Craufurd*, (*c*) the distinction between a reasonable expectation of gain in the shape of freight, commissions, or profits, founded on some interest in the subject matter which was to produce them, and a mere shadowy hope or expectation, was fully and very ably investigated in the Court of Common Pleas, and in the House of Lords, and great talents were displayed and exhausted upon that litigated point. The decision was, that commissions to become due to public agents, and all reasonable expectation of profits, were insurable interests. The interest need not be a property in the subject insured. It is sufficient if a loss of the subject would bring upon the insured a pecuniary loss, or intercept a profit. Interest does not necessarily imply a right to, or property in, the subject insured. It may consist in having some relation to, or concern in, the subject of the insurance, and which relation or concern may be so affected

valued policy, can recover only, in case of loss, a proportion *pro rata*. Alsop *v.* The Comm. Ins. Company, 1 Sumner, 451. [Tobin *v.* Harford, 34 L. J. N. S. C. P. 37; 17 C. B. N. S. 528; 18 C. B. N. S. 791; Denoon *v.* Home & Col. Ass. Co., L. R. 7 C. P. 341; Fay *v.* Alliance Ins. Co., 16 Gray, 455.]

(*c*) Benecke on Indemnity, 146.

(*d*) 19 Geo. II. c. 37.

(*a*) Walker *v.* Maitland, 5 B. & Ald. 171.

(*b*) Wells *v.* Philadelphia Ins. Company, 9 Serg. & R. 108. A lien, or an interest in the nature of a lien, is an insurable interest. Hancox *v.* Fishing Ins. Company, 3 Sumner, 132.

(*c*) 3 Bos. & P. 75; 5 id. 269.

by the peril as to produce damage. Where a person is so circumstanced, he is interested in the safety of the thing, for he receives a benefit from its existence, and a prejudice from its destruction, and that interest is, in the view of the English law, a lawful subject of insurance. (*d*) [1]

It was admitted by the judges of the Court of K. B., in *Craufurd* v. *Hunter*, (*e*) that, at common law, prior to the statute of Geo. II., wager policies were not illegal; and the courts have been very much embarrassed in their endeavors to draw the line of distinction between wagers that were and were not * 277 admissible in courts of justice. The law has been * thought to descend from its dignity when it lends its aid to recover the fruits of an idle and frivolous wager. In *Good* v. *Elliott* (*a*) Mr. J. Buller made a vigorous but unsuccessful stand, against suits upon wagers in any case; and nothing could have been more impertinent than the wager in that case, which was, whether one third person had purchased a wagon of another. Many of the cases stated by Mr. J. Buller were of a nature to draw into discussion, and unnecessarily affect the character or feelings of third persons; and to sustain suits upon such wanton wagers would be a disgrace to any administration of justice. The case of *Jones* v. *Randall* (*b*) went quite far enough, when it sustained an action upon a wager, whether a decree in Chancery would be reversed on appeal to the House of Lords. If wagers are to be allowed in any case, as valid ground for a suit, the betting on the return of a ship, in the shape of a policy without interest, is as harmless as any that could be devised. In *Egerton* v. *Furzeman* (*c*) it was ruled in the English courts, that a wager on a battle between two dogs was illegal, and not the ground of action.

In New York, the courts had formerly assumed it to be a clear

(*d*) Lawrence, J., in 5 Bos. & P. 302, 303, 304; Hughes on Insurance, 30. An equitable, as well as a legal interest, and an interest held under an executory contract, are valid subjects of insurance. Columbian Insurance Company *v.* Lawrence, 2 Peters, 25.

(*e*) 8 T. R. 13.
(*b*) Cowp. 37.
(*a*) 8 T. R. 693.
(*c*) 1 Carr. & P. 613.

[1] Although he has not any title in, or lien upon, or possession of the property itself. Eastern R.R. Co. *v.* Relief Fire Ins. Co., 98 Mass. 420, 423; Wilson *v.* Jones, L. R. 2 Ex. 139, 150; Insurance Co. *v.* Chase, 5 Wall. 509, 513. For some qualifications, see 372, n. 1, where cases as to sufficiency of interest will be found. See Durrant *v.* Friend, 5 De G. & Sm. 343; 11 Eng. L. & Eq. 2.

and settled principle of the common law, that a policy, in which the insured had no interest, and which was, in fact, nothing more than a wager or bet between the parties to the contract, whether such a voyage would be performed, or such a ship arrive safe, was a valid contract. (*d*) It was only required that the wager should concern an innocent transaction, and not be contrary to good morals or sound policy. (*e*) *But now, by statute, (*a*) *278 all wagers, bets, or stakes, made to depend upon any lot, chance, casualty, or unknown or contingent event whatever, are declared to be unlawful, with the exception of contracts on bottomry or respondentia, and all insurances made in good faith for the security or indemnity of the party insured. The statute has effectually destroyed wager policies; for they are not within the exception. In Massachusetts, the Supreme Court expressed a strong opinion against the validity of a wager policy, and the doctrine there is, that all gaming is unlawful, according to the general policy and laws of the Commonwealth. In Pennsylvania, every species of gambling policy, and all actions upon a wager or bet, are reprobated, and they follow the principles, while they do not acknowledge the authority of the English statute in the reign of George II. (*b*) Wager policies, without any real interests to support them, are condemned also by positive ordinances in France, and in most of the commercial nations of Europe. (*c*)

(*d*) Juhel *v.* Church, 2 Johns. Cas. 333; Abbott *v.* Sebor, 3 id. 39; Clendining *v.* Church, 3 Caines, 141; Buchanan *v.* Ocean Ins. Company, 6 Cowen, 318. [*Post*, 369, n. 1.]

(*e*) Bunn *v.* Riker, 4 Johns. 426; Mount *v.* Waites, 7 id. 434; Campbell *v.* Richardson, 10 id. 4 6.

(*a*) New York Revised Statutes, i. 662, secs. 8, 9, 10.

(*b*) Amory *v.* Gilman, 2 Mass. 1; Babcock *v.* Thompson, 3 Pick. 446; Prichet *v.* Insurance Co. of North America, 3 Yeates, 464; Craig *v.* Murgatroyd, 4 id. 168; Adams *v.* Pennsylvania Ins. Company, 1 Rawle, 107. In Vermont it is held, that no suit will lie to recover property won of another by a bet or wager. Collamer *v* Day, 2 Vt. 144. Wager contracts, or bets on elections, are void. Lloyd *v.* Leisenring, 7 Watts, 294. No action upon any wager or bet can be sustained. Edgell *v.* M'Laughlin, 6 Wharton, 176. [*Post*, 369, n. 1.]

(*c*) Ord. de la Mar. liv. 3, tit. 6, Des Ass. art. 22; 1 Emerigon, 264. In Scotland the rule of the civil law relative to *sponsiones ludicræ* was early adopted as common law, and no wager or gaming contract will support an action. 1 Bell's Comm. 300; Code de Commerce, art. 357; Ord. of Genoa, of Middleburg, of Rotterdam, of Amsterdam, of Hamburg, and Stockholm, collected in 2 Magens, 65, 68, 88, 132, 229, 257. Roccus, de Assecur. n. 88. The latter refers to a decision of the Rota of Genoa, in which the principle is declared, *si non adest risicum, assecuratio non valet; nam non adest materia in qua forma posset fundari.* Decisiones Rotæ Genuæ, 55, n. 9.

(4) *Of Reassurance and Double Insurance.* — After an insurance has been made, the insurer may have the entire sum
* 279 he hath insured, *reassured* to him by some other *insurer.

The object of this is indemnity against his own act; and if he gives a less premium for the reassurance, all his gain is the difference between what he receives as a premium for the original insurance and what he gives for the indemnity against his own policy. If he give as much for reassurance, he gains nothing by the transaction; and if he gives a higher premium, as insurers
* will sometimes do to cover a dangerous risk, he becomes a loser by his original insurance. These reassurances are prohibited in England, except in special cases, by the statute of 19 Geo. II. c. 37; and also by every country in Europe, but they are allowed with us. (*a*) The contract of reassurance is totally distinct from, and unconnected with, the primitive insurance; and the reassured is obliged to prove the loading and value of the goods, and the existence and extent of the loss, in the same manner as if he were the original insured. (*b*)[1] He need not abandon to the reinsurer, as soon as the first insured has abandoned to him, for he has no connection with the first insurance. If he proves the original claim against him to be valid, when he resorts over to the reinsurer, he makes out a case for indemnity. (*c*)

These reassurances are allowed by the French ordinances, (*d*) and the first insurer can reassure to the same amount; but the better opinion is, that he cannot insure the premium due him for the first insurance. Valin, Pothier, M. Estrangin, the commentator upon Pothier, and Boulay-Paty, are all opposed to Emerigon on this point, and they certainly bear down his opinion. (*e*)

(*a*) Hastie *v.* De Peyster, 8 Caines, 190; Merry *v.* Prince, 2 Mass. 176.

(*b*) Pothier, h. t., n. 168; Emerigon, i. 247, 250.

(*c*) Hastie *v.* De Peyster, *ub. sup.* When the loss has happened, and been duly ascertained, the reassurer must pay to the first insurer the amount of the loss within the policy, notwithstanding the first insurer has become insolvent, and can pay only in part. He must pay the entire sum reassured, and has no concern with any arrangement between the first insurer and his creditors. 1 Marshall on Insurance, 143; Emerigon, i. 248. He is entitled to make the same defence as the original insurer. N. Y. State Marine Ins. Co. *v.* Protection Ins. Co., 1 Story, 458.

(*d*) Ord. de la Mar. des Assurances, art. 20; Code de Commerce, art. 342.

(*e*) Valin, h. t.; Pothier, h. t., n. 35; 1 Emerigon, 249; 3 Boulay-Paty, 432.

[1] Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 448. (Reinsurance is now lawful in England. St. 30 & 31 Vict. c. 23, § 4; Gledstanes *v.* Royal Exchange Ass. Co. 5 Best & Sm. 797.)

The insured may likewise cause to be insured the solvency * of the first insurer; but this will not often be the *280 case, for it lessens greatly the profits of the voyage, by multiplying the charges upon it; and Marshall says, it has never happened in England; for a double insurance answers better the end proposed. (*a*) The second insurer does not become strictly a surety for the first insurer. It is a totally distinct contract, without any participation in the other, and he is not bound to render any service to the first one. It is a conditional obligation of a special kind. (*b*) Valin and Pothier contend, that the second insurer of the solvency of the first one becomes a surety for the first, and is entitled to oppose to the claim the *exception of discussion* which is to require that the first insurer should, at his expense, be first prosecuted to judgment and execution; but Emerigon and Boulay-Paty are not of that opinion, though they admit that the first insurer must be put legally in default after a legal demand. (*c*)

A *double insurance* is where the insured makes two insurances on the same risk and the same interest. But the law will not allow him to receive a double satisfaction in case of loss, though he may sue on both policies. The underwriters on the different policies are bound to contribute ratably towards the loss. (*d*) They pay according to the rate of their subscriptions, without regard to the order of time in which the policies were made; and if the insured recovers * his whole loss from *281 one set of underwriters, they will be entitled to their action against the other insurers, on the same interest and risk, for a ratable proportion of the loss. (*a*)[1] The doctrine of con-

(*a*) Condy's Marshall, 145.

(*b*) Santerna, de Ass. pt. 3, n. 55, 56, 57, 58; Straccha de Ass. Introduction, n. 48, 49, who cites and adopts the opinion of Santerna; and both of them refer back to the civil law, and to the doctors who had commented upon it; and they, in their turn, are quoted and followed by Emerigon, i. 253.

(*c*) Pothier, Traité des Ass. n. 83; Valin, ii. 66; Le Guidon, c. 2, art. 20; 1 Emerigon, 259; Boulay-Paty, iii. 440, 442.

(*a*) Rogers *v.* Davis, and Davis *v.* Gilbert, decided at N. P., by Lord Mansfield; Park on Insurance, 874, 875, 6th ed.; Lucas *v.* Jefferson Ins. Co., 6 Cowen, 635.

(*a*) Newby *v.* Reed, 1 Wm. Bl. 416; Millaudon *v.* Western Marine & Fire Ins. Company, 9 La. 27.

[1] *Double Insurance.* — See 876, n. 1; Cromie *v.* Kentucky & Louisville M. Ins. Co., 15 B. Mon. 432; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429. It is not double insurance when the second policy applies to other property as well as that first insured; Sloat *v.* Royal Ins. Co., 49 Penn. St. 14; (citing Howard

tribution applies very equitably to such a case. It was so declared by the Circuit Court of the United States at Philadelphia, in *Thurston* v. *Koch*; (*b*) and though in most countries of Europe the first policy in the order of time is to be exhausted before the second operates, yet the rule requiring the insurers in each policy to bear a ratable share of the loss was declared, in that case, to be founded in equity, and in sound principles of commercial policy. The French rule is, that if there exist several contracts of insurance on the same interest and risk, and the first policy covers the whole value of the subject, it bears the whole loss, and the subsequent insurers are discharged on returning all but half per cent premium. But if it does not cover the entire value, the subsequent policies, in case of loss, are bound only to make up the part uncovered. (*c*) The ancient rule in England was according to the French ordinance, (*d*) and it has been deemed more simple and convenient. Merchants frequently prefer it, and it is perfectly consonant to a strict construction of the contract with the first underwriter.

Policies have sometimes a clause introduced into them to prevent the rule of contribution, and to make the insurers responsible according to the order of date of their respective policies. Where two policies were dated upon the same day, it was held, that prior in date was intended to be equivalent to prior in time,

(*b*) 4 Dallas, 848; App. p. 82.

(*c*) Code de Commerce, art. 359.

(*d*) Malynes's Lex Mercatoria, 112; The African Company *v.* Bull, 1 Show. 132; Gilbert, 232.

Ins. Co. of N. Y. *v.* Scribner, 5 Hill, 298;) Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20; nor when different persons, such as mortgagee and mortgagor, insure their respective interests in the same thing; Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517; Fox *v.* Phenix F. Ins. Co., 52 Me. 333; *post*, 371, n. (*e*); nor when the second policy is against a different risk from that covered by the first; Lidgett *v.* Secretan, L. R. 6 C. P. 616; otherwise of a subsequent insurance by two of three owners who were all insured in the earlier policy. Mussey *v.* Atlas Mut. Ins. Co., 14 N. Y. 79.

It is not uncommon to provide that the insured shall not recover more than the proportion which the amount insured by the policy bears to the whole amount insured upon the property, in which case, if a company pays more than its proportion, it is not entitled to contribution from other companies which have insured on similar policies. Fitzsimmons *v.* City F. Ins. Co. of N. H., 18 Wisc. 234. *Inf.* 282, n. (*b*).

As to valued policies, see 274, n. 1; Bruce *v.* Jones, 1 H. & C. 769; Lidgett *v.* Secretan, L. R. 6 C. P. 616.

As to policies issued at the same time, see Washington F. Ins. Co. *v.* Davison, 30 Md. 91; Manhattan Ins. Co. *v.* Stein, 5 Bush (Ky.), 652.

and that the policy first in time, in point of fact, was to bear the loss. (*e*)

*As a general rule of construction, and independent of *282 usage, the first policy, under such a clause as that to which I have referred, would have to bear the whole loss, whether partial or total, to the extent of the policy. (*a*) But the usage of the companies in New York is understood to be, that partial losses are to be apportioned between the policies, without regard to dates, provided the cargo on board was large enough to have attached both policies to it. This is the French rule. In France, if there be goods on board to the amount of both policies, and a partial loss ensues, the insurers contribute ratably in proportion to their subscriptions. (*b*)

(5) *Of Representation and Warranty.* — 1. (*Of representation.*) — All the writers who have treated of the contract of insurance agree, that it is eminently a contract of good faith, which is peculiarly enjoined upon the insured, as he possesses an entire knowledge of all those circumstances which combine to form the contract, and is bound to communicate the facts and objects which are to determine the will of the insurer. A representation relates to facts or information extrinsic to the policy, and may be made by parol or in writing; and though it be not usually

(*e*) Brown *v.* Hartford Ins. Company, 8 Day, 58. The same point was afterwards so ruled in Potter *v.* Marine Ins. Company, 2 Mason, 475. The clause against contribution runs thus: "It is further agreed, that if the assured shall have made any other assurance upon the premises, prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient." The *American clause*, as it has been denominated, is stated in the case of the American Insurance Company *v.* Griswold, 14 Wend. 399, to be, that "in case of any subsequent insurance, the insurer shall, nevertheless, be answerable for the full extent of the sum subscribed by him, without right to claim contribution from subsequent assurers." The one form is adapted to the first policy, and the other form to the last policy. This clause was held, in the above case, to bar the claim for *contribution* from subsequent assurers upon the same cargo, although there was aliment for all policies at the time of subscription.

(*a*) Columbian Ins. Company *v.* Lynch, 11 Johns. 233; Rogers *v.* Davis, Park on Insurance, 374.

(*b*) Ord. de la Mar. des Ass. art. 25; 2 Valin, 78, 74; Code de Commerce, n. 360; Pothier, h. t., n. 77. The American policies generally contain the clause, that "in case of any other insurance upon the property thereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover upon this policy any greater portion of the loss or damage sustained, than the amount hereby insured shall bear to the whole amount insured on the property."

inserted in the policy, it may be inserted, and yet not require, in that case, the severe construction given to a warranty, provided the statement relates not to facts, but to the information, expectation, or belief of the party, or provided the parties declare, at the same time, their intention that the statement should be taken to be a representation merely. (*c*) [1] A positive misrepresentation

(*c*) Rice *v.* New England Ins. Company, 4 Pick. 439; Lothian *v.* Henderson, 3 Bos. & P. 499; Duer's Lecture on the Law of Representations in Marine Insurance, 44 ed. New York, 1844.

[1] *Representation and Warranty.* — In Behn *v.* Burness, 3 Best & Sm. 751, 753, *et seq.*, it is said that a representation is sometimes contained in the written instrument, but is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing), is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. It is further said to be a question of construction for the court whether a descriptive statement in a written instrument is a mere representation or a substantive part of the contract. See, also, 2 Duer on Ins. lect. 14, § 2; Clark *v.* Manufacturers' Ins. Co., 2 Woodb. & M. 472, 487; Carr *v.* Monteflore, 5 Best & Sm. 408, 430. These cases do not seem to agree with Mr. Arnould's view, 4th ed. 477, 589, that in marine policies the main distinction in form between a representation and a warranty is that the former is not introduced into the policy, and the latter always is, except when implied by law. See Hartford Prot. Ins. Co. *v.* Harmer, 2 Ohio St. 452, 464; Odiorne *v.* N. E. M. Ins. Co., 101 Mass. 551, 554.

In a life insurance case it is said that representations to insurers, before or at the time of making the contract, are a presentation of the elements upon which to estimate the risk to be assumed. They are the basis of the contract, and if wrongly presented in any respect material to the risk, the policy issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented. Campbell *v.* N. E. M. L. Ins. Co., 98 Mass. 381, 390. It would seem that misrepresentations which go to the essence of the contract make it void, and not merely voidable, just as a difference in kind between the thing contracted for and that delivered avoid a sale. Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342; Hardy *v.* Union Mut. Ins. Co., 4 Allen, 217. It is obvious that such representations may be made warranties by being incorporated into the policy as part of the contract. *Post*, 376, n. 1; 98 Mass. 391; Eddy Street Iron Foundry *v.* Hampden S. & M. F. Ins. Co., 1 Cliff. 300; Miller *v.* Mut. Benefit Life Ins. Co., 31 Iowa, 216, 227; Bobbitt *v.* Liverpool & L. & G. Ins. Co., 66 N. C. 70; Williams *v.* N. E. Mut. Ins. Co., 31 Me. 219; Garcelon *v.* Hampden Fire Ins. Co., 50 Me. 580; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136; Chaffee *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 376; Gahagan *v.* Union Ins. Co., 43 N. H. 176; Sayles *v.* North Western Ins. Co., 2 Curt. 610; Sillem *v.* Thornton, 3 El. & Bl. 868.

A very usual course for obtaining some kinds of insurance is to make an applica-

to the underwriter, or concealment of a fact material in relation to the risk, or material in the mind and judgment of the insurer, will

tion on a form provided by the insurers, and containing questions which the applicant answers in writing. A policy is afterwards issued, and refers to and incorporates the application as part of the contract, so that the answers become warranties. Of course there is no doubt that such a reference and incorporation is binding on the assured. Ripley *v.* Ætna Ins. Co., and other cases cited *supra*. In doubtful cases statements are construed as representations rather than warranties; Wilson *v.* Conway F. Ins. Co., 4 R. I. 141; Garcelon *v.* Hampden F. Ins. Co., *sup.*; and although when a warranty is made, the effect of a breach will not be changed by the fact that the insurer's agent knew it to be false, Chase *v.* Hamilton Ins. Co., 20 N. Y. 52, 56; Tebbetts *v.* Hamilton Mut. Ins. Co., 8 Allen, 569, the courts are strongly inclined to favor the assured, when, as is usually the case in some kinds of insurance, applications are filled out by local agents of the company. It is thought to be unjust and impolitic to treat such persons as agents for the applicant in making the application, or to allow a discrepancy between the written statements and the facts, as they existed and were communicated to the agent, to avoid the policy. Ins. Co. *v.* Wilkinson, 13 Wall. 222, 235; Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517, 526; May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Franklin *v.* Atlantic Ins. Co., 42 Mo. 456; Columbia Ins. Co. *v.* Cooper, 50 Penn. St. 331; Miller *v.* Mutual Benefit L. Ins. Co., 31 Iowa, 216; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53. See Emery *v.* Piscataqua Ins. Co., 52 Me. 322; but compare Richardson *v.* Maine Ins. Co., 46 Me. 394; Kibbe *v.* Hamilton Mut. Ins. Co., 11 Gray, 163.

After a careful reconsideration of the point mentioned in note (*a*), *post*, 284, it has been held that a representation can only relate to present or past facts. A representation, so called, that an event will come to pass in the future, must be shown to be part of the contract to be material. Kimball *v.* Ætna Ins. Co., 9 Allen, 540; Bilbrough *v.* Metropolis Ins. Co., 2 Comst. 210, 221; New York *v.* Brooklyn Fire Ins. Co., 4 Keyes, 465. It does not seem inconsistent with this view to hold that when an intention is expressly stated in a policy, to do or omit something material to the risk, it is to be construed as a contract to do or omit it. Bilbrough *v.* Metropolis Ins. Co., 5 Duer, 587, 598 (a case favoring the views of Mr. Justice Duer). But see Herrick *v.* Union Mut. Fire Ins. Co., 48 Me. 558. But an assertion of the existence of a present intention is primarily a representation as to a present state of facts, and when it cannot be construed as containing a contract by implication, or is not binding as a contract, for instance, when it is made orally before the issuing of the policy, the question arises, how far such a representation can be material, as it would seem that the insured might lawfully change his mind. It has been laid down that a mere expression of intention, although acted upon, is no ground for equitable interference. Piggott *v.* Stratton, 1 De G., F. & J. 33, 52; Jordan *v.* Money, 5 H. L. C. 185; Langdon *v.* Doud, 10 Allen, 432. But the first case shows that the courts may go far in getting rid of the principle by way either of contract (ib 49) or estoppel. See 284, 374. As to words of description, see 376, n. 1, (*d*).

It is material to add that a warranty may be either affirmative only, that a certain thing is now true, or promissory that something shall be true in the future It does not follow, therefore, that when descriptive words are construed as a war

avoid the policy. It will avoid it though the loss arose from a cause unconnected with the misrepresentation, or even though the misrepresentation or concealment happened through mistake, neglect, or accident, without any fraudulent intention. A positive representation on a material point is essentially a part of the contract, and essentially a warranty, though it be not inserted in the policy. It differs from a warranty in being more liberally construed, and as requiring only to be substantially true; whereas a warranty must be fulfilled to the letter, and precludes all inquiry as to its materiality. (*d*) Lord Mansfield laid
*283 down *with great strength and clearness the general principles which govern this branch of the subject, and they have been implicitly adopted in all succeeding cases. The special facts upon which the contingent chance is to be computed usually lie in the knowledge of the insured only, and the underwriter trusts to his representation, and proceeds upon the confidence that he does not withhold any facts material to the estimate of the risk. The suppression of any such facts, whether by design, or mistake, or negligence, equally renders the policy void, for the risk run becomes different from the one assumed in the policy. The law requires *uberrima fides* in the formation of the contract, and yet either party may be innocently silent, as to grounds open to both, for the exercise of their judgment. The underwriter need not be told general topics of speculation and intelligence. He is bound to know every cause which may occasion natural or political perils. Men argue differently from natural phenomena and political appearances, and when the means of information and judging are open to both parties, each acts from his own skill and judgment. The question in those cases always is, whether there was, under all the circumstances, a fair representation or a concealment; if the misrepresentation or concealment was

(*d*) Carter *v.* Boehm, 3 Burr. 1905; Pawson *v.* Watson, Cowp. 785; Fitzherbert *v.* Mather, 1 T. R. 12; Ratcliffe *v.* Shoolbred, Park on Insurance, 249, 6th ed.; Macdowall *v.* Fraser, Doug. 260; Shirley *v.* Wilkinson, ib. 806, n.; Bridges *v.* Hunter, 1 Maule & S. 15; 1 Marshall on Insurance, 450; Carpenter *v.* American Ins. Company, 1 Story, 57; and see Duer's Lecture on Representations, 45–47, 72, 73, where the subject is discussed with great clearness and force. [Snow *v.* Columbian Ins. Co., 48 N. Y. 624.]

ranty, they are on that account to be taken as implying a promise. O'Niel *v.* Buffalo Fire Ins. Co., 3 Comst. 122; and cases cited, 876, n. 1. See Lycoming Ins. Co. *v.* Mitchell, 48 Penn. St. 367. As to concealment, see 286, n. 1.

designed, whether it was fraudulent; and if not designed, whether it varied materially the object of the policy, and changed the risk understood to be run. If the misrepresentation was by fraudulent design, it avoids the policy, without staying to inquire into its materiality; and if it was caused by mistake or oversight, it does not affect the policy, unless it was material, and not true in substance; and in that case it will vitiate the policy without assuming the ground of fraud, for it is not the contract the party undertook to make. If the representation of the property insured greatly overrate the value, it will avoid the policy, whether the misrepresentation be through ignorance or design. (*a*)

*If the information be stated as mere opinion, expecta- *284
tion, or belief, it does not affect the policy, provided it was given in good faith; for the underwriter, in such a case, takes the risk upon himself. Any such declaration of expectation or belief, if made with a fraudulent intent, avoids the policy. (*a*) [1]

(*a*) Catron *v.* Tenn. Ins. Co., 6 Humph. 176. Marshall, in his Law of Insurance, 479, questions very strongly the propriety of the decision in Carter *v.* Boehm, from which I have chiefly drawn the above principles. But whatever may be the opinion as to the application in that case of the doctrines stated, there is no question as to their solidity, independent of the case, and they were confirmed by Lord Ellenborough, in 4 East, 596, and recently by the Supreme Court of the United States, in M'Lanahan *v.* The Universal Ins. Company, 1 Peters, 170. See, also, Flinn *v.* Tobin, 1 Moody & M. 367, s. p. A positive representation may be proved by evidence, provided the terms of the representation do not plainly contradict, or are not directly repugnant to the terms of the policy, and it becomes, in many cases, when proved, like a usage, a part of the contract. It is also understood, that a representation may supersede an implied warranty, or a usage, if it be a representation of facts inconsistent with the usage, or the truth or obligation of the warranty. Duer's Lecture on Representations, 54, 61, 63, 64, 173, 174.

(*a*) Lord Mansfield, Cowp. 788; Barber *v.* Fletcher, Doug. 305; Hubbard *v.* Glover, 3 Camp. 312; Bowden *v.* Vaughan, 10 East, 415; Rice *v.* New England Marine Ins. Company, 4 Pick. 439; Allegre *v.* Maryland Ins. Company, 2 Gill & J. 136; Duer on Representations, 96, 97, and note 27, p. 214. In the cases of Rice *v.* The New England M. Ins. Co., 4 Pick. 439; Bryant *v.* Ocean Ins. Co., 22 Pick. 200; Whitney *v.* Haven, 13 Mass. 172, and Alston *v.* Mech. M. Ins. Co., 4 Hill (N. Y.), 330, it is declared, that a representation to the insurer imports an affirmation of some *past* or *existing* fact material to the risk, and not a statement of matters resting merely in *expectation* or *intention*. If the representation be in the nature of a *promise for future conduct*, it must be inserted in the policy as a part of the contract, for otherwise a promissory expectation is of no avail. But Mr. Duer, in his 7th Lecture on Representation, has, with

[1] Compare Anderson *v.* Pacific F. & M. Ins. Co., L. R. 7 C. P. 65, with Ionides *v.* Pacific F. & M. Ins. Co., L. R. 6 Q. B 674. As to note (*a*), see 282, n. 1.

A representation to the first underwriter, in favor of the risk, extends to all subsequent underwriters, and on the ground that they subscribed upon their confidence in his judgment and knowledge of the risk, and are, therefore, entitled to avail themselves of all the conditions upon which he subscribed. (*b*) This rule has not been favorably received by later judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. (*c*) Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same risks. (*d*)

Whether the knowledge or information was material for the insurer to know, and necessary to be communicated to him when the contract is made, is a question of fact for a jury, and they are to judge of the materiality of the information under a * 285 consideration of all the circumstances * that belong to the case. (*e*)[2] This point was fully considered, and with a

much research and ability, examined this doctrine on the ground of principle and authority, and questions its accuracy. He insists that a positive *promissory representation* that the specified event will happen, or an act be performed, is clearly deducible from the cases, and sustained by an irresistible weight of authority. Duer's 7th Lecture on the Law of Representations in Marine Insurance, 52, and note 9, pp. 139–156, New York, 1844.

(*b*) Barber *v.* Fletcher, *supra;* Stackpole *v.* Simon, Park on Insurance, 582, 6th ed.; Robertson *v.* Majoribanks, 2 Stark. 573; Duer's Lecture on Representations, 65–69.

(*c*) Brine *v.* Featherstone, 4 Taunt. 869; Lord Ellenborough, Forrester *v.* Pigou, 1 Maule & S. 9; Bell *v.* Carstairs, 2 Camp. 548.

(*d*) Elting *v.* Scott, 2 Johns. 157.

(*e*) It is an unsettled question in the English and American law of insurance, whether the opinions of witnesses of experience and skill, such as insurers, insurance brokers, and merchants, are admissible in evidence to guide the decision of the jury as to the materiality of a representation. It appears to me that the weight of authority, and the manifest reason of the thing, are in favor of the admission of such evidence. The authorities are collected by Mr. Duer, in note 19 to his Lecture on Representations, with his approbation of the admission of such evidence, on the sound maxim that *cuique in sua arte credendum est.* See Holroyd, J., in Berthon *v.* Loughman, 2 Stark. 259; Littledale *v.* Dixon, 4 Bos. & P. 151; Haywood *v.* Rodgers, 4 East, 590; Lord Tenterden, in Rickards *v.* Murdock, 10 B. & C. 527; Tindal, C. J., in Chapman *v.* Walton, 10 Bing. 57; Story, J., in M'Lanahan *v.* Universal Ins. Co., 1 Peters, 188, for the admission; and Lord Mansfield, in Carter *v.* Boehm, 8 Burr. 1905; Gibbs, C. J.,

[2] Gates *v.* Madison Co. M. Ins. Co., 2 Comst. 43. The opinion expressed in the note (*e*) is favored by Hartman *v.* Keystone I. Co., 21 Penn. St. 466; Hobby *v.* Dana, 17 Barb. 111. But compare Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 458.

review of the English and American authorities, in the case of the *New York Firemen Insurance Company* v. *Walden;* (*a*) and that doctrine has since received the unqualified sanction of the Supreme Court of the United States. (*b*) The books abound with cases relative to the much litigated question, as to what are and what are not necessary disclosures, and it is not consistent with my purpose to do more than bring into notice the leading principles which govern this very practical branch of the law of insurance.

It is the duty of the insured to communicate every species of intelligence which he possesses, which may affect the mind of the insurer, either as to the point whether he will insure at all, or as to the rate of premium. The decisions, in some of the old cases, contain strict doctrines on the subject of concealment which have never been shaken; (*c*) and the modern cases are equally sound and exact in their requisitions. (*d*) But the insured is not bound to communicate loose rumors, nor any facts which the underwriters may be presumed to know equally with himself. General news stated in the newspapers and open to all, need not be stated, unless there be something known to the assured, and applying peculiarly to his case, or unless he has particular information not in possession of the public, and then the withholding of it is material. (*e*) The underwriters are presumed to have the ordinary marine intelligence appearing in the gazettes, or when they are fairly put upon inquiry. (*f*)

in Durrell *v.* Bederley, Holt, N. P. 283; Lord Denman, in Campbell *v.* Rickards, 5 B. & Ad. 840; Sutherland, J., in Jefferson Ins. Co. *v.* Cotheal, 7 Wendell, 72, against the admission of such proof.

(*a*) 12 Johns. 513.

(*b*) M'Lanahan *v.* Universal Ins. Company, 1 Peters, 170.

(*c*) De Costa *v.* Scandret, 2 P. Wms. 170; Seaman *v.* Fonereau, Strange, 1183.

(*d*) Lynch *v.* Hamilton, 3 Taunt. 37; Beckwaite *v.* Nalgrove, cited ib. 41; Rickards *v.* Murdock, 1 Lloyd & Wels. 132; 10 B. & C. 527, s. c. In this last case, orders to an agent to wait thirty days after the receipt of the order, before he insures, to give every chance for the arrival of the vessel, were deemed material, and the fact of the delay ought to have been disclosed to the insurer. In the subsequent case of Richards *v.* Campbell, in 1832, the agent was held responsible for his great ignorance in not knowing the necessity of the disclosure, and in not making it.

(*e*) Lynch *v.* Dunsford, 14 East, 494; Moses *v.* Delaware Ins. Company, Wharton's Dig. 310, pl. 18; [1 Wash. 385.]

(*f*) Green *v.* Merchants' Ins. Company, 10 Pick. 402; Alsop *v.* Commercial Ins. Company, reported in 2 Phillips on Insurance, 85, 1st ed.

The insured is not bound to disclose all bygone calamities or produce his portfolio of letters; and he need only disclose the material facts known to him at the date of the last intelligence. (*g*) The underwriter is bound to know the nature
* 286 * and general course of the trade and of the voyage, and he assumes that kind of knowledge at his peril. (*a*) [1] The general rule is, that all facts material to the risk, and known to the one party and not to the other, must be disclosed when the policy is to be effected; and they must be fully and fairly dis-

(*g*) Freeland *v.* Glover, 6 Esp. 14; 7 East, 457, s. c.; Kemble *v.* Bowne, 1 Caines, 75; Vallance *v.* Dewar, 1 Camp. 503.

(*a*) Planché *v.* Fletcher, Doug. 251; Galbraith *v.* Gracie, 1 Condy's Marshall, 388, a, note; De Longuemere *v.* N. Y. Fire Ins. Company, 10 Johns. 120; Kingston *v.* Knibbs, 1 Camp. 508, note; Vallance *v.* Dewar, ib. 503; Stewart *v.* Bell, 5 B. & Ald. 288; Seton *v.* Low, 1 Johns. Cas. 1.

[1] *Concealment.* — See, for the limit of this doctrine, Harrower *v.* Hutchinson, L. R. 5 Q. B. 584.

As to the general rule next stated, see Russell *v.* Thornton, 4 Hurlst. & N. 788; 6 H. & N. 140; Nicholson *v.* Power, 20 L. T. N. S. 580.

There is no excuse for not disclosing facts which the party proposing the insurance is bound to communicate, except that the insurer has, at the time of entering upon the contract, knowledge of the particular fact. The insurer cannot take advantage of his own wilful blindness or negligence, but it is not enough that he may be induced, by a course of reasoning and an effort of memory, to suspect that the vessel is a dangerous risk. Bates *v.* Hewitt, L. R. 2 Q. B. 595. Compare Gaudy *v.* Adelaide Ins. Co., L. R. 6 Q. B. 746.

In England, before a policy is executed, it is usual to prepare a slip fixing the terms of the insurance and the premium. This slip, under the English statutes, is not enforceable at law or in equity, but, according to the understanding and practice of those engaged in marine insurance, is treated as the complete and final contract between the parties, and it has been held on that ground that a failure to disclose facts coming to the knowledge of the insured after the slip was signed, but before the execution of a substituted policy, did not invalidate the latter. Ionides *v.* Pacific Ins. Co., L. R. 6 Q. B. 674, 685; L. R. 7 Q. B. 517.

In Proudfoot *v.* Montefiore, L. R. 2 Q. B. 511, the Court of Queen's Bench disapproved of Mr. Justice Story's reasoning in Ruggles *v.* Gen. Int. Ins. Co., *infra*, n. (*f*), and pronounced the ground on which his decision was affirmed untenable. Gladstone *v.* King, ib., was thought well decided, and the court held that when a loss of cargo came to the knowledge of the agent employed to purchase and ship it, it was his duty to communicate the fact to principal by telegraph; and that if he omitted to do so in order that his principal might not be prevented from insuring before hearing the news, although he wrote by the earliest mail, an insurance effected by the principal in ignorance of the loss was void. But the more limited doctrine of the text is followed in Clement *v.* Phenix Ins. Co., 6 Blatchf. 481. See, also, Folsom *v.* Mercantile M. Ins. Co., 8 Blatchf. 170.

closed. (*b*) But if the subject on which disclosures would otherwise be requisite, be covered by a warranty, either express or implied, in that case it need not become a matter of representation. (*c*) It is likewise sufficient, in the case of a representation, that it be equitably and substantially complied with; (*d*) and in furtherance of that perfect good faith which is so strongly called for in the formation of this contract, it is adjudged, that if the party, after having given instructions for effecting a policy, receives intelligence material to the risk, he must forthwith, or with due and reasonable diligence, communicate it, or countermand his instructions. (*e*) If a person be an agent for *procuring insurance*, the assured is of course answerable for his information, and assumes the responsibility of its truth. So, if the master of the vessel or consignor be the agent to *communicate to the assured the requisite information*, and the assured adopts such information, and makes it the basis of his contract of insurance, he becomes responsible for its truth, and any concealment or misrepresentation in respect to such information by the agent avoids the policy. (*f*) When the insured acts with good faith, the validity of the policy will not be affected by the fraudulent misconduct of the master, in withholding from his owner information of the loss, until after the policy was underwritten.

*The French Ordinance of the Marine had no positive *287 provision on this subject, and yet the same principles which prevailed in the English law were recognized as sound

(*b*) Ely *v.* Hallett, 2 Caines, 57; Kohne *v.* Ins. Company of N. America, 6 Binney, 219; Hoyt *v.* Gilman, 8 Mass. 336.

(*c*) Shoolbred *v.* Nutt, Park on Ins. 300, 6th ed.; Haywood *v.* Rodgers, 4 East, 590; Walden *v.* N. Y. Firemen Ins. Company, 12 Johns. 128; De Wolf *v.* N. Y. Firemen Ins. Company, 20 id. 214; s. c. 2 Cowen, 56.

(*d*) Pawson *v.* Watson, Cowp. 785; De Hahn *v.* Hartley, 1 T. R. 343; Suckley *v.* Delafield, 2 Caines, 222.

(*e*) Emerigon, ii. 148; Valin's Comm. ii. 95; Grieve *v.* Young, Millar on Insurance, 65, [pt. 1, c. 2, § 2;] Watson *v.* Delafield, 2 Caines, 224; 2 Johns. 526, s. c.; M'Lanahan *v.* Universal Ins. Company, 1 Peters, 170. But the assured, it is held, is not bound to use all accessible means of acquiring information material to the risk, up to the last instant of time, as the omission to call at the post office on the day of the insurance, if he acts with entire good faith. Neptune Ins. Company *v.* Robinson, 11 Gill & J. 256.

(*f*) Fitzherbert *v.* Mather, 1 T. R. 12; General Interest Ins. Company *v.* Ruggles, 12 Wheaton, 408; s. c. 4 Mason, 74. The decision in Gladstone *v.* King, 1 Maule & S. 35, was, that if the master conceals a loss or other material fact from the owner, in the letter to him, and the owner, upon the receipt of the letter, and in ignorance of

principles applicable to the government of the contract. (*a*) In the new code, (*b*) it is provided, that any concealment or misrepresentation on the part of the insured, which would diminish the opinion of the risk, or change the subject matter of it, annuls the insurance. It is held to be void even when the concealment or misrepresentation would have had no influence on the loss. Nor is it deemed necessary, under the French law, to prove fraud in fact; and the concealment or misrepresentation is equally fatal, whether it proceeds from design, forgetfulness, or negligence. (*c*) The severe dispositions of the code are much commended by the French lawyers, as an improvement upon their ancient jurisprudence, and a great protection to the insurer against impositions of which he was often the victim. (*d*)

2. (*Of warranty.*) — There is, in every policy, an implied warranty that the ship is seaworthy when the policy attaches. This means, as we have already seen, that the vessel is competent to resist the ordinary attacks of wind and weather, and is competently equipped and manned for the voyage, with a sufficient crew, and with sufficient means to sustain them, and with a captain of general good character and nautical skill. (*e*) It is also

the fact, effects an insurance, the policy is void so far as respects the previous loss; for that the captain was bound, as agent of the owner, to communicate to him the loss, and what was known to the agent was impliedly known to the principal.

(*a*) Emerigon, i. 69. The ordinances of Hamburg, and of the marine, and the Code of Commerce, required generally that every condition or covenant stipulated between the parties should be inserted in the policy. This would seem to include all positive representations, and yet they require only the substantial performance of them, unless a literal fulfilment be made a condition. Ord. de la Marine, 2 Valin, 31, Code de Commerce, art. 332; Benecke, cited by Mr. Duer on Representations, 133. The English judges have regretted that all material representations were not inserted in the policies, to avoid dispute and litigation. Lord Tenterden and Sir Vicary Gibbs, 9 B. & C. 693; 4 Taunt. 639.

(*b*) Code de Commerce, art. 348.

(*c*) Pardessus, iii. 330; Boulay-Paty, iii. 510. The latter writer cites several decisions from the Journal de Jurisprudence Commerciale et Maritime de Marseilles, made within the ten preceding years, by which contracts of insurance were declared void on this very ground of misrepresentation and concealment; and they do great credit to the exemplary justice of the French tribunals. Ib. 514–527.

(*d*) Under this head of *representations*, the lecture of Mr. Duer, recently published, and to which I have frequently referred, contains an excellent analysis of the cases, and a logical deduction of the principles they sustain, and it increases our earnest desire that he may be encouraged to go on, and examine and illustrate the whole body of insurance law, in the same critical and masterly manner.

(*e*) Law *v.* Hollingworth, 7 T. R. 160; Wilkie *v.* Geddes, 3 Dow, 57; Silva *v.* Low 1 Johns. Cas. 184; Brown *v.* Girard, 4 Yeates, 115; Walden *v.* Firemen Ins. Com-

an implied condition, that the goods, tackle of the ship, &c., shall be properly stowed, (*f*) and that there should be a pilot on board of competent skill. (*g*) This warranty of seaworthiness relates to the commencement * of the risk, and the war- *288
ranty is not broken if she becomes unseaworthy afterwards. (*a*) [1] But it is the duty of the assured to keep the vessel

pany, 12 Johns. 128. [The Niagara *v.* Cordes, 21 How. 7. Compare Draper *v.* Comm. Ins. Co., 4 Duer, 234, 21 N. Y. 378, with The Dubuque, 2 Abbott U. S. 20, 25. As to Law *v.* Hollingworth, see 289, n. 1.] In the *nisi prius* case of Clifford *v.* Hunter, 8 Carr. & P. 16, Lord Tenterden ruled, that a ship was not seaworthy for a voyage from India to England, with no other person on board, except the master, capable, by his skill in navigation, of taking the command of the ship, in the case of the death or sickness of the master, and that the mate must have that nautical skill. This is a new doctrine, and it may be questioned as a general rule, applicable to all voyages. Lord Tenterden admitted it to be a question, not of law, but of fact, for a jury. The warranty would seem to imply no more than that the assured must have a sound and well equipped vessel in reference to the voyage, and have on board a competent person as master, and a competent person as mate, and a competent crew as seamen. In the American coasting and West Indian trade, Lord Tenterden's rule would be oppressive, and is contradicted by usage, and is not the law in respect to any such trade. Treadwell *v.* Union Ins. Company, 6 Cowen, 270. In the case of Gillespie *v.* Forsyth, tried before Mr. Justice Bowen and a special jury, in the K. B., at Quebec, October, 1839, the doctrine of Lord Tenterden was discarded, in reference at least to voyages between the West Indies and Quebec, and it was shown to be contrary to usage. Law Reporter for January, 1840, [ii. 257.] But in Copeland *v.* N. E. Marine Ins. Company, 2 Met. 432, it was held, after great discussion, that a vessel, to be seaworthy, must not only have a competent master, but a mate, competent to act as master in case of necessity.

(*f*) Roccus, note 22; Brooks *v.* Oriental Ins. Company, 7 Pick. 259.

(*g*) *Vide supra*, 175.

(*a*) Peters *v.* Phœnix Ins. Company, 3 Serg. & R. 25; Holdsworth *v.* Wise, 1 Mann. & Ry. 673; American Ins. Company *v.* Ogden, 20 Wend. 287. The want of seaworthiness in a vessel when the voyage commences is a good defence, though she arrived in safety at the port of destination. Prescott *v.* U. Ins. Company, 1 Wharton, 399. Seaworthiness at the commencement of the voyage is a condition precedent; and if seaworthiness does not then exist, the policy is void, and the insurers are not responsible for subsequent loss, even if it arises from another cause; for the policy never attached. Starbuck *v.* N. E. Ins. Company, 19 Pick. 199. If a vessel be warranted neutral, it is sufficient that she be so when the risk commences. Eden *v.* Parkinson, Doug. 732; Tyson *v.* Gurney, 3 T. R. 477. If the warranty or representation be falsified by irresistible force or unavoidable accident, after the risk has attached, the validity of the contract remains unimpaired.

[1] *Warranty of Seaworthiness.* — (*a*) *Voyage Policies.* — The general rule of the English law is said to be that the warranty of seaworthiness in voyage policies is satisfied if the vessel is seaworthy at the commencement of the risk. There is no warranty that the vessel shall continue seaworthy. At the same time the warranty may sometimes be divided, so that if the voyage be such as to require a different state of equipment in different parts of it, it is enough if the vessel be at each

seaworthy during the voyage, if it be in his power to do so; and if, from the neglect or want of good faith of the owner or his agents,

stage of the navigation in which the loss happens properly manned and equipped for it. The case of a policy on ship at and from London on a whaling voyage to the North is often put, and the warranty is said to be for four gradations: fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; then fit for whaling. The policy attaches if the ship is fit for dock; but the warranty is broken if either of the other stages of fitness is not completed before the vessel enters upon the stage of the voyage which requires it. Dixon *v.* Sadler, 5 M. & W. 405, 414; 8 M. & W. 895; Biccard *v.* Shepherd, 14 Moore P. C. 471, 493; Thompson *v.* Hopper, 6 El. & Bl. 172, 181; Quebec M. Ins. Co. *v.* Commercial Bank of India, L. R. 3 P. C. 234, 241; Bouillon *v.* Lupton, 15 C. B. N. S. 113, 139.

The language of the text as to the duty of the assured to keep the vessel in a suitable condition for the service in which she is engaged during the voyage insured, is supported by that of some American cases; but it must be understood that this duty is not a technical warranty. Capen *v.* Washington Ins. Co., 12 Cush. 517, 540. Dabney *v.* New England M. Ins. Co., 14 Allen, 300, 305. But the doctrine of the English law and of many American decisions is that if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew. The insurers are liable unless the negligence or misconduct of the assured or his agents was a proximate cause of the loss in a pretty strict sense, as is explained *post*, 302, n. 1. See, also, 289, n. 1; Arnould, 4th ed. 599, 595, 668. Compare Thompson *v.* Hopper, El., Bl. & El. 1038, referred to *infra*. The warranty of seaworthiness in a voyage policy does not extend to the seaworthiness of lighters employed to land the cargo. Lane *v.* Nixon, L. R. 1 C. P. 412.

It is no answer to an action upon a voyage policy on goods to say that the *goods* were not seaworthy at the beginning of the voyage, or that they were in an unfit condition to be shipped, unless it is shown that the loss arose from that unfitness, in which case they are not lost by a peril insured against. Koebel *v.* Saunders, 17 C. B. N. S. 71.

(*b*) *Time Policies.* — The rule that a warranty of seaworthiness is implied in every policy, must be taken with some modification at least, with regard to time policies, in the existing state of the authorities. It has been decided by the House of Lords in England that there is no warranty of seaworthiness at the commencement of the risk, or at the date of underwriting, in a time policy framed in the usual manner, on a vessel then at sea. Gibson *v.* Small, 4 H. L. C. 353; Michael *v.* Tredwin, 17 C. B. 551. And the same decision has been reached by American courts. Capen *v.* Washington Mut. Ins. Co., 12 Cush. 517; Jones *v.* Ins. Co., 2 Wall. Jr. 278. Not long after the determination of Gibson *v.* Small, a case on a similar policy was argued in the Queen's Bench, where it appeared that the ship, instead of being at sea when the policy was underwritten, was lying, outward bound, in the port where the owner resided, although there was no allusion to the place of the ship in the policy. These facts were held not sufficient to distinguish the case from Gibson *v.* Small, and the general rule was laid down, and has been repeated in later cases as settled, that there is no implied warranty of seaworthiness in a time policy. Thompson *v.* Hopper, 6 El. & Bl. 172; El., Bl & El. 1038, 1049; Fawcus *v.* Sarsfield, 6 El. & Bl. 192. See, also, Biccard *v.* Shepherd,

the vessel becomes unseaworthy, by damage or loss in her hull or equipments during the voyage, the owner must repair the

14 Moore P. C. 471, 493; Barker *v.* Janson, L. R. 3 C. P. 303, 306; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 628.

In a subsequent stage of Thompson *v.* Hopper, it was held by some of the judges that the conduct of the insured in knowingly sending the vessel to sea in an unseaworthy condition, and not one of the perils insured against, must be the proximate cause of the loss, in order to exonerate the insurers. But this opinion was by no means unanimous. El., Bl. & El. 1038, reversing s. c. 6 El. & Bl. 937.

On the other hand, it has been held in America that there is an implied warranty of seaworthiness, similar to that implied in a voyage policy, in a time policy on a vessel which is in a foreign port where full repairs may be made, at the commencement of the risk. Hoxie *v.* Pacific M. Ins. Co., 7 Allen, 211; Rouse *v.* Ins. Co., 25 Law Rep. 523; 8 Wall. Jr. 367; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 46.

It does not appear in the American cases that the vessel was stated in the policy or known by the parties to be in port, in which case there might be stronger ground for inferring an intention to warrant seaworthiness than if the vessel was supposed to be at sea. They seem, therefore, to point to the conclusion that there must be implied a general intention to warrant seaworthiness, in time as well as voyage policies, unless the circumstances of the ship shall turn out to have been such that the warranty is inapplicable or requires modification. Bigelow, C. J., even intimates that there is a warranty in a time policy on a vessel at sea that she was seaworthy when last in a port where she could have been made so before the commencement of the risk; and the language of the Connecticut case is very strong. This view, that the ground for denying the warranty at the beginning of the risk is its inapplicability if the vessel is at sea, is confirmed by another Massachusetts decision that there is no such warranty in a mixed policy on a vessel at sea from a certain date, *during her voyage*, until her return, if she should return before a certain other date; Macy *v.* Mut. Mar. Ins. Co., 12 Gray, 497; see 4 Am. Law Rev. 217; and by the statement that the warranty is implied because it is a condition which the assured can and ought to perform, or else has a remedy over against another for not performing, in decisions denying the warranty where the assured has not such power. Lane *v.* Nixon, L. R. 1 C. P. 412, 421. Mr. Justice Erle objects, in his dissenting opinion in Thompson *v.* Hopper, 6 El. & Bl. 172, 185, that the broad ground cannot be taken that the contract is to be construed like any other written contract, for that would exclude the implication of a duty on the part of the insured to disclose all material facts. The majority of the court seem to put their opinion mainly on the desirableness of a short and clear rule.

It is supposed that the principles which are applied in America and England respectively in determining the existence or extent of a duty to repair at intermediate ports during a voyage insured, and which have been stated above, are also applicable to time policies on the question whether any and what duty exists to repair at intermediate ports or at the commencement of each separate voyage during the term insured. Dixon *v.* Sadler, 5 M. & W. 405, 415 (which is said to remain a leading case on account of the discussion contained in it, although it assumed that there was a warranty of seaworthiness in a time policy; Arnould, 4th ed. 595, n. 1); Jenkins *v.* Heycock, 8 Moore P. C. 351, 361; Capen *v.* Washington Ins. Co., 12 Cush. 517, 526. Com-

damage or supply the loss, at the port of refuge, refreshment, or trade. The underwriter will be discharged from liability for any loss, the consequence of such want of faith or diligence. Unseaworthiness, arising after the commencement of the voyage, and produced by a peril insured against, does not, of itself, discharge the insurer. It imposes upon the assured the duty of using reasonable diligence to repair it, and a negligence in that respect may discharge the insurer from any loss arising from the want of such due diligence. (*b*) If a vessel be insured in the latter part of a long sea voyage, the standard of seaworthiness is more liberal and more relaxed, and it will be sufficient if the vessel be competent to be safely navigated home. (*c*) There are numerous cases in England and in this country on the question of seaworthiness, and they have generally been questions depending upon matters of fact, and lead to inquiries too minute for general elementary instruction. (*d*) A breach of the implied warranty of seaworthiness, in the course of the voyage, has no retrospective operation, and does not destroy a just claim to damages for losses occurring prior to the breach of this implied condition. (*e*) The standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of ship-building,

(*b*) Paddock *v.* Franklin Ins. Company, 11 Pick. 227; Hollingworth *v.* Brodrick, 7 Ad. & El. 40; American Ins. Company *v.* Ogden, 20 Wend. 287, 294; Copeland *v.* N. E. Marine Ins. Co., 2 Met. 432.

(*c*) Hucks *v.* Thornton, Holt, N. P. 80; Paddock *v.* Franklin Ins. Company, 11 Pick. 227.

(*d*) The cases are well collected in Phillips on Insurance, i. 308–329, 2d ed.

(*e*) The same principle applies as to misrepresentations exempt from fraud. Duer on Representations, 83; Annen *v.* Woodman, 3 Taunt. 299; Sewall, J., in Taylor *v.* Lowell, 8 Mass. 347; Paddock *v.* Franklin Ins. Company, 11 Pick. 227.

pare Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. 33, 65.

(*c*) *What is Seaworthy.* — The question whether a vessel is seaworthy is almost always to be determined by the jury on the evidence. Walsh *v.* Washington M. Ins. Co., 32 N. Y. 427; Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. 33, 54; Myers *v.* Girard Ins. Co., 26 Penn. St. 192; Field *v.* Ins. Co. of N. A., 3 Md. 244. There is no fixed standard of fitness. Knill *v.* Hooper, 2 H. & N. 277, 283. But a ship before setting out on a voyage is seaworthy if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. Burges *v.* Wickham, 3 Best & Sm. 669, 692; Clapham *v.* Langton, 5 Best & Sm. 729; Hoxie *v.* Pacific M. Ins. Co., 7 Allen, 211, 225. This standard is made use of in other insurance questions, as will be seen hereafter.

a more enlarged experience of maritime risks, and an increased skill in navigation.

In many ports certain equipments would now be deemed essential, which at an earlier period were not customary on the same voyages. Seaworthiness is to be measured by the standard in the ports of the country to which the vessel belongs, rather than that in the port or country where the insurance was made. (*f*)

Every warranty is part of the contract, and is either express or implied. If it be an express warranty, it must appear upon the face of the policy. Any statement or averment of a fact, or any undertaking or description on the part of the insured on the face of the policy, which relates, as a matter of fact, to the risk, amounts to a warranty. It differs from a representation in this respect, that it is in the nature of a condition precedent, and requires a strict and literal performance. Whether the thing warranted be material or not, and whether the loss happened by reason of a breach of the warranty, or did not, is immaterial. A breach of it avoids the contract *ab initio*. (*g*) Every condition precedent requires a strict performance to entitle a party to his right of action. But seaworthiness *in port *289 may be one thing, and seaworthiness for a whole voyage quite another; and a ship may be seaworthy in harbor when under repair though she would not be so in that condition at sea. (*a*) It relates to the purposes in contemplation, whether in port or for the voyage, and seaworthiness is of course subject to be modified by circumstances. A vessel may be seaworthy while lying in port for the purposes to which she is to be there applied, when she would not be for the voyage, and she may be seaworthy for one voyage and not for another. It is sufficient if she be

(*f*) Tidmarsh *v.* Washington Fire and Marine Ins. Company, 4 Mason, 439.

(*g*) De Hahn *v.* Hartley, 1 T. R. 343; Kenyon *v.* Berthon, Doug. 12, note 4; Goix *v.* Low, 1 Johns. Cases, 341; Barker *v.* Phœnix Ins. Co., 8 Johns. 307; Goicoechea *v.* Louisiana State Ins. Company, 6 Martin, N. S. 51; Wood *v.* Hartford F. I. Company, 13 Conn. 533; [Behn *v.* Burness, 3 Best & Sm. 751; Clark *v.* Manufacturers' Ins. Co., 2 Woodb. & M. 472, 487; *ante*, 282, n. 1.] So, in the French law, a false declaration, as that a vessel was armed, or would sail with convoy, though made by mistake, and without fraud, avoids the policy. Pothier, Traité d'Assurance, n. 196.

(*a*) Annen *v.* Woodman, 3 Taunt. 299; Bond *v.* Nutt, Cowp. 601; Pawson *v.* Watson, ib. 785; De Hahn *v.* Hartley, 1 T. R 343; Worsley *v.* Wood, 6 id. 710; Forbes *v.* Wilson, 1 Park on Insurance, 344; Fowler *v.* Ætna Fire Ins. Company, 6 Cowen, 673.

seaworthy for the voyage when she sails. (*b*) The general rule is, that the vessel must be seaworthy at the commencement of the risk, whatever that risk may be, in order to make the policy attach and charge the insurer. (*c*) It was held, in the case of *Weir* v. *Aberdeen*, (*d*) that though a ship be unseaworthy at the commencement of the risk, yet, if the defect be cured before a loss, a subsequent loss is recoverable under the policy. The argument of Lord Tenterden in favor of this doctrine is very weighty, but a doubt seems to have been thrown over its solidity by the Supreme Court of the United States. (*e*)

There has been much discussion respecting the doctrine of seaworthiness, in its application to the successive stages of the voyage subsequent to its commencement. The owner is bound to keep the vessel in a competent state of repair and equipment during the voyage, as far as it may be in his power. If this be not the case, and a loss afterwards happens, which could not by any means be either increased or affected by a prior breach of the implied warranty of seaworthiness when the policy attached, as, for instance, if the master should omit to take a pilot at an intermediate port, when he ought and might have done it, and the vessel be two years afterwards lost by capture, or if he sailed without sufficient anchors, and the vessel be afterwards struck with lightning, would the insurer be discharged? The better opinion would seem to be that he would not be discharged. (*f*) [1]

(*b*) Taylor *v.* Lowell, 3 Mass. 331; Merchants' Ins. Company *v.* Clapp, 11 Pick. 56.

(*c*) Paddock *v.* Franklin Ins. Company, 11 Pick. 227.

(*d*) 2 B. & Ald. 320.

(*e*) M'Lanahan *v.* The Universal Insurance Company, 1 Peters, 170; [and by Quebec M. Ins. Co. *v.* Commercial Bank of India, L. R. 3 P. C. 234.]

(*f*) Shaw, C. J., Paddock *v.* Franklin Ins. Company, 11 Pick. 227; Weir *v.* Aberdeen, 2 B. & Ald. 320; M'Millan *v.* Union Ins. Company of Charleston, S. C. 1838; American Ins. Company *v.* Ogden, 15 Wend. 532; Copeland *v.* N. E. Marine Ins. Co., 2 Met. 432.

[1] *Pilot.* — It has already been explained that the duty to keep the vessel in a suitable condition for the service in which she is engaged is not treated as a technical warranty, even by those courts which assert the existence of such a duty; *ante*, 288, n. 1; and the duty to take a pilot at an intermediate port is a duty of that kind. Law *v.* Hollingworth, cited *ante*, 287, n. (*e*), which seemed to lay down a stricter rule, is explained and qualified in Hollingworth *v.* Brodrick, 7 Ad. & El. 40, 44, and in Sadler *v.* Dixon, 8 M. & W. 895, 900. The opinion is expressed in Arnould on M. Ins. 4th ed. 598, that, except when required by the positive provisions of an act of Parliament, the captain's negligence in not having a pilot on

A clause is frequently inserted in policies, that if a vessel upon a regular survey be declared unseaworthy, by reason of her being unsound or rotten, the insurers shall be discharged. This clause is intended to save the underwriters from the vexatious and difficult investigation of the latent defects of a ship to which the disaster was to be attributed. It is sufficient if the survey be made within a reasonable time after the termination of the voyage; and if the survey states that the vessel was condemned solely on account of rottenness existing at the time of the survey, it is a conclusive bar to the assured. (*g*)

The most usual express warranties are, that the ship was safe at such a time, or would sail by such a day, or would sail with convoy, or a warranty against illicit and contraband trade, or that the property insured is neutral. During the long maritime war that grew out of the French revolution, and while we continued in our neutral position, the warranty of neutrality attracted great attention, and became a very fruitful topic of discussion in the courts of justice. It was understood and settled, that it was not sufficient, under this warranty, that the ship and cargo be in fact neutral. They must be neutral to the purpose of being protected, and, therefore, the ship must have the requisite *insignia* of neutrality by being duly documented as a neutral vessel, and by being unaccompanied with documents that go to falsify the warranty. She must also have been conducted, throughout the voyage, according to the duties which particular treaties and the general rules of neutrality enjoin, so as to be entitled to protection, by the law of nations, in the courts of the belligerent powers. To construe the engagement to be less * than *290 that, would be to render it, in a great degree, idle and nugatory. On such a warranty the insurer lays out of view the risk of loss, by reason of the want of due proof of neutrality, and of a strictly neutral conduct. The insured having in his own hands the means to maintain his averment, he is bound to

(*g*) Steinmetz *v.* United States Ins. Company, 2 Serg. & R. 296; Brandegee *v.* National Ins. Company, 20 Johns. 328; Griswold *v.* National Ins. Company, 3 Cowen, 96; Rogers *v.* Niagara Ins. Company, 2 Hall (N. Y.), 86.

board at any intermediate stage of the voyage, or in entering the port of destination, whereby a loss accrues, will not discharge the underwriters from their liability, if such loss be proximately caused by the perils insured against, and the master and crew were originally competent. *Post*, 802, n. 1.

do it whenever and wherever the neutrality of the property, or its privileges as such, are called in question. (*a*) The warranty imposes upon the insured the exact observance of all those duties which belong to a neutral vessel; and by the violation, or by the omission of any clear and certain neutral duty, the vessel forfeits her neutrality, and the warranty is broken. The neutral is bound to submit to visitation and search, and resistance thereto would be a breach of the warranty. (*b*)

Many interesting questions arise in the course of a maritime war upon the warranty of neutrality, but which attract no attention while they remain dormant in a season of general peace. One of those questions held a prominent place some years ago in the jurisprudence of this country, and led to very vexed discussions and contradictory results. The controversy to which I allude was concerning the legal effect, in a suit upon the policy, of a sentence of condemnation in the admiralty courts of the belligerent powers, of property warranted neutral, but captured, libelled, and condemned as enemy's property. (*c*) The general result of those discussions has been already stated, and they will probably not be revived until some maritime war shall hereafter arise, to stimulate cupidity, and disturb the commerce of the ocean.

* 291 * (6) *Of the Perils within the Policy.* — The general rule is, that the insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage: *præstare tenetur quodcunque damnum obveniens in mari.* It was an ancient opinion, stated by Santerna, that the insurer was not responsible for very unusual and extraordinary perils not specially stated. But such a principle is now utterly exploded, and the policy sweeps within its enclosure every peril incident to the voyage, however strange or unexpected, unless there be a special

(*a*) Blagge *v.* New York Ins. Company, 1 Caines, 549; Baring *v.* Royal Exchange Ass. Company, 5 East, 99; Carrere *v.* Union Ins. Company, Condy's Marshall, 406, *a*, note; Galbraith *v.* Gracie, ib.; Phœnix Ins. Co. *v.* Pratt, 2 Binney, 808; Wilcocks *v.* Union Ins. Company, ib. 574; Coolidge *v.* N. Y. Firemen Ins. Company, 14 Johns. 808. The register is the only requisite document in time of peace in evidence of the national character of the vessel. Catlett *v.* Pacific Ins. Company, 1 Paine, 594. [For other warranties see Insurance Co. *v.* Thwing, 13 Wall. 673; Snow *v.* Columbian Ins. Co., 48 N. Y. 624.]

(*b*) See i 153.

(*c*) See ii. 120, 121.

exception. (*a*) The perils enumerated in the common policy are sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of the sea, and all other causes incident to maritime adventure. The enumerated list may be enlarged or abridged at the pleasure of the parties. In England and in this country, a specification of the risks is an essential part of the contract.[1] In most of the countries of Europe, where there is no special agreement of the parties, the perils that the policy is to cover are defined by law. (*b*)

A person may protect himself by insurance against all losses, except such as may be repugnant to public policy or positive prohibition, or occasioned by his own misconduct or fraud. Against the latter it is not to be presumed any insurance could be effected, nor would the courts tolerate such a vicious principle; for this would, as Pothier says, be a contract which would invite *ad delinquendum*. (*c*)

1. (*Of the acts of the government of parties.*) — An insurance against loss by reason of the acts of one's own government, as an arrest or embargo, is valid. There is no distinction on this point between a foreign and domestic embargo; and if the embargo intervenes after the commencement of the risk, it suspends, but does not dissolve, the contract *of insurance, and the *292 insured may abandon and claim a total loss. (*a*) The same principle is incorporated into the new French commercial code, and it pervades universally the law of insurance. (*b*) A distinction has, however, been taken between that case and a claim arising between subjects of different states, and it has been held, that a

(*a*) Santerna, de Ass. pt. 3, n. 72; Ord. de la Mar. tit. Ass. art. 20; Code, art. 350; Boulay-Paty, iv. 9.

(*b*) Duer on Insurance, lect. 1, § 6.

(*c*) Goix *v.* Knox, 1 Johns. Cas. 337; Simeon *v.* Bazett, 2 Maule & S. 94; Pothier, Traité d'Ass. n. 65.

(*a*) Page *v.* Thompson, cited in Park on Insurance, 109, n. 6th ed.; Odlin *v.* Pennsylvania Ins. Company, 2 Wash. 312; Delano *v.* Bedford Ins. Company, 10 Mass. 347; M'Bride *v.* Marine Ins. Company, 5 Johns. 299.

(*b*) Code de Commerce, art. 69; 1 Emerigon, 541; Pothier, h. t., n. 59.

[1] But the expression of the risks may be by general terms read in the light of those facts of which courts must take judicial notice, or which are within the common knowledge of mankind. Thus, a contract which is in terms a policy of marine insurance, but does not state explicitly the risks insured against, is a policy of insurance against the usual marine risks, of which barratry of the master is held to be one. Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301.

foreigner could not claim against a British underwriter, founded on the act of his own state, any more than if the claim was created by his own act, and on the principle that he was to be deemed a party to the public authoritative acts of his own government. (*c*) But Lord Ellenborough afterwards threw a doubt over the doctrine, and explained away the force of it, by raising refined distinctions. He said, the exclusion of risk occasioned by the act of the assured's own government, was only an implied exclusion from the reason and fitness of the thing, and might be rebutted by circumstances. (*d*) The distinctions were afterwards pointedly disclaimed, and the whole doctrine exploded, on a writ of error, in the Exchequer Chamber; (*e*) and it was there established, that it was no objection to the right of recovery by the insured, that the loss happened by the act of the government of his country, though he and the insurer were subjects of different states. The latter rule has likewise, after a clear and accurate review of the cases, been adopted as just and solid by the Supreme Court of New York; and it was declared, that a subject was not to be deemed a party to the legislative, and much less to the judicial acts of his own country, so as thereby to deprive *293 him of remedy on *a policy by a foreign insurance office, by reason of any acts or judgments of his own country. The contrary doctrine was founded on a fanciful and unreasonable theory. (*a*) [1]

2. (*Of interdiction of commerce.*) — An interdiction of commerce with the port of destination, or a denial of entry by the power at the port, or by a blockade, has been held not to be a loss within the policy, by decisions in England and in this country. The loss must be occasioned by a peril, acting upon the subject insured immediately, and not circuitously, and a just

(*c*) Conway *v.* Gray, 10 East, 536; Mennett *v.* Bonham, 15 East, 477; Flind *v.* Scott, ib. 525.

(*d*) Simeon *v.* Bazett, 2 Maule & S. 94.

(*e*) Bazett *v.* Meyer, 5 Taunt. 824; [Aubert *v.* Gray, 8 Best & Sm. 168.]

(*a*) Francis *v.* Ocean Ins. Company, 6 Cowen, 404; s. c. 2 Wend. 64.

[1] Aubert *v.* Gray, 8 Best & Sm. 163, is to the same effect, but it is intimated that it might be otherwise if the embargo and seizure by the government of the insured was made in connection with hostility between it and the country of insurers. The Court of Exchequer Chamber also observe, that they do not say, in case the act of seizure was a lawful act under the municipal law of Spain, that, as against a Spanish subject, such seizure would be within the insurance.

fear of capture is not sufficient. (*b*) But there are other cases which have declared that an interdiction of commerce with the port of destination by means of a blockade, or the possession of the port by an enemy, was a peril within the policy. It is considered a loss by restraint of princes which could not be resisted, and operates as effectually as if the vessel was actually seized. It would be unreasonable to require the insured to rush into danger with the moral certainty of loss. (*c*) There is no doubt about the general principle, that if the voyage be relinquished merely through fear of capture, the loss is not covered by the policy. The apprehension of capture or of any other peril *in transitu* is no ground of abandonment. But a just fear of one of the perils insured against has been deemed equivalent to the presence of *vis major*, when it applied directly and effectually, as in the case of a blockading squadron, so as to break up the voyage. The danger was imminent, and might be said to be present and palpable, as well as apparently remediless and morally certain. If, therefore, the danger be so great as to amount to almost a certainty * of capture, it becomes a restraint in contempla- * 294
tion of the policy, and this is the doctrine which is best supported by authority.

A warranty against illicit trade was introduced into some of our American policies in 1788. It was intended to apply only to seizures for breaches of the laws of trade, and the commercial regulations of ports. It does not extend to seizures for offences against the law of nations, nor to acts of lawless violence, though committed under a pretext of some municipal regulation; nor to arbitrary seizures under the pretence of illicit trade, when in truth no such thing existed. It only applies to

(*b*) Hadkinson *v.* Robinson, 3 Bos. & P. 388; Lubbock *v.* Rowcroft, 5 Esp. 50, Parkin *v.* Tunno, 11 East, 22; Richardson *v.* Maine Ins. Company, 6 Mass. 102; King *v.* Delaware Ins. Company, 2 Wash. 300; Smith *v.* Universal Ins. Company, 6 Wheaton, 176; Story, J., in Andrews *v.* Essex Ins. Company, 3 Mason, 6.

(*c*) 1 Emerigon, 507–512; Symonds *v.* Union Ins. Company, 4 Dallas, 417; Schmidt *v.* United Ins. Company, 1 Johns. 249; Craig *v.* United Ins. Company, 6 id. 226; Barker *v.* Blakes, 9 East, 283; Olivera *v.* Union Ins. Company, 3 Wheaton, 183; Saltus *v.* United Ins. Company, 15 Johns. 523; Thompson *v.* Read, 12 Serg. & R. 440; Simonds *v.* Union Ins. Company, 1 Wash. 382; Vigers *v.* Ocean Ins. Company, 12 La. 362. If the loss be occasioned by the illegal act of a foreign government, it is a loss within the perils of the policy, even though the master refused to submit to the illegal order, provided his actual conduct was *bona fide* in furtherance of the voyage. Williams *v.* Suffolk Ins. Company, C. C. U. S. Mass., August, 1838; 3 Sumner, 270.

protect the insurers against illicit trade actually carried on or attempted. (*a*)[1]

3. (*Of risks excluded by the usual memorandum.*) — To prevent disputes respecting partial losses, arising from the perishable quality of the goods insured, or from trivial subjects of difference, it has been a general practice to introduce into policies a stipulation, by way of memorandum, that upon certain enumerated articles the insurer should not be liable for any partial loss whatever, and upon others for none, under a given rate per cent. This clause was first introduced into the English policies about the year 1749. Before that time the insurer was liable for every injury, however small, that happened to the thing insured. In France, if there be no such express stipulation, the Ordinance of the Marine, and the new code, provide that
* 295 the insurer * shall not be liable, if the partial loss does not exceed one per cent of the value of the article damaged. (*a*)

The memorandum clause alluded to usually declares that the enumerated articles, and any other articles that are perishable in their own nature, shall be free from average under a given rate, *unless general, or the ship be stranded.* In consequence of this exception, all small partial losses, however inconsiderable, are to be borne by a general average, provided they were incurred in a case proper for such an average; and in *Cantillon* v. *London Assurance Company* (*b*) it was held, that the exception amounted to a *condition*, and that if the ship was stranded, the insured

(*a*) Faudel *v.* Phœnix Ins. Company, 4 Serg. & R. 29; Cucullu *v.* Orleans Ins. Company, 18 Martin, La. 11.

(*a*) 8 Burr. 1551; Ord. de la Mar. tit. Assurances, art. 47; Code de Commerce, art. 408.

(*b*) Cited 8 Burr. 1558.

[1] Dole *v.* New England Mut. M. Ins. Co., 6 Allen, 373, 394. It has been laid down that the word "seizure" cannot be confined to lawful seizure in warranties of this sort. Kleinwort *v.* Shepard, 1 El. & El. 447. But that case is explained and somewhat doubted in a subsequent case which determined that the warranty did not include a mutinous taking possession of the vessel by the crew. Greene *v.* Pacific M. Ins. Co., 9 Allen, 217. The warranty against capture was held to include capture by a Confederate cruiser during the rebellion. Mauran *v.* Ins. Co., 6 Wall. 1; Dole *v.* N. E. M. M. Ins. Co., 6 Allen, 378, and 51 Me. 465; Swinnerton *v.* Columbia Ins. Co., 37 N. Y. 174; Ionides *v.* Universal Mar. Ins. Co., 14 C. B. N. S. 259. See, also, Powell *v.* Hyde, 5 El. & Bl. 607; Monongahela Ins. Co. *v.* Chester, 48 Penn. St. 491.

was let in to prove his whole partial loss. But in *Wilson* v. *Smith* (*c*) that decision was overruled, and it was held that those words did not make a condition, but only an *exception;* and that in the case of stranding, and in all cases proper for a general average, and in those cases only, the memorandum did not apply. Afterwards, in *Mason* v. *Skurray*, (*d*) Lord Mansfield held the same doctrine; and in *Cocking* v. *Fraser*, (*e*) the principle was carried still further, and received its due expansion, and was clearly and precisely defined. It was settled by a strong determination of the Court of K. B., that though a total loss may exist, in certain cases, when the voyage is defeated, yet in case of perishable articles within the memorandum, the insurer is secure against all damage to them whether great or small, whether it defeats the voyage, or only diminishes the price of the goods, unless the article be completely and actually destroyed, so as no longer physically to exist. Considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by *the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction, as settled in that case, is very salutary, by reason of its simplicity and certainty. *296

But this decision was shaken, and the original doctrine of Lord Ch. J. Ryder, in *Cantillon* v. *London Assurance Company*, revived by the decision of the K. B., in *Burnett* v. *Kensington*, (*a*) which declared, that if the ship be stranded, it destroyed the exception, and let in the general words of the policy. It was also shaken by the observations of Lord Alvanley, in *Dyson* v. *Rowcroft*, (*b*) and of Lord Ellenborough, in *Cologan* v. *London Assurance Company*. (*c*) In our American courts, the doctrine of the case of *Cocking* v. *Fraser* is the received law. It was explicitly and pointedly recognized as a sound decision by the Supreme Court of New York, in *Maggrath* v. *Church*, (*d*) and it has received a similar sanction in subsequent cases, in that and in other

(*c*) 3 Burr. 1550.

(*d*) Park on Insurance, 160, [c. 6.]

(*e*) Park on Insurance, 151. In some of our American policies the exception in these words, "*or the ship be stranded,*" is omitted.

(*a*) 7 T. R. 210. (*b*) 3 Bos. & P. 474.

(*c*) 5 Maule & S. 447.

(*d*) 1 Caines, 196.

courts; (e).[1] and the weight of authority is in favor of the doctrine, that in order to charge the insurer, the memorandum articles

(e) Neilson v. Columbian Ins. Company, 3 Caines, 108; Saltus v. Ocean Ins. Company, 14 Johns. 138; Marcardier v. Chesapeake Ins. Company, 8 Cranch, 39; Morean v. United States Ins. Company, 1 Wheaton, 219; Skinner v. Western M. & F. Ins. Company, 19 La. 278.

[1] *The Memorandum.* — (a) *The clause "or the ship be stranded"* is taken to mean that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist. Arnould, 4th ed. 739. In Roux v. Salvador, 3 Bing. N. C. 266, 276, it was contended that it was not material whether the stranding took place whilst the goods insured were on board or after they had been landed; but the court were not prepared to adopt that conclusion, although they did not pass upon it.

(b) *What is a Total Loss.* — Some other American cases besides those cited in the text have spoken of a destruction *in specie* as necessary to make the insurers liable for memorandum articles. But the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation, or from any other insuperable obstacle. Thus it is admitted by American as well as English cases that if goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state either that they cannot be reshipped and carried on with safety, or that they will not arrive at their point of destination *in specie*, the circumstance of their existing *in specie* at the forced termination of the risk is of no importance. In the latter case, at least, the loss is not constructively but absolutely total. The goods could never arrive, and abandonment is unnecessary. Roux v. Salvador, 3 Bing. N. C. 266, 279, 281; *post*, 320, n. (e); Knight v. Faith, 15 Q. B. 649, 661; Potter v. Rankin, L. R. 5 C. P. 341, 356, 375; Hugg v. Augusta Ins. Co., 7 How 595, 607; Williams v. Kennebec Mut. Ins. Co., 31 Me. 455, 462; De Peyster v. Sun Mut. Ins. Co., 19 N. Y. 272, 278; Tudor v. N. E. M. M. Ins. Co., 12 Cush. 554; Lord v. Neptune Ins. Co., 10 Gray, 109, 115; Ridyard v. Phillips, 4 Blatchf. 448.

Taking the English doctrine that the memorandum does not vary the rules upon which a loss shall be partial or total, 3 Bing. N. C. 278, with the decisions that a constructive total loss of a ship is a total loss within an insurance "against total loss only," *post*, 331, n. 1; Heebner v. Eagle Ins. Co., 10 Gray, 131; Greene v. Pacific M. Ins. Co., 9 Allen, 217; Adams v. Mackenzie, 13 C. B. N. S. 442; *sed vide* Willard v. Millers' & M. Ins. Co., 24 Mo. 561; the further conclusion follows that there may be a constructive as well as an absolute total loss of memorandum articles, and such seems to be the English law. Arnould on M. Ins. 4th ed. 951; Rosetto v. Gurney, 11 C. B. 176; Reimer v. Ringrose, 6 Exch. 263. In a number of American cases, however, a peculiar rule seems to be thought applicable to memorandum articles. Hugg v. Augusta Ins. Co., 7 How. 595, 605; Pierce v. Columbian Ins. Co., 14 Allen, 320, 322; Depeyster v. Sun Ins. Co., 17 Barb. 306; 2 Para. Mar. Ins. ch. 4, § 2, 113, n. Abandonment would undoubtedly be necessary upon a constructive total loss of memorandum articles, as in other cases of constructive total loss, although not upon an absolute total loss, as has been said. Knight v. Faith, 15 Q. B. 649, 661; Potter v. Rankin, L. R. 5 C. P. 341, 371; Farnworth v. Hyde, L. R. 2 C. P. 204, 227; 18 C. B. N. S. 835, 856; *post*, 320. In Waller

must be specifically and physically destroyed, and must not exist in specie. It has been frequently a vexed point in the discussions,

stein *v.* Columbian Ins. Co., 44 N. Y. 204, the English and earlier New York cases were discussed. Cocking *v.* Fraser was said to be overruled by the cases mentioned in the text, and by Roux *v.* Salvador; and Maggrath *v.* Church was qualified and explained. The necessity of a total physical destruction of the memorandum articles was denied, and a constructive total loss was pronounced to be sufficient, in accordance with the doctrine of Lord Ellenborough in the text. It was held enough to charge the insurers that it had become impracticable to get at or send the goods to their destination, at the time of abandonment, in consequence of the stranding of the vessel; meaning by impracticable, commercially impracticable, as is explained in the note on abandonment, *post*, 331, n. 1. In this case the policy seems to have been in the form mentioned 295, n. (*e*).

(*c*) *Suing and Laboring Clause.* — The warranty against particular average in a policy on goods excludes a recovery for expenses incurred for the purpose of forwarding the goods to their destination, when they were not incurred in averting an impending loss which would otherwise have fallen upon the underwriters, such as an actual or constructive total loss of the goods, notwithstanding the policy contains the usual English suing and laboring clause. *Post*, 340, n. 1. Such expenses can only be recovered from the insurers of the goods, if at all, on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner by the perils insured against, or, in other words, a particular average on those goods, and therefore, if there is a warranty against particular average, the insurers will not be liable. Great Indian Pen. R. Co. *v.* Saunders, 1 Best & Sm. 41, 51; 2 id. 266. But in a policy on freight that warranty will not prevent the assured from recovering under the suing and laboring clause for the expenses of conveying the cargo from the place of disaster to its destination in another vessel, after a total loss of the one on which it was shipped. Kidston *v.* Empire M. Ins. Co., L. R. 2 C. P. 357; L. R. 1 C. P. 535.

(*d*) *Destruction of a Part.*—The doctrine stated 299, n. (*b*), is now generally accepted, that when memorandum goods *of the same species* are shipped, whether in bulk or in packages, not expressed in the policy to be separately insured, and there is no general average and no stranding, the destruction of a part is not a total loss of part, but a partial loss of the whole. The underwriters will not be liable, although the part lost consists of one or more entire packages, and they are entirely destroyed or otherwise lost by the perils insured against. Newlin *v.* Ins. Co., 20 Penn. St. 312; Ralli *v.* Janson, 6 El. & Bl. 422, 446; Entwisle *v.* Ellis, *inf.*; Hernandez *v.* Sun M. Ins. Co., 6 Blatchf. 317; Kettell *v.* Alliance Ins. Co., 10 Gray, 144, 154. The insured cannot get rid of this principle in a policy on goods, *e.g.* rice, "in ship or ships, to be declared free from particular average," by indorsing a declaration of interest with a separate valuation of each bag of rice. He will not by that means create a separate insurance on each bag. Entwisle *v.* Ellis, 2 Hurlst. & N. 549. But when there has been a total loss of one species of memorandum articles, the insured will not be prevented from recovering by the fact that there are articles of wholly different species which have not been totally lost. Silloway *v.* Neptune Ins. Co., 12 Gray, 78, 85; Wilkinson *v.* Hyde, 3 C. B. N. S. 80, 45; Duff *v.* Mackenzie, ib. 16; Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 216. So if goods of one kind, and insured in one valuation on board a certain ship,

whether the insurer was holden, if the memorandum articles physically existed, though they were absolutely of no value. The *dicta* of some of the judges, in the cases referred to, are in favor of the doctrine, that an extinguishment of the memorandum articles *in value*, was equivalent to an extinguishment *in specie;* and there is much plausible reasoning in favor of that
* 297 explanation of the rule. * Lord Ellenborough, in *Cologan* v. *London Assurance Company*, expressed himself strongly on the point, and declared that it could not be less a total loss because the commodity subsisted in specie, if it subsisted only in the form of a nuisance. There was a total loss of the thing, if by any of the perils insured against it was rendered of no use whatever, although it might not be entirely annihilated. (*a*)[1]

If there be a total loss of the voyage by reason of shipwreck, or any other casualty, and there be no other means to forward the cargo, there is no distinction between the memorandum articles and the rest of the cargo. The total loss applies equally to the whole. (*b*) When part of the articles in the memorandum are totally destroyed by the perils insured against, and the residue remain partially damaged, it has been a very unsettled question, whether the insured was entitled to recover for the part so totally lost. The case of *Davy* v. *Milford* (*c*) is a strong deter-
* 298 mination in favor of the * recovery. It was said that there was no case, nor no reason to maintain, that where the

(*a*) 5 Maule & S. 447; Parry *v.* Aberdein, 9 B. & C. 411. Mr. Benecke says, that the prevalent opinion now is, that if the memorandum articles are, by sea damage, rendered of *no value*, there is a total loss, though they exist in specie. And yet he puts, and leaves unanswered, the question, whether, if a cargo of fish, valued at 100 pounds, be entirely rotten, and can be sold for one shilling, for manure, is that deemed of any value? Benecke on Indemnity, 379. He might have answered in the negative, for the cargo was of no value as fish, or in contemplation of the contract.

(*b*) Manning *v.* Newnham, Condy's Marshall, 586; Cologan *v.* London Assurance Company, 5 Maule & S. 447; Morean *v.* United States Ins. Company, 1 Wheaton, 219; Maggrath *v.* Church, 1 Caines, 214. And see Phillips on Insurance, ii. 467–510, 2d ed., where the cases are collected and stated; Poole *v.* Protection Ins. Co., 14 Conn. 47. The French Code, art. 409, exempts the insurer, under the clause, *free from average* for all partial losses, *except in cases which authorize an abandonment;* and in such cases the insurer has the option between the abandonment and the claim for average loss.

(*c*) 15 East, 559.

are transshipped in a case of necessity into two vessels by the master, a total loss of the cargo of one of them can be recovered for. Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

[1] See 296, n. 1.

least particle of the thing insured subsisted in specie, though the greater part was actually destroyed, the insured should be precluded from recovering the value of that which was totally lost. The language of some of the judges, afterwards, in *Cologan* v. *London Assurance Company*, (*a*) was to the same effect. But in opposition to that doctrine, we have the case of *Hedburg* v. *Pearson*, (*b*) in which the hogsheads of sugar covered by the memorandum were saved, but the greater part of the loaves in each hogshead were washed out and destroyed by a peril of the sea, and yet it was held to be only an average loss, and the insurer wholly discharged. So, in *Guerlain* v. *Col. Insurance Company*, (*c*) part of the memorandum articles (and which were distinct kinds of provisions, and specifically enumerated in the policy) were lost by shipwreck, and the insured was not allowed to recover, on the ground that the insurance was upon so much cargo as an integral subject, and the insurer was not liable for any particular item, though it was totally lost. The court referred to several decisions in the French tribunals, as reported by Emerigon, (*d*) and to the doctrine of that writer by which it appears, that in France, under the clause free of average, the insurer is not holden, though part of the subject insured be totally destroyed. The principle is, that the parties have a right to make their own contracts, and if the contract be lawful, it becomes a law to the court; and it would introduce uncertainty and confusion to undertake to modify the contract (as they do in Italy, under this very clause) (*e*) upon assumed principles of equity. The cases of *Biays* v. *The Chesapeake Insurance Company*, *Morean* v. *The* * *United States Insurance Company*, and * 299 of *Humphreys* v. *The Union Insurance Company*, (*a*) have established the same rule, that the underwriter pays nothing if the loss of the memorandum articles be partial and not total; and it is partial only when part of the cargo arrives in safety, however deteriorated in value, though another part of the cargo had been wholly destroyed by disasters on the voyage. This may now be considered as the settled law of this country on the subject. (*b*)

(*a*) 5 Maule & S. 447. (*b*) 7 Taunt. 154.
(*c*) 7 Johns. 527. (*d*) 1 Emerigon, 662–670.
(*e*) Targa, c. 52, note 18; Casaregis, Disc. 47, n. 10.
(*a*) 7 Cranch, 415; 1 Wheaton, 219, 227, note; 8 Mason, 429.
(*b*) Wadsworth *v.* Pacific Ins. Company, 4 Wend. 83. In that case it was decided,

The French law requires that goods, subject by their nature to particular detriment or diminution, be specified in the policy; otherwise the insurer is not liable for the losses which may happen to those articles, unless the insured was ignorant of the nature of the cargo at the time the contract was made. (*c*) This is a valuable rule, calculated to guard against dispute and imposition.

4. (*Of the usual perils covered by the policy.*) — It will not be necessary, nor will this course of instruction permit me to do more than take notice of a few of the prominent perils which accompany the voyage, and surround it with danger. The general and sweeping clause in the policy which follows the list of enumerated perils, "and of all other perils, losses, and misfortunes, to the hurt, detriment, or damage of the goods, ship, &c.," cover other cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes. (*d*) [1]

The ignorance or inattention of the master or mariners is not one of the perils of the sea. (*e*) Those words apply to all
* 300 * those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. Quod fato contingit, et cuivis patrifamilias, quamvis diligentissimo possit contingere. The imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event. (*a*) [1] The insurer undertakes only to indemnify against

that the underwriter was not answerable for a partial loss on memorandum articles, except for general average, unless there be a *total loss of the whole* of the particular species, whether the particular article be shipped in bulk, or in separate boxes or packages. So, in Brooke *v.* Louisiana Ins. Company, 17 Martin, 530, where the insurance was of a cargo of mules as memorandum articles, it was held, that there must be a physical total loss of the whole number insured, to authorize a recovery. See 16 Martin, 640, 681, discussions on the same case; and Insurance Company *v.* Bland, 9 Dana, 156, to s. p.

(*c*) Ord. de la Mar. tit. Des Ass. art. 31; Code de Commerce, art. 355.

(*d*) Cullen *v.* Butler, 5 Maule & S. 461.

(*e*) Pothier, h. t., n. 64; Gregson *v.* Gilbert, Park on Insurance, 88; Lodwicks *v.* Ohio Ins. Company, 5 Ohio, 433.

(*a*) In Straccha, Glossa, 22, *casus fortuitus* is defined to be *accidens, quod per custo-*

[1] Davidson *v.* Burnand, L. R. 4 C. P. 117, 120, stated *post*, 802, n. 1; Palmer *v.* Naylor, 10 Exch. 382; Monongahela Ins. Co. *v.* Chester, 48 Penn. St. 491, 494; Moses *v.* Sun Mut. Ins. Co., 1 Duer, 159, 172. As to what are perils of the seas, see Dent *v.* Smith, L. R. 4 Q. B. 414.

[1] *Post*, 802, n. 1. Other cases on the difference between ordinary wear and tear and accidents covered by the policy are Magnus *v.* Buttemer, 11 C. B. 876; Paterson *v.* Harris, 1 Best. & Sm. 336.

extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed; but it is often difficult to discriminate between damage occasioned by the ordinary service of the voyage, and which falls upon the owner, and by a peril of the sea, for which the insurer is responsible. Damages resulting from the ordinary employment of the ship, or the inherent infirmity of the article, as the loss of an anchor by the friction of the rocks, or the wear and tear of the equipment of the ship, or her destruction by worms, or the diminution of liquids by the ordinary leakage to which they are naturally

diam, curam et diligentiam mentis humanæ evitari non potest. Santerna, de Ass. part 3, n. 65, adds, *ubi diligentissimus præcavisset, et providisset non dicitur proprie casus fortuitus.* In Andrews *v.* Essex Marine Ins. Company, 3 Mason, 26, and in the case of Cammann *v.* N. Y. National Ins. Company, tried in the Superior Court in New York, in December, 1834, it was held to be an unsettled question, whether a loss proceeding from the *negligence* of the captain would affect the policy as fully as fraud; and the proper rule was suggested by Oakley, J., to be, that the neglect of the captain to use those precautions against damage, which a prudent man would have used *under like circumstances*, would be a case of *gross* negligence, within the meaning of the law. In the case of Bolton *v.* American Ins. Company, tried in the Superior Court of New York, before Ch. J. Jones, (November, 1835,) it was held, that the underwriters were liable for a loss arising, not from negligence merely, but from *gross* negligence by the master. But it is very difficult to draw the line of distinction between the cases where gross negligence ends and ordinary negligence begins, or to distinguish between pure accident and accident from negligence. The courts seem to be approximating in effect to the French meaning of barratry, for they hold, that in a case not amounting to barratry within the meaning of the English law, if the proximate cause of the loss be a peril enumerated, the insurer is liable, though the remote cause of that loss was the negligence of the master or crew. Shore *v.* Bentall, 7 B. & C. 798, n.; Busk *v.* Royal Exchange Ass. Company, 2 B. & Ald. 73; Walker *v.* Maitland, 5 B. & Ald. 171; Bishop *v.* Pentland, 7 B. & C. 219; Redman *v.* Wilson, 14 M. & W. 476. In this last case, the immediate cause of the loss was a peril of the sea, though the want of seaworthiness and the cause of the loss was remotely the negligence in the loading of the vessel. Patapsco Ins. Company *v.* Coulter, 3 Peters, 222. See, also, *infra*, p. 307, note, and 2 Sumner, 200. In Copeland *v.* N. E. Marine Ins. Co., 2 Met. 432, it was decided, after great consideration, that if a vessel be seaworthy when the voyage commences, and the master afterwards becomes incompetent from misconduct, and the vessel be lost for that cause, the insurer was still held liable. Parke, Baron, in Dixon *v.* Sadler, 5 M. & W. 405; Shore *v.* Bentall, note to 7 B. & C. 798, S. P., assuming the act was not barratrous.

It was declared, in the American Ins. Co. *v.* Bryan, 26 Wend. 563, that in the case of an insurance against *barratry* of the master and mariners, the assured is entitled to recover if the loss happened by *theft*, without proving due diligence and skill on the part of the master. The burden of proof of negligence, not barratrous in itself, and yet causing the loss, is on the insurer, if he claims to be excused from liability on the ground of the negligence or want of skill of the master or mariners. But in Perrin *v.* Protection Ins. Co., 11 Ohio, 147, negligence in the agents of the insured was held to be no defence to the insurer.

subject, or hemp taking fire in a state of effervescence, may be mentioned as instances of losses which are not within the policy, because they are not losses attributable to a *casus fortuitus*. (*b*) It has even been a vexed question, whether damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question.

The better opinion would, however, seem to be, that the
* 301 insurer * is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity. (*a*) [1]

When a missing vessel shall be presumed to have perished by a peril of the sea depends upon circumstances, and there is no

(*b*) Valin, ii. 81; Pothier, des Ass. n. 66; 1 Emerigon, 390; Rohl *v.* Parr, 1 Esp. 444; Martin *v.* Salem Marine Ins. Company, 2 Mass. 420; Boyd *v.* Dubois, 3 Camp. 133. Mr. Phillips, in his Treatise on Insurance, i. 639, very properly adds, that if the injury to the ship by worms arose from the loss, by a sea peril, of the protection of the copper sheathing, the insurer may reasonably be charged. But if the loss of the sheathing might have been repaired, before the vessel became exposed to the action of the worms, it was an act of negligence in the master, which would exonerate the underwriter. Hazard *v.* N. E. Marine Ins. Company, 1 Sumner, 218. The insurer is liable for all accidents arising from any *extraordinary* circumstances or cause, and not from the inherent weakness or ordinary wear and tear of the vessel. Potter *v.* Suffolk Ins. Company, 2 Sumner, 197; Fletcher *v.* Inglis, 2 B. & Ald. 315. In the case of McCargo *v.* Merchants' Ins. Co., before the Supreme Court of Louisiana, February, 1845, [10 Rob. (La.) 334,] it was held, that in a policy on a cargo of slaves, the insurer is not liable for a loss from an insurrection or mutiny of the slaves, unless there was an *express* assumption of risk from an insurrection, for that arises from the inherent vice of the subject insured; and this was held to be the English law. It was the case of the Creole, and the policy stated that the insurer should not be liable "for suicide, desertion, or natural death, but chiefly for the risk of detention, capture, and seizure of foreign power."

(*a*) Dale *v.* Hall, 1 Wils. 281; Hunter *v.* Potts, 4 Camp. 203; Aymar *v.* Astor, 6 Cowen, 266; Roccus, de Ass. n. 49; Cleirac, sur le Guidon, c. 5, art. 8, and Emerigon, i. 377, 378, who cites the Dig. 19. 2. 13. 6, and Casaregis, Straccha, Santerna, Kuricke, and Targa may all be considered as maintaining the principle that the owner, and not the insurer, is holden for an injury by rats; and the only case that I have met with directly to the contrary is Garrigues *v.* Coxe, 1 Binn. 592. The opinion of Santerna, de Ass. pt. 4, n. 31, 32, is not consistent with his own principles, for, while he admits that an injury by rats cannot properly come under the name of *casus fortuitus; magis est improvisus proveniens ex alterius culpa, quam fortuitus*, he still concludes it to be a peril generally and absolutely assumed, when not controlled by usage.

[1] Laveroni *v.* Drury, 8 Exch. 166 (see Kay *v.* Wheeler, L. R. 2 C. P. 302, where the question whether the owner of a ship trading between a foreign and an English port is liable to all the responsibilities of a common carrier is expressly left open); *ante*, 217, n. 1.

precise time fixed by the English law. (*b*) In the French law, a vessel not heard from is presumed to be lost after the expiration of one year in ordinary voyages, and of two years in long ones. (*c*) The ordinances of foreign states have been very arbitrary on this point. Thus, by the ordinance of Hamburg, a ship was presumed to be lost, if bound to any place in Europe, and not heard from in three months; and by the Recopilacion des Loyes de Indias, in Spain, if a vessel which goes to the Indies is not heard from within a year and a half, it is presumed to be lost. (*d*) In the case of missing vessels, the loss is presumed to have happened immediately after the date of the last news; so that if an insurance be for three months, and the vessel not being heard from, a further insurance is made for a year, and the vessel *is never heard from, in that case the first insurer pays *302 the loss. (*a*)

What degree of peril changes it from an ordinary to an extraordinary character, so as to bring it within the stipulation of indemnity, is frequently a perplexing question, to be determined by the circumstances of the particular case. And to prevent uncertainty and dispute, it is a settled rule, that the peril, whatever it may be, upon which the policy attaches, must be the proximate, and not the remote cause of the loss. Causa proxima non remota spectatur. (*b*)[1] If a ship be driven ashore by the wind, and in that

(*b*) Green *v.* Brown, Strange, 1199; Brown *v.* Neilson, 1 Caines, 525; Gordon *v* Bowne, 2 Johns. 150; Houstman *v.* Thornton, Holt, N. P. 242.

(*c*) Code de Commerce, art. 375.

(*d*) 1 Magens, 89, 90; Institutes of the Civil Law of Spain, b. 2, tit. 17, c. 1.

(*a*) Boulay-Paty, iv. 246.

(*b*) Walker *v.* Maitland, 5 B. & Ald. 171. It is upon the principle mentioned in the text, that the insurer on goods is not liable when they are sold by the captain of

[1] *Causa proxima non remota spectatur.* — (*a*) Instances in which this is applied are Ionides *v.* Universal M. Ins. Co., 14 C. B. N. S. 259; Marsden *v.* City & County Ass. Co., L. R. 1 C. P. 232; Taylor *v.* Dunbar, L. R. 4 C. P. 206; Montoya *v.* London Ass. Co., 6 Exch. 451; Woodruff *v.* Commercial M. Ins. Co, 2 Hilton, 122; Palmer *v.* Naylor, 10 Exch. 382; 8 Exch. 739; Dyer *v.* Piscataqua F. & M. Ins. Co., 53 Me. 118. Cases of fire insurance are St. John *v.* American Mut. Ins. Co., 11 N. Y. (1 Kern.) 516; Everett *v.* London Assurance, 19 C. B. N. S. 126; Huckins *v.* Peoples' Mut. F. Ins. Co., 11 Foster (31 N. H.), 238; Hillier *v.* Allegheny County Mut. Ins. Co., 8 (Barr) Penn. St. 470, commented on by Case *v.* Hartford F. Ins. Co., 18 Ill. 676. See, as to the derivation and various applications of Lord Bacon's maxim, a learned and able article by Mr. N. St. John Green of the Boston bar, 4 Am. Law Rev. 201. Although it has led to error in actions of tort and of contract where the defendant has caused the damage complained of by his wrong-

situation be captured by an enemy, the loss is to be imputed to the capture, and not to the stranding. (*c*) When a partial loss is

a ship to defray the expenses of repairs, rendered necessary by a tempest. Powell *v.* Gudgeon, 5 Maule & S. 431; Sarquy *v.* Hobson, 4 Bing. 131. Damages to another vessel by collision, in which the vessel insured, according to the admiralty rule, in a case of mutual error, was bound to bear half the damage, were held by the K. B. not chargeable upon the insurer, for the *proximate* injury is what the insurer has to sustain, and not what the ship has to pay for damages to another, by an accident remote and incidental. De Vaux *v.* Salvador, 4 Ad. & El. 420. This decision was examined and questioned by Mr. Justice Story, in the case of Peters *v.* Warren Ins. Co., in the C. C. U. S. for Massachusetts, in October, 1839, 3 Sumner, 389; 1 Story, 463; [14 Peters, 99,] s. c. In this case it was held, that an accidental collision with a foreign vessel was not a case of general average by the American law, unless the loss be a sacrifice voluntarily incurred for the common benefit. 2 Phillips on Insurance, 2d ed. 181–190. In that case the ship Paragon came in collision in the river Elbe with the Galliot Franc Anna, and sunk her; no fault on either side. The Marine Court at Hamburg apportioned one half of the loss upon the Paragon, which the master was compelled to pay, and for which the underwriters were held liable, on the ground that the damages apportioned on the Paragon were a direct and proximate effect of the collision. The great point in discussion was, not the principle that *causa proxima non remota spectatur*, but its application. Lord Bacon (Maxims of the Law, regula 1) gives this sound reason for the maxim, that "it were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause." The French codes and jurists, in a case of mere accident by collision, without the fault of either party, and where the damages are apportioned, declare that the insurers bear the part of the damages which belong to the vessel insured by them. Emerigon, Valin, Pothier, Boulay-Paty, and Estrangin, the commentator on Pothier, all concur in this rule, and it appears to me that the decision of Mr. Justice Story was well sustained by just reasoning and sound authority.

(*c*) Green *v.* Elmslie, Peake, 212. In Hahn *v.* Corbett, 2 Bing. 205, a ship was stranded, and in that condition captured, and the *proxima causa* was held in that case to be the shipwreck, and not the capture, as the former was a total loss. So, if a ship be captured, and while under capture is destroyed by fire, or accident, or negligence of the captors, the loss is attributable to the capture, for the subsequent loss was incidental, and a natural consequence of the capture. Magoun *v.* N. E. Marine Ins. Co., 1 Story, 157.

ful act, it seems peculiarly applicable to insurance as a rule of construction to determine in what cases indemnity is promised. 14 C. B. N. S. 285; 8 Hurlst. & C. 291.

(*b*) *Negligence of Assured.* — The maxim is applied to determine the effects of the negligence of the assured or his agents. Thus, if the negligence of the master and mariners, not amounting to barratry (*post*, 805, n. 1), is the proximate cause of the loss, it is generally admitted that the assured cannot recover, which seems to be only another way of saying that such negligence is not one of the perils insured against. On the other hand, if the proximate cause is a peril insured against, it is now settled that the insurers will be liable, although the accident was due more remotely to the negligence of the crew, or of the assured himself. 288, n. 1; 289, n. 1; 800, n. (*a*); 804, n. (*h*); 807 and n. (*a*); 876, n. 1; Dixon *v.* Sadler, 5 M. & W. 405, 414; 8 M. & W. 895; Biccard *v.* Shepherd, 14 Moore P. C. 471, 493; Arnould, 4th ed. 665, 668; Nelson *v.* Suffolk

followed by a total loss, the former may be considered as merged in the latter. The courts are not to be seeking about for odds

Ins. Co., 8 Cush. 477, 496; Parkhurst *v.* Gloucester Mut. Fish. Ins. Co., 100 Mass. 301, 305; General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, 366; Mathews *v.* Howard Ins. Co., 1 Kern. (11 N. Y.) 9, 15; Atkinson *v.* Great Western Ins. Co., 5 Alb. L. J. 252; Street *v.* Augusta Ins. Co, 12 Rich. 13; American Ins. Co. *v.* Insley, 7 Penn. St. (Barr) 228; Georgia Ins. & T. Co. *v.* Dawson, 2 Gill, 365; Phœnix Fire Ins. Co. *v.* Cochran, 51 Penn. St. 143; Hagar *v.* N. E. M. M. Ins. Co., 59 Me. 460; Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311. In Davidson *v.* Burnand, L. R. 4 C. P. 117, damage to cargo by seawater through the waste pipe, which had been negligently left open by the crew whilst the vessel was loading in port, was held to be covered by a policy in the usual form. The loss was caused by a peril *ejusdem generis* as a peril of the sea, and there was thought to be no distinction between an accident so caused which was due to the negligence of the crew and one which was due to the negligence of the crew of another vessel. A peculiarly happy illustration is furnished by cases of collision due to the negligence of the master and mariners of the vessel insured, which have been much discussed since note (*b*) was written. The underwriters will be liable for the damage done to the insured vessel, because that is directly caused by the collision; but according to the weight of authority they are not liable for the amount the insured owner is compelled to pay the other vessel, because his obligation to pay does not flow directly from the peril alone, but only from that in conjunction with his own or his servant's negligence. General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, 364; Mathews *v.* Howard Ins. Co., 1 Kern. (11 N. Y.) 9; Street *v.* Augusta Ins. Co., 12 Rich. (S. C.) 13; Ionides *v.* Univ. Mar. Ins. Co., 14 C. B. N. S. 259, 290, 291; Xenos *v.* Fox, L. R. 3 C. P. 630, 635; 4 id. 665. *Contra*, Nelson *v.* Suffolk Ins. Co., 8 Cush. 477; Blanchard *v.* Equitable Safety Ins. Co., 12 Allen, 386.

(*c*) *Concurring Causes.* — It must be observed, however, that the insurers could not avoid paying the last mentioned sum on the strength of the rule *causa proxima* alone, as the negligence of the assured and the sea peril were concurring and equally proximate causes of the loss. Other instances of which the same is true may be found, although they are not very common. Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72. When a collision brought on a fire and both simultaneously did damage, but the direct consequences of the fire could be discriminated from those of which the collision was the *causa proxima*, the liability of insurers against fire was easily ascertained by the ordinary rule. Insurance Co. *v.* Transportation Co., 12 Wall. 194, affirming s. c. 6 Blatchf 241; 34 Conn. 561.

(*d*) The maxim suffices for the solution of Green *v.* Elmslie, and Hahn *v.* Corbett, referred to in note (*c*), which are distinguished by the fact that in the former the ship was not hurt by the stranding, and would have been in perfect safety had it been driven on any other coast but that of an enemy; while in the latter the ship and cargo were a total loss before capture; the ship was totally disabled and the goods would have been lost in the sea, if they had not been carried off by the enemy. See also Palmer *v.* Naylor, 10 Exch. 382. In an intermediate case, the insurers were held liable for the portion of the cargo necessarily lost by the stranding, but not liable for what was saved, or for what would have been saved by United States wreckers if they had not been prevented by Confederate troops, the policy containing a warranty against all consequences of hostility. Ionides *v.* Univ. Mar. Ins. Co., 14 C. B. N. S. 259. (This case also shows that the maxim

and ends of previous partial losses, when there is an overwhelming cause of loss which swallows up the whole subject-matter. (*d*) So, on the other hand, if the first loss be distinct and total, and be followed by abandonment, the rights of the parties are fixed, and the courts are not to cast their eyes forward to see what further perils awaited the property. (*e*)

By the rule and practice in the United States, the wages and provisions of the crew during the necessary detention of the vessel for repairs requisite in the course of the voyage, by reason of perils insured against, are considered as included in
* 303 the perils of the sea, and made chargeable upon * the insurer; (*a*) and we have already seen (*b*) how far wages

(*d*) Livie *v.* Janson, 12 East, 648.

(*e*) Schieffelin *v.* N. Y. Ins. Company, 9 Johns. 27.

(*a*) Walden *v.* Le Roy, 2 Caines, 263; Barker *v.* Phœnix Ins. Company, 8 Johns. 307; Padelford *v.* Boardman, 4 Mass. 548; Clark *v.* United Fire and Marine Ins. Company, 7 Mass. 365. [*Contra*, May *v.* Delaware Ins. Co., 19 Penn. St. 312.] In Guzzam *v.* Cincinnati Ins. Company, 6 Ohio, 78, it was held, that in a policy on time, the insurer was not liable for the wages of the crew, while the vessel is stranded within the time. The wages were considered to be the ordinary expense. Webb *v.* Protec Ins. Company, ib. 456, s. p. But in the case of Potter *v.* The Ocean Ins. Company, 8 Sumner, 27, Judge Story held, that it made no difference in the application of the principle, that the wages and provisions of the crew, while the vessel went into port to repair, constituted a general average, when the insurance was on time; nor that there happened to be no cargo on board, and consequently no contribution by cargo or freight. The principle calling for a general average existed, when there was a common sacrifice for the benefit of all. (*b*) *Supra*, 236.

applies not only to the contract of insurance, but to the exceptions, the words of which are construed as they would be if the assured had reinsured his cargo against the perils excepted by the warranty. Ib. 285. But an opposite opinion is expressed on the latter point in St. John *v.* American Mut. Ins. Co., 11 N. Y. 516; Insurance Co. *v.* Transportation Co., 12 Wall. 194, 200.)

(*e*) *Partial followed by Total Loss.* — Livie *v.* Janson, which is cited by the author to the effect of a total loss following a partial loss, is condemned in 1 Phillips on Ins. § 1136, but is explained and upheld in England, 14 C. B. N. S. 294; Lidgett *v.* Secretan, L. R. 6 C. P. 616, 625. In the latter case it is said that if the underwriter pays the total loss, he pays all he has agreed to, except under the suing and laboring clause. If, during the currency of the policy, and after a partial loss which has not been repaired, the vessel is totally lost by a peril excepted out of the policy, in respect of which the owner was his own insurer, the underwriter must be considered by the terms of the contract to be in the same position as if he had so insured and paid for a total loss, and there is no claim against him for a partial loss. This is said to be the case of Livie *v.* Janson. But the rule is limited to a total loss during the time covered by the policy, and the doctrine of merger is not extended to a total destruction of the ship after the policy has expired. See also Knight *v.* Faith, 15 Q. B. 649, 668.

and provisions constitute an item of general average in the cases of capture, embargo, or detention. But I cannot undertake to specify more particularly the various kinds of losses which are deemed to be covered by the general stipulation to indemnify against perils of the sea. Many subtle distinctions have been raised and discussed in the books on this point, and several of them have been stated or referred to by Mr. Phillips. (*c*)

The enumerated perils of the sea, *pirates*, *rovers*, *thieves*, include the wrongful and violent acts of individuals, whether in the open character of felons, or in the character of a mob, or as a mutinous crew, or as plunderers of shipwrecked goods on shore. (*d*) The theft that is insured against by name, means that which is accompanied by violence (*latrocinium*), and not simple theft; *furtum non est casus fortuitus*. (*e*) But the stipulation of indemnity

(*c*) Phillips's Treatise on Insurance, i. 635–647.

(*d*) Nesbitt *v.* Lushington, 4 T. R. 783; Brown *v.* Smith, 1 Dow, 349; Bondrett *v.* Hentigg, Holt, N. P. 149; [Palmer *v.* Naylor, 10 Exch. 382; 8 Exch. 739.] Pirates, rovers, thieves, are perils expressly mentioned in the policy; but in the early history of insurance, it was quite a vexed question, whether they were included among the general perils of the sea; and Santerna, and after him Straccha, have noticed the discussions, and compiled learning on the point. It was conceded, that piracy was a *casus fortuitus* of the sea, but not theft. Santerna, de Ass. & Spons. pt. 3, n. 61–65; Straccha, Glossa, 22, *passim*. Piracy, according to the old authorities, was held to be included in the perils of the sea. 2 Roll. Abr. 248, pl. 10; Comb. 56. But as piracy is now among the enumerated perils in policies, the point is of no importance.

(*e*) Boulay-Paty, iv. 35; Roccus, n. 42; Emerigon, i. c. 12, sec. 29. These cases refer to simple theft committed on board the vessel, and which the law presumes might have been prevented by due vigilance in the master. It is now held, that the clause in the modern policies against loss by *thieves* applies to the acts of thieves who stole from the ship while she lay at the wharf, but who had no connection with the ship, though the master and ship-owners might also be liable as common carriers. It need not now be shown that the goods were taken by assailing thieves, by violence from without. It seems to be intimated that the clause might even apply to simple theft by persons belonging to the ship. The Atlantic Ins. Co. *v.* Storrow, 5 Paige, 293. This decision overrules all the old authorities and text books, for they all apply the term *furtum*, or simple theft, as well as *latrocinium*, or robbery, to *assailants* from without the ship, and exclude from the policy simple theft, as not being properly a casualty. All the English text writers follow the same rule, as Malynes (Lex Mer. c. 25), Molloy (de Jur. Mar. b. 2, c. 7, sec. 7), Beawes (Lex Mer. 313), Weskett (on Ins. tit. Theft), Park (80, 81), Millar (145, 146), and Marshall (by Condy, i. 243). Park, in his 6th ed., says that the English law is silent on the subject. The decision by Chancellor Walworth may be reasonable, and it is according to the popular acceptation of the word *thieves*, but it is against all the text authorities, foreign and domestic. It is also in contravention of the principle that thefts are not casualties; and it may be a matter of questionable policy whether the owners and masters of ships ought to be indemnified against thefts of goods under their own care, and occasioned by their own lack of vigilance. This decision was followed in Bryan *v.* The

against *takings at sea, arrests, restraints and detainments of all kings, princes, and people*, refers only to the acts of government for government purposes, whether right or wrong. An arrest in the domestic port, after the voyage commenced, justifies an abandonment; but if made before the risk commenced,
* 304 the contract * is discharged. (*a*)

An arrest by the admiralty process, at the instance of an individual, on a private claim, is not a case within the policy; and it is to be presumed the Court of Admiralty would indemnify the owner or insured in the award of costs and charges against the unjust prosecutor. (*b*) It is a very ancient rule, that the insurer does not run the risk of obstructions occasioned by the debts or misconduct of the assured. (*c*) Under the insurance against fire, it is held, that if the ship be burnt under justifiable circumstances, to prevent capture, or from an apprehension of a contagious disease, the insurer is liable. (*d*) If sails and rigging, put on shore while the vessel is repairing at a foreign port, be burnt, they are covered by the policy. (*e*) It has likewise been held, after a very learned discussion, that the insurer is answerable for a loss by fire occasioned by the negligence of the master and mariners. (*f*) [1] This decision is subsequent to that of *Grim*

American Ins. Co., in the Superior Court of New York, in April, 1840, where it was held, that an insurance against thieves, and barratry of the master and crew, covered a loss by simple theft on the voyage, unaccompanied with force. s. c. affirmed on error; American Ins. Co. *v.* Bryan, 1 Hill (N. Y.), 25. See, also, 26 Wend. 563; Marshall *v.* Insurance Co., 1 Humph. (Tenn.) 99. It is intimated, in the learned discussions in the case of The American Ins. Co. *v.* Bryan, that a contrary doctrine in the elementary works was probably advanced, without adverting to the difference in the *terms* of the European and American policies.

(*a*) Boulay-Paty, iv. 288. [See Lozano *v.* Janson, 2 El. & El. 160, 176.]

(*b*) Nesbitt *v.* Lushington, *supra*; Ord. of Hamburg, 2 Magens, 218.

(*c*) Le Guidon, c. 2, sec. 7

(*d*) Pothier, h. t., n. 58; Targa, c. 56; Emerigon, i. 484; 2 Valin, 75; Gordon *v.* Rimmington, 1 Camp. 123.

(*e*) Pelly *v.* Royal Exchange Assurance Company, 1 Burr. 341. [See Harrison *v.* Ellis, 7 El. & Bl. 465, 480.]

(*f*) Busk *v.* Royal Exchange Assurance Company, 2 B. & Ald. 73. See, also,

[1] The cases cited in the note (*f*) are those which are cited by Baron Parke, as establishing that the assured makes no warranty that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage. Dixon *v.* Sadler, *ante*, 288, n. 1. The principle, as stated in the text, is simply an illustration of the rule that the proximate cause of the loss, only, is considered. *Ante*, 302, n. 1. Grim *v.* Phœnix Ins. Co. is no longer law even in New York. Mathews *v.* Howard Ins. Co., 1 Kern. (11 N. Y.) 9, 14.

See, as to captures, *ante*, 294, n. 1.

v. *Phœnix Insurance Company*, (*g*) in which it was held, after a discussion equally searching and elaborate, that a loss by fire, arising from carelessness, was not covered by the insurance. The French law coincides with the English decision. (*h*) Every species of *capture*, whether lawful or unlawful, and whether by friends or enemies, is also a loss within the policy. *Barratry* is a peril specially insured against; and Lord Mansfield thought it very strange that the underwriter should undertake *to indemnify against the misconduct of the master, who *305 is the agent of the insured, and subject to his control. (*a*)[1]

Walker *v.* Maitland, 5 id. 171; and Bishop *v.* Pentland, 7 B. & C. 219, s. P.; Gilmore *v.* Carman, 1 Smedes & M. 279. In this last case it was held, that owners of steamboats engaged in the carrying trade on the Mississippi were responsible as common carriers, and that a loss by fire was not within the exception of acts of God, and not within the exception of dangers of the river. It is not inevitable, and may be counteracted by human sagacity. See, also, *infra*, p. 306. It may be here added, that loss of goods by spontaneous ignition is not covered by the policy. Boyd *v.* Dubois, 3 Camp. 133.

(*g*) 13 Johns. 451.

(*h*) Boulay-Paty, iv. 23. The rule appears to be settled by the weight of authority in the United States, that in a marine policy in which fire is expressly insured against, the insurer is answerable for a loss by fire, occasioned by the negligence of the master or crew. Patapsco Ins. Company *v.* Coulter, 3 Peters, 222; Columbia Ins. Company *v.* Lawrence, 10 id. 517; Waters *v.* Merchants' Ins. Company, 11 id. 213.

(*a*) We are told by Roccus, de Ass. n. 89, that barratry is expressly excepted in the policies at Naples. So, by the ordinance of Philip II. for Antwerp, and by the usage at Rotterdam and Cadiz, barratry in the captain or mariners was not insurable. On the other hand, at Hamburg, and Genoa, and Bilboa, it might be insured against. Emerigon, des Ass. i. 366, 367; Ord. de Bilboa, c. 22, n. 19. In the Institutes of the Civil Law of Spain, by Asso & Manuel, b. 2, tit. 17, c. 1, it is laid down that the insurer is not liable for damages arising from the fault of the captain or pilot. In some of our American policies, the risk from barratry is qualified; it is, "Barratry of the master (*unless the assured be owner of the vessel*) and mariners."

[1] *Barratry.* — Since the text was written it has been decided that barratry is one of the usual marine risks, and is covered by a policy which does not state explicitly the perils insured against. *Ante*, 291, n. 1; Parkhurst *v.* Gloucester Mut. Fishing Ins. Co., 100 Mass. 301.

The statement in the text as to the meaning of the term *barratry* in American law is confirmed after a most elaborate examination not only of the cases, but of words derived from the same Sanscrit root in many languages, by Daly, C. J., in Atkinson *v.* Great Western Ins. Co., 5 Alb. L. J. 252. See also Lloyd *v.* General Iron Screw Collier Co., 3 Hurlst. & C. 284, 293; Grill *v.* General Iron Screw Collier Co., L. R. 3 C. P. 476; L. R. 1 C. P. 600. It has been held that the settled meaning of barratry does not include acts by a master who is also owner, even a part owner. Wilson *v.* General M. Ins. Co., 12 Cush. 360. But in England it was held that a part owner can commit barratry. Jone *v.* Nicholson, 10 Exch. 28.

It means a fraudulent breach of duty on the part of the master, in his character of master, or of the mariners, to the injury of the owner of the ship or cargo, and without his consent, and it includes every breach of trust committed with dishonest views. (*b*) Barratry is used by the French writers in its larger sense, as comprehending negligence, as well as wilful misconduct; (*c*) therefore, no illustration can be safely drawn from the French authorities, when the term is used as in the English and American law in a more limited sense, and applicable only to the wilful misconduct of the master or mariners. To trade with an enemy without leave of the owner, though it be intended for his benefit, or for a neutral to resist search, though his motive be to serve the owner, or for a letter of marque to cruise, and take a prize, though done for the benefit of the owner, if the ship be lost by reason of the acts, are all of them acts of barratry. So, sailing out of port in violation of an embargo, or without paying the port duties, or to go out of the regular course upon a smuggling expedition, or to be engaged in smuggling against the consent of the owner, are all of them acts of barratry, equally with more palpable and direct acts of violence and fraud, for they are wilful breaches of duty by the master, in his character of master, to the injury of the owner. (*d*) It makes no difference in *306 the reason of the thing, * whether the injury the owner suffers be owing to an act of the master, induced by motives of advantage to himself, or of malice to the owner, or a disregard

(*b*) Aston, J., Cowp. 155; Willes, J., 1 T. R. 259; Lord Ellenborough, in Earle *v.* Rowcroft, 8 East, 126, 2 Maule & S. 172; Stone *v.* National Ins. Company, 19 Pick. 86, 87; Cook *v.* Comm. Ins. Co., 11 Johns. 40.

(*c*) Pardessus, Cours de Droit Com. iii. n. 772.

(*d*) Stamma *v.* Brown, Strange, 1173; Knight *v.* Cambridge, as cited by Lord Mansfield, in Cowp. 153, and by Lord Ellenborough, in 8 East, 135, 136; Vallejo *v.* Wheeler, Cowp. 143; Robertson *v.* Ewer, 1 T. R. 127; Havelock *v.* Hancill, 3 T. R. 277; Moss *v.* Byron, 6 T. R. 379; Phyn *v.* Royal Exchange Assurance Company, 7 T. R. 505; Earle *v.* Rowcroft, 8 East, 126; Hood *v.* Nesbit, 2 Dallas, 187; Kendrick *v.* Delafield, 2 Caines, 67; Brown *v.* Union Ins. Company, 5 Day, 1; Gook *v.* Commercial Ins. Company, 11 Johns. 40; Grim *v.* Phœnix Ins. Company, 13 Johns. 451; Wilcocks *v.* Union Ins. Company, 2 Binney, 574; Millaudon *v.* New Orleans Ins. Company, 11 Martin (La.), 602; Abbott on Shipping, 5th Am. ed. Boston, 1846, 243. The insurer is answerable for a loss from barratry of the master, in attempting to smuggle, though the policy contains a warranty by the assured against illicit or prohibited trade. Suckley *v.* Delafield, 2 Caines, 222; American Ins. Co. *v.* Dunham, 15 Wend. 1. But deviation, through mere ignorance or a mistaken sense of duty, is not barratry. Phyn *v.* Royal Ex. Ass. Co., 7 T. R. 505; Wiggin *v.* Amory, 14 Mass. 1; Hood *v.* Nesbit, *sup.*

of those laws which it was the master's duty to obey, and which the owner relied upon him to observe. It is, in either case, equally barratry. If the ship be barratrously taken out of her course, that act takes the whole property from the possession of the insured, and produces a total loss. (*a*) But it is requisite that the loss resulting from the barratry must actually happen during the continuance of the voyage; and if the ship be not seized for a smuggling act until she has been moored twenty-[four] hours in safety at the port of destination, the insurer is discharged. (*b*)

We have seen that it is a vexed question, rendered the more perplexing by well balanced decisions, and in direct opposition to each other, whether a loss by fire proceeding from negligence, be covered by a policy insuring against fire. It has been made a question, also, whether a loss by any other peril in the policy, operating immediately and proximately upon the property, be chargeable upon the insurer, when the remote cause of that loss was the negligence or misconduct of the master and mariners, not amounting to barratry. Among a number of cases that bear upon the question, the case of *Cleveland* v. *Union Insurance Company* (*c*) may be selected as a strong decision in favor of the insurer; and the more recent case of *Walker* v. *Maitland*, (*d*) as one equally strong against * him, on that very * 307 point. The doctrine in the last decision seems to be gaining ground as the prevalent and better opinion. (*a*) [1]

(*a*) Dixon *v.* Reid, 5 B. & Ald. 597.

(*b*) Lockyer *v.* Offley, 1 T. R. 252.

(*c*) 8 Mass. 308. (*d*) 5 B. & Ald. 171.

(*a*) The authority of the case of Cleveland *v.* Union Ins. Company is much weakened by the circumstances attending it, as stated by Mr. Justice Story, in Williams *v.* The Suffolk Ins. Co., C. C. U. S. Mass., August, 1838; [3 Sumner, 270.] It has received, however, a confirmation by the decision of the Supreme Court of Ohio, after a full and learned discussion, in Fulton *v.* The Lancaster O. Ins. Co., 7 Ohio, pt. 2, 1, 25. It was there decided, that a river insurance policy, without any clause against barratry, did not cover a loss by a peril within the policy, the remote cause of which was the negligence of the master or crew. The court went upon the authority of former decisions in Ohio, and earlier English cases, and upon the principle that it was just and politic to hold the insurer discharged, when the more remote cause of the loss was negligence of the master or mariners, notwithstanding the immediate cause of the loss was a peril insured against. But I apprehend that the rule, that *causa proxima non remota spectatur*, has now become a controlling and settled rule, not only in the English, but in the general American insurance law. The Supreme Court of Massachusetts,

[1] It is perfectly settled now as has been explained, *ante*, 302, n. 1.

2. Of the Voyage in Relation to the Policy. — (1) *When the Policy attaches and terminates.* — The commencement and end of the risk depend upon the words of the policy. The insurer may take and modify what risk he pleases. The policy may be on a voyage *out*, or on a voyage *in*, or on the whole complex voyage *out and in;* or it may be *for part* of the route, or for a limited *time*, or from *port to port*, in an intermediate stage of the voyage. (*b*) If insurance on a ship be *from* such a place, the risk does not commence until the vessel breaks ground. If *at and from*, it then includes all the time the ship is in port after the policy is subscribed, if the ship be at home; and if abroad, it commences, according to a decision in Pennsylvania, only from the time she has been safely moored twenty-four hours after her arrival. (*c*) But if a ship be expected to arrive at a foreign port,

afterwards, in Delano *v.* The Bedford Ins. Company, 10 Mass. 354, recognized the general rule, that the immediate and direct, not the remote or contingent cause of the loss, was to be regarded in maintaining the right of the assured to recover; and in the Supreme Court of the United States, the doctrine has been repeatedly declared, in conformity with the English rule as laid down in the later cases. Patapsco Ins. Company *v.* Coulter, 3 Peters, 222; Columbia Ins. Company *v.* Lawrence, 10 id. 517; Waters *v.* M. L. Ins. Company, 11 id. 213; Williams *v.* Suffolk Ins. Co., 3 Sumner, 276, 277. *Vide supra*, 300, n., and *infra*, 374. Independent of all authority, the Ohio rule would appear to be the most just, and the other the most practicable, convenient, and certain. It is now adjudged in Ohio, in conformity to the decisions of the Supreme Court of the United States, that on a policy of insurance on a steamboat destroyed by the explosion of the boiler, arising from negligence of the master, and other agents of the insured, the insurer was liable. Perrin *v.* Protection Ins. Co., 11 Ohio, 147.

(*b*) A policy *on time* insures no specific voyage, but covers any voyage within the prescribed time, and the loss and damage the ship may sustain by the perils insured against within the limited period. Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378. A deviation does not apply to a policy on time, for it has no prescribed track. Union Ins. Co. *v.* Tysen, 3 Hill, 118.

(*c*) Garrigues *v.* Coxe, 1 Binney, 592. In Pittegrew *v.* Pringle, 3 B. & Ad. 514, the general principle was admitted to be, that if a ship *quits her moorings*, and removes, though only to a short distance, being perfectly ready to proceed on her voyage, it is a *sailing on the voyage*, though she be detained by some subsequent occurrence. It is otherwise if she be not in a condition for the voyage, when she quits her moorings and hoists sail. So, in Union Ins. Co. *v.* Tysen, 3 Hill, 118, the least locomotion, with readiness of equipment and clearance, satisfies a warranty to *sail*, though the vessel be afterwards driven back. It is otherwise in a warranty to *depart*, for that imports an effectual leaving of the place. In Treadwell *v.* Union Ins. Co., 6 Cowen, 270, the court said, that a policy *at and from North Carolina to New York*, did not attach, at least as to seaworthiness, until the vessel had passed the *boundary lines of the state*, though the voyage had commenced when the vessel sailed with the cargo from Perquimions' River, at or near the town of Hertford, in that state. This was giving too narrow a construction to the words *at and from;* for though it had been justly held,

and be insured *at and from that place*, or *from her arrival* there, other cases say the risk attaches from her *first *308 arrival. (*a*) The risk is usually made to continue until the vessel has been anchored for twenty-four hours in safety, and no longer; and the rule has been applied, though the loss proceeded from a cause, or death wound, existing before the ship's

that the warranty of seaworthiness has not the same extended application *in* as *out* of port, while the vessel is dismantled, and undergoing necessary repairs, (Smith *v.* Surridge, 4 Esp. 25,) yet, to every reasonable extent, such a policy covers the risk of the vessel while within port, or within the line of the state.

But a policy on a vessel, *at and from her port of lading*, means one indicated port or place only, and going to another within seven miles, after she had *begun* to take in cargo, is a deviation. Brown *v.* Tayleur, 4 Ad. & El. 241.

(*a*) Motteaux *v.* London Assurance Company, 1 Atk. 548; Condy's Marshall, 261; 2 Caines Cases, 172. In Parmenter *v.* Cousins, 2 Camp. 235, the ship was insured *at and from* St. Michael to England, and the ship arriving there in distress was blown out to sea and destroyed, after lying at anchor above twenty-four hours; and Lord Ellenborough ruled, that the insurer was not liable, because the vessel had not once been *at* the place in good safety, and the policy on the homeward voyage had not attached. It is surprising that the construction of the policy *at and from* should still remain to be settled. The words ought long since to have been defined and fixed with mathematical precision. Lord Hardwicke says, the policy attaches from the *first arrival*. Ch. J. Tilghman says, it attaches as soon as the vessel *has been safely moored twenty-four hours*. Lord Ellenborough requires the vessel to be at the place in good safety, whether the loss takes place within, or not until above twenty-four hours after she has arrived and anchored. [Haughton *v.* Empire M. Ins. Co., L. R. 1 Ex. 206.] Mr. Justice Porter, in Zacharie *v.* Orleans Ins. Company, 5 Martin, N. S. 637, required the same anchorage for twenty-four hours in *good safety*. In Williamson *v.* Innes, 8 Bing. 81, note, it was held, that on a homeward policy on freight *at and from* A, it attaches when the ship was in a condition to begin to take in her cargo. There are excepted cases in which the risk in a policy *at and from* will not attach until the time of sailing, as where the ship is not finished, or is undergoing repairs, or where there is a particular usage to that effect. The general rule is, that in policies *at and from* a given place, the risk attaches while the vessel is at the place. Palmer *v.* Marshall, 8 Bing. 79; and in Taylor *v.* Lowell, 3 Mass. 331, and which was confirmed in Merchants' Ins. Company *v.* Clapp, 11 Pick. 56, it was held, that in an insurance on cargo and freight *at and from* a foreign port, the policy attaches, though the vessel, while in port with the cargo on board, may need repairs to enable her to undertake the voyage. There is much nicety and difficulty in settling precisely when the policy attaches so as to charge the insurer, or when the voyage insured is, under the circumstances, to be considered as discontinued or abandoned. The case of Tasker *v.* Cunninghame, 1 Bligh, 87, which floated through several courts in Scotland, and was finally disposed of in the British House of Lords, is a sample of much subtlety in discrimination. In Hutton *v.* The American Ins. Co., 7 Hill, 321, Chancellor Walworth held, that if a vessel be driven by stress of weather, or by superior force, into a port of necessity, she is still *at sea* in reference to her port of departure, and destination, and of discharge.

arrival. (*b*)[1] But the risk continues during quarantine, though after the twenty-four hours. (*c*)

If the policy be to a country generally, as to Jamaica, the risk ends at the first port made for the purpose of unloading, after the vessel has been moored there in safety for twenty-four hours. (*d*) But in France, where insurances are generally to the French West India Islands, the risk on the ship continues until the cargo
* 309 is discharged at the last place of * destination. (*a*) So if a vessel be insured from the West Indies to a port of discharge in the United States, and she sailed from the West Indies for Savannah, and after inquiring at that port into the state of the markets, and procuring some repairs and supplies, and staying only a reasonable time for those purposes, and without discharging any part of her cargo, sails for Boston, it was held that she was protected by the policy on her passage to Boston, as Boston was the port of discharge within the policy. (*b*) If the policy contains a liberty to *touch, stay, and trade*, or to *touch and stay*, or if there be a known usage of trade, the risk will be prolonged according to that usage, or the terms of the policy, and interme diate voyages may be covered by the insurance. (*c*)

(*b*) Lockyer *v.* Offley, 1 T. R. 252; Meretony *v.* Dunlope, cited ib. 260. Howell *v.* The Protection Ins. Company, 7 Ohio, 284. In Peters *v.* Phœnix Ins. Company, 8 Serg. & R. 25, the court overruled this case of Meretony *v.* Dunlope, and held, that where a vessel received her death wound during the voyage, or suffered damage above fifty per cent, she might be abandoned, though she had been moored twenty-four hours in safety in the port of destination, and that it was of no moment at what time the loss was ascertained, if it occurred during the voyage.

(*c*) Waples *v.* Eames, Strange, 1243. (*d*) Leigh *v.* Mather, 1 Esp. 412.

(*a*) 2 Emerigon, 72. (*b*) Lapham *v.* Atlas Ins. Co., 24 Pick. 1.

(*c*) Salvador *v.* Hopkins, 3 Burr. 1707; Gregory *v.* Christie, cited in Condy's Marshall, 273; Farquharson *v.* Hunter, Park on Insurance, 67.

[1] According to Knight *v.* Faith, 15 Q. B. 649, the insurers of a ship for time are liable if she receives her death wound during the time, notwithstanding she is kept afloat without the extent of the damage being ascertained till the time has expired; and strong doubts are expressed whether the contrary doctrine was ever laid down by Lord Mansfield. Lockyer *v.* Offley is also explained on the ground that there the proximate cause of the loss was the seizure by the government, which occurred after the policy had expired. L. R. 5 C. P. 200. In Lidgett *v.* Secretan, L. R. 5 C. P. 190, the words "twenty-four hours in good safety," are said not to be satisfied by the vessel arriving and being moored in a sinking state or as a mere wreck, or by a mere temporary mooring. See Crosby *v.* N. Y. Mut. Ins. Co., 5 Bosw. 369. As to what is arrival, see Whitwell *v.* Harrison, 2 Exch. 127; Lindsay *v.* Janson, 4 Hurlst. & N. 699; Meigs *v.* Mut. Mar. Ins. Co., 2 Cush. 439; Bramhall *v.* Sun Mut. Ins. Co., 104 Mass. 510.

The risk upon the cargo is subject to much modification by the agreement of the parties, but it usually commences from the loading thereof aboard the ship. By the French law, the policy covers the goods while on the passage in lighters from the wharf to the ship, in the harbor where she is anchored, though not if the goods are to ascend or descend a river to the ship. (*d*) The risk continues while the cargo is actually on board the ship, and no longer; though if the cargo be temporarily landed from necessity, during the voyage, it is still protected by the policy. (*e*) If the policy, as is usual, covers the risk upon the goods *until safely landed*, then the risk continues during their passage to the shore, and until all the goods are landed. (*f*) Policies of insurance are construed according to the usages of trade; and, therefore, if it be the ordinary course of the trade for the owner to employ a common public lighter to remove the goods from the ship to the shore, the policy covers them; though if he was to employ his own lighter, or take the goods under his own charge, the insurer would be discharged. (*g*) * There are usually distinct * 310 policies on the outward and on the homeward voyage; and if the ship perishes in the harbor abroad, after having discharged part of her outward, and received part of her homeward cargo, there may arise questions as between the different policies on the cargo. It is stated in the French law, that the policy on the outward cargo does not end but by the total or almost total discharge of the outward cargo; and I should presume the risk on the homeward cargo attaches as fast as it is received on board, and that the case may happen in which there was aliment sufficient to sustain both policies concurrently in point of time. If the policy be on the voyage out and home, on cargo to such a value, or on a trading voyage, the policy will attach on every successive cargo taken on board in the course of the voyage, and

(*d*) Boulay-Paty, iii. 419; Code de Commerce, art. 328.

(*e*) Boulay-Paty, iii. 427. [See Pelly *v.* R. E. Ass. Co., *ante*, 304 (*e*), which, however, is distinguished in Martin *v.* Salem M. Ins. Co., 2 Mass. 420; Harrison *v.* Ellis, 7 El & Bl. 465, 480.]

(*f*) Tierney *v.* Etherington, cited in 1 Burr. 348; Gardiner *v.* Smith, 1 Johns. Cas. 141. [Parsons *v.* Mass. F. & M. Ins. Co., 6 Mass. 197; Fletcher *v.* St. Louis Mar. Ins. Co., 18 Mo. 193; Lane *v.* Nixon, L. R. 1 C. P. 412; *ante*, 288, n. 1.]

(*g*) Rucker *v.* London Assurance Company, cited in 2 Bos. & P. 432, *in notis*; Hurry *v.* Royal Exchange Assurance Company, ib. 430; Matthie *v.* Potts, 3 id. 23; Strong *v.* Natally, 4 id. 16; Coggeshall *v.* American Ins. Company, 3 Wend. 288. See *supra*, 260, as to usage.

the amount of property on board to the sum mentioned, remains covered, without regard to the fact, that part of the original cargo was landed at an intermediate port, and the cargo on board at the time of the loss was the proceeds of the outward cargo. The policy attaches on goods taken in exchange, or substituted, in the course of a trading voyage, as often as the goods may be changed. (*a*) But if the policy be on goods outward, and upon their *proceeds* home, and the same goods are brought back in the same vessel, without having been changed or landed at the port of destination, they are not covered by the policy on the homeward voyage. The policy had reference to a change of cargo
* 311 at the port of destination, and meant a substituted * cargo for the one carried out, and not the cargo itself. The homeward cargo, procured by money or credit advanced on the outward cargo, may, and has been deemed, by a reasonable construction, as the proceeds of the outward cargo; (*a*) but it would be too extravagant a departure from the terms of a written contract, to make the issues and profits of a cargo stand in this case for the original cargo. (*b*)

In insurances on freight, the risk usually begins from the time the goods are sent on board, and not before. (*c*) But if the ship, sailing under a contract, be lost on her way to the port of lading, or at the port of lading to which she had arrived in ballast, before any goods are put on board, or when part of the cargo is on board, and preparations are making to receive passengers, the insurer on freight and passage money is liable; because an inchoate right to freight, which is an insurable interest, had commenced, and there was an inception of the risk, which attaches on the whole freight for the voyage. (*d*) [1]

(*a*) Mansfield, Ch. J., in Grant *v.* Paxton, 1 Taunt. 474; Columbian Ins. Company *v.* Catlett, 12 Wheaton, 383; Coggeshall *v.* American Ins. Company, 8 Wend. 283.

(*a*) Haven *v.* Gray, 12 Mass. 71; Whitney *v.* The American Ins. Company, 3 Cowen, 210.

(*b*) Dow *v.* Hope Ins. Company, 1 Hall (N. Y.), 166.

(*c*) Tonge *v.* Watts, Strange, 1251.

(*d*) Thompson *v.* Taylor, 6 T. R. 478; Mackenzie *v.* Shedden, 2 Camp. 431; Horncastle *v.* Suart, 7 East, 400; Truscott *v.* Christie, 2 Brod. & B. 320; Riley *v.* Hartford Ins. Company, 2 Conn. 378; Hart *v.* Delaware Ins. Company, Condy's Marshall, 281, note.

[1] *Beginning of the Risk on Freight.* — It is supposed that a party who has made a contract by which he is to earn freight has an insurable interest at once, although the contract is not to be performed for six months, Potter *v.* Rankin, L. R. 5

If the policy be an open one, the recovery is limited to the actual amount of freight which would have been earned; and it is necessary to prove that goods were on board from which freight was to arise, or that there was some contract, under which the ship owner would have been entitled to freight, if the peril had not occurred. In a valued policy, if the insured has done something towards earning the freight, and there was nothing to prevent earning it but the occurrence * of the peril, his *312 interest in the whole freight has commenced and been put at risk; and the weight of authority is, that he is entitled to recover the amount of the valuation, though only part of the cargo be on board. (*a*) In the case of *De Longuemere* v. *Fire Insurance Company*, (*b*) the court did not question the decision in *Forbes* v. *Aspinall*, (*c*) where a valued policy on freight was

(*a*) Montgomery *v.* Eggington, 3 T. R. 362; Davidson *v.* Willasey, 1 Maule & S. 313; Livingston *v.* Columbian Ins. Company, 3 Johns. 49; De Longuemere *v.* Phœnix Ins. Company, 10 Johns. 127; Same *v.* Fire Ins. Company, ib. 201.

(*b*) 10 Johns. 201.

(*c*) 13 East, 323. [And see Tobin *v.* Harford, 34 L. J. N. S. C. P. 37; 17 C. B. N. S. 528; *ante*, 275; Denoon *v.* Home & Col. Ass. Co., L. R. 7 C. P. 341; Fay *v.* Alliance Ins. Co., 16 Gray, 455, 459.]

C. P. 341; L. R. 3 C. P. 562; Barber *v.* Fleming, L. R. 5 Q. B. 59, 67; Beckett *v.* West of England Mut. Ins. Co., 25 L. T. N. S. 739, 742, although the language of many judges has seemed to imply the contrary. Lucena *v.* Craufurd, 3 B. & P. 75, 95; Michael *v.* Gillespy, 2 C. B. N. S. 627, 647; Barber *v.* Fleming, L. R. 5 Q. B. 59, 71; Arnould, 4th ed. 59. The language of the text, therefore, here and *ante*, 270, in so far as it seems to put the commencement of the insurer's liability in the case supposed on the ground that the assured has just acquired an insurable interest, tends to mislead. The liability of the insurer does not necessarily follow from that, and the insured may have had such an interest long before. But an ordinary insurance upon freight is a contract of indemnity against certain perils during the adventure in which the freight is to be earned (L. R. 3 C. P. 567). The undertaking does not usually extend to risks to be incurred before that adventure begins and irrespective of the freight in question, although a previous loss of the vessel will of course make it impossible to earn the freight. See Arnould, 4th ed. 414; Sellar *v.* M'Vicar (4 Bos. & P.) 1 N. R. 28. Accordingly, when it is said that as soon as the ship owner has taken steps towards the performance of his contract and incurred expense upon the voyage towards earning the freight, his interest ceases to be contingent and becomes inchoate, and, if destroyed by one of the perils insured against, is lost, and must be paid for by the underwriters (L. R. 5 Q. B. 71), it is supposed that no more is meant than that the adventure contemplated by the policy has begun. The doctrine of the text is illustrated, and the cases cited are carried farther, by Barber *v.* Fleming, L. R. 5 Q. B. 59; Tobey *v.* United F. & M. Ins. Co., L. R. 5 C. P. 155.

opened, and a recovery allowed only as to the portion of the cargo on board when the peril occurred; and they rather concurred in it, on the ground that the residue of the cargo, which was to be the aliment for the freight, was not in that case ready to be shipped, and the vessel was, in fact, a mere seeking ship, and for aught that appeared, the residue of the cargo might never have been obtained.

(2) *Of Deviation.* — The policy relates only to the voyage described in it, and to the route proper for the voyage insured; and if the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged, for it is a variation of the risk, and the substitution of a new voyage. The meaning of the contract of insurance for the voyage is, that the voyage shall be performed with all safe, convenient, and practicable expedition, and in the regular and customary track. In the case of an unjustifiable deviation, the insurer is discharged; not indeed from loss occurring previous to the deviation, but from all subsequent losses. These are elementary principles in the law of insurance, and pervade the institutions of every country on the subject. (*d*)

* 313 * The shortness of the time, or of the distance of a deviation, makes no difference as to its effect on the contract; if voluntary and without necessity, it is the substitution of another risk, and determines the contract. (*a*) So strictly has this doctrine been maintained, that where a vessel, having liberty in sailing down the Firth of Forth to touch at Leith, touched at another port in its stead, equally in her way, it was held to be a fatal deviation, though neither risk nor premium would have been increased if it had been permitted. (*b*)

The great cause of litigation in the courts, on this subject of deviation, is as to the facts and circumstances which will be sufficient to justify it on the ground of usage or necessity, or of the true construction of the policy; and these are mostly questions of law for the determination of the court.

Stopping, or going out of the way to relieve a vessel in distress,

(*d*) Roccus, de Ass. n. 20, 52; Emerigon, ii. 28, 59, 60; 9 Mass. 447; Condy's Marshall, 184, 185; 1 Phillips on Insurance, 181, 1st ed.

(*a*) Fox *v.* Black, and Townson *v.* Guyon, cited in Beawes, i. 806; 9 Mass. 449; Martin *v.* Delaware Ins. Company, 2 Wash. 254; 1 Doug. 291; 7 Cranch, 30. [Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26.]

(*b*) Elliot *v.* Wilson, 7 Bro. P. C. 459.

or to save lives or goods, may, perhaps, under certain circumstances, not be considered as a deviation which discharges the insurer. Mr. Justice Lawrence intimates, in one case, (*c*) that it might be justifiable; but Judge Peters observed, that such deviations were justified to the heart on principles of humanity, but not to the law. If, however, the object of the deviation was to save life, Judge Washington afterwards observed, that he would not be the first judge to exclude such a case from the exception to the general rule, though he could not extend the exception to the case of saving property. (*d*) The Chief Justice observed, in the case of *Mason* * v. *Ship Blaireau*, (*a*) that the Supreme * 314 Court of the United States had great doubts whether stopping to relieve a vessel in distress was an unjustifiable deviation in regard to the policy.[1]

(*c*) 6 East, 54.

(*d*) 1 Peters, Adm. 40, 64; 2 id. 378; Bond *v.* The Brig Cora, 2 Wash. 80. This distinction was sustained by Mr. Justice Story, in the case of Foster *v.* Gardner, Am. Jurist, No. 21, and in the case of the Henry Ewbank, 1 Sumner, 400; and he agreed that any stoppage on the high seas, except for the purpose of saving life, would be a deviation, and discharge the underwriter. The Schooner Boston and Cargo, 1 Sumner, 328, s. p. But in Williams *v.* Box of Bullion, U. S. District Court in Mass., 1843, it was held not to be an injurious delay to deviate so as to speak at sea to a vessel with a signal of distress, or to delay three hours to take in shipwrecked mariners, 6 Law Reporter, 363; [1 Sprague, 57.]

(*a*) 2 Cranch, 257, note.

[1] *Deviation.* — It is settled that a deviation to save life will not avoid the policy; Crocker *v.* Jackson, 1 Sprague, 141; Dabney *v.* New England M. M. Ins. Co., 14 Allen, 300, 307, stated 234, n. 1, *a*; George Nicholaus, Newb. 449, 452; Emblem, Daveis, 61, 64; Arnould, 4th ed. 471; and the principle applies to the case of a passenger on board the insured vessel as well as to that of men from other vessels. When such a justifiable deviation has taken place, it will not be rendered unjustifiable by taking cargo on board at the port visited for medical assistance, unless the delay or the risk is increased. Perkins *v.* Augusta Ins. & B. Co., 10 Gray, 312. See Brown *v.* Overton, 1 Sprague, 462. In The True Blue, L. R. 1 P. C. 250, 255 (1966), and The Thetis, L. R. 2 Ad. & Ec. 365, 368 (1869), it was said to be undecided in the English law whether a deviation for the purpose of rendering salvage service to property would avoid a policy of insurance; and doubts were expressed whether that could be laid down as a universal rule, or whether the distinction between deviations for saving life and deviations for saving property is sound. Walsh *v.* Homer, 10 Mo. 6; Turner *v.* Protection Ins. Co., 25 Me. 515, 523; but the distinction is approved in Crocker *v.* Jackson, *sup.*

What will constitute a deviation must of course depend very much on the words of the particular contract, taken in connection with usages of trade, which the underwriters may be presumed to know, so far as such usages are admissible consistently with the written instrument. *Ante*, 260, n. 1; Parsons *v.* Manuf. Ins

The courts are exceedingly strict in requiring a prompt and steady adherence to the performance of the precise voyage insured; and, considering the particular state of facts upon which calculations of the value of risks are made, and the uncertainty and danger of abuse that relaxations of the doctrine would introduce, the severity of the rule is founded in sound policy. (*b*)

If there be liberty granted by the policy to *touch* or to *touch and stay* at an intermediate port on the passage, the better opinion now is, that the insured may trade there, when consistent with the object and the furtherance of the adventure, by breaking bulk, or by discharging and taking in cargo, provided it produces no unnecessary delay, nor enhances nor varies the risk. (*c*) And if there be several ports of discharge mentioned in the policy, and the insured goes to more than one, he must go to them in the order in which they are named in the policy; or if they be not

(*b*) If a steamboat be lost in an attempt to take a vessel in tow, and there be no clause in the policy allowing it, and no acquiescence of the insurers in such a usage, they are not liable. Hermann *v.* Western Marine and Fire Ins. Company, 13 La. 516. Taking a vessel or boat in tow on the Mississippi, held to be a deviation and a discharge of the insurers on the steamboat. Stewart *v.* Tennessee M. & F. Ins. Co., 1 Humph. 242; Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340.

(*c*) Raine *v.* Bell, 9 East, 195; Cormack *v.* Gladstone, 11 id. 347; Laroche *v.* Oswin, 12 id. 131; Urquhart *v.* Barnard, 1 Taunt. 450; Kane *v.* Columbian Ins. Co., 2 Johns. 264; Hughes *v.* Union Ins. Company, 3 Wheaton, 159; Thorndike *v.* Bordman, 4 Pick. 471; Chase *v.* Eagle Insurance Company, 5 id. 51. This liberal construction is also given to the liberty to *touch and make port freely*, contained in the French policies; and if new goods be taken in at such stopping port, the policy on cargo attaches on them as a substitute for the others. If the policy be on cargo to such an amount, and the ship discharges part of her cargo at the stopping port, but reserves sufficient on board as an aliment for the policy, and pursues the voyage, the policy attaches on the *residuum* of the cargo. Emerigon, ii. c. 13, sec. 8; Boulay-Paty, Cours de Droit Com. iv. 140–147.

Co., 16 Gray, 463; Seccomb *v.* Provincial Ins. Co., 10 Allen, 305; Hennessy *v.* N. Y. M. M. Ins. Co., 1 Oldright (Nova Sc.), 259; Mallory *v.* Comm. Ins. Co., 9 Bosw. 101; De Peyster *v.* Sun Mut. Ins. Co., 19 N. Y. 272; Bulkley *v.* Protection Ins. Co., 2 Paine, 82; Harrower *v.* Hutchinson, L. R. 5 Q. B. 584, L. R. 4 Q. B. 523. As stated in the text, the reason why a deviation avoids the policy is that the risk is thereby changed; Merchants' Ins. Co. *v.* Algeo, 82 Penn. St. 330; and the same principle applies to the unnecessary transfer of a cargo insured by a particular vessel from that vessel to another. Oliverson *v.* Brightman, Bold *v.* Rotheram, 8 Q. B. 781, 797; Paddock *v.* Commercial Ins. Co., 2 Allen, 98, 100; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 322; Salisbury *v.* Marine Ins. Co., 28 Mo. 553; *ante*, 257. As to preliminary trips before sailing on the voyage insured, *cf.* Greenleaf *v.* St. Louis Ins. Co., 37 Mo. 25, with Fernandez *v.* Gt. W. Ins. Co., 48 N. Y. 571.

specifically named, he must generally go to them in the geographical order in which they *occur, though there *315 may be cases in which he need not follow the geographical order. (a) This liberty to touch, stay, and trade is always construed to be subordinate to the voyage insured, and to the usual course of that voyage, and for purposes connected with it. It does not extend to ports and places opposite to or wide of the usual course, or wholly unconnected with the voyage insured. This principle is as old as the law of insurance, and has accompanied it in every stage of its progress. (b)

The law requires the voyage, so far as concerns the underwriter, to be performed with reasonable diligence; and every unnecessary delay, in or out of port, or in commencing the voyage insured against, will amount to a deviation. (c) Deviation is always understood to be an afterthought, arising subsequent to the commencement of the voyage, and produced by the perception of some new interest, or the influence of some strong temptation. A premeditated intention to deviate amounts to nothing, unless it be actually carried into execution; and this rule is adopted in England and in the courts of the United States. (d) If the ship quits from necessity the course described in the policy, she must pursue such new voyage of necessity in the direct course and in the shortest time, or it will amount to a deviation. This *was the doctrine as declared by Lord Mansfield in the *316 case of *Lavabre* v. *Wilson;* (a) and that case is reported at large in Emerigon, (b) with a liberal and exalted eulogy (pro-

(a) Beatson v. Haworth, 6 T. R. 531; Marsden v. Reid, 3 East, 572; Clason v. Simmonds, cited in 6 T. R. 533; Kane v. Col. Ins. Company, 2 Johns. 264; Metcalf v. Parry, 4 Camp. 128; Houston v. New England Ins. Company, 5 Pick. 89.

(b) Straccha, Gloss. 14; Casaregis, Disc. 67, n. 23, and Disc. 134; Valin, ii. 77, 78; Emerigon, ii. c. 13, secs. 6 and 8, *passim;* Clason v. Simmonds, 6 T. R 533, note; Gairdner v. Senhouse, 3 Taunt. 16; Langhorn v. Allnutt, 4 id. 511; Hammond v. Reid, 4 B. & Ald. 72; Solly v. Whitmore, 5 id. 45; Bottomley v. Bovill, 5 B. & C. 210; Rankin v. Reave, Park on Insurance, 7th ed. 445; Rucker v. Allnutt, 15 East, 278.

(c) Jarratt v. Ward, 1 Camp. 268; Smith v. Surridge, 4 Esp. 25; Oliver v. Maryland Ins. Company, 7 Cranch, 487; 9 Mass. 447; Earl v. Shaw, 1 Johns. Cas. 317; Mount v. Larkins, 8 Bing. 108; Fremen v. Taylor, ib. 124; Grant v. King, 4 Esp. 175; Seamans v. Loring, 1 Mason, 127. [Augusta Ins. & Bank. Co. of Georgia v. Abbott, 12 Md. 348.]

(d) Foster v. Wilmer, Strange, 1249; Lord Mansfield, in Doug. 18, 365; 3 Cranch, 357; 7 Mass. 352.

(a) Doug. 284. (b) Traité des Ass. ii. 62.

nounced in the midst of war between the two countries) on the wisdom and probity of the English administration of justice: *tanta vis probitatis est, ut eam in hoste etiam diligamus.* All permissions given by the policy out of the ordinary course and incidents of the voyage are to be construed strictly. If the vessel have liberty to carry letters of marque, she may deviate for the purpose of defence, but not for the purpose of capture. (*c*) In *Haven* v. *Holland*, (*d*) an enlarged discretion, and one carried to the very verge of the law, was confided to the captain as to the best mode of defence, and it was held, that the letter of marque might chase and capture hostile vessels in sight, in the course of the voyage, without its being a deviation; and if he captures the vessel, the master may make the victory effectual, and man out the prize, and the delay for those purposes is not a deviation. If liberty be given her to *chase and capture*, that will not enable her to convoy her prize into port, (*e*) though she may do it if she be not thereby led out of the way; (*f*) and to cruise for six weeks, means six consecutive weeks, and not at different times. (*g*)

The object of the deviation must be considered, in order to determine its effect upon the policy. It must be commensurate only with the necessity that produces it, and that necessity will justify a deviation on account of a peril not insured against. (*h*)

* 317 And when the deviation is governed by that * necessity, as a deviation from stress of weather, or to procure necessary repairs, or to join convoy, or to avoid capture or detention, it works no injury to the policy. (*a*)

There has been considerable discussion in the books relative to the identity of the voyage described in the policy, and the voyage actually begun. If the vessel sails on a different voyage, the policy never attaches; but if she be lost before she comes to the

(*c*) Parr *v.* Anderson, 6 East, 202. (*d*) 2 Mason, 280.

(*e*) Lawrence *v.* Sydebotham, 6 East, 45.

(*f*) Ward *v.* Wood, 13 Mass. 539.

(*g*) Syers *v.* Bridge, Doug. 527.

(*h*) Scott *v.* Thompson, 4 Bos. & P. 181; Robinson *v.* Marine Ins. Company, 2 Johns. 89.

(*a*) [Silloway *v.* Neptune Ins. Co., 12 Gray, 73, 82;] Condy's Marshall, 202, b to 213; Phillips on Insurance, i. 2d ed. 480–576. The latter work has collected and digested all the English and American cases on this very diffusive head of deviation, and to which I must refer for a more particular knowledge of the distinctions and exceptions with which the books abound

dividing point, between the course of the voyage in the policy and the course of the new voyage, the change of the voyage often becomes a contested question as to the intention of the party. If the ship really sailed on another voyage, the policy never attached, though the vessel be lost before she came to the dividing point; but if the *termini* of the voyage described in the policy be the same as those upon which the vessel sailed, it is the same voyage, and a mere intention, afterwards formed, to deviate, is of no consequence, if the vessel be lost before she came to the dividing point.[1] The distinction between an alteration of the voyage, and a mere deviation in the course of it, is very reasonable and solid. The one is adopted previous to the commencement of the risk, and shows that the party had receded from his agreement, but the other takes place after the risk has commenced, and relates only to the execution of the original plan. (*b*) It has, however, been held, in one case, after much discussion, (*c*) and suggested in another, in opposition to the established *rule, that the identity of the voyage does not always *318 consist in the identity of the *termini;* (*a*) and that though the *terminus ad quem* be dropped, and another substituted in the course of the voyage, it may be still the same voyage; and if the vessel be lost before she comes to the dividing point between the course to the original, and to the substituted port of destination, it is an intention to deviate, and nothing more. (*b*) [1]

(*b*) Wooldridge *v.* Boydell, Doug. 16; Kewley *v.* Ryan, 2 H. Bl. 343; Middlewood *v.* Blakes, 7 T. R. 162; Silva *v.* Low, 1 Johns. Cas. 184; Henshaw *v.* Marine Ins. Company, 2 Caines, 274; Marine Ins. Company *v.* Tucker, 8 Cranch, 357; Boulay-Paty, iv. 56, 57.

(*c*) Lawrence *v.* Ocean Ins. Company, 11 Johns. 241; s. c. 14 id. 46.

(*a*) Johnson, J., in 3 Cranch, 385.

(*b*) The foreign jurists distinguish between the *voyage insured* and the *voyage of the ship.* Independenter se habet assecuratio a viaggio navis. If a ship sails on a voyage from Saint Malo to Toulon, and is insured from Saint Malo to Cadiz, the latter is the voyage insured, but the former is the voyage of the ship, and the voyage

[1] [Winter *v.* Delaware Mut. Safety Ins. Co., 30 Penn. St. 334.]

[1] It was held in a case which abstained from laying down any broader proposition, that when the vessel left an intermediate port in the voyage assured for a different port of discharge from the one mentioned in the policy, and was lost, the insurers were discharged, although she was pursuing a course which she might have taken if she had continued upon the voyage insured, and although her destination was not changed until after the commencement of the voyage. Merrill *v.* Boylston F. & M. Ins. Co., 8 Allen, 247.

3. Of the Rights and Duties of the Insured in Cases of Loss. — (1) *Of Abandonment.* — A total loss within the meaning of the policy may arise either by the total destruction of the thing insured, or, if it specifically remains, by such damage to it as renders it of little or no value. A loss is said to be total if the voyage be entirely lost or defeated, or not worth pursuing, and the projected adventure frustrated. It is a constructive total loss if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner. In such cases the insured may abandon all his interest in the subject insured, and all his hopes of recovery, to the insurer, and call upon him to pay as for a total loss. The object of the provision is to enable the insured to be promptly reinstated in his capital, and be thereby enabled to engage in some new mercantile adventure. Long interruption to a voyage, and uncertain hopes of recovery, would often be ruinous to the business of the merchant; and, therefore, if the object of the voyage be lost, or not worth pursuing, by reason of the peril insured against, or if the cargo be so damaged as *319 to be of little or no value, or * where the salvage is very high, and further expense be necessary, and the insurer will not engage to bear it, or if what is saved be of less value than the freight, or where the damage exceeds one half the value of the goods insured, or where the property is captured, or arrested, or even detained by an indefinite embargo; in these and other cases of a like nature, the insured may disentangle himself, and abandon the subject to the underwriter, and call upon him to pay a total loss. In such cases, the insurer stands in the place of the insured, and takes the subject to himself with all the chances of recovery and indemnity. A valid abandonment has a retrospective effect, and does of itself, and without any deed of cession, and prior to the actual payment of the loss, transfer the right of property to the insurer to the extent of the insurance; and if after an abandonment, duly made and accepted, the ship should be recovered, and proceed and make a prosperous voyage, the insurer, as owner, would reap the profits. (*a*) [1]

insured is known by its two extremes, or the *terminus a quo* and the *terminus ad quem*. Casaregis, Disc. 67, n. 5, 31; Boulay-Paty, iii. 416, 417.

(*a*) Guidon, c. 7, sec. 1; Goss *v.* Withers, 2 Burr. 683; Hamilton *v.* Mendes, ib. 1198; Milles *v.* Fletcher, Doug. 231; Manning *v.* Newnham, Park on Insurance, 221;

[1] See 331, n. 1.

These considerations have introduced the right of abandonment into the insurance law of every country, and yet the text writers have generally condemned the privilege as inconsistent with just notions concerning the nature of the contract of insurance, which is a contract of indemnity. But it has now become an ingredient so interwoven with the whole system of insurance, that it cannot be abolished, though the late English cases, says Mr. Benecke, show a stronger inclination in the courts to restrict than to enlarge the right. The laws of Hamburg distinguished themselves from all others, *by restricting the right of abandonment *320 to the only case of a missing ship. (*a*)

As soon as the insured is informed of the loss, he ought (after being allowed a reasonable time to inspect the cargo, and for no other purpose) to determine promptly whether he will or will not abandon, and he cannot lie by and speculate on events. If he elects to abandon, he must do it in a reasonable time, and give notice promptly to the insurer of his determination; otherwise he will be deemed to have waived his right to abandon, and will be entitled to recover only for a partial loss, unless the loss be, in fact, absolutely total. (*b*) If the thing insured exists *in specie*, and the insured wishes to go for a total loss, an abandonment is

Cazalet *v.* St. Barbe, 1 T. R. 187; Queen *v.* Union Ins. Company, 2 Wash. 331. The abandonment carries with it to the insurer, not only the title to the subject insured, but its proceeds, if recovered, and any compensation awarded by way of indemnity. The benefit of the *spes recuperandi* passes, and all that may be collateral or incidental to the ownership. Blaauwpot *v.* Da Costa, 1 Eden, 130; Randal *v.* Cockran, 1 Vesey, Sen., 98; Comegys *v.* Vasse, 1 Peters, 193; Atlantic Ins. Company *v.* Storrow, 1 Edw. Ch. 621; Rogers *v.* Hosack, 18 Wend. 319; Matthews, J., in Mellon *v.* Bucks, 5 Martin, N. S. 371. Mr. Benecke justly observes, that the principles in some of the above cases, before Lord Mansfield, were too generally expressed to serve as a basis of the law of abandonment, and that it was from actual decisions, and not from such general observations, that the law must be collected. Benecke on Indemnity, 348.

(*a*) Ord. of Hamburg, 11. The insurance companies of Philadelphia, in 1807, agreed that their policies should provide against abandonment in cases of capture or detention, until sixty days after advice received of the act, unless the property be sooner condemned; and in cases of embargo, until after four calendar months; and against any abandonment on account of seizure or detention in port under French decrees, or on account of the port of detention being blockaded.

(*b*) Mitchell *v.* Edie, 1 T. R. 608. The reasonable time for giving notices of abandonment depends upon circumstances, and five days' delay, after intelligence received, has been held too late. Hunt *v.* Royal Exchange Assurance, 5 Maule & S. 47; [Potter *v.* Rankin, L. R. 5 C. P. 341, 363.]

indispensable. (*c*) The same principle which requires the insured who abandons, to do it in a reasonable time, also requires the insurer who rejects an abandonment, to act promptly. (*d*) The object of the abandonment is to turn that into a total loss which otherwise would not be one; and it is unnecessary, and would be idle, to abandon in the case of an entire destruction of
*321 the subject. (*e*) It is only necessary when the loss is * constructively total within the policy, and not an actual total loss. The right of abandonment does not depend upon the certainty, but upon the high probability of a total loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense. (*a*) Though the subject may physically exist, yet there

(*c*) Mitchell *v.* Edie, 1 T. R. 608; Martin *v.* Crokatt, 14 East, 465; Hunt *v.* Royal Exchange Assurance, 5 Maule & S. 47; Smith *v.* Manufac. Ins. Co., 7 Metc. 448. [But see 331, n. 1, (*b*).]

(*d*) Hudson *v.* Harrison, 3 Brod. & Bing. 97; [Copelin *v.* Ins. Co., 9 Wall. 461; 46 Mo. 211.] The insurer may take possession of a vessel stranded and abandoned to him, and repair her, provided he does it diligently, or in a reasonable time; and if he has not accepted the abandonment, and the repairs amount to less than half the value, he may restore the vessel. Peele *v.* Suffolk Ins. Co., 7 Pick. 254. [But see 331, n. 1, (*b*).]

(*e*) Mullett *v.* Shedden, 13 East, 304; Green *v.* Royal Exchange Assurance Company, 6 Taunt. 68; Cambridge *v.* Anderton, 2 B. & C. 691; Casaregis, Disc. 3, n. 23; Disc. 70, n. 5, 33; Roux *v.* Salvador, 1 Bing. N. C. 526; 1 Scott, 491; 3 Bing. N. C. 266. In this last case, in the Exchequer Chamber, Lord Abinger gave a learned historical review of the law of abandonment, and the decision of the court was, that if the goods insured are damaged by sea perils during the course of the voyage, and at an intermediate port of necessity became perishable and could not be reshipped, the assured might recover as for a total loss without abandonment, even though the perishable articles (hides) did exist in specie, for they could not be reshipped with safety, and they were deemed totally lost as a shipment for the voyage. An abandonment in a policy on freight is held to be unnecessary when the ship is hopelessly stranded, for then there is nothing to abandon. Idle *v.* Royal Exchange Assurance Company, 8 Taunt. 755; Mount *v.* Harrison, 4 Bing. 388. See, also, Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220, the combination of circumstances stated which will authorize an abandonment.

(*a*) Fontaine *v.* Phœnix Ins. Company, 11 Johns. 293; Robertson *v.* Caruthers, 2 Stark. 571; Bradlie *v.* The Maryland Ins. Co., 12 Peters, 378, 398; [32 Ala. 108.] Though the vessel be disabled on the voyage, and it becomes reasonable, under the circumstances of the case, that the master should procure another vessel to send on the cargo, and though he may not be able to do it at the port of distress, or at a contiguous port, yet it has been held not to be a proper case for abandonment of the cargo, inas-

may be a technical total loss to the owner if the things be taken from his free use and possession. Such are the common cases of total losses by embargoes, by captures, and by restraints, and detainments of princes. The right to abandon exists when the ship, for all the useful purposes of the voyage, is gone from the control of the owner; as in the cases of submersion, or shipwreck, or capture, and it is uncertain, or the time unreasonably distant, when it will be restored in a state to resume the voyage; or when the risk and expense of restoring the vessel are disproportioned to the expected benefit and objects of the voyage. All these general doctrines concerning abandonment have been entirely incorporated into our American law, and they exist to all essential purposes in the French jurisprudence. (*b*)

*The case of *Peele* v. *Merchants' Insurance Company* (*a*) *322 contains a very elaborate review of the whole law of abandonment, and the conclusion is, that the right of abandonment is to be judged of by all the circumstances of each particular case existing at the time of abandonment, and that there was no general rule that the injury to the ship by the perils insured against, must in all cases exceed one half her value, to justify an abandonment. The law, as declared in the great cases before Lord Mansfield, of *Goss* v. *Withers*, *Hamilton* v. *Mendes*, and *Milles* v. *Fletcher*, has been acted upon for half a century, and their doctrine has never been shaken; and the case of *M'Iver* v. *Hender-*

much as the cargo in the given case was light, and might without great expense have been transported to another port for shipment. Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131. Each case will be governed on a reasonable view of its special circumstances. If the master must send the cargo, not to a contiguous port, but to distant places for reshipment, and the transportation be difficult and hazardous, the master is not bound to attempt to reship the cargo. Treadwell *v.* Union Ins. Company, 6 Cowen, 270. *Vide supra*, 218.

(*b*) Emerigon, ii. 194–197; Pothier, des Ass. n. 131, 138; Gardiner *v.* Smith, 1 Johns. Cas. 141; Abbott *v.* Broome, 1 Caines, 292; U. Ins. Company *v.* Robinson, 2 Caines, 280; Lee *v.* Boardman, 8 Mass. 238; Marine Ins. Company *v.* Tucker, 3 Cranch, 357 · Chesapeake Ins. Company *v.* Stark, 6 id. 268; Peele *v.* Merchants' Ins. Company, 3 Mason, 27. Submersion is not *per se* a total loss of a vessel. It will depend upon a circumstance whether it be or be not total. Sewall *v.* United States Ins. Company, 11 Pick. 90. When the insurance is on the *ship*, it is a total loss, if at the time of abandonment the ship was absolutely lost to the owner, as by capture or detention; or she was in such a state that the expense of making her available would exceed half her value.

(*a*) 3 Mason, 27. See, also, Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378, S. P.

son (*b*) left the law on the subject of abandonment exactly where those cases had placed it. (*c*)

The French Ordinance of the Marine confined abandonment to the five cases of capture, shipwreck, stranding, arrest of princes, and an entire loss of the subject insured. (*d*) But the new commercial code has modified and enlarged the privilege of abandonment. It applies to the cases of capture, shipwreck, stranding with partial wreck, disability of the vessel occasioned by perils of the sea, arrest of a foreign power, or arrest on the part of the government of the insured after the commencement of the voyage, and a loss or damage of the property insured, if amounting to at least three fourths of its value. (*e*) The English and American law of abandonment applies not only to those cases, but to every case where the perils covered by the policy have occasioned a loss, either of the subject or of the voyage. It is understood,

* 323 that mere * stranding of the ship is not, of itself, to be deemed a total loss; yet it may be attended with circumstances that will justify an abandonment, even though the hull of the ship should not be materially damaged; as if she be stranded where there are no means of adequate relief, and the expense of the removal would exceed the value of the ship. (*a*) The foreign writers distinguish innavigability from shipwreck, and there has been some difficulty as to the true definition of shipwreck. (*b*) But the right to abandon does not turn upon

(*b*) 4 Maule & S. 576.

(*c*) In the case of The American Ins. Company *v.* Ogden, 20 Wend. 287, it was held, that if the ground for abandonment, in the case either of a technical or actual total loss, was the result of *culpable negligence*, or want of *due diligence*, on the part of the owner or his agent, the insurer was not liable. And if there has been a want of *ordinary prudence* in the owner in furnishing funds or credit to the master, to enable him to make the necessary repairs, and the master was thereby deprived of the means to obtain funds or credit, an abandonment cannot be made as for a constructive or technical total loss.

(*d*) Ord. de la Mar. art. 46.

(*e*) Code de Commerce, art. 369.

(*a*) Bosley *v.* Chesapeake Ins. Company, 8 Gill & J. 450.

(*b*) There are two kinds of shipwreck: (1.) When the vessel sinks, or is dashed to pieces. (2.) When she is stranded, which is, when she grounds, and fills with water. The latter may terminate in shipwreck, or may not, and it depends on circumstances whether it will or will not justify an abandonment. The shades of difference between *shipwreck* of the two kinds, and *wreck* absolute and partial, and *stranding* with and without wreck, are minutely stated by the French civilians. See Boulay-Paty, iv. 12–14, 280, 281, [Cours de Droit Com. tit. 10, sec. 16, and tit. 11, sec. 1,] and Ord. de la Mar. h. t., art. 46, which distinguishes between shipwreck, wreck, and stranding. In Bishop *v.* Pent-

*any definition, and the cases on the subject have been *324
governed by their own peculiar circumstances, connected with the property at the time, and with reference to the general principles and analogies of law. (*a*)

The English rule is, that an abandonment, though rightfully made, is not absolute, but it is liable to be controlled by subsequent events; and that if the loss has ceased to be total before action, the abandonment becomes inoperative. The rule was suggested, but left undecided, in *Hamilton* v. *Mendes*, but it was explicitly declared and settled in subsequent cases. (*b*) The English rule does not rest, however, without some distrust as to its solidity. It was much doubted in the House of Lords, by Lord Eldon, in *Smith* v. *Robertson*; (*c*) every question as to the principle was expressly waived, and it has since been very much shaken. (*d*) But in the United States a different rule prevails;

land, 7 B. & C. 219, 1 Mann. & Ry. 49, *stranding* was held to be when a ship, by accident, is on the ground or strand, and is injured thereby. A stranding in the sense of a policy is, when a ship takes ground, not in the ordinary course of navigation, but by accident, or the force of wind, or the sea, and remains stationary for some time. The vessel must ground from an accident happening out of the ordinary and usual course of navigation. She must be on the strand under extraordinary circumstances, or from extraneous causes. Wells *v.* Hopwood, 8 B. & Ad. 20; Kingsford *v.* Marshall, 8 Bing. 458; Lake *v.* Columb. Ins. Co., 13 Ohio, 48. But the cases make a stranding to depend so much upon special circumstances, and they make so many distinctions, that it is difficult to give any precise definition or rule uniformly applicable to the subject. M'Dougle *v.* Royal Exchange Assurance, 4 Camp. 288; 4 Maule & S. 503; Rayner *v.* Godmond, 5 B. & Ald. 225; Burnett *v.* Kensington, 1 Esp. 417; Carruthers *v.* Sydebotham, 4 Maule & S. 77; Barrow *v.* Bell, 4 B. & C. 736, are cases to show the perplexities and nice refinements on this point. Innavigability, in the sense of insurance law, is when the vessel, by a peril of the sea, ceases to be navigable by irremediable misfortune: *in eum statum qui providentia humana reparari non potest*. The ship is relatively innavigable when it will require almost as much time and expense to repair her, as to build a new one. This is the doctrine of Targa and Emerigon, and of the judicial decisions which the latter reports. Targa, c. 54, p. 239, and c. 60, p. 256; Emerigon, i. 591–598. Innavigability, when duly estab lished, constitutes a total loss, and a right to abandon. When it is established by an official survey and report, (*procès verbaux*,) it creates a *presumptio juris* of innavigability, by a peril of the sea, against the insurer, and which he may contradict; but without such a survey, which is required by the French ordinances, the presumption is *juris et de jure* against the insured, that the innavigability proceeded from inherent defects. Emerigon, i. 577.

(*a*) Wood *v.* L. & K. Ins. Company, 6 Mass. 479; Peele *v.* Merchants' Ins. Company, 3 Mason, 42, 43, 44.

(*b*) Bainbridge *v.* Neilson, 10 East, 329; Patterson *v.* Ritchie, 4 Maule & S. 394.

(*c*) 2 Dow, 474.

(*d*) Hollsworth *v* Wise, 7 B. & C. 794. It was there held, that if a ship has been

and it is well settled in American jurisprudence, that an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be devested by subsequent events. (*e*) The right to abandon is to be tested by the actual facts at the time of * 325 the abandonment, * and not upon the state of the information received. (*a*) The opinion of Lord Mansfield, in *Hamilton* v. *Mendes*, was very destitute of precision on this point, and the American rule is founded on principles of equity and public convenience. The opposing doctrine, said a great authority, (*b*) appeared to trench very much upon the true principles of abandonment, and not to be supported by very exact or cogent analogies. The Court of Session in Scotland even went so far as to consider the right to abandon to depend merely upon the information at the time, and that if the right be exercised *bona fide* upon the state of facts received, the transaction was closed and definitive, and was not to be opened or disturbed by any subsequent event, or any event of which the intelligence subsequently arrived. (*c*)

once necessarily abandoned, the owners may recover for a total loss, though she is afterwards recovered and brought into port. This was coming to the true and sound doctrine on the subject. See, also, Naylor *v.* Taylor, 9 id. 718. [But see 331, n. 1.]

(*e*) Bradlie *v.* Maryland Ins. Company, 12 Peters, 378. In Peele *v.* Suff. Ins. Company, 7 Pick. 254, it was held, that if a vessel be stranded and abandoned to the underwriters, and they take and repair her at a cost of less than fifty per cent of her value, they may in a reasonable time return her to the owners without their consent, and exonerate themselves. [*Ante*, 320, n. (*d*).] A contrary doctrine was held in Peele *v.* Merchants' Ins. Company, 2 Mason, *supra;* and the French law is clearly otherwise in a case proper for abandonment, and abandonment duly made. Emerigon, Traité des Ass. ii. 195; Pothier, Traité d'Ass. n. 138; Pardessus, Cours de Droit Com. iii. n. 854.

(*a*) Church *v.* Bedient, 1 Caines Cas. 21; Depau *v.* Ocean Ins. Company, 5 Cowen, 63; Dutilh *v.* Gatliff, 4 Dallas, 446; Marshall *v.* Delaware Ins. Company, 2 Wash. 54; 4 Cranch, 202; Rhinelander *v.* Ins. Company of Pennsylvania, 4 Cranch, 29; Lee *v.* Boardman, 8 Mass. 238; Wood *v.* L. & K. Ins. Company, 6 id. 479; Adams *v.* Delaware Ins. Company, 3 Binney, 287; Peele *v.* Merchants' Ins. Company, 3 Mason, 27; Maryland and Ph. Ins. Company *v.* Bathurst, 5 Gill & J. 159; Bradlie *v.* Maryland Ins. Company, 12 Peters, 378.

(*b*) Story, J., 8 Mason, 87.

(*c*) Smith *v.* Robertson, 2 Dow, 474. In the opinion in Peele *v.* Merchants' Ins. Company, *supra*, 322, it was observed by the court, in reference to the definitive nature of an abandonment, when once duly made, that it was "no slight recommendation of the American doctrine, that it stands approved by the cautious learning of Valin, the moral perspicacity of Pothier, and the practical and sagacious judgment of Emerigon." But an observation of Valin, in the place referred to, makes me

*There is a material difference between an insurance on *326 ship and on cargo, and some confusion is introduced by blending the cases; but the essential principles of abandonment, with some variation, apply equally to each. A total loss of cargo may be effected, not merely by destruction, but, in very special cases, by a permanent incapacity of the ship to perform the voyage, as when it produces a destruction of the contemplated adventure. A loss of the voyage for the season, or a case of retardation only, unless the cargo be of a perishable nature, does not amount to a total loss of the cargo. (a) It is only in particular cases that the loss of the voyage will be a ground of abandonment of the cargo. The goods are not so necessarily connected with the ship, that if the ship be lost, there must of course be a loss of voyage with respect to the goods. In *Gernon* v. *Royal Exchange Assurance*, (b) the ship was forced back by stress of weather, and the cargo found to be so damaged as not to be in a state to send on, and an abandonment was held good. There must be an actual total loss, or one in the highest degree probable, to justify an abandonment of the cargo. (c) In *Hudson* v. *Harrison*, (d) it was admitted to be extremely difficult to deduce any general rule from the circumstances under which the insured has a right to abandon the cargo. It is a very entangled branch of the law of insurance. If the ship has been lost and the cargo materially damaged, the cases and text writers vary as to the right of the insured to abandon, or whether he must send on the goods when half is saved, or a third, or a quarter. (e) The doctrine of the old cases, that the insured

doubt whether he merited the eulogy, in respect to that point; for he says, that though there should be *information of a loss justifying an abandonment*, yet, if the ship should be repaired by the care, and at the expense of the insurer, he thinks the insurer would have a right to compel the insured to receive back the vessel and cargo, notwithstanding the abandonment, and put up with the payment of a partial loss. Valin's Comm. lib. 3, tit. 6, art. 60. The opinion of Valin I take to be heresy in American law, and it is pointedly condemned by Emerigon, ii. 195.

(a) Anderson *v.* Wallis, 2 Maule & S. 240; Everth *v.* Smith, ib. 278. Mere retardation of the voyage by a peril insured against, unless it produces a total incapacity of the ship to perform the voyage, does not constitute a technical total loss of the ship. Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378.

(b) 6 Taunt. 383; [L. R. 4 Q. B. 687.]

(c) Anderson *v.* Wallis, 2 Maule & S. 240; Hunt *v.* Royal Exchange Ass., 5 id. 47; Wilson *v.* Royal Exchange Ass. Company, 2 Camp. 623.

(d) 3 Brod. & B. 97.

(e) See *supra*, 212, 213, 321, note, when it is or is not the duty of the master to send on the cargo by another vessel.

*327 may abandon when the voyage is *lost, is narrowed. Every such loss will not justify it. A retardation is not sufficient. If the profits be reduced one half, it was said the owner was not bound to prosecute the voyage; but every case seems to rest upon its own circumstances.

When a case proper for abandonment exists, and it be duly made, (*a*) the underwriter cannot intercept the exercise of the right, and destroy its effect, by an offer to pay the amount of the repairs. In a case proper for abandonment, the insured may stand upon his rights, uncontrolled by the underwriter, for the option to abandon rests with him, and not with the other party. If by his acts and interference he shows that he intends to act as *owner*, and elects to repair, he loses his right to abandon, or it is a waiver of it, if made. (*b*) He may elect to repair the damage at the expense of the insurer, even if it amounts to the whole value of the ship; (*c*) and, on the other hand, he is not obliged, against his consent, to take the remnants and surpluses of a lost voyage, and claim under the policy the average or expenses incurred by the calamity. This is the more recent, and, I think, the more solid doctrine on the subject, and it is enforced with great strength in the case of *Peele* v. *Merchants' Insurance Company*, (*d*) which has fully investigated and explained all the prominent points under this interesting title in the law of insurance.

In *Pole* v. *Fitzgerald*, (*e*) decided in the Exchequer Chamber, in the middle of the last century, on error from the K. B., it was held, after great discussion and consideration, that on an insurance of a ship for a voyage, it was not sufficient that the voyage be lost, if the ship was safe. It was declared, that the insurance was of the ship and not of the voyage, and the decision was affirmed in the House of Lords, notwithstanding Lord Mansfield made a very strong argument against it in his character of counsel. (*f*) After Lord Mansfield came into the Court of K.

(*a*) To render an abandonment effectual, it is held that the cause of the loss of the ship must be stated in the letter of abandonment, for the benefit of the insurer. Hazard *v.* N. E. Marine Ins. Company, 1 Sumner, 218.

(*b*) Dickey *v.* N. Y. Ins. Company, 4 Cowen, 222; s. c. 3 Wend. 658. Columb. Ins. Company *v.* Ashby, 4 Peters, 139.

(*c*) Story, J., in Humphreys *v.* Union Ins. Company, 3 Mason, 436.

(*d*) 3 Mason, 27. (*e*) Willes, 641.

(*f*) 5 Bro. P. C. 137–142; [4 Bro. P. C. (2d ed.) 439. *Vide post*, 331, n. 1.]

B., he introduced and established *the doctrine which *328
he had maintained as counsel, that on the insurance
of a ship for a specified voyage, a loss of either the ship, or the voyage, was the same thing, and justified an abandonment. This, according to Lord Eldon, (*a*) was an act of the King's Bench, reversing a judgment of the Exchequer Chamber and the House of Lords. The case of *Fitzgerald* v. *Pole*, after having slept unnoticed and disregarded for half a century, was mentioned with respect, first in the Supreme Court of New York, (*b*) and then in *Hadkinson* v. *Robinson*, (*c*) and more recently by Lord Ellenborough, (*d*) who intimated, that the loss of the voyage had nothing to do with the loss of the ship, and that it was well to resort to the good sense of the judgment in *Pole* v. *Fitzgerald*, to purify the mind of those generalities. It is settled, that a loss of the voyage as to the cargo is not a loss of the voyage as to the ship, for a policy on a ship is an insurance of the ship for the voyage, and not an insurance on the ship and the voyage. (*e*) And, under this qualification, I apprehend the doctrine of the case of *Manning* v. *Newnham* to be the established doctrine, that if the ship be prevented by a peril within the policy from proceeding on her voyage, and be irreparably injured, and the voyage be thereby lost, it is a total loss of ship, freight, and cargo, provided no other ship can be procured to carry on the cargo. (*f*) It must be admitted, however, that the extreme variety and apparent conflict of many of the cases on this subject of abandonment, are enough to justify the complaint of Lord Eldon, that there is as much uncertainty on this as on any other branch of the law.

*It is understood to be a fixed rule, that if the ship be *329
so injured by perils as to require repairs to the extent of
more than half her value at the time of the loss, the insured may abandon; for if ship or cargo be damaged so as to diminish their value above half, they are said to be constructively lost. The rule came from the French law, and is to be found in the treatise of Le Guidon, (*a*) where it is applied to the case of goods; and in

(*a*) 1 Dow, 359; 2 id. 477. (*b*) 1 Johns. Cas. 303.
(*c*) 3 Bos. & P. 388.
(*d*) [Falkner *v.* Ritchie,] 2 Maule & S. 293.
(*e*) Alexander *v.* Baltimore Ins. Company, 4 Cranch, 870. See, also, 1 Mason, 348.
(*f*) Condy's Marshall, 585, 586; [3 Doug. 130; 2 Camp. 624, n.]
(*a*) Condy, c. 7, art. 1, 9.

respect to both ship and cargo, the rule has been incorporated into the American jurisprudence. (*b*) There has been considerable discussion in the text-books, as to the right to abandon, when a part only of the property insured is damaged above a moiety, or lost, and this will depend upon the manner in which it is insured. If the insurance be upon different kinds of goods indiscriminately, or as one entire parcel, it is then an insurance upon an integral subject, and an abandonment of part only cannot be made. But if the articles be separately specified and valued, it has been considered so far in the nature of a distinct insurance on each parcel, that the insured was allowed to recover as for a total loss of the damaged parcel, when damaged above a moiety in value. Mr. Phillips has suggested a doubt whether this distinction be well founded. The rule was taken from the French treatises, and unless the different sorts of cargo be so distinctly separated and considered in the policy, as to make it analogous to distinct
* 330 insurances on distinct parcels, there * cannot be a separate abandonment of a part of the cargo insured. (*a*) [1]

The meaning of the words in the rule, "one half of the value," has been held to be the half of the general market value of the vessel at the time of the disaster, and not her value for any particular voyage or purpose. (*b*) The expense of the repairs at the

(*b*) Valin's Comm. ii. 101; Pothier, d'Ass. n. 121; Code de Commerce, art. 869; Gardiner *v.* Smith, 1 Johns. Cas. 141; Dickey *v.* N. Y. Ins. Company, 4 Cowen, 222; Marcardier *v.* Chesapeake Ins. Company, 8 Cranch, 39; Ludlow *v.* Columbian Ins. Company, 1 Johns. 335; Peters *v.* Phœnix Ins. Company, 8 Serg. & R. 25; Wood *v.* L. & K. Ins. Company, 6 Mass. 479; Story, J., 3 Mason, 69. The loss must exceed one half of the goods insured, or the gross amount paid for them. Budd *v.* Union Ins. Company, 4 M'Cord, 1. In Hall *v.* Ocean Ins. Company, 21 Pick. 472, it was held, that in making the estimate to ascertain whether the loss was technically total, or to the amount of fifty per cent on the sum insured, including the premium, items which should be carried to the amount of general average are not to be included.

(*a*) Guerlain *v.* Columbian Ins. Company, 7 Johns. 527; Deidericks *v.* Com. Ins. Company, 10 id. 234; Condy's Marshall, 600; 2 Phillips on Insurance, 870; Valin ii. 108; Pothier, h. t., n. 121, 131, 132; Emerigon, ii. 214; Le Guidon, c. 7, sec. 8, 9. In Seton *v.* Delaware Ins. Company, 2 Wash. 175, it was held, that a partial loss of an entire cargo, by sea damage, if amounting to more than half, might, under circumstances, be converted into a technical total loss; but not if *a distinct part of the cargo* be destroyed, and the voyage be not thereby broken up.

(*b*) As the true basis of the valuation is the value of the ship at the time of the disaster, if, after the damage is or might be repaired, the ship is not, or would not be

[1] See, as to memorandum articles, *ante*, 296, n. 1, (*d*); and perhaps the same principles apply generally. See 331, n. 1, (*a*) *ad f.*, as to freight.

port of necessity, including the expense of getting the ship afloat, if stranded, is the true test for determining the amount of the injury, and such sum is to be taken as will fully reinstate the vessel, and, in general, with the same kind of materials of which she was composed at the time of the disaster. It has also been considered that the three objects of insurance, vessel, cargo, and freight, stand on the same ground as to a total loss by a deterioration of more than one half of the value. (*c*)

In ascertaining the value of the ship, and the quantum of expense or injury, difficulties have arisen, and they were fully discussed, and very clearly explained, in *Peele* v. *Merchants' Insurance Company*. (*d*) The valuation in the policy is conclusive in case of a total loss; but in some respects it is inapplicable for the purpose of ascertaining the quantum of injury in case of a partial loss of goods. The rule in that case is, to ascertain the amount of injury by the difference between the gross proceeds of the sound and damaged goods. (*e*) *This is *331 also the true rule as to the ship, though there is greater difficulty in the application. The value of the ship at the time and place of the accident is the true basis of calculation. (*a*) And with respect to the arbitrary and fluctuating rule as to the allowance to one third new for old, there is no doubt of its application

worth, at the place of repairs, double the cost of repairs, it is a technical total loss. Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378. [Fulton Ins. Co. *v.* Goodman, 32 Ala. 108. See 331, n. 1, (*a*).]

(*c*) Center *v.* American Ins. Company, 7 Cowen, 564; 4 Wend. 45, s. c.; Sewall *v.* United States Ins. Company, 11 Pick. 90.

(*d*) 3 Mason, 70–78.

(*e*) Johnson *v.* Sheddon, 2 East, 581.

(*a*) Patapsco Ins. Company *v.* Southgate, 5 Peters, 604. The valuation in the policy at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one half of the vessel or not. Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378. This decision, pronounced by Mr. Justice Story, was in conformity with the doctrine declared by him in the case of Peele *v.* The Merchants' Ins. Company, 3 Mason, 27; but a different rule has been adopted in Massachusetts and New York, in avowed contradiction to the decision in the federal court. It is held, in the courts in those states, that the value of the vessel, as agreed upon by the parties and inserted in the policy, is to be taken as the true value, in determining whether the repairs could exceed half her value, in reference to the question of abandonment; and that it governs, as well when the assured claims for a technical total loss, as when he claims for a loss by a total destruction of the ship; and further, that in determining the same question, the deduction of one third new for old was to be made from the estimated amount of the repairs. Deblois *v.* The Ocean Ins. Company, 16 Pick. 312; American Ins. Company *v.* Ogden, 20 Wend. 287, 297–300.

in cases of partial loss; but such a deduction is not allowed, and does not apply to cases of total loss. (*b*)[1] The reason of this

(*b*) Peele *v.* The Merchants' Ins. Company, 3 Mason, 28, 73–77.

[1] *Total Loss.* — (*a*) *What is.* — The American rule as to what constitutes a total loss is stated in Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 204, 217; Lockwood *v.* Sangamo Ins. Co., 46 Mo. 71. In some states the deduction of one third new for old is allowed in estimating a total loss. Kettell *v.* Alliance Ins. Co., 10 Gray, 144, 154; Heebner *v.* Eagle Ins. Co., ib. 131, 148; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 322; Allen *v.* Commercial Ins. Co., 1 Gray, 154; Fiedler *v.* N. Y. Ins. Co., 6 Duer, 283. But after a substantial part, though less than half in value, of goods insured as one subject, has arrived in safety at the port of destination, the owner cannot abandon to the insurers and recover for a total loss. Forbes *v.* Manufacturers' Ins. Co., 1 Gray, 871; Pierce *v.* Columbian Ins. Co., 14 Allen, 320, 322. The English rule is that a ship is totally lost, although it is physically possible to repair her, if it is impracticable to do so, as when it can only be done at an excessive or unreasonable cost. To determine whether it is practicable to make the repairs or not, the question is what a prudent owner uninsured would do under the circumstances; and repairs are, practically speaking, impossible, and the loss is total, if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her. Irving *v.* Manning, 1 H. L. C. 287, 307; Moss *v.* Smith, 9 C. B. 94, 103; Knight *v.* Faith, 15 Q. B. 649, 662; Grainger *v.* Martin, 2 Best & S. 456; 4 B. & S. 9; Kemp *v.* Halliday, 6 Best & S. 723, 753; L. R. 1 Q. B. 520; Copelin *v.* Phœnix Ins. Co., 46 Mo. 211. This test applies although the ship is insured "against total loss only." Adams *v.* Mackenzie, 13 C. B. N. S. 442; Heebner *v.* Eagle Ins. Co., 10 Gray, 131; Greene *v.* Pacific M. Ins Co., 9 Allen, 217; *ante*, 296, n. 1. But see Willard *v.* Millers' & Manufacturers' Ins. Co., 24 Mo. 561, 566; 2 Pars. on Mar. Ins. ch. 4, sec. 2, n. 4. In Kemp *v.* Halliday, *sup.*, the amount which would be contributed by the cargo toward the expense incurred for the common benefit in raising ship and cargo was deducted, in determining whether the ship was a total loss, but the court refrained from laying down a general rule. But according to the American cases of Greely *v.* Tremont Ins. Co., 9 Cush. 415; Ellicott *v.* Alliance Ins. Co., 14 Gray, 318; Paddock *v.* Commercial Ins. Co., 104 Mass. 521, 536; Fiedler *v.* New York Ins. Co., 6 Duer, 282, general average losses are not to be added to a partial loss to make up a constructive total loss of the ship. As to the method of estimating the value of the ship, see African St. Co. *v.* Swanzy, 2 K. & J. 660, 664, and Grainger *v.* Martin, *sup.*

The doctrine of Fitzgerald *v.* Pole, *ante*, 327, 328, is approved in later cases, and is law, both in this country and in England. Greene *v.* Pacific M. Ins. Co., 9 Allen, 217, 224. It is pushed farther in England, and leads to the rule mentioned on p. 324. A notice of abandonment may have been justifiably given, yet if the ultimate consequence of the peril insured against is merely the loss of a voyage, a total loss cannot be claimed. But in order to reduce the total to a partial loss, the thing insured must be in existence under such circumstances that the assured may by reasonable means obtain it. Lozano *v.* Janson, 2 El. & El. 160, 177; Kemp *v.* Halliday, 6 Best & Sm. 723, 754. But an abandonment accepted under no mistake of fact is irrevocable. Arnould, 4th ed. 858.

The doctrine of constructive total loss would not apply to policies on bottomry loans, for the ship must be actually and totally destroyed in order to discharge

allowance to the underwriter, of one third of the expense of the reparations, is on account of the better condition in which the

the borrower. *Post*, 859; Broomfield *v.* Southern Ins. Co., L. R. 5 Ex. 192; The Great Pacific, Stephens *v.* Broomfield, L. R. 2 P. C. 516. *But a cargo* is totally lost on the same general principle which is applied to ships if it would cost more to deliver it in a marketable condition at its place of destination than it would be worth there. Farnworth *v.* Hyde, L. R. 2 C. P. 204; Rosetto *v.* Gurney, 11 C. B. 176, 186 (a case of memorandum articles, *ante*, 296, n. 1); Dent *v.* Smith, L. R. 4 Q. B. 414, 446; Stringer *v.* English & Sc. M. Ins. Co., ib. 676; L. R. 5 Q. B. 599. The first of these cases shows that all the extra expenses consequent upon perils of the sea are to be taken into account; but these do not include the original freight, but only the excess, if any, over that sum which the goods owner has to pay for carriage from the place of distress to the place of destination, in case the ship owner is excused from carrying the goods on. Goods lost by jettison are taken into the estimate by Forbes *v.* Manuf. Ins. Co., 1 Gray, 371.

But the prudent owner principle only applies to constructive total loss of ship or constructive total loss of cargo by damage *thereto*, not to expense and labor of earning freight. *Freight* is not lost by perils of the sea, simply because the cost of the repair of sea damage necessary to earn it would be greater than the freight; Moss *v.* Smith, 9 C. B. 94; Philpott *v.* Swann, 11 C. B. N. S. 270, 282; Allen *v.* Mercantile M. Ins. Co., 44 N. Y. 437, 441; nor because a cargo which could have arrived *in specie* with safety to the vessel, on arrival would not be worth the sum payable for freight. Lord *v.* Neptune Ins. Co., 10 Gray, 109; Parsons *v.* Manufacturers' Ins. Co., 16 Gray, 463, 468. But if the ship owner, in order to carry on the cargo with safety, must incur an expense which would greatly exceed the value of the cargo on arrival, there is a total loss of freight; Michael *v.* Gillespy, 2 C. B. N. S. 627; and if the ship is incapacitated by perils insured against from earning the freight, and the owner as a prudent man is justified in abandoning her, the loss of the freight in such a case does not arise from the act of the party, but from the peril insured against. Potter *v.* Rankin, L. R. 5 C. P. 341, 374, 379, 385, reversing S. C. L. R. 8 C. P. 562. See Currie *v.* Bombay Native Ins. Co., L. R. 3 P. C. 72, 83; Kidston *v.* Empire M. Ins. Co., L. R. 2 C. P. 357, 364; Allen *v.* Mercantile M. Ins. Co., 44 N. Y. 437, 443. So the owner of cargo can recover as for a total loss of cash on account of freight, *ante*, 270, n. 1, if the vessel cannot be repaired except at an expense exceeding her value when repaired, together with the freight which she would have earned on the voyage. De Cuadra *v.* Swann, 16 C. B. N. S. 772. A total loss of part of the freight insured is a partial loss. Lord *v.* Neptune Ins. Co., 10 Gray, 109, 129; Parsons *v.* Manuf. Ins. Co., 16 Gray, 463, 468. See, further, as to insurance on freight, *ante*, 270, n. 1.

(*b*) *Notice of Abandonment.* — In Knight *v.* Faith, *sup.*, notice of abandonment was thought necessary in this class of cases. See also Jardine *v.* Leathley, 8 Best & Sm. 700, 707; American Ins. Co. *v.* Francia, 9 (Barr) Penn. St. 390. But this rule must be taken with the limitation that it attaches only where there is something of appreciable value, however small that value may be, to relinquish to the insurer. An idle ceremony is not required. Potter *v.* Rankin, L. R. 5 C. P. 341, 371; Kemp *v.* Halliday, 6 Best & Sm. 723, 753; Lord *v.* Neptune Ins. Co., 10 Gray, 109, 116; Stewart *v.* Greenock M. Ins. Co., 2 H. L. C. 159, 185. Even stronger language will be found in Bullard *v.* Roger Williams

ship is put by them than she was when insured, and the owner, when he comes again into the possession of his vessel, receives

Ins. Co., 1 Curtis, 148; King *v.* Walker, 8 H. & C. 209, 212. And see Graves *v.* Washington M. Ins. Co., 12 Allen, 391; Ins. Co. *v.* Updegraff, 21 Penn. St. 513. See, further, *ante*, 296, n. 1, (*b*).

As to what is sufficient notice, see Currie *v.* Bombay N. Ins. Co., L. R. 3 P. C. 72; King *v.* Walker, 3 Hurlst. & C. 209; Thomas *v.* Rockland Ins. Co., 45 Me. 116. If the insurer takes possession of the vessel to repair her, as mentioned 320, n. (*d*), a failure to restore her in a reasonable time has the same effect as an acceptance. Copelin *v.* Ins. Co., 9 Wall. 461; 46 Mo. 211; Norton *v.* Lexington Ins. Co., 16 Ill. 235.

(*c*) *Effects of Abandonment.* — The general doctrine that an abandonment relates back from the time of acceptance to the time of the loss is confirmed by Sun Mut. Ins. Co. *v.* Hall, 104 Mass. 507. It transfers the interest of the assured no further than the interest is covered by the policy. Arn. 4th ed. 848; Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200. It will not devest a right of action, *e.g.* for conversion of the subject matter, which vested in the assured between the loss and the acceptance, but the action will be maintained in his name for the benefit of the insurers. Clark *v.* Wilson, 103 Mass. 219; Hayward *v.* Cain, 105 Mass. 213; Quebec Fire Ass. Co. *v.* St. Louis, 7 Moore P. C. 286, 316. *Vide post*, 871, n. (*e*); 876, n. 1, as to mortgagees. Conversely the fact that the assured has a distinct right against some other person will not postpone the liability of the underwriters. They must pay the amount claimed in the first instance, and will then be entitled to use the name of the assured as just stated. Dickenson *v.* Jardine, L. R. 3 C. P. 639, 644.

It has been said that abandonment is not necessary to enable the insurers to have the benefit, by way of salvage, of fruits or results of the subject matter which is specifically and actually totally lost, such as the proceeds of the sale of the hides which were a total loss before the sale, in Roux *v.* Salvador, *ante*, 296, n. 1. If such proceeds have been actually realized or received by the assured, the amount will be deducted from the total loss on adjustment. Lord *v.* Neptune Ins. Co., 10 Gray, 109, 116; Prince *v.* Ocean Ins. Co., 40 Me. 481; Thomas *v.* Rockland Ins. Co., 45 Me. 116, 120. Compare Stringer *v.* English & Sc. M. Ins. Co., L. R. 5 Q. B. 599, 606. See also North of England Ins. Ass. *v.* Armstrong, L. R. 6 Q. B. 244; *ante*, 274, n. 1.

(*d*) It follows from the effects of abandonment that it can only be made by the owner of the interest insured or his agent. Jardine *v.* Leathley, 3 Best & Sm. 700.

(*e*) *The duty of the assured* to do his utmost to avert total loss, 331, is embodied in the suing and laboring clause of many policies, by which it is expressly stipulated that his doing so shall not prejudice the insurance, &c. Stringer *v.* English & S. M. Ins. Co., L. R. 4 Q. B. 676, 686; *ante*, 296, n. 1, (*e*); *post*, 840, n. 1. Hickie *v.* Rodocanachi, 4 Hurlst. & N. 455, 467, stated *infra*, shows that when the master leaves the insured vessel, which has become the insurer's property, and employs himself in hiring another ship and forwarding the cargo by that, he is not to be regarded as acting on behalf of the underwriter rather than for his own employer, the former owner.

(*f*) *Right of Abandonees to Freight.* — The American rule of apportionment, *pro rata itineris*, stated *post*, 833, is sanctioned by Buffalo City Bank *v.* N. W. Ins. Co., 30 N. Y. 251, 253; Lord *v.* Neptune Ins. Co., 10 Gray, 109, 123. The English rule that it passes to the insurers, *post*, 834, by Stewart *v.* Greenock M. Ins. Co., 2 H. L. C. 159; 1 Macq. 328; Green *v.* Briggs, 6 Hare, 395, 404. But the English courts

the benefit of the repairs. But neither the reason of the rule, nor the rule itself, applies to the case of a ship suffering a partial loss on her first voyage, when she is new, and cannot be made better by repairs. (*c*) The half value which authorizes an abandonment is half the sum which the ship, if repaired, would be worth without any such deduction. (*d*)

Upon a valid abandonment, either of the vessel or of the cargo insured, the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them. (*e*) The owner or insured, equally with the master, becomes the agent of the insurer on abandonment, and he cannot purchase in the property on his own account, without the consent of his principals; and if he does, it revokes the abandonment, and turns the total into a partial loss. (*f*) It is the duty of the master, resulting from his situation, to act with good faith, and care and diligence, for the protection and recovery of the property, for *the benefit of whom it may eventually concern. The *332 master of an insured ship injured by the perils of the sea, and not competent to complete the voyage, may sell her in a case of necessity, as when the ship is in a place in which she cannot be repaired; or the expense of repairing her will be extravagant, and exceed her value; or when he has no moneys in his possession, and is not able to raise any. (*a*) In cases of capture he is bound,

(*c*) In Pirie *v.* Steele, 8 Carr. & P. 200, it was a matter of dispute when a vessel may be said to be on her first voyage. Lord Abinger thought the best method was to make the deduction of one third new for old depend upon the age of the ship, to be specified in the policy.

(*d*) Dupuy *v.* U. Ins. Company, 8 Johns. Cas. 182. *Contra*, Smith *v.* Bell, 2 Caines Cas. 153; Coolidge *v.* Gloucester Ins. Company, 15 Mass. 341; Peele *v.* Marine Ins. Company, 8 Mason, 76, 77; Williams *v.* Suffolk Ins. Company, 8 Sumner, 270. The extent of loss, in the case of a ship, says Boulay-Paty, is estimated by a comparison of the value in the policy with the value at the place of loss, and not with the amount of the expense requisite to repair. Cours de Droit Com. iv. 252.

(*e*) 2 Phillips on Ins. 439, 449; 7 Johns. 514; 9 id. 21; 13 id. 451; 4 Peters, 189; Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340.

(*f*) Robertson *v.* Western M. & F. Ins. Company, 19 La. 227.

(*a*) Somes *v.* Sugrue, 4 Carr. & P. 276.

do not carry that principle so far as to allow the insurers any thing in the nature of freight for the carriage of the shipowner's own goods before the loss. They only allow for the subsequent carriage. Miller *v.* Woodfall, 8 El. & Bl. 493. Hickie *v.* Rodocanachi, 4 Hurlst. & N. 455, further limits the right of the abandonees to freight earned by the insured ship. It does not extend to that earned by forwarding the cargo in another vessel.

if a neutral, to remain and assert his claim until condemnation, or the recovery be hopeless. (*b*) His wages, and those of the crew, are a charge on the owner, and ultimately, in case of recovery, to be borne as a general average by all parties in interest; and if the abandonment be accepted, the underwriter becomes owner for the voyage, and in that character liable for the seamen's wages, and entitled to the freight subsequently earned. (*c*) If the master purchases in the vessel, or ransoms her, the insurer will be entitled to the benefit of the purchase or composition; and, on the other hand, if the insured affirms the purchase of the master, it will be at the option of the insurer a waiver of the abandonment. The insurer can accept of the repurchase of the master, as his constructive agent, and affirm the act, or he may leave it to fall upon the master. (*d*)

The assured has the right of abandoning the freight when there has been a constructive total loss of the ship; and he has sustained a total loss of the freight, if he abandons the ship to the underwriters on the ship, when the case justifies it, for after such abandonment, he has no longer the means of earning the freight, or of receiving it if earned, for the freight goes to the * 333 underwriters on the ship. (*e*) But * it has been a very controverted question, whether an abandonment of the ship transferred the freight in whole or in part. It was finally settled in the jurisprudence of New York and of Massachusetts, and adopted as the true rule in the Circuit Court of the United States for Massachusetts, that on an accepted abandonment of the ship, the freight earned previous to the disaster was to be

(*b*) Marshall *v.* Union Ins. Company, 2 Wash. 452. The duty of the mariners is the same. The Saratoga, 2 Gall. 164; Brown *v.* Lull, 2 Sumner, 443.

(*c*) Hammond *v.* Essex Fire and Marine Ins. Company, 4 Mason, 196. It has been made a question whether the underwriter, after an accepted abandonment, is bound, in his new character of owner, to go on and complete the voyage. In Case *v.* Davidson, 5 Maule & S. 89, Holroyd, J., was of opinion, that he was under no such obligation to the freighter, whose rights as owner of the goods were personal, lying in contract with the ship owner, *and not running with the ship.* There is a suggestion of Mr. Justice Putnam, to the same effect, in Coolidge *v.* Gloucester Marine Ins. Company, 15 Mass. 343. The underwriter cannot claim salvage property unless there has been an abandonment of the property made and accepted. The Ship Henry Ewbank, 1 Sumner, 400.

(*d*) Saidler *v.* Church, cited in 2 Caines, 286; United Ins. Company *v.* Robinson, ib. 280; Jumel *v.* Marine Ins. Company, 7 Johns. 412; Willard *v.* Dorr, 3 Mason, 161; Boulay-Paty, iv. 309, 310.

(*e*) Benson *v.* Chapman, 6 Mann. & Gr. 810; [s. c. 2 H. L. C. 696; *ante*, 331, n. 1, (*a*).]

retained by the owner, or his representative, the insurer on the freight, and apportioned *pro rata itineris;* and that the freight subsequently earned went to the insurer on the ship. (*a*) In the case of *Armroyd* v. *Union Insurance Company*, (*b*) the question was raised, but left undecided, whether the entire, or only a *pro rata* freight, in such a case, went, on abandonment, to the insurer of the ship. This litigated question has now been settled in England; and in *Case* v. *Davidson*, (*c*) where *ship and freight were separately insured, and each subject abandoned as for a total loss, it was adjudged that the abandonment of the ship transferred the freight as an incident to the ship, and that an abandonment was equivalent to a sale of the ship to the abandonee. (*a*)[1] The French jurisprudence on this subject has been equally embarrassing and unsettled. The Ordinance of 1681 had no textual regulation relative to freight, in cases of abandonment. It was left to the decisions of the tribunals, and they denied to the insurer on the ship any freight for the goods saved. Valin exposed the error, (*b*) and maintained that freight on abandonment, whether paid in advance or not, ought to go to the insurer. In 1778, it was settled at Marseilles, under the sanction of Emerigon, that freight was an accessory to the ship; and in abandoning the ship, the freight acquired during the voy- *334

(*a*) United Ins. Company *v.* Lenox, 1 Johns. Cas. 377; 2 id. 443; Davy *v.* Hallet, 8 Caines, 20; Marine Ins. Company *v.* United Ins. Company, 9 Johns. 186; Coolidge *v.* Gloucester Marine Ins. Company, 15 Mass. 341; Hammond *v.* Essex Fire and Marine Ins. Company, 4 Mason, 196. So, in the case of a mortgage of a ship whilst at sea, and possession taken under it, the accruing freight passes to the mortgagee, as incident to the ship. Dean *v.* M'Ghie, 12 J. B. Moore, 185; [*ante*, 188, n. 1.]

(*b*) 3 Binney, 437.

(*c*) 5 Maule & S. 79; s. c. affirmed on error, 2 Brod. & B. 379. In this case the underwriter claimed and recovered the entire freight, and no distinction was made between the freight arising prior and subsequent to the loss, or prior and subsequent to the abandonment.

(*a*) Mr. Benecke, Principles of Indemnity, 408, after giving an interesting history of the progress of the question, concludes that the insurer on the freight, in case of an abandonment of that also, will still have a personal claim on the owner for the freight subsequently earned, and which, but for the abandonment, would have belonged to him. Though the decision of Lenox and United Insurance Company, in New York, *supra*, 333, n. [*a*], had been in print for eighteen or twenty years, it seems to have been entirely unknown to the English courts, and to Mr. Benecke, in 1824, though he has, in the course of his work, ransacked the local laws and ordinances of most of the petty as well as great commercial states and cities in Europe.

(*b*) Comm. liv. 3, tit. 6, Des Assurances, art. 15.

[1] See 331, n. 1, (*f*).

age went with it. (*c*) The ordinance of 1779 followed that doctrine, and declared that acquired freight already earned on the voyage was insurable, and did not go with the ship on abandonment, but that the future freight to be earned on the goods saved would go to the insurer, if there was no stipulation to the contrary in the policy, saving the wages of seamen and bottomry
* 335 * liens. The new code (*a*) declared that the freight of goods saved, though paid in advance, went, upon abandonment, to the insurer on the ship. The construction given to the code by the Royal Court at Rennes, in 1822, in the case of *Blaize* v. *Company of General Assurance at Paris*, was, that the future freight did not go to the insurer on the ship, but only the freight on the goods saved and already earned at the time of the loss. (*b*)

(2) *Of the Adjustment of Partial Losses.* — In an open policy the general rule is, that the actual or market value of the subject insured is to be estimated at the time of the commencement of the risk. The object of inquiry is the true value of the subject put at risk, and for which an indemnity was stipulated; and the question of total or partial loss does not turn on the estimated value, in a valued policy, but upon a view of all the circumstances attending the loss. (*c*)

There are two kinds of indemnity that may lawfully be obtained under a contract of insurance. The first is, to pay what the goods would have sold for if they had reached the place of destination; and the value there consists of the prime cost and expenses of the outfit, the freight and expenses at the port of delivery, and the profit or loss arising from the state of the market. This species of indemnity puts the insured in the same situation as if no loss had happened. The other kind of indemnity is to pay only the first cost of the goods, or the market value at the time and place of the commencement of the risk, and the expenses incurred; and

(*c*) Emerigon, ii. 217–227.

(*a*) Code de Commerce, art. 886.

(*b*) Boulay-Paty, iv. 397–417.

(*c*) Young *v.* Turing, 2 Mann. & Gr. 593, 597, 601. The question whether a loss be total or partial is, whether, in the condition of the ship, the owner, as a man of prudence and discretion, would, under the circumstances, if uninsured, have sold the ship, or have endeavored to get her off and repair her. Domett *v.* Young, 1 Carr. & M. 465, s. P. A *partial loss* is frequently termed a *particular* average, in distinction from a *general* average, and Mr. Benecke says, that it denotes, in general, every kind of expense or damage, short of a total loss, and which is to be borne by the proprietor of the particular concern; and he says it is expressive, and ought to be retained. Stevens & Benecke on Average, by Phillips, 341.

this places the insured in the situation he was before he undertook the adventure. (*d*) It annuls the speculation, and excludes the consideration of any eventual profit or loss. The first kind of insurance is, in the opinion of Mr. Benecke, (*e*) more conformable to the nature of mercantile transactions, and affords, in every case, an exact indemnity; but the second kind of insurance * of goods is the one in practice in England and * 336 other commercial countries. (*a*)

The actual or market value at the port of departure may frequently be different from the invoice price, or prime cost, and when that happens, or can be ascertained, it is to be preferred. (*b*) In *Gahn* v. *Broome*, (*c*) the invoice price was adopted as the most stable and certain evidence of the actual value; but in *Le Roy* v. *United Insurance Company*, (*d*) the invoice price was understood to be equivalent to the prime cost, and that was commonly the market value of the subject at the commencement of the risk. The court, in that case, did not profess to lay down any general rule, but they, nevertheless, adopted the prime cost as being a plain and simple, and generally speaking, the best rule by which to test the value of the subject. The English Court of King's Bench in *Usher* v. *Noble*, (*e*) pursued, in effect, the same rule, by estimating a loss on goods in an open policy at the invoice price, at the loading port, and taking with that the premium of insurance and commission, as the basis of the calculation. (*f*) [1]

(*d*) See *supra*, 274, n. b; Marchesseau *v.* The Merchants' Ins. Co., 1 Rob. (La.) 488.

(*e*) Treatise on the Principles of Indemnity in Marine Insurance, c. 1.

(*a*) The underwriters, in cases of partial loss, have nothing to do with remote or contingent losses. They have nothing to do with bottomry bonds given to raise money for repairs, though they must bear their share of the extra expenses of raising the money, as part of the partial loss. They are not bound to supply funds in a foreign port for repairs. They are simply bound to pay the partial loss. Bradlie *v.* The Maryland Ins. Company, 12 Peters, 378. In Oriental Bank *v.* Tremont Ins. Company, 4 Met. 1, it was held, that interest is not payable on a policy of insurance, if there be no agreement to pay interest, or the insurer be not in default in payment.

(*b*) Snell *v.* Delaware Ins. Company, 4 Dallas, 430; Carson *v.* Marine Ins. Company, 2 Wash. 464.

(*c*) 1 Johns. Cas. 120. (*d*) 7 Johns. 343.

(*e*) 12 East, 639.

(*f*) This is admitted in the French law to afford all the indemnity that was stipu-

[1] Under an open policy the goods are estimated at their market value at the inception of the risk, and not at the invoice price. Warren *v.* Franklin Ins. Co., 104

If goods arrive damaged at the place of destination, the way to ascertain the quantity of damage, either in open or valued policies, is to compare the market price or gross amount of the damaged goods with the market price or gross amount at which the same goods would have sold if sound. (*g*) But this
* 337 mode of adjustment affords no perfect indemnity * to the insured, for he has to pay freight for the goods as if they were sound, and which freight he cannot recover of the insurer. Various expedients have been suggested to remedy the inconvenience, and the true one is to insure the sum to be paid for the freight and charges at the port of delivery. (*a*)

We have seen, in a former lecture, (*b*) that an adjustment of a general average at a foreign port is conclusive; and it is equally so between the parties to the policy, and between the parties in interest in the adventure. (*c*) It is the rule in all the foreign countries for the underwriter to be bound by foreign adjustment of general average, unless there be a stipulation to the contrary in the policy, as is the case in those of the insurance companies at Paris. (*d*) There is a material difference between the adjustment of a partial loss, and of a general average, since the former is adjusted according to the value at the time and place of departure of the vessel, and the latter according to the value at the foreign port. (*e*) And as in cases of partial loss, it is to be adjusted upon a comparison of the gross proceeds of the sound and damaged goods, the underwriter has nothing to do either with the state of the market, or with the loss on landing expenses, freight, and duty, accruing in consequence of the deterioration; for no premium is

lated by the policy. Boulay-Paty, iv. 41, 42. The premium of insurance is considered as part of the value of the goods.

(*g*) Lewis *v.* Rucker, 2 Burr. 1167; Johnson *v.* Sheddon, 2 East, 581; Usher *v.* Noble, 12 id. 639; Benecke on Indemnity, 426.

(*a*) Benecke on Indemnity, 17-26.

(*b*) *Ante*, Lect. 47, 244.

(*c*) Though the foreign adjustment be conclusive as between the parties to it, yet the party to whom the contribution has been made is not restricted in his claim, under the policy, to the sum apportioned as his share of the loss, when it falls short of a complete indemnity. Thornton *v.* United States Ins. Company, 3 Fairfield, 164.

(*d*) Molloy, b. 2, c. 6, sec. 16; 7 Mass. 370; 5 Cowen, 68; Benecke on Indemnity, 331.

(*e*) Emerigon, i. 659; Ord. de la Mar. tit. Du Fret, art. 6.

Mass. 518. The percentage *of that value* to be paid by the underwriters is ascertained as stated in the next paragraph of the text.

paid for those items, and all other modes of adjusting particular average, except that founded on the principle of the gross proceeds, are erroneous. (*f*) In settling losses under the memorandum in the policy, which declares articles free of average, under say five per cent, if a partial loss to an article be found, on survey and sale, to have been five per cent, the insurer pays the damages and *the expenses*. If under five *per cent, he pays *338 nothing, and the insured *bears the expenses*. The expenses are like costs of suit, and fall upon the losing party. The expenses are not taken to make up the five per cent. (*a*)

(*f*) Benecke on Indemnity, 426, 427. In the adjustment of loss on a policy on profits, it is not necessary to show what the profits would have been if the loss had not happened. It is sufficient to show interest in the cargo, and the loss thereof. The loss of the cargo carries with it the loss of the profits, either in whole or in part, as the case may be. If the cargo be totally lost, the loss on the policy on profits is total. If partial on cargo, it is partial on profits, and to the same extent. The *salvage* on what is saved of the cargo is credited to the insurer on profits, as well as to the insurer on cargo. They stand on the same footing precisely. Henrickson *v.* Margetson, 2 East, 549, note; Barclay *v.* Cousins, 2 East, 544; Patapsco Ins Company *v.* Coulter, 3 Peters, 222. In some of the New York policies, this principle is specially recognized by the introduction of the clause in policies on profits, that *the policy is subject to the same average and benefit of salvage as cargo.*

(*a*) Benecke on Indemnity, 486. Great Indian P. R. Co. *v.* Saunders, 2 Best & Sm. 266, 267, 268.] Mr. Benecke, in c. 9, has gone into particular calculations on the subject of the adjustment of particular average, on every kind of expense or damage short of a total loss, and applied his principles to almost all the variety of cases that can arise; and to his lucid explanations I must refer the student for a more practical knowledge of the subject. The five per cent is to be computed upon the valuation in the policy, after deducting the premium. Several or distinct losses happening to the ship at different times, are not to be added to make up the five per cent. Brooks *v.* Oriental Ins. Company, 7 Pick. 259. [Paddock *v.* Commercial Ins. Co., 104 Mass. 521, 533.] Distinct successive losses to the ship cannot be added together to make up the five per cent, though it may be otherwise as to the cargo. In the one case, many trifling losses may fall within the common wear and tear of the ship borne by the owner; but in the other, the entire damage cannot be ascertained until the cargo is unladed; ib. See, also, Stevens on Average, 214; Benecke, 478. But in the case of Donnell *v.* Columb. Ins. Company, 2 Sumner, 366, a different view was taken of the subject under the memorandum in the policy, and after a thorough examination of the English and the French law of insurance, it was held, that if there be successive losses on the ship or cargo, each less than five per cent, but amounting in the aggregate to more than five per cent, they were not within the exception, and were to be borne by the insurer. The exception of all losses not amounting to five per cent means all losses during the voyage, and the exception applies to all losses, *ejusdem generis*, below five per cent, and not amounting in the aggregate to five per cent. Mr. Justice Story drew the conclusion that there was no distinction in the insurance law of Europe between the aggregate averages of the whole voyage and an average loss at a particular period.

If extraordinary expense and extra freight be incurred in carrying on the cargo in another vessel, when the first one becomes disabled by a peril of the sea, the French rule is, to charge the same upon the insurer of the cargo. (*b*) This question is left undecided in the English law, but in this country we have followed the French rule. (*c*) With respect to leakage, the rule, in cases free from special stipulation, is, that the insurer is not liable for waste occasioned by ordinary leakage, and only for leakage beyond the ordinary waste, and produced by some extraordinary accident. The practice is, to ascertain, in each particular case, what amount of leakage is to be attributed to ordinary causes, or the fault of the insured, or bad stowage, and what to the perils of the sea; and, in pursuing this inquiry, the season of the year, the * 339 nature of the articles, the description of the vessel, * the length of the voyage, and the stowage, are all to be considered. (*a*)

An adjustment of a loss cannot be set aside or opened except on the ground of fraud, or mistake of facts not known. It is only *prima facie* evidence of the claim, and the party must have a full disclosure of the circumstances of the case before he will be concluded by it. In the language of Lord Ellenborough, they must all be blazoned to him as they really existed. (*b*) And in making the adjustment, in the case of a partial loss, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for the repairs, and to allow the deduction of one third new for old upon the balance. (*c*) In England, if the injury be sustained, and the

(*b*) Emerigon, i. 429–433; Code de Commerce, n. 391, 393.

(*c*) Mumford *v.* Commercial Ins. Company, 5 Johns. 262; Searle *v.* Scovell, 4 Johns. Ch. 218; Dodge *v.* Marine Ins. Company, 17 Mass. 471. [Great Indian P. R. Co. *v.* Saunders, 1 Best & Sm. 41, 51; *ante*, 296, n. 1, (*c*); *post*, 340, n. 1.]

(*a*) Phillips on Insurance, i. 246, 247; Millar on Insurance, 132; 2 Valin, 14, 80, 88; 1 Emerigon, 391.

(*b*) Dow *v.* Smith, 1 Caines, 82; Shepherd *v.* Chewter, 1 Camp. 274; Steel *v.* Lacy, 3 Taunt. 286.

(*c*) Burnes *v.* Nat. Ins. Company, 1 Cowen, 265; Savage, C. J., in Dickey *v.* New York Ins. Company, 4 id. 245; Brooks *v.* Oriental Ins. Company, 7 Pick. 259; Eager *v.* Atlas Ins. Company, 14 id. 141. See *supra*, 331. The rule applies equally to steam vessels insured on our interior waters. Wallace *v.* Ohio Ins. Company, 4 Ohio, 234. In Potter *v.* The Ocean Ins. Company, C. C. U. S. Mass., October, 1837, 3 Sumner, 27, it was held, that in case of repairs to the ship, by the perils insured against, the deduction of one third new for old was applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those lost or destroyed.

repairs made, when the vessel is new, and on her first voyage, no deduction of new for old is made; because, the vessel being new, it is not supposed that she is put in better condition by the repairs. (*d*) But in this country that distinction has not been adopted, and the deduction of one third new for old is made, whether the vessel be new or old. (*e*)

The insurer is liable for all the labor and expense attendant upon an accident which forces the vessel into port to be repaired; (*f*) and in consequence of the general permission in * the policy for the insured to labor for the recovery of *340 the property, the insurer may be rendered liable for the expenses incurred in the attempt to recover the lost property, in addition to the payment of a total loss. (*a*) [1] It has been a ques-

(*d*) Fenwick *v.* Robinson, 1 Danson & Lloyd, 8; 8 Carr. & P. 328.

(*e*) Dunham *v.* Com. Ins. Company, 11 Johns. 315; Sewall *v.* U. S. Ins. Company, 11 Pick. 90. Temporary repairs in the course of the voyage are held to be particular average; but other repairs abroad, from strict necessity, to enable the vessel to return, and which become useless afterwards, are general average. Brooks *v.* Oriental Ins. Company, 7 id. 259.

(*f*) Shiff *v.* Miss. Ins. Company, 1 La. 304.

(*a*) 1 Caines, 284, 450; 7 Johns. 62, 424, 433; [4 Mason, 300;] 4 Taunt. 867. Emerigon has taken notice of this stipulation in the English policies, by means of which the insurer may become chargeable beyond the amount of his subscription; and there is the same stipulation, by which they may be so charged, in the policies, at Antwerp, Rouen, Nantes, and Bourdeaux; and there is the same clause in the *formula* given by Loccenius. In the form used at Marseilles, there is no such clause;

[1] *The suing and laboring clause* has been referred to heretofore, 331, n. 1, (*e*); 296, n. 1, (*c*). By it the assured is authorized to sue, labor, &c., at the cost of the insurers in order to avert a loss which would have fallen on the insurer, or to mitigate its consequences. Arnould on M. Ins. 4th ed. 238; Xenos *v.* Fox, L. R. 3 C. P. 630, 637. But if the expenses are not incurred in averting an impending loss which would otherwise have fallen upon the underwriters, such as an actual or constructive total loss of the goods in the case of a policy on memorandum articles, they cannot be recovered under this clause. Great Indian Pen. R. Co. *v.* Saunders, 1 Best & S. 41; 2 id. 266; Booth *v.* Gair, 15 C. B. N. S. 291. But compare Indianapolis Ins. Co. *v.* Mason, 11 Ind. 171, 178.

As to the effect of the clause in a policy on freight, even where there is a warranty against particular average, see Kidston *v.* Empire M. Ins. Co, *ante*, 296, n. 1, (*c*). The principle of this decision was followed in a case where there does not seem to have been such a warranty. The loss of freight was averted by an extraordinary expenditure incurred by the ship owner for that very purpose, in forwarding the goods to their destination by land, under circumstances in which it would have been practicable to reload the goods on board the vessel on which they were originally shipped at a less expense, and the assured was allowed to recover that part of his disbursements which would have been necessary had he reloaded. Lee *v.* Southern Ins. Co., L. R. 5 C. P. 397.

tion much contested in the French tribunals, whether the insurer can, in cases distinct from the above stipulation, be held chargeable at the same time, and cumulatively, with the amount of an average, and also with the amount of a subsequent total loss in the same voyage. This is said to be contrary to all principle, and the elements of the contract; and it was decided in the Court of Cassation, in 1823, after great litigation, that the insurer was not holden beyond the amount of his subscription, and for which he received a premium, notwithstanding the prior partial and subsequent total loss. (*b*)

(3) *Of the Return of Premium.* — The premium paid by the insured is in consideration of the risk which the insurer
* 341 assumes, and if the contract of * insurance be void *ab initio*, or the risk has not been commenced, the insured is entitled to a return of premium. If the insurance be made without any interest whatsoever in the thing insured, and this proceeds through mistake, misinformation, or any other innocent cause, the premium is to be returned. So if the insurance be made with short interest, or for more than the real interest, there is to be a ratable return of premium. If the risk has not been run, whether it be owing to the fault, pleasure, or will of the insured, or to any other cause, the premium must be returned, for the consideration for which it was given fails. (*a*) [1] If the vessel never sailed on the voyage insured, or the policy became void by a failure of the warranty, and without fraud, the policy never attached; but if

and without such clause, and as a general rule, the insurer is not chargeable beyond his subscription. But with such a special clause, Valin and Emerigon both agree, that the expense must be borne by the insurer, though it go beyond the effects recovered. This, however, is denied by Boulay-Paty, who insists that the sum subscribed limits all claim upon the insurer. 1 Emerigon, 484; 2 id. 202–213; Valin's Comm. ii. 99; Boulay-Paty, iv. 312, 313. In some of our American policies, the stipulation is, that the assured may labor and travel, for, in, and about the safeguard and recovery of the property, *to the charges whereof the insurers will contribute, according to the rate and quantity of the sum insured.*

(*b*) Kermel *v.* La Compagnie Royale d'Assurance, reported in the Journal de Cassation, 1823, and quoted at large in Boulay-Paty, iv. 519–532, [tit. 12, sec. 7;] and see, also, ib. 272–276.

(*a*) Tyrie *v.* Fletcher, Cowp. 666; Loraine *v.* Thomlinson, Doug. 585; 8 T. R. 156, arg.; Holmes *v.* United Ins. Company, 2 Johns. Cas. 329; Taylor *v.* Sumner, 4 Mass. 56.

[1] New York F. M. Ins. Co. *v.* Roberts, 4 Duer, 141. If a material representation is false, so that the policy never attaches, if at the same time there is no fraud, the assured may recover the premium. Anderson *v.* Thornton, 8 Exch. 425.

the risk has once commenced, though the voyage be immediately thereafter abandoned, there is to be no return or apportionment of premium. And if the premium is to be returned, it is the usage in every country, where it is not otherwise expressly stipulated in the policy, for the insurer to retain one half per cent by way of indemnity for his trouble and concern in the transaction. (*b*)

The insurer retains the premium in all cases of actual fraud on the part of the insured or his agent. (*c*) So, if the trade be in any respect illegal, the premium cannot be reclaimed. (*d*) If the voyage be divisible, there may be an apportionment of the premium; and if the risk as to the one part of the voyage has not commenced, the premium may *be proportionably *342 retained. But the premium cannot be divided and apportioned, unless the risks were divisible and distinct in the policy. If the voyage and the premium be entire, there can be no apportionment. It is requisite that the voyage, by the usage of trade or the agreement of the parties, be divisible into distinct risks; and, in that case, if no risk has been run as to one part, there may be an apportionment of premium. (*a*)

The French code provides for the apportionment of premium in the case of an insurance on goods, when part of the voyage has not been performed. (*b*) M. Le Baron Locré, in his commentary upon this article, vindicates it by very ingenious reasoning, which M. Boulay-Paty (*c*) thinks, however, does not remove the difficulty; and he contends that such a provision is contrary to a principle of the contract, that when the risk has once commenced, the right to the entire premium is acquired.

4. **Of the Writers on Insurance Law.** — I have now finished a survey of the leading doctrines of marine insurance, which is by far the most extensive and complex title in the commercial code.

(*b*) Emerigon, ii. 154; 2 Phillips on Insurance, 526; Code de Commerce, art. 349; Hendricks *v.* Com. Ins. Company, 8 Johns. 1.

(*c*) Tyler *v.* Horne, Park on Insurance, 285; Chapman *v.* Frazer, Marshall on Insurance, 652; Hoyt *v.* Gilman, 8 Mass. 336.

(*d*) Morck *v.* Abel, 3 Bos. & P. 35; Vandyck *v.* Hewitt, 1 East, 96.

(*a*) Stevenson *v.* Snow, 3 Burr. 1237; Long *v.* Allan, Marshall on Insurance, 660; [4 Doug. 276;] Donath *v.* Ins. Company of North America, 4 Dallas, 468; Ogden *v.* Firemen Ins. Company, 12 Johns. 114; 2 Phillips on Insurance, 538.

(*b*) Code de Commerce, art. 356.

(*c*) Cours de Droit Commercial Maritime, iv. 98, 99.

There is no branch of the law that has been more thoroughly investigated, and more successfully cultivated in modern times, not only in England, but upon the European continent. Maritime law in general partakes more of the character of international law than any other branch of jurisprudence; and I trust I need not apologize for the free use which has been made, for the purpose of argument or illustration, not of English author-
* 343 ities only, * but of the writings of other foreign lawyers, and the decisions of foreign tribunals, relative to the various heads of the law-merchant. I am justified, not only by the example of the most eminent of the English lawyers and judges, but by the consideration that the law-merchant is part of the European law of nations, and grounded upon principles of universal equity. It pervades everywhere the institutions of that vast combination of Christian nations, which constitutes one community for commercial purposes and social intercourse; and the interchange of principles and spirit and literature, which that intercourse produces, is now working wonderful improvements in the moral and political condition of the human race.

The general principles of insurance law rest on solid foundations of justice, and are recommended by their public utility; and yet it is a remarkable fact, that none of the nations of antiquity, though some of them were very commercial, and one of them a great maritime power, appear to have used, or even to have been acquainted with, this invaluable contract. (*a*) It was equally a stranger to the early maritime codes compiled on the revival of arts, learning, and commerce, at the conclusion of the middle ages. The Consolato del Mare, the laws of Oleron, and the laws of the

(*a*) Bynkershoek and Emerigon both agree, that the contract of insurance was not to be found in the Roman law, though some traces of it have been supposed to be perceived in the Roman history. Bynk. Quæst. J. Pub. lib. 1, c. 21. Emerigon, des Ass. Pref. John Duer, Esq., has recently bestowed a learned examination and able argument upon the question, whether marine insurance was known to the ancients, and he gives strong presumptive reasons in favor of the use of that insurance among the Romans. See his Preliminary Lecture to a Course of Lectures on Marine Insurance, New York, 1844, and which now constitutes the first Lecture of the Introductory Discourse to his great work on the Law and Practice of Marine Insurance, vol. i. ed. New York, 1845. If he should finish the extensive work which he is engaged in preparing for the press, (and in which I wish him every encouragement,) he will, judging from his known erudition and talents, as well as from the sample before us, give to the public a treatise of exhausting research, skilful criticism, and consummate ability.

Hanseatic Association, were all silent upon the subject of the contract of insurance. The first allusion to it is said to have been made in the latter part of the fourteenth century, and where we should not, at that early age, have first expected to find it; in the laws of Wisbuy, compiled in the Teutonic language on the bleak shores of an island in the middle of the Baltic Sea. (*b*) It is so necessary a contract, that Valin concludes *maritime *344 commerce cannot well be sustained without it, for no prudent ship owner would be willing to risk his own fortune, and that of others, on an unprotected adventure at sea. The business of uncovered navigation or trade would be spiritless or presumptuous. The contract of insurance protects, enlarges, and stimulates maritime commerce; and under its patronage, and with the stable security which it affords, commerce is conducted with immense means and unparalleled enterprise, over every sea, and to the shores of every country, civilized and barbarous. Insurers are societies of capitalists, who are called by

(*b*) The allusion to marine insurance, in art. 66 of the Laws of Wisbuy, is so obscure or equivocal, that the most celebrated jurists have differed in opinion as to the origin of the contract. Cleirac, in his commentary on that article of the Laws of Wisbuy, applies it directly to insurances; and he had studied that compilation thoroughly, for he translated it into French, from the old German, or Tudesque language, in which the code had been preserved to his day. In the collection of Sea Laws, published at London, under Queen Anne, the article, as translated, applies to marine insurance. Emerigon, also, in the preface to his treatise, gives that construction to the article, and he and Cleirac are great authorities on the point. On the other hand, Emerigon admits that Stypmannus, Ansaldus Gibalinus, and Casaregis would not allow that the use of insurances was introduced into commerce until towards the fifteenth century; and Valin intimates that the contract of insurance came from the Italians, and passed from them to the Spaniards, Dutch, and other commercial nations. Malynes, as early as 1622, traced the practice of insurance from Claudius Cæsar to the inhabitants of Oleron, and then to Antwerp and London. Cleirac's les Us et Coutumes de la Mer, 155; Malynes's Lex Mercatoria, pt. 1, 105; Emerigon, Traité des Ass. Pref.; Valin's Comm. ii. 27. Bynkershoek said he had no evidence that the contract of insurance was in use in Holland in the fifteenth century, though he found it to have been in established use by the middle of the following century. Quæst. J. Priv. lib. 4, c. 1. Mr. Duer, (on Insurance, &c., i 28–32,) after a critical examination, concludes that marine insurance first came into use in Italy at the close of the 12th, or beginning of the 13th century. Don Antonio de Capmany, in his History of the Commerce of Barcelona, referred to in M'Culloch's Dictionary of Commerce, art. Insurance, gives an ordinance in Spanish relative to insurance, issued by the magistrates of that city in 1436. This is done more effectually by Duer, in his work on Insurance, i. 34, 35, and in the App. to vol. ii., for he gives an English translation of the ordinance. Barcelona must, therefore, be regarded as the birthplace of the earliest ordinance on the subject of marine insurance.

their business to study with profound sagacity, and with exactness of calculation, the geography and navigation of the globe, the laws of the elements, the ordinances of trade, the principles of international law, and the customs, products, character,
*345 and institutions of every * country where tide waters roll, or to which winds can waft the flag of their nation. (a)

Many of the states and great commercial cities of Europe, in the early periods of modern history, made and published ordinances relating to insurance, and most of them have been collected in Magens's Essay on Insurance, published in 1755. The most important of these compilations were the ordinances of Barcelona, Bilboa, Florence, Genoa, Antwerp, Rotterdam, Amsterdam, Copenhagen, Stockholm, and Königsberg, as well as royal ordinances of the kings of France, Spain, and Portugal. They are authentic memorials of the prosperity of commerce, and evidence of the early usages in respect to a contract governed by general principles of policy and justice. We may also refer to the decisions of the Rota of Genoa (of which so much use is made by Roccus), to show how early and extensively insurance questions became a source of litigation and topic of discussion
*346 in the courts of * justice. (a) But without dwelling upon these historical views, my object at the close of this lecture is, merely to direct the attention of the student to the character

(a) The French lawyers have described the contract of insurance in strong and eloquent language. C'est une espèce de jeu, said Emerigon, truly and gravely; qui exige beaucoup de prudence de la part de ceux qui s'y adonnent. Il faut faire l'analyse des hazards, et posséder la science du calcul des probabilités; prévoir les écueils de la mer, et ceux de la mauvaise foi; ne pas perdre de vue les cas insolites et extraordinaires; combiner le tout, le comparer avec le taux de primes, et juger quel sera le résultat de l'ensemble. But the French counsellors of state, Messrs. Corvetto, Bégouen, and Maret, in their report to the legislative body, on the 8th September, 1807, declared that Ce beau contrat est le noble produit du génie de l'homme, et le premier garant du commerce maritime. Il a consulté les saisons; il a porté ses regards sur la mer; il a interrogé ce terrible élément; il en a jugé l'inconstance; il en a pressenti les orages; il a épié la politique; il a reconnu les portes et les côtes des deux mondes; il a tout soumis à des calculs savans, à des théories approximatives, et il a dit au commerçant habile; au navigateur intrepide: certes il y a des désastres sur lesquels l'humanité ne peut que gémir; mais quant à votre fortune allez, franchissez les mers, déployez votre activité et votre industrie: Je me charge de vos risques.

(a) Those decisions, under the title of Decisiones Rotæ Genuæ de Mercatura, are contained in the voluminous compilation, which includes the works of Santerna and of Straccha, and was published at Amsterdam in 1669. They amount to two hundred and fifteen decisions, and many of them relate to insurance questions, and they settled principles which govern at this day.

and value of the most distinguished works which have elevated and adorned this branch of the law.

The earliest work extant on insurance is the celebrated French treatise entitled Le Guidon. It was digested and prepared some centuries ago, by a person whose name is unknown, for the use of the merchants of Rouen. It was published by Cleirac, in 1671, in his collection entitled Les Us et Coutumes de la Mer; but it was a production of a much earlier date, and it contains decisive evidence that the law of insurance had become, in the sixteenth century, a regular science. Emerigon viewed it as containing the true principles of nautical jurisprudence, and valuable for its wisdom and for the great number of principles and decisions which it contained; and when Cleirac gave to the world his revised and corrected edition of the Le Guidon, he regretted that he was not able to rescue from oblivion the name of an author who had conferred signal honor on his country, by the merit and solidity of his production, though it wanted the taste and elegance of later ages. (*b*)

The treatise of Roccus on insurance has been universally regarded as a text book of great authority. He was an eminent civilian and judge at Naples, and published his work in 1655; and Mr. Ingersoll, the American translator, perceives an analogy between the treatises of Roccus and Littleton's Tenures. That analogy does truly exist in the sound logic, admirable precision, and vast power of compression, * which are dis- *347
played throughout his works. He made free use of the treatises of Santerna and Straccha on insurance law, and gave authority to those very creditable productions of the latter part of the sixteenth century. (*a*) Bynkershoek has devoted the

(*b*) Cleirac's Pref. to Le Guidon.

(*a*) The treatise of Santerna, a Portuguese lawyer, De Assecurationibus et Sponsionibus Mercatorum, and the later work of Straccha, of Ancona, De Assecurationibus, equally abound in references throughout the body of their works to the civil law and the early civilians. The latter is essentially the groundwork of the treatises of Roccus, and yet both Straccha and Santerna are rudely termed, by Bynkershoek, semi-barbarous writers, though they were familiar not only with the Roman law, but with the Roman classics. Emerigon and Valin make free use of the works of these authors, as they do also of the commercial discourses of Casaregis, who is without contradiction, as Valin says, (Com. sur Ord. Pref.) the best of all the writers whom he had enumerated, and he had already mentioned Cleirac, Straccha, Stypmannus, Loccenius, Kuricke, Peckius, Vinnius, and Weysten. Casaregis has also received the highest and warmest eulogy from the learned and eloquent author of the article n. 15, in The North American Review, vii. 328.

fourth book of his Quæstiones Juris Privati to the contract of insurance. It constitutes a large treatise, which discusses, with his usual freedom of thought and expression, almost every important branch of the law of that contract. His work, which occasionally refers to the Roman law, is almost entirely grounded on Dutch edicts, and judicial decisions in the courts of Holland. It is essentially a collection of reports of cases adjudged in the Dutch courts, and I do not perceive that he ever refers to the decisions of the Rota of Genoa, or to the writings of Santerna, Straccha, or Roccus, which were before his eyes. Such reserve, or proud disdain of foreign illustration and aid, detracts greatly from the scientific character and liberal temper of the work. But we proceed to the mention of authors, by whose learned labors the utility of all preceding treatises on insurance was superseded, and their fame and lustre eclipsed.

* 348 * Valin's copious commentary upon that part of the ordinance of Louis XIV. which relates to insurance, is deserving of great attention, and it has uniformly and everywhere received the tribute of the highest respect, for the good sense, sound learning, and weight of character which are attached to his luminous reflections. Pothier's essay on insurance is a concise, perspicuous, accurate, and admirable elementary digest of the principles of insurance, and it contains the fundamental doctrines and universal law of the contract. But the treatise of Emerigon very far surpasses all preceding works, in the extent, value, and practical application of his principles. It is the most didactic, learned, and finished production extant on the subject. He professedly carries his researches into the antiquities of the maritime law, and illustrated the ordinances by what he terms the jurisprudence of the tribunals; and he discussed all incidental questions, so as to bring within the compass of his work a great portion of international and commercial law connected with the doctrines of insurance. In the language of Lord Tenterden, no subject in Emerigon is discussed without being exhausted, and the eulogy is as just as it is splendid. Emerigon was a practical man, who united exact knowledge of the details of business with manly sense and consummate erudition. He was a practising lawyer at Marseilles, for perhaps forty years, and the purity of his private life corresponded with the excellence of his public character. Valin acknowledges that he owed some of the best parts of his

work to the genius and industry of that eminent civilian, who gratuitously pressed upon him, with a cordiality and disinterestedness almost without example, a rich collection of materials, consisting of decisions and authorities, suitable to illustrate and adorn the jurisprudence of the commentary. It would be difficult to peruse the testimony which Valin has so frankly borne to the moral, as well as literary and professional accomplishments of Emerigon, without being sensibly touched with the generosity of the friendship of those illustrious men.

*Since the renovation of the marine ordinance of Louis *349
XIV., in the shape of the commercial code of France of 1807, there has arisen a host of commentators, such as the Baron Locré, Pardessus, Laporte, Delvincourt, Toullier, and Boulay-Paty, of various and unequal merit. The treatise of M. Pardessus, on commercial law, in five volumes, contains a neat and excellent digest of the law of marine insurance; and though he has not enriched his work with citations from the text writers, or with references to judicial decisions, it contains intrinsic evidence of extensive and accurate research, as well as of clear and solid judgment. Toullier, though already quite voluminous, has not as yet touched on the commercial code. On the law of insurance, I would select and recommend Boulay-Paty as the latest and best writer. He has explained and illustrated every part of the code, but devoted nearly half of his voluminous work to the single head of insurance, and he has treated the subject very much in the style of Emerigon. He has trodden in his footsteps, adopted his copious learning, applied his principles with just discrimination, and gives us a complete treatise on every branch of insurance, according to the order and under the correction of the new code.

The first notice of the contract of insurance that appears in the English reports, is a case cited in Coke's Reports, (*a*) and decided in the 31st of Elizabeth; and the commercial spirit of that age gave birth to the statute of 43d Elizabeth, passed to give facility to the contract, and which created the Court of *Policies of Assurance*, and shows by its preamble that the business of marine insurance had been in immemorial use, and actively followed. But the law of insurance received very little study and cultivation for ages afterwards; and Mr. Park informs us that there

(*a*) 6 Coke, 47, b.

were not forty cases upon matters of insurance prior to the year 1756, and even those cases were generally loose nisi prius notes, containing very little information or claim to authority. From that time forward the decisions of the English courts on insurance assumed new spirit and vigor, and they deserve to be studied with the utmost application. When Sir William Blackstone published the second volume of his Commentaries, Lord Mansfield had presided in the Court of King's Bench for nearly ten years; and in that short space of time the learning relating to marine insurance had been so rapidly and so extensively cultivated that he
* 350 concluded, that if the principles * settled were well and judiciously collected, they would form a very complete title in the code of commercial jurisprudence. Mr. Park (now a judge of the Court of King's Bench) took the suggestion, and published his System of the Law of Marine Insurances in 1786, and he had the advantage of the labors of the whole period of Lord Mansfield's judicial life; and the decisions are collected and digested with great copiousness, erudition, and accuracy. He extracted all that was valuable from the compilations of Malynes, Molloy, Magens, Beawes, and Weskett; and he had the good sense and liberality to enrich his work with the materials of those vast and venerable repositories of commercial learning, the Le Guidon, the foreign ordinances, and the writings of Roccus, Bynkershoek, Valin, Pothier, and Emerigon.

About the time that Park published his treatise, the Elements of the Law relating to Insurances, by Mr. Millar, a Scotch advocate, appeared at Edinburgh. He evidently compiled his work without any knowledge of the contemporary publication of Mr. Park; and though the English cases are not so extensively cited and examined by him, he supplied the deficiency by a digest of cases in Scotland; and he appears to have been equally familiar with the continental civilians, and to have discussed the principles of insurance with uncommon judgment and freedom of inquiry. Since the publication of Millar's treatise, no work appeared in Scotland on the subject of insurance, until Mr. Bell took a concise view of that as well as of other maritime contracts, in his very valuable Commentaries; and he states that since the period of 1787, the mercantile law of Scotland has been making rapid strides towards maturity.

The treatise of Park had passed through five editions, when

Mr. Marshall published, in 1802, his Treatise on the Law of Insurance. It contains a free and liberal discussion of principles, and it is more didactic and elementary in its instruction than the work of his predecessor, but it abounds *with *351 citations of the same cases at Westminster, and a reference to the same learned authors in France and Italy. Mr. Park is entitled to the superior and lasting merit of being the artist who first reduced the English law of insurance to the beauty and order of a regular science, and attracted to it the rays of foreign genius and learning. The American edition of Marshall, by Mr. Condy, is greatly to be preferred to any other edition; and even that improved work is now in a considerable degree superseded by Mr. Phillips's Treatise on the Law of Insurance, the first volume of which was published at Boston in 1823, and the second in 1834, and a new and improved edition of the entire work, in two volumes, in 1840. This author has very diligently collected and ingrafted into his work not only the English cases, but the substance of all the American cases, and decisions on insurance, which had been accumulating for a great number of years. In that view it is an original work of much labor, discrimination, and judgment, and of indispensable utility to the profession in this country. (*a*)

The treatise of Mr. Benecke, on the Principles of Indemnity in Marine Insurance, may be considered as an original work of superior merit, written by a business man, on the most useful and practical part of the law of insurance. It contains great research, clear analysis, strong reasoning, and an accurate application of principles, and was intended for the use of the merchant and ship owner, as well as of the practising lawyer. The work was the result of much study, research, and experience; and the public expectation of its value, from the well known character and ability of *the author, had been highly raised, a long *352 time before the publication. (*a*)

(*a*) In 1828, a new Treatise on the Law relating to Insurance, by David Hughes, Esq., of the Inner Temple, was published at London. It goes over the same ground already fully and sufficiently occupied by his two eminent predecessors, Park and Marshall; and with very scanty reference to any foreign authorities, it cites all the modern English cases. It is a plain, methodical, and correct treatise, and must be valuable to an English lawyer, *so far as it has incorporated into the work the substance of the recent decisions not to be found in the former works.* Beyond that information, the treatise is entirely superfluous.

(*a*) The treatise of Mr. Benecke was published in 1824, and yet, in Jacobsen's

work on the Laws of the Sea, published at Altona, in 1814, he speaks of this treatise, by its title, as being in preparation by a master-hand. This treatise of Mr. Benecke is said to be only an inconsiderable portion of his great original work on Insurances and Maritime Loans, published at Hamburg, between 1805 and 1810, and translated into Italian, and published at Trieste in 1828. It is the most comprehensive and perfect work on insurance and maritime loans, says Mr. Duer, that has yet appeared. Lecture on Representations, 185.

LECTURE XLIX.

OF MARITIME LOANS.

THE contracts of *bottomry* and *respondentia* are maritime loans of a very high and privileged nature, and they are always upheld by the admiralty with a strong hand, when entered into *bona fide*, and without any suspicion of fraud. The principle on which they are founded and supported is of great antiquity, and penetrates so deeply into it, that Emerigon says its origin cannot be traced. It was borrowed by the Romans from the laws of the ancient Rhodians, and it is deeply rooted in the general maritime law of Europe, from which it has been transplanted into the law of this country. The object of hypothecation bonds is to procure the necessary supplies for ships which happen to be in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by means of such instruments, the vessels and their cargoes must be left to perish. The authority of the master to hypothecate the ship and freight, and even the cargo, in a case of necessity, is indisputable. (*a*) The vital principle of a bottomry bond is, that it be taken in a case of unprovided necessity, where the owner has no resources or credit for obtaining necessary supplies. (*b*) If the lender knew that the owner had an empowered consignee or agent in the port, willing to supply his wants, the taking the bond is a fraud; but if fairly taken under an ignorance of the fact, the * courts of admiralty are disposed to uphold such bonds, *354 as necessary for the support of commerce in its extremities

(*a*) The Gratitudine, 3 C. Rob. 240, 267; The Hero, 2 Dods. 189; Case of the Duke of Bedford, 2 Hagg. Adm. 294. *Vide supra*, 178. Sea stores, particularly for the subsistence of passengers, are objects of a bottomry bond. 2 Hagg. Adm. 301.

(*b*) *Vide supra*, 171. The degree of necessity that will justify the master in taking up money on bottomry for repairs, and that will justify the creditor in lending it, is examined with great learning and judgment in the case of the Ship Fortitude, Law Reporter, i. [124,] C. C. U. S. Mass., August, 1838, 3 Sumner, 228.

of distress. (*a*) [1] And if the lender of money on a bottomry or respondentia bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like an insurer, the risk of sea perils, it is lawful, reasonable, and just, that he should be authorized to demand and receive an extraordinary interest, to be agreed on, and which the lender shall deem commensurate to the hazard he runs. (*b*)

A bottomry bond is a loan of money upon the ship, or ship and accruing freight, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a specific voyage, or for a definite period. It is in the nature of a mortgage, by which the ship owner, or the master on his behalf, pledges the ship as a security for the money borrowed, and it covers the freight of the voyage, or during the limited time. *A respondentia bond* is a loan upon the pledge of the cargo, though an hypothecation of both ship and cargo may be made in one instrument; and generally, it is only a personal obligation on the borrower, and is not a specific lien on the goods, unless there be an express stipulation to that effect in the bond; and it amounts, at most, to an equitable lien on the salvage in case of loss. (*c*) The condition of the

(*a*) The Nelson, 1 Hagg. Adm. 169; Lord Stowell, in the case of the Gratitudine, 3 C. Rob. 271, 272.

(*b*) For the historical learning on the subject of maritime loans, see Dig. 22. 2. *De nautico fœnore.* Code 4, 33; ib.; Bynk. Q. J. Priv. lib. 3, c. 16, pp. 506, 509. Emerigon, h. t., c. 1, sec. 1, has collected all that the Roman law has said on the subject. The speeches of Demosthenes against Zenothemis, Apaturius, Phormio, Lacritus, and Dionysodorus, relate to the *fœnus nauticum* of the Roman law, or the bottomry contract of the modern commercial nations. See, in The American Jurist, n. 6, p. 248, an account of maritime loans in ancient Athens, taken from the treatise on the Public Economy of Athens, by the learned Augustus Boekh, Greek Lecturer and Professor at the University of Berlin. The goods were generally, and sometimes the vessel was pledged for the security of the loan, with maritime interest. See, also, Lord Stowell, in the case of the Gratitudine, 3 C. Rob. 267; The Alexander, 1 Dods. 278; The Augusta, ib. 283; The Hero, 2 id. 139.

(*c*) 2 Bl. Comm. 459; Busk *v.* Fearon, 4 East, 319. According to Emerigon, ii. 476, 561, the respondentia lender has a *lien* on the cargo of the borrower on board; and if the loan be for the outward and homeward voyage, the lien affects the return

[1] The circumstances which will authorize the master to give a bottomry bond, and the law by which the obligation will be governed, have been stated and explained *ante*, 172, n. 1; 164, n. 1. It will be seen in the former note that in some cases such a bond may be given for a preëxisting debt It has been held that a consul had authority, by reason of his official position, under circumstances of necessity, when the master had been murdered, to give a bottomry bond. Cynthia, 16 Jur. 748; 20 Eng. L. & Eq. 628.

loan is *the safe arrival of the subject hypothecated, and *355
the entire principal as well as interest is at the risk of the lender during the voyage. The bottomry holder undertakes the risk of the voyage as to the enumerated perils, but not as to those which arise from the fault or misconduct of the master or owner. Quia suscipit in se periculum navigationis, suscepit periculum fortunæ non culpæ. The money is loaned to the borrower, upon condition that if the subject pledged be lost by a peril of the sea, the lender shall not be repaid, except to the extent of what remains; and if the subject arrives safe, or if it shall not have been injured, except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on, and for the repayment the person of the borrower is bound, as well as the property pledged. This is the definition of the contract given by Pothier; (*a*) and it was taken from the Roman laws, and has been adopted by Emerigon, and he says the definition is given in nearly the same terms by all the maritime jurists. (*b*)

Money may also be lawfully loaned at any rate of interest, upon the mere hazard of a specific voyage, to be mentioned in the contract, without any security either upon the ship or cargo. But this last species of maritime loan depending upon the event of the voyage, has a tendency to introduce wagering and usurious contracts, and it has been restrained in England, by the statute of 19 Geo. II, c. 37, as to East India voyages. If the borrower has no effects on board, or having some, he borrows much beyond their value, it will afford a strong ground to suspect fraud, and that the voyage will have an unfortunate end. (*c*) Such loans were entirely suppressed in France, by the marine ordinance of 1681. They were considered to be wagers, in the form of bottomry contracts; and it was declared that, in case of loss, the borrower upon goods should not be discharged without proving *that he had goods on board at the time of the *356
cargo, being the proceeds of the outward cargo. By the foreign laws the lender on *respondentia* has the pledge of the goods as a security. Pothier, Bynkershoek, and Emerigon. Abbott on Shipping, 5th Am. ed. Boston, 1846, p. 197. But this is not the English law. *Respondentia* loans have been disused in England since the statute of 19 Geo. II., c. 37.

(*a*) Contrats à la grosse, n. 1.

(*b*) Emerigon, Traité des Contrats à la grosse, c. 1, sec. 2; 2 Hagg. Adm. 58, 57; Story, J., in the case of the Brig Draco, 2 Sumner, 186, s. P.

(*c*) Casaregis, Disc. 62, n. 7; Guidon, c. 19, sec. 10.

loss, on his own account, to the amount of the sum lent. (*a*) The same prohibition was continued in the commercial code, and the loan on bottomry, or at respondentia, is valid to the extent only of the value of the subject matter on which the loan is effected. (*b*) Sergeant Marshall says, (*c*) that there is no common law decision that sanctions such a loan, and he considers it to be a gambling contract. The weight of authority is, however, in favor of the validity of these maritime loans, where nothing is hypothecated. (*d*) The lender runs the risk of the voyage, and receives extraordinary interest by way of compensation. The contract is not usurious, for the principal loaned is put at risk. (*e*)

The general rule is, that the power of the master to take up money upon bottomry or respondentia exists only after the voyage has commenced, and is to be exercised in some foreign port where the owner does not reside, for in such cases only is the hypothecation presumed to be necessary. (*f*) But it is not indispensable to the validity of an hypothecation bond, that the ship or cargo should be in a foreign port. The law does not look to the mere locality of the transaction, but to the difficulty of communication between the master and his owners. If forced into a port of the same country in which the owner resides, the master may hypothecate the ship and cargo, in a case of extreme necessity, and when he had no opportunity or means, or it was extremely difficult to communicate with the owners.

* 357 Occasions may arise in which the different * ports of the same country may be as much separated and cut off from all communication with each other, as if they were situated in distant parts of the globe. (*a*)

(*a*) Ord. de la Mar. tit. Des Contrats à grosse Aventure, art. 14; ib. art. 8.

(*b*) Code de Commerce, art. 317.

(*c*) Condy's Marshall, ii. 745.

(*d*) 2 Bl. Comm. 459; Molloy, b. 2, c. 11, sec. 18.

(*e*) Soome *v.* Gleen, 1 Sid. 27. The New York Revised Statutes, i. 662, declare void all wager contracts, except contracts on bottomry or respondentia. See *supra*, 278. It is essential that the principal and interest should both be put at risk, if the interest reserved be more than legal interest, in order to constitute a bottomry contract. Jennings *v.* Insurance Company of Pennsylvania, 4 Binney, 244.

(*f*) Condy's Marshall, ii. 741, b. c.; Reade *v.* Commercial Insurance Company, 3 Johns. 360; 1 Emerigon, ii. 424, 436; Code de Commerce, art. 321; Lister *v.* Baxter, Strange, 695; Abbott on Shipping, 5th Am. ed. 193.

(*a*) La Ysabel, 1 Dods. 273. See, also, The Rhadamanthe, 1 Dods. 201; Greeley *v.* Waterhouse, 19 Me. 1. [*Ante*, 172, n. 1; 164, n. 1.]

There is great analogy between the contracts of bottomry and insurance. They are frequently governed by the same principles, though each of them has a character peculiar to itself. They contribute in different proportions to the facility and security of maritime commerce; but the immense capitals now engaged in every branch of commerce, and the extension of marine insurance, have very essentially abridged the practice of such loans. The master cannot hypothecate for a preëxisting debt, and the necessity of the loan must be shown to have existed at the time it was made (*b*) and that the master had no other means of raising the money at marine interest; and when that fact is established, the misapplication of it by the master, without the knowledge and assent of the lender, will not affect its validity. (*c*) The marine interest depends entirely upon the risk, and, therefore, if the proposed voyage be abandoned before the risk has attached, the contract is turned into a simple and absolute loan at ordinary legal interest. So, if the borrower had not goods on board the ship to the value of the sum borrowed, the contract, in case of loss, is reduced in proportion to the diminished value, and the borrower is bound at all events to return the surplus of the sum borrowed, with the ordinary interest. The maritime interest is in a ratio to the maritime risk or value of the goods shipped. (*d*) After the voyage has commenced, and the loan has been for a moment at hazard, though the vessel be shortly forced back, by the perils of the sea, into the port of departure, and the voyage broken up, the lender is entitled to * his principal, *358 with the marine interest, for the whole had been put at hazard. (*a*) The same principle of necessity, which upholds a bottomry bond, entitles a bohd of a later date, fairly given at a

(*b*) The Brig Hunter, Ware, 249. Dr. Lushington, in the case of the Ship Vibilia, in the English Admiralty, in December, 1838, held, that where the general character of the transaction was clearly that of bottomry, the whole was to be presumed to be of the same character, unless expressly disproved; and that it was competent for a foreign merchant, without any express agreement at all for a bottomry bond, to make advances on the security of the ship as a lien given by the law of his own country, and that it was not necessary to have a bottomry bond, or any agreement for one, till the ship was about to sail. The Law Reporter for September, 1839, [p. 149; 1 Wm. Rob. 1.]

(*c*) The Jane, 1 Dods. 461; Emerigon, ii. 434; Hurry *v.* The Ship John, 1 Wash. 293. *Vide supra*, 168 and 171, n. (*d*).

(*d*) Emerigon, Traité des Contrats à la grosse, c. 6, sec. 1; Franklin Ins. Company *v.* Lord, 4 Mason, 248.

(*a*) Boulay-Paty, Cours de Droit Com. iii. 74–76, 167–169.

foreign port, under a pressure of necessity, to priority of payment over one of a former date; notwithstanding this is contrary to the usual rule in other cases of security. (*b*) The equity of it consists in this, that the last loan furnished the means of preserving the ship, and without it the former lenders would entirely have lost their security, and therefore it supersedes a prior mortgage as well as any other prior lien. (*c*) The bottomry bond is also to be paid before any prior insurance, (*d*) and it supersedes a previous mortgage of the ship. (*e*) The bottomry bond cannot be made to cover advances made upon the personal security of the borrower, and not upon the exclusive security of the ship; but taking bills of exchange at the same time, by way of collateral security, does not exclude the bottomry bond, nor diminish its solidity. (*f*) [1]

The perils which the lender on bottomry runs, are usually specified in the bond; and, according to the forms in common use, they are essentially the same as those against which the underwriter in a policy of insurance undertakes to indemnify. By the French law, the lender can insure the money lent, for he runs the risk of it. He can insure the principal, though not his maritime interest. (*g*) The respondentia bonds in Philadelphia are said to be peculiar. The lender is entitled to the benefits of sal-

* 359 vage, and is liable for general * and particular average. They extend to perils by fire, enemies, men of war, or any other casualties. (*a*) There is not, in respect to the contract,

(*b*) The Rhadamanthe, 1 Dods. 204; The Betsey, ib. 289; The Jerusalem, 2 Gallison, 350; Code de Commerce, art. 328.

(*c*) The Sloop Mary, 1 Paine, 671; s. p. *supra*, 175.

(*d*) Boulay-Paty, iii. 228, 232.

(*e*) The Duke of Bedford, 2 Hagg. Adm. 294.

(*f*) The Augusta, 1 Dods. 283; The Jane, ib. 461; The Hunter, Ware, 249.

(*g*) Guidon, c. 18, sec. 2, note, by Cleirac; Roccus, de Navibus, n. 51; Valin, ii 12; Appleton *v.* Crowninshield, 3 Mass. 448; Code de Commerce, art. 347.

(*a*) Insurance Company of Pennsylvania *v.* Duval, 8 Serg. & R. 138. By the Code de Commerce, art. 330, the lender, on bottomry and respondentia, is also chargeable for general and for particular average.

[1] Atlantic, Newb. 514; Greely *v.* Smith, 3 Woodb. & M. 236. It seems to be the English doctrine that the master may pledge the personal credit of the owner, and also give a bottomry bond as collateral security, provided the two things are done by separate and distinct instruments. Stainbank *v.* Shepard, 13 C. B. 418, 443; Willis *v.* Palmer, 7 C. B. N. S. 340, 360; Bristow *v.* Whitmore, 4 De G. & J. 325 334.

any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. (*b*) The property saved, whatever it may be in amount, continues subject to the hypothecation. The lender can look only to what is saved; and if that be not equal to the value of the loan, the lender must bear the loss of the residue, and he cannot recover the deficiency of the borrower. By the general marine law, the lender on bottomry is entitled to be paid out of the effects saved, so far as those effects go, if the voyage be disastrous. (*c*)

The position laid down by Lord Mansfield, and afterwards by Lord Kenyon, (*d*) that the lender on bottomry or *respondentia* was not liable to contribute, in case of a general average, has been much and justly questioned in the elementary works. (*e*) It is contrary to the maritime law of France, and of other parts of Europe, and in Louisiana we have a decision *against *360 it. (*a*) The new French law, contrary to the ordinance of 1681, charges the lender with simple average, on partial losses, unless there be a positive stipulation to the contrary; but such a stipulation, to exempt him from gross or general average, would be void, and contrary to natural equity. (*b*) The reasoning of Emerigon is conclusive in favor of the right of making the lender chargeable with his equitable proportion of an average contribution. If he owes the preservation of his money lent to the sacrifice made by others for the preservation of the ship and cargo, why should he not contribute towards a jettison, ransom, or com-

(*b*) Thomson *v.* Royal Exchange Assurance Company, 1 Maule & S. 80. [The Great Pacific, L. R. 2 P. C. 516; L. R. 2 Ad. & Ec. 381; *ante*, 331, n. 1; Broomfield *v.* Southern Ins. Co., L. R. 5 Ex. 192.]

(*c*) Parker, J., and Sewall, J., in Appleton *v.* Crowninshield, 3 Mass. 443; Wilmer *v.* The Smilax, Peters Adm. 295, note; Valin's Comm. ii. 12; Code de Commerce, art. 327; Magens on Insurance, ii. 52, 56, 196–198, 430; Emerigon, ii. 544, 547. [Great Pacific, *sup.* n. (*b*).]

(*d*) Joyce *v.* Williamson, [3 Doug. 164], and Walpole *v.* Ewer, Park on Insurance, 6th ed. 563, 565. In the former case, Lord Mansfield declared it to be a clear point, that by the law of England there was neither average nor salvage upon a bottomry bond. This must be understood with the exception in the statute of 19 Geo. II. c. 37, which, on East India risks, allows the benefit of salvage to the lender on bottomry or at respondentia.

(*e*) See Condy's Marshall, ii. 760, 761; 1 Phillips on Insurance, 735–737, 2d ed.

(*a*) Chandler *v.* Garnier, 18 Martin, 599.

(*b*) Ord. de la Mar. h. t., art. 16; Code, art. 330; Emerigon, Traité des Contrats à la grosse, c. 7, sec. 1.

position, made for the common safety? If no such sacrifice had been made, he would have lost his entire loan, by the rapacity of pirates, or the violence of the storm.

If the ship or cargo be lost, not by the perils of the sea, but by the default of the borrower or master, the hypothecation bond is forfeited, and must be paid. If the ship be lost on the voyage, and the cargo forwarded by another ship, in that case the borrowers must pay the debt, for such is the spirit of the contract. (*c*) The lender, who is, in effect, an insurer, does not, as in ordinary cases of insurance, assume the risk of barratry or loss by the fraud or misconduct of the borrower or his agents. (*d*) And the doctrine of seaworthiness, deviation, and the necessity of diligence and correct conduct on the part of the borrower, are equally applicable to this contract as to that of insurance. The lender is not to bear losses proceeding from the want of seaworthiness, or from unjustifiable deviation, or from the fault of the borrower, or the inherent infirmity of the cargo. Nor does he run the risk of the goods shipped on board another ship without necessity. (*e*)

* 361 * These maritime loans may be safely effected in a fair and proper case, as we have already seen, at the port of destination, as well as at any other foreign port. (*a*) So, the consignee of the cargo, and even the agent of the owner or charterer of the ship, under special circumstances, may take a bottomry bond, by way of security for advances made by him. (*b*) [1] The owner himself may also execute a bottomry

(*c*) Ins. Company of Penn. *v.* Duval, 8 Serg. & R. 138.

(*d*) Roccus, de Navibus, n. 51; Western *v.* Wildy, Skinner, 152; Ord. de la Mar. tit. Contrats à la grosse, art. 12; Emerigon, ii. 509–512; Code de Commerce, art. 326.

(*e*) Condy's Marshall, ii. 753–758; Boulay-Paty, iii. 158–164, 171–176; ib. 192. So, if the vessel be sold or transferred after the risk has commenced, or the voyage be in any manner broken up by the borrower, the maritime risk terminates, and the bond becomes presently payable, in like manner as a policy of insurance becomes in a like case *functus officio* as to future risks. The Brig Draco, 2 Sumner, 198, 194.

(*a*) 8 Johns. 352.

(*b*) The Alexander, 1 Dods. 278; The Hero, 2 id. 139; Case of the Ship Venus, Abbott on Shipping, 5th ed. Boston, 1846, p. 208.

[1] Royal Arch, Swabey, 269, 279. This case also shows that a bond given with the consent of the owner, upon a vessel in a home port, for a new voyage, would probably not be upheld in the British admiralty, because it creates a secret lien

bond abroad, and it will be enforced in our American admiralty courts, which have undoubted jurisdiction over such contracts, though executed on land and under seal. (*c*)

It has been made a question, whether a loan on bottomry or respondentia be good, if the ship or goods be already at sea when it is effected, inasmuch as the motives to the loan are supposed to have ceased after the ship's departure. Valin is in favor of the validity of the loan, and he considers that the presumption is either that the money has been usefully employed in the things put at risk, or in paying what was due on that account; and this reasoning is deemed solid by Marshall, notwithstanding it stands opposed to the high authority of Emerigon. (*d*) It has, likewise, been recently sanctioned by the decision of the Supreme Court of the United States, who have adjudged that it is not necessary that a respondentia loan (and the law on this point is the same, whether applied to respondentia or bottomry bonds) should be made before the departure of the ship on the voyage, and that it may be made after the goods are at risk. Nor is it necessary that the money should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It is sufficient that the risk of the voyage be substantially and really taken, and the advance made in good faith for a maritime premium. (*e*) The *lender is not presumed to lend upon *362

(*c*) The Sloop Mary, 1 Paine, 671; Menetone *v.* Gibbons, 3 T. R. 267. The bottomry bond may be given by the owner, without the concurrence of the master, or by the master, according to circumstances. The Duke of Bedford, 2 Hagg. Adm. 294. And it may be made by the owner, either in a foreign or home port. The Brig Draco, 2 Sumner, 157.

(*d*) Valin's Comm. i. 366; Emerigon, ii. 484; Condy's Marshall, ii. 747, a.

(*e*) Whether a bottomry bond, executed by the owner in his own place of residence, be valid, has been questioned, but when executed by him in a foreign port, it is undoubtedly binding. The Sloop Mary, 1 Paine, 671. It is not necessary to the validity of a bottomry bond made by *the owner* of the vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage. The owner may employ the money as he pleases. But if made by *the master, virtute officii*, it must be for the ship's necessities, for the implied authority of the master extends no further. The Brig Draco, 2 Sumner, 157.

without necessity. Ib. 276. Compare note (*e*), criticised in Greely *v.* Smith, 3 Woodb. & M. 236, 254. It was decided that an agreement to postpone payment of a bottomry bond until after the conclusion of a subsequent voyage, &c., but that the bond should remain a lien on the ship in the mean time, and a postponement accordingly, put an end to the right of the obligee to proceed *in rem* as against subsequent mortgagees, although the agreement might be a valid personal contract.

the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run upon other goods. The loan may be made, and the risk taken, upon the usual footing of policies of insurance, lost or not lost, and precisely as if the ship was then in port; and if, before the hypothecation be given, the property be actually lost by any of the perils enumerated in it, the loss must be borne by the lender. (*a*)

After the risk has ceased by the safe arrival of the ship, marine interest ceases, and gives place to the ordinary legal interest, on the aggregate amount of the debt due, consisting of the money lent with the maritime premium. This is understood to be the rule in the French law. The ordinary interest begins upon the accumulated sum when the marine interest ceases; and Boulay-Paty follows the authority of Emerigon, and of the French judicial decisions, in support of this rule, and in opposition to the doctrine of Pothier and Pardessus, who insist that no interest whatever accrues between the cessation of the maritime interest and the judicial demand of the debt. (*b*)

* 363 * The French code (*a*) prohibits all loans, in the nature of bottomry or respondentia, upon seamen's wages or voyages. A sailor is not generally in a situation to expect any great profit which would justify a loan upon maritime interest, and wages are too slender a basis for a maritime loan, and the provision is dictated by sound policy. The English and American courts of admiralty have a broad equity jurisdiction over such

(*a*) Conard *v.* Atlantic Insurance Company, 1 Peters, 886.

(*b*) Emerigon, ii. 414; Pothier, Traité du Pret, à la grosse Aventure, n. 51. M. Pardessus, Cours de Droit Com. iii. n. 917; Boulay-Paty, iii. 80–89. Marshall on Insurance, ii. 752, lays down the rule according to the opinion of Pothier, who holds that the ordinary interest, after the risk has ceased, commences only on the principal sum lent, and not on the joint principal and maritime interest, for that would be compound interest. There are no English decisions on the point, and if the French law is to govern, it is decidedly against the opinion of Pothier. There is ground for the conclusion, that when the risk has been run, and the peril ceases, the loan, with the extraordinary premium, becomes an absolute debt, which ought to carry interest if the payment be delayed. The French law declares, and it is also the doctrine of Casaregis, that a bottomry contract, if made payable to *order* or *bearer*, is negotiable, like a bill of exchange, and is to be dealt with and protested in like manner. Casaregis, Disc. 55; Boulay-Paty, iii. 97; Code de Commerce, art. 313.

(*a*) Code de Commerce, art. 319.

contracts. The bottomry bond may be good in part, and bad in part; and if the premium has been unduly enhanced from a knowledge of the master's necessities, the Court of Admiralty, which acts *ex æquo et bono*, may moderate it or refuse to ratify it. (*b*) But if marine interest has not been stipulated, no court can supply the omission, and it will be taken to be a contract upon ordinary interest; for no new obligation can be inferred or reasoned out by a commentary on the contract itself. (*c*)

(*b*) 1 Dods. 277, 288; The Ship Packet, 3 Mason, 255; The Nelson, 1 Hagg. Adm. 176, 826, 827; The Cognac, 2 id. 377; The Hunter, Ware, 255. [Brig Bridgewater, Olcott, 35; Furniss *v.* Brig Magoun, ib. 55.]

(*c*) Pothier, Traité du Pret, à la grosse, n. 19. See, for further information on the subject of maritime loans, Emerigon's Essay on Maritime Loans, which is the most complete treatise extant on the subject. The substance of it has been ably incorporated into the work of M. Boulay-Paty, on a Course of Maritime Commercial Law, and it has been closely and accurately translated by John E. Hall, Esq., of Baltimore.

LECTURE L.

OF INSURANCE OF LIVES, AND AGAINST FIRE.

1. **Of Insurance of Lives.** — These insurances are liberal contracts, and while they create an advantageous investment of capital, they operate benevolently towards the public. Their usual purpose is to provide a fund for creditors, or for family connections in case of death. The insurer, in consideration of a sum in gross, or of periodical payments, undertakes to pay a certain sum, or an annuity, depending upon the death of a person whose life is insured. The insurance is either for the whole term of life, or for a limited period. Such is the nature of these contracts, that they are well calculated to relieve the more helpless members of a family from a precarious dependence, resting upon the life of a single person; and they very naturally engage the attention and influence the judgment of those thinking men, who have been accustomed to reflect deeply upon the past, and to form just anticipations of the future.

The practice in Europe, of life assurances, is in a great degree confined to England, and it has been introduced into the United States. (*a*) It is now slowly but gradually attracting the public attention and confidence in our principal cities. According to a maxim of the civil law, the life of a freeman was above all valuation; *liberum corpus æstimationem non recipit;* and
* 366 the nautical * legislation of some parts of Europe, on this subject, has been founded upon the principle, that it was unfit and improper to allow insurances on human life. They have been tolerated in Naples, Florence, and by the ordinances of Wisbuy, but they were condemned in the Le Guidon, as contrary to good morals, and as being the source of infinite abuse. So, insurances for life were expressly forbidden by the ordinance

(*a*) The Massachusetts Hospital Life Insurance Company was incorporated in 1818.

of Louis XIV.; and the prohibition was made to rest on the reason given in the civil law. The ordinances of Amsterdam, Rotterdam, and Middleburg adopted the same rule, which, though true in some respects, was in this case very absurdly applied. (*a*) The new French code has omitted any express provision on the subject, though Boulay-Paty thinks that a prohibition is covertly but essentially contained in art. 334 of the code; and he inveighs vehemently against policies upon human life, as being gambling contracts of the most pernicious kind. (*b*) Most of the commentators on the new code, as Delvincourt, (*c*) Locré, (*d*) De Laporte, and Estrangin, concur in the same opinion. Pardessus, (*e*) on the other hand, is in favor of the legality of such insurance; and this must have been the opinion of the French government, for a royal *ordinance of 1820 established a company for *367 the purpose of insuring lives.

There are two chartered life assurance companies established in France, and though the terms of insurance are moderate, and the companies extremely respectable, they have met with very little encouragement; and this grave species of insurance does not seem to be congenial to the taste and habits of either the French or Italians. In the Netherlands, life assurance societies are established with reasonable anticipations of success. An ordinance of the government gives them a monopoly by excluding all foreign companies from interfering with the business on their native soil. The same exclusion exists in Denmark, while the life assurance institutions in that kingdom are said to be nothing. They are more likely to flourish in Germany than in any other part of Continental Europe, judging from the experiment already made, and the character and dispositions of the people. (*a*)

(*a*) Le Guidon, c. 16, art. 5; Ord. of Wisbuy, art. 66; Ord. de la Mar. tit. Assurances, art. 10; Valin ii. 54; Pothier, h. t., n. 27; Emerigon, i. 198.

(*b*) Cours de Droit Com. iii. 366, 368, 496–506. Istæ conditiones sunt plenæ tristissimi eventus, et possunt invitare ad delinquendum. Grival, dec. 57, n. 48. Boulay-Paty says, that these life assurances ought to be left to their English neighbors. The English are willing they should be so left, and exult in the distinction; for Sergeant Marshall, in his Treatise on Insurance, ii. 768, suggests that the prohibition of insurance on lives in France and Italy proceeds from motives of policy, founded on a startling sense of the great infirmity of their public morals, which would expose to hazard lives so insured.

(*c*) Inst. de Droit Com. Français, ii. 345.

(*d*) Esprit du Code de Commerce, iv. 75. (*e*) ii. 808.

(*a*) Edinburgh Review, xlv. 488–490. In 1828, a life insurance company was established at Gotha, in Germany, and has been attended with great success.

The life assurance companies in England commenced with the Amicable Society, in the beginning of the last century; and in 1827, there were in the United Kingdom forty-four life assurance companies, all maintaining a zealous and dangerous competition. The companies used formerly to select and take only lives of health and vigor; but now it is said to be the practice to accept all lives proposed, where no positive disease is manifested. So, residence in any part of Europe is universally admitted, and the companies are very much exposed to frauds, and the consequent diminution of credit and confidence, by the assurance of bad lives, and sinking the average duration of lives insured much below the average duration of human life. (*b*) There is no doubt a good deal of intrinsic difficulty in the subject; and it requires no ordinary degree of science, skill, and experience to form just and accurate rates of insurance, or tables of annuities
* 368 on * scales measuring truly the probabilities and value of life, in its various stages of existence, in different climates, in different employments, and in the vicissitudes of action to which it is subject.

(1.) The party insuring must have an *interest* in the life insured. The English statute of 14 Geo. III. c. 48, prohibited insurances on lives, when the person insuring had no interest in the life, and it prohibited the recovery under the policy of a greater sum than the amount or value of the interest of the insured in the life, and required the insertion in the policy of the person's name interested therein, or for whose benefit the policy was made. A *bona fide* creditor has an insurable interest in his debtor's life to the extent of his debt, for there is a probability, more or less remote, that the debtor would pay the debt if he lived. (*a*) The insurance is frequently made a part of the creditor's security in loans of money. A person may insure his own life for the benefit of heirs or creditors, or he may insure the life of another in which he may be interested, and assign the policy to those who have an interest in the life. The policy is good for the creditor as a collateral security, though he may have other security; and being substantially a contract of indemnity against the loss of the debt, it ceases, as to the creditor, with the

(*b*) Edinburgh Review, xlv. 498, 500.
(*a*) Anderson *v.* Edie, Park on Insurance, 6th ed. 575.

extinguishment of the debt. (*b*) If it be assigned by way of security, it is not, in that case, extinguished by the payment of the debt, but the reversionary interest in the insured becomes the means of credit to him on other occasions. The insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child, merely in the character of husband or parent. (*c*) But if a child be supported by his father, who is dependent on some fund terminable by his death, the child has an insurable interest *in the father's life. (*a*) So, it *369 has been held, that a trustee who had a legal technical interest as executor, though not the beneficial interest in the life of another, may insure it. (*b*) The necessity of an interest in the life insured, in order to support the policy, prevails generally in this country, because wager contracts are almost universally held to be unlawful, either in consequence of some statute provision, or upon principles of the common law. (*c*)

(2.) We have seen that the *terms and conditions* of the English policies are more relaxed now than formerly, but this is not the

(*b*) Godsall *v.* Boldero, 9 East, 72.

(*c*) Halford *v.* Kymer, 10 B. & C. 724. By the New York statute of April 1, 1840, entitled "An act in respect to insurances for lives, for the benefit of married women," it is made lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the net amount of the insurance becoming due shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors. Such exemption not to apply where the amount of premium annually paid shall exceed $300; and in case of the death of the wife before her husband, the amount of the insurance may be made payable after her death to her children, or their guardian, for their use.

(*a*) Lord *v.* Dall. 12 Mass. 115. A sister has an insurable interest in the life of a brother on whom she depends for support.

(*b*) Kenyon, C. J., in Tidswell *v.* Ankerstein, Peake's Cases, 151.

(*c*) *Vide supra*, 278. The New York statute (R. S. i. 662) against wagers, does not, in express terms, extend to insurances on lives, as the statute of Geo. III. does; but the general prohibition of wagers, bets, or stakes, depending "upon any casualty, or unknown or contingent event whatever," may constructively apply. The 10th section of the New York act shows that *insurances* were included in the prohibition, for it declares that the prohibition shall not extend so as to affect insurances "made in good faith, for the *security* or *indemnity* of the party insured." This implies that the insured must have a real beneficial interest in the life of another. The *bona fide* assignee of a life policy may sue in the name of the assignor, and equity will compel the assignor to permit the assignee to use his name. Ashley *v.* Ashley, 3 Sim. 149.

case with the American policies upon lives.[1] They contain a condition, when relating to the lives of persons in the northern

[1] *Life Insurance.*—(*a*) *Insurable Interest.* — The necessity of such an interest, apart from statute, is asserted in Ruse *v.* Mutual Life Ins. Co., 23 N. Y. 516; Bevin *v.* Connecticut M. L. Ins. Co., 23 Conn. 244. But it is denied on the ground that wagers are valid at common law, and that this class of wagers can hardly be pronounced contrary to public policy, when they are admitted to be valid if the assured have an interest in the life insured, in Trenton M. L. & F. Ins. Co. *v.* Johnson, 4 Zabr. 576. See Miller *v.* Eagle Life & H. Ins. Co., 2 E. D. Smith, 268; Mowry *v.* Home Ins. Co., 9 R. I. 346.

An interest is generally required by statute. But it is important to observe that many of the terms of the English act are not adopted in this country, and that the English decisions under it must be received with great caution. Thus the American decisions as to what interests are sufficient will be found more favorable to the assured than the English are. In England, Halford *v.* Kymer, 868, n. (*c*), is cited by later cases with approbation. Hebdon *v.* West, 3 B. & S. 579. But in America a father is held to have an insurable interest in the life of his minor son, and it is intimated, that as considerations of morals and natural affection may be stronger than those of positive law, they may be equally efficacious, in the absence of statute, to form the basis of a policy. Loomis *v.* Eagle Life & H. Ins. Co., 6 Gray, 396. See also Mitchell *v.* Union L. Ins. Co., 45 Me. 104; Forbes *v.* American M. L. Ins. Co., 15 Gray, 249. The language of other cases goes to sustain the proposition that a person has an insurable interest in the life of another when there is a reasonable probability that he will gain by the latter's remaining alive or lose by his death. Miller *v.* Eagle Life & H. Ins. Co., 2 E. D. Smith, 268, 294; Hoyt *v.* N. Y. L. Ins. Co., 3 Bosw. 440. Bliss on Life Ins. § 21. A wife has an interest in the life of her husband, apart from statute. Thompson *v.* American Tontine L. & S. Ins. Co., 46 N. Y. 674; Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283. So, perhaps, has a husband in his wife's. Wight *v.* Brown, 11 Ct. of Sess. 2d ser. 459. See, further, Morrell *v.* Trenton Mut. Ins. Co., 10 Cush. 282.

It is clear that if the insured had an interest at the time the policy was issued, it is not necessary that he should have one at the time of the death. Life insurance is not a contract of indemnity, and Godsall *v.* Boldero, 368, n. (*b*), is no longer law. Dalby *v.* India & London L. Ass. Co., 15 C. B. 365; Law *v.* London Indisputable L. P. Co., 1 Kay & J. 223; Hebdon *v.* West, 3 Best & S. 579, 591; Rawls *v.* American M. L. Ins. Co., 27 N. Y. 282; Mowry *v.* Home Ins. Co., 9 R. I. 346; Loomis *v.* Eagle Life Ins. Co., 6 Gray, 396, 401; Insurance Co. *v.* Bailey, 13 Wall. 616, 619; Robert *v.* New England M. L. Ins. Co., 2 Disney, 106. So a *bona fide* assignee of a policy valid in its inception need not have any interest in the life insured, St. John *v.* American M. L. Ins. Co., 13 N. Y. 31; Valton *v.* National L. F. L. Ass. Soc., 22 Barb. 9; 20 N. Y. 32; although the language in Stevens *v.* Warren, 101 Mass. 564, looks the other way. A person has an insurable interest in his own life, and may make the loss payable to his personal representatives, or to a stranger who has no interest. Campbell *v.* New England M. L. Ins. Co., 98 Mass. 381; Provident Life Ins. & Inv. Co. *v.* Baum, 29 Ind. 236. See American Life & H. Ins. Co. *v.* Robertshaw, 26 Penn. St. 189. Under the laws of some states children named in such a policy may have a vested interest in the proceeds, although not parties to the contract. Landrum *v.* Knowles, 7 C. E. Green (22 N. J. Eq.), 594; Chapin *v.*

states, that the policy is to be void if the insured shall die upon the high seas or the great lakes; or shall, without the previous

Fellowes, 36 Conn. 132; Connecticut Mut. L. Ins. Co. *v.* Burroughs, 34 Conn. 305. They have even been said to be the "assured" within the meaning of the policy, and proper persons to sue upon it. Hogle *v.* Guardian Life Ins. Co., 6 Rob. (N. Y.) 567; 4 Abb. Pr. N. S. 346. But it may be doubted if this is the law in most jurisdictions; see cases *supra*; Tweddle *v.* Atkinson, 1 Best & Sm. 393; and compare Greenfield *v.* Mass. Mut. L. Ins. Co., 47 N. Y. 430. *Post*, 876, n. 1, (*c*). But it is said that such arrangements as these would not be allowed to be made a cover for a mere wager. Stevens *v.* Warren, 101 Mass. 564; Miller *v.* Eagle L. & H. Ins. Co., 2 E. D. Smith, 268. In Rawls *v.* Am. M. L. Ins. Co., 27 N. Y. 282, where the policy was taken out in the name of a debtor payable to his creditor, who really obtained it and paid the premiums, it was treated as a contract with the latter. See also Rivers *v.* Gregg, 5 Rich. Eq. (S. C.) 274. But see Woodbury Savings Bank *v.* Charter Oak Fire Ins. Co., 29 Conn. 374.

(*b*) *Conditions of the Policy.* — If a party insures *his own life* by a policy containing no exception in case of suicide, it may still be held contrary to public policy to allow him to insure himself a benefit in case of his committing a felony, where suicide is felonious. But such a policy is not avoided by suicide while insane. Horn *v.* Anglo-Australian & Univ. F. L. Ins. Co., 7 Jur. N. S. 673; 30 L. J. N. S. Ch. 511; 2 Bigelow, 602. Very possibly a policy on the life of another would not be avoided by his felonious suicide. See Moore *v.* Woolsey, 4 El. & Bl. 243, 255. When the policy contains the usual condition against suicide or death by the party's own hand, the prevailing opinion is, that if the party kills himself voluntarily, knowing the nature and effect of the act which he does, and intending the consequence, the policy is avoided, although he is insane at the time. Clift *v.* Schwabe, 8 C. B. 437; Dufaur *v.* Professional L. Ass. Co., 25 Beav. 599, 602; White *v.* British Empire M. L. Ass. Co., L. R. 7 Eq. 394; Dean *v.* American Mut. Life Ins. Co., 4 Allen, 96; Cooper *v.* Massachusetts Mut. L. Ins. Co., 102 Mass. 227; Nimick *v.* Mut. Ben. L. Ins. Co., 3 Brewster, 502. The statement in note (*d*) is too broad, although Breasted's case there cited, and affirmed in 4 Seld. (8 N. Y.) 299, confines the exception to felonious suicide, and holds the company liable if the suicide is caused by the insanity, in opposition to the prevailing doctrine. It has also been held that the policy is not avoided by suicide which the jury find to have resulted from an irresistible impulse, and not from the will. Easterbrook *v.* Union Mut. L. Ins. Co., 54 Me. 224; Gay *v.* Union M. L. Ins. Co., U. S. C. C. Conn. 1871, 2 Bigelow, 4; Terry *v.* Life Ins. Co., 1 Dillon, 403; St. Louis M. L. Ins. Co. *v.* Graves, 6 Bush, 268.

The policy is generally conditioned to be void, also, if the assured die in the known violation of law. It is conceded that the violation of law must be the cause of the death to exempt the insurer, and it has been confined to voluntary criminal acts in some cases. Cluff *v.* Mut. Benefit L. Ins. Co., 13 Allen, 308; 99 Mass. 317; See Harper *v.* Phœnix Ins. Co., 18 Mo. 109; 19 Mo. 506; Overton *v.* St. Louis M L. Ins. Co., 39 Mo. 122. On the other hand, it has been held that if the violation of law, though not criminal, was of a character likely to produce the death as a natural, reasonable, or legitimate consequence, it would avoid the policy. Bradley *v.* Mut. Ben. L. Ins. Co., 45 N. Y. 422.

A breach of the restriction on residence need not be the cause of the death in order to avoid the policy. Nightingale *v.* State Mut. L. Ins. Co., 5 R. I. 38; Hathaway *v.* Trenton Mut. L. Ins. Co., 11 Cush. 448.

consent of the company, pass beyond the settled limits of the United States, and of the British provinces of the two Canadas, Nova Scotia, and New Brunswick, or south of the states of Virginia and Kentucky; and they all contain the like condition or exception, if the assured enter into the military or naval service; or in case he shall die by suicide, or in a duel, or by the hands of justice. (*d*) The life insurance would be avoided upon the general policy of the law, on the execution of the assured for felony, without the insertion of this last condition. (*e*) The basis of the insurance is a declaration in writing of the person making the insurance, as to the birthplace, age, residence, and employment of the party insured, with a description of the diseases or infirmity (if any) with which he has been afflicted. This declaration, not being spread out at large upon the policy, is not strictly a warranty, and it is sufficient if it be given in good faith, and be true in substance. Whatever averment or representation is inserted in the policy becomes a warranty, and * 370 must be strictly true. But if there be no warranty or * representation, or fraud, the insurer runs the risk of the goodness of the life; (*a*) and even a warranty that the person is in good health is not falsified by the fact that he was at the time subject to great inconvenience, and a partial palsy, in consequence of an old wound not dangerous to life; or that he was troubled with spasms and cramps from fits of the gout. This has been held to be a reasonable good state of health within the warranty. The seeds of death are in every human constitution, and it is only requisite that there be not at the time any existing disorder tending to shorten life. (*b*)

(3.) The life in the given case may be insured for the term of natural life, as is usual, or it may be insured for a definite period. (*c*) In the case of a policy of the latter kind, if the party

(*d*) If the assured died by suicide while insane, the case is not within the exception. Borradaile *v.* Hunter, 5 Mann. & Gr. 639; Breasted *v.* Farmers' L. & T. Company, 4 Hill (N. Y.), 73; [4 Seld. 299. But see 369, n. 1, (*b*).]

(*e*) Amicable Ass. Society *v.* Bolland, 2 Dow & Clark, 1; Bolland *v.* Disney, 8 Russ. 851; 4 Bligh, N. S. 194.

(*a*) Stackpoole *v.* Simon, at N. P., 2 Marshall on Insurance, 772.

(*b*) Ross *v.* Bradshaw, 1 Wm. Bl. 812; Watson *v.* Mainwaring, 4 Taunt. 763 Willis *v.* Poole, at N. P., 2 Marshall on Insurance, 771.

(*c*) It is said to be now usual, in the English policies on lives, to state the day of the commencement, and of the termination thereof, and to declare that both are inclusive. Ellis on the Law of Fire and Life Insurance, 136. A life policy may be

receives a mortal wound within the period, and dies after it has expired, the underwriter is discharged. (*d*) All concealment or suppression of material facts avoids the policy. The same good faith is as requisite in this as in all other policies; and whether the suppression arises from fraud or accident is quite immaterial, if the fact be material to the risk, and that is a question for a jury. (*e*)

2. Of Insurance against Fire. — By this insurance the underwriter, in consideration of the premium, undertakes to indemnify the insured against all losses in his houses, buildings, furniture, ships in port, or merchandise, by means of accidental fire happening within a prescribed period. The premium is usually paid in advance, and the contract effected by the parties without the intervention of a broker. (*f*)

It has been made a question by some persons, whether the negligence and frauds which the insurance of property from fire has led to, did not counterbalance all the advantages and relief

assigned to a *bona fide* creditor, but it will not avail as to third persons, creditors of the insured, without notice to the insurers before the death of the insured, and the acceptance of the assignment by the assignee before that date. Succession of Risley, 11 Rob. (La.) 298. The general rule is, that if a party has been absent seven years, without having been heard from, the presumption of law arises that he is dead, but there is no legal presumption as to the time of his death. Nepean *v.* Doe, 2 M. & W. 894; [*In re* Phené's Trusts, L. R. 5 Ch. 139.]

(*d*) Willes, J., 1 T. R. 260. [Howell *v.* Knickerbocker L. Ins. Co., 44 N. Y. 276.]

(*e*) Lindenau *v.* Desborough, 8 B. & C. 586; Morrison *v.* Muspratt, 12 B. Moore, 231; 4 Bing. 60, s. c.

(*f*) The offices of fire insurance companies usually annex to their policies the various classes of hazards and rates of annual premiums. The lowest rate of premium is for buildings exposed to the least degree of hazard, as buildings of brick or stone covered with tile, slate, or metal, the window shutters of solid iron, gutters and cornices of brick, stone, or metal, and party-walls above the roof. The rate of premium rises in proportion to the increase of hazard, and is highest in buildings entirely of wood. The rate of premium depends likewise upon the fact, by whom and by what trade, or for what purpose the building is occupied, and whether as a private dwelling or otherwise, and its situation with respect to contiguous buildings, and *their* construction, materials, and use. Goods are also classed, in respect to the rates of premium, into such as are *not hazardous*, *hazardous*, *extra hazardous*, and such as compose cases of *extraordinary risk*, and are the subject of *special* agreement. In England, it is sometimes part of the contract of insurance, that the insurer is not to be liable for loss arising from ignition occasioned by natural heating of the articles insured, or by the misapplication of fire heat under process of manufacture. Ellis on Fire and Life Insurance, 25. Mr. Ellis infers, from the case of Austin *v.* Drewe, 6 Taunt. 436, that damage by *heat* alone, without *ignition*, is not covered by the ordinary fire policy, even though there be no express provision against a damage of that kind.

which such insurances have afforded in cases of extreme distress. But the public judgment in England and in this country has long since decided that question; (*g*) and insurance companies
* 371 against fire have * multiplied exceedingly, and extended their dealings to every part of the country, and excited and deserved public confidence, by reason of the solidity of their capital, and the skill, prudence, and integrity of their operations. (*a*)

(*g*) A late English traveller, Mr. Elliott, says that nearly all the houses in Berlin, the capital of Prussia, are insured against fire.

(*a*) The great conflagration in the city of New York, on the night of the 16th and morning of the 17th December, 1835, was unexampled in this country since fire insurance was in practice, in the rapidity and violence of its ravages, and in the amount of property destroyed. It, of course, absorbed the capital of many of the most solidly established fire insurance companies, and rendered them insolvent. This was an extraordinary case, and without precedent, and was not within the reach of ordinary calculation. Fire insurance in England commenced about a century and a half ago, and is carried on by joint stock companies with large capital, though there are others called *contribution societies*, in which every person insured becomes a member or proprietor, and participates in the profit and loss of the concern. M'Culloch's Dictionary of Commerce, art. Insurance. A mutual insurance association of this kind existed in New York for many years after the peace of 1783, and before incorporated companies with capital stock came in fashion. The New York Contributionship Fire Company was incorporated in April, 1822, on that basis. There are others of that kind existing now in some of the states, and mutual insurance companies have of late become more frequent and attractive. And since the public confidence in the incorporated insurance companies, with comparatively small capitals, became impaired by reason of losses by the great fire in New York, a voluntary private association of that kind, under the title of the Alliance Mutual Insurance, was instituted December 28, 1835. Formerly the English fire insurance companies were at liberty to insure property in New York, by means of an agency established here. This was deemed by our citizens as the safest source, owing to their great capitals, to apply to for indemnity against fire. But a different policy prevailed and finally gained the ascendency with our legislature. A prohibitory act applicable to such cases was defeated in April, 1807, and again in March, 1809, by the objections of the Council of Revision, which were drawn and submitted to the Council by the author of this note, then a member of the Council. But on the 18th of March, 1814, the prohibition passed into a law. The Council of Revision at that time abandoned their former ground, though the individual member who brought forward the objections on the two former occasions, persevered in raising the same objection, The prohibition was originally confined to all foreign insurances against fire. But by the act of May 1st, 1829, c. 336, the prohibition was extended to marine insurance and bottomry. The law by the N. Y. R. Statutes, 3d ed. i. 896, 897, now is, that all foreign insurances against fire in this state are prohibited, and a ratable two per cent premium is to be paid into the state treasury by the agent of foreign individuals or associations, not authorized by law for effecting insurances against losses by fire, and against marine risks. The prohibition extends equally to lending money by such individuals and associations or respondentia or bottomry, or of effecting any contract by way of insurance or loan,

We will consider, (1) the interest; (2) the terms and construction of the policy; (3) the adjustment of the loss.

(1) *Of the Interest in the Policy.* — If policies were without interest, they would be peculiarly hazardous, by reason of the temptation which they would hold out to the commission of arson, and they would fall within the general prohibition, by statute, of wager policies. (*b*) According to Lord King and Lord Hardwicke, (*c*) an insurance against fire, without an interest by the insured in the property lost, at the time of insuring and at the time of the loss, was void even at common law. A creditor may have a policy on the house and goods of his debtor, upon which he has a lien or mortgage security, for that gives him a sufficient interest. (*d*) So, a trustee, or agent, or factor, who has the custody of goods for sale on commission, may insure them, and a *bona fide* equitable interest may be insured. (*e*) In the case of

or any other business which marine insurance companies under the laws of New York may do.

(*b*) *Vide supra*, 278, [369, n. 1.]

(*c*) Lynch *v.* Dalzell, 3 Bro. P. C. 497; [Tomlins' ed. iv. 431;] Sadlers' Company *v.* Badcock, 2 Atk. 554.

(*d*) On a sale by a master on a foreclosure of a mortgage, and before the report of the sale is confirmed, the premises are destroyed by fire, it was held, in the Circuit Court of New York, that the interest of the assured was existing at the time of the loss. McLaren *v.* H. F. Ins. Co., 4 N. Y. Legal Observer, 137. [But see s. c. 1 Seld. 151.]

(*e*) Lucena *v.* Craufurd, 3 Bos. & P. 75, 95, 98; 5 id. 289, s. c.; 2 Marshall on Insurance, 789; Locke *v.* North American Ins. Company, 18 Mass. 67. An equity of redemption is an insurable interest. Strong *v.* Manufacturers' Ins. Company, 10 Pick. 40. A mortgagor and mortgagee may each insure the same building, so as to recover their respective interests therein, without disclosing the qualified nature of the interest, except the same be required. Traders' Ins. Company *v.* Robert, 9 Wend. 404; Jackson *v.* Mass. Mutual Fire Ins. Company, Sup. Court, Mass. 1840, s. p. [23 Pick. 418; *ante*, 281, n. 1.] If the *mortgagee* insures on his own account, and for his debt, when that is extinguished, the policy ceases, and the mortgagor has no interest in it, and cannot take advantage of it. If the premises be destroyed by fire before the debt is extinguished, the insurer must pay the debt to the amount of the insurance to the mortgagee, and he will then be entitled to an assignment of the debt, and recover it of the mortgagor; for the payment of the insurance is no discharge of the debt, but it only changes the creditor. If the *mortgagor* insures, he will, in case of loss, be entitled to recover the amount of it, for it is his own loss, and he may insure to the full value of his property, notwithstanding any incumbrance thereon. Carpenter *v.* The Providence Washington Ins. Company, 16 Peters, 495. The mortgagee has no right to claim the benefit of a policy on the mortgaged property made for the mortgagor, as he has no more title under the contract than any other creditor. Policies are special contracts with the assured, and are not deemed in their nature incident to the property insured. [See 876, n. 1, (*c*).]

De Forest v. *Fulton Fire Insurance Company*, (*f*) the court carried this question of constructive interest to a still greater extent, and it was decided that a commission merchant, consignee, or factor, having goods of the consignor or principal in his possession, has an insurable interest therein, not merely to the extent of his commissions, but to the full value of the goods, with-
* 372 out reference to his lien. He was to be * deemed owner as to all the world, except his principal, for the purpose of an insurable interest.[1] But it is usually made a condition in our American policies, that the nature of the property be disclosed; and goods held in trust, or on commission, must be insured *as such*, or they will not be covered by the policy. (*a*) A person having an interest in the rent of buildings, may insure the rent from loss by fire within the prescribed period, and the claim would be for the loss of so much rent as would have arisen between the time of the fire, and the end of the given period, if the peril had not intervened. (*b*) And as in the case of marine insurance, if the policy be *for whom it may concern*, it will cover any interest existing at its date. (*c*)

(2) *Of the Terms and Construction of the Policy.* — A policy against fire is strictly a policy on time, and the commencement and termination of the risk are stated with precision. The English policies (and I presume the American also) contain the exception of damage by fire happening by "invasion, foreign

(*f*) 1 Hall (N. Y.), 84.

(*a*) [See South Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101; 6 Am. Law Rev. 460, 468.] If there be no such condition in the policy, and there be no questions put, the assured is not bound to disclose the nature of his title. Strong *v.* Manufacturers' Ins. Company, 10 Pick. 40.

(*b*) If the policy be on a house which is rented to a tenant, and it be destroyed by fire, Mr. Bell considers it to be a difficult and unsettled question, whether the policy would cover the rent lost, as being part of the owner's loss, when the policy was silent as to rent *eo nomine*. See 1 Bell's Comm. on the Laws of Scotland, 627. But I apprehend that with us such consequential damages would not be estimated, and that the claim of the assured would be confined to the direct loss of the building. On the insurance of a *house* or *ship*, the possible profits that might have arisen if the loss had not happened, is an incidental part of the loss, and not recoverable under such a policy. 1 Ad. & El. 621. But a policy on a store, and $1,000 on the stock of goods therein, for six years, attaches to any goods the assured may have in the shop, to the amount insured at any time within the six years. Lane *v.* Maine M. Fire Ins. Company, 3 [Fairfield,] 44.

(*c*) Jefferson Ins. Company *v.* Cotheal, N. Y. Superior Court of Common Pleas, March, 1829, [7 Wend. 72.]

[1] See 376, n. 1, (*a*).

enemy, or any military or usurped power whatsoever." It is sometimes added, "or by riot or civil commotion"; for the words "usurped power" mean invasion from abroad, or an internal rebellion, and not the power of a common mob. (*d*)

The insured is bound in good faith to disclose to the insurer *every fact material to the risk, and within his *373 knowledge, and which, if stated, would influence the mind of the insurer in making or declining the contract. (*a*) The strictness and nicety required in the contract of marine insurance do not, it has been said, so strongly apply to insurances against fire, for the risk is generally assumed upon actual examination of the subject by skilful agents on the part of the insurance officers. (*b*) Reasonable grounds of apprehension of loss from existing facts known to the insured, and denoting impending danger, must be stated to the insurer, or the policy will be void, even though there was no intentional fraud in the case. (*c*) If there be a representation of facts, it is sufficient if the same be fairly made and substantially true; and if the representation be referred to in general terms in the policy, and not spread out at large on the face of the instrument, it is still only a representation, and does not amount to the technical warranty. (*d*) When the policy contains a warranty or condition appearing upon the face

(*d*) Drinkwater *v.* London Assurance Company, 2 Wils. 363. Fire by lightning is usually declared to be a loss within a fire policy. But books of accounts, written securities, or evidences of debt, title deeds, writings, money or bullion, are not deemed objects of insurance, and they are usually specially excepted. Nor are jewels, plate, medals, paintings, statuary, sculptures, and curiosities included in a policy of insurance, unless specified. Conditions annexed to a policy on the same sheet are to be taken as being *prima facie* as part of the policy, though there be no express reference to them in the policy itself. Roberts *v.* Ch. M. Ins. Co., 8 Hill, 501. [Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210.]

(*a*) Columbian Ins. Co. *v.* Lawrence, 2 Peters, 25; Curry *v.* Com. Ins. Company, 10 Pick. 535. [Bebee *v.* Hartford Mut. F. Ins. Co., 25 Conn. 51.]

(*b*) Jolly *v.* Baltimore Equitable Society, 1 Harr. & Gill, 295. [Clark *v.* Manufacturers' Ins. Co., 8 How. 235; Delahay *v.* Memphis Ins. Co., 8 Humph. 684; Gates *v.* Madison Co. M. Ins. Co., 1 Seld. (5 N. Y.) 469; Cumberland Valley Mut. Prot. Ins. Co. *v.* Schell, 29 Penn. St. 31.] But Ch. J. Savage, in Fowler *v.* Ætna Ins. Company, 6 Cowen, 673, held differently, and he saw no reason for a difference on this point between marine and fire insurance policies.

(*c*) Bufe *v.* Turner, 6 Taunt. 338; Walden *v.* Louisiana Ins. Company, 12 La. 134.

(*d*) Jefferson Ins. Company *v.* Cotheal, New York Superior Court of Common Pleas, March, 1829, [7 Wend. 72]; Delonguemare *v.* Tradesmen's Ins. Company, ib. 2 Hall (N. Y.), 589; Snyder *v.* Farmers' Ins. and Loan Company, 18 Wend. 92. [See 282, n. 1.]

of it, although written in the margin or transversely, or on a subjoined paper referred to in the policy, it must be strictly complied with. (*e*) And yet, where a policy contained a clause prohibiting the use of the building for *storing therein* goods denominated in the memorandum annexed to the policy as hazardous, the keeping of such goods as oil, or spirituous liquors, by a grocer, in ordinary quantities, for his ordinary retail, was held not to be, under the circumstances, a storing of them within the policy. (*f*)[1] A representation that ground contiguous to the building insured is vacant, does not amount to a warranty that it shall * 374 * continue vacant during the continuance of the risk, or prevent the insured from erecting a building upon it provided he had not already formed and concealed that intention, and that the erection was not, in point of fact, in any way the cause of the loss. (*a*) So, if it was represented at the time of the insurance, that the building was connected with another building on one side only, and before the loss happened it became connected on two sides, this does not avoid the policy, unless, in point of fact, the risk thereby becomes increased. (*b*)[1] The assured may exercise the ordinary and necessary acts of ownership over his buildings, and make the requisite repairs, without prejudice to his policy. A contrary rule would be so inconvenient as, in a great degree, to destroy this species of insurance. (*c*) But if a loss accrues by means of a gross negligence or misconduct of the workmen, or if the alterations in the building materially enhance the risk, and are not necessary to the enjoyment of it, or were not the exercise of ordinary acts of ownership, the insurers will be released from their contract. (*d*)

(*e*) Worsley *v.* Wood, 6 T. R. 710; Fowler *v.* Ætna Fire Ins. Company, 6 Cowen, 673; s. c. 7 Wend. 270; Ellis on Fire Insurance, 29, 30; Faulkner *v.* Central F. Ins. Company, Kerr (N. B.), 279. [See 282, n. 1; 376, n. 1, (*d*).]

(*f*) Langdon *v.* New York Equitable Ins. Company, 1 Hall (N. Y.), 226. [See 3 Comst. 122.]

(*a*) Stebbins *v.* Globe Ins. Company, 2 Hall (N. Y.), 632. [*Ante*, 284, n. (*a*); 282, n. 1; Gates *v.* Madison County Mut. Ins. Co., 5 N. Y (1 Seld.) 469, 477.]

(*b*) Stetson *v.* Mass. Fire Ins. Company, 4 Mass. 330.

(*c*) Grant *v.* Howard Ins. Co., 5 Hill (N. Y.), 10.

(*d*) Stetson *v.* Mass. Fire Ins. Company, 4 Mass. 330; Jolly *v.* Baltimore Equi-

[1] Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202; Hynds *v.* Schenectady County Mut. Ins. Co., 11 N. Y. 554. Compare Whitmarsh *v.* Conway F. Ins. Co., 15 Gray, 359, with Wetherell *v.* City F. Ins. Co., ib. 276, and cases cited. See 376, n. 1.

[1] See 376, n. 1.

The English statute of 9th May, 1828, has prudently protected the insurer from the impositions to which he is naturally exposed, by the practice of covering under one policy extended and cumulated subjects of risk. The statute requires that detached buildings, or goods therein, occasioning a plurality of risks, be valued and insured separately; and all insurances against fire, made upon two or more separate subjects or parcels of risk collectively, in one sum, are declared void. It is a condition of the policy, in most cases, that if there be any other insurance already made against loss by fire on the property, and not notified to the insurers, * the policy is to be deemed void; and if there *375 be any other insurance on the property afterwards made, the insurers are to have notice of it with reasonable diligence, and the same is to be duly acknowledged in writing, or that omission will also render the policy void. (*a*) [1]

Fire policies usually contain a prohibition against the assignment of them, without the previous consent of the company. But without this clause, they are assignable in equity, like any other chose in action; though, to render the assignment of any value to the assignee, an interest in the subject matter of the insurance must be assigned also, for the assignment only covers such interest as the assured had at the time of the assignment. (*b*) This restriction upon assignments of the policy applies only to

table Society, 1 Harr. & Gill, 295; Curry *v.* Commonwealth Ins. Company, 10 Pick. 535. A loss by fire, in policies against fire on land, occasioned by the mere fault and negligence of the assured, his servants or agents, without fraud or design, is a loss within the policy. Waters *v.* M L. Ins. Company, 11 Peters, 213; s. c. 1 McLean, 275; Shaw *v.* Robberds, 1 Nev. & Perry, 279; s. c. 6 Ad. & El. 75; Henderson *v.* M. & F. Ins. Company, 10 Rob. (La.) 164. In Shaw *v.* Robberds, the rule was stated to be, if the policy be silent as to alterations with trade or business carried on upon the premises, such alteration does not avoid the policy, though the trade be more hazardous, and no notice of the alteration. Pim *v.* Reid, 6 Mann. & Gr. 1, s. P. The same rule in marine policies. *Supra*, 307.

(*a*) Carpenter *v.* Providence W. Ins. Company, 16 Peters, 495. *Reassurance* is a valid contract, in cases of fire, as well as in marine policies. The reassurance operates not upon the risk, but upon the property covered by the original policy, and the requirements of the contract are satisfied when those in the original policy are, and notice thereof be given to the reassurer. This species of insurance requires, as well as the primitive contract, the communication of all material information. New York B. Fire Ins. Company *v.* New York Fire Ins. Company, 17 Wend. 359.

(*b*) Marshall on Insurance, 800. [Hooper *v.* Hudson R. F. Ins. Co., 17 N. Y. 424.]

[1] See 376, n. 1.

transfers before a loss happens, and it applies only to voluntary sales, and not to sales on execution. (*c*) In some cases, the statute creating a fire insurance company authorizes assignments of policies to the purchaser of the subject insured, and authorizes the assignee to sue in his own name, provided notice be given of the assignment before a loss happens, so as to allow the company, at their election, to return a ratable proportion of the premium, and be exonerated from the risk.

(3) *Of the Adjustment of the Loss.* — Settlements of losses by fire are made on the principle of a particular average, and the estimated loss is paid without abandonment of what has been saved. (*d*) Damages and reasonable charges on removing, at a fire, articles insured, are covered by the policy. So there may be a general average for a sacrifice made by the insured for the common good, in a case of necessity. It is analogous to the law of contribution by cosecurities. (*e*) If a tenant erects a building on a lot held under a lease, with liberty to renew or remove

The assignment of a policy *without notice to the office*, will not, under the English bankrupt system, prevent the interest in the policy from passing by a subsequent assignment in bankruptcy, on the ground that the policy without the notice, remained under the disposing power of the bankrupt as reputed owner. *Ex parte* Colvill, Montagu, 110. If buildings insured be mortgaged, the policy is *ipso facto* assigned to the mortgagee. Farmers' Bank *v.* M. A. Society, 4 Leigh, 69. Policies against fires, being personal contracts, do not pass to the purchaser of the property before loss, without the assent of the insurer, and the policy ceases if the property be sold without that assent, for no person is entitled to claim for a subsequent loss. Ætna Fire Ins. Company *v.* Tyler, 16 Wend. 385; Wilson *v.* Hill, 3 Met. 66. See, also, *supra*, 262, as to marine policies.

(*c*) Brichta *v.* N. Y. Lafayette Ins. Company, 2 Hall (N. Y.), 872. [Mellen *v.* Hamilton F. Ins. Co., 17 N. Y. 609.] Strong *v.* Man. Ins. Company, 10 Pick. 40. And if the assured contract to sell at a future day on payment, and before the day arrives the premises are destroyed by fire, this is not an alienation to defeat the policy, for the assured has the legal title and possession, and an insurable interest and equity equal to the purchase money. Trumbull *v.* Portage M. Ins. Company, 12 Ohio, 305; [see 876, n. 1, (*b*).]

(*d*) As loss by fire is not generally a total loss, the valuation in the policy, says Mr. Bell (Comm. i. 627), is rather fixing a maximum beyond which the underwriters are not to be liable, than a conclusive ascertainment of the value. In France, valued policies against fire are rejected; and in Wallace *v.* Insurance Company, 4 La. 289, the policy, and even the legality of valued policies on fire, seemed to be questioned. With us, policies against fire are taken to be open ones, unless otherwise expressed. They are not invariably open policies. Laurent *v.* Chatham Fire Ins. Company, 1 Hall (N. Y.), 41; Alchorne *v.* Saville, 6 J. B. Moore, 202, n. [Cushman *v.* Northwestern Ins. Co., 34 Maine, 487.]

(*e*) Welles *v.* Boston Ins. Co., 6 Pick. 182.

the building *at the end of the lease, and the build- *376
ing be destroyed by fire a few days before the end of the lease, though the building as it stood was worth more than the sum insured, and if removed, would have been worth much less, yet the courts look only to the actual value of the building as it stood when lost, and they do not enter into the consideration of these incidental and collateral circumstances, in fixing the true standard of indemnity. (*a*)

It is usually stipulated in the policy, that in case of any prior or subsequent insurance on the same property, and of which due notice has been given, and a loss occurs, the assured is not to recover beyond such ratable proportion of the damages as the amount insured by the policy shall bear to the whole amount insured, without reference to the dates of the different policies. The loss is to be certified upon oath, and the certificate of a magistrate, notary, or clergyman, is made necessary to be procured in favor of the truth and fairness of the statement of the loss; and the strict and literal compliance with the terms of these conditions is held indispensable to a right of recovery. (*b*) If it be part of the contract that the insurer is to be liable only to the extent of the sum insured, and after payment for a partial loss a total loss ensues, the insurer is liable only for the difference between the sum already paid and the sum insured. (*c*) The contract is confined to the parties, and, as a general rule, no equity attaches upon the proceeds of policies in favor of any third persons, who, in the character of grantee, mortgagee, or creditor, may sustain loss by the fire, without some contract or trust to

(*a*) Laurent *v.* Chatham Fire Ins. Company, 1 Hall (N. Y.), 41.

(*b*) Worsley *v.* Wood, 6 T. R. 710; [Mason *v.* Harvey, 8 Exch. 819; Roper *v.* Lendon, 1 El. & El. 825; Smith *v.* Haverhill F. Ins. Co., 1 Allen, 297; Campbell *v.* Charter Oak Ins. Co., 10 Allen, 213;] Roumage *v.* Mechanics' Fire Ins. Company, 1 Green (N. J.), 110; Columb. Ins. Company *v.* Lawrence, 2 Peters, 25; Savage, C. J., in Dawes *v.* N. R. Ins. Company, 7 Cowen, 462; Leadbetter *v.* Insurance Company, 13 Me. 265. This last is a very strong case. If there be any fraud or false swearing by the assured in the exhibition of his proofs of loss, he forfeits his claim to a recovery. Regnier *v.* Louisiana State Marine and Fire Ins. Company, 12 La. 844; Howard *v.* City Fire Ins. Co., N. Y. Superior Court, May, 1843. The courts are strict in holding the assured to the utmost candor and good faith in rendering to the insurer the amount of his loss; and a false and fraudulent exaggeration of the amount of the property lost, avoids the policy, and destroys the right to recover.

(*c*) Curry *v.* Commonwealth Ins. Company, 10 Pick. 535. The law of marine insurance respecting *salvage* does not apply to fire policies. Liscom *v.* Boston M. F. Ins Company, 9 Met. 205.

that effect. If the subject of the insurance be burnt during the continuance of the policy, the benefit of the policy goes to the personal representatives of the insured, unless by some act of the party entitled to the proceeds they become clothed with the character of real estate. (*d*)[1]

(*d*) Mildmay *v.* Folgham, 3 Ves. 472; Lord King, in Lynch *v.* Dalzell, 4 Bro. P. C. 432, ed. Tomlins; Norris *v.* Harrison, 2 Mad. 268; Ellis on the Law of Fire and Life Insurance, 81; Columbia Ins. Company *v.* Lawrence, 10 Peters, 507; Carpenter *v.* Providence W. Ins. Co., 16 Peters, 495. A mortgagee of the property has no right or title to the benefit of the policy, taken by the mortgagor for his own benefit, unless it be assigned to him. But if the mortgagor was bound by covenant or otherwise to insure the premises for the better security of the interest of the mortgagee, the latter will have an equitable lien upon the money due on the policy to the extent of his interest in the property destroyed. Vernon *v.* Smith, 5 B. & Ald. 1; Neale *v.* Reid, 8 Dowl. & Ryl. 168; Thomas *v.* Vonkapff, 6 Gill & J. 372; Carter *v.* Rockett, 8 Paige, 437; [276, n. 1, (*c*).] Fire policies usually contain a provision for a renewal on payment of the premium; and some of the London policies of insurance against fire for one year or longer, are understood to operate for fifteen days beyond the time of the expiration of their policies. This is the case with the Sun, Fire, and Royal Exchange, and Phœnix Insurance Companies. Hughes on Insurance, 508.

There is an admirable summary of the law of contracts, express and implied, treated of in this and the preceding volume, to be seen in the Principles of the Law of Scotland, by Professor Bell, of the University of Edinburgh, 8d ed. 1833. The essential principles of the law of contracts, of *sale, hiring, bailment, surety, negotiable paper, partnership, maritime contracts of affreightment, average, salvage, bottomry, and respondentia, marine insurance,* and *insurance against fire and of lives,* are stated with all possible brevity consistent with perspicuity, precision, and accuracy. The cases and authorities are annexed to each proposition, and the adjudged cases are given at large in some succeeding volumes as *illustrations* of the principles declared. I do not know of a more convenient and useful manual of the kind to the student and practising lawyer. Though the principles of the Scotch law are drawn from the civil law, yet they agree in most of the material points with the doctrines and adjudications in the English and American law. Mr. More, the learned editor of the last edition of Lord Stair's Institutions of the Law of Scotland, 1832, i., notes from A. to Q., has likewise given a very full and correct view of the law of contracts, conjugal, domestic, and commercial, in all their various incidents and relations, founded on judicial decisions and the principles of the Roman law. The Treatise on the Law of Sale, by M. P. Brown, Edin. 1821, has interwoven the principles of the English law of sale with the same in Scotland (the main object of the treatise) with great utility and practical convenience.

[1] *Fire Insurance.*—(*a*) *Insurable Interest.*—The general principle with regard to insurable interest has been stated *ante,* 276, and n. 1. See 261, and n. (*e*). Eastern R.R. Co. *v.* Relief Fire Ins. Co., 98 Mass. 420, 423. A mechanic's lien is insurable. Franklin F. Ins. Co. *v.* Coates, 14 Md. 285; Carter *v.* Humboldt F. Ins. Co., 12 Iowa, 287; Stout *v.* City Fire Ins. Co., ib. 371. A shareholder in the Atlantic Telegraph Company had an insurable interest in the adventure of laying the cable, although not in the cable. Wilson *v.* Jones, L. R. 2 Ex. 139. It has been

laid down, less accurately, that a member of a corporation has an insurable interest in the corporate property. Warren *v.* Davenport F. Ins. Co., 31 Iowa, 464.

In states where wagers, or such beneficial wagers, are not illegal, the tendency of modern cases is to allow any person intrusted with goods to insure them to their full value without orders from the owner, and even without informing him that he has taken out a policy. In case of a total loss the insured will be entitled to recover the value of the whole, and to apply the proceeds in the first place to cover his own interest, and will be trustee for the owners as to the rest. Waters *v.* Monarch F. & L. Ass. Co., 5 El. & Bl. 870, 881; London & N. W. R. Co. *v.* Glyn, 1 El. & El. 652; Martineau *v.* Kitching, L. R. 7 Q. B. 436, 457; Stillwell *v.* Staples, 19 N. Y. 401; Savage *v.* Corn Exchange F. & I. Ins. Co., 86 N. Y. 655, 657; Siter *v.* Morrs, 13 Penn. St. 218; Goodall *v.* New Eng. M. F. Ins. Co., 5 Fost. (25 N. H.) 169; Ætna Ins. Co. *v.* Jackson, 16 B. Mon. 242. See North British & M. Ins. Co. *v.* Moffatt, L. R. 7 C. P. 25, 31; Seagrave *v.* Union M. Ins. Co., L. R. 1 C. P. 305, 319; Shaw *v.* Ætna Ins. Co., 49 Mo. 578; 261, n. (*c*), 271, 276, 371, 372. But to constitute interest insurable against a peril, it must be such that the peril would, by its proximate effect, cause damage to the assured. A mere agent, without possession or lien, does not acquire an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal. Seagrave *v.* Union Marine Ins. Co., L. R. 1 C. P. 305. See Sawyer *v.* Mayhew, 51 Me. 398. But see North British & M. Ins. Co. *v.* Moffatt, L. R. 7 C. P. 25, 31.

Although some of the cases speak of the owner's ratifying the insurance, it would seem clear that when a bailee insures in his own name only, and not on behalf of the owners, he is the only person who can maintain an action on the policy, and that the owner can only look to the bailee as having in his hands money proceeding from or substituted for the goods, *ante*, 258, and n. (*d*), 19 N. Y. 407, and so it has been held. Bank of South Carolina *v.* Bicknell, 1 Clifford, 85. See Martineau *v.* Kitching, L. R. 7 Q. B. 436, 458, 460. But see Goodall *v.* N. E. Ins. Co., *sup.* On this principle it would seem that the rule of apportionment just laid down is the correct one. See L. R. 7 Q. B. 460; Dalgleish *v.* Buchanan, 16 Ct. of Sess. 2d ser. 332. But a different one seems to have been applied in Siter *v.* Morrs, *sup.*

(*b*) *Effect of permitted Assignment of Subject Matter.* — It is said that a transfer of the legal title to a vessel does not extinguish a right to recover on the policy, if the insured still retains any right of interest in the vessel or her proceeds. Worthington *v.* Bearse, 12 Allen, 382, 384. So a vendor who has contracted to sell, and has received part of the purchase money, but who has not yet parted with the title, can recover the whole amount insured, for his own benefit, if the loss authorizes the purchaser to rescind; Boston & Salem Ins. Co. *v.* Royal Ins. Co., 12 Allen, 381; or in trust for the purchaser as to the surplus if the contract is not avoided. Insurance Co. *v.* Updegraff, 21 Penn. St. 513. But in the latter case it has been held that the vendor could only recover to the extent of the purchase money remaining unpaid. Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247, 267. Even when the insured parts with his whole interest he does not thereby avoid the policy, in the absence of a condition against alienation, but only makes it inoperative, so that if the subject matter is afterwards destroyed, he cannot recover, because he has suffered no loss; accordingly, if he repurchases it during the term and before loss, his interest revives, and the intermediate transfer becomes immaterial. Worthington *v.* Bearse, 12 Allen, 382. Perhaps on this ground, among the con-

flicting decisions as to the effect of alienation by one of two insured partners to the other, mentioned below, the most satisfactory is Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444, where there was no breach of condition, and the only question was as to interest. It was held that an action could be maintained in the names of both, recovery being limited to the value of the unassigned share. If the contract is joint, both parties must join in the action; Tate *v.* Cit. Mut. Ins. Co., 18 Gray, 79; and if it had been avoided as to one, there could be no recovery; but it was not avoided, although one of the plaintiffs had suffered no damage.

A transfer of the subject matter insured does not of itself give the assignee any claim to or under the policy, whether the transfer be by voluntary act *inter vivos;* Wilson *v.* Hill, 3 Met. 66; Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444; King *v.* Preston, 11 La. An. 95; by death; Wyman *v.* Prosser, 36 Barb. 368; or by sale on execution. Plimpton *v.* Farmers' Mut. Ins. Co., 43 Vt. 497.

(*c*) *Mortgaged Premises.* — As between the mortgagee and mortgagor, payment by the insurers to the former does not affect the liability of the latter. The mortgagee is not in such a fiduciary relation to the mortgagor that what he does as such must enure to the benefit of the mortgagor, subject to the payment of the mortgage money. White *v.* Brown, 2 Cush. 412; Cushing *v.* Thompson, 34 Me. 496; Dobson *v.* Laud, 8 Hare, 216. (But when the mortgagee does not insure himself, but takes an assignment of the mortgagor's policy, see Barnes *v.* Union M. F. Ins. Co., 45 N. H. 21, 26.) Conversely the mortgagee cannot, in the absence of agreement to that effect, charge the mortgagor with the premiums which he has paid to insure the property against fire. Dobson *v.* Laud, 8 Hare, 216; Bellamy *v.* Brickenden, 2 J. & H. 137; Brooke *v.* Stone, 34 L. J. N. S. Ch. 251. So the mortgagee has not merely as such any interest in a policy effected by the mortgagor. Nichols *v.* Baxter, 5 R. I. 491; Plimpton *v.* Farmers' Mut. Ins. Co., 43 Vt. 497, 499.

It is often the case that the mortgagor takes out a policy in his own name, payable in case of loss to the mortgagee. This is a contract with the mortgagor, which is subject to any equities against him, and on which he is the proper person to sue, unless the common law rules have been changed by statute. It is his interest, and not the mortgagee's, which is insured, and an alienation by him will defeat a recovery. Grosvenor *v.* Atlantic Fire Ins. Co., 17 N. Y. 391; Springfield F. & M. Ins. Co. *v.* Allen, 43 N. Y. 389, 394, 397. See below in this note, (*k*). He has even been treated as the assured, after payment of the mortgage debt, when the policy was taken out in the name of the mortgagee. Norwich F. Ins. Co. *v.* Boomer, 52 Ill. 442; See 369, n. 1, (*a*) *ad finem*. But the mortgagor's contract to insure for the benefit of the mortgagee gives the latter an equitable lien on the proceeds of policies issued to the former. 376, n. (*d*); Nichols *v.* Baxter, 5 R. I. 491. See 43 N Y. 389, 398.

The right of the insurer to be subrogated to the claim against the mortgagor to the extent of the payment upon the policy is sustained by the language of many cases. Springfield Ins. Co. *v.* Allen, 43 N. Y. 389, 398; Kernochan *v.* New York Bowery F. Ins. Co., 17 N. Y. 428, 441; Insurance Co *v.* Woodruff, 2 Dutcher, 541, 551; Smith *v.* Columbia Ins. Co., 17 Penn. St. 258, 260; 21 id. 521; Rex *v.* Ins. Co., 2 Phila. 357; Honore *v.* Lamar F. Ins. Co., 51 Ill. 409, 414; Norwich F. Ins. Co. *v.* Boomer, 52 Ill. 442, 447; 371, n. (*e*). The Massachusetts courts have held a different doctrine. King *v.* State Mut. F. Ins. Co., 7 Cush. 1; Suffolk Fire Ins. Co. *v.* Boyden, 9 Allen, 123.

(*d*) *Warranty.* — Words of description have been thought to contain a warranty that the assured would not voluntarily do any thing to make the condition of the

building described vary from the description so as thereby to increase the risk of the underwriter. Sillem *v.* Thornton, 8 El. & Bl. 868, 882. And see, as to answers in the present tense to questions in an application which is part of the contract, Williams *v.* N. E. Mut. F. Ins. Co., 31 Me. 219; Houghton *v.* Manuf. Mut. Ins. Co., 8 Met. 114, 122; Jones Manuf. Co. *v.* Manuf. M. Ins. Co., 8 Cush. 82; Crocker *v.* People's M. Ins. Co., ib. 79. Policies very generally contain a clause that any change of circumstances increasing the risk without the consent of the company shall avoid the policy; and this may have the effect to convert representations that certain precautions are taken, into an undertaking that they shall continue to be taken substantially during the continuance of the policy. Houghton *v.* Manuf. Mut. Ins. Co., 8 Met. 114, 122; Jones Manuf. Co. *v.* Manuf. M. Ins. Co., 8 Cush. 82; Crocker *v.* People's M. Ins. Co., ib. 79. But descriptive words are generally construed as going only to the present condition of things at the time the policy is issued. Smith *v.* Mechanics' & Traders' Ins. Co., 32 N. Y. 399; Aurora Fire Ins. Co. *v.* Eddy, 55 Ill. 213; Schmidt *v.* Peoria Ins. Co., 41 Ill. 295; Blood *v.* Howard Ins. Co., 12 Cush. 472, 474; May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291, 306; Joyce *v.* Maine Ins. Co., 45 Me. 168; Gilliat *v.* Pawtucket M. Ins. Co., 8 R. I. 282. And Sillem *v.* Thornton is not a decision as to the effect of an alteration in the state of the premises insured after the date of the policy. Stokes *v.* Cox, 1 H. & N. 533, 536. See 282, n. 1, *ad finem*. As to partial avoidance, see Koontz *v.* Hannibal Ins. Co., 42 Mo. 126.

(*e*) *Conditions of Avoidance.* — As to what is double insurance, see 281, n. 1. A policy conditioned as in the text, 874, 875, has been held not to be avoided by a prior or subsequent one, which is itself void *ab initio*. Clark *v.* New England Mut. Ins. Co., 6 Cush. 342, 353; Hardy *v.* Union Mut. Ins. Co., 4 Allen, 217; *ante*, 282, n. 1, and cases *infra*. But it has been held to be avoided by one which is only voidable. Carpenter's case, 875, note (*a*); Bigler *v.* N. Y. Ins. Co., *inf.*; cases which incline to attribute a like effect to a void policy on strong grounds. It may happen that a prior policy is conditioned to be void if any subsequent one be taken out without the assent of the first insurers, and that then a second is taken out without such assent, conditioned to be void in case of any prior policy existing. In such a case, as the nonexistence of a prior policy is a condition precedent to the existence of the second, and as the prior policy does exist until avoided by a second, it would seem clear that the second has not even a momentary validity. The first is accordingly held to remain binding. Gale *v.* Belknap Ins. Co., 41 N. H. 170; Schenck *v.* Mercer County Mut. Ins. Co., 4 Zabr. 447; Philbrook *v.* New England Mut. Ins. Co., 37 Me. 137, 145. But see Bigler *v* New York Central Ins. Co., 22 N. Y. 402.

Policies often contain a condition against alienation of the property insured without the assent of the insurers. It has been stated that an agreement to sell does not put an end to the insurable interest of the vendor. See above in this note, (*a*), & 875, n. (*c*). And it is equally clear that such an agreement before the price is paid or the title passed is not a breach of the condition. Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247, 261. See Orrell *v.* Hampden Ins. Co., 13 Gray, 431. Neither is a mortgage of the property insured. Conover *v.* Mut. Ins. Co. of Albany, 1 Comst. 290; 3 Denio, 254; Shepherd *v.* Union Mut. Ins. Co., 38 N. H. 232; Hartford Ins. Co. *v.* Walsh, 54 Ill. 164; Smith *v.* Monmouth Mut. Ins. Co., 50 Me. 96; Pollard *v.* Somerset Mut. Ins. Co., 42 Me. 221. See Rice *v.* Tower, 1 Gray, 426; Edmands *v.* Mut. Safety F. Ins. Co., 1 Allen, 311. A transfer of one joint owner to his coöwner has been held to be a breach of the condition, and to put

an end to the insurable interest of one of the parties to the contract, and so to make an action in their joint names not sustainable. Finley *v.* Lycoming County Mut. Ins. Co., 30 Penn. St. 311; Dreher *v.* Ætna Ins. Co., 18 Mo. 128. At the same time, if the contract is joint, an action cannot be maintained in the name of the sole owner. Tate *v.* Citizens' Mut. Ins. Co., 13 Gray, 79. On the other hand, it has been held that an action could be maintained in the name of both, the recovery being limited to the value of the unassigned share, in a case where there was no breach of condition. Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444, discussed above in (*a*) of this note. And the latest decision under the New York statutes is that a transfer of his interest by a retiring partner to the others is not a breach of the condition, which refers to alienation to strangers to the contract, and that the remaining partners could recover to the full extent of the indemnity named in the policy. Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405; (*vide ib.* 408, 409; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401, 409; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247, 259;) Pierce *v.* Nashua F. Ins. Co., 50 N. H. 297. An assignment in bankruptcy or insolvency upon the assured owner's petition is an alienation within the condition. Adams *v.* Rockingham Mut. Ins. Co., 29 Me. 292; Young *v.* Eagle F. Ins. Co., 14 Gray, 150. It has been held otherwise in a case where the creditors petitioned. Starkweather *v.* Cleveland Ins. Co., 2 Abb. U. S. 67. Dying intestate is not. Burbank *v.* Rockingham M. F. Ins. Co., 24 N. H. (4 Fost.) 550; but compare Lappin *v.* Charter Oak Ins. Co., 58 Barb. 325. Other cases besides those at 375, to the effect that the restriction upon assignments of the policy applies only to transfers before a loss, are Mellen *v.* Hamilton F. Ins. Co., 17 N. Y. 609; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402; 40 Barb. 292; Carter *v.* Humboldt F. Ins. Co., 12 Iowa, 287. And it has been considered that an attempt to restrict a transfer of the claim after loss would be invalid. 38 Barb. 402; West Branch Ins. Co. *v.* Hellenstein, 40 Penn. St. 289. As to pledge of policy, see (*h*) of this note.

A temporary and immaterial exposure to the prohibited hazards, not resulting in loss, was held not to avoid the policy in Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202; Harris *v.* Columbiana Ins. Co., 4 Ohio St. 285; Hynds *v.* Schenectady County Mut. Ins. Co., 11 N. Y. (1 Kern.) 554; Williams *v.* N. E. Mut. F. Ins. Co., 31 Me. 219. See Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Conn. 517, 526. But it was held otherwise in Glen *v.* Lewis, 8 Exch. 607. The question seems to be very much one of construction.

(*f*) *Waiver.* — Conditions may be waived by the insurers, and slight circumstances sometimes have that effect, for instance, a refusal to pay on other grounds, and failure to set up that afterwards relied on. Taylor *v.* Merchants' F. Ins. Co., 9 How. 390; Bodle *v.* Chenango County M. Ins. Co., 2 Comst. 53; Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. 495; Underhill *v.* Agawam Mut. F. Ins. Co., 6 Cush. 440, 445; Clark *v.* N. E. Mut. F. Ins. Co., ib. 342, 345; Pettengill *v.* Hinks, 9 Gray, 169, 170; Bartlett *v.* Union Mut. Ins. Co., 46 Me. 500; Firemen's Ins. Co. *v.* Crandall, 33 Ala. 9; Francis *v.* Somerville Mut. Ins. Co., 1 Dutch. 78; Rathbone *v.* City Fire Ins. Co., 31 Conn. 193; Norwich & N. Y. T. Co. *v.* Western Mass. Ins. Co., 34 Conn. 561, 570; Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297.

The powers of agents to waive are construed pretty liberally. Viele *v.* Germania Ins. Co., 26 Iowa, 9; Miner *v.* Phœnix Ins. Co., 27 Wis. 693; compare 282, n. 1.

(*g*) The rule that only the proximate cause of the loss is regarded applies to fire as well as to marine insurance; *ante*, 302, n. 1; and it may be doubted whether

any negligence, even of the assured in person, not amounting to proof of a fraudulent intent to commit or permit an injury within the policy, would prevent a recovery. Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. (11 Fost.) 238, 248 (explaining Chandler *v.* Worcester Mut. Ins. Co., 8 Cush. 328); Johnson *v.* Berkshire Mut. F. Ins. Co., 4 Allen, 388.

(*h*) *Effect of permitted Assignment of Policy.* — A deposit of a policy by way of collateral security will give the bailee a lien on the proceeds, without the necessity of his having an interest in the subject matter, and will not amount to a breach of the condition against assignment. Bibend *v.* Liverpool & L. Ins. Co., 30 Cal. 78; Ellis *v.* Kreutzinger, 27 Mo. 311.

After an assignment of the policy, the same persons remain the legal parties to the contract, and the same interest is insured as before; and a subsequent breach of condition by the assignor, or alienation of his whole insurable interest, will defeat the insurance. It is so held even where an assignment of the policy for collateral security is made by consent of the company. Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401; State Mut. F. Ins. Co. *v.* Roberts, 31 Penn. St. 438; Birdsey *v.* City F. Ins. Co., 26 Conn. 165; Illinois M. F. Ins. Co. *v.* Fix, 53 Ill. 151. See also the cases above in this note on mortgaged premises. But see Pollard *v.* Somerset Mut. Ins. Co., 42 Me. 221, and 45 N. H. 27, *inf.* So the assignor remains the insured, and it is his interest only that is covered, after an indorsement, "in case of loss, pay the amount to A. B.," assented to by the insurers, even if the assignee be allowed to sue in his own name, as he is in Massachusetts. Fogg *v.* Middlesex Mut. Ins. Co., 10 Cush. 337, 346; Minturn *v.* Manufacturers' Ins. Co., 10 Gray, 501, 506; Edes *v.* Hamilton Mut. Ins. Co., 3 Allen, 362; Bates *v.* Equitable Ins. Co., 10 Wall. 33, 38. See Pollard *v.* Somerset Ins. Co., 42 Me. 221, 228; Barnes *v.* Union Ins. Co., 45 N. H. 21, 27 (citing a case overruled in 17 N. Y. 401, *sup.*); Pierce *v.* Nashua Ins. Co., 50 N. H. 297. Compare Bayles *v.* Hillsborough Ins. Co., 3 Dutch. 168. But when what is called an assignment of the policy is made in consideration of a return of premium, at the same time with a transfer of the subject matter insured, and the insurers assent to the transaction, and surrender the old deposit note and receive a new one in place of it, there is an entire change in the contract, party, and interest insured, and a new insurance with the assignee on his interest is substituted for that previously in force. Fogg *v.* Middlesex Mut. Ins. Co., 10 Cush. 337, 346; Flanagan *v.* Camden Mut. Ins. Co., 1 Dutcher, 506. There seems to have been what amounted to a new insurance in Miner *v.* Phœnix Ins. Co., 27 Wis. 693. See also Foster *v.* Equitable Mut. Ins. Co., 2 Gray, 216, explained 3 Allen, 863. But see Lycoming Ins. Co. *v.* Mitchell, 48 Penn. St. 367.

(*i*) *Arbitration Clause.* — A common condition is that in case of loss the claim shall be submitted to arbitration, and the distinction which seems to prevail is that a promise to pay the sum which arbitrators may award will prevent a cause of action arising until the award, but a mere agreement to refer will not bar an action. Scott *v.* Avery, 5 H. L. C. 811; Roper *v.* Lendon, 1 El. & El. 825; Elliot *v.* Royal Exch. Ass. Co., L. R. 2 Ex. 237; Rowe *v.* Williams, 97 Mass. 168; Smith *v.* B. C. & M. R.R., 36 N. H. 458, 487; Hurst *v.* Litchfield, 89 N. Y. 377; and many other cases. But see an article on Arbitration Clauses, 3 Am. Law Rev. 249.

(*k*) *Adjustment of Loss.* — The technical rules of marine insurance, such as deduction of new for old, are not applied to insurances against fire; the rule is indemnity; Brinley *v.* National Ins. Co., 11 Met. 195; although the rule *causa proxima spectatur* is applied in estimating the amount for which the insurers are liable, as well as in determining whether they

are liable at all. *Supra*, (*g*), in this note; Hillier *v.* Alleghany County Mut. Ins. Co., 8 (Barr) Penn. St. 470, commented on by Case *v.* Hartford F. Ins. Co., 13 Ill. 676. If property insured at less than its value is partly destroyed, the assured is to be paid his whole loss, if it does not exceed the amount insured. Trull *v.* Roxbury Mut. F. Ins. Co., 8 Cush. 268, 267; Underhill *v.* Agawam Mut. F. Ins. Co., 6 Cush. 440; Mississippi Mut. Ins. Co. *v.* Ingram, 34 Miss. 215. When the insurers reserve the option of rebuilding in case of loss and elect to do so, this also has been treated as no more than the payment of a partial loss, leaving the insurers liable to the extent of the residue of the sum insured above the expense of rebuilding in case of a second fire. Trull *v.* Roxbury Mut. F. Ins. Co., 8 Cush. 268. See Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray, 432. But in New York the election to rebuild has been said to convert the policy into a building contract, and the insurers' liability for a breach of it is held not to be measured by the amount of insurance named in the policy. Morrell *v.* Irving Fire Ins. Co., 33 N. Y. 429; Beals *v.* Home Ins. Co., 36 N. Y. 522.

As to apportionment of double insurance, compare Haley *v.* Dorchester Mut. Ins. Co., 12 Gray, 545; Ashland Mut. Ins. Co. *v.* Honsinger, 10 Ohio. St. 10.

PART VI.

OF THE LAW CONCERNING REAL PROPERTY.

LECTURE LI.

OF THE FOUNDATION OF TITLE TO LAND.

In passing from the subject of personal to that of real property, the student will immediately perceive that the latter is governed by rules of a distinct and peculiar character. The law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy. We have either never introduced into the jurisprudence of this country, or we have, in the course of improvements upon our municipal law, abolished all the essential badges of the law of feuds; but the deep traces of that policy are visible in every part of the doctrine of real estates, and the technical language, and many of the technical rules and fictions of that system, are still retained.

(1) *Government Grants.* — It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor, or lord paramount of all the land in the kingdom, and the true and only source of title. (*a*) In this country we have *adopted the *378

(*a*) 2 Bl. Comm. 51, 53, 59, 86, 105. Sir William Blackstone, in his chapter on property in general, Comm. ii. c. 1 (and which, for clearness and accuracy, as well as for the elegance of its style, remains unrivalled), considers prior occupancy to be the foundation of title to property; and that when the occupant became unwilling or incapable to continue his occupancy, the disposition of property by sale, by will, and by the law of successions and inheritance, was dictated by mutual convenience, and the peace and interests of civil society, and rests for its foundation on municipal law.

same principle, and applied it to our republican governments; (*a*) and it is a settled and fundamental doctrine with us, that all valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the Revolution. This was the doctrine declared in New York, in the case of *Jackson* v. *Ingraham*, (*b*) and it was held to be a settled rule, that the courts

Sir Francis Palgrave says, that the practical establishment of the theory that the king was the original proprietor of all the lands in the kingdom, was to be attributed to the constant working of the crown lawyers, who always presumed that the land was held by feudal tenure, until the contrary could be shown. Rise and Progress of the English Commonwealth, i. 584. The same principle of feudal tenure prevails in Scotland. Bell's Prin. of the Law of Scotland, sec. 676. [This subject has received new light from historical investigations since the author wrote. It will be found discussed in a note to the next volume.]

(*a*) The Revised Constitution of New York, of 1846, declares that the people, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and that all lands, the title to which fails from a defect of heirs, reverts or escheats to the people. Art. 1, sec. 11.

(*b*) 4 Johns. 168; Jackson *v.* Waters, 12 id. 365, s. p. By the N. Y. Revised Statutes, 3d ed. ii. p. 2, sec. 1, the people are declared to possess the original and ultimate property in and to all lands within the jurisdiction of the state. It was declared by statute in Connecticut, in 1718, that no title to lands was valid, unless derived from the Governor and Company of the colony. Revised Statutes of Connecticut, 1784, 118. In the elaborately discussed case of De Armas *v.* Mayor, &c., of New Orleans, 5 La. 132, it was admitted to have been uniformly the practice of all the European nations having colonial establishments and dominion in America, to consider the unappropriated lands occupied by savage tribes, and obtained from them by conquest or purchase, to be crown lands, and capable of a valid alienation, by sale or gift by the sovereign, and by him only. No valid title could be acquired without letters patent from the king. See ib. 188, 195–197, 206, 213, 216. But it is said that purchases made at Indian treaties, under the competent sanction of the government of the United States, vest a valid title in the purchaser, without any patent. Baldwin, J., in Mitchell *v.* United States, 9 Peters, 748, 756, 757. This opinion is, however, so contrary to the previous authorities on the subject, that I should apprehend it would be proper for further consideration. The law, however, seems to be considered as settled, that purchases made at Indian treaties, with the approbation of the government agent, carry a valid title without the necessity of a patent from the United States. Coleman *v.* Doe, 4 Smedes & M. 40.

In the English law it has always been considered a fundamental principle, that the king, by his prerogative, was entitled to all mines of gold and silver, whether in lands belonging to the crown or to a subject. Lord Coke says that the king has no such right, by virtue of his prerogative, in any other metals than gold and silver, for those metals alone are requisite for the coining of money for the use of his subjects. 2 Inst. 577, 578. In the great Case of Mines, in the Exchequer (Plowd. 310, 336), it was resolved, by a majority of the twelve judges, that if the mine, in the lands of a sub-

could not take notice of any title to land not derived from our own state or colonial government, and duly verified by patent. This was also a fundamental principle in the colonial jurisprudence. All titles to land passed to individuals from the crown,

ject, was of copper, tin, lead, or iron, and had gold or silver intermixed, though of less value than the baser metals, the whole mine belonged to the crown, because the nobler metal attracted to it the less valuable, and the king could not hold jointly with the subject, and consequently he took the whole. The minority of the judges, and Plowden himself, dissented from this severe and unreasonable doctrine, and it was corrected by the statutes of 1 Wm. & Mary, c. 30, and 5 Wm. & Mary, c. 6, which declared that no mine of copper, tin, lead, or iron should be adjudged a royal mine, though gold or silver might be extracted from it; but the crown was allowed to take the proceeds of the mine in such cases, provided that the king paid the owner within thirty days after the ore should have been extracted and raised, at certain specified rates.

The statute law of New York has asserted the right of the state, as sovereign over mines, to the extent of the English statutes, and with more definite limits. The provision in the N. Y. R. S. 3d ed. i. 322, is, that all mines of *gold* and *silver* discovered or hereafter to be discovered in this state, belong to the people in their right of sovereignty; *and also* all mines of other metals on lands owned by persons not citizens of any of the United States; *and also* all mines of other metals discovered on lands owned by a citizen of any of the United States, the ore of which, upon an average, shall contain less than two equal third parts in value of copper, tin, iron, and lead, or any of those metals; *also*, all mines and all minerals and fossils discovered upon lands belonging to the people of the state, shall be the property of the people. But all mines, of whatever description, other than mines of gold and silver, discovered upon any lands owned by a citizen of any of the United States, the ore of which, upon an average, shall contain two equal third parts or more in value of copper, tin, iron, and lead, or any of those metals, shall belong to the owner of such land. N. Y. R. S. 3d ed. i. 322. The statute contains some qualifications in favor of the discoverer of mines.

What is the law of the other states on the subject of royal mines, I am not able to say, though it is to be presumed that the exception of mines of gold and silver is the usual *formula* in all government patents and grants by the United States, as well as by the several states.

Mr. Justice Clayton of Georgia, in the case of The State of Georgia *v.* Canatoo, a Cherokee Indian, brought up on *habeas corpus* (reported in the National Intelligencer of October 24, 1843), held, that the right and title to land included a right to all the mines and minerals therein, unless they were separated from the lands by positive grant or exception; and that if the state made a grant of public lands to an individual, without any exception of mines and minerals, the mines and minerals would pass to the grantee as part and parcel of the land; and that the Cherokee Indians had a right to dig and take away gold and silver from the lands in their reserves, or lands not ceded to the state, and were not amenable in trespass for so doing, inasmuch as they had as good a right to the use of the mines and minerals as to the use of the land and its products in any other respect: that they were lawful occupants, not chargeable with waste; for the right of the state was a right of preëmption only, and never considered otherwise by the government of Great Britain, when it claimed and exercised dominion over this country, nor by our own government, which succeeded to the British powers.

through the colonial corporations, and the colonial or proprietary authorities. (*c*) Even with respect to the Indian reservation lands, of which they still retain the occupancy, the validity of a patent has not hitherto been permitted to be drawn in question in a suit between citizens of the state, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished. (*d*) It was also declared, in *Fletcher* v. *Peck*, (*e*) to be the opinion of the Supreme Court of the United States, that the nature of the Indian title to lands lying within the territorial limits of a state, though entitled to be respected by all courts until it be legitimately extinguished, was not such as to be absolutely repugnant to a seisin in fee on the part of the government within whose jurisdiction the lands are situated. (*f*)

* 379 * (2) *Title by Discovery.* — The history and grounds of the claims of the European governments and of the United States to the lands on this continent, and to dominion over the Indian tribes, have been since more largely and fully considered. In discussing the rights and consequences attached by the international law of Europe to prior discovery, it was stated in *Johnson* v. *M'Intosh*, (*a*) as an historical fact, that on the discovery of this continent by the nations of Europe, the discovery was considered to have given to the government by whose

(*c*) Dr. Arnold, in his History of Rome, i. 267-270, considers it to have been a general principle in the ancient states of Greece and Italy, that all property in land was derived from the government by allotment to individuals in absolute right. Conquered lands were won for the state, and not for individuals. That portion which was assigned to individuals they took absolutely, but the great mass of the lands was left as the demesne of the state, and the occupiers of it held only by a precarious tenure.

(*d*) Jackson *v.* Hudson, 8 Johns. 375. It is judicially settled in Kentucky and Ohio, and in the Supreme Court of the United States, that a patent for land conveys the legal title, but leaves all equities open; and the courts go behind the patent for lands, and examine the equity of the title. Brush *v.* Ware, 15 Peters, 93.

(*e*) 6 Cranch, 87.

(*f*) This was the language of a majority of the court in the case of Fletcher *v.* Peck. It was a mere naked declaration, without any discussion or reasoning by the court in support of it; but Judge Johnson, in the separate opinion which he delivered, did not concur in the doctrine. He held that the Indian nations were absolute proprietors of the soil, and that practically, and in cases unaffected by particular treaties, the restrictions upon the right of soil in the Indians amounted only to an exclusion of all competitors from the market, and a preëmptive right to acquire a fee simple by purchase when the proprietors should be pleased to sell.

(*a*) 8 Wheaton, 543.

subjects or authority it was made a title to the country, and the sole right of acquiring the soil from the natives, as against all other European powers. Each nation claimed the right to regulate for itself, in exclusion of all others, the relation which was to subsist between the discoverer and the Indians. That relation necessarily impaired, to a considerable degree, the rights of the original inhabitants, and an ascendency was asserted in consequence of the superior genius of the Europeans, founded on civilization and Christianity, and of their superiority in the means and in the art of war. The European nations which respectively established colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The natives were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion, though not to dispose of the soil at their own will, except to the government claiming the right of preëmption. The practice of Spain, (*b*) France, Holland, and England, *proved the very general *380 recognition of the claim and title to American territories given by discovery. The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been judicially questioned. (*a*) The rights of the British government

(*b*) By the laws of Spain, particular portions of the soil of Louisiana were allotted to the Indians, and care was taken to make the acquisitions valuable, by preventing the intrusion of white settlers. The Laws of the Indies directed, that when the Indians gave up their lands to the whites, others should be assigned to them; and the lands allotted to the Indian tribes by the Spanish officers, in pursuance of the laws of the Indies, were given to them in complete ownership, equally as if they were held under a complete grant. But as the Indians were considered in a state of pupilage, the authority of the public officers, who were constituted their guardians, was necessary to a valid alienation of their property. Recop. de las Indias, cited by Porter, J., in 18 Martin, 857–859, who speaks most liberally of the humane policy and justice of the Spanish laws in relation to the Indian tribes. See also translations from the Recopilacion de Leyes de las Indias, in White's new Recopilacion, ii. 84, 41, 59, 95, which show the anxious and paternal care with which the Spanish laws guarded the Indians from abuse and fraud.

(*a*) As early as 1782, the American Minister, Mr. Jay, told the Spanish Minister, Count d'Aranda, that our right to the territories of the Indian nations comprehended within the colonial chartered limits was a question to be discussed and settled between us and the Indians; that we claim the *right of preëmption* with respect to them, and the *sovereignty* with respect to all other nations. Life and Writings of John Jay,

within the limits of the British colonies passed to the United States by the force and effect of the act of independence; and the uniform assertion of those rights by the crown, by the colonial governments, by the individual states, and by the Union, is, no doubt, incompatible with an absolute title in the Indians. That title has been obliged to yield to the combined influence which military, intellectual, and moral power gave to the claim of the European emigrants. (*b*)

(3) *Qualified Indian Rights* — This assumed but qualified dominion over the Indian tribes, regarding them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory by right of discovery, arose, in a great degree, from the necessity of the case. To leave the Indians in possession of the country, was to leave the country a wilderness; and to govern them as a distinct people, or to mix with them, and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations rendered them incapable
* 381 * of sustaining any other relation with the whites than that of dependence and pupilage. There was no other way of dealing with them than that of keeping them separate, subordinate, and dependent, with a guardian care thrown around them

ii. 474. The Indians in the Northwest Territory of the United States did not concur in any such logic, for the delegates of the confederate nations who met in council the American commissioners at Sandusky, in 1793, to attempt the negotiation of a peace, declared that they had never yielded to or agreed with the King of England or the United States to surrender any exclusive right of preëmption, and that they consider themselves free to make any bargain or cession of lands whenever and to whomsoever they pleased.

(*b*) The right of discovery was not recognized in the Roman law. It is an imperfect title unless followed by occupation, and unless the intention of the sovereign or state to take possession be declared or made known to the world. Vattel, b. i. c. 18, sec. 207, 208; Martens's Precis. 37; Klüber, Droit des Gens Modernes de l'Europe, sec. 126. This is the language of the modern diplomatists and publicists, on the part of England, Spain, Russia, and the United States. Mere transient discovery amounts to nothing, unless followed in a reasonable time by occupation and settlement, more or less permanent, under the sanction of the state. In the disputes and discussions between the British government and Spain, in 1790, relative to Nootka Sound, on the northwest coast of America, the former claimed as an indisputable right the possession of such establishments as they should form, with the consent of the natives of the country, not previously occupied by any of the European nations. See Greenhow's History of Oregon and California, 4th ed. 204.

for their protection. (*a*) The rule that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists, and that the Indians were to be considered as occupants, and entitled to protection in peace in that character only, and incapable of transferring their right to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbors, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension, or the restriction which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights.

This is the view of the subject which was taken by the Supreme Court, in the elaborate opinion to which I have referred. The same court has since been repeatedly called upon to discuss and decide great questions concerning Indian rights and title; and the subject has of late become exceedingly grave and momentous, affecting the faith and character, if not the tranquillity and safety, of the government of the United States.

In the case of *Cherokee Nation* v. *State of Georgia*, (*b*) it was held by a majority of the court, that the Cherokee nation of Indians, dwelling within the jurisdictional limits of * the * 382 United States, was not a *foreign state* in the sense in which the term is used in the Constitution, nor entitled as such to proceed in that court against the state of Georgia. But it was admitted that the Cherokees were *a state*, or distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintain-

(*a*) It was shown in the case of Mitchel *v.* United States, 9 Peters, 740, that it was part of the governor's oath in the Spanish colonies, as prescribed by the laws of the Indies, *that he should take care of the welfare, increase, and protection of the Indians.*

(*b*) January Term, 1831, 5 Peters, 1.

ing the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were domestic dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to our government. The subject was again brought forward, and the great points which it involved reasoned upon and judicially determined, in the case of *Worcester* v. *State of Georgia*, (*a*) which was another case arising out of the operation of the laws of Georgia.

The legislature of that state, in the years 1828, 1829, and 1830, passed several penal statutes in reference to the Cherokee nation and territory. The purpose and effect of those laws was, to demolish the Cherokee government and institutions, and annihilate their political existence as a nation, and to divide their territory among the adjoining counties in Georgia, and extend the civil and criminal law of the state over the Indian territory. Those laws dealt with them as if they were alike destitute of civil and political privileges, and were mere tenants at sufferance, without any interest in the soil on which they dwelt, and which had been uninterruptedly claimed and enjoyed by them and their ancestors as a nation from time immemorial. Their lands had been guaranteed to them as a nation, and the protection of the United States pledged to them in their national capacity; and their existence, competence, and rights, as a distinct
* 383 political * society, recognized, by treaties made with them in the years 1785, 1791, 1798, 1805, 1806, 1816, 1817, and 1819, by the government of the United States, under all the forms and solemnities of treaty compacts. The statutes of Georgia, nevertheless, prohibited the Cherokees, under highly penal sanctions, from the exercise within the territory they so occupied, of any political power whatever, legislative, executive, or judicial. They were declared not to be competent witnesses in any court of the state to which a white person might be a party, unless such white persons resided in the Cherokee nation; and they were also declared to be incompetent to contract with any white person. Their territory was divided into sections, and directed to be surveyed and subdivided into districts, and disposed of by

(*a*) 6 Peters, 515. [This was the view taken in a report on the effect of the XIV. Amendment referred to in a note to lect. XXV.]

lottery among the citizens of Georgia. Their gold mines were taken possession of by force, and the use of them by the Indians prohibited. They were, however, declared to be protected in the possession of their *improvements*, *until the legislature should enact to the contrary*, or the Indians should voluntarily abandon them. (*a*)

The Supreme Court of the United States, *in the case of Worcester*, reviewed the whole ground of controversy, relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially in reference to the Cherokee nation, within the territorial limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded

(*a*) In the session of 1881–82, the legislature of Alabama also extended the civil and criminal jurisdiction of that state over all the Indian territory within its limits, and dealt with the Indians (Creeks and Cherokees) as being under the absolute control of the state. So, also, in the session of 1833, the legislature of Tennessee extended the laws and jurisdiction of the state over the tract of country within the boundary limits of the state in the occupancy of the Cherokees. But the extension, though in violation of the treaties existing between the United States and the Cherokees, was made with mild and reasonable qualifications, in respect to the Cherokees, compared with similar acts in some other states. It secured them in the enjoyment of their improvements and personal property, and allowed them to enjoy their native usages, and prevented entry upon, or occupancy of, any of the lands in their territory, by white men, and exempted the Cherokee Indians from any criminal jurisdiction, under the act for offences committed by them within their territory, except for murder, rape, and larceny. It was in the spirit of the act of the legislature of New York, of 12th of April, 1822, asserting exclusive criminal jurisdiction over all crimes and offences committed within the Indian reservations in the state, by and between Indians. The Tennessee act was founded on the necessity of the case, owing to the very reduced population of the Cherokees within the state of Tennessee, and the too great imbecility of their organization and authority to preserve order, and protect themselves from atrocious crimes. The criminal jurisdiction of New York was vindicated on that ground in Goodell *v.* Jackson, 20 Johns. 716; and on the same ground the act of Tennessee was vindicated in their Supreme Court, in the case of The State *v.* Foreman, a Cherokee Indian, [July,] 1835. 8 Yerg. 256. But even that decision, ably as it was supported, was resisted with equal ability by Judge Peck, one of the members of the court, on the ground of subsisting treaties between the United States and the Cherokees, recognizing their national and self-governing authority, and which treaties did not exist in the case in New York. In Wall *v.* Williamson, 8 Ala. 48, it was adjudged that a marriage between two Indians belonging to the Choctaw tribe, and entered into according to the laws and customs of the tribe at the place where it took place, was valid, even though the laws of Alabama had been extended over that Indian territory. The laws and customs of the Choctaws were not in fact abrogated by the extension of the Alabama jurisdiction, so far as the members of the tribe were affected; and as by Choctaw law the husband may at pleasure dissolve the marriage tie, the dissolution as between the Indians is recognized in Alabama as valid.

on a denial of the right of the Indian possessor to sell. Though the right to the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and, in respect to the Indians, it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank
*384 *paper, so far as the rights of the natives were concerned.

The English, the French, and the Spaniards were equal competitors for the friendship and the aid of the Indian nations. The crown of England never attempted to interfere with the national affairs of the Indians, further than to keep out the agents of foreign powers, who might seduce them into foreign alliances. The English government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands when they were willing to sell, at a price they were willing to take, but they never coerced a surrender of them. The English crown considered them as nations competent to maintain the relations of peace and war, and of governing themselves under her protection. The United States, who succeeded to the rights of the British crown in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only binding the Indians to the United States as dependent allies. A weak power does not surrender its independence and right to self-government, by associating with a stronger, and receiving its protection. This is the settled doctrine of the law of nations; and the court concluded and adjudged that the Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia could not rightfully have any force, and into which the citizens of Georgia had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The court accordingly considered the acts of Georgia which have been mentioned, to be repugnant to the Constitution, treaties, and laws of the United States, and consequently that they were, in judgment of law, null and void.

The decision of the Supreme Court of the United States was

not the promulgation of any new doctrine; for the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial domains
*as subjects, or members of the body politic, and amenable *385
individually to their jurisdiction. They treated the Indians within their respective territories as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character, and exercise self-government, and while residing within their own territories, owing no allegiance to the municipal laws of the whites. The judicial decisions in New York and Tennessee, in 1810 and 1823, correspond with those more recently pronounced in the Supreme Court of the Union, and they explicitly recognized this historical fact and declared this doctrine. (*a*) The original Indian nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the governments which protected them, and had thrown over them and beyond them their assumed patented domains. These governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indians, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the state, and a government grant was the only lawful source of title admitted in the courts of justice. The colonial and state governments, and the government of the United States, uniformly dealt upon these

(*a*) Jackson *v.* Wood, 7 Johns. 295; Goodell *v.* Jackson, 20 id. 693; Holland *v.* Pack, Peck (Tenn.), 151. In 1830, the Supreme Court of Tennessee stated, that the act of North Carolina of 1783 (and which was part of the statute law of Tennessee), admitted that the Cherokees were an independent people, and not citizens of that state; that they were governed by their own laws, and not subject to the legislature of North Carolina. The court declared that grants from that state of Indian lands were valid as between the state and grantees, but that they were subject to the Indian right and title of exclusive occupancy and enjoyment. Blair *v.* The Pathkiller, 2 Yerg. 407. The legislature of New York, so late as 1818, by statute, authorized the governor "to hold *a treaty or treaties on the part of the people of this state with the Oneida nation of Indians, or any other of the Indian nations or tribes within this state,* for the purpose of extinguishing their claim to such part of their lands lying within this state as he might deem proper, for such sums and annuities as might be mutually agreed upon by the parties." Laws of New York, 36th sess. c. 130.

* 386 principles with the Indian nations dwelling * within their territorial limits. The Indian tribes placed themselves under the protection of the whites, and they were cherished as dependent allies, but subject to such restraints and qualified control in their national capacity as was considered by the whites to be indispensable to their own safety, and requisite to the due discharge of the duty of that protection. (*a*)

(4) *Right of Colonization.* — There has been considerable diversity of opinion and much ingenious speculation, on the claim of right to this country by the Europeans, founded on the title by discovery. We have seen that with respect to the English colonists in America, the claim was modified, and much of its extravagance destroyed, by conceding to the native tribes their political rights and privileges, as dependent allies, and their qualified title to the soil. As far as Indian rights and territories were defined and acknowledged by the whites by treaty, there was no question in the case, for the whites were bound by the moral and national obligations of contract and good faith; and as far as Indian nations had formed themselves into regular organized governments, within reasonable and definite limits necessary for the hunter state, there would seem also to be no ground to deny the absolute nature of their territorial and political rights. But beyond these points our colonial ancestors were not willing to go. They seem to have deemed it to be unreasonable, and a perversion of the duties and design of the human race, to bar the Europeans, with their implements of husbandry and the arts, with their laws, their learning, their liberty, and their religion, from all entrance into this mighty continent, lest they might trespass upon some

(*a*) In Mitchel *v.* United States, 9 Peters, 711, 745, 746, the Supreme Court once more declared the same general doctrine, that lands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation, as their common property, by a perpetual right of possession; that the ultimate fee was in the crown or its grantees, subject to this right of possession, and could be granted by the crown upon that condition; that individuals could not purchase Indian lands without license, or under rules prescribed by law; that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies. Grants and sales by the Indians at Indian treaties, under the sanction of the local governments, gave a valid title. The doctrine was in that case applied to grants of lands in Florida, from the Creek and Seminole Indians, under the sanction of the Spanish authorities.

part of the interminable forests, deserts, and hunting-grounds of an uncivilized, erratic, and savage race of men. Nor could they be brought to entertain much respect for the loose and attenuated claim of such occupants, to the exclusive use of a country evidently fitted and intended by Providence to be subdued and cultivated, and to become the residence of civilized nations.

It was part of the original destiny and duty of the human * race to *subdue the earth, and till the ground whence* * 387
they were taken. The white race of men, as Governor Pownall observed, have been "land-workers from the beginning;" and if unsettled and sparsely scattered tribes of hunters and fishermen show no disposition or capacity to emerge from the savage to the agricultural and civilized state of man, their right to keep some of the fairest portions of the earth a mere wilderness, filled with wild beasts, for the sake of hunting, becomes utterly inconsistent with the civilization and moral improvement of mankind. Vattel did not place much value on the territorial rights of erratic races of people, who sparsely inhabited immense regions, and suffered them to remain a wilderness, because their occupation was war, and their subsistence drawn chiefly from the forest. He observed that the cultivation of the soil was an obligation imposed by nature upon mankind, and that the human race could not well subsist, or greatly multiply, if rude tribes, which had not advanced from the hunter state, were entitled to claim and retain all the boundless regions through which they might wander. If such a people will usurp more territory than they can subdue and cultivate, they have no right to complain, if a nation of cultivators puts in a claim for a part, and confines the natives within narrower limits. He alluded to the establishment of the French and English colonies in North America as being, in his opinion, entirely lawful; and he extolled the moderation of William Penn, and of the first settlers in New England, who are understood to have fairly purchased of the natives, from time to time, the lands they wished to colonize. (*a*)

The original English emigrants came to this country with no slight confidence in the solidity of such doctrines, and in their right to possess, subdue, and cultivate the American wilderness, as being, by the law of nature and the gift of Providence, open and common to the first occupants in the * character * 388

(*a*) Droit des Gens, c. 1, sec. 81, 209.

of cultivators of the earth. The great patent of New England, which was the foundation of the subsequent titles and subordinate charters in that country, and the opinions of grave and learned men, tended to confirm that confidence. According to Chalmers, the practice of the European world had constituted a law of nations which sternly disregarded the possession of the aborigines, because they had not been admitted into the * 389 society of nations. (a) But whatever *loose opinions

(a) Chalmers's Political Annals, 676. The Puritans circulated a paper in England, immediately preceding their projected emigration to Massachusetts Bay, entitled *General Considerations for the Plantation of New England.* Mather's Magnalia, i. 65, ed. 1820. It was published at large in Hutchinson's State Papers (Boston, 1769, p. 27), and it declared that "the whole earth was the Lord's garden, and he had given it to the sons of Adam, to be tilled and improved by them. Why, then, should any stand starving for places of habitation, and in the mean time suffer whole countries, as profitable for the use of man, to lie waste without any improvement?" In answer to the objection that they had no warrant for taking land a long time possessed by other sons of Adam, it was stated, that what "was common to all was proper to none. This savage people ruleth over many lands without title or property, for they enclose no ground, neither have they cattle to maintain it. There was more than enough for them and us. By a miraculous plague a great part of the country was left void of inhabitants. Finally, they would come in with good leave of the natives." We may also refer to an able paper, written by the Rev. Mr. Bulkley, of Colchester, in Connecticut, in 1724, entitled, "An Inquiry into the Right of the Aboriginal Natives to the Lands in America, and the Titles derived from them." Massachusetts Historical Collections, iv. 159. In that treatise the learned author confines Indian titles, which have any solidity or value, to those particular parcels of land which they had subdued and improved; and insists that the English had an undoubted right to enter, and appropriate, for agricultural purposes, all the residue of the waste and unimproved lands in the country, as being common, and open to the first *bona fide* occupants. He contended, that in a state of nature, the only title to property was the labor by which the same was appropriated and cultivated, and that the Indian tribes were still in that imperfect state of civil policy which borders upon a state of nature; and the extensive tracts of country which they claimed as national property were not subject to any regulation, nor defined as property, and lay neglected in that common state wherein nature had left it. Cotton Mather, also, in his Magnalia Christi Americana (i. 72), considered it as an instance of the most imaginable civility, that the English purchased several tracts of land of the natives, *notwithstanding the patent which they had for the country.* The great patent of New England, granted by King James, in 1620, to the council at Plymouth, in England (and which was by the patent incorporated by the name of "the Council established at Plymouth, in the county of Devon, for the planting, ruling, and governing of New England in America"), recited, that the king's subjects had "taken actual possession of the continent mentioned in the patent, in the name and to the use of the king, as sovereign lord thereof; that there were no other subjects of any Christian king or state, by any authority from their sovereign lords or princes, actually in possession of any of the lands between the degrees of forty and forty-eight; that the country being depopulated by pestilence and devastation, the appointed time had come in which Almighty God had thought

might have been entertained, or latitudinary doctrines inculcated, in favor of the abstract right to possess and colonize America, it is certain that in point of fact the colonists were not satisfied, or did not deem it expedient to settle the country without the consent of the aborigines, procured by fair purchase, under the sanction of the civil authorities. The pretensions of the patent of King James were not relied on, and the prior Indian right to the soil of the country was generally, if not uniformly, recognized and respected by the New England Puritans. (*a*) They always negotiated with the Indian nations as distinct and independent powers; and neither the right of preëmption, which was * uniformly claimed and exercised, nor the state *390 of dependence and pupilage under which the Indian tribes within their territorial limits were necessarily placed, were carried so far as to destroy the existence of the Indians as self-governing communities. (*a*) The manner in which the people of

fit and determined that those large and goodly territories, deserted as it were by their natural inhabitants, should be possessed and enjoyed by such of his subjects as should be conducted thither; that the settlement would tend to the reducing and conversion of such savages as remained wandering in desolation and distress, to civil society and the Christian religion, and to the enlargement of the king's dominions." The grant was of all the continent between the fortieth and forty-eighth degrees of north latitude, and "in length by all the breadth aforesaid throughout the main land from sea to sea, provided the same, or any part, be not actually possessed or inhabited by any other Christian prince or state," and to be called by the name of "New England, in America." The grant was to forty corporators, consisting of noblemen, knights, and gentlemen of high distinction; and their successors were to be supplied from time to time by the choice of the company. The whole territory was granted to the corporation, to be held of the crown in free and common socage, and with absolute power of legislation and government over the whole country, and with a complete monopoly of its trade. Subsequent grants of the soil of Massachusetts and Maine issued from this company. See the patent at large in Hazard's State Papers, i. 103, and in Baylies' Historical Memoir, i. 160, and in the Plymouth Colony Laws, edited and published by William Brigham, in 1836. The charter of the colony of New Plymouth, in 1629, was granted by that company, and is also given at large in that last work.

(*a*) The excellent Roger Williams, the earliest and clearest asserter of the rights and sanctity of conscience in matters of religion, wrote an essay, in which he maintained that an English patent could not invalidate the rights of the native inhabitants of this country; and it was at first condemned by the government in Massachusetts, in 1634, as sounding like treason against the cherished charter of the colony. Bancroft's History, i. 400.

(*a*) When the Puritans of New England first settled at Plymouth, and made treaties with the Indians, those treaties bore the language of dependence and submission; and the English accepted of the acknowledgments of the sachems that they were *dependent* and *allies* and *loyal subjects of King James*. Morton's New England Memorial, 64, 67, 286; Baylies' Historical Memoir, i. 66, 82; Plymouth Colony Laws, App. 305,

this country, through all periods of their colonial history, treated and dealt with the Indians, is a subject of deep interest, and well worthy of the thorough and accurate examination of every person conversant with our laws and history, and whose bosom glows with a generous warmth for the honor and welfare of his country.

(5) *Indian Rights, how regarded.* — 1. (*By the colonists.*) — The settlement of that part of America now composing the United States has been attended with as little violence and aggression, on the part of the whites, in a national point of view, as were compatible with the fact of the entry of a race of
* 391 civilized men into the territory of savages, and with * the power and the determination to reclaim and occupy it. The colony of Massachusetts, in 1633, prohibited the purchase of lands from the natives, without license from the government; and the colony of Plymouth, in 1643, passed a similar law. Very strong and authentic evidence of the distinguished moderation and equity of the New England governments towards the Indians is to be found in the letter of Governor Winslow, of the Plymouth colony, of the 1st May, 1676, in which he states, that before King Philip's war, the English did not possess one foot of land in that colony but what was fairly obtained by honest purchase from the

ed. 1886. But when war was about commencing with King Philip, in 1675, he insisted that all former agreements with Plymouth were, as he truly apprehended they were, agreements of amity and not of subjection, and the Indians regarded themselves as allies, and not as subjects of England. Those Indian stipulations were regarded by Massachusetts as amounting only to a state of qualified dependence. The Indians in Connecticut were always treated as friends and allies, and as a free people, though regarded in some degree as wards of the colony. The great object of the regulations in the Revised Statutes of Connecticut, of 1672 and 1702, was to protect, civilize, and Christianize the Indians, and this protection continues down to this day. Baylies' Historical Memoir, ii. pt. 8, 28; Trumbull's History of Connecticut, i. 342; Revised Statutes of Connecticut, 1821, 279, note; ib. 808; Chalmers's Political Annals, 898. As further evidence of the truth of the historical deductions mentioned in the text, we may refer to the king's proclamation of the 7th of October, 1763, after the treaty of Paris, founded on the immense acquisition of territory by England, under that treaty. It declared, "that the several nations or tribes of Indians with whom we were connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories, as, not having been ceded or purchased by us, are reserved to them, or any of them, as their hunting-grounds." "And all the lands and territories lying *to the westward of the sources of the rivers which fall into the Atlantic Ocean from the west or northwest*, were declared to be reserved under the king's sovereignty, protection, and dominion, for the use of the said Indians; and all purchases, or settlements, or taking possession of any of the lands so reserved, without the king's special leave and license first obtained, were strictly forbidden." Dodsley's Ann. Reg. 1763, 208.

Indian proprietors, and with the knowledge and allowance of the general court. (*a*) The New England annals abound with proofs of a just dealing with the Indians in respect to their lands. The people of all the New England colonies settled their towns upon the basis of a title procured by fair purchase from the Indians with the consent of government, except in the few instances of lands acquired by conquest, after a war deemed to have been just and necessary. (*b*) Instances are to be met with in the early annals of New England, of regular and exemplary punishment of white persons, for acts of injustice and violence towards the Indians. (*c*) The Massachusetts legislature, in 1633, threw the protection of its government over the Indians in the enjoyment of their improved lands, hunting grounds, and fishing places, *by declaring that they should have relief in any of the *392 courts as the English have. (*a*)

The government of the colony of New York has a claim equally fair with that of any part of America, to a policy uniformly just, temperate, and pacific towards the Indians within the limits of its jurisdiction. While the Dutch held and governed the colony, the Indian titles were always respected, and extinguished by fair means, and with the consent of the natives. This policy was continued by their conquerors; and on the first settlement of the English at New York, in 1665, it was ordained that no purchase of lands from the Indians should be valid without the governor's license, and the execution of the purchase in his presence;

(*a*) Hazard's Collections of State Papers, ii. 531–534; Holmes's American Annals, i. 383; Hubbard's Narrative.

(*b*) Holmes's Annals, i. 166–169, 220, 231, note 4, 233, 245, 248, 259, 312, 317; Winthrop's History, i. 259; Hazard's State Papers, ii. *passim*; Massachusetts Historical Collections, *passim*; Trumbull's History of Connecticut, i. 113–117; Sullivan's Hist. District of Maine, 143–149; Dwight's Travels, i. 167; Baylies' Hist. Memoir, i. 287; Statutes of Connecticut, passed in 1702, 1717, and 1722. We find in the Statutes of Connecticut, of 1838, special provisions enacted as late as 1834, 1835, and 1836, for the protection of the land of the Mohegan, Pequot, and Niantic tribes of Indians within that state. So the Revised Statutes of Massachusetts, of 1836, contain exemption of the Indians within that commonwealth from taxation, and allow them some special privileges and provision for the support of common schools among the Marshpee Indians; but all marriages between them and the whites are declared void. In Mississippi, by statute, 1829, all the privileges, immunities, and franchises of white persons were extended to Indians, and they are competent witnesses in any case where white persons would be. Doe *v.* Newman, 3 Smedes & M. 565.

(*c*) Winthrop's Hist. of New England, i. 84, 267, 269; Baylies' Hist. Memoir, i. 245–248; Morton's New England Memorial, 207.

(*a*) Holmes's Annals, i. 217, 218.

and this salutary check to fraud and injustice was essentially continued. (*b*) Regulations of that kind have been the invariable American policy. The king, by proclamation, soon after the peace of 1763, prohibited purchases of Indian lands, unless at a public assembly of the Indians, and in the name of the crown, and under the superintendence of his colonial authorities. A prohibition of individual purchases of lands, without the consent of government, has since been made a constitutional provision in New York, Virginia, and North Carolina. The colonists of New York settled in the neighborhood of the most formidable
*393 Indian confederacy known to the country, *and came in contact with their possessions. But the Six Nations of Indians, of which the Mohawks were the head, placed themselves and their lands under the protection of the government of New York, from the earliest periods of the colony administration. (*a*) They were considered and treated as separate but dependent nations, and the friendship which subsisted between them and the Dutch, and their successors, the English, was cemented by treaties, alliances, and kind offices. It continued unshaken from the first settlement of the Dutch on the shores of the Hudson and the Mohawk, down to the period of the American war; and the fidelity of that friendship is shown by the most honorable and the most undoubted attestations. (*b*) And when we consider the long and distressing wars in which the Six Nations were involved, on our account, with the Canadian French, and the artful means which were used

(*b*) Smith's Hist. of New York, i. 39; Duke of York's Laws, in the Collections of the New York Historical Society, i.; Wood's Sketch of the First Settlement of Long Island, 12, 22, 23; Collections of the New York Historical Society, i. 171, 211, 224, 227, 239. As evidence of the just and friendly disposition of the Dutch towards the Indians, we have the interesting fact, that the Minesink Valley, on the Delaware, was settled by Dutch emigrants as early as 1644; and being an industrious, quiet, and pious people, and having purchased the lands from the Indians, they lived in uninterrupted peace and friendship with them for upwards of one hundred years. Preston's Notices of Minesink, published in 1829.

(*a*) Colden's History of the Five Nations, *passim*; Governor Pownall's Administration of the Colonies, 268–274; Journals of the Confederation Congress, i. May 1, 1782.

(*b*) The speech of the Indian Good Peter to the commissioners at Fort Schuyler, in 1788, is strong proof of the fact. He said, that "when the white men first came into the country, they were few and feeble, and the Five Nations numerous and powerful. The Indians were friendly to the white men and permitted them to settle in the country, and protected them from their enemies." Collections of the New York Historical Society, iii. 326.

from time to time to detach them from our alliance, it must be granted, that the faith of treaties has nowhere, and at no time, been better observed, or maintained with a more intrepid spirit, than by those generous barbarians. (*c*)

(*c*) Colden's History of the Five Nations of Canada, dependent on the Province of New York, i. 84, *et passim;* Chalmers's Political Annals, 576. The confederacy of the Iroquois, or Five Nations, (and which was known as the confederacy of the Six Nations, after the Tuscaroras were admitted into the union,) might afford the subject of an historical sketch, in the hands of a master, replete with the deepest interest and curiosity. It was distinguished, from the time of the first discovery of the Hudson down to the war of 1756, for its power, policy, and martial spirit. At the close of the seventeenth century that confederacy was computed to contain 10,000 fighting men. Burke's Account of the European Settlements in America, ii. 193. But this was a very exaggerated computation, for, in 1677, an intelligent traveller (Wentworth Greehalph) who visited the Five Nations, computed the whole number of fighting men at 2,150. In 1747, they were supposed not to exceed 1,500. The great influence of Sir William Johnson is said to have collected only 1,000 Indians for so exciting an expedition as that against Montreal, in 1760. Douglass's Summary of the British Settlements in North America, i. 185, 186. Annual Register for 1760; Chalmers's Political Annals, 609. In 1763, according to a census then taken, the number of warriors of the Six Nations amounted to 1,950. Stone's Life of Brant, i. 86, note. The Five Nations, during the time of their ascendency and glory, extended their dominion on every side, and levied tribute on distant tribes. They blockaded Quebec for several months, about the year 1660, with 700 warriors. Proud's History of Pennsylvania, ii. 294; Hawkins's Quebec, 805. The Mohawks were the terror and scourge of all the New England Indians, and those dwelling west of Connecticut River paid them tribute. Trumbull's History of Connecticut, vol. i. They extended their conquest down the Hudson, to Manhattan Island, and subdued the Canarse Indians on the west end of Long Island. Wood's Sketch of the First Settlement of Long Island, 1824, p. 24. The Iroquois pushed their conquest to Lake Huron, and fought desperate actions with the Hurons and the Chippewas on the borders of Lake Superior; and Mr. Schoolcraft very reasonably attributes their superiority in war over the western tribes to their early use of firearms, instead of the bow and war-club. Charlevoix (Travels in Canada, i. 152, 167, 171) speaks in strong terms of the power and fierceness of the Iroquois, who, as early as 1720, had almost extirpated the Algonquins, the Hurons, and other tribes of Canadian savages. Mr. Thompson, in his History of Long Island, New York, 1839, p. 56, or at p. 78, vol. i. of his second ed. 1843, says that the Iroquois, or Six Nations, were Algonquins, and that the Algonquin, or Chippewa race of Indians, embraced anciently all the tribes in New England and New York; and the fact is derived, he says, from identity of language. This point is not within my means of research; and recurring back to the Mohawks, Governor Colden was well acquainted with their history, and by means of his office of Surveyor-General of the Province of New York, he had access to the most authentic sources of information. He wrote the first part of his History of the Five Nations as early as 1727, and he says that they carried their arms to the Carolinas and the banks of the Mississippi, and entirely destroyed many Indian nations. The Chevalier Tonti accompanied M. De la Salle in his expedition and discoveries on the great lakes and the Mississippi, 1678–1684, and was appointed governor of Fort St. Louis, on the River Illinois, and

In New Jersey, the proprietaries very early secured all their titles by Indian purchases; and all purchases to be made,

he mentions the remarkable fact, that in 1684, about 500 Iroquois warriors came and attacked his fort, being jealous of the new establishment. Account of De la Salle's Discoveries, by M. Tonti, inserted in the Collections of the New York Historical Society, ii. 286. In 1684, Lord Howard, Governor of Virginia, was under the necessity of meeting the chiefs of the Five Nations at Albany, in order, by negotiations, to check their excursions to the south. Colden's History, i. 44–53. In the Indian war of Virginia, which terminated in 1677, all the Indian tribes on the east side of the Alleghany ridge became tributary to the province, but protected by the whites in their persons and property. The Five Nations kept superior to any such subjection; and though their headquarters, or great council place, was at Onondaga, in the western part of New York, they continued their hostile marches along the frontiers of Virginia. A treaty was at length made with them in 1722, by which they stipulated not to cross the Potomac, or pass to the eastward of the great mountains; and the tributary Indians of Virginia agreed, on their part, not to pass the same to the north or west; and, *by a colony statute, any tributary Indians violating the treaty were to be transported and sold as slaves.* 4 Randolph's Rep. 633. But the ambitious spirit and daring enterprise of the Six Nations continued to a much later period. An intelligent old Mohawk Indian communicated the fact to General Schuyler, that in his early life he was one of a party of Mohawks who left their castles on an expedition against the Chickasaws in Carolina. The expedition was disastrous, and the Chickasaws destroyed them by an attack in ambush, and only two, of which he was one, escaped. His companion fled to St. Augustine, but he returned home by land, and supplied himself on his long journey with food by his bow and arrow. He cautiously avoided all Indian settlements, and did not see the face of a human being from the time he fled from the battle in Carolina, until he reached the Mohawk castles. This anecdote I received in the year 1803, from General Schuyler, who appeared to place implicit confidence in its accuracy, and no person was more competent to afford precise information on every subject connected with our colonial history and Indian affairs than that very intelligent and accomplished man.

The Six Nations of Indians within the state of New York, by their paucity of numbers and insignificance (with the exception, perhaps, of the Senecas), have at least ceased to exist in a distinct national capacity as tribes, exercising self-government, with a sufficient competency to protect themselves. Upon this fact the laws of New York (Act of April 12, 1822, c. 204; Revised Statutes, ii. 697) have asserted the sole and exclusive jurisdiction of the courts of the state over all crimes and offences committed on the Indian reservations, as well as elsewhere. In September, 1836, there was a treaty concluded between the United States and the New York Indians (being the remains of the Six Nations) relative to their voluntary removal to the Indian territory west of the state of Missouri, and it contained liberal provisions for their removal and support. But by the act of New York, of the 8th of May, 1845, the Seneca Indians who did not remove, but elected to reside on the Cattaraugus and Alleghany Reservations, were placed in a state of protection and improvement. They were declared to hold those reservations as a *distinct community*, by the name of the "Seneca Nation of Indians," with power to institute suits in the state courts, in law and equity, for the protection and recovery of their rights, and lands, and damages. No individual act of any Indian was allowed to prejudice their rights and suits as a community. An attorney for the protection of Indian rights is appointed by the state,

*without the consent of the government, were, by a law, *395
in 1682, declared to be void. In west New Jersey, in 1676, the liberality of the Quaker influence went so far as to provide by law, that in all trials where Indians, being natives of the province, were concerned, the jury was to consist of six persons of the neighborhood and six Indians. (a) In 1758, the Indians, at a treaty at Easton, released, for a valuable consideration, all claims to lands in New Jersey; (b) and the legislature of Pennsylvania, in 1783, asserted it to have been their uniform practice to extinguish Indian titles by fair purchase. *The justice *396
and equity of the original Indian purchases by William Penn, the founder of Pennsylvania, particularly at his memorable treaty of 1682, were known and celebrated throughout Europe. (a) So, Governor Calvert, in 1633, planted Maryland, after fair purchases from the Indians; and in 1644, all Indian purchases, without the consent of the proprietary of the province, were declared, by law, to be illegal and void. (b) There are also repeated proofs upon record, of purchases from Indians, which covered a considerable part of the lower country of Virginia; and Mr. Jefferson says, that the upper country was acquired by purchases made in the most unexceptionable form. (c) The cases of unauthorized intrusions upon Indian lands happened in the early settlement of Virginia; (d) for laws were very soon made in Virginia to protect Indians in their territorial possessions and rights from the frauds of the whites. (e) Georgia was settled under similar good

and the chiefs of the nation may annually elect local officers, and among other, three peacemakers, who have some judicial power. The provisions are benevolent, just, and discreet. [See Strong v. Waterman, 11 Paige, 607.]

(a) Learning and Spicer's Collections, 278, 400, 401, 479, 667.

(b) Annual Register for 1759, 191. In 1831, the legislature of New Jersey passed an act to extinguish the title of the Delaware tribe of Indians to the fisheries in the rivers and bays of the state, by the payment of the consideration of $2000, though the act declared that the right was to be considered as barred by a voluntary abandonment of the use of it.

(a) Watson, in his Annals of Philadelphia, in 1830, has given some curious details respecting the localities of the spot where William Penn held his first Indian treaty, a treaty memorable in diplomatic annals for the simplicity and moral grandeur of the spectacle, and its auspicious and permanent influence upon the minds of the Indians. The chain of friendship then formed continued, says Proud (History of Pennsylvania, i. 212), uninterruptedly for more than seventy years.

(b) Chalmers's Annals, 216.

(c) Jefferson's Notes on Virginia, 158.

(d) Chalmers, b. 1, 58. (e) Abr. Laws of Virginia, 96.

auspices; and Savannah, with a considerable tract of land, was purchased from the Creek Indians by Governor Oglethorpe, in 1733 and 1738, under the sanction of solemn treaties. In 1763, a large cession of lands in Georgia was also made by the Creeks, Cherokees, and other nations of Indians.

The historical facts and documents to which we have referred, relative to the acquisition of the Indian lands in this country, are sufficient to vindicate the justice and moderation * 397 * of our colonial ancestors. But wars with the natives resulted, almost inevitably, from the intrusion of the whites. The origin of those wars is not imputable to any general spirit of unkindness or injustice on the part of the colonial authorities, though they sometimes exhibited signal and severe proofs of the display of superior power and cruel retaliation. (*a*) There were

(*a*) The cases I allude to in New England were the incursions upon the Indian settlements on Block Island; the extirpation of the Pequots; the occasional execution of sachems and other prisoners of war; the giving of rewards or a bounty for Indian scalps, and the sale of captives, including women and children, for slaves. See Winthrop's History of New England, i. 192–199, 232–237; ib. ii. 181–184; Penhallow's Indian Wars; Morton's New England Memorial, by Davis, App. 452–455; Hutchinson's History of Massachusetts, i. 207; Holmes's American Annals, i. 181, 237–241, 272; Baylies' Historical Memoir, vol. ii.; Trumbull's History of Connecticut, i. 112. In Potter's Early History of Narragansett, *passim*, to be found in the "Collections of the Rhode Island Historical Society," vol. iii., the injustice and cruelty of the early New England Puritans, in their dealings and wars with the Indians, are the subject of bold and severe animadversion. The most reprehensible conduct towards the Indians was that in Carolina, of fomenting hostilities among the tribes, in order to purchase or kidnap Indian captives, and sell them for slaves in the West Indies. Mr. Grahame, on the authority of Archdale, Oldmixon. Hewit, and Chalmers, states this fact, and says, that it was not until after persevering and vehement remonstrances that a law was procured first to regulate, and then to extirpate this profligate practice. Grahame's History of the American Colonies, ii. 135, 136. The Indians, except free Indians in amity with the government, formerly were, if they be not still, regarded in some of the states as fit subjects for slavery, like negroes, by applying to them the maxim that *partus sequitur ventrem*. Stroud's Sketch of the Laws relating to Slavery, 11, 12; Butt *v.* Rachel, 4 Munf. 209; The State *v.* Van Waggoner, 1 Halst. 374. The American Indians on every part of the coast of America were, for a long time after the discovery of Columbus, kidnapped and sold as slaves in Europe and the West Indies. The practice was as early as 1520, and continued for nearly two centuries. The public mind was deeply vitiated on this subject. The sale and slavery of Indians was deemed lawful, and the exile and bondage of captives in war, of all conditions, was sanctioned by the sternest Puritans. 1 Bancroft's History, 41, 43, 180–182. But the act of Virginia, in 1679, declaring Indian prisoners, taken in war, to be slaves to the soldiers taking them; and another act, in 1682, declaring that all Indians sold by other Indians to the colonists as slaves, should be slaves, were repealed as early as 1691. Hudgins *v.* Wrights, 1 Hen. & Munf. 136; Pallas *v.* Hill, 2 id. 149;

also, at times, acts of fraud and violence committed by individual colonists, prompted by cupidity and a consciousness of superior skill and power, and springing from a very blunt sense of the rights of savages. (*b*) The causes of war with the Indians were inherent in the nature of the case. They arose from Indian jealousy of the presence and location of white people, for the Indians had the sagacity to perceive, what the subsequent history of this country has abundantly verified, that the destruction of their race must be the consequence of the settlements of the English and their extension over the country. (*c*) And if wars with them were *never unjustly provoked by the colonial gov- *398 ernments or people, yet they were, no doubt, stimulated on the part of the Indians by the consciousness of impending danger, the suggestions of patriotism, and the influence of a fierce and lofty spirit of national independence. In all their wars with the whites, the means and the power of the parties were extremely unequal, and the Indians were sure to come out of the contest with great loss of numbers and territory, if not with almost total extermination. There was always much in the Indian character, in its earlier and better state, to excite admiration, as there was, and still is, in their sufferings, to excite sympathy.

or, according to the case of Robin *v.* Hardaway, Jefferson, 109, not until 1705, when Indian slave laws ceased in Virginia.

(*b*) Hutchinson's History, i. 5, 283; Holmes's Annals, i. 147, 148.

(*c*) The war with the Pequots, in 1637, and the confederacy of Indian nations formed in 1675, by Metacom, the sachem of the Wampanoags, commonly called King Philip, would seem to have been formed by the influence of these patriotic views on the part of the Indians. This is the conclusion, as to those wars, which is drawn by an able and learned colonial annalist. Chalmers's Political Annals, 291, 398. So the efforts of Pontiac, in 1763 and subsequently, and of Tecumseh, between 1806 and 1814, to unite the Indian nations in the west in a great confederacy, for expelling the whites from the Mississippi Valley, were made under the same impulse. The massacre of the whites in Virginia, in 1644, arose, says Governor Winthrop (and he wrote from contemporary information, which came from the Indians), because the Indians saw the English took up all their lands, and would drive them out of the country. Winthrop's History, by Savage, ii. 164. See also Bancroft's History, i 194, 195. The proud Mohawks more patiently submitted to their impending fate, for, sagaciously dreading the rapid progress of the white population, they, in 1785, conveyed a very valuable part of their territory to the corporation of Albany, *to take effect upon the total dissolution of their tribe*, and this deed Governor Crosby afterwards wantonly destroyed. Smith's History of New York, ii. 80. The Mohawks, as the New York House of Assembly observed in an address in 1764 (Journals of the Assembly, ii. 765), were the least populous, most easily managed, best affected, and most intelligent of all the Indians.

2. (*By the United States.*) — The government of the United States, since the period of our independence, has pursued a steady system of pacific, just, and paternal policy towards the Indians within their widespread territories. It has never insisted upon any other claim to the Indian lands than the right of preëmption, upon fair terms; and the plan of permanent annuities, which the United States, and the state of New York, among others, have adopted as one main ingredient in the consideration of purchases, has been attended with beneficial effects. (*a*) The efforts of the national government to protect the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the whites, and
* 399 * to impart to them some of the essential blessings of civilization, have been steady and judicious, and reflect lustre on our national character. (*a*) This affords some consolation, under a view of the melancholy contrast between the original character of the Indians, when the Europeans first visited them, and their present condition. We then found them a numerous, enterprising, and proud-spirited race; and we now find them a

(*a*) As evidence of the extent of the dealings of the United States with the Indians, and of the pecuniary expenditures and annuities granted to them, or on their account, under treaty stipulations, we may refer to the act of Congress of the 3d March, 1835, c. 50, which made an annual appropriation of one million eight hundred and thirty thousand dollars and upwards, to the following nations and tribes, viz.: The Six Nations of Indians in New York, the Senecas, Ottawas, Wyandotts, Munsees, Delawares, the Christian Indians, the Miamis, Eel River's Pottowattamies, Pottowattamies of Huron, of the Prairie, of the Wabash, of Indiana; the Chippewas, Winnebagoes, Menomonies, the Sioux of Mississippi; the Yancton and Santie Bands, Omahas, Sacs of Missouri, the Sacs, Foxes, Ioways, Ottoes, Missourias, Kansas, Osages, Kickapoos, Kaskaskias, and Peorias, the Weas, Piankeshaws, Shawanees, Senecas of Lewiston, Choctaws, Chickasaws, Creeks, the Creeks East, the Creeks West, the Cherokees, the Cherokees West, the Quapaws, the Florida Indians, and the Pawnees. Similar specific appropriations were made, in subsequent years, for Indian annuities, &c.; and these annual provisions for expenditures incurred on account of the Indians under the guardianship of the United States, cover annual stipulations, arising under Indian treaties, from the year 1790 down to this day.

(*a*) In the ordinance of Congress of 13th July, 1787, for the Government of the Territory of the United States northwest of the river Ohio, it was made a fundamental article of compact between the original states and the people and states in the said territory, that the utmost good faith should always be observed towards the Indians. Their lands and property should never be taken from them, without their consent. In their property, rights, and liberty they never should be invaded or disturbed, unless in just and lawful wars authorized by Congress; and just and humane laws should from time to time be made for preventing wrongs being done to them and for preserving peace and friendship with them.

feeble and degraded remnant, rapidly hastening to annihilation. The neighborhood of the whites seems, hitherto, to have had an immoral influence upon Indian manners and habits, and to have destroyed all that was noble and elevated in the Indian character. They have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and, judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own. (*b*)

(*b*) An able and well instructed writer in the North American Review, N. S. XII. (1826,) art. 5, has satisfactorily shown that the intentions of the government of the United States, in their treatment of the Indians, and in all their intercourse with them, have been uniformly just and benevolent. This was the case down to the year 1829. But under the administration of President Jackson, the policy and course of conduct of the government of the United States, in respect to the Indian tribes on the east side of the Mississippi, and south of the Ohio and the Potomac, was essentially changed. The act of Congress of May 28th, 1830, c. 148, first gave legislative sanction to the policy and plan of exchanging the Indian lands, within the limits of the individual states, for portions of the unoccupied territory of the United States west of the Mississippi, and for causing the Indian tribes or nations east of the Mississippi to be removed and established in that western territory. The plan was further matured by the act of Congress of July 14th, 1832, c. 228, and the execution of it became the systematic and settled policy of the administration of President Jackson. The protection which was directed to be afforded to the Indians, under the act of Congress of 30th March, 1802, and which was stipulated, by treaties, to be granted to them, has been withdrawn; and the Cherokees, in particular, have been left in a defenceless state, to the penal laws of the State of Georgia. The President, by his message to Congress of the 15th of February, 1832, declared his conviction, "that the destiny of the Indians within the settled portion of the United States, depends upon their entire and speedy migration to the country west of the Mississippi," and that if any of the Indians repel the offer of removal, they must remain "with such privileges and disabilities as the respective states, within whose jurisdiction they be, may prescribe." He said again, in his message to Congress of December 7th, 1835, that "the plan of removing the aboriginal people, who yet remain within the settled portions of the United States, to the country west of the Mississippi, ought to be persisted in till the object is accomplished, and prosecuted with as much vigor as a just regard to their circumstances will permit, and as fast as their consent can be obtained. All preceding experiments for the improvement of the Indians have failed. They cannot live in contact with a civilized community and prosper."

* The case of the southern Indians is one which appears to be in every view *400 replete with difficulty and danger; and especially when we consider the different and conflicting views which have been taken of their rights by the supreme executive and judicial authorities of the Union.

Since the preceding part of this note was written, and in 1838, those Indians have finally been expelled, by military force, from the southern states, and transported

across the Mississippi. President Van Buren in his message to Congress of the 4th December, 1838, entered into an elaborate vindication of the policy of the federal government in the removal of the Indian nations from the east to the west side of the Mississippi, and held that a mixed occupancy of the same territory by the white and red man was incompatible with the safety and happiness of either, and that their removal was dictated by necessity. He stated that the exclusive and peaceable possession of their new territory, west of any of the states, was guaranteed to them by the United States; and that since the 4th of March, 1829, the Indian title to upwards of one hundred and sixteen millions of acres of land has been acquired, and that the United States had paid upwards of seventy-two millions of dollars to and on behalf of the Indians, in permanent annuities, lands, reservations, and the necessary expense of removal and settlement of them.

The condition of the Indian tribes in the northwestern part of the United States is also deplorably wretched. They have outlived, in a great degree, the means of subsistence in the hunter state, and the tribes west of Lake Michigan, and on the waters of the Upper Mississippi, are unable to procure the requisite food and clothing. They perish from diseases incident to savage life, and arising from scanty and unwholesome food, listless indolence, intemperance, and the want of every comfort. These causes operate as fatally as wasteful wars with each other. See observations of General Lincoln, in Mass. Historical Collections, v. 6, and of the Rev. Dr. Kirkland, id. iv. 67; Governor Clinton's Discourse before the New York Historical Society, in the Collections of the New York Historical Society, ii. 37; Memoir of Governor Cass, of the Michigan Territory, addressed to the Secretary of War, in October, 1821; Major Long's Expedition to the source of St. Peter's River, in 1823, ii. *passim*; Messrs. Clark & Cass, in their Report to Congress, in 1829. The Indians consider their country lost to them by encroachment and oppression, and they are irreclaimably jealous of their white neighbors. The restless and enterprising population on their borders are exempt, no doubt, from much sympathy with Indian sufferings, and they are penetrated with perfect contempt of Indian rights. If it were not for the frontier garrisons and troops of the United States, officered by correct and discreet men, there would probably be a state of constant hostility between the Indians and the white borderers and hunters. They covet the Indian hunting grounds, and they will have them; and the Indians will finally be compelled by circumstances, annoyed as they are from without, and with a constantly and rapidly diminishing population, and with increasing poverty and misery, to recede from all the habitable parts of the Mississippi Valley and its tributary streams, until they become essentially extinguished, or lost to the eye of the civilized world.

In June, 1834, a bill was introduced into the House of Representatives of the Congress of the United States, for establishing an *Indian Territory* west of the Mississippi, extending from the Platte River on the north, and the state of Missouri and the Arkansas territory on the east, to the Spanish possessions south and west; and it was the favorite policy of the government to persuade all the Indian tribes, east of the Mississippi, to migrate and settle, as a confederacy of tribes, on that territory. The bill provided a government for the confederacy, to be established, with the free consent of all the Indian chiefs, and to be governed by Indian chiefs, under the control and patronage of the government of the United States; and it provided that the Indian confederacy might send a delegate to Congress. But the bill met with so much opposition in the House, that it was laid upon the table and never called up. An act of Congress was, however, passed on the 30th June, 1834, c. 161, consolidating many of the former provisions in the laws since the year 1800, and altering others, and establishing a new Indian code. It provided that the part of the United States west of the river Mississippi, and not within the states of Missouri and Louisiana, or the

territory of Arkansas, and also the part of the United States east of the Mississippi, and not within any state to which the Indian title has not been extinguished, should be taken and deemed to be the *Indian Country*. There was to be no trade with any of the Indians therein, without a license from, and under the regulations of, the general superintendent of the Indian affairs, or some agent thereof, and which licenses were subject to recall; no trader was to reside, or attempt to reside therein, without a license, nor must any foreigner go into the Indian country without a passport; no barter, except between Indians; and no persons other than Indians are to hunt, trap, take, or destroy any [peltries] or game within the limits of any tribes with whom the United States have treaties. No person is to drive or convey horses, mules, or cattle, to range or feed on any Indian lands, without the consent of the tribe to whom the lands belong. The superintendent and agents of Indian affairs are authorized to remove from the Indian country all persons found there contrary to law, and the President of the United States may employ military force for that purpose. All persons making a settlement on any lands belonging, secured, or granted, by treaty with the United States, to any Indian tribe, or surveying, or attempting to survey the same, or to designate boundaries, are liable to a penalty, and to be removed by military force. All purchases from any Indian nation or tribe must be by treaty authorized by law. It is made penal to interfere by message, talk, or correspondence with any Indian nation, tribe, chief, or individual, with intent to violate any treaty or law; or to sell, give, or dispose of, to any Indian in the Indian country, spirituous liquors or wine. The criminal laws of the United States are declared to be in force in the Indian country; but they are not to extend to crimes committed by one Indian against the person or property of another Indian. In the repeal of most of the former statute provisions since 1800, relative to the Indians, the Intercourse Act of March 30, 1802, is excepted, so far as respects the Indian tribes residing east of the Mississippi. By act of Congress of March 8d, 1847, the act of 1834 was amended, with more efficient protection to the Indians against the introduction of spirituous liquors and wine, and for the more safe appropriation to the Indians of the annuities, moneys, and goods, paid or furnished by the United States to the Indian tribes. The character of this Indian territory came into discussion in the case of The United States *v.* Rogers, 4 How. 567; and it was adjudged that the Indian tribes residing within the territorial limits of the United States (and this Indian territory is within such limits) were subject to their authority, and Congress may by law punish offences committed there, (if not within the limits of one of the states,) whether the offender be a white man or an Indian; and that though a white man of mature age be adopted in an Indian tribe, he is not an Indian within the proviso of the act of Congress, and is liable to indictment and trial for crimes committed in such territory, as being within the jurisdiction of the Federal courts.

"Who can assure the Indians," says De Tocqueville, (De la Democratie en Amérique, ii. 298, 299,) "that they will be permitted to repose in peace in their new asylum? The United States engage to protect them, but the territory which they occupied in Georgia was guaranteed to them by the most solemn faith. In a few years, the same white population which pressed upon them in their ancestral territory will follow them to the solitudes of Arkansas; and as the limits of the earth will at last fail them, their only relief will be death." The last remnant of the Indian tribes east of the Mississippi and north of the Ohio were the Wyandotts, "the last of the braves of the Ohio tribes," and a remnant of the Miami tribe in Indiana, with the exception of the remains of the Senecas, of the Six Nations. They have been sent "in hopeless banishment" to the far West. Burnet [in the Notes on the early settlement of the Northwestern Territory, by Jacob Burnet, New York, 1847, c. 21] considers that the commencement, progress, and close of the degeneracy and ruin of the Northwestern

Indians began at the treaty of Greenville, in 1793, which opened a friendly intercourse and corrupting influence with the whites, and which in less than fifty years terminated in the extinction of a race of men once numerous, powerful, brave, and uncontaminated with the corruptions of civilization, and who were the original and undisputed sovereigns of the entire country, from Pennsylvania to the Mississippi, "and a more delightful, fertile valley cannot be found on the earth." Judge Burnet cites the cases of the Cherokees and the Wyandotts, to prove that the Indians were capable of the arts of civilized life, and that necessity would have made them industrious and prosperous agriculturists, "if the covetous eye of the white man had not fixed on their incipient improvements."

LECTURE LII.

OF INCORPOREAL HEREDITAMENTS.

THINGS real consist of lands, tenements, and hereditaments. The last word is almost as comprehensive as property, for it means any thing capable of being *inherited*, be it corporeal, incorporeal, real, personal, or mixed. (*a*) The term real estate means an estate in fee or for life in land, and does not comprehend terms for years, or any interest short of a freehold. (*b*) A *tenement* comprises every thing which may be holden, so as to create a tenancy, in the feudal sense of the word, and no doubt it includes things incorporate, though they do not lie in tenure. (*c*) Corporeal hereditaments are confined to *land*, which, according to Lord Coke, (*d*) includes not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and which has an indefinite extent, upwards as well as downwards, so as to include every thing terrestrial, under or over it. (*e*) Incorporeal

(*a*) Co. Litt. 6, a.

(*b*) Co. Litt. 19, 20; and see *supra*, ii. 342; Merry *v.* Hallet, 2 Cowen, 497.

(*c*) Preston on Estates, i. 8; Co. Litt. 19, b, 20, a; Doe *v.* Dyball, 1 Moore & P. 330.

(*d*) Co. Litt. 4, a.

(*e*) 2 Bl. Comm. 18. There are exceptions to the general rule, that land includes every thing above and below the surface. Thus, a man may have an inheritance in an upper chamber, though the lower buildings and the soil be in another, and it will pass by livery. Co. Litt. 48, b. Ejectment will lie for a house, without any land; and a house erected by A on the land of B, with permission, or under contract, belongs to A as personal property. Doty *v.* Gorham, 5 Pick. 487; Marcey *v.* Darling, 8 id. 283; [Howard *v.* Fessenden, 14 Allen, 124, 128; Pullen *v.* Bell, 40 Me. 314; Dame *v.* Dame, 38 N. H. 429.] It is usual, in such a city as London, for different persons to have several freeholds in the same spot. The cellar may belong to one person, and the upper rooms to another. Doe *v.* Burt, 1 T. R. 701. The lease of a cellar, or other room in a house, gives no interest in the land; and if the house be destroyed, the lessee's interest is gone. Winton *v.* Cornish, 5 Ohio, 478; [*post*, 468, n.] A grant of water does not pass the soil beneath, but it passeth a right to fishing. Co. Litt. 4, b.

*402 *tenements and hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their own nature, or by use, annexed to corporeal inheritances, and are rights issuing out of them, or concern them. They pass by deed without livery, because they are not tangible rights. (*a*) These distinctions were well known to the civil law, and are clearly defined in Justinian's Institutes. They have their foundation in the nature of things, and very material legal consequences flow from them in practical jurisprudence. Res corporales sunt quæ sua natura tangi possunt, veluti fundus; incorporales sunt quæ tangi non possunt et in jure consistunt, sicut usus fructus, usus et obligationes. (*b*) [1] A freehold right in a pew in a church may be classed among incorporeal rights, for in England the right only extends to the use of the pew for the purpose of sitting therein during divine service. (*c*) The owner of the pew cannot dig a vault under it, or

(*a*) Bracton, ii. 18; Co. Litt. 20, a, 49, a.

(*b*) Just. Inst. 2. 2. A corporate right or privilege to select and acquire land for a corporate purpose, is declared to be an incorporeal hereditament, existing independent of, and prior to, any act of location or survey. Canal Company *v.* Railroad Company, 4 Gill & J. 1.

(*c*) 2 Addams Eccl. 419. The qualified interest of a party in a pew in a church is an interest in real estate, and comes within the statute of frauds, and a parol contract for a pew beyond a year is void. First Baptist Church of Ithaca *v.* Bigelow, 16 Wend. 28. In Maine, Massachusetts, and Connecticut, pews in a church are declared to be real estate. In New Hampshire and in the city of Boston, they are held to be personal estate. The Revised Statutes of Massachusetts made that exception in favor of Boston, as had been previously done by the statute of 1798. In Vermont, a pew owner has a right to the occupation of it when the church is used for public worship, but is not entitled to compensation if the house be pulled down as too old and unfit for public worship, though it would be otherwise if taken down for the sake of taste or convenience. Kellogg *v.* Dickinson, Law Reporter for May, 1846. [18 Vt. 266.] In Pennsylvania, a cemetery annexed to a church, and used for burial of the dead, cannot be the subject of a mechanic's lien, and sold for debt.

[1] The distinction between corporeal and incorporeal things was attacked by Austin as senseless; lect. xiii. 372; lect. xl. 708; but if *quæ in jure consistunt* be translated "which exist only in contemplation of law," or "which depend on the law for existence," instead of "which consist in a right," as in the ordinary translations, it will be seen to have had a meaning in the Roman law. The first instance of the *res incorporales* given in the Institutes is the *hereditas*, which is a fictitious thing in the same sense in which a corporation is a fictitious person; and is said in the Digest to be a *universitas* distinct from its component parts (D. 50. 16. 208). This shows what the Roman lawyers had in mind, although some of their examples may be hard to justify. The above suggestion will be found more fully explained in an article by the present writer, 7 Am. Law Rev. 55. iv. 441, n. 1.

erect any thing over it, without the consent of the owners or trustees of the church. (*d*) It is a right subject to that of the trustees or owners of the church, who have the right to take down, rebuild, or remove the church, for the purpose of more convenient worship, without making any compensation to the pew holders for the temporary interruption; though it has been held, in Massachusetts, that if the church should be taken down unnecessarily, and as a matter of expediency and not of necessity, the pew holder would be entitled to be indemnified for the loss of his pew. While the house remains, the right to the use of the pew is absolute, and the owner may maintain ejectment, case, or trespass, according to circumstances, if he be disturbed in his right. (*e*)

The incorporeal hereditaments which subsist by our law are fewer than those known and recognized by the English law. We have no such rights as advowsons, tithes, dignities, (*f*) and

Beam *v.* Methodist Church, The Law Reporter for September, 1846. In England, the parson is seised of the freehold of his church, and the right of property in a particular pew is a mere easement annexed to the messuage of the pew holder. [See Churton *v.* Frewen, L. R. 2 Eq. 634.] Pews are subject to the control of church wardens under the ordinary. But in New York a pew holder is held not to have an interest in the soil. The freehold of the church is in the trustees. The right of the pew holder is not real estate, and is no bar to a sale of the church and grounds by the trustees. But if the corporation of the church owns the fee of the ground, and the trustees have granted a durable lease or fee of ground for a vault, it cannot be sold if the owner of the vault objects. In the matter of the Brick Presbyterian Church, 8 Edw. Ch. 155; Shaw *v.* Beveridge, 3 Hill, 26.

(*d*) Ryder, C. J., Sayer, 177; Daniel *v.* Wood, 1 Pick. 102; 3 id. 346.

(*e*) Gay *v.* Baker, 17 Mass. 435; Howard *v.* First Parish, &c., 7 Pick. 138; Kimball *v.* Second Parish in Rowley, 24 id. 347; [Gorton *v.* Hadsell, 9 Cush. 508. See St. Paul's Church *v.* Ford, 34 Barb. 16; Cooper *v.* Presb. Ch., 32 Barb. 222; Wheaton *v.* Gates, 18 N. Y. 395; Abernethy *v.* Church of the Puritans, 3 Daly, 1; Perrin *v.* Granger, 33 Vermont, 101.] Baptist Church *v.* Witherell, 3 Paige, 302; Fisher *v.* Glover, 4 N. H. 180; Price *v.* Methodist Church, 4 Ohio, 515. See Pettman *v.* Bridger, 1 Phill. Eccl. 316, as to pew rights, under the ecclesiastical law; Heeney *v.* St. Peter's Church, 2 Edw. Ch. 608; Shaw *v.* Beveridge, 3 Hill, 26.

(*f*) The law of dignities, though unknown to us, is of great importance in the English law, and it frequently brings into view deep investigations in regal and parliamentary antiquities. As matters for curious inquiry, we may particularly select two great peerage cases before the House of Lords, as being replete with antiquarian erudition and research. The cases I allude to are, (1) The case of the Earldom of Oxford, in the time of Charles I., in which the title and dignity of that earldom, under the name of the noble house of De Vere, was traced up through successive descents and generations to the time of William the Conqueror. The case at large, with the opinions of the judges, is reported in Sir W. Jones's Reports, 96. (2) The case of the Barony of L'Isle, decided a few years ago, upon the claim of Sir John Shelley Sidney, who traced up his claim in a clear course of descent to the

*403 franchises of the chase; and those titles require * complicated regulations, and have been a fruitful source of discussion. The most litigious cases in the Exchequer Reports are those relating to tithes; and it is a great relief to the labors of the student, and a greater one to the duties of the courts, and infinitely more so to the agricultural interests of the country, that the doctrine of tithes is unknown to our law.

The incorporeal rights which I shall now consider, are, 1. Commons; 2. Ways, easements, and aquatic rights; 3. Offices, 4. Franchises; 5. Annuities; and 6. Rents.

1. **Of the Right of Common.** — The right of common is a right which one man has in the lands of another. The object is, to pasture his cattle, or provide necessary fuel for his family, or for repairing his implements of husbandry. (*a*)[1]

This right was intended, in early ages, for the encouragement of agriculture, and existed principally between the owner of a manor and his feudal tenants. "By the ancient common law," said Lord Coke, when commenting upon the statute of Merton,(*b*) "if a lord of a manor enfeoffed others of some parcels of arable land, the feoffees should have common appendant, in the waste ground of the manor, for two causes: (1.) As incident to the feoffment, for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; and, by consequence, the tenant shall have common in the wastes of the manor for his beasts of the plough; and this was the beginning of common appendant. (2.) The other reason was, for maintenance and advancement of agriculture, which was much favored in law." The policy of the old law in favor of common of pasture and of estovers, as being conducive to improvement in agriculture, has entirely changed, or become obsolete; and this incorporeal right is now found to be an incumbrance *404 rather than an advantage. The rights of common * are little known or used in this country, and probably do not

Countess of Shrewsbury, in the time of Edward IV. The barony had fallen into abeyance, and slept in the tomb of the Countess of Warwick ever since the year 1421. But as no time bars in cases of peerage, it was, upon very plausible grounds, attempted to be revived in 1825. The case was reported by Mr. Nicholas. See the London Law Magazine for July, 1829, art. 3.

(*a*) Finch's Law, 157, [b. 2, c. 9.] (*b*) 2 Inst. 86; 4 Co. 37, a.

[1] The origin of commons in the communities of the middle ages is explained *post* iv. 441, n. 1.

exist in any of the northern or western parts of the United States, which have been settled since the Revolution. The Ch. J. of Pennsylvania, while he admitted that a right of common was an estate well known in the law, declared that he knew of very few instances of rights of common. (*a*) But the right is still known and enjoyed, and has been frequently a subject of litigation, in some parts of the State of New York; and it is interesting to perceive the nice distinctions, and the clear and accurate sense of justice, which arose and were applied to this head of the law.

(1) *Of Common of Pasture and of Estovers.* — Common of pasture was known at common law as common of pasture appendant and common of pasture appurtenant. The first, or common *appendant*, is founded on prescription, and is regularly annexed to arable land. It authorized the owner or occupier of arable land to put commonable beasts upon the waste grounds of the manor, from the necessity of the case, and to encourage agriculture. The tenant was limited to such beasts as were *levant* and *couchant* on his estate, because such cattle only were wanting to plough and manure his land. It was deemed an incident to a grant of land, as of common right, and to enable the tenant to use his plough land. (*b*) Common *appurtenant* may be annexed to any kind of land, and may be created by grant as well as prescription. (*c*) It allowed the owner to put in other beasts than such as plough or manure the land; and, not being founded on necessity, like the other right, as to commonable beasts, was not favored in the law. (*d*) Common of estovers may be equally appendant or appurtenant.

The law concerning common appendant received great discussion and consideration, in *Bennett* v. *Reeve*, in 1740. (*e*)

*It was admitted to be the settled law, that common of *405
pasture appendant belonged only to arable land, and could not be severed from it; and that if the land be divided ever so often, every little parcel was entitled to common appendant, but only for commonable cattle, or such as were necessary to plough and manure the tenant's arable land. The Court of C. B., after

(*a*) Trustees of the Western University *v.* Robinson, 12 Serg. & R. 33. We meet, however, with a discussion of the right of common in Carr *v.* Wallace, 7 Watts (Penn.), 394.

(*b*) 2 Bl. Comm. 33. (*c*) 2 Bl. Comm. 33; Cowlan *v.* Slack, 15 East, 108.

(*d*) 2 Bl. Comm. 33; 3 Cruise's Dig. tit. Common. (*e*) Willes, 227.

two arguments, rejected the claim of a tenant, who, by the process of subdivision, claimed only a yard of land to a right of common for sixty-four sheep. He was entitled only to a right of common for such cattle as were wanted to plough and manure his yard of land, and in this way the court brought his claim within reasonable limits.

Common of pasture, whether appendant or appurtenant, might be apportioned upon the alienation of the land to which the common belonged, because it was founded in necessity and common right. "God forbid," said Lord Coke, (*a*) "that the law should not be so, for otherwise many commons in England would be avoided and lost." Thus, in *Wild's Case*, (*b*) he being seised of forty acres of land, to which a right of common pasture on two hundred adjoining acres for commonable cattle was appurtenant, sold five acres. It was held, that the alienee had a right of common appurtenant to the five acres, and that the alienation of part of the land did not destroy the right of common either of the alienor or alienee, but each retained a right of common proportioned to their estates. The warm language of Coke shows the deep conviction of that age, that these rights of common were indispensable to the tillage of the English tenantry. But the change of manners and property, and of the condition of society in this country, is so great, that the whole of this law of commonage is descending fast into oblivion, together with the memory of all the talent and learning which were bestowed upon it by the ancient lawyers.

*406 *There have been several cases on this subject of the right of common of pasture, and of estovers, discussed in the Supreme Court of New York, and the principles to be deduced from the ancient decisions were fully and accurately considered.

The first case I allude to was that of *Watts* v. *Coffin*, (*a*) which was upon a lease executed before the Revolutionary war, in which, by express covenant, the grantor had conveyed to the lessee in fee common of pasture, and reasonable estovers, out of the woods of the manor of Rensselaerwick, at Claverack. The grantor had cultivated, or, in ancient language, *approved* the manor lands by leasing, so as to leave no common of estovers or of pasture, and in that way had actually destroyed the exercise of the right under

(*a*) 4 Co. 38. (*b*) 8 Co. 78, b. (*a*) 11 Johns 495.

the covenant. The only question was, as to the remedy; and it was held, that the tenant could not set off that claim under the covenant, against the rent due upon the perpetual lease, but must resort to his covenant if any remedy existed. It was, however, left undecided, whether any right of common existed after the waste and unappropriated parts of Claverack had disappeared by the settlement and improvement of the country. In England, before the statute of Merton, 20 Henry III., it was supposed that the lord could not improve any part of his waste grounds, however extensive they might be, provided another person had a grant of common of pasture therein, because the common issued out of the whole waste, and every part of it. But that statute, and the statute of Westminster II., 13 Edward I., allowed him to do it, if he left sufficient common of pasture for the tenants; and this was all that any tenant could, in common justice, have required, before the provision of the statute. It is now well settled in the English law, that the owner of lands, in which another has a right of common, may improve and enclose part of the common, *leaving a sufficiency of common for the tenant. In those *407 cases in which a right of common of pasture exists here, the right of the owner of the soil to improve would seem necessarily to be subject to the same limitation, and to be exercised consistently with the preservation of a right of common.

The next case in which this right of common was discussed was that of *Livingston* v. *Ten Broeck*. (*a*) In that case an ancient deed had conveyed a large tract of land in the manor of Livingston, with a right of common of pasture and of estovers; and the court, in the decision of that case, recognized several principles of ancient law applicable to this right of common.

Thus, if a person seised of part of the land subject to common, should purchase part of the adjoining land entitled to common, here would be an unity of title in one and the same person to part of the land entitled to a privilege of common, and to part of the land charged with that privilege, or out of which the common was to be taken. This unity of title extinguished his right of common, and upon this principle, that if it was to continue in his hands, his interest would induce him to take common for the land he purchased out of that part of the manor which he did not own, in order to relieve his own land of the burden and cast it upon

(*a*) 16 Johns. 14.

his neighbor. This temptation to abuse and fraud the cautious policy of the old law would not permit. So, also, if a man, having common in a large field owned by several persons, purchased an acre from one of them, his right of common was extinguished upon the same principle. This was the rule declared in *Rotherham* v. *Green*; (*b*) and the right of common became extinct equally in either case, by aliening or releasing part of the land entitled to common, and by purchasing part of the *408 land charged with it. If it were otherwise, * the tenant of the residue might be charged with the burden of the whole common. The rule is, that this right of common shall not be so changed or modified by the act of the parties, as to increase, or even to create the temptation to increase, the charge upon the land out of which common is to be taken. An extinguishment of the right as to a portion of the land charged, is an extinguishment of the whole; and this principle of ancient policy was illustrated in the case to which I have referred.

In *Leyman* v. *Abeel*, (*a*) another branch of the same subject was brought under the consideration of the Supreme Court.

It was held, that incorporeal hereditaments descend by inheritance as real estate, and in that case a right of common of estovers, which had descended to children, was held to be incapable of division between them; and this upon an old and just principle of law, to prevent the land from being doubly or trebly charged. In accordance with the case of *The Earl of Huntington* v. *Lord Mountjoy*, (*b*) it was held, that a common in gross and uncertain, as the right to cut wood and dig turf, might be assigned, but it could not be alienęd in such a way as to give the entire right to several persons, to be enjoyed by them separately. Lord Coke said, (*c*) that if such a right of common descended to coparceners, as it was not partable, the eldest

(*b*) Cro. Eliz. 593. [See Hall *v.* Lawrence, 2 R. I. 218; Bell *v.* Ohio & P. R.R., 25 Penn. St. 161.]

(*a*) 16 Johns. 30. So, also, in Van Rensselaer *v.* Radcliff, 10 Wend. 639, it was adjudged, according to the doctrine of Lord Coke, in Co. Litt. 164, b, that *common of estovers* could not be apportioned. It is an entirety, and cannot be divided, for that might work oppression and injustice, by surcharging the land. If, therefore, a farm entitled to estovers be divided *by the act of the party* among several tenants, neither of them can take estovers, and the right is extinguished. [See Livingston *v.* Ketcham, 1 Barb. 592.]

(*b*) Godbolt, 17; Co. Litt. 164, b, s. c. (*c*) Co. Litt. 165, a.

should have the right, and the rest should have contribution, or an allowance of the value in some other part of the inheritance. But if the ancestor left no inheritance from which to make compensation or recompense to the younger coparceners, one parcener was to have it for a time, and the other for the like time, so that no prejudice should accrue to the owner of the soil. This mode of enjoyment, alternately, or in succession, was carried, in the *ancient law, to a ludicrous extent. Thus, says Coke, *409 according to the rules to be found in Bracton, Britton, and Fleta, in the case of a common of piscary descending to two or more parceners, the one may have one fish, and the other the second; the one may have the first draught, and the other the second. If it be of a mill, the one was to have the mill for a time, and the other for the like time, or the one the first toll dish, and the other the second.

In the case in New York last referred to, it was held, that this law was changed under the operation of our statute of descents, and that if such a right of common descended to several heirs as tenants in common, or parceners, it could not be divided, but there must be a joint enjoyment. They may jointly alien, but one tenant cannot convey alone, nor can the eldest heir take the whole of this indivisible right of common of estovers, and make recompense. It is a joint right, to be enjoyed jointly by the heirs, or their assignees; and upon the principle that the land charged with the right is not to have an increase of burden by the multiplication of claimants.

This right of common may be controlled by custom. It may be held subservient to a distinct right in the lord of the manor, founded on immemorial usage, to dig in the soil, without leaving sufficient herbage for the commoners. (*a*)

(2) *Of Common of Piscary.* — This is said to be a liberty, or right of fishery in the water covering the soil of another person, or in a river running through another man's land. (*b*) A *common of fishery* is not an exclusive right, but one enjoyed in common with certain other persons; and Lord Holt said it was to be resembled to the case of other common. (*c*) The books speak likewise of a **free fishery*, as being a franchise in the *410

(*a*) Bateson *v.* Green, 5 T. R. 411.
(*b*) 2 Bl. Comm. 34, 39; Cruise's Digest, tit. Common, sec. 34.
(*c*) 2 Salk. 637.

hands of a subject existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. (*a*) There is also a *several fishery*, which is a private exclusive right of fishery in a navigable river or arm of the sea, accompanied with the ownership of the soil. It is a grant along with the soil, though the soil may be granted without this several fishery; and it has likewise been strongly asserted and maintained, that a several fishery may exist without the ownership of the soil. (*b*)

But these distinctions between common of piscary, free fishery, and several fishery, seem to be quite unsettled in the books; (*c*) and the authorities referred to by Mr. Hargrave, (*d*) throw embarrassment in the way of the attempt to mark with pre-
*411 cision the line of discrimination between the several *rights of fishery. In a modern case, (*a*) the judges took a distinction between a common fishery (*commune piscarium*), which may mean for all mankind, as in the sea, and a common of fishery (*communiam piscariæ*), which is a right, in common with certain other persons, in a particular stream; and the text writers were deemed to have spoken inaccurately when they confounded

(*a*) This exclusive right of free fishery in a public river was so unreasonable as to be prohibited in future by Magna Charta, c. 16, 20, 47. [Mayor, &c., of Carlisle *v.* Graham, L. R. 4 Ex. 361; Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 21.]

(*b*) Com. Dig. tit. Prerogative, D. 50; Co. Litt. 4 b, 122 a; Hale, de Jure Maris, c. 5; the case of the Royal Fishery of the Banne, Davies, 149; Smith *v.* Kemp, 2 Salk. 637; Carter *v.* Murcot, 4 Burr. 2162; Seymour *v.* Lord Courtenay, 5 id. 2814. Mr. Angell, in his valuable Treatise on the Common Law in Relation to Watercourses, 6–10, has collected the authorities on the question whether a several fishery may exist without the property in the soil. The reason of the thing, and the weight of authority, are in favor of the affirmative of the question; and he justly concludes that property in watercourses may be subjected to every kind of restriction by positive agreement. In Duke of Somerset *v.* Fogwell, 5 B. & C. 875, it was declared, that in ordinary cases the owner of a *several fishery* was to be presumed to be owner of the soil. He is, however, only *prima facie* owner of the soil. Partheriche *v.* Mason, 2 Chitty, 658.

(*c*) See the discussions at the bar in Freary *v.* Cooke, 14 Mass. 488. Sir William Blackstone says, that a *free fishery* is an exclusive right. Comm. ii. 39, 40. But in Seymour *v.* Lord Courtenay, 5 Burr. 2814, Lord Mansfield declared that it was essential to a free fishery that more than one person should have a coextensive right in the same subject. So, in Melvin *v.* Whiting, 7 Pick. 79, it was held, that a free fishery was not an exclusive fishery.

(*d*) Harg. Co. Litt. lib. 2, No. 181.

(*a*) Benett *v.* Costar, 8 Taunt. 183.

the distinction. The more easy and intelligible arrangement of the subject would seem to be, to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals.

It was a settled principle of the common law, that the owners of lands on the banks of fresh water rivers, above the ebbing and flowing of the tide, had the exclusive right of fishing, as well as the right of property opposite to their respective lands *ad filum medium aquæ;* and where the lands on each side of the river belonged to the same person, he had the same exclusive right of fishery in the whole river, so far as his lands extended along the same. The right exists in rivers of that description, though they may be of the first magnitude, and navigable for rafts and boats, but they are subjected to the *jus publicum*, as a common highway or easement, for many navigable purposes. The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience; and all erections and impediments made by the owners, to the obstruction of the free use of the river as a highway for boats and rafts, are deemed nuisances. This right of fishery in rivers not navigable is also subject to the qualification of not being so used as to injure the private rights of others; and it does not extend to impede the passage of fish up the river by means of dams or other obstructions. The impediment was at common law a nuisance, and in Massachusetts it subjects * the party creating it to *412 a penalty given by statute. (*a*) Under these reasonable qualifications, the right of private property in rivers was recognized at common law in the earliest ages, and it has been uniformly admitted down to this day. (*b*) The law was laid down very clearly and emphatically in the case of the river Banne, in Ireland, (*c*) which is regarded as a leading case and a sound

(*a*) Weld *v.* Hornby, 7 East, 195; Commonwealth *v.* Chapin, 5 Pick. 199. The regulation of fisheries within the jurisdiction of the several states is matter of statute provision; and the laws of Connecticut, in particular, have been many and very specific on the subject. Statutes of Connecticut, 1888, pp. 269–285. But manufacturing machinery, and steamboats, and the insatiable cupidity and skill of fishermen, have prodigiously diminished the resort of the most valuable fish into the rivers of the northern states.

(*b*) Hale, de Jure Maris, c. 1, cites a record in the K. B., as early as 18 and 19 Edward I., in which this rule was asserted. [Mayor, &c., of Carlisle *v.* Graham, L. R. 4 Ex. 361.]

(*c*) Davies, 149.

authority; and the doctrine of that case was, that a subject might have a several freehold interest in a navigable river or tide water, by special grant from the crown, but not otherwise; and that without such grant, or prescription, which is evidence of a grant, the right of fishing was common. On the other hand it was held, that in rivers not navigable (and in the common law sense of the term, those only were deemed navigable in which the tide ebbed and flowed), the owners of the soil on each side had the interest and the right of fishery; and it was an exclusive right, and extended to the centre of the stream opposite their respective lands. This case was followed by that of *Carter* v. *Murcot* (*d*) in which the K. B. recognized that doctrine in its fullest extent; and Sir Matthew Hale, in his treatise De Jure Maris, (*e*) has not only laid down the same propositions, but he has discussed the subject with great and accurate learning, and it has become a text book of the highest authority.

This private right of fishery is confined to fresh water rivers, unless a special grant or prescription be shown; and the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters, under the free and *413 *masculine genius of the English common law, is a right public and common to every person; and if any individual will appropriate an exclusive privilege in navigable waters and arms of the sea, he must show it strictly by grant or prescription. (*a*) [1] The common right of fishing in navigable waters is

(*d*) 4 Burr. 2162. (*e*) Harg. Law Tracts, art. 1.

(*a*) Hale, de Jure Maris, c. 4; Sir Matthew Hale, in Lord Fitzwalter's Case, 1 Mod. 105; Warren *v.* Matthews, 1 Salk. 357; 6 Mod. 73; Ward *v.* Creswell, Willes, 265; The Mayor, &c., of Oxford *v.* Richardson, 4 T. R. 437; Carter *v.* Murcot, 4 Burr. 2162; Parker *v.* The Cutler M. Co., 20 Me. 353.

[1] *Riparian Proprietors.* — (*a*) *Right of Fishery.* — The riparian owner's exclusive right of fishing in English fresh water rivers, and the public right of fishing in tidal waters, are said to depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in a public river respectively. Murphy *v.* Ryan, 2 Ir. Rep. C. L. 148, 149; Mayor, &c., of Carlisle *v.* Graham, L. R. 4 Ex. 361, 368. In the first cited case the ownership of the sovereign was said not to extend beyond the ebb and flow of the tide, although the river was navigable beyond that point; and on that ground, inasmuch as a custom that the public should have *profit à prendre* in private soil could not legally exist, it was held that the public could not acquire by immemorial usage any right of fishing in a navigable river above the ebb and flow of the tide. See Cobb *v.* Davenport, 4 Vroom (33 N. J.), 223. In the second it was held that a several fishery in a tidal

founded on such plain principles of natural law, that it is considered by many jurists as part of the law of nations. The civil law declared, that the right of fishing in rivers, as well as in the sea and ports, was common; and in some respects it went beyond the common law, for it held, that all rivers where the flow of water was perennial, belonged wholly to the public, and carried with it the right of fishery, as well as the public use of the banks. (*b*) Bracton adopted the doctrine of the civil law, and held, (*c*) that the right of fishing in rivers, and the use of the banks, was com-

(*b*) Inst. 2. 1. 2; Dig. 43, tit. 12, 13, 14, 15.
(*c*) B. 1, c. 12, sec. 6.

river which had permanently changed its channel could not be followed from the old into the new channel.

In Massachusetts it is said that the right of fishing and taking clams in the sea or rivers in any town in the Commonwealth is a public right belonging to all the inhabitants of the town, unless restricted by acts of the legislature, &c.; and that it is not incident to the right of property in the soil, but is unaffected by the question whether the title in the land under the water is in the Commonwealth, in the town, or in private persons. Proctor *v.* Wells, 103 Mass. 216; Weston *v.* Sampson, 8 Cush. 347. It is consistent with this that the ownership of the land between high and low water mark by private riparian proprietors should be held subject to the public rights; *post*, 430; Boston *v.* Richardson, 105 Mass. 351, 354; Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 21; *post*, 427, n.(*d*); iv. 441.n.1.

See, as to planted beds of oysters, *post*, 418, n. (*c*); Lowndes *v.* Dickerson, 34 Barb. 586.

(*b*) *Encroachments.* — It has been held by the House of Lords, on a Scotch appeal, but upon general grounds of policy, that an encroachment by a riparian proprietor upon the *alveus* of a running stream can be complained of by the opposite owner without the necessity of proving either that damage has been or is likely to be sustained from that cause. Bickett *v.* Morris, L. R. 1 H. L. Sc. 47. And the same rule is applied to a tidal navigable river, although it would be otherwise of works erected upon the sea shore. Attorney General *v.* Lonsdale, L. R. 7 Eq. 377. But see Harvard College *v.* Stearns, 15 Gray, 1.

(*c*) *Navigable Waters.* — Cases which deny the existence of any peculiar privileges as appurtenant to the bank of navigable water where the tide ebbs and flows, with the exception of alluvion and dereliction, are Stevens *v.* Paterson & Newark R.R. Co., 5 Vroom (34 N. J.), 532. Gould *v.* Hudson R. R.R. (2 Seld.) 6 N. Y. 522. The same decision has been made in the case of owners on the banks of the Mississippi, in a state where the fee of the river bed, below ordinary high water mark, is held to be in the state for the use of the public. Tomlin *v.* Dubuque, Bellevue, & Miss. R.R., 32 Iowa, 106. But able dissenting opinions were delivered in all of these cases, and in Yates *v.* Milwaukee, 10 Wall. 497, the riparian right is said to be one of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessarily taken for the public good, upon due compensation. It includes access to the navigable part of the stream and the right to make a wharf, subject to the rights of the public.

See, generally, Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 21; Moulton *v.* Libbey, 37 Me. 472.

mon *jure gentium*. But it is everywhere agreed, that this common right is liable to be modified and controlled by the municipal law of the land, and no person has a right to pass over the lands of others in order to get to the water. In *Blundell* v. *Catterall*, (*d*) which called forth a very elaborate and learned discussion, the doctrine of the civil law, as stated by Bracton, was disclaimed, and it was held, that the public had no common law right of crossing the beach or sea shore, for the purpose of bathing in the sea, as against the lord of a manor who was owner of the soil of the shore, and had the exclusive right of fishing therein. So, also, in France, before the Revolution, the right of fishing in navigable and not navigable rivers, was not common to all the * 414 subjects, but belonged * to the king, and such individuals as under him possessed jurisdictional rights. (*a*) The Napoleon code was formed upon the ruins of seigneurial and feudal rights, and it is declared, that rivers, and navigable or floatable streams, shores, and land between high and low water mark, were considered as dependencies of the public domain, and that the right of fishing was under the regulation of particular laws. (*b*) It is now understood, that the owners of the lands on rivers not navigable or floatable (*flottables*) have the exclusive right of fishing therein, as well as the exclusive ownership of the soil composing the bed of the river. Though some communes attempted to appropriate that right to themselves, the claim was put down by decrees, and on the principle that the abolition of feudal rights, of which the right of fishing was one, was for the benefit, not of the communes, but of the feudal vassals, who had become free in their persons and property, and that there no longer existed any seigneurial rights. (*c*)

The English doctrine as to navigable rivers, and the common right as to the use thereof, and as to the right of fishing as well as to the right to the soil, in rivers not navigable, in the common law

(*d*) 5 B. & Ald. 268.

(*a*) Inst. Droit Français, par Argou, i. 214; Pothier, Traité du Droit de Propriété, n. 52.

(*b*) Code Napoleon, n. 538, 715.

(*c*) Toullier's Droit Civil Français, iii. n. 144, 145, 146; Questions de Droit, par Merlin, vi. tit. Pêche. The latter author has collected the ancient authorities in support of the seigneurial exclusive right of fishery in all streams not navigable, and the several decrees of the revolutionary governments abolishing those feudal and odious rights.

sense of the term, have been declared to be the law in several of the United States. (*d*) The legislature of *New York, *415 when they reënacted, in 1787, all the British statutes that were deemed applicable to our situation, considered a *common of fishery* as an existing right, for they provided the writ of *novel disseisin* for the disturbance of it. (*a*) So, a franchise of a *several fishery* at a particular place in a public river, has been admitted to exist, and an instance of such a grant was mentioned in the case of *Stoughton* v. *Baker*. (*b*) The statute law of the colony of Massachusetts made some alterations in the common law. Each town might appropriate the right of free fishing in navigable rivers, within the town, and the right of free fishing was confined to householders. The legislature likewise assumed the regulation of the passage and protection of fish in streams not navigable, in the technical sense; and it is now considered that fisheries are, as at common law, the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute, and the right, unless secured by a particular grant or prescription, is held subject to legislative control. (*c*) The New York Revised Statutes (*d*) have also deemed the regulation of fisheries, in waters navigable or not navigable, a matter of public concern; and they have regulated the time and mode of fishing in the waters of the state, and particularly in respect to certain kinds of fish, and in the waters of the upper Hudson. The courts of Common Pleas in each county have likewise the authority, under certain checks and restrictions, to regulate the fishing in any of the *streams, ponds, or lakes in their respective counties, and *416 to prevent the destruction of the fish therein. In *Jacobson*

(*d*) The People v. Platt, 17 Johns. 195; Hooker v. Cummings, 20 id. 90; *Ex parte* Jennings, 6 Cowen, 518; Berry v. Carle, 3 Greenl. 269; Scott v. Wilson, 3 N. H. 321; Commonwealth v. Charlestown, 1 Pick. 180; Adams v. Pease, 2 Conn. 481; Arnold v. Mundy, 1 Halst. 1; Dane's Abr. ii. 692, sec. 18; Browne v. Kennedy, 5 Har. & J. 195.

(*a*) Laws of New York, 10th sess. c. 50, sec. 7.

(*b*) 4 Mass. 527.

(*c*) Nickerson v. Brackett, 10 Mass. 212, 216; Waters v. Lilley, 4 Pick. 145; Ingraham v. Wilkinson, ib. 268; Vinton v. Welsh, 9 id. 87; Cottrill v. Myrick, 8 Fairf. 222, 229; Lunt v. Hunter, 16 Me. 1; Dane's Abr. ii. 688–712, or c. 68. In that chapter Mr. Dane has diligently collected the English and American authorities applicable to the subject. [See Moulton v. Libbey, 37 Me. 472; Preble v. Brown, 47 Me. 284; Proctor v. Wells, 108 Mass. 216; Weston v. Sampson, 8 Cush. 347.]

(*d*) Vol. i. 687, 688.

v. *Fountain*, and afterwards, in *Gould* v. *James*, (*a*) it was considered that a person might, by grant or prescription, have an exclusive right to fishery, even in an arm of the sea, or in a navigable river, where the tide ebbed and flowed; and in New Jersey, the right of several fishery has been attempted to be carried beyond the rule of the common law. The doctrine asserted was, that, in that state, the whole of the soil under its navigable and tide waters, is individual and not public property, and that it passed in fee simple from the original proprietors under the royal patents to the present occupiers and grantees. The title was originally in the king, by right of discovery, according to the public law of Europe; and, it is said, he was competent to convey, and did convey the soil in New Jersey, as well under navigable waters as elsewhere, to the Duke of York, and by him it was conveyed to Sir George Carteret and the representatives of Lord Berkeley, and from them the title passed, and has been regularly transmitted to the present owners of lands on the navigable waters of the state. Upon that broad foundation it was maintained, that the proprietors of land on rivers and waters, navigable as well as not navigable, had immemorially claimed and exercised the right to the soil, and to a several fishery in all waters within the state in front of their lands and shores, subject, nevertheless, to the *jus publicum*, or use of the same, as a public highway for all navigable purposes, and also subject to the regulations of the legislature for the passage and protection of fish. (*b*) But whatever force might have been due to such an opinion, if the question was *res integra*, the law is now declared, after a very profound and exhausting forensic discussion, to be, that there is no *417 several fishery in the *navigable waters of New Jersey, but the same is common to all the people of the state. (*a*)

(*a*) 2 Johns. 170; 6 Cowen, 369; Rogers v. Jones, 1 Wend. 237, s. p.

(*b*) Griffith's Register, tit. New Jersey, art. Fisheries.

(*a*) Arnold v. Mundy, 1 Halst. 1; [Den v. Jersey Co., 15 How. 426; Stevens v. Paterson & Newark R.R., 5 Vroom (34 N. J.), 532;] Martin v. Waddell, 16 Peters, [367,] s. p. In this last case it was adjudged, that the property in the oyster fisheries, in the public rivers and bays in East New Jersey was vested in the state by the Revolution in 1776, as succeeding in that respect to the prerogatives and regalities which belonged to the crown, and was afterwards vested in the grantees under the act of New Jersey, in 1824. The legislature of New Jersey, by act of 1826, have declared it to be unlawful for any persons, not resident citizens of the state, to use any net or seine, for the purpose of taking fish, in any of the rivers or waters within the jurisdiction of the state. Elmer's Dig. 205. But Pennsylvania and New

Though the right of fishery in a navigable river be a common right, the adjoining proprietors have the exclusive right to draw the seine and take fish on their own lands; and if an island or a rock, in tide waters, be private property, no person but the owner has the right to use it for the purpose of fishing. (*b*) It has been further decided, that though the sea shore, between high and low water mark, be held by grant as private property, the common right still exists to go there and fish, and even to dig and take shell fish; and if the owner of the soil claims an exclusive right, he must show a prescription for it controlling the general right at common law. (*c*)

In Pennsylvania, the English doctrine that no rivers are deemed navigable, so as to give the common right of fishing, except those where the tide ebbs and flows, has been held not to be applicable to the great rivers in that state; and the owners of land on the banks of such rivers as the Susquehannah and Delaware, for instance, so far up as they have a capacity for public use as commercial highways, have no exclusive right * of fishing *418 in the rivers opposite their respective lands. The right to fisheries in such rivers is declared to be vested in the state, and open to all the world; (*a*) and a similar exception to the rule of the common law has been suggested to exist in North and South Carolina. (*b*)

Jersey have, by mutual arrangement, concurrent jurisdiction over the waters of the river Delaware, to a certain extent, and the exercise of the right of fishery is exercised in conformity to such arrangements. See act of New Jersey, of 26th November, 1808; Elmer's Dig. 199. In Maryland it is also declared, that the king, before the Revolution, had the right to grant lands covered by navigable waters, subject to the right of the public to fish and navigate them; and that this right, subject to the restriction, passed to the proprietors of Maryland by the royal grant, and that the right was then vested in the state. Browne *v.* Kennedy, 5 Harr. & J. 195. [Chapman *v.* Hoskins, 2 Md. Ch. 485.] In Mr. Angell's Treatise on the Right of Property in Tide Waters, c. 7, he has shown that a right of several fishery in navigable waters in front of their lands, may and does exist in individuals, by usage, in several of the states.

(*b*) Lay *v.* King, 5 Day, 72; The Commonwealth *v.* Shaw, 14 Serg. & R. 9.

(*c*) Bagott *v.* Orr, 2 Bos. & P. 472; Peck *v.* Lockwood, 5 Day, 22. But the case of Bagott *v.* Orr may be considered as shaken by that of Blundell *v.* Catterall, 5 B. & Ald. 268; and the doctrine in Peck *v.* Lockwood seems to be very questionable. [See Moulton *v.* Libbey, 37 Me. 472; Preble *v.* Brown, 47 Me. 284; Weston *v.* Sampson, 8 Cush. 347.]

(*a*) Carson *v.* Blazer, 2 Binney, 475; Shrunk *v.* The President, &c. of the Schuylkill Navigation Company, 14 Serg. & R. 71. [See Tinicum Fishing Co. *v.* Carter, 61 Penn. St. 21.]

(*b*) Cates *v.* Wadlington, 1 M'Cord, 580; Collins *v.* Benbury, 3 Ired. (N. C.) 277

The conclusion on this subject is, that a right of fishery in navigable or tide waters, below high water mark, is a common right; and if one or more individuals set up an exclusive right to a free or several fishery, it must be clearly shown by prescription or positive grant. (*c*) In rivers and streams not navigable as tide waters, the owners of the soil over which they flow have, at common law, (and which common law has been generally recognized in these United States,) the exclusive right of fishing each on his own side, unless some other person can show a grant or prescription for a common of piscary, in derogation of the right naturally attached to the ownership of the soil; and such right is held subject to the public use of the water as a highway, and to the free passage of fish, and in subordination to the regulations to be prescribed by the legislature for the general good.

(3) *Of the Remedy for the Disturbance of these Rights.* — The disturbance of a right of common of pasture arises when a person who has no right interferes by putting in his cattle, or if he has a right to use the land for commonable cattle, by putting in those which are not commonable, or by surcharging the common by putting in more cattle than the pasture will sustain. In these cases, the owner of the soil has his action of trespass, and the commoner his special action upon the case, inasmuch as both the owner of the land and the owner of the right of common are injured. The common law gave to the commoner a writ of *admeasurement of pasture*, under which process a jury, *419 with the *sheriff, apportioned the quantity of cattle to the extent of the ground and the number of proprietors. So, also, if the commoner be disseised, either of the common of pasture, of estovers, or of fishery, he may have, where statute regulations have not prevented it, a writ of *novel disseisin* to rein-

In this last case it was declared, that no general or exclusive right of fishery existed in the navigable waters of that state, and a navigable stream existed when the waters were sufficient in fact to afford a common passage for people in sea vessels.

(*c*) Palmer *v.* Hicks, 6 Johns. 133; Rogers *v.* Jones, 1 Wend. 237; Delaware & M. R.R. Co. *v.* Stump, 8 Gill & J. 479. But if an individual plant a bed of oysters in a bay, or an arm of the sea, and clearly designate and mark out the bed by stakes, it is not an interference with the common right of fishing in the bay, but the person who planted the oyster bed so designated acquired a qualified property in them sufficient to maintain trespass against any person who invaded that property. Fleet *v.* Hegeman, 14 Wend. 42; [Decker *v.* Fisher, 4 Barb. 592; Lowndes *v.* Dickerson, 34 Barb. 583. But see Brinckerhoff *v.* Starkins, 11 Barb. 248.]

state himself in the possession. Such injuries are now generally redressed by the more familiar and easy remedy of an action upon the case; and the mention of those old and obsolete actions in the first revision of the statute laws of New York, in 1787 (*a*), arose from the circumstance that the statute of Westminster 2, 13 Edward I., was literally transcribed. But the New York Revised Statutes, which went into operation in 1830, have abolished the writ of *novel disseisin*, and all the other real actions; and the remedy for a violation of these incorporeal rights is either by an action of ejectment, or a special action on the case, according to the nature of the right and injury. The substitution of the action of ejectment for the possessory real actions has been effected also by statute in New Jersey, and probably the ancient remedies have been superseded in most of the states in the Union by more convenient and familiar actions.

2. Of Easements and Aquatic Rights. — Under the head of easements may be included all those privileges which the public, or the owner of neighboring lands or tenements, hath in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do something on his own land, for the advantage of the public, or of the dominant owner to whom the privilege belongs. These easements are incorporeal rights, and imposed upon corporeal property for the benefit of the public, or of other corporeal property; and I shall, in the remainder of this lecture, treat at large of the various kinds and modifications of easements and of aquatic rights, into which the subject may be subdivided.[1]

(*a*) Laws of New York, sess. 10, c. 4, sec. 6, and c. 50, sec. 7.

[1] *Easements.* — A. *Essential Qualities.* — (*a*) *Dominant Estate.* — Mr. Gale thinks (Easem. 5) that there must be a dominant tenement, and this view is favored by Mounsey *v.* Ismay, 3 H. & C. 486, 497; Shuttleworth *v.* Le Fleming, 19 C. B. N. S. 687, 710; Güterb. Bract. ch. 15; Aust. Jur. lect. 49, 50. In Rangeley *v.* Midland R. Co., L. R. 3 Ch. 306, *post*, 432, n. 1, it is said, "a public road or highway is not an easement." But see the editor's note, (*d*), Gale on Easem. 4th ed. 11, and Dyce *v.* Lady Hay, 1 MacQ. (H. L. Sc.) 305, 312. A right of drawing water from a spring by means of an aqueduct may be reserved in gross, Goodrich *v.* Burbank, 12 Allen, 459; but Mr. Washburn (Easem. 10) thinks this a case of *profit à prendre*.

(*b*) It has been said to be of the essence of one easement, at least, the *servitus aquæ ducendæ*, that it exists for the sake of the dominant tenement alone, so that its exercise by the dominant owner cannot operate to create a new right for the benefit of the servient owner. Mason *v.* Shrewsbury & Hereford R. Co., L. R. 6 Q. B. 578, 587. But see Ford *v.* Whitlock,

(1) *Of Ways.* — This incorporeal hereditament is a right of private passage over another man's ground. It may arise either

27 Vt. 265, where a principle analogous to that of dedication was applied.

(c) *A Servitude consists* in patiendo. — The principle of the Roman law was that a servitude never imposed an active duty, but only a duty to suffer or abstain from doing something. Servitutium non ea natura est, ut aliquid faciat quis (veluti viridia tollat, aut amœniorem prospectum præstet, aut in hoc ut in suo pingat); sed ut aliquid patiatur, aut non faciat. D. 8. 1. 15, § 1. This is generally so, as a fact, in the English law, and it is thought to be so on principle in 2 Austin Jurisp. lect. 49, 3d ed. 840–842. What has been called a spurious easement, obliging an owner to keep his fences in repair, has been recognized by the cases to the extent of holding that the servient owner's failure to repair them rendered him liable for any injury which the adjoining owner's cattle might sustain in consequence. Gale on Easem. 4th ed. 460. But it is hard to find a case in which duties to do positive acts are imposed on the owner of one estate for the benefit of the owner of another, simply by reason of the former's occupation of the servient premises, and apart from a contract either made by himself, or to the burden of which he succeeds by the peculiar notion of privity. An attempt to explain the historical origin of this fiction will be found in an article, which has already been referred to, in 7 Am. Law Rev. 49 *et seq.* See, also, iv. 441, n. 1. In general it is supposed that the duty of the servient owner is the same as that of third persons in point of law, viz., to abstain from interfering with a right *in rem*, although it is more onerous in point of fact, by reason of his occupation of the land. See D. 43. 19. 3, § 5; Saxby *v.* Manchester, Sheffield, &c., R. Co., L. R. 4 C. P. 198. But see Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

(d) *New Kinds of Easements.* — Another principle which is important in this connection is that incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner. A person may bind himself by covenant to allow any right he pleases over his own property, but he cannot create a new species of incorporeal hereditament so as to enable the party entitled to it to sue third persons in his own name for interfering with it, or, it seems, so as to bind the land in the hands of an assignee Keppell *v.* Bailey, 2 My. & K. 517, 535. See Hill *v.* Tupper, 2 H. & C. 121; Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300; Richards *v* Harper, 35 L. J. N. S. Ex. 130; L. R. 1 Ex. 199; Nuttall *v.* Bracewell, L. R. 2 Ex. 1; Ackroyd *v.* Smith, 10 C. B. 164, 187, 188; Ellis *v.* Bridgnorth, 15 C. B. N. S. 52, 78. See iv. 480, n. 1.

B. *Creation.* — (a) *By Implication.* — In Pyer *v.* Carter, 1 H. & N. 916, the owner of two houses conveyed one of them to the defendant without reservation, and some time afterwards conveyed the other to the plaintiff. The plaintiff's house was drained by a drain that ran under the other house, as the defendant might have been led to find out by a careful examination of the premises, but did not in fact know. A new drain over the plaintiff's land only could have been built for about £6, but the plaintiff was held entitled to an easement. This case has been denied by others of equal weight; and there is considerable authority for the proposition that no easement, although apparent and continuous, at least if not in existence before the unity of possession, will be taken to have been reserved by implication, unless it is necessary in a strict sense. Suffield *v.* Brown, 10 Jur. N. S. 111; S. C. 33 L. J. N. S. Ch. 249; Carbrey *v.* Willis, 7 Allen, 364; Davies *v.* Sear, L. R. 7 Eq. 427; Crossley *v.* Lightowler, L. R. 2 Ch. 478, 486; Potts

by grant of the owner of the soil, or by prescription, which supposes a grant, or from necessity. (*b*) If it be a freehold right, it

(*b*) 1 Rol. Abr. 391, tit. Chimin private, 10. A right of way, public or private, is held to be an incorporeal hereditament. Nelson, J., 12 Wend. 98; Holman, J., 1 Blackf. 45; Cowen, J., 20 Wend. 99; Mr. J. Cowen says, a public way, if not an hereditament in every sense, is certainly a *quasi* hereditament. [See n. 1, A. (*a*).]

v. Smith, L. R. 6 Eq. 311; Oliver *v.* Pitman, 98 Mass. 46; Warren *v.* Blake, 54 Me. 276; Brakely *v.* Sharp, 1 Stockt. N. J. 9, 18; see Richards *v.* Rose, 9 Exch. 218; White *v.* Bass, 7 H. & N. 722; Eno *v.* Del Vecchio, 6 Duer, 17. As to implied reservation of a way of necessity, see 424, n. 1. It is hardly clear whether as strict a rule would be applied against easements by implied grant. It was in Potts *v.* Smith, L. R. 6 Eq. 311; Morrison *v.* Marquardt, 24 Iowa, 35, 60, cases of light and air; (see Haverstick *v.* Sipe, 33 Penn. St. 368; Mullen *v.* Stricker, 19 Ohio St. 135;) and in Dodd *v.* Burchell, 1 H. & C. 113, a case of a way. See Kenyon *v.* Nichols, 1 R. I. 411; Screven *v.* Gregorie, 8 Rich. (S. C.) 158. So in some cases where both estates were conveyed at the same time; Randall *v.* McLaughlin, 10 Allen, 366; Warren *v.* Blake, 54 Me. 276; Mullen *v.* Stricker, 19 Ohio St. 135; when the easement was not apparent, Butterworth *v.* Crawford, 46 N. Y. 349. But it has been said rather than decided that an easement may pass by implication with the dominant estate when it would not have been taken to have been reserved had the *quasi* servient estate been conveyed. Johnson *v.* Jordan, 2 Met. 234, 240; Carbrey *v.* Willis, 7 Allen, 364, 368; Leonard *v.* Leonard, ib. 277, 283; Parker *v.* Bennett, 11 Allen, 388. See Suffield *v.* Brown, Brakely *v.* Sharp, *sup.*

But Pyer *v* Carter has been referred to with approval by some American cases more or less different from it in the precise point involved. Fetters *v.* Humphreys, 8 C. E. Green, 260, 263; Seymour *v.* Lewis, 2 Beasl. 439; Janes *v.* Jenkins, 34 Md. 1; Butterworth *v.* Crawford, 3 Daly, 57; see Washb. Easem. 44 *et seq.*; Morland *v.* Cook, L. R. 6 Eq. 252, 265. And in Watts *v.* Kelson, L. R. 6 Ch. 166, 171, both the Lords Justices thought that it was rightly decided, and Mellish, L. J., said that most of the judges had not approved of Lord Westbury's observations on it in Suffield *v.* Brown, and that he thought the order of the two conveyances in point of date was immaterial.

If the way, in the case stated from Staples *v.* Heydon, text, 420, were ill defined, and had not existed before the unity of possession, and were not a way of necessity, it certainly would not have passed. Thomson *v.* Waterlow, L. R. 6 Eq. 36; Langley *v.* Hammond, L. R. 3 Ex. 161. But in the latter case, Bramwell, B., doubted whether it would not have passed if it had been well defined, and apparent, although not a way of necessity; and on this principle, when, during the unity of possession, conduit pipes were laid down from one estate to the other, the purchaser of the latter was held to acquire an easement. Watts *v.* Kelson, *sup.* Even an easement of light for certain windows over the grantor's adjoining land was thought to have passed without express words in Janes *v.* Jenkins, 34 Md. 1, contrary to the cases cited above. The same distinction has been acted on in several cases where both estates were conveyed at the same time. Phillips *v.* Phillips, 48 Penn. St. 178; McCarty *v.* Kitchenman, 47 Penn. St. 239; Worthington *v.* Gimson, 2 El. & El. 618; Polden *v.* Bastard, 4 Best & S. 258; s. c. L. R. 1 Q. B. 156, 161; Curtiss *v.* Ayrault, 47 N. Y. 73. See Pearson *v.* Spencer, 3 Best &

must be created by deed, though it be only an easement upon the land of another, and not an interest in the land itself. (*c*) A right of way *ex vi termini* imports a right of passing in a particular line, and not the right to vary it at pleasure, and go in different directions. This would be an inconvenience to the owner of the land charged with the easement, and an abuse of *420 the right. (*d*) It is likewise a principle of law, *that nothing passes as incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. (*a*)

If it be a right of way in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and it is so exclusively personal, that the owner of the right cannot take another person in company with him. (*b*) But when a right of way is appendant or annexed to an estate, it may pass by assignment when the land is sold to

(*c*) Hewlins *v.* Shippam, 5 B. & C. 221.

(*d*) Jones *v.* Percival, 5 Pick. 485. [Jennison *v.* Walker, 11 Gray, 423, 426. See Bannon *v.* Angier, 2 Allen, 128.]

(*a*) Lyman *v.* Arnold, 5 Mason, 195. These prescriptive rights are *stricti juris*. A right of way for one purpose does not necessarily include a right of way for another purpose. The extent of the right must depend upon the circumstances. Ballard *v.* Dyson, 1 Taunt. 279; Cowling *v.* Higginson, 4 M. & W. 245. [Dare *v.* Heathcote, 25 L. J. N. S. Ex. 245; 86 Eng. L. & Eq. 564. See Hawkins *v.* Carbines, 27 L. J. N. S. Ex. 44; 3 H. & N. (Am. ed.) 914.]

(*b*) Finch's Law, 17, 31; Year Book, 7 H. 4, 36, B.

S. 761; s. c. 1 B. & S. 571; Huttemeier *v.* Albro, 18 N. Y. 48, 52; Lampman *v.* Milks, 21 N. Y. 505. Most of the above cases also adopt the distinction between continuous easements and those which are used only from time to time, and lay it down that the former will pass by implication without words of grant. In Lampman *v.* Milks it was said that when the owner of land by an artificial arrangement has effected an advantage for one portion, to the burdening of the other, upon a severance of the ownership the holders of the two portions take them respectively charged with the servitude, and entitled to the benefits openly and visibly attached at the time of the conveyance of the portion first granted; and this is cited with approval in Curtiss *v.* Ayrault, 47 N. Y. 73, 79; Fetters *v.* Humphreys, 8 C. E. Green (18 N. J. Eq.), 260, 263. It may be doubted if this was the proper ground of decision in the first case, however.

As a general rule easements which are appurtenant pass without express mention. Brown *v.* Thissell, 6 Cush. 254. But the mention of appurtenances may sometimes be important. Ammidown *v.* Ball, 8 Allen, 293. See Langley *v.* Hammond, L. R. 8 Ex. 161; Thomson *v.* Waterlow, L. R. 6 Eq. 36; Dobbyn *v.* Somers, 13 Ir. Com. L. 293. But see Pope *v.* O'Hara, 48 N. Y. 446, 455.

(*b*) As to easements by prescription, see 445, n. 1. As to the extent of easements or what amounts to an infringement, see 448, n. 1. The subjects of dedication, extinguishment, license, &c., will also be treated farther on.

which it was appurtenant. Thus, in the case stated in *Staples* v. *Heydon*, (*c*) if one be seised of lot A. and lot B., and he used a way from lot A. over lot B. to mill or to a river, and he sells lot A., with all ways and easements, the grantee shall have the same privilege of passing over lot B. that the grantor had.

A right of way may arise from necessity in several respects. Thus, if a man sells land to another which is wholly surrounded by his own land, in this case the purchaser is entitled to a right of way over the other's ground to arrive at his own land. The way is a necessary incident to the grant, and without which the grant would be useless. (*d*) This principle was carried so far, in a modern case, (*e*) as to be applied to a trustee selling land he held in trust, and to which there was no access but over the trustee's own land. The right of way in that case passed of necessity as incidental to the grant; for though he conveyed in the character of trustee, it could not be intended that he meant to make a void grant, and every deed must be taken most strongly against the grantor. Lord Kenyon said it was impossible to distinguish that from the ordinary case where a man granted a close surrounded by his own land. The general rule is, that when the use of * a thing is granted, every thing is granted *421 by which the grantee may have and enjoy such use. (*a*) If one man gives another a license to lay pipes of lead in his land to convey water to a cistern, he may enter on the land and dig therein to mend the pipes. (*b*) So, if a person has a shop on another's soil by permission, he has a right of ingress and egress as to the soil between the highway and the shop. The right is necessary to the enjoyment of the tenement. (*c*) The maxim is,

(*c*) 6 Mod. 3; 2 Ld. Raym. 922; Newmarch *v.* Brandling, 3 Swanst. 99, s. c.

(*d*) Finch's Law, 68; Clark *v.* Cogge, Cro. Jac. 170; Oldfield's case, Noy, 123; Turnbull *v.* Rivers, 3 M'Cord, 131; Holmes *v.* Seely, 19 Wend. 507; Nichols *v.* Luce, 24 Pick. 104. All the authorities support the doctrine, says Mr. Woolrych, in his full and accurate Treatise on the Law of Ways, 21, that in the case of a grant of land without a reservation of any way, a way of necessity will pass as incident to the grant.

(*e*) Howton *v.* Frearson, 8 T. R. 50.

(*a*) Co. Litt. 56.

(*b*) Twysden, J., in Pomfret *v.* Ricroft, 1 Saund. 321.

(*c*) Doty *v.* Gorham, 5 Pick. 487. In Chambers *v.* Furry, 1 Yeates, 167, the Supreme Court of Pennsylvania held, that the owner of a ferry over a navigable stream had no right to land or receive freight on the adjoining banks, even though the landing place was a public highway, without the owner's consent. The dedication of ground for the purpose of a public road was said to give no right to use it for the other purpose. This doctrine was afterwards referred to, recognized, and adopted by

that *quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest.*[1]

the same court, in Cooper *v.* Smith, 9 Serg. & R. 26. The same principle is to be found in Savile, 11, pl. 29, where it is said, that in every ferry the land on both sides the water ought to belong to the owner of the ferry, for otherwise he could not land on the other side. But this strict and severe rule is somewhat relaxed in England; and in Peter *v.* Kendal, 6 B. & C. 703, the K. B. denied the justness of the conclusion in Savile, and held, that the owner of a ferry need not have the property in the soil on either side. It was sufficient that the landing place was a public highway. It was a right incident to the ferry, to use such a landing place for the purposes of a ferry. This is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected.

In Allen *v.* Farnsworth, 5 Yerg. 189, it was held, that the state, by virtue of the right of eminent domain, might establish ferries wherever the legislature should deem them necessary for the public easement, without any regard to the ownership of the soil, on making just compensation. But in point of fact all the statutes authorized the grant of the franchise by way of preference to the owners of the land on each bank of the river where the ferry was established. So, by statute in New York, the owner of the land through which the highway adjoining to the ferry runs, is first entitled to the license for keeping a ferry. N. Y. R. S. 3d ed. i. 642. By the Tennessee act of 1807, c. 25, the owner of the soil on each side of a river is, in exclusion of all others, entitled to the ferry. Without statute provision he is not, as a matter of right, and because he is owner, entitled to keep it. Nashville Bridge Company *v.* Shelby, 10 Yerg. 280. The case of Pipkin *v.* Wynns, 2 Dev. (N. C.) 403, recognizes the same general right of the sovereign, but holds that the owner of the adjacent land is *entitled* to the preference, and if he refuses to exercise the franchise, it may be granted to another, *on making compensation* to the owner of the fee for the use of the soil, and this must be done, although there be a public highway leading to the river on both sides. This decision, like those in Pennsylvania, construes more strictly than the late English case the easement of a public highway leading to the river. The law in Kentucky in respect to ferries is, that the owner of land on the river Ohio is alone entitled to be the grantee of a ferry across it. It is a franchise incident to the land, and is valuable property. But no ferry is to be granted within a mile and a half of one previously established, unless, in the opinion of the granting power, the public interest shall require it, and the abuse of that discretion is subject to judicial control. Carter *v.* Kalfus, 6 Dana, 43. Though a ferry franchise be a statutory incident to land, yet the beneficial interest may be transferred to another, and entitle him to the profits. Kennedy *v.* Covington, 8 Dana, 59. The statute provision in some of the western states is, that no person shall keep a ferry so as to demand and receive pay, without a license, to be granted and regulated by the county courts. Revised Statutes of Missouri, 1835.

It was declared, in Bowman *v.* Wathen, 2 M'Lean, 376, that the right to a ferry attaches to the riparian proprietor, and it cannot be taken from him without compen-

[1] A ferry franchise may be granted although only one shore be within the jurisdiction of the state making the grant. Conway *v.* Taylor, 1 Black, 603. See Marshall *v.* Grimes, 41 Miss. 27.

It seems that the right to keep a public ferry does not pass as appurtenant to the fee of the riparian proprietor. Harrison *v.* Young, 9 Ga. 359, 365. Nor does a grant of the ferry confer a title to the soil. Somerville *v.* Wimbish, 7 Grat. 205.

If a man hath several distinct parcels of enclosed land, and he sells all but one surrounded by the others, and to which he has no way or passage except over one of the lots he has sold, it has been made a question, whether he be entitled to a right of way against his own deed, when he has been so improvident as to reserve none. It is said, in *Clark* * v. *Cogge*, (*a*) that the *422 law reserves to him a right of way in such case from necessity. But the position in that case seems to have been contrary to the doctrine in the prior case of *Dell* v. *Babthorpe*, (*b*) where it was held, that if a man had a close and a wood adjoining it, and time out of mind a way had been used over the close to the wood, and he then sells the close to one man, and the wood to another, the grantee of the wood has no right of way over the close, for the grantor had excluded himself, as he had sold the close without reserving such a right; and as he had lost his right, he could not communicate any to the grantee of the wood. But in this last case, it did not appear to be necessary to go over the close in question to the wood, and there might have been another way to it; and the weight of authority is, that the grantor has a right of way to his remaining land, in case of necessity, when he cannot otherwise approach his land. The law presumes a right of way reserved, or rather gives a new way, from the necessity of the case, and the new right of way ceases with the necessity for it. (*c*) This principle of law has been for a long time recognized. Thus, in *Packer* v. *Welsted*, (*d*) decided in the Upper Bench, under the protectorate of Cromwell, A. had three parcels of land, and there was a private way out of the first parcel to the second, and out of the two first parcels to the third. B. purchased all these parcels, and then sold the two first to C. There was no way to the land not sold but through the other two parcels; and the court ad-

sation. The riparian owner on a navigable river may convey the soil, excepting the *right of ferriage*. This right of ferriage becomes an incorporeal hereditament, and may be granted the same as a rent, and the grantee will have a right to use the soil for ferryways, and for no other purpose. By the laws of Indiana this ferry right is assignable. It is real estate, and descends to the heirs, and is subject to dower and the other incidents of real property; and in Illinois, ferries are declared to be *publici juris*, and can be granted by the sovereign power, and riparian possessors are not thereby entitled to the ferry franchise. Mills *v.* County Comm., 2 Scamm. 58.

(*a*) Cro. Jac. 170. (*b*) Cro. Eliz. 800.

(*c*) Holmes *v.* Goring, 2 Bing. 76; 9 Moore, 166, s. c.; Collins *v.* Prentice, 15 Conn. 89.

(*d*) 2 Sid. 89.

judged that the way continued from necessity, and that the party was not liable in trespass for using it. So also, in *Dutton* v. *Taylor*, (*e*) A. owned two closes, B. and C., and there was no
* 423 passage to close B. but through close C., * and he sold close C., and it was held, upon plea and demurrer, that the right of way still existed from necessity, and that it was not for the public good that close B. should be left uncultivated. This last case is supposed to be binding; and Lord Kenyon said, in *Howton* v. *Frearson* (*a*) that he was prepared to submit to the express authority of it, though his reason was not convinced, and he thought there were great difficulties in the question.

But the doctrine of the case of *Dutton* v. *Taylor* received confirmation in *Buckby* v. *Coles*, (*b*) where it was decided, that if a person owned close A., and a passage of necessity to it over close B., and he purchased close B., and thereby united in himself the title to both closes, yet if he afterwards sold close B. to one person, without any reservation, and then close A. to another person, the purchaser of close A. has a right of way over close B. This case seems to put an end to all doubts as to the existence of a right of way from necessity, even over the land which the claimant of the way had previously sold.

If a right of way be from close A. to close B., and both closes be united in the same person, the right of way, as well as all other subordinate rights and easements, is extinguished by the unity of possession. (*c*) But there is a distinction between a right of way existing from necessity, and one merely by way of easement or convenience. The former is not extinguished by the unity of possession, as a right of way to a church or market, or a right to a gutter carried through an adjoining tenement, or to a watercourse running over the adjoining lands. (*d*) Sergeant Williams (*e*) is of opinion, that the right of way, when claimed
* 424 by necessity, is founded entirely * upon grant, and derives its force and origin from it. It is either created by express words, or it is created by operation of law, as incident to the grant; so that, in both cases, the grant is the foundation to the

(*e*) 2 Lutw. 1487. (*a*) 8 T. R. 50. (*b*) 5 Taunt. 311.

(*c*) Whalley *v.* Thompson, 1 Bos. & P. 371.

(*d*) Popham, J., in Jorden *v.* Atwood, Owen, 121; Shury *v.* Piggot, 3 Bulst. 339; Cruise's Dig. tit. Ways, 23, 24; note to 1 Bos. & P. 374.

(*e*) Note 6 to 1 Saund. 323.

title. If this be a sound construction of the rule, then it follows, that, in the cases I have mentioned, the right of the grantor to a way over the land he has sold, to his remaining land, must be founded upon an implied restriction, incident to the grant, and that it cannot be supposed the grantor meant to deprive himself of all use of his remaining land. This would be placing the right upon a reasonable foundation, and one consistent with the general principles of law. (*a*) [1]

There is a temporary right of way over the adjoining land, if the highway be out of repair, or be otherwise impassable, as by a flood. But this right of going upon the adjoining land applies to public and not to private ways. (*b*) A person having a right to a private way over another's land, has no right to go upon the adjoining land, even though the private way be impassable or founderous, by being overflowed by a river. The reason given is, that the owner of the way may be bound to repair, and the impas-

(*a*) In Cooper *v.* Maupin, 6 Mo. 624, the court, after much discussion and criticism of the cases referred to in the two preceding pages, concluded that a right of way from *necessity* does not exist from one part of the claimant's land to another part of the same contiguous tract, over the land of another. The question must depend upon circumstances. No doubt it must be a case of necessity, and not of convenience merely; and when that necessity does exist, and there be no access to the claimant's land without a way over another's land, that right of way must exist, to be used, of course, with the least inconvenience or detriment to the other's land. The English cases referred to appear to me to declare a rule sound in reason and in law.

(*b*) Taylor *v.* Whitehead, Doug. 745; Henn's Case, W. Jones, 296; 3 Salk. 182, pl. 4; 2 Bl. Comm. 36.

[1] *Way of Necessity.* — See, generally, Leonard *v.* Leonard, 2 Allen, 543; Pinnington *v.* Galland, 9 Ex. 1; 1 Wms. Saund. 323, n. 6; White *v.* Bass, 7 H. & N. 722, 732; Gayford *v.* Moffat, L. R. 4 Ch. 133; Davies *v.* Sear, L. R. 7 Eq. 427. The grantor may have a way of necessity, although he conveyed with covenants of warranty. Brigham *v.* Smith, 4 Gray, 297. Otherwise when the way would be inconsistent with the object of the conveyance. Seeley *v.* Bishop, 19 Conn. 128. A pretty strict rule as to the degree of necessity is laid down. M'Donald *v.* Lindall, 3 Rawle, 492; Screven *v.* Gregorie, 3 Rich. (S. C.) 158. "A reasonable necessity." Oliver *v.* Pitman, 98 Mass. 46, 50. See Pettingill *v.* Porter, 8 Allen, 1; Thayer *v.* Payne, 2 Cush. 327. See 419, n. 1, B. (*a*). The right ceases with the necessity for it. Viall *v.* Carpenter, 14 Gray, 126; N. Y. Life Ins. Co. *v.* Milnor, 1 Barb. Ch. 354; Pierce *v.* Selleck, 18 Conn. 321; Pearson *v.* Spencer, 3 Best & S. 761, 767. *Semble contra per* Parke, B., Proctor *v.* Hodgson, 10 Ex. 824, 828.

The distinction said in the text to have been alluded to in Taylor *v* Whitehead is denied. In neither case can the person having the right of way go on the adjoining land. Williams *v.* Safford, 7 Barb. 309. But he may, if the owner of the fee obstructs the old way. Leonard *v.* Leonard, 2 Allen, 543; Farnum *v.* Platt, 8 Pick. 339. *Contra*, Williams *v.* Safford, *sup.*

sable state of the private way may be owing to his own neglect; but if public roads become impassable, it is for the general good that the people should be entitled to pass in another direction. There may be a distinction between a private way arising from necessity, and a private way founded on grant or prescription; and such a distinction was alluded to by one of the judges in *Taylor* v. *Whitehead*. If a person be obliged, of necessity, to go over another's farm to arrive at the land which the other sold him, and the private way assigned be destroyed by a flood or otherwise, he may of right cross the farm on another line, and he is not obliged, at his peril, to keep such a road of necessity in *425 repair. By selling land surrounded * with his own, the grantor has bound himself to furnish the purchaser a reasonable passage to it.

The right of way, as to a foot or tow path along the banks of navigable rivers, has been a subject of great discussion, and of much regulation in the laws of different nations.

In the civil law, the banks of public rivers and the sea shore were held to be public. Riparum usus publicus est; littorum quoque usus publicus est jure gentium. (*a*) The law of nations was here used for natural right, and not international law,[1] in the modern sense of it; and it is stated in the Institutes of Justinian, that all persons have the same liberty to bring their vessels to land, and to fasten ropes to the banks of the river, as they have to navigate the river itself. These liberal doctrines of the Roman law have been introduced into the jurisprudence of those nations of Europe which have followed the civil, and made it essentially their municipal law. Thus, in Spain, the sea shore is common to the public; and any one may fish, and erect a cottage for shelter. The banks of navigable rivers may also be used to assist navigation. (*b*) In the French law, navigable or floatable rivers, as they

(*a*) Inst. 2, 1, 4, 5. The bank of a river is that which contains the water in its utmost height. Ripa ea putatur esse, quæ plenissimum flumen continet. Dig. 43. 12. 3. 1.

(*b*) Institutes of the Civil Law of Spain, by Doctors Asso and Manuel, b. 2, tit. 1. This is also the law in Louisiana; the banks of navigable rivers, though they are the property of those who possess the adjacent lands, are nevertheless subject to the public use so far that vessels may make fast to the shore and to the trees planted there, and they may be unloaded, and the goods deposited and nets dried there. So any persons may build cabins on the sea shore for shelter, and fish from there. and moor ships and dry nets there. Civil Code, arts. 443, 446; Hanson *v.* City Council of Lafayette, 18 La. 295.

[1] *Ante*, i. 1, n. 1.

are termed, have always been regarded as dependencies of the public domain, and the lands on each side subject to the servitude or burden of towing-paths for the benefit of the public. (*c*)

The English law was anciently the same as the Roman
* law, if we may judge from the authority of Bracton, (*a*) *426
who cites the words of the civil law, declaring the banks of navigable rivers to be as much for public use as the rivers themselves. So, Lord Holt held, (*b*) that every man, of common right, was justified in going with horses on the banks of navigable rivers for towing. But Sir Matthew Hale, in his treatise De Jure Maris, and in which he has exhausted the learning concerning public property in the sea and rivers, and collected all the law on the subject, concluded that individuals had a right to a tow-path, for towing vessels up and down rivers, *on making a reasonable compensation to the owner* of the land for the damage. (*c*) This condition, which he annexes to the privilege, shows, that, in his opinion, there was no such common right in the English law, inasmuch as it depended on private agreement with the owner of the soil. The point remained in this state of uncertainty, until the case of *Ball* v. *Herbert*, in 1789, (*d*) brought the whole doctrine into discussion. The case was respecting a claim to tow on the bank of the River Ouze, in Norfolkshire, with men and horses, whenever it was necessary for the purposes of navigation, doing as little damage as possible. It was admitted that the Ouze was a navigable river, where the tide ebbed and flowed. The question was, whether, at common law, the public had a right to tow vessels on the banks of either side of a navigable river; and it was investigated and argued with great ability. All the cases bearing on the question were collected and reviewed, and the court concluded that there was not, and never had been, any right at common law, for the public to tow on the banks of navigable rivers. The claim was directly contrary to common experience; and it was observed by Lord Kenyon, that
the navigators * on the Thames were frequently obliged, *427
at several places, to pass from one side of the river to the other, with great inconvenience and delay, because they had no

(*c*) Ferrier's Inst. 2, 1, 4, 5, and note, ib.; Code Napoleon, n. 538, 650.
(*a*) Lib. 1, c. 12, sec. 6.
(*b*) 1 Ld. Raym. 725; 6 Mod. 168.
(*c*) Harg. L. T. 85, 86, 87.
(*d*) 3 T. R. 253.

such general right. It was admitted, that on many navigable rivers, there was a custom to tow on the banks; but the privilege in those cases rested on the special custom, and not on any common law right. The statutes which have given a right of towing on parts of the Severn, Trent, and Thames are evidence that no such general right before existed. (*a*)

(2) *Riparian Rights.* — It is a settled principle in the English law, that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high water mark; and the shore below common, but not extraordinary high water mark, belongs to the state as trustee for the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property.[1] The public

(*a*) In New York it has been adjudged, after a very able and thorough examination of the question, that the public have not the right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such user has been continued upwards of twenty years with the knowledge of the owner. Pearsall *v.* Post, 20 Wend. 111; s. c. 22 Wend. 425. On the other hand, it is held, in Missouri, that navigators and fishermen are entitled to the temporary use of the banks of the navigable rivers in that state, though owned by private individuals, for the purpose of landing and repairing their vessels, and exposing their sales and merchandise. But this use is only for transient purposes, and under restrictions. O'Fallon *v.* Daggett, 4 Mo. 343.

[1] *Riparian Rights.* — (*a*) The text is confirmed by Howard *v.* Ingersoll, 13 How. 381, 421 *et seq.*; United States *v.* Pacheco, 2 Wall. 587, 590; *ante*, 418, n. 1; Attorney General *v.* Chambers, 4 De G., M. & G. 206; Stevens *v.* Paterson & Newark R.R., 5 Vroom (34 N. J.), 532, 545, 555. The author of the American note to Dovaston *v.* Payne, 2 Sm. L. C., says that the state owns only to low water mark, but the authorities hardly support him. The Massachusetts cases cited by him depend on the ordinance of 1641, hereafter referred to.

(*b*) *Great Rivers.* — With regard to the point discussed in note (*d*) and *post*, 430, the title of riparian owners on the great rivers is thought to extend *ad medium filum aquæ*, in Berry *v.* Snyder, 3 Bush, 266; Jones *v.* Soulard, 24 How. 41; Brown *v.* Chadbourne, 31 Me. 9; Bradford *v.* Cressey, 45 Me. 9; Arnold *v.* Elmore, 16 Wis. 509; Mariner *v.* Schulte, 13 Wis. 692; Walker *v.* Board of Public Works, 16 Ohio, 540; Magnolia *v.* Marshall, 39 Miss. 109; Newton *v.* Eddy, 23 Vt. 319; Lorman *v.* Benson, 8 Mich. 18; Rice *v.* Ruddiman, 10 Mich. 125. *Semble*, Commonwealth *v.* Alger, 7 Cush. 53, 97; Boston *v.* Richardson, 13 Allen, 146, 154; Schurmeier *v.* St. Paul & P. R.R., 10 Minn. 82, 102, and cases. (See s. c. 7 Wall. 272, 286 *et seq.*) *Contra*, a long discussion in People *v.* Canal Appraisers, 33 N. Y. 461; Stuart *v.* Clark, 2 Swan, 9; McManus *v.* Carmichael, 3 Clarke (Iowa), 1; Haight *v.* Keokuk, 4 id. 199; Bailey *v.* Miltenberger, 31 Penn. St. 37; Monongahela Bridge Co. *v.* Kirk, 46 Penn. St. 112; 2 Am. Law Rev. 589.

See, as to privileges of riparian owners, *ante*, 418, n. 1.

(*c*) The general principle that a grant bounded by a stream extends *ad filum*, is

have at common law a right to navigate over every part of a common navigable river, and on the large lakes; and in England even the crown has no right to interfere with the channels of public navigable rivers. They are public highways at common law. The sovereign is trustee for the public, and the use of navigable waters is inalienable. But the shores of navigable waters, and the soil under them, belong *to the state* in which they are situated, as sovereign. (*b*) The right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; they are *juris publici*, except that the proprietors adjoining such rivers own the soil, *ad filum aquæ*. (*c*) But grants of land, bounded

(*b*) Pollard *v.* Hagan, 3 How. 212.

(*c*) Hale, de Jure Maris, c. 4, 5, 6; Rex *v.* Smith, Doug. 425 [441]; Williams *v.* Wilstated in Lord *v.* Commissioners of Sydney, 12 Moore, P. C. 473; Boston *v.* Richardson, 13 Allen, 146, 154; Pratt *v.* Lamson, 2 Allen, 275, 284; Knight *v.* Wilder, 2 Cush. 199; Walton *v.* Tifft, 14 Barb. 216. So when the boundary was an ancient artificial mill pond. Mill R. Woollen Man. Co. *v.* Smith, 34 Conn. 462; Phinney *v.* Watts, 9 Gray, 269. Otherwise of a grant by a state. Howard *v.* Ingersoll, 13 How. 381; Alabama *v.* Georgia, 23 How. 505; 18 Allen, 157. But see 7 Moore, P. C. 497. See 432, n. 1. The *filum* is thought to be the middle line between the shores without regard to the channel. Hopkins Academy *v.* Dickinson, 9 Cush. 544, 552.

(*d*) *Accessions.* — The text, 428, is confirmed by Chapman *v.* Hoskins, 2 Md. Ch. 485; Barrett *v.* New Orleans, 18 La. An. 105. A strong case was Banks *v.* Ogden, 2 Wall. 57, where a proprietor dedicated to the public a street along the shore of Lake Michigan, and then sold land bounded by the street, and it was held that he was entitled to alluvial accretions, as he owned the fee of the lake side of the street. Contiguity is always necessary to the right. Saulet *v.* Shepherd, 4 Wall. 502. It seems to be immaterial that the cause of the deposit is artificial if created *alio intuitu*. Att. Gen. *v.* Chambers, 4 De G. & J. 55; Halsey *v.* McCormick, 18 N. Y. 147.

Light is thrown on the principles according to which alluvial accessions should be divided by the similar case of the division of flats among owners of the upland. The fundamental rule is said to be that the flats are to be so divided as to give to each parcel a width at its outer or seaward end proportional to that which it has at high water mark. The dividing lines are generally to be drawn in the most direct course from high to low water mark, and the flats in front of each proprietor's upland should, if practicable, be as wide at low as at high water mark. Wonson *v.* Wonson, 14 Allen, 71, 79. Where the side lines of several upland lots were parallel and oblique to the shore, but the effect of producing these lines would have been to cut off the access from one of the lots to low water, the dividing lines were drawn perpendicular to the base line of the cove. Stone *v.* Boston Steel & Iron Co., 14 Allen, 230. The former of these cases contains an elaborate discussion of the principles and authorities. See, also, Crook *v.* Corporation of Seaford, L. R. 6 Ch. 551; Johnston *v.* Jones, 1 Black, 209; O'Donnel *v.* Kelsey, 4 Sandf. (N. Y.) 202.

on rivers, or upon the margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway. (*d*) The proprietors of

cox, 1 Willmore & Hodges, 477; La Plaisance Bay Harbor *v.* City of Monroe, 1 Walker Ch. (Mich.) 155; Louisiana Civil Code, art. 442, 443, 444. In Connecticut, it was held, in the case of East Haven *v.* Hemingway, 7 Conn. 186, that the owners of land adjoining a navigable river have an exclusive right to the soil between high and low water mark, for the purpose of erecting wharves and stores. But see *infra*, 432, note, cases *contra*; and the case of Chapman *v.* Kimball, 9 Conn. 88, also recognized the English rule; and it is there held, that the riparian proprietor on a navigable river or arm of the sea, is not entitled to the seaweed which grows and accumulates on the bed below low water mark. It belongs to the public. In the case of The Canal Appraisers *v.* The People, 17 Wend. 571, Chancellor Walworth stated the true rule of the common law to be, that grants embracing within their bounds *rivers and streams above tide water*, convey not only the banks, but the beds of the rivers or streams, and the islands therein, unless clearly, by the grant itself, excluded from it. But the right of the grantee to the rivers or streams above tide water, if they be navigable, is not absolute, but subject to the right of the public to use the waters as a highway, for the passage of boats, &c. The common law rule, however, does not apply to large navigable lakes, nor to rivers constituting the boundaries between New York and other states. In the State of New York, by statute, N. Y. R. S. 3d ed. i. 78, 79, it is declared, that whenever two counties are separated from each other by a river or creek, the middle of the channel is the division line; and if the boundary line crosses an island, the whole of it is deemed to be within the county in which the greater part of it lies; and the officers of the counties bordering on Seneca Lake, and of the counties of Kings, Richmond, and New York, on the waters in Kings and Richmond, south of New York, have concurrent civil and criminal jurisdiction for the purpose of serving process.

(*d*) Hale, de Jure Maris, 6, 9, 22, 86; Palmer *v.* Mulligan, 3 Caines, 318; The River Banne, Davies, 152, 155, 157; Deerfield *v.* Arms, 17 Pick. 41; Commissioners of the Canal Fund *v.* Kempshall, 26 Wend. 404; Child *v.* Starr, 4 Hill (N. Y.), 369, 373; Adams *v.* Pease, 2 Conn. 481; Esson *v.* M'Master, Kerr, N. B. 501; Bowman *v.* Watken, 2 M'Lean, 376. In Pennsylvania it is held, that the owners of land on the rivers Delaware and Schuylkill have a right to the land between high and low water mark, subject to the public easement, or right to pass over it when covered by the water. Ball *v.* Slack, 2 Wharton, 508; [Lehigh Valley R.R. *v.* Trone, 28 Penn. St. 206; Bailey *v.* Miltenberger, 31 id. 37; Tinicum Fishing Co. *v.* Carter, 61 id. 21; Boston *v.* Richardson, 105 Mass. 351.] The riparian proprietor also owns the land in the river Ohio, between high and low water mark. Lessee of M'Culloch *v.* Aten, 2 Ohio, 307; Blanchard *v.* Porter, 11 Ohio, 138. By compact between Pennsylvania and New Jersey, the river Delaware remains a common highway, equally free and open to both states, but each state reserves the right of regulating the fisheries on the Delaware annexed to their respective shores, and each state exercises concurrent jurisdiction on the waters of the river. So, by

the adjoining banks have a right to use the land and water of the river, as regards the public, in any way not inconsistent with

compact, the boundary line between New York and New Jersey, on the Hudson River is the middle of the river, but the exclusive jurisdiction over the waters of the river and bay, but not reaching to the wharves and improvements on the Jersey shore, is in New York. So, New Jersey has exclusive jurisdiction over the waters of the Sound between Staten Island and New Jersey, with like reservations. Rights of property in each state reach to the middle of the rivers. Elmer's Dig. 562. The ordinance of Congress of 18th July, 1787, *for the government of the Territory of the United States northwest of the river Ohio*, declared it to be a fundamental provision, to remain forever unalterable, that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, should be common highways, and forever free. But this provision did not abolish or impair the common law principle, that he who owns the lands on both banks owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the river, subject to the same easement. Gavitt *v.* Chambers, 8 Ohio, 496. Nor did it prohibit the legislatures of the states to improve the navigation of such rivers and carrying places by canals, railroads, and turnpikes, and for charging tolls for such increased facilities. Spooner *v.* M'Connell, 1 M'Lean, 337. [See i. 439, n. 1.] All the navigable waters in the western states and territories have, by successive acts of Congress, been declared public highways, as, see acts of May 18th and June 1st, 1796, March 3d, 1803, March 26th, 1804, March 3d, 1811, February 20th, 1811, April 8th, 1812, June 4th, 1812, March 1st, 1817, May 8th, 1817. In the case of Middleton *v.* Pritchard, 3 Scamm. 510, this subject was learnedly discussed, and it was justly held, that at common law the title of the riparian proprietor, bounded by a navigable stream, extended only to high water mark, and in streams not navigable, the rights of the riparian proprietor extended exclusively to the middle thread of the current. That arms of the sea, and streams where the tide ebbs and flows, are by the common law deemed navigable; and streams above tide water, though navigable in fact, are not deemed navigable in law. All government grants bounded upon a river not navigable entitle the grantee to all islands lying between the mainland and the centre thread of the current, *for grants by the government are to be construed by the common law, unless the government qualify or exclude that construction; for where government makes a grant, and does not reserve any right or interest that could pass by the grant, and shows no intention to make such reservation, the grant must be intended to include all that might pass by it. Grants are to be taken most strongly against the grantor.* The clear and frank exposition of the common law in this learned case, and especially in respect to government grants, does honor to the court which delivered it. It was further declared, that the Mississippi River was not a navigable stream at common law, and the title of the riparian proprietor extended to the middle thread of the stream, including islands, &c., but that navigators had not only the privilege of floating upon the water, but to land and fasten their vessels and boats to the shore, for that this was a part of the public easement, which the owners of the lands must bear. The same question as to the rights of the Mississippi in the riparian owner was very learnedly discussed in Morgan *v.* Reading, 3 Smedes & M. 336, and the same doctrine and law were declared; the common law, and not the civil law, governed the case, and the magnitude of the river did not affect it. The Mississippi River, above the ebb and flow of the tide, was not navigable in the sense of the common law, and the rights of the riparian owner went to the middle of the river, subject, of course, to the right of passage to the public as a highway, and with the right, perhaps, though not absolutely decided, to the right, in cases of necessity, to

the easement; and neither the state nor any other individual has the right to divert the stream, and render it less useful to
*428 the owners of the soil. (e) It * would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the owner, in such cases, to the edge of the river. Where a stream is used in a grant as a boundary or monument, it is used as an entirety to the centre of it, and to that extent the fee passes.[1] *Prima facie*, said the Vice-Chancellor of England, (a) the proprietor of each bank of a stream is the proprietor of half the land covered by the stream. If the same person be the owner of the lands on both sides of the river, he owns the whole river to the extent of the length of his lands upon it. If a fresh water river, running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad filum medium aquæ;* but if the alteration be sensibly and suddenly made, the ownership remains according to the former bounds;

fasten and moor vessels and floats to the shore. These decisions, in the courts of Illinois and Mississippi, are highly creditable to their learning and firmness; and it is consoling to meet with such frank and manly support of the binding force of the common law on which American jurisprudence essentially rests. [See 427, n. 1, (b).]

(c) *Ex parte* Jennings, 6 Cowen, 548; People *v.* Canal Appraisers, 13 Wend. 355; Oliva Boissonnault, Stuart (Lower Canada), 524. In the case of The Canal Appraisers *v.* The People, 17 Wend. 571, the judgment of the Supreme Court of New York, in 13 Wend. 355, was reversed, and the right of the state over waters above the flow of the sea, for all public purposes, in derogation of individual rights, was declared. All rivers, in fact navigable, were deemed public rivers, and subservient to public uses. Thus, though the erection of a dam across the Hudson River, at the sloop lock between Troy and Lansingburgh, destroyed the value of a waterfall, situate in the middle sprout of the Mohawk River, a tributary stream, the owner of the mill site was held not entitled to damages or compensation, within the provision of the canal law. Zimmerman *v.* Union Canal Company, 1 Watts & S. 346, s. P. But the doctrine in the case in 6 Cowen, and in the case in 17 Wendell, seems to have been overruled by the case of The Commissioners of the Canal Fund *v.* Kempshall, 26 Wend. 404, where it was adjudged, in the Court of Errors, that fresh water rivers to the middle of the stream belong to the owners of the adjoining banks, each to the centre or thread of the river; and if *navigable*, the right of the owners is subject to the *servitude* of the public interest for passage or navigation. The owners are entitled to the usufruct of the waters flowing in the river, as appurtenant to the fee of the adjoining banks; and for an interruption in the enjoyment of their privileges in that respect, *in consequence of improvements made by the state*, are entitled to compensation for damages sustained.

(a) Wright *v.* Howard, 1 Sim. & Stu. 190; Shaw, C. J., in Deerfield *v.* Arms, 17 Pick. 41, to the same point.

[1] See 427, n. 1, (c).

and if the river should then forsake its channel, and make an entire new one in the lands of the owner on one side, he will become owner of the whole river, so far as it is enclosed by his land. This is the general doctrine as to alluvions. (*b*) If soil be formed by islands, or relicted land out of the sea or a river, by slow and imperceptible accretion, it belongs, in the case of the sea or navigable rivers, to the sovereign, and in the case of rivers not navigable in the common law sense of the term, or above where the sea ebbs and flows, it belongs to the owners of the adjoining land. (*c*) [2] Islands situated in a river do not form any

(*b*) The doctrine of alluvions and battures has led, for many years past, at New Orleans, to the most laborious and expensive litigation; and the Roman, Spanish, and French laws applicable to the case have been examined and discussed with profound research and consummate ability. One of the most recent cases is that of Municipality No. 2 *v.* Orleans Cotton Press, 18 La. 122. It was there declared, that the right to future alluvial formation or batture, or right of accretion, (for *batture* is a marine term, and denotes a bottom of sand, &c., rising towards or above the surface of the river,) was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches. It was an accessory to the principal estate or land, and cities as well as individuals may acquire it, *jure alluvionis*, as owner of the front, or riparian proprietor. The right was founded in justice, arising from the risks to which the land was exposed, and from the burden of keeping up levees or embankments in front of the river to protect the estate. When the government laid out the city of New Orleans, it left an open space between the front row of houses and the river, and which was marked *quai* on the plan. It was a dedication of this space to public uses, and it became a *locus publicus*; and if the proprietors of riparian estates in the faubourgs left such open spaces between the front street and the river, marking it as a public place, it amounted to a dedication, if accepted by the public. But if there was no such indication or intention, and acts of ownership, as a riparian proprietor, were exercised, then the space belonged to the riparian proprietor. One of the judges in that case (and one venerable from his age, his learning and character) was of opinion, that when the plan of a city or faubourg fronting on a navigable river, or the sea, had an open space between the front row of houses or street, and the water in public use, it became part of the port, as a *locus publicus* dedicated to public uses, without any other designation or evidence of dedication. It was afterwards adjudged, in the case of The City Council of Lafayette *v.* Holland, ib. 286, that where the owner throws open a passage for the use of the public, and shows no visible intention that he means to preserve his right over it, a dedication to the public would be presumed. And again, in Pulley *v.* Municipality No. 2, id. 278, it was held, that the *use* of the batture outside of the levee, on the bank of the river, at New Orleans, was vested in the public or city for public uses, but that the *title* to the soil, and the accretions, were vested in the front proprietors of the land to which the batture attaches or forms.

(*c*) Just. Inst. 2. 1. 28; Dig. 41. 1, tit. De acq. rer. dominio, 7. 1; Puff. 4, 7, 12. The civil law says, that the ground gained on a river by alluvion, or imperceptible increase, belongs to the owner of the adjoining land, *jure gentium*. This is also the

[2] See 427, n. 1, (*d*).

exception to this general principle, and they belong to the person who owns the land on that side of the river to which they are nearest; though, if they be situated so as to cover the middle of the river, they would belong in severalty to the owners on each side, according to the original dividing line, or *filum aquæ* continued on from the place where the waters begin to divide. Each proprietor is entitled to a larger or smaller proportion of the alluvial formation and shore line, according to the extent of his original line on the shore of the river. (*d*)

*429 *This principle of the common law has been recognized and prevails in the states of Maine, New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Maryland, Ohio, Virginia, North Carolina, and Louisiana. (*a*) In Maine and

rule of the common law. Bracton, lib. 2, c. 2; Hale, de Jure Maris, c. 6; 2 Bl. Comm. 261, 262; The King *v.* Lord Yarborough, 3 B. & C. 91; 1 Dow & Clark, 178, s. c.; New Orleans *v.* United States, 10 Peters, 662; Schultes on Aquatic Rights, 115–138; Deerfield *v.* Arms, 17 Pick. 41. If seaweed be cast on the *sea shore* by slow degrees and gradual accumulation, it belongs as a marine increase to the riparian proprietor. Emans *v.* Turnbull, 2 Johns. 322.

(*d*) Hale, de Jure Maris, c. 1, 2, 3, 4, 6; Bracton, De Acq. Rer. lib. 2, c. 2, sec. 2; Dig. 41. 1. 29; King *v.* Smith, Doug. 441; Code Napoleon, n. 561; The People *v.* Canal Appraisers, 13 Wend. 355; Deerfield *v.* Arms, 17 Pick. 41; Toullier, Droit Civil, iii. 107, 108. If the waters of a river be divided by an island, and one fourth of the stream descends on one side of the island, and the residue on the other, it was held, in Crooker *v.* Bragg, 10 Wend. 260, that the owner of the shore where the largest quantity of water flows was entitled to the use of the whole water flowing on that side of the island.

It may here be observed as a general rule, that the rights of a riparian proprietor do not attach to a mere intruder on land, for he is limited to his actual possession. Watkins *v.* Holman, 16 Peters, 25.

(*a*) Berry *v.* Carle, 3 Greenl. 269; Morrison *v.* Keen, ib. 474; Weston, Ch. J., in Bradley *v.* Rice, 18 Me. 201. (In that case it was held, and so it had been in Waterman *v.* Johnson, 13 Pick. 261, that where the land in a conveyance was bounded by a pond of water, the grant extended only to the margin of the pond.) Claremont *v.* Carlton, 2 N. H. 369; King *v.* King, 7 Mass. 496; Lunt *v.* Holland, 14 id. 149; Ingraham *v.* Wilkinson, 4 Pick. 268; Adams *v.* Pease, 2 Conn. 481; Warner *v.* Southworth, 6 id. 471. In this last case, it was held, that if a wide ditch or a wide stone wall constituted the boundary line, and the owner on one side conveyed his land, bounding the grantee on the ditch or wall, the same principle would apply, and the grant would extend to the centre of the ditch or wall. Palmer *v.* Mulligan, 3 Caines, 318; The People *v.* Platt, 17 Johns. 195; Hooker *v.* Cummings, 20 id. 90; *Ex parte* Jennings, 6 Cowen, 518; Arnold *v.* Mundy, 1 Halst. 1; Hayes *v.* Bowman, 1 Rand. 417; Mead *v.* Haynes, 3 id. 33; Home *v.* Richards, 4 Call, 441; Gavitt *v.* Chambers, 3 Ohio, 495; Browne *v.* Kennedy, 5 Harr. & J. 195; Williams *v.* Buchanan, 1 Ired. (N. C.) 535; Morgan *v.* Livingston, 6 Mart. (La.) 19. [Boston *v.* Richardson, 13 Allen, 146, 154.] In Browne *v.* Kennedy it was held, that if the state be entitled to the soil covered by a river not navigable, and grant the lands lying on such a river, and names the river as a

Massachusetts, some alterations in * the common law have *430
taken place; for by the colony ordinance of 1641, and by usage arising therefrom, the proprietors of the adjoining land, on bays and arms of the sea, and other places where the tide ebbs and flows, go to low water mark, subject to the public easement, and not exceeding one hundred rods below high water mark. According to judicial constructions of that ordinance, the flats between high and low water mark may be occupied by wharves and other erections, provided the easement or passage be not too much obstructed; and this right of property to low water mark, or one hundred rods, extends to all cases where the tide ebbs and flows, including as well the shores of the open sea as those of creeks and coves. (*a*) The common law, as we have already

boundary, the grantee becomes a riparian proprietor, and entitled to the land the river covers, *ad filum medium aquæ*. A variety of cases to the same effect are cited in the learned note of the reporter, in 6 Cowen, 544; and they demonstrate the existence of the rule that a grantee, bounded on a river, (and it is almost immaterial by what mode of expression,) goes *ad medium filum aquæ*, unless there be decided language showing a manifest intent to stop short at the water's edge. So, if a conveyance of land on the bank of a river, not navigable, be bounded *along the shore of the river*, the grantee still takes *ad filum aquæ*. Starr *v.* Child, 20 Wend. 149. In the case of The Canal Commissioners *v.* The People, 5 Wend. 428, the language of the judges of the Court of Errors, in New York, was, that by the rule of the common law which prevailed here, grants of lands, bounded on rivers above tide water, extended *usque filum aquæ*, including the beds of rivers and the islands therein, and the exclusive right of fishing, unless the same was clearly intended to be reserved, but subject, nevertheless, to the right of the public to use the water as a highway. The right of the riparian owner to the stream is as sacred as other private property, and the state cannot appropriate the water to public uses by artificial erections or improvements, without making compensation. The People *v.* Canal Appraisers, 18 Wend. 355. Lands under the water of navigable lakes are placed on the same footing with lands under the waters of navigable rivers, and they require a specific grant to enable the riparian proprietor to go beyond the shore, and the grant of the bed of such lakes can only be made to the owner of the adjoining land. This is the rule in New York and New Hampshire equally as to the waters of navigable rivers and lakes. N. Y. Revised Statutes, i. 208, sec. 67; The State *v.* Gilmanton, 9 N. H. 461. In Scotland, navigable lakes, though not considered strictly *inter regalia*, yet if they form great channels of communication, Mr. Bell thinks there is some reason to regard them as *res publicæ*, and subject to public uses as a navigable river. Principles of the Law of Scotland, 171. In this country, our great navigable lakes are properly regarded as public property, and not susceptible of private property more than the sea.

(*a*) Storer *v.* Freeman, 6 Mass. 435; Dane's Abr. ii. 693, 694; [Commonwealth *v.* Roxbury, 9 Gray, 451, and note by the Reporter;] Parker, C. J., in Ingraham *v.* Wilkinson, 4 Pick. 258; Sale *v.* Pratt, 19 Pick. 191. In the case of Thomas *v.* Hatch, 8 Sumner, 170, in a case in the district of Maine, it was held, that a boundary *on* a stream, or *by* or *to* a stream, includes the flats to low water mark, and in many cases to the middle thread of the river. But if the boundary be *to the bank*, or *by the bank*,

seen, has been rejected, or deemed inapplicable to the great inland rivers in Pennsylvania, and the owners of the land on the banks of them do not, as of course, acquire right to the soil covered by the waters of the rivers, but the soil and waters of the rivers, with the rights and privileges incident thereto, remain in the public. (*b*) In South Carolina the doctrine of the common law on this subject has been held to be inapplicable; but as the common law still applies to rivers capable of being made navigable, and which possess obstructions to the passage of boats of every
* 431 description, and * as the adjoining owners in such cases go *ad filum aquæ*, (*a*) the modifications which the common law

or *on the bank* of a river, the boundary may be limited to the bank. [Stone *v.* City of Augusta, 46 Me. 127.] So, if it be bounded by the *margin* of the stream. Nickerson *v.* Crawford, 16 Me. 245. See, also, *supra*, 415. The colonial ordinance of 1641 extended the title of riparian proprietors to the low water mark, and though originally limited to the Plymouth Colony, and afterwards annulled, yet the doctrine of it is held in Massachusetts and Maine to be part of the common law of those states. Parsons, Ch. J., in Storer *v.* Freeman, 6 Mass. 438; Lapish *v.* Bangor Bank, 8 Greenl. 85. In the case of The Commonwealth of Massachusetts *v.* Wright (American Jurist, No. 6, 185), it was decided, in 1829, that a wharf extending into the navigable channel in Boston harbor, so as in the course of time to injure the navigation, was indictable as a public nuisance; and upon conviction, it was ordered to be abated at the expense of the defendants. See Rex *v.* Lord Grosvenor, 2 Stark. 511, and Hale, de Portibus Maris, c. 7, sec. 2. Whether the erection in such cases amounts to a common nuisance, is a question of fact. The law of Connecticut declares it to be a common nuisance to dam, stop, or obstruct any river, brook, stream, or run of water, or divert the same from its natural course, to the prejudice of any person, without liberty from the town, where such town has a right to grant it. Revised Statutes of Connecticut, 1821, 862.

(*b*) Carson *v.* Blazer, 2 Binney, 475; Shrunk *v.* President of the Schuylkill Navigation Company, 14 Serg. & R. 71; Zimmerman *v.* The Union Canal Company, 1 Watts & S. 351. In Starr *v.* Child, 20 Wend. 149, Mr. J. Bronson earnestly contended, that the rule of the common law, that the flow and reflow of the tide was a test of a public river, did not apply to the great fresh water rivers of New York, and that they belonged to the public; but the majority of the court adhered to and declared the common law rule. In Alabama, the rule is, that every watercourse, suited to the ordinary purposes of navigation, whether the tide ebbs and flows or not, is a public highway, and the riparian owner cannot assert any private right of soil to the bed of the river beyond the low water mark. The question in that state does not depend upon the common law test of the ebbing and flowing of the tide; for if the river be suited to the ordinary purposes of navigation, it is, by statute, declared to be a public highway, and the title to the bed of the river remains in the public, unless it has been expressly granted. Bullock *v.* Wilson, 2 Porter, 436. And it is competent to a state government to authorize the erection of a bridge across a navigable river, below where the coasting trade is carried on by licensed vessels, provided the bridge be built with a drawbridge, for the passing and repassing of vessels, free of expense. The People *v.* S. & R. Railroad Company, 15 Wend. 113.

(*a*) Cates *v.* Wadlington, 1 M'Cord, 580.

has undergone do not seem to be very material. So, in North Carolina, the ebbing and flowing of the tide is not the sole test of a navigable river. If a river be deep enough for sea vessels to navigate to and from the ocean, it is a navigable stream, and the boundary of the adjacent land is not the thread or middle of the channel, but the edge of the water at low water mark. (*b*)

The sea shore, according to Lord Hale's definition, is the ground between the ordinary high and low water mark, and it *prima facie*, and of common right, belongs to the king, but may be vested in a subject by prescription, or by grant, as if the king grants a manor *cum littore maris eidem adjacente*, the shore itself will pass. (*c*) But it was said by the Ch. J., in *Arnold* v. *Mundy*, (*d*) that a grant bounded upon navigable water, where the tide ebbs and flows, extended to high water mark when the tide was high, and to low water mark when the tide was low, and that the immediate space between high water and low water mark might be reclaimed, and exclusively appropriated by the owner of the adjacent land, to wharves, buildings, and other erections. (*e*) There may be a

(*b*) Wilson v. Forbes, 2 Dev. 30; Ingraham v. Threadgill, 3 id. 59. In the latter case it was the language of the court, that in a river not navigable for the purposes of navigation, the right of fishing belongs to the riparian owners. In Elder v. Burrus, 6 Humph. 358, the Supreme Court of Tennessee followed the rule in North Carolina, and in opposition to the rule of the English law, held, that the owners of land on a navigable stream above tide water had title only to ordinary low water mark, and not to the centre of the stream.

By compact between the states of Virginia and Kentucky, in the years of 1789 and 1792, the jurisdiction of the river Ohio, below high water mark, was to be common to the people of each state.

(*c*) Hale, de Jure Maris, c. 4, 5; Constable's Case, 3 Co. 105, 107, b. The *shore* of a fresh river is where the land and water ordinarily meet. 6 Cowen, 547. By the Civil Code of Louisiana, art. 442, the sea shore is declared to be that space of land over which the sea spreads in the highest water, during the winter season.

(*d*) 1 Halst. 1.

(*e*) [Dutton v. Strong, 1 Black, 23; Bell v. Gough, 3 Zabr. 624; State v. Jersey City, 1 Dutch. 525; Thurman v. Morrison, 14 B. Monr. 867. But not below low water mark. Dana v. Jackson Street Wharf Co., 31 Cal. 118. And the right mentioned in the text is thought to be no more than a license, revocable by the state without compensation in Stevens v. Paterson & N. R.R. Co., 5 Vroom (34 N. J.), 532. See 413, n. 1, (*c*).] In Scotland, the owner of land, bounded on the sea shore, may prevent the encroachments of the sea by artificial operations, and thereby gain by embankments, holding the shore subject to the public uses. Bell's Principles of the Law of Scotland, 169. A similar principle was declared in Connecticut, in Nicholas v. Lewis, 15 Conn. 137, and that the freehold so reclaimed from the sea shore was in the riparian proprietor, subject to the public right to abate it, if it proves to be a nuisance.

movable freehold, as is stated by Lord Coke; (*f*) and if a grant was made of the sea shore, the freehold would shift as the sea receded or encroached, and it would take all the soil that should, from time to time, be within high and low water mark. (*g*) But I should apprehend the better opinion to be, that in ordinary grants of land bounded on the sea, or a river, the boundary limit must be stable, either at ordinary high or low water mark, and not subject to alternate change with the flux and reflux of the tide. In *Handley's Lessee* v. *Antony* (*h*) it was considered as a general, natural, and convenient rule of construction in public grants of territory bounded by *a river*, instead of being bounded by *432 the bank or *shore, to take the permanent river for the boundary line, and that would, of course, carry the line to ordinary low water mark, and include the land left diurnally bare by the receding of the water. The rule was, in that case, applied to a country or state bounded by a river; and the English common law does not allow the riparian owner, under the grant of the sovereign, of lands bounded on tide waters, to go beyond ordinary high water mark. (*a*) Such grants are construed most favorably for the king, and against the grantee; and Sir William Scott has vindicated (*b*) such a construction as founded in wise policy; for grants from the crown are made by a trustee for the public, and no alienation should be presumed that was not clearly and indisputably expressed.

(3) *Highways.* — Every thoroughfare which is used by the public, and is, in the language of the English books, "common

(*f*) Co. Litt. 48, b. [See iv. 441, n. 1.]

(*g*) Bayley, J., in Scratton *v.* Brown, 4 B. & C. 485. So, also, as to admiralty jurisdiction. See *supra*, i. 366.

(*h*) 5 Wheat. 374.

(*a*) [*Ante*, 427, n. 1.] Parsons, C. J., in Storer *v.* Freeman, 6 Mass. 438; Cortelyou *v.* Van Brundt, 2 Johns. 357. In Kean *v.* Stetson, 5 Pick. 492, it was considered that the whole of a navigable river included within high water mark, on each side, was a public highway, and owners of the adjoining lands have no right to erect wharves and other obstructions between high and low water mark, if it materially injure or straighten the passage for vessels and boats. A grant or prescription to occupy the flats of a navigable river with wharves and other erections, is always upon the implied condition, that they do not essentially impair the public easements in the stream, for then the erection would become a nuisance.

(*b*) 5 C. Rob. 182. In Hollister *v.* Union Company, 9 Conn. 436, a grant on a navigable river was not construed so as to impede the reasonable improvements of the navigation, though remote and consequential damages to the banks or shores of the river might ensue.

to all the king's subjects," is a highway, whether it be a carriage way, a horse way, a foot way, or a navigable river. It is, says Lord Holt, the *genus* of all public ways. (*c*) The law with respect to public highways and to fresh water rivers is the same, and the analogy perfect, as concerns the right of soil. The presumption is, that the owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. (*d*) [1] Being owners of the

(*c*) The Queen *v.* Saintliff, 6 Mod. 255.

(*d*) The law is well settled, that where a mere easement is taken for a public highway, the soil and freehold remain in the owner of the land, *incumbered only with the easement*, or right of passage in the public. Dovaston *v.* Payne, 2 H. Bl. 527. And upon the discontinuance of the highway, the soil and freehold revert to the owner of the land. Fairfield *v.* Williams, 4 Mass. 427; Perley *v.* Chandler, 6 id. 454; Stackpole *v.* Healey, 16 Mass. 33; Mayor, &c., of Savannah *v.* Steamboat Company, R. M. Charlton, 342; United States *v.* Harris, 1 Sumner, 21, 37; Nicholson *v.* Stockett, 1 Walker (Miss.), 67; In the Matter of John and Cherry Streets, 19 Wend. 659, 666;

[1] *Highways.*—(*a*) A highway is said not to be an easement, but a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing; the public generally assuming the obligation of repairing it. Rangeley *v.* Midland R. Co., L. R. 3 Ch. 306, 310, 311. And it need not be a thoroughfare in the sense of being open at both ends, as a *cul-de-sac* may be dedicated or laid out as such. Bateman *v.* Bluck, 18 Q. B. 870; The People *v.* Kingman, 24 N. Y. 559; Danforth *v.* Durell, 8 Allen, 242; Stone *v.* Brooks, 35 Cal. 489. But see People *v.* Jackson, 7 Mich. 432; Tillman *v.* People, 12 Mich. 401; Holdane *v.* Cold Spring, 28 Barb. 108; 21 N. Y. 474. See, as to *dedication*, *post*, 451, n. 1.

(*b*) *As to the Rights of the Public.*—Where private property cannot be taken without compensation, it is unlawful to impose any additional burden on land under a highway without paying for it; such as allowing the public to depasture cattle on the highway; Woodruff *v.* Neal, 28 Conn. 165; Harrison *v.* Brown, 5 Wis. 27; Jewett *v.* Gage, 55 Me. 538; *contra*, Hardenburgh *v.* Lockwood, 25 Barb. 9; a market; State *v.* Laverack, 5 Vroom (34 N. J.), 201; a steam railroad; Williams *v.* N. Y. C. R.R., 16 N. Y. 97; People *v.* Kerr, 27 N. Y. 188, 205; Gray *v.* First Divn. St.P. R.R., 13 Minn. 315; Att. Gen. *v.* Morris & E. R.R., 4 C. E. Green, 386, ib. 575; but see Mercer *v.* Pittsburgh, Ft. W., & C. R.R., 36 Penn. St. 99; but not a horse railroad; Elliot *v.* Fairhaven & W. R.R., 32 Conn. 579; Cincinnati Street Railway *v.* Cumminsville, 14 Ohio St. 524; Brown *v.* Duplessis, 14 La. An. 842; Hinchman *v.* Paterson H. R.R., 2 C. E. Green (17 N. J. Eq.), 75; Boston *v.* Richardson, 13 Allen, 146, 160; Hobart *v.* Milwaukee R.R. Co., 27 Wis. 194. See Commonwealth *v.* Temple, 14 Gray, 69; *contra*, Craig *v.* Roch. & B. R.R., 39 N. Y. 404; Reg. *v.* Train, 9 Cox C. C. 180. Probably gas pipes could not be laid without compensation; Galbreath *v.* Armour, 4 Bell App. Cas. 374; Boston *v.* Richardson, 13 Allen, 146, 160; or telegraph posts; Reg. *v.* U. K. Tel. Co., 9 Cox C. C. 174. See Dickey *v.* Maine Tel. Co., 46 Me. 483; Commonwealth *v.* Boston, 97 Mass. 555. But any use may be made of the land which is conducive to the enjoyment of the public right, such as the making of culverts, drains, and sewers for the cleansing of the streets. West *v.* Bancroft, 32 Vt. 367; Cone *v.* Hartford, 28

soil, they have a right to all ordinary remedies for the freehold. They may maintain an action of ejectment for encroachments upon the road, or an assize if disseised of it, or trespass against any person who digs up the soil of it, or cuts down any
* 433 trees growing on the side of the road, and * left there for shade or ornament. The freehold and all profits belong to the owners of the adjoining lands. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the servitude or easement of a way over it,

Nelson, J., 12 Wend. 371, 378. It is a principle of the common law, and equally the law in every state, unless specially controlled. In one of the cases above cited, the owner was held to be restored to the use of the soil, though he had received compensation for it.

Conn. 868; People *v.* Kerr, 27 N. Y. 188, 204; Kelsey *v.* King, 32 Barb. 410; Turner *v.* Dartmouth, 18 Allen, 291; Boston *v.* Richardson, ib. 146, 159; Franklin *v.* Fisk, ib. 211. But see, as to quarries for repairs, Kelly *v.* Donahoe, 2 Met. (Ky.) 482. And when the surface of land has been occupied for a public use, and paid for, it may be applied to another similar public use without further compensation. Chase *v.* Sutton Manuf. Co., 4 Cush. 152; 13 All. 160; Heath *v.* Barman, 49 Barb. 496.

(*c*) The text, 433, and cases n. (*a*), are confirmed by Chamberlain *v.* Enfield, 43 N. H. 356. And the owner of the freehold, by reason of his general property, may maintain an action for the erection of a bay window over the highway. Codman *v.* Evans, 5 Allen, 308; *post*, 451, n. 1; St. Mary, Newington, *v.* Jacobs, L. R. 7 Q. B. 47, 54.

(*d*) The text, 434, and cases note (*a*), as to the fee passing to the centre of the way in a grant bounded by it, is confirmed by 427, n. 1; Banks *v.* Ogden, 2 Wall. 57; Berridge *v.* Ward, 10 C. B. N. S. 400; Queen *v.* Strand Board of Works, 4 Best & S. 526, 551; Hoboken Land Co. *v.* Kerrigan, 31 N. J. 13; Boston *v.* Richardson, 13 Allen, 146, 153; Marsh *v.* Burt, 34 Vt. 289; Codman *v.* Evans, 1 Allen, 344. So a conveyance of lots by number on a plan referred to and made public when the plan represents them as bounded by a street. Bissell *v.* N. Y. C. R.R., 23 N. Y. 61; Perrin *v.* N. Y. C. R.R., 36 N. Y. 120; Berridge *v.* Ward, *sup.* And when land is sold bounded "on a passage called H. Av. on said plan," the purchaser has a right to have the way kept open for its whole length as delineated. Rogers *v.* Parker, 9 Gray, 445; at least as far as the the next open street on the side of the lot purchased; Hawley *v.* Mayor, &c., of Baltimore, 33 Md. 270, 280; Att. Gen. *v.* Morris & E. R.R., 4 C. E. Green, 386; but see ib. 575. See, also, Espley *v.* Wilkes, L. R. 7 Ex. 298. But if the grantor has no interest in the land under the street, there is no implied covenant that the street shall remain open. Howe *v.* Alger, 4 Allen, 206. See, also, as to lands marked "Play Ground" and "Ornamental Grounds," Light *v.* Goddard, 11 Allen, 5. It has been held that there is no such covenant or any grant of a right of way when the supposed passage referred to as a boundary, although on the grantor's land, has neither been opened nor dedicated to the public, as by the publication of a plan with the way laid down upon it. Hopkinson *v.* McKnight, 31 N. J. 422. See, further, *post*, 451, n. 1.

and with police regulations. (*a*) The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road, as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice; and it was

(*a*) 1 Rol. Abr. 392, B.; 2 Inst. 705; Lade *v.* Shepherd, Str. 1004; Gibbs, C. J., 7 Taunt. 89; Abbott, C. J., 2 Stark. 468; Doe *v.* Pearsey, 7 B. & C. 304; Goodtitle *v.* Alker, 1 Burr. 133, 143; Headlam *v.* Headley, Holt N. P. 468; Cortelyou *v.* Van Brundt, 2 Johns. 357; Jackson *v.* Hathaway, 15 id. 447; Makepeace *v.* Worden, 1 N. H. 16; Peck *v.* Smith, 1 Conn. 103; Perley *v.* Chandler, 6 Mass. 454; Robbins *v.* Borman, 1 Pick. 122; Adams *v.* Emerson, 6 Pick. 57; Writter *v.* Harvey, 1 M'Cord, 67; Bolling *v.* Mayor of P., 3 Rand. 563; Chambers *v.* Furry, 1 Yeates, 167; Pomeroy *v.* Mills, 3 Vt. 279; Gidney *v.* Earll, 12 Wend. 98; Mayor, &c., of Savannah *v.* Steamboat Company, R. M. Charlton, 342. The owner of the land over which a public highway passes, if he digs a raceway across the road, and builds a bridge over it, and a traveller sustains damage by its being out of repair, is liable in damages. Dygert *v.* Schenck, 23 Wend. 446. The statute of New York (N. Y. Revised Statutes, i. 525) allowing the owners of lands adjoining highways to plant trees on the sides of the road, and to bring actions of trespass for injuring them, assumes and affirms the principle of the common law in relation to such rights. It specially declares that all trees standing or lying on any land over which a highway is laid out, are for the use of the owner of the land, except such as may be requisite to make or repair the highway or bridges on the land. Though a turnpike corporation has only an easement in the land over which the turnpike road is located, a grant of the use of the land necessary for the enjoyment of the franchise as by erecting toll-houses, and digging wells and cellars for their accommodation, is necessarily implied. Tucker *v.* Tower, 9 Pick. 109. By the law of Louisiana, which follows in this respect the civil and not the common law, the soil of public highways is in the public. Renthrop *v.* Bourg, 4 Mart. (La.) 97; Dig. 43. 8. 2. 21. In the city of New York, the rule is, that if a lot be sold, bounded on a *street as designated on a map* of the city, or of the owner's land, the purchaser takes the lot with the indefeasible privilege of a right of way in the street as an easement. The fee of the street remains in the vendor, but *subject to the easement*, and the value of his fee is but nominal. This right of way is founded on an implied covenant in the grant. The street is considered, by means of the sale and map, as *dedicated to the public* by the vendor, when the municipal authorities shall think proper to open the street. In the Matter of Lewis Street, 2 Wend. 472; Livingston *v.* Mayor of New York, 8 id. 85; Wyman *v.* Mayor of New York, 11 id. 486. The cases of City of Cincinnati *v.* White, 6 Peters, 431; Sinclair *v.* Comstock, Harr. Ch. (Mich.) 404, and of The Trustees of Watertown *v.* Cowen, 4 Paige, 510, lay down the same rule, that if the owner of lands in a city or village lays the same out in lots and streets, and sets apart ground for a public square or common, it is a dedication of the streets or squares to the public, of which the grantees cannot be deprived. [Congreve *v.* Smith, 18 N. Y. 79, 84. See Woodring *v.* Forks Township, 28 Penn. St. 355. He cannot obstruct the way to lay down gas pipes to his house without the authority of Parliament. Queen *v.* Longton Gas Co., 2 El. & El. 650.]

said, in *Peck* v. *Smith*, (*b*) that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the *general rule, that a grant of land bounded upon a highway or river carries the fee in the highway or river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intent. (*a*) But it is competent for the owner of a farm or lot, having one or more of its sides on a public highway, to bound it by express terms on the side or edge of the highway, so as to rebut the presumption of law, and thereby reserve to himself his latent fee in the highway. He may convey the adjoining land without the soil under the highway, or the soil under the highway without the adjoining land. If the soil under the highway passes by a deed of the adjoining land, it passes as parcel of the land, and not as an appur-

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*435 tenant. It is equally competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river and to reserve the stream or flats below high water mark, if he does it by clear and specific boundaries. (*a*) The purchaser, in such a case, takes the bank of the river as it is, or may thereafter be, by alluvion or decrease of the flow of the river. He takes it subject to the common incidents which may diminish or increase the extent of his boundaries. (*b*) He may also convey the bed of a stream separate from the lands which bound it. (*c*)

(*b*) 1 Conn. 103.

(*a*) 1 Rol. Abr. 392, B. pl. 5; Harg. Law Tr. 5; Stevens *v.* Whistler, 11 East, 51; Headlam *v.* Headley, Holt N. P. 463; Wright *v.* Howard, 1 Sim. & Stu. 190; Brown *v.* Kennedy, 5 Harr. & J. 195; Cortelyou *v.* Van Brundt, 2 Johns. 357; Jackson *v.* Hathaway, 15 id. 447; Canal Commissioners *v.* The People, 5 Wend. 423; Lunt *v.* Holland, 14 Mass. 149; Hatch *v.* Dwight, 17 id. 289; Claremont *v.* Carlton, 2 N. H. 369; Luce *v.* Carley, 24 Wend. 451; Morrison *v.* Keen, 3 Greenl. 474; Chatham *v.* Brainard, 11 Conn. 60; Champlin *v.* Pendleton, 18 id. 23; Johnson *v.* Anderson, 18 Me. 76; Sibley *v.* Holden, 10 Pick. 249. *Contra*, Tyler *v.* Hammond, 11 Pick. 193.

(*a*) Storer *v.* Freeman, 6 Mass. 435; Hatch *v.* Dwight, 17 id. 299; Jackson *v.* Hathaway, 15 Johns. 447; Webber *v.* Eastern R.R. Company, 2 Met. 151; Child *v.* Starr, 4 Hill (N. Y.), 369, 378, 374, 381; Dunlap *v.* Stetson, 4 Mason, 349.

(*b*) Adams *v.* Frothingham, 3 Mass. 352; Scratton *v.* Brown, 4 B. & C. 485; Dunlap *v.* Stetson, 4 Mason, 349. A river where the tide does not ebb and flow has no *shores* in the legal sense. It has *ripa*, but not *littus;* and shores, when applied to such a river, mean the water's edge, or margin of the stream. Child *v.* Starr, 4 Hill, 376, 380, 381

(*c*) Den *v.* Wright, 1 Peters C. C. 64. See the notes to the case of Dovaston *v.*

(4) *Servitudes and Vicinage.* — The civil law treated very extensively of these incorporeal rights annexed to land; and what in the common law are termed *easements*, or a right which one man has to use the land of another for a special purpose, went under the general denomination of *servitudes*, because they were charges on one estate for the benefit of another. Toullier defines servitudes to be real rights, *jura in re*, existing in the property of another. Like incorporeal hereditaments, they have been held not to pass without a grant. (*d*) By virtue of such a right, the proprietor of the estate charged is bound to permit, or not to do, certain acts in relation to his estate, for the utility or accommodation of a third person, or of the possessor of an adjoining estate. The term is a metaphorical expression, borrowed from personal servitude, but the charge is entirely attached to real estates, and not to the person. Servitutum ea natura est, ut aliquid patiatur aut non faciat. Servitutem non hominem debere sed rem. (*e*)

Payne, 2 H. Bl. 527, in Smith's Leading Cases, Law Library, N. S. XXV., in which the English, and especially the American editor, Mr. Wallace, has condensed and classified the principles respecting highways and riparian rights, deduced from the numerous cases, with diligence, skill, and usefulness.

(*d*) Orleans Navigation Company *v.* New Orleans, 2 Mart. (La.) 214. Easements may arise by implied grant, as upon the severance of an estate by a grant of part thereof, all those continuous and apparent easements continue which have been used by the owner during the unity of the estate, and without which the enjoyment of the severed portions could not be fully had, for no man can derogate from his own grant. Easements of necessity are also implied as incidents to a grant. In Gale & Whatley's Treatise of Easements, the numerous English cases on this subject are cited, and critically and skilfully analyzed. See pp. 49 to 86. The New York edition of this treatise by Mr. Hammond is much improved by the addition of American cases. [See 419, n. 1, B.]

(*e*) Dig. 8. 1. 15; ib. 8. 5. 6. 2. Toullier's Droit Civil Français, iii. n. 876; Institutes of the Civil Law of Spain, by Doctors Asso and Manuel, translated by L. F. C. Johnston, 1825. This digest of the civil jurisprudence of Spain collects summarily and states with great precision the Spanish law concerning servitudes, both in town and country (lib. 2, tit. 6), and it appears to be a very close adoption of the distinctions of the civil law on the subject of rural and city services. The Code Napoleon, b. 2, tit. 4, has also condensed, and the Civil Code of Louisiana has borrowed from it, the principles of the civil law on the subject of servitudes. Before the promulgation of the code, there were many French treatises on servitudes, and in the Répertoire de Jurisprudence, par Merlin, and in his Questions de Droit, tit. Servitude, a crowd of Italian, German, and French treatises on servitudes are cited, and among them the Traité des Servitudes, by Lalaure, which Toullier says has been of great use to all succeeding writers. The subject is treated at large by Merlin, and he has enriched it with forensic discussions. The treatise by Desgodets was a simple commentary upon the law of buildings, under the custom of Paris; but since the era of the code, M. La

The regulations in the civil law on the subject of urban and rural servitudes were just and equitable, and the provisions made to define and protect those rights were far more minute *436 and precise than those which are to be found *on the same subjects in the books of the common law; and it is difficult to solve many questions arising on those rights, without having recourse to the solid and luminous principles of the civil law, which are of permanent and universal application. (a)

In cities, where the population is dense, and the buildings compact, a great variety of urban services grow out of the relation of vicinage. There is the right of *support*, which arises from contract, or prescription, which implies a grant. This right is where the owner of a house stipulates to allow his neighbor to rest his timbers on the walls of his house. There is also the servitude *of drip*, by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate. So there is the right *of drain*, or to convey water in pipes through or over the estate of another. The right *of way* may also be attached to a house, entry, gate, well, or city lot, as well as to a country farm. These servitudes or easements must be created by the owner, and one tenant in common cannot establish them upon the common property without the consent of his cotenant. (b) The exercise of these urban and rural servitudes

Page has published two octavo volumes, entitled Lois des Batimens, ou le Nouveau Desgodets, in which the law of vicinage, in relation to city servitudes is examined with great minuteness of detail. The Traité du Voisinage, in two volumes octavo, by M. Fournel, a French lawyer of the old *régime*, discusses at large the different subjects embraced by the law of vicinage, in an alphabetical or dictionary form; and he is a learned and voluminous writer, who has published several interesting tracts on various branches of the law, and who speaks with freedom and contempt of the great mass of laws and ordinances promulgated by the revolutionists in France prior to 1800, when the first edition of his work on the law of vicinage appeared. In those egislative assemblies, he says, there were *peu de jurisconsultes, beaucoup d'hommes de loi*. Since the new code, the Traité des Servitudes, suivant les Principes du Code, par M. Pardessus, is much regarded, and this eminent professor is always cited by Toullier with respect, though he combats with freedom many of his opinions. Toullier himself (iii. 326–554) has discussed the whole of this subject of servitudes upon the principles of the code, with his usual order, accuracy, and learning.

(a) M. Fournel, when speaking of the Roman law in relation to this subject, says, that *Quelque chose que vous démandez aux lois Romaines, elles vous en fournissent la réponse*; and we may say of that law, as the younger Pliny said of Titus Aristo, who was an accomplished lawyer, and his particular friend: *Nihil est quod discere velis, quod ille docere non possit.*

(b) Dig. 8. 1. 2; ib. 8. 2. 19; Pothier, Coutume d'Orleans, Int. to tit. 18, des Ser-

may be limited to certain times. The right of drawing water, for instance, from a neighbor's well may be confined to certain hours, or a right of passage may be confined to a part of the day, or to a certain place. (*c*)

(5) *Party Walls.* — If there be a party wall between two houses, and the owner of one of *the houses pulls it *437 down, in order to build a new one, and with it he takes down the party wall belonging equally to him and his neighbor,

vitudes, art. 2, n. 6. See, also, his Traité du Quasi-Contrat de Communauté, *passim*; Institutes of the Laws of Holland, by Van der Linden, b. 1, c. 11, sec. 2; Institutes of the Civil Law of Spain, by Doctors Asso and Manuel, b. 2, tit. 6; Bell's Principles of the Law of Scotland, 266–274; Civil Code of Louisiana, arts. 784–788. In Burge's Comm. on Colonial and Foreign Laws, ii. tit. Servitudes, the law of urban and rural servitudes under the civil law, and the codes of those nations which have adopted and modified the civil law, is extensively considered. Servitudes, chargeable upon the estate in common, such as the right to enter, and search and dig for coal, and carry it away, would go to alter, injure, waste, and destroy the estate; and any attempt to do it without common consent, or under some equitable modification, to be prescribed on partition or otherwise, would subject the party to the action of trespass or waste, or to restraint by injunction at the instance of the dissenting cotenant.

(*c*) The general rule, in the civil and French as well as in the English law, is, that the burden of necessary repairs of an easement is cast upon the owner of the dominant and not of the servient tenement, for the easement is for the exclusive benefit of the former. Dig. Si serv. vend. 1, 6, sec. 2, 1, 8; Code Civil, art. 698; Bracton, lib. 4, fo. 222; Lord Mansfield, in Taylor *v.* Whitehead, 2 Doug. 745; Gale & Whatley on Easements, 308; Prescott *v.* Williams, 5 Met. 429. The law of vicinage rests on just foundations. Any act or default of the possessor of a tenement, to the injury of a party interested in the neighboring tenement, becomes a nuisance. So if a person, negligently and without ordinary prudence, constructs a hay rick on the extremity of his land, and with great negligence suffers hay to remain liable to spontaneous ignition, and it takes fire and burns his neighbor's house, he is liable in damages. Vaughan *v.* Menlove, 3 Bing. N. C. 468. See, also, to the same point, Tubervil *v.* Stamp, 1 Salk. 13; Barnard *v.* Poor, 21 Pick. 378. If a fire occurs by the negligence of the owner, and destroys his neighbor's house, he is liable in damages; but not if the accident was inevitable, or the owner not in fault. The principle is, that every man is so bound to deal with his own property as not to injure the property of others. To erect on the defendant's house eaves and a pipe, overhanging and conducting water on land in the occupation of a tenant, is a permanent injury, which gives an action on the case to the reversioner. Tucker *v.* Newman, 8 Perry & Dav. 14. If sparks from a railway or steamboat engine set fire to an erection on an adjoining field or building, the liability of the company for the injury will depend upon the question of negligence on their part. Aldridge *v.* G. Western R. Co., 3 Mann & Gr. 515; Cook *v.* Champlain T. Company, 1 Denio, 92; s. p. *supra*, ii. 284; [Fero *v.* Buffalo & S. L. R.R., 22 N. Y. 209; Smith *v.* London & S. W. R. Co., L. R. 6 C. P. 14. But compare Pennsylvania R.R. *v.* Kerr, 62 Penn. St. 353.] A canal company is not liable in damage for a mere accidental breach of a canal. Higgins *v.* Ches. & Del. Canal Co., 3 Harring. 411. Messrs. Gale & Whatley on Easements have treated of the rights and remedies arising from nuisances created by vicinage, 275–296, and to that learned work I refer the reader, as a critical digest of the cases would lead me too far into detail.

and erects a new house and new wall, he is bound, on his part, to pull down the wall and reinstate it in a reasonable time, and with the least inconvenience; and if the necessity of the reparation of the old wall be established, the neighbor is bound to contribute ratably to the expense of the new wall. But he is not bound to contribute to building the new wall higher than the old one, nor with more costly materials. All such extra expense must be borne exclusively by him who pulls down and rebuilds. (*a*)[1] If the owner of a house in a compact town finds it necessary to pull it down, and remove the foundations of his building, and he gives due notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of that house may sustain by the operation, provided he remove his own with

(*a*) Campbell *v.* Meesir, 4 Johns. Ch. 334; Pothier, du Quasi Contrat de Communauté, n. 187–192, 220, 221.

[1] (*a*) *Party Walls.* — When a party wall is destroyed by fire, the joint owners are remitted to their original title to the division line; and if one rebuilds on the old foundation so that part of the wall stands on land of the other, the latter may use that part without paying for it. (Campbell *v.* Meesir, *sup.*, limited;) Sherred *v.* Cisco, 4 Sandf. 480; Orman *v.* Day, 5 Fla. 385; Partridge *v.* Gilbert, 15 N. Y. 601; Dowling *v.* Hennings, 20 Md. 179. So the easement in a party wall is terminated by its decay. Dowling *v.* Hennings, *sup.* See generally Phillips *v.* Boardman, 4 Allen, 147. Campbell *v.* Meesir is approved, and Sherred *v.* Cisco condemned incidentally in Vollmer's Appeal, 61 Penn. St. 118. Party walls are regulated by statute in some states. Thus, in Louisiana, when a party has built a wall on his own land an adjoining owner may make it a wall in common by paying to the person who has made the advance the half of what he has laid out for its construction. Costa *v.* Whitehead, 20 La. An. 341; Auch *v.* Labouisse, ib. 553. See Vollmer's Appeal, *sup.* As to what is evidence of an ouster sufficient to sustain trespass, see Stedman *v.* Smith, 8 El. & Bl. 1; case lies for an injury to the wall by negligent digging on defendant's land, Moody *v.* McClelland, 39 Ala. 45. As to covenants relating to party walls, see iv. 480, n. 1, A. (*a*).

(*b*) *Lateral Support.* — The late English cases establish the principle that if land is dug away to such an extent that the adjoining land would have fallen whether there were buildings on it or not, an action will lie, and the buildings may be allowed for in damages. Brown *v.* Robins, 4 H. & N. 186; Stroyan *v.* Knowles, 6 H. & N. 454; Hunt *v.* Peake, H. R. V. Johns. 705. But a man is not prevented from draining his own land because it will diminish his neighbor's support by withdrawing the percolating water, if his doing so does not derogate from the express or implied terms of his own grant Popplewell *v.* Hodkinson, L. R. 4 Ex. 248; see Elliot *v.* North Eastern R. Co., 10 H. L. C. 333. And there can be no recovery if the sinking of the land would not have caused appreciable damage but for the buildings upon it. Smith *v.* Thackerah, L. R. 1 C. P. 564; *post*, 448, n. 1. These distinctions were not fully before the court in Foley *v.* Wyeth, 2 Allen, 131.

reasonable and ordinary care. (*b*) Where there had been no party wall, but the walls of the house pulled down stood wholly on its lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period sufficient to establish an easement by prescription, the owner of the adjoining house would be entitled to have his beams inserted for a resting place in the new wall. Such an easement is continual, without requiring the constant and immediate act of man; and it is an apparent one, shown by an exterior work; and, consequently, it has the qualities sufficient by the common law, and also deemed in the French law sufficient to establish an easement by prescription. (*c*) It has been held, in England, that the owners of a party wall, built at joint expense, and standing partly on the land of each, are not tenants in common, but each party continues owner * of his land, and has a right to the use of the wall, and a * 438 remedy for a disturbance of that right. But the common use of a wall separating adjoining lots belonging to different owners is *prima facie* evidence that the wall, and the land on which

(*b*) 2 Roll. Abr. 564, T. pl. 1; Peyton *v.* St. Thomas's Hospital, 9 B. & C. 725; Massey *v.* Goyder, 4 Carr. & P. 161; Walters *v.* Pfeil, 1 Moody & M. 362; Wyatt *v.* Harrison, 3 B. & Ad. 871. But in this last case it is suggested, that if the house which is injured by the digging had been *ancient*, the rule might be otherwise, as that circumstance might imply the consent of the adjoining proprietor to its erection. Buildings which are ancient, or erected upon ancient foundations, or protected by prescription, cannot lawfully be disturbed by deep excavations or other improvements on adjoining lots. But otherwise a person may make reasonable improvements and excavations on his own ground, though they should injure or endanger an edifice on the adjoining land, by digging near and deeper than its foundations, provided he exercises ordinary care and skill; and the injured party does not possess any special privileges, protecting him from the consequences of such improvements, either by prescription or grant. Lasala *v.* Holbrook, 4 Paige, 169; Thurston *v.* Hancock, 12 Mass. 221; Jones *v.* Bird, 5 B. & Ald. 837; Richart *v.* Scott, 7 Watts, 460; [Moody *v.* McClelland, 89 Ala. 45.] Whether due care has been used in the case is a question of fact for a jury. Dodd *v.* Holme, 3 Neville & Mann. 739; 1 Ad. & El. 493, s. c. The taking proper precautions to prevent injury to adjoining walls in disturbing foundations is indispensable, to exempt the party from responsibility for special loss. Trower *v.* Chadwick, 3 Bing. N. C. 334; Pierce *v.* Musson, 17 La. 389; Pardessus, Traité des Servitudes, 302; Partridge *v.* Scott, 3 M. & W. 220. If a man builds his house at the extremity of his land, he does not thereby and without a grant acquire any rights of easement or support over his neighbor's land. See Gale & Whatley's Treatise on Easements, 216–267, where all the cases are cited and commented upon as to the right of support, and of making excavations adjoining another's land. The civil and the French law are also referred to in that and other branches of the work, whenever they may serve to illustrate what may be dubious or obscure in the English law on the topics under discussion.

(*c*) Code Napoleon, n. 690.

it stands, belong equally to the different owners, in equal, undivided moieties, as tenants in common. (*a*)

(*a*) Matts *v.* Hawkins, 5 Taunt. 20; Cubitt *v.* Porter, 8 B. & C. 257. The Building Act of 14 Geo. III. c. 78, has given to each party certain easements in the wall on the land of the other, and has made special and ample provision on the subject of houses and partition walls in the city of London. Some statute regulations of that kind seem to be required in large cities, though in France the customs of Paris and Orleans have supplied the place of more minute statute provisions. We have in the Assize, enacted under Henry Fitz-Ailwyne, the first Lord Mayor of London, A. D. 1189, a very curious document respecting the regulation of party walls. After the great fire in the time of King Stephen, London began to be built of stone and tile. The walls were to be three feet in thickness, and each owner was to give half of the space for the wall. If any individual was aggrieved by the encroachment of his neighbor, he could restrain the workmen by giving security to the sheriff to appear and prosecute. The mayor and twelve sworn aldermen were to repair to the spot and hear the allegations of the parties, and decide finally between them. The encroachment was to be corrected in forty days, or the sheriff executed the remedy. Sir Francis Palgrave's Rise and Progress of the English Commonwealth, ii. 172, 174, 175. This ordinance is evidence of a strong, vigilant, and civilized police in that rude and turbulent age. The work of Sir Francis surpasses any modern work whatever in ingenious and profound antiquarian erudition relative to English legal antiquities.

Party walls and buildings in the city of Philadelphia are specially regulated by statute. Purdon's Digest, 984, 985. And the operations of the English statute of Geo. III., on the rights of neighboring proprietors, and the adjudications on those rights, are fully stated in Gibbons on the Law of Dilapidations, 110–125. So, in the city of Washington, by the fundamental regulations in buildings, established in 1791, it is a condition annexed to title, that when the owner of a lot builds a partition wall between himself and his neighbor, he shall lay the foundations equally upon the lands of both, and any person who shall afterwards use the partition wall, or any part of it, shall reimburse to the first builder a moiety of the charge of such part as he shall use. Miller *v.* Elliot, C. C. U. S. March Term, 1839.

In the city of New York, the foundation of every building must not be less than six feet below the street or sidewalk directly in front of it; and if not, the owner will not be entitled to recover damages, by the erecting, with ordinary care, of any adjoining building. Laws of New York, April 10, 1818, c. 106. In respect to trees growing on or near the division line between two lots of land, it was held, that if the tree grows on the lot of A., with nearly an equal part of its roots spreading into the ground of B., the tree nevertheless belongs to A., in whose soil the body of it is. Masters *v.* Pollie, 2 Rol. Rep. 141. Lord Holt held that, in such a case, A. and B. were tenants in common of the tree, though if all the roots grew in the land of A., and the branches overshadowed the land of B., the branches followed the root, and the property of the whole tree was in A. Waterman *v.* Soper, 1 Ld. Raym. 737. In Holder *v.* Coates, 1 Moody & M. 112, the right was considered as turning upon the fact, in whose land was the tree first planted. The civil law made such a tree common property. Inst. 2. 1. 31; Dig. 41. 1. 7. 13. See, on this subject, Code Civil, art. 670, 671, 672, 673. In Griffin *v.* Bixby, 12 N. H. 454, the same principle was followed, and it was held, that if a tree stand directly on the line between two owners, it is the common property of both, and trespass lies if one of them destroys it without consent of the other. In Lyman *v.* Hale, 11 Conn. 177, it was held, after an elaborate discussion, that if a

(6) *Division Fences.* — In connection with this subject of party walls, may be mentioned the law concerning division fences between the owners of adjoining lands. These interests are generally the object of local statute regulations. The doctrine is, that at common law the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription; and if bound by prescription to fence his close, he was not bound to fence against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping. (*b*) The legal

tree stands on the land of A., and extends its roots into, and its branches over the land of B., the tree, with all its roots and branches, and the fruit thereon, belong exclusively to A., and B. becomes a trespasser if he appropriates to his own use any of the overhanging fruit. This appears to have been the best considered, and is not only the latest, but the most simple and definite rule on the subject. [Dubois *v.* Beaver, 25 N. Y. 123.]

In New York, by the statutes of March 19, 1813, c. 35, sec. 20, (and which is still in force,) the Common Council of the city of New York was authorized to make rules and regulations for making, amending, and maintaining as well partition fences as others, in the city. Under this power, the corporation have, by ordinance, (1833,) regulated partition fences and *walls*. It requires partition walls to be made and maintained by the owners of the land on each side, and if the same can be equally divided, each party shall make and keep in repair one half part. Disputes concerning the division of the wall, and the parts to be made or repaired by each owner respectively, or as to its sufficiency, to be settled by the aldermen and assistant of the ward. If the wall cannot be conveniently divided, it is to be made and kept in repair at joint and equal expense. A surplus wall, higher or lower than the regulation, to be at the individual expense of the owner; and on a neglect of contribution by one party, the other may make the whole wall, and recover from the other party his proportion of the expense. The same regulation applies to partition fences.

(*b*) Rust *v.* Low, 6 Mass. 90; Thayer *v.* Arnold, 4 Met. 589; Little *v.* Lathrop, 5 Greenl. 356; Holladay *v.* Marsh, 3 Wend. 142; Chancellor Walworth, in 18 Wend. 221; Stackpole *v.* Healy, 16 Mass. 33; Avery *v.* Maxwell, 4 N. H. 36; Wells *v.* Howell, 19 Johns. 385; Stafford *v.* Ingersoll, 3 Hill, 38. The removal of landmarks is made a misdemeanor by statute in New York; and the N. Y. Revised Statutes, i. 353–355, and the Revised Statutes of Ohio, 1831, and of Illinois, 1833, have prescribed rules for making and maintaining sufficient division fences between the owners of adjoining lands; but there is an express exception, in New York and Ohio, in favor of owners choosing to let their lands lie open; and in that case I apprehend that, as a general rule, the respective owners would be remitted to their common law rights and duties. The equitable rule towards making and maintaining division fences between adjoining owners of land, we find in the statutes of the old Plymouth Colony. Plymouth Colony Laws, ed. 1836, p. 196. The principle of equitable contribution towards the erection and maintenance of division fences between the owners of adjoining lands exists independent of statute provision. In the matter of R. & S. Railroad Company, 4 Paige, 553. It is to be found in the institutions of those nations which are founded upon the

obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no agreement has been made, rests entirely on positive provisions by statute; and trespass will lie against the owner of cattle entering on the grounds of another, though there be no fence to obstruct them, unless he can protect himself by statute, or prescription, or agreement. (*c*) [1] The public have no rights, even in a public highway, but a right of way or passage; and if cattle be placed in the highway for the purpose of grazing, and escape into an adjoining close, the owner of the cattle, unless he owns the soil of that

civil law. Code Napoleon, art. 653, 655, 656; Civil Code of Louisiana, art. 683–686; Institutes of the Laws of Holland, by J. van der Linden, b. 1, c. 11, sec. 3. The statute of Alabama declares a partition fence to be the joint property of both the adjoining proprietors, and each is bound to keep the entire fence in good repair; and if one of them will not aid in repairing the fence, the other may cause it to be done, and recover the value or moiety of the expense. Walker *v.* Watrous, 8 Ala. 498.

(*c*) Churchill *v.* Evans, 1 Taunt. 529; Thayer *v.* Arnold, 4 Met. 589. The statute law of Alabama, regulating partition fences (Laws of Alabama, 862), gives an action for damages against the owner of cattle breaking into any grounds "enclosed with a strong and sound fence." This would imply that, in that state, no suit lies, if there be no protecting fence. And in New York, by statute of April 18, 1838, c. 261, if any person liable to erect or repair a division fence shall neglect or refuse to do it, he shall have no action for damages incurred, but shall be liable for all damages accruing by reason of such neglect or refusal, to the lands, crops, &c., of the party injured. See the very provisional statute law of Connecticut on the subject. Statutes of Connecticut, 1838, pp. 250–258. In Connecticut the rule of the common law is not adopted, and the owner of lands is obliged to enclose by a lawful fence, or he cannot maintain an action of trespass for a damage thereon, by the cattle of another. Studwell *v.* Ritch, 14 Conn. 292. The statute of Mississippi defines a lawful fence to be one "five feet high, well staked and ridered, or sufficiently locked, and so close that the beasts breaking into the enclosure could not creep through." Revised Code of Mississippi, 1824, p. 384.

[1] Lyon *v.* Merrick, 105 Mass. 71; Richardson *v.* Milburn, 11 Md. 340. When neither of the owners of a partition fence repairs it, the common law rule applies. Webber *v.* Closson, 35 Me. 26; Myers *v.* Dodd, 9 Ind. 290. So cattle killed by a train, while trespassing on a railroad track, cannot be recovered for. Price *v.* N. J. R.R. & T. Co., 31 N. J. 229; Munger *v.* Tonawanda R.R., 4 Comst. 349; s. c. 5 Denio, 255; Hurd *v.* Rutland & B. R.R., 25 Vt. 116; R.R. Co. *v.* Skinner, 19 Penn. St. 298; Eames *v.* B. & W. R.R., 14 Allen, 151, Waldron *v.* P. S. & P. R.R., 35 Me. 422; N. Pa. R.R. *v.* Rehman, 49 Penn. St. 101; U. P. R. Co. *v.* Rollins, 5 Kans. 167. See Logansport, P. & B. R.R. *v.* Caldwell, 38 Ill. 280. But there are some decisions to the contrary, as in some states the owner of cattle is held not to be bound to keep them on his own land unless required by statute. Kerwhacker *v.* C. C. & C. R.R., 3 Ohio St. 172; Wright *v.* Wright, 21 Conn. 329; Seeley *v.* Peters, 5 Gilm. 130, cited, Stoner *v.* Shugart, 45 Ill. 76; Raiford *v.* Miss. C. R.R., 43 Miss. 238, 239. See Antisdel *v.* Chicago & N. W. R. Co., 26 Wis. 145; 6 Am. Law Rev. 723, 725; Smith *v.* Fletcher, 440, n 1, (*c*); iv. 110, n. 1.

part of the highway on * which he placed his cattle, cannot *439
avail himself of the insufficiency of the fences in excuse of the trespass. (a)

(7) *Running Waters.* — Important questions have arisen in respect to the use of running waters, between different proprietors of portions of the same stream; and such questions are daily growing in interest, as the value of water power is more and more felt in manufacturing establishments.

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. (b) Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. (c) This is the clear and settled general doc-

(a) It is stated, that in England, a party who makes a partition fence between him and his neighbor, must have it wholly on his own land. Lawrence, J., in Vowles *v.* Miller, 3 Taunt. 138. But in Massachusetts the more reasonable rule is, that partition fences and ditches are to be placed on the land of both parties equally. Newell *v.* Hill, 2 Met. 180.

(b) But if a running stream be not a natural watercourse, but created by the owner of the land, and it flows beneficially into a neighbor's land, as water raised from a mine by a steam engine, or water from the spout of the eaves of a row of houses, thrown upon and used by the owner of adjoining ground, no presumption of a grant or a right to have that water continued in perpetuity exists, for that would unreasonably compel the owner of the mine to work it, or keep his engine in motion, or his row of houses unaltered. Arkwright *v.* Gell, Exch. E. T. 1839, cited in Gale & Whatley on Easements, 182. [5 M. & W. 203; Mason *v.* Shrewsbury & H. R. Co., L. R. 6 Q. B. 578.]

(c) Dig. 39. 3. 4. 10; Code, lib. 3, t. 34, 1, 7; Pothier, Traité du Contrat de Société, second App. n. 236, 237; Toullier, iii. 88, n. 133; Luttrel's Case, 4 Co. 87, a.; Shury *v.* Piggot, 3 Bulst. 339; s. c. Popham, 166; Hays *v.* Hays, 19 La. 351; Brown *v.* Best,

*440 trine on *the subject, and all the difficulty that arises consists in the application. The owner must so use and

1 Wils. 174; Bealey *v.* Shaw, 6 East, 208; Wright *v.* Howard, 1 Sim. & Stu. 190; Saunders *v.* Newman, 1 B. & Ald. 258; Williams *v.* Morland, 2 B. & C. 915; Mason *v.* Hill, 3 B. & Ad. 304; 5 id. 1; s. c. Gardner *v.* Village of Newburgh, 2 Johns. Ch. 162; Belknap *v.* Belknap, ib. 468; Merritt *v.* Parker, 1 Coxe (N. J.), 460; Tyler *v.* Wilkinson, 4 Mason, 397; Coalter *v.* Hunter, 4 Rand. 58; Hammond *v.* Fuller, 1 Paige, 197; Hutchinson *v.* Coleman, 5 Halst. 74; King *v.* Tiffany, 9 Conn. 162; Blanchard *v.* Baker, 8 Greenl. 253; Omelvany *v.* Jaggers, 2 Hill (S. C.), 634, 640; St. Louis *v.* St. Louis, Stuart (Lower Canada), 575; Martin *v.* Jett, 12 La. 501; Webb *v.* The Portland Manuf. Company, 3 Sumner, 190; Davis *v.* Fuller, 12 Vt. 178; Evans *v.* Merriweather, 3 Scam. 492; Shreve *v.* Voorhees, 2 Green Ch. 25; Parker *v.* Griswold, 17 Conn. 288. In the case of Barron & Craig *v.* Corporation of Baltimore (American Jurist, n. 4, p. 203), the corporation, in the exercise of their municipal powers, diverted certain streams from their natural channels to a point near the plaintiff's wharf, on navigable water, within the harbor and city of Baltimore, to which point a large deposit of sand and earth was carried down by the streams, and injured the value of the wharf. It was held that a private action lay for the damage arising from this corporate act. It is stated to have been a rule in the French law, that the owner of the higher land had a right to divert a stream to his own utility, and that the owner of the land below could not contest it in the absence of a grant. Merlin, Rep. Jurisp. tit. Cours d'Eau. But the civil code very equitably qualified this doctrine. Code Civil, art. 641, 643, 644.

The rights respecting running streams, between adjoining proprietors of lands, are regulated by very precise rules in Pennsylvania. Thus, in M'Calmont *v.* Whittaker, 8 Rawle, 84, the water power belonging to a riparian owner was considered as consisting of *the difference of level between the surface where the stream in its natural surface first touches his land, and the surface where it leaves it.* The stream under that limitation of right might be occupied, in whole or in part, or not at all, without endangering the right or restricting the mode of its enjoyment, unless there has been an actual, prior, adverse occupancy protected by the statute of limitations. The riparian owner, by digging on his own land, cannot legally lower the surface of the water standing on a pool on the land above him, nor can he enter and lower the surface of the water as it leaves his land, by deepening the channel in the land below him. In Acton *v.* Blundell, 12 M. & W. 324, a very important question on water rights arose, and was very learnedly considered. The judgment of the Court of Exchequer Chamber made a distinction between waters running on the surface of lands, and flowing below it in a subterraneous course. The former was open to observation, notorious usage, calculation, and value, but not the latter; and it was held, that the owner of land through which water flows in a subterraneous course, has not such a right or interest in it as to be able to maintain an action against a land owner who digs a well on his own land, or carries on mining operations in his own land, in the usual manner, and drains away the water from the land of the adjoining owner, and leaves his well dry. The civil law was examined, and was found to sustain the judgment of the court. "Marcellus scribit; cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo nocendi, sed suum agrum meliorem faciendi id fecit." Dig. lib. 39, tit. 3, sec. 12. This question as to the rights of water running below the surface, seems not to have been raised and settled in the English law, and the decision does not affect the rights mentioned in this lecture respecting running waters over the surface of land. The court went upon the principle which

apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbor above him. (*a*)[1] Streams of water are

gives to the owner of the soil all that lies beneath the surface, and he has a right to apply such property to his own purposes at pleasure; and if, in the exercise of that right, he intercepts or drains his neighbor's underground springs, it is *damnum absque injuria*.

(*a*) Neal *v.* Henry, 1 Meigs (Tenn.), 17. If the owner of land flowed by a mill dam, *sells the mill and dam* and retains the land, the purchaser takes by the grant the right to overflow the land to the former extent. But if the owner *sells the land flowed*, and retains the mill and dam, without reserving the right to flow, he subjects himself to damage if he does it. Preble *v.* Reed, 17 Me. 169. The grant of a mill carries with it the use of the head of water necessary to its enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor. Rackley *v.* Sprague, 17 Me. 281.

[1] *Watercourses, &c.* — (*a*) *What Use is unlawful.* — As stated in the text, the diminution of a stream, to be unlawful, must be substantial, and sufficient to cause actual damage. Elliot *v.* Fitchburg R.R., 10 Cush. 191; Wheatley *v.* Chrisman, 24 Penn. St. 298; Wadsworth *v.* Tillotson, 15 Conn. 366; Gillett *v.* Johnson, 30 Conn. 180; Chatfield *v.* Wilson, 31 Vt. 358; Gerrish *v.* New Market Man. Co., 10 Fost. (30 N. H.) 478, 488; Dilling *v.* Murray, 6 Porter (Ind.), 324; Embrey *v.* Owen, 6 Exch. 353; Wood *v.* Waud, 3 Exch. 748, 781. The above seems to be the true test, on common law principles (*ante*, 437, n. 1; *post*, 448, n. 1), but perhaps is narrower than the rule which is often laid down in American cases, that a riparian proprietor has a right to the reasonable use of the water. Springfield *v.* Harris, 4 Allen, 494; Davis *v.* Getchell, 50 Me. 602; Gould *v.* Boston Duck Co., 13 Gray, 442; Pitts *v.* Lancaster Mills, 13 Met. 156; Hayes *v.* Waldron, 44 N. H. 580; Snow *v.* Parsons, 28 Vt. 459. Even in England it has been said that a riparian proprietor has a right to the ordinary use of the water for domestic purposes, whatever the effect upon those below him. Miner *v.* Gilmour, 12 Moore P. C. 131, 156, cited and approved in Nuttall *v.* Bracewell, L. R. 2 Ex. 1; Stein *v.* Burden, 29 Ala. 127; Springfield *v.* Harris, 4 Allen, 494. But if the water is used in a manner which is unlawful by the above tests, as if it be detained certain hours each day; Sampson *v.* Hoddinott, 1 C. B. N. S. 590; or permanently diverted; Tillotson *v.* Smith, 32 N. H. 90; Chatfield *v.* Wilson, 27 Vt. 670; 31 Vt. 358; Corning *v.* Troy Iron and Nail Factory, 40 N. Y. 191, 204; Van Hoesen *v.* Coventry, 10 Barb. 518; Parker *v.* Griswold, 17 Conn. 288; or if ice be cut as fast as formed; Mill R. Woollen Manuf. Co. *v.* Smith, 34 Conn. 462; nominal damages may be recovered, although the plaintiff, from not actually using the water, has not been damnified beyond the infraction of his right. See cases last cited, and Wood *v.* Waud, 3 Exch. 748, 772; *post*, 448, n. 1.

The statement in the text as to dams is confirmed by McCoy *v.* Danley, 20 Penn. St. 85. But the cause of action does not accrue on the building of the dam, but only when the upper land is actually flowed. Carlisle *v.* Cooper, 4 C. E. Green (19 N. J. Eq.), 256; 6 C. E. Green (21 N. J. Eq.), 576.

(*b*) *Subterranean Waters.* — The general right to drain subterranean waters not

intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar

flowing in definite channels, although feeding a spring or stream, is asserted in Chasemore *v.* Richards, 7 H. L. C. 349; 5 H. & N. (Am. ed.) 982; Frazier *v.* Brown, 12 Ohio St. 294; Delhi *v.* Youmans, 50 Barb. 316, and cases cited; Bliss *v.* Greeley, 45 N. Y. 671; New River Co. *v.* Johnson, 2 El. & El. 435; Clark *v.* Conroe, 38 Vt. 469, 474; Wheatley *v.* Baugh, 25 Penn. St. 528; Greenleaf *v.* Francis, 18 Pick. 117; Buffum *v.* Harris, 5 R. I. 243. But see Bassett *v.* Salisbury Mahuf. Co., 43 N. H. 569, 577, 579. (Malice would not alter the case. Chatfield *v.* Wilson, 28 Vt. 49; Rawstron *v.* Taylor, 11 Exch. 869, 878. But see Wheatley *v.* Baugh, *sup.*; Swett *v.* Cutts, 50 N. H. 439.) But there may be a distinction between subterranean water running in a well defined stream, and water merely percolating. New River Co. *v.* Johnson, 2 El. & El. 435, 445; Chasemore *v.* Richards, 7 H. L. C. 349, 374; Wheatley *v.* Baugh, *sup.* And in England the principle has been further limited by holding that the liberty to drain subterranean percolations is subject to the rights of adjoining owners in surface streams, so far that, if the flow of running surface water is substantially diminished by percolation from it to a drain, an injunction may be granted. Grand Junction Canal Co. *v.* Shugar, L. R. 6 Ch. 483.

In Bassett *v.* S. M. Co., *sup.*, an obstruction of natural drainage accompanied with damage was held actionable unless caused in the reasonable use of the defendant's own land; and the same test of reasonable use was afterwards applied to the obstruction of surface waters not flowing in a defined stream. Swett *v.* Cutts, 50 N. H. 439. These cases disapprove the doctrine of the English and other cases as to the right to drain subterranean percolations. A somewhat similar decision to Swett *v.* Cutts is Gillham *v.* Madison County R.R., 49 Ill. 484, which disapproves the Massachusetts decisions following.

(*c*) *Surface Drainage.* — In other cases it is generally laid down without qualification with regard to surface drainage that a party may lawfully obstruct the flow from his neighbor's land, Dickinson *v.* Worcester, 7 Allen, 19; Gannon *v.* Hargadon, 10 Allen, 106; Greeley *v.* Maine C. R.R., 53 Me. 200; Bowlsby *v.* Spear, 2 Vroom (31 N. J.), 351 (explaining Earl *v.* De Hart, 1 Beasl. 280); Pettigrew *v.* Evansville, 25 Wis. 223, 236 *et seq.*; Hoyt *v.* Hudson, 27 Wis. 656; see Beard *v.* Murphy, 37 Vt. 99; *contra*, Swett *v.* Cutts, *sup.*; or drain his own as he pleases, although he prevents the water from coming to his neighbor's land as before, provided he does not injure a neighbor by discharging the water upon his land in an unusual quantity, or at an unusual place. Rawstron *v.* Taylor, 11 Exch. 869; Curtis *v.* Ayrault, 47 N. Y. 73, 78. See, as to the proviso, Miller *v.* Laubach, 47 Penn. St. 154; Butler *v.* Peck, 16 Ohio St. 334; Waffle *v.* N. Y. C. R.R., 58 Barb. 413; Pettigrew *v.* Evansville, 25 Wis. 223. A party who, even without negligence, so changes the surface of his lands that a great quantity of water collects there, and when a freshet comes escapes through fissures and floods his neighbor's mines, has been held liable, although if he had taken none of the steps which led to the damage the plaintiff's loss would have been greater, Smith *v.* Fletcher, L. R. 7 Ex. 305, on the principle of Fletcher *v.* Rylands, *post*, iv. 110, n. 1.

With regard to the distinction between surface drainage and a watercourse, it is said that a watercourse must be more than surface drainage occasioned by extraordinary causes; it is a stream *usually* flowing in a definite channel with

every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance * of his neighbor. (*a*) Pothier *441

(*a*) Beissel *v.* Sholl, 4 Dallas, 211; Palmer *v.* Mulligan, 3 Caines, 307; Weston *v.* Alden, 8 Mass. 136; Colburn *v.* Richards, 13 Mass. 420; Cook *v.* Hull, 3 Pick. 269; Runnels *v.* Bullen, 2 N. H. 532; Tyler *v.* Wilkinson, 4 Mason, 397; Merritt *v.* Brinckerhoff, 17 Johns. 306; Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282; Williams *v.* Morland, 2 B. & C. 910; Thompson *v.* Crocker, 9 Pick. 59; Johns *v.* Stephens, 8 Vt. 308; Pugh *v.* Wheeler, 2 Dev. & Batt. 50; Wadsworth *v.* Tillotson, 15 Conn. 366. In Howell *v.* M'Coy, 3 Rawle, 256, the rule *sic utere tuo ut alienum non lædas*, in its application to the doctrine in the text, was laid down with precision and accuracy. It was held, that a person had a right to so much of the water of a stream running across his land as was needful and proper for supplying his tan yard and bark mill, and that he was bound to return the water so diverted, and not necessarily used and consumed in his business, without unnecessary diminution and waste, into the natural channel below, and that he was bound to return it without polluting or poisoning it by admixture with unwholesome substances, to the injury of the owner below. This was in accordance with the sound doctrine of the common law, as declared in Aldred's Case, 9 Co. 57, b, prohibiting acts creating a nuisance to one's neighbor. [Wheatley *v.* Chrisman, 24 Penn. 298; Carhart *v.* Auburn G. L. Co., 22 Barb. 297.]

So, again, in Arnold *v.* Foot, 12 Wend. 330, where a spring of water rises in the land of A., and runs a stream to the land of B., it was held, that A. has no right to divert the stream from its natural channel, though it be not more than sufficient for his domestic uses, and for the irrigation of his land. He may use it for domestic uses, and for his cattle, but not to irrigate his land, if that would exhaust the running stream. Brown *v.* Best, 1 Wilson, 174, s. p.; Smith *v.* Adams, 6 Paige, 435, s. p. The owner may dig a well on any part of his own land, though he thereby diminishes the

banks. But it may be small, and the flow not constant. Luther *v.* Winnisimmet Co., 9 Cush. 171, 174; Ashley *v.* Wolcott, 11 Cush. 192; Bowlsby *v.* Spear, *sup.*; Gillett *v.* Johnson, 30 Conn. 180; Hoyt *v.* Hudson, 27 Wis. 656; Rawstron *v.* Taylor, *sup.*; Broadbent *v.* Ramsbotham, 11 Exch 602.

lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. (*b*) But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.* (*c*)

(8) *Easements acquired and lost by Prescription.* — 1. (*Water.*) — This natural right to the use *of waters*, as an incident or particular easement to the land, may be abridged, or enlarged, or modified, by grant or prescription. (*d*) Though a stream be diminished in quantity, or corrupted in quality, by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time as to raise the presumption of a grant, and which presumption is the foundation of title by prescription, the other party whose land is below must take the stream subject to such adverse right; and twenty years' exclusive enjoyment of the water in any particular manner, affords, according to the English law, and the law of New York, Massachusetts, and several other states, * 442 presumption of such a grant. (*e*) But nothing short * of a

water in his neighbor's well, in the absence of grant, or adverse user, or malice. Greenleaf *v.* Francis, 18 Pick. 117.

(*b*) Traité du Contrat de Société, second App. n. 236.

(*c*) The Code Napoleon, n. 640, 641, 643, 644, and the Civil Code of Louisiana, art. 656, 657, establish the same just rules in the use of running waters. So, in North Carolina, Missouri, &c., the regulations of grist mills and mill dams is deemed a matter of public concern, and subject to statute prescriptions. Revised Statutes of Missouri, 1835; R. S. North Carolina, c. 74.

(*d*) Prescription is a title acquired by possession had during the time, and in the manner fixed by law. Co. Litt. 113, b.

(*e*) The time of limitation varies in particular states. Thus, in Connecticut and Vermont, the term of prescription is fifteen years, and in South Carolina five years. Manning *v.* Smith, 6 Conn. 289; Martin *v.* Bigelow, 2 Aiken, 184; Anderson *v.* Gilbert, 1 Bay, 375. But the law in South Carolina on the subject of *prescription* does not seem to take its rule from the Act of Limitations of 1712, for in Sims *v.* Davis, 1 Cheeves Law & Eq. 2, it was declared or assumed as settled law, that twenty years of enjoyment of a way over another's land, was presumptive evidence of right. Even a right of way over the unenclosed lands of another, may be acquired by twenty years'

contract, or of such a time of enjoyment of water diverted from the natural channel, or interrupted by dams or other obstructions, or materially changed in its descent or character, will justify the owner as against any land owner above or lower down the stream, to whom such alterations are injurious. In the character of riparian proprietors, persons are entitled to the natural flow of the stream without diminution to their injury, and to them may be applied the observation of Whitlock, J., in *Shury* v. *Piggot* (*a*) that a watercourse begins *ex jure naturæ*, and having taken a course naturally, it cannot be diverted. But, on the other hand, the owners of artificial works may acquire rights by actual appropriation, as against the riparian proprietor, and the extent of the right is to be measured by the extent of the appropriation, and the use of the water for a period requisite to establish a conclusive presumption of right. In such a case, the natural right of the riparian proprietor becomes subservient to the acquired right of the manufacturer. (*b*) The general and established doctrine is, that an exclusive enjoyment of water, or of

enjoyment thereof, under an assertion of right by the one party, or admissions thereof by the other. In Louisiana, the time of prescription varies according to the subject, from three to thirty years. Civil Code, art. 3435–3476. But I presume that generally, in this country, we follow the English time of prescription. It was so understood by Ch. J. Parker, in Gayetty *v.* Bethune, 14 Mass. 49, and in Gilman *v.* Tilton, 5 N. H. 231, and by Chancellor Vroom, in Shreve *v.* Voorhees in 2 Green (N. J.), 25. In Louisiana, the right *of drip* is acquired by prescription, on an enjoyment of ten years without complaint. Vincent *v.* Michel, 7 La. 52. In Pennsylvania, the time requisite to defeat the right to an incorporeal hereditament, by nonuser, is twenty one years. Dyer *v.* Dupui, 5 Wharton, 584. The English statute of 2 and 3 Wm. IV. c. 71, commonly called the Prescription Act, establishes the prescription of twenty years arising from the uninterrupted enjoyment of a way, or watercourse, or light, as a legal bar; and in this respect the statute seems to be declaratory of the preëxisting law, arising, however, from a presumption to be drawn by the jury. But this statute is liable to the reproach of being carelessly and obscurely drawn. See Gale & Whatley on Easements, 97, 123. The statute further declares, that an interruption of the use of an easement, acquiesced in for a year, with notice thereof, and of the authority under which it is made, will prevent a right from being acquired. It does not apply to the extinguishment of an easement already acquired.

(*a*) 3 Bulst. 339.

(*b*) Brown *v.* Best, 1 Wils. 174; Bealey *v.* Shaw, 6 East, 208; Tyler *v.* Wilkinson, 4 Mason, 397; Hatch *v.* Dwight, 17 Mass. 289. The law of watercourses, whether natural or artificial, is the same; and the uninterrupted flow of water for twenty years through an artificial canal, will establish a right through an adit artificially made for draining a mine, and used for a brewery below for twenty years after the working had ceased, and the mine could not afterwards be so worked as to pollute it. Magor *v.* Chadwick, 11 Ad. & El. 571; [White *v.* Chapin, 12 Allen, 516; s. c. 97 Mass. 101; Sutcliffe *v.* Booth, 9 Jur. N. S. 1037; Gaved *v.* Martyn, 19 C. B. N. S. 732; Ivimey *v.* Stocker, L. R. 1 Ch. 396; Nuttall *v.* Bracewell, L. R. 2 Ex. 1.]

light, or of any other easement, in any particular way, for twenty years, or for such other period less than twenty years, which in any particular state is the established period of limitation, (*c*) and enjoyed without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which might have been, but was not asserted. (*d*)

* 443 * The right is confined to the extent and the mode of enjoyment, during the twenty years. All that the law requires is, that the mode or manner of using the water should not be materially varied, to the prejudice of other owners; and the proprietor is not bound to use the water in the same precise manner, or to apply it to the same mill, for such a construction of the rule would stop all improvements in machinery. (*a*) He is only not to vary the enjoyment to the prejudice of his neighbor. He may, by his erections and dams, increase the quantity of the water appropriated, or increase the velocity of the current below, provided no material injury be produced to the land or works of the occupant of the stream below him, or to his enjoyment of them. This presumption of title, founded on that enjoyment, is equally well established in the English (*b*) and American

* 444 law. (*c*) To render * the enjoyment of any easement for

(*c*) State *v.* Wilkinson, 2 Vt. 480; Cuthbert *v.* Lawton, 8 M'Cord, 194; Bolivar M. Co. *v.* Neponset M. Co., 16 Pick. 241. See, also, p. 448, n. b, c. Less than the prescribed term of limitation may, under circumstances, raise the presumption of the dedication of land to the public use. State *v.* Catlin, 8 Vt. 530. So, the exclusive enjoyment of an easement, as a right of way, for a less period than twenty years, may form an equitable estoppel to the claim of another person, who has, by positive acts of acquiescence, encouraged an innocent purchaser to buy the land to which the easement was appurtenant. Lewis *v.* Carstairs, 6 Wharton, 193.

(*d*) Shaw *v.* Crawford, 10 Johns. 236; Bealey *v.* Shaw, 6 East, 214; Johns *v.* Stevens, 3 Vt. 316. No time short of twenty years will legalize a nuisance; and it is no defence to an action on the case for a nuisance, in carrying on the business of a tallow chandler, that the defendant had carried on a noxious and offensive trade for three or even ten years before the plaintiff became possessed of his premises. Bliss *v.* Hall, 4 Bing. [N. C.] 183.

(*a*) Palmer *v.* Kebblewhaite, 2 Show. 250.

(*b*) Lewis *v.* Price, Esp. Dig. 636; Bradbury *v.* Grinsell, 2 Saund. 175, *a*; Brown *v.* Best, 1 Wils. 174; Bealey *v.* Shaw, 6 East, 208; Balston *v.* Bensted, 1 Camp. 463; Saunders *v.* Newman, 1 B. & Ald. 258; Barker *v.* Richardson, 4 id. 578; Cross *v.* Lewis, 2 B. & C. 686; Williams *v.* Morland, ib. 910; Livett *v.* Wilson, 3 Bing. 115; Gray *v.* Bond, 2 Brod. & B. 667; Wright *v.* Howard, 1 Sim. & Stu. 190; Mason *v.* Hill, 3 B. & Ad. 304.

(*c*) Hazard *v.* Robinson, 3 Mason, 272; Gayetty *v.* Bethune, 14 Mass. 49; Hoffman *v.* Savage, 15 id. 132; Sherwood *v.* Burr, 4 Day, 244; Ingraham *v.* Hutchinson, 2 Conn. 584; Stiles *v.* Hooker, 7 Cowen, 266; Campbell *v.* Smith, 3 Halst. 189; Cooper

twenty years a presumption *juris et de jure*, or conclusive evidence of right, it must have been continued, uninterrupted, or pacific, and adverse, that is, under a claim of right, with the

v. Smith, 9 Serg. & R. 26; Strickler *v.* Todd, 10 id. 63; Tyler *v.* Wilkinson, 4 Mason, 397; Belknap *v.* Trimble, 3 Paige, 577. In Massachusetts, the common law remedy against a mill owner for overflowing another's land, is taken away, and a special and more limited remedy substituted. The provincial statute of 1718 allowed the dams of corn and saw mills to stand, though they should cause the land of others to be overflowed, and the injured party was, by a particular process, to have an annual compensation in damages assessed by a jury. Mills, in the infancy of the country, were public easements, and required marked encouragement. But this statute was substantially, and Ch. J. Parker thinks, incautiously, renewed in 1796, when the necessity of such encouragement to mill erections had ceased, and lands had generally risen in value. Stowell *v.* Flagg, 11 Mass. 364. The Massachusetts Revised Statutes of 1836, p. 676, continued in substance the Colony Act, with equitable and careful regulations. But the exceptionable principle of the act is, that it allows the land above the mill to be overflowed, in the first instance, at the pleasure of the mill owner, and leaves the injured party to seek his compensation subsequently. There are similar statute provisions in the states of Maine, Rhode Island, and Virginia; and they appear, said the Ch. Justice, to be material and unjustifiable abridgments of the common law right to the enjoyment of property. The statute of Massachusetts, of 1713, and which was continued in Maine, under the modified statutes of 1821 and 1824, was deemed so inequitable and oppressive to the owners of lands overflowed, that in 1838 a bill was prepared by one, and submitted to another legislature in the state of Maine for repealing the acts on the subject, so as to leave rights and remedies as to overflowing lands by mills to the operation of the common law, as is the case in most of the other states. In Virginia, the statute regulations concerning the use of running streams, and the erection of mill dams, provides, that if a person owning land on both sides of a stream wishes to build a dam, he may apply at once, without notice to the owners of the land above and below, for a writ *ad quod damnum*. The jury summoned under that writ are to examine the lands above and below belonging to others, and declare the damages that would arise to the several proprietors, who are then to be summoned, and the court determines whether, under all circumstances, leave ought to be given to build the dam. If given, the party applying is laid under certain conditions for preventing the obstruction of the passage for fish and ordinary navigation, and convenient crossing of the watercourse, as should seem meet. The applicant upon paying the damages assessed to the parties entitled, may proceed to erect his mill and dam. 2 Revised Code, c. 235; Crenshaw *v.* Slate River Company, 6 Rand. 245. There is a similar provision, if a person, desirous to build a mill, owns the land only on one side of the stream. 1 Revised Code of Virginia, 277; Revised Code of Mississippi, 1824, p. 336. There are statute provisions of a similar nature in Illinois, North Carolina, Alabama, &c., relative to the erection of mills and dams affecting other riparian owners. Revised Laws of Illinois, ed. 1833; 1 N. C. Revised Statutes, 1837, p. 420; Aiken's Ala. Dig. 2d ed. 325. And in Indiana, the act of 1831 declares minute regulations respecting grist mills and millers. So in Pennsylvania, by statute of March 28, 1803, the owners of lands adjoining navigable streams of water, except the rivers Delaware, Lehigh, and Schuylkill, may erect dams for mills and other waterworks, and use the requisite water therefor, provided they do not obstruct or impede the navigation of the stream, or prevent the fish from passing up the same. [Todd *v.* Austin, 34 Conn. 78]

implied acquiescence of the owner. (a) The time of enjoyment requisite for the prescription is deemed to be uninterrupted, when it is continued from ancestor to heir, and from seller to buyer.

It must be a lawful continuation from one person to another,
*445 and any * interruption of the enjoyment by an adverse claim and possession destroys the prescription. (a) [1]

The cases usually say, that this right, acquired by twenty years' undisturbed and uninterrupted enjoyment of an easement, is founded on the presumption of a grant or release; and if so, it is not an absolute title, but one that is liable to be rebutted by

(a) Bracton, lib. 2, c. 28, sec. 1; ib. lib. 4, c. 88, sec. 1; Co. Litt. 113, b; Code Napoleon, art. 2229; Sargent v. Ballard, 9 Pick. 251; Rowland v. Wolfe, 1 Bailey (S. C.), 56; Corning v. Gould, 16 Wend. 531; Colvin v. Burnett, 17 Wend. 564. [See 445, n. 1.]

(a) Inst. Justin. lib. 2, tit. 6, sec. 7, 8; Sargent v. Ballard, *supra*.

[1] *Easements by Prescription.* — An interruption of the enjoyment before a right is acquired destroys the effect of the previous user. Pollard v. Barnes, 2 Cush. 191; *post*, 450. Such is the pulling down of a temporary dam which caused certain land to be flowed, although only done to make way for a permanent one. Branch v. Doune, 18 Conn. 233. See Carlisle v. Cooper, 4 C. E. Green (N. J.), 256; s. c. 6 id. 576. But when a dam is a permanent structure, kept in such repair as is required for its economical use, a right may be gained to keep the water up to its ordinary height, although it has not been kept up to that height constantly. Carlisle v. Cooper, *sup.*; Winnipiseogee Co. v. Young, 40 N. H. 420.

The user must be adverse; Barnes v. Haynes, 13 Gray, 188; as an unexplained user of twenty years is presumed to be; Hammond v. Zehner, 21 N. Y. 118; Polly v. M'Call, 37 Ala. 20; Blake v. Everett, 1 Allen, 248; so of one which begun under an oral gift as distinguished from a mere license. Stearns v. Janes, 12 Allen, 582; Arbuckle v. Ward, 29 Vt. 43; Miller v. Garlock, 8 Barb. 153. But not so of the use of the whole water power by means of a dam, as against the opposite owner, while he has no occasion to use the water. Pratt v. Lamson, 2 Allen, 275.

It seems clear on principle that to obtain a right by prescription the use should be as of right against all the world, inasmuch as the right when obtained binds the fee. Bright v. Walker, 1 Cr., M. & R. 211, 221; Aust. Jur. lect. 49, 3d ed. 837, 838. See lect. 50, ib.

The enjoyment must be with the acquiescence of the owner; so that no right is gained if the use has not been visible or known Hannefin v. Blake, 102 Mass. 297; Carbrey v. Willis, 7 Allen, 368; Smith v. Miller, 11 Gray, 145; Napier v. Bulwinkle, 5 Rich. 311, 324; Chadwick v. Trower, 6 Bing. N. C. 1. But if visible, knowledge may be presumed without proof. Perrin v. Garfield, 37 Vt. 304, 311. Otherwise, it seems, if the alleged servient owner and his agents have been absent and ignorant during the whole time. Bright v. Walker, 1 Cr., M. & R. 211, 219. So no right is acquired as against a lunatic; Edson v. Munsell, 10 Allen, 557; a *feme covert*; McGregor v. Wait, 10 Gray, 72; or a minor; Watkins v. Peck, 13 N. H. 360.

As to what interference with such easements is actionable, see 448, n. 1. As to abandonment, see 449, n. 1.

circumstances, and is to stand good until the presumption of title be fully and fairly destroyed. This was the doctrine so late as the cases of *Campbell* v. *Wilson*, (*b*) and of *Livett* v. *Wilson*, (*c*) and it is the prevalent language in the books, English and American. (*d*) But some of the later English authorities seem to give to this presumption the most unshaken stability, and they say it is conclusive evidence of title. In *Tyler* v. *Wilkinson*, (*e*) where the whole law on the subject is stated with learning, precision, and force, the presumption is even made to be one *juris et de jure*, and to go to the extinguishment of the right in various ways, as well as by grant. The operation of the presumption, founded on the fact of the uninterrupted enjoyment of the easement for twenty years, is said to exist, notwithstanding personal disabilities of particular proprietors might have intervened, and where, in the ordinary course of proceedings, grants would not be presumed. (*f*)

The nature and extent of the right acquired by prior occupancy of a running stream becomes frequently an important and vexatious question between different riparian proprietors. *If I am the first person who applies the water of a run- *446 ning stream to the purpose of irrigation, or of a mill, I cannot afterwards be lawfully disturbed in any essential degree, in the exercise of my right, though I may not have enjoyed it for twenty years, provided the water be used by me in such a reasonable manner as not to divert the natural course of the stream from the lands below, or essentially to destroy the same use of it as it naturally flowed over the lands of the proprietors above and below me. (*a*) Prior occupancy short of * the statute *447

(*b*) 8 East, 294. (*c*) 8 Bing. 115.

(*d*) A plea of an easement enjoyed for twenty years under the statute of 2 and 3 William IV., must state that the enjoyment was had *as of right*. Holford *v.* Hankinson, 5 Q. B. 584.

(*e*) 4 Mason, 397.

(*f*) No prescription can give a title to land of which more certain evidence may be had. It only applies to incorporeal hereditaments, or for what lies in grant. Wilkinson *v.* Proud, 11 M. & W. 33; [Carlyon *v.* Lovering, 1 H. & N. 784, 798; Ferris *v.* Brown, 3 Barb. 105; Caldwell *v.* Copeland, 37 Penn. 427, 431.]

(*a*) Platt *v.* Johnson, 15 Johns. 213. In Hatch *v.* Dwight, 17 Mass. 289, the Ch. J. went beyond the doctrine in the text, for he said, that the first occupant of a mill site, by erecting a dam and mill, had a right to water sufficient to work his wheels, even if it should render useless the privilege of any one above or below upon the same stream. If the right of prior occupancy, in the case stated, did not go thus far, the water privilege would seem to be rendered wholly useless for mill purposes to all parties. A more limited rule was laid down in Martin *v.* Bigelow, 2 Aiken, 184; for

term of prescription, and without consent or grant, will not confer any exclusive right, as between different riparian proprietors, to the use of a running stream. (*a*) If, however, the prior occupant has enjoyed the use of water in any particular mode for twenty years, so as to have acquired a title by prescription, he is, in that case, entitled to remain undisturbed in his possession, in the mode and to the extent commensurate with the right as it has been acquired and defined by enjoyment. (*b*) But if the prior use of the stream should have been materially altered within the twenty years, to the injury or annoyance of any adjoining occupant, who had, in the mean time, possessed himself of the use of the water, the title by prescription would be
* 448 wanting as to such * alterations, and they would be unlawful, and, consequently, a ground of action. (*a*)

2. (*Light.*) — The elements of *air and light* are rights or incidents attached to the enjoyment of real estate, and the law gives weight and effect to the first appropriation of them. They may be classed under the head of incorporeal hereditaments, and the Roman law considered things of this kind, consisting in rights and privileges, as *res incorporales*. (*b*) If I build my house close to my neighbor's wall, I cannot compel him to demolish it, though it may obstruct my light, for the first occupancy is in him. On the other hand, the owner of a house will be restrained by injunction, and be liable to an action upon the case, if he makes any

it was there held, that a mere prior occupancy of a running stream by a mill, did not prevent another person from using the same water above, on the same stream, in a prudent way, unless the mill below had been erected, and the water used for it more than fifteen years, being the period of limitation. The court said, that the common law on this point was not applicable in Vermont, as it would go to allow the person who erected the first mill on a small stream to control and defeat all mill privileges on the same stream above him. So, in Anthony *v.* Lapham, 5 Pick. 175, it was declared that the owner of land through which a natural stream flows may use it for watering his cattle or irrigating his land, but he must use it in the latter way so as to do the least possible injury to his neighbor below, and he must return the surplus into the natural channel.

(*a*) Tyler *v.* Wilkinson, 4 Mason, 401, 402.

(*b*) Saunders *v.* Newman, 1 B. & Ald. 258; Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282; Sherwood *v.* Burr, 4 Day, 244.

(*a*) Goodrich *v.* Knapp, MS. case, decided in the Supreme Court of New York, 1828. [The same principle applies to acts substantially in excess of prescriptive rights already acquired. Crossley *v.* Lightowler, L. R. 2 Ch. 478; Shrewsbury *v.* Brown, 25 Vt. 197.]

(*b*) Inst. 2, 2. [See also Townsend *v.* McDonald, 2 Kern. 381; Pillsbury *v.* Moore, 44 Me. 154; 402, n. 1.]

erections or improvements so as to obstruct the *ancient* lights of an adjoining house. The lights must be ancient to entitle them to this special protection; and it would seem, from the opinion of the judges in *Bury* v. *Pope*, (*c*) that lights of thirty or forty years' standing were not deemed ancient within the purview of the old rule on the subject. There was no doubt, as early as the English revolution, that window lights, which had become established by the legal time of prescription, were entitled to be protected against obstructions. (*d*) In modern times the period of prescription or limitation has been shortened, and the uninterrupted and exclusive enjoyment of window lights for twenty years has been held to be sufficient to raise a presumption of title to the unobstructed enjoyment of that protection. (*e*) In *Daniel* v. *North*, (*f*) it was considered as settled law, that twenty years' quiet and uninterrupted possession of window lights was sufficient ground for a jury to presume a grant or covenant, provided there was evidence that the owner or landlord (and not the tenant merely) of the opposite premises had knowledge during the twenty years of the fact. The right so acquired is not absolute, but *prima facie* evidence only of right, and it is liable to be rebutted and destroyed by proof to the contrary, and it is likewise subject to qualifications. Thus ancient lights are entitled to protection as such, in the precise mode, and to the extent enjoyed during the period which gave them the claim to be ancient lights, and no further. (*g*) Nor can a person sustain a claim to an ancient window light, in derogation of his own grant of the adjoining ground, without reservation. (*h*)

(*c*) Cro. Eliz. 118.

(*d*) Villers *v.* Ball, 1 Show. 7; Palmer *v.* Fletcher, 1 Lev. 122; Aldred's Case, 9 Co. 58.

(*e*) Wilmot, J., 1761, in Lewis *v.* Price, Esp. Dig. 636, 2d ed.; s. c. Wms. Saund. ii. 175, note *a*, *b*, *c*; Darwin *v.* Upton, Wms. note, ib.; 8 T. R. 159, cited by Buller, J.; Back *v.* Stacy, 2 Russ. 121; Manier *v.* Myers, 4 B. Mon. 520, 521.

(*f*) 11 East, 371.

(*g*) Martin *v.* Goble, 1 Camp. 320.

(*h*) Palmer *v.* Fletcher, *supra*; Cox *v.* Matthews, 1 Vent. 237; Holt, C. J., in Roqwell *v.* Pryor, 6 Mod. 116; Crompton *v.* Richards, 1 Price, 27; Story *v.* Odin, 12 Mass. 157. Nor will the making and enjoying window lights for twenty years conclude the adjoining neighbor, and prevent him from building up against such lights, unless there be evidence of his knowledge of the fact sufficient to presume a grant. A tenant in possession during the time is not sufficient of itself to raise the presumption, for he might have been indifferent to the encroachment. Daniel *v.* North, 11 East, 372. By the custom of the city of London, a man may build to any height, upon

This doctrine of ancient lights, or, in the language of the writers on the civil law, borrowed from the law itself, of "servitudes of lights or prospect" attached to estates, is laid down with great precision in the Pandects, and in the codes of those modern nations which have made the civil law the basis of their municipal law; (*i*) and it is evidence of much civilization and refinement in the modifications of property. But the doctrine is not much relished in this country, owing to the rapid changes and improvements in our cities and villages. A prescriptive right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights, and views, and prospects, or, on the other hand, to protect a house or garden from being looked in upon by a neighbor, would affect essentially the value of vacant lots, or of lots with feeble and low buildings upon them. (*j*) It was admitted, in *Mahan* v. *Brown*, (*k*) that a man might open a window in his own house overlooking the privacy of B., and unless the right to the window light had been secured by grant, acquiescence, or otherwise, the only remedy for B. would be the erection, on his own soil, of an obstruction opposite the offensive window, and in that way shut out the light.[1] At

ancient foundations, although he darkens his neighbor's lights thereby, provided all the four walls belong to him. A reversioner may recover for obstructing ancient lights, to the injury of his reversionary interest. Shadwell v. Hutchinson, 3 Carr. & P. 615.

(*i*) *Vide supra*, 436, note *a*.

(*j*) The English law does not recognize a servitude of mere prospect, except by express grant or covenant. Aldred's Case, 9 Co. 58; Tindal, Ch. J. in Penwarden v. Ching, Moo. & Mal. 400.

(*k*) 13 Wend. 261.

[1] *Light and Air.* — (*a*) In England it is not lawful even to obstruct new windows if it cannot be done without also obstructing ancient lights. Tapling v. Jones, 11 H. L. C. 290; 12 C. B. N. S. 826; 11 C. B. N. S. 283. There is a remedy for the obstruction of ancient lights both at law and in equity, and if such lights are obstructed, the fact that the owner has contributed to the diminution of light will not prevent his maintaining the action or obtaining an injunction to which he would otherwise have been entitled. Staight v. Burn, L. R. 5 Ch. 163; Tapling v. Jones, *sup.*; Martin v. Headon, L. R. 2 Eq. 425; Calcraft v. Thompson, 15 W. R. 887; Clarke v. Clark, L. R. 1 Ch. 16; Yates v. Jack, ib. 295. In many American courts it has been denied that a right to light and air could be obtained by prescription. Carrig v. Dee, 14 Gray, 183; Paine v. Boston, 4 Allen, 168; Mullen v. Stricker, 19 Ohio St. 135; Haverstick v. Sipe, 33 Penn. St. 368; Cherry v. Stein, 11 Md. 1; Ward v. Neal, 37 Ala. 500; Pierre v. Fernald, 26 Me. 436; Hubbard v. Town, 33 Vt. 295. See Napier v. Bulwinkle, 5 Rich. 311. So in England as to wind for a windmill.

length the Supreme Court of New York, in *Parker* v. *Foote*, (*l*) went so far as to declare that the modern English doctrine, on the subject of lights, was an anomaly in the law, and not applicable to the condition of the cities and villages in this country. The injury resulting from window views was deemed rather speculative, and not analogous to the case of ways, commons, markets, watercourses, &c., where the injury was direct, palpable, and material; and the same rule of presumption ought not to apply to two classes of cases so essentially different. Though this incorporeal servitude of light is familiar to the laws of all civilized nations, and is, under due regulations, a very valuable incident to the enjoyment of property, there does not seem to be any well founded objection to the decision in the case last referred to, so far as it goes to declare that the enjoyment of the easement must be uninterrupted for the period of twenty years, and under a claim or assertion of right, and with the knowledge and acqui-

(*l*) 19 Wend. 309.

Webb *v.* Bird, 13 C. B. N. S. 841; s. c. 10 C. B. N. S. 268.

(*b*) With regard to pollutions of air, the question whether the plaintiff comes to a nuisance or the reverse is not now applied as the test of his right of action. Bliss *v.* Hall, 4 Bing. N. C. 183; s. c. 5 Scott, 500; *ante*, 442, (*d*); conceded on both sides in Bamford *v.* Turnley, 3 Best & S. 62, 70, 78. An action lies for noxious vapors which visibly diminish the value of the plaintiff's property; but whether a merely personal annoyance is an actionable nuisance seems to depend on the time, the place, and the trades carried on in the neighborhood. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642; s. c. 4 Best & S. 608, 616. See Crossley *v.* Lightowler, L. R. 3 Eq. 279, 289; L. R. 2 Ch. 478, 481.

(*c*) It may be remarked here that the rule that damage to be unlawful must be substantial has been applied to acts done in the enjoyment of a party's own land, but interfering with the support, Smith *v.* Thackerah, L. R. 1 C. P. 564; *ante*, 437, n. 1, (*b*); Bonomi *v.* Backhouse, El., Bl. & El. 622; 9 H. L. C. 503; Chasemore *v.* Richards, 7 H. L. C. 349, 382, or the flow of water in a stream, Elliot *v.* Fitchburg R.R., 10 Cush. 191; *ante*, 440, n. 1, (*a*), or the ancient lights (where, as in England, they are allowed to be acquired), Beadel *v.* Perry, L. R. 3 Eq. 465; Dent *v.* Auction Mart Co., L. R. 2 Eq. 245; Kelk *v.* Pearson, L. R. 6 Ch. 809; and other similar incidents of the land of another; as distinguished from direct trespasses, or infractions of rights exactly determined by the words of a deed or covenant, which are unlawful without proof of damage. Northam *v.* Hurley, 1 El. & Bl. 665; Western *v.* McDermott, L. R. 2 Ch. 72; L. R. 1 Eq. 499; Jordan *v.* Mayo, 41 Me. 552; Brooks *v.* Reynolds, 106 Mass. 31. See Chasemore *v.* Richards, 7 H. L. C. 349, 369. But there would probably be a remedy, both at law and equity, for acts sufficient to cause actual damage, although the plaintiff was not using his rights at the time. See 440, n. 1; Yates *v.* Jack, L. R. 1 Ch. 295; Bickett *v.* Morris, L. R. 1 H. L. Sc. 47; 413, n. 1; Corning *v.* Troy Iron & Nail Factory, 40 N. Y. 191. But see Smyles *v.* Hastings, 22 N. Y. 217 Compare ii. 561, n. 1.

escence of the owner; and that the presumption of right, under these circumstances, is not an absolute bar, and conclusive, but it may be explained and repelled, and is only a matter of evidence for a jury to infer the right. (*m*)

3. (*Air.*) — The right to the enjoyment of free and pure *air*, as incident to the estate, is likewise under the protection of the law If, therefore, any thing offensive be erected so near the house of another as to corrupt or pollute the air, it becomes a nuisance and an action lies for the injury. On the other hand, if a tanyard for instance, renders the air of the house and garden, subsequently established, adjoining it, less pleasant and salubrious, the nuisance is remediless as to the person who voluntarily plants himself near it. (*n*)

(9) *Easements lost by Abandonment.* — A right acquired by use may, however, be lost by nonuser; and an absolute discontinuance of the use for twenty years, affords a presumption of the extinguishment of the right in favor of some other adverse right. (*o*) As an enjoyment for twenty years is necessary to found a presumption of a grant, the general rule is, that there

(*m*) The Court of Appeals in South Carolina, in the case of M'Cready *v.* Thomson, 1 Dudley Law & Eq. 131, held, that an action in the case lay for obstructing the air and light of the plaintiff's windows, which he had the uninterrupted enjoyment of as an easement by the prescriptive right of twenty years and upwards. It is a reasonable right, contributing to the comfort and value of a person's habitation. So the Court of Chancery will, by injunction, in a proper case, prevent the obstruction of light enjoyed for twenty years. Robeson *v.* Pittinger, 1 Green Ch. (N. J.) 57.

(*n*) 2 Bl. Comm. 402, 403; Com. Dig. tit. Action upon the Case for a Nuisance, A. C.; Rex *v.* Cross, 2 Carr. & P. 483. See *supra*, p. 441, n. a, 442, n. d. See further, as to nuisance disturbing the rightful enjoyment of easements, Sir Wm. Jones, 222; Doddridge, J., in Jones *v.* Powell, Palmer, 536; 2 Rol. Abr. Nusans, G. pl. 1, 8, 9; Bower *v.* Hill, 1 Bing. N. C. 549; Hall *v.* Swift, 6 Scott, 167; Gale & Whatley on Easements, 895, 896. It is said by the Chancellor, in Catlin *v.* Valentine, 9 Paige, 575, that a slaughter-house in a city is *prima facie* a nuisance to the neighborhood, and that it was not requisite to constitute a nuisance that the noxious business should endanger the health of the neighborhood. It is sufficient if it be offensive to the senses, and renders the enjoyment of life there uncomfortable.

The remedies for disturbance in the rightful enjoyment of an easement are: 1. By act of the party; for the injured party may enter upon another's land and abate the nuisance. 2. By action at law. 3. By suit in equity. See Gale & Whatley on Easements, part 4, c. 2.

(*o*) Prescott *v.* Phillips, decided in 1797, and reported in 2 Evans's Pothier, 186 Lawrence *v.* Obee, 3 Camp. 514. Bracton laid down the same principle, that incorporeal rights acquired by use may be equally lost by disuse. Lib. 4; De Assisa Novæ Disseisinæ, c. 38, sec. 3; Corning *v.* Gould, 16 Wend. 531. This last case contains a full and learned view of the law on the subject.

must be a similar nonuser to raise the presumption of a release. The mere nonuser of an easement, for twenty years, will afford a presumption of a release or extinguishment, but not a very strong one, in a case unaided by circumstances; but if there has been, in the mean time, some act done by the owner of the land charged with the easement, inconsistent with, or adverse to the existence of the right, a release or extinguishment of the right will be presumed. (*l*) The doctrine of the civil law was, that a servitude was presumed to have been released or renounced, when the owner of the estate to which it was due permitted the owner of the estate charged with it to erect such works on it, as a wall, for instance, which naturally and necessarily hindered the exercise of the right, and operated to annihilate it. The mere sufferance of works to be erected, repugnant to the *enjoyment *449 of the servitude, would not raise the presumption of a release, unless the sufferance continued for a time requisite to establish a prescription; or the works were of a permanent and solid kind, such as edifices and walls, and presented an absolute obstacle to every kind of enjoyment of the easement. There must be a total cessation of the exercise of the right to the servitude, during the entire time necessary to raise the presumption of extinguishment, or there must have been some permanent obstacle permitted to be raised against it, and which absolutely destroyed its exercise. (*a*) If the act which prevents the servitude be

(*l*) See the reasoning of Sir William D. Evans, in Evans's Pothier, ii. 186. In the case of Wright *v.* Freeman, 5 Harr. & J. 477, a presumption of extinguishment by nonuser, of a right of way for twenty years, was held to be admissible, but it was fortified in that case by acts of the party, and these acts were relied on by the court. Mr. Justice Story, in Tyler *v.* Wilkinson, says, that the proprietors of Sergeant's trench were entitled to so much, and no more of the water of the river, as had been accustomed for twenty years to flow through their trench, to and from their mills, whether actually used or necessary for the mills or not. See, also, White *v.* Crawford, 10 Mass. 183. In Arnold *v.* Stevens, 24 Pick. 106, the court protected an easement so far against the presumption of abandonment, as to hold that the mere neglect of the grantee for forty years to exercise the right to dig ore in the land of another, would not extinguish the right, when there was no act of *adverse* enjoyment on the part of the owner of the land. In 10 Pick. 310, Emerson *v.* Wiley, it was held, that a right of way is not lost by nonuser for less than twenty years; and in Yeakle *v.* Nace, 2 Wharton, 128, that twenty-one years' adverse occupation extinguishes it.

(*a*) Dig. 8. 6. 5; Voet, Com. ad Pand. lib. 8, tit. 6, secs. 5, 7; Toullier's Droit Civil Français, iii. n. 678; Répertoire de Jurisprudence, par Merlin, tit. Servitude, c. 30, sec. 6, c. 88. Toullier says, that the article Servitude, in the Répertoire, is composed with great care. Civil Code of Louisiana, art. 815, 816; Haight *v.* Proprietors of the Morris Aqueduct, 4 Wash. 601. In Dyer *v.* Sanford, 9 Met. 395, some nice

incompatible with the nature or exercise of it, and be by the party to whom the servitude is due, it is sufficient to extinguish it and if it be extinguished for a moment, it is gone forever. (*b*) [1]

Unity of possession of the estate to which an easement is attached, and of the estate which the easement encumbers, is, in effect, an extinguishment of the easement. But this does not apply to a way of necessity; and though it be suspended by the unity of possession, it revives by necessary implication, when the

questions respecting easements were discussed, and it was laid down that an easement could not be extinguished or renounced by a parol agreement between the owner of the dominant and the servient tenement, but the owner of the dominant tenement may make such changes in the use and condition of the estate as to amount to an abandonment. So, an executed license may operate as an abandonment to the extent of it. [Veghte *v.* Raritan Water P. Co., 4 C. E. Green (N. J.) 142; Morse *v.* Copeland, 2 Gray, 302; *post*, 452, n. 1.]

(*b*) Taylor *v.* Hampdon, 4 M'Cord, 96. The statute of 2 and 3 William IV. c. 71 declared, that no claim to any way or other easement, or to any watercourse, or the use of any water, should be defeated by showing the commencement of the right or user at any time prior to twenty years' enjoyment; and after forty years the right should be deemed absolute. So, a claim to the use of light, enjoyed for twenty years without interruption, should be deemed absolute. Flight *v.* Thomas, 11 Ad. & El. 688. The better doctrine would seem to be, that the mere intermittance of the user of an easement, unless accompanied by some evident intention to renounce the right, does not amount to an abandonment. So, acts of interruption must be known and acquiesced in to raise the presumption of having renounced the right. Gale & Whatley on Easements, 880–888.

[1] *Abandonment.*—It has been held that mere nonuser for twenty years of an easement created by deed is not sufficient proof of abandonment. Hall *v.* McCaughey, 51 Penn. St. 43; Bannon *v.* Angier, 2 Allen, 128; Smyles *v.* Hastings, 22 N. Y. 217; 24 Barb. 44; Castle *v.* Shipman, 85 N. Y. 533, 542; Jewett *v.* Jewett, 16 Barb. 150; Owen *v.* Field, 102 Mass. 90, 114. And there seems to be no sound distinction between easements created by deed and those acquired by prescription; Veghte *v.* Raritan Water P. Co., 4 C. E. Green, 142; Ward *v.* Ward, 7 Exch. 838; Stokoe *v.* Singers, 8 El. & Bl. 31; Lovell *v.* Smith, 3 C. B. N. S. 120; Angell Waterc. 6 ed. § 252, n. 4; though it is suggested in many of the first cited cases; see 2 Wash. R. P. 56; Farrar *v.* Cooper, 34 Me. 394. In one case of easement by prescription it is suggested that during the nonuser of the right an intent not to abandon it should be indicated. Crossley *v.* Lightowler, L. R. 2 Ch. 478 482.

Other easements may be lost in less than twenty years, in the way in which it is said that ancient lights may be, text, 450. Reg *v.* Chorley, 12 Q. B. 515; Crossley *v.* Lightowler, L. R. 2 Ch. 478, 482; Raritan Water Power Co. *v.* Veghte, 6 C. E. Green (21 N. J. Eq.), 463, 480. But it would seem that the abandonment must have been acted upon. Stokoe *v.* Singers, 8 El. & Bl. 31, 37. See Lovell *v.* Smith, 3 C. B. N. S. 120, 127; Cook *v.* Mayor, &c., of Bath, L. R. 6 Eq. 177; D. *sup.* n. (*a*). See also D. 8. 2. 6, where a distinction is mentioned between rustic and urban servitudes; 452, n. 1.

possession is again severed. (*c*) Nor is a watercourse extinguished by unity of possession, and this from the necessity of the case, and the nature of the subject. This was settled, after a very elaborate discussion, in *Shury* v. *Piggot*, (*d*) and that case was accurately examined and deliberately confirmed, in all its parts, in *Hazard* v. *Robinson*. But the use of water, in a particular way, by means of an * aqueduct, may be extinguished by *450 the unity of possession, and title of both the parcels of land connected with the easements; and if the adverse enjoyment of an easement be extinguished, within the period of prescription, by the unity of title, and the land which possesses the easement be shortly thereafter separated again from the land charged with the easement, by a reconveyance, the right to be acquired by user must commence *de novo* from the last period. (*a*) As to light and air, the right to them is acquired by mere occupancy, and will continue so long only as the party continues the enjoyment, or shows an intention to continue it. A person may lose a right to ancient lights by abandonment of them, within a less period than twenty years, if he indicates an intention, when he relinquishes the enjoyment of them, as by building a blank wall to his house, never to resume it. (*b*) [1] It is the modern doctrine, that the ceasing to enjoy such an easement, acquired by occupancy, will destroy the right, provided the discontinuance be absolute and decisive, and unaccompanied with any intention to resume it within a reasonable time; and it is a wholesome and wise qualification of the rule, considering the extensive and rapid improvements that are everywhere making upon real property. (*c*)

(10) *Easements by Dedication to the Public.* — Dedications of land for public purposes, as for charitable and religious uses, and for public highways and village squares, enure as grants, and may be valid, without any specific grantee *in esse* at the time, to

(*c*) 1 Saund. 323, note 6; Story, J., in Hazard v. Robinson, 3 Mason, 276.

(*d*) 3 Bulst. 339; Popham, 166.

(*a*) Manning v. Smith, 6 Conn. 289. (*b*) Ibid.

(*c*) Moore v. Rawson, 3 B. & C. 332; Tindal, C. J., in Liggins v. Inge, 7 Bing. 698, s. p. It was held, in Moore v. Rawson, that the right to ancient lights may be devested under an implied abandonment, though it was doubted whether it would have that effect on a right of way or common; and a distinction was taken by Littledale, J., between prescriptive rights to be enjoyed upon the property of the party himself, and those to be exercised upon the land of another.

[1] See 449, n. 1.

whom the fee could be conveyed. (*d*) And if a street be designated by public commissioners, duly authorized, as passing over certain lands, and the owner subsequently conveys part of the land lots, *bounding them on such a street*, this is held to be a dedication of the land, over which the street passes, to the public use, and on opening the street, the purchaser can only obtain a nominal sum as a compensation for the fee. (*e*) But it has been an unsettled question, what length of time was requisite to create the presumption of a valid dedication of a highway to the public. It seems to be agreed that some portion of time is necessary to establish a presumptive dedication of it. Thus, in the case of *The Trustees of Rugby Charity* v. *Merryweather*, before Lord Kenyon, at the London sittings, (*f*) eight years' free use of a way to the public, with permission of the owner, was deemed quite sufficient time for presuming a dereliction of the way to the public; and Lord Kenyon referred to a case in which six years had *451 been held sufficient. This decision * has been much questioned in subsequent cases. In *Woodyear* v. *Hadden*, (*a*) the language of the court was, that time was a material ingredient in the foundation of the presumption. In that case, nineteen years' use of a street for a public highway was held not to be clear and decisive, and therefore not sufficient evidence of a dedication

(*d*) Town of Pawlet *v.* Clark, 9 Cranch, 292; City of Cincinnati *v.* White, 6 Peters, 431; Brown *v.* Manning, 6 Ohio, 303; Watertown *v.* Cowen, 4 Paige, 510; Hobbs *v.* Lowell, 19 Pick. 405. In this last case, the effect of the dedication of a highway to the public was elaborately discussed, and it was held that a highway may be so established by the owner of the soil with an assent on the part of the public. In Gowen *v.* Phil. Ex. Co., 5 Watts & S. 142, Ch. J. Gibson traced this modern, and which he termed anomalous doctrine of dedication to public use, or of a grant to the public without the intervention of a trustee, up to the case of Rex *v.* Hudson, Str. 909, in the year 1732.

(*e*) In the Matter of Thirty-second Street, 19 Wend. 128; Matter of Thirty-ninth Street, N. Y. 1 Hill, 191. In this last case it was held, that where a deed bounds the grantee by a street designated on the commissioner's map, he dedicates the land in the site of the street to the public use; and this is the conclusion whether the purchaser be bound by the *centre* of the street, or *the side of it*. In the case of Pearsall *v.* Post, 20 Wend. 119–137, Mr. Justice Cowen learnedly and ably discussed the subject; and he considered the doctrine to be rather novel and anomalous, that a grant, either in religious or other cases, could be good, when there was no person in existence capable of taking any thing under it. He held, also, that dedications of lands or easements to the public, were to be confined to common highways, streets, and squares, and that all other easements were founded on the presumption of a grant between competent parties. This case was afterwards affirmed on error. 22 Wend. 425.

(*f*) 11 East, 375, note. (*a*) 5 Taunt. 125.

of it to the public. Again, in *Wood* v. *Veal*, (*b*) it was adjudged, that no dedication of a highway to the public by a tenant for years, though it were for ninety-nine years, or by any other person except the owner of the fee, would be binding upon such owner; and it was intimated by Lord Tenterden, that during the progress of the requisite time, the highway ought to have been used as a thoroughfare. The true principle on the subject, to be deduced from the authorities, I apprehend to be, that if there be no other evidence of a grant or dedication, than the presumption arising from the fact of acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required, as being the usual and analogous period of limitation. But if there were clear, unequivocal, and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment and dedication of the land, those acts would be sufficient to establish the dedication, within any intermediate period, and without any deed or other writing. (*c*) [1] In

(*b*) 5 B. & Ald. 454.

(*c*) See, further, Rex v. Lloyd, 1 Camp. 260; Lethbridge v. Winter, ib. 263, note; Rex v. Inhabitants of St. Benedict, 4 B. & Ald. 447; Jarvis v. Deane, 8 Bing. 447; Woolard v. M'Cullough, 1 Ired. (N. C.) 432; City Council of Lafayette v. Holland, 18 La. 286; Hunter v. Trustees of Sandy Hill, 6 Hill (N. Y.), 407. See, also, *supra*, 428. In Pritchard v. Atkinson, 4 N. H. 1, seventeen years were, in that case, deemed to be a sufficient period. State v. Catlin, 8 Vt. 530, s. p. In the case of State v. Trask, 6 id. 355, it was held, that if land be laid out as a public common for the purpose of a court-house, and the public acquire an interest in it as such, it is deemed a dedication to the public use, and it cannot be reclaimed, though the use be discon-

[1] *Dedication.* — Dedication has been often said to be a case of estoppel *in pais*. (See 2 Gr. Ev. § 662 *et seq.*; 2 Wash. R. P. 459; Holdane v. Cold Spring, 21 N. Y. 474, 479; Child v. Chappell, 5 Seld. 246; Mankato v. Willard, 13 Minn. 13; Ford v. Whitlock, 27 Vt. 265; and cases below.) And in general to prove a public highway there must be evidence of an acceptance as well as of the *animus dedicandi*. Indeed, in most states the acceptance of a highway not ancient must be shown to have been with the assent of the town liable to repair. Holmes v. Jersey City, 1 Beasl. 299; State v. Atherton, 16 N. H. 203, 210; Hyde v. Jamaica, 27 Vt. 443, 454; Folsom v. Underhill, 36 Vt. 580; Durgin v. Lowell, 8 Allen, 398; Morse v. Stocker, 1 Allen, 150; Rowland v. Bangs, 102 Mass. 299; Tillman v. People, 12 Mich. 401; State v. Bradbury, 40 Me. 154; Mayberry v. Standish, 56 Me. 342; Jordan v. Otis, 37 Barb. 50; Kelly's Case, 8 Gratt. 632. See Gentleman v. Soule, 32 Ill. 271; Oswego v. Oswego Canal Co., 2 Seld. 257; Lee v. Sandy Hill, 40 N. Y. 442; Manderschid v. Dubuque, 29 Iowa, 78 But it has been held that acceptance may be shown from user by the public alone. Guthrie v. New Haven, 31 Conn. 308, Green v. Canaan, 29 Conn. 157; Stone v

Hatch v. *Dwight*, (*d*) it was declared upon the same principle, that if a mill site, unoccupied, be abandoned by the owner, evi-

tinued. But see, *contra*, *supra*, 432, note. In the case of New Orleans *v.* The United States, 10 Peters, 662, in which the doctrine of dedication of property to public uses was largely and learnedly discussed, it was held not to be essential that the right to use the property so dedicated, should be vested in a corporate body. It may exist in the public, and have no other limitations than the wants of the community at large. And if buildings be erected on, or grants be made of, part of the land so dedicated, by the party making it, such acts would not disprove the dedication, or affect the *vested* rights of the public. I should apprehend that the last proposition must be taken with some qualifications, for the fact might raise the question, as a matter of evidence, whether the property was ever legally vested in the public, or irrevocably dedicated to it; and if it had been, whether nonuser by the public, and an adverse claim by the original owner, might not, in the lapse of time, bar the public; for in this country time may create a bar to the sovereign's right. Thus, by the New York Revised Statutes, ii. 292, the people are not to sue or implead any person, in respect to lands, by reason of any right or title, unless the right or title accrued within twenty years before suit brought, or the people had received the rents and profits within twenty years, the case of liberties of franchise excepted. There is a similar provision in the Revised Statutes of Massachusetts, part 3, tit. 5, c. 119, sec. 12. It was held, in Willoughby *v.* Jenks, 20 Wend. 96, that to give a title in the occupant of a lot, bounding on a street dedicated to the public, to the soil, *usque filum viæ*, the street must have been accepted by the public as such. Until such acceptance the street remains the property of the original proprietor, subject to the easement or right of way of purchasers of lots adjoining the street.

There has been considerable discussion of the question, whether there may be a *partial* dedication of a highway to the public, as for foot passengers, or for horses and not for carts, or for carts except those carrying coal. The better opinion would seem to be, that the public must take *secundum formam doni*, and that the dedication may be definite, not only as to time, but as to the mode of use. Lethbridge *v.* Winter, 1 Camp. 263, note; Marquis of Stafford *v.* Coyney, 7 B. & C. 257; Gowen *v.* Phil. Ex. Co., 5 Watts & S. 141; Poole *v.* Huskinson, 11 M. & W. 827.

(*d*) 17 Mass. 289.

Brooks, 35 Cal. 489; David *v.* New Orleans, 16 La. An. 404; Bissell *v.* N. Y. C. R.R., 26 Barb. 630; Buchanan *v.* Curtis, 25 Wis. 99. See Rees *v.* Chicago, 38 Ill. 322; Wilder *v.* St. Paul, 12 Minn. 192; Case *v.* Favier, ib. 89; Manderschid *v.* Dubuque, 29 Iowa, 78. In England where the assent of the parish is not necessary (Rex *v.* Leake, 5 B. & Ad. 469) and in the absence of statute there is no action for injuries arising from the neglect to repair, (Gibson *v.* Mayor of Preston, L. R. 5 Q. B. 218, 222; M'Kinnon *v.* Penson, 8 Exch. 319, 321) open user as of right for six years is *prima facie* evidence of dedication. Queen *v.* Petrie, 4 El. & Bl. 737. See Larned *v.* Larned, 11 Met. 421. So is user of seventy years, although the land was under lease the whole time. Winterbottom *v.* Lord Derby, L. R. 2 Ex. 316. But see Bermondsey *v.* Brown, L. R. 1 Eq. 204. And undoubtedly a public way may be established by prescription. In such cases both dedication and acceptance may be presumed. Jennings *v.* Tisbury, 5 Gray, 73; Durgin *v.* Lowell, 3 Allen, 398; State *v.* Atherton, 16 N. H. 203, 210; Stevens *v.* Nashua, 46 N. H. 192; Gentleman *v.* Soule, 32 Ill. 271; Debolt *v.* Carter, 81 Ind. 355; Cady *v.* Conger

dently with an intent to leave it unoccupied, it would be unreasonable that the other riparian proprietors, above and below, should be prevented, by fear of suits, from making a profitable * use of their sites. *452

(11) *Rights by License.* — The law is solicitous to prevent all kinds of imposition and injury, from confidence reposed in the acts of others; and a parol license to do an act, on one's

19 N. Y. 256; Irwin *v.* Dixion, 9 How. 10; Onstott *v.* Murray, 22 Iowa, 457; Simons *v.* Cornell, 1 R. I. 519; Att. Gen. *v.* M. & E. R.R., 4 C. E. Green (19 N. J. Eq.), 366, 575; Wood *v.* Hurd, 5 Vroom (34 N. J.), 87. *Contra*, Kelly's Case, 8 Gratt. 632, that an acceptance of record even of an ancient road must be proved. See Mayberry *v.* Standish, 56 Me. 342.

Another common method of dedication, which is generally regulated by statute, is for the owner of a town site to record a plan of it, showing the highways, &c., in the proper office. After he has sold lots with reference to it, it is said that there is a dedication of the ways to the public, which even the purchaser of the land over which the way runs cannot disturb. The rights of the purchaser have been stated, *ante*, 432, n. 1, (*c*). Preston *v.* Navasota, 34 Texas, 684, and cases below. R.R. Co. *v.* Schurmeir, 7 Wall. 272; Methodist Episcopal Church *v.* Mayor of Hoboken, 4 C. E. Green (19 N. J. Eq.), 335. The statute often provides that the fee in such cases shall be held by the municipal corporation for the use of the public; but apart from statute the fee does not pass. Banks *v.* Ogden, 2 Wall. 57; Mankato *v.* Willard, 13 Minn. 13; Dovaston *v.* Payne, 2 Sm. L. C. Am. note. It has been held that for the public to acquire any rights there must be an acceptance of the way in like manner as if there had been no plan or sale with reference to it. Lee *v.* Lake, 14 Mich. 12; Baker *v.* Johnston, 21 Mich. 319, 347. See Child *v.* Chappell, 5 Seld. 246, 256; Holdane *v.* Cold Spring, 21 N. Y. 474, 479; Baker *v.* St. Paul, 8 Minn. 491. But see Logansport *v.* Dunn, 8 Ind. 378; Evansville *v.* Page, 28 Ind. 525, 527; Yates *v.* Judd, 18 Wis. 118; (see Yates *v.* Milwaukee, 10 Wall. 497, 506;) Alves *v.* Henderson, 16 B. Mon. 131; Stone *v.* Brooks, 35 Cal. 489; Trustees M. E. Church *v.* Mayor, &c., of Hoboken, 4 Vroom (33 N. J.), 13; 4 C. E. Green (19 N. J. Eq.), 355; Wash. Easem. 145. The question is very apt to depend on statute.

In this country dedications to other public uses are recognized and sustained without a grant, somewhat after the analogy of charitable trusts. Baker *v.* Johnston, 21 Mich. 319, 341. But there can be no dedication to private uses, or to a limited part of the public. Trustees of M. E. Church *v.* Mayor, &c., of Hoboken, 33 N. J. 13; Todd *v.* Pittsburg, Ft. W., & Chic. R.R., 19 Ohio St. 514, 524.

As an instance of partial dedication it has been held that there may be a dedication to the public of a right of way, subject to the right of the owner of the soil to plough it up in due course of husbandry. Mercer *v.* Woodgate, L. R. 5 Q. B. 26; Arnold *v.* Blaker, L. R. 6 Q. B. 433. See Daniels *v.* Wilson, 27 Wis. 492.

Use of the land for other purposes than those to which it was dedicated by plan as described above may be restrained at suit of the original proprietor; Warren *v.* Lyons, 22 Iowa, 351; or of the owners of adjoining lots. Cook *v.* Burlington, 30 Iowa, 94, 101, (in which attention is called to the fact that the plaintiff in the earlier Iowa case was owner of adjacent lots;) Price *v.* Thompson, 48 Mo. 361. See 432, n. 1, as to the rights of owners of the freehold subject to a way, and of the public.

own land, affecting injuriously the air and light of a neighbor's house, is held not to be revocable by such neighbor after it has been once acted upon and expense incurred. (*a*) Such a license is a direct encouragement to expend money, and it would be against conscience to revoke it as soon as the expenditure begins to be beneficial. The contract would be specifically enforced in equity. Such a parol license to enjoy a beneficial privilege is not an interest in land within the statute of frauds. If, however, a parol license be granted for a temporary purpose, as the permission to erect a dam, it has been held to terminate with the decay of the dam, as the purpose of the license has then been fulfilled. (*b*) [1] In *Liggins* v. *Inge*, (*c*) the court distinguished between

(*a*) Webb *v.* Paternoster, Palmer, 71; 2 Eq. Ca. Abr. 522; Short *v.* Taylor, cited ib.; Winter *v.* Brockwell, 8 East, 308; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241; Rerick *v.* Kern, 14 id. 267; Bridges *v.* Blanchard, 8 Nev. & M. 691; Wood *v.* Manley, 11 Ad. & El. 34; Liggins *v.* Inge, 7 Bing. 682; Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102. But in Crocker *v.* Cowper, in 1 Cromp., M. & R. 418, it was held, that a verbal license was not sufficient to confer an easement in another's land, and that it was revocable, though acted upon. It has also been decided that a license in writing, *without deed*, to hunt on the grounds and fish in the waters of the grantor, was void. Bird *v.* Higginson, 4 Nev. & M. 505. So, a license to erect a building on another's land, cannot be revoked so entirely as to make the person who erected it a trespasser for entering and removing it after the revocation. Barnes *v.* Barnes, 6 Vt. 388.

(*b*) Hepburn *v.* M'Dowell, 17 Serg. & R. 388; [Allen *v.* Fiske, 42 Vt. 462.] A parol license to enjoy an easement is countermandable whilst it remains executory. Wallis *v.* Harrison, 4 M. & W. 538.

(*c*) 7 Bing. 682.

[1] *Licenses.* — (*a*) An executed license to do acts of a permanent nature on the land of the licensee, or of a third person, which necessarily obstruct the enjoyment of an easement of the licensor over such land either wholly or in part, is irrevocable. Curtis *v.* Noonan, 10 Allen, 406; Morse *v.* Copeland, 2 Gray, 302; Veghte *v.* Raritan W. P. Co., 4 C. E. Green, 142; 6 id. (21 N. J. Eq.) 463, 475; Jamieson *v.* Millemann, 3 Duer, 255; Stokoe *v.* Singers, 8 El. & Bl. 31; 449, n. (*a*); 450, and n. 1. But where the act is done on land of the licensor he is not estopped to revoke at law. Curtis *v.* Noonan, Morse *v.* Copeland, *sup.*; Fisher *v.* Moon, 11 L. T. N. S. 623, 625; Gale Easem. 48 and Pt. 3, ch. 2, § 2. Arrianus ait . . . ubi de obligando quæritur propensiores esse debere nos si habemus occasionem ad negandum; ubi de liberando ex diverso ut facilior sis ad liberationem. D. 44. 7. 47. Probably in every case except the above a mere license not coupled with an interest is revocable at law. It is so although for a valuable consideration and acted upon. Morse *v.* Copeland, 2 Gray, 302; Adams *v.* Andrews, 15 Q. B. 284; Collins Co. *v.* Marcy, 25 Conn. 239; Foot *v.* N. H. & N. Co., 23 Conn. 214; Houston *v.* Laffee, 46 N. H. 505; Marston *v.* Gale, 4 Fost. (24 N. H.) 176; Selden *v.* D. & H. Canal, 29 N. Y. 634, 639; Foster *v.* Browning, 4 R. I. 47; Woodward *v.* Seely, 11 Ill

licenses which, when countermanded, leave the party *in statu quo*, and licenses for the construction of buildings and works, which are not revocable.

157; Burton *v.* Scherpf, 1 Allen, 133; Jamieson *v.* Millemann, 3 Duer, 255; Duinneen *v.* Rich, 22 Wis. 550. See Fuhr *v.* Dean, 26 Mo. 116, 126; Wolfe *v.* Frost, 4 Sandf. Ch. 72, 94. But in equity the doctrine of estoppel has been applied; Duke of Devonshire *v.* Eglin, 14 Beav. 530; Bankart *v.* Houghton, 27 Beav. 425; Davies *v.* Marshall, 10 C. B. N. S. 697, 708; see Veghte *v.* Raritan W. P. Co., 4 C. E. Green, 142; 6 id. (21 N. J. Eq.) 463, 475; as it has also been in states having no separate equitable tribunal. Rerick *v.* Kern, 2 Am. L. C.; Lacy *v.* Arnett, 33 Penn. St. 169; Huff *v.* McCauley, 53 Penn. St. 206; Snowden *v.* Wilas, 19 Ind. 10; Wilson *v.* Chalfant, 15 Ohio, 248. See Jackson & Sharp Co. *v.* Phil., Wil., & Balt. R.R., 11 Am. Law Reg. N. S. 374; Rynd *v.* Rynd Farm Oil Co., 68 Penn. St. 397. But see Owen *v.* Field, 12 Allen, 457. See, as to the peculiar case of dedication, 451, n. 1; Ford *v.* Whitlock, *ante*, 419, n. 1, (*b*). Many of the above were cases of parol licenses, which, if under seal, might have amounted to the grant of an easement; but a mere license is revocable, though under seal. 18 M. & W. 845; Woodward *v.* Seely, 11 Ill. 157. But see Dark *v.* Johnston, 55 Penn. St. 164, 169. So, even in Pennsylvania, is a license from a city exercising the right of eminent domain. Branson *v.* Philadelphia, 47 Penn. St. 329.

(*b*) *License. Lease. Easement.* — It is often of importance to determine whether an agreement is merely a license, or whether it creates a lease or an easement, as the case may be. A familiar example of the distinction between a license and a lease is that of furnished lodgings. The lodger has the exclusive enjoyment of the rooms; but the servants of the owner have to keep the rooms in order, and the occupation of the rooms is by the person who thus employs servants to look after them. If the agreement gives a right of exclusive occupation, and the landlord has nothing to do on the land, it is more than a license. Another example is furnished by the distinction between those charter parties by which the master becomes the servant of the charterers, and those in which he remains the servant of the ship owners, *ante*, 188, 1. Roads *v.* Overseers of Trumpington, L. R. 6 Q. B. 56, 62. Compare Smith *v.* St. Michael, 8 El. & El. 383, 390; Reg. *v.* Morrish, 32 L. J. N. S. M. C. 245. See, generally, Kabley *v.* Worcester Gas Light Co., 102 Mass. 392. So, if the occupation is by the landlord's servant, the relation of landlord and tenant will not be created, People *v.* Annis, 45 Barb. 304; and the same is true of occupation under an executory contract to purchase. Dolittle *v.* Eddy, 7 Barb. 74; Burnett *v.* Caldwell, 9 Wall. 290; *post*, iv. 118, n. 1.

The distinction between a license to do something on the land of the licensor and an easement is harder to draw. It is said that a license is revocable and personal, while an easement is irrevocable and an interest in land. But these are legal consequences of a distinction in the character of the limitations creating them. An unsuccessful attempt to create an easement is often called a license, Coleman *v.* Foster, 1 H. & N. 37, but it is believed that in some cases the difference will be found to be independent of the form of the instrument, and to be somewhat one of degree, between permissions to do acts of which the number is either definite or ascertainable by the requirements of a particular occasion, such as removing a certain chattel, on the one hand, and a permission to do an unlimited number of acts of a certain kind on the other. A permission to cross land from A. to B. once, or a definite number of times, is a license, and

The modern cases distinguish between an easement and a license. An easement is a liberty, privilege, or advantage in land without profit, existing distinct from an ownership of the soil. (*d*) A claim for an easement must be founded upon a grant by deed or writing, or upon prescription, which supposes one, for it is a permanent interest in another's land, with a right at all times to enter and enjoy it. But a license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable, nor within the statute of frauds. (*e*) This distinction between a privilege or easement, carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, *453 and it * becomes difficult in some of the cases to discern a substantial difference between them. The case of *Wood* v. *Lake*, (*a*) which held a parol agreement for the liberty to stack

(*d*) Prentiss, Ch. J., Pomeroy *v.* Mills, 3 Vt. 279.

(*e*) [Wolfe *v.* Frost, 4 Sandf. Ch. 72;] Prince *v.* Case, 10 Conn. 375; Kerr *v.* Connell, Berton (N. B.) 151; Woodbury *v.* Parshley, 7 N. H. 237; Mumford *v.* Whitney, 15 Wend. 380, S. P., where it was held, that such a *license* by parol was valid, but that a parol agreement to allow a party to enter and erect a dam for a *permanent* purpose was void within the statute of frauds, for it was a transfer of an *interest* in the land. If we understand the license, said Ch. J. Savage, as it is defined here in the text, there is no difficulty on the subject. It is a mere authority to do a particular act, as to hunt, or fish, or erect a temporary dam, and conveys no interest, and the license is executory, and may be revoked at pleasure; but acts done under it before the revocation are no trespass.

A power reserved in a lease of revoking an easement is valid, and the revocation affords no ground for a claim in damages to the lessee. Bacon's Maxims, Reg. 4; *Ex parte* Miller, 2 Hill (N. Y.), 418.

(*a*) Sayer, 3.

not within the statute of frauds. A right of way is a permission to cross it an indefinite number of times, and is within the statute. See Austin on Jurisp. lect. 49, 3d ed. ii. 838; Hooper *v.* Clark, L. R. 2 Q. B. 200; Wickham *v.* Hawker, 7 M. & W. 63, 79. If a license while in force may be exclusive and may confer rights as against third persons, and if it should be held irrevocable when under seal, the distinction would still appear in the fact that unlike an easement, an irrevocable license may also be created by parol when coupled with an interest in a chattel. An easement, however, is only a right to use or control the servient estate in certain definite and limited ways. An indefinite and unlimited right of user, granted in proper form, would hardly be called an easement even if it did not amount to a lease of the land. Austin, 822, 853; Clayton *v.* Corby, 5 Q. B. 415, 422. See, generally, Dark *v.* Johnston, 55 Penn. St. 164; Newby *v.* Harrison, 1 J. & H. 393; Carr *v.* Benson, L. R. 3 Ch. 524, 533, cases which use the word license in a broader sense than above. In the first case the instrument although under seal was only an agreement for a future conveyance.

coal upon any part of the close of another, for seven years, to be valid, was questioned at the time by Mr. Justice Foster, and it has been since forcibly attacked by Sir Edward B. Sugden, in his Treatise of the Law of Vendors and Purchasers, (*b*) and was questioned also in 1 Johnson's Ch. Rep. 143; and yet that case has been recognized, and the doctrine of it sanctioned, by Lord Ch. J. Gibbs, in *Tayler* v. *Walters*. (*c*) The decision in *Cook* v. *Stearns* (*d*) narrows the limits assigned to a parol license, while, on the other hand, the cases of *Ricker* v. *Kelly* and *Clement* v. *Durgin* (*e*) seem to approach and favor the more questionable doctrine in *Wood* v. *Lake*. (*f*)

(*b*) P. 56, 8d London ed.
(*c*) 7 Taunt. 878.
(*d*) 11 Mass. 538.
(*e*) 1 Greenl. 117; 5 id. 9.

(*f*) It was held, in Bridges *v.* Purcell, 1 Dev. & Batt. (N. C.) 492, that a parol license to overflow one's land by a mill pond could be revoked, and at all events it ceased with the life of the grantor. Mr. Justice Gaston, who gave the opinion of the court, was disposed to question the doctrine on this subject, in the cases of Liggins *v.* Inge, Webb *v.* Paternoster, and Tayler *v.* Walters; and he held, that the decision in Wood *v.* Lake was clearly wrong. A mere parol license is revocable, though acts done under it, until countermanded, are lawful. This was the amount of the reasoning in the case in North Carolina. Beidelman *v.* Foulk, 5 Watts, 308; Couch *v.* Burke, 2 Hill (S. C.), 534, s. P. See, also, Hall *v.* Chaffee, 13 Vt. 150, to the s. P. The case of Tayler *v.* Walters is considered as decidedly overruled by the case of Hewlins *v.* Shippam, 5 B. & C. 221, and Cocker *v.* Cowper, 1 Cromp., M. & R. 418. See, also, Gale & Whatley's Treatise on Easements, 18–46, where all the authorities on parol licenses are collected, and the effect of them well considered. But an interest in land once passed cannot be revoked. Jackson *v.* Blanshan, 3 Johns. 292. In the case of Wood *v.* Leadbitter, 13 M. & W. 838, this vexatious subject of license in respect to land was greatly discussed, and the four cases of Webb *v.* Paternoster, Wood *v.* Lake, Tayler *v.* Walters, and Wood *v.* Manley, were very critically examined in the judgment delivered by Baron Alderson. The case of Tayler *v.* Walters was pointedly condemned, and the case of Webb *v.* Paternoster was so replete with confusion as to be of no weight. The authority of all those cases is very much disturbed. The conclusion at which the court arrived was, that a right to enter and remain on the land of another for a certain term could be created only by deed, and that a parol license to do so was revocable at any time. A right of common, or right of way, or right in the nature of an easement, could only be granted by deed. A mere license passes no interest, but a license coupled with an interest was not revocable.

On the subject of easements and aquatic rights, I have derived much aid and facility in my researches, from the three valuable treatises of Mr. Angell, which treat of *watercourses*, of *tide waters*, and of the *rights acquired by adverse enjoyment for twenty years*. In those essays the author has faithfully collected the law and authorities applicable to the subject, and accompanied his digest of them with free and judicious criticism. The disturbance of incorporeal rights, relative to partition walls, foundations of buildings, the diversion of water, obstruction of lights, &c., amounting to nuisances, are also well and fully discussed in Gibbons on the Law of Dilapidations and Nuisances, c. 10. In the propositions of the English parliamentary commissioners on the subject of real property, it was submitted, that adverse enjoyment during twenty years of

*454 *3. Of Offices. — Offices are another species of incorporeal hereditaments, and they consist in a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it. (a) Offices, in England, may be granted to a man in fee, or for life, as well as for years, and at will. (b) In the United States, no public office can properly be termed an hereditament, or a thing capable of being inherited. The constitution, or the law, of the state, provides for the extent of the duration of the office, which is never more permanent than during good behavior. (c) Private ministerial offices only can be classed as hereditaments, and I do not know of any such subsisting among us. It would not be consistent with our manners and usages, to grant a private trust or employment to one, and his heirs, in fee; though I do not know of any positive objection to such a contract in point of law. But in the revision of the statute law of New York, in 1787, most of the provisions in the ancient English statutes relative to office were reënacted. It was

any profit or easement, in or over the soil of another, should be *prima facie* evidence of a right, but one liable to be rebutted by proof that the owner had been under disability, or that the land had been under a lease, or that there was a life interest therein; but such proof was not to be open to the lessee or tenant for life. The adverse enjoyment for sixty years was to be conclusive evidence of a right, without regard to the disabilities of the parties, or the state of the title to the land. The nonuser of any profit or easement in or over the soil of another during twenty years, was to be *prima facie* evidence of its extinguishment, but liable to be rebutted. I should have apprehended that all those propositions, except the sixty years' provision, were already part of the English law, and that it was useless to have proposed them.

(a) Finch's Law, 162. The right to exercise a public office is as much a species of property as any other thing capable of possession, and the law affords adequate redress when the possession of it is wrongfully withheld. Wammack *v.* Holloway, 2 Ala. 31.

(b) 2 Bl. Comm. 36.

(c) In Hoke *v.* Henderson, 4 Dev. (N. C.) 18, 19, it was decided that a clerk's office, which was held during good behavior, and many other public offices, were, under certain limitations, *the subject of property*, like every other thing, corporeal or incorporeal, from which men can earn a livelihood. And if another should unlawfully usurp the office, the owner might have an action for damages for the expulsion, and a *mandamus* to restore him to the possession and emoluments of the office. [See United States *v.* Addison, 6 Wall. 294.] In the able and elaborate opinion delivered by Judge Nicoll, in the case of The State *v.* Dews, R. M. Charlton, 397, it was held, that public officers in this country were public agents or trustees, and had no proprietary interest or private property in their offices beyond the constitutional tenure and salary (if any) prescribed; and that official rights and powers flowing from their offices might be changed at the discretion of the legislature, during their continuance in office. The custody of a jail, for instance, it was held, might, without the violation of any constitutional right, be taken by statute from the sheriff, and vested in the city corporation.

provided, among other things, (*d*) [1] that if a man be unduly disturbed in his office, a writ of novel disseisin should be maintained for offices in fee, and for life, as well as for lands and tenements. This regulation was taken from the statute of Westminster 2d, 13 Edw. I., and it was probably a very useless provision, and it has been omitted in the last revision of the laws of New York, which went into operation in January, 1830. But we have (and very properly) reënacted (*e*) the substance of the statute of 5 and 6 Edw. VI. c. 15, *against buying and selling offices*, and it prohibits the sale of any office, or the deputation * of any *455 office, or taking any fee or reward therefor. The offence is made a misdemeanor, and it is likewise punished with the loss of the office; but it does not apply to the case of a deputy agreeing to pay his principal part of the profits of an office, and to be allowed to reserve another part to himself as a compensation for his services. (*a*) The object of the statute was to prevent corruption in office, and it alludes only to corrupt bargains and sales of offices, and not to the fair and necessary appointments of deputies with a reasonable allowance, though on this point there have been some refined distinctions established.

If an officer has a certain salary, or certain annual profits, a deputation of his office, reserving a sum not exceeding the amount of his profits, has been held not to be contrary to the statute,

(*d*) Laws of New York, sess. 10, c. 50, sec. 7.

(*e*) New York Revised Statutes, ii. 696, secs. 85, 86, 87. The legislature of Virginia, in 1792, reënacted the statute of 5 and 6 Edw. VI.; Revised Code of Virginia, ed. 1814, i. p. 79.

(*a*) Gulliford *v.* De Cardonell, 2 Salk. 466. The English statute of 5 and 6 Edw. VI. has been extended by the acts of 49 Geo. III. and 6 Geo. IV., which declare that no public office (a few only excepted) shall be sold, under pain of disability to dispose of or hold it. So it was held, in Hill *v.* Paul, 8 Cl. & F. 295, that the profits of a public office could not be assigned for the benefit of creditors.

[1] *Offices.* — There is no contract between the government and the officer to permit him to perform the duties, and to receive a certain compensation. *Ante*, i. 419, n. 1. The right to fees arises only from the actual rendition of the services. Smith *v.* Mayor of N. Y., 37 N. Y. 518. See Conner *v.* Mayor of N. Y., 1 Seld. 285; Warner *v.* People, 2 Denio, 272; Swann *v.* Buck, 40 Miss. 268, 302, and cases cited; Coffin *v.* State, 7 Ind. 157; Benford *v.* Gibson, 15 Ala. 521; Barker *v.* Pittsburgh, 4 (Barr) Penn. St. 49.

An agreement by an applicant for an office to divide the fees with another applicant if he will withdraw and aid the former to obtain it is void. Gray *v.* Hook, 4 Comst. 449, cited in Tool Co. *v.* Norris, 2 Wall. 45; and in Lyon *v.* Mitchell, 36 N. Y. 235. See Liness *v.* Hesing, 44 Ill. 118.

because the principal is entitled to the fees and perquisites of the office, and the deputy to a recompense for his labor in the execution of it. So, if the profits be uncertain, the deputy may lawfully agree to pay so much out of the profits, for in that case he cannot be charged for more than he receives. But if the office consists of uncertain fees and profits, and the deputy agrees to pay a certain sum annually, without restricting the payment to the proceeds of the profits, it would be a sale within the statute; and the case is not altered by the office yielding more in contingent profits than the amount of the money stipulated to be paid. (*b*) It would also be a contract within the purview of the statute for the deputy to secure all the profits to the person appointing him, for this would infallibly lead to extortion in the *456 deputy. (*c*) *The statute in New York would seem to be broader than the English statute of 5 and 6 Edw. VI., for it has omitted the explanatory and restrictive words in that statute, applying it to "office or offices, or any part or parcel of them that shall in any wise touch or concern the administration or execution of justice;" and the preamble shows, that it was intended to apply to "places where justice is to be administered, or any service of trust executed." In England, the place of under-marshal of London is a service of public trust, and yet it has been held to be salable, because it only concerned the police

(*b*) Godolphin *v.* Tudor, 2 Salk. 468; s. c. Willes, 575, note; Garforth *v.* Feron, 1 H. Bl. 328; Noel *v.* Fisher, 3 Call, 215; Becker *v.* Ten Eyck, 6 Paige, 68; Mott *v.* Robbins, 1 Hill (N. Y.), 21. In Tappan *v.* Brown, 9 Wend. 175, it was decided, that if a person receiving *a deputation to a public office*, which entitles him by law to a certain *percentage* upon the fees and emoluments of his principal, agrees to perform the duties at a *fixed salary*, the agreement is in violation of the act against buying and selling offices, and is void; although it be not certain that the stipulated sum would be less than the percentage allowed by law.

(*c*) Layng *v.* Paine, Willes, 571; Becker *v.* Ten Eyck, 6 Paige, 68. If the deputy of a public officer be entitled by law to certain fees and perquisites as deputy, and he agrees to give the officer appointing a portion of such fees or perquisites, it is a purchase of the deputation, and void under the statute. Ib. The statute of 5 and 6 Edw. VI. has been reënacted in Virginia, with the addition of a *proviso*, that the act was not to prohibit the appointment and acting of any deputy clerk, or deputy sheriff, who shall be employed to assist their principals in the execution of their respective offices. *Prima facie* this proviso would seem to have been unnecessary; but it has been decided under it, that where a sheriff farmed his shrievalty to G., whom he appointed his deputy for a sum in gross, to be paid him by G., who was to discharge all the duties, and take all the emoluments of the office, the contract was lawful! Salling *v.* M'Kinney, 1 Leigh, 42. Upon this construction the proviso rises into great importance.

of the city. (*a*) If, however, the statute of New York should not admit of a more comprehensive construction than the one from which it was taken, yet the principles of the common law supply all deficiencies; and many agreements for the sale of offices that are not within the statute of Edw. VI. have been held void, as being against public policy. The sale of any office in which the public are concerned is held to be against principles of public policy, and an offence at common law. If A. should agree to allow B. a certain proportion of the profits of an office in the king's dockyards, in case the latter retired, and he succeeded to the appointment, the agreement would be void, as not supported by a valid consideration. (*b*)

The provisions and rules of the ancient common law were remarkably provident in respect to the public interest; and *an office of trust, that concerned the administration of *457 justice, could not be granted in reversion, or for a term of years, for the grantee might become incompetent, or it might vest in executors and administrators, if the officer should die within the term; and it would be impossible that the law should know beforehand, whether the representatives would be competent to discharge the trust. This was so ruled by Lord Coke and others, in *Sir George Reynel's Case*, respecting the office of marshal of the Marshalsea. (*a*) Sir Henry Finch, in his Discourse, (*b*) held that the grant of an office to an ignorant man, who had no skill at all, was utterly void; as if the king, by his letters patent, made a clerk of the crown in the K. B., who had no experience in office, and was utterly insufficient to serve the king and people.

The general rule is, that judicial offices must be exercised in person, and that a judge cannot delegate his authority to another. I do not know of any exception to this rule with us, though in England there are several. (*c*) What is a judicial, and what is a

(*a*) Lord Hardwicke, in Butler *v.* Richardson, 1 Atk. 210; Amb. 78.

(*b*) Parsons *v.* Thompson, 1 H. Bl. 322; Blachford *v.* Preston, 8 T. R. 89; Best Ch. J., in Richardson *v.* Mellish, 9 Moore, 485.

(*a*) 9 Co. 95. In Hoke *v.* Henderson, 4 Dev. (N. C.) 28, it was declared, that the legislature could lawfully confer a clerk's office for life, or during good behavior, or during pleasure, or for any term of years determinable with life at an earlier day This could only apply to cases in which the constitution had not prescribed the tenure.

(*b*) Page 162.

(*c*) 4 Inst. 291; Molins *v.* Werby, 1 Lev. 76.

ministerial function, has been sometimes a matter of dispute. In *Medhurst* v. *Waite*, (*d*) Lord Mansfield said it was taking the definition too large, to say that every act, where the judgment was at all exercised, was a judicial act, and that a judicial act related to a matter in litigation. But a ministerial office may be exercised by a deputy, though a deputy cannot make a deputy, according to the maxim *delegata potestas non potest delegari.* The distinction between a deputy and an assignee of an office, as stated by Lord Coke, in *The Earl of Shrewsbury's Case*, (*e*) will serve to explain the application of the statute against buying and selling offices to assignees and not to deputies. An assignee of an * 458 office, he says, is a person who has an estate * or interest in the office itself, and doth all things in his own name, and for whom his grantor shall not answer. But a deputy hath not an estate or interest in the office. He is but the officer's shadow, and doth all things in the name of the officer himself, and nothing in his own name, and his grantor shall answer for him. (*a*)

4. Of Franchises. — Another class of incorporeal hereditaments are franchises, being certain privileges conferred by grant from government, and vested in individuals. In England they are very numerous, and are understood to be royal privileges in the hands of a subject. (*b*) They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant. Some of these franchises are presumed to be founded on a valuable consideration, and to involve public duties, and to be made for the public accommodation, and to be

(*d*) 8 Burr. 1259. (*e*) 9 Co. 42.

(*a*) As the ancient statute of 5 and 6 Edward VI., against the sale of offices, has been revived and reënacted in New York, it might have been as well to have also reënacted the statute of 12 Richard II. (A. D. 1388), entitled an Act that *none shall obtain offices by suit, or for reward, but upon desert.* They all seem to have constituted parts of one ancient system, and to have been dictated by the same provident and generous spirit It declared, that the appointing power who should "ordain, name, or make justices of the peace, sheriffs, customers, comptrollers, or any other officer or minister of the king, should be firmly sworn not to ordain, name, or make any, for any gift or brocage, favor or affection; and *that none which pursueth by him, or by other privily or openly, to be in any manner of office, shall be put in the same office,* or in any other." This statute, said Lord Coke (Co. Litt. 234, a), was worthy to be written in letters of gold, but more worthy to be put in due execution.

(*b*) 2 Bl. Comm. 37; Finch's Law, 164

affected with a *jus publicum*, and they are necessarily exclusive in their nature. The government cannot resume them at pleasure, or do any act to impair the grant, without a breach of contract. The privilege of making a road, or establishing a ferry, and taking tolls for the use of the same, is a franchise, and the public have an interest in the same; and the owners of the franchise are liable to answer in damages, if they should refuse to transport an individual without any reasonable excuse, upon being paid or tendered the usual rate or fare. (*c*) [1] The obligation between the government and the owner of such franchises is mutual. He is obliged to provide and maintain facilities for accommodating the public, at all times, with prompt and convenient passage. The law, on the other hand, in consideration of this duty, provides him a recompense, by means of an exclusive toll, to be exacted from persons who use the road or ferry, and, of course, it will protect him against any new establishment which is calculated to draw away his custom to his prejudice. An estate in such a franchise, and an estate in land, rest upon the same *principle, *459 being equally grants of a right or privilege for an adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant, as in the case of the grant of a ferry, bridge, or turnpike, or railroad, that the government will not, either directly or indirectly, interfere with it, so as to destroy or materially impair its value. Every such interference, whether it be by the creation of a rival franchise or otherwise, would be in violation or in fraud of the grant. All grants or franchises ought to be so construed as to give them due effect, by excluding all contiguous competition, which would

(*c*) Beekman *v.* Saratoga and Schenectady Railroad Company, 3 Paige, 45; Paine *v.* Patrick, 3 Mod. 289, 294; Story, J., in Charles River Bridge *v.* Warren Bridge, 11 Peters, 639.

[1] At common law a carrier could not charge more than was reasonable, but he could carry at an unreasonably low rate for favored individuals. Baxendale *v.* E. C. R. Co., 4 C. B. N. S. 63, 88; Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 237; Fitchburg R.R. *v.* Gage, 12 Gray, 393. In this country it has been held that a railroad, being a public use, as shown by the exercise of eminent domain in its favor, cannot arbitrarily exclude persons from its benefits. 3 Paige, 75; Sanford *v.* Catawissa R.R., 24 Penn. St. 378; Twells *v.* R.R., 3 Am. Law Reg N. S. 728; Shipper *v.* Pa. R.R., 47 Penn. St 338. See Lumbard *v.* Stearns, 4 Cush 60; Gaslight Co. *v.* Colliday, 25 Md. 1 16; Shepard *v.* Milwaukee Gaslight Co 6 Wis. 539; 15 id. 318.

be injurious, and operate fraudulently upon the grant. The common law contained principles applicable to this subject, dictated by sound judgment and enlightened morality. It declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for the disturbance, and in modern practice he usually resorts to chancery, to stay the injurious interference by injunction. (*a*) [1] We have nothing to do

(*a*) 22 Hen. VI. 14, b. Paston, J.; Bro. action sur le case, pl. 57, tit. Nuisance, pl. 12; 2 Rol. Abr. 140, pl. 20, 140, pl. 1, 2, 3, 191; F. N. B. 184; Yard *v.* Ford, 2 Saund 172; 2 Bl. Comm. 37; 3 id. 218, 219; Tripp *v.* Frank, 4 T. R. 666. Lord Holt, in the case of Keeble and Hickeringall, Holt, 20; Newburgh Turnpike Company *v.* Miller, 5 Johns. Ch. 111; 4 id. 160, s. P. Dartmouth College *v.* Woodward, 4 Wheaton, 518; Huzzy *v.* Field, 2 Cr., M. & R. 432. It has been usual in the grant of a franchise to exclude in express terms all interference within specified distances. This practice has become highly expedient, considering the doctrine established in the cases referred to in a subsequent part of this note. By a general act in Illinois (Revised Laws of Illinois, 1833), a ferry or toll bridge privilege, created by statute, excludes all other establishments of the kind within three miles of the same. So, the act of Georgia, of 21st of December, 1835, creating the Chattahoochee Railroad Company, excludes for twenty-five years all other railroads running parallel thereto within twenty miles. This is in affirmance of the common law rule, and it is the wisest course, for it prevents all uncertainty and dispute as to what are reasonable distances in the given case, and what would amount to an unlawful interference. In Dyer *v.* Tuscaloosa Bridge Company, 2 Porter (Ala.) 296, it was held, after an elaborate discussion, that the erection of a toll bridge under legislative grant, within a short distance of a ferry previously held under a county court license, so as to prove a great injury to it, was not an unconstitutional act, nor an exclusive grant of a ferry, and that the license was taken subject to the paramount discretion of the legislature. Other ferries may be established alongside of ferries *opposite to towns*, in the discretion of the court, and in like manner bridges may be established alongside of ferries. The statute law of Alabama only provided that no ferry should be established within two miles of *another ferry* already established. The exception to the exclusive privilege is, when the ferry is situate at or near the town, when one ferry might not be sufficient. Jones *v.* Johnson, 2 Ala. 746. So, one toll bridge cannot be established within three miles of another *toll bridge*. The case above cited was deemed to be warranted by statutory construction, otherwise it would seem to be hardly consonant with general principles.

But the case of Charles River Bridge *v.* Warren Bridge (11 Peters, 420), is of more momentous import, and contains and establishes a doctrine subversive of that in the text, and which goes very far to destroy the security and value of legislative franchises. The court declared, by Mr. Chief Justice Taney, that public grants were to be construed strictly, and that nothing passed as against the state by implication, in diminution of the legislative powers requisite to accomplish the end of their creation. It was

[1] Raritan & D. B. R.R. *v.* Delaware & R. Canal, 3 C. E. Green, 546, 1 C. E. Green, 321. See Auburn & C. Plank R. *v.* Douglass, 5 Seld. 444, cited and remarked upon, 3 C. E. Green, 571; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44. See also Ferrel *v.* Woodward, 20 W's. 458.

with a great proportion of the franchises that occupy a large space in the treatises on English law; and whoever claims an exclusive privilege with us, must show a grant from the legislature. Corporations, or bodies politic, are the most usual franchises known in our law; and they have been sufficiently considered in a former volume. These incorporated franchises seem, indeed, with some impropriety, to be classed by writers among hereditaments, since they have no *inheritable* quality, inasmuch as a corporation, in cases where there is no express limitation to its continuance by the charter, is supposed never to die, but to be clothed with a kind of legal immortality. (*b*) Special privileges, conferred upon towns and individuals in a variety of ways, and for numerous purposes, having a connection with the public interest, are franchises.

*5. **Of Annuities.** — An annuity, says Lord Coke, (*a*) is *460 a yearly sum stipulated to be paid to another, in fee, or for life, or years, and chargeable only on the person of the grantor. If it be agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent like an estate in fee,

accordingly decided, that the grant by statute to the Charles River Bridge Company of the right founded on a valuable consideration, to build a bridge over that river, and to take toll, contained no engagement from the State of Massachusetts, nor any implied contract, that the privilege to erect another bridge contiguous thereto, and on the same line of travel, and which might create competition, and diminish or destroy its income, should not be granted within the period of the operation of the grant; that as no grant of any such exclusive privilege, or any contract of the kind was *expressed*, none was to be intended or inferred. There was no constructive franchise or privilege admitted, and the decision rested on legislative sovereignty and its all surpassing powers. Mr. Justice Story dissented from this extraordinary doctrine and decision, and with his customary learning and ability. The same latitudinary doctrine was declared, after a very elaborate discussion, in the case of Tuckahoe Canal Co. *v.* Tuckahoe Railroad Co. in the Court of Appeals in Virginia, 11 Leigh, 42. As there was no *express* provision in the charter against the exercise of legislative power to charter other and rival companies for transportation along the same line, parallel and contiguous, it was held, that the legislature might lawfully, and in their discretion, exercise the power, though it might in effect impair or annihilate the profits of the prior company. This, I apprehend, may now be considered as a prevalent principle in American constitutional law, and, in my humble opinion, it is deeply to be regretted. [*Ante*, i. 419, n. 1.]

(*b*) They are, nevertheless, deemed incorporeal hereditaments; and shares in a railroad incorporated company have, in Kentucky, been adjudged to be real estate, which descends as realty, and of which a widow might be endowed. Price *v.* Price, 6 Dana, 107.

(*a*) Co. Litt. 144, b.

and forfeitable for treason as an hereditament, (*b*) and for that reason it belongs to the class of incorporeal hereditaments. (*c*) It is chargeable upon the *person* of the grantor, for if the annuity was made chargeable upon land, it would then become a rent charge, and descend to the heirs as real property. (*d*)[1] The remedy for a failure in the payment of the annuity was anciently by the original writ of annuity, but now the remedy is by a personal action of debt or covenant on the instrument by which the annuity is created. Unless the grantor grants the annuity for himself and his heirs, the heirs of the grantor are not bound, for the law presumes, by the omission to name them, that he did not intend to include them in the obligation. (*e*)

6. **Of Rents.** — Rents are the last species of these incorporeal hereditaments, and they form a very important and interesting title under this branch of the law.

(1) *Of the Various Kinds of Rents.* — Rent is a certain yearly profit in money, provisions, chattels, or labor, issuing out of lands and tenements, in retribution for the use, and it cannot issue out of a mere privilege or easement. (*f*) There were, at common law, according to Littleton, (*g*) three kinds of rent, viz., rent service,

(*b*) Co. Litt. 2, a; Nevil's Case, 7 Co. 84, b.

(*c*) An annuity in fee is personal estate *sub modo*. It has none of the incidents and characteristics of real estate, except that of descending to the heir, and not forming assets in the hands of the executor. The husband is not entitled to his curtesy, nor the wife to her dower, in an annuity. It cannot be conveyed by way of use, and it is not within the statute of frauds, and may be bequeathed and assigned as personal estate. Stafford *v.* Buckley, 2 Ves. 170; Aubin *v.* Daly, 4 B. & Ald. 59. The personal nature of an annuity is discussed with learning and ability in the article entitled "Personal Hereditaments," in the American Law Magazine, for October, 1843.

(*d*) Co. Litt. 144, b.

(*e*) Ib. Mr. Ellis, in a recent treatise, entitled "The Law of Fire and Life Insurance and Annuities," has collected and arranged all the law on the subject of *annuities for lives*. An annuity, as well as a judgment, is presumed to be satisfied after twenty years, if nothing has been done under it.

(*f*) 2 Bl. Comm. 41; Gilbert on Rents, 9; Co. Litt. 142, a; Buszard *v.* Capel, 8 B. & C. 141.

(*g*) Sec. 218.

[1] Sollory *v.* Leaver, L. R. 9 Eq. 22. But an annuity charged on the real and personal estate of a testator which was expressed to be left to A. B. "forever," without mention of heirs, was held to pass to the personal representative of A. B. Taylor *v.* Martindale, 12 Sim. 158. So, when annuities charged in like manner were left to the testator's children, "or their heirs," the next of kin of a deceased child took. Parsons *v.* Parsons, L. R. 6 Eq. 260.

rent charge, and rent seck. *Rent service* was where the tenant held his land by * fealty, or other corporeal service, * 461 and a certain rent; and it was called rent service, because there was some corporeal service incident to the tenancy, as fealty, homage, or other service. A right of distress was inseparably incident to this rent. (*a*) *Rent charge*, or fee-farm rent, is where the rent is created by deed, and the fee granted; and as there is no fealty annexed to such a grant of the whole estate, the rent charge was not favored at common law. The right of distress is not an incident, and it requires an express power of distress to be annexed to the grant, which gives it the name of a rent charge, because the lands are, by the deed, charged with a distress. (*b*) *Rent seck*, *siccus*, or barren rent, was rent reserved by deed, without any clause of distress, and in a case in which the owner of the rent had no future interest or reversion in the land. The owner of the rent was accordingly driven to the slow and tedious remedy by a writ of annuity, or a writ of assize. (*c*) [1]

(*a*) Litt. s. 215; Co. Litt. 142, a; Kenege *v.* Elliot, 9 Watts, 258.

(*b*) Litt. s. 217; Co. Litt. 143, b; Gilbert on Rents, 155. In the case of Ingersoll *v.* Sergeant, 1 Wharton, 337, the law on this head is learnedly reviewed and discussed by Mr. Justice Kennedy; and it is declared, that the statute of *Quia Emptores* (18 Edw. I.) was never in force in Pennsylvania, and that a rent reserved to grantor and his heirs, in the grant of lands in fee, is a *rent service* and not a *rent charge*. The release of part of the ground from the rent does not therefore extinguish the whole, and the remainder of the land remains subject to a due proportion of the rent.

(*c*) Litt. s. 218, 217, 218, 235, 236; Co. Litt. 150, b, 160, a; Gilbert on Distresses, 6.

[1] *Rent.* — (*a*) *From what Rent issues.* — It has been said that a rent may issue out of lands and their furniture, such as live stock, &c.; and it has been held that a right of distress may be incident to a rent purporting to issue out of both; Mickle *v.* Miles, 31 Penn. St. 20; and that such a rent may be apportioned. Newton *v.* Wilson, 8 Hen. & M. 470. But see Sutliff *v.* Atwood, 15 Ohio St. 186; Fay *v.* Holloran, 35 Barb. 295. It would seem that the Pennsylvania case might have been put on the 3d resolution of Spencer's Case, 5 Rep. 16, that "the rent did not issue out of the stock or sum, but out of the land only."

(*b*) *Rents Service and Rents Charge.* — Although a rent reserved to the grantor and his heirs upon a conveyance of lands in fee is held to be a rent service in Pennsylvania, it has been held in an interesting case that ownership of land in that state is allodial. A party who had conveyed land in fee, reserving a ground rent, afterwards obtained the deeds and fraudulently altered them, whereupon the purchaser refused to pay the rent any longer. It having been held that the remedies for the rent on the deed were gone (Arrison *v.* Harmstad, 2 Barr, 191; Wallace *v.* Harmstad, 15 Penn. St. 462), the grantor distrained, and took the ground that the rent was an estate which vested in him before the alteration, and was not devested by that, and that it was a rent service to which distress was incident as of common

But the statute of 4 Geo. II. c. 28, abolished all distinction between the several kinds of rent, so far as to give the same remedy by distress in cases of rents seck, rents of assize, and chief rents, as in the case of rent reserved upon a lease. The statute of New York (*d*) has not adopted that provision in so many words, but it gives the remedy by distress in all cases where any certain services, or certain rents reserved out of lands or tenements, remain due. The remedy is extended equally to the grantees and assignees of the lessor, and to the heirs, executors, and administrators of the party entitled. (*e*)

There is, therefore, the same universal remedy by action and by distress, for every species of rent or service lawfully due, *462 when the same is certain. (*f*) The * tenancy that will

(*d*) New York Revised Statutes, i. 747, sec. 18, 20, 21, 22.

(*e*) The relations of landlord and tenant have been very materially altered in the state of New York since the last edition of this work. In the new (perhaps the better expression would be the *newest*) constitution of New York, which took effect on the first of January, 1847, it was provided, that "no lease or grant of agricultural land for a longer period than twelve years, thereafter made, in which should be reserved any rent or service of any kind, should be valid." (Const. art. 1, sec. 14.) By a law of the New York legislature, passed May 13th, 1846, distress for rent was abolished; and the provisions of the Revised Statutes, i. 476, giving preference to landlords' claims for rent over judgment creditors, were repealed. (Laws of sess. 69th, ch. 274.) It will be perceived that these are momentous changes in long established law.

(*f*) Cornell *v.* Lamb, 2 Cowen, 652; Smith *v.* Colson, 10 Johns. 91. The case of Cornell *v.* Lamb assumes that a reversionary interest must be subsisting in the person who distrains; but that case arose prior to the New York Revised Statutes, and when the extended provision in those statutes had not been adopted. The restriction as to the necessity of a reversionary interest mentioned in that case seems to be now removed by the 18th section of the statute above cited. A doubt was suggested, in

right apart from the deed. But the court held that although the rent was a rent service, there might be a rent service without tenure; that the right of distress, unless derived from a deed, was incident to tenure only; and that there were no tenures in Pennsylvania since the Revolution, in spite of the statute *Quia Emptores* not being in force. Wallace *v.* Harmstad, 44 Penn. St. 492.

It is now held in New York that a rent purporting to be reserved in fee upon a conveyance of lands is a rent charge, not a rent service; but that the right of reëntry may be created by deed, and is valid in favor of the grantor of the land, his heirs, devisees, and assigns, against the grantee, his heirs, and assigns. Van Rensselaer *v.* Barringer, 89 N. Y. 9, and cases cited; Van R. *v.* Dennison, 85 N. Y. 893; Van R. *v.* Slingerland, 26 N. Y. 580; Van R. *v.* Hays, 19 N. Y. 68; Van R. *v.* Ball, ib. 100; Hosford *v.* Ballard, 39 N. Y. 147; Cruger *v.* McClaughry, 51 Barb. 642; s. c. 41 N. Y. 219. So, the covenants. Van Rensselaer *v.* Read, 26 N. Y. 558; Tyler *v.* Heidorn, 46 Barb. 439. See Lyon *v.* Chase, 51 Barb. 13; Hunt *v.* Thompson, 2 Allen, 341.

authorize a distress does not necessarily require a formal lease, and it may be implied from circumstances, and a parol lease will be sufficient. (*a*)

The best way of reserving perpetual rents, if it be intended that rents should always be of the same value, is to stipulate that the payment be in kind, such as wheat or other produce, or in cattle or poultry. This was the almost universal practice in ancient times, and a great proportion of the ancient leases in New York, in the manor counties, were of that description. By the statute of 18 Eliz., one third part of the rent upon college leases was directed to be reserved in corn, to be paid either in corn, or at the current prices at the nearest public market. We have an instance in New York of the same provident foresight in the act *instituting the University*, (*b*) *and limiting its annual *463 income to 40,000 bushels of wheat. This arrangement saves the interest of the persons in whose favor rent is reserved from sinking by the depreciation of money, owing to the augmentation of gold and silver, and the accumulation of paper credit. The rents which have been reserved in corn, says Dr. Smith, have preserved their value much better than those which have been reserved in money. (*a*)

In the feudal ages, a great proportion of the produce of the

the case of Cornell *v.* Lamb, whether the right of distress could exist in those cases where the land was *allodial*, without an authority for that purpose in the lease or contract. To establish the right of distress at common law, without any power in the lease, there always existed a rent due, a reversionary interest in the landlord, and fealty due as incident to the tenure of *free and common socage*. To remove this doubt, it was declared by the New York Revised Statutes, i. 718, sec. 8, rendering all lands in the state allodial, that the abolition of tenures should not take away or discharge any rents or services certain, which had been or might be created or reserved. This was intended to subject allodial lands to the incidents which before applied to socage tenures.

(*a*) Knight *v.* Bennett, 8 Bing. 361; Cornell *v.* Lamb, 2 Cowen, 652; Jacks *v.* Smith, 1 Bay, 315. It was to be presumed, that in those states in which the English law of distress for rent has been essentially preserved, the remedy had equally been extended to every kind of rent. But I should infer that this was not the case in Virginia; for in the American Jurist, No. 8, the question is raised, and discussed with much acuteness and research, *whether in Virginia, on the conveyance of land in fee-simple, reserving rent, the feoffor, without an express stipulation to that effect, has a right of distress.* The writer concludes in the affirmative, and that on a feoffment in fee, *with a reservation of rent*, the feoffee thereby becomes a tenant, and the feoffor a landlord, with the remote reversionary interests called a reverter.

(*b*) Laws of New York, sess. 36, c. 69, sec. 1.

(*a*) Smith's Wealth of Nations, i. 34, 187

land went as rent to the landlord. The cultivators of the soil were generally bondsmen, or tenants at will, whose labors in peace and services in war were equally at the command of the landlord. In modern times, the rent of land has been tripled and quadrupled; but the produce of the land, in the progress of improvement, has been increased in a much greater proportion, and the amount of the yearly produce of land is several times greater than the amount of the yearly rent. (*b*)

(2) *When and how far not Payable.* — 1. (*Of eviction.*) — It is a rule of law, that the rent must be reserved to him from whom the land proceeded, or to his lawful representatives, and it cannot be reserved to a stranger. Thus, if A. leases a lot or parcel of land to B., on a certain rent, the payment of that rent cannot be reserved to C.; and the reason is, that the rent is payable as a return for the possession of the land, and it must, therefore, be rendered to the person from whom the land passed. (*c*) It was also, on the same ground, decided, in *Prescott* v. *De Forest*, and afterwards in *Cornell* v. *Lamb*, (*d*) that the right of distress for rent was incident to the reversion, and that no other person *464 could distrain *but he who owned the reversion. The person who distrains must have some reversionary interest to sustain the right. (*a*) If the landlord dies before the rent becomes due, it goes to the heir as incident to the reversion; but if he dies after the rent had become payable, it goes to the executor or administrator as part of the personal estate, and the executor or administrator has the same remedy by action or by distress, for the recovery of all such arrears, that the testator or intestate might have had if living. (*b*) If the tenant be evicted from the lands demised to him, by a title paramount, before the rent falls due, he will be discharged from the payment of the rent, for the obligation to pay ceases when the consideration for it ceases, and which was the enjoyment of the land. (*c*) But if the lawful evic-

(*b*) Smith's Wealth of Nations, i. 333.

(*c*) Litt. s. 346; Co. Litt. 143, b.

(*d*) 16 Johns. 159; 2 Cowen, 652.

(*a*) This is altered in New York by statute. *Vide supra*, 461.

(*b*) 1 Saund. 287, n. 17; Strafford *v.* Wentworth, Prec. in Ch. 555; Rockingham *v.* Penrice, 1 P. Wms. 177; Laws of New York, sess. 36, c. 63, sec. 18; New York Revised Statutes, i. 747, secs. 21, 22; 2 Dana (Ky.) 54. A purchaser of the reversion at sheriff's sale is entitled to the rent becoming payable after the execution of the deed. Bank of Pennsylvania *v.* Wise, 3 Watts, 394. [Martin *v.* Martin, 7 Md. 368.]

(*c*) 2 Roll. Abr. tit. Rent, O.; 1 Saund. 205, n.

tion by paramount title be of part only of the demised premises, the rent is apportionable, and the eviction a bar *pro tanto*. (*d*) [1]

(*d*) Stevenson *v* Lambard, 2 East, 576; Lansing *v.* Van Alstyne, 2 Wend. 561.

[1] *Eviction.* — A wrongful eviction of a tenant *by his landlord* (*post*, 470) from a part of the premises demised by a written lease for one entire rent, is a bar to any claim either for rent under the lease, or for use and occupation. Leishman *v.* White, 1 Allen, 489; Christopher *v.* Austin, 1 Kern. 216; Shumway *v.* Collins, 6 Gray, 227. So is a refusal to admit the tenant to a portion of the premises. McClurg *v.* Price, 59 Penn. St. 420. See Reed *v.* Reynolds, 37 Conn. 469; Greton *v.* Smith, 33 N. Y. 245. But after admission nothing less than an eviction will suspend rent either in whole or in part. Fuller *v.* Ruby, 10 Gray, 285. But see Rogers *v.* Ostrom, 35 Barb. 523. And a partial eviction does not put an end to the tenancy, or discharge the covenants relating to the condition of the premises. Morrison *v.* Chadwick, 7 C. B. 266; Newton *v.* Allin, 1 Q. B. 518. The tenant must be deprived of part of that for which he pays the rent; he will not be discharged by being deprived of the use of a mere easement. Williams *v.* Hayward, 1 El. & El. 1040, 1046; or by his landlord's breach of covenant; ib.; Kelsey *v.* Ward, 33 N. Y. 83; or by his landlord's erecting a building on adjoining land which darkens his windows. Palmer *v.* Wetmore, 2 Sandf. 316; Myers *v.* Gemmel, 10 Barb. 537; Royce *v.* Guggenheim, 106 Mass. 201, 204. And the eviction must be something more than a mere trespass or act interfering with the beneficial enjoyment of the demised premises. It is something done by the landlord indicating his intention that the tenant shall no longer continue to hold the premises. Upton *v.* Townend, Upton *v.* Greenlees, 17 C. B. 30, 64, 68; Lounsbery *v.* Snyder, 31 N. Y. 514; Gilhooley *v.* Washington, 4 Comst. 217; Peck *v.* Hiler, 31 Barb. 117; Edgerton *v.* Page, 1 Hilton, 320, 20 N. Y. 281. Thus, where two adjoining tenements, which were let by separate leases, were destroyed by fire, and the landlord in rebuilding intentionally changed the plan of the tenements, making one larger and the other smaller than before, it was held an eviction as to both. Upton *v.* Townend, &c., *sup.* But see Campbell *v.* Shields, 11 How. Pr. (N. Y.) 565; Blair *v.* Claxton, 18 N. Y. 529. Any act of a grave and permanent nature done by the landlord with the intention and effect of depriving the tenant of the enjoyment of any portion of the demised premises is an eviction in the modern sense which suspends the entire rent while it lasts. The question whether the act is of that character and done with that intent is for the jury. Upton *v.* Townend, Upton *v.* Greenlees, 17 C. B. 30; Royce *v.* Guggenheim, 106 Mass. 201.

There is another class of cases, at least in America, besides those of actual eviction which have been mentioned, in which, without any substantial change being made in the subject matter of the demise, there is a diminution of beneficial occupation, as shown in note (*f*), sufficient to justify the tenant in leaving, and which he may turn into an eviction by doing so; but he must actually quit the premises. Cohen *v.* Dupont, 1 Sandf. 260; Edgerton *v.* Page, 20 N. Y. 281, 1 Hilton, 320; Greton *v.* Smith, 33 N. Y. 245, 249; Rogers *v.* Ostrom, 35 Barb. 523; Jackson *v.* Eddy, 12 Mo. 209 But where the tenant did not leave the premises, the following acts have been held not to amount to an eviction: the erection of a fence so that the tenant could only reach the premises over land of another; Boston & W. R.R. *v.* Ripley, 13 Allen, 421; allowing waste pipes to leak into the premises; Edgerton *v.* Page, 20 N. Y. 281; cutting holes through floors and ceiling

So, if there be an actual expulsion of the tenant from the whole, or a part, by the lessor, before the rent becomes due, and it be continued until after the rent becomes due, the entire rent is suspended; (*e*) but no offensive or outrageous conduct on the part of the landlord, as by erecting a nuisance in the neighborhood of the demised premises, will be sufficient. (*f*)

*465 *2. (*Destruction of the premises.*) — The cases have afforded a full discussion of the interesting question, how far a tenant is excused from the payment of rent, when he is deprived, even by inevitable necessity or misfortune, and without any default on his part, or on the part of the landlord, of the enjoyment of the premises. In *Taverner's Case*, (*a*) which arose in 34 and 35 Hen. VIII., a man made a lease of land, and of a

(*e*) Salmon *v.* Smith, 1 Saund. 202, 204, note 2; Co. Litt. 148, b; Ascough's Case, 9 Co. 185; Page *v.* Parr, Style, 432; Timbrell *v.* Bullock, ib. 446; Pendleton *v.* Dyett, 4 Cowen, 581; Bennett *v.* Bittle, 4 Rawle, 339. The same principle applies if the tenant has been obliged to pay rent to a person having a prior and better title to it. Sapeford *v.* Fletcher, 4 T. R. 511. The interference of the landlord with the possession deliberately, by entry, eviction, or disturbance of the possession, and depriving the tenant of the beneficial enjoyment of the premises, will suspend or extinguish the rent. Ogilvie *v.* Hull, 5 Hill (N. Y.), 52.

(*f*) Pendleton *v.* Dyett, *ub. sup.* But this decision was reversed in the New York Court of Errors, as, see s. c. 8 Cowen, 727; and the latter doctrine is, that if the landlord, by indecent and outrageous conduct, as by bringing habitually a lewd woman into the house, or by habitually using indecent familiarities with the tenant's wife, induce the lessee and his family, in order to escape from such a nuisance, *to quit the premises*, it amounts to a constructive eviction, and bars the landlord from his action for rent. Gunning *v.* Burdell, N. Y. Marine Court, Sept. 1848, s. p. It is an implied condition in leasing a house, that it be fit for the purpose of occupation; and if it be infected with a nuisance, the lessee is not bound to stay in it, and is discharged from rent. Smith *v.* Marrable, 1 Carr. & Marsh. 479; s. c. 11 M. & W. 5. This last case was considered by the court, in Sutton *v.* Temple, and Hart *v.* Windsor, 12 M. & W. 52, 68, as very limited and questionable; and again, in Surplice *v.* Farnsworth, 7 Man. & Gr. 576, the Court of C. B. followed these latter decisions, and decided that the tenant is not entitled to quit until the tenancy is regularly terminated, although the premises be out of repair, and the landlord is bound to repair, and does not.

(*a*) Dyer, 56, a.

for belts for machinery; Elliot *v.* Aiken, 45 N. H. 80; piling firewood on the premises; Lounsbery *v.* Snyder, 31 N. Y. 514. See also Cram *v.* Dresser, 2 Sandf. 120.

Acts not amounting to an eviction might nevertheless affect the amount to be recovered for use and occupation. Boston & W. R.R. *v.* Ripley, 13 Allen, 421; Gilhooley *v.* Washington, 4 Comst. 217; Cowie *v.* Goodwin, 9 C. & P. 378; and would even be allowed to be set up by way of recoupment in an action for rent, in some jurisdictions where that doctrine has been extended in modern times. Kolsey *v.* Ward, *sup.*

flock of sheep, rendering a certain rent, and all the sheep died. The question was, whether the tenant could have relief from this calamity, at the expense of his landlord, by an apportionment of the rent. It was very much debated, and different opinions were entertained by the sergeants and judges who discussed the subject. Some of them thought there was good reason and equity to apportion the rent, or, in other words, to make a proportional deduction for the loss of the sheep. But others held to the contrary opinion, and that though the sea, or an inundation, should gain upon the land, or part of it be burnt by wildfire, the entire rent must issue out of the remainder, and that it would be different if part of the land should be recovered from the tenant by a title paramount to that derived from his landlord. The point was left unsettled by this early decision; but the opinion of those who were for the payment of the entire rent gained a decided superiority in the course of the subsequent century.

In *Paradine* v. *Jane*, (*b*) an action of debt was brought for rent, upon a lease for years, and the defendant pleaded, by way of excuse for the nonpayment of the rent, that he had been driven from the premises by public enemies, viz., by Prince Rupert and his soldiers. The case was fully and ably argued before the King's Bench, during the time of the civil wars, in the reign of Charles I. It was insisted, that by the law of reason, a man ought not to pay rent when he could not enjoy, without any default on his part, the land demised * to him, and that the *466 civil and common law exempted the party in such a case. But Rolle, J., (the same person who was author of the Abridgment,) overruled the plea, and held, that neither the hostile army, nor an inundation, would exempt the tenant from paying rent. The same doctrine has been continued to this day; and it is well settled, that upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from his obligation to pay the rent. The case of *Hallet* v. *Wylie* (*a*) was decided on that principle, and the principal English authorities were reviewed. Since that decision, the point has been presented and decided the same way in the English C. B., in *Baker* v. *Holtzapffell*; (*b*) and the unsettled question, whether a court of equity would grant relief to the tenant

(*b*) Aleyn, 26; Style, 47.
(*b*) 4 Taunt. 45.
(*a*) 8 Johns. 44.

against the landlord's claim at law for rent, has also been put at rest by the decision in *Hare* v. *Grove*, (*c*) in the English Exchequer, and of *Holtzapffell* v. *Baker*, (*d*) in the English Court of Chancery. In both of these cases, the court of equity refused to interfere in favor of the tenant, who was considered as having no equity against the effect of his own express agreement to pay the rent. The same rule prevails equally in England and in this country, in the case of an express covenant to pay rent; (*e*) but it is understood that, by the civil law, the prætor would exempt the tenant from paying the rent, or modify the obligation, according to equity, when the property was destroyed by fire, inunda-
* 467 tion, or violence, * or the crops failed by a bad season. (*a*)

So, Lord Northington, in *Brown* v. *Quilter*, (*b*) thought it very clear, that a man should not pay rent for what he cannot enjoy, if occasioned by an accident which he did not undertake to meet. But I apprehend that the law, as it is now settled on that point, rests on solid foundations of justice and policy. It is to be observed, that the case only applies to *express* agreements to pay; and if a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents. The loss of the rent must fall either on the lessor or lessee; and there is no more equity that the landlord should bear it than the tenant, when the tenant has engaged expressly to pay the rent, and when the landlord must bear the loss of the property destroyed. The calamity is mutual; and there is much weight in the observation of the counsel, in one of the cases referred to, that these losses by fire may often proceed from the carelessness of tenants; and

(*c*) 8 Anst. 687.

(*d*) 18 Ves. 115. See also, to the same point, Leeds *v.* Cheetham, 1 Sim. 146, and Lamott *v.* Sterett, 1 Harr. & J. 42.

(*e*) Pollard *v.* Shaaffer, 1 Dallas, 210; Fowler *v.* Bott, 6 Mass. 63; Wagner *v.* White, 4 Harr. & J. 564; Leeds *v.* Cheetham, 1 Sim. 146, *contra;* Ripley *v.* Wightman, 4 M'Cord, 447; Gates *v.* Green, 4 Paige, 355; Linn *v.* Ross, 10 Ohio, 412.

(*a*) Dig. 19. 2. 15. 2; ib. 50. 17. 23; Code, 4, 65, 8; and see the copious annotations in the Elzevir edition of the Corpus Juris Civilis, annexed to the article in the Code. The doctrine of the civil law is also followed in the French law, and in the law of other countries which follow the civil law. Code Civil, n. 1722, 1733; 1 Bell's Comm. 452; Civil Code of Louisiana, art. 2667. Puffendorf (b. 5, c. 6, sec. 2) considers the rule of the civil law to be just and equitable.

(*b*) Amb. 619.

if they can escape from the rent, which they may deem inconvenient, by leaving the property carelessly exposed, it might very much lessen the inducements to a reasonable and necessary vigilance on their part. (*c*)

Inevitable accident will excuse a party from a penalty, but will not relieve him from his covenant to perform. Thus, in a case as early as 28 and 29 Henry VIII., (*d*) the party covenanted to sustain and repair the banks of a river, under pain of forfeiture of 10*l*, and the banks were destroyed suddenly * by a great flood. The court held, that he was bound to repair, but was not subjected to the penalty. And in the modern cases, (*a*) it has been held, that the lessee or the assignee of a lease, in which the lessee covenanted for himself and his assigns, absolutely to repair, was bound to repair, notwithstanding the buildings were accidentally destroyed by fire. And if the premises be out of repair, the tenant cannot make repairs at the expense of the landlord, or deduct the amount of them out of the rent, unless there be a special agreement for that purpose between the tenant and his landlord. (*b*) But if the tenant be not under any agreement to repair, and the premises become unsafe and useless from want of repairs, the tenant from year to year may quit without notice, and he would not be liable, in an action for use and occupation, for any rent after the occupation had ceased to be beneficial. (*c*) [1] *468

(*c*) In Hart *v.* Windsor, 12 M. & W. 79, 85, the authorities are all cited by the counsel and Mr. Baron Parke, in favor of the binding force of the contract to pay rent on a demise of land, though occupation becomes impracticable by calamity or *vis major*, provided the estate continues.

(*d*) 1 Dyer, 33 a.

(*a*) The Earl of Chesterfield *v.* Duke of Bolton, Comyns, 627; Bullock *v.* Dommitt, 2 Chitty K. B. 608; s. c. 6 T. R. 650.

(*b*) Mumford *v.* Brown, 6 Cowen, 475.

(*c*) Edwards *v.* Hetherington, cited in Salisbury *v.* Marshall, 4 Carr. & P. 65. The English doctrine is, that to enable a tenant to avoid his lease, there must be a default on the part of the landlord, as where there was either error or fraudulent description of the premises, or they were rendered uninhabitable by the wrongful act or default of the landlord. Izon *v.* Gorton, 5 Bing. N. C. 501; Arden *v.* Pullen, 10 M. & W. 321.

[1] (*a*) *Destruction of Premises.* — According to the doctrine of the later American cases, when the premises out of which the rent issued are destroyed, the liability terminates, although there be an express covenant as where a single room is let and afterwards burned. But when the land itself is let, the rent issues from the land, and of course none the less for the destruction of a house upon it. Graves *v.* Berdan, 26 N. Y. 498; s. c. 29 Barb. 100; Womack *v.* McQuarry, 28 Ind. 108;

When rent is due, a tender upon the land is good, and prevents a forfeiture. The tenant is not bound to go and seek the landlord, provided the contract be silent as to the place of payment; and yet a personal tender to the landlord, off the land, is also good. (*d*) The time of payment depends upon the contract; and if there be no special agreement to the contrary, the payment would be due either yearly, half-yearly, or quarterly, according to the usage of the country, and the presumed intention to conform to it. If there be no usage in the case, the rent is due at the end of the year. But in the city of New York, it is provided by statute, that, in the absence of any special agreement, the rent is payable quarterly, and the hiring terminates on the first of May thereafter. (*e*)

*469 *3. (*Of apportionment.*) — On the subject of the apportionment of rent, there are several distinctions to be noticed. There are two modes of apportioning rent. The one is, by granting the reversion of part of the land out of which the rent issues;

(*d*) Walter *v.* Dewey, 16 Johns. 222; Gibbs, C. J., Soward *v.* Palmer, 8 Taunt. 277; Hunter *v.* Le Conte, 6 Cowen, 728.

(*e*) New York Revised Statutes, i. 744, sec. 1.

Stockwell *v.* Hunter, 11 Met. 448; Kerr *v.* Merchants' Exch. Co., 8 Edw. Ch. 315; Winton *v.* Cornish, 5 Ohio, 477; Ainsworth *v.* Ritt, 88 Cal. 89; McMillan *v.* Solomon, 42 Ala. 356; Buerger *v.* Boyd, 25 Ark. 441. *Contra*, Izon *v.* Gorton, 5 Bing. N. C. 501; *sup.* n. (c); Helburn *v.* Mofford, 7 Bush, 169.

Other cases in which the principle of Paradine *v.* Jane was applied to covenants in leases are Leavitt *v.* Fletcher, 10 Allen, 119; Kramer *v.* Cook, 7 Gray, 550; Tilden *v.* Tilden, 13 Gray, 103, 109. But there is a tendency to relax the strictness of the general doctrine as to contracts there laid down, in many cases, some of which will be found *ante*, ii, 468, n. 1; 591, n. 1. Dexter *v.* Norton, 47 N. Y. 62.

(*b*) *Unfitness of Premises.*—With regard to the existence of any condition in the lease of a house that it is fit for occupation, or duty to disclose its state, it is to be observed that Smith *v.* Marrable, *ante*, 464, n. (*f*), was the lease of a furnished house ready for immediate occupation. See Howard *v.* Doolittle, 8 Duer, 464; Dutton *v.* Gerrish, 9 Cush. 89, 94. The general rule is the other way in the absence of active deceit or express warranty. Keates *v.* Cadogan, 10 C. B. 591; Foster *v.* Peyser, 9 Cush. 242; Welles *v.* Castles, 8 Gray, 323; Cleves *v.* Willoughby, 7 Hill, 83; Elliot *v.* Aiken, 45 N. H. 30, 36. See Hazlett *v.* Powell, 30 Penn. St. 293 As to duty to repair, see iv. 110, n. 1.

(*c*) *Place of Tender.* — With regard to the place of tender, there is no doubt that at common law the lessor must demand the rent upon the land on the day when it becomes due, at a convenient time before sunset, but not earlier, in order to reënter for breach of condition upon nonpayment. Acocks *v.* Phillips, 5 H. & N. 183. But a covenant for payment, like other contracts of that kind, is not performed unless the tenant seek the landlord. Haldane *v.* Johnson, 8 Exch. 689.

Cf. solem collocare of Salic Law (Merkel), § 50. 1.

the other by granting part of the rent to one person, and part to another. (*a*) It is laid down as a general rule, in the more ancient cases, that if the owner of a rent service purchased part of the land out of which the rent issued, the rent was to be apportioned according to its just value, and the tenant was discharged of the rent, in a ratio to the land purchased. But if a man had a rent charge, and purchased or released part of the land out of which the rent issued, the whole rent was held to be extinguished. (*b*) The objection to the doctrine of the apportionment of rent was, that it exposed the tenant to several suits or processes of distress, for a thing which was originally entire, and he ought not to be obliged to pay his rent in different parcels, and to several landlords, when he contracted to pay, in one entire sum, to one person. But the convenience of mankind dictated the necessity of an apportionment of rent in a variety of cases. Though it was a principle of the common law that an entire contract could not be apportioned, yet the apportionment of rent was, under certain circumstances, allowed by the common law, either on severance of the land from which it issued, or of the reversion to which it was incident. A person has a right to sell the whole or any part of his reversionary interest in land. It may be necessary to divide his estate out on rent among his children, or to sell part to answer the exigencies of the family; and it would be intolerable if such a necessary sale worked an extinguishment of the whole rent. The rent passes as an incident to the purchaser of the reversion, and the tenant may always avoid several suits and distresses by a punctual payment * of his *470. rent. The rent is to be apportioned among the several owners of the reversion of the rent, according to the value of the land; and whenever the question becomes a litigated one in a court of justice, it is the business of the jury, upon evidence produced, to apportion the rent to the value of the land.[1] These

(*a*) Abbott, C. J., 5 B. & Ald. 876.

(*b*) Litt. sec. 222; Co. Litt. 147, b, 148, a; Talbot's Case, 8 Co. 104, 106; Gilbert on Rents, 152, 163, 164.

[1] *Apportionment.* — The text is confirmed by Van Rensselaer *v.* Gallup, 5 Denio, 454. But an annuity charged upon fluctuating incomes of different funds was contributed for according to the actual income *de anno in annum*, and not in proportion to the capitalized value. Ley *v.* Ley, L. R. 6 Eq. 174.

When a rent charge of the kind described as existing in New York, *ante*,

things are now generally regulated by the agreement of parties, whenever a sale of part only of the demised premises is made; and the tenant has no concern with the transaction, since he pays no more than his stipulated rent, and to the claimants in the proportions settled by themselves. There is no doubt, therefore, that a rent charge may be apportioned, whenever the reversioner or owner of the rent either releases part of the rent to the tenant, or conveys part of the land to a stranger. (*a*) The rent is also liable to apportionment by act of law, as in cases of descent and judicial sales. (*b*) If the landlord enters upon part of the demised premises by wrong, the better opinion is, that it suspends the payment of the whole rent until the tenant be restored to the whole possession, for the lessor ought not to be able so to apportion his own wrong as to oblige the tenant to pay any thing for the residue; (*c*) but the rule is otherwise in the case of a lawful entry into part of the demised premises, by the authority of the tenant himself. (*d*)

The rule at common law was, that neither law nor equity would apportion rent as to time, and, therefore, if the tenant for life gave a lease for years, rendering a yearly rent, and died in the course of the year, the rent could not be apportioned, and the tenant would go free of rent for the first part of the year. * 471 The principle was, that an entire contract could * not be apportioned. The imperfect performance of it, depending on various acts, could not reasonably afford a title to the whole,

(*a*) Co. Litt. 148, a; Gilbert on Rents, 163; Farley *v.* Craig, 6 Halst. 262.

(*b*) Wotton *v.* Shirt, Cro. Eliz. 742; Litt. sec. 224; 1 Rol. Abr. tit. Apportionment, D. pl. 3, 4, 5. The judicial sales spoken of in the cases cited were those in which part of a rent charge was extended on an execution, and it was held good, though the tenant might be liable to two executions.

(*c*) 1 Rol. Abr. 940, n.; Gilbert's Law of Executions, 288; Smith *v.* Raleigh, 3 Camp. 513; Briggs *v.* Hall, 4 Leigh, 484.

(*d*) Hodgkins *v.* Robson, 1 Vent. 276; Vaughan *v.* Blanchard, 1 Yeates, 176.

461, n. 1, descends, the right of reëntry attached to it is also apportioned among the heirs of the owner. Cruger *v.* McLaury, 41 N. Y. 219. As to the effect of an eviction by the landlord, see 464, n. 1. A rent service is apportioned on a sale of part of the reversion, and a subsequent eviction of the tenant by the purchaser from his portion, even with the advice and consent of the landlord, will not suspend the right of the latter to the residue of his rent. Reed *v.* Ward, 22 Penn. St. 144; Linton *v.* Hart, 25 Penn. St. 193. So as to what are held to be rent charges in New York, *ante*, 461, n. 1; Van Rensselaer *v.* Chadwick, 22 N. Y. 82.

and from the complex nature and uncertain value of part performance, it could not afford a title to any part of the stipulated consideration. (*a*) But the statute of 11 Geo. II. c. 19, sec. 15, supplied the principle, that apportionment should be made of rent in respect to time in such cases, and that part of the statute has been reënacted or adopted in this country. (*b*)

(3) *Of the Remedy.* — The remedy provided by law for the recovery of rent, depends upon the nature of the instrument or contract by * which payment is secured. The *472 suit may be an action of covenant, or debt, or assumpsit, for the use and occupation of the land. The action of assumpsit to recover a reasonable satisfaction for use and occupation, was first given by the English statute of 11 Geo. II. c. 19, and it has been followed by the N. Y. Revised Statutes, vol. i. 748, sec. 26. If the tenant never actually went into the possession, the remedy

(*a*) Bro. Abr. tit. Apportionment. pl. 7, 26; Clun's Case, 10 Co. 127; Jenner *v.* Morgan, 1 P. Wms. 392. The Master of the Rolls, in Hay *v.* Palmer, 2 id. 502; Cutter *v.* Powell, 6 T. R. 320; [Stillwell *v.* Doughty, 3 Bradf. (N. Y.) 359; Marshall *v.* Moseley, 21 N. Y. 280.] Annuities and servants' wages, like rents, were not in general apportionable at common law, and the rule seemed to be applicable to all periodical payments becoming due at fixed intervals. If a servant was hired for the month or year, and the service ceased within the time, there was no apportionment of wages for the actual time of service, though the rule operated in some cases most unjustly. Bro. Abr. tit. Apportionment, pl. 13, 22, 26. Countess of Plymouth *v.* Throgmorton, 1 Salk. 65. But the old rule is now held to be relaxed, and wages, it is understood, may be apportioned, upon the principle that such is the reasonable construction of the contract of hiring. Lawrence, J., 6 T. R. 326; M'Clure *v.* Pyatt, 4 M'Cord, 26; Bacot *v.* Parnell, 2 Bailey (S. C.), 424. And though annuities are not subject to apportionment, like rent, under the statute of 11 Geo. II., yet, if the annuitant dies within the quarter or year, as the case may be, and the annuity was given for maintenance in infancy, or for the separate maintenance of a *feme covert*, equity will apportion the annuity up to the day of the annuitant's death, on the principle that the allowance was necessary. Hay *v.* Palmer, 2 P. Wms. 501; Pearly *v.* Smith, 3 Atk. 260; Howel *v.* Hanforth, 2 Wm. Bl. 843; 17 Serg. & R. 178, s. P. [Blight *v.* Blight, 51 Penn. St. 420. But not law. The Queen *v.* Lords of the Treasury, 16 Q. B. 357, 363.] Dividends, or moneys invested in stock, are also held not to be, as a general rule, apportionable, either in law or equity. Wilson *v.* Harmer, 2 Ves. 672; Rasleigh *v.* Master, 3 Bro. C. C. 99.

(*b*) N. Y. Revised Statutes, i. 747, sec. 22; 17 Serg. & R. 171; *Ex parte* Smyth, 1 Swanst. 337. The editor has annexed a learned note to the last case, on the doctrine of apportionment, as existing both before and since the statute of 11 Geo. II. The statute of 4 William IV. c. 22, in amendment of the Act of 11 Geo. II., declared that all rents service, rents charge, and other rents, annuities, dividends, and *all other payments of every description, made payable at fixed periods*, should be apportioned, and it provided for the recovery of the apportioned parts from the last period of payment.

must be upon the lease or agreement; and if the tenant once entered into possession, the recovery may be, under the English statute, for the whole term; but in New York it is doubted whether the recovery could be had beyond the period of actual occupation. (a) The landlord may also reënter, or recover possession of the land, by the action of ejectment, for nonpayment of rent, provided half a year's rent or more be in arrear, and no sufficient distress can be found; and if the tenant, in such a case, does not redeem within six months after execution issued, the land will be deemed discharged from the lease or contract. (b) But the more usual, prompt, and effectual remedy is by distress, which was provided by the common law, and has been regulated and greatly improved by statute in England and in this country. (c)

In New York we have adopted the common law on the subject of distress for rent, and we have likewise reënacted the substance of the English statutes of 52 Hen. III., 3 Edw. I., 13 Edw. I., 21 Hen. VIII., 17 Car. II., 2 W. and M., 8 Anne, and 4 and 11 Geo. II., (d) and which statutes were made on purpose to control abuses, and mitigate the rigor of the common law, as well as render more certain and effectual the right of reëntry on the part of the landlord. (e) The English common and statute law, in relation to distress for rent, and the relief of landlords, has been generally, and I apprehend essentially, adopted in several of the other states as, for instance, in New Jersey, (f) Pennsylvania, (g) Delaware, Indiana, (h) Illinois, (i) Maryland, Virginia, (j) Kentucky, (k)

(a) Wood v. Wilcox, 1 Den. 37.

(b) This was the provision of the statute of 4 Geo. II., and it is adopted in New York (N. Y. Revised Statutes, ii. 505), and probably in several of the other states.

(c) The summary proceedings by distress, in its two branches for damage feasant for cattle, and for arrears of rent, have come down from the Anglo-Saxon times, as is shown by Sir Francis Palgrave, in his Rise and Progress of the English Commonwealth, c. 6.

(d) N. Y. Revised Statutes, i. 747, secs. 18–24; ib. ii. 500–505.

(e) In New York, by statute of 13th May, 1846, c. 274, the remedy of distress for rent is abolished, and the right of reëntry reserved to the landlord by lease or grant, in default of goods, was regulated. The reëntry can be made only upon fifteen days' previous notice thereof.

(f) Elmer's Dig. 134. 302; R. S. of New Jersey, 1847, tit. 4, c. 8.

(g) Purdon's Penn. Dig. 870–878; Quinn v. Wallace, 6 Wharton, 452.

(h) In Indiana, the landlord cannot distrain in person or by his bailiff; but under

(i) Revised Laws of Illinois, ed. 1833.

(j) Act of 1792; Revised Code of Virginia, i. 214.

(k) Statute of Kentucky, 1811.

Mississippi, (*l*) South Carolina, and Georgia; (*m*) but the whole law has been judicially declared in North Carolina to be irreconcilable with the *spirit of their laws and govern- *473 ment, and to be of no force in that state. (*a*) It is deemed to be equally objectionable, in the opinion of judicial authority, in South Carolina, and fit to be abolished, as being an unreasonable and oppressive relict of the feudal system, and repugnant to the policy of our institutions. (*b*) The common law method of distress for rent is expressly abolished by statute in Alabama. (*c*) In Louisiana, the English remedy for rent essentially prevails, for the lessor has a right of pledge on the movable effects of the lessee found upon the premises, and also on the movable effects of third persons being in a house or store on the premises by their consent, express or implied. The right does not extend to goods transiently or accidentally on the premises, and the lessor

the statute of 1824, he must go before a justice of the peace, and on oath obtain a warrant to a constable to make the distress; and if the tenant replevies the goods, he gives bond to prosecute the landlord, and not the officer. Harris *v.* M'Faddin, 2 Blackf. 71; Statutes of Indiana, 1838, p. 472.

(*l*) Revised Code of Mississippi, 1824; 3 Howard, 54.

(*m*) Hartshorne *v.* Kierman, 2 Halst. 29; Hoskins *v.* Paul, 4 id. 110; Woglam *v.* Cowperthwaite, 2 Dallas, 68; Garrett *v.* Hughlett, 1 Harr. & J. 8; City Council of Charleston *v.* Price, 1 M'Cord, 299; Dorsey *v.* Hays, 7 Harr. & J. 370; Neale *v.* Clautice, ib. 372; Smith *v.* Meanor, 16 Serg. & R. 375; Ridge *v.* Wilson, 1 Blackf. 409; Wright *v.* Matthews, 2 id. 187; Mayo *v.* Winfree, 2 Leigh, 870; Jones *v.* Murdaugh, ib. 447; Cripps *v.* Talvande, 4 M'Cord, 20; Burket *v.* Boude, 3 Dana (Ky.), 209; Walker (Miss.), 170, 349; Hale *v.* Burton, Dudley, 105; Hotchkiss's Code of Statute Laws of Georgia.

(*a*) Dalgleish *v.* Grandy, Cam. & Nor. 22; Deaver *v.* Rice, 3 Batt. 431.

(*b*) Youngblood *v.* Lowry, 2 M'Cord, 39. But, notwithstanding this strong language, the law of distress is still in force in South Carolina, and the statute of 1808 even allows landlords to distrain for double rent from the demand of possession when the tenant holds over for three months after notice to quit. Talvande *v.* Cripps, 3 M'Cord, 147; Reeves *v.* McKenzie, 1 Bailey, 497. The statute of 11 George II., c. 19, relative to pleadings in replevin in cases of distress for rent, has been adopted in practice. Moorhead *v.* Barrett, 1 Cheeves Law Rep. in S. C. 99. But the statute of 32 Hen. VIII., c. 37, giving the power of distress to executors, &c., was never in force in South Carolina. Bagwell *v.* Jamison, ib. 249. It is worthy of notice, that the process of distress and the taking of pledges was the Anglo-Saxon mode of enforcing the appearance of the defendant in suits at law. No other process was originally known to the common law. The free and sturdy Saxons would not submit to personal arrests. Palgrave's Rise and Progress of the English Commonwealth, ii. 138.

(*c*) Aikin's Dig. 2d ed. 857. In Tennessee and Ohio it is stated that the law of distress for rent does not exist. Treatise on Landlord and Tenant, by John N. Taylor, New York, 1844, p. 230, and which is a learned and valuable digest of the American law on the subject.

may exercise his right of seizing the goods while on the land, or within fifteen days after they are removed, provided they continue to be the property of the lessee. (*d*) In the New England states their law of attachment on mesne process may have superseded the law of distress for rent; but under their attachment laws, the principles of the common law doctrine of distress seem to have been essentially assumed, subject to the same checks and limitations which, under the English statute law and modern decisions, have modified and improved them. (*e*) I shall, therefore, proceed to consider the remedy by distress for rent, upon the principles of the English common and statute law, as being incorporated into the jurisprudence of most of the United States.

The exorbitant authority and importance of the feudal aristocracy, and the extreme dependence and even vassalage of the tenants, was the occasion of introducing the law of distresses, and which summary remedy is applicable to no other contracts for the payment of money than those between landlord and tenant. The nonpayment of rent, or nonperformance *474 *of any other stipulated service, was originally, by the feudal law, a forfeiture of the feud, and the lord was at liberty to enter and reassume. The severity of those feudal forfeitures was then changed, and intended to be softened into the right of distress, which was borrowed, as Baron Gilbert supposes, (*a*) from the civil law, for by that law the creditor had a right to seize a pledge in order to obtain justice. So, under the feudal law, instead of insisting upon an absolute forfeiture of the land, or even of the right of the lord to enter and hold the lands until the tenant had rendered his service, the law substituted the seizure of the cattle and other movables found upon the land,

(*d*) Civil Code of Louisiana, art. 2675–2679.

(*e*) Potter *v.* Hall, 3 Pick. 368. The regulation of the law of distress was made by statute in Massachusetts as early as 1641. Digest of Massachusetts Laws, 1675. The remedy by the writ of replevin for goods distrained or impounded is regulated by statute in Connecticut. Revised Statutes, 1821; and by statute in 1838, the writ of replevin is extended to debts taken by process of foreign attachment. Statutes of Connecticut, 1838, p. 506. The same remedy was provided for goods impounded or distrained, by the Plymouth Colony Laws, 1671. See Brigham's ed. 256, 275. See also Revised Statutes of Vermont, 1839, p. 197. The writ of replevin is given for goods unduly distrained or attached; but I apprehend the remedy for nonpayment of *rent*, in the New England States, is not by distress, but by action of debt or assumpsit. See Mass. R. S. c. 60, secs. 22, 23.

(*a*) Gilbert on Distresses, 2.

and allowed them to be detained as a pledge until the damages were paid. This power of distress, as anciently used, was soon found to be as grievous and oppressive as the feudal forfeiture. It was equally distressing to the tenant to be stripped in an instant of all his goods and chattels, for arrearages of rent, as it was to be turned out of the possession of his farm. The power of distraining for rent, and other feudal services, became an engine of the most insupportable tyranny and oppression. (*b*) These abuses were first stated in the statute of 51 Hen. III., De Districtione Scaccarii, wherein it is mentioned, that the commonalty of the realm had sustained great damage by wrongful taking of distresses for the king's debts; and it provided, that when beasts should be distrained and impounded, the owner might feed them without disturbance; and that the things distrained should not be sold until the expiration of fifteen days; and that if there were any chattels to distrain, neither beasts of the plough, nor sheep, should be distrained; and that the distress should be reasonable in amount, according to the estimation of neighbors. In the following year, the statute of Marlebridge, in the 52 Henry III., was passed, providing more generally against the abuse of the *right of distress, and that statute stated the abuses *475 of landlords in strong language: Magnates graves ultiones fecerunt, et districtiones quosque redemptiones reciperunt ad voluntatem suam. What made the grievance more insupportable was, that the lords refused to permit the king's courts to take cognizance of the distresses which they had made at their own pleasure, and therefore, as Sir Edward Coke observes, they assumed to be judges in their own causes, contrary to the solid maxim of the common law. (*a*) This statute restored the authority of the regular courts, and ordered all distresses to be reasonable, and that whoever made an excessive distress should be grievously amerced. The distress was not to be taken or driven out of the county, and it was not to be made upon a public highway, and a remedy by replevin was given for a wrongful distress. By these salutary provisions, the power of distress was confined to the original intention of the law, which was to seize the tenant's goods by way of pledge, in order to compel him to perform his feudal engagements. (*b*)

(*b*) Gilbert on Distresses, 3.
(*b*) Gilbert on Distresses, 4, 84.
(*a*) 2 Inst. 102, 108.

The common law also imposed several benign restrictions upon this summary and somewhat perilous authority of distress. It forbade perishable articles to be distrained, because all pledges ought to be returned in the same good condition as when taken. It forbade the tools and implements of a man's trade, as well as the beasts of the plough, to be distrained, provided other articles could be found; because the taking of such articles would tend to produce an utter inability in the tenant to redeem the pledge. (*c*) The goods were also to be put into a pound, and there kept safely, without being used by the landlord, until they were redeemed. (*d*)

*476 *But if the tenant was disposed to controvert the legality of the distress, either by denying any rent to be due, or by averring it to be paid, the law provided him with a remedy by the writ of replevin; which was a writ authorizing the sheriff to take back the pledge and deliver it to the tenant, on receiving security from him to prosecute the writ to effect, and to return the chattels taken, if he should fail in making good his defence. (*a*)

In modern times, the whole policy of the law respecting distresses has been changed. It was inconvenient, if not absurd, that property should be kept in an inactive state in order to compel a man to perform his stipulated payment. A distress at this day is no more than a summary mode of seizing and selling the tenant's property to satisfy the rent which he owes; and the extent and manner of the operation have been changed, and made entirely reasonable and just, and equally conducive to the security of the landlord and the protection of commerce.

When rent is due and unpaid, and when no judgment in a personal action has been had for the recovery of the same, (*b*) the

(*c*) 2 Inst. 132, 133; Gilbert on Distresses, 35, 36.

(*d*) Cro. Jac. 148. A tender of amends comes too late after the goods distrained for rent or for trespass are impounded, for they are then in the custody of the law. Pilkington's Case, 5 Co. 76, a; Ladd *v.* Thomas, 12 Ad. & El. 117. It is good while the chattels remain in the custody of the distrainor. Browne *v.* Powell, 12 Moore, 454; Hilson *v.* Blain, 2 Bailey (S. C.), 168.

(*a*) In New Hampshire, judgment for the defendant in replevin is not for the return of the goods, but for the value of the chattels replevied in damages. Bell *v.* Bartlett, 7 N. H. 178.

(*b*) New York Revised Statutes, ii. 500, sec. 2. In Maryland, by statute, in 1832, the remedy by distress for rent, payable in grain or other produce, was regulated. In Pennsylvania, judgment in debt for rent, without satisfaction, does not take away the remedy by distress. Bantleon *v.* Smith, 2 Binney, 146. The statute of 8 Anne,

landlord, upon demand, may enter immediately, by himself or his agent, (*c*) upon the demised premises, and distrain any goods and chattels that are to be found there, belonging to the tenant or others, and this right of the landlord to distrain any goods and chattels upon the premises, is founded upon reasons of public policy, to prevent collusion and fraud. (*d*) This was the rule

c. 14, authorized distress during six months after the end of the term, if the lessor's title and the tenant's possession still continued. This is the statute law also in Virginia and Kentucky; and the statute in the latter state authorizes the distress, though the tenant has removed his effects from the land. Lougee *v.* Colton, 2 B. Mon. 115.

(*c*) As a check to abuse in the exercise of the right of distress, the New York Revised Statutes, ii. 501, secs. 2, 3, 8, require that no distress shall be made for any rent for which a judgment shall have been recovered in a personal action; and they also require every distress to be made by the sheriff or one of his deputies, or by a constable or marshal of the city or town, and upon the previous affidavit of the landlord or his agent, of the amount of rent due, and the time when. So, in Georgia, the distress warrant is to be granted by a justice of the peace. Prince's Dig. 1837, 687.

(*d*) Gorton *v.* Falkner, 4 T. R. 565; Jones *v.* Powell, 5 B. & C. 647. A stranger's goods on the land may be distrained even for a rent charge. Saffrey *v.* Elgood, 1 Ad. & El. 191. In Virginia, by statute, in 1818, the property of strangers, found upon the premises, is exempted from distress. 4 Rand. 334. In Gorton *v.* Falkner, Mr. J. Ashurst considers the foundation of the principle that the goods of the stranger may be taken, to be, that the landlord is supposed to give credit to the visible stock on the premises, and he ought, therefore, to have recourse to every thing he finds there. But the Chief Justice, in Brown *v.* Sims, 17 Serg. & R. 138, was of opinion, that the right of distraining a stranger's goods on the premises, rested on no principle of reason or justice, and he thought that the constantly growing exceptions to that part of the law of distress would, in the end, eat out the rule itself. So, again, in Riddle *v.* Welden, 5 Wharton, 1, the Ch. J. of Pennsylvania looked very unfavorably upon the extent of the English law of distress; and it was adjudged in that case, that the effects of a lodger and boarder were exempt from distress for rent due from the keeper of the boarding house, and it was considered that the whole law of special exemptions rested on the principle of public convenience. In New Jersey, by statute, the goods on the premises, not belonging to the tenant, are exempted from distress for rent due from the tenant. New Jersey Revised Laws, 201, sec. 8; Elmer's Dig. 135; R. S. New Jersey, 1847. This is also the case in Illinois. Revised Laws of Illinois, 1833. In Ohio, the writ of replevin lies for goods and chattels wrongfully detained; but I do not perceive, in the "enacted and revised" laws of Ohio, of 1831, any allusion specially to *distress for rent*. The statute law of Missouri allows the writ of replevin, in the case of goods wrongfully taken or wrongfully detained, but in no other case, and it is silent as to the remedy by *distress* for rent. It gives remedy by action for the recovery of rent. Revised Statutes of Missouri, 376. The Kentucky statute of 1811, on this subject, gives the landlord a right to distrain the goods of his tenant or subtenant *only*, and thus exempts from the distress warrant the goods of all other persons, even those *bona fide* purchased of the tenant, and still remaining on the premises. And this power of distress for rent does not extend to the interest of a mortgagor, or

*477 of the common law. (e) But this inconvenient *privilege is subject to many exceptions. Articles that may be temporarily placed upon the land by way of trade, and belonging to third persons, (a) are exempted from distress, on the broad principle of public convenience, and for the benefit of commerce. The goods of a guest, (b) or a horse at a public inn, or sent to a livery stable to be taken care of, or the goods of a boarder at a boarding house, or corn at a mill, or cloth at a tailor's shop, or goods delivered to a person exercising a public trade, to be wrought or managed in the way of his business, or a grazier's cattle put upon the land for a night, on the way to market, or goods deposited in a warehouse or with an auctioneer for sale, or on storage in the way of trade, or goods of a principal in the hands of a factor, are not distrainable for rent. (c) The exemption would seem to be general in those cases in which the course of business necessarily puts the tenant in temporary possession of the property of his customers. (d) With respect to the cattle of a stranger found upon the land, there is this distinction, that if they broke in they are distrainable immediately, but if the fences were bad they are not distrainable, until the owner, after

his equity of redemption in goods mortgaged. Snyder v. Hitt, 2 Dana (Ky.), 204; Craddock v. Riddlesbarger, ib. 205.

(e) Beadley on Distress, 106; Butler v. Morgan, 8 Watts & S. 58.

(a) Hoskins v. Paul, 4 Halst. 110.

(b) The property of boarders at taverns and boarding houses is not liable to distress for rent, although the property be in the possession and actual use of the tenant by their permission. Stone v. Matthews, 7 Hill (N. Y.), 429.

(c) 2 Saund. 289, a, n. 7; Gisbourn v. Hurst, 1 Salk. 249; 3 Bl. Comm. 8; Gilman v. Elton, 3 Brod. & B. 75; Co. Litt. 47, a; Thompson v. Mashiter, 1 Bing. 183; Matthias v. Mesnard, 2 Carr. & P. 353; Brown v. Sims, 17 Serg. & R. 138; Youngblood v. Lowry, 2 M'Cord, 39; Adams v. Grane, 1 Cromp. & M. 380; Riddle v. Welden, 5 Wharton, 1; Connah v. Hale, 23 Wend. 462; [Brown v. Arundell, 20 L. J. N. s. C. P. 30; Williams v. Holmes, 22 id. Ex. 283; Cadwalader v. Tindall, 20 Penn. St. 422; Briggs v. Large, 30 id. 287; Allen v. Agnew, 4 Zabr. 443; Marshall v. Vultee, 1 E. D. Smith (N. Y.), 294;] Owen v. Boyle, 22 Me. 47. This last case related to goods stored in a warehouse for *reshipment*, and was decided, after great discussion, by a majority of the court, not to be distrainable. If a stranger's goods be on the demised premises without his fault, and he endeavors to reclaim them with due diligence, and without any voluntary delay, they are not in that case and in that plight distrainable for rent. So, the purchaser of goods at a sheriff's sale must remove them in a reasonable time (and which is very short), or they will be liable to distress for rent. Gilbert v. Moody, 17 Wend. 354.

(d) This was a principle declared by the Ch. J. of Pennsylvania, in Brown v. Sims, 17 Serg. & R. 138, and Riddle v. Welden, 5 Wharton, 1, and by Mr. Justice Cowen, in Connah v. Hale, 23 Wend. 472-477.

notice, has neglected to take them away. (*e*) Corn and grass, whether growing or cut, are seizable by way of distress, and those articles and cattle may be secured or impounded upon the premises and there sold. (*f*) The distress must be reasonable, and it cannot *be made in a public highway, or removed *478 out of the county. (*a*) The highway, in particular, ought to be secure to the tenant for the intercourse of commerce, and the preservation of peace and good order.

Nor can beasts of the plough, sheep, or implements of a man's trade, be taken for rent, so long as other property can be found; but they may be distrained if not in actual use at the time, and there be no other sufficient distress on the premises. (*b*) In the case of *Simpson* v. *Hartopp*,(*c*) the question was, whether a stocking-frame, in the actual use of a weaver at the time, was distrainable for rent; and after two distinct arguments, at different terms, it was adjudged that it was not. Lord Ch. J. Willes took an accurate and elaborate view of the law on the subject; and it was stated that there were several sorts of things not distrainable at common law. 1. Things annexed to the freehold, such, for instance, as furnaces, millstones, and chimney-pieces. 2. Things delivered to a person exercising a public trade, to be worked up or managed in the way of his trade, as a horse at a smith's shop, material sent to a weaver, a horse brought to an inn; though with respect to a carriage at a livery stable, it has

(*e*) In South Carolina, estrays, though *levant et couchant*, are not distrainable for rent; but the cattle of third persons, put on the premises with the consent of the owners, are liable to distress. Reeves *v.* McKenzie, 1 Bailey, 497.

(*f*) Corn, growing, and sold on *fi. fa.*, and left on the land to be reaped, is not distrainable for rent accruing after seizure on the execution. Wright *v.* Dewes, 3 Nev. & M. 790; Peacock *v.* Purvis, 2 Brod. & B. 362, s. P.

(*a*) By the New York Revised Statutes, ii. 501, sec. 5, 6, the distress cannot be driven out of the town, except to a pound within three miles' distance, and within the same county; and all beasts and chattels taken at one time must be kept, as near as may be, in the same place. Nor can goods distrained be removed, if tender of the rent be made before they are impounded or removed. Vertue *v.* Beasley, 2 Moody & M. 21. If sufficient distress be made, and afterwards abandoned without any reasonable excuse, a second distress for the same rent is illegal. Dawson *v.* Cropp, C. B. 1845. [1 C. B. 961. See Owens *v.* Wynne, 4 E. & B. 579.]

(*b*) Gorton *v.* Falkner, 4 T. R. 565; Fenton *v.* Logan, 9 Bing. 676; 2 Inst. 132, 133; New York Revised Statutes, ii. 502, sec. 13. In Louisiana, the landlord has a privilege, by way of pledge, on the tools of a tradesman found on the premises, for the payment of rent. Parker *v.* Starkweather, 19 Martin (La.), 337.

(*c*) Willes, 512.

since been determined, (*d*) that it was not privileged from distress for rent by the lessor of the stable. 3. Cocks or sheaves of corn. (*e*) 4. Beasts of the plough and instruments of husbandry. 5. Instruments of a man's trade. These two last sorts were *479 only exempted from distress *sub modo*; * that is, upon the supposition that there was other sufficient distress. The court, in that case, held, that the stocking-frame was privileged from distress while the party was actually using it, even though there was no other distress on the premises. If it had not been in actual use, it might have been distrained; and if things in actual occupancy could be distrained, it would, as Lord Kenyon observed, (*a*) perpetually lead to a breach of the peace. The case of *Webb* v. *Bell* (*b*) seems to have laid down a contrary doctrine to a certain extent; for it was there held, that two horses, and the harness fastened to a cart laden with corn, might be distrained for rent. But Lord Ch. J. Willes doubted the law of that case; and even in the case itself a doubt is suggested, whether, if a man had been upon the cart, the whole team would not have been privileged for the time. (*c*) In Massachusetts, under their law of attachment upon mesne process, which is analogous to the common law doctrine of distress for rent, it has been held, that a stage coach at a tavern, in preparation, and nearly ready to depart, might be attached; and the court inclined to think, that stage

(*d*) Francis *v.* Wyatt, 3 Burr. 1498. This case was questioned as to the accuracy of the report, by Mr. J. Patteson, in Brown *v.* Shevil, 4 Nev. & M. 277, where it was held, that all goods sent to a tradesman to be wrought upon in the trade, were, while in his custody, protected from distress; and that the rule applied to the case of a beast sent to a butcher to be slaughtered for the sender. [See Kerby *v.* Harding, 20 L. J. N. S. Ex. 163.]

(*e*) Shocks and sheaves of corn are distrainable in England by statute; but as there is no such statute in Indiana, the common law rule prevails. Given *v.* Blann, 3 Blackf. 64.

(*a*) Storey *v.* Robinson, 6 T. R. 138; Fenton *v.* Logan, 9 Bing. 676; Field *v.* Adames, 12 Ad. & El. 649, S. P.

(*b*) 1 Sid. 440.

(*c*) The sheriff, *on execution*, may seize a horse, though the owner is riding him at *the time*, which is not allowed in the case of a distress. State *v.* Dilliard, 3 Ired. (N. C.) 102. In Muspratt *v.* Gregory, 1 M. & W. 634, the question as to articles privileged from distress was discussed with great learning and refinement, and it was held, that the boat of a manufacturer, placed for receiving and carrying away salt on a canal, was not privileged, inasmuch as the salt to be conveyed was not privileged on the ground of the benefit of trade, or within any of the five rules of exemption laid down by Ch. J. Willes.

coaches, steamboats, and vessels in actual use, might be attached, though the decision did not go to that broad extent. (*d*)

(*d*) Potter *v.* Hall, 3 Pick. 368. The New York Revised Statutes, ii. 501, 502, sec. 10, ib. 367, sec. 22, specially exempt spinning wheels, weaving looms, and stoves, kept for use in a dwelling house, books not exceeding $50 in value, and kept and used as part of the family library, a pew occupied by the family in a place of public worship, sheep to the number of ten, with their fleeces, and the cloth manufactured from them, one cow, two swine, and a few necessary articles of provisions and furniture, as well as wearing apparel and bedding, and owned by a householder, and the necessary tools of a mechanic to the value of $25, from distress for rent, as well as from execution. So, certain articles, as looms, spinning wheels, stoves, wool, flax, &c., to 20 lbs. weight, loaned or furnished to indigent widows and females, are exempt from distress and from execution. New York Statutes, April 15th, 1814, c. 141. The exemption of personal property from distress for rent and sale, under execution, was still further extended in New York in 1842. Laws of N. Y. sess. 65, c. 157. It exempts necessary household furniture, and working tools, and team owned by any householder, or having a family for which he provides, to the value not exceeding $150, provided the exemption be not applied to a demand on execution for the purchase money of such articles. In the case of Quackenbush *v.* Danks, 1 Denio, 128 it was adjudged that this exemption act of New York of property from distress for rent and from execution, so far as it affected the remedy on past contracts, was void, as impairing the obligation of contracts. So, when a man dies, leaving a widow and minor children, there shall be a like exemption; and so any assignment, sale, or pledge of property so exempted, the consideration for which was intoxicating liquors, is declared to be void. But things annexed to the freehold for the purpose of trade or manufacture, and not fixed into the wall of any building, so as to be essential to its support, and grain, grass, and roots, whether growing or gathered and remaining on the land, may be distrained. On the other hand, personal property deposited with, or hired, or lent to the tenant with the consent of the landlord, cannot be distrained; nor can the property of others, which accidentally strays on the premises, or is deposited with the tavern keeper, or the keeper of a warehouse, in the usual course of their business, or deposited with any person for the purpose of being repaired or manufactured. Ib. ii. 502, secs. 10, 14. The property of boarders at taverns and boarding houses is also exempt in New York from distress for rent. Laws of New York, sess. 56, c. 200. The statute laws of the other states, no doubt, exempt from attachment, execution, or distress, or other legal process, necessary articles, requisite to keep families from suffering, including all necessary tools of a man's trade, or for limited agricultural business. 5 Mass. 318; 4 Conn. 450; 2 Wharton, 26; Acts of Georgia, December 22d, 1822 and 1834; Act of Maine, 1838, c. 307; Statutes of Tennessee, cited in 1 Humph. 391, 392. The statute of Alabama, in 1832, is exceedingly liberal on this point. It exempts from all legal process "two cows and calves, 500 lbs. of meat, 100 bushels of corn, *all books*, a pair of work oxen, all tools or implements of trade, 20 head of hogs," &c. The statute law of Kentucky, of 1828, exempts from execution against a housekeeper with a family, *one work beast*, and no more of that kind of property; and the statute of Michigan (1839) exempts from execution private libraries, not exceeding in value, in the whole, $100. The statute law of Georgia, of December 11th, 1841, exempts from execution founded on contracts in favor of heads of families, *twenty acres of land*, and an additional *five acres* for each child of defendant under fifteen years of age, provided the land derives its chief value from its adaptation to agricultural purposes. If the defendant owns more than twenty acres, he is to

*480 *After the distress has been duly made, if the goods be not replevied within five days after notice, the statute of New York has provided, that the goods shall be forthwith appraised, and sold at public vendue, under the superintendence of a sheriff or constable, towards satisfaction of rent. (a) And this law of distress is liable to so much abuse on the part of the landlord, and tenants are so often driven to desperate expedients to elude the promptitude and rapidity of the recovery, that the law has been obliged to hold out the penalty of double damages against the one, if he distrains when no rent is due, and of treble damages against the other, if he unlawfully rescues the goods distrained. (b) If the tenant holds over, the possession may be recovered, in New York, by the landlord, under a new and summary course of proceeding. (c) The proceeding applies to tenants for years, and from year to year, or for part of a year, or at will, or at sufferance, and to the assigns, under tenants or legal representatives of such tenant; and it applies to holding over after the expiration of the term without permission, or after default in the payment of rent pursuant to contract. This provision was, however, qualified subsequently by statute, in cases where the unexpired term of the

procure twenty acres to be laid off, so as to include the dwelling house and improvements on the tract, not exceeding in value $1200. The exemption is further extended to one horse and ten head of hogs, &c. By the constitution of Wisconsin, adopted in 1846, 40 acres of land, to be selected by the husband, or the homestead of a family not in any city or village, and not exceeding 40 acres; or city or village lots, being the homestead of a family, and not exceeding in value $1000, are not to be subject to sale on execution for debts subsequently contracted, though such exemption is not to affect any mechanic's or laborer's lien, nor mortgages lawfully obtained, nor shall such property be alienated by the husband without the wife's consent.

By the Roman law, the landlord's lien for his rent of a farm was confined to the produce of the field. Neither cattle, nor implements of husbandry, nor furniture, were included. But the rule varied in the case of houses rented, and the permanent movables within the house were liable to distress for rent. Dig. 20. 2. 7. 1.

(a) N. Y. Revised Statutes, ii. 504, secs. 24, 25, 26; and within ten days after the sale, the officer must file, in the office of the town-clerk, the original warrant of distress, and the original affidavit of the landlord or his agent. Ib. 501, sec. 9.

(b) N. Y. Revised Statutes, ii. 504, secs. 23, 27. Executors and administrators have, as such, the usual remedy by distress for nonpayment of rent. Ib. i. 747.

(c) Ib. ii. 512, sec. 28. In Connecticut, summary process to obtain possession is also given in favor of the owner, when the lessee holds over. Revised Statutes of Connecticut, 1821, p. 807. There is probably a summary remedy to obtain possession as against a lessee, who ought to quit, given by statute in the states generally. The statute of 1 and 2 Vict. c. 74, also gives a summary remedy where the tenant holds over, where there is no rent, or the rent does not exceed £20 a year.

lease exceeds five years at the time of issuing the warrant; (*d*) and it gives the tenant, or his representatives, or his judgment creditor, or mortgagee, one year after possession recovered by the landlord, to redeem. But in the case of a tenancy *at will, or by sufferance, one month's previous notice in *481 writing to the tenant to remove must have been given; and in case the proceeding be for nonpayment of rent, there must have been a previous demand for the rent, or three days' notice in writing, to pay or deliver the possession. (*a*) This summary remedy for nonpayment of rent applies also where the tenant has been discharged under any insolvent act, as to his debts or person, or after the estate has been sold under an execution against such person. (*b*) But it does not apply, when it shall appear that satisfaction for the rent might have been obtained by distress; and the whole provision is general, and applies to every part of the estate. At common law, distress could only be made on the land out of which the rent issues; (*c*) but now, by statute, if the tenant carries away his goods, before or after the rent becomes due, leaving the rent unpaid, the goods of such tenant are not only liable to be seized wherever found, at any time within thirty days after the rent becomes due, though the removal may have been at any time within six months preceding, but the tenant forfeits double the value of the goods if the removal was fraudulent. (*d*) And in order to give

(*d*) Laws of N. Y., April 12, 1842, c. 240.

(*a*) N. Y. Revised Statutes, i. 745, secs. 7, 8, 9, ii. 512, sec. 28. A mortgagor, after forfeiture, is not that kind of tenant who can be dispossessed in this summary way. Roach *v.* Cosine, 9 Wend. 227.

(*b*) N. Y. Revised Statutes, ii. 512, sec. 28. In Pennsylvania, under their statutes, a summary remedy for recovery of possession is given to the landlord, when the tenant removes without leaving goods sufficient to pay three months' rent, and the tenant refuses to give security to pay it. Freytag *v.* Anderson, 1 Ashmead, 98; Black *v.* Alberson, ib. 127. But this remedy does not deprive the landlord of his action for the rent, though he may have repossessed himself of the premises. Rubicum *v.* Williams, ib. 280.

(*c*) This doctrine was enforced with great strictness in the case of Buszard *v.* Capel (8 B. & C. 141; 6 Bing. 150, s. c. on error), where it was decided, that a barge attached to a wharf by a rope could not be distrained for rent by the lessor of the wharf, though the land on which the wharf stood was demised; and the *use of the land* in the river Thames opposite the wharf, between high and low water mark, was demised as appurtenant to the wharf, but *not the land itself* over which the barge floated when it was distrained. See also Winslow *v.* Henry, 5 Hill (N. Y.), 481.

(*d*) N. Y. Revised Statutes, ii. 502. sec. 15; 503, secs. 16, 17. Reynolds *v.* Shuler, 5 Cowen, 328. The statute of New York goes further than the English statute of 11

*482 further and effectual *security to the rent of the landlord, where the rent is certain, (*a*) the statute of 8 Anne, c. 14, declared (and that provision has been very generally reënacted in this country), that no goods of a tenant, or of any other person being on the premises, and liable to distress, can be taken on an execution at the instance of a creditor, until arrears of rent due at the time, and not exceeding one year, be previously deducted. (*b*) The sheriff must have notice (and either written or parol is sufficient) of the landlord's claim, otherwise he is not bound to know who the landlord is, or what rent is in arrear. (*c*) The one year's rent to the landlord, in case of execution against the personal property of the tenant, refers to the last year's rent; (*d*) and by the Revised Statutes of New York, if the tenant denies that rent is due as claimed, he may tender a bond with sureties to the officer to pay all rent due, not exceeding one year's rent. The bond is to be executed to the landlord, and delivered to him, and

George II., or the statute of Pennsylvania of 1772, for by them the goods must have been removed *after* the rent was due, to authorize the landlord to distrain them. [Dibble *v.* Bowater, 22 L. J. N. S. Q. B. 396.] Grace *v.* Shively, 12 Serg. & R. 217. The Pennsylvania statutes of 1772 and of 1825 (the last being a supplement to the other) require the removal to be fraudulent. Purfel *v.* Sands, 1 Ashm. 120. The law in Louisiana goes beyond the statute in New York, for if the tenant removes his goods from the premises, and abandons them, he becomes liable at once for the rent of the whole term *due and to become due.* The tenant is considered as withholding from the landlord the *pledge* he had for the rent, but execution only goes for the rent actually payable, and so *toties quoties* monthly during the period of the term. The doctrine was taken from the Roman law, and the equity of it recommended it strongly to the Louisiana courts. Christy *v.* Casanave, 2 Martin (N. S.), 451; Reynolds *v.* Swain, 18 La. 198. In Kentucky, where the tenant is about to remove his effects, attachment for rent lies before it is due, if the rent be payable in money. Poer *v.* Peebles, 1 B. Mon. 1.

(*a*) Risley *v.* Ryle, 11 M. & W. 16.

(*b*) N. Y. Revised Statutes, i. 746, sec. 12–17; Russell *v.* Doty, 4 Cowen, 576; Statutes of Virginia, Kentucky, &c.; 2 Dana (Ky.), 208; Purdon's Dig. Penn. 378; 6 Rob. (La.) 885. R. S. N. Jersey, 1847, tit. 4, c. 7, has the English statutes and remedies on the subject of landlords and tenants condensed. Indeed, the statute code of New Jersey had adhered closely to the rules of the common law and of the English remedial statutes, and fortunately bears but few marks of the modern presumptuous spirit of innovation.

Though goods be seized by the sheriff under attachment against an absconding debtor, it does not detract from the landlord's right of distress. Acker *v.* Witherell, 4 Hill (N. Y.), 112.

(*c*) Smith *v.* Russell, 8 Taunt. 400; Alexander *v.* Mahon, 11 Johns. 185; N. Y. Revised Statutes, i. 746, secs. 12, 18; Waring *v.* Dewberry, Str. 97; Burket *v.* Boude, 8 Dana (Ky.), 213; Van Rensselaer *v.* Quackenboss, 17 Wend. 34.

(*d*) Bradby on Distress, 118.

for his use, by the officer, and it is to be received as a substitute for his lien on the execution. (*e*)

This power of the landlord does not extend to the seizure of goods, as a distress for rent, when the goods have been sold *bona fide*, and for a valuable consideration, either by the tenant himself, or by execution, before the seizure was made. (*f*)

But a mortgage of the goods is said not *to be a sale *483 within the provision, so as to protect them from distress. (*a*)

And if the interest of the tenant in the term has ceased, and the tenancy ended, and the tenant, with his goods, removed from the premises, a distress for rent could not formerly be made, though it be within thirty days from the termination of the tenancy. (*b*) The remedy by distress, according to the common law, assumed the tenancy to continue, and ceased with it; (*c*) but by a provision in the statute of 8 Anne, (and which has been adopted in this country,) (*d*) the remedy by distress is extended to six months after the termination of the tenant's lease, whether the lease be for life, for years, or at will. It was made necessary, under the statute, that the landlord's title and the tenant's possession should equally have continued; but by the New York Revised Statutes, it is declared generally that the distress may be made upon any goods remaining or removed, in the same manner, within the same time, and under the same provisions and restrictions, as if the tenancy had not ended. (*e*) The distress may also be made,

(*e*) N. Y. Revised Statutes, i. 746, sec. 12–17. The process and forms of the summary proceeding in New York, to oust the tenant wrongfully holding over, are given in a note to the case of Nicholas *v.* Williams, 8 Cowen, 1. If the tenant for life or years, or any other person coming in under or by collusion with such tenant, wilfully holds after demand and one month's notice to quit, he is chargeable at the rate of double the yearly value of the land, and the special damages and equity cannot afford him any relief. N. Y. Revised Statutes, i. 745, sec. 11. Double rent is likewise given if a tenant gives notice of his intention to quit, and does not remove pursuant to notice. Ib. sec. 10.

(*f*) N. Y. Revised Statutes, ii. 503, sec. 16; Neale *v.* Clautice, 7 Harr. & J. 372, s. p.; Craddock *v.* Riddlesbarger, 2 Dana (Ky.), 209, 211.

(*a*) Reynolds *v.* Shuler, 5 Cowen, 323.

(*b*) Terboss *v.* Williams, 5 Cowen, 407. Goods of a mere *undertenant*, who removed from the premises before any rent became due, are not liable to distress. It would be otherwise if the goods belonged to an *assignee* of the original tenant. Acker *v.* Witherell, 4 Hill (N. Y.), 112. [See Ragsdale *v.* Estis, 8 Rich. 429.]

(*c*) Co. Litt. 47, 1; Pennant's Case, 3 Co. 64; Stanfill *v.* Hickes, 1 Ld. Raym. 280.

(*d*) N. Y. Revised Statutes, ii. 500, sec. 1.

(*e*) N. Y. Revised Statutes, ii. 500, sec. 1; ib. 503, sec. 16. The remedy by distress, if the goods be removed, is confined to thirty days after the removal, and if

under the above limitations, for all the arrears of rent arising during the tenancy, though the rent of several years should happen to be in arrear. (*f*) And in *Webber* v. *Shearman*, (*g*)

remaining upon the demised premises, to six months from the determination of the lease. Bukup *v.* Valentine, 19 Wend. 554. The New York statutes have likewise given a summary remedy to the landlord, with the aid of a magistrate, in cases where the premises are deserted, and the rent left in the arrear. N. Y. Revised Statutes, ii. 512. A like summary remedy to obtain possession, where there are not goods on the premises sufficient to pay the rent, is given by statute in Pennsylvania, in 1830.

(*f*) Braithwaite *v.* Cooksey, 1 H. Bl. 465; *Ex parte* Grove, 1 Atk. 104; Wright *v.* Williams, 5 Cowen, 501; Blake *v.* De Liesseline, 4 M'Cord, 496; Sherwood *v.* Phillips, 13 Wend. 479. The English real property commissioners, in their report in 1829, proposed that no person should bring any action, or distrain for any arrears of rent, after six years from the time when the same became due. This provision was incorporated into the statute of 3 and 4 William IV. c. 27, but it does not apply to actions of debt for rent *upon any indenture of demise*: they may be brought in such cases within twenty years, or when there is a written admission that the rent is due. It was held, in St. Mary's Church *v.* Miles, 1 Wharton, 229, that mere lapse of time, without demand of payment, was no evidence by presumption that the *ground rent* (which the case says is favored in law), founded on deed, has been released or extinguished, though it may raise a presumption that the *arrears* have been paid.

There is a variety of opinion in the books as to the recovery of interest upon rent in arrear. In *covenant* for rent payable in money, interest has been allowed. Clark *v.* Barlow, 4 Johns. 183; Obermyer *v.* Nichols, 6 Binney, 159; 4 M'Cord, 59, s. p. [Livingston *v.* Miller, 11 N. Y. 80; Burnham *v.* Best, 10 B. Mon. 227.] So, in debt for rent, Dennison *v.* Lee, 6 Gill & J. 388. On the contrary, in Cooke *v.* Wise, 3 Hen. & Munf. 468–501, interest was held not to be recoverable by way of damages in debt for rent, for the party had his remedy by distress. Not recoverable in suit in Louisiana, but from the judicial demand. Perret *v.* Dupre, 19 La. 341. But all the cases agree that, under the remedy by *distress*, the rent only, and not interest by way of damages, is recoverable. Braithwaite *v.* Cooksey, 1 H. Bl. 465; Lansing *v.* Rattoone, 6 Johns. 43; Dennison *v.* Lee, 6 Gill & J. 383; Sherry *v.* Preston, 2 Chitty, 245; Vechte *v.* Brownell, 8 Paige, 212. All the statute provisions relative to the remedy by distress assume this principle. It is also adjudged that the remedy by distress exists only in cases where the rent is, by the agreement of the parties, made *certain*, either in money or services, or can be reduced to a certainty. Valentine *v.* Jackson, 9 Wend. 302. The N. Y. Revised Statutes, i. 747, sec. 18, gives the remedy by distress, when any "certain services or certain rent," reserved out of land, is due. They allow the owner of a wharf in the city of New York to distrain for *wharfage* any goods and chattels on board of any vessel which has used the wharf, though the vessel had removed from the wharf to another part of the city. See New York Revised Statutes (ed. 1813), ii. sec. 212, 217.

Whenever goods are wrongfully distrained, the owner may recover them by an action of replevin. This action of replevin lies also in other cases, where goods have been tortiously taken or detained. Pangburn *v.* Patridge, 7 Johns. 140. See also 6 Binney, 2; 16 Serg. & R. 300; Baker *v.* Fales, 16 Mass. 147; Pease *v.* Simpson, 3 Fairf. 261; Seaver *v.* Dingley, 4 Greenl. 306; 12 Wend. 32; 14 Johns. 84; 15 id. 402; 19 id. 31; 20 id. 467; 1 Wend. 109, to the same point. In Seaman *v.* Baker & Mc-

(*g*) 6 Hill (N. Y.), 20.

it was held, that if the tenant remain in the occupation of the premises for several successive years, under distinct demises from year to year, from the same landlord, the whole period is to be regarded as one term for the purpose of continuing the right of distress.

* But the object of this work will not permit me to * 484 descend into greater detail, and I am obliged to be confined to a general view of the law on the subject of rent, and the remedy to recover it. The contract for rent, and the remedy, are

Whister, in the Supreme Court of Nova Scotia, in July, 1845, replevin was sustained after a learned discussion, in the case of trespass upon land for stones tortiously taken from a quarry and worked into grindstones. It was formerly the understanding and practice in the English courts and books, that replevin was the remedy applied only to a wrongful distress for rent, but it has lately been considered as applicable to any wrongful detention of chattels. Dore *v.* Wilkinson, 2 Stark. 288; 1 Chitty Gen. Pr. 811. [See Mennie *v.* Blake, 6 El. & Bl. 842; Mellor *v.* Leather, 1 El. & Bl. 619.] This is now the prevalent American doctrine. Baron Parke said, in George *v.* Chambers, 11 M. & W. 149, and the other judges agreed, that replevin was a remedy at common law in all cases where goods are improperly taken, though not in a case of goods taken in execution under a court of regular jurisdiction, and only where it has no jurisdiction. Revised Code of Indiana, ed. 1838, p. 476; 2 Blackf. 174, 176, note 8; Statute of Ohio, 1831. The N. Y. Revised Statutes, ii. 522, have also granted the writ of replevin whenever goods have been wrongfully taken, or are wrongfully detained. But the statute provides that replevin shall not lie for goods taken by warrant for any tax, assessment, or fine, nor for goods seized on execution or attachment, unless they be goods exempted by law from such process, nor unless the party hath a right at the time to reduce the goods into his possession.

In Indiana, by statute, 1831, replevin lies for goods unlawfully detained, though they may have been lawfully taken. 2 Blackf. 176, note 3; 418, note. So, the writ lies in Michigan, Illinois, Missouri, Delaware, and Arkansas, for goods wrongfully taken or detained. Territorial Act of Michigan, April 4, 1833; Revised Laws of Illinois, ed. 1833, p. 508; Skinner *v.* Stouse, 4 Mo. 93; Revised Statutes of Arkansas, 659; 3 Harr. (Del.) 113. The decisions in Massachusetts and Maine, that replevin will lie for goods unlawfully detained, though not preceded by a tortious taking, were founded upon the statutes of 1789 and 1821. In New Jersey, the statute regulating the action of replevin, lies for goods *taken and wrongfully detained*, and it is a close adoption of the English statute law on the subject. Elmer's Dig. 466. When it is said in the books that replevin will not lie for goods taken in *execution*, the rule is to be taken to be limited to cases in which the writ of replevin is sued out by the defendant in the execution. The taking of the goods of a *stranger* is a trespass, and replevin lies, as the cases above cited show, when goods are tortiously taken, and therefore goods taken in execution may be replevied by a stranger to it. Winnard *v.* Foster, 2 Lutw. 1191; Rooke's Case, 5 Co. 99; Platt, J., in Clark *v.* Skinner, 20 Johns. 467; Dunham *v.* Wyckoff, 3 Wend. 280; Louisville & P. Company *v.* Holborn, 2 Blackf. 267; Brewer *v.* Curtis, 3 Fairf. 51; American Jurist, n. 23, art. 4, where this point is elaborately and ably discussed. In Virginia, by statute, in 1823, the writ of replevin is confined to the cases of distress for rent. 1 Rob. Pr. 408. This is also the case in Mississippi. Wheelock *v.* Cozzens, 6 Howard (Miss.), 279.

in constant use and application; and in the cities and large towns there are few branches of the law that affect more sensibly the interests of every class of the people. (*a*) The law may be deemed rather prompt and strict with respect to the interests of the landlord, but I am inclined to think it is a necessary provision, and one dictated by sound policy. It is best for the tenant that he should feel the constant necessity of early and punctual performance of his contract. It stimulates to industry, economy, temperance, and wakeful vigilance; and it would tend to *485 check the growth and prosperity * of our cities, if the law did not afford the landlords a speedy and effectual security for their rents, against the negligence, extravagance, and frauds of tenants. It is that security which encourages moneyed men to employ their capital in useful and elegant improvements. If they were driven in every case to the slow process of a suit at law for their rent, it would lead to vexatious and countless lawsuits, and be, in many respects, detrimental to the public welfare.

(*a*) The modern regulations on the subject of distress for rent are founded on the statutes of 2 W. & M. c. 5; 8 Anne, c. 14; 4 Geo. II. c. 28; 11 Geo. II. c. 19; and those statutes have been reënacted, with some improvements, in New York, and doubtless form the basis of our American law on the subject of distress for rent, in all those states where that remedy prevails. The statute of 11 Geo. II. c. 19, seems to have been, for instance, very strictly adopted and followed in Pennsylvania and Maryland. 12 Serg. & R. 218; 7 Harr. & J. 372, 378.

LECTURE LIII.

OF THE HISTORY OF THE LAW OF TENURE.

TENURE is inseparable from the idea of property in land, according to the theory of the English law. All the land in England is held mediately or immediately of the king. There are no lands to which the term tenure does not strictly apply, nor any proprietors of land, except the king, who are not legally tenants. To express the highest possible interest that a subject can have in land, the English law uses the terms fee simple, or a tenancy in fee, and supposes that some other person retains the absolute and ultimate right. The king is, by fiction of law, the great lord paramount, and supreme proprietor of all the lands in the kingdom, and for which he is not bound by services to any superior. Prædium domini regis est directum dominium, cujus nullus author est nisi Deus. (*a*) So thoroughly does this notion of tenure pervade the common law doctrine of real property, that the king cannot grant land to which the reservation of tenure is not annexed, though he should even declare, in express words, the grant be *absque aliquo inde reddendo*. (*b*) Sir Henry Spelman (*c*) defines a feud to be *usus fructus rei immobilis sub conditione fidei; vel jus utendi prædio alieno*. The vassal took the profits, but the property * of the soil remained in the lord, and the *seignory* of * 488
the lord and the vassal's *feud* made, together, saith Spelman, that "absolute estate of inheritance, which the feudists, in time of old, called *allodium*."

This idea of tenure pervades, to a considerable degree, the law of real property in this country. The title to land is essentially

(*a*) Co. Litt. 1, b, 65, a; 2 Bl. Comm. 105.

(*b*) Bro. tit. Tenures, 8, 52; 6 Co. 6, b; 9 Co. 128, a; Wright on Tenures, 137, 138.

(*c*) Treatise of Feuds and Tenures by Knight Service, c. 1; Glossarium Voce Feodum.

allodial, and every tenant in fee simple has an absolute and perfect title, yet, in technical language, his estate is called an estate in fee simple, and the tenure free and common socage. I presume this technical language is very generally interwoven with the municipal jurisprudence of the several states, even though not a vestige of feudal tenure may remain. In many of the states, there were never any marks of feudal tenure, and in all of them the ownership of land is essentially free and independent. By the statute of New York, of the 20th February, 1787, (*a*) entitled An Act concerning Tenures, the legislature reënacted the statute of 12 Car. II. c. 24, abolishing the military tenures, and turning all sorts of tenures into free and common socage. Under that statute, all estates of inheritance at common law were held by the tenure of free and common socage; but all lands held under grant of the people of the state (and which included, of course, all the lands in the western and northern parts of the state which have been granted and settled since the Revolution) were declared to be allodial and not feudal, and to be owned in free and pure *allodium*. (*b*) The New York Revised Statutes, which took effect on the first day of January, 1830, went the entire length of abolishing the existing theory of feudal tenures of every description, with all their incidents, and declaring all lands within the state to be allodial, and that the entire and absolute property was vested in the owners, according to the nature of their respective estates, subject only to the liability to escheat. (*c*) But *489 though the distinction, *in this country, between feudal and allodial estates, either does not exist at all, or has become merely nominal, it will be impossible for the student to understand clearly and accurately the doctrine of real property and the learning which illustrates it, without bestowing some attention to the history and character of feudal tenures.

1. Of the Origin and Establishment of Feudal Tenures on the Continent of Europe. — Some writers have supposed that the sources of feuds were not confined to the northern Gothic nations who overturned the western empire of the Romans; and that

(*a*) Laws of New York, sess. 10, c. 36.

(*b*) This is precisely the statute law of New Jersey. Elmer's Dig. 82.

(*c*) New York Revised Statutes, i. 718, sec. 8. In Maryland, it is declared that lands became in effect allodial after the Revolution, subject to no tenure, nor to any of the services incident thereto. Matthews *v.* Ward, 10 Gill & J. 448. [See 461, n. 1, (*b*)]

an image of feudal policy had been discovered in almost every age and quarter of the globe. (*a*) But the resemblances which have been suggested are too loosely stated, and are too faint and remote to afford any solid ground for comparison. The institutions which seem to have been most congenial to the feudal system, were to be found in the Roman policy. The relation of patron and client resembled, in some respects, the * feudal lord and vassal; and Niebuhr, in his His- *490 tory of Rome, (*a*) declares that relation to have been the feudal system in its noblest form. (*b*) The grants of forfeited lands, by the Roman conquerors to their veteran soldiers, as a recompense for past service, and more especially the grants of the Emperor Alexander Severus, and in the time of Constantine, on the condition of rendering future military service, afford the most plausible argument for deducing the feudal customs and tenures from the Roman law. There were, however, strong and essential marks of difference between the two systems. The connection between the patron and client was civil, and not military, and

(*a*) Voet, in his Digressio de Feudis, sec. 1, and Mr. Hargrave, in note 1 to lib. 2, Co. Litt., have referred to the several authors by whom this opinion has been advanced, and also by whom it has been refuted. I would further add, that the feudal policy is declared, by Dr. Robertson, to have existed in its most rigid form among the ancient Mexicans; and the government of the Burman empire is said to exhibit, at this day, a faithful picture of Europe during the feudal ages. The same resemblances have been traced among the Mahrattas, and the Rajpoots in Hindostan, and also in the island of Ceylon. Robertson's History of America, b. 7, ii. 280; Col. Symes's Embassy to Ava, ii. 356; Asiatic Annual Register for 1799, tit. Miscellaneous Tracts, 116; Col. Tod's Annals of Rajpootana, reviewed in Edinburgh Review, n. 103. Mr. Prescott, in his History of the Conquest of Mexico, i. 26–28, recognizes several features of the feudal system in the Aztec monarchy. The country was occupied by numerous powerful chieftains, who lived like independent princes on their domains, and held them from the monarch, under various tenures. Some of them were entailed on the eldest male issue, and most of them were burdened with the obligation of military service. Niebuhr says, the feudal system was obstinately preserved among the states or cities of the Etruscans, prior to the dominion of the Romans. The governments were rigid aristocracies, with kings elected for life, and the laboring classes were serfs. History of Rome, i. 99, 101. Gibbon discovered in the governments of the ancient Parthian and Persian empires, the essence of the feudal system, in grants, by the king, to the nobles, of lands and houses, on condition of service in war. Gibbon's History, i. 329, 343.

(*a*) Vol. i. 99.

(*b*) Mr. Spence, in his Equitable Jurisdiction, i. 28–49, considers the feudal relation of lord and vassal much more congenial with the aristocratic principle that prevailed in the relation of patron and client, and patron and freedman, in the Roman dominion, than with the free condition of the ancient Germans. He has examined, with much research and minute erudition, the usages and institutions of the Anglo-Saxons. Part 1, b. 1, c. 1–15.

the Roman estates and military grants were stable, and of the nature of allodial property. The leading points of difference between the Roman and feudal jurisprudence, in relation to land, have been abundantly shown, by the most able and the most learned of the modern legal antiquaries. (c)

(c) Hargrave's note 1 to lib. 2, Co. Litt.; Butler's note 77 to lib. 3, Co. Litt.; Sullivan's Treatise on the Feudal Law, lect. 3. Mr. Spence, in his work entitled An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, London, 1826, pp. 5, 32, &c., has examined the Roman policy on this subject, and studied the Roman laws, and particularly the Theodosian code, with the utmost attention. He has drawn from that copious source of legal antiquities a body of facts to sustain and illustrate the theory, that the barbarians adopted in a great degree the laws and institutions of the Romans, as they found them in the provinces which they invaded and subdued. His conclusion would apply better to France than to any other part of Europe. In Spain, it is said, that the early Spanish lawgivers disliked the Roman laws, and drove them from their tribunals. The Visigoths prohibited the use of them. See Institutes of the Civil Law of Spain, by Asso & Manuel, Pref. A historian more learned, even in the antiquities of Spain, than probably either of those Spanish doctors, admits that the Visigoths of Spain indulged their subjects at first with the enjoyment of the Roman law, but at length they composed a code of civil and criminal jurisprudence, which superseded those foreign institutions. Gibbon's History of the Roman Empire, vi. 378. The Gothic King of Spain, Recesvinto, prohibited the use of the Roman law in the courts, and the Visigothic code (of which the Fuero Juzgo was a Spanish translation) was the civil and criminal statute law of Spain during the Gothic ages, and prior to the Partidas; and the civil part of that code contained strong marks of the influence of the Roman law infused into it by the Spanish clergy. See Edinburgh Review, xxxi. art. 5, on the Gothic laws of Spain, in which the subject is handled with profound learning.

On the other hand, the Theodosian code, and the books of the jurisconsults authorized by that code, were the law of Gaul, when it was conquered by the Visigoths, Burgundians, and Franks; and those laws continued to be almost universally observed under the kings of the first race, and the Breviarium contributed to preserve the knowledge and use of the Roman law among the West Goths. But eventually the use of the Roman law was interdicted in the West Gothic empire. The Emperor Charlemagne, in the year 788, caused the Theodosian code to be transcribed from the abridgment of it in the edition of Alaric, King of the Visigoths; and that abridgment of the code, which is sometimes called the Anian Breviary, or the Lex Romana of the Visigoths, was the only one from which a knowledge of the civil law was gained by the jurists of Gaul, prior to the recovery of the Pandects. Histoire du Droit Français, par l'Abbé Fleury, c. 6, 11. The Breviarium Aniani, so called after Anian, the first minister of Alaric, was published at the beginning of the sixth century, by order of Alaric, and it was compiled essentially from the Theodosian code, and partly from the codes of Gregorius and Hermogenes, and the writings of Roman jurisconsults; and it was, in its turn, superseded by the more popular and vigorous doctrines of the feudal system. Its poverty is incredible, says Savigny, when viewed in connection with the rich materials from which it was formed. There is no doubt that villanage, or the servitude of the glebe, existed in the Roman provinces before the German conquests. This appears from the contents of the Code de Agricolis, et Cencitis, et Colonis. Code, lib. 2, tit. 47; and Montesquieu has justly and sagaciously inferred,

*The better and the prevailing opinion [is], that the *491
origin of the feudal system is essentially to be attributed to
the northern *Gothic conquerors of the Roman empire. It *492
was part of their military policy, and devised by them as
the most effectual means to secure their conquests. It was the
law of military occupation, and the great purpose of the tenure
was defence. The chieftain, as head or representative of his
nation, allotted portions of the conquered lands, in parcels, to
his principal followers, and they, in their turn, gave smaller par-

even from the laws of the Burgundians, that predial servitude existed in Gaul before it was invaded by those barbarians. Esprit des Loix, liv. 30, c. 10. But this humble service bore no resemblance to grants by military chiefs to their freeborn soldiers and companions, on condition of rendering future military service. M. Savigny, in his History of the Roman Law during the Middle Ages, vol. i. (translated from the German by E. Cathcart,) contends, from a full examination of original documents, that the Roman law was kept up after the German conquests, by the aid of Roman judges, and that the former inhabitants in the provinces continued in the possession of their personal freedom and property to a considerable degree. It was the policy of the Teutonic conquerors to govern their Roman subjects by the Roman law. They preserved their separate manners and laws, and there arose a system of *personal rights and laws*. The Roman and his German conqueror resided in the same city or place, each under his own laws. It often happened, said Bishop Agobard, in his letter to Louis le Débonnaire, that five men, each under a different law, might be found walking or sitting together. At first, only two laws were admitted; the law of the victors, which was properly a territorial law, and the law of the vanquished provincials, which was personal. In process of time the laws of other German races conquered by the Franks were acknowledged along with the laws of the victor and of the vanquished Romans. In the Burgundian collection of laws, it was declared, that *Inter Romanos, Romanis legibus præcipimus judicari.* Ib. i. 100, 103. With the Burgundians, the Roman lands were divided between the Burgundians and Romans. The former took half of the house, and two thirds of the cultivated lands, and one third of the bondsmen. The West Goths also deprived the Romans, by allotment or partition, of two thirds of their lands. Ib. 279, 283. In Italy, the East Goths, under Odoacer, took one third of the land. Ib. 315, 316. Mr. Finlay, in his interesting History of Greece under the Romans, London, 1844, says, that the Ostrogoths, after the conquest of Italy, allowed the Romans to retain two thirds of their landed estates, and all their movable property. The government of Theodoric was impartial and wise, and Italy was still a Roman land, and the Romans formed a large majority of the middling classes. The senate of Rome, the municipal councils of the other cities, and the old courts of law, and in short the civil laws and institutions, existed unchanged. Finlay's Hist. p. 291. But the Lombards, who succeeded to the Greek dominion in Italy, took only one third of the *produce* of the Roman estates, and the Romans were apportioned among the Lombards as their *hospites*, or guests, and were chargeable with the above tribute. M. Savigny insists, that the Roman civil institutions in the provincial cities were generously allowed by the Burgundians, West Goths, Franks, and Lombards to be retained by the vanquished. Ib. 387–434. In like manner, after the conquest of Lombardy by Charlemagne, it was left to the inhabitants to choose whether they would be judged by their own, the Roman, or the French law.

cels to their subtenants or vassals, and all were granted under the same condition of fealty and military service. (a) The rudiments of the feudal law have been supposed, by many modern feudists, to have existed in the usages of the ancient Germans, as they were studied and described by Cæsar and Tacitus. (b) But there *could not have been any thing more among the ancient Germans than the manners and state of property fitted and prepared for the introduction of the feudal tenures. Land with them was not subject to individual ownership, but belonged as common property to the community, and portions of it were annually divided among the members of each respective tribe, according to rank and dignity. (a) The German nations beyond the Rhine and the Danube prescribed limits to the march of the Roman legions; and while the latter successfully established the government, arts, institutions, and laws of their own country in Spain, Gaul, and Britain, the free and martial Germans resented every such attempt, and preserved unimpaired their native usages, fierce manners, and independent genius. (b) *The traces of the feudal policy were first distinctly perceived among the Franks, Burgundians, and Lombards, after they had invaded the Roman provinces. They

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(a) Craig's Jus Feudale, lib. 1, Dieg. 4, sec. 4, De Feudorum Origine et Progressu; Wright on Tenures, 7.

(b) Sir Henry Spelman on Feuds and Tenures by Knight Service, c. 2; Glossarium, voce Feodum; Grotius, de Jure Belli et Pacis, lib. 1, c. 8, sec. 23; Wright on Tenures, c. 1, pp. 6, 7; Sullivan on Feudal Law, lec. 8; Dalrymple's Essay on Feudal Property, c. 1. Hic contractus (scilicet feudalis) proprius est Germanicarum gentium, neque usquam invenitur, nisi ubi Germani sedes posuerunt. This is the language of Grotius, and that of Craig is to the same effect: Hæc sunt juris feudalis prima cunabula, hæc feudorum infantia ab usu et consuetudine ferocissimarum gentium, quæ ab Aquilone in Romanum orbem incurrerant, primum nata et introducta. Jus Feudale, 1, 4, 5. In a few passages of Cæsar and Tacitus, concerning the customs of the Germans, may be seen, says Dr. Sullivan, the old feudal law, in all its original parts, in embryo.

(a) Cæsar, de Bel. Gal. b. 6; Tacitus, Mor. Ger. c. 5, 11, 26. [See iv. 441, n. 1.]

(b) Velleius Pater. b. 2, c. 117, 118, It was their custom, said the Germans to Julius Cæsar, delivered down to them from their ancestors, to oppose, not to implore, those who made war upon them. Cæsar, de Bel. Gal. 4, 6. The German tribes had national institutions before their conquests, and they were societies of freemen, who possessed, in their collective capacity, all powers, legislative and judicial. The nobles, as to power, were merely freemen. The land was divided into districts, and the judicial power was in all the freemen of the district, and the count presided at the public meetings, and commanded the tribes in war. The other classes, distinct from the freemen, were bondmen and slaves. Savigny's History of the Roman Law during the Middle Ages, i. c. 4.

generally permitted the Roman institutions to remain in the cities and towns, but they claimed a proportion of the land and slaves of the provincials, and brought their own laws and usages with them. (*a*) The crude codes of the barbarians were reduced to writing after they had settled in their new conquests, and they supplanted, in a very considerable degree, the Roman laws. (*b*) The conquered lands which were appropriated by the military chiefs to their faithful followers, had the condition of future military service annexed, and this was the origin of fiefs and feudal tenures. The same class of persons who had been characterized as volunteers or companions in Germany, became loyal vassals under the feudal grants. (*c*)

These grants, which were first called benefices, were, in their origin, for life, or perhaps only for a term of years. (*d*) * The vassal had a right to use the land and take the profits, *495

(*a*) The barbarian conquerors of Gaul and Italy generously allowed every man to elect by what law he would be governed. Esprit des Loix, b. 28, c. 2; Hallam on the Middle Ages, i. 88. But Savigny insists, that the law by which every man was to be governed, was determined by birth, and not by election or free choice, and he enters into an elaborate and critical discussion on the point. History of the Roman Law, i. 134–150.

(*b*) Esprit des Loix, b. 28, *passim*; ib. b. 30, c. 6, 7, 9. Montesquieu has given a very interesting account of the institutions and of the character of the laws of the northern nations, which they introduced and established in France, Spain, and Italy, and the struggle which those laws and usages maintained with the provincial laws of the Romans. See also Spence's Inquiry, b. 3, c. 2, 8.

(*c*) Esprit des Loix, b. 3, c. 16; 2 Bl. Comm. 45, 46.

(*d*) Hallam on the Middle Ages, i. 89, insists, in opposition to most of the writers on the feudal system, that these beneficiary grants were never precarious and at will. He controverts on this point the position of Craig, Spelman, Du Cange, Montesquieu, Mably, Robertson, and all the other feudists. It is worthy of notice, that Lord Ch. B. Gilbert, in his Treatise on Tenures, 2, 8, considered feuds to have been originally for life. Sir Francis Palgrave says, that the feudal benefice was never held for a shorter term than the life of the grantee, and that the Teutonic nations took their plan of the beneficiary or feudal tenure from the Roman beneficiary system, which consisted in the assignment of a particular portion of land as the price of military service. The Rise and Progress of the English Commonwealth, i. 495–501. The uncertainty that pervades this subject seems to be the necessary result of the unfixedness, disorder, and chaos into which every thing was thrown during the transition state from the migratory and predatory life of barbarians to the settled life of cultivators. This is the view of the subject taken by M. Guizot, in his History of Civilization in Europe; and he says that benefices for years, for life, and hereditary benefices, existed together at the same time, and that even the same lands passed, in a few years, through these different stages. Even the institutions of monarchy, of the feudal relation of lord and vassal, and assemblies of freemen, existed at the same time, and were continually confounded and continually changing.

and he was bound to render in return such feudal duties and services as belonged to a military tenure. The property of the soil remained in the lord from whom the grant was received The right to the soil, and to the profits of the soil, were regarded as separate and distinct rights. This distinction continued when feuds became hereditary. The king or lord had the *dominium directum*, and the vassal or feudatory, the *dominium utile;* and there was a strong analogy between lands held by feudal tenure and lands held in trust, for the trustee has the technical legal title, but the *cestui que trust* reaps the profits. The leading principle of feudal tenures, in the original and genuine character of feuds, was the condition of rendering military service. (*a*) Prior to the introduction of the feudal system, lands were allodial, and held in free and absolute ownership, in like manner as personal property was held. Allodial land was not suddenly, but very gradually supplanted by the law of tenures, and some centuries elapsed between the first rise of these feudal grants and their general establishment. (*b*)

They were never so entirely introduced as to abolish all vestiges of allodial estates. Considerable portions of land in continental Europe continued allodial; and to this day, in some parts of it, the courts presume lands to be allodial until they are shown to be feudal, while, in other parts, they presume the lands to be feudal until they are shown to be allodial. (*c*)

(*a*) The definition of a *fief*, according to Pothier, and which he took from Dumoulin, is an estate in land held under the charge of fealty, homage, and military service. Traité des Fiefs, part 1, c. prelim. sec. 1, 3.

(*b*) Hallam, i. 97, 112, says, that five centuries elapsed before allodial estates had given way, and feuds had attained to maturity; and he considers that the establishment of feuds on the continent was essentially confined to the dominions of Charlemagne, and that they had not great influence, either in the peninsula or among the Baltic powers.

(*c*) Voet, in his Digressio de Feudis, sec. 4, Com. ad Pand. lib. 88, says, that if it be uncertain whether an estate be feudal or allodial, the presumption is in favor of its being allodial, as being the free and natural state of things. And in Germany allodial estates are prevalent even to this day. Heinec. Elem. Jur. Germ. vi. 230, 231. The feudal tenures and services existed in France down to the period of the late revolution; but in those parts of France governed by *le droit écrit*, all lands were presumed to be allodial until the contrary was shown; while in the *pays coutumiers* the rule was, that there was no land without a lord, and those who pretended their lands were free, were bound to prove it. Inst. au Droit Français, par Argou, i. 195. But now, in France, the feudal law, with all its rights and incidents, is abolished, as being incompatible with freedom and social order. Toullier, Droit Civil Français, iii. 64; ib. vi.

*The precise time when benefices became hereditary is *496 uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates. (a) The perpetuity of fiefs was at last established by a general law, which allowed fiefs, in imitation of allodial estates, to descend to the children of the possessor. (b) The perpetuity of fiefs was established earlier in France than in Germany; but throughout the continent, it appears, they had become hereditary, and accompanied with the right of primogeniture and all the other incidents peculiar to feudal governments, long before the era of the Norman Conquest. (c) The *right of primo- *497 geniture, and preference of males in the line of succession, became maxims of inheritance, in pursuance of the original military policy of the feudal system. It was the object of these rules to preserve the fee entire and undivided, and to have at all times

192. So, in the United Netherlands, feudality was abolished, and all fiefs declared allodial, when the government was revolutionized by the French arms.

(a) Craig, Jus Feudale, lib. 1, Dieg. 4, sec. 10. The Abbé de Mably, in his Observations sur l'Hist. de France, b. 2, c. 5, note 8, says, that Louis le Débonnaire, the son and successor of Charlemagne, first rendered fiefs hereditary in France; but a greater authority says, that hereditary benefices existed under the first race of French kings, or before Pepin, the father of Charlemagne. Hallam on the Middle Ages, i. 91.

(b) This was by a capitulary of Charles the Bald, A.D. 877. Esprit des Loix, b. 31, c. 25.

(c) Craig, in his Jus Feudale, lib. 1, Dieg. 4, De Feudorum Origine et Progressu, has given an interesting summary of the history of feuds. He traces them from their infancy, when they were precarious, or at will, to their youth, when they were for life, or descended to the sons only, between the year 650 and the ascension of Charlemagne, in the year 800; and to their advancement towards maturity under the reign of the Emperor Conrad II., when they descended to grandchildren and to brothers in the case of paternal feuds; *in feudo paterno, et non in feudo noviter acquisito.* The last step, in the advancing progress of feuds, was when they were clothed with the general attributes of hereditary estates. See, also, Consuetudines Feudorum, b. 1, tit. 1, 8; b. 2, tit. 11; Esprit des Loix, b. 31, c. 28, 29, 31, 32; Inst. au Droit Français, par Argou, i. b. 2, c. 2, Des Fiefs; Hallam on the State of Europe during the Middle Ages, i. 91, 96. The Book of Fiefs, under the title of Consuetudines Feudorum, is supposed (Spelman's Glossary, Voce Feodum) to have been compiled by two Milanese lawyers, A.D. 1170, from the law of fiefs in Lombardy; but Voet, in his Digressio de Feudis, sec. 2, says, that it is uncertain who were the authors of the collection. This code of feudal law is usually annexed to the Corpus Juris Civilis, and therefore conveniently accessible to the American lawyer. It is the source from which modern lawyers and historians have drawn much of their knowledge of the feudal jurisprudence of continental Europe. Mr. Butler says, it attained more authority in the courts of justice than any other compilation, and was taught classically in most of the academies of Italy and Germany. It has justly, according to Craig, the force and authority of law by the consent of almost all nations; *ex consensu pene omnium gentium.*

a vassal competent, from his sex and age, to render the military services which might be required. The practice of subinfeudations, or *arrière fiefs*, by the higher ranks of feudal vassals, grew with the growth of tenures, and they were created on the same condition of military service by the inferior vassals to their immediate lords. The feudal governments gradually assumed the appearance of combinations of military chieftains, in a regular order of subordination, but loosely connected with each other, and feebly controlled by the monarch, or federal head.

It would appear, at first view, to be very extraordinary, that such a free and rational species of property as allodial, and which was well calculated to meet the natural wants of *498 *individuals, and the exigencies of society, should ever, in any one instance, have been voluntarily laid aside, or exchanged for a feudal tenure. As a general rule, the allodial proprietor had the entire right and dominion. He held of no superior to whom he owed homage, or fealty, or military service. His estate was deemed subservient to the purposes of commerce. It was alienable at the will of the owner. (*a*) It was a pledge to the king for the good behavior of the subject, and was liable to forfeiture for crimes against the state. It was a security to individuals for the performance of private contracts, and might be taken and sold for debt. It passed to all the children equally

(*a*) The term allodial is said to have been derived from *al*, which signifies *integer*, and *od*, which signifies *status*, or *possessio*; so that *al-od*, or *allodium*, signified *integra possessio*, or absolute dominion. This etymology of the word, Dr. Gilbert Stuart says, was communicated to him by a learned Scotch judge. Stuart's View of Society in Europe, 205. Whether this idea be well founded, or be merely ingenious (for Dr. Robertson, in his View of Society, prefixed to his History of Charles V. note 8, quotes a German Glossary, which makes *allodium* to be compounded of the German particle *an* and *lot*, *i.e.* land obtained by lot), it at least corresponds with the character of allodial estates. Mr. Crabb, in his History of the English Laws, p. 11, gives another origin of *allodium*. He says it was derived from *a*, privative, and *lode*, or *leude*, a vassal, that is, without vassalage. This he took from Spelman, who, in his Glossary, voce Allodium, mentions the same derivation. Mr. Hallam says, that allodial lands are commonly opposed to beneficiary or feudal, and in that sense the words continually occur in ancient laws and documents. But it sometimes stands simply for an estate of inheritance, and hereditary fiefs are frequently termed *allodia*. See his View of the State of Europe during the Middle Ages, i. 80, a work which appears to be equally admirable for vigor of mind, for profound research, for manly criticism, and for the spirit of freedom. In the French law, *Franc-aleu* signifies allodial land, or an estate entirely free, and not holden of any superior, and wholly exempt from all seignorial rights and services. Inst. au Droit Français, par Argou, i. 194. Allodium est proprietas quæ a nullo recognoscitur. Ferrier's Dict. tit. Franc-aleu.

by inheritance. In these respects allodial estates were the very reverse of lands held by a feudal * tenure. Land, *499 under that servitude, was locked up from commerce, and from that control over it by the owner which is so necessary in the intercourse and business of social life. But it appears to be well ascertained, that the feudal policy was gradually adopted throughout Europe, after the overthrow of the western empire, upon the principle of self-preservation. The turbulent state of society, consequent upon the violent fall of that empire, and the want of regular government competent to preserve peace and maintain order and justice, encouraged and recommended the feudal association. A feudal lord and his vassals, connected by the mutual obligation of protection and service, acted in concert and with efficacy. The strength and spirit of these private combinations made amends for the weakness of the civil magistrate. A proud and fierce feudal chief was sure to revenge any injury offered to himself or any of his dependants, by the united force of this martial combination. Much higher compositions were exacted, even by law and in the courts of justice, for injuries to vassals, than to allodial proprietors. (*a*) The latter were, in some measure, in the condition of aliens or outlaws, in the midst of society; and the feudal tenants, united by regular subordination under a powerful chieftain, had the same advantage over allodial proprietors, as has been justly observed by an eminent historian, (*b*) which a disciplined army enjoys over a dispersed multitude; and were enabled to commit, with impunity, all injuries upon their defenceless neighbors. Allodial proprietors, being thus exposed to violence without any adequate legal protection, were forced to * fly for shelter within the enclosure of the feudal *500 association. They surrendered their lands to some powerful chief, paid him the reverential rights of homage and fealty, received back their lands under the burdensome services of a feudal tenure, and partook of the security of vassals, at the expense of the dignity of freemen. Allodial estates became extinguished in this way and from these causes, and the feudal

(*a*) Montesquieu, in his account of the changes of allodial into feudal estates, says, it was the privilege of a vassal of the king, by the Salic and Ripuarian laws, that the slayer was to pay 600 sous for killing a vassal, and 200 sous for killing a freeman or allodial proprietor, whether Frank or barbarian, and only 100 sous for killing a Roman! Esprit des Loix, b. 31, c. 8.

(*b*) Hume's History of England, Appendix, vol. ii.

system gradually spread, and was extended over the principal kingdoms of Europe. (*a*)

A state of anarchy, according to Mr. Hallam, was the cause, rather than the effect, of the general establishment of feudal tenures. The original policy of the system was generous and reasonable, for it had in view public defence and private protection. Very able and eloquent champions of the cause of civil liberty have admitted, that the feudal system was introduced and cherished by the spirit of freedom; and that it had a tendency, before the original design of it was perverted and abused, to promote good faith, to purify public morals, and to refine and elevate social sympathies. (*b*)

But this same loyal association, which was so auspicious in its beginnings, as in a great degree to destroy the value of allodial property, degenerated, in process of time, and became
*501 *the parent of violence and anarchy, promoted private wars, and led to a system of the most grievous oppression. Except in England, it annihilated the popular liberties of every nation in which it prevailed, and it has been the great effort of modern times to check or subdue its claims, and recover the free enjoyment and independence of allodial estates. (*a*)

2. Of the History of Feudal Tenures in England. — England was distinguished above every part of Europe for the universal establishment of the feudal tenures. There is no presumption or

(*a*) Esprit des Loix, b. 31, c. 8; Robertson's History of Charles V. vol. i. note 8, annexed to his View of Society; Hallam's View of Society in the Middle Ages, i. c. 2, 93, 94; Stuart's View of Society in Europe, b. 1, c. 2, sec. 8; Spence's Inquiry, 346. This last writer shows, from the capitularies of Charlemagne, that in his time there was scarcely a person in his widely extended empire, who was not the vassal either of the monarch, or of some bishop, or count, or other powerful individual.

(*b*) Dr. Stuart's View, b. 2, c. 1, sec. 1; Hallam, *supra*, i. 99, 178, 179. Sir Henry Spelman, in his Treatise of Feuds and Tenures, c. 2, viewed the feudal law in the same light. "It was," he observes, "carried by the Lombards, Saliques, Franks, Saxons, and Goths into every kingdom, and conceived to be the most absolute law for supporting the royal estate, preserving union, confirming peace, and suppressing robbery, incendiaries, and rebellions." It became, he says, the law of nations in Western Europe.

(*a*) The feudal system still exists in full force and destructive energy in Hungary, where the entire surface of the soil is possessed by the nobles. They are, themselves, exempt from taxation, and the peasants have no political rights, and are held under rigorous feudal subjection. There is likewise a partial continuance of the feudal institutions in Bohemia, Moravia, and Silesia, and strongly and oppressively in Gallicia, Turnbull's Austria, ii. c. 15.

admission in the English law of the existence of allodial lands. They are all held by some feudal tenure. There were traces of feudal grants, and of the relation of lord and vassal in the time of the Anglo-Saxons; but the formal and regular establishment of feudal tenures in their genuine character, and with all their fruits and services, was in the reign of William the Conqueror. (*b*)

(*b*) The ordinances of William the Norman, establishing the feudal tenure of lands, to be held *jure hereditario in perpetuum*, are quoted as authentic by the most learned of the English lawyers (Wright on Tenures, 65–76; Bl. Comm. ii. 50); and they are collected in Lambard's Archaionomia, 170; L. L. Conq. Wm. I. c. 52, 55. Those laws purport to have been enacted, *per commune concilium totius regni*. Sir Francis Palgrave, in his Rise and Progress of the English Commonwealth, ii. 88, gives the original text, hitherto unpublished, of the statute or capitular of the laws and customs granted by William the Conqueror to the English, and professing to be the same as the laws of Edward the Confessor. It is a curious and interesting monument of the written Anglo-Saxon law first diffused into the common law. It is devoted principally to criminal jurisprudence, and relates specially to pecuniary fines, and the efficacy of frank pledges. Vassals were bound to the soil and could not depart, nor, on the other hand, could they be expelled by their lords. They were *churls* or *villains*, and not slaves or serfs, and their rents and duties were fixed by custom. No Christian could be sold to a foreign country, nor especially to infidels. No sales of any chattel, to the value of four denarii, were good without four witnesses of the burgh or country village. He granted peace and immunity to the holy church. Death was to be inflicted for many crimes, but not for slight ones; *non enim debet pro re parva deleri factura, quum ad imaginem suam Deus condidit et sanguinis sui pretio redemit;* the force of Christianity as well as of penal law was thus applied to the preservation of peace and the security of persons and property. The first act of Saxon legislation was by Ethelbert, King of Kent, and it was in the imperial style, as that the king *decreed* or *enacted* with the *advice* of his council or *witan*. The dignified clergy, who were the sole depositaries of learning and of rank, with the thanes or nobility, were members of that council. Spence's Equitable Jurisdiction, i. 12, 18.

It has been a subject of great dispute, and one which has occasioned the most laborious investigations, whether feudal tenures were in use among the Saxons. This is to us a question of no moment, and it is nowhere any thing more than a point of speculative and historical curiosity; but even in that view it may command the attention of the legal antiquarian. Though, in a general sense, military services and feuds might have been known to the Anglo-Saxons, yet the weight of authority, even in opposition to such names as Coke and Selden, would rather seem to be in favor of the conclusion, that hereditary fiefs, with their servitudes, such as aid, wardship, marriage, and perhaps relief (for Sir Henry Spelman and Mr Hallam differ on that point), were introduced by the Conqueror. Spelman wrote his great work on Feuds and Tenures by Knight Service to refute the argument of the Irish judges, and to support the position in his Glossary that feuds were introduced at the Norman Conquest, and he insists that feuds were not hereditary in England under the Saxon dynasty. He declares that there is not a single charter in the Saxon tongue, before the Conquest, in which any feudal word is apparently expressed. His discussion of the general question is distinguished for its acuteness and research, and he has been followed in his opinion, either wholly or in a great degree, by Sir Matthew Hale, Sir Martin Wright, Sir William Blackstone, and Mr. Butler. To these great authorities may be added

* 502 * The tenures which were authoritatively established in England, in the time of the Conqueror, were principally of

the equal name of Mr. Burke, who, in his admirable Abridgment of English History, b. 2, c. 7, maintains the position that the Anglo-Saxons, those ruthless conquerors, who swept before them the laws, language, and religion of the ancient Britons, and lived in savage ignorance amid the ruins of Roman arts and magnificence, knew nothing of hereditary fiefs, or any thing analogous to feudal tenures. Craig, in his learned and elaborate work on the feudal law, is equally of opinion with Spelman (and he preceded Spelman in this inquiry,) that the feudal law was first introduced into England by William the Conqueror. Jus Feudale, lib. 1, Dieg. 7.

Mr. Turner, on the other hand, in his History of the Anglo-Saxons, throws the weight of his authority, and great Saxon learning, into the opposite scale. He says, there can be no doubt that the most essential part of what has been called the feudal system actually prevailed among the Anglo-Saxons. He admits that though all their lands were charged with the *trinoda necessitas*, yet that the military service (the most material of those three servitudes) might be commuted by a pecuniary mulct, and all lands were hereditary without primogeniture. These admissions destroy the force of his conclusion. Turner's History, ii. 541, 542, or Appendix, n. 4, b. 6, c. 3. The *trinoda necessitas*, or liability for repairing fortresses and bridges, and for the military service of the state, was coeval, Mr. Spence thinks, with the Saxon division of the conquered lands, and was not a feudal obligation. Equitable Jurisdiction, i. 9. In the recent History of Boroughs and Municipal Corporations in England, by H. A. Merewether and A. J. Stephens, i. 69, they are also of opinion that the material parts of the feudal tenure did exist before the Conquest, and that the Normans brought over only some of the more severe provisions and heavier services of the feudal tenure. Mr. Reeve and Mr. Hallam perceive, in the dependence in which free and even noble tenants, held their estates of other subjects under the Anglo-Saxon constitution, much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman Conquest. Reeves's History of the English Law, i. 9; Hallam on the Middle Ages, ii. c. 8, pt. 1. It would be presumption in me, even if the occasion called for it, to attempt much discussion of such a question, inasmuch as I have no means of access to original documents. There is one, and only one Saxon monument which I have examined, and I would suggest, though with very great diffidence, that the Anglo-Saxon laws, as collected and translated from Saxon into Latin, by William Lambard, in his Archaionomia (Wheelock's ed. Cambridge, 1644), seem to show sufficiently, by their silence on the topic of feuds, and by the general tenor of their provisions, that the feudal system was not then in any kind of force or activity. These laws are the crude productions of a semibarbarous race. Their chief objects were: (1.) The preservation of the peace. (2.) The settling the rate of pecuniary mulcts or compositions for all sorts of crimes, and when corporal punishment was resorted to, the prescription was cruel. (3.) The settling of the ceremonies of religious observances, and the oaths of the purgation and proof in judicial trials. (4.) The regulation of the fraternities of frank pledges. Those laws are evidence, however, of the existence and great extent of the evils of predial and domestic servitude; and they show, also, even amidst their gross superstitions, numerous indications of the civilizing genius of Christianity, and the effect of religious discipline and restraint, in taming savage manners, and inculcating upon the minds of a rude and illiterate people the obligations of peace, good order, and justice. As the Anglo-Saxon laws contained very few regulations concerning private civil rights, it has been supposed that those rights were under the government of Roman laws

*two kinds, according to the services annexed. They *503
were either tenures by *knight service*, in which the services,
*though occasionally uncertain, were altogether of a mili- *504
tary nature, and esteemed highly honorable, according to

remaining with the original natives. An impenetrable obscurity appears to hang over the subject of the Anglo-Saxon institutions; and the toilsome, deep, acute, and spirited researches of Sharon Turner and Sir Francis Palgrave, in Anglo-Saxon history, involve the reader in a labyrinth of investigation, from which he derives little benefit, and finds it difficult to preserve his courage in the investigation. Sir Francis Palgrave says, that the laws of Alfred are entirely silent with respect to those institutions, which, according to later historians, are to be ascribed to his sound policy and wisdom. A considerable portion of the Anglo-Saxon law was never recorded in writing, and we have not a single law, and hardly a single document, from which the course of the descent of land can be inferred. Palgrave's Rise and Progress of the English Commonwealth, i. 47, 59. The feudal system was created by the union of Roman laws and barbarian usages; and as to the perplexed question relative to the existence or non-existence of an Anglo-Saxon feudal system, Sir Francis concludes that the main difference between Anglo-Saxon feudality and the Norman feudal system consisted in the establishment in the latter era of a more certain canon of descent and inheritance. The claim of the heir became an absolute right, and the lord lost any discretionary power of denying the renewal of the grant. Feudal principles were applied, under the Saxon king Egbert, to insure the supremacy of the crown. The beneficiary system had been long before interwoven with the municipal law. It was now enforced upon the dependants of the crown, and introduced into Germany, where feudality had become a mighty engine of power in the Carlovingian empire. Id. i. c. 19, 576–587.

It is worthy of observation, and goes in confirmation of the conclusion, that the English law of feuds was essentially of Norman, and not of Anglo-Saxon origin, that allodial lands were changed into feudal throughout the kingdom of Scotland, and the feudal structure completed there, about the same time with the like revolution in landed property in England. This event took place under Malcolm III., who began his reign A.D. 1057. Dalrymple's Essay on the History of the Feudal Property, 20, 21. Though Craig admits that the feudal law was unknown in Scotland before the year 1000, yet he is of opinion that it was introduced into Scotland before it was used in England; and he insists that it existed in Scotland, with the incidents of wardship, marriage, and relief, some time before the Conquest. Jus Feudale, lib. 1, Dieg. 8.

Another question arising in the ancient history of the English law is, whether the great similarity between the ancient laws of England and those of the Duchy of Normandy was produced by the exportation of the English laws into Normandy, or the importation of the Norman laws into England. Sir Matthew Hale, in his History of the Common Law, c. 6, will not allow, as Lord Coke had refused to allow before him, that the English took their laws from the Norman race, and he insists that the laws of Normandy were, in the greater part thereof, borrowed from the English. He appeals to the Grand Coustumier de Normandie, and which, he says, was compiled after the time of King John. This venerable code of Norman laws and usages is interesting to those persons who are fond of the study of legal antiquities. I am indebted to the kindness of an English lawyer for the possession of a copy of the work, in Norman French, with a Latin commentary, neatly printed at Rouen, A. D. 1589.

the martial spirit of the times; or they were tenures by *socage*, in which the services were defined and certain, and generally of a predial or pacific nature. (*a*) Tenure by knight service, in addition to the obligation of fealty and the military service of forty days in a year, was subject to certain hard conditions. The tenant was bound to afford *aid* to his lord, by the payment of money, when his lord stood in need of it, on certain emergent calls, as when he married his daughter, when he made his son a knight, or when he was taken prisoner. So, when a tenant died, his heir at law was obliged to pay a *relief* to the lord, being in the nature of a compensation for being permitted to succeed to the inheritance. If the heir was under age, the lord was entitled to the *wardship* of the heir, and he took to himself the profits of the land during the minority. Various modes were devised to elude the hardships of this guardianship in chivalry, incident to the tenure by knight service. The lord had also a right to dispose of his infant ward in *marriage*, and if the latter refused, he or she forfeited as much as was arbitrarily assessed for the value of the match. If the tenant aliened his land, he was liable
* 505 to pay a *fine* to the lord, for the privilege of * selling. Lastly, if the tenant died, without leaving an heir competent to perform the feudal services, or was convicted of treason or felony, the land *escheated* or reverted to the feudal lord. (*a*)

The greatest part of the lands in England were held by the tenure of knight service; and several of these fruits and consequences of the feudal tenure belonged also to tenure in socage. The oppression of the feudal conditions of *relief*, *wardship*, and *marriage* was enormously severe for many ages after the Norman Conquest, and even down to the reign of the Stuarts. Upon the

(*a*) Wright on Tenures, 139–142.

(*a*) Littleton's Tenures, b. 2; Wright on Tenures, *passim*; 2 Bl. Comm. c. 5. Mr. Hallam, i. 101–106, ii. 23, says, that reliefs, fines upon alienation, escheats, and aids were feudal incidents belonging to feuds, as established on the continent of Europe; and that wardship and marriage were no parts of the grant or feudal system, but were introduced into England, and perhaps invented, by the rapacious feudal aristocracy, under the Norman dynasty. He, however, gives instances of their prevalence afterwards, all over Europe.

The Master of the Rolls, in the great case of Burgess *v.* Wheate, 1 Eden, 177, says, that the right of escheat was not founded on the want of an *heir*, but of a *tenant* to perform the services; and that the words had been used promiscuously, because, before the power of alienation, want of tenant and heir was the same thing, for, at the death of the ancestor, none but the heir could be tenant.

death of the tenant *in capite*, his land was seized by the crown, and an *inquisitio post mortem* taken before the escheator, stating the description and value of the estate, and the name and age of the heir. The adult heir appeared in court and did homage to the king, and paid his relief and recovered the estate. If the heir was a minor, the land remained in wardship until he was of age, and sued out his writ *de ætate probanda*, and under that process he procured his release from wardship. The sale of the marriage of the heir, whether male or female, was a valuable perquisite to the king or his grantee. The ward was in contempt if he or she refused the proffered match. In the reign of Henry II., the crown wards were inventoried * like the slaves of a plantation; and according to the Assizes of Jerusalem, the matron of sixty years might refuse a husband without incurring the penalties of a contempt. (*a*) The abuses of the feudal connection took place equally in other parts of Europe; but the spirit of rapacity met with a more steady and determined resistance by the English of the Saxon blood, than by any other people. This resistance produced the memorable national compact of Magna Charta, which corrected the feudal policy, and checked many grievances of the feudal tenures; and the intelligence and intrepidity of the House of Commons, subsequent to the era of the great charter, enabled the nation to struggle with better success than any other people against the enormous oppression of the system.

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A feoffment in fee did not originally pass an estate in the sense we now use it. It was only an estate to be enjoyed as a benefice, without the power of alienation, in prejudice of the heir or the lord; and the heir took it as a usufructuary interest, and in default of heirs, the tenure became extinct, and the land reverted to the lord. The heir took by purchase, and independent of the ancestor, who could not alien, nor could the lord alien the seigniory without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, and contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord; and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the Book of Fiefs, (*b*) the

(*a*) Sullivan's Lectures, lec. 13; Harg. n. 65, to lib. 2, Co. Litt.; Quart. Rev No. 77, p. 59. (*b*) Lib. 2, tit. 55.

hand of him who knowingly wrote a deed of alienation was directed to be struck off.

The first step taken to mitigate the severe restriction
*507 upon *alienation of the feudal estate was the power of alienation by the tenant with leave of the lord, and this tended to render the heir dependent upon the ancestor. The right of alienation was first applied to the lands acquired by the tenant by purchase; and Glanville says, (a) that, in his time, it was, generally speaking, lawful for a person to alien a reasonable part of his land by inheritance or purchase; and if he had no heirs of his body, he might alien the whole of his purchased lands. If, however, he had a son and heir, he could not disinherit him, and alien the whole, even of his purchased lands. The restraint was almost absolute when the tenant was in by descent, and quite relaxed when he was in by purchase; and there was no distinction on this subject, whether the fief was held by a military or socage tenure. The free alienation of land commenced with burgage tenures, and was dictated by the genius of commerce. (b) The next variation in favor of the tenant was the right to alien without the lord's license, when the grant was to him and his heirs and assigns, and the general right of alienation seems to have been greatly increased and extensively established, in the age of Bracton. (c) The tenant gained successively the power of alienation, if the grant was only to him and his heirs; and the power to charge or incumber the land. The lord's right was still further affected by acts of Parliament and judicial determinations, for the fee was made subject by *elegit* to the tenant's debts, and also by process under the statutes merchant and staple. (d) It was further, and as early as the reign of Edw. III., made subject to the dower of the wife. (e) Subinfeudation was also an indirect mode of transferring the fief,
*508 *and resorted to as an artifice to elude the feudal restraint upon the alienation; and by the time the statute of Quia

(a) B. 7, c. 1.

(b) Dalrymple's Essay on Feudal Property, c. 8, sec. 1.

(c) Bracton, b. 2, c. 5, sec. 4, 7; c. 6, fol. 18, b; c. 27, sec. 1.

(d) West. 2, 13 Ed. I. c. 18; also 13 Ed. I. De Mercatoribus, and 27 Ed. III. Under the statute of De Mercatoribus, the whole of a man's lands were liable to be pledged in a statute merchant for a debt contracted in trade, though only a moiety thereof was delivered over by *elegit* for any other debt. The statute of 1 and 2 Vict. c. 110, has now made the *whole* of the lands liable to the *elegit*.

(e) Bro. tit. Dower, pl. 64.

Emptores, 18 Edward I., was enacted, prohibiting subinfeudations to all but the king's vassals, this feudal restraint had essentially vanished, and the policy of that statute was to recall the stability and perpetuity of landed estates. (*a*)

Successive improvements in the character of the estate and the condition of the tenant greatly relieved the nation from some of the prominent evils of the feudal investiture. But the odious badges of the tenure still existed; and Lord Bacon, in his speech at a conference before the Lords, on behalf of the Commons, in the reign of James I., strongly recommended, by way of composition with the crown, the abolition of wards and tenures, as having become troublesome and useless. (*b*) At length, upon the restoration of Charles II., *tenure by knight service, with *509 all its grievous incidents, was by statute abolished, and the tenure of land was, for the most part, turned into free and common socage, and every thing oppressive in that tenure was also abolished. The statute of 12 Charles II. essentially put an end to the feudal system in England, although some fictions (and

(*a*) The statute of Quia Emptores, 18 Ed. I. c. 1, did not attempt to restrain the practice of alienation altogether; but its object was to prohibit the practice of subinfeudation. A freeman might sell his lands at pleasure; but the will of the donor should be observed, and the feoffee or purchaser should hold the lands of the same chief lord of the fee, and by the same services, as his feoffor held them before. The feoffor could not make himself lord of such an estate. All he could do was to transfer his own tenancy. Sir Thomas Clarke, the Master of the Rolls, in Burgess *v.* Wheate, 1 Eden, 191, has given a short but clear view of the progress of the feudal estate, in its recovery from the feudal restraint of nonalienation. See, also, Mr Butler's note 77, lib. 3, Co. Litt., V., n. 6, 7, 8, 9, 10, 11; and see, especially, the able and learned history of the alienation of land, in Dalrymple's Essay on Feudal Property, c. 3.

(*b*) Lord Bacon's Works, iii. 359. It appears, by the directions given by order of James I. to the Master of the Wards, that the king, while he sought to restrain the abuses, set a high value on his prerogative rights of wardship and marriage. There was a yearly inquisition directed to be taken by persons of credit, for each county, of the persons and lands in wardship, to be certified and returned into the Exchequer; and though Lord Bacon declared that the policy, spirit, and utility of the military tenures were entirely gone, yet it appears that the people were grievously oppressed by "feudaries, and other inferior ministers of like nature, by color of the king's tenures;" and the royal instructions were, that the "vexations of escheators and feudaries be repressed, which, upon no substantial ground of record, vex the country with inquisitions and other extortions; and that the Master of Wards take special care to receive private information from gentlemen of quality and conscience in every shire, touching these abuses." So late as the reign of Charles I., the Earl of Warwick, as grantee of the wardship of an heiress, extorted £10,000 sterling for his consent to a marriage on every account desirable. Lord Bacon's Works, iii. 864–868; Sullivan's Lectures on Feudal Law, lec. 18.

they are scarcely any thing more), founded on the ancient feudal relation and dependence, are still retained in the socage tenures.

3. Of the Doctrine of Tenure in the United States. — Socage tenure denotes lands held by a fixed and determinate service, which is not military, nor in the power of the lord to vary at his pleasure. It was the certainty and pacific nature of the service, duty, or render, which made this species of tenure such a safeguard against the wanton exactions of the feudal lords, and rendered it of such inestimable value in the view of the ancient English. It was deemed by them a point of the utmost importance, to change their tenures by knight service into tenure by socage. Socage tenures are, however, of feudal extraction, and retain some of the leading properties of feuds, as has been shown by Sir Martin Wright, in his learned treatise on tenures; (*a*) and which work has been freely followed by Sir William Blackstone, in his perspicuous and elegant, and we may truly add, masterly disquisitions on the feudal law. Most of the feudal incidents and consequences of socage tenure were expressly abolished in New York by the act of 1787; and they were wholly and entirely annihilated by the New York Revised Statutes, as has been already mentioned. (*b*) They were also abolished by statute in Connecticut, 1793; (*c*) and they * 510 have never existed, or they * have ceased to exist, in all essential respects, in every other state. The only feudal fictions and services which can be presumed to be retained in any part of the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due. The act of New York, in 1787, provided that the socage lands were not to be deemed discharged of "any rent certain, or other services incident, or belonging to tenure in common socage, due to the people of this state, or any mean lord, or other person, or the fealty or distresses incident thereunto." The Revised Statutes (*a*) also provided that "the abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may be, created or

(*a*) Pp. 141–144. (*b*) *Supra*, p. 378.

(*c*) The statutes of Connecticut, 1838, p. 889, declared, that "every proprietor in *fee simple* of lands" had an absolute and direct dominion and property in the same. They were declared to be "vested with an allodial title."

(*a*) N. Y. Revised Statutes, i. 718, sec. 4.

reserved." The lord paramount of all socage land was none other than the people of the state, and to them, and them only, the duty of fealty was to be rendered; and the quit-rents, which were due to the king on all colonial grants, and to which the people succeeded at the Revolution, have been gradually diminished by commutation, under various acts of the legislature, and are now nearly, if not entirely, extinguished.

In our endeavors to discover the marks or incidents which with us discriminated socage tenure from allodial property, we are confined to the doctrine of fealty, and of holding of a superior lord. Fealty was regarded by the ancient law as the very essence and foundation of the feudal association. It could not on any account be dispensed with, remitted, or discharged, because it was the *vinculum commune*, the bond or cement of the whole feudal policy. (*b*) Fealty was the same as *fidelitas*. It was an oath of fidelity to the lord; and, to use the words of Littleton, (*c*) when a free-holder doth * fealty to his lord, he shall lay his right hand *511 upon a book, and shall say, "Know ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the terms assigned: so help me God and his saints." This oath of fealty everywhere followed the progress of the feudal system, and created all those interesting ties and obligations between the lord and his vassal, which, in the simplicity of the feudal ages, they considered to be their truest interest and greatest glory. It was also the parent of the oath of allegiance, which is exacted by sovereigns in modern times. The continental jurists frequently considered homage and fealty as synonymous; but this was not so in the English law, and the incident of homage was expressly abolished in New York by the act of 1787, while the incident of fealty was expressly retained. Homage, according to Littleton, was the most honorable and the most humble service of reverence that a frank tenant could make to his lord; but it is quite too abject and servile a ceremony of submission, allegiance, and reverence to be admissible at this day.

Lands held by socage tenure (and all lands granted or patented before the Revolution are so held) (*a*) would seem, in theory, to

(*b*) Wright on Tenures, 85, 55, 138, 140, 145. (*c*) Sec. 91.

(*a*) The tenure prescribed in all the early colonial charters or patents was free and

have been chargeable with this oath of fealty; and every tenant, whether in fee, for life, or for years, was, by the English law, obliged to render it when required, as being an indispensable service, due to the lord of whom he held. Fealty was at common law deemed inseparable from tenure of every kind, except the tenure in frankalmoign; but a tenant at will was not bound to it, as his estate was too precarious; and though Littleton says, that a tenant for years was bound to render fealty to the lessor, Mr. Hargrave has referred to some cases which raise a doubt upon
* 512 that point. (*b*) He also observes, that no statute has * ever varied the law of fealty, and that the title to fealty still remains, though it is no longer the practice to exact its performance. However, if required, it must be repeated on every change of the lord, and the remedy for compelling the performance of fealty is by distress. (*a*) Sir Matthew Hale (*b*) says, the oath of fealty may be due to an inferior lord, and then the oath must have the saving *salva fide et ligeantia domini regis*. It may be exacted in England by landlords, and lords of manors, from tenants other than tenants at will, or from year to year. The New York statute of 1787 saved the services incident to tenure in common socage, and which it presumed might be due, not only to the people of the state, but to any mean lord or other private person, and it saved the fealty and distresses incident thereunto. But this doctrine of the feudal fealty was never practically

common socage, being "according to the free tenure of lands of East Greenwich, in the county of Kent, in England; and not *in capite* or by knight's service." See the great patent of New England, granted by King James in 1620; the charter of Massachusetts in 1629; the prior charter of Virginia in 1606; the charter of the Province of Maine in 1639; the Rhode Island charter in 1663; the Connecticut charter in 1662; the Maryland charter in 1632; the act of the General Assembly of the colony of New York, of 13th May, 1691; (Bradford's ed. of Colony Laws, printed in 1719;) the charter of Pennsylvania in 1681; the patent of 1662, of Carolina; the charter of Georgia in 1732. These charters, or the substance of them, are to be seen in most of our early colonial documentary collections, annalists, and historians; and the substance of them is accurately condensed and stated in Story's Commentaries on the Constitution of the United States, vol. i.

(*b*) Littleton, sec. 117, 130, 131, 132, 139; Co. Litt. 68, a, 67, b; Harg. n. 18 to lib. 2, Co. Litt.

(*a*) Harg. n. 20 to lib. 2, Co. Litt. The distress was also the remedy of the feudal lord for enforcing his claim to *relief*, and the validity of his title was tried on the part of the heir in the action of replevin. Case of the Provost of Beverly, 40 Edw. III. 9. By the N. Y. Revised Statutes, i. 747, sec. 18, distress is a remedy given for all certain services, as well as certain rent reserved out of lands, and due.

(*b*) H. P. C. i. 67.

applied, nor assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the state, and then it resolved itself into the oath of allegiance which every citizen, on a proper occasion, may be required to take. Lord Coke did not designate any very material difference between the oath of fealty and the general oath of allegiance, though he raised the question as to the difference which might exist between them; (c) but Sir Matthew Hale, (d) in a long and learned dissertation, undertakes to explain the difference between the oath of allegiance and the oath of fealty. Under the New York statute of 1787, fealty, in the technical sense of the feudal law, was a dormant and exploded incident of feudal *tenure; (a) and by the Revised Statutes even the fiction *513 has become annihilated, unless it may be supposed to be lurking in the general declaration, that "the people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state." (b)

Thus, by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen. Though the doctrine of a feudal tenure by free and common socage may be applicable to the real property in this country, chartered and possessed before our Revolution, and though every proprietor should be considered as holding

(c) Co. Litt. 68, b. (d) H. P. C. i. 62–70.

(a) In Cornell v. Lamb, 2 Cowen, 652, it was declared, by Woodworth, J., that fealty was not, in fact, due on any tenure in this state, and had become altogether fictitious. The statute of 1787 would seem, according to the feudal theory, not to have been penned with philological accuracy, when it declared, that the *tenure* of all lands derived from the people of this state should be allodial, and not feudal. Allodial estates have no mark of tenure, and are enjoyed in absolute right, and tenure signifies the holding of a superior lord. Sir Henry Spelman says, that the first place in which he met with *tenure* in a feudal sense, was among the laws of the Saliques and Germans, in the constitution of the Emperor Conrad, about the year 915, when *beneficia*, afterwards called *feuds*, first became hereditary. Spelman's Treatise on Feuds, c. 8. Tenure est la manière par quoy les ténémens sont tenus des Seigneurs. Custum. de Norm. cited by Sir Martin Wright on Tenures, 139, note. But the statute did not commit any mistake, because it used the word, not in a feudal, but in the popular sense, for right or title, in like manner as in England, the king, whose inheritance cannot possibly import a *tenure*, is said to be seised in his demesne as of fee.

(b) N. Y. Revised Statutes, i. 718, sec. 1.

an estate in fee simple, none of the inconveniences of tenure are felt or known. We have very generally abolished the right *514 of primogeniture, * and preference of males, in the title by descent, as well as the feudal services, and the practice of subinfeudation, and all restraints on alienation. (*a*) Socage tenures do not exist any longer, in some of the United States, while they still exist, in theory at least, in others; but where they do exist, they partake of the essential qualities of allodial estates. An estate in fee simple means an estate of inheritance, and nothing more, and in common acceptation it has lost entirely its original meaning as a beneficiary or usufructuary estate, in contradistinction to that which is allodial. It was used even by Littleton and Coke to denote simply an inheritance; and they are followed by Sir Martin Wright and Sir William Blackstone. (*b*) Whether a person holds his land in pure *allodium*, or has an absolute estate of inheritance in fee simple, is perfectly immaterial, for his title is the same to every essential purpose. The distinction between the two estates has become merely nominal, and a very considerable part of Littleton's celebrated treatise on tenures, on which Lord Coke exhausted his immense stores of learning, has become obsolete. But those parts of it which have ceased to be of modern application, will, nevertheless, continue, like the other venerable remains of the Gothic system, to be objects of examination and study, not only to the professed antiquarian, but to every inquisitive lawyer, who, according to the advice of Lord Bacon, is desirous "to visit and strengthen the roots and foundation of the science." (*c*) [1]

(*a*) By the Revised Constitution of New York of 1846, all fines, quarter sales, or other like restraints upon alienation, reserved in any grant or lease of land made thereafter are declared to be void. Art. 1, sec. 15.

(*b*) Co. Litt. 1; 2 Bl. Comm. 106.

(*c*) C'est un beau spectacle que celui des loix féodales: un chêne antique s'élève. il faut percer la terre pour les racines trouver. Montesquieu's account of the feudal laws is the best and most solid part of his work. He traces them up to the forests of Germany, and shows that they were suggested by the usages, promoted by the policy, and matured by the martial genius of the ancient Germans. Those fierce tribes of barbarians, having long been inured to turbulent warfare, at length broke through the restraints imposed by disciplined valor, put to flight the Roman eagles in all the northern provinces of the Empire, and finally prostrated the most extensive and best cemented monarchy which had ever insulted and enslaved mankind.

[1] The subjects dealt with in this chapter are considered, so far as the origin of individual property in land is concerned, in the next volume, 441, n. 1. The results of the more recent investigations there referred to are not considered with refer-

ence to the political institutions of the Teutonic tribes. It may be mentioned here that M. Nasse confirms the author's opinion, and says that it may now be considered an established fact that the feudal system did not exist in England at the Anglo-Saxon period, and was first imported as an institution by the Normans. Contemporary Rev. xix. 748.

But compare Stubbs's Documents illustrative of English History, 18.

The first definition of *alodium* given 498, n. (*a*), is confirmed by Morier's Essay in the Systems of Land Tenure in Various Countries (published under the sanction of the Cobden Club, London, 1870), p. 291, on the authority of Professor Max Müller. The derivation of *feodum* is more uncertain, but it is thought that it is derived from the same root as the Old High German *fihu*, cattle, to express the idea of beneficial as distinct from absolute ownership. Compare the use of the word *chattel* in English law. Ib. *Cf.* Pap. Jurid. Soc. ii. 420, 421.

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