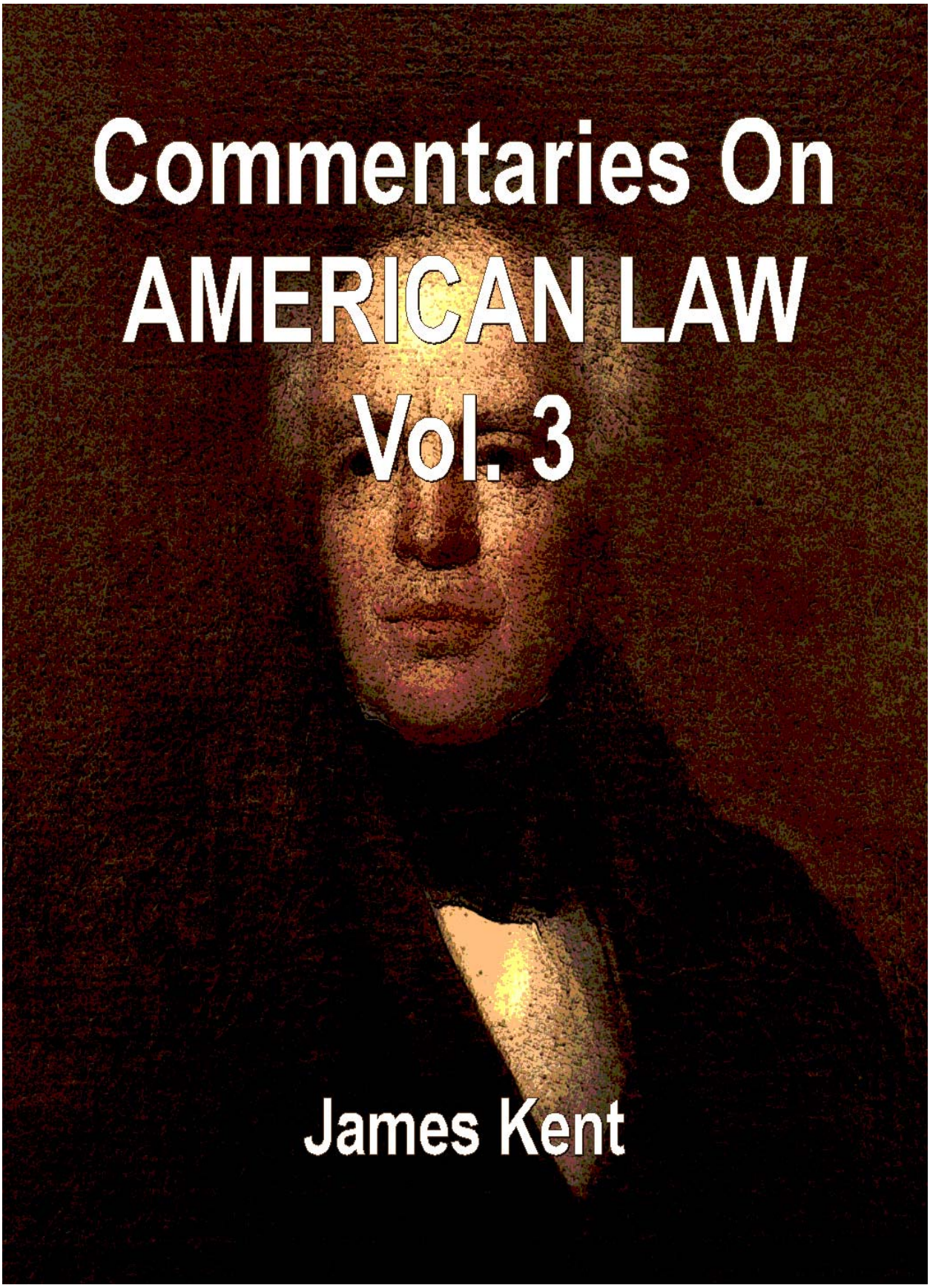
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JAMES KENT

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Footnotes have been converted to chapter end notes.
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PART 5 (con’t.):
Of the Law Concerning
Personal Property

LECTURE 43

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; (2.) the rights and duties of partners, in their relation to each other, and to the public; (3.) the dissolution of the contract.

I. Of the nature, creation, and extent of partnerships.

Partnership is a contract of two or more 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.[1] 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.[2] 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 appreciated, is of the essence of the contract.[3] Credit alone seems not to be sufficient, according to Pothier, because not of itself a thing of value;[4] but credit is of great value in a mercantile sense, and it would be difficult for a person to lend his credit permanently to a partnership, without incurring responsibility as a partner. 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.[5]

A joint possession renders persons tenants in common, but it does not, of itself, constitute them partners; and, therefore, surviving partners, and the representatives of a deceased partner, are not partners, notwithstanding they have a community of interest in the joint stock.[6] There must be a communion of profit to constitute a partnership as between the parties. They must not be jointly concerned in the purchase only, 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 had never met and contracted together as partners, 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.[7] The same distinction was known in the civil law: *qui nolunt inter se contendere, solent per nuntium rem emere in commune; quod asocietate longere motum*.[8] It has been repeatedly recognized in this country, and may be

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considered as a settled rule.[9]

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.[10] 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.[11] A partnership necessarily implies the 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.[12] If the partnership consists of a large unincorporated association, it is usually regulated by special agreement; but the established law of the land in reference to such partnerships, is the same as in ordinary cases, and every member of the association (whatever private arrangement there may be to the contrary between the member, and which is only a mischievous delusion) is liable for all the debts of the concern.[13]

It is, however, the judicial language in some of the cases,[14] that the members of a 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. 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 it is calculated to check the enterprise of such institutions, and impair the credit and value of them as safe investments of capital.

Though there be no express articles of copartnership, the obligation of a partnership engagement may equally be implied in the acts of 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. 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.[15] Though there should even be a mutual understanding between the members of an association, that they should not be partners, and that the party sought to be charged as a partner was not to contribute either his money or labor, or to partake of the profits, yet, in suite of these stipulations, he becomes a partner as against the rest of the world, if he lends his name to the company. The rule is founded on principles of general policy, to prevent the frauds to which creditors would otherwise be exposed.[16]

It is not essential to a legal partnership, that it be confined to commercial business. It may exist

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between attorneys, conveyancers, mechanics, artisans, or farmers; as well as between merchants or bankers.[17] The essence of the association is, that they 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.[18] 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 rateable 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. If there be no such agreement on the subject, the general conclusion of law is, that the partnership tosses are to be equally borne, and the profits equally divided;[19] and this would be the rule, as I apprehend, even 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.[20]

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.[21] 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 profits, with an agreement that the remaining partners are to assume all risks of loss.[22] But a partnership, in which the entire profit was to belong to some of them, in exclusion of others, would be manifestly unjust and illegal. It would be what the Roman lawyers called *societas leonina*, in allusion to the fable of the lion, who, having entered into a partnership with the other animals of the forest, in hunting, appropriated to himself all the prey.[23]

There may be a general partnership at large, or it may be limited to a particular branch of business, or to one particular subject.[24] 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.[25] This principle has not been extended to the case of two persons signing a joint note,[26] though it is not easy to perceive a distinction between the cases.[27]

There is no difficulty, 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 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.[28] The question arises also in the case of a nominal partner, who has no actual interest in the trade, or its profit, but becomes responsible as a partner by suffering his name to appear to the world as a partner, by which means he lends to the partnership the sanction of his credit. There is a just and marked distinction between partnership as respects the

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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. 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.

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. By partaking of the profits, he diminishes the fund which ought to be applied to the payment of the debts of the company. 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 time, 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 gives credit to the house; and if he were permitted, as against creditors, to deny the partnership, the greatest fraud and injustice would be practiced. These principles are clearly settled, and are now regarded by the English courts as fundamental doctrines;[29] and they have been as explicitly asserted with us, and are now incorporated into the jurisprudence of this country.[30] 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.[31]

A person may be allowed, in special cases, to receive part of the profits of a business without becoming a legal or responsible partner. To allow a clerk, or agent, a portion of the profits of sales as a compensation for labor, or a factor such 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. Seamen take a share by agreement with the ship-owner, in the profits of a whale fishery, 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.[32] 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.[33]

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 on a register.[34] Thus, in France, by the ordinance of 1673, limited partnerships (*la Societe en commondite*) were established, by which one or more persons, responsible in solid 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;[35] and it is likewise introduced into the Louisiana code, under the title of partnership *in commendam*.[36] 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 a recent statute of New York.[37] By that statute a limited partnership may consist of one or more partners jointly and severally responsible according to the existing laws, who are called general partners, and one or more partners 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

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names of the special partners are not to be used in the firm, 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 register must be made in the clerk's office of the county, with an accompanying affidavit, and certificate of the title of the firm, and the names of the partners, and the amount of capital furnished by the special partners, and the period of the partnership, and the capital advanced by the special partners, must be in cash. 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 partnership. 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 this stare, that the statute law of any other country than that of Great Britain, has been closely imitated and adopted.

It is a general and well established principle, that when a person joins a partnership as a member, he does not, without a special promise, assume the previous debts of the firm, nor is he hound 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.[38] If, however, goods are purchased in pursuance of a previous agreement between two or wore 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.[39]

II. Of the rights and duties of partners in their relation to each other, and to the public.

(1.) *Of the interest of partner, 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,[40] was part of the law merchant, for the advancement and continuance of commence 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 Keeper, in *Jeffereys v. Small*,[41] 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.[42] But no partner has an exclusive right to any part of the joint stock, until a balance of accounts be struck between him and his co-partners, 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.[43]

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

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to be distributed as personal estate.[44] The same point has been extensively discussed and considered in this country, and the weight of authority, and the reason and justice of the case undoubtedly is, 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 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.[45] In Tennessee, an estate so held in joint tenancy by partners for the purposes of trade, may be sold by the survivor, in whom is the legal title; but he will be subject to account to the representatives of the deceased partner for their proportion of the proceeds.[46] In this state, 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*,[47] 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 *Goodwin v. Richardson*,[48] 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 England; but the other American decisions. are more restricted in their operation, and are not inconsistent with the most correct and improved view of the English law. Their object is to secure the rights of purchasers and encumbrances without notice, from being affected by a claim of partnership rights of which they were ignorant. In *Edgar v. Donnally*,[49] a right to land had 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.

In *Nicoll v. Mumford*,[50] 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 in the settlement of accounts, on the principle of partnership. The doctrine of Lord Hardwicke on this point, in *Doddington v. Hallet*,[51] was considered to be overruled by the modern decisions in chancery,[52] and by the universal understanding in the commercial world. But when the case of *Nicoll v. Mumford* was reviewed in the Court of Errors,[53] the doctrine of Lord Hardwicke was considered, by the majority of the judges, to be the better doctrine; and no doubt there may be a special partnership in a ship, as well as in the cargo, in regard to a particular voyage or adventure. It was assumed by the court in *Lamb v. Durant*,[54] that vessels, as well as other chattels, might be held in strict partnership, with all the control in each partner incident to commercial partnerships.

(2.) *Acts by which one Partner may bind a firm.*

The act of each partner in transactions relating to the partnership, is considered the act of all, and binds al I. 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 endorse, and accept bills and notes. Acts in which

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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 course of dealing, has reference to business transacted by the firm.[55]

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.[56] But if a bill or note be drawn by one partner in his own name only, and without appearing to be on partnership account, the partnership is not bound by the signature, even though it was made for a partnership purpose.[57] If, however, the bill be drawn by one partner in his own name, upon the firm, on partnership account, the act of drawing has been held to amount, in judgment of law, to tin acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill.[58] 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.[59] 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.[60]

But if partnership security be taken from one partner, without the previous knowledge 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.[61] 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.[62] 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; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law 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.[63]

The conclusion is otherwise, if the subject matter of the contract was consistent with the partnership business, and the defendants would be bound to show that the contract was out of the regular course of the partnership dealings.[64] 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 mart 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

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firm, and is not within the scope of its authority, or its regular course of dealing, he is, in judgment of law, guilty of a fraud.[65]

If, however, 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 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.[66]

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.[67] A like power in each partner exists 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.[68] 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.[69]

This salutary check to the power of each partner to bind the firm, was derived from the civil law. *In re pari potiorem causum esse prohibentis constat*.[70] 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;*[71] and in *Kirk v. Hodgson*,[72] 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. The weight of authority is decidedly in favor of the power of a partner to interfere and arrest the firm from the obligation of an inchoate purchase which is deemed injurious. This is the rule in France in ordinary commercial partnerships; and yet, if by the terms of the partnership, the management of its business be confined to one of the partners, the exercise of his powers in good faith, will he valid even against the will, and in opposition to the dissent, of the other members.[73]

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 it has relation to the trade in which the partners are engaged, and when the pawnee had no knowledge that the property was partnership property.[74] But this principle does not extend to part owners engaged in a particular purchase, for they are regarded as tenants in

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common, and no member can convey to the pawnee a greater interest than he himself has in the concern.[75] 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.[76]

It was formerly understood, that one partner might bind his copartners by a guaranty, or letter of credit, in the name of the firm;[77] and Lord Eldon, in the case *Ex parte Gordon*,[78] 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 guaranty of the debt of a third person, without a special authority for that purpose., or one to be implied from the previous course of dealing between the parties, unless the guaranty be afterwards adopted and acted upon by the firm. The guaranty must have reference to the regular course of business transacted by the partnership, and then it will be obligatory upon the company, and this is the principle on which the distinction rests.[79] The same general rule applies when one partner gives the copartnership as 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.[80]

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.[81] But one partner, by the special 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;[82] and the general doctrine of the English law on this point has been clearly recognized and settled by numerous decisions in our American courts.[83]

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 the release.[84] 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.[85] 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.[86] Nor can one partner bind the firm by a submission to arbitration, even 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.[87]

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

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debt. 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*,[88] 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.[89] The doctrine of that case has even been extended to acknowledgments by a partner after the dissolution of the partnership, in relation to antecedent transactions, on the ground, that as to them, the partnership still continued.[90] But there have been just and necessary 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.[91] To give that acknowledgment any force, the existence of the original partnership debt must be proved or admitted *aliunde*.[92] Of late, however, the decision in *Whitcomb v. Whiting* has been very much questioned in England, and it seems now to he considered as an unsound authority by the court which originally pronounced it.[93] And we have the best authority in this country for the conclusion, that the acknowledgment of a debt by a partner, after the dissolution of the partnership, will be of no avail, and will not take the debt out of the statute 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 Pennsylvania, but in the Supreme Court of the United States;[94] and the law in England, and in this country, seem equally to be tending to this conclusion.

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 mutter concerning judicial proceedings.[95] 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, 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. 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 of the partnership in the same line of business.[96] The rule is evidently founded in sound policy; and the same rule is applied to the case of a master of et vessel, charged with a cargo for a foreign market, and in which he has a joint concern.[97]

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.[98] If the partnership be for a definite period, it terminates of course when the period arrives. But in that case, and ii 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 one of them, and by the death, insanity, or bankruptcy 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

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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.[99]

(1.) *Dissolution by the voluntary act of either partner.*

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.[100] The civil law, and the English law, contain the same rule on the subject.[101] 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.[102] A reasonable notice of the dissolution might be very advantageous to the company, but it is not requisite; and a partner may, if he pleases, 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.[103] Though the partnership be constituted by deed, a notice in the gazette by one partner, is evidence of a dissolution of the partnership as against the party to the notice, even if the partnership articles require a dissolution by deed.[104]

But if the parties 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.[105] This is the assumed principle of law by Lord Eldon in *Peacock v. Peacock*,[106] and in *Crawshay v. Maule*;[107] and yet in *Marquand v. The New York Man. Company*,[108] it was held, that the voluntary assignment by one partner, of all his interest in the concern, dissolved the partnership, though it was stipulated iii 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*,[109] it was held by one of the judges,[110] 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 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 partner ship 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. Such a power would-seem to be implied in the capacity of a partner, to interfere and dissent from a purerchase or contract about to be made by his associates; and the commentators on the Institutes lay down the principle as drawn from the civil law, that each partner has a power to dissolve the conection 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.[111]

The marriage of a feme sole partner would like wise operate as a dissolution of the partnership, because her capacity to act ceases, and she becomes subjected 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.

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(2.) *By the death of a partner*.

The death of either party is, *ipso facto*, a dissolution of the partnership, however numerous the association may be. The personal qualities of 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.[112] 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.[113] 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 continuing partners, for want of notice of such dissolution.[114] 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.[115] The provision in the Roman law was followed by Argou, in his institutes of the French law.[116] 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.[117] His opinion has been followed in the Code Napoleon;[118] and in the English law, such a provision in the articles of partnership for the benefit of the representatives of a deceased partner, is not questioned; and it was expressly sustained by Lord Talbot.[119]

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.[120] 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 hag not used due diligence in 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.[121]

(3.) *By the insanity of a partner*.

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 just cause for the interference of the Court of Chancery to dissolve the partnership, and have the accounts taken, and the property duly applied.[122]

(4.) *By bankruptcy of a partner*.

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Bankruptcy, either of the whole partnership, or of an individual member, dissolves a partnership; and the assignees become, as to the interest of the bankrupt 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 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 property of the bankrupt. is vested in his assignees, who cannot carry on the trade.[123] 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.[124] 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; but, in respect to 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.[125] If all the interest of a partner be seized 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 Engligh law, though it is frequently assumed;[126] but it. follows, as a necessary consequence, from the sale of his interest, and it is equivalent in that respect to a voluntary assignment. It was 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 them by judicial process on behalf of his creditors.[127]

(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 he impracticable, and the property invested liable to be wasted and lost.[128] It may be dissolved when the whole scheme of the association is found to be visionary, or founded upon erroneous principles.[129] So, if the conduct of a partner 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, dissolve the association,[130] notwithstanding the other members object to it. 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; 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 fur trifling causes, as 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 renders it impossible to carry on the business upon the terms stipulated.[131] A breach of covenants in articles which is 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 in junction to restrain the breach of the covenant, or, under circumstances, to dissolve the partnership.[132] 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.[133] A mere temptation to abuse partnership property is not sufficient to induce the court to interfere by injunction;[134] but when a

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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 conceru.[135]

In some instances, chancery will restrain a partner from an unseasonable 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.[136] 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 ought to control the convenience of any individual member.[137] 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.[138] This conclusion would be extremely reasonable, for the case would be analogous in principle to that of insanity, and equally proper for equitable relief.

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, has been largely discussed, and the doctrine explicitly settled and declared by the courts of justice in this state.[139]

(7.) *Consequences of the dissolution.*

When a partnership is actually ended by death, notice, or other effectual mode, no 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 dissolution, and the partners, from that time, become distinct persons, and tenants in common of the joint stock. One partner cannot endorse bills and notes previously given to the firm, so as to bind it. If the paper was even endorsed 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.[140] But until the purpose of finishing the prior concerns be accomplished, the partnership, as we have already seen, may be said 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.[141] 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

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or improper conduct.[142]

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, and a conversion of it into money. If, however, before a sale, the partner in possession of the capital continues the trade with the joint property, he will be bound to account with the other partner for the profits of the trade, subject to just allowances.[143] The joint creditors have the primary claim upon the joint fund, for 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 partnership debts are to be settled before any division of the funds takes place. This claim of the joint creditors is not such a lien upon the property, but that a *bona fide* alienation to a purchaser for valuable consideration, by the partners, or either of them, before judgment and execution, will be held valid. 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.[144]

To render the dissolution safe and effectual, there must be due notice given of it to the world, and it is held, that 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 notice of the dissolution. 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 continued, and to bestow faith and confidence to the partnership name in consequence of that belief.

What shall he 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.[145] 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 dealings with the firm. As to persons who have been previously in the habit of dealing with the 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. 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 its *Mowati v. Howland*;[146] 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.[147] 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 not presumptive evidence merely, but conclusive evidence of the fact as to all persons who have not been previous dealers with the partnership. 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 a 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.[148]

When a single partner retires from the firm, the same notice is requisite to protect from continued

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responsibility; and even if due notice be given, yet if the retiring partner willingly suffers his name to continue in the firm, he will still be held.[149] 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.[150] 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 count, and he is chargeable only for debts contracted during the time he was actually a partner.[151] 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 he is not a partner, and suffers it to deal under mistake and delusion.[152]

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 tinder this head abound with minute and refined distinctions, and they form a comprehensive and very complicated part, of this branch of commercial law.[153]

NOTES

1. Pufendorf, *Droit de la Nat*. liv. 5. ch. 8. s. 1. Pothier, *Traité du Contrat de Société*, No. 1. *Repertoire de Jurisprudence, art. Société*. 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 in the time of Pothier, though he considered it to be a sage provision. (Pothier, ibid. No. 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 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, edit. N.Y. 1824, ch. 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. ch. 15. translated by Johnston, London, 1825.)

2. *Dob v. Halsey*, 16 Johns Rep. 34.

3. Pothier, *Traité du Con. de Soc*., No, 8, 9, 10. Ferriere, sur Inst. 3. 26. Code Napoleon, No. 1833.

4. Pothier, ibid. No. 10.

5. *Reid v. Hollinshead*, 4 Barnw. & Cress. 867.

6. *Pearce v. Chamberlain*, 2 Vesey, 33.

7. *Hoare v. Dawes*, Doug. 371. *Coope v. Eyre*, 1 H. Blacks. 37.

8. Dig. 17. 2. 33.

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9. *Holmes v. United Insurance Company*, 2 Johns Cases, 329. *Post v. Kimberly*, 9 Johns. Rep. 470. *Osborne v. Brennar*, 2 Nott & McCord, 427.

10. *Sims v. Willing*, 8 Serg. & Rawle, 103

11. Lord Ellenborough. *McIver v. Humble*, 16 East, 173.

12. *Nairn v. Sir William Forbes*, Bell's Commentaries on the Law of Scotland, vol. ii, 626.

13. *The King v. Dodd*, 9 East, 516. *Holmes v. Higgins*, 1 Barnw. & Cress. 74. *Hess v. Worts*, 4 Serg. & Rawle, 356.

14. Gibson, J., *Hess v. West*, 4 Serg. & Rawle, 491. Platt, J., *Skinner v. Dayton*, 19 Johnson, 537.

15. De Grey, Ch. J., *Grace v. Smith*, 2 Blacks. Rep. 998. Eyre, Ch., J., *Waugh v. Carver*, 2 H. Blacks. 247. *Cheap v. Cramond*, 4 Barnw. & Ald. 663. Spencer, J., Dob. v. Halsey, 16 Johns. Rep. 40.

16. Eyre, Ch. J., *ub sup*. Thompson J., *Post v. Kimberley*, 9 Johns. Rep. 489.

17. *Willet v. Chambers*, Cowp. 814. Gould, J., *Coope v. Eyre*, 1 H. Blacks. 43. Pothier, *Traité de Soc*. No. 55.

18. Dig. 18, 1. 35. 2. Pothier, *Traité du Con de Soc.* n. 14. *Briggs v. Lawrence*, 3 Term Rep. 454. *Aubert v. Maze*, 2 Bos. & Pull 371. *Griswold v. Waddington*, 16 Johns Rep 49.

19. Inst. 3. 26. 1. Pothier, *ub. sup*. n. 73. *Peacock v. Peacock*, 16 Vesey, 49.

20. Pothier, *ub. sup*. No. 15-19. n. 25.

21. Dig. 17.2. 44. Pothier, *ub. sup*. n. 13.

22. Pothier ibid. n. 25,26.

23. Dig. 17. 2. 29. 2. Pothier, *ub. sup*. No. 12.

24. Lord Mansfield. *Willet v. Chambers*, Cowp. 816. Code Napoleon; No. 1841.

25. Carvick v. Vickery, Doug. 653. note.

26. Hopkins v. Smith, 11 Johns. Rep. 161.

27. The Roman law, which has been followed in France, distinguished between two kinds of universal partnership, the one *universorum bonorum*, and the other *universorum quae ex quaestu 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 Contrat de Soc*. No. 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, No. 2800-2805.

The other species of universal partnerships 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. 43-52. Code Napoleon, No. 1838.) The same kind of general partnerships, embracing all the present and future property of the parties, is known in the laws of Spain. Institutes by Doctors Asso & Manuel, b. 2. c. 15.

28. *Robinson v. Wilkinson*, 3 Price's Exch. Rep. 538. Lord Loughborough, 1 H. Blacks. Rep. 48. *Pitts v. Waugh*, 4 Mass. Rep. 424. Duncan, J., 8 Serg. & Rawle, 55.

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29. *Hoare v. Dawes*, Doug Rep. 371. *Grace v. Smith*, 2 Wm Blacks. Rep. 998. *Waugh v. Carver*, 2 H. Blacks Rep. 235. *Hesketh v. Blanchard*, 4 East, 144. *Ex parte Hamper*, 17 Vesey, 404. *Ex parte Langdale*, 18 Vesey, 300. *Carlen v. Drury*, 1 Ves. 4 Bea. 157. *Cheap v. Cramond*, 4 Barnw. & Ald. 663. Best, J., *Smith v. Watson*, 2 Barnw. & Cress. 401.

30. *Purviance v. McClintee*, 6 Serg. & Rawle, 259. *Gill v. Kuhn*, ibid. 333. *Dob v. Halsey*, 16 Johns. Rep. 40. *Shubrick v. Fisher*, 2 Desauss. Ch. Rep. 148. *Osborne v. Brennan*, 2 Nott & McCord, 427.

31. *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. Rep. 627.

32. *Dixon v. Cooper*, 3 Wils. 40. *Cheap v. Cramond*, 4 Barnw. & Ald. 670. *Benjamin v. Porteus*, 2 H. Blacks. 590. *Meyer v. Sharpe*, 5 Taunton, 74. *Hesketh v. Blanchard*, 4 East, 144. *Dry v. Boswell*, 1 Campb. N.P. 329. *Wilkenson v. Frazier*, 4 Esp. N. P. 182. *Muzzy v. Whitney*, 10 Johns Rep. 226. *Rice v. Austin*, 17 Mass. Rep. 206.

33. *Ex parte Hamper*, 17 Vesey, 404. *Ex parte Rowlandson*, 1 Rose, 89. *Ex parte Watson*, 19 Vesey, 458. Mr. Cary, in his recent 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.

34. Lord Loughborough, 1 H. Blacks. Rep. 49.

35. *Repertoire de Jurisprudence*, par Merlin, tit. *Société*, art. 2. Code de Commerce, b. 1. tit. 3. sec. 1.

36. Civil Code of Louisiana. art. 2810.

37. Laws of N.Y. April, 1822. sess. 45. ch. 244. and sess. 60. ch. 238.

38. *Saville v. Robertson*, 4 Term Rep. 720. *Young v. Hunter*, 4 Taunt. Rep. 582. *Poindexter v. Waddy*, 6 Munf. Rep. 418.

39. *Gouthwaite v. Duckworth*, 12 East, 421.

40. Co. Litt. 182. a.

41. 1 Vern. 217.

42. *Martin v. Crompe*, 1 Lord Raym. 340.

43. *Nicoll v. Mumford*, 4 Johns Ch. Rep. 522. *Fox v. Hanbury*, Coop. Rep. 445. *Taylor v. Fields*, 4 Vesey, 396. 15 Vesey, 559. note S. C.

44. *Thornton v. Dixon*, 3 Bro. Ch. Cas. 199. Lord Loughborough in *Smith v. Smith*, 5 Vesey, 189. *Ripley v. Waterworth*, 7 Vesey, 424. *Featherstonhaugh v. Fenwick*, 17 Vesey, 298. Lord Eldon, in *Townsend v. Devaynes*, cited in Gow on Partnership, 54. edit. Phil. 1825, and in *Crawshay v. Maule*, 1 Swanston, 521. *Contra*, Sir Wm. Grant, in *Bell v. Phyn*, 7 Vesey, 453, and *Balmain v. Shore*, 9 Vesey, 500. Gow on Partnership, 54, 55.

45. *Forde v. Herron*, 4 Munf. 316. *McDermot v. Laurence*, 7 Serg. & Rawle, 438.

46. McAlister v. Montgomery, 3 Hayw. 96.

47. 15 Johns. Rep. 159.

48. 11 Mass. Rep. 469.

49. 2 Munf. 397.

50. 4 Johns. Ch. Rep. 522.

51. 1 Vesey, 497.

52. See 5 Vesey, 575. 2 Ves. & Bea. 242. 2 Rose, 76, 78. 1 Montagu on Partnership, 102, note.

53. 20 Johns. Rep. 611.

54. 12 Mass. Rep. 54.

55. *Hope v. Cust*, cited in 1 East's Rep. 53. *Swan v. Steele*, 7 East's Rep. 210. *Rothwell v. Humphreys*, 1 Esp. N. P. 406.

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Abbott. Ch. J., *Sandilands v. Marsh*, 2 Barnw. & Ald. 673. *Ex parte Agace*, 2 Cox's Cases, 312. Shippen, J., *Gerard v. Basse*,1 Dallas' Rep. 119. Parker, Ch. J., in *Lamb v. Durant*, 12 Mass. Rep. 56, 57. *Mills v. Barber*, 4 Day's Rep. 420. Pothier,*Traité du Contrat de Soc*. No. 96-105.

56. *Mason v. Ramsey*, 1 Campb. N.P. 384.

57. *Siffkin v. Walker*, 2 Campb. 308. *Ripley v. Kingsbury*, 1 Day's Rep. 150. note. *Emly v. Lye*, 15 East's Rep. 7.

58. *Dougal v. Cowles*, 5 Day's Rep. 511.

59. *Van Reims Dyk v. Kane*, 1 Gall. Rep. 630.

60. *Ex parte Peele*, 6 Vesey, 602.

61. Arden v. Sharpe, 2 Esp. N: P. 524. *Shirreff v. Wilks*, 1 East's Rep. 48. *Ex parte Bonbonus*, 8 Vesey, 540. *Livingston v. Hastie*, 2 Caines' Rep. 246. *Lansing v. Gaine and Ten Eyck*, 2 Johns. Rep. 300. *Baird v. Cochran*, 4 Serg. & Rawle, 397. *Chazournes v. Edwards*, 3 Pickering, 4.

62. *Green v. Deakin*, 2 Starkie's N. P. 347. *New York Firem. Insurance Company v. Bennett*, 5 Conn. Rep. 574.

63. 4 Johns. Rep. 277, 278. Spencer J., *Dob v. Halsey*, 16 Johns. Rep., 48.

64. *Doty v. Bates*, 11 Johns. Rep. 544.

65. Abbot, Ch. J., and Bayley, J., *Sandilands v. Marsh*, 2 Barnw. & Ald. 673.

66. *Ridley v. Taylor*, 13 East's Rep. 175. *Williams v. Thomas*, 6 Esp. N.P. 18. Lord Eldon, *Ex parte Peele*, 6 Vesey, 604, and *Ex parte Bonbonus*, 8 Vesey, 544. *Arden v. Sharpe*, 2 Esp.,N. P, 524. *Wells v. Masterman*, ibid.731. *Bond v. Gibson*, 1 Campb. N.P. 185. *Usher v. Dauncey*, 4 ibid. 97. *Livingston v. Roosevelt*, 4 Johns. Rep. 251. *New York Fire Insurance Company v. Bennett*, 5 Conn. Rep. 574.

67. *Fox v. Hanbury*, Cowp. Rep. 445. Best, J., in *Barton v. Williams*, 5 Barnw. & Ald. 395. *Piersons v. Hooker*, 3 Johns. Rep 68. *Mill v. Barber*, 4 Day's Rep. 428. *Lamb v. Durant*, 12 Mass. Rep. 54. *Harrison v. Sterry*, 5 Cranch's Rep. 289. Pothier, *Traité du Contrat de Soc*. No. 67. 69. 72. 90.

68. *Willet v. Chambers*, Cowp. Rep. 814. *Rapp v. Latham*, 2 Barnw. & Ald. 795. *Bond v. Gibson*, 1 Campb. N.P. 185. Baldwin, J. 5 Day's Rep. 515. Spencer J., 15 Johns. Rep. 422.

69. *Willis v. Dyson*, 1 Starkie's N P. 164. *Galway v. Matthew*, 1 Campb. N.P. 403. 10 East's Rep. 264. S. C. *Leavitt v. Peck*, 3 Conn. Rep. 124.

70. Dig. 10. 3. 28. Pothier, *Traité de Soc*. No. 90.

71. 7 Price's Rep. 193.

72. 3 Johns. Ch. Rep. 400.

73. Pothier, *Traité du Con. de Soc*. No. 71. 90.

74. *Raba v. Ryland*, 1 Gow's N.P. 132. *Tupper v. Haythorne*, in Chancery, reported in a note to the case in Gow.

75. *Barton v. Williams*, 5 Barnw. & Ald. 395.

76. *Willet v. Chambers*, Cowp. Rep. 814. *Rapp v. Latham*, 2 Barnw. & Ald. 795.

77. *Hope v. Cust*, cited in 1 East's Rep. 53.

78. 15 Vesey, 286.

79. *Duncan v. Lowndes*, 3 Campb. N.P. 478. *Sandilands v. Marsh*, 2 Barnw. & Ald. 673. *Crawford v. Stirling*, 4 Esp. N. P. 207. *Sutton and McNickle v. Irwine*, 12 Serg. & Rawle, 13.

80. *Foot v. Sabin*, 19 Johns. Rep. 154. *New York Firem. Insurance Company v. Bennett*, 5 Conn. Rep. 574.

81. *Harrison v. Jackson*, 7 Term Rep. 207.

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82. *Ball v. Dunsterville,* 4 Term Rep. 3 3. *Williams v. Walsby,* 4 Esp. Y P. 220. *Steiglitz v. Egginton,* 1 Holt's N. P. 141.

83. *Gerard v. Basse,* 1 Dallas' Rep. 119. *Green v. Beals*, 2 Caines' Rep., 254. *Clement v. Brush*, 3 Johns. Cas. 180. *Mackay v. Bloodgood,* 9 Johns. Rep. 285. Anon., 2 Hayw. N. C. Rep. 99. *Mills v. Barber*, 4 Day's Rep. 428. *Garland v. Davidson,* 3 Munf. Rep. 189. In the marginal note giving the substance of the decision in the Court of Errors is *Skinner v. Dayton*, 19 Johns Rep. 513, it is stated generally that the authority for one partner to bind the association by deed may be by parol; but I apprehend, that neither the decision in that case, nor the language of the court, goes beyond the English cases in the effect to be given to a parol authority, and that the marginal note of my learned friend the reporter, ought not to receive any other construction.

84. *Tooker's case,* 2 Co. 63. *Ruddock's case,* 6 Co. 25. *Hawkshaw v. Parkins,* 2 Swanst. Rep. 576-580. *Pierson v. Hooker,* 3 Johns. Rep. 68. *Bruen v. Marquand,* 17 Johns. Rep. 58.

85. *Salmon v. Davis,* 4 Binney's Rep. 375.

86. *Ex parte Hodgkinson,* 19 Vesey, 291.

87. *Stead v. Salt,* 3 Bingham's Rep. 101. *Karthaus v. Ferrer,* 1 Peter's Rep. 221.

88. Doug. Rep. 652.

89. *Bound v. Lathrop,* 4 Conn. Rep. 336. *Hunt v. Bridgham,* 2 Pick. Rep. 581.

90. *Wood v. Braddick,* 1 Taunt. Rep. 104. *Simpson v. Geddes,* 2Bay's Rep. 533.

91. *Hackley v. Patrick,* 3 Johns Rep. 536. *Walden v. Sherburne,* 15 ibid. 409. *Chardon v. Colder,* 2 Const. Rep S. C. 685.

92. *Smith v. Ludlows,* 6 Johns. Rep. 267. *Johnson v. Beardslee,* 15 ibid. 3.

93. *Atkins v. Tredgold,* 2 Barnw. & Cress. 23.

94. *Bell v. Morrison,* 1 Peter's Rep. 351. Case decided in Pennsylvania, December, 1827, and cited ibid. 396. note.

95. *Burton v. Issit,* 5 Barnw. & Ald. 267.

96. Pothier, *Traité du Contrat de Soc*. No. 59. *Glassington v. Thwaites*, 1 Sim. & Stu. 133.

97. Boulay Paty, *Cours. de Droit Com*. tom. 2, 94.

98. Inst. 3. 26. 6. *Extincto subjecto tollitur adjunctum*. Pothier. *Traite de Soc*. No. 140-143, illustrates this rule in his usual manner, by a number of plain and familiar examples. 16 Johns. Rep. 491. S. P.

99. Inst. 3. 26. sec. 7, 8, Vinnius, b. t. 3. 26. 4. Hub. in Inst. lib. 3. tit. 26. sec. 6. Pothier, *Con. de Soc*. No. 147, 148. 11 Vesey, 5. 1 Swanst. Rep. 480, 508. 16 Johns. Rep. 491.

100. *Peacock v. Peacock,* 16 Vesey 49. *Featherstonhaugh v. Fenwick,* 17 Vesey 298. Lord Eldon, in 1 Swanst. Rep, 508.

101. Inst. 3. 26. 4. Code. 4. 37. 5.

102. Pothier *Traité de Soc*. 150 says, that the dissolution by the act of a party ought to be done in good faith, and reasonably, *debit 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.

103. 17 Vesey 308, 309.

104. *Doe and Waithman v. Miles,* 1 Starkie's N.P. 181.

105. Gow on Partnership, 303, 305. edit. Phil. 1825.

106. 16 Vesey, 56.

107. 1 Swanst. Rep. 495.

108. 17 Johns. Rep. 525.

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109. 19 Johns. Rep. 538.

110. Mr. Justice Platt.

111. *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 caeteris; tamen tale pactum, tanquam factum contra naturam societatis, cujus in aeternum nulla coitio est contemnere licet.* Vinnius in Inst. 3. 26. 4. pl. 1. Ferriere, ibid. tom. 5. 156. Dig. 17.2. 14.

112. Pothier, *Traité du Contrat de Société*, n. 146. Inst. 3. 26. 5. Vinnius, h. t. *Pearce v. Chamberlain*, 2 Vesey, sen, 33. Lord Eldon, 3 Merivale, 614. 1 Swanst. Rep. 509.

113. Pothier, *Traité du Contrat de Soc*. No. 156, 157.

114. *Vulliamy v. Noble*, 3 Merivale, 614.

115. Dig. 17. 2. 35. 52. 59.

116. *Inst. au Droit Francois* l. 8. ch. 23.

117. Pothier, *ub. sup*. No. 145.

118. Art. 1868.

119. *Wrexham v. Hudleston*, 1 Swanston, 514. note. *Pearce v. Chamberlain*, 2 Vesey, sen. 33. *Balmain v. Shore*, 9 Vesey, 500. *Warner v. Cunningham*, 3 Dow's Parl. Cas. 76. *Gratz v. Bayard*, 11 Serg. & Rawle, 41.

120. *Ex parte Ruffin*, 6 Vesey, 126. *Hartz v. Schroder*, 8 Vesey, 217. *Ex parte Williams*, 11 Vesey, 5. *Peacock v. Peacock*, 16 Vesey, 57. *Wilson v. Greenwood*, 1 Swanst. Rep. 480. *Crawshay v. Maule*, ibid. 506. *Murray v. Mumford*, 6 Cowen, 441, 16 Johns. Rep. 493.

121. *Harnersly v. Lambert*, 2 Johns Ch. Rep. 568.

122. *Wrexham v. Hudleston*, cited 1 Swanst. Rep. 514. note. *Sayer v. Bennet*, 1 Cox's Cas. 107. *Waters v. Taylor*, 2 Ves. & Bea. 301.

123. *Fox v. Hanbury*, Cowp. 445. Lord Eldon, *ex parte Williams*, 11Vesey, 5. *Wilson v. Greenwood*, 1 Swanst. Rep. 482. *Marquand v. N. Y. Man. Co.*, 17 Johns. Rep. 525.

124. Inst. 3. 26. 8. 17 Johns Rep. 525.

125. *Harvey v. Crickett*, 5 Maul. & Selw. 316. *Barker v. Goodair*, 11 Vesey, 78. *Dutton v. Morrison*, 17 Vesey, 193.

126. So stated *arguendo* in *Sayer v. Bennett*, 1 Montagu on Part. note 16. Gow on Partnership, 310.

127. *Dict. du Digest par Thevenot Dessaules*, art. *Société*, No. 56. 70.

128. *Baring v. Dix*, 1 Cox's Cas. 213

129. *Buckley v. Cater*, and *Pearce v. Piper*, referred to for that purpose by Lord Eldon, in 3 Ves. & Bea. 181. See also, to the same point, Reeve.

130. Parkins, 2 Jacob & Walk. 390.

131. *Waters v. Taylor*, 2 Ves. & Bea, 299. *Goodman v. Whitcomb*, 1 Jacob & Walk. 569

132. *Marshal v. Colman*, 2 Jacob & Walk. 266.

133. *Inst. au Droit Francois par Argou*, tom. 2. 249.

134. *Glassington v. Thwaites*, 1 Simon & Stu. 124.

135. Tilghman, Ch. J., 11 Serg. & Rawle, 48.

136. *Clavany v. Van Sommer*, cited in 3 Wood lec. 416. and t Swanst. Rep. 511, note.

137. Dig. 17. 2. 65. 5. Pothier, *Traité de Soc*. No. 150, 151.

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138. *Traité de Soc*. No. 142.

139. *Griswold v. Waddington*, 15 Johns. Rep. 57. S. C. 16 Johns. Rep. 438.

140. *Kilgour v. Finlyson*, 19 Blacks. Rep. 155. *Abel v. Sutton*, 3 Esp. N. P. Rep 108. *Lansing v. Gaine and Ten Eyck*, 2 Johns. Rep. 300. *Sanford v. Mickles*, 4 ibid. 224. *Foltz v. Pourie*, 2 Desauss. Ch. Rep 40.

141. *Wilson v. Greenwood*, 1 Swanst. Rep. 480. *Crawshay v. Maule*, ibid. 506, 528.

142. *Philips v. Atkinson*, 2 Bro. Ch. Cas, 272.

143. *Crawshay v. Collins*, 15 Vesey, 218. *Featherstonhaugh v. Fenwick*, 17 ibid. 298.

144. *West v. Skip*, 1 Vesey, sen. 456. *Ex parte Ruffin*, 6 Vesey, 119. *Ex parte Fell*, 10 Vesey, 347. *The Master of the Rolls, Campbell v. Mullett*, 2 Swanst. Rep. 608, 610. *Ex parte Harris*, 1 Maddock's Ch. Rep. 583. *Murry v. Murry*, 5 Johns. Ch. Rep. 60. *Woddrop v. Ward*, 3, Desauss, S. C. Rep. 203. *White v. Union Ins. Co.*, 1 Nott & McCord's Rep. 557. *Ridgely v. Carey*, 4 Har. & McHenry, 167.

145. In the case of carriers, a notice limiting their responsibility was held not to be sufficiently given, though constantly published in a weekly newspaper which the party had taken for three years. It could not be intended, said the court, that a party read all the contents of any newspaper he might chance to take. (Rowley v. Horne, 3 Bing. Rep. 2.) This was doing away all constructive notice, and the objection was severely sustained. I should apprehend, that such notice was proper evidence for a jury, and from which they might infer actual notice.

146. 3 Day's Rep. 353

147. *Godfrey v. Turnbull*, 1 Esp. N. P. 371. *Parkin v. Carruthers*, 3 ibid. 248. *Gorham v. Thompson*, Peake's N. P. Cas. 42. *Graham v. Hope*, ibid. 154. *Leeson v. Holt*, 1 Starkie's Rep. 186. *Jenkins v. Blizard*, ibid. 420. *Williams v. Keates*, 2 Starkie's Rep. 290. *Wright v. Pulham*, 2 Chitty, 121. *Rooth v. Quin*, 7 Price's Rep. 193. *Lansing v. Ten Eyck*, 2 Johns Rep. 300. *Ketcham v. Clark*, 6 ibid. 144. *Graves v. Merry*, 6 Cowen's Rep. 701. *Martin v. Walton*, 1 McCord's Rep. 16. *Bank of South Carolina v. Humphreys*, ibid. 388. *Whitman v. Leonard*, 3 Pick. Rep. 177.

148. *Griswold v. Waddington*, 15 Johns. Rep. 57. 16 Johns. Rep. 494.

149. *Williams v. Keates*, 2 Starkie's Rep. 290. *Brown v. Leonard*, 2 Chitty's Rep. 120.

150. *Newsome v. Coles*, 2 Campb. Rep. 617.

151. *Evans v. Drummond*, 4 Esp. N. P. Rep. 89. *Armstrong v. Hussey*, 12 Serg. & Rawle, 315.

152. *Goode v. Harrison*, 5 Barnw. & Ald. 147.

153. 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 by 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. Cary, which has nothing in particular to recommend it, except it be the addition of new cases arising since the publication of Mr. Gow.

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LECTURE 44

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[1] 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, and maritime interest, on the arrival of the vessel at the foreign port. This certainly would not have been necessary, says Pothier,[2] 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.[3] 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, and they grew into use on the coasts of the Mediterranean in the fourteenth century.[4] 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. That statute has been generally adopted in this country, either formally, or in effect, and promissory notes are every where negotiable.[5] The effect of the statute is 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.[6] 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.[7] The history of that struggle is no longer interesting; but there is no doubt that 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 1673, long before Lord Holt asserted them to be of late English inventions.[8]

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.*

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, absolutely, and at all events.[9] If A., living in New York, wishes to receive 1000 dollars, which awaits his orders in the hands of B., in London, he applies to C., going from New York to London, to pay him 1000 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,

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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, 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 earliest 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. As the bill is payable to C., or his order, he may, by endorsement, direct the bill to be paid to D., and, in that case, C. becomes the endorser, and D., to whom the bill is endorsed, is called the endorsee, or holder. A check partakes more of the character of a bill of exchange than of a promissory note. It is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay, but it is an 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.[10]

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. In England, negotiable paper must be for the payment of money[11] in specie, and not in bank notes.[12] 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.[13] But the doctrine of these cases has been met and denied,[14] and I think the weight of argument is against them, and in favor of the English rule. It is essential that the bill carry with it a personal credit, given to the drawer or endorser, 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.[15] 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, 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.[16]

Nor is it necessary that the note should be made at home. Foreign, as well as inland notes, are equally negotiable within the statute of Anne.[17] It is a general principle, that all contracts, as to their nature, validity and construction, are governed by the *lex loci contractus*, unless they had reference in respect to the performance of them to the laws of other places, and in that case they are to be governed by those laws; and as the endorsement is equivalent to a new contract as between the parties to it, the note may be regulated by the laws of one place, and the endorsement by those of another. This is the doctrine which has been amply recognized in England,. and in this country, and it constitutes part of the code of international law. *Locus regit actum*, and, by the law of nations, every personal contract which is valid where it was made, is valid everywhere, unless condemned by some positive regulation of the state, or some strong rule of public policy.[18] There is a difference taken in the cases between the construction and the execution of the contract. The lex loci has reference only to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. The remedy must be pursued by the means which the law points out where the party resides.[19]

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The instrument must be made payable to the payee, and 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 transferrable quality. Without them it is a valid instrument 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. 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.[20] If the name of the payee or endorsee be left blank, any *bona fide* holder may insert his own name as payee.[21]

It is usual to insert the words value received, in a bill or note; but they are unnecessary, and value is implied in every bill, note, and endorsement. These words are not usual in checks, which are negotiable, like in land bills, and are governed by the same rules.[22] 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.[23] 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 endorsed; and it is the same, in effect, as if the name of B. had been omitted. The bearer may sue in his own name, on showing that he came by the note *bona fide*, and for a valuable consideration.[24] So, a bill or note, payable to a fictitious person, may be sued by an innocent endorsee, 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.[25]

(3.) *Of the rights of the holder*.

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer, or endorsed in blank, and such a *bona fide* holder can recover upon the paper, though it came to him from a person who had stolen or rubbed it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised.[26] 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 or fraud, before the onus is cast upon the holder of showing the consideration he gave for it.[27] 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 before it fell due. Where one has done a mercantile act, said Lord Ch. Baron Gilbert, he subjects himself to mercantile law.[28]

There seems to be but two cases in which a bill or note is void in the hands of an innocent endorsee for valuable consideration; and these 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 in this state, and, generally throughout the United States) are peremptory, and make the bill or note absolutely void.[29] The same rule would, of course, apply to every case in which the contract is by statute declared absolutely void.

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

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be inquired into between the maker and payee, and between the endorser and endorsee, for the latter are, in this view, treated as original parties.[30] The rule equally applies when the endorsee took the paper with notice of the illegal consideration, or of the want of it, or of any circumstances which would have avoided the note in the hands of the endorser;[31] or when taken not in the course of mercantile business, or after it was due.[32]

It was admitted, in *Bay v. Coddington*,[33] that negotiable paper could be assigned or transferred by an agent, or any other person, fraudulently, so as to bind the true owners 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 and existing debt, nor for cash, or property advanced upon it, nor for any debt credited, 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 endorsee takes the paper under circumstances which might reasonably create suspicions that it was not good, he takes it at his peril. The rule is usually applied to the case of notes over due, but the principle is of general application.[34]

In *Gill v. Cubitt*,[35] the court of K. B. made a strong application of the principle, and held, that if an endorsee takes a bill heedlessly, and without due caution, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or acceptor may be let in to his defense. 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*,[36] 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 security of negotiable paper, and to render it more difficult for thieves and robbers to pass it off.

(4.) *Of the acceptance of the bill*.

There is no precise time fixed by law in which bills payable at sight, or by a given time, must be presented to the drawee for acceptance. The holder need not take the earliest opportunity. A bill payable at a given time after date, need not be presented for acceptance before the day of payment; but if presented, and acceptance be refused, it is dishonored, and notice must then be given to the drawer.[37] A bill payable sixty days after sight, means sixty days after acceptance, and such a bill, as well as a bill payable on demand, must be presented in a reasonable time, or the holder will have to bear the loss proceeding from his default.[38]

The acceptance may be by parol, or in writing, and general or special.[39] Though a bill comes into

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the hands of a person with a 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 the mode of payment, is a conditional acceptance, which the holder is not bound to receive; and if he 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;[40] 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.[41] 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.[42]

In *Coolidge v. Payson*,[43] 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*,[44] and it 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 decisions of Lord Mansfield in *Pillans and Rose v. Van Mierop and Hopkins*,[45] where he laid down the broad principle, that a promise to accept previous to the existence of the bill, amounted to an acceptance. It is giving credit to the bill, and which maybe done as entirely by a letter written before, as by one written after the date of the bill.

Every act giving credit to the bill amounts to an acceptance.[46] There is no doubt that an acceptance, once fairly and fully made and consummated, cannot be revoked; but to render it binding, the acceptance must be a complete act, and an absolute assent of 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.[47] 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.[48] If the bill be accepted in a qualified degree only, and not absolutely, according to the tenor of it, the holder may accept 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.[49]

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, though he accepted without consideration, and for the sole accommodation of the drawer. Accommodation paper is now governed by the same rules as other paper. This is the latest and the best doctrine, both in England and in this, country.[50] If the acceptor alters the bill on acceptance, he vacates it as against drawer and endorsers; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor.[51]

A third person, after protest for non-acceptance by the drawee, may intervene, and become party to

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the bill, in a collateral way, by accepting and paying the bill for the honor of the drawer, or of a particular endorser. 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. He has his remedy against the person for whose honor he accepted, and against all the parties who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser.[52] The acceptance, *supra protest*, is good, 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.[53]

The policy of the rule granting these privileges to the acceptor, *supra protest*, is to induce the friends of the drawer or endorser 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 guarantying 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.[54] The holder is not bound to take an acceptance, *supra protest*;[55] 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;[56] and if the bill, on its face, directs a resort to a third person, in case of refusal by the drawee, such direction becomes part of the contract.[57]

As between the holder of a check and the endorser, it ought to be presented for acceptance with due diligence;[58] but as between the holder and the 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.[59] The drawee ought to accept or refuse 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 be dead, the bill may be presented to his executor or administrator.[60]

(5.) *Of the endorsement.*

A valid transfer may be made by the payee, or his agent. In the case of a bill made or endorsed to a feme sole, who afterwards marries, the right to endorse it belongs to the husband. So, the assignee of an insolvent payee, or the executor or administrator of a deceased payee, are entitled to endorse the paper.[61] And if a bill be made payable to a mercantile house consisting of several partners, an endorsement by 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 endorse it.

The bill cannot be endorsed 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 endorsements 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 endorsee; but no other use can be made of a blank endorsement in filling it up, than to point out the person to whom the bill or note is to be paid. A note endorsed in blank is like one payable to bearer, and passes by delivery, and the holder

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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.[62] 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 endorsed in blank.[63] The holder may strike out the endorsement to him, though full, and all prior endorsements in blank except the first, and charge the payee or maker.[64]

There is no necessity for any negotiable words in the endorsement. A bill originally negotiable, continues so in the hands of the endorsee, unless the general negotiability be restrained by a special endorsement by the payee. He may stop its negotiability by a special endorsement, but no subsequent endorsee can restrain the negotiable quality of the bill.[65] The first endorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged, or fraudulently circulated.[66] If a blank note or check be endorsed, it will bind the endorser to any sum, or time of payment, which the person to whom he entrusts the paper chooses to insert in it.[67] This only applies to the case in which the body of the instrument is left blank. If negotiable paper, regularly filled up, be endorsed in blank, the endorser is held only in the character of endorser,[68] and according to the terms and legal operation of the instrument.

In the case of blank endorsements, possession is evidence of title; but if the endorsements be all filled tip, the first endorsee cannot sue without showing that he had taken up the bill or note. The acceptor or maker is liable only to the last endorsee. The prior endorsers have parted with their interest in the paper, and are presumed to have received a valuable consideration for it. But if the last endorsee protests the bill for non-payment, and it be paid by a prior endorser, the latter acquires, by such payment, a new title to the instrument.[69]

Though the holder of paper fairly negotiated, be entitled to recover, and to shut out almost every equitable defense, 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 at his peril, and subject to every defense existing against it before it was negotiated.[70] But it has been a question, when a note, payable upon demand, is to be deemed a note out of time, so as to subject the endorsee, upon a subsequent negotiation of it, to the operation of the rule. When the facts and circumstances are ascertained, the reasonableness of time is matter of law, and every case will be depend upon its special circumstances. Eighteen months, eight months, seven months, five months, even two months and an 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 endorser is discharged.[71] On the other hand, in *Thurston v. McKown*,[72] a note payable on demand, and endorsed within seven days after it was made, was held to be endorsed in season to close all inquiry into the origin of the note. And when a note is negotiated in season, it may afterwards pass from one endorsee to another, after it is due, and the holder will be equally with the first endorsee protected in his title.[73]

There is no certain time in which a bill, payable at sight, or a given time thereafter, must be presented for acceptance. It must not be locked up for any considerable time; but if put into circulation, the courts are very cautious in laying down any rules 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.[74] 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

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upon the particular circumstances of each case.[75] If a bill or note be absolutely assigned so as to pass the whole interest in the instrument to the endorsee, 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 endorsement.[76] But where the endorsement is a mere authority to receive the money for the use, or according to the directions of the endorser, it would be evidence that the endorsee did not give a valuable consideration, and was not the absolute owner. A negotiable instrument may be endorsed so as to exempt the endorser from liability, as if the endorser should add, at his own risk, or without recourse. In that case, the maker or acceptor, and prior endorsers, would be held, according to the rules and usages of commercial paper, but the immediate endorser would be exempted from responsibility by the special contract.[77]

If the bill or note be negotiated after it is due, and be thereby opened to every equitable defense, yet a demand must be made upon the drawee or maker within a reasonable time, and notice given to the endorser in order to charge him, equally as if it had been a paper payable at sight or negotiated before it was due.[78]

(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 notaria1 protest receives credit in all courts and places by the law and usage of merchants, and it is a requisite step by the custom of merchants in the case of a foreign bill, and must be made promptly upon refusal. 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.[79] On inland bills no protest was required by the common law, and it was only made necessary by the statutes of 9th and 10th Wm. III. and 3d and 4th Anne, which have not been adopted in New York, and, therefore, such protest need not de made in this state.[80] After the protest for non-acceptance, immediate notice must be given to the drawer and endorser, in order to fix them, and the omission would not be cured by the bill being presented for payment and subsequent notice of the non-payment, as well as non-acceptance.[81] The drawer or endorser may be sued forthwith upon the protest for non-acceptance, without waiting until the bill is also presented for payment, and refused.[82]

The English law requiring protest, and notice of non-acceptance of foreign bills, has been adopted and followed as the true rule of mercantile law in the states of Massachusetts, Connecticut, New York, and South Carolina.[83] But the Supreme Court of the United States, in *Brown v. Barry*,[84] and in *Clarke v. Russel*,[85] held, that, in an action on a protest for non-payment on a foreign bill, a protest for non-acceptance, or a notice of the nonacceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this country, and those decisions have been followed in Pennsylvania.[86] It becomes, therefore, a little difficult to know what is the true rule of the law merchant in the United States, on this point, after such contradictory decisions. The Scotch law is the same as the English,[87] and it appears to me, that is the better doctrine, and most consistent with commercial policy.

If the bill has been accepted, demand of payment must be made 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 upon him personally if no particular place be appointed, and it cannot be made by letter through the post office.[88] But there is a great deal of perplexity and confusion in the cases

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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 a 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 bean idle attempt.[89]

The general principle is, that due diligence must be used to find out the party, and make the demand; and the inquiry will always he, whether, under the circumstances of the case, due diligence has been used. If the party has absconded, that will, as a general rule, excuse the demand.[90] If 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.[91] 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 date; and the presumption is, that the maker resides where the note is dated, and that he contemplated payment at that place.[92] But it is presumption only; and if the maker resides elsewhere within the state when the note falls due, and that be known to the holder, demand must be made at the maker's place of residence.[93]

The rule in the English law is, that if a 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.[94] 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;[95] 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.[96]

In this state it has been decided,[97] 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. This would appear to be contrary to the rile as now understood and established in the English law; and it would seem to he contrary to the opinion of the Court of Errors of this state, in the case of *Woodworth v. The Bank of America,* [98] 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. 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,[99] 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,*[100] were deemed to be controlling authorities on the point. The case of *Caldwell v. Cassidy* 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,[101] that a memorandum upon a note as to where it should be payable, was not a part of it; and in *Exon v. Russell,*[102] 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*,[103] 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 addition was a material variation, and discharged the acceptor. In the case of *The Bank of America v. Woodworth,*[104] a note was

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endorsed 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 endorser. The Supreme Court of this state have since decided,[105] that where the endorser 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 endorser to the maker to fill up the blanks. The principle of the decisions in Massachusetts is, that if the endorsement be made at the time of making the note, the endorser is to be treated as an original promissor, because he is supposed to participate in the consideration.[106]

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. This is the plain sense of the contract, and the words accepted payable at a given place, are equivalent to an exclusion of a demand elsewhere.[107]

Three days of grace apply equally, according to the custom of merchants, to foreign and inland bills and promissory notes.[108] 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 after the paper falls due,) to pay. It has been said,[109] 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 the 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 presented, and he is not entitled to any further time. 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.[110] The three days of grace apply equally to bills payable at. sight.[111] A bill payable at so many days sight, means so many days after legal sight, or acceptance;[112] and when the time is to be computed by days, as so many days after sight, the day of the date of the instrument is, by the modern practice, excluded.[113]

It is equally unseasonable, to demand payment before the expiration of the third day of grace, as after the day. 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 endorser of the note, are discharged.[114] If, however, a note be made for negotiation at a 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.[115] The same rule applies, when a bank, by usage, treats a particular day as a holiday, though not legally known as such, and make demands, and give notice, on the day preceding; the parties to a note discounted there, and conusant of the usage, are bound by it.[116] 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.[117]

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(7.) *Of the steps requisite to fix the drawer and endorsers.*

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 endorsers, 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 drawee of the bill or check, and of the maker of the note, but he must give reasonable notice to the drawer and endorsers, of their default, to entitle himself to a suit against them.[118] Notice to one of several partners. or to one of several joint drawers or endorsers, is notice to them all.[119] What is reasonable notice to the drawer or endorser, is sometimes said to be a question of law, and at other times to be a question of fact. The question of reasonable notice is usually compounded of law and fact, 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.[120] 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. This means, the first convenient and practicable mail that goes on the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or endorser reside out of town, the notice may, indeed, be sent on Thursday, but must be sent by the mail that goes on Friday; 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 other carrier, on Friday. 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; and it is settled, that each party into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice. If the demand he made on Saturday, it is sufficient to give notice to the drawer or endorser on Monday, and putting the notice by letter into the post office, is sufficient, though the letter should happen to miscarry. If the holder uses the ordinary mode of conveyance, he is not required to see that the notice is brought home to the party.

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 a little behind the mail. 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 the dwelling house; and 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 hire, and if the house he shut up by a temporary absence, still the notice may be left there. If the parties live in different towns, the letter must he forwarded to the post office nearest to 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.[121]

The notice must specify that the bill is dishonored, and the design of it is, that the drawer may be enabled to secure his claim against the acceptor, and the endorser against the maker, and the notice

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may come from any person who is a party to the bill.[122] So, any agent, having possession of the bill, may give the notice, and it treed not state at whose request it was given, nor who was the owner of the bill. There is no precise form of the notice. It is sufficient that it state the fact of non-payment, and that the holder looks to the endorser.[123] 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 endorser, on receiving notice of the dishonor of the bill, should neglect to give the like notice, with due diligence to the first endorser, the latter would not be liable to him.[124]

It is not necessary, in the case of notice of the non-acceptance, or non-payment of a bill, that a copy of the bill and protest should accompany the notice. It is sufficient to give notice of the fact.[125] 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 endorser, to be charged on non-acceptance or non-payment, is entitled 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.[126] 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.

There are many cases in which notice is not requisite, or the want of it waived.

If the drawee refuses to accept, because he has no effects of the drawer in hand, notice to the drawer is not necessary. This exception to the general rule proceeds on the ground of fraud in the drawer; 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. 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 fade 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 fair mercantile agreement.[127]

The exception applies only to the drawer, and not to the endorser of a bill drawn without funds; and it is now settled in England, in France, and in this country, that neither the insolvency of the drawer, or drawee, or acceptor, or the fact that the drawee had absconded, does away the necessity of a demand of payment, and notice to the drawer; nor dots knowledge in the endorser, when he endorsed the paper, of the insolvency of the maker of the note, or druwee of the bill, do away the necessity of notice, in order to charge him.[128] It was left undecided in *Rhode v. Proctur*,[129] whether, in 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.[130]

Giving time by the holder to the acceptor of a bill, after the drawer has been fixed, will discharge the other parties to the bill; but the agreement for delay must be one having a sufficient consideration, and binding in law upon the parties.[131] If the holder gives time to the endorser, knowing that the note was made for his accommodation, he does not thereby discharge the drawer.[132]

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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 endorser are in the light of sureties for the acceptor, and the holder must do nothing to impair the right which they have to resort to the acceptor for indemnity, or which would amount to a breach of faith in him towards the acceptor. 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.[133] But receiving part of the debt from the acceptor, after the drawer has been duly fixed, works no prejudice to the holder's right against the drawer or endorsers, for it is in aid of all parties who are eventually liable.

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, in the exercise of their right of recourse against the maker or acceptor. The holder may give time to an immediate endorser, 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 the subsequent ones, for it varies the rights of the subsequent parties, and discharges them. The parties to a bill are chargeable in different order. The acceptor is first. liable, and the endor, sers in the order in which they stand on the bill, and taking new security, or giving time, or discharging, or compounding with a subsequent endorser, cannot prejudice a prior endorser, because he has no rights against a subsequent endorsee.[134]

If due notice of non-acceptance or non-payment be not given, yet a subsequent promise to pay, by the party entitled to notice, will amount to a waiver of the want of notice, provided the promise was made clearly and unequivocally, and with knowledge of the fact of a want of due diii,grence on the part of the holder.[135] So if the endorser has protected himself front loss by taking collateral security of the maker of the note, or an assignment of his property, it is a waiver of his legal right, to inquire proof of demand and notice.[136]

If the endorser comes again into possession of the bill he is to be reguarded *prima facie* its the owner, and may sue and recover, though there be on it subsequent endorsements, and no receipt or endorsement back to him, and he may strike out the subsequent names.[137] To maintain a suit against the endorser, 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 endorsement, nor the hand of the drawer.[138] 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 endorser is no discharge of the acceptor. Nothing short of the statute of limitations, or payment, or a release, or an express declaration of the holder, will discharge the acceptor.

He is bound, like the maker of a note, as a principal debtor. His acceptance is evidence that the value of the bill was in his bands, or had been received by him from the drawer. He is liable to the payee, to the drawer, and to every endorser. 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 endorser.[139] Though a bill, payable to

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a fictitious payee, be strictly void, yet if the fact was known to the acceptor, he may be sued by an innocent endorsee, equally as upon a note payable to bearer.[140] And if the holder of a bank bill cut 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.[141]

(8.) *Of the measure of damages.*

The engagement of the drawer and endorser 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, on the drawer or endorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays. 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 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 re-exchange; and this it does by giving him the face of the protested bill, with interest, and the necessary expenses, including the amount or price of the re-exchange.[142]

But in this country a different practice was introduced while we were English colonies, and it has continued to this day. Our usages on this subject form au exception to the commercial law of Europe.

In New York, the rule has uniformly been, to allow twenty percent damages on the return of foreign bills protested for non-acceptance or non-payment, 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 endorser. The mercantile usage was, to consider the twenty percent an indemnity for consequential damages, and to require the bill 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[143] considered the twenty percent to be in lieu of damages in case of re-exchange, and the demand, with that allowance, was to be settled at the par of exchange. This doctrine was overturned by the Court of Errors,[144] and the holder was held to be entitled to recover, not only the twenty percent[145] 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.[146]

The rate of damages on bills drawn and payable within the United States, or other parts of North America, was subsequently, in 1819, regulated in New York lay statute, and the damages fixed at five, or seven and an half, or ten percent, 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 all bills, foreign and inland, have been made the subject of a new regulation. They provide that upon bills drawn or negotiated within this state, upon any person, at any place

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within the states east of New York, or north of North Carolina, the damages to be allowed and paid, upon the usual protest for non-payment, shall be three percent upon the principal sum specified in the bill; and upon any person at any place within the states south of Virginia, five percent; and upon any person at any other place, in or adjacent to this continent, or in Europe, ten percent.

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 non-payment. 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 and demand of payment. 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 non-payment, are to be ascertained and determined, without reference to the rate of exchange existing between this state and the place on which the bill is drawn. But if the contents of the trill 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.

This new regulation confines the damages to bills protested for non-payment; and I infer, that no damages were intended to be allowed, because none are mentioned, on bills returned protested for non-acceptance. In every other respect, the claim on bills returned dishonored for non-acceptance, as to expenses, interest, and the rate of exchange, may, perhaps, be considered as governed by existing mercantile usage, until we have some judicial exposition of the law.

The laws and usages of the other states vary most essentially on the subject of damages on protested. bills. 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, bait the result is nearly similar; while between other states the result varies from four and a half to fifteen percent. In Massachusetts, the usage always has been 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 percent damages in lieu of the price of exchange.[147] But this rule has been changed, by statute, in 1826, and bills on Europe are now settled at the current rate of exchange and interest., and five percent damages; and if the bill be drawn upon any place beyond the Cape of Good Hope, twenty percent damages.

In Pennsylvania, the rule for a century past was twenty percent damages, in lieu of re-exchange; but by statute, in 1821, twenty percent damages were allowed upon protested bills on Europe, and twenty-five percent upon other foreign bills, in lieu of all charges, and the amount of the bill is to be ascertained and determined at the rate of exchange. In Maryland, the rule, by statute, is fifteen percent 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 North and South Carolina, the damages, by statute, are fifteen per. cent., and in Alabama and Louisiana, twenty percent. The damages in Georgia, by statute, in 1827, on foreign bills protested for non-payment, are ten percent, together with the usual expenses and interest, and the principal to be settled at the current rate of exchange.[148]

The inconvenience of a want of uniformity in the rule of damage 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

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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; has been well and, I think, conclusively shown, in the official documents which have been prepared on that subject.[149]

(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 endorser of negotiable paper, a few remarks concerning its creation and validity will not be altogether inapplicable to the subject.

In *Pillans v. Van Mierop*,[150] 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.[151] 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,[152] 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, and is an essential part of the agreement. This was the decision in the case of *Wain v. Warlters*;[153] and though that decision has been frequently questioued,[154] it has since received the decided approbation of the courts of law;[155] 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.[156] The decisions have all turned upon the force of the word agreement; and where, by the statute, the word promise has been introduced, by requiring the promise or agreement to be in writing, as in Virginia, the construction has not been so strict.[157]

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 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.[158] If, however, 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

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of the collateral undertaking; for the consideration for the original debt will not attach to this subsequent promise; and to such a case the doctrine in *Wain v. Warlters* applies. But if the promise to pay the debt. of another arises 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.[159]

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.

After a valid guaranty has been made, the rights of the parties in the relative character of principal and surety affords an interesting subject of inquiry, but it is one that does not strictly appertain to the doctrine of negotiable paper;[160] and I shall conclude the present general sketch or outline of that subject, with some notice of the principal publications on bills and notes.

(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. [161] The treatises and leading cases must be 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' *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 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 no day of business, the money must he demanded on the second day, and that the notice of the default of payment must he sent off 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

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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. 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 casts a rapid glance over the law concerning bills of exchange; but that part of his work is far inferior to the treatise of Marius.

Beawe'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 It., and for this we have the authority of Lord Holt in *Buller v. Crisp*.[162] 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 ingrafted into his work the substance of all the judicial decisions down to that time. His work became, therefore, a very valuable digest to the practicing lawyer, and particularly as during the times of Lord Holt and Lord Mansfield, the law concerning negotiable paper was extensively discussed, and vastly improved. Mr. Bayley, who is now 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 expresses' 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 wore 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 snaring degree, to the treatise of Pothier for illustration of the rules of this part of the general law merchant; and 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 on Bills, and Jones on bailment, have all been enriched by the profound and classical productions of France and Italy 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 commentary upon the French ordinance of 1673; and he had ample materials in the commentary of M. Jonsse, 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 *Scacchia 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. He refers to the ordinances of various German states, and of several of the Hanse Towns relating to

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commercial paper, and he cites eight or ten professed German treatises on bills of exchange.[163]

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; and there is a clear and concise summary of the law concerning negotiable paper in *M. le Comte Merlin's Repertoire de Jurisprudence*, under the title of *Lettre et Billet de Change*. Thomson's treatise on the law of bills and notes in Scotland, is a superior work, and spoken of in very high terms by persons entirely competent to judge of its value; I allude to the reference to that treatise by Mr. Bell, in his commentaries, and by Mr. Justice Bayley, in one of his recent opinions in the King's Bench. The law concerning negotiable paper has now 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.

NOTES

1. Dig. 22. 2. 4. 1

2. *Traité du Con. de Change*, No. 6.

3. See the pleading of Isocrates, entitled, *Trapeziticus*. (*Isocratis Scripta omnia*, edit. H. Wolfius, Basle, 1587.) In that interesting forensic argument which Isocrates puts into the mouth of a son of Sopaeus, 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 one 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 advantage to the young man, for it saved him the risk of remittance from Pontus, over a sea covered with Lacedaemonian 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 Pontus should not honor the draft, and the young Pontian should fail.

4. 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 Europe by the Lombard merchants in the thirteenth century. M. Boucher says, he 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, tom. 1. 614. 620.) M. Merlin says, the edict of Lewis 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, and says, that the Italians and merchants of Amsterdam first established the use of them in France. *Repertoire de Jurisprudence*, tit. *Lettre et Billet de Change*, sec. 2.

5. Promissory notes are negotiable throughout the Union, and the endorsee can sue in his own name; and in New York, Massachusetts, Virginia, South Carolina, and most of the states, he has all the privileges of an endorsee under the law merchant. But in Vermont, New Jersey, Pennsylvania, and Kentucky, his rights under the law merchant are to be taken with some qualification, and especially in the state last mentioned. See Griffith's Law Register, *passim*.

6. *Heylyn v. Adamson*, 2 Burr. Rep. 669. *Brown v. Harraden*, 4 Term Rep. 148.

7. *Clerke v. Martin*, 2 Lord Raym. 757.

8. The pragmatic of Pope Pius V *De Cambiis*, as early as 1571, is mentioned by Mr. Du Ponceau, in his able and interesting Dis erlation on the Nature and Extent of the Jurisdiction of the Courts of the United, States, p. 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, painstaking, and powerful argument, in favor of the position, that at common law, and before the statute of Anne, an endorsee of a promissory note could sue a remote endorser.

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9. This definition is taken from Bayley on Bills, p. 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.

10. *Cruger v. Armstrong*, 3 Johns. Cas. 5. *Conroy v. Warren*, ibid. 259.

11. *Morris v. Lee*, 2 Ld. Raym. 1396. 8 Mod. Rep. 362. Str. 629. *Martin v. Chauntry*, Str. 1271. *Thomas v. Roosa*, 7 Johns. Rep. 461.

12. Bayley on Bills, edit. Boston, 1826, p. 6.

13. *Keith v. Jones*, 9 Johns. Rep. 120. *Judah v. Harris*, 19 ibid. 144.

14. *McCormick v. Trotter*, 10 Serg. & Rawle, 94.

15. *Dawkes v. De Lorane*, 3 Wils. Rep. 207. *Beardesley v. Baldwin*, 2 Str. Rep. 1151. *Roberts v. Peake*, 1 Burr. 323.

16. *Cook v. Colehan*, Str. Rep. 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. Rep. 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. Rep. 262. 3 ibid. 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. edit. Boston, 1826, p. 8-15. and Chitty on Bills. edit. Philadelphia, 1826, p. 42-50.

17. *Milne v. Graham*, 1 Barnw. & Cress. 192.

18. See Huberus, vol. 2. lib. 1 tit. 3. *De conflictu legum, passim*. Emerigon *des Ass*. tom. 1, ch, 4. sec. 8. has collected the principles of all the foreign jurists on the point, and poured a flood of learning over the subject. See also, Toullier's *Droit Civil*, tom. 10. 117, for the doctrine of continental Europe. See *Robinson v. Bland*, 2 Burr. Rep. 1077. *Melan v. The Duke de Fitz-James*, 1 Bos. & Pull. 138. *Dalrymple v. Dalrymple*, 2 Haggard's Rep. 54. Ferguson's Decisions in the Consistorial Court of Scotland, *passim*, for the doctrine of the English and Scottish Courts. See *Van Reims Dyk v. Kane*, 1 Gallis. Rep. 371. *Slacum v. Pomeroy*, 6 Cranch's Rep. 221. *Warren v. Lynch*, 5 Johns. Rep. 538. *Thompson v. Ketcham*, 8 Johns. Rep. 146. *Hicks v. Brown*, 12 Johns. Rep. 142. *Van Raugh v. Van Arsdale*, 3 Caines' Rep. 154. *Powers v. Lynch*, 3 Mass. Rep. 77. *Grimshaw v. Bender*, 6 Mass. Rep. 157. *Hazzlehurst v. Kean*, 4 Yeates' Rep. 19. *Scofield v. Day*, 20 Johns. Rep. 102. *McCandlish v. Cruger*, 2 Bay's Rep. 377, for the principles recognized in our American jurisprudence.

19. *Lodge v. Phelps*, 1 Johns. Cas. 139. Heath, J., 1 Bos. & Pull. 142.

20. *Hill v. Lewis*, 1 Salk. Rep. 132. *Burchell v. Slocock*, 2 Lord Raym. 1545. *Smith v. Kendall*, 6 Term Rep. 123. *Rex v. Box*, 6 Tannt. Rep. 325. *Gerard v. La Coste*, 1 Dallas' Rep. 194. *Downing v. Backentoes*, 3 Caines' Rep. 137.

21. *Cruchley v. Clarance*, 2 Maule & Selw. 90.

22. *Popplewell v. Wilson*, 1 Str. Rep. 264. *Emery v. Bartlett*, 2 Lord Raym. 1555. *Boehm v. Sterling*, 7 Term Rep. 423. *White v. Ledwich*, cited in Bayley on Bills, 25.

23. *Taylor v. Dobbins*, 1 Str. Rep. 399. *Elliott v. Cooper*, 2 Lord Raym. 1576.

24. *Grant v. Vaughan*, 3 Burr. Rep. 1516.

25. *Collins v. Emett*, 1 H. Blacks. Rep. 313. *Minet v. Gibson*, 3 Term Rep. 481. 1 H. Blacks. Rep. 569. *Tatlock v. Harris*, 3 Term Rep. 174. *Hunter v. Blodgett*, 2 Yeates' Rep. 480. *Foster v. Shattuck*, 2 N. Hamp. Rep. 446.

26. *Miller v. Race*, 1 Burr. Rep. 452. *Grant v. Vaughan*, 3 Burr. Rep. 1516. *Peacock v. Rhodes*, Doug. Rep. 633. *King v. Milson*, 2 Campb. N. P. 5. *Solomons v. The Bank of England*, 13 East's Rep. 135, *in notis*. *Cruger v. Armstrong*, 3 Johns. Cas. 5. *Conroy v. Warren*, ibid. 259. *Thurston v. McKown*, 6 Mass. Rep. 428.

27. *Collins v. Martin*, 1 Bos. & Pull. 648. *Reynolds v. Chettle*, Campb.N. P. 596.

28. Gilbert's *Lex Praetoria*, 288, 289.

29. *Bowyen v. Bampton*, Str. Rep. 1155. Lord Mansfield, in *Peacock v. Rhodes*, Doug. Rep. 636. *Lowe v. Walker*, ibid. 736. *Ackland v. Pearce*, 2 Campb. N.P. 599. Since the above decisions, the statute of 58 Geo. III c. 98 protects bills and notes in the hands of an endorsee, for valuable consideration, and without notice, though founded on usury; and as there seems to be

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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.

30. *De Bras v. Forbes*, 1 Esp. N.P. Rep. 117. Ashhurst, J., 2 Term Rep 71.

31. *Steers v. Lashley*, 6 Term Rep., 61. *Wiffen v. Roberts*, 1 Esp. N. P. 261. *Perkins v. Challis*, 1 N. Hamp. Rep. 254.

32. *Brown v. Davis*, 3 Term Rep. 80. *Down v. Halling*, 4 Barnw. & Cress. 330. *Ayer v. Hutchins*, 4 Mass. Rep. 370.

33. 5 Johns. Ch. Rep. 56.

34. *Ayer v. Hutchins*, 4 Mass. Rep. 370.

35. 3 Barnw. & Cress. 466.

36. 4 Esp. N.P. 56.

37. Bank of Washington v. Triplett, 1 Peters' Rep. 25.

38. Marius on Bills, 19. *Smith v. Wilson*, Andrew's Rep. 187. *Chamberlyn v. Delarive*, 2 Wils. Rep. 353. *Muilman v. D'Eugino*, 2 H. Blacks. Rep. 565. *Aymar v. Beers*, 7 Cowens' Rep. 705.

39. *Lumley v. Palmer*, Str. Rep. 1000. *Powell v. Monnier*, 1 Atk. Rep. 612.

40. Marius, 17. 21. Molloy, b. 2. ch. 10. sec. 21.

41. 2 Brod. & Bing. 165.

42. *Miln v. Prest*, 4 Campb. Rep. 393.

43. 2 Wheat. Rep 66. See also to S. P. 1 Peters' Rep. 264.

44. 15 Johns. Rep. 6.

45. 3 Burr. Rep. 1663.

46. *Powell v. Monnier*, 1 Atk. 611. *Wynne v. Raikes*, 5 East's Rep. 514.

47. *Cox v. Troy*, 5 Barnw. & Ald. 474. Emerigon, tom. t. 45. cites Dupuy de la Serra, art. *des. lettres de change*, ch. 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 Contrat 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.

48. *Harvey v. Martin*, 1 Campb. 425. note.

49. *Wegerslofe v. Keene*, 1 Str. Rep. 214. *Smith v. Abbott*, 2 Str. Rep. 1152.

50. *Fentum v. Pocock*, 5 Taunton, 192. *The Governor and Company of the Bank of Ireland v. Beresford*, 6 Dow's Parl. Cas. 234. *Bank of Montgomery County v. Walker*, 9 Serg. & Rawle, 299. *Murray v. Judah*, 6 Cowen. 484.

51. *Paton v. Winter*, 1 Taunton, 420.

52. *Mulford v. Walcott*, 1 Lord Raym. 574. *Mertens v. Winnington*, 1 Esp.N. P. Rep. 112. Bayley on. Bills, 209.

53. *Konig v. Bayard*, 1 Peters' Rep. 250.

54. Beawes, tit. Bills of Exchange, pl. 42. *Jackson v. Hudson*, 5 Campb. 447.

55. *Mitford v. Walcot*, 12 Mod. Rep. 410.

56. Pothier, h. t. pl. 170.

57. Pothier, h. t. pl. 137.

58. *Rickford v. Ridge*, 2 Campb. 537. *Beeching v. Gower*, 1 Holt, 313, note of the Reporter.

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59. *Cruger v. Armstrong*, 3 Johns. Cas. 5. *Conroy v. Warren*, ibid. 259.

60. Molloy, b. 2. c. 10. sect. 34. Bayley on Bills, 128.

61. Parker, Ch. J., in 1 P. Wms. 255. *Conner v. Martin*, cited in 3 Wils. Rep. 5. *Rawlinson v. Stone*, 3 Wils. Rep. 1.

62. *Peacock v. Rhodes*, Doug. Rep. 633. *Francis v. Mott*, cited in Doug. Rep. 634. Bull. N. P. 275. *Livingston v. Clinton*, and *Cooper v. Kerr*, cited in 3 Johns. Cas, 264. *Lovell v. Evertson*, 11 Johns. Rep. 52. Duncan, J, in 13 Serg. & Rawle, 315.

63. *Gorgier v. Mieville*, 3 Barnw. & Cress. 45.

64. *Smith v. Clarke*, Peakes' N. P. Rep. 225. *United States v. Barker*, 1 Paine's Rep. 156.

65. *Edie v. East India Company*, 2 Burr. Rep. 1216. *Ancher v. The Bank of England*, Doug. Rrp. 637. *Smith v. Clarke*, 1 Esp. Rep. 180.

66. *Lambert v. Pack*, 1 Salk. Rep. 127. *Putnam v. Sullivan*, 4 Mass.Rep. 45. *Codwise v. Gleason*, 3 Day's Rep. 12.

67. *Russel v. Langstaffe*, Doug. Rep. 514.

68. See *Jackson v. Richards*, 2 Caines' Rep. 343.

69. *Mendes v. Carreroon*, 1 Lord Raym. 742. *Gorgerat, v. McCarty*, 2 Dallas' Rep. 144.

70. *Brown v. Davies*, 3 Term Rep. 80. *Tinson v. Francis*, 1 Campb. Rep. 19.

71. *Furman v. Haskin*, 2 Caines' Rep. 369. *Losee v. Dunkin*, 7 Johns. Rep. 170. *Field v. Nickerson*, Mass. Rep. 131. *Sice v. Cunningham*, 1 Cowen's Rep. 397. *Martin v. Winslow*, 2 Mason's Rep. 241.

72. 6 Mass. Rep. 428.

73. *Chalmers v. Lanion*, 1 Campb. Rep. 383.

74. *Goupy v. Harden*, 7 Taunt. Rep. 159.

75. *Fry v. Hall*, 7 Taunt. Rep. 396. *Muilman v. D'Eugino*, 2 H. Blacks. Rep. 565.

76. Parsons, Ch. J., 6 Mass. Rep 228.

77. Dallas, J., in *Goupy v. Harden*, 7 Taunt. Rep. 163. *Rice v. Stearns*, 3 Mass. Rep. 225. *Welch v. Lindo*, 7 Cranch's Rep. 159. Ersk. Inst. of the Scotch Law, vol. ii. 468. Bell's Com. on the Scotch Law, vol. i. 402.

78. *McKinney v. Crawford*, 8 Serg. & Rawle, 351. *Berry v. Robinson*, 9 Johns. Rep. 121. Bishop v. Dexter, 2 Conn. Rep. 419. *Dwight v. Emerson*, 2 N. Hamp. Rep. 159. *Rugely v. Davidson*, 3 S. C. Const. Rep. 33.

79. *Tassell v. Lewis*, 1 Lord Raym, 743. *Rogers v. Stevens*, 2 Term Rep. 713. Butler, J., 4 Term Rep. 175. *Gale v. Walsh*, 5 Term Rep. 239. *Charters v. Bell*, 4 Esp. Rep. 48.

80. *Miller v. Hackley*, 5 Johns. Rep. 375. In this 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. 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 S C. Const. Rep. 100. *Landsdale v. Brown*, C. C., U. S. October, 1821, for Pennsylvania district, Whart. Dig. tit. Bills of Exchange, p1.61.) 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 is supported by Dr. Tucker. (See Tucker's Blackstone, vol. ii. 467, note 22.) and also by Marius on Bills, p. 2, who holds, 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.

81. *Roscow v. Hardy*, 2 Campb. Rep. 458.

82. *Milford v. Mayor*, Doug. Rep. 55. *Ballingalls v. Gloster*, 3 East's Rep. 481.

83. *Watson v. Loring*, 3 Miss. Rep. 557. *Sterry v. Robinson*, 1 Day's Rep. 11. *Mason v. Franklin*, 3 Johns. Rep. 202. *Weldon v. Buck*, 4 ibid. 144. *Winthrop v. Pepoon*, 1 Bay's Rep. 468.

84. 3 Dallas' Rep. 365.

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85. Cited in 6 Serg. & Rawle, 358

86. *Read v. Adams*, 6 Serg. & Rawle, 356.

87. 1 Bell's Comm. 408.

88. *Saunderson v. Judge*, 2 H. Blacks. Rep. 509. *Stedman v. Gooch*, 1 Esp. N. P. Rep. 3. *Berkshire Bank v. Jones*, 6 Mass. Rep. 524. *State Bank v. Hurd*, 12 Mess. Rep. 172. *Mason v. Franklin*, 3 Johns.Rep. 202. *Whittier v. Graffam*, 3 Greenleaf, 82.

89. *Boot v. Franklin*, 3 Johns. Rep. 207.

90. 4 Mass. Rep. 45. 4 Serg. & Rawle, 480.

91. *Anderson v. Drake*, 14 Johns. Rep. 114. *McGruder v. Bank of Washington*, 9 Wheat. Rep. 598. Bayley on Bills, edit. Boston, 126.

92. *Stewart v. Eden*, 2 Caines' Rep. 127. *Duncan v. McCullough*, 4 Serg. & Rawle, 480.

93. *Anderson v. Drake*, 14 Johns. Rep. 114.

94. *Saunderson v. Judge*, 2 H. Blacks. Rep. 509. *Sanderson v. Bowes*, 14 East's Rep. 500. *Dickinson v. Bowes*, 16 East'sRep. 110. *Butterworth v. Le Despenser*, 3 Maule & Selw. 150.

95. *Howe v. Bowes*, 16 East's Rep. 112.

96. *Herring v. Sanger*, 3 Johns. Cas. 71.

97. *Wolcott v. Van Santyoord*, 17 Johns. Rep. 248. *Caldwell v. Cassidy*, 8 Cowen's Rep. 271.

98. 19 Johns. Rep. 891.

99. United States Bank v. Smith, 11 Wheat. Rep. 171.

100. 2 H. Blacks. Rep. 509. 6 Mass. Rep. 524.

101. Bayley on Bills, 25.

102. 4 Maule & Selw. 505.

103. 4 Barn. & Ald. 197.

104. 16 Johns. Rep. 315. S. C. Johns. Rep. 390.

105. *Mitchell v. Culver*, 7 Cowen's Rep. 336. *Mechanics' and Farmers' Bank v. Scuyler*, ibid. 337, note.

106. Parker, Ch. J., in *Tenney v. Prince*, 4 Pickering, 385.

107. 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 Rep. 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. Aylet*, 3 Taunt Rep. 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, a well as of the time, of acceptance. In *Fenton v. Goundry*, 13 East's Rep. 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. Rep. 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. Rep. 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 Bro. & Bing Rep. 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., but the House of Lords reversed the judgment of the K. B., and overthrew their doctrine, and

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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. 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 part of the contract; but if a bill be accepted, payable at a particular place, it is not a part of the acceptance, and the presentment need not be made there. Soon after this decision was made, the statute of I and 2 Geo. IV. ch. 78 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 U. S. Bank v. Smith, 11 Wheat. Rep. 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 endorser, such demand and proof were held to be indispensable.

108. *Brown v. Harradan*, 4 Term Rep. 148. *Bussard v. Levering*, 6 Wheat. Rep. 102. *Lindenberger v. Beall*, ibid. 104. 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 is not entitled to grace, unless it be an express part of the contract. *Jones v. Fales*, 4 Mass. Rep. 245.

109. Buller, J., 4 Term Rep. 174. The opinion of Buller, J., has been adopted in *Greeley v. Thurston*, 4 Greenleaf, 479.

110. *Tassell v. Lewis*, 1 Lord Raym, 743. *Jackson v. Richards*, 2 Caines' Rep. 343. *Lewis v. Burr*, 2 Caines' Cas. in Error, 195. *Bussard v. Levering*, 6 Wheat. Rep. 102.

111. *Colman v. Sayer*, 1 Barnard K. B. 303. Bayley on Bills, 152. 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 his journey, payable at sight, to be obliged to wait the days of grace for his money. Traité du Con. de Change, art. 172.

112. *Mitchell v. De Grand*, 1 Mason's Rep. 176.

113. Bayley on Bills, 155.

114. *Coleman v. Sayer*, Str. Rep. 829. *Wiffen v. Roberts*, Esp. N.P. Rep. 261.

115. *Renner v. Bank of Columbia*, 9 Wheat. Rep. 581. *Mills v. The Bank of the United States*, 11 ibid. 431. *Bank of Washington v. Triplett*, 1 Peters' Rep. 256.

116. *City Bank v. Cutter*, 3 Pick. Rep 414.

117. *Bank of Washington v. Triplett*, 1 Peters' Rep. 25.

118. *Heylyn v. Adamson*, 2 Burr. Rep. 669. *Rushton v. Aspinall*, Doug. Rep. 679.

119. *Porthouse v. Parker*, 1 Campb. Rep. 82

120. *Tindal v. Brown*, 1 Term Rep. 167. *Darbishire v. Parker*, 6 East's Rep. 3. *Hilton v. Shepherd*, 6 East's Rep. 14, *in notis*. *Bateman v. Joseph*, 12 East's Rep. 433. *Ches. Ins. Co. v. Stark*, 6 Cranch's Rep. 273. *Mar. Ins. Co. v. Ruden*, ibid. 328. *Taylor v. Brigden*, 8 Johns. Rep. 173. In the late cases of *Aymar v. Beers*, 7 Cowen's Rep. 705, and of the *Bank of Columbia v. Lawrence*, 1 Peter's Rep. 578, it is 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 it 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.

121. Grose, J., and Lawrence. J., in *Darbishire v. Parker*, 6 East's Rep. 10. *Scott v. Lifford*, 9 East's Rep. 347. *Smith v. Mullet*, 2 Campb. 208. *Hilton v. Fairclough*, ibid. 633. *Williams v. Smith*, 2 Barnw. & Ald. 496. *Bancroft v. Hall*, 1 Holt's N P. 476. *Bray v. Hawden*, 5 Maule & Selw. 68. *Jackson v. Richards*, 2 Caines' Rep. 343. *Stewart v. Eden*, ibid. 121. *Corp v. McComb*, 1 Johns. Cas 328. *Ireland v. Kip*, 10 Johns. Rep. 490. *Lenox v. Roberts*, 2 Wheat. Rep. 373. *Bussard v. Levering*, 6 Wheat. Rep. 102. *Lindenberger v. Beall*, ibid 104. *Shed v. Brett*, 1 Pick. Rep. 401. *Mead v. Engs*, 5 Cowen's Rep. 303. *Whittier v. Graffam*, 3 Greenleaf's Rep. 82. *The Bank of Columbia v. Lawrence*, 1 Peters' Rep. 578.

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122. *Jameson v. Swinton*, 2 Campb. Rep. 373.

123. *Shed v. Brett*, 1 Pick. Rep. 401. *Mills v. Bank of the United States*, 11 Wheat Rep. 431

124. *Morgan v. Woodworth*, 3 Johns. Cas. 89. Pothier, *Traité du Con. de Change*, No. 153.

125. *Cromwell v. Hynson*, Esp. N. P. Rep. 511. *Charters v. Bell*, 4 ibid. 48. *Robins v. Gibson*, 1 Maule & Selw. 289. *Lenox v. Leverett*.10 Mass. Rep. 1.

126. *Powell v. Roach*, 6 Esp. N.P. Rep. 76. Beawes, 420, 424, sec. 74. *Kenworthy v. Hopkins*, 1 Johns. Cas. 107.

127. *Bickerdike v. Bollman*, 1 Term Rep. 405. *Rogers v. Stephens*, 2 ibid. 73. *Corney v. Da Costa*, 1 Esp. N. P. Rep. 302. *Staples v. Okines*, ibid 332. *Clegg. v. Cotton*, 3 Bos. & Pull. 239. *Brown v. Maffey*, 15 East's Rep. 216. *Rucker v. Hiller*, 16 East's Rep. 43. *Cory v. Scott*, 3 Barnw. & Ald. 619. *French v. Bank of Columbia*, 4 Cranch's Rep. 141.

128. *Nicholson v. Gouthit*, 2 H. Blacks. Rep. 609. *Esdaile v. Sowerby*, 11 East's Rep. 114. *Howe v. Bowes*, 5 Taunt. Rep. 30. *Rhode v. Proctor*, 4 Barnw. & Cress. 517. *Jackson v. Richards*, 2 Caines' Rep. 343. *Sanford v. Dillaway*, 40 Mass. Rep. 52. *Buck v. Cotton*, 2 Conn. Rep. 126. Mr. Bell, in his Commentaries, vol. i. 413, mentions a number of Scotch decisions to the same effect. See also, Pardessus, part 6. tit. 8, ch. 3. sec. 4. to the same point.

129. 4 Barnw. & Cress. 517.

130. See *Ex parte Moline*, 19 Vesey's Rep. 216, and Thompson on Bills, p. 535, as cited to that point by Mr. Justice Bayley, in *Rhode v. Proctor*. See also Bell's Comm. vol. i. 421.

131. *McLemore v. Powell*, 12 Wheat. Rep. 554.

132. *Walker v. Bank of Montgomery County*, 12 Serg. & Rawle, 382. S. C. 9 Serg. & Rawle, 229.

133. *Ex parte Smith*, 3 Bro. 1. *Walwyn v. St. Quintin*, 1 Bos. & Pull 652. *English v. Darley*, 2 ibid. 61. *Clark v. Devlin*, 3 ibid. 26. *Ex parte Wilson*, 11 Ves. Rep. 410. *Gould v. Robson*, 8 East's Rep. 576. *Pring v. Clarkson*, 1 Barnw. & Cress. 14.

134. *English v. Darley*, 3 Esp. N.P. Rep. 49. S. C. 2 Bos. & Pull. 61. *Smith v. Knox*, 3 Esp. N. P. Rep. 46. *Sargent v. Appleton*, 6 Mass. Rep. 65.

135. *Goodall v. Doller*, 1 Term Rep. 712. *Hope v. Alder*, 6 East's Rep. 16, *in notis*. *Lundie v. Robertson*, 7 East's Rep. 231. *Borradaile v. Lowe*, 4 Taunt. Rep. 93. *Stevens v. Lynch*, 2 Campb. N.P. 332. *Miller v. Hackley*, 5 Johns. Rep. 375. *Martin v. Winslow*, 2 Mason's Rep. 241. *Fotheringham v. Price*, 1 Bay's Rep. 291. Thornton v. Wynn, 12 Wheat. Rep. 183.

136. *Mead v. Smalt*, 2 Greenleaf's Rep. 207. *Bond v. Farnham*, 5 Mass. Rep. 170. *Prentiss v. Danielson*, 5 Con. Rep. 175.

137. *Dugan v. U. States*, 3 Wheat. Rep. 172. *Norris v. Badger*, 6 Cowen's Rep. 499.

138. *Critchlow v. Parry*, 2 Campb. N.P. Rep. 182.

139. *Simmonds v. Parminter*, 1 Wils. Rep. 185. *Dingwall v. Dunster*, Doug. Rep. 247. *Smith v. Chester*, 1 Term Rep. 654. *Fentum v. Pocock*, 5 Taunt Rep. 192.

140. *Gibson v. Minet*, 1 H. Blacks, Rep. 569. S. C. 2 Term Rep. 481.

141. *Patton v. Bank of S. C.*, 2 Nott. & McCord, 464. *Martin v. Bank of the United States*, C. C. Pennsylvania district, 1821. *Bank of the United States v. Sill*, 5 Conn. Rep. 106.

142. *Mellish v. Simeon*, 2 H. Blacks. Rep.378. *De Tastel v. Baring*, 11 East's Rep. 265. Parsons, Ch. J., in *Grimshaw v. Bender*, 6 Mass. Rep. 157. Code de Commerce, b. 1. tit. 8. sec. 13. Van Leeuwen's Commentaries, 440.

143. *Hendricks v. Franklin*, 4 Johns. Rep. 119. *Weldon v. Buck*, ibid. 144.

144. *Graves v. Dash*, 12 Johns. Rep. 17.

145. *Denston v. Henderson*, 13 Johns. Rep. 322.

146. Laws of New York, 42d sess. ch. 34.

147. *Grimshaw v. Bender*, 6 Mass. Rep. 157.

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148. See Griffith's Law Register, passim, under the head of "bills of exchange and promissory notes." 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.

149. 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 Champer of Commerce approved of the principle of damages on foreign bills returned under protest, and they state that the practice of re-exchanges, 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.

150. 3 Burr. Rep. 1663.

151. 7 Brown's P.C. 556.

152. 29 Charles, II. ch. 3. sec. 4.

153. 5 East Rep. 10.

154. See *Ex parte Minet*, 14 Ves. Rep. 190. *Ex parte Gardom*, 15 ibid. 286

155. *Saunders v. Wakefield*, 4 Barnw. & Ald. 595. *Jenkins v. Reynolds*, 3 Brod. & Bing. 14. *Morley v. Boothby*, 3 Bing. Rep. 107.

156. *Sears v. Brink*, 3 Johns Rep. 210. *Leonard v. Vredenburgh*, 8 ibid. 29. 2 Nott & McCord, 372, note. *Packard v. Richardson*, 17 Mass. Rep. 122. *Levy v. Merrill*, 4 Greenleaf's Rep. 180. S. P. ibid. 387. *Sage v. Wilcox*, 6 Conn. Rep. 81.

157. Marshall, Ch. J., 5 Cranch's Rep. 151-2.

158. *Leonard v. Vredenburgh*, 8 Johns. Rep. 29. *D'Wolf v. Babaud*, 1 Peters' Rep. 476. The doctrine in 8 Johns. Rep. is confirmed in 11 Johns. Rep. 221 and 13 Johns. Rep. 175, and in Peters' Rep. the doctrine is said to be founded in good sense and convenience.

159. *Leonard v. Vredenburgh*, 8 Johns. Rep. 29. *Bailey v. Freeman*, 11 ibid. 221. *Hunt v. Adams*, 5 Mass. Rep. 358. *Williams v. Leper*, 3 Burr. Rep. 1886.

160. 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.

161. As evidence of the diffusiveness of the subject, and the infinity of its subordinate rules and distinctions, I would refer to the edition of Chitty on Bills, published at Philadelphia in 1826, which is a bulky octavo of 729 pages in small type, and which has an index alone of 159 pages. It contains the citation of perhaps 2000 English, and 600 American adjudged cases, on this single subject of bills and notes. I have attempted no more, in the course of the lecture, than to select a sufficient number of cases to establish the general principles, and to show their widespread adoption. And yet I am apprehensive that I may be censured by some, as having, as it is, gone too far into detail, and encumbered the notes too much with references to authority. My apology (if any be necessary) is, that these commercial subjects, as it appears to me, cannot be handled usefully in any other way. My mind has been too long disciplined by the actual business of life, to indulge in general theory on law subjects, or to think it of much value. The first duty of a law book is to state the law as it is, truly and accurately, and then the reason or principle of it as far as it is known; and if the author be a lecturer or commentator, he may be more free in his observations on its history and character, and be ought to illustrate it by comparison with the institutions of other countries and ages, and, in strong cases, to point out its defects, to show its false doctrines, and modestly and temperately to suggest alterations and improvements. All this I have endeavored to do, so far as the subject was within the compass of my means and resources; but still the existing and leading rules, ought to be laid open to the inspection of the lawyer and the scholar, with mathematical precision, and absolute certainty. I say ought, for how can any one pretend to be infallible in treating of subjects perplexed by ten thousand cases, and when every rule is checked or qualified by reservations and exceptions of the most fine-spun and subtle character.

162. 6 Mod. Rep. 29.

163. See Heineccii *Opera*, tom. 6. *in fine*.

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LECTURE 45

Of the Title to Merchants' Vessels

THE utility of any attempt at 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 merchants' ships. 3. Of the contract of affreightment. This arrangement is very nearly the same with that pursued by Mr. Abbott, (now Lord Tenterden,) in his treatise on the subject, and which, after comparing it with 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 to vessels.*

The title to a ship 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.[1] 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.[2] 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;[3] and a sale and delivery of a ship, without any bill of sale, or instrument, will be good as between the parties.[4] But 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. 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 even 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.[5]

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 and fraudulently conducted; and the English courts of common law do not regard them as binding, even

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though made *bona 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.[6] Lord Stowel, 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, when the fact of necessity was proved, to be very convenient; 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.[7]

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 the master, under the auxiliary sanction of the court, founded merely upon a survey of the ship to see whether she 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*. So, as we have already seen in a former volume,[8] capture by a public enemy divests 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.[9]

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. Delivery of the muniments of title will be sufficient, unless the part owner be himself in the actual possession.[10] 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 possible on the return of the ship. But the buyer takes subject to all encumbrances, and to all lawful contracts made by the master respecting the employment and hypothecation of the ship prior to notice of the transfer.[11]

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 with the act of taking possession as soon as conveniently may be (and which in England must be by statute within ten days) after the vessel arrives in port.[12]

(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;[13] and the great point for discussion is, who is to be regarded as owner.

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The ownership, in relation to this subject, is not determined by the register; nor is a regular bill of sale of the property essential to exempt the former owner from responsibility for supplies furnished. Where the contract of sale is made, and possession delivered, the circumstance that the naked legal time remains in the vendor for his security, does not render him liable, as owner, on the contracts, or for the conduct of the master.[14]

It has been a disputed question, whether the mortgagee of a ship, before he takes possession, be liable for the burdens, and entitled to the benefits, belonging to the owner'. In the case of *Chinney v. Blackbourne*,[15] 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*.[16] But Lord Kenyon, in *Westerdell v. Dale*,[17] entertained a different opinion, and he considered the mortgagee, whether in or out of possession, to he the owner, and entitled to the freight, and bound for the expense, 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 mortgagees in possession, and the vessel employed in his service.[18] The case of *Fisher v. Willing*,[19] has also 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 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 *The Mohawk Insurance Company v. Eckford*, decided in the Court of Common Pleas in the city of New York, as recently as January, 1828, and the case of *Thorn v. Hicks*,[20] show, that the rule is considered to be settled in this state, 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. In a case before Lord Ellenborough, so late as 1816,[21] 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 he 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 character 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. Rowe*,[22] was that, a vendee of a ship, whatever equitable title might exist in hint, 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 tradesman who supplied the materials.

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There are analogous cases which throw light upon this subject. Thus, in *Young v. Brander*,[23] 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 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 the charter party, to appoint the captain.[24] The question in these cases is, whether the owner, by reason of the charter party, has divested himself of the ownership *pro hac vice*, and whether there hits been any direct contract between the parties, varying the responsibility.

In *Vallejo v. Wheeler*,[25] 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 *McEntire v. Brown*[26] and it was held, that where, by the terms of the charter party, the ship owner appoints the master and crew, and retains the management aid 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 thee voyage, and in such case the hirer is to be deemed owner for the voyage. In *Hallet v. The Columbian Insurance Company*,[27] 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 wade in *Taggard v. Loring*.[28] The case of *Fletcher v. Braddick*[29] adopted the same principle which had been laid down by Ch. J. Lee in *Parish v. Crawford*,[30] 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 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 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*;[31] and it is the principle declared by the Supreme Court of the United States in *Marcardier v. The Chesapeake Insurance Company*,[32] and *Gracie v. Palmer*,[33] and followed generally by the

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courts of justice in this country.[34] It may be considered as the sound and settled law on the subject.

(3.) *Of the custom house documents*.

The United States have imitated the policy of England and other commercial nations, in conferring peculiar privileges upon American built ships, and owned by our own citizens; and I shall now examine 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.[35]

The acts of Congress of 31st December, 1792, and 18th February, 1793, constitute the basis of the regulations in this country for the foreign and coasting trade, and for the 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 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.[36] 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 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 was 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.[37] 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.[38] 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.[39] 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.[40]

There are several minute regulations respecting the change of the certificate, and the granting of a

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new register, which need not here be detailed;[41] but when a vessel, duly registered, shall be sold or transferred, in whole or 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.[42] Upon every change of master, the owner must report such change to the collector, and have a memorandum of such change endorsed 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.[43]

Vessels enrolled and licensed, or licensed only, if under twenty tons, to be deemed entitled to the privileges of vessels employed in the coasting trade or fisheries.[44] And 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.[45] 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.[46] 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.[47]

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.[48] If any vessel enrolled or licensed, proceed on a foreign voyage, without first surrendering up her enrolment and license, and being duly registered, she shall, with her cargo imported into the United States, be subject to forfeiture.[49] The other general provisions relative to the rights and duties appertaining to the coasting trade and the fisheries, need not here he 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 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.[50] Every registered or unregistered vessel, owned by a citizen of the United States, and going to a foreign country, and, if an unregistered vessel, sailing with a sea letter, is entitled to a passport, to be furnished by the collector of the district.[51] But no sea letter certifying any vessel to be the property of a citizen of the United States, can he issued, except to ships duly registered or enrolled and licensed, or to vessels wholly owned by citizens of

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the United States, and furnished with, or entitled to sea letters, or other custom-house documents.[52]

The English registry act of 26 Geo. III. requires 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 is declared to be utterly null and void to all intents and purposes; and this is 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 ship, immediately on next arrival in port.[53] 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 privileges as an 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 did not 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.[54]

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.[55] 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 endorsement. on the certificate of registry, and rendered it indispensable in every sale, as is 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 has 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.[56] It has even been a question of much discussion, 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 endorsement on the certificate of registry. The language, in many of the cases,[57] 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 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 law 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 endorsement 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

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statutes be complied with.[58] The opinion of Sir Thomas Plumer, in *Thompson v. Smith*, 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 defiance annexed to the bill of sale ought to be fully endorsed its part of the instrument on the certificate of registry, if the ship be mortgaged in port, or if while at sea, a copy of the whole transmitted to the custom house; and that though the defeasance should not be 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 English jurisprudence on this subject.[59]

The registry is not a document required by the law of nations as expressive of a ship's national character.[60] The registry acts are to be considered as forms of local or municipal institution, 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.[61] 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 wag requisite that all French built vessels 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.[62]

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.[63] The case of *The Mohawk Insurance Company v. Eckford*, decided in the New York Court of Common Pleas in 1828, 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.[64]

(4.) *Of port owners*.

The several part owners of a ship are tenants in common. 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*.[65] The marine law of England respecting part owners of vessels, is distinguished for the wisdom and equity of its provisions, and it has are undoubted pre-eminence 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

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dissenting minority.

Ownership in a ship is, ordinarily, not like the case of joint concern, 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. 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.[66] The Court of Chancery exercises this sort of equitable jurisdiction in cases where the admiralty cannot, as where the shares are not ascertained.[67]

If the part owners be equally divided in opinion in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her.[68] It is said, that the Court of Admiralty has no jurisdiction to compel an obstinate part owner to sell his share;[69] 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.[70] 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.[71] The language in the Court[72] of Errors of this state, in the case which has been already mentioned, does not lead to an opposite conclusion.[73] That case only admitted, that a ship might be held, not only 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 ease 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.[74]

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 partner. As part owner he has only a disposing power over his own interest in the ship, and he can convey no greater title. But there may be a partnership, as well as a co-tenancy, in a vessel; and, 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. But as the law presumes, that the common possessors of a valuable chattel will and desire whatever is necessary to the preservation and profitable employment of the common property, 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 as such for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of part owners.[75]

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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 law of Holland considered it to be prejudicial to trade, to carry the responsibility of part owners to the extent of the English law; and the rule there is, that each part owner shall be answerable in relation to the ship, no further than to the extent of his share.[76] The English and Scotch law 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.[77] 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, rateably to the extent of his interest as an insurer, and no further.[78]

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. 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. 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 interests of navigation. 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.[79] Boulay Paty[80] 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 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.[81]

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 for the owners, or bind them to the expenses of law suits.[82]

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 co-tenants.[83]

NOTES

1. Story, J., 1 Mason's Rep. 139. 2 ibid. 435.

2. Stat. 34, Geo. III. c. 68. See also, *Camden v. Anderson*, 5 Term Rep. 709. *The Sisters*, 5 Rob. Adm. Rep. 155. Bell's Commentaries on the Laws of Scotland, vol. i. 152.

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3. *Robertson v. French*, 4 East's Rep. 130.

4. *Taggard v. Loring*, 16 Mass. Rep. 336.

5. *Hayman v. Milton*, 5 Esp. N.P. Rep. 65.

6. *Reid v. Darby*, 10 East's Rep. 143. *Morris v. Robinson*, 3 Barnw. & Cress. 196.

7. *Fanny and Elmira*, 1 Edw.Adm. Rep. 117.

8. See vol. i. 96.

9. In the case of the *Attorney General v. Norstedt*, 3 Price's Exchq. Rep. 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.

10. *Addis v. Baker*, 1 Anst. Rep. 222. Abbott on Shipping, 10.

11. *Mair v. Glennie*, 4 Maule & Selw. 240. *Hay v. Fairburn*, 2 Barnw & Ald. 193. *Atkinson v. Maling*, 2 Term Rep. 462. *Portland Bank v. Stubbs*, 6 Mass. Rep. 422. *Putnam v. Dutch*, 8 Mass. Rep. 287. *Badlam v. Tucker*, 1 Pick. Rep. 396.

12. *Portland Bank v. Stacey*, 4 Mass. Rep. 663.

13. *Webster v. Seekamp*, 4 Barnw. & Ald. 352.

14. *Wendover v. Hogeboom*, 7 Johns. Rep. 308. *Leonard v. Huntington*, 15 ibid. 298. *Thorn v. Hicks*, 7 Cowen's Rep. 697.

15. 1 H. Blacks. 117. note.

16. 1 H. Blacks. Rep. 114.

17. 7 Term Rep. 306.

18. *McIntyre v. Scott*, 8 Johns. Rep. 159. *Champlain v. Butler*, 18 ibid. 169. *Tucker v. Buffington*, 15 Mass. Rep. 477.

19. 8 Serg. & Rawle, 118.

20. 7 Cowen's Rep. 697.

21. *Twentyman v. Hart*, Starkie's Rep. 366.

22. 11 East's Rep. 435.

23. 8 East's Rep. 10.

24. *Frazer v. Marsh*, 13 East's Rep. 238.

25. Cowp. Rep. 143.

26. 1 Johns. Rep. 229.

27. 8 Johns. Rep. 272.

28. 16 Mass. Rep. 336.

29. 5 Bos. & Pull. 182.

30. Str. Rep. 1251.

31. 2 Brod. & Bing. 410.

32. 8 Cranch's Rep. 39.

33. 8 Wheat. Rep. 605.

34. *Pitkin v. Brainerd*. 5 Conn. Rep. 451. *Clarkson v. Edes*, 4 Cowen's Rep. 470. *Reynolds v. Toppan*, 15 Mass. Rep. 370. *Emery v. Hersey*, 4 Greenleaf's Rep. 407.

35. An historical view of the laws of England, with regard to shipping and navigation, is given with admirable clearness,

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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 unrivaled strength of their navy. The policy of the British statutes was to confine the privileges of their 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 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 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 Geo. III. c. 60 was framed by the elder Lord Liverpool, and it gave rise to the treatise of Mr. Reeve, 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 sea men and merchants but the other encouraged also British ship building. The statute of 26 Geo. 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 Win. III c. 22. The general principle established by the act of 26 Geo. 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 endorsement 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 Geo. III c. 68 was an enlargement of the statute 26 Geo. 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 navigation laws of Great Britain now form a permanent and regular code, but one still involved in a labyrinth of statutes, and not easily rendered simple and intelligible to practical men. 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 has established on solid foundations the naval power and commercial superiority of his country. The code of laws constituting the navigation system of England, has been well digested, not only in the history of Mr. Reeves to which I have alluded, but by Lord Tenderden, 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, intelligible, and well written, 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 very ample treatise on the "Laws of Commerce and Manufactures, and Contracts relating thereto," we have also a condensed and accurate digest of the same code of navigation laws.

36. Act of 31st of December, 1792, sec. 1. and 2.

37. Ibid. sec. 3, 4, and 11.

38. Act of 31st of December, 1792, sec. 6. and 7.

39. Act of the United States, March 2d, 1803, sec. 3.

40. Law of the United States, 31st December, 1792, sec. 9.

41. Ibid, sec. 12 and 13.

42. Law of the United States, 31st of December, 1792, sec. 14.

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43. Ibid. sec. 15. and 16.

44. Act of Congress, February 18th, 1793, sec. 1.

45. Ibid. sec. 2.

46. Ibid. sec. 3.

47. Act of Congress, February 18th, 1793, sec. 4.

48. Ibid. sec. 6.

49. Ibid.

50. Act of the U S., June 27, 1797.

51. Acts of Congress, June 1, 1796, and March 2, 1803.

52. Act of Congress, March 26, 1810.

53. *Rolleston v. Hibbert*, 3 Term Rep. 406.

54. *The United States v. Willings and Francis*, 4 Cranch's Rep. 48.

55. *Hatch v. Smith*, 5 Mass. Rep. 42.

56. The cases of *Rolleston v. Hibbert*, 3 Term Rep. 406. *Camden v. Anderson*, 5 Term Rep. 709. *Westerdell v. Dale*, 7 ibid. 306. *Moss v. Charnock*, 2 East's Rep. 399. *Heath v. Hubbard*, 4 East's Rep. 110. *Moss v. Mills*, 6 Ibid. 144. *Hayton v. Jackson*, 8 ibid. 511, and *Hibbert v. Rolleston*, 3 Bro. Rep. 571, and the opinions of Wood, B. & Heath, J, in *Hubbard v. Jobnstone*, 3 Taunt. Rep. 177, and of Lord Eldon, in *Ex parte Yallop*, 15 Ves. Rep. 60, and *Ex parte Houghton*, 17 Ves. Rep. 251, and of Sir Wm. Grant, in 11 Ves. Rep. 642, may be selected as samples of the strictness with which the statutes are construed, and of the defects of *bona fide* transfers of vessels by failure to comply with the literal terms of the statutes. The cases of *Rolleston v. Smith*, 4 Term Rep. 161, *Capadose v. Codner*, 1 Bos. & Pull. 483, *Ratchford v. Meadows*, 3 Esp. N. P. Rep. 69, *Bloxham v. Hubbard*, 5 East's Rep. 407, *Kerrison v. Cole*, 8 East's Rep. 231, *Robinson v. Macdonnell*, 5 Maule & Selw. 228, *Curtis v. Perry*, 6 Yes. Rep. 739, *Mestaer v. Gillespie*, 11 Ves. Rep. 621, 637, may be selected, on the other hand, as containing evidence of the influence of equity upon the severity of those provisions.

57. Lord Eldon scattered *ambiguas voces* to that effect in *Curtis v. Perry*, 6 Vesey's Rep. 739. *Campbell v. Stein*, 6 Dow's P. C. 116. *Ex parte Yallop*, 15 Vesey's Rep. 60. *Ex parte Houghton*, 17 Vesey's Rep. 251. *Dixon v. Ewart*, 3 Merival's Rep. 333.

58. *Mair v. Glennie*, 4 Maule & Selw. 240. *Robinson v. Macdonnell*, 5 ibid. 228. *Hay v. Fairbairne*, 2 Barnw. & Ald. 193. *Monkhouse v. Hay*, 2 Brod. & Bing. 114. *Thompson v. Smith*, 1 Madd. Ch. Rep. 395.

59. In 1823, 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," p. 34. Mr. Holt, in a note to his reports of Cases of Nisi Prius vol. I. 603, 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 and accurate 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, vol. i. 306-312.

60. *Le Cheminant v. Pearson*, 4 Taunt. Rep. 367.

61. 6 Vesey's Rep. 739. 15 ibid. 68. *Bloxham v. Hubbard*, 5 East's Rep. 407.

62. Boulay Paty, tom. i. 257-260.

63. *Tinkler v. Walpole*, 14 East's Rep. 226. *McIver v. Humble*, 16 East's Rep. 169. *Fraser v. Hopkins*, 2 Taunt. Rep. 5. *Sharp v. United Insurance Company*, 14 Johns. Rep. 201.

64. By the French law, a verbal sale of a ship may do as between the parties, but, 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

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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. and 3. and Valin's Com. ibid. tom. 1. 602. Code de Com. art. 193, 191, 196. Boulay Paty, Cours de Droit Com. tom. 1. 168, 170.

65. Valin's Com. tom. 1, 584.

66. *Graves v. Sawcer*, T. Raym Rep. 15. *Strelly v. Winson*, 1 Vern. Rep. 297. Anon. 2 Ch. Cas. 316. *Ouston v. Hebden*, 1 Wils. Rep. 101. Lord Ch J. Abbott on Shipping part 1. ch. 3. *In the matter of Blanshard*, 2 Barnw. & Cress. 214. In *Willings v. Blight*, 2 Peter's Adm. Rep. 298, the general jurisdiction of the admiralty, as stated, seemed to have been assumed.

67. *Hally v. Goodson*, 2 Merivale's Rep. 77.

68. Abbott on Shipping, *ub. sup*. sec. 6,

69. Ouston v. Hebden, *ub. sup*.

70. *Willings v. Blight, ub. sup*. 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 Commentaries on the Laws of Scotland, vol. i. 503.

71. It was so declared by Mr. Abbot in his elementary work on shipping, p. 4. and Lord. Ch. J. Dallas observed, in 8 Taunt. Rep. 774. that one part owner of a ship could not bind the rest, as in partnership cases.

72. See *ante*, p. 16.

73. 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 Mugens 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. Liv. 2. tit. 8. *Des Proprietaires*, art. 6. Valin, ibid. vindicates this interdiction as conducive to the benefit of trade, though he admits it has its inconveniences, and that such is the destiny of all human laws.

74. *Wright v. Hunter*, 1 East's Rep. 20. *Lamb v. Durant*, 12 Mass. Rep. 54.

75. Holt on Shipping Int. p. 53. and vol. i. p. 367-369. *Wright v. Hunter*, 1 East's Rep. 20. *Scottin v. Stanley*, 1 Dallas' Rep. 129.

76. Van Leeuwen's Com. on the Roman Dutch Law, b. 4. ch. 2. sec. 9. Vinnius, not. in *Com. 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.

77. *Baldney v. Ritchie*, 1 Stark. Rep. 338. Westerdell v. Dale, 7 Term Rep. 306. Bell's Com. vol i. 520, 524.

78. *The United Insurance Company v. Scott*, 1 Johns. Rep. 106.

79. *Ord. de la Marine*, liv. 2. tit. 8. art. 5. tit. *Des Proprietaires*, and Valin's Com. ibid. tom. 1, 573-554. Code de Commerce, art. 220.

80. *Cours de Droit Commercial Maritime*, tom. 1. p. 339-347.

81. Boulay Paty, *ub. sup*, 351. Pardessus, tom. 2. p. 27 is, however, of 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, tom. 1. 227, 228.

82. *French v. Backhouse*, 5 Burr. Rep. 2727. *Bell v. Humphries*, 2 Stark. Rep. 345. *Campbell v. Stein*, 6 Dow's Rep. 134. Bell's Commentaries, vol. i. 504.

83. *Jackson v. Robinson*, 3 Mason's Rep. 138.

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LECTURE 46

Of the Persons Employed in the Navigation of Merchants' 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 initiated 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 must have the talent to command in the midst of danger, and courage and presence of mind to meet and surmount extraordinary perils. He must 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 discipline, under the guidance of justice, moderation, and good sense. Charged frequently with the sale of the cargo, and the re-investment of the proceeds, he must 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.[1]

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 the ship.[2] 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 owner, and he could bind him by his acts as master; and all the foreign marine ordinances give this power. The master is appointed by the owner, and the appointment holds him forth to the public as a person worthy of trust and confidence. 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. The latter may, however, exempt himself from personal responsibility, by expressly confining the credit to the owner, and stipulating against his personal liability.[3]

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 principal necessarily has that control over an agent, for whose acts he is accountable, and it is in the

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power of the master to provide for the case by a special contract for indemnity in case of dismission.[4] 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.[5]

The master may, by a charter party, bind the ship and freight. This het 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.[6] As the admiralty has no jurisdiction in this case, unless according to the unsettled doctrine in *De Lovio v. Boit*,[7] 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 is supposed by Mr. 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.[8]

The master can bind the owners, not only in respect to the usual employment 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, land be can bind the owner personally as to 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.[9] If moneys be advanced to the. master while abroad, it will be incumbent on the creditor, if he means to charge the owner, to prove the actual necessity of the repairs or supplies for which the money was advanced; 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.[10] The great case of *Carey v. White*, which underwent much discussion, established the principle of personal responsibility of the owners, provided the creditor could show the actual existence of the necessity off those things which gave rise to his demand; and this, same doctrine is considered to be equally well established in-the jurisprudence of this country.[11]

Under the French ordinance of 1681, the master might hypothecate 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. He could only bind 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.[12] 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 bas bestowed an elaborate discussion on the point; and this was equally the maritime law of the middle ages.[13] The law on this subject is the same in Holland as in France,[14] and the learned Grotius, in a work where we should hardly have expected to find such a municipal provision,[15] 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.

Sir William Scott, in the case of the *Gratitudine*,[16] doubts whether the master has authority, even in

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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 case 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. Emerging, 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.[17]

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 settled by Lord Mansfield, in the case of *Wilkins v. Carmichael*,[18] 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. It was afterwards solemnly adjudged in *Hussey v. Christie*,[19] that the master had no lien on the ship for money expended, or debts incurred, by him, for repairs done to it on the voyage; and in *Smith v. Plumer*,[20] 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. Sir William Scott, in the case of the *Favorite*, 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 his personal contract with his owner, not relating to the bottom of the ship. The language of the case of *Smith v. Plumer*,[21] was equally that he had no lien on the cargo for money expended, or debts incurred by him, for repairs, or the necessary purposes 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.

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*,[22] is a decision in the 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*.[23] In those cases, the English authorities were reviewed and cited

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by the court, and the more enlarged 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*.[24] It was rather loosely mentioned, that the master's claim for disbursements abroad was a lien on the ship; and much more recently, in the Circuit Court of the United States for Massachusetts,[25] the rule was laid down, that the master had a lien upon the freight for all his advances 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.[26]

The civil law, and the law of those countries which have adopted its principles, give a lien upon the shin, 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.[27] 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,[28] accept 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.[29]

In this country, it 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.[30] 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*,[31] and reasserted in the case of the *St. Jago de Cuba*.[32] The rule of the English common law is explicitly adopted, that material men, and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands, with the exception of the shipwright who has possession of the ship. The distinction is, that if repairs have been made, or necessaries furnished, to a foreign ship, or to a 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 his security, and he may maintain a suit in rem, in the admiralty, to enforce his right. 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.[33] In New York, by statute,[34] shipwrights, material men, and suppliers of ships, have a lien for the amount of their debts, whether the ship be owned within the state or not; but the lien ceases after due security is given, or after the expiration of twelve days from the time the vessel leaves the port.

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.[35] This authority is, however, limited to objects connected 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. He is to act with a 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

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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.[36]

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 at their residence.[37] But if only a minority of the owners are present or reside at the place, then the captain's power remains good.[38] It is incumbent upon the creditor who claims an hypothecation, to prove the actual existence of the necessity of those things which gave rise to his demand, though he need not see to the actual and *bona fide* application of the money. The loan must not exceed the necessity, and it must be made in a place, and under circumstances, to afford relief.[39] This power of the master to borrow money on bottomry, and hypothecate the ship for there payment, 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.[40] 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.[41]

The master, in the 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. 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.[42] This power of the master to pledge 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.[43]

But if the voyage be 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 sweeps all ordinary rules before it.[44] The merely acting in good faith, and for the interest of ail 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.[45] 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 commission, and becomes the unauthorized act of a servant, disposing of property which he was entrusted only to carry and convey.

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 poet of destination. But, in *Richardson v. Nourse*,[46] 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

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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 being 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.[47]

It may be here observed, that 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 he is within the usual limits of the pilot's employment.[48] The pilot, while on board, has the exclusive 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 while under the charge of the pilot, through his default, negligence, or unskillfulness, the owner would be responsible to the party injured for the act of the pilot, as being the act of his agent.[49] Some doubt has been thrown on the point, by the *dictum* of Ch. J. Mansfield in *Boucher v. Nordstrom*,[50] but 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.[51]

(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 anti 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 native clement they are habitually buffeted by winds and waves, and wrestling with tempests; and in time of war 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.[52] It becomes, therefore, 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.

The seamen employed in the merchant's service, are made subject to special regulations, prescribed by statute. Shipping articles are contracts in writing, or in print, declaring the voyage and the term of time for which the seamen are shipped, and when they 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. 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.

If the mate and a majority of the crew, after the voyage is begun, but before the vessel has left the

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land, deem the vessel unsafe, or not duly provided, 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 expense 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.[53] Fishermen engaged in the fisheries are liable to the like penalties for desertion; and the fishing contract must be in writing, signed by the shipper and the fishermen, and countersigned by the owner.[54] 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 merchants' service, and to make them liable to the same restrictions, and entitled to the same remedies.[55]

Provision is made for the prompt recovery of seamen's wages, of which one third is due at every port at which the vessel shad 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. 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.[56] The statutes further 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 water, and salted meat, and wholesome ship bread, well secured under deck.[57]

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 he 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 convenience, are to receive sick foreign seamen on a charge of seventy-five cents per day, to be paid by the master of the foreign vessel.[58]

And to relieve American seamen who may be found destitute in foreign ports, it is made the duty of the American consuls and commercial agents, to provide for them, 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

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men to every hundred tons burden of the ships, 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.[59]

The act of Congress of March 3d, 1813, declared, that no seaman who was not a citizen or native 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 applies only to those nations who shall, in like manner, have prohibited the employment of American seamen.

Greenwich hospital, in England, is a noble asylum for 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 merchants' service. This was provided for by the statute of 20 Geo. II. which created a corporation, 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 six pence 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.

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 entrusted 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; find his authority, in that respect, is analogous to that of a master on land over his apprentice or scholar.[60] The 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 must noxious offense, 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 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.[61] The master may also confine a passenger who refuses to submit to the necessary discipline of the ships.[62]

The master has also the right to discharge a seaman for just cause, and put him ashore in a foreign country, and he is responsible in damages if he discharges him without just cause.[63] This power of discharge extends to the mate and subordinate officers, as well as to the seamen, for the master must

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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.[64] 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 and make satisfaction; and if the master refuses, the seaman tray follow the ship, and recover his wages for the voyage.[65]

It was a question which received a profound discussion and led to a learned research, in *Harden v. Gordon*,[66] whether a seaman who became sick and disabled on the voyage, was entitled to medical advice and aid at the expense of the ship. It was there shown and decided, that the expense of caring a sick seaman in the course of the voyage, was a charge upon the ship according to the maritime law of Europe, 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 had not changed the maritime law, except so far as respects medicines and medical advice, when there was a proper medicine chest, and medical directions, on board the ship; and it did not apply to nursing. diet and lodging, if the seamen be carried ashore. 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 last referred to, with great force, and moving on solid principle, vindicated the admiralty jurisdiction over the whole compensation, in all its varied forms, when due to seamen for their maritime services.

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.[67] 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. 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 Curacao and elsewhere, means, in shipping articles, a voyage from New York to Curacao, and the word elsewhere is rejected as being void for uncertainty.[68]

Seamen, in the merchant service, are usually hired at a certain sum, either by the month, or for the voyage. In the fishing trade the seamen usually serve under an engagement to receive a portion of the profits of the adventure. The share, or profits of the voyage, are a substitute for regular wages; and the act of Congress,[69] 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's service.

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; for the general engagement of the seamen is to do all that 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.[70] It requires the performance of some service not within the scope of the original contract, as by

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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.[71] So, no wages can be recovered when the hiring has been for an illegal voyage, or one in violation 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.[72]

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.[73] He will equally be entitled to his wages to the end of the voyage, when wrongfully discharged by the master in the course of it.[74] The marine law very 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, 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.[75] 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.[76]

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 he 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.[77] that if the ship perish by tempest, fire, enemies, etc., 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.” If the voyage and the freight 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.[78] 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.[79] Seamen's wages, in trading voyages, are due *pro rata itineris*. This has been so decided in the Scottish courts, and upon principles of controlling equity.[80]

If a 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 tip to his death, when the hiring was by the month, and there was no special contract in the way;[81] and a similar opinion was mentioned by one of the judges of the C. B. in another case.[82] In a still later case,[83] et was assumed by the Court. of C. B., that the 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.[84] On the other hand, it was subsequently

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decided, in the District Court of the United States for South Carolina,[85] and in the District Court in Massachusetts,[86] 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 elaborate 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 Lewis 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.[87]

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.[88] 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.[89] The owners may waive or modify their claim to freight as they please, but their acts cannot 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*,[90] with distinguished force and research; and it was held, that where a ship sailed from the United States to Gibralter, 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.[91]

Capture by an enemy extinguishes the contract for seamen's wages; and Sir William Scott, in the case of *The Friends*,[92] 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*;[93] and the American decisions have fully discussed the question, and they lay down 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, with a rateable deduction for the expenses of salvage. Nothing can be more equitable than to allow 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.[94] 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

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the interruption of the voyage, in like manner as in case of capture and recapture. The Court of K. B. declared the law to this effect in *Beale v. Thompson*,[95] and they proceeded on the sound and incontestible 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. So, in the case of shipwreck, if any proportion of freight be paid for the cargo saved, wages of seamen are to be paid in the same proportion.

Whenever freight is earned, wages are 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 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 *cestui que trusts* 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 seaman without adequate remuneration, the courts will interfere, and moderate or annul the stipulation. 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 engage 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.[96] It has likewise been decided, that a stipulation that the wages of the seamen, earned in the intermediate periods, should depend upon the ultimate successful termination of a long and divided voyage, was inoperative and void.[97]

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 rateably 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*,[98] 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 this state, in *Lewis v. Davis*,[99] and afterwards most 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 *Sparr v. Pearson*.[100]

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 has arisen from the fault, fraud, connivance, or negligence, of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. If the embezzlement be fixed on any individual, he is solely responsible; and where it was made by the crew, butt the particular offender is unknown, and from the circumstances of the ease, 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

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for the misdemeanors of the guilty; and in a 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.

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 contributed to preserve.[101] There were no English decisions on the point, when Lord Tenterden published the third edition of his work;[102] 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 seamen, 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.[103] I apprehend, however, with great deference to the suggestions of that eminent judge, that in such cases where the voyage is broken up by *vis major*, and no freight earned, no wages, *co nomine*, are due; and that the equitable claim which seamen may have upon the remains of the wreck, is a claim for salvage, and that it is incorrectly denominated in the books a title to wages. Wages, in such cases, would be contrary to the great principle in marine law, that freight is the mother of wages, and the safety of the ship the mother of freight.[104]

By the act of Congress,[105] one third of the seamen's wages is due at every port where the ship 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. But there is no fixed period of time by the marine law, within which mariners must proceed to enforce their lien for wages. It does not, 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 master, are all liable for the payment of them.

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. 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.[106] 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.[107]

Desertion from the ship without just cause, or the justifiable discharge of a seaman by the master, for bad conduct, will wont 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,[108] and by the act of Congress,[109] desertion is accompanied with a forfeiture of all the wages that are due; 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.[110] Public policy and private justice here move together, and the maritime ordinances

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unite in this conclusion.

So, if the seaman quits the ship involuntarily, or is driven ashore by reason of cruel usage, and for personal safety, the wages are not forfeited.[111] On the other hand, it is the duty of seamen to abide by the vessel as longs as reasonable hope remains, and if they desert the ship under circumstances of dander or distress 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.[112] 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.[113]

NOTES

1. Cleirac, in his *Jugemens d'Oleron*, ch. 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 so constantly exposed to lawless rapacity, required to possess military, as well as ordinary nautical skill: omnibus *privilegiis militaribus gaudet*. *Roccus de Navibus et Naulo*, note 7. Emerigon, *Traité des Ass*. tom. 1. 182. Valin's Com. liv. 2. tit *Du Capitaine, passim.* Jacobsen's Sea Laws, by Frick, b. 2. ch. l. Boulay Paty, *Cours de Droit Mar*. tom. 1. 368, 376, 379. *Repertoire 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's Rep. 242, in our American admiralty.

2. *Boson v. Sandford*, Carth. Rep. 58. *Rich v. Coe*, Cowp. Rep. 636. *Ellis v. Turner*, 8 Term Rep. 531. *Reynolds v. Toppan*, 16 Mass. Rep. 370.

3. *Hoskins v. Slayton*, Cases temp. Hard. 360. Lord Mansfield. *Parmer v. Davies*, 1 Term Rep. 108. Lord Ellenborough, *Hussy v. Christie*, 9 East's Rep. 482.

4. *Ord. de la Mer. des Proprietaires*, art. 4. Code de Commerce, art, 218. M. Pardessus, tom. 2. 35. M. Dalvincourt, *Inst. Com*. tom. 2, 294. Boulay Paty, tom. 1. 324-329.

5. Bell's Com. vol. i. 506, 508.

6. *Ord. de la Mer*. liv. 3, tit. 1, art. 11, and Valin, ibid. tom. i. 629.

7. See vol. i. 344.

8. Abbott on Shipping, part. 2. ch. 2. sec. 5.

9. Dig. 14. 1. 8. and 10, 11. *Speerman v. De Grave*, 2 Vern. Rep. 643. *Sansum v. Braggenton*, 1 Vesey's Rep. 443.

10. Dig. 14. 1. 9. Loecenius, lib. 2. c. 6. n. 12. 2 Emerig.440. Boulay Paty, *Cours de Droit Com*. t. 1. 119.

11. 1 Bro. P. C. 284, edit. 1784. Abbott on Shipping, part 2. ch. 3. sec. 6. S. C. *Wainwright v. Crawford*, 4 Dallas' Rep. 225. *Milward v. Hallet*, 2 Caines' Rep. 77. *James v. Bixby*, 11 Mass. Rep. 34.

12. *Ord.* liv. 2. tit. 8. *Des Proprietaires*, art. 2. Code du Commerce, art. 216, 234.

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13. Code, art. 216. Emerigon, *Cont. a la Grosse*, ch. 4. sec. 11. Boulay Paty, tom. 1. 272-278.

14. Van Leeuwen's Com. on the Dutch Law. b. 4. ch. 2. sec. 9.

15. Grot. *De Jure belli et pacis*, b. 2. ch. 11. sec. 13.

16. 3 Rob. Adm. Rep. 274.

17. 2 Emerigon, 458. Valin's Com. tit. *Du Capitaine*, art. 19. Boulay Paty, tom. 2. p. 73, 74.

18. Doug. Rep. 101.

19. 9 East's Rep. 426.

20. 1 Barnw. & Ald. 575.

21. 2 Rob. Adm. Rep. 232.

22. 1 Paine's Rep. 72.

23. 8 Serg. & Rawle, 118.

24. 1 Peter's Adm. Rep. 227.

25. *Ship Packet*, 3 Mason's Rep. 255.

26. In the case of the *Ship Packet*, there is no reference to the decision in *Smith v. Plumer*, though that decision contained a critical review of all (he 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*.

27. Dig. 42. 5. 26. and 34. 1 Voet's Com. 20. 2. 29. Casaregis, Disc. 18. 1 Valin's Com. 363, 367. The new French code, art. 191, gives the order of privileged debts which are liens upon the ship, and take preference to each other, and to all other debts, in the order in which they are placed. Among them are: (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 or 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 furnished 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. Code de Commerce, art.191. Boulay Paty, *Cours de Droit Com*. t 1, p. 110-124.

28. *Watkinson v. Barnardiston*, 2 P. Wms. 367. *Buxton v. Snee*, 1 Vesey's Rep. 154.

29. Abbott on Shipping, part 2. ch. 3. sec. 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. *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.

30. *Stevens v. The Sandwich*, District Court for Maryland, 1 Peter's Adm. Rep. 233. note. *Gardens v. The Ship New Jersey* ibid, 223.

31. 4 Wheat. Rep. 438.

32. 9 Wheat. Rep. 409.

33. The Supreme Court have, in these cases, assumed, that a port of another state was not, as respects this rule, a home port. The Court of Sessions in Scotland, have also held, that Hull, in England, was, in respect to Scotch owners, a foreign port. (*Stewart v. Hall*, 1 Bell's Com. 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.

34. Laws of New York, sess. 22. ch. 1, sess. 40. ch. 60.

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35. *The Gratitudine*, 3 Rob. Adm. Rep. 240.

36. *The Ship Packet*, 3 Mason's Rep. 255.

37. Code de Commerce, art. 232.

38. 2 Boulay Paty, 271.

39. *Rucher v. Conyngham*, 2 Peters' Adm. Rep. 295. *Cupisino v. Perez*, 2 Dallas' Rep. 194. *The Aurora*, 1 Wheat. Rep. 96. *Rocher v. Busher*, 1 Stark. Rep. 27. Roccus, *De Navibus*, not. 23.

40. Reade v. Commercial Insurance Company, 3 Johns. Rep. 352.

41. See *Rucher v. Conyngham*, 2 Peters' Rep. 307, 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 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 Com, vol. i. 529. note.

42. *The Gratitudine*, 3 Rob. Adm. Rep. 240, 263. *The United Insurance Company v. Scott*, 1 Johns. Rep. 115. *Freeman v. The East India Company*, 5 Barnw. & Ald. 617.

43. *Watt v. Potter*, 2 Mason's Rep. 77.

44. *Hayman v. Molton*. 5 Esp. N. P. Rep. 65. *Mills v. Fletcher*, Doug. Rep. 219. *Idle v. The Royal Exchange Insurance Company*, 8 Taunt. Rep. 755. *Freeman v. The East Indian Company*, 5 Barnw. & Ald. 617. *Cannan v. Meaburn*, 1 Bingh. Rep. 243. *Robertson v. Clarke*, ibid. 445.

45. *Van Omeron v. Dowick*, 2,Campb. N. P. Rep. 42. *Morris v. Robinson*, 3 Barnw. & Cress. 196.

46. 3 Barnw. & Ald. 237.

47. Abbott on Shipping, part. 2 ch. 3, sec. 20. 22. Chose J., *Blaine v. The Ship Charles Carter*, 4 Cranch's Rep. 328.

48. *Law v. Holligworth*, 7 Tern Rep. 160. *The William*, 6 Rob. Adm. Rep. 316.

49. *Bussy v. Donalson*, 4 Dallas' Rep. 206. *Hugget v. Montgomery*, 5 Bos. & Pull. 446.

50. 1 Taunt. Rep. 568.

51. In the case of the *Portsmouth*, 6 Rob. Adm. Rep. 317. Snell v. Rich, 1 Johns. Rep. 395.

52. The recklessness with which sailors dissipate their wages, and the facility with which they are cheated out of them, are proverbial, and those who have the 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 or the ocean: than either the *praecipitem Africum decertantum aquilonibus*, the *rabien noti*, the *monstra natantia*, or the *infames scopulose acroceraunia*.

53. Act of Congress, July 20th, 1790, ch. 29. sect. 1, 2, 3, 5, and 7.

54. Act of Congress, June 19th, 1813, ch. 2. sect, 1 and 2.

55. Wait v. Gibbs, 4 Pickering, 298.

56. Act of Congress, July 20th, 1790, ch. 29, sec. 6.

57. Ibid. sec. 8. and 9, and Act of Congress of March 2d, 1805, ch. 88.

58. Acts of Congress, July 16th, 1798, March 2d, 1799, and May 3d, 1802.

59. Act of Congress, February 28th, 1803, ch. 62.

60. Molloy, b. 2. ch. 3. sec. 12. *Thorne v. White*, 1 Peters' Adm Rep. 168. *Rice v. The Polly and Kitty*, 2 ibid. 420. *Michaelson v. Denison*, 3 Day's Rep. 294. *Comersford v. Baker*, before Lord Stowel, June, 1825. *The United States v. Dewey*, New York Circuit, June, 1828.

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61. *Watson v. Christie*, 2 Bos. & Pull. 224.

62. *Boyce v. Bayliffe*, 1Campb. N. P. 58.

63. *Relf v. The Ship Maria*, 1 Peters' Adm. Rep. 186. *Black v. Ship Louisiana*, 2 ibid. 268. *Hulle v. Heightman*, 2 East's Rep. 145. Sir William Scott, in the case of the *Exeter*, 2 Rob. Adm. Rep. 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 of December, 1729, art. 1. mentioned in 1 Valin's Com. p. 734. and it is adopted in the Code de Commerce, art 270.

64. *Atkyns v. Burrows*, 1 Peters' Adm. Rep. 244. *Thompson v. Bush*, cited in 12 Serg. & Rawle, 267.

65. Laws of Oleron, art. 13. Laws of Wisbuy, art. 25. *Relf. v. The Ship Maria*, 1 Peters' Adm. Rep. 193, 194.

66. 2 Mason's Rep. 541.

67. Act of 20th July, 1790, ch. 29.

68. Decision in the District Court of Maryland, by Judge Winchester, 1. Hall’s L. J. 209.

69. Act of Congress, 19th of June, 1813, ch. 2. sec. 1 and 2.

70. *Harris v. Watson*, Peake's N. P. Rep. 72. *Stilk v. Myrick*, 2 Campb. N.P. 317.

71. *Yates v. Hall*, 1 Term Rep. 73.

72. *The Vanguard*, 6 Rob. Adm. Rep. 207.

73. *Chandler v. Grieves*, 2 H. Blacks. Rep. 606, note. Abbott on Shipping, part 4, ch. 2. sec. 1. *Williams v. The Brig Hope*, 1 Peters' Adm. Rep. 138.

74. *Robinett v. The Ship Exeter*, 2 Rob. Adm. Rep. 261. *The Beaver*, 3 ibid. 92. *Keane v. The Brig Gloucester*, 2 Dallas' Rep. 36. 2 Peters' Adm. Rep. 403. *Rice v. The Polly and Kitty*, 2 Peters' Adm. Rep. 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.

75. *Ord. des Loyers des Matelots*, art. 3. Pothier's *Louage des Matelots*, n. 203. Cushing's Translation, p. 123. Roccus, *de Nav. et Naulo*, n. 43. Ingersoll's Translation, p. 46. *Hoyt v. Wildfire*, 3 Johns. Rep. 518.

76. *Siggard v. Roberts*, 3 Esp. N. P. Rep. 71.

77. Anon. 1 Sid. Rep. 179.

78. Malyne's *Lex Mercatoria*, p, 105. Molloy, *de Jure Maritimo*, b. 2. c. 3. sec. 7. *Hoyt v. Wildfire*, 3 Johns. Rep. 518.

79. In *Wolf v. The Brig Oder*, 2 Peters' Adm. Rep. 1, where the voyage was broken up by seizure for debt, wages up to the time were allowed, and one additional month's pay. 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*, No. 203) 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.

80. *Ross v. Glassford*, and *Morrison v. Hamilton*, cited in 1 Bell's Com 515. But the rule may be varied by agreement. *Appleby v. Dodge*, 8 East's Rep. 300.

81. *Cutter v. Powell*, 6 Term Rep. 320.

82. Heath, J., in *Beale v. Thompson*, 3 Bos. & Pull. 425.

83. *Armstrong v. Smith*, 4 Bos. & Pull. 299.

84. *Walton v. The Ship Neptune*, 1 Peters' Adm. Rep. 142. *Sims v. Jackson*, ibid. 157, note.

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85. *Carey v. Schooner Kitty*, Bee's Adm. Rep. 255.

86. *Natterstrom v. Ship Hazard*, 2 Hall's L. J. 359.

87. If the seaman be hired by the voyage, and die during it, the standard books of maritime law, says Mr. Bell, seems 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 Commentaries, vol. i, 514.

88. Anon. Holt. Ch. J., 1 Lord Ramy. 639.

89. Notes of Judge Winchester's decisions, 1 Peters' Adm. Rep. 186. note. Abbot on Shipping, part 3. ch. 2. sec. 4. *Blanchard v. Bucknam*, 3 Greenleaf's Rep. 1.

90. 2 Mason's Rep. 319.

91. Anon. 2 Show. Rep. 291.

92. 4 Rob. Adm. Rep. 143.

93. 3 Esp. N. P. Rep. 36.

94. *Hart v. The Ship Little John*, 1 Peters Adm. Rep. 115. *Howland v. The Brig Lavinia*, ibid. 123. *Singstrom v. Schooner Hazard*, 2 Peters' Adm. Rep. 384. *Brooks v. Dorr*, 2 Mass. Rep. 39. *Wetmore v. Henshaw*, 12 Johns. Rep. 324.

95. 4 East's Rep. 546.

96. *Harden v. Gordon*, 2 Mason's Rep. 541.

97. *The Juliana*, decided by Lord Stowell, 19th of March, 1822, and mentioned in 2 Mason's Rep. 557. See also, to the same effect, Judge Winchester's decision in the District Court of Maryland, in 1 Peters" Adm. Rep. 187, note. *Mallett v. Stephens*, in Mass. 1800, cited in Abbott, p. 490. American edition, 1810.

98. 4 Bos. & Pull. 347.

99. 3 Johns. Rep. 17.

100. 1 Mason's Rep. 104.

101. The laws of Oleron, art 3, of Wisbuy, art. 15. 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.

102. Abbott, part. 4. ch. 2. sec. 6.

103. *The Neptune*, 1 Haggard's Adm. Rep. 227. 1 Peters' Rep. 54, 195. 2 ibid. 426.

104. *Dunnett v. Tomhagen*, 3 Johns. Rep. 154. *The Saratoga*, 2 Gallison, 164.

105. Act of July 20th, 1790, ch. 29. sec. 6.

106. *Madonna D'Idra*, 1 Dodson's Rep. 37. *Sydney Cove*, 2 ibid. 11. *The Ship Mary*, 1 Paine's Rep. 180.

107. *Ord. de la Marine*, tit. *De la Saisie des Navires*, art. 16. *De l'Engagement*, art. 19. Code du Commerce, art. 191, 193. The commercial code of Napoleon settles the order and rights of privileged debts, much more fully and precisely than the marine ordinance of Lewis XIV; and this priority in favor of seamens's wages pervades both the maritime ordinances. The venerable code of the *Consolato del Mare*, ch. 138,expressed itself on this 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, tom. ii. 205. See also, Cleirac upon the Judgments of Oleron, art. 8. n. 31. and Boulay Paty, *Cours de Droit Com*. tom. 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.

108. 11 and 13 Wm III c.7, and 2 Geo. II, c. 36.

109. Act of 20th July, 1790, ch. 29. sec 2 and 5.

110. *Whitton v. The Brig Commerce*, 1 Peters' Adm. Rep. 160.

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111. *Limland v. Stephens*, 3 Esp. N.P. Rep. 269.

112. *Sims v. Mariners*, 1 Peters' Adm. Rep. 395.

113. *Buck v. Lane*, 12 Serg. & Rawle, 266. 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 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.

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LECTURE 47

Of the Contract of Affreightment

(1.) *Of the charter party*.

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.[1] 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 of a ship describes the parties, the ship, and the voyage, and contains, on the part of the owner, a stipulation as to sea-worthiness, 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. 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.[2]

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.[3] 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.[3]

It is the duty of the owner of the ship, not only to see 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 tho voyage, unless he be prevented by perils of the sea.[4] 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.[5] The freighter is bound on his part not to detain the ship beyond the stipulated or usual time, to load, or to 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,

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and it may become due either 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.[6] 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.[7]

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.[8] fit the English law, the hiring of ships without writing is undoubtedly valid; 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.[9]

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. And if the ship he 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 hoard, but for what the vessel could have taken, had a full cargo been furnished.[11] 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 landing, 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.[12]

By the contract the owner is bound to see that the ship be seaworthy, which means that she must be tight, staunch and strong, well furnished, manned, victuals, and, in all respects, equipped in the usual manner, for the merchants' service in such a trade. 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.[13] 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 law of nations. Such documents are necessary to secure the vessel from disturbance at home, on the high seas, and in foreign ports.[14] 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 expenses 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 or contribution.[15] 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 equipment, 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.[16] The responsibility of the owner begins where that of the wharfinger ends, and when the goods are delivered to some accredited person on board the ship.[17] 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 sail without convoy, and be lost, the owner becomes

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answerable to the shipper in damages, for the breach of that representation.[18]

(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 of the shipper and consignee, the places of departure and discharge, the names 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.[19] By the bill of lading, the master engages as a common carrier to carry and deliver the goods to the consignee, or his order; 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. 1.59., 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. This statute assimilated the law of England to the 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.[20]

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 endorsement and delivery of it transfers the property in the goods from the time of the delivery.[21]

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 endorsed 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 endorsed.[22]

(3.) *Of the carriage of the 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 maritime law.[23]

When the voyage is ready, the master is bound to sail as soon as the wind and tide permit; but he ought not to set out in very tempestuous weather.[24] 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. [25] He is bound, likewise, to obtain the requisite sailing instructions for the convoy;[26] 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.[27]

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The master is bound, likewise, to proceed to the port of delivery 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;[28] 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 distress, will justify a deviation from the regular course of the voyage.[29] 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.[30] In case 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 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.[31]

The Rhodian law[32] 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 the contract related only to the ship that was disabled.[33] The laws of Oleron, and the ordinances of Wisbuy, gave the power to the master to hire another vessel, if he choose to do so, and earn freight; but the marine ordinance of Lewis XIV. declared it to be the duty of the master to hire another ship in such a case, if it be in his power.[34]

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.[35]

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, adopts the construction of Emerigon, and holds his reasoning to be conclusive.[36]

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 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.[37] 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

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necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion 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 tranship 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 here.[38] 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 reasonable time for the merchant to wait for the 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 to be too unfit and worthless to be carried on.[39] The master is not bound to go to a distance to procure another vessel, nor to encounter serious impediments in 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.[40]

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.[41] 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.[42] We have already seen, in what cases and to what extent the master may hypothecate or sell the cargo at a port of necessity; 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 placed in a worse situation by the sale of the goods than if they had remained on board the ship. But the foreign authorities are very much at variance on the point, and it remains yet to be settled in the English and American law.[43]

(4.) *Of the delivery of the goods at the port of destination.*

On 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.[44] 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.[45] 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 possessions.[46] The manner of delivery, and the period at which the responsibility of the owners and master ceases, will much depend upon usage.[47] The general rule is, that delivery at the wharf, (when there are no special directions to the contrary,) discharges the master.[48] But the better opinion is,

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that there must be a delivery at the wharf to some person authorized to receive the goods; and the master cannot discharge himself, by leaving them naked and exposed at the wharf. 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.[49]

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 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.[50] 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.[51]

(5.) *Of the responsibility of the ship owner.*

The causes which will excuse the owners and master for the non-delivery 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.[52] 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.[53] A loss 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.[54] But 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.[55]

It is often a difficult point to determine, whether the disaster happened by a peril of the sea, or unavoidable accident, or by the fault, negligence, or want of skill of the master. If a rock 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 to the fault of the master. But if the ship be forced upon such a rock or shallow by winds or tempests, or if the bar was occasioned 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.[56] 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 has exempted ship owners in some of these hard cases; but I do not know of any such statute exemptions in this country.[57]

(6.) *Of the duties of the shipper.*

We have seen what are the general duties of the master. Those on the part of the charterer are, to use

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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.[58] If the freighter puts one board prohibited, or contraband goods, by means whereof the ship is subjected to detention and forfeiture, he oust answer to the ship owner for the consequences of the act.[59] 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 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.[60] 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 is a condition precedent, and must be fulfilled. A partial performance is not sufficient, nor can a partial payment, or rateable freight, be claimed, except in special cases, and those cases are exceptions to the general rule, and called for by principles of equity.

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.[61]

It is supposed to be the doctrine of the case of *Bell v. Puller*,[62] 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.[63] The French law, in such a case, also allows freight for bringing back the cargo, because it could not be sold, or was not permitted to be landed.[64]

If there be no express agreement in the case, the master is not bound to part with the goods until the freight be paid; and if 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 ship owner's lien for freight is gone when the charterer is constituted owner, and takes exclusive possession for the voyage, or when the payment of the freight is, by agreement, postponed beyond the time, or at variance with the time and place, for the delivery of the goods. 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.[65] When the goods are to be delivered to the consignee on payment of freight, the consignee makes himself responsible by

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receiving the goods under the usual condition expressed in the bill of lading. And if the goods, by the bill of lading,[66] 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.[67] So, if the master delivers the goods without payment of the freight, he may sue the consignee to whom the goods were 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.[68] 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.[69] 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 independent 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.[70]

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 ship 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 (thought, 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.[71] Nothing can be more just, observes 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 maritime perils.[72]

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.[73] 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.[74] 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.[75]

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.[76] 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 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*,[77] in which the doctrine was extensively examined; and it was shown, by a reference to the foreign ordinances, and the soundest classical writers on maritime law, 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[78] of Europe, if he refuses to surrender the cargo to the shipper

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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.[79] 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 was of the same opinion.

Pothier, on the other hand, was against the right of the owner to abandon 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*.[80] 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 in France.[81] The ship owner performs his engagement when 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.[82]

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; but the ship owner would still be entitled to his freight, if the casks were well stowed, and their contents were essentially gone by leaking, or inherent waste, or imperfection of the casks.[83]

Should the cargo consist of livestock, 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. But if the agreement was 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.[84] 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.[85] The reason is, that the consideration for the 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*,[86] the rule of the 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. Auston*,[87] 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,[88] that many authors on maritime jurisprudence, as Kurick, Loccenius, and Straccha, will not allow even such a special agreement to be valid.[89]

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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*,[90] 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 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 was, 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.

The question, as to the right to a rateable 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.[91] 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,[92] and the question has been repeatedly discussed and determined of late years. It has been held, that the contract of affreightment was au entire contract; and unless fully performed by delivery of the whole cat-go, 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, 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.[93]

The apportionment of freight usually happens, when the ship is forced into a port short of her destination, and cannot finish the 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 ship, the master will be entitled to the whole freight, because the freighter is the cause of the contract not being performed. 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 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;[94] 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 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 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*.[95] If the

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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 performs the outward, and fails to perform the homeward voyage, no freight is recoverable.[96]

The rule by which the amount of the rateable 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.[97]

(8.) *Of loss from collision of ships.*

This has been a very 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 necessarily 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. 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, must get out of the way of the vessel that is close hauled.[98] So, a neglect of due means to check a vessel entering a river or harbor where others lie at anchor, is a fault which creates responsibility for damages which may ensue.[99] Where the collision arose by *vis major*, or physical causes exclusively, and without any negligence or fault, open or concealed, the damage must be borne where it falls.[100]

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, the marine law, by a *rusticum judicium*, apportions the loss, as having arisen equally by the fault of both parties.[101] 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. 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.[102] There has been much difference in the codes and authorities in maritime law, whether the cargo, as well as the ship, was to contribute to the loss. Valin contends, that the contribution is only between the ships, and that the cargoes are totally excluded from the benefit, as well as from the burden of contribution 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.[103]

(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 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.

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By the Rhodian law, as cited in the Pandects,[104] 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 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. 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 its 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 maritime 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; and the foreign ordinances[105] 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. A regular jettison, says Emerigon, is that which takes place with order, and without confusion, and is founded on previous deliberation.[106] But the irregular jettison is equally 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 it is called *semi-naufragium*.[107] The captain must first begin the jettison with things the least necessary, the most weighty, and of least value, and nothing but the greatest extremity would excuse the master who should commence the jettison with money, and other precious parts of the cargo.[108]

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 be no ground for contribution.[109] All damage arising immediately from jettison, or other acts 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.[110] 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 detention, constitute the subject of general average, according to the decisions in New York and Massachusetts.[111] Those decisions are supported by the rule as laid down in Beawes,[112] and they are in coincidence with the law and practice of Holland and France.[113]

Lord Tenderden, in his treatise on shipping,[114] 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.[115] The result of the decisions in *Plummer v. Wildman*, and *Power v. Whitmore*,[116] is, that where the general safety requires a ship to go into

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port to refit, by reason of some peril, the necessary expense of going into port, of preparing for the refitting the ship by unloading, warehousing, reloading, and the charges of the crew during the necessary detention, are general average. But the costs of the repairs, so far as they accrue 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.

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;[117] while, in the case of a vessel detained by an embargo, they are not so subject and are chargeable exclusively on the freight.[118] 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 a case, the subject of general average.[119] 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.[120]

We cannot but lament the uncertainty 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 they commend very highly the regulations of the ordinance and of the code as just and equitable, and marked with certainty and precision.[121]

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 unlacing the goods, to repair damages to the ship, 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 mace good by contribution.[122] It was attempted, in the case of *Covington v. Rogers*,[123] to extend the application of 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.[124]

If the ship be voluntarily stranded, to escape danger 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.[125] 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*,[126] 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, and writers on maritime law were consulted, and the

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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 a general average.[127] The question, therefore, in which the foreign and domestic authorities so materially vary, remains yet to be definitely settled.

A temporary safety is all that is requisite to entitle the 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.[128] Goods shipped on deck contribute if saved, but if lost by jettison, they are not entitled to the benefit of general average; for they, by their situation, increase the difficulty of the navigation, and are peculiarly exposed to peril.

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.[129] The general doctrine is, that all the merchandise, of whatever kind or weight, or to whomsoever belonging, contributes. The contribution is made, not on account of encumbrance to the ship, but of safety obtained, and, therefore, bullion and jewels put on board as merchandise, contribute according to their full value. By the Rhodian law,[130] 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 for private use, and not as merchandise for transportation, do not now contribute in a case of general average.[131] The common rule, according to Magens,[132] is, that what articles pay freight must contribute, and what 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 as 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.[133]

Instruments of defense 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 hardships and perils they endure well entitle them to an exemption from further distress.[134] 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

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sold, equally as if they had been thrown overboard to lighten the vessel. In such a case, a portion of the cargo, according to Lord Stowell, is abraded for the general benefit.[135]

Without entering minutely into the doctrine of adjusting and settling a general average,[136] it will be sufficient to observe, that, as a general rule, the goods sacrificed, as well as the goods saved, 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.[137] 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 of departure, making a reasonable allowance for wear or tear on the voyage up to the time of the disaster; and the practice in this country, at least it is the practice in Boston,[138] 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.[139]

The subject of the adjustment of a general average has been very much discussed in some of the modern cases. In *Leavenworth v. Delafield*,[140] 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*,[141] 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. The subject underwent a very full discussion in *Strong v. The New York Firemen Insurance Company*,[142] 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. When the general average was thus fairly settled in the foreign port, according to the usage and law of the port, it was binding, though settled differently from what it would have been in the tome port. The very same principle was largely examined and recognized in *Simonds v. White*.[143] 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 assuming a case for general average, when none existed, is not binding.[144] 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.[145]

(9.) *Of salvage.*

Salvage is the compensation allowed to persons by whose assistance a shin or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss; and it often forms a material ingredient in the discussions and adjustment which take place when a voyage has been disastrous. Thee allowance of salvage depends frequently on positive statute regulations fixing the rate, and the foreign ordinances contain precise enactments on this head. The regulation of salvage,

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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.[146] 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.

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 rat net proceeds of the property saved. 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 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 numbers of the crews.[147] The same observations were made by the court in *Mason v. Ship Blaireau*,[148] and no instance was found in which salvors were allowed beyond a moiety of the value. 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.

Though, in general, a passenger, seaman, or pilot, is not 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; yet, a passenger, for extraordinary exertions beyond the line of his duty, has been deemed entitled to a liberal compensation as salvage.[149] So, in a case of extraordinary peril, it is admitted, that great exertions and personal hazard may exalt a pilotage service into a salvage service.[150] And if the 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.[151]

The subject of salvage was largely discussed in our courts in a case of recapture.[152] The District Court of New York allowed as savage 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.[153] The rule of 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.[154] The same rule has been adopted by statute in this country,[155] and it 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

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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.[156]

(10.) *Of the dissolution of the contract of affreightment*.

The contract of affreightment may be dissolved without execution, not only by the act of the parties, but in many cases by the act of the law.

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 of destination, the contract is dissolved.[157] 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.[158] So, if 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.[159]

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.[160] 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.[161] 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,[162] declares, that, if before the vessel sails on 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 have found any other model so perfect, or to have made any material improvement upon it. It is equally distinguished for practical good sense, and for extensive and accurate learning, remarkably compressed, and appropriately applied.[163] Another work from which 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 encumbrance 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.

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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 explored, and with more than a Denham or a Parry's success.[164] Panaetius 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, Pufendorf, 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 Tusculum, and still less would he think of erecting a temple to 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.

NOTES

1. Butler, n. 138. to lib. 3. Co. Litt. Pothier's Charter Party, by Gushing, n. 1. Valin's Com. tom. 1, 617. The translation of Pothier's treatises on maritime contracts, by Mr. 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. It would contribute greatly to the circulation and cultivation of maritime, law in this country, if some other treatises of Pothier, and especially the commentaries of Valin, could also appear in an English dress.

2. Abbott on Shipping, part 3, ch 1, sec. 6.

3. Pothier, *Charte-Partie*, No. 4. Abbott on Shipping, part 3, ch. 1, sec. 3.

4. Pothier, ibid. No. 8. Abbott, part 3, ch. 1, sec. 4.

5. *Putnam v. Wood*, 3 Mass. Rep. 481.

6. *Havelock v. Geddes*, 10 East's Rep. 555.

7. Laws on Charter Parties, 130.

8. *Leer v. Yates*, 3 Taunton, 387. *Harman v. Gandolph*, 1 Holt's N. P. 35. 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, vol. ii. 17. note.

9. *Ord. de la Mar*. liv. 3. tit. *des Charte-Parties*, art. 1, and Valin's Com. ibid. Code de Commerce, art. 273.

10. Molloy, *de Jure Mar*. b. c. 4. sec. 3. *Smith v. Shepherd*, cited in Abbott on Shipping, part 3, ch. 4, sec. 1 Boulay Paty, tom. ii. 268, 269.

11. *Duffie v. Hayes*, 15 Johns. Rep. 327.

12. *Ord. du Fret*. art. 2. Pothier, *Charte-Partie*, n. 20, 21, 22, 24, 25. Code de Com. n. 287.

13. *Lyon v. Mells*, 5 East's Rep. 428. *Putnam v. Wood*, 3 Mass. Rep. 481. *Silva v. Low*, 1 Johns. Cas. 184. *Ord. de la Marine*, liv. 3. tit. 3. *Du Fret*, art. 12. Valin's Com. h. t. says, 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.

14. Abbott, part 3, ch. 3, sec. 4. *Baring v. The Royal Exchange Assurance Company*, 5 East's Rep. 99. *The same v. Christie*, ibid. 398. *Baring v. Claggett*, 3 Bos. & Pull. 201. *Lothian v. Henderson*, ibid. 499. *Ord. de la Marine*, liv. 3. tit. 1. *Charte-Parties*, art. 10. Valin's Com. h. t.

15. *Jackson v. Sharnock*, 8 Term Rep. 509.

16. See vol. ii. 472.

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17. *Cobban v. Downe*, 5 Esp. N. P. Rep. 41.

18. *Runguist v. Ditchell*, 3 Esp. N.P. Rep. 64.

19. Beawes' *Lex Mer*. 133, 142.

20. *Wilson v. Dickson*, 2 Barnw. & Ald. 2.

21. See vol. ii. 434. This is also the law in France. Code de Commerce, art. 281.

22. *Caldwell v. Ball*, 1 Term Rep. 205. 1 Bell's Com. 545.

23. The duties of the captain are prescribed 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, *role d'equipage*, 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 fails 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, and 1779. Code de Com. art. 224, 225, 226, 228, 229. Code Civil, art. 59, 86. 1 Emerig. 374. Boulay Paty, tom. ii. p. 1-35. 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 Com. vol. 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.

24. Roccus, note 56. Ord. of Rotterdam, art. 128.

25. *Morley v. Bordieu*, Str. Rep. 1265. *Lilly v. Ewer*, Doug. Rep. 72. *Jefferies v. Legendra*, Carth. Rep. 216.

26. *Webb v. Thomson*, 1 Bos. & Pull. 5. *Anderson v. Pitcher*, 2 ibid. 164. *Victorin v. Cleeve*, Str. Rep. 1250.

27. *Constable v. Cloberie*, Palmer's Rep. 397. *Davidson v. Gwynne*,12 East's Rep. 381.

28. *Shubrick v. Salmond*, 3 Burr. Rep. 1637.

29. Roccus on Ins. note 52. *Patrick v. Ludlow*, 3 Johns. Cas. 10. *Post v. Phoenix Ins. Company*, 10 Johns. Rep. 79. *Reade v. Com. Ins. Company*, 3 Johns. Rep. 352. *Suydam v. Marine Ins. Company*, 2 Johns. Rep. 138. Marshall, Ch. J., *Mason v. Ship Blaireau*, 2 Cranch's Rep. 257, note.

30. *Burgon v. Sharpe*, 2 Campb. N. P. Rep. 529.

31. Molloy, b. 2. c. 4. sec. 5. *Griswold v. New York Insurance Company*, 3 Johns. Rep. 321. *Bradhurst v. Columbian Insurance Company*, 9 Johns. Rep. 17. *Schieffelin v. New York Insurance Company*, ibid. 21.

32. Dig. 14. 2. 10. 1.

33. Vinnius, *notae ad Com. Peckii, ad Rem Nauticam*, p. 294, 295, and Anthony Faber, *Com. ad Pand*, whom Vinnius cites and follows.

34. *Jugemens d'Oleron*, art. 4. Laws of Wisbuy, art. 16. *Ord. de la Mar*. tit. *Du Fret*, art. 11.

35. Valin, tit. *Du Fret*, art. 11. tom. i. 618. Pothier, *Charte-Partie*, n. 68. Emerigon, tom. i. 428, 429.

36. Code de Commerce, art. 296. Boulay Paty, *Cours de Droit*, Com. t. 2. 400-405.

37. Lord Ellenborough, 10 East's Rep. 393.

38. *Mumford v. The Commercial Insurance Company*, 5 Johns. Rep. 262. *Searle v. Scovell*, 4 Johns. Ch. Rep. 218.

39. *Herbert v. Hallet*, 3 Johns. Cas. 93. *Clarke v. Mass. F. & M. Ins. Co.*, 2 Pickering, 104.

40. *Saltus v. The Ocean Ins. Co.*, 12 Johns. Rep. 107. *Tredwell v. Union Ins. Co.*, 6 Cowen's Rep. 270.

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41. Roccus, n. 40. 55. *Dale v. Hall*, 1 Wils. Rep. 281. Vinnuis, *notae ad Peckium*, p. 259. 1 Emerigon, 373. *Proprietors of the Trent Navigation v. Wood*, 3 Esp. N.P. Rep. 127.

42. *Cheviott v. Brooks*, 1 Johns. Rep. 364.

43. Emerigon has collected all the authorities, pro and con, on this very debatable question. See Hall's Emerigon on Maritime Loans, p. 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's Com. tit. *Du Fret*, art. 14. vol i. p. 655. Cushing's Pothier on Maritime Contracts, p. 19. *Charte-Partie*, n. 34, and Cleirac, *Judgmens 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. Mr. Abbott, in his Treatise on Shipping, part 3. ch. 3. sec. 10. is also against the claim of the shipper to be paid for the goods sold.

44. Abbott, part 3, ch. 3, sec. 11. *Soldergreen, v. Flight*, cited in 6 East's Rep. 622.

45. Abbott, *ub. supra*.

46. Laws of Wisbuy, art, 57. *Ord. de la Marine*, liv. 3. tit. *Du Fret*, art. 23.

47. *Wardell v. Mourillyan*, 2 Esp. N.P. Rep. 693.

48. *Hyde v. Trent and Mersey Navigation Company*, Term Rep. 389.

49. *Strong v. Natally*, 4 Bos. & Pull. 16. See vol. ii. 469.

50. Abbott, part. 3, ch. 9, sec. 25.

51. *The Constantia*, 6 Rob. Adm. Rep. 321. 1 Emerigon *des Ass*. 317.

52. See vol. ii. 464-473.

53. *Pickering v. Barkley*, Styles, 132. *Barton v. Wolliford*, Comb. 56.

54. *Forward v. Pittard*, 1 Term Rep. 27. *Hyde v. Trent and Mersey Navigation Company*, 5 Term Rep. 389.

55. *Garside v. Trent and Mersey Navigation Co.*, 4 Term Rep. 581

56. *Smith v. Shepherd*, cited in Abbott, part. 3, ch. 4, sec. 1.

57. See vol. ii. 470. There is an exemption in Massachusetts by statute of 1818.

58. *Lewin v. East India Company*, Peake's Rep. 241.

59. *Smith v. Elder*, 3 Johns. Rep. 105.

60. 1 Peters' Adm. Rep. 206.

61. Roccus, note 72, 73, 74, 75. *Edwin v. East India Company*, 2 Vern. Rep. 210. *Atkinson v. Ritchie*, 10 East's Rep. 530. Peters, J., in *Giles v. The Brig Cynthia*, 1 Peters Adm. Rep. 207.

62. 2 Taunt. Rep. 286.

63. Lawes on Charter Parties, 152.

64. Boulay Paty, tom. ii. 391.

65. *Chandler v. Belden*, 18 Johns. Rep. 157. *Clarkson v. Edes*, 4 Cowen's Rep. 470. *Ruggles v. Bucknor*, 1 Paine's Rep. 358. *Christie v. Lewis*, 2 Brod. & Bing. 410. *Pickman v. Wood*, 6 Pick. Rep. 248.

66. *Roberts v. Holt*, 2 Show. Rep. 332.

67. *Cock v. Taylor*, 2 Campb. N. P. Rep. 587.

68. Mansfield, Ch. J,, in *Brouncker v. Scott*, 4 Taunt. Rep. 1.

69. Abbott on Shipping, part 3, ch. 4, sec. 4.

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70. *Artaza v. Smallpiece*, 1 Esp. N.P. Rep. 23.

71. *Morgan v. Insurance Company of North America*, 4 Dallas' Rep. 455.

72. *Ord. tit. Du Fret*. art. 15. Valin, ibid. Code de Commerce, art. 299.

73. *Scott v. Libby*, 2 Johns. Rep. 336. *Liddard v. Lopes*, 10 East's Rep. 526.

74. 3 Rob. Adm. Rep. 180.

75. *Hadley v. Clarke*, 8 Term Rep. 259. *McBride v. Marine Insurance Company*, 5 Johns. Rep. 308. *Baylies v. Fettyplace*, 7 Mass. Rep. 325.

76. *Curling v. Long*, 1 Bos. & Pull. 634.

77. 16 Johns. Rep. 348.

78. *Ord. de la Mar*. liv. 3. tit. 3. Fret, art. 15. and tit. Charter Parties, art. 8. Valin, h. t. Pothier, *Charte-Partie*, No. 69, 100, 101. Laws of Oleron, art 4. *Consulat*, par Boucher, ch. 80, 82, 84. Roccus *de Nav*., n. 54. Jacobsen's Sea Laws, by Frick, p, 295.

79. Valin's Com. t. 1. 670. Pothier, *Charte-Partie*, No. 59.

80. Dis. 22. n. 48. and Disc. 23. n. 86 and 87

81. 3 Johns. Rep. 321. Mr. Bell says it is likewise the law in Scotland. 1 Bell's Com. 570.

82. *Ord. tit. Du Fret*, art. 25. Ord. of Rotterdam, art. 155. Code de Com. art 305,310. Boulay Paty, tom. 2, 488.

83. Molloy, b. 2. c. 4. sec. 15. *Frith v. Barker*, 2 Johns. Rep. 327.

84. Dig. 14. 2. 10. Molloy, b. 2. c. 4. sec. 8.

85. *Ord. de la Mar. tit. Du Fret.* art. 18. Roccus, *de Nav. et Naulo*, not. 80. Cleirac, *les Us et Coutumes de la Mar*, p. 42. Code de Com. art. 302.

86. 3 Johns. Rep. 335.

87. 3 Pick. Rep. 20.

88. Com, tom. i. 661.

89. 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 rateable freight, in such case, was equitable.

90. 4 Maule & Selw. 37.

91. *Ritchie v. Atkinson*, 10 East's Rep. 295.

92. *Bright v. Cowper*, 1 Brownlow, 21. and this case is cited with approbation by Grose, J., in 7 Term Rep. 385. Malynes, in his *Lex Mer*. p. 100, is of opinion, that there is no freight due, though he speaks in a loose and questionable manner. But Mr. Abbott, in his Treatise on Shipping, part 3, ch. 7, sec. 9., 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. p. 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.

93. *Post and Russell v. Robertson*, 1 Johns. Rep. 24. See, also, *Clarke v. Gurnell*, 1 Bulst. 167. *Cook v. Jennings*, 7 Term Rep. 381. *Osgood v. Grosing*, 2 Campb. N. P. Rep. 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.

94. Laws of Oleron, art 4. Ord. of Wisbuy, art 16. Roccus, note 81. Straccha, *de Navibus*, part 3, n. 24. *Ord. de la Marine*, lit. 3. tit. 3. *Du Fret*. art 21, 22.

95. *Luke v. Lyde*, 2 Burr. 883. *Cooke v. Jennings*, 7 Term Rep. 381. *Hunter v. Prinsep*, 10 East's Rep. 378. *Liddard v. Lopez*, ibid. 526. Abbott on Shipping, part 3, ch. 7, sec. 13. *Robinson v. Marine Insurance Company*, 2 Johns. Rep. 323.

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Hurton v. Union Insurance Company, cited in Cond's Marshall on Ins. 281, 691. *Caze & Richard v. Baltimore Insurance Company*, 7 Cranch's Rep. 358. *Armroyd v. Union Insurance Company*, 3 Binney, 437. *Welch v. Hicks*, 6 Cowen's Rep. 504.

96. Laws on Charter Parties, p. 149, 150.

97. *Marine Insurance Company v. Lenox*, cited and approved of in *Robinsons v. The Marine Insurance Company*, 2 Johns. Rep. 323. *Coffin v. Storer*, 5 Mass. Rep. 252.

98. *The Woodrop-Sims*, 2 Dod. Adm. Rep. 83. *The Thames*, 5 Rob. Adm. Rep. 345.

99. *Neptune 2d*, 1 Dods. Adm. Rep. 467.

100. Dig. 9. 2. *Consulat de la Mar*. par Boucher, 200-203. Abbott on Shipping 354. Marshall on Insurance, 493.

101. Cleirac, *Us et Coutumes de la Mar*. 63. *The Woodrop-Sims*, 2 Dod. Adm. Rep. 85.

102. Com, tom. tit. 166.

103. This case was decided in the House of Lords in 1824. See Bell's Com. Vol. i. 580-583, who has collected and digested the foreign authorities on the subject.

104. 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 Vinnins. in the treatise *ad Rem Nauticam*, and of a treatise of Bynkershoek; and it has received the most ample illustrations in the dissertations upon it by numerous other civilians, among whom may be selected Emerigon and Abbott.

105. Laws of Oleron, art. 8. of Wisbuy, art. 20, 21, 38. Code de Commerce, art. 410.

106. 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.

107. *Consulat de la Mar*. ch. 284. Targa, ch. 68. Casaregis, Dics. 40. n. 28.

108. Code de Commerce, art. 411. Emerigon, t. i. 609, has beautifully illustrated from Juvenal, the growth and progress of an irregular jettison, and that imminent danger and absorbing terror which justifies 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 quae mea sunt
Praecipitare volens pulcherrima. — Juvenal, sat. 12.

109. Pothier, tit. *Avaries*, n. 113.

110. *Maggrath v. Church*, 1 Caine's Rep. 196.

111. *Walden v. Le Roy*, 2 Caine's Rep. 263. *Padelford v. Boardman*, 3 Mass. Rep. 548.

112. *Lex Mercat*. vol. i. 161.

113. Ricard, *négoce d'Amsterdam*, p. 280. Emerigon, *Traité des Ass.*, t. i. 624

114. Abbott on Shipping, part 3. ch. 8. sec. 8.

115. *Power v. Whitmore*, 4 Maule & Selw. 141.

116. 3 Maule & Selw. 482. 4 ibid. 141.

117. Ricard, *négoce d'Amsterdam*, p. 279. Boulay Paty, tom. iv. 444. *Leavenworth v. Delafield*, 1 Caine's Rep. 474. *Kingston v. Girard*, 4 Dallas' Rep. 274.

118. *Robertson v. Ewer*, 1 Term Rep. 127. *Penny v. New York Insurance Company*, 3 Caine's Rep. 155. *McBride v. Marine Insurance Company*, 7 Johns. Rep. 431.

119. *Insurance Company of North America v. Jones*, 2 Binney's Rep. 547.

120. Bynck. *Quaest. J. Priv*. lib. 4. ch. 25. Bynkershoek, in one of the adjudged cases which he cites, complains that the

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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, vol. 166-69, 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.

121. *Ord. de la Mar. Des Avaries*, art. 7. Code, art. 400, 401. Boulay Paty, t. 4. 466.

122. *Ord. de la Mar.* tit. *Avaries*, art. 6. Valin's Com. tom. ii. 165. 1 Emerigon, 620-1.

123. 5 Bos. & Pull. 378.

124. Emerigon, tom. 1. 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 the mast and sail, and a lantern at the mast head, 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.

125. 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 for the purpose of saving 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, p. 220-1.

126. 9 Johns. Rep. 9.

127. *Caze v. Richards, in the Circuit Court of the United States for Pennsylvania*, cited 2 Serg. & Rawle, 237. *Gray v. Waln*, ibid. 229.

128. Vinnius, in *Peckium ad legem Rhodiam*, p. 346. 250. Boulay Paty, tom. iv. 443.

129. *Smith v. Wright*, 1 Caines' Rep. 43. Boulay Paty, tom. 4. 566.

130. Dig. 14. 2. 2.

131. Abbott, part 3, ch. 8, sec. 14.

132. Magens on Insurance, vol. i. 62, 63.

133. *Ord. de la Marine, tit. Du Fret*. art. 11. Code de Commerce, art. 419. Pothier, Des Avaries, n. 125. 1 Emerigon, 645. Boulay Paty, tom. iv. 561, 562.

134. 1 Emerigon, 642.

135. Hall's Emerigon on Maritime Loans, p. 94. *The Gratitudine*, 3 Rob. Adm. Rep. 264.

136. 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, ch. 5 and 7.

137. The *Consolato del Mare*, and the usage of diverse 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 place of discharge, if afterwards. But the ordinance of the marine did not make any such distinction. 1 Emerigon, 654.

138. 3 Mason's Rep. 439.

139. Abbott on Shipping, part 3, ch.8, sec. 14, 15. *Strong v. Fire Ins. Co.*, 11 Johns. Rep. 323. *Simonds v. White*, 2 Barnw. & Cress. 805. *Gray v. Waln*, 2 Serg. & Rawle, 229, 257, 258.

140. 1 Caines' Rep. 574.

141. 2 Johns. Rep. 98.

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142. 11 Johns. Rep. 323.

143. Barnw. & Cress. 805. There is a remarkable coincidence on all points, in the discussions and decisions in the two cases last cited. That delivered in the K. B. by Lord Ch. J. Abbott, is by no means superior, though it was ten years subsequent, in point of time, to the one delivered in the Supreme Court of New York, by the late William W. Van Ness; and that distinguished judge examined the law on that occasion with his usual discernment, and expressed himself with accuracy and perspicuity.

144. *Lenox v. United Ins. Company*, 3 Johns. Cases, 178. *Power v. Whitmore*, 4 Maule & Selw. 141.

145. Abbott, part 3, ch. 8, sec. 17.

146. *The Aquila*, 1 Rob. Adm. Rep. 32. *The two friends*, ibid. 235. *The Sarah*, cited in a note to 1 Rob. Adm. Rep. 263. Marshall, Ch. J., 2 Cranch's Rep. 267.

147. *L'Esperance*, 1 Dods. Rep. 46

148. 2 Cranch's Rep. 268.

149. *Newman v. Walters*, 3 Bos. & Pull. 612.

150. Sir William Scott, in *The Joseph*, 1 Rob. Adm. Rep. 257. Phil. edit.

151. *Mason v. Ship Blaireau*, 2 Cranch's Rep. 240.

152. *Talbot v. Seaman*, 1 Cranch's Rep. I.

153. *The War Onskan*, 2 Rob. Adm. Rep. 299. *The Carlotta*, 5 ibid. 54.

154. *The Santa Cruz*, 1 Rob. Adm. Rep. 42.

155. Act of Congress, March 3d, 1800, ch. 14. sec. 3.

156. *The two Catherines*, 2 Mason's Rep. 319.

157. *Liddard v. Lopes*, 10 East's Rep. 526.

158. *The Hiram*, 3 Rob. Adm. Rep. 180.

159. *Scott v. Libby*, 2 Johns. Rep. 336. *The Tuleta*, 6 Rob. Adm. Rep, 177.

160. *Hadley v. Clarke*, 8 Term Rep. 259. *McBride v. Marine Insurance Company*, 5 Johns. Rep. 308. *Baylies v. Fettyplace*, 7 Mass. Rep. 325.

161. *Palmer v. Lorillard*, 16 Johns. Rep. 348.

162. Code de Commerce, art. 276, 277.

163. A new edition of Abbott on Shipping has been for some time impatiently expected, from the same able hand that favored the public with the American edition of 1810: but it had not appeared, or at least had not come to hand, when these lectures were put to the press.

164. 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.

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LECTURE 48

Of the Law of 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, 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.[1] It was for a long time an unsettled question in the English law, whether the insurance of enemy's property was lawful. 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.[2] 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. Ill. 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,[3] 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. Nesbit*,[4] 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 greet name and influence of Lord Mansfield. 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*[5] was still more directly on the point, 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*,[6] where it was held, that the insurance of goods

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purchased in an enemy's country during war, by a British agent, and shipped for British subjects, was a lawful insurance. But every distinction of that kind was subsequently abandoned; 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 assurance 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[7] otherwise insure previous to the war, against all evils incident to the war. Insurances of enemy's property had been indulged, but never were legal. The judicial language at last was,[8] 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.[9] Bynkershoek, in a chapter 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[10] 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.

The doctrine of the European law, on this subject, was extensively discussed and explicitly recognized in this state, in the case of *Griswold v. Waddington*;[11] 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.

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. 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 himself, and not *in solido*, a risk to the amount of his subscription. 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.

(2.) *Of the essential or usual terms of the policy.*

If the ship be specified in the policy, it becomes part of the contract, and no other ship can be substituted without necessity; but the cargo tray be shifted from one ship to another, if it be done from necessity, and the insurer of it will still be liable. An insurance on the body of a ship 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.[12] An

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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.[13] So, it will be valid if made on account of A., or of whom it may concern.[14] In England, the statute of 28 Geo. III. prohibits insurances in blank, as to the name of the insured; and the party in interest, or some agent in his behalf, must be inserted; and the suit on the policy may be brought in the name of the principal or agent. The interest of the real owner may 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.[15] If the policy has the words whomsoever it may concern, then it will cover the whole partnership interest;[16] and Valin and Boulay Paty think it covers the whole if the policy be generally on his goods.[17]

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 pay the loss, or retain the premium, as the case may be. 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 that without them the policy would be void if the subject was lost when the insurance was made.[18] 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.[19]

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 insurance.[20] 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.[21]

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.[22] 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 through 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 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.[23]

If the subject matter of the policy he assigned, the policy may also be assigned, so as to give a right of action to the assignee. But if there be no statute provision, (as there is in Pennsylvania,[24]) the assignee 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.[25]

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(3.) *Of the objects of insurance*.

The subdivision of this head will include the consideration of illicit trade — contraband of war — seamen's wages — freight — profits and commissions, and 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. 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 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: this is a clear, settled, and universal principle. 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 hound to administer.[26]

It has been a question, however, 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 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[27] 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 at Marseilles, in 1158, 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, Valin concurs in opinion with Emerigon[28] 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.[29]

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 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 later was by Valin, bows to the irresistible energy of the principles of Pothier, and concedes, that the insurance of a foreign smuggling, or contraband trade, is rather tolerated than justified, and allowed only because other nations have indulged in the same vicious practice.[30] In

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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 policy or comity, 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, make the insurance, it is held to be a fair contract between the parties, and he is bound by it.[31]

The decisions of Lord Mansfield on this subject must be considered as laying down an exceedingly lax morality, particularly in the case of *Planche 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 doctrine in *Boucher v. Lawson*,[32] 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 *Weymell v. Reed*,[33] seemed to have felt the pressure of the unsound and immoral principle involved in the doctrine of the English courts, for he purposely waived the inquiry whether 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 English writers on insurance have not concurred entirely in opinion on the question; for while Miller, 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.[34]

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. 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. All the authorities, foreign and domestic, recognize this doctrine. But if the trade be known to be illicit, and the underwriter 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.[35] It is certainly matter of surprise and regret, that in such countries as France, England, and 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, should be countenanced, and even encouraged, by the courts of justice. The principle does no credit to the commercial jurisprudence of the age.[36]

(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 he 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.[37] Mr.

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Phillips, in his Treatise of 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.[38] But though it may be difficult to answer this reasoning, it is certain, that the established doctrine is not so rigorous. Vattel[39] 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 effect of an inevitable necessity.

The Chief Justice of Massachusetts, in *Richardson v. Maine Insurance Company*,[40] examined this subject with very accurate discrimination, and he considered, that illicit voyages might 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, 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.

But 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.[41]

(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 every where assumed as a settled principle in the marine law of England, that seamen's wages are not insurable.[42] 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.[43]

(4.) Of freight, profits, and commissions.

In France and Spain, freight not earned cannot be insured, and for the same reason, that seamen's

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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 that which is a nonentity, and had no certain existence, as future contingent freight and profits.[44] 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.[45] In England, and in 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 has 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 insurer 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 a part of them, are put on board, or from the tune the ship has commenced the voyage for the purpose of a cargo. 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; and if the 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.[46]

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.[47] They are likewise, in this country, held to bean insurance interest.[48] Insurances on freight, 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 cases 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 upon 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.[49]

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 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,[50] 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 profit of goods may lawfully be estimated in an insurance on goods.[51] 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.[52] I should apprehend that. was the proper course, trough 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 profitable market, or that the state of the foreign market was such as to have afforded, as in Grunt v. Parkinson, a very strong

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expectation of profits. 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 he ascertained by the insured, in case a loss should happen. A valued policy is where a value has been set in the ship or goods insured, and inserted in the policy ill 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 hove 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*,[53] it was supposed that every policy on profits must, of necessity, be a valued one. because without the valuation it Mold be extremely difficult to ascertain the amount to be recovered. A loss on the profits must he regulated by the loss of the property from which the profits were to arise.[54]

The value in the policy is, or ought to he, 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.[55] It means the amount of the insurable interest; and if the insured has sonic interest at risk, and there be no fraud, the valuation on 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. lit he valuation should, however, be grossly enormous, as in the case put by Lord Mansfield, where cargo was valued at £2,000, and the insured had only the value of a cable on board.;here is no doubt it would raise it, strong presumption of fraud; and either the valuation or the policy would be set aside. A valuation, fraudulent in fact, as respects the insurer, 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.[56]

There are cases which suggest that the valuation is applicable only to cases of total loss, and does not apply to average losses.[57] But the better opinion 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 adjustment is to 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. Mr. Benecke concludes from a consideration of the cases, that the opinion, that in a case of a partial loss the valuation ought to he disregarded, is as destitute of authority, as it is void of justice and sound reason.[58]

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.[59] 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.[60] If, therefore, certain articles be 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 which the articles actually lost bore to the valuation of the whole at the commencement of the risk.[61]

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(6.) Of wager policies.

A mere hope or expectation, without some interest in the subject matter, is a wager policy, and all such policies are, by statute, in England, declared void.[62] 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 for the negligence of the master, he has an insurable interest.[63] In the case of *Lucena v. Craufurd*,[64] 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 very litigated point. The decision in that case was, that commissions to become due to public agents, and all reasonable expectations 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 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.

It was admitted by the judges of the Court of K. B. in *Craufurd v. Hunter*,[65] 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 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. Elliot*,[66] Mr. J. Buller made a vigorous, but unsuccessful stand, against suits upon wages 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 n nature to draw into discussion, and unnecessarily affect the character or feelings of third persons; and to sustain suits upon such wanton wages, would be a disgrace to any administration of justice. The case of *Jones v. Randall*,[67] 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*,[68] it was ruled lately in the English courts, that a wager on a battle between two dogs was illegal, and not the ground of action.

In this state, we have assumed it to be a clear 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.[69] We only require, that the wager should concern an innocent transaction, and not be contrary to good morals or sound policy.[70] In Massachusetts, the Supreme Court has 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 is reprobated, and they follow the principles, while they do not acknowledge the authority of the English statute in the reign of George II.[71] Wager policies, without

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any real interest to support them, are condemned also by positive ordinances in France, and in most of the commercial nations of Europe.[72]

(4.) *Of reassurance and double insurance*.

After an insurance has been made, the insurer may have the entire sum he has 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 re-assurance, 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 gives 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 ch. 37; but they are allowed with us.[73] 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.[74] 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 re-insurer, he makes out a case for indemnity.[75]

These reassurances are allowed by the French ordinances,[76] and the first insurer can reassure to the same amount; but the better opinion is, that he cannot inure 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.[77]

The insured may likewise cause to be insured the solvency of the first insurer; but this will not often be the 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.[78] 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.[79] 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.[80]

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 rateably towards the loss.[81] 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 froth one set of underwriters, they will be entitled to their action against the other insurers, on t he same interest and risk, for a rateable proportion of the loss.[82] The doctrine of contribution 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*;[83] and though, in most countries of Europe, the first policy in the order of time is to be exhausted

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before the second operates, yet the rule requiring the insurers in each policy to bear a rateable 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 exists 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 percent 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.[84] The ancient rule in England was according to the French ordinance,[85] 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, and that the policy first in time, in point of fact, was to bear the loss.[86]

As a general rule of construction, and independent of 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.[87] 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 rateably in proportion to their subscriptions.[88]

(5.) *Of representation and warranty*.

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. It is, accordingly, an established principle, that a misrepresentation to the underwriter, or concealment of a fact material to the risk, will 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 an fraudulent. intention.[89] Lord Mansfield laid down, with great strength and clearness, the general principles which governed this branch of the subject, and they have been implicitly adopted in all succeeding cases.

The special facts upon which the contingent chance was 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 render 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 the 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

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circumstances, a fair representation, or a concealment; if the misrepresentation or concealment was 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 by mistake, or oversight, it does not affect the policy, unless it was material, and not true in substance.[90]

If the information be stated as mere opinion, or expectation, and, perhaps, as mere belief, it does not amount to a representation, or affect the policy, provided it was given in good faith, for the underwriter, in such a case, takes the risk upon himself.[91]

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.[92] 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.[93] Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel, and against the same risks.[94]

The knowledge or information material for the insurer to know, and necessary to be communicated to him, when the contract is made, is a question. not of science, or one which rests upon the opinion of mercantile men, but a question of fact for a jury, and they are to judge of the materiality of the information under a consideration of all the circumstances that belong to the case.[95] This point was fully considered, and with a review of the English and American authorities, in the case of the *New York Firemen Insurance Company v. Walden*;[96] and that doctrine has since received the unqualified sanction of the Supreme Court of the United States.[97] The books abound with cases relative to the very litigated question as to what are, and what are not. necessary disclosures. The largest and most accurate digest of the English and American decisions on this subject., is to be seen in Mr. Phillips' Treatise on the Law of Insurance, ch. 7; and it will not be 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;[98] and the modern cases are equally sound and exact in their requisitions.[99] But the insured is not bound to communicate loose rumors, nor any facts which the underwriter may be presumed to know equally with himself.

The insured is not bound to disclose all by-gone 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.[100] The underwriter is bound to know the nature and general course of the trade and of the voyage, and he assumes that kind of knowledge at his peril.[101] 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 disclosed.[102] 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.[103] It is likewise sufficient in the case of a representation, that it be equitably and substantially complied with;[104] and in furtherance of that perfect good faith which

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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.[105] If, however, 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.[106]

The French ordinance of the marine had no positive provisions on this subject, and yet the same principles which prevail in the English law were recognized as sound rules applicable to the government of the contract.[107] In the new code[108] 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,[109] to prove fraud in fact; and the concealment or misrepresentation is equally fatal; whether it proceed from design, forgetfulness, or negligence. 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.

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.[110] This warranty of seaworthiness relates to the commencement of the risk, and the warranty is not broken if she becomes unseaworthy afterwards.[111] 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.[112] 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.[113]

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. It differs from a representation in this respect, that it is 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*. Every condition precedent requires a strict performance to entitle a party to his right of action. But seaworthiness in port 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.[114] It was held, in the case of *Wier v. Aberdeen*,[115] that though a ship be unseaworthy at the commencement of the risk, yet if the defect, be cured before 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 latterly thrown over its solidity by the Supreme Court of the United States.[116]

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 wars that grew out of the French revolution, and while we continued in our neutral position, the warranty of neutrality attracted great attention,

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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 lit 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 accompanied 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 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 do it whenever and wherever the neutrality of the-property, or its privileges as such, are called in question.[117] 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 ditty, 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 the warranty.[118]

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, libeled and condemned as enemy's property.[119] 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.

(6.) *Of the nature, variety, and extent of the risks or perils within their policy*.

The general rule is, that the insurer charges himself with all the maritime perils which the thing insured can meet with on the voyage: *praestare 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 exception.[120] 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.

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 he 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*.[121]

(1.) Of the acts of the government of the parties.

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An insurance against loss by reason of the acts of one's own government, as an arrest, or embargo, is valid.[122] The same principle is incorporated into the new French commercial code, and it pervades universally the law of insurance.[123] 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 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.[124]

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.[125] The distinctions were afterwards pointedly disclaimed, and the whole doctrine exploded, on a writ of error, in the Exchequer Chamber;[126] 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 this state; 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 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.[127]

(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 Massachusetts. The loss must be occasioned by a peril, acting upon the subject insured immediately, and not circuitously, and a just fear of capture is not sufficient.[128] But there are other, and later, and more numerous cases, which have established a different conclusion from the same principles, and 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. 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 point on which these latter cases rest is, that if the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy.

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 offenses against the law of nations, nor to acts of lawless violence, though committed under a pretext of some municipal regulation.[129] The apprehension of capture, or of any other peril, *in transitu*, is no ground of abandonment. In the cases in which a just fear of one of the perils insured against has been deemed equivalent to the presence of vis major, and sufficient to charge the loss upon the insurer, the danger was imminent, and might be said to be present and palpable, as well as apparently remediless and morally certain.[130]

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(3.) Of insurance of lives.

It was a maxim of the civil law, that the life of a freeman was above all valuation: *liberum corpus aestimationem non recipit*; and the nautical legislation of some parts of Europe has been founded upon that principle, and they have deemed it unfit and improper to allow insurances on human life. While they are tolerated in Naples, Florence, by the ordinance of Wisbuy, and in England, they were condemned in the Le Guidon, as contrary to good morals, and as being the source of infinite abuse; and insurances on lives were expressly prohibited by the ordinance of Louis XIV. The prohibition is made to rest on the reason given in the civil law; and the ordinances of Amsterdam, Rotterdam, and Middleburg, adopted the same rule.[131] The new code has omitted any express provision on the subject, though Boulay Paty[132] thinks that a prohibition is covertly but essentially contained in art. 334 of the code; and most of the commentators on the new code, as Delvincourt,[133] Locre,[134] De Laporte, and Estrangin, concur in the same opinion. Pardessus,[135] on the other hand, is in favor of the legality of such insurances, and this must have been the opinion of the French government, for a royal ordinance of February, 1820, established a company for the purpose of insurances upon lives.[136]

(4.) 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 percent. 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 afterwards the new code, provides that the insurer shall not be liable, if the partial loss does not exceed one percent of the value of the article damaged.[137]

The memorandum clause in a policy usually declares that the enumerated articles should 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*,[138] it was held that the exception amounted to a condition, and that if the ship was stranded, the insured was let in to prove his whole partial loss. But in *Wilson v. Smith*,[139] 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*,[140] Lord Mansfield held the same doctrine; and in *Cocking v. Fraser*,[141] 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

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commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction, as settled in that ease, is very salutary, by reason of its simplicity and certainty.

But this decision was shaken, and the original doctrine of Lord Ch. J. Rider in *Cantillon v. London Assurance Company* revived, by the decision of the K. B. in *Burnet v. Kensington*,[142] 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*,[143] and of Lord Ellenborough, in *Cologan v. London Assurance Company*.[144] But 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*,[145] and it has received a similar sanction in subsequent cases, in that and in other courts;[146] and the weight of authority is in favor of the doctrine, that in order to charge the insurer, the memorandum articles must be specifically and physically destroyed, and must not exist in specie.

It has been frequently a vexed point in the discussions, whether the insurer was held, 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 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.[147]

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.[148] When part of the articles in the memorandum are totally destroyed by the perils insured against, and the residue remains 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*,[149] is a strong determination in favor of the recovery. It was said, that there was no case, nor no reason to maintain, that where the 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*,[150] was to the same effect. But, in opposition to that doctrine, we have the case of *Hedburgh v. Pearson*,[151] 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 he only an average loss, and the insurer wholly discharged. So, in *Guerlain v. Col. Ins. Co.*,[152] 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,[153] and to

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the doctrine of that writer, by which it appears, that in France, under the clause free of average, the insurer is not held, 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)[154] upon assumed principles of equity. The cases of *Biays v. The Chesapeake Insurance Company*, and of *Morcan v. The United States Insurance Compan*y,[155] 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.

The French law positively 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.[156] This is a valuable rule, calculated to guard against dispute and imposition.

(5.) Of the usual perils covered by the policy.

It will not be necessary, nor will the present course of instruction admit me to do more, than take notice of a few of the prominent perils which accompany the voyage, and surround it with danger.

The ignorance or inattention of the master or mariners, is not one of the perils of the sea.[157] These words apply to all 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 diligentisimmo possit contingere*. The imprudence, or want of skill in the master, may have been unforeseen, but it is not a fortuitous event.[158] The insurer undertakes only to indemnity against 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 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 *cas fortuit*.[159] 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.[160] The better opinion would, however, seem to be, that the insurer is not liable for this sort of damage, because it may be prevented by due care, and it is within the control of human prudence and sagacity.

When a missing vessel shall be presumed to have perished by a peril of the sea, depends upon circumstances, and there is no precise time fixed by the English law.[161] 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.[162] The ordinances of foreign states have been very arbitrary on this point.

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Thus, by the ordinance of Hamburgh, 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, it is not heard from within a year and an half.[163] 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 the loss.[164]

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*.[165] If a ship be driven ashore by the wind, and in that situation be captured by an enemy, the loss is to he imputed to the capture, and not to the stranding.[166] When partial loss is 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 and ends of previous partial losses, when there is an overwhelming cause of loss which swallows up the whole subject matter.[167] So, on the other hand, if the first loss be distinct and total, and he 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.[168]

By the rule and practice in these 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 the perils of the sea, and made chargeable upon the insurer[169] and we have already seen[170] hour far wages 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.[171]

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.[172] The theft that is insured against by name, means that which is accompanied with violence, (*latrocinium*,) and not simple theft: *furtum non est casus fortuitus*.[173] But the stipulation of indemnity 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, the contract is discharged.[174] 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.[175] 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.[176]

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.[177] This decision is subsequent to that of *Grim v. The Phoenix Insurance Company*,[178] 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

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insurance. The French law coincides with the English decision.[179] 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 is the agent of the insured, and subject to his control.[180] It means fraudulent conduct on the part of the master, in his character of master, or of the mariners, to the injury of the owner, and without his consent, and it includes every breach of trust committed with dishonest views. Barratry is used by the French writers in its larger sense, as comprehending negligence, as well as wilful misconduct; 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, are all of thorn acts of barratry, equally with more palpable and direct acts of violence and fraud, for they are breaches of duty by the master, in his character of master, to the injury of the owner.[181] It makes no difference in 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 to 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.[182] 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 hours in safety at the port of destination, the insurer is discharged.[183]

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 is equally doubtful, 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*,[184] may be selected as a strong decision in favor of the insurer; and the more recent case of *Walker v. Maitland*,[185] as one equally strong against him, on that very point. It may be expedient to suspend one's own judgment, under such a sad uncertainty of the law, and leave the question for further judicial consideration, since an eminent judge of the Supreme Court of the United States has thought proper to take this course.[186]

II. **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 risks 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

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port or port, in an intermediate stage of the voyage. 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.[187] But if a ship be expected to arrive at a foreign port, and be insured at and from that place, or from her arrival there, other cases say, the risk attaches from her first arrival.[188] 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 arrival.[189] But the risk continues during quarantine, though after the twenty-four hours.[190]

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.[191] But in France, where insurances are generally to the French West India Islands, the risk on the ship continues until the cargo is discharged at the last place of destination.[192] 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 intermediate voyages may be covered by the insurance.[193]

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.[194] The risk continues while the cargo is actually on hoard the ship, and no longer; though if the cargo be temporarily landed from necessity, during the voyage, they are still protected by the policy.[195] 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.[196] Policies of insurance are construed according, to the usages of trade; and 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.[197]

There are usually distinct 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, the policy will attach on every successive cargo taken on board in the course of the voyage, and the amount of property on board to the sum mentioned, remains covered, if on board, 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.[198]

In insurances on freight, the risk usually begins from the time the goods are sent on board, and not before.[199] But if the ship, sailing tinder 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

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of the cargo is on board, and preparations 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.[200]

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 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.[201] In the case of *De Longuemere v. Fire Insurance Company*,[202] the court did not question the decision in *Forbes v. Aspinall*,[203] where a valued policy on freight was 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 most regular and customary track. In the case of an unjustifiable deviation, the insurer is discharged; not indeed from loss occurring previous to the deviation, beat from all subsequent losses. These are elementary principles in the law of insurance, and pervade the institutions of every country on the subject.[204]

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.[205] So strictly has this doctrine been maintained, that where a vessel having liberty in sailing down the Frith of Forth to touch at Leith, she 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.[206]

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, 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,[207] 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 exceptions to the general rule, though

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he could not extend the exception to the case of saving property.[208] The Chief Justice observed, in the case of *Mason v. Ship Blaireau*,[210] that the Supreme 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.

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.

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.[210] 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 specifically named, he must generally go to them in the geographical order in which they occur, though there may be cases in which he need not follow the geographical order.[211] 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.[212]

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, will amount to a deviation.[213] Deviation is always understood to be an after thought, 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.[214] 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 case of *Lavabie v. Wilson*,[215] and that case is reported at large in Emerigon,[216] with a liberal and exalted eulogy (pronounced 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 defense, but not for the purpose of capture.[217] In *Haven v. Hollead*[218] a pretty enlarged discretion, and one carried to the very verge of the law, was confided to the captain as to the best mode of defense, 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,[219] though she may do it if she he not thereby led out of the way;[220] and to cruise for six weeks, means six consecutive weeks, and not at different times.[221]

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.[222] And when the deviation is governed by that

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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.[223]

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 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.

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.[224] It has, however, been held, in one case, after much discussion,[225] and suggested in another, in opposition to the established rule, that the identity of the voyage does not always consist in the identity of the *termini*;[226] 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.[227]

III. **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 entirety lost or defeated, or not worth pursuing, and the projected adventure frustrated. 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 a petit insured against, or if the cargo be so damaged as 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, 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 it prosperous voyage, the insurer, as owner, would reap the profits.[228]

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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 Hamburgh distinguish themselves from all others, by restricting the right of abandonment to the only case of a missing ship.[229]

As soon as the insured is informed of the loss, he ought (after being al lowed a reasonable tinge 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. If the thing insured exists *in specie*, and the insured wishes to go for a total loss, an abandonment is indispensable.[230] 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.[231] 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 the subject.[232] It is only necessary when the loss is constructively total.

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 afterwards recovered at a less expertise.[233] Though the subject may physically exist, yet there may be a technical total loss to the owner, if the thing 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 usual purposes of the voyage, is gone from the control of the owner; as 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.[234]

The case of *Peele v. The Merchant's Insurance Company*,[235] 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, and that there was no general rule that the injure 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 *Mills v. Fletcher*, has been acted upon for half a century, and their doctrine has never been shaken; and the late case of *McIver v. Henderson*[236] left the law on the subject of abandonment exactly where those cases had placed it.

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.[237] But the new commercial code has modified and enlarged the privilege of abandonment. It applies to the cases of capture,

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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.[238] 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, 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. The foreign writers distinguish innavigability from shipwreck, and there has been sortie difficulty as to the true definition of shipwreck.[239] But the right to abandon does not turn upon any definition, and the cases on the subject have been governed by their own peculiar circumstances, connected with the property at the time, and with reference to the general principles and analogies of law.[240]

The English rule is, that an abandonment, though rightfully made, is not absolute, but 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.[241] 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*,[242] and every question as to the principle expressly waived. But in these United States a different rule prevails, 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 divested by subsequent events. The right to abandon is to be tested by the actual facts at the time of the abandonment, and not upon the state of the information received.[243] The opinion of Lord Mansfield, in *Hamilton v. Mendes*, was very destitute of precision and decision on this point, and the American rule is founded on principles of equity, and public convenience. The opposite doctrine, said a great authority,[244] 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.[245]

There is a material difference between an insurance on 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 its 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.[246] 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. The Royal Exchange Assurance*,[247] the ship was forced back by stress of weather, and the cargo found to be so damaged as not to he in a state to send on, and an abandonment was held

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good. There must be an actual total loss, or one in the highest degree probable, to justify an abandonment of the cargo.[248] In *Hudson v. Harrison*,[249] 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. The doctrine of the old cases, that the insured 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 on its own circumstances.

When a case proper for abandonment exists, and it be duly made, 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. He may elect to repair the damage at the expense of the insurer, even if it amounts to the whole value of the ship; and on the other hand, he is not obliged, against his consent, to take the remnants and surplusses of a lost voyage, and claim under the policy only 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. The Merchants' Insurance Company*, which has so fully investigated and explained all the prominent points under this interesting title in the law of insurance.

In *Pole v. Fitzgerald*,[250] 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.[251] After Lord Mansfield came into the Court of K. B., he introduced and established the doctrine which 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,[252] 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,[253] and then in *Hadkinson v. Robinson*[254] and more recently by Lord Ellenborough,[255] 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 from 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.[256] 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 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.[257] 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 and cargo be so injured by perils as to require

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repairs to the extent of more than half her value, the insured may abandon; for if the ship or cargo he damaged so as to diminish their value above half, they are said to be lost. The rule came from the French law, and is to be found in the treatise Le Guidon,[258] where it is applied to the case of goods; and in respect to both ship and cargo, the rule has been incorporated into the French, English, and American jurisprudence.[259] 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 insurances on distinct parcels, there cannot be a separate abandonment of a part of the cargo insured.[260]

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. The expense of the repairs at the port of necessity, 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 mas 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 to more than one half of the value.[261]

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. The Merchants' Insurance Company*.[262] 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.[263] This is also the true rule as to the ship, though there is a greater difficulty in the application.

The value of the ship at the time of the accident, is the true basis of calculation. And with respect to the arbitrary and fluctuating rule as to the allowance of one third new for old, there is no doubt of its application in cases of partial loss; but such a deduction is nut allowed, and does not apply to cases of total loss. The reason of this allowance to the underwriter, of one third of the expense of ripe reparations, is on account of the better condition in which the ship is put by them, than she was when insured; and, therefore, 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. The half value which authorizes an abandonment, is half the sum which the ship, if repaired, would be worth, without any such deduction.[264]

Upon a valid abandonment, the master becomes the agent of the insurer, and the insured is not bound by his subsequent acts unless he adopts them It is the same thing with the consignee of the cargo. 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. In cases of capture he is bound, if a neutral, to remain and assert his claim until

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condemnation, or the recovery be hopeless. 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. 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 masters.[265]

It has been a very difficult and 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, that on an accepted abandonment of the ship, the freight earned previous to the disaster was retained by the owner, and apportioned *pro rata itineris*; and that the freight subsequently to be earned went to the insurer on the ship.[266] In Pennsylvania, the language of the case of *Armroyd v. The Union Insurance Company*,[267] was that the entire freight, in such a case, went on abandonment to the insurer of the ship. This litigious question has now been settled in England, substantially as it was settled in the year 1800, in this state; and in *Case v. Davidson*,[268] 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 subsequently earned as incident to the ship.[269]

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,[270] 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 voyage went with it.[271] 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 seaman and bottomry liens. The new codes[272] 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. The 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.[273]

(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.

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 lost had happened. The other kind of indemnity is, to pay only the first cost of the goods, and the expenses incurred; and this places the insured in the

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situation he was before he undertook the adventure. 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,[274] 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 other commercial countries.

The active 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.[275] In *Gahn v. Broome*,[276] the invoice price was adopted as the most stable and certain evidence of the actual value; but in *Le Roy v. United Insurance Company*,[277] 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*,[278] 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.[279]

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.[280] But this 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 [281]

We have seen, in a former lecture, 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. It is the rule in all foreign countries for the underwriter to be bound by foreign adjustments 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.[282] 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.[283] 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 paid for those items, and all other modes of adjusting particular average, except that founded on the principle of the gross proceeds, are erroneous.[284] In settling losses under the memorandum in the policy, which declares articles free of average under say five percent, if a partial loss to an article he found, on survey and sale, to have been five percent, the insurer pays the damages, and the expenses. If under five percent, he pays 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 percent.[285]

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.[286] This question is left undecided in the English law, but in this country we

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have followed the French rule.[287] 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, and what to the perils of the sea; and, in pursuing this inquiry, the season of the year, the nature of the articles, the description of the vessel, the length of the voyage, and the stowage, are all to be considered.[288]

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.[289] 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, and to allow the deduction of the one third new for old upon the balance. In England, if the injury be sustained, and the repairs made when the vessel is new, 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. But in New York that distinction has not been adopted, and the deduction of one third new for old is made, whether the vessel be new or old.[290]

In consequence of the general permission in the policy for the insured to labor for the recovery of 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.[291] It has been a question 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 held beyond the amount of his subscription, and for which he received a premium, notwithstanding the prior partial and the subsequent total loss.[292]

(3.) *Of the return of premium.*

The premium paid by the insured is in consideration of the risk which the insurer 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 whatever 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 rateable return of premium. If the risk has not been run, whether it he owing to the fault, pleasure or will of the insured, or to any other cause, the premium must he returned, for the consideration for which it was given fails.[293] 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 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 percent by way of indemnity for his trouble and concern in the transaction.[294]

The insurer retains the premium in all cases of actual fraud on the part of the insured, or his agent.[295] So, if the trade be in any respect illegal, the premium cannot be reclaimed.[296] If the voyage be

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divisible, there way 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 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.[297]

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.[298] M. Le Baron Locre, in his commentary upon this article, vindicates it by very ingenious reasoning, which M. Boulay Paty[299] 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.

IV. **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. 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 illustration, not of English authorities 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 every where 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.[300] 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 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.[301]

It is so necessary a contract, that Valin concludes, maritime commerce cannot well be sustained without it, for no prudent shipowner 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,

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civilized and barbarous. Insurers are societies of capitalists, who are called by 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 inter national law, and the customs, products, character and institutions of every country, where tide waters roll, or winds can waft the flag of their nation.[302]

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 Magen'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 Koningsberg, 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 in the courts of justice.[303] 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 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 1971, 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 was 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.[304]

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 displayed 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.[305] Bynkershoek has devoted the fourth book of his *Quaestiones 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 marine insurance. 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

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treatises on insurance was superseded, and their fume and luster eclipsed.

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 every where 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 carried 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 Centerden, 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 practicing 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 difficulty to peruse the testimony which Valin has so frankly borne to the oral 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 XIV, in the shape of the commercial code of France of 1897, there has arisen a host of commentators, such as the Baron Lorcé, Pardessus, Laporte, Delvincourt, Toullier, and Boulay Paty, of various and unequal merit. 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 given 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,[306] 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. But the law of insurance received very little study and cultivation for ages afterwards; and Mr. Park informs that there were not forty cases upon matters of insurance prior to the year 1756, and even those cases were generally loose nisi pries 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

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so rapidly and so extensively cultivated, that he 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. Miller, 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 Miller'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 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 shed upon 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' Treatise on the Law of Insurance, published at Boston, in 1823. This author has very diligently collected and ingrafted into his work 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.

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 practicing lawyer. The work was the result of many years' study, researches 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 time before the publication.[307]

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NOTES

1. Pothier terms it a contract *du Droit des Gens*.

2. Stat. 21 Geo. II. ch. 4.

3. *Henkle v. The Royal Exchange Assurance Company*, 1 Vesey's Rep. 317.

4. 6 Term Rep. 23.

5. 6 Term Rep. 35.

6. 1 Bos. & Pull. 345.

7. *Furtado v. Rodgers*, 3 Bos. & Pull. 191. *Gamba v. La Mesurier*, 4 East's Rep. 407. *Brandon v. Curling*, ibid. 410.

8. Lord Ellenborough, *Kellner v. La Mesurier*, 4 East's Rep. 396. Lord Erskine, *Ex parte Lee*, 13 Vesey's Rep. 64.

9. The ordinances of Barcelona, as early as 1484, declared such insurances void. *Consulat de la Mar. par Boucher*, tom. ii. 717. See also, Le Guidon, ch. 2. sec. 5. in Cleirac, *Us et Coutumes de la Mer*. p. 197. edit. 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 Bynck. Q. J. Pub. lib. i. ch. 21. Emerigon, *des Ass*. tom. i. 128.

10. Valin's Com. tom. ii. 32.

11. 16 Johns. Rep. 438.

12. Emerigon, tom. i. 423. Boulay Paty, tom. iii. 379. *Plantamour v. Staples*, 1 Term Rep. 611, note.

13. Emerigon, tom. i. 173. *Kewley v. Ryan*, 2 H. Blacks. 343. *Henchman v. Offley*, ibid. 345, note.

14. Boulay Paty, tom. iii. 528, 531, tom. iv. 28.

15. Valin's Com. tom. ii. 34. 1 Emerigon, 293, 294. *Graves & Barnewell v. Boston Marine Insurance Co.*, 2 Cranch's Rep. 419. *Dumas v. Jones*, 4 Mass. Rep. 647.

16. *Lawrence v. Sebor*, 2 Caines' Rep. 203.

17. Valin. tom. ii. 34. Boulay Paty, tom. iii. 386.

18. 5 Burr. Rep. 2803, 2804. Park, 31.

19. *Rota Genuae Decisio*, 42. n. 8. Roccus *de Ass*. n. 51. Emerigon, tom.ii. 121.

20. Le Guidon, ch. 12. art. 2. *Ord. de la Mar. tit. des Assurances*, art. 4. Code de Commerce, art. 337. Boulay Paty, *Cours de Droit Com*. tom. iii. 411, 412.

21. Boulay Paty, tom. iii. 388, 389.

22. 2 Magens, 26, 68. Le Guidon, ch. 2. art. 11.

23. *Dalzell v. Mair*, 1 Campb. Rep. 532. *Foy v. Bell*, 3 Taunton Rep. 493.

24. 1 Binney's Rep. 429.

25. 2 Marshall on Ins. by Condy, 800, 803, 805. Phillips on Ins. 11. *Carter v. Union Ins. Co.* 1 Johns. Ch. Rep. 463. *Wakefield v. Martin*, 3 Mass. Rep. 558. *Bell v. Smith*, 5 B. & Cress. Rep. 188.

26. Johnston v. Sutton, Doug. Rep. 254. Parkin v. Dick, 11 East's Rep. 502. The United States v. The Paul Sherman, 1 Peter's Rep. 98. Phillips on Ins. p. 35. 1 Emerigon, 210, ch. 8. sec. 5. And see his opinion in a note to 2 Valin, 130; in which he refers to Straccha *de Assecur. Glossa*, 5. n. 2, 3, 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*. part 4, n. 17.

27. 1 Emerg. 210-215. 2 Valin, 128, note.

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28. *Com. des Assur*. tom. ii. 127.

29. *Traité des Ass*. n. 58.

30. 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*, part 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. I would beg leave, however, respectfully to express my regret, that the many interesting references which are embodied in the text of Roccus, should have been detached and omitted. There is no author who less required a *rasé* edition, than Roccus. His two little treatises, *De Navibus et Naulo* and *De Assecurationibus*, are golden essays, composed with the comprehensive energy and brevity of Tacitus or Montesquieu, and they remind us of the admirable precision of Littleton and Humphreys, in an age when the *biblomania* has become a universal epidemic, and writers are every where, and on every subject, "piling up reluctant quarto upon solid folio," such authors as these I have alluded to, shine with increased luster.

31. *Planche v. Fletcher*, Doug. Rep. 238. *Lever v. Fletcher*, Hil. Vac. 1780, cited Park on Ins. 313, 6th edit.

32. Cases tempt. Hard. 183.

33. 5 Term Rep, 599.

34. Miller on Insurance, 23. Park on Insurance 313. Conde's Marshall on Insurance, vol. i. 60. Chitty on Commercia Law, vol. 1, 182-84.

35. Valin, tom. ii. 127. *Planche v. Fletcher*, Doug. Rep. 251. Roccus, *de Ass*. not. 21. *Gardiner v. Smith*, 1 Johns. Cas. 141. *Richardson v. Maine Insurance Company*, 6 Mass. Rep 102. *Parker v. Jones*, 13 ibid. 173. *Andrews v. Essex Fire and Marine Insurance Company*, 3 Mason's Rep. 18, 20. *Archibald v. Mer. Ins. Company*, 3 Pickering's Rep. 70.

36. In the case of *La Jeune Eugenie*, 2 Mason's Rep. 459, 460, a case that pleads the cause of humanity with admirable eloquence, the rule supporting smuggling voyages is admitted, but pretty plainly condemned.

37. See vol. i. 132. and the authorities there cited, and in addition thereto, see *Seton & Co. v. Low*, 1 Johns. Cas. 1. *Barker v. Blakes*, 9 East's Rep. 283. *Pond v. Smith*, 4 Conn. Rep. 297. *Jubel v. Rhinelander*, 2 Johns. Cas. 120, and affirmed on error, ibid. 487.

38. Phillips on Insurance, p. 39.

39. B. 3, c. 7. sec. 111.

40. 6 Mass. Rep. 102.

41. Parsons, Ch. J., 6 Mass. Rep. 114, 116. In this state, 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 presumption the contraband cargo need not be disclosed. *Seton & Co. v. Low*, 1 Johns. Cas. 1. *Jubel v. Rhinelander*, 2 ibid. 120, 487.

42. 1 Magens on Insurance. 1 R. Lord Mansfield, in 3 Burr. Rep. 1912. *Webster v. De Tastet*, 7 Term Rep. 157.

43. Emerigon tom. i. 236.

44. Boulay Paty, tom. iii. 482, 483.

45. *Ord. de la Mar. du Fret.*, art. 15. Code de Commerce, art. 347. Cleirac, sur le Guidon, ch. 15. art. 1. 1 Emerig. 224. Ord. of Bilboa, ch. 22.

46. *Tonge v. Watts*, Str. Rep. 1251. *Thompson v. Taylor*, 6 Term Rep. 478. *Forbes v. Aspinall*, 13 East's Rep. 323. *Davidson v. Willasey*, 1 Maule & Selw. 313. *Riley v. Hartford Insurance Company*, 2 Conn. Rep. 368. *Livingston v. Columbian Insurance Company*, 3 Johns Rep. 49. *Davy v. Hallett*, 3 Caines' Rep' 16. Mr. Benecke, in his Treatise on the Principles of Indemnity, p. 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 a case of a safe arrival, would be to insure the ship and freight jointly, as one indivisible risk, in the same policy.

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47. *Grant v. Parkinson*, cited in Park on Insurance, p. 354. 6th edit. *Le Cras v. Hughes*, ibid. 355. *Craufurd v. Hunter*, 8 Term Rep. 13. *Barclay v. Cousins*, 2 East's Rep. 544. *Henrickson v. Mayetson*, ibid. 549. note.

48. *Loomis v. Shaw*, 2 Johns. Cas. 3*6. Tom v. Smith, 3 Caine's Rep. 245. Abbott v. Sebor, 3 Johns. Cas. 39.* Fosdick v. Norwich Marine Insurance Company, 3 Day's Rep. 108.

49. Benecke on Indemnity, p. 35.

50. *Traité du Con. de Vente*, n. 5. 6.

51. Roccus. n. 31. 96. Santerna, *de Ass*. and *Spons. Merc. Tract* part 3. n. 40, 41. Straccha, *de Ass. Gloss*, 6. n. 1. Ord. of Hamburg. 2 Magens, 213. Benecke, 35.

52. *Hodgson v. Glover*, 6 East's Rep. 316.

53. 1 Johns Rep. 433.

54. *Abbott v. Sebor*, 3 Johns. Cas. 39.

55. Pothier, *des Ass*, n. 43.

56. Lord Mansfield in *Lewis v. Rucker*, 2 Burr. Rep. 1171. *Shaw v. Felton*, 2 East's Rep. 109. *Feise v. Aguillar*, 3 Taunton's Rep. 506. *Haigh v. De la Cour*, 3 Campb. Rep. 319. *Forbes v. Aspinall*, 13 East's Rep. 323. *Auberi v. Jacobs*, W g' twick's Rip 118. *Wilcott v. Eagle Ins. Co.*, 4 Pickering's Rep. 429. *Marine Ins. Co. v. Hodgson*. 6 Cranch's Rep 206. Condy's Marshall, 290, 291. Phillips on Insurance, 305-313. Valin's Com. tom. ii. 147. Pothier *des Ass*. n. 151, 159. Boulay Paty, tom. 3. 397, 398. M. Devincourt, in his *Institutes de Droit Com.* tom. 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 Com*. tom. 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. The *Le Guidon*, ch. 2. art. 13, and Valin, Com. tom. 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 valuation, and they are generally held to be conclusive, unless shown to be fraudulent. Benecke on Indemnity, 151, 152.

57. Lord Mansfield in *Le Cras v. Hughes*, cited in 2 East's Rep. 113. Sewall. J., 7 Mass. Rep. 370.

58. *Goldsmith v. Gillies*, 4 Taunton's Rep. 803. *Tunno v. Edward*, 12 East's Rep. 488. *Forbes v. Aspinall*, 13 East's Rep. 323. Phillips on Insurance, 312-317. Benecke on Indemnity, p. 152, 153, 157.

59. *Forbes v. Aspinall*, 13 East's Rep. 323.

60. Parker, Ch. J., *Haven v. Gray*, 12 Mass. Rep. 71.

61. Benecke on Indemnity, 146.

62. 19 Geo. II. c. 37.

63. *Walker v. Maitland*, 5 Barnw. & Ald. 171.

64. 3 Bos. & Pull. 75. 5 ibid. 269

65. 8 Term Rep. 13.

66. 3 Term Rep. 693.

67. Cowp. Rep. 37.

68. 1 Carr & Payne, 613.

69. *Juhel v. Church*, 2 Johns. Cas. 333. *Abbott v. Sebor*, 3 ibid. 39. *Clendening v. Church*, 3 Caines' Rep. 141. *Buchanan v. Ocean Insurance Company*, 6 Cowen's Rep. 318.

70. *Bunn v. Riker*, 4 Johns. Rep. 426. *Mount and Wardell v. Waites*, 7 ibid. 434. *Campbell v. Richardson*, 10 ibid. 406.

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71. *Amory v. Gilman*, 2 Mass. Rep. 1. *Babcock v. Thompson*, 3 Pickering's Rep 446. *Pritchett v. Ins. Co. N. A.*, 3 Yeates' Rep. 464. *Craig v. Murgatroyd*, 4 ibid. 168.

72. *Ord. de la Mar*. liv. 3. tit. 6. Des Ass. art. 22. 1 Emerig. 264,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 Assecut*. n. 88. He 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. Deciones Rotae Genuaæ*, 55. n. 9.

73. *Hastie v. De Peyster*, 3 Caine's Rep. 190. Merry v. Prince, 2 Mass. Rep. 176.

74. Pothier, h. t. n. 153. Emerigon, tom. i. 247. 250.

75. *Hastie v. De Peyster, ub. sup*.

76. *Ord. de la Mar. des Assurances*, art. 20. Code de Commerce, art. 342.

77. Valin. h. t. Pothier, h. t. n. 35. 1 Emerig. 249. 3 Boulay Paty, 432.

78. Condy's Marshall, p. 145.

79. Santerna, *de Ass*. pars 3. n. 55, 56, 57, 58. Straccha, *de Ass*. introduc. n. 48, 49, who cites and adopts the opinion of Saterna; 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, tom. i. 253.

80. Pothier, *Traité des Ass*. No. 33. Valin. tom. ii, 66. *Le Guidon*, ch. 2. art. 20. 1 Emerig. 259. Boulay Paty, tom. iii. 440, 442.

81. *Rogers v. Davis*, and *Davis v. Gilbert*, decided at N P. by Lord Mansfield. Park on Ins. 374, 375, 6th edit. *Lucan v. Jeff. Ins. Co.*, 6 Cowen's Rep. 635.

82. *Newby v. Reed*, 1 Blacks. Rep. 416.

83. 4 Dallas' Rep. 349, App. p. 32.

84. Code de Commerce, art. 359.

85. Malyne's *Lex Mercatoria*, 112. *The African Company v. Bull*, 1 Show. Rep. 132. Gilbert's Rep. 232.

86. *Brown v. Hartford Insurance Company*, 3 Day's Rep. 58. The same point was afterwards so ruled in *Potter v. Marine Insurance Company*, 2 Mason's Rep. 475.

87. *Columbian Insurance Company v. Lynch*, 11 Johns. Rep. 233. *Rogers v. Davis*, Park on Insurance, 374.

88. *Ord. de la Mar. des Ass*. art. 25. 2 Valin, 73, 74. Code de Commerce, n. 360. Pothier, h. t. n. 77.

89. *Carter v. Boehm*, 3 Burr. Rep. 1905. *Pawson v. Watson*, Cowp. Rep. 755. *Fitzherbert v. Mather*, 1 Term Rep. 12. *Ratcliffe v. Shoolbreed*, Park on Insurance, 249. 6th edit. *MacDowall v. Fraser*, Doug. Rep. 260. *Shirley v. Wilkinson*, Doug. Rep. 293, n. *Bridges v. Hunter*, 1 Maule & Selw. 15.

90. Marshall, in his Law of Insurance, p. 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's Rep. 696, and recently by the Supreme Court of the United States in *McLanahan v. The Universal Insurance Company*, 1 Peters' Rep. 170.

91. Lord Mansfield, Cowp. Rep. 788. *Baker v. Fletcher*, Doug. Rep. 305. *Hubbard v. Glover*, 3 Camp. Rep. 312. *Bowden v. Vaughan*, 10 East's Rep. 415. *Rice v. New England Marine Insurance Company*, 4 Pickering's Rep. 439.

92. *Barber v. Fletcher, ub. sup. Stackpole v. Simon*, Park on Insurance, 582, 16th edit.

93. *Brine v. Featherstone*, 4 Taunt. Rep. 869. Lord Ellenborough, *Forrester v. Pigou*. 1 Maule & Selw. 9. *Bell v. Carstairs*, 3 Campb. Rep. 543.

94. *Elting v. Scott*, 2 Johns. Rep. 157.

95. *Durell v. Bederley*, 1 Holt's N P. Rep. 283.

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96. 12 Johns. Rep. 513.

97. *McLanahan v. The Universal Insurance Co.*, 1 Peters' Rep. 170.

98. *Dacosta v. Scandrett*, 2 P. Wms. 170. *Seaman v. Fonereau*, Str. 1183.

99. *Lynch v. Hamilton*, 3 Taunton's Rep. 37. *Beckwaite v. Walgrove*, cited ibid.

100. *Freeland v. Glover*, 6 Esp. N. P. 14. 7 East's Rep. 457. S. C. *Kemble v. Bowne*, 1 Caines' Rep. 75. *Valiance v. Dewar*, l Campb. N. P. Rep. 503.

101. *Planche v. Fletcher*, Doug. Rep. 251. *Calbraith v. Gracie*, 1 Condy's Marshall, 388. a. note. *Delonguemere v. N.Y. Firemen Insurance Co.*, 10 Johns. Rep. 120. *Kingston v. Knibbs*, 1 Campb. N. P. Rep. 503. n. *Vallance v. Dewar*, ibid. 503. *Stewart v. Bell*, 5 Barnw. & Ald. 238. *Seton v. Low*, 1 Johns. Cas. 1.

102. *Ely v. Ballet*, 2 Caines' Rep. 57. *Kohue v. Insurance Co. N. A.*, 6 Binney's Rep. 219. *Hoyt v. Gilman*, 8 Mass. Rep. 336.

103. *Shoolbred v. Nutt*, Park, 300. 6th edit. *Haywood v. Rodgers*, 4 East's Rep. 590. *Walden v. N.Y. Fireman Insurance Co.*, 12 Johns. Rep. 128.

104. *Pawson v. Watson*, Cowp. Rep. 785. *De Hahn v. Hartley*, l Term Rep. 343. *Suckley v. Delafield*, 2 Caines' Rep. 222.

105. Emerigon, tom. ii. 148. Valin's Com, tom. ii. 95. *Grieve v. Young*, Miller on Insurance, 65. *Watson v. Delafield*, 2 Caines' Rep. 224. 2 Johns. Rep. 526. S. C. *McLanahan v. Universal Insurance Co.*, 1 Peters' Rep. 170.

106. *Gen. Int. Insurance Co. v. Ruggles*, 12 Wheat. Rep. 408.

107. Emerigon, tom. i. 69.

108. Code de Commerce, art. 348.

109. Pardessus, tom. iii. 330. Boulay Paty, tom. iii. 510. The latter writer cites several decisions from the *Journal de Jurisprudence Commerciale et Maritime de Marseille*, made within the last ten 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. Ibid. p. 514-527.

110. *Law v. Hollingworth*, 7 Term Rep. 160. *Wilkie v. Geddes*, 3 Dow's Rep. 57. *Silva v. Low*, 1 Johns. Cas. 134. *Brown v. Girard*, 4Yeate's Rep. 115.

111. *Peters v. Phoenix Insurance Company*, 3 Serg. & Rawle, 25.

112. The cases are well collected in Phillips on Insurance, p. 113-119.

113. *Annen v. Woodman*, 3 Taunt. Rep. 299. Sewall, J., 3 Mass. Rep. 347.

114. *Annen v. Woodman*, 3 Taunt. Rep. 299. *Bond v. Nutt*, Cowp. Rep. 601. *Pawson v. Watson*, ibid 785. *Dehahn v. Hartley*, 1 Term Rep. 343. *Worsley v. Wood*, 6 Term Rep. 710. *Fowler V. Ætna Fire Insurance Company*, 6 Cowen's Rep. 673.

115. 2 Barnw. & Cress. 320.

116. *McLanahan v. The Universal Insurance Company*, 1 Peters' Rep. 170.

117. *Blagge v. N.Y. Insurance Company*, 1 Caines' Rep. 549. *Baring v. Royal Ex. Ins. Co.*, 5 East's Rep. 99. *Carrere v. Union Ins. Co.*, Cond. Marshall, 406. a. note. *Calbraith v. Gracie*, ibid. *Phoenix Insurance Company v. Pratt*, 2 Binn. Rep. 308. *Wilcocks v. Union Insurance Company*, ibid. 574. *Coolidge v. N.Y. Firem. Insurance Company*, 14 Johns, Rep. 308.

118. See vol. i. 144.

119. See vol. ii. 102.

120. Santerna *de Ass*. pars. 3. n. 72. *Ord. de la Mar*. tit. Ass: art. 20. Code, art. 350. Boulay Paty, tom. iv. 9.

121. *Goix v. Knox*, 1 Johns. Gas. 337. *Simeon v. Bazett*, 2 Maule & Selw. 94. Pothier, *Traité de Ass*. No. 65.

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122. *Page v. Thompson*, cited in Park on Insurance, 109. n. 6th edit. *Odlin v. Penn. Ins. Co.*, Condy's Marshall, p. 508. a. note. *Delano v. Bedford Insurance Company*, 10 Mass. Rep. 347. *McBride v. Marine Insurance Company*, 5 Johns. Rep. 299.

123. Code de Com, art. 369. 1 Emerigon, 541. Pothier, h. t. No. 59.

124. *Conway v. Gray*, 10 East's Rep. 536. *Mennett v. Bonham*, 15East's Rep. 477. *Flindt v. Scott*, ibid. 525.

125. *Simeon v. Bazett*, 2 Maule & Selw. 94.

126. *Bazett v. Meyer*, 5 Taunt. Rep. 824.

127. *Francis v. Ocean Insurance Company*, 6 Cowen's Rep. 104.

128. *Hadkinson v. Robinson*, 3 Bos. & Pull., 388. *Lubback v. Rowcroft*, 5 Esp. N.P. Rep. 50. *Parkin v. Tunno*, 11 East's Rep. 22. *Richardson v. Maine Insurance Co.*, 6 Mass. Rep. 102.

129. *Faudel v. Phoenix Insurance Co.* 4 Serg. & Rawle, 29. Emerigon, tom. i. 542. *Symonds v. Union Insurance Co.*, 4 Dallas' Rep. 417. *Schmidt v. Union Insurance Co.*, 1 Johns. Rep. 249. *Craig v. Union Insurance Co.*. 6 Johns. Rep. 226. *Barker v. Blakes*, 9 East's Rep. 283. *Olivera v. The Union Insurance Co.*, 3 Wheat. Rep. 183. *Saltus v. Union Insurance Co.*, 15 Johns Rep. 523. *Thompson v. Read*, 12 Serg. & Rawle, 440.

130. 1 Emerigon, 507-512. 6 Johns. Rep 250.

131. *Le Guidon*, ch. 16. art. 5. Ord. of Wisbuy, art. 66. *Ord. de la Mar*. tit. Assurances, art. 10. Valin, tom. ii. 54. Pothier, h. t. n. 27. Emerigon, tom. i. 198.

132. *Cours de Droit Com*. tom. iii. 366, 368, 500.

133. *Inst. de Droit Com. Francois*, tom. ii. 345.

134. *Esprit du Code de Commerce*, tom. iv. 75.

135. tom. ii. 303.

136. Boulay Paty, tom. iii 446-506, inveighs vehemently against policies upon human life, as being gambling contracts of the most pernicious kind, and which ought to be left to their English neighbors. *Istae conditiones sunt plenae tristissimi eventus, et possunt invitare ad delinquendum*. Grivel, dec. 57. n. 28. Nothing can appear to an English or American lawyer more idle than the alarm of the French jurists, or more harmless than an insurance upon life, and which operates kindly and charitably in favor of dependent families. But though we do not adopt the logic of M. Boulay Paty, and do absolutely disclaim his construction of the language of the code, we cannot but admire the spirit with which he arraigns the legality of the royal ordinance, as being a violation of the constitutional charter under the empire of which they live. He denies the validity of the ordinance, on a ground that would be conclusive, if it were applicable. viz.; that a law cannot be repealed but by the concurrence of the three legislative estates of the realm; and Frenchmen, he says, have the happiness to live under a free and limited constitution. This is a sample of the just and temperate spirit of freedom now prevalent in continental Europe; and the observations do honor to the independent mind of the learned professor, who represents himself to be *Conseiller de sa Majesté a la Cour Royale de Rennes*.

137. 3 Burr. Rep, 1551. *Ord. de la Mar*. tit. Assurances, art. 47. Code de Commerce, art. 408.

138. Cited 3 Burr Rep. 1553.

139. 3 Burr. Rep. 1550.

140. Park on Ins. 160.

141. Park on Ins. 151. 25 Geo. III.

142. 7 Term Rep. 210.

143. 3 Bos. & Pull. 474.

144. 5 Maule & Selw. 447.

145. 1 Caines' Rep 196.

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146. *Neilson v. Columbia Insurance Company*, 3 Caines' Rep. 108. *Saltus v. Ocean Insurance Company*, 14 Johns. Rep. 138. *Marcardier v. Chesapeake Insurance Company*, 8 Cranch's Rep. 39. *Morean v. The U. S. Insurance Company*, 1 Wheat. Rep. 219.

147. 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.

148. *Manning v. Newnham*, Condy's Marshall, 586. *Cologan v. London Assurance Company*, 5 Maule & Selw. 447. *Morean v. U. S. Insurance Company*, 1 Wheat. Rep. 219. *Maggrath v. Church*, Caines' Rep. 214, and see Phillips on Insurance, p. 489, where all the cases on this, equally as on all other subjects which he discusses, are collected and stated with extraordinary diligence and accuracy, considering the complicated nature, and infinite variety, of the questions and decisions that at this day constitute the law of insurance. The French code, art. 409, exempts the insurer, under the clause free from average, from all partial losses, except in cases which authorize an abandonment; and in such cases, the insured has the option between the abandonment, and the claim for average loss.

149. 15 East's Rep. 559.

150. 5 Maule & Selw. 447.

151. 7 Taunt. Rep. 154.

152. 7 Johns. Rep. 527.

153. Emerig. 662-670.

154. Targa, ch. 52. not. 18. Casaregis, Disc. 47. n. 10.

155. 1 Wheat. Rep. 219, 227, note.

156. *Ord. de la Mar*. tit. Des Ass.,art. 31. Code de Commerce, art. 356.

157. Pothier, h. t. No. 61. *Gregson v. Gilbert*, Park on Insurance, 83.

158. In Straccha, Glossa. 22 *casus fortuitus* is defined to be *accidens. quod per custodiam, curam et diligentiam mentis humanae evitari non potest.* Santerna, de Ass. pars 3 n. 65. adds, *ubi diligentissimus praecavisset, et providisset non dicitur proprie casus fortuitus.*

159. Valin, tom. ii. 81. Pothier, *des Ass*. No. 66. 1 Emerigon, 390. *Rhol v. Parr*, 1 Esp. N.P. Rep. 444. *Martin v. Salem Marine Insurance Company*, 2 Mass. Rep. 420. *Boyd v. Dubois*, 3 Cambp. N. P. Rep. 133. Mr. Phillips, in his Treatise on Insurance, p. 252, 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 insurers may reasonably be charged.

160. *Dale v. Hall*, 1 Wils. Rep. 281. *Hunter v. Potts*, 4 Campb. N.P. 203. *Aymar v. Castor*, 6 Cowen's Rep. 266. Coccas, de Ass. n. 49. Cleirac, *sur le Guidon*, ch. 5. art. 8. and Emerigon, tom. 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 held for an injury by rats; and the only case that I have met with directly to the contrary, is *Garrigues v. Coxe*, 1 Binn. Rep. 592. The opinion of Santerna, *De Ass*. pars 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.

161. *Green v. Brown*, Str. Rep. 1199. *Brown v. Neilson*, 1 Caines' Rep. 525. *Gordon v. Bowne*, 2 Johns. Rep. 150. *Houstman v. Thornton*, 1 Holt's N P. Rep. 242.

162. Code de Commerce, art. 375.

163. 1 Magens, 89, 90.

164. Boulay Paty, tom. iv. 246.

165. *Walker v. Maitland*, 5 Barnw. & Ald. 171.

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166. *Green Elmslie*, Peake's N. P. Rep. 212.

167. *Livie v. Jansen*, 12 East's Rep. 648.

168. *Schieffelin v. N.Y. Ins. Co.*, 9 Johns. Rep. 27.

169. *Walden v. Le Roy*, 2 Caines' Rep. 263. *Barker v. Phoenix Ins. Co.*, 3 Johns. Rep 307. *Padelford v. Bardman*, 4 Mass. Rep. 548.

170. *supra*, p. 188.

171. See Phillips' Treatise on Insurance, p. 254-259. 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. Saterna, *de Ass*. and Spons, pars 3. n. 61-65. Straccha, Glossa. 22, *passim*.

172. *Nesbit v. Lushington*, 4 Term Rep. 783. *Brown v. Smith*, 1 Dow's Rep. 349. *Bondrett v. Hentigg*, 1 Holt's N.P. Rep. 149.

173. Boulay Paty, tom. iv. 35.

174. Boulay Paty, tom. iv. 238.

175. *Nesbit v. Lushington, ubi sup*. Ord. of Hamburg, 2 Magens, 218.

176. Pothier, h. t. D. 53. Targa, ch. 56. Emerigon, tom. i. 434. *Gordon v. Rimmington*, 1 Campb. N.P. Rep. 123.

177. *Busk v. The Royal Exchange Assurance Company*, 2 Barnw. & Ald. 73.

178. 13 Johns. Rep. 451.

179. Boulay Paty, tom. iv. 23.

180. We are told by Roccus, *De Ass.* n. 89, that barratry is expressly excepted in the policies at Naples

181. *Stamma v. Brown*, Str. Rep. 1173. V*allejo v. Wheeler*, Cowp. Rep. 143. *Nutt v. Bourdieu*, 1 Term Rep. 323. *Haovelck v. Hancill*, 3 Term Rep. 277. *Moss v. Byrom*, 6 Term Rep. 379. *Phyn v. Royal Exchange Assurance Company*, 7 Term Rep. 505. *Earll v. Rowcroft*, 8 East's Rep. 126. *Hood v. Nesbit*, 2 Dallas' Rep. 37. *Kendricke v. Delafield*, 2 Caines' Rep. 67. *Cook v. Com Ins. Co.*, 11 Johns. Rep. 40. *Grim v. The Phoenix Insurance Company*, 13 Johns. Rep. 451. *Wilcocks v. Union Insurance Company*, 2 Binn. Rep. 574.

182. *Dixon v. Reid*, 5 Barnw. & Ald. 597.

183. *Lockyer v. Offley*, 1 Term Rep. 252.

184. 8 Mass. Rep. 308

185. 5 Barwn. & Ald. 171.

186. 3 Mason's Rep. 26.

187. *Garrigues v. Coxe*, 1 Binn. Rep. 592. In *Treadwell v. the Union Insurance Company*, 6 Cowen's Rep. 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 line 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. That was giving too narrow a construction to the words *at and from*; for though it has been justly held, 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. N. P. Rep. 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.

188. *Motteaux v. The London Assurance Company*, 1 Atk. Rep. 548. Condy's Marshall, 261. 2 Caines' Cases in Error, 172. In *Parmeter v. Cousins*, 2 Campb. N. P. Rep. 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

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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 moored twenty-four hours. Lord Ellenborough requires the vessel to be at the place in good safety, whether it takes place within, or not until above twenty-four hours after she has arrived and anchored.

189. *Lockyer v. Offley*, 1 Term Rep. 252. *Meretony v. Dunlope*, cited in 1 Term Rep. 260. In *Peters v. The Phenix Insurance Company*, 3 Serg. & Rawle, 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 50 percent 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.

190. *Waples v. Eames*, Str. 1243.

191. *Leigh v. Mather*, 1 Esp. N.P. Rep. 412.

192. 2 Emerigon, 72.

193. *Salvador v. Hopkins*, 3 Burr. Rep. 1707. *Gregory v. Christie*, cited in Condy's Marshall, 273. *Farquharson v. Hunter*, Park on Insurance, 67.

194. Boulay Paty, tom. iii. 419. Code de Commerce, art. 328

195. Boulay Paty. tom. iii. 427.

196. *Tiernay v. Etherington*, cited in 1 Burr. Rep. 348. *Gardinier v. Smith*, 1 Johns. Cas. 141.

197. *Rucker v. London Assurance Co.*, cited 2 Bos. & Pull. 432, *notis*. *Hurry v. Royal Exchange Assurance Co.*, 2 Bos. & Pull. 430. *Matthie v. Potts*, 3 ibid. 23. *Strong v. Natally*, 4 ibid. 16.

198. *Columbian Ins. Co. v. Catlett*, 12 Wheat. Rep. 383.

199. *Tonge v. Watts*, Str. Rep. 1251.

200. *Thompson v. Taylor*, 6 Term Rep. 478. *Mackenzie v. Shedden*, 2 Camp. N.P. Rep. 431. *Horncastle v. Stuart*, 7 East's Rep. 400. *Truscott v. Christie*, 2 Brod. & Bing. 320. *Riley v. Hartford Ins. Co.*, 2 Conn. Rep. 373. *Hart v. Delaware Ins Co.*, Condy's.Marshall, 281. n

201. *Montgomery v. Eggington*, 3 Term Rep. 362. *Davidson v. Willasey*, 1 Maule & Selw. 313. *Livingston v. Columbian Ins. Co.*, 3 Johns. Rep. 49. *De Longuemere v. The Phoenix Ins. Co.*, Johns. Rep. 127. *Same v. Fire Ins. Co.*, 10 ibid. 201.

202. 10 Johns. Rep. 201.

203. 13 East's Rep. 323

204. Roccus, *de Ass*. n. 20. 52. Emerigon, tom. ii 28, 59, 60. 9 Mass. Rep. 447. Condy's Marshall, p. 184, 185. Phillips on Insurance, p. 161.

205. *Fox v. Black*, and *Townson v. Guyon*, cited in Beawes' vol. i. 306, 9 Mass. Rep. 449.

206. *Elliott v. Wilson*, 7 Bro. P. C. 459.

207. 6 East's Rep. 54.

208. 1 Peters' Adm. Rep. 40, 64. 2 ibid. 378.

209. 2 Cranch's Rep. 257, note.

210. *Raine v. Bell*, 9 East's Rep. 195. *Cormack v. Gladstone*, 11 ibid. 347. *Laroche v. Oswin*, 12 ibid. 131. *Urquhart v. Barnard*, 1 Taunt Rep. 450. *Kane v. Columbian Insurance Company*, 2 Johns. Rep 264. *Hughes v. Union Insurance Company*, 3 Wheat. Rep. 159. *Thorndike v. Boardman*, 4 Pickering's Rep. 471. 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 aliment for the policy, and pursues the voyage, the policy attaches on the *residuum* of the cargo. Emerigon, tom. ii. c. 13. sec. 8. Boulay Paty, *Cours de Droit Com*. t. 4. 140-147.

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211. *Beatson v. Haworth*, 6 Term Rep. 531. *Marsden v. Reid*, 3 East's Rep. 572. *Clason v. Simmonds*, cited in 6 Term Rep. 533. *Kane v. Col. Ins. Co.*, 2 Johns. Rep. 264. *Metcalf v. Parry*, 4 Campb. N. P.Rep. 123.

212. Straccha, Gloss. 14. Casaregis, Disc. 67. n. 23. and Disc. 134. Valin, tom. ii. 78, 79. Emerigon, tom. ii. ch. 13. sec. 6. and 8, *passim*. *Gardiner v. Senhouse*, 3 Taunt. Rep. 16. *Langhorn v. Allnutt*, 4 ibid. 511. *Hammond v. Reid*, 4 Barnw. & Ald. 72. *Lolly v. Whitmore*, 5 ibid. 45. *Bottomley v. Bovill*, 5 Barnw. & Cress. 210.

213. *Jarratt v. Ward*, 1 Campb.N P. 263. Smith v. Surridge, 4 Esp. N.P. Rep. 25. *Oliver v. Maryland Insurance Company*, 7 Cranch's Rep. 487. 9 Mass. Rep. 447. *Earle v. Shaw*, 1 Johns. Cas. 317.

214. *Forster v. Wilmer*, Str. Rep. 1249. Lord Mansfield, in Doug. Rep. 18, 365. 3 Cranch's Rep. 357. 7 Mass. Rep. 352.

215. Doug Rep. 284.

216. *Traité des Ass*. tom. ii. 62.

217. *Parr v. Anderson*, 6 East's Rep. 202.

218. 2 Mason's Rep. 230.

219. *Lawrence v. Sidebotham*, 6 East's Rep. 45.

220. *Ward v. Wood*, 13 Mass. Rep. 539.

221. *Syers v. Bridge*, Doug. Rep. 509.

222. *Scott v. Thompson*, 4 Bos. & Pull. 181. *Robinson v. Marine Insurance Company*, 2 Johns. Rep. 89.

223. Condy's Marshall, 203. b. to 213. Phillips on Insurance, ch. 12. p. 179-224. 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.

224. *Wooldridge v. Boydell*, Doug. Rep. 16. *Kewley v. Ryan*, 2 Ft. Blacks. Rep. 343. *Middlewood v. Blakes*, 7 Term Rep. 162. *Silva v. Low*, 1 Johns. Cas. 184. *Henshaw v. The Marine Insurance Company*, 2 Caines' Rep. 273. *Marine Insurance Company v. Tucker*, 5 Cranch's Rep. 357. Boulay Paty, tom. iv. p. 56, 57.

225. *Lawrence v. Ocean Insurance Company*, 11 Johns. Rep. 241. S. C. 14 ibid. 46.

226. Johnson, J. in 3 Cranch's Rep. 385.

227. 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 insured is known by its two extremes, or the *terminus a quo*, and the *terminus ad quem*. Casaregis, Disc. 67 e. 5 and 31. Boulay Paty, tom. iii. 416, 417.

228. *Gross v. Withers*, 2 Burr. Rep. 683. *Hamilton v. Mendes*, ibid. 1198. *Mills v. Fletcher*, Doug. Rep. 231. *Manning v. Newnham*, Parks on Insurance, 221. *Cazalet v. St. Barbe*, 1 Term Rep. 187. Mr. Benecke justly observes, that the principles in some of these cases by 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.

229. Ord. of Hamburgh, tit. 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.

230. *Mitchell v. Edie*, 1 Term Rep. 608. *Martin v. Crokatt*, 14 East's Rep. 465. *Hunt v. Royal Exchange Insurance Co.*, 5 Maule & Selw. 47.

231. *Hudson v. Harrison*, 3 Brod. & Bing. 97.

232. This was also the opinion of Casaregis, Disc. 3. n. 23. Disc. 70. n. 5. and 33.

233. *Fontaine v. Phenix Insurance Co.*, 11 Johns. Rep. 293. *Robert son v. Caruthers*, 2 Starkie's N. P. Rep. 571.

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234. Emerigon, tom. ii. 194-197. Pothier, *des Ass*. n. 131, 138. *Gardiner v. Smith*, 1 Johns. Cas. 141. *Abbott v. Broome*, 1 Caine's Rep. 292. *Union Insurance Co. v. Robinson*, 2 Caine's Rep. 280. *Lee v. Boardman*, 3 Mass. Rep. 238. *Marine Insurance Co. v. Tucker*, 3 Cranch's Rep. 357. *Ches. Insurance Co. v. Stark*, 6 Cranch's Rep. 268. *Peele v. Merchant's Insurance Co.*, 3 Mason's Rep. 27.

235. 3 Mason's Rep. 27.

236. 4 Maule & Selw. 576.

237. *Ord. de la Mar*. 46.

238. Code de Commerce, art 369.

239. 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, tom. iv. p. 12-14, 230, 231, and *Ord. de la Mar*. h. t. art. 46, which distinguishes between shipwreck, wreck, and stranding.

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, ch. 54. p. 239, and ch. 60. p. 256. Emerigon, tom. i. 591-598.) Innavigability, when duly established, 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, tom. i. 577.

240. *Wood v. L. and K. Ins. Co.*, 6 Mass. Rep. 479. *Peele v. Merchants' Ins. Co.*, 3 Mason's Rep. 42, 43, 44.

241. *Bainbridge v. Neilson*, 10 East's Rep. 329. *Patterson v. Ritchie*, 4 Maule & Selw. 394.

242. 2 Dow's Rep. 474.

243. *Church v. Bedient*, 1 Caines' Cases in Error, 21. *Depau v. Ocean Ins. Co.*, 5 Cowen's Rep. 63. *Dutilh v. Gatliff*, 4 Dallas' Rep. 446. *Rhinelander v. Ins. Co. of Pennsylvania*, 4 Cranch's Rep. 29. *Marshall v. Delaware Ins. Co.*, ibid. 202. *Lee v. Boardman*, 3 Mass. Rep. 238. *Wood v. L. and K. Ins. Co.*, 6 ibid. 479. *Adams v. Delaware Ins. Co.*, 3 Binn. Rep. 287. *Peele v. The Merchants' Ins. Co.*, 3 Mason's Rep. 27.

244. Story, J., 3 Mason's Rep. 37.

245. *Smith v. Robertson*, 2 Dow's Rep. 474. In the opinion in *Peele v. The Merchants' Insurance Company*, 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, on the place referred to, makes me doubt whether he merited the eulogy in respect to that point; for he says, that though there should be information of a loss justifying the 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 Com. tom. ii. 144. or lib. 3. tit. 6. art 60. That opinion of Valin I take to be heresy in American law, and it is pointedly condemned by Emerigon, tom. i. 195.

246. *Anderson v. Wallis*, 2 Maule & Selw. 240. Everth v. Smith, ibid. 278.

247. 6 Taunt. Rep. 383.

248. *Anderson v. Wallis*, 2 Maule & Selw. 240. *Hunt v. The Royal Exchange Assurance Company*, 5 Maule & Selw. 47. *Wilson v. The Royal Exchange Assurance Company*, 2 Campb. N. P. Rep. 624.

249. 3 Brod. & Bing, 97.

250. Wilies' Rep. 641

251. 5 Bro. P. C. 137-142.

252. 1 Dow's Rep. 359. 2 Dow's Rep. 477.

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253. 1 Johns. Cas. 309.

254. 3 Bos. & Pull. 388.

255. 2 Maule & Selw. 293.

256. *Alexander v. Baltimore Insurance Company*, 4 Cranch's Rep. 370. See also, 1 Mason's Rep. 343.

257. Condy's Marshall, 585, 586.

258. Ch. 7. art. 1 and 9.

259. Valin, Com. tom. ii. 101. Pothier, *des Ass*. n. 121. *Gross v. Withers*, 2 Burr. Rep. 683. *Gardiner v. Smith*, 1 Johns Cas. 141. *Dickey v. N.Y. Ins. Co.*, 4 Cowen's Rep. 222. *Marcardia v. The Chesapeake Ins. Co.*, 9 Cranch's Rep. 39. *Ludlow v. Columbian Ins. Co.*, 1 Johns. Rep. 335. *Peters v. Phenix Ins. Co.*, 3 Serg. & Rawle, 25. *Wood v. L. and K. Ins. Co.*, 6 Mass. Rep. 479. Story, J., 3 Mason's Rep. 69.

260. *Guerlain v. The Columb. Ins. Co.*, 7 Johns. Rep. 527. *Deidericks v. Com. Ins. Co.*, 10 ibid 234. Condy's Marshall, 600. Phillips on Insurance, 434, 435. Valin, tom. ii. 108. Pothier, h. t. No. 121, 131, 132. Emerig. tom. ii. 214. *Le Guidon*, ch. 1. sec 8, 9.

261. *Center v. American Ins. Co.*, 7 Cowen's Rep. 564.

262. 3.Mason's Rip. 70-78.

263. *Johnson v. Shedden*, 2 East's Rep. 681.

264. *Dupuy v. The U. Ins. Co.*, 3 Johns. Cas. 182. Contra, *Smith v. Bell*, 2 Caines' Cases in Error, 153. *Coolidge v. Gloucester Ins. Co.*, 16 Mass. Rep. 341. *Peele v. Marine Ins. Co.*, 3 Mason's Rep. 76, 77. 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*. tom. iv. 252.

265. *Saidler & Craig v. Church*, cited in 2 Caines' Rep. 289. *United Ins. Co. v. Robinson*, 2 Caines' Rep. 280. *Jumel v. Marine Ins. Co.*, 7 Johns. Rep. 412. *Willard v. Dorr*, 3 Mason's Rep. 161. Boulay Paty, tom. iv. 309,310.

266. *United Insurance Co. v. Lenox*, 1 Johns. Cas. 377. 2 Ibid. 443. *Davy v. Hallet*, 3 Caines' Rep. 20.

267. 3 Binney's Rep. 437.

268. 5 Maule & Selw. 79. S. C. affirmed on error, 2 Brod. & Bing. 379.

269. Mr. Benecke, Principles of Indemnity, p. 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 The United Insurance Co.*, in this state, has 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 word, ransacked the local laws and ordinances of most of the petty as well as great commercial states and cities of Europe. 1 should think it was almost time for Englishmen to find out that there is, in point of fact, a very cultivated system of commercial jurisprudence actually existing and in operation on this side of the Atlantic.

270. Com. liv. 3. tit. 6. *des Assurances*, art. 15.

271. Emerigon, tom. ii. 217-227.

272. Code de Commerce, art. 386.

273. Boulay Paty, tom. iv. 397-417.

274. Treatise on the Principles of Indemnity in Marine Insurance, ch. 1.

275. Snell v. Delaware Ins. Co., 4 Dallas' Rep. 430. Carson v. Marine Ins. Co., Wharton's Dig. 340. h. t. n. 205.

276. 1 Johns. Cas. 120.

277. 7 Johns. Rep. 343.

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278. 12 East's Rep. 639.

279. This is admitted in the French law to afford all the indemnity that was stipulated by the policy. Boulay Paty, tom. iv. p.41, 42.

280. *Lewis v. Rucker*, 2 Burr. Rep. 1167. *Johnson v. Sheddon*, 2 East's Rep. 581. *Usher v. Noble*, 12 East's Rep. 639. Benecke on Indemnity, 426.

281. Benecke on Indemnity, 17-26.

282. Molloy, b. 2. ch. 6 sec. 16. 7 Mass. Rep. 370. 5 Cowen's Rep. 63. Benecke on Indemnity, 331.

283. 1 Emerigon, 659. *Ord. de la Mar.* tit. *Du Jet.* art. 6.

284. Benecke on Indemnity, p. 426, 427.

285. Ibid, p. 436. Mr. Benecke, in ch. 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.

286. Emerigon, tom. i. 429-433. Code de Commerce, No. 391. 393.

287. *Mumford v. The Commercial Ins. Co.*, 5 Johns. Rep. 262. Searle v. Scovell, 4 Johns. Ch. Rep. 218. *Dodge v. The Marine Ins. Co.*, 17 Mass. Rep. 471.

288. Phillips on Insurance, p. 246, 247. Miller on Insurance, 132. 2Valin, 14, 80, 83. Emerigon, vol. i. 391.

289. *Dow v. Smith*, 1 Caines' Rep. 32. *Shepherd v. Chewter*, 1 Campb.N. P. Rep. 274. *Steel v. Lacy*, 3 Taunt. Rep. 286.

290. *Dunham v. Com. Ins. Co.*, 11 Johns. Rep. 315. *Byrnes v. National Ins. Co.*, 1 Cowens' Rep 265.

291 1 Caines' Rep. 284. 450. 7 Johns. Rep. 62. 424, 433. 4 Taunt. Rep. 367. 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, Bouen, Nantes and Bordeaux; and there is the same clause in the formula given by Loccenius. In the form used at Marseilles there is no such clause, 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 Emerigon, 202-213. Valin's Com. tom. ii. 99. Boulay Paty, tom. iv. 312-313.

292. *Kermet v. la Compagnie Royal d'Assurance*, reported in the *Journal de Cassation*, 1123., and quoted at large in Boulay Paty, tom. iv. 519-532. And see also ibid. p. 272-276.

293. *Stevenson v. Snow*, 3 Burr. Rep. 1237. *Tyrie v. Fletcher*, Cowp. 666. 8 Term Rep. 156, arg. *Holmes v. U. Ins. Co.*, 2 Johns. Cas. 329. *Taylor v. Summer*, 4 Mass. Rep. 56.

294. Emerigon, tom. ii 154. Phillips on Insurance, 503. Code de Commerce, art. 349. *Hendricks v. Com. Ins. Co.*, 8 Johns. Rep. 1.

295. *Tyler v. Hern*, Park on Insurance, 285. *Chapman v. Fraser*, Marshall on Insurance, 652.

296. *March v. Abel*, 3 Bos. & Pull. 35. *Van Dyck v. Hewitt*, 1 East's Rep. 96.

297. *Stevenson v. Snow*, 3 Burr. Rep. 1237. *Long v. Allen*, Marshall on Insurance, 660. *Donath v. Ins. Co. of N. A.*, 4 Dallas's Rep. 463. *Ogden v. Firem. Ins. Co.*, 12 Johns. Rep. 114. Phillips on Insurance, 503-510.

298. Code de Commerce, art. 356.

299. *Cours de Droit Commercial Maritime*, tom. iv. 98, 99.

300. 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. Bynck. *Quaest. J. Pub*. lib. 1. c. 11. Emerigon, *des Ass.* Pref.

301. The allusion to marine insurance in art. 66. of the Laws of Wisbuy, is so obscure or equivocal, that the most celebrated

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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 too 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, Gibalinus, Ansaldus 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 Caesar to the inhabitants of Olerun, and then to Antwerp and London. Cleirac's *les Us et Coutumes de la Mer*, p. 155. Malynes' *Lex Mercatoria*, part 1, 105. Emerigon, *Traité des Ass*. Pref. Valin's Com. tom. 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. *Quaest. J. Priv*. lib. 4 ch. 1.

302. The French lawyers have described the contract of insurance in strong and eloquent language. *C'est une especе 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 posseder la science du calcul des probabilities; prévoir les ecueils 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 des primes, et juger quel sera le resulta de l'ensemble*. But the French counselors of state, Messrs. Corvetto. Begouen 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. I1 a consulté les saisons; il a po té ses regards sur la mer; il a interrogé ce terrible elément: il en a juge l'inconstance: il en a presenti les orages: il a epie la politique: il a reconnu les portes et les cotes des deux mondes: il a tout soumis a des calculs savans, a des theories approximatives, et il a dit au commercant habile: an navigateur intrepide: certes il y a des desastres sur lesquels l'humanite ne peut que gemir: mais quint a votre fortune allez. fransissez les mers, deployez votre activite el votre industrie; Je me charge de vos risques.*

303. Those decisions, under the title of *Decisiones Rotae Genuae 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 215 decisions; and many of them relate to insurance questions, and they settled principles which govern at this day.

304. Cleirac's pref. to *Le Guidon*.

305. The treatise of Santerna, a Portuguese lawyer, *De Assecurationibus st Sponsionibus Mercatorum*, and the larger and 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, semibarbarous 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 No. 15, in the North American Review, vol. 7. p. 323.

306. 6 Coke's Rep. 47. b.

307. 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.

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LECTURE 49

Of Maritime Loans

THE contract 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 radicated 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. If the lender of money on a bottomry or *respondentia* bond, be willing to stake the money on 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.[1]

A bottomry bond is a loan upon the ship and freight, and is in the nature of a mortgage, and covers the whole freight of the voyage, from the port of departure to the port of destination. 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, in some cases, it is only a personal obligation on the borrower, and is not a specific lien on the goods, and amounts, at most, to an equitable lien on the salvage, in case of loss.[2] The condition of the loan is the safe arrival of the subject hypothecated; and the entire principal, as well as interest, is at the risk of the lender during the voyage. It may be defined to be an agreement by which the lender lends money 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. This is the definition of the contract given by Pothier;[3] 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.[4]

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 strong ground to suspect fraud, and that the voyage will have an unfortunate end.[5] 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 loss, on his own account, to the amount of the sum lent.[6] 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.[7] Sergeant Marshall says,[8] 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

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maritime loans, where nothing is hypothecated.[9] The lender runs the risk of the voyage, and he receives extraordinary interest by way of compensation. The contract is not usurious, for the principal loaned is put at risk.[10]

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 it is to be exercised in some foreign port where the owner does not reside.[11] 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. 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. 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.[12]

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, has very essentially abridged the practice of such loans. The necessity of the loan must be shown, 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.[13] 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. 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, with the maritime interest, for the whole had been put at hazard.[14] The same principle of necessity, which upholds a bottomry bond, entitles a bond of a later date, fairly given at a foreign port, under a pressure of necessity, to priority of payment over one of a former date; notwithstanding his is contrary to the usual rule in other cases of security.[15] 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.[16] The bottomry bond is also to be paid before any prior insurance.[17] The bottomry bond cannot be made to cover advances made upon the personal security of the borrower, and not upon the exclusive security 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.[18]

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.[19] The *respondentia* bonds in Philadelphia, are said to be peculiar. The lender is entitled to the benefits of salvage, and is liable for general and particular average. They extend to perils by fire, enemies, men of war, or any other casualties.[20] There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated, will discharge the borrower on bottomry.[21] 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

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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.[22]

The position laid down by Lord Mansfield, and afterwards by Lord Kenyon,[23] that the lender on bottomry was not liable to contribute, in case of a general average, has been much and justly questioned in the elementary works.[24] It is contrary to the maritime law of France, and of other parts of Europe. The new French law, contrary to the ordinance of 1681, charges the lender with simple average, or 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.[25] 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 composition, 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. 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.[26] 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.[27]

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.[28] So, the consignee of the cargo, and even the agent of the owner of the ship, under special circumstances, may take a bottomry bond, by way of security for advances made by him.[29] The owner himself may also execute a bottomry bond abroad, and it will be enforced in our American Admiralty Courts, which have undoubted jurisdiction over such contracts.[30]

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.[31] 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 should be made before the departure of the ship on the voyage, and that it may be made after the goods ate 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. The lender is not presumed to lend upon 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

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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.[32]

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 maritime premium.[33] The ordinary interest begins when the marine interest ceases; and Boulay Paty follows the authority of Emerigon, and of the recent 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.

The French code[34] 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 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 aequo et bono*, may moderate it, or refuse to ratify it.[35] 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.[36]

NOTES

1. Dig. 22. 2. *De nautico foenore*. Code 4. 33. Ibid. Emerigon, h. t. ch. 1. sec. 1. has collected all that the roman law had said on the subject. See also Lord Stowell, in the case of the *Alexander*, 1 Dodson's Adm. Rep. 278. *The Augusta*, ibid. 283. *The Hero*, 2 ibid. 139.

2. *Busk v. Fearon*, 4 East's Rep. 319.

3. *Contrat la grosse*, n. 1.

4. Emerigon, *Traité des Contrats à la grosse*, ch. 1. sec. 2.

5. Casaregis, dis. 62, n. 7. Guidon, ch. 19, sec. 10.

6. *Ord. de la Mar*. tit. *des contracts à grosse aventure*, art. 14. ibid. art. 3.

7. Code de Commerce, art. 317.

8. Condy's Marshall, vol. ii, 745.

9. 2 Blacks. Com. 459. Molloy, b. 2. ch. 10. sec. 13.

10. *Soome v. Gleen*, 1 Sid. Rep. 27.

11. Condy's Marshall, vol. ii. 741. b. c. *Reade v. Com. Ins. Co.*, 3 Johns. Rep. 306. 1 Emerigon, tom. ii. 424, 436. Code de Commerce, art. 321.

12. *La Ysabel*. 1 Dodson's Rep. 273.

13. *The Jane*, 1 Dodson's Rep. 461. Emerigon, tom. ii. 434.

14. Boulay Paty, *Cours. de droit com.*, tom. iii. 74-76, 167-169.

15. *The Rhadamanthe*, 1 Dodson's Rep. 204. *The Betsey*, ibid. 289. *The Jerusalem*, 2 Gallison's Rep. 350. Code de Commerce, art. 323.

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16. *The Sloop Mary*, 1 Paine's Rep. 671.

17. Boulav Paty. tom. 3. 228, 232.

18. *The Augusta*, 1 Dodson's Rep. 283. *The Jane*, ibid. 461.

19. Guidon, ch 18. sec. 2. note, by Cleirac. Roccus, *De Navibus*, n. 51. Valin, tom. ii. 12. *Appleton v. Crowninshield*, 3 Mass. Rep. 443. Code de Commerce, art 347.

20. *Insurance Company of Pennsylvania v. Duval*, 8 Serg. & Rawle, 138. By the Code de Commerce, art. 380, the lender, on bottomry, and *respondentia*, is also chargeable for general and for particular average.

21. *Thompson v. The Royal Exchange Assurance Company*, 1 Maule & Selw. 30.

22. Parker, J., and Sewall, J., in *Appleton v. Crowninshield*, 3 Mass. Rep. 448. *Wilmer v. Smilax*, 2 Peters' Adm. Rep. 295, note. Valin's Com. tom. ii. 12. Code de Commerce, art. 327. Magens on Insurance' vol. ii. 52. 56. 196-8. 430. Emerigon, tom. ii. 544. 547. Phillips on Insurance, 301.

23. *Joyce v. Wiliamson*, and *Walpole v. Ewer*. —Park on Ins. 6th edit. 563. 565.

24. See Condy's Marshall, vol. ii. 760, 761. Phillips on Ins. 301, 2.

25. Ord. de la Mar. h. t. art. 16. Code, art. 330. Emerigon, *Traité des Contrats à la grosse*, ch. 7. sec. 1.

26. Roccus, *De Navibus*, n. 51. *Western v. Wildy*, Skinner, 152. *Ord. de la Mar*. tit. *Contrats à la grosse*, art. 12. Emerigon, tom. ii. 509-512. Code de Commerce, art. 326.

27. Condy's Marshall, vol. ii. 753-758. Boulay Paty, tom. 3. 158-164, 171-176. Ibid. 192.

28. 3 Johns Rep. 352.

29. *The Alexander*, 1 Dodson, 178. *The Hero*, 2 ibid. 139.

30. *The Sloop Mary*, 1 Paine's Rep. 671.

31. Valin's Com. tom. i. 366. Emerigon, tom. ii. 484. Condy's Marshall, vol. ii. 747, a.

32. *Conard v. The Atlantic Ins. Co.*, 1 Peters' Rep. 386.

33. Emerigon, t. 2. 414. M. Pardessus, *Cours de Droit Commer*. t. ii. 273. Boulay Paly. t. iii. 80-89. 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, tom iii. 97. Code de Commerce, art. 313.

34. Code de Commerce, art. 319.

35. 1 Dodson, 277, 283. *The Ship Packet*, 3 Mason, 255.

36. Pothier, *Traité du Pret a la Grosse*, n. 19. See, for further in formation 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 S. Hall, Esq. of Baltimore.

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PART 6:
Of the Law Concerning
Real Property

LECTURE 50

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.

It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title.[1] In this country we have adopted the same principle, and applied it to our republican governments; 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 this state, in the case of *Jackson v. Ingraham*,[2] and it was held to be a settled rule, that our courts could not take notice of any title to land not derived from our own state or colonial government, and duly verified by patent. Even with respect to the Indian reservation lands, of which they still retain the occupancy, the fee is supposed to reside in the state, and the validity of a patent has not hitherto been permitted to be drawn in question, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished. This was assumed to be the law of the land, by the Supreme Court of this state in *Jackson v. Hudson*,[3] and the same doctrine has been repeatedly declared by the Supreme Court of the United States.[4] The nature of the Indian title to lands lying within the jurisdiction of a state, though entitled to be respected by all courts until it be legitimately extinguished, is not such as to be absolutely repugnant to a seizin in fee on the part of the government within whose jurisdiction the lands are situated. Such a claim may be consistently maintained, upon the principle which has been assumed, that the Indian title is reduced to mere occupancy.

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, has been largely discussed, and the solidity of that claim, to a qualified extent, explicitly asserted, by the courts of justice in this country. In *Johnson v. McIntosh*,[5] it was stated 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 subjects or authority it was made, 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 ascendancy 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 right to grant a title to the soil, subject only to the

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Indian right of occupancy. The practice of Spain, France, Holland and England, proved the very general recognition of this principle. 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. The rights of the British government 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.

The whites assert the right to a qualified dominion over the Indian tribes, and to regard 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. This assumed claim or right arises 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 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 for their protection.

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 restrictions 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 of the United States; and the several local governments, both before and since our revolution, have always acted upon' the principles there laid down. It was shown, in *Goodell v. Jackson*,[6] that the government of New York had always claimed the exclusive right to extinguish Indian titles to lands within their jurisdiction, and had held all individual purchases from the Indians, whether made from them individually, or collectively as tribes, if made without the previous authority of the government, to be null and void. The legislature of Virginia, in 1779, asserted the same exclusive right of preemption, and the colonial and state authorities throughout the Union, always negotiated with the Indians within their respective territories as dependent tribes, governed, nevertheless, by their own chiefs and usages, and competent to act in a national character, but placed under the protection of the whites, and owing a qualified subjection, so far as was requisite for the public safety. The Indian tribes within the

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territorial jurisdiction of the government of the United States, are treated in the same manner, and the numerous treaties, ordinances, and acts of Congress, from the era of our independence down to the present time, establish the fact.

But while the ultimate right of our American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken; it is equally true, that the Indian possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force of arms in the event of a just and necessary war.

If the settled doctrine on the subject of Indian rights and titles was now open for discussion, the reasonableness of it might be strongly vindicated on broad principles of policy and justice, drawn from the right of discovery; from the sounder claim of agricultural settlers over tribes of hunters; and from the loose and frail, if not absurd title of wandering savages to an immense continent, evidently designed by Providence to be subdued and cultivated, and to become the residence of civilized nations.

When the country, now within the dominion of the United States, was first discovered by the Europeans, it was found to be, in a great degree, a wilderness, sparsely inhabited by tribes of Indians, whose occupation was war, and whose subsistence was drawn chiefly from the forest. Their possession was good and perfect to the extent requisite for subsistence and reasonable accommodation, but beyond that degree their title to the country was imperfect. Title by occupancy, is limited to occupancy in point of fact. Erratic tribes of savage hunters and fishermen, who have no fixed abode, or sense of property, and are engaged constantly in the chase or in war, have no sound or exclusive title either to an indefinite extent of country, or to seas and lakes, merely because they are accustomed, in search of prey, to roam over the one, or to coast the shores of the other.

Vattel had just notions of the value of these aboriginal rights of savages, and of the true principles of natural law in relation to them. 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 forests through which they might wander. If such 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.[7] Though the conquest of the half civilized empires of Mexico and Peru was a palpable usurpation, and an act of atrocious injustice, the establishment of the French and English colonies in North America was entirely lawful; and the colonists have not deviated from the precepts of the law of nature, in confining the natives within narrower limits.[8]

The settlement of the country, now composing these 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 civilized men into the territory of savages, and with the power and the determination to reclaim and occupy it. Vattel extols the moderation of William Penn, and of the first settlers of New England, who are understood to have fairly purchased of the natives, from time to time, the land they wanted to colonize. But wars with the Indians resulted, almost inevitably, from the intrusions of the whites, and especially when the spirit of the institutions of Penn was wanting. The origin of those wars is not imputable to any unkindness or injustice on the part of the colonial governments, though there were, at times, acts of fraud and violence committed by individuals among the colonists, prompted by cupidity, and a consciousness of superior skill and

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power, as well as springing from a very blunt sense of the rights of savages.

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.[9] Very strong and authentic evidence of the distinguished moderation and entire equity of the New Englaud 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 Indian proprietors; and that by law none could purchase, or receive by gift, any lands of the Indians, without the knowledge and allowance of the general court.[10]

But the causes of wars with the Indians were inherent in the nature of the case. They arose from the fact of the presence and location of white people; and 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 colonists, and their extension over the country.[11] In all the wars of the whites with the Indians, 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. Their usages in war were ferocious and cruel; but there was still much in the Indian character, in their earlier and better state, to excite admiration, and in their sufferings, at all times, to excite sympathy.

If wars with them were never unjustly provoked by the colonial governments or people, they were, no doubt, stimulated, on the part of the Indians, by a deep sense of injury, by a view of impending danger, by the suggestions of patriotism, and by a fierce and lofty spirit of national independence. Their history appears under manifest disadvantage to them, and with scarcely a cheering page to the honor of their race. We have been tailed too frequently to delineate the darkest traits in their character, and have told their story according to our prejudices and partial views. Being ignorant of letters, they have had no annalists of their own; no native poets or historians to transmit to posterity the specimens of their genius, to portray their feelings, to record their grievances, to vindicate their character, or to perpetuate the memory of their daring achievements.

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. The Indian titles have always been respected and extinguished with the consent of the natives, and by fair means.[12] The fierce and formidable confederacy of the Six Nations, of which the Mohawks were the head, placed themselves and their lands under the protection of our government from the earliest periods of the colony administration. The friendship of the parties 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. and when we consider the long and distressing wars in which the Six nations were involved on our account with the Canadian French, end the artful means which were used from time to time to detach them from our alliance, it must be granted, that the faith of treaties has no where, and at no time, been better observed, or maintained with a more intrepid spirit, than by those generous barbarians.[13]

The government of the United States, since the period of our independence, has also pursued a

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steady system of pacific, just, and paternal policy towards the Indians, within their wide spread territories. The United States have never insisted upon any other claim to the Indian lands, than the right of preemption, upon fair terms; and the plan of permanent annuities, which the United States, and which the state of New York, among others, have adopted, as one main ingredient in the consideration of purchases, has beet) attended with beneficial effects. 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 to impart to them some of the essential blessings of civilization, have been steady and judicious, and reflect luster on our national character.

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 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.[14]

NOTES

1. 2 Blacks. Com. 51, 53, 86,105.

2. 4 Johns. Rep. 163. *Jackson v. Waters*, 12 Johns. Rep. 365. S. P.

3. 3 Johns. Rep. 375.

4. *Fletcher v. Peck*, 6 Cranch's Rep. 87. *Johnson v. McIntosh*, 8 Wheat. Rep. 543.

5. 8 Wheat. Rep. 543.

6. 20 Johns. Rep. 693. This case was argued and decided in March, 1823, at Albany, and concurrently, in point of time, with that of *Johnson v. McIntosh*, at Washington; and the entire coincidence in the doctrine of the two cases, is very apparent, and evidence of the general sense of the nation.

7. Droit des Gens, b. 1. sec. 81.

8. Ibid. b. I. sec. 209.

9. Hutchinson's History of Massachusetts, vol. i. 5. 283. Holmes' American Annals, vol. i. 184.

10. Hazard's Collection of State Papers, vol. ii. 531-534. Holmes' American Annals, vol. i. 435. See also an account of the various purchases from the Indians, in that part of Massachusetts which is now the state of Maine, between the years 1643 and 1675, in Sullivan's History of the District of Maine, p. 143-149.

11. The war of 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 engendered by these patriotic views on the part of the Indians.

12. 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, executed in his presence, and this salutary check to fraud and injustice was continued. (Smith's History of New York, p. 39. edit. 1792.) This has been the invariable American policy down to this day; and the prohibition of individual purchase of Indian lands without the consent of the government, has been made even a constitutional provision in some of the states; as, for instance, in New York, Virginia, and North Carolina.

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13. Colden's History of the Five Nations of Canada, dependent on the Provinces of New York. Vol. i. 34. *et passim*. The confederacy of the Five Nations, (and which was known as the confederacy of the Six Nations after the Tuscaroras were admitted into the Union) was distinguished, from the time of the first discovery of the Hudson down to the war of 1756, for its power and martial spirit. At the close of the seventeenth century, that confederacy was computed to contain 10,000 fighting men; but their decrease was so rapid, that in 1747 they were supposed not to exceed 1,500 (Burke's Account of the European Settlements in America, vol. ii. 133. Douglass' Summary of the British Settlements in North America, vol. i. 185, 186). The Five Nations during the time of their ascendancy and glory, extended their dominion on every side, and levied tribute on distant tribes. Charlevoix (Travels in Canada, Vol. i. 152, 167-171) speaks in strong terns of the power and fierceness of the Iroquois, who as early as 1710, had almost extirpated the Algonquins, the Hurons, and other tribes of Canadian savages. Governor Colden was well acquainted with their history, and in his character of surveyor general of the province, he had access to the best means for information. He wrote the first part of his history as early as 1727 and he says, that the Five Nations carried their arms to the Carolinas, and the banks of the Mississippi, and entirely destroyed many Indian nations. In 1684, Lord Howard the Governor of Virginia was under the necessity of meeting the Five Nations in council at Albany, in order to check by negotiation their incursions to the south. (Colden's History, Vol i. 3645.) Their military spirit and daring enterprise were continued to a 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, and he said that the expedition was disastrous, and the Chickasaws met and destroyed them by an attack in ambush; that only two of them, of which he was one, escaped. His companion fled to St. Augustin, and he returned home to the Mohawk, 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 that 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. No person was more capable of giving precise information on every subject connected with our colonial history, and Indian affairs, than that very intelligent and accomplished man; and since his name has been thus incidentally introduced, I cannot refrain from adding, that he stands conspicuous in that proud roll of statesmen and civilians, of patriots and heroes, who adorned the annals of New York in the most trying periods of its history, between the years 1755 and 1790. It may be truly said, that no part of the history of this country excels the local history of the period I have alluded to in interesting events, or would be more worthy of the pen of some native scholar and man of genius.

14. An able and well instructed writer in the North American Review, No. lv. 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. But the system of treaty making, and assembling conventions of Indians, pursued to a considerable extent on the part of the United States, and accompanied with presents and annuities, is supposed by another writer, also able and well instructed, (the American Quarterly Review, No. vi. art. 5.) to have been attended with much abuse in practice, and with very injurious effects upon the moral and civil condition of the Indian tribes. The subject of the treatment of the Indians is one which appears to be, in every view, replete with difficulty and danger. It seems to be almost impossible to stay or arrest their rapid progress to ruin. The condition of the Indian tribes is deplorably wretched. They 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, and which, in a considerable degree, partakes of the fierce and lawless manners of the hunter state, are exempt, no doubt, from much sympathy with Indian sufferings, and they are penetrated with perfect contempt for 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 must 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.

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LECTURE 51

Of Incorporeal Hereditaments

THINGS real consist of lands, tenements, and hereditaments. The latter is a word almost as comprehensive as property, for it means, any thing capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed.[1] A tenement comprises every thing which may be held, so as to create a tenancy, in the feudal sense of the word.[2] Corporeal hereditaments are confined to land, which, according to Lord Coke,[3] 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 it or over it.[4]

Incorporeal 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.[5] These distinctions were well known to the civil law, and are clearly defined in the Institutes. They have their foundation in the nature of things, and very material legal consequences flow from them in practical jurisprudence. *Res corporales sunt quae sua natura tangi possunt, veluti fundus; incorporales sunt quae tangi non possunt et in jure consistunt, sicut usus fructus, usus,* etc.[6]

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, and franchises of the chace; 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 state, 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.

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.[7]

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,[8] 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 plow 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 plow; 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 encumbrance rather than an advantage. The right of common is little known or used in this country, and probably does not exist in any of the northern or western parts of the United States, which have been settled since the

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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. But the right is still known and enjoyed, and has been frequently a subject of litigation, in some parts of this state; 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.[9]

(1.) *Of common of pasture and of estovers.*

Common of pasture was known 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 wanted to plow 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 plow land. Common appurtenant may be annexed to any kind of land, and may be created by grant, as well as prescription. It is allowed the owner to put in other beasts than such as plow or manure the land; and, not being founded in necessity, like the other right, as to commonable beasts, was not favored in the law.[10]

The law concerning common appendant received great discussion and consideration, in *Bennett v. Reeve*, in 1740.[11] It was admitted to he the settled law, that common 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 plow and manure the tenant's arable land. The Court of C. B., after 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 plow 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,[12] “that the law should not be so, for otherwise many commons in England would be avoided and lost.” Thus, in *Tilde's Case*,[13] he being seized of forty acres of land, to which a right of common of 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 the condition of society in this country, is so great, that the whole of this law 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.

There have been several cases on the subject of the right of common of pasture, and of estovers, discussed in the Supreme Court of this state, and the principles to be deduced from the ancient decisions were fully and accurately considered.

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The first case I allude to was that of *Watts v. Coffin*,[14] 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 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 Hen. 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 2. 13 Edw. 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 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 he subject to the same limitation, and to he 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*.[15] 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 seized of part of the land subject to common, should purchase part of the adjoining land entitled to common, here would bean 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 to cast it upon 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*,[16] 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 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 the right of the 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 ably illustrated in the case to which I have referred.

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In *Leyman v. Abeel*,[17] another branch of this 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*,[18] 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 aliened in such a way as to give the entire right to several persons, to be enjoyed by them separately. Lord Coke said,[19] that if such a right of common descended to coparceners, as it was not partible, the eldest 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, according to the rules to be found in Bracton, and 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 draft, 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 last case I have 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.

The 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.[20]

(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.[21] 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.[22] The books speak likewise of a free fishery, as being a franchise in the 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. 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.[23]

But these distinctions between common of piscary, free fishery, and several fishery, seem to be quite

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unsettled in the books;[24] and the authorities referred to by Mr. Hargrave[25] throw embarrassment in the way of the attempt to mark, with precision, the line of discrimination between these several rights of fishery. In a late case,[26] 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 piscariae*,) 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 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 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 aquae*; 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.

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.[27] The law was laid down very clearly and emphatically in the case of The river Banne, in Ireland, [28] which is regarded as a leading case, and a sound 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 center of the stream opposite their respective lands. This case was followed by that of *Carter v. Murcot*,[29] in which the K. B. recognized that doctrine in its fullest extent; and Sir Matthew Hale, in his treatise *De Jure Maris*,[30] 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 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.[31] The common right of fishing in navigable waters, is 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.[32]

Bracton adopted the doctrine of the civil law, and held,[33] that the right of fishing in rivers, and the

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use of the banks, was common *jure gentium*. But it is every where 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 *Blundel v. Catteral*,[34] 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 pub[lic] 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 their revolution, the right of fishing in navigable, and not navigable rivers, was not common to all the subjects, but belonged to the king, and such individuals as under him possessed jurisdictional rights.[35] 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.[36] It is now understood, that the owners of the lands on rivers not navigable or flotable, (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 such seigneurial rights.[37]

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 the right to the soil, in rivers not navigable, in the common law sense of the term, has been declared to be the law in this, and some other of the United States.[38] The legislature of New York, when they re-enacted 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 disseizin, for the disturbance of it.[39] 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*.[40] 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 have 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 the exclusive right of the owners of the banks of rivers not navigable, unless otherwise appropriated by statute, and that the right, unless secured by a particular grant or prescription, is held subject to legislative control.[41] In *Jacobson v. Fountain*, and afterwards, in *Gould v. James*,[42] it was considered that a person might, by grant or prescription, have an exclusive right of 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 is asserted, 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

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of the state.

Upon that broad foundation it is maintained, that the proprietors of land on rivers and waters, navigable as well as not navigable, have 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.[43] 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 several fishery in the navigable waters of New Jersey, but the same is common to all the people of the state.[44]

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.[45] 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.[46]

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 that the owners of land on the banks of such rivers as the Susquehanna and Delaware, for instance, have no exclusive right of fishing 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;[47] and a similar exception to the rule of the common law, has been suggested to exist in South Carolina.[48]

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. In rivers and streams not navigable as tide waters, the owners of the soil over which they flew bave, 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.

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, 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 disseized, either of the common of pasture, of estovers, or of fishery, he may have a writ of *novel disseizin* to reinstate 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 revised act of New

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York, in 1787,[49] arose from the circumstance that the statute of Westminster 2d, 13 Edw. I was literally transcribed.

II. **Of ways, easements, and aquatic rights**.

(1.) *Of ways.*

This incorporeal hereditament is a right of private passage over another man's ground. It may arise either by grant of the owner of the soil, or by prescription, which supposes a grant, or from necessity. If it be a freehold right, it must be created by deed, though it be only an easement upon the land of another, and not an interest in the land itself.[50]

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.[51] But when a right of way is annexed to an estate, it may pass by assignment when the land is sold to which it was annexed as appurtenant. Thus, in the case stated in *Staples v. Heydon*,[52] if one be seized of lot A. and lot B., and he used a way from lot A. over lot B., to a 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.[53] This principle was carried so far, in a modern case,[54] 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 it 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 by which the grantee may have and enjoy such use. 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.[55] The maxim is, that *quando aliquis aliquid concedit, concedere videtur, et id, sine quo res uti non potest*.

If a man has 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 had 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 *Clarke v. Cogge*,[56] that the 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*,[57] 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

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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.[58] This principle of law has been for a long time recognised.

Thus, in *Packer v. Welsted*,[59] 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 adjudged, that the way continued from necessity, and that the party was not liable in trespass for using it. So, also, in *Dutton v. Tayler*,[60] A. owned two closes, B. and C., and there was no 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 the close B. should be left uncultivated. This last case is supposed to be binding; and Lord Kenyon said, in *Howton v. Frearson*, 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. Tayler* received confirmation in *Buckby v. Coles*,[61] where it is 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 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 doubt 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.[62] 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 water course running over the adjoining lands.[63] Sergeant Williams[64] is of opinion, that the right of way, when claimed 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 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.

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.[65] 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 foundrous, by being overflowed by a river. The reason given is, that the owner of the way may be bound to repair, and the impassable 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

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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 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 two 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*.[66] The law of nations was here used for natural right, and not international law, 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 beep 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.[67] In the French law, navigable or floatable rivers, as they 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.[68]

The English law was anciently the same as the Roman law, if we may judge from the authority of Bracton,[69] 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,[70] 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.[71] 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,[72] 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, at several places, to pass from one side of the river to the other, with great inconvenience and delay, because they had no 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 nut on any common law right. The statutes which have given a right of towing on parts of the Severn, Trent,

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and Thames, are evidence that no such general right before existed.

(2.) *Of easements and aquatic 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 highwater mark; and the shore below common, but not extraordinary high-water mark, belongs to 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. But grants of land, bounded 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 center of the stream; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage as a public highway. The proprietors of 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 the easement; and neither the state, nor any other individual, has the right to divert the stream, and render it less useful to the owners of the soil. 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 center of it, and to that extent the fee passes *prima facie*, said the vice chancellor of England,[73] the proprietor of each bank of a stream, is the proprietor of half the land covered by the stream. If the same person be 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 aquae*; but if the alteration be sensibly and suddenly made, the ownership remains according to the former bounds, 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. If soil be formed out of the sea or a river, by slow and imperceptible alluvion and accretion, it belongs to the owner of the adjoining land.[74] Islands situated in a river do not form any 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 in the middle of the river, they would belong in severalty to the owner on each side, according to the original dividing line, or *filum aquae*, continued on from the place where the waters begin to divide.[75]

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 and Virginia.[76] In Massachusetts, some alterations in the common law have been made by statute; 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.[77]

The common law, as we have already 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 a right to the soil covered by the waters of the rivers, but the soil and waters of the rivers,

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with the rights and privileges incident thereto, remain in the public.[78] In South Carolina the doctrine of the common law on this subject has been held to he inapplicable; but as the common law still applies to rivers capable of being made navigable, and which possesses obstructions to the passage of boats of every description, and as the adjoining owners in such cases go *ad filum aquae*,[79] the modifications which the common law has undergone do not seem to be very material.

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.[80] But it was said by the Ch. J., in *Arnold v. Mundy*,[81] 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 intermediate 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. There may be a moveable freehold, as is stated by Lord Coke;[82] and if a grant was made of the seashore, 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.[83]

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 reflex of the tide. In *Handley's Lessee v. Anthony*,[84] 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 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 oft he sovereign, of lands bounded on tide waters, to go beyond ordinary high-water mark.[85] Such grants are constructed most favorably for the king, and against the grantee; and Sir William Scott has vindicated [86]such a rule of 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.

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 owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the 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 disseized of it, or trespass against any person who digs up the soil of it, or cuts down any 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, and with police regulations.[87]

The established inference of law is, that a conveyance of land bounded on a public highway, carries with it the fee to the center of the road as part and parcel of the grant. The idea of an intention in a 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 said, in *Peck v. Smith*, that there was no instance where the fee of a highway, as distinct from the

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adjoining land, was ever retained by the vendor. It would require an express declaration to sustain such an inference; and it may be considered as the just and settled doctrine, that a grant of land bounded upon a highway or river, carries the fee in the highway or river to the center of it.

The civil law treated very extensively of these incorporeal rights annexed to land; and what in them common law are termed easements, 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. By virtue of such a right, the proprietor oft he 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. Servitutum non hominem debere sed rem.*[88]

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 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 principle of the civil law, which are of permanent and universal application.[89]

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 co-tenant.[90]

The exercise of these servitudes 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. If there be a party-wall between two houses, and the owner of one of the houses pulls it down, in order to build a new one, and with it he takes down the party-wall belonging equally to him and his neighbor, and erects a new house and a 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; anti if the necessity of the reparation of the old wall be established, the neighbor is bound to contribute rateably 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.[91]

If 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

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in the French law sufficient, to establish an easement by prescription.[92] 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 remedy for a disturbance of that right.[93]

But the most 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 anti more felt in manufacturing establishments.

Every proprietor of lands on the banks of a river hag 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*, is the language of the law. Though he may use the water while it runs over his 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.[94]

This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and 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. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar 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 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.[95] Pothier 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.[96] 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*.[97]

This natural right to the use of waters, as an incident or particular easement to the land, may be

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abridged, or enlarged, or modified, by grant or prescription, 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, 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, presumption of such a grant.[98] But nothing short of a contract, or of such a time of enjoyment of water diverted from the natural channel, or interrupted by darns, or other obstructions, or materially changed in its descent or character, will justify the owner as against any land owner 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. Piggott*,[99] that a water course begins *ex jure naturae*, 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 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.[100] The general and established doctrine is, that an exclusive enjoyment of water, or of light, or of any other easement in any particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person, which have been, but wits not asserted. The right is confined to the extent, and the mode of the 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. He is only not to vary the enjoyment to the prejudice of his neighbor.

This presumption of title founded on that enjoyment, is equally well established in English[101] and American law.[102]

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 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*, [103] and of *Livet v. Wilson*,[104] and it is the prevalent language in all the books, English and American. 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*[105] 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 basement 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.

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. The law gives

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considerable weight and effect to the first appropriation oft he elements of light, air, and water; and, therefore, 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. So, if I make a tanyard, which renders less pleasant and salubrious the air of the house and garden subsequently established adjoining it, the nuisance is said to be without a remedy to the person who voluntarily plants himself near it.[106] If I am the first person who applies the water of a running stream to the purposes of irrigation, or of a mill, I cannot afterwards be lawfully disturbed in any essential degree, in the exercise of my right, 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, nor essentially to destroy the use of it as it naturally flowed over the lands of the proprietors above and below me.[107] 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.[108] 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 wanting as to such alterations, and they would be unlawful, and, consequently, a ground of action.[109]

Aright 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.[110] As an enjoyment for twenty years is necessary to found a presumption of a grant, the general rule is, that there must be a similar non-user to raise the presumption of a release. But I do not apprehend that the mere non-user of an easement, even for twenty years, will necessarily raise a presumption of its extinguishment, unless 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; and, in that case, a release or extinguishment of the right will be presumed.[111]

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 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.[112]

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 possession is again severed.[113] Nor is a water course 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. Pigott*,[114] 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 the unity of possession and title of both the

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parcels of land connected with the easement; 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 re-conveyance, the right to be acquired by user, must commence *de novo* from the last period.[115]

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.[116] It is the modern doctrine, that the ceasing to enjoy such an easement 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 every where making upon real property.

So, also, in *Hatch v. Dwight*,[117] it was declared, upon the same principle, that if a mill-site unoccupied be abandoned by the owner, evidently 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. The law is solicitous to prevent all kind of imposition, and injury from confidence reposed in the acts of others; and a parol license to do an act, on one's own land, affecting injuriously the air and light of a neighbor's house, is held not to be revocable after it has been once acted upon.[118]

III. **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.[119] Offices, in England, may be granted to a man in fee, or for life, as well as for years, and at will.[120] In the United States, no public office can properly he 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. 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 this state, in 1787, most of the provisions in the ancient English statutes relative to offices, were re-enacted.

It was provided, among other things,[121] that if a man be unduly disturbed in his office, a writ of novel disseizin should be maintainable 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 is probably a very useless provision. We have likewise (and very properly) re-enacted[122] the substance of the statute of 5 and 6,Edw. VI. ch. 15. against buying and selling offices, and it prohibits the sale of any office, or the deputation of any office, or taking of any fee or reward therefor. The offense is punished with the loss of the office; but it does not apply to the case of a deputy ageing 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.[123] 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 appointment of deputies with

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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, 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.[124] 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 deputy.[125]

The statute in this state 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 saleable, because it only concerned the police of the city.[126] If, however, the statute of this state should not admit of a more comprehensive, construction titan 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. Thus, if A. should agree to allow to B. a certain proportion of the profits of an office in the king's dock-yards, in case the latter retired, and he succeeded to the appointment, the agreement would be void, as not supported by a valid consideration.[127]

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 justice, could not he granted for a term of years, for then 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.[128] Sir Henry Finch, in his Discourse,[129] 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,[130] What is a judicial, and what is a ministerial function, has been sometimes a matter of dispute. In *Medhurst v. Waite*,[131] 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 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*,[132] will serve to explain the application of the statute against buying and selling

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offices to assignees and not to deputies. An assignee of an office, he says, is a person who has an estate or interest in the office itself, and does all things in his own name, and for whom his grantor shall not answer. But a deputy has not any estate or interest in the office. He is but the officer's shadow, and does all things in the name of the officer himself, and nothing in his own name, and his grantor shall answer for him.[133]

IV. **Of franchises**.

Franchises are 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.[134] We have nothing to do 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. 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.

V. **Of annuities**.

An annuity, says Lord Coke,[135] is 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 he paid to him and his heirs, it. is a personal fee, and transmissible by descent like an estate in fee, and forfeitable for treason as an hereditament,[136] and for that reason it belongs to the class of incorporeal hereditaments. It is chargeable only upon the person of the grantor, for if the annuity was made chargeable upon land, it would then become a species of rent.[137] The remedy for a failure in the payment of the annuity, is either by the ancient and obsolete original writ of annuity, or by the modern and easy remedy of a personal action on the instrument by which the annuity is created.

VI. **Of rents**.

Rents are the least species of these incorporeal hereditaments, and they form a very important and interesting title under this branch of the law.

Rent is a certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements in retribution for the use.[138] There were, at common law, according to Littleton,[139] three kinds of rent, *viz.* rent service, rent charge, and rent seck. Rent service was where the tenant held his land by fealty, or other corporeal service, and a certain rent; and it was called rent service because it was given as a compensation for military, or other services, to which the land was originally liable.[140] A right of distress was inseparably incident to his rent. 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 rent, 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.[141]

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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.[142] 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 seek, rents of assize, and chief rents, as in the case of rent reserved upon a lease. The statute of New York on the subject of distresses and rents,[143] has not adopted that provision in so many words, but it assumes, that the remedy by distress lies for rent reserved and due upon any demise, lease, or contract whatsoever, and for any kind of rent; and it specially gives the remedy by distress to the executors and administrators of persons who were entitled to rent seck, rent service, rent charge, and fee farms, and died leaving arrearages of rent due.[144] There is, therefore, the same universal remedy by action and by distress, for every species of rent or service lawfully due, when the same is certain, and the landlord who distrains has a reversionary interest.[145] The tenancy that will authorize a distress does not necessarily require a formal lease, and it may be implied from circumstances, and a parol lease will be sufficient.[146]

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 this state, in the manor countries, 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 of the same provident foresight in the act instituting the university in this state,[147] and limiting its annual 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 prodigious accumulation of paper credit. The rents which have been reserved in corn, says Doctor Smith, have preserved their value much better than those which have been reserved in money.[148]

In the feudal ages a great proportion of the produce of the 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.[149]

We will, in the first place, ascertain when, and to what extent, rent is due, and then take a view of the remedy for the recovery of rent.

(1.) 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.[150] It was also, on the same ground, decided, in *Prescott v. De Forest*, and afterwards in *Cornell v. Lamb*,[151] that the right of distress for rent was incident to the reversion, and that no other person could distrain but he who owned the reversion. The person who distrains must have some reversionary interest to sustain the right.. 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

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become payable, it goes to the executor or administrator as part of the personal estate, and the executor or administrator may distrain for the arrears of rent due at the tenant's death.[152]

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 he enjoyment of the land.[153] 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 be continued until after the rent becomes due, it bars the claim for the rent;[154] 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.[155]

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 *Tavener's case*,[156] which arose in 34 and 35 Hen. VIII, a man made a lease of land, and of a 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*,[157] an action of debt was brought for rent, upon a lease for years, and the defendant pleaded, by way of excuse for the non-payment 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 civil and canon 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*,[158] 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*;[159] and the unsettled question, whether a court of equity would grant relief to the tenant against the landlord's claim at law for rent, has also been put at rest by the decision in *Hare v. Grove*[160] in the English Exchequer, and of *Holtzapffell v. Baker*,[161] 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.[162] The same rule prevails generally on this point, of an effect of an express covenant to pay rent; but it is understood, that by the civil law, the praetor would exempt the tenant from paying rent, or modify the obligation,

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according to equity, when the property was destroyed by fire, inundation, or violence, or the crops failed by a bad season.[163] So, Lord Northington, in *Brown v. Quilter*,[164] 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 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 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.

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,[165] the party covenanted to sustain and repair the banks of a river, under pain of forfeiture of úi0., 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.

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.[166] 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[167]

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; the other, by granting part of the rent to one person, and part to another.[168] 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 he apportioned according to its just value, and the tenant was discharged of the rent, in a ratio to the value oft he land purchased. But if a man had a rent charge, and purchased part of the land out of which the rent issued, the whole rent was held to be extinguished.[169] 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 he reversion to which it was an incident. A

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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 rent. The rent is to be apportioned among the several owners of the reversion or 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.

These 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.[170] The rent is also liable to apportionment by act of law, as in cases of descent and judicial sales.[171] 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; 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.[172]

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. 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, and from the complex nature, and uncertain value of part performance, it con Id not afford a title to any part of he stipulated consideration.[173] But the statute of II 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 re-enacted in this state.[174]

(2.) 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 suit may be an action of covenant, or debt, or assumpsit, for the use and occupation of the land. The landlord may also re-enter, or recover possession of the land, by the action of ejectment, for non-payment of rent, provided no sufficient distress can he found; and if the tenant, in such a case, does not redeem within six months, the land will he deemed discharged from the lease or contract. 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.

In this state we have adopted the common law on the subject of distress for rent, and we have likewise re-enacted the substance of the English statutes of 52 Hen. III, 3 Edw. I, 13 Edw. I, 21 Hen. VIII, 17 Car. II, W. and M., 8 Anne, and II Geo. II,[175] and which statutes were made on purpose to control abuses, and mitigate the rigor of the common law. The English common and statute law, in relation to distress for rent, has been generally, and, I apprehend, essentially adopted in several of the other states, as, for instance, in New Jersey, Pennsylvania, Maryland, and South Carolina;[176] but the whole law has been judicially declared in North Carolina, to be irreconcilable with the spirit of

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their laws and government, and to be of no force in that state.[177] In the New England states, their law of attachment on mesne process has superseded the law of distress fur 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 it.[178] 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 this, and 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 non-payment of rent, or non-performance 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 it. 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 supposses,[179] 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 moveables found upon the land, 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.[180] 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 plow, 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 52d Hen. III. was passed, providing more generally against the abuse of the right of distress, and that statute stated the abuses of landlords in strong language: *Magnates graves ultiones fecerut, 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.[181] 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 bee made upon the 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 hew, which was to seize the tenant's goods by way of pledge, in order to compel hint to perform his feudal engagements.[182]

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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 plow, 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.[183] The goods were also to be put into a pound, and there kept safely, without being used by the landlord, until they were redeemed.[184]

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 defense.

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, the landlord, upon demand, may enter immediately, by himself or his agent, 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 convenience, and to prevent collusion and fraud.[185] But this inconvenient privilege is subject to many exceptions. Articles that may be temporarily placed upon the land by way of trade, are exempted from distress, on the broad principle of public convenience, and for the benefit of commerce. A horse at a public inn, or corn at a mill, or cloth at a tailor's shop, or a grazier's cattle put upon the land for a night, on the way to market, or goods deposited in a warehouse for sale, or goods of a principal in the hands of a factor, are not. distrainable for rent.[186]

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 had, they are not distrainable, until the owner, after notice, has neglected to take them away. 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. The distress must be reasonable, and it cannot be made in a public highway, or removed out of the county. 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 plow, 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.[187]

In the case of *Simpson v. Hartopp*,[188] 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

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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, materials sent to a weaver, a horse brought to an inn; though, with respect to a carriage at a livery stable, it has since been determined,[189] that it was not privileged from distress for rent by the lessor of the stable. 3. Cocks, or sheaves of corn. 6. Beasts of the plow, and instruments of husbandry. 5. Instruments of a man's trade. These two last sorts were 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,[190] perpetually lead to a breach of the peace.

The case of *Webb v. Bell*,[191] 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. 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 coaches, steam-boats, and vessels in actual use, might be attached, though the decision did not go to that broad extent.[192]

After the distress has been duly made, if the goods be not replevied within five days after notice, the law 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 the rent. 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.[193] If the tenant, in this state, holds over, he is liable to pay double rent, and all special damages; and the possession may be recovered in such cases, by the landlord, under a new and summary course of proceeding.[194]

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. But in the case of a tenancy at will,. or sufferance, three months previous notice in 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 of the rent, or three days notice in writing, to pay, or deliver the possession. This summary remedy for nonpayment of rent, 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 state.[195]

If the tenant carries away his goods, 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 more than thirty days preceding, but the tenant forfeits double the value of the goods.[196] And in order to give further and effectual security to the rent of the landlord, no goods of a tenant, or of any other person being on the premises, and liable to distress, can be taken

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on execution at the instance of a creditor, until the arrears of rent due at the time, and not exceeding one year, be previously deducted.[197] On this last point, it has been held,[198] that the sheriff must have notice of the landlord's claim, otherwise he is not bound to know who the landlord is, or what rent is in arrear.

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, before the seizure was made.[199] But a mortgage of the goods is said not to be a sale within the provision, so as to protect them from distress.[200] 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 cannot thereafter be made, though it be within thirty days from the termination of the tenancy.[201] The remedy by distress, according to the common law, assumed the tenancy to continue, and ceased with it;[202] but by the statute of 8 Anne, (and which has been adopted in this country,)[203] the remedy by distress, is extended to six months after the determination of the tenant's lease, provided the landlord's title and the tenant's possession continue. The distress may also be made, 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.[204]

But the object of this work will not permit me to 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 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.[205] The law may be deemed rather prompt and strict with respect to the interest of the landlord, but I am inclined to think it as a very 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 check the growth and prosperity of our cities, if the law did not afford to landlords a speedy and effectual security for their rents, against the negligence, extravagance, and frauds of tenants. It is that security which encourages monied 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 law-suits, and be, in many respects, detrimental to the public welfare.

NOTES

1. Co Litt. 6. a.
2. Preston. on Estates, vol. i. 8.
3. Co. Litt. 4. a.
4. 2 Blacks. Com. 18.
5. Bracton. lib. ii. ch. 18. Co. Litt. 20. a. 40. a.
6. Just. Inst. 2. 2.
7. Finch's Law, 157.
8. 2 Inst. 86. 4 Co. 37. a.
9. *Trustees of the Western University v. Robinson*, 12 Serg. & Rawle, 33.

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10. 2 Blacks. Com. 33. 3 Cruise's Dig. tit. Common.

11. Willes' Rep. 227.

12. 4 Co. 36.

13. 8 Co. 78.

14. 11 Johns. Rep. 495.

15. 16 Johns. Rep. 14.

16. Cro. Eliz. 593.

17. 16 Johns. Rep. 30.

18. Godbolt, 17. Co. Litt. 164. b. S. C.

19. Co. Litt. 165. a.

20. *Bateson v. Green*, 5 Term Rep. 411.

21. 2 Blacks. Com. 34. 39. Cruise's Digest, tit. Common, sec. 34.

22. 2 Salk. 637.

23. Com. Dig. tit. Prerogative, D. 50. Hale, *De Jure Maris*, ch. 5. *The case of the Royal Fishery of the Banne*, Davies' Rep. 149. *Smith v. Kemp*, 2 Salk. 637. *Carter v. Murcot*, 4 Burr. Rep. 2162. *Seymour v. Lord Courtenay*, 6 Burr. Rep. 2314. Mr. Angell, in his valuable Treatise on the Common Law, in relation to Water Courses, p. 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 water courses, may be subjected to every kind of restriction by positive agreement.

24. See the discussions at the bar in *Freary v. Cooke*, 14 Mass. Rep. 488. Sir William Blackstone says, that a free fishery is an exclusive right. Com. vol. ii. 39, 40. But in *Seymour v. Lord Courtenay*, 5 Burr. Rep. 2814, Lord Mansfield declared, that it was essential to a free fishery that more than one person should have a co-extensive right in the same subject.

25. Harg. Co. Litt. lib. 2. No. 181.

26. Bennett v. Costar, 8 Taunton, 183.

27. Hale, *de Jure Maris*, ch. 1. cites a record in the K. B. as early as 18 and 19 Edw.I. in which this rule was asserted.

28. Davies' Rep. 149.

29. 4 Burr. Rep. 2162.

30. Harg. Law Tracts, art. 1.

31. Hale, *de Jure Maris*, ch. 4. Sir Matthew Hale in *Lord Fitzwalter's case*, I .Mod Rep.103. *Warren v. Matthews*, 1 Sulk. Rep. 357. 6 Mode Rep. 73. *Ward v. Cresswell* Willes' Rep 265. *The Mayor, & c. of Oxford v. Richardson*, 4 Term Rep. 437. *Carter v. Murcot*, 4 Burr. Rip. 2162

32. Inst. 2.1.2. Dig. 43. tit. 12, 13, 14, 15.

33. L.1. c. 12. sec. 6.

34. 5 Barnw. & Ald. 268.

35. *Inst. Droit Franc*. par Argou, tom. i. 214. Pothier, *Traité du Droit de Proprieté* No.32

36. Code Napoleon. No. 538. 715.

37. Toullier's *Droit Civil Francais*, tom. iii. No. 144, 145, 146. *Questions de Droit*, par Merlin, tom, iv. tit. Peche. The latter authority has collected the ancient authorities in support of the seigneurial exclusive right of fishers in all streams not navigable, and the several decrees of the revolutionary governments abolishing those feudal and odious rights.

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38. *The People v. Platt*, 17 Johns. Rep. 195. *Hooker v. Cummings*, 20 ibid. 90. *Ex parte Jennings*, 6 Cowen's Rep. 518. *Berry v. Carle*, 3 Greenleafs Rep. 269. *Commonwealth v. Charlestown*, 1 Pickering's Rep. 180. *Adams v. Pease*, 2 Conn. Rep. 481. *Arnold v. Mundy*, l Halsted's Rep. 1. Dane's Abr., vol. ii. 692. sed. 13.

39. Laws of N.Y., 10th sess. ch. 50. sec. 7.

40. 4 Mass. Rep. 527.

41. *Waters v. Lilley*, 4 Pickering's Rep. 145. *Ingraham v. Wilkinson*, ibid 268. Dane's Abr. vol. ii. p. 688 to 712. or.ch. 68. In that chapter Mr. Dane has diligently and learnedly collected the English and American authorities applicable to the subject.

42. 2 Johns. Rep. 170. 6 Cowen's Rep 369.

43. Griffith's Register, tit. New Jersey, art. Fisheries.

44. *Arnold v. Mundy*, 1 Halsted's Rep. 1. In Mr. Angell's Treatise on the right of property in tide waters, ch. 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.

45. *Lay v. King*, 5 Day's Rep. 72. *The Commonwealth v. Shaw*, 14 Serg. & Rawle, 9.

46. *Bagott v. Orr*. 2 Boss.& Pull. 472. *Peck v. Lockwood*, 5 Day's Rep. 22. But the case of *Bagott v. Orr* may be considered as overruled by that of *Blundell v. Catterall*, 5 Barnw. & Ald. 268. and the doctrine in *Peck v. Lockwood*, seems to be very questionable.

47. *Carson v. Blazer*, 2 Binney's Rep. 475. *Shrunk v. The President., &c. of the Schuylkill Navigation Company*, 14 Serg. & Rawle, 71.

48. *Cates v. Wadlington*, 1 M'Cord's Rep. 580.

49. Laws of N.Y. sess. 10. ch. 4 sec. 6, and ch. 50. sec. 7,

50. *Hewlins v. Shippam*, 5 Barnw. & Cress. 221.

51. Finch's Law, 17. 31.

52. 6 Mod. Rep. 3. 2 Lord Raym. 922.

53. *Clarke v. Cogge*, Cro. Jac. 170.

54. *Howton v. Frearson*, 8 Term Rep. 50.

55. Twysden, J., in *Pomfret v. Ricroft*, 1 Saund. Rep. 321.

56. Cro. Jac. 170.

57. Cro. Eliz. 300

58. *Holmes v. Elliott*, 2 Bingham's Rep. 76.

59. 2 Sid. Rep. 39.

60. 2 Lutw. Rep. 1487

61. 5 Taunt. Rep. 311.

62. *Whalley v. Thompson*, 1 Bos. & Pull. 371.

63. Popham. J, in *Jorden v. Atwood*. Owen's Rep. 121. Cruise's Dig tit. Ways, 23, 24. Note to 1 Bos. & Pull. 374.

64. Note 6. to 1 Saund. Rep 323.

65. *Taylor v. Whitehead*, Doug. Rep. 745.

66. Inst. 2. 1. 4. and 5.

67. Institutes of the Civil Law of Spain, by Doctors Asso and, Manuel, b. 2. tit. 1.

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68. Ferriere's Inst. 2. 1. 4, and 5., and note ibi. Code Napoleon, 538. 650.

69. Lib. 1. c. 12. sec. 6.

70. Lord Raym, 725. 6 Mod. Rep. 163.

71. Harg. L. T. p. 85, 86, 87.

72. 3 Term Rep. 253. No.

73. *Wright v. Howard*, 1 Simons & Stewart, 190.

74. Just. Inst. 2. 1. 20. Hale, *De Jure Maris*, ch 6. 2 Blacks. Com. 261, 262. *The King v. Lord Yarborough*, 3 Barnw. & Cress. 91.

75. Hale, *De Jure Maris*, ch. 1, 2, 3, 4. and 6. Bracton, De Aqu. Rer., lib. ii. ch. 2. sec. 6 Dig. 41. 1. 29. The King v. Smith, Doug. Rep. 441. Code Napoleon, No. 561.

76. *Berry v. Carle*, 3 Greenleaf's Rep. 269. *Morrison v. Keen*, ibid. 474. *Claremont v. Carlton*, 2 N. H. Rep. 369. *King v. King*, 7Mass. Rep. 496. *Lunt v. Holland*, 14 ibid. 149. *Ingraham v. Wilkinson*, 4 Pickering's Rep. 268. *Adams v. Pease*, 2 Conn Rep. 481. *Palmer v. Mulligan*, 3 Caines' Rep. 318. *The People v. Platt*, 17 Johns. Rep. 195. *Hooker v. Cummings*, 20 ibid. 90. *Ex parte Jennings*, 6 Cowen's Rep. 518. *Arnold v. Mundy*, 1 Halsted's Rep. 1. *Hayes, Ex'r, v. Bowman*, 1 Randolph's Rep. 417. A variety of cases to the same effect, are cited in the learned note of the reporter, in 6 Cowen's Rep, 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 aqua*, unless there be decided language, showing a manifest intent to stop short at the water's edge,

77. *Storer v. Freeman*, 6 Mass. Rep. 435. Dane's Abr. vol. ii. 693 694. Parker Ch. J., in *Ingraham v. Wilkinson*, 4 Pickering's Rep. 263.

78. *Carson v. Blazer*, 2 Binney's Rep. 475. *Shrunk v. The President of the Schuylkill Navigation Co.*, 14 Serg. & Rawle, 71.

79. *Cotes v. Wadlington*, 1 McCord's Rep. 280.

80. Hale. *De Jure. Maris*, ch. 4. and 5.

81. Halsted's Rep. 1.

82. Co. Litt. 48: b.

83. Bayley, J., in *Stratton v. Brown*, 4 Barnw. & Cress. 485.

84. 5 Wheat. Rep. 374.

85. Parsons, Ch. J., in *Storer v. Freeman*, 6 Mass. Rep. 438. *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357.

86. 5 Rob. Adw. Rep. 182.

87. *Goodtitle v. Alker*, 1 Burr Rep. 133. *Cortelyou v. Van Brundt*, 2 Johns. Rep. 357. *Jackson v. Hathaway*, 15 ibid. 447. *Makepeace v. Worden*, 1 N. Hamp. Rep. 16. *Peck v. Smith*, 1 Conn. Rep.103. *Perley v. Chandler*, 6 Mass. Rep. 454. *Robbins v. Borman*, 1 Pickering's Rep. 122. *Chambers v. Furry*, 1 Yeates' Rep. 167. The statute of New York, (sess. 36 ch. 33. sec. 28 and 29.) 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.

88. Dig. 3. 1. 15 Ibid. 8. 5, 6. 2. Toullier's *Droit Civil Franc.* tom. iii. n. 376. 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 distinction 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 Repertoire 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 Lataure, 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.

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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. Le Page has published two octavo volumes, entitled, *Lois des Batimes, 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 regime, discusses at large he 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 legislative 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 great respect, though he combats with freedom many of his opinions. Toullier himself (tom. iii. 326. to 554.) has discussed the whole of this subject of servitudes upon the principles of the code, with his usual order, accuracy and learning.

89. M. Fournel when speaking of the Roman law in relation to this subject, says, that *Quelque chose que vous demandez aux lois Romaines, elles vous enfournissent 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 passit.*

90. Dig. 8. 1. 2. Ibid. 8. 2. 19. Pothier, Coutume d'Orleans, Int. to tit. 13. des Servitudes, art 2. n. 6. See also his *Traité du Quassi Contrat de Communaute*, passim. Institutes of the Civil Law of Spain, by Doctors Asso and Manuel, book 2. tit. 6.

91. *Campbell v. Mesier*, 4 Johns. Ch. Rep. 334. Pothier, *Du Quasi-Contrat de Communaute,* No. 187-192. 220, 221.

92. Code Napoleon, No. 690.

93. *Matts v. Hawkins*, 5 Taunt. Rep. 20. The building act of 14 Geo. III. ch. 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 minute statute provisions.

94. Dig. 39. 3, 4. and 10. Pothier, *Traité du Contrat de Société*, second app. No. 236. 237. *Brown v. Best*, l Wils. Rep. 178. *Bealey v. Shaw,* 6 East's Rep. 203. *Wright v. Howard*, 1 Simon & Stuart, 190, *Gardner v. Village of Newburgh*, 2 John Ch. Rep. 162. *Belknap v Belknap*, ibid. 463. *Merritt v. Parker*, 1 Coxe's N J. Rep, 460. *Tyler v. Wilkinson*, by Story, J. Rhode Island Circuit, 1826.

95. *Beissell v. Stroll*, 4 Dallas' Rep. 211. *Palmer v. Mulligan*, 3 Caines, Rep. 207. *Colburn v. Richards*, 13 Mass. Rep. 420. *Cook v. Hull*, 3 Pickering's Rep. 268. *Runnels v. Bullen.* 2 N. 11. Rep. 532. *Tyler v. Wilkinson*, Rhode Island Circuit. 1826. *Merritt v Brinckerhoff,* 17 Johns. Rep. 306. *Van Bergen v. Van Bergen*, 3 Johns. Ch. Rep. 282.

96. *Traité du Contrat de Société* second app. No. 236.

97. The Code Napoleon, No. 640, 641, 643, 644 establishes the same just rules in the use of running waters.

98. The time of limitation varies in particular states. Thus, in Connecticut, the term of prescription is fifteen years, and in South Carolina, five years: (*Manning v. Smith*, 6 Conn. Rep. 239. *Anderson v. Gilbert*, 1 Bay's Rep. 375.) 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. Rep. 49.

99. 3 Bulst Rep. 339.

100. *Brown v. Best*, 1 Wils. Rep. 174. *Benly v. Sha*w, 6 East's Rep. 208. *Tyler v Wilkinson*, Rhode Island Circuit, 1826. *Hatch v. Dwight,* 17 Glass. Rep. 239.

101. *Lewis v. Price*, Esp Dig. 636. *Bradbury v. Grinsell*, 2 Saund,, Rep. 175. a. *Brown v. Best*, 1 Wils. Rep. 174. *Bealey v Shaw*, 6 East's Rep. 208. *Balston v. Bensted,* 1 Campb. N. P. Rep. 463. *Saunders v. Newman*, 1 Barnw. & Ald. 258. *Barker v. Richardson*, 4 Barnw. & Ald. 578. *Lewis v. Cross*, 2 Barnw. & Cress. 686. *Williams v Morland*, ibid. 910. *Livatt v. Wilson*, 3 Bingh. Rep. 115. *Gray v. Bond*, 2 Brod & Bingh. 667. *Wright v. Howard*, 1 Simon & Stuart 190.

102. Hazard v. Robinson, 3 Mason's Rep, 272. Sherwood v. Burr,4 Day's Rep. 244. Ingraham v. Hutchinson, 2 Conn. Rep. 584. Stiles v. Hooker 7 Cowen's Rep. 268. Campbell v. Smith. 3 Halsted's Rep. 139. Cooper v. Smith, 9 Serg & Rawle, 26. Strickler v. Todd, 10 ibid. 63. Tyler v. Wilkinson, before Judge Story, Rhode Island Circuit, 1826.

103. 3 East's Rep. 249.

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104. 3 Bing. Rep 115.

105. Rhode Island Circuit, 1826.

106. 2 Blacks. Com. 14. 403. Cow. Dig. tt Action upon the Case for a Nuisance, C. *Van Bergen v. Van Bergen*, 3 Johns. Ch. Rep. 282.

107. *Platt v. Johnston*, 15 Johns. Rep. 213. In *Hatch v. Dwight*, 17 Mass, Rep. 289. the Ch. J. 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.

108. *Saunders v. Newman*, 1 Barnw. & Ald. 258. *Van Bergen v. Van Bergen*, 3 Johns. Ch. Rep. 282. *Sherwood v. Burr*, 4 Day's Rep 244.

109. *Goodrich v. Knapp*, 8 Cowen's Rep.

110. *Prescott v. Phillips*, decided in 17 9. and reported in 2 Evans' Pothier, 136. *Lawrence v. Obee*, 3 Campb. Rep. 514. Bracton laid down the same principle, that incorporeal rights acquired by use may be equally lost by disuse. Lib. iv. *De assisa novae disseisinae*, ch. 38. sec.3.

111. See the reasoning of Sir William D. Evans, in Evans' Pothier, vol. ii. 136.; and the opinion of Mr. Justice Story, in *Tyler v. Wilkinson*, in which he says, that the proprietors of Sergent'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. Rep 183.

112. Dig. 8. 6.5., Voet. Com. ad Pand. Lib. 8. tit. 6. sec. 5 and 7. Touillier's *Droit Civil Francais*, tom. iii. n. 673. *Repertoire de Jurisprudence*, par Merlin, tit Servitude, ch. 30. sec. 6. ch. 33. Touillier says, that the article Servitude in the Repertoire is composed with great care. Civil Code of Louisiana, art. 815, 816.

113. 1 Saund. Rep. 323. note 6. Story J., in *Hazard v. Robinson*, 3 Mason's Rep. 276.

114. 3 Balst. Rep. 339. Popham's Rep. 166.

115. *Manning v. Smith*, 6 Conn. Rep 289

116. *More v. Rawson*, 3 Barnw. & Cress. 332.

117. 17 Mass. Rep. 289.

118. *Winter v. Brockwell*, 8 East's Rep. 308. *Web v. Paternoster*, Paler's Rep. 71. 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 water courses, 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.

119. Finch's Law, 162.

120. 2 Blacks. Com. 36.

121. Lass of N.Y. sess. 10. ch. 50. sec. 7.

122. Laws of N.Y. sess 11. ch. 16.

123. *Gulliford v. De Cardonell*, 2 Salk. Rep. 466.

124. *Godolphin v. Tudor*, 2 Salk. Rrp. 468. Willes's Rep. 575. note, S. C.

125. *Layng v. Paine*, Wille's Rep. 571.

126. Lord Hardwicke, in *Butler v. Richardson*, 1 Atk. Rep. 210. Amb. Rep. 73.

127. *Parsons v. Thompson*, 1. H. Blacks Rep. 322.

128. 9 Co. 95.

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129. Page, 162.

130. 4 Inst 29. 1 Lev. Rep. 76.

131. Burr. Rep. 1259.

132. 9 Co. 43.

133. As the ancient statutes of Westminster 2d, 13 Edw. I. and of 5 and Edw. VI. relative to the remedy for disturbance in office, and against the sale of offices, have been revived and re-enacted in this state, it might have been as well to have also re-enacted the statute of 12 Richard III., (A. D. 1318.) 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 any 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. Lilt. 234. a.) was worthy to be written in letters of gold, but more worthy to be put in due execution.

134. 2 Blacks. Com. 37. Finch's Law, 164,

135. Co. Lit. 144. b.

136. Co. Litt. 2. a. *Nevil's case*, 7 Co. 34. b.

137. Co. Litt. 144. b.

138. 2 Blacks. Com.41. Gilbert on Rents, 9.

139. Sec. 213.

140. Litt s. 213. Co. Litt. 142 a.

141. Litt. s. 217. Co. Litt. 143. b

142. Litt. s. 213. 217, 218. 235, 236. Co. Litt. 150. b. 160. a. Gilbert on Distresses, 6.

143. Laws of N.Y. sess. 36. ch. 63.

144. Ibid. sec. 5, 6. 10. 11. 18.

145. *Cornell v. Lamb*, 2 Cowen's Rep. 652. *Smith v. Colson*, 10 Johns. Rep. 91.

146. *Knight v. Bennett*, 3 Bing. Rep. 361. *Cornell v. Lamb*, 2 Cowen's Rep. 652. *Jacks v. Smith*, 1 Bay's Rep. 315.

147. Laws of N.Y. sess. 36. ch. 69. sec. 1.

148. Smith's Wealth of Nations, vol. i. 34. 187.

149. Smith's Wealth of Nations, vol. i. 333.

150. Litt. s. 346. Co Lilt. 142. b.

151. 16 Johns. Rep 1. 9. 2 Cowen's Rep. 652.

152. 1 Saund. Rep. 287. n. 11. *Strafford v. Wentworth*, Prec in Ch. 555. *Rockingham v. Penrice*, 1 P. Wms. 177. Laws of N.Y. sess. 36. ch 63. sec. 18.

153. 2 Rol Abr. tit. Rent, 0.

154. *Salmon v. Smith*, 1 Saund. Rep. 202. and 204. note 2. Co. Litt. 148. b. *Page v. Parr*, Styles' Rep. 432. *Timbrell v. Bullock*, ibid. 446. *Pendleton v. Dyett*, 4 Cowen's Rep. 581.

155. Pendleton v. Dyett, ub. sup.

156. 1 Dy. Rep. 55. b.

157. Aleyn's Rep. 26. Style's Rep. 47.

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158. 3 Johns. Rep. 44.

159. 4 Taunt. Rep.45.

160. 3 Anst. Rep. 687.

161. 18 Vesey's Rep. 115.

162. *Pollard v. Shaeffer*, 1 Dallas's Rep. 210. *Fowler v. Bott*, 6 Mass Rep. 63.

163. Dig. 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.

164. Amb. Rep. 619.

165. 1 Dyer, 33. a.

166. *Walker v. Dewey*, 16 Johns. Rep. 222. Gibbs, Ch. J. *Soward v. Palmer*, 8 Taunt. Rep. 277. *Hunter v. Le Conte*, 6 Cowen's Rep. 728

167. Laws N.Y. sess. 43. ch. 194. sec. 4.

168. Abbott, Ch. J., 5 Barnw. & Ald. 876.

169. Litt. sec. 222. Co. Litt. 147. b. 148. Q. *Talbot's case*, 8 Co. 102. Gilbert on Rents, 152. 163, 164,

170. Co. Litt. 148. a. Gilbert on rents, 163.

171. *Wotton v. Shirt*, Cro. Eliz. 742. Litt. sec. 224. 1 Rol Abr. tit. Apportionment, D. pl. 3, 4. 5.

172. *Hodgkins v. Robson*, 1 Vent Rep. 276. Vaughan v. Blanchard, 1 Yeates' Rep. 176.

173. Bro. Abr. tit. Apportionment, p1. 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 ibid. 602.

174. Laws of N.Y. sess. 36, rh. 63. sec. 27. *Ex parte Smith*, 1 Swanst. Rep. 333. The editor has annexed a learned note to that case. on the doctrine of apportionment as existing both before and since the statute of 11 Geo. II.

175. Laws of N.Y. sess. 11. ch. 5. Sess. 26. ch. 63.

176. *Hartshorn v. Kierman*, 2 Halsted's Rep. 29. *Woglam v. Cowperthwaite*, 2 Dallas' Rep. 68. *Garret v. Hughlet*, 1 Harr. & J. 3. 1 McCords' Rep. 299.

177. *Dalgleish v. Grandy*, Cam. & Nor. Rep. 22.

178. *Potter v. Hall*, 3 Pickering's Rep. 368.

179. Gilbert on Distresses, p. 2.

180. Ibid. p. 3.

181. 2 Inst. 102, 103.

182. Gilbert on Distresses, 4, 34.

183. 2 Inst. 132, 133. Gilbert on Distresses, 35, 36.

184. Cro. Jac. 148.

185. *Gorton v. Falkner*. 4 Term Rep. 565.

186. 2 Saund Rep. 289, a. n. 7. *Gisbourne v. Hurst*, 1 Salk. Rep. 249. 3 Black Com. 8. *Gilman v. Elton*, 3 Brod. &. Bing. 75. Co. Litt. 47. a. *Thompson v. Mashiter*, 1 Bing. Rep. 283.

187. *Gorton v. Falkner*, 4 Term Rep. 565. 2 Inst. 132, 133.

188. Wille's Rep. 512.

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189. *Francis v. Wyatt,* 3 Bur. Rep. 1498.

190. *Storey v. Robinson*, 6 Term Rep. 138.

191. 1 Sid. Rep. 440.

192. *Potter v. Hall*, 3 Pickering's Rep. 368. The statutes of New York of sess. 38. ch. 227. and sess. 38. ch. 177. specially exempt spinning wheels, and weaving looms, kept for use in a dwelling house; and sheep to the number of ten, and he cloth manufactured from them, one cow, two swine, and the pork of the same. and a few necessary articles of furniture. as well as wearing apparel and bedding, and owned by a householder are also exempted from distress for rent, as well as from execution. So the act of sess. 38. ch. 153. requires an affidavit. previous to any distress for rent, in the city of New York, of the amount of rent due. Also, by act of sess. 37. ch. 141. certain articles of property loaned by benevolent institutions in the city of New York, are exempted from dig. tress for rent. And by the act sess. 47. ch. 44. family pictures, and books, not exceeding fifty dollars in value, are exempt from distress and execution, in the hands of executors and administrators.

193. Laws or N. Y. sess. 36. ch. 36. sec. 8 and 9.

194. Ibid. sess. 36. ch. 63. sec. 21. Sess. 43. ch. 194.

195. Laws of N.Y. sess. 43, ch. 194.

196. Ibid. sess. 36. ch. 63. sec. 13, 14. Sess. 43. ch. 194. *Reynolds v. Shuler*, 5 Cowen's Rep. 323.

197. Ibid. sess. 36. ch. 63. sec. 12, 13. 14. Sess. 43. ch. 194. *Russell v. Doty*, 4 Cowen's Rep. 576.

198. *Smith v. Russell*, 3 Taunt. Rep. 400. *Alexander v. Mahon*, 11 Johns Rep. 185.

199. Sess. 36. ch. 63. sec. 13.

200. *Reynolds v. Shuler*, 5 Cowen's Rep. 323.

201. *Turboss v. Williams*, 5 Cowen's Rep. 407.

202. Co. Litt. 47. b. *Pennant's case*, 3 Co. 64. *Stanfill v. Hicks*, 1 Lord Raym 280.

203. Laws N.Y. sess. 36 ch. 63, sec. 17.

204. *Brathwaite v. Cooksey*, 1 H. Black. 465. *Wright v. Williams*, 5 Cowen's.Rep. 501.

205. 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 re-enacted, 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.

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LECTURE 52

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 is no allodial property, or 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. *Praedium Domini Regis est directum Dominium, cujus nullus author, est nisi Deus*.[1]

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 to be *absque aliquo inde reddendo*.[2] Sir Henry Spelman[3] defines a feud to be *usus fructus rei immobilis sub conditione fidei; vel jus utendi praedio alieno*. The vassal took the profits, but the property of the soil remained in the lord, and the seignory of 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 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. By the statute of New York, of the 20th February, 1787,[4] entitled, An Act concerning Tenures, the Legislature re-enacted the statute of 12 Car. II. ch. 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, are held by the tenure of free and common socage; but all lands held under grant of the people of the state, (and which includes, of course, all the lands in the western and northern parts of this state, which have been granted and settled since the revolution,) are declared to be allodial and not feudal, and to be owned in free and pure allodium. All the lands in this state are,, therefore, in contemplation of law, either held by the tenure of free and common socage, or enjoyed as allodial; and though the distinction has become merely nominal, it is impossible to give to the student any intelligible explanation of 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 an image of feudal policy had been discovered in almost every age and quarter of the globe.[5] 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. But the grants of forfeited lands, by the Roman conquerors to their veteran

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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 deducting 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 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.[6]

The better, and the prevailing opinion is, that the origin of the feudal system is essentially to be attributed to the northern Gothic conquerors of the Roman empire. It was part of their military policy, and devised by them as the most effectual means to secure their conquests. 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 parcels to their sub-tenants or vassals, and all were granted under the same condition of fealty and military service. 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 Caesar and Tacitus.[7] But there could not have been anything 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.[8] 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.[9]

The traces of the feudal policy were first distinctly perceived among the Franks, Burgundians and Lombards, after they had invaded the Roman provinces. They 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.[10] 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.[11] 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.[12]

These grants, which were first called benefices, were, in their origin, for life, or perhaps only for a term of years.[13] The vassal had a right to use the land, and take the profits, 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. Prior to the introduction of the feudal system, lands were allodial, and

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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.[14]

They were never so strictly 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.[15]

The precise time when benefices became hereditary, is uncertain. They began to be hereditary in the age of Charlemagne, who facilitated the conversion of allodial into feudal estates.[16] 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.[17] 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.[18] The right of primogeniture, 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 a vassal competent, from his sex and age, to render the military services which ought be required. The practice of subinfeudations, or *arriere fiefs*, by the higher ranks of feudal vassals, grew with the growth of tenures, and were created on the same condition military service by the inferior vassals to their immediate lords. The feudal governments gradually assumed the appearance of combinations of military chieftains, fit a regular order of subordination, but loosely connected with each other, and feebly controlled bo the monarch, or federal head.

It would appear, at first view, to he very extraordinary that such a free and rational species of property as allodial, and which was well calculated to meet the natural wants of 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.[19] 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 by inheritance. In these respects allodial estates were the very reverse of lands held by a feudal tenure. Land 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

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feudal chief was sure to revenge any injury offered to himself or any of his dependents, 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.[20] They 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,[21] which a disciplined army enjoys over a dispersed multitude; and were enabled to commit, with impunity, all injuries upon their defenseless 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 association. They surrendered their lands to some powerful chief, paid him the reverential rites of homage and fealty, received back their lands tinder 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 system gradually spread, and was extended over the principal kingdoms of Europe.[22]

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 defense 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.[23]

But this same loyal association, which was so auspicious in its beginning as in a great degree to destroy the value of allodial property, degenerated in process of time, and became 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.

(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 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.[24]

The tenures which were authoritatively established in England, in the time of the Conqueror, were principally of two kinds, according to the service annexed. They were either tenures by knight service, in which the services, though occasionally uncertain, were altogether of it military nature, and esteemed highly honorable, according to the martial spirit of the times; or they were tenures by socage, in which the services were defined and certain, and generally of a praedial or pacific nature.[25] 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,

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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 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.[26] The greatest part of the lands in England were held by this tenure by knight service; and several of these fruits and consequences of the feudal tenure, belonged also to tenure in socage. Those abuses of the feudal connection took place equally in England, and in other parts of Europe. The spirit of rapacity met, however, 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 Carta, 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 ere of the great charter, enabled the nation to struggle with better success than any other people against the enormous oppression of the system

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 an usufructuary interest, and in default of heirs the tenure became extinct, and the lend reverted to the lord. The heir took by purchase, and independent of the ancestor, who could not alien, nor could the lord alien the seignory 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 pertly from favor to the heir, end partly from favor to the lord, end 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,[27] the 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 upon alienation of the feudal estate, was the power of alienation by the tenant with leave of the lord, end this tended to leave 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,[28] 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.[29] 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.[30] The tenant gained successively the power of alienation, if the grant was only to him and his heirs; and

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the power to charge, or encumber 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 debt, and also by process under the statutes merchant and staple.[31] It was further, and as early as the reign of Edw. III., made subject to the dower of the wife.[32] Subinfeudation was also an indirect mode of transferring the fief, and resorted to as an artifice to elude the feudal restraint upon alienation; and when the statute of *Quia Emptores*, 18 Edw. 1 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.[33]

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.[34] At length, upon the restoration of Charles II, tenure by knight service, with 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 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 these 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;[35] 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.

But most of the feudal incidents and consequences of socage tenure, are expressly abolished in New York, by the act of 1787, already mentioned; and they are all annihilated by statute in Connecticut; and they have never existed, or they have ceased to exist, in all essential respects, in every other state. The only feudal fictions and services which appear to be retained in this state, consist of the feudal principle, that the lends in socage are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due. The act of 1787 provided, that the socage lands were not to be deemed discharged of “any rents 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 lord paramount of all socage land is none other than the people of this state, and to them, and them only, the duty of fealty ought 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.

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In our endeavors to discover the marks or incidents which still discriminate 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.[36] Fealty was the same as *fidelitas*. It was an oath of fidelity to the lord, and, to use the words of Littleton,[37] when a freeholder does fealty to his lord, he shall lay his right hand 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 aught to do at the terms assigned: so help me God and his saints."

This oath of fealty every where 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 he 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 as 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 in this state by socage tenure, (and all lands granted or patented before the revolution are so held,) would seem, in theory, to be 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 hold. Fealty was at common law deemed inseparable from tenure of every kind, except the tenure in Frankalmoigne; but a tenant at will was not hound 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 that point.[38] 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.[39] Sir Matthew Hale[40] says, the oath of fealty may be due to an inferior lord, and then the oath must have the saving *salva fide et ligentia domini regis*.

The question here occurs, can this oath of fealty be exacted in this state by landlords, and lords of manors, from tenants other than tenants at will, or from year to year? The statute I have so often referred to, saves the services incident to tenure in common socage, and which, it presumes, may be due, not only to the people of this state, but to any mean lord, or other private person, and it saves the fealty and distresses incident thereunto. It would not be fit or expedient to retain this doctrine of the feudal fealty, in reference to any other superior than the chief lord of the fee, or, in other words, the people of this state, and then it resolves 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 then[41] but Sir Matthew Hale,[42] in a long and learned dissertation, undertakes to explain the difference between the oath of allegiance and the oath of fealty. The statute of 1787 was only a transcript of the statute of 12 Charles II., and the provision was probably retained for greater caution; and as the practice of exacting fealty has gone

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entirely out of use in England, and was never known in this state, and is altogether inconsistent with our policy and mariners, fealty, in the technical sense, may fairly be considered as a dormant incident of feudal tenure never to be revived.[43]

The Statute of 1787, declares that the tenures upon all grants from the people of this state, shall be allodial, and not feudal, and be discharged from all services whatsoever, and shall be taken to be, and continue in, free and pure allodium only.[44]

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 in theory to a great part of the real property in this country, chartered and possessed before our revolution, and though every proprietor be considered as holding an estate in fee simple, none of the inconveniences of tenure are felt or known. We have very generally abolished the right 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. Socage tenures do not exist any longer, even in theory, in those parts of this state which have been patented since the revolution; and where they do exist, they partake of the 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.[45] 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.”[46]

END OF VOLUME III

NOTES

1. Co Litt. 1. b. 65. a. 2 Blacks. Com. 105.

2. Bro. tit Tenures, 3. 52. 6 Co. 6. b. 9 Co. 123. a. Wright on Tenures, 137, 138.

3. Treatise of Feuds and Tenures by Knight Service, ch. 1.

4. Laws N. Y. sess. 10. ch. 36.

5. 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 Doctor Robertson to have existed in its most rigid form among the ancient Mexicans; and the government of the Birman [Burmese] 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 in the island of Ceylon. Robertson's History of America, b. 7. vol. ii. 280. Col. Symes' Embassy to Ava, vol. ii. 356. Asiatic Annual Register, for 1799, tit. Miscellaneous Tracts, p. 116.

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6. Harg. note 1 to lib, ii. Co. Litt. Butler's note 77. to lib. iii. Co. Litt. Sullivan's Treatise on the Feudal Law lec. 3. Mr. Spence, in a recent work, entitled, An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, London, 1826 p. 5. 32. 32, 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 an ancient, and now seemingly exploded 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, vol. vi. 378.

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. It is a remarkable fact, that the Emperor Charlemagne, in the year 788, caused the Theodosian code to be transcribed from the edition of Alaric, king of the Visigoths, and that code, which is sometimes called the Anian Breviary, 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 Francais*, par l'Abbe Fleury, ch. 4 and 11. There is no doubt that villenage, or the servitude of the glebe, existed in the Roman provinces. This appears from the contents of the code *De Agricolis, et Censitis, et Colonis*. Code, lib. ii. tit. 47, and Montesquieu has justly and sagaciously inferred, even from the laws of the Burguardians, that praedial servitude existed in Gaul before it was invaded by those barbarians. *Esprit des Loix*, liv. xxx. ch. 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.

7. Sir Henry Spelman on Feuds and Tenures by Knight Service, ch. 2. Grotius, *De Jure Belli et Pacis.* lib. i. ch. 3. sec. 23. Wright on Tenures, ch. 1, p. 6, 7. Sullivan on Feudal Law, lec 3. Dalrympel's Essay on Feudal Property. ch. 1. *Hic contractus (scilicet feudalis) proprius est Germanicorum Gentrum neque usquam invenitus, nisi ubi Germani sedes posuerunt.* This is the language of Grotius, and Craig is to the same effect: *Constat, feudorum originem a septentrionstibus Gentibus defluxisse*. Craig, *De Jure Feud*, 25. In a few passages of Caesar and Taciitus concerning the customs of the Germans, may be seen, says Dr. Sullivan, the old feudal law, and all its original parts, in embryo.

8. Caesar, *De Bel. Gal*. b. 6. Tacitus, *Mor. Ger*. ch. 5. 11. 26.

9. Vellius Pater, b. 2. ch. 117, 118. It was their custom, said the Germans to Julius Caesar, delivered down to them from their ancestors, to oppose, not to implore, whoever made war upon them. Caesar, *De Bel. Gal*. b. 6.

10. The barbarian conqueror of Gaul and Italy generously allowed every man to elect by what law he would be governed. *Esprit des Loix*, b. 25. ch. 2. Hallam on the Middle Ages, vol. 1. 83.

11. *Esprit des Loix*, b. 28, *passim*, ibid. b. 30. ch. 6, 7, 9. Montesquieu has given a very interesting account of the institutions and 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, 3.

12. *Esprit des Loix*, b. 3. c. 16.

13. Hallam on the Middle Ages, vol. 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.

14. Hallam, vol. i. 97, 112, says, that five centuries elapsed before allodial estates had given away, 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.

15. Voet, in his *Digressio de Feudis*, sec. 4 *Com. ad Pand*. lib. 28, 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*. tom. 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 erril* all lands were presumed to be allodial until the contrary was shown, while in the *pays contumiers* 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 Francais*, par Argou tom. i. 195) But now, in France, the feudal law, with all its rights and incidents, is abolished, as being incompatible with freedom

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and social order. Touillier, *Droit Civil Francais*, tom. iii. 64. Ibid, tom. vi. 192.

16. The Abby de Mably, in his *Observations sur l'Hist. de France*, b. 2. ch. 5. note 3, says that Louis le Debonnaire, the son and successor of Charlemagne, first rendered fiefs hereditary in France, but a much 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, vol. i 91.

17. This was by a capitulary of Charles the Bald, A. D. 877. *Esprit des Loix*, b. 31. c. 25.

18. *Consuetudines Feudorum*, b. 1. tit 1 and 8. b. 2. tit. 1. *Esprit des Loix*, b. 31. ch 28, 29, 31, 32. *Inst. au Droit Francais* par Arzou, tom. 1. b. 2. ch.2. *Des Fiefs*. Hallam on the State of Europe during the Middle Ages. vol. i. 91, 96. The Book of Fiefs, under the title of *Consuetudines Feudorum* is supposed to have been compiled by two Milanese lawyers. A.D. 1176, 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.

19. The term allodial is said to have been derived from *al*, which signifies integer, and *od*, which signified 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 Scots judge. (Stuart's View of Society in Europe. p. 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 obtaining by lot,) it at least corresponds with the character of allodial estates. Mr. Hallam says, that allodial lands are commonly opposed to beneficiary or feudal, and in that sense the word continually occurs 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, (vol. 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 held of any superior, and wholly exempt from all seignorial rights and services. *Inst. au Droit Francais*, par Argou, tom. i. 193. *Allodium est proprietas quae a nullo recognoscitur*. Ferriere's Dict. tit. *Franc-aleu*.

20. 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 riparian laws, to pay 600 sous for the murder of a vassals, 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. 3l. ch. 8.

21. Hume's History of England, appendix,

22. *Esprit des Loix*, b. 31. ch. 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, vol. i. ch. 2. p. 93, 94. Stuart's View of Society in Europe, b. 1. ch. 2. sec. 3. Spence's Inquiry, p. 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.

23. Dr. Stuart's View, b. 2. ch. 1. sec. 1. Hallam, *ub. sup*. vol. i. 99-178, 179. Sir Henry Spelman, in his Treatise of Feuds and Tenures, ch. 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."

24. The ordinances of William the Norman, establishing the feudal tenure of lands to be held *jure haereditario in perpetuum*, are quoted as authentic by the most learned of the English lawyers; (Wright on Tenures, p. 65 to 76. Blacks. Com. vol. ii. p. 60.) and they are collected in Lambard's *Archaionomia*, p. 170. L. L. Conq. Wm. I. ch. 52, 55. Those laws purport to have been enacted, *per commune concilium totius regni*.

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 anything 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 Seldon, 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

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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 the equal name of Mr. Burke, who, in his admirable Abridgment of English History, b. 2. ch. 7, maintains the position, that the Anglo Saxons, those fierce and 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.

Mr. Turner, on the other hand, in his recent 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 lands were hereditary without primogeniture. These admissions destroy the force of his conclusion. (Turner's History, vol. ii. 541,542 or Appendix, No. 4. b. 6. ch. 3). Mr. Reeve and Mr. Hallam take a middle course, and 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. (Reeve's History of the English Law, vol. i. p. 9. Hallam on the Middle Ages, vol. ii. ch. 8. part 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*, (Whelock's edit. 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 semi barbarous race. Their chief objects were, (1.) True preservation of the peace. (2.) The settling the rate of pecuniary mulcts or compositions for all sorts of crimes, and when corporeal punishment was resorted to, the prescription was cruel. (3.) The settling the ceremonies of religious observances, and the oaths of 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.

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 Feudal Property, p. 20, 21.

25. Wright on Tenures, 139-142.

26. Littleton's Tenures, b. 2. Wright on Tenures, *passim*. 2 Blacks. Com. ch. 5. Mr. Hallam, vol. i. 101-106, vol. 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's Rep. 177, says, that the right of escheat was not founded on 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.

27. Lib. 2. tit. 55.

28. B. 7. ch. 1.

29. Dalrymple's Essay on Feudal Property, ch. 3. sec. 1.

30. Bracton b. 2. c. 5, sec. 4. and 7, — ch. 6. fo. 18. b. — ch. 27, sec. 1.

31. West, 11, 13 Edw. I. ch. 18, also 13 Edw. I. *De Mercatoribus*, and 27 Edw. III.

32. Bro. tit. Dower, pl. 64.

33. Sir Thomas Clarke, the Master of the Rolls, in *Burgess v. Wheate*, 1 Eden's Rep. 191, has given a short, but clear view, of the progress of the feudal estate in its recovery from the feudal restraint of non alienation. See also, Mr. Butler's note, 77.

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to lib. 3. Co. Litt. V. No. 6, 7, 8, 9, 10, and 11: and see especially the able and learned history of the alienation of land, in Dalrymple's Essay on Feudal Property, ch. 3.

34. Lord Bacon's Works, vol. iii. 359.

35. P. 141 to 144.

36. Wright on Tenures, p. 35, 55, 138, 140, 145.

37. Sec. 91.

38. Littleton, sec. 117, 130, 131, 132, 139. Co. Litt. 63. a. 67. b. Harg. n. 13 to lib. ii. Co. Litt.

39. Harg. n. 20, to lib. ii. Co. Litt.

40. H P C, vol. i. 67.

41. Co. Litt. 68. b.

42. H. P. C. vol. i, p. 62-70.

43. In *Cornel v. Lamb*, 2 Cowen's Rep. 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.

44. The statute would seem, according to the feudal theory, not to have been penned with philological accuracy, when it declares, that the tenure of all lands derived from the people of this state shall be allodia', 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 of Feuds,ch. 3. *Tenure est la maniere par quay les tenements sont tenus des Seigneurs*. *Custum. de Norm*. cited by Sir Martin Wright on Tenures, p. 139. note.) But the statute has not committed 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 seized in his demesne as of fee.

45. Co. Litt. 1. 2 Blacks. Com. 106.

46. *C'est un beau spectacle que celui des loix feudales; un chene antique s'éleve: il faut perrer 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.

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