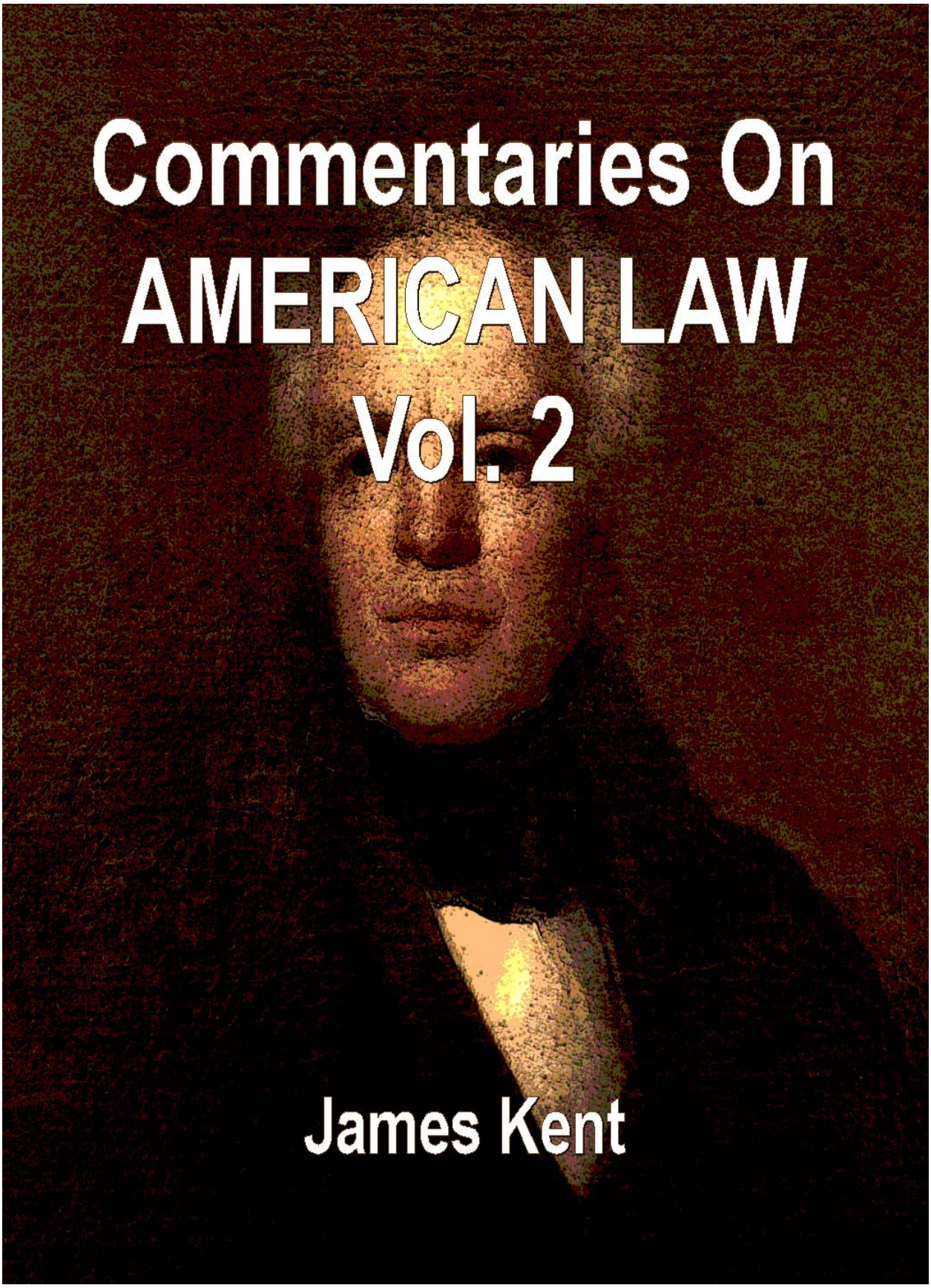
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James Kent

COMMENTARIES ON AMERICAN LAW

BOOK 2 (1827)

JAMES KENT

Based on the first edition

Footnotes have been converted to chapter end notes.
Spelling has been modernized.

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PART 4
Of the Law Concerning the Rights of Persons

LECTURE 24

Of the Absolute Rights of Persons

THE rights of persons in private life are either absolute, being such as belong to individuals in a single unconnected state; or relative, being those which arise from the civil and domestic relations.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable. The history of our colonial governments bears constant marks of the vigilance of a free and intelligent people; who understood the best securities for political happiness, and the true foundation of the social ties. The inhabitants of Massachusetts, in the very infancy of their establishment. declared by law that the free enjoyment of the liberties which humanity, civility and Christianity called for, was due to every man in his place and proportion, and ever had been, and ever would be, the tranquillity and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen, and they defined and declared those privileges with a caution, sagacity and precision, that have not been surpassed by their descendants. Those rights were afterwards, in the year 1692, on the receipt of their new charter, reasserted and declared. It was their fundamental doctrine, that no tax, aid or imposition whatever, could rightfully be assessed or levied upon them, without the act and consent of their own legislature; and that justice ought to be equally, impartially, freely, and promptly administered. The right of trial by jury, and the necessity of due proof preceding conviction, were claimed as undeniable rights; and it was further expressly ordained, that no person should suffer without express law, either in life, limb, liberty, good name, or estate; nor without being first brought to answer by due course and process of law.[1]

The first act of the General Assembly of the colony of Connecticut, in 1639, contained a declaration of rights in nearly the same language;[2] and among the early resolutions of the General Assembly of the colony of New York, we meet with similar proofs of an enlightened sense of the provisions requisite for civil security. It was declared by them,[3] that the imprisonment of subjects without due commitment for legal cause, and proscribing and forcing them into banishment, and forcibly seizing their property, were illegal and arbitrary acts. It was held to be the unquestionable right of every freeman, to have a perfect and entire property in his goods and estate; and that no money could be imposed or levied, without the consent of the General Assembly. The erection of any court of judicature without the like consent, and exactions upon the administration of justice, were declared to be grievances. Testimonies of the same honorable character are doubtless to be met with in the records of the other colony legislatures. But we need not pursue our researches on this point, for the best evidence that call be produced of the deep and universal sense of the value of our natural rights, and of the energy of the principles of the common law, are the memorials of the spirit which pervaded and animated every part of our country, after the peace of 1763, when the same parent power which had nourished and protected us, attempted to abridge our immunities, and retard the progress of our rising greatness.

The House of Burgesses in Virginia took an early and distinguished part, upon the first promulgation of the stamp act, in the assertion of their public rights as free born English subjects.[4] The claim to common law rights, soon becomes a topic of universal concern and national vindication. In October, 1765, a convention of delegates from nine colonies, assembled at New York, and made and

published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were the exclusive power to tax themselves, and the privilege of trial by jury.[5] The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the memorable declaration of rights of the first continental congress, in October, 1774. That declaration contained the assertion of several great and fundamental principles of American liberty, and it constituted the basis of those subsequent bills of rights, which, under various modifications, pervaded all our constitutional charters. It was declared, "that the inhabitants of the English colonies in North America, by the Immutable laws of nature, the principles of the English constitution, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever, a right to dispose of either, without their consent; that their ancestors, who first settled the colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural born subjects; and by such emigration, they by no means forfeited, surrendered, or lost any of those rights; that the foundation of English liberty, and of all free government, was a right in the people to participate in the legislative power, and that they were entitled to a free and exclusive power of legislation, in all matters of taxation and internal policy, in their several provincial legislatures, where their right of representation could alone be preserved; that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law; that they were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances;– that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."[6] Upon the formation of the several state constitutions, after the colonies had become independent states, it was, in most instances, thought proper to collect, digest, and declare, in a precise and definite manner, and it, the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind.

The precedent for these declaratory bills of rights was to be found, not only ire the colonial annals to which I have alluded, but in the practice of the English nation, who had frequently been obliged to recover by intrepid councils, or by force of arms, and then to proclaim by the most solemn and positive enactments, their indefeasible rights, as a barrier against the tyranny of the executive power. The establishment of Magna Carta, and its generous provisions for all classes of freemen against the complicated oppressions of the feudal system; the petition of right, early in the reign of Charles I, asserting by statute the rights of the nation as contained in their ancient laws, and especially in "the great charter of the liberties of England;" and the bill of rights at the revolution, in 1688, are illustrious examples of the intelligence and spirit of the English nation, and they form distinguished eras in their constitutional history. But the necessity in our representative republics of these declaratory codes, has been frequently questioned, inasmuch as the government, in all its parts, is the creature of the people, and every department of it is filled by their agents, duly chosen or appointed, according to their will, and made responsible for mal-administration. It may be observed, on the one hand, that no gross violation of those absolute private rights, which are clearly understood and settled by the common reason of mankind, is to be apprehended in the ordinary course of public affairs; and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty. When the spirit of liberty has fled, and truth

and justice are disregarded, private rights can easily be sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private right. It requires more than ordinary hardness and audacity of character, to trample down principles, which our ancestors cultivated with reverence, which we imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity, and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are part of the muniments of freemen, show in their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private right. Care, however, is to be taken in the digest of these declaratory provisions, to confine the manual to a few plain and unexceptionable principles. We weaken greatly the force of them, if we encumber the constitution, and Perhaps embarrass the future operations and more enlarged experience of the legislature, with a catalogue of ethical and political aphorisms, which, in some instances, may reasonably be questioned, and in others, justly condemned.[7]

In the revision of the constitution of New York, in 1821, the declaration of rights was considerably enlarged, and yet the most comprehensive, and the most valuable and effectual of its provisions, were to be found in the original constitution of 1777, as it was digested by some master statesmen, in the midst of the tempest of war and invasion. It was declared,[8] that no authority should be exercised over the people or members of this state, on any pretense whatever, but such as should be derived from, and granted by them; and that trial by jury, as formerly used, should remain inviolate for ever; and that no bills of attainder should be passed, and no new courts instituted, but such as should proceed according to the course of the common law; and that no member of the state should be disfranchised, or deprived of airy of his rights or privileges under the constitution, unless by the law of the land, or the judgment of his peers. Several of the early state constitutions had no formal bill of rights inserted in then; and experience teaches us, that the most solid basis of public safety, and the most certain assurance of the uninterrupted enjoyment of our personal rights and liberties, consists, not so much in bills of rights, as in the skillful organization of the government, and its aptitude, by means of its structure and genius, and the spirit of the people which pervades it, to produce wise laws, and a just, firm, and intelligent administration of justice.

I shall devote the remainder of the present lecture to examine more particularly the right of personal security and personal liberty, and postpone the consideration of the right of private property, until we arrive at another branch of our inquiries.

(1.) The right of personal security is guarded by provisions which have been transcribed into the constitutions in this country from Magna Carta, and other fundamental acts of the English Parliament, and it is enforced by additional and more precise injunctions. The substance of the provisions is, that no person, except on impeachment, and in cases arising in the military and naval service, shall be held to answer for a capital, or otherwise infamous crime, or for any offense above the common law degree of petit larceny, unless he shall have been previously charged on the presentment or indictment of a grand jury; that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself; and in all criminal prosecutions, the accused is entitled to a speedy and public trial by an impartial jury; and upon the trial he is entitled to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. And as a further guard against abuse and oppression in criminal proceedings, it is declared, that excessive bail cannot be required, nor excessive fines imposed, or cruel and unusual punishments inflicted; nor can any bill of attainder, or ex post facto law, be passed. The constitution of the United States, and the constitutions of almost every state in the Union, contain the same declarations in substance, and nearly in the same language. And where express constitutional provisions on this subject appear to be wanting, the same principles are probably asserted by declaratory legislative acts; and they must be regarded as fundamental doctrines in every state, for all the colonies were parties to the national declaration of nights in 1774, in which the trial by jury, and the other rights and liberties of English subjects, were peremptorily claimed as their undoubted inheritance and birthright.

It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken, or imprisoned, or diseased of his freehold, or liberties, or estate, or exiled, or condemned, or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers. The words, by the law of the land, as used in Magna Carta,[9] in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke,[10] is the true sense and exposition of those words.

But while cruel and unusual punishments are universally condemned, some theorists have proposed the entire abolition of the punishment of death, and have considered it to be an unnecessary waste of power, if not altogether unjust and unwarrantable. It has been supposed, that the object of punishment, and the ends of government, can be as well, or more effectually answered, by the substitution of milder sanctions. The great difficulty is, to attain the salutary ends of punishment, and, at the same time, avoid wounding the public sense of humanity. The punishment of death is, doubtless, the most dreadful, and the most impressive spectacle of public justice; and it is not possible to adopt any other punishment equally powerful by its example. It ought to be confined to the few cases of the most atrocious character, for it is only in such cases that public opinion will warrant the measure, or the peace and safety of society require it. Civil society has an undoubted right to use the means requisite for its preservation; and the punishment of murder, with death, accords with the judgment and the practice of mankind, because the intensity and the violence of the malignity that will commit that crime, require to be counteracted by the strongest motives which call be presented to the human mind. Grotius[11] discusses much at large, and with his usual learning and ability, the design and the lawfulness of punishment; and he is decidedly of the opinion, that capital punishments in certain cases, are not only lawful under the divine law, but indispensable to restrain the audaciousness of guilt. He recommends, however, for adoption in many cases, the advice, and even the example of some of the ancients, by the substitution of servile labor and imprisonment for capital punishment. This has been done since his time to a very great extent in some parts of Europe, and especially in these United States. Though the penitentiary system has not hitherto answered the expectations of the public, either in the reformation of offenders, or as an example to deter others; yet the more skillful arrangement of the prisons, and the introduction of a stricter and more energetic system of prison discipline, consisting essentially of close confinement, united with productive labor, (and which have been carried into effect. with beneficial results in the state prison at Auburn, and in the new state prison at Mount Pleasant, in this state,) afford encouraging expectations that they will be able to redeems the credit of the system, and recommend the punishment of solitary imprisonment and hard labor, instead of capital and other sanguinary

punishments, to the universal approbation of the civilized world.

While the personal security of every citizen is protected from lawless violence, by the arm of government, and the terrors of the penal code; and while it is equally guarded from unjust and tyrannical proceedings oil the part of the government itself, by the provisions to which we have referred; every person is also entitled to the preventive arm of the magistrate as a further protection from threatened or impending danger; and, on reasonable cause being shown, he may require his adversary to be bound to keep the peace. If violence has been actually offered, the offender is not only liable to be prosecuted and punished on behalf of the state, but he is bound to render to the party aggrieved, adequate compensation in damages. The municipal law of our own, as well as of every other country, has likewise left with individuals the exercise of the natural right of self defense, in all those cases in which the law is either too slow, or too feeble to stay the hand of violence. Homicide is justifiable in every case in which it is rendered necessary in self-defense, against the person who comes to commit a known felony with force against one's person, or habitation, or property, or against the person or property of those who stand in near domestic relations.[12] The right of self-defense in these cases is founded in the law of nature, and is not, and cannot be superseded by the law of society. In those instances, says Sir Michael Foster, the law, with great propriety, and in strict justice, considers the individual to be under the protection of the law of nature. There are some important distinctions on this subject, between justifiable and excusable homicide, and manslaughter, and murder, which it does not belong to my present purpose to examine; and I will only observe, that homicide is never strictly justifiable in defense of a private trespass, nor upon the pretense of necessity, when the party is not free from fault in bringing that necessity upon himself.[13]

(2.) As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.[14] The Roman law took a just distinction between slander spoken and written; and the same distinction prevails in our law, which considers the slander of a private person by words, in no other light than a civil injury, for which a pecuniary compensation may be obtained. The injury consists in falsely and maliciously charging another with the commission of some public office, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if trite, would render him unworthy of employment; or, lastly, with any other matter or thing, by which special injury is sustained. But if the slander be communicated by pictures, or signs, or writing, or printing, it is calculated to have a wider circulation, to make a deeper impression, and to become proportionably more injurious. Expressions which tend to render a man ridiculous, or lower him in the esteem and opinion of the world, would be libelous if printed, though they would not be actionable if spoken.[15] A libel, as applicable to individuals, has been well defined[16] to be a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. A malicious intent towards government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel. It then becomes a grievance, and the law has accordingly considered it in the light of a public as well as a private injury, and has rendered the party not only liable to a private suit at the instance of the party libeled, but answerable to the state by indictment, as guilty of an offense tending directly to a breach of the public peace.[17]

But though the law be solicitous to protect every man in his fair fame and character, it is equally

careful that the liberty of speech, and of the press, should be duly preserved. The liberal communication of sentiment, and entire freedom of discussion, in respect to the character and conduct of public men, and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers, which resides in the free people of these United States. It has, accordingly, become a constitutional principle in this country, that "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press."

The law of England, even under the Anglo-Saxon line of princes, took severe and exemplary notice of defamation, as an offense against the public peace;[18] and in the time of Henry III, Bracton[19] adopted the language of the Institutes of Justinian, and held slander and libelous writings to be actionable injuries. But the first private suit for slanderous words to be met with in the English law, was in the reign of Edward III, and for the high offense of charging another with a crime which endangered his life.[20] The mischiefs of licensed abuse were felt to be so extensive, and so incompatible with the preservation of peace, that. several acts of parliament, known as the statutes *de scandalis magnatum*, were passed to suppress and punish the propagation of false and malicious slander.[21] They are said to have been declaratory of the common law,[22] and actions of slander were slowly, but gradually multiplied, between the time of Edward III, and the reign of Elizabeth,[23] when they had become frequent. The remedy was applied to a variety of cases and in a private action of slander for damages, and even in the action of *scandalum magnatum*, the defendant was allowed to justify, by showing the truth of the fact charged, for if the words were true, it was then a case of damnum absque injuria, according to the just opinion of Paulus, in the civil law.[24] But in the case of a public prosecution for a libel, it became the established principle of the English law, as declared in the Court of Star Chamber, about the beginning of the reign of James I,[25] that the truth of the libel could not be shown by way of justification, because, whether true or false, it was equally dangerous to the public peace. The same doctrine remains in England to this day unshaken; and in the case of *The King v. Burdett*,[26] it was held, that where a libel imputes to others the commission of a triable crime, the evidence of the truth of it was inadmissible, and that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances, and that if the contents were likely to produce mischief, the defendant must be presumed to intend that which his act was likely to produce. "The liberty of the press," as one of the judges in that case observed, "cannot impute criminal conduct to others without violating the right of character, and that right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends." Whether the rule of the English law was founded on a just basis, and whether it was applicable to the free press and free institutions in this country, has been a question extensively and laboriously discussed in several cases which have been brought before our American tribunals.

In the case of *The People v. Croswell*,[27] which came before the Supreme Court of this state in 1804, and was argued at the bar with very great ability, the court were equally divided in opinion on the point, whether, on an indictment for a libel, the defendant was entitled to give in evidence to the jury the truth of the charges contained in the libel. In the Court of Appeals in South Carolina, in 1811, the court unanimously decided, in the case of *The State v. Lehre*,[28] that by the English common law it was settled, on sound principles of policy derived from the civil law, that the defendant had no right to justify the libel by giving the truth of it in evidence. The court, in the learned and able opinion which was delivered in that case, considered that the law, as then declared, was not. only

the law of England, but probably the law of all Europe, and of most of the free states of America. The same question has been frequently discussed in Massachusetts. In the case of *The Commonwealth v. Chase*,[29] in 1808, it was decided, that the publication of a libel maliciously, and with intent to defame, was clearly a public offense, whether the libel be true or not; and the rule was held to be founded on sound principles, indispensable to restrain all tendencies to breaches of the peace, and to private animosity and revenge. The essence of the offense consisted in the malicious intent to defame the reputation of another; and a man may maliciously publish the truth against another with the intent to defame his character, and if the publication be true, the tendency of the publication to inflame the passions, and to excite revenge, is not diminished. But though a defendant, on an indictment for a libel, cannot justify himself for publishing the libel, merely by proving the truth of it, yet he may repel the criminal charge by proving that the publication was for a justifiable purpose, and not malicious; and if the purpose be justifiable, the defendant may give in evidence the truth of the words, when such evidence will tend to negative the malicious intent to defame. The same question was again agitated and discussed before the same court in 1825, in the case of *The Commonwealth v. Blanding*[30] and the court strongly enforced the doctrine of the former case, that, as a general rule, the truth of the libel was not admissible in evidence upon the trial of the indictment; and this principle of the common law. was declared to be founded in common sense and common justice, and prevailed in the codes of every civilized country. It was further held, that whether in any particular case such evidence be admissible, was to be determined by the court; and, if admissible, then the jury were to determine whether the publication was made with good motives, and for justifiable ends. The sauce rule, that the truth cannot be admitted in evidence on indictment for a libel, though it may in a civil suit for damages, has been adjudged in Louisiana;[31] and the weight of judicial authority undoubtedly is, that the English common law doctrine of libel is the common late doctrine in this country, in all cases in which it has not been expressly controlled by constitutional or legislative provisions. The decisions in Massachusetts and Louisiana were made notwithstanding the constitution of the one state had declared, that "the liberty of the press ought not to be restrained," and that the other had said, that "every citizen might freely speak, write, and print, on any subject, being responsible for the abuse of that liberty." Those decisions went only to control the malicious abuse or licentiousness of the press, and that is the most effectual way to preserve its freedom in the genuine sense of the constitutional declarations on the subject. Without such a check, the press, in the hands of evil and designing men, would become a most formidable engine, and as mighty for mischief as for good. Since the decision in 1825, the legislature of Massachusetts have interposed, and by an act passed in March, 1827 have allowed the truth to be given in evidence in all prosecutions for libels, but with a proviso that such evidence should not be a justification, unless it should be made satisfactorily to appear upon the trial, that the matter charged as libelous was published with good motives, and for justifiable ends.

The constitutions of several of the United States have made special provision in favor of giving the truth in evidence in public prosecutions for libels. In the constitutions of Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana. and Illinois, it is declared, that in prosecutions for libels on men in respect to their public official conduct, the truth may be given in evidence, when the matter published was proper for public information. In the constitutions of Mississippi and Missouri, the extension of the right to give the truth in evidence is snore at and applies to all prosecutions or indictments for libel::, without any qualifications annexed in restraint or the privilege; and an act of the legislature of New Jersey, in 1799, allowed the same unrestricted privilege. The legislature of Pennsylvania, in 1809[32] went far beyond their own constitution, and declared by statute, that no person should be indictable for a publication on the official conduct of men in public trust; and that

in all actions or criminal prosecutions for a libel, the defendant might plead the truth in justification, or give it in evidence. The decision of the Court of Errors of this state, in *Thorn v. Blanchard*,[33] carried the toleration of a libelous publication to as great an extent as the Pennsylvania law; for it appeared to be the doctrine of a majority of the court, that where a person petitioned the council of appointment to remove a public officer for corruption in office, public policy would not permit the officer libeled to have any redress by private action, whether the charge wag true or false, or the motives of the petitioner innocent or malicious. The English law on the point seems to be founded in a juster policy. Petitions to the king, or to parliament, or to the secretary at war, for the redress of any grievance, are privileged communications, and not actionable libels, provided the privilege be not abused; but if it appear that the communication was made maliciously, and without probable cause, the pretense under which it is wade aggravates the case, and an action lies.[34] The constitution of this state, as amended in 1821, is a little varied in its language from those provisions which have been mentioned, and is not quite so latitudinary in its indulgence as some of them. It declares, that "in all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that. the matter charged as libelous, is true, and was published with good motives, and for justifiable ends, the party shall be acquitted." These provisions in favor of giving the truth in evidence, are to be found only in those constitutions which have been promulgated long since our revolution; and the current of opinion seems to have been setting strongly, not only in favor of erecting barriers against any previous restraints upon publications, (and which was all that the earlier sages of the revolution had in view, but in favor of the policy that would diminish or destroy altogether every obstacle or responsibility in the way of the publication of the truth. The subject is not without its difficulties, and it has been found embarrassing to preserve equally, and in just harmony and proportion, the protection which is due to character, and the protection which ought to be afforded to liberty of speech, and of the press. These rights are frequently brought into dangerous collision, and the tendency of measures in this country has been to relax too far the vigilance with which the common law surrounded and guarded character, while we are animated with a generous anxiety to maintain freedom of discussion. The constitution of this state makes the facts in every possible case a necessary subject of open investigation; and however improper or unfit those facts may be for public information, and however painful or injurious to the individuals concerned, yet it would seem, that they may, in the first instance, be laid bare before the jury. The facts are to go to them, at all events; for the jury are to determine, as it shall appear to them, whether the motives of the libeler were good, and his end justifiable.

The act of Congress of the 14th of July, 1798, made it an indictable offense to libel the government, or Congress, or the President of the United States; and it made it lawful for the defendant, upon the trial, to give in evidence in his defense, the truth of the matter contained in the publication charged as a libel. This act was, by the terms of it, declaratory, and it. was intended to convey the sense of Congress, that in prosecutions of that kind it was the common right of the defendant to give the truth in evidence. So, the case of *The People v. Croswell*, in this state, was followed by an act of the legislature on the 6th of April, 1805, enacting and declaring, that in every prosecution, for a libel, (and which included public and private prosecutions) it should be lawful for the defendant to give in evidence in his defense the truth of the natter charged; but such evidence was not to be a justification, unless, on the trial, it should be made satisfactorily to appear, that the matter charged as libelous was published with good motives, and for justifiable ends; and this was the whole extent of the doctrine which had been claimed in favor of the press in the case of *The People v. Croswell*.

There appears to have been some contrariety of opinion in the. English books on the point, whether

a defendant in a private action upon a libel, could be permitted to justify the charge, by pleading the truth. But the prevailing, and the better opinion is, that the truth may, in all cases, be pleaded by way of justification, in a private action for damages, arising, from written or printed defamation, as well as in an action for slanderous words.[35] The ground of the private action, is the injury which the party has sustained, and his consequent right to damages as a recompense for that injury, but if the charge, in its substance and measure. be true in point of fact, the law considers the plaintiff as coming into court without any equitable title to relief. And yet it is easy to be perceived. that in the case of libels upon private character, greater strictness as to allowing the truth in evidence, by way of justification, ought to be observed, than in the case of public prosecutions; for the public have no interest in the detail of private vices and defects, when the individual charged is not a candidate for any public trust; and publications of that kind, are apt to be infected with malice, and to be very injurious to the peace and happiness of families. If the libel was made, in order to expose to the public eye personal defects, or misfortunes, or vices, the proof of thee truth of the charge would rather aggravate than lessen the baseness and evil tendency of the publication; and there is much justice and sound policy in the opinion, that in private, as well as public prosecutions for libels, the inquiry should be pointed to the innocence or malice of the publisher's intentions. The truth ought to be admissible in evidence to explain that intent, and not in every instance to justify it.[36] The guilt and the essential ground of action for defamation, consist in the malicious intention; and when the mind is not in fault, no prosecution can be sustained.[37] On the other hand, the truth may be printed and published maliciously, and with an evil intent, and for no good purpose, and when it would be productive only of private misery, and public scandal and disgrace.

(3.) The right of personal liberty, is another absolute right of individuals, which has long been a favorite object of the English law. It is not only a constitutional principle, as we have already seen, that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint, or imprisonment, by the security of the privilege of *habeas corpus*.

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected.[38] Whenever any person is detained with or without due process of law, unless for treason or felony, plainly and specially expressed in the warrant of commitment, or unless such person be a convict, or legally charged in execution, he is entitled to his writ of *habeas corpus*. It is a writ of right, which every person is entitled to, *ex merito justiciae*;[39] but the benefit of it was, in a great degree, eluded in England prior to the statute of Charles II, as the judges only awarded it in term time, and they assumed a discretionary power of awarding or refusing it.[40] The explicit and peremptory provisions of the statute of 31 Charles II. c. 2, restored the writ of *habeas corpus* to all the efficacy which was requisite for the due protection of the liberty of the subject. That statute has been reenacted or adopted, if not in terms, yet in substance and effect, in all these United States.[41] The privilege of this writ, is also made an express constitutional right at all times, except in cases of invasion or rebellion, by the constitution of the United States, and by the constitutions of most of the states in the Union. The citizens are declared in some of these constitutions, to be entitled to enjoy the privilege of this writ in the most “free, easy, cheap, expeditious, and ample manner;” and the right is equally perfect in those states where such a declaration is wanting. The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the *habeas corpus* act, is a common law right; and it is undoubtedly true, as has been already observed,[42] that the common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors, upon their

emigration to this country. The revolution did not involve in it any abolition of the common law. It was rather calculated to strengthen and invigorate all the just principles of that law, suitable to our state of the society and jurisprudence. It has been adopted or declared in force, by the constitutions of some of the states,[43] and by statute in others;[44] and where it has not been so explicitly adopted, it is nevertheless to be considered as the law of the land, subject to the modifications which have been suggested, and to express legislative repeal.[45] We shall, accordingly, in the course of these lectures, take it for granted, that the common law of England, applicable to our situation and governments? is the law of this country, in all cases in which it has not been altered or rejected by statute, or varied by local usages, under the sanction of judicial decisions.

The substance of our statute provisions on the subject of the writ of *habeas corpus*, may be found in the statute of 31 Charles II. c. 2, which is the basis of all the American statutes on the subject, and which the statute of this state[46] has closely followed. It is provided, that the person imprisoned, if he be not a person convict, or in execution by legal process, or committed for treason or felony, plainly expressed in the warrant, or has not neglected to apply within two whole terns after his imprisonment, may apply by any one on his behalf, in vacation time, to a judicial officer, for the writ of *habeas corpus*; and the officer, upon few of the copy of the warrant of commitment, or upon proof of the denial of it after due demand, must allow the writ to be directed to the person in whose custody the party is detained, and made returnable immediately before him. Upon service of the writ, the party detained is to be brought before the judge, with all reasonable diligence, together with the true cause of the commitment, and detainer, and the judge is thereupon required to discharge the prisoner, upon reasonable sureties, or else remand him, as the nature of the case, and the circumstances of the commitment, shall require.

An adequate penalty is imposed upon the person whose duty it shall be to make return to the writ, for neglecting or refusing to obey the same within the time prescribed; and if the judicial officer shall refuse to allow the writ when, duly demanded, he also forfeits a penalty to the party aggrieved. The penalty is granted against the judicial magistrate, who, in vacation time, denies the writ; and judges are trot responsible for the exercise of their discretion, according to their judgment, in term time; for they then sit and act, not in a ministerial, but in a judicial capacity.[47] Nor does any penalty attach upon the act of the judge, after the prisoner is brought before him. He is then, according to his best judgment and discretion, to bail, discharge, or remand the prisoner.

The act of this state of the 21st of April, 1818,[48] declared that the provisions of the permanent *habeas corpus* act should extend to" all cases, where any person, not being committed or detained for any criminal or supposed criminal matter, nor in execution by legal process, should be confined or restrained of his liberty, under any color or pretense whatsoever." The *habeas corpus* act in Pennsylvania, is equally extensive.[49] When the prisoner is brought before the judge, his judicial discretion commences, and he acts under no other responsibility than that which belongs to the ordinary exercise of judicial power, The prisoner is to be bailed, or discharged, or remanded, as to justice shall appertain. He may be remanded in the following cases: (1.) when it appears that he is detained upon legal process, out of some court having jurisdiction of criminal matters: (2.) when he is detained by warrant, under the hand and seal of a magistrate, for some matter or offense, for which, by law, the prisoner is not bailable; (3.) when he is a convict in execution, or detained in execution by legal civil process; and, (4.) when detained for a contempt, specially and plainly charged in the commitment, by some court having authority to commit for contempts, unless the power and authority of such, court shall have expired and ceased.

Upon the return of the *habeas corpus*, the judge is not confined to the face of the return, but he is to examine into the facts contained in the return, and into the cause of the imprisonment, whether the commitment be for any criminal or supposed criminal matter, or not; and then he is to discharge, bail, or remand, as the case shall appear to require. This power of revising the cause of commitment is given by the act of this state of 1818; and it authorizes the judge to reexamine all the testimony taken before the magistrate who originally committed, and to tape further proof on the subject, for he is "to examine into the facts." This was the construction given to the act in *The Matter of Washburn*;[50] and it is a new power, not to be found in the English statute, and it probably exists in other states, and is an improvement upon the English provisions. The power gives to the judge who takes cognizance of the case, upon the return of the writ, the character of a court of review, even as to the acts of a coordinate magistrate. The policy of the introduction of these new checks, is to prevent more effectually the continuance of till unjust or groundless imprisonment.

A question was raised, and much discussed, in the courts of justice in this state, in the case of Yates,[51] whether the judge before whom a prisoner was brought upon *habeas corpus*, had a right to examine into the validity of a commitment of a person for a Contempt, by a court confessedly competent for the purpose. The person committed by the Chancellor in that case, by an order by him made, sitting in the Court of Chancery, was brought before a judge of the Supreme Court, in vacation time, upon *habeas corpus*, and discharged. The Chancellor, disregarding the discharge, recommitted the party, and the same judge again, on *habeas corpus*, discharged him. He was again recommitted, and an *habeas corpus* was again issued, returnable before the Supreme Court, where the case was elaborately discussed and considered, and the party remanded to prison, as being in execution under a conviction for a contempt, and, therefore, not entitled to his discharge. This order of the Supreme Court being brought up in review before the Court of Errors by a writ of error, the judgment or order of the Supreme Court was reversed. Whatever inference might have been drawn in the first instance from that reversal, yet the question was put afloat, and the better opinion would rather seem to be, that the doctrine of the Supreme Court was reinstated in all its force, by another decision of that court, subsequently affirmed by the same Court of Errors, holding, that the Chancellor was not responsible to the party he had so repeatedly committed, for the penalty given by statute upon re-imprisonment after a discharge on *habeas corpus*,[52] the result of that controversy leaves the following principles undisturbed, and tends to settle and confirm them, *viz.* (1.) That every court has a right to commit for contempt, and that no other court has a right, upon *habeas corpus*, to control that commitment. (2.) That no judge is responsible, in a private suit, to pains and penalties for his judicial acts. If any doubt had remained as to the ultimate effect of the decisions in the case of *Yates*, that doubt was entirely removed by the act of 1818, already referred to, which declared, that a party in prison for a contempt, could not be discharged on *habeas corpus*, so long as the power of the court which determines the contempt continued. That act may be considered as only declaratory of the established principle of law, that every court of justice has a right to commit for contempts, and that it belongs exclusively to the court offended, to judge of contempts, and what amounts to them; and no other court or judge can, or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction. This may be considered as the established doctrine, equally in England and in this country.[53]

It is provided, by the *habeas corpus* act, that a person set at large by the writ, cannot be re-imprisoned for the same offense, unless by the legal order or process of the court wherein he was bound by recognizance to appear, or of some other court having jurisdiction of the cause. The construction given to this prohibition in the case of Yates,[54] was, that the power of the judge in

vacation to discharge on *habeas corpus*, did not extend to cases of commitments in execution by the judgment of a court of record, for this would be giving to a single judge the right to control the decisions of all the courts of record, and even the decision of a majority of the court of which he was a member, provided he reserved the exercise of his power until after the adjournment of the court. Such a discharge was not considered to be any obstacle to a re-imprisonment for the same offense by the court which committed. The discharge was considered as not warranted by the statute, which never intended to vest the power of review of judicial decisions of the regular tribunals, in a single member out of court, and acting in a summary manner. It expressly excepted from the operation of its provisions, the case of persons convict, or in execution by legal process.[55]

By the specific provisions which have been considered, the remedy for an unjust detention is distinctly marked; and even in cases of valid imprisonment, care is taken that it be not unreasonably or unnecessarily protracted. Persons committed for treason or felony, are, upon their petition, to be indicted and tried by the second term after their commitment, or they will e discharged, unless satisfactory cause be shown for the delay. No citizen can be sent a prisoner out of the state, for any crime committed within it; and whoever is concerned in doing it is responsible to the party in exemplary damages, and is also deemed guilty of a misdemeanor, and disabled to hold any office of profit or trust. The judge awarding the *habeas corpus* is also authorized to attach any person who meditates to elude the requisitions of the writ, by withdrawing from the jurisdiction of this state with the party in confinement.[56]

This is the substance of the provisions of the *habeas corpus* act, intended for the security of the personal liberty of the citizen. The statute has always been considered in England as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt, and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right.

In addition to the benefit of the writ of *habeas corpus*, which operates merely to remove all unlawful imprisonment, the party aggrieved is entitled to his private action of trespass to recover damages for the false imprisonment; and the party offending, and acting without legal sanction, is also liable to fine and imprisonment, as for a misdemeanor.

In England, the regular consequence of personal liberty is said to be, that every Englishman may claim a right to abide in his own country so long as he pleases, and is not to be driven from it, unless by the sentence of the law, prescribing exportation or banishment in the given case; or unless required abroad while in the military or naval service. Exportation in England rests entirely upon statute, for it was a punishment unknown to the common law.

Some of our American constitutions[57] have declared, that no person shall be liable to be transported out of the state for any offense committed within it. It would not be consistent with the spirit of that provision to prescribe banishment as a part of the punishment, whatever foreign place or asylum might be deemed suitable for the reception of convicts. In this, and in most of the states, no such constitutional restriction is imposed upon the discretion of the legislature; and in this state, the governor is authorized to pardon upon such conditions as he may think proper. Convicts have sometimes been pardoned under the condition of leaving the state in a given time, and not returning. This was equivalent, in its effect and operation, to a judicial sentence of exportation or banishment.

In England, the king, by the prerogative writ of *ne exeat*, may prohibit a subject from going abroad without license. But this prerogative is said to have been unknown to the common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure. The first invasion of this privilege, was by the constitutions of Clarendon, in the reign of Henry II,[58] and they were understood to apply exclusively to the clergy, and prohibited them from leaving the kingdom without the king's license. In the Magna Carta of king John, every one was allowed to depart the kingdom, and return at his pleasure, except in time of war.[59] But this provision was omitted in the charter of Henry III; and in the reign of Edward I, it began to be considered necessary to have the king's license to go abroad; and it became at last to be the settled doctrine, and no subject possessed the right of quitting the kingdom without the king's license; and prerogative writs, which were in substance the same as the *ne exeat*, became in use, requiring security of persons meditating a departure, that they should not leave the realm without the king's license.[60] The prerogative of the crown, on this point, seems to be conceded; but until the king's proclamation, or a writ of *ne exeat*, has actually issued, it is understood that any Englishman may go beyond sea.

This writ of *ne exeat* has, in modern times, been applied as a civil remedy in Chancery, to prevent debtors escaping from their creditors. It amounts, in ordinary civil cases, to nothing more than process to hold to bail, or compel a party to give security to abide the decree. In this view, we have at present no concern with this writ; and in this country, the writ of *ne exeat* is not in use, except in Chancery for civil purposes, between party and party. No citizen can be sent abroad, or, under the existing law of the land, prevented from going abroad, except in those cases in which he may be detained by civil process, or upon a criminal charge. The constitutions of several of the United States have declared, that all people have a natural right to emigrate from the state, and have prohibited the interruption of that right.[61] We shall, in the course of the next lecture, examine particularly into the foundation of this right of emigration. when carried to the extent of a perpetual renunciation of one's allegiance to the country of his birth.

NOTES

1. Hazard's State Papers, vol. I. 408. 487, edit. Philad. 1791. Hutchinson's Hist. of Massachusetts, vol. ii, 64.
2. Trumbull's Hist. of Connecticut, vol. i, 98.
3. Journals of the Assembly of the Colony of New York, vol. 1. 6. 224.
4. Jefferson's Notes on Virginia, 189. Marshall's Life of Washington, vol. ii. 88, and Appendix, note No. 4.
5. Marshall's Life of Washington. vol. ii, 90, and Appendix, note No. 5.
6. Journals of Congress, vol. i. 26. edit. Phil. 1800.
7. The following instances may be mentioned, as illustrations of the questionable nature of some of these declaratory provisions:

Thus, several of the state constitutions, as those of New. Hampshire, Massachusetts, Vermont, North Carolina, 0hio, Indiana, and Illinois, have made it an article in their bill of rights, that the people have a right, not only to apply to the legislature by petition, or remonstrance, but to "instruct their representatives." If, by this, be meant, that they may give to their representatives wholesome advice or information, it is a palpable truth, and quite a harmless article, but if it be intended to declare, that the people of a town, or county, or district, may give binding instructions to their immediate delegates, and to which they must conform without any exercise of their own discretion, in like manner as an agent or attorney in private business is bound by the directions of his principal, it would then render all discussion and deliberation in the legislature useless. This would be repugnant to the theory of government, which supposes that the representatives are to meet and consult together for the common welfare, and to have a regard, in the making of laws, to the greatest general good, and to make the

local views and interest of a part of the community, subordinate to the general interest of the whole. The principle of the English common law applicable to the members of the British House of Commons, is deemed to be the true doctrine on this subject. Though chosen by a particular county or borough, the member, when elected and returned, serves for the whole realm. The end of his election is not particular, but general; not barely to advantage his constituents, but for the common weal; and he is not bound to take and follow the advice of his constituents upon any particular point, unless he thinks it proper or prudent so to do. (4 Inst. 14. 1 Blacks. Com. 159) The people cannot debate in their collective capacity. They can only deliberate and make laws by their representatives; and in the ordinary course of human affairs, the exercise of their sovereignty, and the means of their safety, will consist in the discreet selection of the rulers, who are to administer the government of their choice.

So, it is declared, in some of the state constitutions, as Maryland, North Carolina, and Tennessee, that "monopolies are contrary to the genius of a free government, and ought not to be allowed." This would seem to restrain the legislature from granting any exclusive privilege even for a limited time, and prevent them from encouraging the introduction and prosecution of hazardous and expensive experiments in some art, science, or business, calculated to be extensively useful. "A temporary monopoly of that kind," says Doctor Adam Smith, (Inquiry into the Wealth of Nations, vol. ii. 272.) "may be vindicated upon the same principles upon which a like monopoly of a new machine is granted to its inventor, and that of a new book to its author." If the principle be correct, that all monopolies are contrary to the genius of a free state it would condemn the power given to Congress to secure to authors and inventors the exclusive right to their writings and discoveries, and which species of monopoly is deemed to be exceedingly just and useful. Again; it is made an article in the declaration of rights, in the constitution of Illinois, that "there shall be no other banks or moneyed institutions in the state, but those already provided by law, except a state bank and its branches." This is too general and too indefinite a restraint upon the exercise of legislative discretion, and the subject seems scarcely of sufficient importance to have been classed among the "general, great, and essential principles of liberty and free government." In a commercial state, it would lead to the loss of many useful moneyed establishments, or what is more probable, it would be a temptation to efforts to elude the force of the article by evasive constructions. So, the provision in the declaration of rights in the constitution of Mississippi, that "no citizen shall be prevented from emigrating on any pretense whatever," seems to be stated in terms too strong and unqualified, and it would require some latitude of interpretation to prevent the unjust application of the injunction to the case of persons emigrating with the fraudulent design of avoiding the payment of debt, or the discharge of a known duty, as the relief of bail or security. It is declared in the constitution of Ohio, that every association of persons, being regularly formed, and having given themselves a name, may, on application to the legislature be entitled to letters of incorporation to enable them to hold estates, real and personal, for the support of their schools, academies, colleges, universities, and other purposes." The provision is too indefinitely expressed, and relates to a case of ordinary legislative discretion, and if literally carried into execution, it would be productive of great inconvenience. It does not seem to be deserving of a place among "the essential principles of liberty and free government to be for ever unalterably established."

8. Constitution of 1777, art. 1. 13. 41.

9. Ch. 29.

10. 2 Inst. 50.

11. De Jure Belli, b. 2. ch. 20.

12. Hawk. P. C. b. 1, c. 28. s. 21. Foster's Discourse of Homicide, 273, 274.

13. Hawk. ibid. s. 22, 23.

14. Potter's Greek Antiq, vol. i. 179. Halstead's *Gentoo Code*, 182. Cicero *de Republica*, lib. iv. Tacit. Ann. lib i, ch. 72. Hor. Epist. b ii, Ep. i. 152. Aul. Gel. b. iii. c. 3. Inst. 4. 4. 1. 3 Johnson's Cases, 362, note; where the reporter, with great learning and accuracy, has collected the material provisions in the Roman law on the subject. Since the publication of that note, the view of the law of defamation among the ancients has been extensively considered in Holt's Law of Libel, b. i, ch. 1.

15. *Villers v. Monsley*, 2 Wils. 403.

16. 4 Mass. Rep. 168. 2 Pickering's Rep. 115.

17. 1 Hawk. P. C. b. i, ch. 73.

18. 2 Inst. 227.

19. Lib. 3. *de Actionibus*, ch. iv.

20. 30 Ass. 29. Reeve's Hist. English Law, vol. iii. 90.

21. Statutes of 3 E. 1, 2 R. II, and 12 R. II.

22. 2 Mod. 161, 165.

23. 4 Co. 110-112.

24. Dig. 47. 10. 18.

25. *De Libellis famosis*, 5 Co. 125. Hudson's Treatise on the Star Chamber, published in 2d vol. Collec. Jurid.

26. 4 Barnw. & Ald. 95.

27. 3 Johns. Cas. 337.

28. 2 Rep. Const. Court, p. 809.

29. 4 Mass. Rep. 163.

30. 3 Pickering, 304.

31. *Territory v. Nugent*, Christy's Dig. of Louisiana Decisions, tit. Ev. No. 161.

32. 1 Binney, 601. *Commonwealth v. Duane*.

33. 5 Johns. Rep. 508.

34. 5 Barnw. & Ald. 642. Best, J.

35. Holt, Ch. J. 11 Mod. 99. Buller's N. P. 8. *J'Anson v. Stuart*, 1 Term, 748. In Massachusetts, a statute passed in March, 1827, not only allows the truth to be pleaded by way of justification in all actions for libels, as well as for oral slander, but every inference to be drawn from such a plea in admission of the fact of publication, or of malice, if the plea be not proved, is destroyed. The statute affords facility and encouragement to the plea.

36. Vinnius in Inst. 4. 4. 1. Edinb. Review, vol. xxvii. p. 102. 142. Vol. xxxiii. 207,

37. We have a remarkable illustration of this principle, in a decision cited by Lord Coke, when at the bar, and arguing the cause of *Brook v. Montague*. (Cro. J. 91.) A preacher, in his sermon, recited a story out of Fox's Martyrology, of one Greenwood, as being a very wicked man, and a persecutor, who died under signal visitations of God's displeasure. The preacher intended to show, by that example, the judgment of Providence upon great sinners; but he was totally mistaken as to the fact, for Greenwood was not dead or diseased, but present at the preaching of the sermon. He brought his action for the defamation; and the court instructed the jury, that the defendant, having read and delivered the words as matter of history, and without any evil intention, was not liable in damages.

38. 2 Inst. 589.

39. 4 Inst. 290.

40. 3 Bulst. 27.

41. See, for instance, the *habeas corpus* act, in Massachusetts, of 16th March, 1785, referred to in 2 Mass. Rep. 550; and the *habeas corpus* act of South Carolina, of 1712, and referred to in 2 Bay, 563. and 2 Const. Rep. 698.; and the *habeas corpus* act of Pennsylvania, of 18th February, 1785, and referred to in 1 Binney, 374.; and the *habeas corpus* act of New York, 1 R. Laws, 354.; and the *habeas corpus* act of New Jersey, referred to in 3 Halsted, 121.

42. See vol. i. 322.

43. Constitutions of New York and New Jersey.

44. Pennsylvania and Virginia.

45. 2 N. Hamp. Rep. 44. Marshall, Ch. J. in *Livingston v. Jefferson*, 4 Hall's L. J. 78.

46. Laws N.Y. vol. i. 352. edit. 1813.

47. *Yates v. Lansing*, 5 Johns. Rep. 282.

48. Sess. 41. ch. 277.

49. l Binney, 376.

50. 4 Johns. Ch. Rep. 106.

51. 4 Johns. Rep. 318.

52. 5 Johns. Rep. 282. *Yates v. Lansing*. 6 Johns. Rep. 337. *Yates v. The People*.

53. *Crosby's case*, 3 Wils. 188. *Burdett v. Abbott*, 14 East, 1. *Gist v. Bowman*, 2 Bay, 182. *Anderson v. Dunn*, 6 Wheaton, 204.

54. 1 Johns. Rep. 318.

55. The case of the *King v. Jones*, according to an English printed report of the case, was decided by Lord Ellenborough at chambers, on the 30th of November, 1816. The defendant had been convicted by two justices of a statute offense, and sentenced to three months imprisonment, and being brought up on *habeas corpus*, Abbott moved for his discharge on the ground of error in the conviction. Bolland in opposition to the motion, cited the case of *Yates*, in the Supreme Court of this state. His lordship took time to examine the case, and then declared, that the doctrine of it was strange and unprecedented, for that the decision of the judge in vacation, on *habeas corpus*, was binding, and could not be reviewed or reversed by the first committing authority, until it was brought up regularly by certiorari. This was the substance of the decision; and if it be admitted, that a judge at chambers has jurisdiction to review and reverse a commitment in execution, by the order or judgment of the Supreme Court or of the Court of Chancery, for a contempt, then, indeed, such decision, upon *habeas corpus*, would be binding until regularly brought up; but if he has no such power, (as the Supreme Court of New York adjudged,) then his act is irregular, null, and void, and the party so irregularly discharged by him is liable to recommitment by the first committing authority. The first committing authority in that case was none other than the Court of Chancery, holding its regular session, and awarding execution upon conviction in that case, and the power that prostrated the effect of that judgment and execution by discharging the party, was none other than a single officer acting summarily out of court. Which of these two decisions ought to be held valid, until regularly reviewed and reversed by the proper appellate jurisdiction, was the question in the Supreme Court in the case of *Yates*. The doctrine of the Supreme Court was, that a conviction in Chancery was not to be reviewed and reversed in that summary way. The doctrine of Lord Ellenborough appears to have been, that such a conviction (and of course a judgment of the Supreme Court) might be summarily reviewed and reversed as to the execution upon it, by a judge at chambers; while, on the other hand, his decision is obligatory every where, until brought up and reviewed in the regular course. This latter doctrine appears to be best entitled to the appellation of “strange and unprecedented,”

56. Laws N.Y. sess. 36. ch. 57. s. 10. Act of 1818. supra, s. 4, 5:

57. Constitutions of Vermont, Ohio, Illinois, and Mississippi.

58. Beames on the writ of Ne Exeat, p. 2.

59. Blacks. Ed. of Magna Carta of king John, art. 42.

60. Beame's Ne Exeat, ch. i.

61. Constitution of Vermont, Pennsylvania, Kentucky, Indiana, Mississippi, and Louisiana.

LECTURE 25

Of Aliens and Natives

WE are next to consider the rights and duties of citizens in their domestic relations, as distinguished from the absolute rights of individuals, of which we have already treated. Most of these relations are derived from the law of nature, and they are familiar to the institutions of every country, and consist of husband and wife, parent and child, guardian and ward, and master and servant. To these may be added, an examination of certain artificial persons created by law, under the well known name of corporations. There is a still more general division of the inhabitants of every country, under the comprehensive title of aliens and natives, and to the consideration of them our attention will be directed in the present lecture.

(1.) Natives are all persons born within the jurisdiction of the United States. If they were resident citizens at the time of the declaration of independence, though born elsewhere, and deliberately yielded to it an express or implied sanction, they became parties to it, and are to be considered as natives; their social tie being coeval with the existence of the nation. If a person was born here before our independence, and before that period voluntarily withdrew into other parts of the British dominions, and never returned; yet, it has been held, that his allegiance accrued to the state in which he was born, as the lawful successor of the king; and that he was to be considered a subject by birth.[1] It was admitted, that this claim of the state to the allegiance of all persons born within its territories prior to our revolution, might subject those persons who adhere to their former sovereign, to great inconveniences in time of war, when two opposing sovereigns might claim their allegiance; and, under the peculiar circumstances of the case, it was, undoubtedly, a very strong application of the common law doctrine of natural and perpetual allegiance by birth. The inference to be drawn from the discussions in the case of *McIlvaine v. Coxe*,[2] would seem to be in favor of the more reasonable doctrine, that no *antenatus* ever owed any allegiance to the United States, or to any individual state, provided he withdrew himself from this country before the establishment of our independent government, and settled under the king's allegiance in another part of his dominions, and never afterwards, prior to the treaty of peace, returned and settled here. The United States did not exist as an independent government until 1776; and it may well be doubted whether the doctrine of allegiance by birth be applicable to the case of persons who did not reside here when the revolution took place, and did not, therefore, either by election or tacit assent, become members of the newly created state. The ground of the decision in the latter case was, that the party in question was not only born in New Jersey, but remained there as an inhabitant until the 4th of October, 1776, when the legislature of that state asserted the right of sovereignty, and the claim of allegiance over all persons then abiding within its jurisdiction. By remaining there after the declaration of independence, and after that statute, the party had determined his right of election to withdraw, and had, by his presumed consent, become a member of the new government, and was, consequently, entitled to protection, and bound to allegiance. The doctrine in the case of *Respublica v. Chapman*,[3] goes also to deny the claim of allegiance, in the case of a person who, though born here, were not here, and assenting to our new governments, when they were first instituted. The language of that case was, that allegiance could only attach upon those persons who were then inhabitants. When an old government is dissolved, and a new one formed, "all the writers agree," said Ch. J. McKean, "that none are subjects of the adopted government who have not freely assented to it." The same principle was declared by the Supreme Court of this state, to *Jackson v. White*,[4] and it was held, that though a British subject resided here as a freeholder on the 4th of July, 1776, and on the 16th of July, 1776, when the convention of this state asserted the right of sovereignty, and the claim of allegiance

over all persons, was abiding here; yet that, under the circumstances, the person in question being a British officer, and a few weeks thereafter placed on his parole, and in December, 1776, joining the British forces, was to be deemed an alien, and as having never changed his allegiance, or elected to become a party to our new government. The doctrine in the case of *Ainslie v. Martin*, was contrary also to what had been held by the same court in the cases of *Gardner v. Ward*, and *Kilham v. Ward*,[5] where it was decided, that persons born in Massachusetts before the revolution, who had withdrawn to a British province before our independence, and returned during the war, retained their citizenship; while the same persons, had they remained in the British province until after the treaty of peace, would have been British subjects, because they had chosen to continue their former allegiance, and there was but one allegiance before the revolution. This principle was asserted by the same court in the case of Phipps,[6] and I consider it to be the true and sound law on the subject.

It is the doctrine of the English law, that natural born subjects owe an allegiance, which is intrinsic and perpetual, and which cannot be divested by any act of their own.[7] In the case of Macdonald, who was tried for high treason, in 1746 before Lord Ch. J. Lee, and who, though born in England, had been educated in France, and spent his riper years there, his counsel spoke against the doctrine of natural allegiance as slavish, and repugnant to the principles of their revolution. The Court, however, said, it had never been doubted, that a subject born, taking a commission from a foreign prince, and committing high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private subject to shake off his allegiance, and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown.[8] Entering into foreign service, without the consent of the sovereign, or refusing to leave such service when required by proclamation, is held to be a misdemeanor at common law.[9]

It has been a question, frequently and gravely argued, both by theoretical writers, and in forensic discussions, whether the English doctrine of perpetual allegiance applies in its full extent to this country. The writers on public law have spoken rather loosely, but generally in favor of the right of a subject to emigrate, and abandon his native country, unless there be some positive restraint by law, or he is at the time in possession of a public trust, or unless his country be in distress, or in war, and stands in need of his assistance.[10] is Cicero regarded it as one of the firmest foundations of Roman liberty, that the Roman citizen had the privilege to stay or renounce his residence in the state, at pleasure.[11] The principle which has been declared in some of our state constitutions, that the citizens have a natural and inherent right to emigrate, goes far towards a renunciation of the doctrine of the English common law, as being repugnant to the natural liberty of mankind, provided we are to consider emigration and expatriation, as words intended in those cases to be of synonymous import. But the allegiance of our citizens is due, not only to the local government under which they reside, but primarily to the government of the United States; and the doctrine of final and absolute expatriation requires to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence, as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy. The question has been frequently discussed in the courts of the United States, but it remains still to be definitively settled by judicial decision.

A review of those discussions cannot be uninstructive.

In the case of *Talbot v. Janson*,[12] the subject was brought before the Supreme Court of the United

States, in 1795. It was contended on one side, that the abstract right of individuals to withdraw from the society of which they were members, was antecedent and superior to the law of society, and recognized by the best writers on public law, and by the usage of nations: that the law of allegiance was derived from the feudal system, by which men were chained to the soil on which they were born, and converted from free citizens, to be the vassals of a lord or superior; that this country was colonized and settled upon the doctrine of the right of emigration; that the right was incontestible, if exercised in due conformity with the moral and social obligations; that the power assumed by the government of the United States of naturalizing aliens, by an oath of allegiance to this country, after a temporary residence, spiritually implies that our citizens may become subjects of a foreign power by the same means.

The counsel on the other side conceded, that birth gave no property in the man, and that upon the principles of the American government, he might leave his country when he pleased, provided it was done *bona fide*, and with good cause, and under the regulations prescribed by law; and that he actually took up his residence in another country, under an open and avowed declaration of his intention to settle there. This was required by the most authoritative writers on the law of nations; and Heineccius, in particular, required that the emigrant should depart with the design to expatriate, and actually join himself to another state; that though all this be done, it only proved that a roan might be entitled to the right of citizenship in two countries, and proving that he had been received by one country, did not prove that his own country had surrendered him; that the locomotive right finally depended upon the consent of the government; and the power of regulating emigration, was an incident to the power of regulating naturalization, and was vested exclusively in Congress; and until they had prescribed the mode and terms, the character and the allegiance of the citizen continued.

The judges of the Supreme Court felt and discovered much embarrassment in the consideration of this delicate and difficult question, and they gave no definitive opinion upon it. One of them[13] observed, that admitting the intention of expatriation had been legally declared, it was necessary that it should have been carried into effect, and that the party should have actually become a subject of the foreign government; that the cause of removal must be lawful, otherwise the emigrant acts contrary to his duty; that though the legislature of a particular state should, by law, specify the lawful causes of expatriation, and prescribe the manner in which it might be effected, the emigration could only affect the local allegiance of the party, and not draw after it a renunciation of the higher allegiance due to the United States; and that an act of Congress was requisite to remove doubts, and furnish a rule off civil conduct on this very interesting subject of expatriation. Another of the judges[14] admitted the right of individual emigration, to be recognized by most of the nations of the world, and that it was a right to be exercised in subordination to the public interest and safety, and ought to be under the regulation of law; that it ought not to be exercised according to a man's will and pleasure, without any restraint; that every man is entitled to claim rights and protection in society, and he is, in his turn, under a solemn obligation to discharge his duty; and no man ought to be permitted to abandon society, and leave his social and political obligations unperformed. Though a person may become naturalized abroad, yet if he has not been legally discharged of his allegiance at home, it will remain, notwithstanding the party may have placed himself in difficulty, by double and conflicting claims of allegiance.

The majority of the Supreme Court gave no opinion upon the question; but the inference, from the discussion, would seem to be, that a citizen could not divest himself of his allegiance, except under

the sanction of a law of the United States; and that until some legislative regulations on the subject were prescribed, the rule of the common law must prevail.

In 1797, the same question was brought before the Circuit Court of the United States for the district of Connecticut, in the case of Isaac Williams,[15] and Ch. J. Elsworth ruled, that the common law of t his country remained as it was before the revolution. The compact between the community and its members was, that the community should protect its members, and that the members should at all times be obedient to the laws of the community, and faithful to its defense. No member could dissolve the compact without the consent or default of the community, and there had been no consent or default on the part of the United States. No visionary writer carried the principle to the extent, that a citizen might, at any, and at all times, renounce his own, and join himself to a foreign country; and no inference of consent could be drawn from the act of the government in the naturalization of foreigners, as we did not inquire into the previous relations of the party, and if he embarrassed himself by contracting contradictory obligations, it was his own folly, or his fault.

The same subject was again brought before the Supreme Court in the case of *Murray v. The Charming Betsey*, in the year 1804.[16] It was insisted, upon the argument, that the right of expatriation did exist, and was admitted by all the writers upon general law, but that its exercise must be accompanied by three circumstances, *viz.* fitness in point of time, fairness of intent, and publicity of the act. The court, however, in giving their opinion, avoided any decision of this great and litigated point, by observing, that "whether a person born within the United States, or becoming a citizen according to the established laws of the, entry, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it was not necessary to decide." Afterwards, in the Circuit Court of the United States, at Philadelphia,[17] Judge Washington observed, that he did not then mean to moot the question, of expatriation, founded on the self-will of a citizen, because it was beside the case before the court; but that he could not admit, that a citizen of the United States could throw off his allegiance to his country without some law authorizing him to do so. This was the doctrine declared also by the Chief Justice of Massachusetts.[18] The question arose again before the Supreme Court of the United States, so late as February, 1822, in the case of *The Santissima Trinidada*,[19] and it was suffered to remain in the same state of uncertainty. The counsel on the one side insisted, that the party had ceased to be a citizen of the United States, and had expatriated himself, and become a citizen of Buenos Aires, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. The counsel on the other side admitted, that men may remove from their own country in order to better their condition, but it must be done for good cause, and without any fraudulent intent; and that the slavish principle of perpetual allegiance growing out of the feudal system, and the fanciful idea that a man was authorized to change his country and his allegiance at his own will and pleasure, were equally removed from the truth. Mr. Justice Story, in delivering the opinion of the court, waived the decision of the question, by observing, that the court gave no opinion whether a citizen, independent of any legislative act to that effect, could throw off his own allegiance to his native country; that it was perfectly clear it could not be bone without a *bona fide* change of domicile, under circumstances of good faith; and that it would be sufficient to ascertain the precise nature and limits of this doctrine of expatriation, when it should become a leading point for the judgment of the court.

From this historical review of the principal discussions in the federal courts on this interesting subject in American jurisprudence, the better opinion would seem to be, that a citizen cannot

renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered.

There is, however, some relaxation of the old and stern rule of the common law, required and admitted under the liberal influence of commerce. Though a natural born subject cannot throw off his allegiance, and is always amenable for criminal acts against his native country, yet for commercial purposes he may acquire the rights of a citizen of another country, and the place of domicile determines the character of a party as to trade.[20] Thus, in the case of *Scott v. Schwartz*,[21] it was decided, in the Exchequer, the 13 Geo. II, that a residence in Russia gave the mariners of a Russian ship the character of Russian mariners, within the meaning of the British navigation act. And in the case of *Wilson v. Marryat*,[22] it was decided by the Court of K. B., that a natural born British subject might acquire the character, and be entitled to the privileges of an American citizen for commercial purposes. So, an American citizen may obtain a foreign domicile, which will impress upon him a national character for commercial purposes, in like manner as if he were a subject of the government under which he resided; and yet without losing on that account his original character, or ceasing to be bound by the allegiance due to the country of his birth.[23] The subject who emigrates *bona fide*, and procures a foreign naturalization, may entangle himself in difficulties, and in a conflict of duties, as Lord Hale observed;[24] but it is only in very few cases that the municipal laws would affect him. If there should be war between his parent state and the one to which he has attached himself, he must not arm himself against the parent state; and if he be recalled by his native government, he must return, or incur the pain and penalties of a contempt. Under these disabilities, all the civilized nations of Europe adopt (each according to its own laws) the natural born subjects of other countries.

The French law, as well since as before their revolution,[25] will not allow a natural born subject of France to bear arms, in time of war, in the service of a foreign power, against France; and yet, subject to that limitation, every Frenchman is free to abdicate his country.

(2.) An alien is a person born out of the jurisdiction of the United States. There are some exceptions, however, to this rule, by the ancient English law, as in the case of the children of public ministers abroad, (provided their wives be English women,) for they owe not even a local allegiance to any foreign power.[26] So, also, it is said, that in every case, the children born abroad, of English parents, were capable, at common law, of inheriting as natives, if the father went and continued abroad in the character of an Englishman, and with the approbation of the sovereign.[27] The statute of 25 Edw. III. stat 2, appears to have been made to remove doubts as to the certainty of the common law on this subject, and it declared, that children thereafter born without the ligeance of the king, whose father and mother, at the time of their birth, were natives, should be entitled to the privileges of native subjects, except the children of mothers who should pass the sea without leave of their husbands. The statute of 7 Ann, c. 5. was to the same general effect; but the statute of 4 Geo. II. c. 31. required only that the father should be a natural born subject at the birth of the child, and it applied to all children then born, or thereafter to be born. Under these statutes it has been held,[28] that to entitle a child born abroad to the rights of an English natural born subject, the father must be an English subject; and if the father be an alien, the child cannot inherit to the mother, though she was born under the king's allegiance.

The act of Congress of the 14th of April, 1802, establishing a uniform rule of naturalization, affects

the issue of two classes of persons: (I.) By the 4th section, it was declared, that "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." This provision appears to apply only to the children of persons naturalized, or specially admitted to citizenship; and there is color for the construction, that it may have been intended to be prospective, and to apply as well to the case of persons thereafter to be naturalized, as to those who had previously been naturalized. It applies to all the children of "persons duly naturalized," under the restriction of residence and minority, at the time of the naturalization of the parent. The act applies to the children of persons duly naturalized, but does not explicitly state, whether it was intended to apply only to the case where both the parents were duly naturalized, or whether it would be sufficient for one of them only to be naturalized, in order to confer, as of course, the right of citizens upon the resident children, being under age. Perhaps it would be sufficient for the father only to be naturalized; for in the supplementary act of the 26th of March, 1504, it was declared, that if any alien, who should have complied with the preliminary steps made requisite by the act of 1802, dies before he is actually naturalized, his widow and children shall be considered as citizens. This provision shows, that the naturalization of the father, was to have the efficient force of conferring the right on his children; and it is worthy of notice, that this last act speaks of children at large, without any allusion to residence or minority; and yet, as the two acts are intimately connected, and make but one system, the last act is to be construed with reference to the prior one, according to the doctrine of the case *Le parte Overington*.[29] (2.) By a subsequent part of the same section, it is declared, that "the children of persons, who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: provided that the right of citizenship shall not descend to persons, whose fathers have never resided within the United States." This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who then were, or had been citizens; and consequently the benefit of this provision narrows rapidly by the lapse of time, and the period will soon arrive, when there will be no statute regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. This provision leaves us likewise in doubt, whether the act intended by the words, "children of persons," both the father and mother, in imitation of the statute of 23 Edw. III.; or the father only, according to the more liberal declaration of the statute of 4 Geo. II. This clause differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural born citizens, or of citizens who were original actors in our revolution, and therefore it was more comprehensive and more liberal in their favor. But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective in being confined to the case of children of parents who were citizens in 1802, or had been so previously. The former act of 29th January, 1795, was not so; for it declared generally, that "the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States." And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite surprising that the rights of the children of American citizens, born abroad, should, by the existing act of 1802, be left so precarious, and so far inferior in the security which has been given, under like circumstances, by the English statutes.

We proceed next to consider the disabilities, rights and duties of aliens.

An alien cannot acquire a title to real property by descent, or created by other mere operation of law. The law *quae nihil frustra*, never casts the freehold upon an alien heir who cannot keep it. This is a well settled rule of the common law.[30] It is understood to be the general rule, that even a natural born subject cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. If an alien purchases land, or if land be devised to him, the general rule is, that in these cases, he may take and hold, until an inquest of office has been had; but upon his death, the land would instantly, and of necessity, (as the freehold cannot be kept in abeyance,) without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.[31] If an alien, according to a case put by Lord Coke,[32] arrives in England, and has two sons born there, they are of course natural born subjects; and if one of them purchases land, and dies without issue, his brother cannot inherit as his heir, because he must deduce his title by descent, through his father, who had no inheritable blood. But the case, as put by Coke, has been denied to be the law by the majority of the court in *Collingwood v. Pace*;[33] and it was there held, that the sons of an alien could inherit to each other, and derive title through the alien father. The elaborate opinion of Lord Ch. B. Hale, was distinguished by his usual learning, though it was rendered somewhat perplexing and obscure by the subtlety of his distinctions, and the very artificial texture of his argument. It is still admitted, however, that a grandson cannot inherit to his grandfather, though both were natural born subjects, provided the intermediate son was an alien, for the grandson must, in that case, represent his father, and he had no inheritable blood to be represented; and the reason why the one brother may inherit from the other, is, that as to them the descent is immediate, and they do not take by representation from the father. The law according to Lord Hale, respects only the mediate relation of the brothers as brothers, and not in respect of their father, though it be true that the foundation of their consanguinity is in the father; and it does not look upon the father as such a medium or nexus between the brothers, as that his disability should hinder the descent between them. This distinction in the law, which would admit one brother to succeed as heir to the other, though their father be an alien, and yet not admit a son to inherit from his grandfather because his father was an alien, is very subtle. The reason of it is not readily perceived, for the line of succession, and the degrees of consanguinity, must equally, in both cases, be traced through the father. The statute of 11 and 12 Wm. 111. c. 6. was made on purpose to cure the disability, and brush away these distinctions, by" enabling natural born subjects to inherit the estate of their ancestors, either lineal or collateral, not withstanding their father, or mother, or other ancestor, by, from, through, or under whom they might make or derive their title, were aliens." This statute, however, did not go so far as to enable a person to deduce title as heir, from a remote ancestor, through an alien ancestor still living.[34]

The provision in the statute of Wm. III. is in force in Maryland, as was admitted in the case last refereed to, and also in Kentucky; and it was adjudged, in the case of *Palmer v. Downer*,[35] to have. been adopted, and to be in force in Massachusetts. But it has not been adopted in this state; and, therefore, with us, as well as in those other states where there are no statute regulations on the subject, the rule of law will depend upon the authority of Lord Coke, or the justness and accuracy of the distinctions taken in the greatly contested case of *Collingwood v. Page*, and which, according to Sir William Blackstone, was, upon the whole, reasonably decided. The enlarged policy of the present day would naturally incline us to a benignant interpretation of the law of descents, in favor of natural born citizens who were obliged to deduce a title to land from a pure and legitimate source, through an alien ancestor; and Sir Matthew Hale admitted,[36] that the law was very gentle in the

construction of the disability of alienism, and rather contracted than extended its severity. If a citizen dies, and his next heir bean alien who cannot take, the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed.[37]

The distinctions between the *antenati* and the *postnati*, in reference to our revolution, have been frequently the subject of judicial discussion since the establishment of our independence.

It was declared, in Calvin's case,[38] that, "albeit the kingdoms of England and Scotland should, by descent, be divided and governed by several kings; yet all those who were born under one natural obedience, while the realms were united, would remain natural born subjects, and not become aliens by such a matter *ex post facto*. The *postnatus* in such a case would be *ad fidem utriusque regis*." It was accordingly held, in that case, that the *postnati* of Scotland, born after the union of the two crowns, could inherit lands in England. The community of allegiance, at the time of birth, and at the time of descent, both existed. The principle of the common law contained in that case, that the division of an empire worked no forfeiture of previously vested rights of property, has been frequently acknowledged in our American tribunals,[39] and it rests on solid foundations of justice. The titles of British subjects to lands in the United States, acquired prior to our revolution, remained, therefore, unimpaired. But persons born in England, or elsewhere out of the United States, before the 4th of July, 1776, and who continued to reside out of the United States after that event, have been held to be aliens, and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast; and an English subject, born and always resident abroad, never owed allegiance to a government which did not exist at his birth, and he never became a party to our social compact. The British *antenati* were, consequently, held to be incapable of taking, by subsequent descent, lands in these states, which are governed by the common law.[40] This doctrine was very liberally considered in respect to the period of the American war, in the case of *Den v. Brown*;[41] and it was there held, that the British *antenati* were not subject to the disabilities of aliens, as to the acquisition of lands *bona fide* acquired between the date of our independence and that of the treaty of peace in 1783, for the contest for our independence was then pending by an appeal to arms, and remained undecided. But the position was not tenable; and in a case elaborately discussed, and greatly litigated on several grounds, in the Court of Appeals, in Virginia, and afterwards in the Supreme Court of the United States,[42] it was the acknowledged doctrine, that the British *antenati* could not acquire, either by descent or devise, any other than a defeasible title to lands in Virginia, between the date of our independence and that of the treaty of peace in 1783. The line of distinction between aliens and citizens was considered to be coeval with our existence as an independent nation.

It has been very frequently assumed, on the doctrine in Calvin's case, that the same principle alight not be considered to apply in England, in respect to the American *antenati*, and that they would, on removing within the British dominions, continue to take and inherit lands in England, as natural born subjects; but I apprehend, the assumption has been made without just grounds. It was contrary to the doctrine laid down by Professor Wooddeson, in his lectures,[43] published as early as 1792: and the late case in the King's Bench, of *Doe v. Acklam*,[44] seems entirely to explode it. It was decided, that children born in the United States, since the recognition of our independence by Great Britain, of parents born here before that time, and continuing to reside here afterwards, were aliens, and could not inherit lands in England. To entitle a child born out of the allegiance of the crown of England, to be deemed a natural born subject, the father must be a subject at the time of the birth of the child, and the people of the United States ceased to be subjects in the view of the English law, after the

recognition of our independence, on the 31 day of September, 1783. If the American *antenati* ceased to be subjects in 1783, they must, of course, have lost their subsequent capacity to take as subjects. The English rule is, to take the date of the treaty of peace in 1783, as the era at which we ceased to be subjects; but our rule is, to refer back to the date of our independence. In the application of that rule, the cases show some difference of opinion. In this state, it has been held, that where an English subject, born abroad, emigrated to the United States, in 1779, and lived and died here, he was to be deemed an alien, and the title to land, which he afterwards acquired by purchase, was protected, not because he was a citizen, but on the ground of the treaty of 1794.[45] In Massachusetts; on the strength of an act passed in 1777, persons born abroad, and coming into that state after 1776, and before 1783, and remaining there voluntarily, were adjudged to be citizens.[46] The Supreme Court, in Connecticut has adopted the same rule, without the aid of any statute, and it was held,[47] that a British soldier, who came over with the British army in 1775, and deserted, and came and settled in Connecticut in 1778, and remained there afterwards, became, of course, a citizen, and ceased to be an alien; and that the United States were enabled to claim as their citizens, all persons who were here voluntarily, at either the period of our independence, or of the treaty of peace. The principle of the case seemed to be, that the treaty of peace operated by way of release from their allegiance of all British subjects who were then domiciled here; for it was admitted, that the rule would not apply to the subjects of any other nation or kingdom, who carne to reside here after the declaration of independence, for they would not be within the purview of the treaty. The same principle seems to have been recognized by the chief justice of Massachusetts, in *Ainslie v. Martin*;[48] but it may be considered as very much disturbed by the opinion of the judges of the Supreme. Court of Massachusetts, in the case of *Phipps*, a pauper,[49] in which they declare, that if a person was not a citizen before the treaty of peace, he did not become such by the mere force of that instrument, and by the mere fact of his being there on the ratification of the treaty. If he was born in Massachusetts and had returned during the war, though he had withdrawn himself before the date of independence, he was considered as retaining his citizenship. That was the amount of the cases of *Gardner v. Ward*, and *Kilham v. Ward*, to which the judges referred and this is the final exposition which has been given to the law on the subject.

Though an alien may purchase land, or take it by devise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found; and if he dies before any such proceeding be had, we have seen that the inheritance cannot descend, but escheats of course. If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the government to seize the land. His conveyance is good as against himself, and he may, by a fine, bar persons in reversion and remainder, but the title is still voidable by the sovereign.[50] In Virginia, this prerogative right of seizing lands *bona fide* sold by an alien to a citizen, is abolished by statute;[51] and so it was, to a limited degree, in this state, by an act in 1826.[52] An alien may take a lease for years of a house, for the benefit of trade. According to Lord Coke,[53] none but an alien merchant can lease land at all, and he is restricted to a house, and if he dies before the termination of the lease, the remainder of the term is forfeited to the king, for the law gave him the privilege for habitation only, as necessary to trade, and not for the benefit of his representatives. The force of this rigorous doctrine of the common law is undoubtedly suspended with us, in respect to the subjects of those nations with whom we have commercial treaties; and it is now justly doubted,[54] whether the common law be really so inhospitable, for it is inconsistent with the established maxims of sound policy, and the social intercourse of nations. Foreigners are admitted to the rights of citizenship with us on liberal terms, and as the law requires five, and only five years residence, to entitle them and their

families to the benefits of naturalization, it would seem to imply a right, in the mean time, to the necessary use of real property; and if it were otherwise, the means would be interdicted which are requisite to render the five years residence secure and comfortable.

Aliens are under the like disabilities as to uses and trusts arising out of real estates. Au alien can be seized to the use of another, but the use cannot be executed as against the state, and will be defeated on office found.[55] Nor can an alien be a *cestui que trust* but under the like disability, and the sovereign may, in chancery, compel the execution of the trust.[56]

Aliens are capable of acquiring, holding, and transmitting moveable property, in like manner, as our own citizens, and they can bring suits for the recovery and protection of that property.[57] They may even take a mortgage upon real estate by way of security for a debt, and this I apprehend they may do without any statute permission, for it has been the English law from the early ages.[58] It was so held lately in the Supreme Court of the United States,[59] and that the alien creditor was entitled to come into a court of equity to have the mortgage foreclosed, and the lands sold for the payment of his debt. The question whether the alien in such a case could become a valid purchaser of the mortgaged premises sold at auction at his instance, is left untouched; and as such a privilege is not necessary for his security; and would be in contravention of the general policy of the common law, the better opinion would seem to be, that he could not, in that way, without special provision by statute, become the permanent and absolute owner of the fee.

Even alien enemies, resident in the country, may sue and be sued as in time of peace, for protection to their persons and property is due, and implied from the permission to them to remain, without being ordered out of the country by the President of the United States. The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection.[60] The effect of war upon the rights of aliens we need not here discuss, as it has been already considered in a former part of this course of lectures, when treating of the law of nations.[61]

During the residence of aliens amongst us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace, and the preservation of order, and which do not relate specially to our own citizens. This is a principle of justice and of public safety universally adopted; and if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country.[62] They and their sons are liable to be enrolled in the militia of this state, provided they are seized of any real estate within this state.[63] This is a reasonable duty required of them in consideration of the special benefit which is conferred. It is in the nature of a charge upon their property, and the personal service can be omitted under the penalty of a moderate pecuniary assessment.

If aliens come here, with an intention to make this country their permanent residence, they will have many inducements to become citizens, since they are unable as aliens, to have a stable freehold interest in land, or to hold any civil office, or vote at elections, or take any active share in the administration of the government. There is a convenient and easy mode provided, by which the disabilities of alienism may be removed, and the qualifications of natural born citizens obtained. The terms upon which any alien, being a free white person, can be naturalized, are prescribed by the acts of Congress of the 14th of April, 1802, ch. 28.; the 3d of March, 1813, ch. 184.; and 22d of March, 1816, ch. 32. It is required, that he declare, on oath, before a state court, being a court of record with a seal and clerk, and having common law jurisdiction, or before a circuit or district court of the

United States, three years, at least, before his admission, his intention to become a citizen, and to renounce his allegiance to his own sovereign. At the time of his admission, his country must be at peace with the United States, and he must before one of these courts, take an oath to support the constitution of the United States, and likewise, on oath, renounce and abjure his native allegiance. He must, at the time of his admission, satisfy the court, that he has resided five years, at least, within the United States, and one year, at least, within the state where the court is held; and if he shall have arrived after the peace of 1815, his residence must have been continued for five years next preceding his admission, without being at any time during the five years out of the territory of the United States. The evidence of the time of his arrival within the United States, is to consist of the registry of his arrival made upon his report, or the report of his parent or guardian, before a court of the United States; and the certificate of that report and registry, and of his declared intention to become a citizen, must be produced to the court admitting him; and he must satisfy the court, that during that time, he has behaved as a wan of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. He must, at the same time, renounce any title, or order of nobility, if any he has. The act further provides, that the children of persons duly naturalized, being minors at that time, shall, if dwelling in the United States, be deemed citizens. It is further provided,[64] that if any alien shall die after his report and declaration, and before actual admission as a citizen, his widow and children shall be deemed citizens.

A person thus duly naturalized, becomes entitled to all the privileges and immunities of natural born subjects, except that a residence of seven years is requisite to enable him to hold a seat in congress, and no person, except a natural born citizen, is eligible to the office of governor of this state, or president of the United States.

The laws of Congress on the subject of naturalization, have been subject to great variations. In 1790, only two years previous residence was required. In 1795, the period was enlarged to five years; and in 1798, to 14 years; and in 1802, it was reduced back to five years, where it still remains. This period of probation has probably been deemed as liberal as was consistent with a due regard to our peace and safety. A moderate previous residence becomes material, to enable aliens to acquire the knowledge and habits proper to make wholesome citizens, who can combine the spirit of freedom with a love of the laws. Strangers, on their first arrival, and before they have had time to acquire property, and form connections and attachments, are not to be presumed to be acquainted with our political institutions, or to feel pride or zeal in their stability and success.[65]

If an alien dies before he has taken any steps under the act of naturalization, his personal estate goes according, to his will, or if he died intestate, then according to the law of distribution of the place of his domicile, at the time of his death.[66] The stationary place of residence of the party at his death, determines the rule of distribution,[67] and this is a rule of public right, as well as of natural justice. *Mobilia personam sequuntur, immobilia situm.*[68] The unjust and inhospitable rule of the most polished states of antiquity, prevailed in many parts of Europe, down to the middle of the last century; and Vattel expressed his astonishment that there should have remained any vestiges of so barbarous a usage in an age so enlightened. The law, which claimed, for the benefit of the state, the effects of deceased foreigners, who left no heirs, who were natives, existed in France as late as the commencement of their revolution.[69] This rule of the French law, was founded not only on the Roman law, but it was attempted to be justified by the narrow and absurd policy of preventing the wealth of the kingdom from passing into the hands of subjects of other countries.[70] It was abolished

by the constitution of the first constituent assembly, in 1791, and foreigners were admitted upon the most liberal terms, and declared capable of acquiring and disposing of property equally with natural born citizens. The treaty of commerce between the United States and France, in 1778, provided against the evil effects of this law, by declaring that the inhabitants of the United States were to be exempted from the *droit d'aubaine*, and might dispose by will of their property, real and personal, (*biens meubles et immeubles*,) and if they died intestate, it was to descend to their heirs, whether residing in France, or elsewhere, and the like privilege was conferred upon Frenchmen dying in this country. The treaties of France with other powers, usually contained the same relaxation of her ancient rule; and though the treaty of 1778 was abolished in 1798, yet, in the renewed treaty of 1801, the same provision was inserted, and under it American citizens in France, and French subjects in the United States, could acquire, hold, and transmit, real as well as personal property, equally as if they were natives, and without the necessity of an act of naturalization, or special permission. This last treaty expired in 1809, and the rights of Frenchmen arising thereafter, were left, like those of other aliens, to be governed by the general law of the land.

The Napoleon code did not pursue the liberal policy of the French constituent assembly of 1791, and it seems to have revived the harsh doctrine of the *Droit D'Aubaine*, under the single exception, that aliens should be entitled to enjoy in France the same civil rights secured to Frenchmen by treaty in the country to which the alien belongs.[71]

It is not sufficient to create the exemption in favor of the alien, that civil rights are granted to Frenchmen by the local laws of the foreign country, unless that concession be founded upon treaty.[72] The law at present in France is, that a stranger cannot, except by special favor, dispose of his property by will; and when he dies, the sovereign succeeds by right of inheritance to his estate.[73]

British subjects, under the treaty of 1794, between the United States and Great Britain, were confirmed in the titles which they then held to lands in this country, so far as the question of alienism existed; and they were declared competent to sell, devise, and transmit the same, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, as to those lands, be regarded as aliens. The treaty applied to the title, whatever it might be; but it referred only to titles existing at the time of the treaty, and not to titles subsequently acquired.[74] It was, therefore, a provision of a temporary character, and by the lapse of time it is rapidly becoming unimportant and obsolete.

The legislature of this state, and probably of many other states, are in the practice of annually granting to particular aliens, by name, the privilege of holding real property. In 1825,[75] they passed a general and permanent statute, enabling aliens to take and hold lands in fee, and to sell, mortgage, and devise, but not demise or lease the same, equally, as if they were native citizens, provided the party had previously taken an oath that he was a resident in the United States, and intended always to reside therein, and to become a citizen thereof as soon as he could be naturalized, and that he had taken the incipient measures required by law for that purpose. There are similar statute provisions in favor of aliens in South Carolina, Indiana, Illinois and Missouri; and in Louisiana, Pennsylvania and Ohio, the disability of aliens to take, hold, and transmit real property, seems to be entirely removed.[76] In North Carolina and Vermont, there is even a provision inserted in their constitutions, that every person of good character, who comes into the state, and settles, and takes an oath of allegiance to the same, may thereupon purchase, and by other just means, acquire, hold, and transfer land, and after one year's residence, become entitled to most of the privileges of a natural born

subject. These civil privileges, conferred upon aliens, by state authority, are dictated by a just and liberal policy; but they must be taken to be strictly local; and until a foreigner is duly naturalized, according to the act of Congress, he is not entitled in any other state to any other privileges than those which the laws of that state allow to aliens. No other state is bound to admit, nor would the United States admit, any alien to any privileges, to which he is not entitled by treaty, or the laws of nations, or the laws of the United States, or of the state in which he dwells. The article in the constitution of the United States,[77] declaring that citizens of each state were entitled to all the privileges and immunities of citizens in the several states, applies only to natural born or duly naturalized citizens, and if they remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other. If, therefore, for instance, free persons of color are not entitled to vote in Carolina; free persons of color emigrating there from a northern state, would not be entitled to vote. The laws of each state ought, and must, govern within its jurisdiction; and the laws and usages of one state cannot be permitted to prescribe qualifications for citizens, to be claimed and exercised in other states, in contravention to their local policy.[78]

The act of Congress confines the description of aliens capable of naturalization to" free white persons." I presume that this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood, as mulattoes, are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, though I should doubt whether any of them were "white persons" within the purview of the law. It is the declared law of this state,[79] that Indians are not citizens, but distinct tribes, living under the protection of the government, and, consequently, they never can be made citizens under the act of Congress.

Before the adoption of the present constitution of the United States, the power of naturalization resided in the several states; and the constitution of this state, as it was originally passed,[80] required all persons born out of the United States, and naturalized by our legislature, to take an oath abjuring all foreign allegiance and subjection, in all matters, ecclesiastical as well as civil. This was intended, and so it operated, to exclude from the benefits of naturalization Roman Catholics who acknowledged the spiritual supremacy of the pope, and it was the result of former fears and prejudices (still alive and active at the commencement of our revolution) respecting the religion of the Romish church, which European history had taught us to believe was incompatible with perfect national independence, or the freedom and good order of civil society. So extremely strong, and so astonishingly fierce and unrelenting, was public prejudice on this subject, in the early part of our colonial history, that we find it declared by law in the beginning of the last century,[81] that every Jesuit and popish priest who should continue in the colony after a given day, should be condemned to perpetual imprisonment; and if he broke prison and escaped, and was retaken, he should be put to death. That law, said Mr. Smith, the historian of the colony as late as the year 1756,[82] was worthy of perpetual duration!

NOTES

1. *Ainslie v. Martin*, 9 Mass, Rep. 454.
2. 2 Cranch, 280. 4 Ibid. 209.

3. 1 Dallas, 53.

4. 20 Johns. Rep. 313.

5. 2 Mass. Rep. 236, 244, note

6. 2 Pickering, 394, note.

7. 1 Hale's P. C. 68. Foster's Crown Law, 7. 59. 183.

8. Foster, ibid. 59.

9. 1 East's P. C. 81. 1 Hawk. P. C. b. i. ch. 22, sect. 3. On the 16th, of October, 1807, the king of England declared, by proclamation, that the kingdom was menaced, and endangered, and he recalled from foreign service all seamen and seafaring men, who were natural born subjects, and ordered them to withdraw themselves, and return home, on pain of being proceeded against for a contempt. It was further declared, that no foreign letters of naturalization could, in any manner, divest his natural born subjects of their allegiance, or alter their duty to their lawful sovereign.

10. Grotius, b. 2. c. 5 s. 24. Puf. Droit des Gens, liv. 8. ch. 11. s. 2. 3. Vattel, b. 1. ch. 19. s. 218. 223, 224, 225. 1 Wyckefort L'Embass. 117, 1119.

11. Ne quis invitus civitate mulctur, neve in civitate maneat invitus. Haec sunt enim fundamenta firmissima nostrae libertatis, sui quemque juris et retinendi et dimittendi esse dominum. Orat. pro. L. C. Balbo, ch. 13.

12. 8 Dallas, 133.

13. Paterson, J.

14. Iredell, J.

15. Cited in 2 Cranch, 82, note.

16. 2 Cranch, 64.

17. *United States v. Gillies*, 1 Peters' C. C. Rep. 159.

18. 9 Mass. Rep. 401.

19. 7 Wheaton, 283.

20. See vol. 1. p. 71.

21. Comyn's Rep. 677.

22. 8 Term Rep. 31. 1 Bos. & Pull. 430. S. C.

23. *United States v. Gillies*, 1 Peters' C. C. Rep, 159. *Murray v. The Schooner Charming Betsey*, 2 Cranch, 64.

24. 1 Hale's P. C. 68.

25. Pothier's *Traite du droit de Propriété*, No. 94. Code Napoleon, No. 17. 2l. Toullier, Droit civil Francais, tom. 1. No.266.

26. 7 Co. Calvin's case, 18. a.

27. *Hyde v. Hill*, Cro. E. 3 Bro. tit. Descent, pl. 47. tit. Denizen, pl. 14.

28. *Doe v. Jones*, 4 Term Rep. 300.

29. 5 Binney, 371.

30. *Calvin's case*, 7 Co. 25. a. 1 Vent. 417. *Jackson v. Lunn*, 3 John. Cas. 109. *Hunt v. Warnicke*, Hardin's Rep. 61.

31. *Collingwood v. Pace*, 1 Sid. 193. 1 Lev. 59. S. C. Co. Litt. 2. b. Plowd. 229. b. 230. a. *Jackson v. Lunn*, supra. *Fox v. Southack*, 12 Mass. Rep. 143. 8 ib. 445. *Fairfax v. Hunter*, 7 Cranch, 603, 619, 620. *Orr v. Hodgson*, 4 Wheaton, 453. *Governeur v. Robertson*, 11 Wheaton, 332. In North Carolina, an alien may take by purchase, but he cannot take by devise, any more than he can inherit. 2 Haywood. 37. 104. 108.

32. Co. Litt. 8. a.

33. 1 Sid. 193. 1 Vent. 413.

34. *McCreery v. Somerville*, 9 Wheaton, 354.

35. 2 Mass Rep. 179. note.

36. 1 Vent. 427.

37. Co. Lit. 8. a. Com. Dig. tit. Alien, c. 1. *Orr v. Hodgson*, 4 Wheaton, 453. *Jackson v. Jackson*, 7 Johns. Rep 214.

38. 7 Co. 1. p. 27.

39. *Apthorp v. Backus*, Kirby's Rep. 413. Kinsey, Ch. J. in *Den v. Brown*, 2 Halstead, 337. *Kelly v. Harrison*, 2 Johns. Cas. 29. *Jackson v. Lunn*, 3 Johns. Cas. 109. Story, J., 9 Church, 59.

40. *Reed v. Reed* cited in 1 Munf. 225, and opinion of Roane, J. Appendix to that volume. *Dawson v. Godfrey*, 4 Cranch, 321. *Jackson v. Burns*, 3 Binney, 75. *Blight v. Rochester*, 7 Wheaton, 535.

41. 2 Halsted, 305.

42. *Hunter v. Fairfax's Devisee*, 1 Munf. 218, and 7 Cranch, 603. S. C.

43. Vol. i. 382.

44. 2 Barnewall & Cresswell, 779.

45. *Jackson v. Wright*, 4 Johns. Rep. 75.

46. *Cummington v. Springfield*, 2 Pickering, 394.

47. *Hebron v. Colchester*, 5 Day, 169.

48. 9 Mass. Rep. 460.

49. 2 Pickering, 394, note.

50. 4 Leon. 84. Sheppard's Touchstone, by Preston, 56. 232. 7 Wheaton, 545.

51. Griffith's Law Register, tit. Virginia.

52. Laws of N.Y. sess. 49. ch. 297. sec. 3.

53. Co. Litt. 2. b.

54. Harg. Co. Litt. n. 9. to b. 1.

55. Gilbert on Uses, by Sugden, 10. 367. 445. Preston on Conveyancing, vol. ii. p. 247.

56. *Attorney General v. Sands*, 3 Ch. Rep. 20. Com. Dig. tit. Alien, c. 3. Gilbert on Uses, by Sugden, 86. 404.

57. 7 Co. 7. Dy. 2, b.

58. Year Book, 11 Edw. 111. cited in the marginal note to 1 Dy. 2. b.

59. *Hughes v. Edwards*, 9 Wheaton, 489.

60. *Wells v. Williams*, 1 Lord Raym. 282. *Daubigny v. Davillon*, 2 Anst. 462. *Clark v. Morey*, 10 Johns. Rep. 69. *Russel v. Skipwith*, 6 Binney, 241.

61. See vol. i. p. 53. to 62. 153.

62. Vattel, b. 2. c. S. s. 101, 102. 108.

63. Militia Act, Laws of N.Y. sess. 46, ch. 244, sec. 8.

64. Act of Congress, March 26th, 1804, ch. 47.

65. During the elevation and splendor of the Athenian power, the privilege of a citizen of Athens was deemed a very distinguished favor. It could only be obtained by the consent and decree of two successive assemblies of the people, and was granted to none but to men of the highest rank and reputation, or who had performed some signal service to the republic. 1 Potter's Greek Antiquities, 44, 45. 150. In the time of Demetrius Phalereus, there were resident in Attica, 10,000 freemen, being foreigners, or of foreign extraction, or freed slaves, who had not the rights of Athenian citizens, 1 Mitf. Hist. 354, 355. And yet it is said, that foreigners could not dispose of their goods by will, but they were appropriated, at their death, for the public use. 2 Potter, 344. In Rome, foreigners could not make a will, and the effects of a foreigner, at his death, went to the public or to his patron, under the *jus applicationis*. Cic. de Orat. 139. Dig. 49. 15. 52. Ibid. lib. 35, *ad legem falcidiam*, *Prae. Dict. du Dig. tit. Etrangers*. The Romans were noted for their peculiar jealousy of the *jus civitatis*, or rights of a Roman citizen. It was, at first, limited to the Pomoeria of Rome, and then gradually extended to the bounds of *Latium*. In the time of Augustus, as we are informed by Suetonius, De Aug. sect. 40 the same anxiety was discovered to keep the Roman people pure and untainted of foreign blood; and he gave the freedom of the city with a sparing hand. But when Caracalla, for the purpose of a more extended taxation, levelled all distinctions, and communicated the freedom of the city to the whole Roman world, the national spirit was lost among the people, and the pride of their country was no longer felt, nor its honor observed. 1 Gibb. Hist. 268.

66. 1 Binney, 336. 3 Johns. Ch. Rep. 210. 1 Mason's Rep. 408.

67. *Pipon v. Pipon*, Amb. 25. *Burn v. Cole*, Amb. 415.

68. *Hub. Proelec*. tom. i. 278. tom. ii. 542. *De conflictu legum*, sect. 15 Vattel, b. 2. c. 8, sect. 110, 111.

69. 1 Domat, 26. sect. 11.

70. Ibid. 555. sect. 13.

71. Code Napoleon, No. 11. 726. 912.

72. M. Toullier, in his *Droit Civil Francais*, tom. 1. n. 265. cites for that rule a decree of the Court of Cassation in 1806; and he says, that this article in the Napoleon code was taken from one in the new Prussian code.

73. Repertoire de Juris. par Merlin, tit. Aubaine, and tit. Etranger, ch. 1. No. 6.

74. 1 Wheaton, 300. 4 Ibid. 463. 7 Ibid. 535. 9 Ibid. 496. 12 Mass. Rep. 143.

75. Laws of N.Y. sess. 48. ch. 307.

76. Griffith's Law Reg. passim. 1 Const. Rep. S. C. 412. Christy's Dig. tit. alien.

77. Art. 4. sect. 2.

78. It is a curious fact in ancient Grecian history, that the Greek states indulged such a narrow and excessive jealousy of each other, that intermarriage was forbidden, and none were allowed to possess lands within the territory of another state. When the Olynthian republic introduced a more liberal and beneficial policy in this respect, it was considered as a portentous innovation. Mitford's Hist. vol. v. p. 9.

79. *Goodwell v. Jackson*, 20 Johns. Rep. 693.

80. Art. 42.

81. Colony Laws, vol. i. p. 38. Livingston & Smith's ed.

82. Smith's History of N.Y. p. 111.

LECTURE 26

Of the Law Concerning Marriage

The primary and most important of the domestic relations, is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage, a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts.[1] In the examination of this interesting contract, I shall, in the first place, consider how a marriage may be lawfully made, and, secondly, how it may be lawfully dissolved; and, lastly, I shall take a view of the rights and duties which belong to that relation.

(1.) All persons who have not the regular use of the understanding, sufficient to deal with discretion in the common affairs of life, as idiots and lunatics, (except in their lucid intervals,) are incapable of agreeing to any contract, and of course to that of marriage. But though marriage with an idiot or lunatic, be absolutely void, and no sentence of avoidance be absolutely necessary; yet. as well for the sake of the good order of society, as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction.[2] The existence and extent of mental disease, and how far it may be sufficient, by thy; darkness and disorder which it brings upon the human faculties, to make void the marriage contract, may sometimes be a perplexing question, extremely distressing to the injured party, and fatal to the peace and happiness of families. Whether the relation of husband and wife lawfully exists, never should be left uncertain. Suits to annul a marriage, by reason of idiocy or lunacy, have consequently been often instituted and sustained in the spiritual courts in England.[3] The proper tribunal for the investigation of this question, when it is brought up directly, and for the mere purpose of testing the validity of the contract, will depend upon the local institutions of every state. In those states, which have no tribunals distinct from the supreme courts of common law jurisdiction, for the exercise of equity powers, whatever jurisdiction is exercised over the matrimonial contract, must be in the common law courts. In this state, it has been adjudged to belong to the Court of Chancery, which possesses, exclusively, all the powers of the ecclesiastical courts in England, which can be lawfully exercised over the question under our constitution and laws.[4]

A marriage procured by force or fraud, is also void *ab initio*, and may be treated as null by every court, in which its validity may be incidentally drawn in question. The basis of the marriage contract, is consent and the ingredient of fraud or duress, is as fatal in this, as in any other contract, for the free assent of the mind to the contract is wanting.[5] The common law allowed divorces *a vinculo, causa metus, causa impotentiae*, and those were cases of a fraudulent contract. It is equally proper in this case, as in those of idiocy or lunacy, that the fraud or violence should be judicially investigated, in a suit instituted for the very purpose of annulling the marriage; and such a jurisdiction in the case, belongs to the ecclesiastical courts in England, and to the Court of Chancery in this state, and was lately sustained in a case of gross fraud.[6] It is said that error will, in some cases, destroy a marriage, and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the substance of the contract; and it would be difficult to state a case, in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is well understood, that error, and even disingenuous representations in respect to the qualities of one of the contracting

parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced.[7]

(2.) No persons are capable of binding themselves in marriage, until they have arrived at the age of consent, which, by the common law of the land, is fixed at fourteen in males, and twelve in females. The law supposes that the parties at that age, have sufficient discretion for such a contract, and they can then bind themselves irrevocably, and cannot afterwards be permitted to plead even their egregious indiscretion, however distressing the result of it may be. Marriage, before that age, is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made.[8] But this rule of reciprocity, however true in its application to actual marriages, does not apply to other contracts made by a competent party with an infant, nor even to a promise of marriage per versa de futuro with an infant, under the age of discretion. The person of full age is absolutely bound, and the contract is only voidable at the election of the infant. This point was ruled by the K. B. in *Holt v. Ward Clarencieux*,[9] after the question had been argued by civilians, to see what light might be thrown upon it from the civil and canon law. Though this be the rule of the English law, the civilians and canonists are not agreed upon the question; and Swinburne was of opinion, that the contract in that case was not binding upon the one party more than upon the other.[10]

The age of consent by the English law, was no doubt borrowed from the Roman law, which established the same periods of twelve and fourteen, as the competent age of consent to reader the marriage contract binding. Nature has not fixed any precise period, and municipal laws must operate by fixed and reasonable rules. The same rule was adopted in France, before their revolution;[11] but by the Napoleon code,[12] the age of consent was raised to eighteen in males, and fifteen in females, though a dispensation from the rule may be granted for good cause.

(3.) No person can marry while the former husband or wife is living. Such second marriage is, by the common law, absolutely null and void;[13] and it is probably a statute offence in most, if not in all of the states in the Union. In this state, it is made a felony in all but certain excepted cases. Those cases are, when the husband or wife, as the case may be, of the party who remarries, remains continually without the United States for five years together, or when one of the married parties shall have absented from the other by the space of five years together, and the one not knowing the other to be living within that time; or the persons, who at the time of such marriage, are divorced by the sentence of a competent court, or whose former marriage has been duly declared void, or was made within the age of consent.[14] This statute was a transcript of the statute of I Jas. I. c. II, with a reduction of the time of absence, from seven to five years; and though the penal consequences of a second marriage do not apply in those excepted cases, yet if the former husband or wife be living, though the fact be unknown, and there be no divorce *a vinculo* duly pronounced, or the first marriage has not been duly annulled, the second marriage is absolutely void, and the party remarrying incurs the guilt of an unlawful connection. If there be no statute regulation in the case, the principle, the common law, and not only of England, but generally of the Christian world, is, that no length of time, or absence, and nothing but death, or the decree of a court, confessedly competent to the case, can dissolve the marriage tie.[15]

The statute of this state is susceptible of the same construction as that given to the statute of James, and therefore, if one of the married parties shall have continually remained abroad for five years, and be living, even within the knowledge of the party here, or the parties were at the time only under

a divorce *a mensa et thoro*, yet the second marriage, though void in law, would not be within the penalties of the act. It is still a divorce, and the act does not distinguish between the two species of divorce.[16] The crime of bigamy, or of polygamy, as it ought more properly to be termed,[17] has been made a capital offence in some, and punished very severely in other parts of Europe;[18] but the new civil code of France,[19] only renders such second marriage unlawful, without annexing any penalty for the offence.

The direct and serious prohibition of polygamy contained in our law, is founded on the precepts of Christianity, and the laws of our social nature, and it is supported by the sense and practice of the civilized nations of Europe.[20] Though the Athenians, at one time, permitted polygamy, yet, generally, it was not tolerated in ancient Greece, but was regarded as the practice of barbarians.[21] It was also forbidden by the Romans throughout the whole period of their history, and the prohibition is inserted in the Institutes of Justinian.[22] Polygamy may be regarded as exclusively the feature of Asiatic manners, and of half-civilized life, and to be incompatible with civilization, refinement, and domestic felicity.

(4.) In most countries of Europe in which the canon laws has had authority or influence, marriages are prohibited between near relations by blood or marriage. Prohibitions similar to the canonical disabilities in the English ecclesiastical law, were contained in the Jewish laws, from which the canon law was, in this respect, deduced; and they existed also in the laws and usages of the Greeks and Romans, subject to considerable altercations of opinion, and with various modifications and extent.[23] These regulations, as far at least as they prohibit marriages among near relations, by blood or marriage, (for the canon and common law made no distinction on this point between connections by consanguinity and affinity,[24] are evidently founded in the law of nature; and incestuous marriages have generally (but with some strange exceptions at Athens[25]) been regarded with abhorrence by the soundest writers and the most polished states of antiquity. Under the influence of Christianity, a purer taste, and stricter doctrine, has been inculcated; and an incestuous connection between an uncle and niece, has been recently adjudged by a great master of public and municipal law, to be a nuisance extremely offensive to the laws and manners of society, and tending to endless confusion, and the pollution of the sanctity of private life.[26]

It is very difficult to ascertain exactly the point at which the laws of nature have ceased to discountenance the union, It is very clearly established, that marriages between relations by blood in the lineal, or ascending and descending lines, are unnatural and unlawful, and they lead to a confusion of rights and duties. On this point, the civil, the canon, and the common law, are in perfect harmony. In the very learned opinion which Ch. J. Vaughan delivered on this subject in *Harrison v. Burwell*,[27] upon consultation with all the judges of England, he considered that such marriages were against the law of nature, and contrary to a moral prohibition binding upon all mankind. But when we go to collaterals, it is not easy to fix the forbidden degrees by clear and established principles.[28]

In several of the United States, marriages within the levitical degrees are made void by statute; but in this state we have no statute defining the forbidden degrees, and in England, the prohibition to marry within the levitical degrees rests on the canon law, which, in that respect, received the sanction of several statutes passed in the reign of Hen. VIII. It was considered, in the case of *Wightman v. Wightman*,[29] that marriages between brothers and sisters in the collateral line, were equally, with those between persons in the lineal line of consanguinity, unlawful and void, as being

plainly repugnant. to the first principles of society, and the moral sense of the civilized world. It would be difficult to carry the prohibition farther without legislative sanction; and it was observed, in the case last referred to, that in this state, independent of any positive institution, the courts would not probably be authorized to interfere with marriages in the collateral line beyond the first degree, especially as the levitical degrees were not considered to be binding as a mere rule of municipal obedience. The Napoleon code,[30] has adopted precisely the same extent of prohibition, as forming the impassable line between lawful and incestuous marriages; and though the prohibition goes deeper into the collateral line, yet the government reserved to itself the power to dispense, at its pleasure, with such further prohibitions. It is evident, that the compilers of that code considered the marriage between collaterals in the first degree of consanguinity, to be founded on a prohibition which was of absolute, uniform, and universal obligation, because, as to the prohibition between brothers and sisters, the sovereign had no dispensing power. In England, the question was considered by the Court of Delegates in the case of *Butler v. Gastrill*,[31] and though the court did not agree to admit marriages between brothers and sisters to be against the law of nature, as marriages were so considered, between parties connected in the lineal line; yet they admitted them to be against the law of God, and against good morals and policy. It is not consistent with my purpose to pursue this inquiry more minutely. The books abound with curious discussions on the limitations which ought to be prescribed; and in the English cases, in particular, to which I have referred, the courts bestowed immense labor, and displayed profound learning, in their investigations on the subject.[32]

(5.) The consent of parents, or guardians, to the marriage of minors, is not requisite. In this state, we have no statute provision in the case, and marriages are left to the freedom of the common law, and, consequently, with as few checks in the formation of the marriage contract, as in any part of the civilized world. The matrimonial law of Scotland, and of Ireland, is similar to our own,[33] and so was the English law prior to the statute of 26 Geo. II. c. 33. That statute, among other things, declared all marriages under licenses, when either of the parties were under the age of twenty-one years, if celebrated without publication of banns, or without the consent of the father, or unmarried mother, or guardian, to be absolutely null and void. The English statute pursued the policy of the civil law, and of the law of the present day in many parts of Europe, in holding clandestine marriages to be a grievous evil, so far as they might affect the happiness of families, and the control of property.[34] Though the Roman law greatly favored marriages by the fatuous *jus trium liberorum*, allowing certain special privileges to the parent of three or more children; yet it held the consent of the father to be indispensable to the validity of the marriage of children, of whatever age, except where that consent could not be given, as in cases of captivity, or defect of understanding.[35] Parental restraints upon marriage existed likewise in ancient Greece,[36] and they exist to a very great extent in Germany,[37] Holland,[38] and France.[39] The marriage of minors, under these European regulations, is absolutely void, if had without the consent of the father, or mother, if the survivor; and minority in France extends to the age of twenty-five in males, and twenty-one in females, and even after that period the parental and family check continues in a mitigated degree.

(6.) No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law.[40] The Roman lawyers strongly inculcated the doctrine, that the very foundation and essence of the contract consisted in consent freely given, by parties competent to contract. *Nihil proderit signasse tabulas, si mentem matrimonii non fuisse constabit. Nuptias non concubitus, sed consensus facit*. This is the language

equally of the common and canon law, and of common reason.

If the contract be made *per verba de praesenti*, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*. There is no recognition of any ecclesiastical authority in forming the connection, and it is considered entirely in the light of a civil contract. This is the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the marriage pct of 26 Geo. II; and the canon law is also the general law throughout Europe as to marriages except where it has been altered by the local municipal law. The only doubt entertained by the common law was, whether cohabitation was also necessary to give validity to the contract.[41] It is not necessary that a clergyman should be present to give validity to the marriage, though it is, doubtless, a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy.[42]

By the Scots law, a previous publication of the intention of the parties is required, though a clandestine marriage without such public notice is still valid in law, and only subjects the parties to certain penalties.[43] It has been the usual practice with nations, to prescribe certain forms and ceremonies, and generally of a religious nature, as being requisite to accompany the celebration of the marriage solemnity.[44] In the Roman Catholic church, marriage was elevated to the dignity of a sacrament, and was clothed with formalities, and made a complicated institution. But in France, under the revolutionary constitution of 1791, marriage was declared to be regarded in law as a mere civil contract. The same principle was adopted in the code Napoleon; and now, says Toullier,[45] the law separates the civil contract entirely from the sacrament of marriage, and does not attend to the laws of the church and the nuptial benediction, which bind only the conscience of the faithful. The statute of 26 Geo. II required all marriages in England, without special license to the contrary, to be celebrated in a parish church, or public chapel, and rendered the place indispensable to the validity of them. In most cases, the observance of the positive municipal regulations, was made necessary to the validity of the marriage; but the painful consequences of such a doctrine, have recommended a less severe discipline, in respect to the parties themselves and their issue. The statute of 3 Geo. IV relaxed the rigor of the former statute, in some particulars, as in the case of the marriage of minors by license, without parental consent, or without due publication of banns, for the severity of that statute frequently led to cases of the most alarming nature, such as the annulling of marriages after the parties had lived happily for a great many years, and reared children. In the states of Maine and Massachusetts, it is requisite, by statute, to a valid marriage, that it be made in the presence and with the assent of a magistrate, or a stated or ordained minister of the gospel; and though a marriage without publication of banns, and without the consent of the parents or guardians, will expose the officer to a penalty for breach of the statute, yet a marriage so had, would nevertheless be lawful and binding, provided there was the presence and assent of a magistrate or minister.[46] The statute law of Connecticut, requires the marriage to be celebrated by a clergyman or magistrate, and requires the previous publication of the intention of marriage, and the consent of parents, and it inflicts a penalty on those who disobey the regulation; but it is the opinion of the learned author of the Treatise on the Domestic Relations,[47] that the marriage, if made according to the common law, without observing any of those statute regulations, would still be a valid marriage. This I should infer, from the. ruse of *Wyckoff v. Boggs*,[48] to be the rule in New Jersey, where the marriage contract

is under similar legislative regulations. It is the doctrine judicially declared in New Hampshire and Kentucky, and the marriage is held valid as to the parties, though it be not solemnized in form, according to the requisitions of their statute law. There are probably statute provisions of a similar import in other states of the Union; and wherever they do not exist and specially apply, the contract is, everywhere in this country, (except in Louisiana,) under the government of the English common law.

(7.) It has been a point much discussed in the English courts, whether a clandestine marriage in Scotland, of English parties, who resided in England, and resorted to Scotland, with an intent to evade the operation of the English marriage act,[49] could be received and considered in England, as valid. Though we may not, in this country, have at present any great concern with that question, the principle is nevertheless extremely important in the study of the general jurisprudence, applicable to the marriage contract.

As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is, that a marriage valid by the law of the place where it is made, is valid everywhere. An exception to this rule is stated by Huberus,[50] who maintains, that if two persons, in order to evade the law of Holland, which requires the consent of the guardian or curator, should go to Friezeland, or elsewhere, where no such consent is necessary, and there marry, and return to Holland, the courts of Holland would not be bound by the law of nations to hold the marriage valid, because it would be an act done *ad eversionem juris nostri*. In opposition to this opinion, we have the decision of the Court of Delegates in England in 1768, in *Compton v. Bearcroft*,[51] where the parties, being English subjects, and one of them a minor, ran away, without the consent of the guardian, to avoid the English law, and married in Scotland. In a suit in the Spiritual Court, to annul the marriage, it was decided, that the marriage was valid. This decision of the Spiritual Court has been since frequently and gravely questioned. Lord Mansfield, a few years before that decision of the delegates, intimated pretty strongly,[52] his opinion in favor of the doctrine in Huberus, though he admitted the case remained undecided in England. The settled law is now understood to be, that which was decided in the Spiritual Court. It was assumed and declared by Sir George Hay, in 1776, in *Harford v. Morris*,[53] to be the established law. The principle is, that, in respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence. This rule was shown by the foreign authorities referred to by Sir Edward Simpson in 1752, in the case of *Scrimshire v. Scrimshire*,[54] to be the law and practice in all civilized countries by common consent and general adoption. It is a part of the *jus gentium* of Christian Europe, and infinite mischief and confusion would ensue with respect to legitimacy, succession, and other rights, if the validity of the marriage contract was not to be tested by the laws of the country where it was made. This doctrine of the English ecclesiastical courts, was recognized by the Supreme Court of Massachusetts, in *Medway v. Needham*;[55] and though the parties in that case left the state on purpose to evade its statute law, and to marry in opposition to it, and being married returned again, it was held, that the marriage must be deemed valid, if it be valid according to the laws of the place where it was contracted, notwithstanding the parties went into the other state with an intention to evade the laws of their own. It was admitted, that the doctrine was repugnant to the general principles of law relating to other contracts; but it was adopted in the case of marriage, on grounds of policy, with a view to prevent the public mischief and the disastrous consequences which would result from holding such marriages void. It was hinted, however, that this comity giving effect to the *lex loci*, might not be applied to gross cases, such as incestuous marriages, which were repugnant to the morals and policy of all civilized nations. This comity has been carried so far[56]

as to admit the legitimacy of the issue of a person who had bean divorced *a vinculo* for adultery, and who was declared incompetent to remarry, and who had gone to a neighboring state where it was lawful for him to remarry, and there married.[57]

NOTES

1. The great philosophical poet of antiquity, who was, however, most absurd in much of his philosophical theory, but eminently beautiful, tender, and sublime in his poetry, supposes the civilization of mankind to have been the result of marriage and family establishments.

> *Castaque privatae veneris connubia laeta*
> *Cognita sunt, prolemque ex se videre creatam:*
> *Tum genus humanum primum mollescere caepit.*
> Lucret. de Rer. Nat. lib. 6.

2. 2 Phillimore's Rep. 19. 69.

3. *Ash's case*, Prec. in Ch. 203. 1 Eq. Ca. Abr. 278. pl. 6. *Ex parte Turing*. 1 Ves. & Bea. 140. *Turner v. Myers*, 1 Haggard, 414.

4. *Wightman v. Wightman*, 4 Johns. Ch. Rep. 343.

5. Voet ad Pand. lib. 24. 2. 15. Toullier's Droit Civil Francais, tom. 1. No. 501. 504. 506. 512. Reeve's Domestic Relations 201. 207, Pothier's Trait du Contrat de Marriage, No. 307, 308. 2 Haggard, 104. 246.

6. *Ferlat v. Gojon*, 1 Hopkins, 478.

7. Toullier, ibid. No. 515. 521. Pothier, ibid. No. 310. 314. 1 Phillimore, 137. 2 Haggard, 243. 1 Day's Rep. 111. *Benton v. Benton*.

8. Co. Litt. 33. a. 79. b.

9. 2 Str. 937.

10. Harg. Co. Litt. lib. 2. n. 45.

11. Domat, 24.

12. No. 144.

13. Cro. Eliz. 858. 1 Salk. 121.

14. Laws N.Y. 11th sess. ch. 24.

15. 1 Roll. Abr. 340. pl. 2. 357. pl. 40. 360. F. *Williamson v. Parisien*, 1 Johns. Ch. Rep. 389. *Fenton v. Reed*, 4 Johns. Rep. 52

16. 4 Blacks. Com. 163, 164. This point was raised and discussed in *Porter's case*, Cro. Car. 461, and while the court admitted the second marriage to be unlawful and void, yet they did not decide whether the statute penalty would attach upon such a case of bigamy.

17. Harg. Co. Litt. lib. 2. n. 48.

18. Barrington on the Statutes, p. 401.

19. No. 147.

20. Paley's Moral Philosophy, b. 3. c. 6.

21. 2 Potter's Greek Antiq. 264. Taylor's Elem. Civil Law, 340-344.

22. Cic. de Orat. 1. 40. Suet. Jul. 52. Inst. 1. 10. b. ad fin. Taylor, ibid. 44-347. The more ancient laws of Rome, prohibiting divorces, were extremely praised by Dionysius of Halycarnassus, lib. 2.

23. 1 Potter's Greek Antiq. 107. 2 Ibid. 267, 268, 269. Tacit. Ann. 12. sec. 4, 5, 6, 7.

24. Co. Litt. 235. a. Gibson's Cod. 412. 1 Phillimore's Rep. 201. 355.

25. 1Mitford's Hist. of Greece, vol. vii. p. 374.

26. *Burgess v. Burgess*, 1 Haggard, 386. Such a connection was held in equal abomination by Justinian's Code. Code 5. 8. 2.

27. Vaughan's Rep. 206. 2 Vent. 9. S. C.

28. Doctor Taylor, in his Elements of the civil law, p. 314-389, has gone deeply into the Greek and Roman learning as to the extent of the prohibition of marriage between near relations, and he says, the fourth degree of collateral consanguinity is the proper point to stop at; that the marriage of first cousins is lawful, and the civil law properly established the fourth as the first degree that could match with decency.

29. 4 Johns. Ch. Rep. 343.

30. No. 161, 162.

31. Gilbert's Eq. Rep. 156.

32. Whether it be proper or lawful, in a religious or moral sense, for a man to marry his deceased wife's sister, has been discussed by American writers. Mr. N. Webster, in his Essays, published at Boston in 1790, No. 26, held the affirmative; and it is made lawful by statute in Connecticut. Dr. Livingston, in his Dissertations, published at New Brunswick in 1816, and confined exclusively to that point, maintained the negative side of the question. It is not my object to meddle with that question; but such a marriage is clearly not incestuous or invalid by our municipal law.

33. Erskine's Inst. vol. i. 89-91. McDouall's Inst. vol. i. 112. 2 Addam's Rep. 375. 1 Ibid 64.

34. The rigor of the act of Geo. II was somewhat softened by the new marriage act of 3 Geo. IV c. 75, and the provisions rendering void all marriages solemnized by license, by minors, without consent, was repealed, and marriages had by previous publication of banns were rendered valid, though there had been false names used in the publication of the banns. 1 Addam's Rep. 28. 94. 479.

35. Inst. 1. 10. Pr. Taylor's Elements of the Civil Law, 310-313.

36. Potter's Greek Antiq. vol. ii. 270, 271.

37. Heinec. Elem. Jur. Gen. lib. 1. s. 138.

38. Van Leeuwen's Cons. on the Roman Dutch Law, p. 73.

39. Pothier, *Traite du Contrat de Mar*. No. 321-342. Code Napoleon, No. 148-160. Toullier, *Droit Civil Franc*. tom, 1. 453-463.

40. Grotius, b. 2. c. 5. s. 10. Bracton, lib. 1. ch. 5. sec. 7.

41. 6 Mod. 155. 2 Salk. 137 S. C. *Dalrymple v. Dalrymple*, 2 Haggard, 54. *La Tour v. Teesdale*, 8 Taunton, 830. *Fenton v. Reed*, 4 Johns. Rep. 52.

42. 1 Salk. 119. 4 Burr. 2057. Doug. 171. *The King v. Stockland*, Burr. Sett. Cases, 509. *Cunninghams v. Cunninghams*, 2 Dow. 482. *McAdarn v. Walker*, 1 Dow. 148. *Fenton v. Reed*, 4 Johns. Rep. 2.

43. 1 Ersk. Inst. 91. 93. McDouall's Inst. vol. i. 112.

44. Selden's Uxor Ebraica, b. 2. c. l. 2 Potter's Greek Antiq. 279. 283. Dr. Taylor's Elem. 275. 278.

45. Droit Civil Francais, tom. 1. No. 494.

46. *Milford v. Worcester*, 7 Mass. Rep. 48. *Ligonia v. Buxton*, 2 Greenleaf, 102

47. Reeve's Domestic Relations, p. 196. 200. 290.

48. 2 Halsted, 138.

49. 2 N. Hamp. Rep. 268. 3 Marshall, 370.

50. *De Conflictu Legum*, sec. 8.

51. Buller's N. P. 114. 2. Haggard, 443, 444. S.C.

52. *Robinson v. Bland*. 2 Burr. 1077.

53. 2 Haggard, 418-433.

54. 2 Haggard, 412-416.

55. 16 Mass. Rep. 157.

56. *West Cambridge v. Lexington*, 1 Pickering, 506.

57. By the French civil code, No. 63.; publication of banns is to precede marriage; and by the article No. 170, if a Frenchman marries in a foreign country, the same regulation is still to be observed; and yet, according to Toullier, Droit Civil Francais, tom. 1. No. 578. and note ib. the omission to comply with the prescribed publication does not render the marriage void, whether celebrated at home or abroad. But if the marriage by a Frenchman abroad, be within the age of consent fixed by the French code, though beyond the age of consent fixed by our law, it would seem, that, the marriage would not be regarded in France as valid, though valid by the law of the place where it was celebrated. The French code, No. 170, requires the observance by Frenchmen of the ordinances of that code, though the marriage be abroad, for personal laws follow Frenchman wherever they go. Toullier, Droit Francais, tom. 1. Nos. 118. and 576.

LECTURE 27

Of the Law Concerning Divorce

WHEN a marriage is duly made, it becomes of perpetual obligation, and cannot be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.

By the ecclesiastical law, a marriage may be dissolved, and declared void *ab initio*, for canonical causes of impediment, existing previous to the marriage. Divorces *a vinculo matrimonii*, said Lord Coke,[1] are *causa praecontractus*, *causa metus*, *causa impotentiae seu frigiditatis*, *causa affinitatis*, *causa consanguinitatis*. We have seen how far a marriage may be adjudged void, as being procured by fear or fraud, or contracted within the forbidden degrees. The courts in Massachusetts are authorized by statute to grant divorces *causa impotentiae*; and in Connecticut, imbecility has been adjudged sufficient to dissolve a marriage, on the ground of fraud.[2] The canonical disabilities, such as consanguinity, and affinity, and corporeal infirmity, existing prior to the marriage, render it voidable only, and such marriages are valid for all civil purposes, unless sentence of nullity be declared in the lifetime of the parties; and it cannot be declared void for those causes after the death of either party. But the civil disabilities, such as a prior marriage, want of age, or idiocy, make the contract void *ab initio*, and the union meretricious.[3] In this state, it has been recently adjudged,[4] that corporeal impotence is not, under our existing laws, a cause of divorce, and that the English law of divorce on that point has never been adopted. The new French code is silent on this point; and Toullier[5] condemns a decree of divorce *causa impotentiae*, which was pronounced in France in 1808, as contrary to the spirit of the code, and leading to scandalous inquiry.

During the period of our colonial government, for more than one hundred years preceding the revolution, no divorce took place in the colony of New York; and for many years after we became an independent state, there was not any lawful mode of dissolving a marriage in the lifetime of the parties, but by a special act of the legislature. This strictness was productive of public inconvenience, and often forced the parties, in cases which rendered a separation fit and necessary, to some other state, to avail themselves of a more easy and certain remedy. At length, the legislature, in 1787, authorized the Court of Chancery to pronounce divorces *a vinculo*, in the single case; of adultery, upon a bill filed by the party aggrieved. As the law now stands, a bill for a divorce for adultery, can be sustained in two cases only: (1.) If the married parties are inhabitants of this state, at the time of the commission of the adultery: (2.) If the marriage took place in this state, and the party injured be an actual resident at the time of the adultery committed, and at the time of filing the bill. If the defendant answers the bill,[6] and denies the charge, a feigned issue is to be awarded, under the direction of the Chancellor, to try the truth of the charge before a jury, in a court of law. Upon the trial of the issue, the fact must be sufficiently proved by testimony, independent of the confession of the party; for, to guard against all kind of improper influence, collusion, and fraud, it is the general policy of the law on this subject, not to proceed solely upon the ground of the confession of the party to a dissolution of the marriage contract. The rule that the confession of the party was not sufficient, unless supported by other proof, was derived from the canon law, and arose front the jealousy that the confession might he extorted, or made collusively, in order to furnish means to effect a divorce.[7]

If the defendant suffers the bill to be taken *pro confesso*, or admits the charge, it would be equally dangerous to act upon that admission of the bill, and the statute therefore directs that the case be

referred to a master in chancery, to take proof of the adultery, and to report the same, with his opinion thereon. If the report of the master, or the verdict of the jury, as the case may be, shall satisfy the Chancellor of the truth of the charge of adultery, he is then to decree a dissolution of the marriage; but this dissolution is not to affect the legitimacy of the children; and the defendant, by way of punishment for the guilt, is disabled from remarrying during the life of the other party.[8]

The statute further provides, that if the wife be the complainant, the court is to make a suitable allowance in sound discretion out of the defendant's property, for the maintenance of her and her children, and to compel the defendant to give reasonable security to abide the decree, by the sequestration of his estate. The Chancellor is also to give to the wife, being the injured party, the absolute enjoyment of any real estate belonging to her, or of any personal property derived by title through her, or acquired by her industry. If, on the other hand, the husband be the complainant, then he is entitled to retain the same interest in his wife's real estate, which he would have had, if the marriage had continued; and be is also entitled to her personal estate and choses in action which she possessed at the time of the divorce, equally as if the marriage had continued; and the wife loses her title to dower, and to a distributive share in the husband's personal estate.

These are all the statute provisions in this state on the subject of a divorce *a vinculo matrimonii*; and it has been decided, that if the marriage was solemnized out of the state, it must distinctly and certainly appear upon the bill, that both parties were inhabitants of the state at the time of the commission of the adultery, and this was held necessary to give the court jurisdiction.[9] It must also appear, if the parties were married within the state, that the complainant was an actual resident at the time of the offense, and of bringing the suit; and this means, that the party's domicile was here, or that he had fixed his residence *animo manendi*.[10] It has also been adjudged, that though the fact of adultery be made out, it does not follow, as a matter of course, that a divorce is to be awarded, for the remedy by divorce is purely a civil and private prosecution, under the control, and at the volition of the party aggrieved, and he may bar himself of the remedy by his own act. Neither party can obtain a divorce for adultery, if the other party recriminates, and can prove a correspondent infidelity. The *delictum*, in that case, must be of the same kind, and not an offense of a different character. The *compensatio criminis* is the standard canon law of England in all cases of divorce, and the same principle, it is to be presumed, prevails in these United States.[11] So, if the husband, subsequently to the adultery, cohabits with his wife, after just grounds of belief in her guilt, it is, in judgment of law, a remission of the offense, and a bar to the divorce. This is a general principle every where pervading this branch of jurisprudence.[12] It is also well established, that lapse of time, or a long tacit acquiescence of the husband in his wife's infidelity, even without cohabitation, but without any disability on his part to prosecute, will be deemed equivalent to a *condenatio injuriae*, and bar a prosecution for a divorce, unless the delay be satisfactorily accounted for. The husband is not to be permitted, at any distance of time, to agitate such inquiries, and especially where his tacit acquiescence continued after his wife had formed another matrimonial connection, and he slumbered in uncomplaining silence, until she became the mother of a new race of children.[13]

The policy of this state has been against divorces from the marriage contract, except for adultery. We meet with a great variety of practice and opinion on this subject, in this country and in Europe, and among ancient and modern nations; but the stringer authority, and the better policy, are in favor of the stability of the marriage union. The ancient Athenians allowed divorces with great latitude, but they were placed under one important check, for the party suing for a divorce was obliged to appeal to the magistrate, state the grounds of complaint, and submit to his judgment. It was a regular

action, analogous in substance to a bill in Chancery; and if the wife was the prosecutor, she was obliged to appear in person, and not by a proctor.[14] The graver Romans permitted the liberty of divorce to a most injurious and shameful degree. Either party might renounce the marriage union at pleasure. It was termed *divortium sine causa*, or *sine ulla querela*; and the principle is solemnly laid down in the pandects, that *bona gratia matrimonium dissolvitur*.[15] We find the Roman lawyers, discussing questions of property depending upon these voluntary divorces, or in which *Titia divortium a Seio fecit. Moevia Titio repudium misit*.[16] This facility of separation tended to destroy all mutual confidence, and to inflame every trifling dispute. The abuse of divorce prevailed in the most polished ages of the Roman republic, and it was unknown in its early history. Though the twelve tables gave to the husband the freedom of divorce, yet the republic had subsisted 500 years when the first instance of a divorce occurred.[17] The Emperor Augustus endeavored by law to put some restraint upon the facility of divorce;[18] but the check was overpowered by the influence and corruption of manners. Voluntary divorces were abolished by one of the novels of Justinian, and they were afterwards revived by another novel of the Emperor Justin.[19] In the novel restoring the unlimited freedom of divorce, the reasons for it are assigned; and while it was admitted, that nothing ought to be held so sacred in civil society as marriage, it was declared, that the hatred, misery, and crimes, which often flowed from indissoluble connections, required as a necessary remedy, the restoration of the old law, by which marriage was dissolved by mutual will and consent.[20] This practice of divorce is understood to have continued in the Byzantine or eastern empire, to the 9th or 10th century, and until it was finally subdued by the influence of Christianity.

In modern Europe, divorces were not allowed in the Roman Catholic countries, because marriage was considered a sacrament, and held indissoluble during the life of the parties. This was formerly the case in France;[21] and it was the general doctrine in the Latin, though not so either in the Greek or Protestant churches. But the French revolution, like a mighty inundation, swept away at once the laws and usages of ages; and, at one period, the French government seemed to have declared war against the marriage contract, and six thousand divorces are said to have taken place in the city of Paris in the space of two years and three months.[22] The code Napoleon regards marriage only as a civil contract, and allows divorces not only for several reasonable causes, such as adultery, and grievous injuries, to be submitted to a judicial tribunal, but also without cause, and founded merely upon mutual consent, according to the usage of the ancient Romans. This consent is subjected to several restraints which do in fact create very great and serious checks upon the abuse of the privilege.[23] By the Dutch law there are but two just causes of divorce *a vinculo, viz.* adultery and malicious desertion;[24] and, by the English law, a marriage, valid in its commencement, cannot be dissolved for any cause without an act of parliament.[25] This was not the case in England anciently;[26] and until the 44th Eliz. divorces *a vinculo* were allowed for adultery. But in *Foliamb's case*, 44 Eliz., it was held, in the Star Chamber, that adultery was only a cause of divorce *a mensa et thoro*,[27] and the Archbishop of Canterbury said, in that case, it had been so settled before him, on appeal, by many divines and civilians.

In some of the United States,[28] divorces are restrained, even by constitutional provisions, which require to every valid divorce, the assent of two thirds of each branch of the legislature, founded on a previous judicial investigation and decision. The policy of other states is exceedingly various on this subject. In several of them,[29] no divorce is granted, but by a special act of the legislature, according to the English practice; and so strict and scrupulous has been the policy of South Carolina, that there is no instance in that state, since the revolution, of a divorce of any kind, either by the sentence of a court of justice, or by act of the legislature.[30] In all the other states, divorces *a vinculo*

may be granted judicially for adultery. In some of them,[31] the jurisdiction of the courts as to absolute divorces, for causes subsequent to the marriage, is confined to the single case of adultery; but in the residue of the states, intolerable ill usage, or wilful desertion, or unheard of absence, or some of them, will authorize a decree for a divorce *a vinculo*, under different modifications and restrictions.[32]

It is very questionable, whether the facility with which divorces can be procured in some of the states, be not productive of more evil than good. It is doubtful, whether even divorces for adultery do not lead to much fraud and corruption.[33] Some of the jurists are of opinion, that the adultery of the husband, ought not to be noticed, or made subject to the same animadversion as that of the wife; because it is not evidence of such entire depravity, nor equally injurious in its effects upon the morals, and good order, and happiness of domestic life. Montesquieu,[34] Pothier,[35] and Dr. Taylor,[36] all insist, that the cases of husband and wife ought to be distinguished, and that the violation of the marriage vow, on the part of the wife, is the most mischievous, and the prosecution ought to be confined to the offense on her part.

It may become a question of some difficulty with us, how far a divorce in one state is to be received as valid in another. The first inquiry is, how far has the legislature of a state the right, under the constitution of the United States, to interfere with the marriage contract, and allow of divorces between its own citizens, and within its own jurisdiction. The question has never been judicially raised and determined in the courts of the United States, and it has generally been considered that the state governments have complete control and discretion in the case. In the cause of *Dartmouth College v. Woodward*,[37] the point was incidentally alluded to; and the Chief Justice observed, that the constitution of the United States had never been understood to restrict the general right of the legislatures of the states, to legislate on the subject of divorces; and the object of state laws of divorce was to enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it had been broken by the other. It would be in time to inquire into the constitutionality of their acts, when the state legislatures should undertake to annul all marriage contracts, or allow either party to annul it at the pleasure of the other. Another of the judges of the Supreme Court[38] spoke to the same effect. He said, that a general law, regulating divorces, was not necessarily a law impairing the obligation of such a contract. A law, punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, was not a law impairing the obligation of contracts. But he was not prepared to admit a power in the state legislatures to dissolve a marriage contract without any cause or default, and against the wish of the parties, and without a judicial inquiry to ascertain the breach of the contract.

Assuming, therefore, that in ordinary cases the constitutionality of the laws of divorce, in the respective states, is not to be questioned, the embarrassing point is, to determine how far a divorce in one state has a valid operation in another. There can be no doubt, that a divorce of the parties who were married, and regularly domiciled, at the time, in the state whose courts pronounced the divorce, would be valid every where. The difficulty is, when the husband and wife were married, and reside in a state where divorces are not permitted at all by the policy of its law, or not permitted to the extent and for the causes allowed to operate in other states; and they, or one of them, remove into another state for the sole and express purpose of procuring a divorce, and, having obtained it, return into their native state, and contract other matrimonial ties. How arc the courts of the state where the parties had their home, to deal with such a divorce? When a divorce was sought in such a case, the courts in Massachusetts very properly refused to sustain a libel for a divorce, and sent the parties

back to seek such relief as the laws of their own domicile afforded.[39] The Supreme Court of this state has refused to assist a party who had thus gone into another state, and obtained a divorce on grounds not admissible here, and procured in evasion of our laws. They would not sustain an action for alimony founded on such a divorce.[40] Afterwards, in *Borden v. Fitch*,[41] the sane court held a divorce in another state, obtained by the husband when the wife resided out of the state, and had no notice of the proceeding, to be null and void; because, the court pronouncing the divorce had no lawful jurisdiction of the case when they had none over the absent wife. They considered it to be a judgment obtained upon false and fraudulent suggestions. So, also, in *Hanover v. Turner*,[42] the Supreme Court in Massachusetts held a divorce in another state to be null and void, as having been fraudulently procured by one of their citizens, without a change of domicile. There is no doubt of the rule, that the allegation that a foreign judgment was obtained by fraud is admissible, and, if true, it will destroy its effect. All judgments rendered any where against a party who had no notice of the proceeding, are rendered in violation of the first principles of justice, and are null and void.[43] Sentences obtained by collusion are there nullities, and all other courts may examine into facts upon which a judgment has been obtained by fraud. Every party is at liberty to show, that another court was imposed on by collusion.[44] The question is, whether, if such a divorce be procured in another state, by parties submitting to the jurisdiction, and after a fair investigation of the merits of the allegations upon which the decree was founded, such a decree be entitled to be received as valid and binding upon the courts of the native state of the parties. A graver question cannot arise under this title in our law.

The *locus delicti* may not be important in the jurisprudence of the states. It is not material in this state, provided the marriage was solemnized here. The effect that the constitution and laws of the United States have on the question, has not been judicially decided; but it is settled, that the judgment. of a state court is to have the same faith and credit in every other court in these United States, which it has in the courts of the state in which it was pronounced.[45] According to the doctrine of the decisions in the federal courts, it may be contended, that a divorce in one state, judicially conducted and declared, and procured under circumstances which gave to the court full jurisdiction of the cause, and of the parties, and sufficient to render the divorce valid and binding there, would be good and binding in every other state; and yet it is evident, that the domestic policy of one state, on this very interesting subject of divorce, may in this way be exposed to be greatly disturbed by a different policy in another state. It is my duty, in this place, to leave this question as I find it; but if such a decree will operate and conclude the question in every state, we are at least relieved from that alarming and distressing collision which exists between the judicatures of England and Scotland on this subject; and the appeal must be made to the mutual comity, moderation, and forbearance of the legislatures of the several states, in their respective regulations on the subject of divorce. The twelve judges of England decided, in 1812, in *Lolly's case*, that as by the English law a marriage was indissoluble, a marriage contracted in England could not be dissolved in any way except by act of Parliament.[46] The party in that case was convicted of bigamy for marrying again after a Scotch divorce; and, consequently, all foreign divorces of English marriages were held to be null and void. I presume that such a decision will not be considered as law here, as between the several states. But supposing a marriage here is dissolved abroad, as in Scotland or France, for instance, for causes not admissible with us, how would such a divorce affect a marriage solemnized here? A short examination of some of the cases discussed in England and Scotland on this litigious subject, may be useful and instructive. The *conflictus legum* is the most perplexing and difficult title of any in the jurisprudence of public law.

In *Utterton v. Tewsh*,[47] the marriage was in England, and the husband afterwards committed adultery, and abandoned his wife, and went to Scotland, and resided there above forty days, living in adultery. The wife sued for a divorce *a vinculo*, in the Consistorial Court in Scotland, in 1811, and the court dismissed the bill, on the ground that the husband had not formed a real and permanent domicile in Scotland, so as to give the court jurisdiction. Here was an English marriage by English parties, who had not changed their original English domicile, and if they had, the judges doubted whether, according to *jure gentium*, the *lex loci contractus* ought not to be preferred. There was great danger of collusion of English parties to obtain a divorce *a vinculo* in Scotland, in opposition to the English law, which does not allow such divorces; and if decrees night be obtained in Scotland, which would be invalid in England, a distressing collision would arise, and dangerous questions touching the legitimacy of children by a second marriage, and the rights of succession, and the crime of bigamy.

But the decree of the Consistorial Court was reversed on appeal, and the cause was remanded to that court, and they, accordingly, proceeded upon the bill for a divorce, and pronounced a divorce *a vinculo* for the adultery charged. Lord Meadowbank, in pronouncing the decree of reversal in the Supreme Court of Review, delivered a learned and powerful opinion. He observed, that the relation of husband and wife was acknowledged *jure gentium*, and the right to redress wrongs incident to that relation attached on all persons living within the territory, though the marriage was celebrated elsewhere. It was not necessary that the foreigners should have acquired a domicile *animo remanendi*; and if the law refused to apply its rules to these domestic relations, recognized by all civilized nations, Scotland could not be deemed a civilized country; as thereby it would permit a numerous description of persons to traverse it, and violate with impunity all the obligations of domestic life. If it assumed jurisdiction, and applied, not its own rules, but the law of the foreign country where the relation had been created, the supremacy of the law of Scotland, within its territory, would be compromised, and powers of foreign courts unknown to the law usurped and exercised. A domicile was of no consequence, if the foreigner was to be personally cited, or his residence sufficiently ascertained. If the wife who prosecuted was innocent of any collusion, it was no bar to the remedy, that the husband came to Scotland and committed adultery, with a calculation that it would be detected by the wife, or that he came to Scotland with the criminal intent of instigating his innocent wife to divorce him.

In the next case that came before the Consistorial Court, in 1816,[48] the parties married, and lived in England, and the husband deserted his wife, committed adultery, and domiciled himself in Scotland. The judges did not concur in their views of the subject. Two of them held, that the husband was sufficiently domiciled in Scotland to give jurisdiction, but that the law of England, which was the *locus contractus*, ought to govern, upon principles of comity and international law, and not the *lex domicilii*. They were, therefore, of opinion, that the divorce for the adultery should be only *a mensa et thoro*. The other two judges thought that the domicile was not changed, and therefore a divorce *a vinculo* could not be pronounced. On appeal, the Court of Session remanded. the cause for the purpose of inquiry into the fact of domicile. The Consistorial Court then held, that the real English domicile of the husband was not changed by being a weekly lodger in Scotland for eighteen months, and that a change of the real domicile made *bona fide et animo remanendi*, at the date of the action, was necessary, for the purpose, not, indeed, of jurisdiction, but to determine whether the rule of the *lex loci*, upon principles of international law, did or did not apply. The rule of judgment must be the *lex loci*, as there was no change of the real English domicile, and, therefore, a divorce *a mensa et thoro*, and none other, was pronounced. But on appeal this decree was also reversed by the Court

of Session, and the court below ordered to render a decree of divorce *a vinculo*.

A third case was decided in 1816.[49] The marriage was in England; but the parties lived and cohabited together in Scotland, for eight years, and the adultery was committed there. The question was not one of domicile, for that was too clear to be questioned, but it was the general and broad question, whether the *lex loci contractus*, or the law of the domicile, was to govern in pronouncing the divorce. Two of the judges were for following the law of the domicile, and rendering a divorce *a vinculo*, and the other two were for the *lex loci*, and granting only a divorce *a mensa*. But the court of review reversed this decree also, and directed the cause to proceed upon the law of Scotland.

In *Butler v. Forbes*, decided in 1817,[50] the marriage was in Scotland; but the real domicile of the parties was in Ireland. The adultery was committed in Scotland, during a transient visit there. The consistory court held, that the law of the real domicile must prevail over the law of the contract. The *locus delicti* was immaterial, but the law of the real domicile was the governing principle, and they refused any other than a divorce *a mensa*. The court of review reversed this decree also, and directed a divorce *a vinculo*.

In *Kibblewhite v. Rowland*, in 1816,[51] the parties were English, and married, and domiciled in England; but the defendant had committed adultery on a visit to Scotland, and his wife sued him for a divorce. The Consistorial Court. held, that both the law of the contract and the law of the domicile were against a divorce *a vinculo*, and they refused it. This decree was also reversed, and the usual divorce *a vinculo* directed.

I will cite but one more of these Scotch decisions, in which the subject is discussed in a very masterly manner. The case of *Gordon v. Pye*, was decided in the Consistorial Court, in 1815.[52] The parties were English, and married in England, and resided there during the whole period of cohabitation. The husband deserted his wife, and transiently transferred his domicile to Scotland, and committed adultery there. The Court dismissed the bill, on the principle that the *lex loci contractus* must govern, as the permanent domicile was still in England, and a divorce *a vinculo* could not be obtained. The court insisted, that by the *jus gentium*, courts in one country cannot set aside contracts valid in another country where they were made. A temporary residence, raised for the purpose of jurisdiction, would be *in fraudem legis*. The *lex loci* is the sound rule of decision in respect to marriage contracts; and the courts of one country ought not to be converted into engines for either eluding the laws of another, or determining matters foreign to their territory. The *lex loci* ought to prevail over the *lex domicilii* on just principles of international policy, as the marriage contract is *jure gentium*. All Christian states favor the perpetuity of marriage, and suspicion, and alarm watch every step to dissolve it, and the plaintiff was entitled *ex comitate*, and upon principles of international Jaw, to the same measure of redress she would be entitled to in England, and especially when the *lex loci contractus*, and the *lex domicili*, both concurred. To grant such divorces contrary to the *lex loci*, would be to invite foreigners to come to Scotland and commit adultery for the sake of the divorce, and this would hurt the public morals, and pollute a jurisdiction constituted to act in evident hostility to the laws and the policy of other states.

But the Court of Session reversed the decree, in opposition to all this reasoning and doctrine; and they insisted that the relation of husband and wife, wherever originally constituted, was entitled to the same protection and redress as to wrongs committed in Scotland, that belong of right to that relation by the law of Scotland. By marrying in England, the parties do not become bound to reside

for ever in England, or to treat one another in every other country according to the provision of the law of England. To redress the violation of the duties and abuse of the powers of the marriage state, belongs to the law of the country where the parties reside, and to which they contract the duties of obedience, whenever they enter its territories. There is nothing in the will of the parties that gives the *lex loci* any particular force over the marriage contract, or that impedes the course of the *jus publicum*, in relation to it; and it would be no objection to a divorce, at the instance of a Roman Catholic, that his marriage was, as to him, a sacrament, and by its own nature indissoluble. Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. Unlike other contracts, marriage cannot be dissolved by mutual consent; and it subsists in full force, though one of the parties should be for ever rendered incapable, as in the case of incurable insanity, from performing his part of the nuptial contract. Matrimonial obligations are *juris gentium*, and admit of no modification by the will of the parties; and foreign courts are not bound to inquire after that will, or after the municipal law to which it may correspond. They are bound to look to their own law, and to hold it paramount, especially in the administration of that department of internal jurisprudence, which operates directly on public morals and domestic manners. The consequences would be embarrassing, and probably inextricable, if the personal capacities of individuals, as of majors and minors, the competency to contract marriages, and infringe matrimonial obligations, and the rights of domestic authority and service, were to be regulated by foreign laws and customs, with which the mass of the population must be utterly unacquainted. The whole order of society would be disjointed, were the positive institutions of foreign nations concerning the domestic relations admitted to operate universally, and form privileged casts living each under separate laws. Though marriage, contracted according to the lex loci, be valid all the world over, yet many of its rights and duties are regulated and enforced by public law, which is imperative on all who are domiciled within its jurisdiction. The laws of divorce are considered as of the utmost importance as public laws, affecting the dearest interests of society; and they are not to be relaxed as to a person domiciled in Scotland, because his marriage was contracted out of it. If two natives of Scotland were married in France or Prussia, the marriage would be valid in Scotland; but would the parties be entitled to come into court, and insist on a divorce *a vinculo*, because their tempers were not suitable, or for any of the great variety of whimsical and absurd grounds for a divorce allowed by the Prussian code of 1795? Certainly not; and the conclusion was, that the law of divorce must be governed by the law of Scotland, whenever the party was sufficiently domiciled there to enable the court to sustain jurisdiction of the cause.

I have thus given, for the benefit of the student, a pretty enlarged view of the discussions in Scotland, on this great question, touching the power of divorce in one country upon marriage in another. The same question was brought up on appeal from Scotland, to the House of Lords in England, in 1813, in the case of *Tovey v. Lindsay*;[53] and Lord Eldon there stated the decision of the twelve judges to have been, that no English marriage could be dissolved but by parliament. The question in the case was, whether an English marriage could be dissolved by a Scotch court, even if the parties were sufficiently domiciled there to found a jurisdiction of the case. The Lord Chancellor admitted it to be a question of the highest importance; and Lord Redesdale intimated, that it could not be just, that one party should be able, at his option, to dissolve a contract, by a law different from that under which it was formed, and by which the other party understood it to be governed. The case was remitted back for review, without any final decision in the English House of Lords; but the opinions of Lord Eldon and Lord Redesdale evidently agreed with the decision of the twelve judges at Westminster, and went to deny the competency of any foreign court to pronounce a decree of divorce *a vinculo* of English marriages, or to pronounce any other decree in

the case than such as would be warranted by the *lex loci contractus*.

Upon the principles of the English law, a marriage contracted in this state cannot be dissolved, except for adultery, by any foreign tribunal out of the United States; because the *lex loci contractus* ought to govern; and if a divorce by a judicial proceeding in one of these United States, be entitled to a different consideration in others, it is owing to the force which the national compact, and the laws made in pursuance of it, give to the records and judicial proceedings of other states. If, however, a marriage in this state should be dissolved, not by a regular judicial sentence, but by an act of the legislature in another state, passed specially for the purpose, and for a cause not admissible here, would such a divorce be received here as binding? A statute, though not in the nature of a judicial proceeding, is, however, a record of the highest nature; and in some of the states all their divorces are by special statutes. But if a statute, though a matter of record, was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow. That construction is utterly inadmissible. While it is conceded to be a principle of public law, requisite for the safe intercourse and commerce of mankind, that acts valid by the law of the place where they arise, are valid every where, it is at the same time to be understood, that this principle relates only to civil acts founded on the volition of the parties, and not to such as proceed from the sovereign power. The force of the latter cannot be permitted to operate beyond the limits of the territory, without effecting the necessary independence of nations. And, in the present case, it is to be observed, that the act of Congress of the 26th of May, 1790, ch. 11, prescribing the mode of authenticating records, only declares the faith and credit to be given to the records and judicial proceedings of the courts in the several states; and the supplementary act of the 27th of March, 1804, ch. 56. relates only to office books kept in the public offices, and has no bearing on this point, But if, instead of a divorce by statute *ex directo*, the act should refer a special case to a court of justice, with directions to inquire into the fact, and to grant a divorce, or withhold it, as the case might require, would that, be a judicial proceeding, to which full effect ought to be given? A number of embarrassing questions of this kind may be raised on this subject of interfering jurisdictions, and some of them may, probably, hereafter exercise the talents, and require the application of the utmost discretion and wisdom of the courts of justice. I have done as much as becomes the duty which I have assumed, in bringing into view the most material decisions which have taken place, and stating the principles which have been judicially recognized.

ln cases not governed by the constitution and laws of the United States, the doctrine of the English law generally, and, with some few exceptions, is the law of this country, as to the force and effect to be given to foreign judgments. I shall, probably, take occasion, in subsequent parts of these lectures, to consider the effect to be given here to foreign contracts, foreign assignments, foreign official acts, and other various transactions in the course of business, as the subjects to which they can be applied may render easy and pertinent the consideration of this branch of municipal and general jurisprudence. At present it will be sufficient to show, in connection with this inquiry, that the English law is exceedingly, if not peculiarly liberal, in the respect which it pays to foreign judgments, in all other cases, except the case of a foreign divorce of an English marriage. As early as the reign of Charles II, Lord Chancellor Nottingham maintained, in the House of Lords, in *Cottington's case*,[54] that a foreign decree of divorce, in the case of a foreign marriage, was conclusive, and could not be opened, or the merits reexamined. It was against the law of nations, he observed, not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form of those countries wherein they were given. He referred to *Wier's case*, 5 J. I.[55] wherein a judgment in debt having been rendered in Holland against an

Englishman, he fled from execution to England, and the judgment being certified, the defendant was imprisoned in the admiralty for the debt, and the K. B., upon *habeas corpus*, held the imprisonment to be lawful and that "it was by the law of nations that the justice of one nation should be aiding to the justice of another nation, and the one to execute the judgments of the other."

A distinction is taken in the English law, between a suit brought to enforce a foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause. No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment. In the former case, the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained. This was the principle declared and settled by the House of Lords in 1771, in the case of *Sinclair v. Fraser*, upon an appeal from the Court of Session in Scotland.[56] But if the foreign judgment has been pronounced by a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing party institutes a new suit upon the same matter, the plea of the former judgment constitutes an absolute bar, provided the subject, and parties, and grounds of the judgment, be the same. It is a *res judicata*, which is received as evidence of truth; and the *exceptio rei judicatae*, as the plea is termed in the civil law, is final and conclusive.[57] This is a principle of general jurisprudence founded on public convenience, and sanctioned by the usage and courtesy of nations.[58] The rule of the English law has been very generally recognized in the courts of justice in this country, in cases not affected by the constitution and law of the United States.[59] There is one exception in the jurisprudence of some of the states, as to the force and effect of foreign sentences in the prize courts of admiralty, bearing upon neutral rights. While those sentences are regarded in the courts of the United States as binding and conclusive upon the same questions,[60] there has been some difference of opinion, and some collisions on this point, in the decisions in the state courts.[61] The weight of judicial authority appears, however, to be decidedly in favor of the binding force and universal application of the doctrine of the English law.[62]

The statute of this state,[63] authorizes the Court of Chancery to allow of qualified divorces *a mensa et thoro*, founded on the complaint of the wife of cruel and inhuman treatment, or such conduct as renders it unsafe and improper for her to cohabit with her husband, and be under his dominion and control; or for wilful desertion of her, and refusal or neglect to provide for her. The court may decree a separation from bed and board for ever, or for a limited time, in its discretion, and may make suitable provisions, by way of alimony, for the support and maintenance of the wife and children, and may sequester the husband's estate for that purpose. The husband is allowed to show, by way of defense, the ill conduct of his wife.

These qualified divorces are allowed by the laws of almost all countries. In England, they are allowed only *propter saevitiam aut adulterium*; and where there is a separation for such a cause, if the parties come together again, the same cause cannot be revived.[64]

In determining what is *saevitia*, by the ecclesiastical law, we find it stated, in *Evans v. Evans*,[65] that it is necessary there should be a reasonable apprehension of bodily hurt. The courts keep the rule very strict. The causes must be grave and weighty, and show such a state of personal danger as that the duties of the married life cannot be discharged. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not

threaten bodily harm, do not amount to that cruelty against which the law can relieve. The wife must disarm such a disposition in the husband by the weapons of kindness.[66]

This being the rule of the English courts, it would appear, that divorces *a mensa* are placed by our statute on rather broader ground. They are not only for cruelty, but generally for such conduct on the part of the husband towards his wife, as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control. Probably the word unsafe, in our statute, may mean the same thing as the reasonable apprehension of bodily hurt in the English cases. It was considered, in the case of *Barrere v. Barrere*,[67] that the danger or injury must be serious, and the slightest assault or touch in anger, was not, in ordinary cases, sufficient. It was likewise held, in that case, that the separation need not be declared to be for any specific time, but may be left general and indefinite, with liberty to the parties to be reconciled when they please, and to apply to be discharged from the decree. The decree of divorce is always, by the canon law, *sub spe reconciliationis*.[68]

The statute in this case seems to have considered the wife as the only infirm party who stands in need of such protection, for it confines the divorce *a mensa*, for cruelty, desertion, or other improper conduct, to such conduct in the husband;[69] but the English ecclesiastical law makes no such distinction, and divorces are granted, on a bill by the husband, for cruel usage by the wife.[70] Upon these separations from bed and board, the children that the wife has during the separation, are bastards, for due obedience to the decree is to be presumed, unless the contrary be shown.[71] If, however, cohabitation between the husband and wife existed, the presumption of illegitimacy is destroyed.

These qualified divorces are regarded as rather hazardous to the morals of the parties. In the language of the English courts, it is throwing the parties back upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife. The ecclesiastical law has manifested great solicitude on this subject, by requiring, in every decree of separation, an express monition to the parties “to live chastely and continently, and not, during each other's life, contract matrimony with any other person;” and security was formerly required from the party suing for the divorce, to obey the mandate.[72] The statute allows the husband, on such a bill by the wife, for ill conduct, to show, in his defense, and in bar of the suit, a just provocation in the ill behavior of the wife, and this would have been a good defense, even without the aid of the statute.[73] And on these separations from bed and board, the courts entrusted with the jurisdiction of the subject, will make suitable provision for the support of the wife and children, out of the husband's estate, and enforce the decree by sequestration; and the Chancellor, in this state, may exercise his discretion in the disposition of the infant children, and vary or annul the same from time to time, as circumstances may require.[74] I apprehend there is not, in these United States, any essential difference in principle, or departure from the doctrines of the English law, on the subject of divorces *a mensa et thoro*.[75]

NOTES

1. Co. Litt. 235. a.
2. 1 Day's Rep. 111. *Benton v. Benton*. Dame's Abr, of American Law, ch. xlvi. art. 9. sec. 14.
3. *Elliott v. Gurr*, 2 Phillimore, 16.
4. *Burtis v. Burtis*, 1 Hopkins, 557.
5. Droit Civil Francais, tom. 1. No. 525.

6. Laws of N.Y. act of 13th April, 1813. ch. 103.

7. Burns' Eccl. Law, tit. Marriage, sect. 11. *Traite de l'Adultere*, par. Fournel, p. 160. *Baxter v. Baxter*, 1 Mass. Rep. 346. *Betts v. Betts*, 1 Johns. Ch. Rep. 197.

8. Laws of N.Y. act of 13th April, 1813, ch. 102.

9. *Mix v. Mix*, 1 Johns. Ch. Rep. 204.

10. *Williamson v. Parisien*, 1 Johns. Ch. Rep. 389.

11. *Oughton's ordo Judiciorum*, vol. i. tit. 214. *Forster v. Forster*, 1 Haggard 144. *Proctor v. Proctor*, 2 Haggard, 292. *Chambers v. Chambers*, 1 Haggard, 439

12. *Oughton's Ordo, ub. supra*. Burn's Eccle. Law, tit. Marriage. sec. xi. 1 Ersk. Inst. 113, 114. 6 Mass. Rep. 147. anon. *Williamson v. Williamson*, 1 Johns. Ch. Rep. 492.

13. *Williamson v. Williamson, ub. supra*. 2 Phillimore, 161. *Best v. Best*. 2 Haggard, 313. *Mortimer v. Mortimer*.

14. Plutarch's *Life of Alcibiades*. 2 Potter's Greek Antiq. 296, 297. Taylor's Elements of the Civil Law, 352, 353.

15. Dig. 24. 157. 62. and 64.

16. Dig. 24. 3. 34. and 38.

17. How beautifully Horace recommended the value and continuance of the marriage union, must be familiar to every classical scholar:

> *Felices ter et amplius,*
> *Quos irrupta tenet copula; nec malis*
> *Divulsus Querimoniis,*
> *Suprema citius solvet amor die.*
> Lib. 1. car. 13.

18. Suet. ad. Aug. 34.

19. Dict. du Dig. tit. Divorce, No. 617, 618.

20. Nov. 140.

21. Domat. 651. *Traite de L'Adultere* par Fournel, 366. 370. *Traite du Contrat de Mariage*, par Pothier, s. 462. 466. 497.

22. Quarterly Review, No. 56. p. 509.

23. Code Napoleon, No. 233, 275 to 297.

24. *Voet de Divortiis et Repudiis*, s. 5. lib. 24. tit. 2.

25. 1 Blacks. Com. 441.

26. Bracton, fo. 92.

27. Moore, 683. pl. 942. 3 Salk. 138.

28. Georgia and Mississippi.

29. Delaware, Maryland, Virginia, South Carolina, Georgia, Mississippi and Louisiana.

30. South Carolina Equity Reports, vol. i. Int. p. 24. Vol. ii. 646.

31. Maine, Massachusetts, New York, North Carolina, and Illinois.

32. Griffith's Law Register, h. t. 1 New Hamp. Rep 198. Reeve's Domestic Relations, p. 205. Bracken ridge's Law Miscellanies, 421.

33. I have had occasion to believe, in the exercise of a judicial cognizance over numerous cases of divorce, that the sin of adultery was sometimes committed on the part of the husband, for the very purpose of the divorce.

34. *Esprit des Loix*, tom. 3. 186.

35. *Traite du Contrat de Mariage*, No. 516.

36. Elem. of the Civil Law, p. 254.

37. 4 Wheaton, 518.

38. Mr. Justice Story.

39. *Hopkins v. Hopkins*, 3 Mass. Rep. 158. *Carter v. Carter*, 6 Mass. Rep. 263.

40. *Jackson v. Jackson*, 1 Johns, Rep. 424.

41. 15 Johns. Rep. 121.

42. 14 Mass, Rep. 227.

43. *Fisher v. Lane*, 3 Willson, 297. *Kilburn v. Woodworth*, 5 Johns. Rep. 37. *Thurber v. Blackbourne*, 1 N. H. Rep. 242. *Aldrick v. Kinney*, 4 Conn. Rep. 380.

44. *Dutchess of Kingston's case*, Harg. St. Tri. vol. xi. 262. 1 Haggard, 290.

45. See vol. i. 244.

46. 1 Dow's P. C. 124, 136.

47. Fergusson's Reports of Decisions in the Consistorial Court of Scotland, in actions of divorce, p. 23.

48. *Duntze v. Levett*, Fergusson, p. 68.

49. *Edmonstone v. Lockhart*, Fergusson, p. 168.

50. Fergusson, p. 209.

51. Fergusson, p. 226.

52. Fergusson, p. 2769.

53. 1 Dow's Rep. 117.

54. Note to 2 Swanston, 542, from Lord Nottingham's MSS.

55. 1 Rol Abr. 530. pl. 12.

56. Cited in the case of *The Dutchess of Kingston*, 11 State Tr. by Harg. 222.; and also in *Galbraith v. Neville*, Doug. Rep. 5. note. See also, Lord Kenyon's opinion in this latter case, 5 East, 475. note.

57. *Hughes v. Cornelius*, Raym. 473. *Burrows v. Jemino*, Str. 733. *Hamilton v. The Dutch East India Company*, 8 Bro. P. C. by Tomlins, p. 264. *Lothian v. Henderson*, 3 Bos. & Pull. 499. *Graham v. Maxwell*, 2 Dow. Par. Cases, 314.

58. Vattel, b. 2. c. 7. s. 84, 85. Martens' Summary of the Law of Nation's, b. 3. c. 3. s. 20. Ersks, Inst. of Scots. Law, vol. ii. 735. Kame's Pr. of Equity, vol. ii. 366.

59. *Hitchcock & Fitch v. Aitkin*, 1 Caines' Rep. 460. *Goix v. Low*, 1 Johns. Cas. 393. *Taylor v. Bryden*, 8 Johns. Rep. 178. *Aldrich v. Kinney*, 4 Conn. Rep. 380. *Bissell v. Briggs*, 9 Mass. Rep. 463. Washington, J. 4 Cranch's Rep. 442.

60. *Croudson v. Leonard*, 4 Cranch's Rep. 434.

61. They were declared to be conclusive, according to the English rule, upon the question of neutral property, in a subsequent suit upon the policy of insurance, by the courts of law in New York. 1 Johns. Cas. 16. *Ludlows v. Dale*, 2 Johns. Cas. 127. *Vandenheuvel v. Utica Insurance Company*; but the doctrine in those cases was reversed in the Court of Errors. 2 Johnson's Cases, 451. They were declared to be conclusive by the Supreme Court of Pennsylvania, in 1 Binney, 299, note; but the legislature of that state, by an act passed in March, 1809, declared, that they should not be held conclusive. They were held to be binding in South Carolina, 2 Bay, 242, in Connecticut, 1 Day, 142, and in Massachusetts, 6 Mass. Rep. 277.

62. The question, touching the effect of foreign judgments, has been frequently, and very extensively and profoundly

discussed, before the French tribunals; and it is surprising to observe the very little respect or comity which has hitherto been afforded to the judicial decisions of foreign nations, in so enlightened, so polished, and so commercial a country as France.

The French jurisprudence on this subject, disclaimed any authority derived from the *jus gentium*, and it was placed entirely upon the basis of the royal ordinance of 1629. That ordinance declared, that foreign judgments, for whatever cause, should not be deemed to create any lien, or have any execution in France; and that notwithstanding the judgments, Frenchmen, against whom they might have been rendered, should not be affected by them, but be entitled to have their rights discussed *de novo*, equally as if no such judgment had been rendered.

Emerigon, (Traite des Ass. ch. iv. sect. 8. ch. xii. sect. 20) said, that the rule applied equally in favor of strangers domiciled in France, and it applied, whether the Frenchman be the plaintiff or defendant; but as to foreign judgments between strangers, they might be executed in France, without any examination of the merits.

It has, however, been a vexed question, whether foreign judgments, as between strangers, were entitled to any notice whatever, or were to receive a blind execution, without looking into their merits. There seems to have been much vibration of opinion, and doubt and uncertainty, on this point.

In the elaborate argument, which M. Merlin delivered before the Court of Cassation, in the case of *Spohrer v. Moe*, and which he has preserved entire in his *Questions de Droit, tit. Jugement*, sect. 14, he showed by many judicial precedents, that the French law (*jurisprudence des arrets*), had been uniform from the date of the royal ordinance, down to this day; that nothing which had been judicially decided under a foreign jurisdiction, had any effect in France, and did not afford any ground or color, even for the *exceptio rei judicatae*. He maintained, that the law did not distinguish between cases, for that all foreign judgments, whoever might be the parties, whether in favor or against a Frenchman with a stranger, or whether between strangers, and whether the judgment was by default, or upon confession or trial, were of no avail in France, and the *jurisprudence des arrets* rejected every such distinction. Whenever this rule had been suspended, it had been occasioned by the force of special treaties, such as that between France and the Swiss cantons, in 1777; or accorded by way of reciprocity to a particular power, such as in the case of the Duke of Lorrain, in 1738. The judgment of the Court of Cessation, on appeal, rendered in the year 12 of the French republic, was, that the foreign judgment, in that case, in which a Frenchman was one of the parties, and a Norwegian the other, was of no effect whatever. (*Vide Repertoire de jurisprudence, tit. Jugement*, sect 6. *Questions de Droit*, h. t. sect. 14.) Afterwards in the case of *Holker, v. Holker*, decided in the Court of Cassation, in 1819, it was settled upon the authority of the new code civil, No. 2123, and 2128, and of the *code de procedure*. No. 546, that the ordinance of 1629 no longer applied, and that the codes made no distinction among foreign judgments, and rendered them all executory, or capable of execution in France, after being subject to reexamination; and whoever sought to enforce a foreign judgement, must show the reasons on which it was founded. (*Vide Questions du Droit*, par M. Merlin, tit. Jugement, sect. 14.) In that very case, it had been previously decided by the Court of the First Instance, at Paris, in 1815, that a foreign judgment was to be regarded as definitive between strangers, and to be executed in France, without their courts being permitted to take cognizance of the merits. The Royal Court of Paris, in 1816, on appeal, decided otherwise, and declared, that foreign judgments had no effect in France, and that the principle was unqualified and absolute, and was founded on the sovereignty and independence of nations, and could be invoked by all persons, subjects and strangers, without distinction. The Court of Cassation, on a further appeal, decided, that they were to be regarded *sub modo*; they were not to be of any force without a new investigation of the merits, for a blind submission to them would be repugnant to the nature of judicial tribunals, and strike at the right of sovereignty within every independent territory. I have said that the rule was settled in that case, but it seems to be difficult to know when or how the rule on this subject can be deemed settled in France, for the conflict of opinion between their various tribunals, and at different periods of time, is extraordinary. This very question, whether a foreign judgment between two strangers, could receive execution in France without revision or discussion, was raised so recently as January, 1824, before a tribunal, at Paris, between *Stacpoole v. Stacpoole and others*, and it was decided in the negative, after a discussion on each side, distinguished for depth of learning, and a luster of eloquence, not to be surpassed. M. Toullier ventures to consider the French jurisprudence, or the *droit public* of France, as being irrevocably established by the decree of the Court of Cassation, in 1819, and he considers it as resting on sound foundations. Foreign judgments are no longer absolute nullities since they can be declared executory, after the French courts have taken cognizance of the merits of them, and have acted in respect to them in the nature of a court of appeal. The rule applies to all foreign judgments without distinction, and the French courts will admit the proofs taken in the foreign courts, *locus regit actum*. Vide Toullier's *Droit Civil Francais, suivant l'ordre du Code*, tome 10. No 76 to 86. The French and the English law have now at last approached very near to each other on this interesting head of national jurisprudence. They agree perfectly when the foreign judgment is sought to be enforced; but I do not know whether the French courts will permit, as they certainly ought, a plea of a foreign judgment in bar of a new suit for the same cause, to be conclusive, if fairly pronounced by a foreign court, having a jurisdiction confessedly competent for the case.

63. Laws of N.Y. sess. 36. ch. 102. sect. 10, 11.

64. Lord Eldon, 11 Vesey, 532.

65. 1 Haggard, 35.

66. 1 Haggard, 364. 409. vol. ii. p. 148. Pothier, *Traite du Contrat de Mariage*, sec. 509. 2 Mass. Rep. 150. 3 Ibid. 321. 4 Ibid. 587.

67. 4 Johns. Ch. Rep 187.

68. Burns' Eccl. Law, tit. Marriage, c. 11. sec. 4. *Oughton's Ordo Jud*. tit. 215. sec. 3. Bynk. Q. Jur. Priv. L. 2. c. 8.

69. *Vanveghten v. Vanveghten*, 4 Johns. Ch. Rep. 301.

70. *Kirkman v. Kirkman*, 1 Haggard, 409.

71. 1 Salk. 123.

72. Burns' Eccl. Law. tit. Marriage, ch. 11. sec. 4. *Barrere v. Barrere*, 4 Johns. Ch. Rep. 196, 198. *Vanveghten v. Vanveghten*, ibid. p. 501.

73. 2 Haggard, 154.

74. Laws of N.Y. sess. 36. ch. 102. s. 11. sess. 38. ch. 221. *Barrere v. Barrere*, 4 Johns. Ch. Rep. 197.

75. Reeves' Domestic Relations, ch. 16. *Thompson v. Thompson*, 2 Dallas 128. *Warren v. Warren*, 8 Mass. Rep. 321.

LECTURE 28

Of Husband and Wife

THE legal effects of marriage, are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union.[1] From this principle, it follows, that at law no contracts can be made between the husband and wife, without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting with him; and all the contracts which subsisted between them prior to the marriage, are dissolved. The wife cannot convey lands to her husband, though she may release her dower to his grantee; nor can the husband convey lands by deed directly to the wife.[2] The husband may devise lands to his wife, for the instrument is to take effect after his death; and by a conveyance to uses, he may create a trust in favor of his wife,[3] and equity will decree performance of a contract by the husband with his wife, for her benefit.[4] The general rule is, that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts, and perform her contracts.

According to the plan of these general disquisitions, I cannot undertake to enter very minutely into the numerous distinctions and complex regulations which appertain to the law of husband and wife. My purpose will be answered, if I shall be able to collect and illustrate the leading principles only; and that I may be able to do this clearly, and to the satisfaction of the student, I shall consider the subject in the following order:

1. The right which the husband acquires by marriage in the property of the wife.
2. The duties which he assumes in the character of husband.
3. How far the wife is enabled by law to act during coverture, as a *feme sole*.
4. Her competency, in the view of a Court of Equity, to deal with her property.
5. Other rights and disabilities incident to the marriage union.

I. The right which the husband acquires by marriage, in the property of the wife.

(1.) If the wife, at the time of marriage, be seized of an estate of inheritance in land, the husband, upon the marriage, becomes seized of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives.[5] It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life, if he dies before his wife, and in that event, she takes the estate again in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death, the estate goes to the wife, or her heirs; and in all these cases, the emblements growing upon the land, at the termination of the husband's estate, go to him, or his representatives.

During the continuance of the life estate of the husband, he sues in his own name for an injury to the props of the land; but for an injury to the inheritance, the wife must join in the suit, and if the husband dies before recovery, the right of action survives to the wife. If the husband himself commits waste, the coverture is a suspension of the common law remedy of the wife against him.

If the assignee, or creditor of the husband, who takes possession of the estate, on a sale on execution of his freehold interest, commits waste, the wife has her action against him, in which the husband must join; for though such assignee succeeds to the husband's right to the rents and profits, he cannot commit waste with impunity.[6] So, also, the heir of the wife may sue the husband for the waste, and no doubt the Court of Chancery would stay by injunction the husband's waste, on behalf of the wife herself. But it seems, that from want of privity, the heir of the wife cannot bring an action of waste against the assignee of the husband.[7] The subtle distinction in *Walker's case*,[8] and which we have followed, was, that if the tenant by the curtesy assigns over his estate, the heir of the wife can sue him for waste done after the assignment; but if the heir grants over the reversion, the grantee cannot sue the husband, for the privity of the action is destroyed. He can only sue the assignee of the husband, for as between them there is a privity of estate.

If an estate in land be given to the husband and wife, or a joint purchase be made by them, during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. The same words of conveyance, which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. This is a nice distinction laid down in the old books, and it continues to this day to be the law.[9] The husband alone may grant or charge the wife's land during their joint lives, and if he be tenant by the curtesy, during his own life. He cannot alien or encumber it, so as to prevent the wife, or her heirs, after his death, from enjoying it, discharged from his debts and engagements. But from the authorities, when closely examined, says Mr. Preston,[10] it seems, that the husband has the power to transfer the whole estate of his wife, and the estate will be in the alienee of the husband, subject to the right of entry of the wife, or her heirs, and which entry is necessary to revest the estate after the husband discontinues it. She was driven at common law to her writ of right, as her only remedy; but Lord Coke says,[11] he found that in the times of Bracton and Fleta, the writ of entry *cui in vita*, was given to the wife, upon the alienation of her husband, and this was her only remedy in the age of Littleton.[12] That writ became obsolete after the remedial statute of 32 Hen. VIII. c. 28, which reserved to the wife her right of entry, notwithstanding her husband's alienation; and the writ of entry lay even if she had joined with her husband in a conveyance by feoffment or bargain and sale, for such conveyances were deemed the sole act of the husband, as the wife was not separately examined.[13]

(2.) [Missing text]

tate for her life, or for the life of another person, the husband becomes seized of such an estate in right of his wife, and is entitled to the profits during the marriage. On the death of the wife, the estate for her own life is gone, and the husband has no further interest in it. But if she have an estate for the life of another person, who survives her, the husband becomes a special occupant of the land during the life of such other person. After the estate for life has ended, the land goes to the person entitled in reversion or remainder, and the husband, *quasi* husband, has no more concern with it. This estate the husband can only sell or charge to the extent of his interest in it, and his representatives take as emblements the crops growing at his death.

(3.) The husband, upon marriage, becomes possessed, also, of the chattels real of the wife, as leases for years, and the law gives him power, without her, to sell, assign, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime;[14] except it be such an interest as the wife has,

by the provision or consent of her husband, by way of settlement.[15] Such chattels real are also liable to be sold on execution for his debts. If he makes no disposition of the same in his lifetime, he cannot devise the chattels real by will;[16] and the wife, after his death, will take the same in her own right, without being executrix or administratrix to her husband. If he grants a rent charge out of the same, without altering the estate, the rent charge becomes void at his death. If he survives his wife, the law gives him her chattels real, absolutely, by survivorship; for he was in possession of the chattel real during the coverture, by a kind of joint tenancy with the wife.[17]

(4.) As to debts due to the wife, at the time of her marriage, by bond, note, or otherwise, and which are termed chores in action, the husband has power to sue for, and recover the same; and when recovered, and reduced to possession, the money becomes absolutely his own. So, he has power to release, and discharge, and assign the debts, and to change the securities, with the consent of the debtor. But if he dies before he recovers the money, or alters the security, the wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for his debts. If his wife dies, and he survives her, before he has reduced the chose in action to possession, it does not strictly survive to him; but he is entitled to recover the same to his own use, by acting as her administrator. By the statute of distributions of 22 and 23 Charles II, and the 25th sec. of the stat. of 29 Charles II c.3. in explanation thereof, and which have been reenacted in this state,[18] the husbands of *femes covert* who die intestate, have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute, it is held, that the husband is entitled, for his own benefit, *jure mariti*, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced to possession, or contingent, or recoverable only by suit.[19] But if the wife leaves chores in action not reduced to possession in the wife's life, the husband will be liable for her debts *dum sola*, to that extent; for those choses in action will be assets in his hands.[20] It is also settled, that if the husband who has survived his wife, dies before he has recovered the chosen in action, his representatives are entitled to that species of property, and the right of administration follows the right of the estate, and is to be granted to the next of kin of the husband. So, if, after the husband has administered in part on his wife's estate, and dies, and administration *de bonis non* of the wife should be obtained by a third person, he would be deemed a mere trustee for the representatives of the husband.[21]

It has been considerably discussed in the books, by what title the husband, surviving his wife, takes her choses in action. It has often been said, that he takes by the statute of distributions as her next of kin. But, from the language of the English courts, it would seem to be more proper to say, that he takes under the statute of distributions as husband, with a right in that capacity to administer for his own benefit; for, in the ordinary sense, neither the husband nor wife can be said to be next of kin to the other.[22]

What will amount to a change of property in action belonging to the wife, so as to prevent it from going back to the wife in case she survives her husband, was discussed in the case of *Schuyler v. Hoyle*.[23] It was there shown, that the husband may assign, for a valuable consideration, his wife's choses in action to a creditor, free from the wife's contingent right of survivorship. But a voluntary assignment by the husband of the wife's choses in action, without consideration, will not bind her if she survives him. The rule is, that if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the wife's choses in action, or assigns them without reservation, for a valuable consideration, or if he recovers by a suit in his own name, or if he releases the debt, in all these cases, upon his death, the right of survivorship in the wife, to the property, ceases. And

if the husband obtains a judgment or decree, as to money to which he was entitled in right of his wife, and the suit was in his own name alone, the property vests in him by the recovery, and is so changed as to take away the right of survivorship in the wife. If the suit was in their joint names, and he died before he had reduced the property to possession, the wife, as survivor, would take the benefit of the recovery.[24] It is settled, that in a suit in chancery, by the husband, to recover a legacy, or distributive share due to the wife, she must be made a party with him, and then the court will require the husband to make a suitable provision for the wife out of the property. The Court of Chancery has always discovered an anxiety to provide for the wife out of her property in action which the husband may seek to recover. If he takes possession in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife to the property if she survives hint. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take as survivor, instead of the personal representatives of the husband.

The equitable interests of the wife depend upon the same principles as her choses in action, in respect to survivorship, and she is only bound by an assignment for a valuable consideration. A general assignment in bankruptcy passes her property, subject to her right of survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other. It has been, accordingly, held, that a legacy in stock was not reduced to possession by such an assignment, so as to bar the wife's right of survivorship, and the wife took it by survivorship as against the assignees.[25]

The wife's equity to a reasonable provision out of her property for the support of herself and her children, makes a distinguished figure in the modern chancery cases, which relate to the claims of the husband upon the property of his wife in action. If the husband wants the aid of chancery to enable him to get possession of his wife's property, he must do what is equitable, by making a reasonable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband, or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property.[26] The provision is to be proportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. And perhaps chancery ought, on just principles, to restrain the husband from availing himself of any means, either at law or equity, of possessing himself of the wife's personal property in action, unless he would make a competent provision for her; but I believe no case has gone the length of interfering with the husband's suit at law.

Chancery has never gone further than to restrain the husband from proceeding in the ecclesiastical courts for the recovery of the wife's legacy, until a provision was made for her;[27] and, upon that doctrine, a suit at law for a legacy, or distributive share, ought equally to be restrained, for such rights in action are of an equitable nature, and properly of equitable cognizance. The principle is, that chancery will lay hold of the property of the wife, as far as it may be in its power, for the purpose of providing a maintenance for her when she is abandoned by her husband; and in *Dumond v. Magee*,[28] where the husband had abandoned his wife for many years, and married another woman, he was held to have forfeited all just claim to his wife's distributive share of personal estate inherited by her, and the same was appropriated by decree to her separate use.

This subject was considered, and the principal authorities reviewed, in the case of *Kenny v. Udall*.[29]

It was there held, that the wife's equity attached upon her personal property whenever it was subject to the jurisdiction of the court, and was the object of a suit, in any hands to which it might come, or in whatever manner it might have been transferred. It makes no difference whether the application to the court for the property be by the husband, or his representatives, or assignees, or by the wife, or her trustee, seeking a provision out of the property. This equity is equally binding, whether the transfer of the property be by operation of law, under a commission of bankruptcy, or by act of the party to general assignees, or to an individual, or whether the particular transfer was voluntary, or made upon a good and valuable consideration, or in payment of a just debt. The court may, also, in its discretion, give the whole, or part only of the property, to the wife, according to the circumstances of the case. So, again, in *Haviland v. Bloom*,[30] the same subject came under consideration, and the rule in equity was considered as settled, that the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, lying in action, was a valid right, and extended not only to property which she owned *dum sola*, but to property descended or devised to her during coverture. A new equity arises to the wife upon property newly acquired, and attaches upon it equally as upon that which she brought with her upon marriage.

The wife's equity does not, according to the adjudged cases, attach, except upon that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity. The rule in equity does not controvert the legal title of the husband to his wife's personal fortune; and if he once acquired possession of that property, though it should have been of an equitable nature, chancery will leave him in undisturbed possession of it. The claim attaches only on that part of the wife's personal fortune which the husband cannot acquire without the aid of a court of equity. If he can acquire possession of it without a suit at law, or in equity, or by a suit at law, without the aid of chancery, (except, perhaps, as to legacies, and portions by will, or inheritance, as has been already suggested,) the husband will not be disturbed in the exercise of that right.[31] But it is unnecessary to pursue this subject more minutely. The cases in chancery to which I have referred, have incorporated into the equity jurisprudence of this state, all the leading provisions and principles of the English courts of equity on this head: and though such a protection to the wife cannot be afforded in Pennsylvania, where there is no Court of Chancery,[32] yet, I presume, it exists in those other states where courts, with distinct equity powers, according to the English system, are established. It exists in Tennessee, and is even exercised in their Supreme Court of law.[33]

There is a difference as to choses in action belonging to the wife, whether the husband sues in his own name exclusively, or jointly with his wife. The principle of the distinction is, that if he brings the action in his own name alone, (as he may for a debt due to the wife upon bond,[34] it is a disagreement to the wife's interest, and implies it to be his intention that it should not survive her. But if he brings the action in their joint names, the judgment is, that they shall both recover, and the debt survives to the wife. The judgment does not alter the property, or show it to be his intention that it should be altered. It is also the rule of equity, that if before marriage, the husband make a settlement or, the wife, in consideration of her fortune, he is considered in the light of a purchaser of her fortune, and his representatives will be entitled, on his dying in his wife's lifetime, to the whole of her things in action, though not reduced to possession in his lifetime, and though there be no special agreement for that purpose. If the settlement be in consideration of a particular part only of her fortune, the right of survivorship in the wife will exist only as to the part of her property not comprised in the settlement, and not reduced to possession by the husband.[35] The settlement must expressly state, or clearly import, that it was in consideration of the wife's fortune, and it must

appear to be adequate to the purchase of her fortune, before it will bar her right of survivorship.[36]

(5.) As to personal property of the wife, which she had in possession at the time of the marriage, in her own right, and not *en auter droit*, such as money, goods, and chattels, and moveables, they vest immediately and absolutely in the husband, and he can dispose of them as he pleases, and on his death, they go to his representatives, as being entirely his property.

II. The duties which the husband assumes.

The husband is answerable for the wife's debts before coverture; but if they are not recovered during the coverture, he is discharged. He is answerable for her debts only in virtue of the duty imposed on him to discharge all the obligations of the wife; and that his responsibility should cease after coverture ceases, is, in some cases, rather against conscience; but then, as a compensation for the rule, it is to be considered that the charging the husband in all cases with the debts, would be against conscience also. It is a strict rule of law which throws upon the husband during coverture all the obligations of the wife; and by the same rule of law, he is discharged after the coverture ceases, by the death of the wife. Courts of equity have held, that they could not vary the rule of law according to the fact, whether the husband had, or had not received a portion with his wife, or charge his conscience in one case more than in the other. This is the meaning of the case of *Heard v. Stanford*,[37] according to Lord Redesdale's explanation of the rule on this point.[38]

The rule of law on this subject may operate very injuriously to creditors; for if the wife be largely indebted before marriage, and the husband takes and appropriates all her personal property to himself, and the wife dies before the creditors have collected their debts, the husband is no longer liable, and the creditors of the wife are left without remedy. If the husband himself dies before the debts are collected, his representatives are not liable; and though the wife remains liable after her husband's death, for her former debts remaining unpaid, she may have no property to pay them. The answer to this objection is attempted by Lord Macclesfield, in the *Earl of Thomond v. Earl of Suffolk*.[39] It may be hard, he observes, that the husband should be answerable for the wife's debts, when he receives nothing from her; but we are to set off against that hardship, the rule that if the husband has received a personal estate with the wife, and happens not to be sued during the coverture, he is not liable. He runs a hazard in being liable to the debts much beyond the personal estate of the wife; and in recompense for that hazard, he is entitled to the whole of her personal estate, though far exceeding the debts, and is discharged from the debts as soon as the coverture ceases. In *Heard v. Stanford*, there was a strong effort made before Lord Ch. Talbot, to charge the husband, after the wife's death, with a debt of her's *dum sola*, to the extent of what he had received from her, for she happened to bring a large personal estate to her husband. The injustice of the case was pressed upon the court, for upon the rule as it stood, a *feme sole* might be worth £10,000, and owe £1000, and marry and die, and the husband might appropriate the £10,000 to his own use, and not pay one farthing of the debt. Lord Nottingham was so provoked at the hardship of the rule, in a case in which the wife brought a large portion to her husband, and died, and when the husband continued in possession of the goods, and refused to pay the very debt contracted by the wife for the goods, that he declared he would alter the law. But Lord Talbot said, that nothing less than an act of parliament could alter the law; and the rule was fixed, that the husband was liable to the wife's debts only during the coverture, unless the creditor recovered judgment against him in the wife's lifetime, and that only the wife's choses in action not reduced to possession in her lifetime, would be assets in the husband's hands, when they come to him, as her administrator. If relief ought to be

given against the husband, because he received sufficient property with the wife, then by the same reason, if the wife had brought no fortune to her husband, and judgment was recovered against him during coverture, relief ought to be afforded to the husband against this judgment after his wife's death. He declared, that the rule could not be disturbed by a court of equity; and it has continued unaltered to this day. The husband is liable, not as the debtor, but as the husband. It is still the debt of the wife, and if she survive her husband, she continues personally liable.[40] It has also been held by the K. B. in *Miles v. Williams*,[41] that the debts of the wife; *dum sola*, as well as the husband's debts, are discharged by the bankruptcy of the husband. It is clear, that a certificate of bankruptcy discharges him; and Lord Ch. J. Parker thought, that the wife was also discharged forever, and not merely during the husband's life, though on that point, he said, it was not necessary to give a decided opinion.

The husband is bound to provide his wife with necessaries suitable to her situation, and his condition in life; and if she contracts debts for them during cohabitation, he is obliged to pay those debts; but for any thing beyond necessaries he is not chargeable. He is bound by her contracts for ordinary purchases, from a presumed assent on his part; but if his dissent be previously made known, the presumption of his assent is rebutted, and it is said he is not liable; though the better opinion would seem to be, that he may still be liable; but the seller would be obliged to show, at least, the absolute necessity of the purchase for her comfort.[42] If the tradesman furnishes goods to the wife, and gives the credit to her, the husband is not liable.[43] Nor is he liable for money lent to the wife, unless his request be averred and shown.[44] So, if the husband makes a reasonable allowance to the wife for necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable, unless the tradesman can show, that the allowance was not supplied[45] if the husband abandons his wife, or they separate by consent, without any provision for her maintenance, of if he sends her away, he is liable for her necessaries, and he sends credit with her to that extent. But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries. The very fact of the elopement and separation, is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. The husband is not liable unless he receives his wife back again.[46] The duties of the wife, while cohabiting with her husband, form the consideration of his liability. He is, accordingly, bound to provide for her in his family, and while he is not guilty of any cruelty, and is willing to provide her a home, and all reasonable necessaries there, he is not bound to furnish them elsewhere. All persons supplying the food, lodging, and raiment, of a married woman, living separate from her husband, are bound to make inquiries, and they give credit at their peril.[47]

It has been a question, whether, if the wife elopes, and repents, and returns again, and her husband refuses to receive her, he is then bound for her necessaries. The opinion of Lord Ch. J. Raymond, in *Child v. Hardyman*,[48] seems to be, that he would be liable; for he says, that if the husband should refuse to receive the wife, "from that time it may be an answer to the elopement." Lord Eldon subscribed to that case, and the same doctrine has been declared in this state.[49] It has also been a debatable point, whether, if the husband should refuse to provide necessaries for his wife, and prohibit a particular person, or any person. from trusting her, and she should, notwithstanding the prohibition, be trusted with necessaries suitable to her age and degree, and rank in life, the law would then, notwithstanding such prohibition, rare an assumpsit against the husband. In the case of *Manby v. Scott*, in the reign of Charles II,[50] which was argued many times at the bar, and then in the Exchequer, by all the judges of England, it appeared to be the opinion of a large majority of the judges, that the husband could not he charged even with necessaries for the wife, against his express

previous prohibition to trust her, and that her remedy would be, in the Spiritual Court for alimony. But the minority of the court held, that the husband would be chargeable from the necessity of the case; and that the husband cannot deprive the wife of the liberty which the law gives her of providing necessaries at his expense, for her preservation. This opinion of the minority seems to be the received law at this day, and the extreme rigor of the old rule is relaxed. The husband is bound to provide his wife with necessaries, when she is not in fault, from a principle of duty and justice; and the duty will raise an assumpsit independent of his consent, and when no consent can be inferred, as in the case of a refusal on his prat to provide her with necessaries. If he turns her out of doors, and forbids all mankind from supplying her with necessaries, or if she receive such treatment as affords a reasonable cause for her to depart from his house, and refuse to cohabit with him, yet he will be bound to fulfill her contracts for necessaries, suitable to her circumstances, and those of her husband. The case of *Bolton v. Prentice*,[51] which arose in the K. B. as late as 18 Geo. II, goes the length of establishing this reasonable doctrine. The wife took up necessaries on credit after the husband had used her ill, and abandoned her, and forbidden the plaintiff from trusting her. But the K. B. held, that the husband had no right to make such a prohibition in such a case, and they distinguished the case from that of *Manby v. Scott*, because, in that, the wife was guilty of the first wrong; and they sustained the action of assumpsit for the goods sold to the wife.

In a very modern decision in the K. B.,[52] it was held, that if a man turned away his wife without justifiable cause, he was bound by her contracts for necessaries suitable to her degree and estate. If they live together, he is only bound by her contracts made with his assent, which may be presumed. If the wife goes beyond what is reasonable and prudent, the tradesman trusts the wife at his peril, and the husband is not bound but by his assent, either express or reasonably implied. The doctrine of the Supreme Court of this state is to the same effect.[53]

The husband is liable for the torts and frauds of the wife committed during coverture. if committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with her husband. Where the remedy for the tort is only damages by suit, or a fine, the husband is liable with the wife; but if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment.[54] The wife, during coverture, cannot be taken on *ca. sa*. for her debt *dum sola*, or a tort *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone.[55] If the tort or offense be punished criminally by imprisonment, or other corporal punishment, the wife alone is to be punished, unless there be evidence of coercion, from the fact, that the offense was committed in the presence, or by command of the husband. This indulgence is carried so far as to excuse the wife from punishment for theft committed in the presence, or by the command of her husband.[56] But the coercion which is supposed to be conveyed by the command or presence of the husband, is only a presumption of law, and, like other presumptions, may be repelled.

III. How far the wife has a capacity at law during coverture, to act as a *feme sole*.

The disability of the wife to contract so as to bind herself, arises not from want of discretion, but because she has entered into an indissoluble connection, by which she is placed under the power and protection of her husband, and because she has not the administration of property, but has given up to him all personal property in possession,[57] and the right to receive all such as may be reduced into possession. But this general rule is subject to certain exceptions, when the principle of the rule could not be applied, and when reason and justice dictate a departure from it.

In the first place, a wife may pass her freehold estate by a fine, and this was the only way in which she could, at common law, convey her real estate. She may, by a fine, and a declaration of the uses thereof, declare a use for her husband's benefit. So, if the husband and wife levy a fine, a declaration of the uses by the husband alone, will bind the wife and her heirs, unless she disagrees to the uses.[58] The husband must be a party with the wife to her conveyance, but if she levy a fine as a fern sole, without her husband, it will be good as against her and her heirs,[59] though the bus, band may avoid it during coverture, for the benefit of the wife, us well as for himself.[60] The wife, however, may as an attorney to another, convey an estate in the same manner as her principal could, and she may execute a power simply collateral, and, in some cases, a power coupled with an interest, without the concurrence of her husband.[61] She may also transfer a trust estate, by lease and release, as a *feme sole*.[62]

The conveyance of land by *femes covert*, under the government of the colony of New York, was, in point of fact, by deed, and not by fine, and upon the simple acknowledgment of the wife before a competent officer, without a private examination. Such loose modes of conveyance were mentioned in the act of the 16th of February, 1771, and were confirmed; but it was declared, that in future, no estate of a *feme covert* should pass by deed without her previous private acknowledgment before the officer, that she executed the deed freely without any fear or compulsion of her husband. The deeds of *femes covert*, in the form used in other cases, accompanied by such an examination, have ever since been held sufficient to convey their estates, or any future contingent interest in real property. If the wife resides out of the state, she may unite with her husband, and convey all her right and interest, present and contingent, equally as if she were a fume sole, and without any such special acknowledgment.[63]

This substitute of a deed for a conveyance by fine, has prevailed throughout the United States, as the more simple, cheap, and convenient mode of conveyance. The reason why the husband was required to join with his wife in the conveyance[64] was, that his assent might appear upon the face of it, and to show he was present to protect her from imposition. His concurrence in the conveyance is expressly made necessary, in this state, when a non-resident wife conveys without Acknowledgment; and though her release of dower may under certain circumstances, be good if duly executed by her alone, her conveyance of any other interest, without her husband, would, at best, be very imperfect, since his interest in her estate would not be affected. Whether the deed would be absolutely void without her husband being a party, seems not to be definitively declared, but to be left in doubt, by our American cases.[65] No deed of a wife will operate as an estoppel to her subsequently acquired interest in the land;[66] but whether that doctrine, as declared in this state, will apply to non-resident *femes covert*, may be doubted, since the statute says, that they shall be barred, by their deeds, of all right and title, “in like manner” as if they were *femes sole*.

If the husband was banished, or had abjured the realm, It was an ancient and another necessary exception to the general rule of the wife's disability to contract, and she was held capable to contract, and to sue and be sued, as a *feme sole*. In such a case, both her and her creditors would be remediless without that exception. In the case of *Belknap v. Lady Weyland*,[67] it was held, 2 Hen. IV. 7, that the wife of a man exiled or banished, could sue alone, though that exception was regarded at that day almost as a prodigy; and some one exclaimed, *eccemodo mirum, quod foemina fert breve regis, non nominando virum conjunctum robore legis*. Lord Coke seems to put the capacity of the wife to sue as a *feme sole*,[68] upon the ground, that the abjuration or banishment of the husband, amounted to a civil death. But if the husband be banished for a limited time only, though it be no civil death, the

better opinion is, that the consequences as to the wife are the same, and she can sue and be sued as a *feme sole*. And if the husband bean alien living abroad, the reason of the exception also applies; and it was held in the case of *Deerly v. Duchess of Mazarine*,[69] that in such a case, the wife was suable as a *feme sole*, in like manner as if the husband had abjured the realm. Though it was mentioned in that case, that the husband was an alien enemy, and had been divorced in France, yet, as Lord Loughborough said,[70] the decision did not rest on either of those grounds, but solely and properly on the ground, that the wife lived in England, on a fortune of her own, and separate from her husband, who had always resided abroad as an alien.

Again, in *Walford v. the Duchess of Pienne*,[71] Lord Kenyon held, that the wife was liable as a *feme sole*, for goods sold, when the husband was a foreigner, residing abroad, and that this case came within the principle of the common law, applicable to the case of the husband abjuring the realm. If the wife was not to be personally chargeable for debts contracted under such circumstances, she would be without credit, and might starve. If, however, the husband was a native, instead of an alien, he thought the rule might be different, as in that case, he was to be presumed to have the *animus revertendi*;[72] and in the case of *De Gaillon v. L'Aigle*,[73] the Court of C. B. held the same doctrine, and that a *feme covert* was chargeable with her contracts, where the husband, being a foreigner, had voluntarily abandoned her, and resided abroad, and that it was for her benefit that she should be liable, in order to enable her to obtain a credit, and secure a livelihood. It was also said, in that case, that there was no instance, in which the wife was held personally liable on her contracts, on the ground of her husband residing abroad, when he was an Englishman born. In corroboration of the distinction contained in that suggestion, we may refer to the case of *Boggett v. Frier*,[74] in which the K. B. held, that the plaintiff could not sue as a *feme sole*, for trespass to leer property, when her husband, being a natural born subject, had deserted her for years before, and gone beyond sea, but without having abjured the realm, or been exiled, or banished.

This is the extent of the English authorities on this subject, and it is easy to perceive that there might be most distressing cases under them; for though the husband be not an alien, yet if he deserts his wife, and resides abroad permanently, the necessity that the wife should be competent to obtain credit, and acquire and recover property, and act as a fence sole, exists its full force. It is probable, that the distinction between husbands who are aliens, and who are not aliens, cannot long be maintained in practice, because there is no solid foundation in principle for the distinction. But on this general subject of the liability of the absence of the husband, it is still an unsettled point, and attended with difficulty and embarrassment, whether the principle that she is to be deemed a *feme sole*, is to stop short at a matter of contract, or to go the length of considering her a *feme sole*, for all business purposes.

If the wife be divorced *a mensa et thoro*, according to a very common practice in this state, can she then sue and be sued as a *feme sole*? It is so stated in one of the elementary books;[75] but I do not find any adjudged case to the point. I should apprehend, that she could sue alone for any injury to her character, or person, or separate property. She will have property settled upon her, in such case, by the decree of separation, and she will be entitled to acquire property by her own industry; and it would seem to be indispensable that she should have a capacity to act for herself, and the means to protect herself, since she is withdrawn from the dominion and protection of her husband. They are separated by a judicial sentence; and in such a case, Lord Loughborough has said,[76] that she could be sued without her husband.

In *Hatchett v. Baddeley*, 16 Geo. III,[77] the C. B. held, that a *feme covert* eloping from her husband, and running in debt, could not be sued alone, for that no act of the wife could make her liable to be sued alone. If she could be sued, she could sue, acquire property, and release actions, and this would overturn first principles. In no case, said one of the judges, can a *feme covert* be sued alone, except in the known excepted cases of abjuration or exile, where the husband is considered as dead, and the woman as a widow. It was afterwards held by the same court, in *Lean v. Schutz*, 18 Geo. III,[78] that if the wife had even a separate maintenance, and lived apart from her husband, she could not be sued alone. There was no instance in the books, sail the court, of an action being sustained against the wife, when the husband was living at home, and under no civil disability. A wife may acquire a separate character by the civil death of her husband, but she cannot acquire it by a voluntary separation.

But a few years afterwards, the Court of K. B., under the influence of Lord Mansfield, in the celebrated case of *Corbett v. Poelnitz*,[79] introduced a new principle into the English law, respecting the relation of husband and wife; but a principle that was familiar to the Roman law, and to the municipal law of most of the nations of Europe. The court, in that case, held, that a *feme covert* living apart from her husband, by a deed of separation, mutually executed, and having a large and competent maintenance settled upon her, beyond the control of her husband, might contract, and sue, and be sued, as a *feme sole*. Lord Mansfield put the action, upon the ground of the wife having an estate settled upon her to her separate use, and acquiring credit, and assuming the character and competency of a *feme sole*. The ancient law had no idea of a separate maintenance; and when that was introduced, the change of customs and manners required, as indispensable to justice, the extension of the exceptions to the old rule of law, which disabled a married woman from contracting. The reason of the rule ceased when the wife was allowed to possess separate property, and was disabled from charging her husband.

This decision of the K. B. was in 1785, and it gave rise to great scrutiny and criticism. It was considered as a deep and dangerous innovation upon the ancient law.

In *Compton v. Collinson*,[80] Lord Loughborough held, notwithstanding that decision, that it was an unsettled point, whether an action could be maintained against a married woman, separated from her husband by consent, and enjoying a separate maintenance. Again, in *Ellah v. Leigh*,[81] the K. B. in 1794, indirectly assailed the decision in *Corbett v. Poelnitz*, and did not agree that the court could change the law, so as to adapt it to the fashion of the times. They declared, however, without touching the authority of the decision, that upon a voluntary separation of husband and wife, without a permanent fund for her separate use, she could not be sued alone as a *feme sole*. Afterwards, in *Clayton v. Adams*,[82] the Court of K. B. went a step further towards overturning the authority of *Corbett v. Poelnitz*, and held, that though the wife lived apart from her husband, and carried on a separate trade, she was not suable; for if she could be sued as a *feme sole*, she might be taken in execution, which would operate as a divorce between husband and wife. At last, in *Marshall v. Rutton*,[83] the K. B. decided, in 1800, after a very solemn argument, before all the judges, that a *feme covert* could not contract, and be sued, as a *feme sole*, even though she be living apart from her husband, and have a separate maintenance secured to her by deed. The court said, that the husband and wife being but one person in law, were unable to contract with each other, and that such a contract, with the consequences attached to it, of giving the wife a capacity to contract, and to sue and be sued, would contravene the general policy of the law, in settling the relations of domestic life, and would introduce all the confusion and inconvenience, which must necessarily result from so

anomalous and mixed a character, as such a married woman would be. The only way in which such a separation can be safe and effectual, is, by having recourse to trustees, in whom the property of which it is intended the wife shall have the disposition may vest, uncontrolled by the rights of the husband, and it would fall within the province of a court of equity to recognize and enforce such a trust. At law, a woman cannot be sued as a *feme sole*, while the relation of marriage subsists, and she and her husband are living under the same government.

Lord Eldon, afterwards, in the case of *Lord St. John v. Lady St. John*,[84] speaking of these decisions at law, expressed himself very decidedly against the policy and the power of a *feme covert* becoming a *feme sole* by a deed of separation. She was incompetent to contract with the husband; and if separated, she could not be a witness against her husband; she could not commit felony in his presence; she must follow the settlement of her husband; her husband would be suable for her trespass. In short, the old rule is deemed to be completely re-established, that an action at law cannot be maintained against a married woman, unless her husband has abjured the realm.[85]

But if the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries, and the general reputation of the separation will, in that case, be sufficient. This was so ruled by Holt, Ch. J., in *Todd v. Stokes*,[86] and this general doctrine was conceded in the modern case of *Nurse v. Craig*,[87] in which it was held, that if the husband fails to pay the allowance, according to stipulation in the deed of separation, the person who. supplies the wife with necessaries can sue the husband upon an *indebitatus assumpsit*. This rule, in all its parts, was adopted by our Supreme Court in *Baker v. Barney*.[88] But our courts have not gone further, and have never adopted the rule in *Corbett v. Poelnitz*;[89] and I apprehend, that the general rule of the common law, as understood before and since that case, is to be considered the law in this country; though, perhaps, not exactly under the same straitened limitation mentioned in the books.[90] I should apprehend, that the wife could sue, and be sued, without her husband, when the separation between the husband and wife was the act of the law, and that takes place not only in the case of a divorce *a mensa et thoro*, but also in the case of imprisonment of the husband as a punishment for crimes. Such a separation may, in this respect, be equivalent to transportation for a limited time; and the sentence which suspended the marital power, suspends the disability of the wife to act for herself, because she cannot have the authority of her husband, and is necessarily deprived of his protection.

IV. The competency of the wife to deal with her property as a *feme sole*.

At common law, a married woman was not allowed to possess personal property independent of her husband. But, in equity, she is allowed, through the medium of a trustee, to enjoy property as freely as a *feme sole*.[91] It is not necessary that the trustee should be a stranger. The husband himself may be the trustee; and if property be settled to a married woman's separate use, and no trustee be, appointed, the husband will be considered as such, not withstanding he was not a party to the instrument under which the wife claims. Where the husband stipulates, before marriage, either that his wife shall enjoy her own property, or that she shall be entitled to a certain benefit out of his estate, he will be bound in equity to perform his agreement, even though it was entered into with the wife herself, and became extinguished at law by his subsequent marriage. Gifts from the husband to the wife may be supported, as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees.[92]

The wife being enabled in equity to act upon property in the hands other trustees, she is treated in that court as having interests and obligations distinct from those of her husband. She may institute a suit, by her next friend, against him, and she may obtain an order to defend separately suits against her; and when compelled to sue her husband in equity, the court may order him to make her a reasonable allowance in money to carry on the suit.

The general grounds upon which equity allows a wife to institute a suit against her husband, are when any thing is given to her separate use, or her husband refuses to perform marriage articles, or articles for a separate maintenance; or where the wife, being deserted by her husband, has acquired by her labor a separate property of which he has plundered her.[93] Though a woman may be proceeded against in equity without her husband, and though her separate estate be liable for her debts *dum sola*, yet the court cannot make a personal decree against her for the payment of a debt. All it can do is to call forth her separate personal property in the hands of trustees, and to direct the application of it.[94] When the wife has separate property, the relief afforded is by following it in the hands of trustees; and, in this way, courts of equity can attain a pure and perfect justice, which courts of law are unable to reach.

If, by marriage settlement, the real and personal estate of the wife be secured to her separate use, the husband is accountable for that part of it which comes to his hands; and a *feme covert*, with respect to her separate property, is to be considered a *feme sole sub modo* only, or to the extent of the power clearly given her by the marriage settlement. Her power of disposition is to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property; and if she has a power of appointment by will, she cannot appoint by deed; and if by deed, she cannot dispose of the property by a parol gift or contract. These marriage settlements are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes, or unkindness, or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated. These general principles pervade the numerous and complicated cases on the subject; though, it must be admitted, that those cases are sometimes discordant in the application of their doctrines, and perplexingly subtle in their distinctions.[95]

In the case of *Jaques v. The Methodist Episcopal Church*, as reviewed in the Court of Errors of this state,[96] it was declared, that a *feme covert*, with respect to her separate property, was to be regarded in a court of equity as a *feme sole*, and might dispose of it without the assent and concurrence of her trustee, unless she was specially restrained by the instrument under which she acquired her separate estate. But it was held, (and in that consisted the difference between the decision in chancery and the correction of it on appeal,) that though a particular mode of disposition was specifically pointed out in the instrument or dead of settlement, it would not preclude the wife from adopting any other mode of disposition, unless she was, by the instrument, specially restrained in her power of disposition to a particular mode. The wife was, therefore, held at liberty, by that case, to dispose of her property as she pleased, though not in the mode prescribed, and to give it to her husband as well as to any other person, if her disposition of it be free, and not the result of flattery, force, or improper treatment.

This decision of the Court of Errors of this state, renders the wife more completely and absolutely

a *feme sole*, in respect to her separate property, than the English decisions would seem to authorize; and it, unfortunately, withdraws from the wife those checks that were intended to preserve her more entirely from that secret and insensible, but powerful marital influence, which might be exerted unduly, and yet in a manner to baffle all inquiry and detection.

A wife may also contract with her husband, even by parol, after marriage, for a transfer of property from him to her, or to trustees for her, provided it be for a *bona fide* and valuable consideration; and she may have that property limited to her separate use.[97] This was so held in the case of *Livingston v. Livingston*,[98] and as the wife died, in that case, after the contract had been executed on the part of the husband, and before it had been executed on the part of the wife, the infant children of the wife were directed to convey, as infant trustees, by their guardian, the lands which their mother, by agreement with her husband, had contracted to sell.

A wife may, also, sell or mortgage her separate property for her husband's debts, and she may create a valid power in the mortgagee to sell in default of payment. She can convey upon condition, and she may prescribe the terms.[99] It was long since held, even at law, in the case of *Wotton v. Hele*,[100] that the husband and wife might grant land belonging to the wife, by fine, with covenant of warranty, and that if the grantee should be evicted by a paramount title, covenant would lie, after the husband's death, against the wife, upon the warranty. This is a very strong case to show that the wife may deal with her land by fine as if she were a *feme sole*; and what she can do by fine in England, she may do here by any legal form of conveyance, provided she execute under a due examination. The case states, that the Court of K. B. did not make any scruple in maintaining, that the action of covenant was good against the wife on her warranty contained in her executed fine, though she was a *feme covert* when she entered into the warranty. It is also declared, in the old books,[101] that if the husband and wife make a lease for years of the wife's land, and she accepts rent after his death, she is liable on the covenants in the lease; for, by the acceptance of the rent she affirms the lease, though she was at liberty, after her husband's death, if she had so chosen, to disaffirm it.[102]

This doctrine, that the wife can be held bound to answer in damages after her husband's death, on her covenant of warranty, entered into during coverture, is not considered by the courts in this country to be law; and it is certainly contrary to the settled principle of the common law, that the wife was incapable of binding herself by contract. In the Supreme Court of Massachusetts,[103] it has been repeatedly held, that a wife was not liable on the covenants in her deed, further than they might operate by way of estoppel; and though the question in these cases arose while the wife was still married, yet the objection went to destroy altogether the effect of the covenant. So also, in *Jackson v. Vanderheyden*,[104] it was declared, that the wife could not bind herself personally by a covenant, and that a covenant of warranty inserted in her deed, would not even stop her from asserting a subsequently acquired interest in the same lands.

Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine, or convey her estate. The agreement by a *feme covert*, with the assent of her husband, for a sale of her real estate, is absolutely void at law, and the Courts of Equity never enforce such a contract against her.[105] In the execution of a fine, or other conveyance, the wife is privately examined, whether she acts freely; and without such an examination, the act is invalid. But a covenant to convey is made without any examination; and to hold the wife bound by it, would be contrary to first principles on this subject, for the wife is deemed incompetent to make a contract,

unless it be in her character of trustee, and when she does not possess any beneficial interest in her own right. The Chancery jurisdiction is applied to the cases of property settled to the separate use of the wife by deed or will, with a power of appointment, and rendered subject to her disposition. On the other hand, the husband has frequently been compelled, by decree, to fulfill his covenant, that his wife should levy a fine of her real estate, or else to suffer by imprisonment the penalty of his default.[106] But Lord Cowper once refused to compel the husband to procure his wife to levy a fine, as being an unreasonable coercion, since it was not in the power of the husband duly to compel his wife to alien her estate.[107] In other and later cases, the courts have declined to act upon such a doctrine;[108] and Lord Ch. B. Gilbert questioned its soundness.[109] In *Emery v. Wase*,[110] Lord Eldon observed, that if the question was perfectly *res integra*, he should hesitate long before he undertook to compel the husband, by decree, to procure his wife's conveyance; for the policy of the law was, that the wife was not to part with her property, unless by her own spontaneous will. Lastly, in *Martin v. Mitchell*,[111] where the husband and wife had entered into an agreement to sell her estate, the Master of the Rolls held, that the agreement was void as to the wife, for a married woman had no disposing power, and a Court of Equity could not give any relief against her on such a contract. She could not bind herself by contract, except in the execution of a power, and in the mode prescribed; nor would the court compel the husband to procure his wife to join in the conveyance. Such, said the Master of the Rolls, was not now the law.

The English courts of equity have recently thrown a further and very important protection around the property settled on the wife on her marriage, for her separate use, with a clause against anticipation. It was declared, in *Ritchie v. Broadbent*,[112] that a bill would not be sustained, to transfer to the husband property so settled in trust, even though the wife was a party to the bill, and ready to consent on examination to part with the funds. The opinion of the Lord Ch. Baron was grounded on the effect to be given to the clause against anticipation, and does not apply to ordinary cases, or affect the general power of the wife, where no such check is inserted in the settlement.

A wife cannot devise her lands by will, for she is excepted out of the statute of wills; nor can she make a testament of chattels, except it be of those which she holds *en autre droit*, or which are settled on her as her separate property, without the license of her husband. He may covenant to that effect, before or after marriage, and the Court of Chancery will enforce the performance of that covenant. It is not strictly a will, but in the nature of an appointment, which the husband is bound by his covenant to allow.[113] The wife may dispose by will, or by act in her lifetime, of her separate personal estate, settled upon her, or held in trust for her, or the savings of her real estate given to her separate use; and this she may do without the intervention of trustees, for the power is incident to such an ownership.[114] It has been held, even at law, in this country,[115] that the wife may, by the permission of her husband, make a disposition in the nature of a will, of personal property, placed in the hands of trustees, for her separate use, by her husband, or by a stranger, and either before or after marriage. If a *feme sole* makes a will, and afterwards marries, the subsequent marriage is a revocation in law of the will. The reason given is, that it is not in the nature of a will to be absolute, and the marriage is deemed equivalent to a countermand of the will, and especially as it is not in the power of the wife after marriage, either to revoke or continue the will, inasmuch as she is presumed to be under the restraint of her husband.[116] But it is equally clear, that where an estate is limited to uses, and a power is given to a *feme covert*, before marriage, to declare those uses, such limitations of uses may take effect; and though a married woman cannot be said strictly to make a will, yet she may devise, by way of execution of a power, which is rather an appointment, than a will; and whoever takes under the will, takes by virtue of the execution of the power. Thus, in the case of

Bradish v. Gibbs,[117] it was held, that a *feme covert* might execute by will, in favor of her husband, a power, given or reserved to her while *sole*, over her real estate. In that case, the wife, before marriage, entered into an agreement with her intended husband, that she should have power during the coverture, to dispose of her real estate by will, and she afterwards during coverture devised the whole of her estate to her husband; and this was considered a valid disposition of her estate in equity, and binding on her heirs at law. The point in that case was, whether a mere agreement entered into before marriage, between the wife and her intended husband, that she should have power to dispose of her real estate during coverture, would enable her to do it, without previously to the marriage vesting the real estate in trustees, in trust for such persons as she should by deed or will appoint; and it was ruled not to be necessary; and the doctrine has received the approbation of the Supreme Court of Pennsylvania.[118] Equity will carry into effect the will of a *feme covert*, disposing of her real estate in favor of her husband, or other persons than her heirs at law, provided the will be in pursuance of a power reserved to her in and by the antenuptial agreement with her husband.

With respect to antenuptial agreements, equity will grant its aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and the policy of the law. Equity will execute the marriage articles at the instance of any person who is within the influence of the marriage consideration, as all such persons rest their claims on the ground of a valuable consideration. The husband and wife, and their issue, are all of them considered as within that influence, and at at the instance of any of them, equity will enforce a specific performance of the articles.[119]

Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against creditors and purchasers. The marriage is, itself, a valuable consideration for the agreement, and sufficient to give validity to the settlement. This was so decided in the case of *Reade v. Livingston*;[120] and it was there held, that voluntary settlements after marriage, upon the wife or children, and without any valid agreement previous to the marriage to support then, were void as against creditors existing when the settlement was made, But if the person be not indebted at the time, then it is settled that the postnuptial voluntary settlement upon the wife or children, if made without any fraudulent intent, is valid against subsequent creditors. This was not only the doctrine in *Reade v. Livingston*, and deduced from the English authorities, but it has since received the sanction of the Supreme Court of the United States, in the case of *Sexton v. Wheaton*.[121]

A settlement after marriage may be good, if made upon a valuable consideration. Thus, if the husband makes a settlement upon the wife, in consideration of receiving from the trustees of the wife possession of her equitable property, that will be a sufficient consideration to give validity to the settlement, if it was a case in which a court of equity would have directed a settlement out of the equitable estate itself, in case the husband had sought the aid of the court, in order to get possession of it.[122] The settlement made after marriage, between the husband and wife, may be good, provided the settler has received a fair and reasonable consideration in value for the thing settled, so as to repel the presumption of fraud. It is a sufficient consideration to support such a settlement, that the wife relinquishes her own estate, or agrees to make a charge upon it for the benefit of her husband, or even if she agrees to part with a contingent interest.[123] But the amount of the consideration must be such as to bear a reasonable proportion to the value of the thing settled, and when valid, these postnuptial settlements will prevail against, existing creditors, and subsequent purchasers.[124] A settlement upon a meritorious consideration, or one not strictly valuable, but founded on some moral

consideration, as gratitude, benevolence, or charity, will be good against the settler and his heirs; but whether it would be good as against creditors and purchasers, does not seem to be entirely settled, though the weight of opinion, and the policy of the law, would rather seem to be against their validity in such a case.

If the wife, previous to marriage, makes a settlement of either her real or personal estate, it is a settlement in derogation of the marital rights, and it will depend upon circumstances, whether it be valid. If the settlement be upon herself, her children, or any third person, it will be good in equity, if made with the knowledge of her husband. If he be actually a party to the settlement, a Court of Equity will not avoid it, though he be an infant at the time it was made.[125] But if the wife was guilty of any fraud upon her husband, as by inducing him to suppose he would become possessed of her property, he may avoid the settlement, whether it be upon herself, her children, or any other person.[126] If the settlement be upon children by a former husband, and there be no imposition practiced upon the husband, the settlement would be valid, without notice;[127] and it would seem, from the opinion of the Lord Chancellor, in *King v. Colton*, that such a settlement, even in favor of a stranger, might be equally good under the like circumstances. It is a general rule, without any exception, that whenever any agreement is entered into for the purpose of altering the terms of a previous marriage agreement, by some only of the persons who are parties to the marriage agreement, such subsequent agreement is deemed fraudulent and void. The fraud consists in disappointing the hopes and expectations raised by the marriage treaty.

It is a material consideration respecting marriage settlements, not only whether they are made before or after marriage; but if after marriage, whether upon a voluntary separation, by mutual agreement between the husband and wife. Lord Eldon, in *St. John v. St. John*,[128] intimated, that a settlement, by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law, and void; and he made no distinction between settlements resting on articles; and a final complete settlement by deed; or between the cases where a trustee indemnified the husband against the wife's debts, and where there was no such indemnity. The ground of his opinion was, that such settlements, creating a separate maintenance, by voluntary agreement between husband and wife, were, in their consequences, destructive to the indissoluble nature and the sanctity of the marriage contract; and he considered the question to be the gravest and the most momentous to the public interest, that could fall under discussion in a court of justice. Afterwards, in *Worrall v. Jacob*,[129] Sir William Grant said, he apprehended it to be settled, that Chancery would not carry into execution articles of agreement between husband and wife. The court did not recognize any power in the married parties to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of the contract. But he admitted, that engagements between the husband and a third person, as a trustee, for instance, though originating out of, and relating to a separation, were valid, and might be enforced in equity. It was, indeed, strange, that such an auxiliary agreement should be enforced, while the principal agreement between the husband and wife to separate, and settle a maintenance on her, should be deemed to be contrary to the spirit and the policy of the law. If the question was *res integra*, said Lord Eldon, untouched by *dictum*, or decision, he would not have permitted such a covenant to be the foundation of a suit in equity. But *dicta* have followed *dicta*, and decision has followed decision, to the extent of settling the law on this point too firmly to be now disturbed in Chancery.

I have thus given, for the benefit of the student, a sketch of the leading principles and distinctions (for to them I have confined myself) respecting marriage settlements, and the trusts created by them,

and how far the wife is considered in equity as capable of acquiring, holding, and disposing of separate property in herself. The subject occupies an important and voluminous title in the code of English equity jurisprudence; and so extensive have become the trusts growing out of marriage settlements, that a lawyer of every great experience,[130] considered, that half the property of England was vested in nominal owners, and it had become difficult to ascertain whether third person were safe in dealing for fiduciary property with its trustees, without the concurrence of the beneficial owner.[131]

The law respecting marriage settlements is, as I apprehend, essentially the same in Pennsylvania, Virginia, North Carolina, South Carolina, Kentucky, and probably, in other states, as in England, and in this state.[132] But, in Connecticut, it has been decided, that an agreement between husband and wife, during coverture, was void, and could not be enforced in chancery.[133] The Court of Appeals in that state would not admit the competency of the husband and wife to contract with each other, nor the competency of the wife to hold personal estate to her separate use. But afterwards, in *Nichols v. Palmer*,[134] an agreement between the husband and a third person, as trustee, though originating out of, and relating to, a separation between husband and wife, was recognized as binding.

V. Other rights and disabilities incident to the marriage union.

The husband and wife cannot be witnesses for or against each other. This is a settled principle of law, and it is founded as well on the interest of the parties being the same, as on public policy.[135] Nor can either of them be permitted to give any testimony either in a civil or criminal case, which may have the least tendency to criminate the other; and this rule is so inviolable, that no consent will authorize the breach of it. Lord Thurlow said, in *Sedgwick v. Walkins*,[136] that for security of the peace *ex necessitate*, the wife might make an affidavit against her husband, but that he did not know one other case, either at law, or in chancery, where the wife was allowed to be a witness against her husband.

But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge the husband; for if he permits the wife to act for him as his agent in any particular business, he adopts, and is bound by her acts and admissions, and they may be given in evidence against him.[137] So, also, where the husband permitted his wife to deal as a *feme sole*, her testimony was admitted, where she acted as agent, to charge her husband.[138] In the case, likewise, of *Fenner v. Lewis*,[139] where the husband and wife had agreed to articles of separation, and a third person became a party to the agreement as the wife's trustee, and provision was made for her maintenance and enjoyment of separate property, it was held, that the declarations and confessions of the wife were admissible in favor of her husband in a suit against the trustee. In such a case, the law so far regarded the separation, as not to hold the husband any longer liable for her support.[140] The policy of the rule excluding the husband and wife from being witnesses for or against each other, whether founded, according to Lord Kenyon,[141] on the supposed bias arising from the marriage, or, according to Lord Hardwicke,[142] in the necessity of preserving the peace and happiness of families, was no longer deemed applicable to that case. In *Aveson v. Lord Kinnaird*,[143] dying declarations of the wife were admitted, in a civil suit against her husband, they being made when no confidence was violated, and nothing extracted from the bosom of the wife which was confided there by the husband. Lord Ellenborough referred to the case of *Thompson v. Trevannion*, in Skin. 402 where, in an action by husband and wife, for wounding the wife, Lord Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing to her own

advantage, to be given in evidence as part of the *res gestae*.

These cases may be considered as exceptions to the general rule of law, and which, as a general rule, ought to be steadily and firmly adhered to, for it has a solid foundation in public policy.

In civil suits, where the wife cannot have the property demanded, either solely to herself, or jointly with her husband, or where the wife cannot maintain an action for the same cause if she survive her husband, the husband must sue alone. In all other cases in which this rule does not apply, they must be joined in the suit; and where the husband is sued for the debts of the wife before coverture, the action must be joint against husband and wife, and she may be charged in execution with her husband; though if she be in custody on mesne process only, she will be discharged from custody on motion.[144] The husband may, also, be bound to keep the peace as against his wife; and, for any unreasonable and improper confinement by him, she may be entitled to relief upon *habeas corpus*. If a woman marries, pending a suit against her, the plaintiff may proceed to judgment and execution against her alone without joining the husband;[145] but for any cause of action, either on contract or for tort, arising during coverture, the husband only can be taken in execution.[146] These provisions in favor of the wife are becoming of less consequence with us every year, inasmuch as imprisonment for debt is undergoing constant relaxation; and by an act of the legislature of New York, in 1824,[147] no female can be imprisoned upon any execution issued in a suit before a justice of the peace.

I trust I need not apologize for having dwelt so long upon the consideration of this most interesting of the domestic relations. The law concerning husband and wife, has always made a very prominent and extensive article in the codes of civilized nations. There are no regulations on any other branch of the law, which affect so many minute interests, and interfere so deeply with the prosperity, the honor, and happiness of private life. As evidence of the immense importance which in every age has been attached to this subject, we may refer to the Roman law, where this title occupies two entire books of the Pandects,[148] and the better part of the fifth book of the code. Among the modern civilians, Dr. Taylor devotes upwards of one sixth part of his whole work on the Elements of the Civil Law, to the article of marriage; and Heineccius, in his voluminous works, pours a flood of various and profound learning on the subject of the conjugal relations.[149] Pothier, who has examined, in thirty-one volumes, the whole immense subject of the municipal law of France, which has its foundations principally laid upon the civil law, devotes six entire volumes to the law of the matrimonial state. When we reflect on the labors of those great masters in jurisprudence, and compare them with what is here written, a consciousness arises of the great imperfection of this humble view of the subject; and I console myself with the hope, that I may have been able to point out at, least the paths of inquiry to the student, and to have stimulated his exertions to become better acquainted with this very comprehensive and most interesting head of domestic polity.

There is a marked difference between the provisions of the common law and the civil law, in respect to the rights of property belonging to the matrimonial parties. Our law concerning marriage settlements appears, to us at least, to be quite simple, and easy to be digested, when compared with the complicated regulations of the community or partnership system, between husband and wife, which prevails in many parts of Europe, as France, Spain, and Holland, and also in the state of Louisiana. That system is founded on the Roman law, which Van Leeuwen, in his Commentaries, terms the common law of nations.[150] I do not allude to the earlier laws of the Roman republic, by which the husband was invested with the plenitude of paternal power over the wife, but to the civil law in the more polished ages of the Roman jurisprudence, when the wife was admitted to the

benefit of a liberal antenuptial contract, by which her private property was secured to her, and a community of estate between the husband and wife introduced. The civil law at first prohibited the husband and wife from making valid gifts to each other *causa mortis*; yet the rigor of the law was afterwards done away, and donations between the husband and wife were good if they were not revoked in the lifetime of the parties; and Justinian abolished the distinction between donations *inter vivos ante nuptias et post nuptias*, and he allowed donations *propter nuptias* as well after as before marriage.[151] The wife could bind herself by her contracts without charging her husband. She was competent to sue and be sued without him. They could sue each other, and, in respect to property, were considered as distinct persons, and the contracts of the one were not binding on the other.

Whatever doubts may arise in the mind of a person educated in the school of the common law, as to the wisdom or policy of the powers, which, by the civil law, and the law of those modern nations which have adopted it, are conceded to the wife in matters of property; yet, it cannot be denied, that the preeminence of the Christian nations of Europe, and of their descendants and colonists in every other quarter of the globe, is most strikingly displayed in the equality and dignity which their institutions confer upon the female character.

NOTES

1. Co. Lilt. 112. a. 187. b. Litt. sect. 168. 291.

2. *Martin v. Martin*, 1 Greenleaf, 394. *Rowe v. Hamilton*, 3 Greenleaf, 63.

3. Co. Litt. 112. a.

4. *Moore v. Ellis*, Bunb. 205. *Livingston v. Livingston*, 2 Johns. Ch, Rep. 537. *Shepard v. Shepard*, 7 Johns. Ch. Rep. 57.

5. Co. Litt. 351. a.

6. *Babb and wife v. Perley*, 1 Greenleaf's Rep. 6.

7. *Bates v. Schraeder*, 13 Johns. Rep. 260.

8. 3 Co. 22.

9. Litt. sect. 291. 665. Co. Litt 187. b. 188 a. 351. Bro. Abr. tit. *Cui in vita*, 8. 2 Blacks. Rep. 1214. 16 Johns. Rep. 115. 5 Johns. Ch. Rep. 437.

10. Essay on Abstracts of Title, vol. i. 334, 435, 436.

11. 2 Inst. 343.

12. Litt. sect. 594. The extent of the remedy under this ancient writ, may be seen in Bro. Abr. tit. *Cui in vita*, and F. N. B. 193. h. t.

13. Co. Litt. 326. a.

14. Co. Litt. 46. b.

15. *Sir Edward Turner's case*, l Vern. 7.

16. Co. Litt. 351. a.

17. Co. Litt. 351. b. Butler's note, 304. to Co. Litt. lib. 3. 351. a. 1 Rol. Abr. 345. pl. 40.

18. Laws of N.Y. sess. 36. ch. 75.

19. *Whitaker v. Whitaker*, 6 Johns. Rep. 112.

20. 3. P. Wms. 409. 411. Cases temp. Talb. 173. S. C. *Heard v. Stanford*.

21. Butlers note, 304. to lib. 3 Co. Litt. 6 John. Rep. 118.

22. 3 Vesey, 246, 247. 14 Vesey, 381, 382. 15 Vesey, 537. 18 Vesey, 49, 55, 56.

23. 5 Johns. Ch. Rep. 196.

24. *McDowl v. Charles*, 6 Johns Ch. Rep. 132.

25. *Mitford v. Mitford*, 9 Vesey, 87.

26. *Howard v. Moffatt*, 2 Johns. Ch. Rep. 206. 1 Eden's Rep. 67. 370, 371. 2 Atk. 420, 421, 422. 11 Vesey, 17. 20, 21. 1 Madd. Ch. Rep. 362. Clancy's Essay, *passim*.

27. 2 Atk. 419.

28. 4 Johns. Ch. Rep. 318.

29. 5 Johns. Ch. Rep. 464. 3 Cowen, 590. S.C.

30. 6 Johns. Ch. Rep. 178.

31. *Howard v. Moffatt*, 2 Johns. Ch. Rep. 206.

32. *Yohe v. Barnet*, 1 Binney, 358.

33. McElhatten v. Howel, 4 Haywood, 19; and to the student who wishes to take a connected and comprehensive view of the whole doctrine, I would recommend the learned note of Mr. Butler, note 304. to lib. 3 Co. Litt. and more especially Clancy's Essay on the Equitable Rights of Married Women.

34. 1 Vern. 396. 3 Lev. 403. *Howell v. Maine*. But Mr. Preston, in his Essay on Abstracts of Title, vol. i. 348. condemns the doctrine in this case in *Levinz*, and denies that a husband can sue alone on a bond given to the wife alone.

35. Butler's note, 304. to lib. 3. Co. Litt. 1 Vern. 396. note 5. *Garforth v. Bradley*, 2 Vesey, 677. *Meredith v. Wynn*, Eq Ca. Abr. 70. pl. 15. *Packer v. Windham*, Prec. in Ch. 412. *Druce v. Dennison*, 6 Vesey, 395.

36. *Cleland v. Cleland*, Prec. in Ch. 63. *Carr v. Taylor*, 10 Vesey, 579.

37. 3 P. Wms. 409. Cases temrp. Talb. 173.

38. 1 Sch. & Lef. 263.

39. 1 P. Wms. 469.

40. *Woodman v. Chapman*, 1 Campb. N. P. 189.

41. 1 P. Wms. 249.

42. *Etherington v. Parrot*, 1 Salk. 118. 2 Lord Raym. 1006. S. C,

43. 5 Taunton, 356.

44. 7 Ibid. 432.

45. 4 B. & Aid. 252.

46. *Robinson v. Grenold*, 1 Salk. 119. *Morris v. Martin*, Str. 647. *Child v. Hardyman*, Str. 875. *Manby v. Scott*, 1 Mod. 124. 1 Sid. 109. 1 Lev. 4. S.C. 12 Johnson, 293. 3 Pickering, 289. Kirkpatrick, Ch. J. 2 Halsted, 146.

47. *McCutchen v. McGahay*, 11 Johns. Rep. 281.

48. 2 Str. 875.

49. 11 Johns. Rep. 281. 12 Ibid. 293. 3 Esp. Cases, 256.

50. 1 Mod. 124. 1 Sid. 109. 1 Lev. 4. S. C., and the case is given at large in Bacon's Abr. tit. Baron and Feme.

51. Str. 1214.

52. *Montague v. Benedict*, 3 Barn. & Cress. 631.

53. *McCutchen v. McGahay*, 11 Johns. Rep. 281.

54. 3 Blacks. Com. 414.

55. *Jackson v. Gabree*, 1 Vent, 51.

56. 1 Hawk. P. C. b. 1. c. 1. s. 9.

57. 1 Vesey 305. 1 H. Blacks, 346.

58. *Beckwith's case*, 2 Co. 57. *Swanton v. Raven*. 3 Atk. 195.

59. Bro. Abr. tit. Fines, pl. 75. *Compton v. Perkins*, sect. 20

60. Preston on Abstracts of Title, vol. i. 336.

61. Sugden on Powers, 148.

62. *Burnabv v. Griffin*, 3 Vesey, 266.

63. Laws of N.Y. sess. 36. ch. 97. s. 2.

64. *Davey v. Turner*, 1 Dallas, 11. *Watson v. Bailey*, 1 Binney, 470. *Jackson v. Gilchrist*, 15 Johns. Rep. 89. *Fowler v. Shearer*, 7 Mass. Rep. 14. *Gordon v. Haywood*, 2 N.H. Rep. 402. *Thatcher v. Omans*, Supplement to 3 Pickering, 521. *Lithgow v. Kavenagh*, 9 Mass. Rep. 172.

65. 7 Mass. Rep. 21. 2 N. H. Rep. 405. In *Rowe v. Hamilton*, 3 Greenleaf, 63, the Chief Justice says, that the wife cannot convey her own lands to a stranger, unless the husband joins with her in the deed.

66. *Jackson v. Vanderheyden*, 17 John. Rep. 167.

67. Cited in Co. Litt. 132. b. 133. a.

68. Note 209, to lib. 2 Co. Litt. *Sparrow v. Carruthers*, decided by Yates, J. and cited as a good authority in l Term Rep. 6. 1 Bos. & Pul. 359. 2 Bos. & Pul. 233. *Carrol v. Blencow*, 4 Esp. N.P. Rep. 27.

69. l Ld. Raym 147. 1 Salk. 116.

70. 1 H. Blacks. 349.

71. 2 Esp. N. P. Rep. 554.

72. *Franks v. Duchess of Pienne*, 2 Esp. N. P. Rep. 587.

73. 1 Bos. & Pul. 357.

74. 11 East. 301.

75. Bacon, tit. Baron and Feme, M.

76. 2 Vesey, Jun. 145.

77. 2 H. Blacks. 1079.

78. 2 Blacks. Rep. 1195.

79. 1 Term Rep. 5.

80. 1 H. Blacks. 350

81. Term Rep. 679.

82. 6 Term Rep. 604.

83. 8 Term Rep. 545.

84. 11 Vesey, 529, 530.

85. See the observations of the Master of the Rolls, in 3 Vesey, 443, 444, 445.

86. 1 Salk. 116.

87. 5 Bos. & Pul. 148.

88. 8 Johns Rep. 72.

89. See 2 Halsted, 150. where that case was expressly condemned.

90. In some of the states, as Pennsylvania and South Carolina, a wife may act as a *feme sole* trader, and become liable as such, in imitation of the custom of London. *Burke v. Winkle*, 2 Serg. & Rawl. 189. *Newbiggin v. Pillans*, 2 Bay, 162.

91. *Bennet v. Davis*, 2 P. Wms. 316.

92. *Rich v. Cockell*, 9 Vesey, 369.

93. *Cecil v. Juxon*, 1 Atk. 278.

94. *Hulme v. Tenant*, 1 Bro. 16. *Norton v. Turvill*, 2 P. Wms. 144. *Lillia v. Airey*, 1 Vesea, jun. 277. Lord Loughborough, 2 Ves. jun. 145.

95. *Jaques v. The Methodist Episcopal Church*, 1 Johns. Ch. Rep. 450. 3 Ibid. 77.

96. 17 Johns. Rep. 548.

97. *Lady Arundell v. Phipps*, 10 Vesey, 139. 145.

98. 2 Johns. Ch. Rep. 537.

99. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129.

100. 2 Saund, 177. 1 Mod. 290. S.C.

101. *Greenwood v. Tyber*, Bro. Jac. 563, 564. 1 Mod. 291.

102. 2 Saund. 180. n. 9.

103. *Fowler v. Shearer*, 7 Mass. Rep. 21. *Colcord v. Swan*, Ibid. 291.

104. 17 Johns. Rep. 167.

105. *Butler v. Buckingham*, 5 Day, 492.

106. *Griffen v. Taylor*, Tothill, 106. *Barrington v. Horn*, 2 Eq. Cas. Abr. 17. pl. 7. Sir Joseph Jekyll, in *Hall v. Hardy*, 3 P. Wms. 137. *Withers v. Pinchard*, cited in 7 Vesey, 475. *Morris v. Stephenson*, 7 Vesey, 474.

107. *Otread v. Round*, 4 Viner's Abr. 203. pl. 4.

108. Prec. in Ch. 76. Amb. 495.

109. Gilbert's *Lex Praetoria*, 245.

110. 8 Vesey, 505. 514

111. 2 Jacob & Walker, 412.

112. Ibid. 455.

113. *Pridgeon v. Pridgeon*, 1 Ch. Cas. 117. *Rex v. Bettesworth*, Str. 891.

114. *Peacock v. Monk*, 2 Vesey, 190. *Rich v. Cockell*, 9 Vesey, 369.

115. *Emery v. Neighbour*, 2 Halsted 142.

116. *Forse & Hambling's case*, 4 Co. 60. B. 2 P. Wms. 624. 2 Term Rep. 695. S. P.

117. 3 Johns. Ch. Rep. 523.

118. 10 Serg. & Rawl, 447.

119. *Osgood v. Strode*, 2 P. Wms. 255. *Bradish v. Gibbs*, 3 Johns. Ch. Rep. 550.

120. 3 Johns. Ch. Rep. 481.

121. 8 Wheaton, 229.

122. *Moor v. Rycault*, Prec. in Ch. 22. *Brown v. Jones*, 1 Atk. 190. *Middlecome v. Marlow*, 2 Atk. 518.

123. *Ward v. Shallet*, 2 Vesey, 16.

124. *Lady Arundel v. Phipps*, 10 Vesey, 139.

125. *Slocombe v. Glubb*, 2 Bro. 545.

126. Butler, J. in *Strathmore v. Bowes*, Ibid. 345.

127. *King v. Colton*, 2 P. Wms. 674.

128. 11 Vesey, 530.

129. 3 Merivale, 256, 268.

130. Mr. Butler.

131. In addition to the general abridgments, there are several professed treatises recently published on this head, as Atherley's Treatise on the Law of Marriage, and other Family Settlements, published in 1813; Keating's Treatise on Family Settlements and Devises, published in 1815; Bingham on the Law of Infancy and Coverture, published in 1816; and the title of Baron and Feme in Ch. J. Reeve's work on the Domestic Relations. In those essays the subject can be studied and pursued through all its complicated details.

132. *Rundle v. Murgatroyd*, 4 Dallas, 304, 307. *Scott v. Lorraine*, 6 Munf. 117. *Bray v. Dudgeon*, ibid. 132. *Tyson v. Tyson*, 2 Hawks. 472. Crostwaight v. Hutkinson, 2 Bibb. 407. *Browning v. Coppage*, 3 Bibb. 37. South Carolina Eq. Rep. *passim*.

133. Dibble v. Hutton, 1 Day, 221.

134. 5 Day, 47.

135. *Davis v. Dinwoody*, 4 Term Rep, 678.

136. 1 Vesey, jun. 49.

137. Anon. 1 Str. 527. *Emerson v. Blanden*, 1 Esp. N. P. Rep. 142. *Palethorp v. Furnish*, 2 ibid. 511, note.

138. *Rutten v. Baldwin*, 1 Eq. Cas. Abr. 226, 227; but Lord Eldon said, in 15 Vesey, 165. that he had great difficulty in acceding to that case, to that extent.

139. 10 Johns. Rep. 38.

140. *Baker v. Barney*, 8 Johns. Rep. 72.

141. 4 Term Rep. 678.

142. *Baker v. Dixie*, Cases temp. Hardw. 252.

143. 9 East, 182.

144. Anon. 3 Wils. 124.

145. *Doyley v. White*, Cro. Jac. 323. Cooper v. Hunchin, 4 East, 521.

146. Anon. Cro. C. 513. 3 Blacks. Com. 414.

147. Sess. 47. ch. 238. sec. 42.

148. Lib. 23. and 24.

149. Vide Opera Heinec. tom. 2. *De marito Tutore et Curatore Uxoris legitimo*, and tom. 7, *Commentarius ad legem Juliam et Papiam Poppoeam*.

150. In Louisiana, according to their new civil code, as amended and promulgated in 1824, (Art. 2312. 2369.) the partnership, or community of acquests, or gains, exists by law in every marriage, where there is no stipulation to the contrary. This was a legal consequence of marriage, under the Spanish law. (Christy's Dig. tit. Marriage.) But the parties may modify or limit this partnership, or agree that it shall not exist. They may regulate their matrimonial agreements as they please, provided the regulations be not contrary to good morals, and be conformable to certain prescribed modifications. (Art. 2305.) In the case of married persons removing into the state from another state, or from foreign countries, their subsequently acquired property is subjected to the community of acquests. (Art. 2370.) This very point was also decided recently in the case of *Saul v. his Creditors*, published at New Orleans, in 1827. The Supreme Court of Louisiana, in the able opinion pronounced by Judge Porter, on behalf of the court, held, that though a marriage was contracted in a state governed by the English common law, yet if the parties removed into Louisiana, and there acquired property, such property on the dissolution of the marriage in that state, by the death of the wife, would be regulated by the law of Louisiana. Consequently, a community of acquests and gains did exist between married parties, from the time of their removal into the state, and the property they acquired after their removal, became common, and was to be equally divided between them, on the principles of partnership. The decision was founded on an ancient Spanish statute in the *Partidas*, which governed at New Orleans when it was a Spanish colony. While it was admitted that by the comity of nations, contracts were to be enforced according to the principles of law which governed the contract in the place where it was made, yet it was equally part of the rule, that a positive law regulating property in the place where it was situated, (and which the European continental, jurists called real statutes, in contradistinction to those personal statutes which follow and govern the individual wherever he goes,) must prevail when opposed to the *lex loci contractus*. The right of sovereignty settles that point, whenever the rules of the place of the contract, and of the place of its execution, conflict. The comity of nations must yield to the authority of positive legislation; and it was admitted, that independent of that authority, the weight of the opinion of civilians in France and Holland was, that the law of the place where the marriage was contracted ought to be the guide, and not that of the place were it was dissolved. The property of married persons is divided into separate property, being that which either party brings in marriage, or subsequently acquires by inheritance or gift, and common property, being that acquired in any other way by the husband and wife during marriage. (Art. 2314.) The separate property of the wife is divided into dotal, being that which she brings to the husband to assist in the marriage establishment, and *extra dotal*, or paraphernal property, being that which forms no part of the dowry. (Art. 2315.) The husband is the head and master, and the proceeds of the dowry belong to the husband, during the marriage, and he has the administration of the partnership or community of profits of the matrimonial property, and he may dispose of the revenues which they produce, and alienate them, without the consent of the wife. (Art. 2373.) He cannot alienate the dotal estate, and he is subject, in respect to that property, to all the obligation of the usufructuary. (Art. 2344.) If the husband and wife stipulate that there shall be no partnership between them, the wife preserves the entire administration of her property, moveable and immoveable, and may sell it; (Art. 2394, 2395.) and if there be no agreement as to the expenses of the marriage, the wife contributes to the amount of one half of her income. (Art. 2397.) A sale by the husband to his wife, to replace her paraphernal property sold by him, is good. Her land, whether dotal or not, is not affected by her husband's debts. Christy's Dig. tit. Husband and Wife. I cannot here go further, and give a detailed view of the law of the marriage contract in Louisiana. My object is merely to state enough to show, that its regulations are, peculiarly for this country, very complex; and to a mere English lawyer, they will probably appear to be embarrassing, and rather forbidding. Our taste, and modes of thinking, are very much under the influence of education; and we are naturally led to give a preference to the institutions under which we live, and with which we are best acquainted.

The Louisiana code appears to be a transcript in this, and in many other respects, of the Code Napoleon; and the very complicated regulations of the French code on the subject of marriage property, occupy a wide space, even in that comprehensive and summary digest of the French law. Pothier had devoted three volumes of his works to the conjugal rights in community, and M. Toullier, who had discussed extensively the law of marriage, in the former part of his *Droit civil Francais suivaut l'ordre du code*, has devoted his last or 12th volume, to a commentary upon the regulations of the Code civil, concerning the community system; and as he is proceeding with his great work, he will probably exhaust several volumes upon that extensive title. I have selected, for the information of the student, a few of the leading principles in the French code, on the subject.

It is declared, that the husband owes protection and maintenance to the wife according to his means and condition. (Code civil, No. 213, 214.) The wife owes him obedience, and cannot do any act in law, without the authority of her husband; and without his concurrence, she cannot give, alien or acquire property. (Code civil, No. 215, 217.) But if the husband refuses to authorize his wife to do any act in law, she may apply to a judicial tribunal, for leave to act. (Ibid. No. 218, 219.) If she be a public

trader, she may bind herself without the authority of her husband, in whatever concerns that business. (Ibid. No. 220.) She may also make a will without his authority. (Ibid. No 226.) No general authority, though stipulated by the marriage contract, is valid, except as to the administration of the wife's property. (Ibid. No. 223.) But the law allows the husband and wife to make any special contract as to property, which is not incompatible with good morals, and does not derogate from the power of the husband over the person of the wife and children, nor change the legal order of succession (Code civil, No. 1387, 1388, 1389.) The parties may stipulate in writing, before marriage, that the conjugal relation, in respect to property, shall be regulated either under the community, or under the dotal rule, and the code prescribes their rights and powers under each of those systems, and they may modify as they please the management and disposition of the joint property placed in community. They may stipulate that each of the married parties shall separately pay their own debts, and this stipulation will bind them, on the dissolution of the community, to account to each other. (Ibid. No. 1391, 1395, 1401, 1402, 1421, 1497, 1500, 1510, 1526.) These marriage contracts cannot be altered after marriage; and, ordinarily, the husband administers the personal property in community, and may sell or encumber it, but he cannot take away by will the rights of the wife as survivor. If they stipulate that they shall be separate in property, the wife retains the entire administration of her real and personal property and revenues, and each party contributes to the charges of the marriage according to agreement. (Ibid. No. 1536, 1537.) In no case can the wife have a power given her to alienate her real estate without the consent of her husband; and if they marry under the dotal rule, and not under the rule of the community, the husband has the sole administration of the dotal property during the marriage. (Ibid. No. 1531.)

The Dutch matrimonial law in respect to property, is essentially the same. See Van Leeuwen's Commentaries on the Roman Dutch Law, b. 4. ch. 23, 24. and Voet's Commentaries on the Pandects, under the appropriate titles. The same general usages and rules prevail throughout all the European nations which have adopted the civil law.

151. Inst. 2. 7. 3. Bynk. Opera, tom. 1. 166. Obser. Jur. Rom. lib. 5, ch. 18.

LECTURE 29

Of Parent and Child

THE next domestic relation which we are to consider, is that of parent and child. The duties that reciprocally result from this connection, are prescribed, as well by those feelings of parental love and filial reverence which Providence has implanted in the human breast, as by the positive precepts of religion, and of our municipal law.

I. Of the Duties of Parents.

The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.[1]

The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law.[2] The Athenian and the Roman laws were so strict in enforcing the performance of this natural obligation of the parent, that they would not allow the father to disinherit the child from passion or prejudice, but only for substantial reasons, to be approved of in a court of justice.[3]

The obligation on the part of the parent to maintain the child, continues until the latter is in a condition to provide for its own maintenance, and it extends no further than to a necessary support. The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws. According to the language of Lord Coke, it is “nature's profession to assist, maintain, and console the child.” A father's house is always open to his children. The best feelings of our nature establish and consecrate this asylum. Under the thousand pains and perils of human life, the home of the parents is to the children a sure refuge from evil, and a consolation in distress. In the intenseness, the lively touches, and unsubdued nature of parental affection, we discern the wisdom and goodness of the great Author of our being, and Father of Mercies.

All the provision that the statute law of this state has made on the subject, applies to the case of mere necessary maintenance, and the provision was borrowed from the English statutes of 43 Eliz. and 5 Geo. 1. The father and grandfather, mother and grandmother, being of sufficient ability, of any poor, blind, lame, or decrepit person whomsoever, not being able to maintain himself, and becoming chargeable to any city or town, shall, at their own charge and expense, relieve and maintain every such person, in such manner as the justices of the peace of the county, at their general sessions, shall order and direct, under the penalty of one dollar and fifty cents for every week's disobedience of the order. If the father, or if the mother, being a widow, run away and leave their children a public charge, their estate is liable to be sequestered, and the proceeds applied to the maintenance of the children.[4] The statute justly imposes a similar obligation upon the children and grandchildren, under like circumstances. This feeble rind scanty statute provision was intended for the indemnity of the public against the maintenance of paupers, and it is all the injunction that the statute law pronounces in support of the duty of parents to maintain their adult children. During the minority of the child, the case is different, and the parent is absolutely bound to provide reasonably for his maintenance

and education, and he may be sued for necessaries furnished, and schooling given to a child. under just and reasonable circumstances.[5] The father is bound to support his minor children, if he be of ability, even though they have property of their own; but this obligation in such a case does not extend to the mother.[6] The legal obligation of the father to maintain his child, ceases as soon as the child is of age, however wealthy the father may be, unless the child becomes chargeable to the public as a pauper.[7] The construction put upon the statute of 43 Eliz. renders it applicable only to relations by blood, and the husband is not liable fur the expenses of the maintenance of the child of the wife by a former husband;[8] nor for the expense of the maintenance of the wife's mother.[9] If, however, he takes the wife's child into his own house; he is then considered as standing in loco parentis, and is responsible for the maintenance and education of the child; for, by that act, he holds the child out to the world as part of his family.[10] There was great force of reason and justice in the extra judicial dicta referred to in the case in Strange, that the husband ought to maintain the parents of his wife, if he was able, and they were not; because the wife was liable before marriage to support then, and her personal property, and the use of her real estate, passed, by the marriage, to the husband. But the statute does not reach the case; and when the wife, by her marriage, parts with her ability to maintain her children, she ceases to be liable.[11] If, however, the wife has separate property, the Court of Chancery would, undoubtedly, in a proper case, make an order charging that property with the necessary support of her children and parents.

A father is not bound by the contract of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one. Were it otherwise, a father who had an imprudent son, might be prejudiced to an indefinite extent. What is necessary for the child is left to the discretion of the parent; and where the infant is *sub potestate parentis,* there must be a clear omission of duty as to necessaries, before a third person can interfere, and furnish them, and charge the father. It will always be a question for a jury, whether, under the circumstances of the case, the father's authority was to be inferred.[12] If the father suffers the children to remain abroad with their mother, or if he forces them from home by severe usage, he is liable for their necessaries.[13] And in consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labor and services. There can be no doubt, that this right in the father is perfect while the child is under the age of fourteen years. But as the father's guardianship by nature continues until the child has arrived to full age, and as he is entitled by statute to constitute a testamentary guardian of the person and estate of his children until the age of twenty-one, the inference would seem to be, that he was, in contemplation of law, entitled to the custody of the persons, and to the value of the services and labor of his children, during their minority. This is a principle assumed by the elementary writers;[14] and the cases of *Day v. Everett*,[15] and *Gale v. Parrott*,[16] are to the same effect, and take the principle to be unquestionable; though, in the latter case, it was observed, that if the minor was eloigned from the parent, he might, of necessity, be entitled to receive the fruits of his own labor, and that it would require only slight circumstances to enable the court to infer the parent's consent to the son's receipt and enjoyment of his own wages. The father, says Blackstone, has the benefit of his children's labor while they live with him, and are maintained by him, and this is no more than he is entitled to from his apprentices or servants.

The father may obtain the custody of his children by the writ of *habeas corpus*, when they are improperly detained from him;[17] but the courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere

upon *habeas corpus*, and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father against the will of the child. They will even control the right of the father to the possession and education of his child, when the nature of the case appears to warrant it.[18] The father may also maintain trespass for a tort to an infant child, provided he can show a loss of service, for that is the gist of the action by the father.[19]

The duty of educating children in a manner suitable to their station and calling, is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either from the want of good habits, and the means of subsistence, or from want of rational and useful occupation. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance. This parental duty is strongly and persuasively inculcated by the writers on natural law.[20] Solon was so deeply impressed with the force of the obligation, that he even excused the children of Athens from maintaining their parents, if they had neglected to train them up to some art or profession.[21] Several of the states of antiquity were too solicitous to form their youth for the various duties of civil life, to entrust their education solely to the parent. Public institutions were formed in Persia, Crete, and Lacedaemon, to regulation and promote the education of children, in things calculated to render them useful citizens, and to adapt their minds and manners to the genius of the government. Great pains have been taken, and munificent and noble provision made, in this country, to diffuse the means of knowledge, and to render ordinary instruction accessible to all. Several of the states[22] have made the maintenance of public schools an article in their constitutions. In the New England states, each town and parish are obliged, by law, to maintain an English school a considerable portion of the year, and the school is under the superintendence of the public authority, and the poorest children in the country have access to these schools. The state of Connecticut has a large and growing school fund, economically and wisely managed, and appropriated, in a great degree, to the support of common schools. Ordinary education is so far enforced in that state, that if parents will not teach their children the elements of knowledge, by causing them to read the English tongue well, and to know the laws against capital offenses, the selectmen of the town are enjoined to take their children from such parents, and bind them out to proper masters, where they will be educated to some useful employment, and will be taught to read and write, and the rules of arithmetic necessary to transact ordinary business. This law, said the late Chief Justice Reeve,[23] has produced very astonishing effects, and to it is to be attributed the knowledge of reading and writing, so universal among the people of that state.[24] In Massachusetts they have nothing which bears the name of a school fund, yet liberal donations have been made for the support of grammar schools, ordained by law in every town of the state of a certain size. The legislature of Virginia, also, some years ago, appropriated the greater part of the income of a literary fund, to the establishment of schools for the education of the poor throughout the state.

The laws of our own state were formerly exceedingly deficient on this subject, and we had no legal provision for the establishment of town schools, or the common education of children, except the very unimportant authority given to the overseers of the poor, and two justices, to bind out poor children as apprentices, according to their degree and ability, and the obligation imposed upon their masters to learn them to read and write. But since the year 1795, a new and bright light shines upon our domes tic annals, and from that era we date the commencement of a great and spirited effort on

the part of government, to encourage common schools throughout the state. The annual sum of 50,000 dollars was appropriated for five years, and distributed equitably among the several towns, for the establishment and encouragement of schools, for teaching children the most useful and necessary branches of a good English education. A sum equal to one half of the sum granted by the state to each town, was directed to be raised by each town, during the same period, for an additional aid to the schools.[25] In 1805, a permanent fund for the support of common schools was first provided,[26] and it was enlarged by subsequent legislative appropriations.[27] An increasing anxiety for the growth, security, and application of the fund, and a deep sense of its value and importance, were constantly felt. In 1811, the legislatures[28] took measures for the preparation and digest of a system for the organization and establishment of common schools, and the distribution of the interest of the school fund. In 1812,[29] the present system was established, under the direction of an officer known as the superintendent of common schools. The interest of the school fund was directed to be annually distributed among the several towns, in a ratio to their population, provided the towns should raise a sum equal to their proportion, by a tax upon themselves. Each town was directed to be divided into school districts, and town commissioners and school inspectors. were directed to be chosen, and the children who had access to these schools were to be between the ages of five and fifteen years.

This system thus established, has prospered to an astonishing degree. In 1820, the fund distributed was $80,000, in addition to a like sum, which was raised by taxation, in the several school districts, and applied in the same way. In 1823, there were 7382 school districts, and consequently as many common schools; and upwards of 400,000 children, or more than one fourth of our entire population, were instructed in that year, in these common schools. The sum of $182,000, and upwards, was expended in that year, from the permanent school fund, and the moneys raised by town taxes, for that purpose, in the support of common schools. The general and local school fund, according to the report of the superintendent of common schools, of the 8th January, 1824, amounted to $1,637,000; and it is well known to be in a course of steady, progressive enlargement.

According to the last annual report of the superintendent of common schools, made in January, 1827, there were 431,601 children taught at the public schools, without including those belonging to 570 school districts, from which no reports were received. The instruction is probably very scanty in many of the schools, from the want of school books and good teachers; but the elements of knowledge are universally taught, and the foundations of learning are laid. The school fund is solid and durable; and it is placed under the guaranty of the constitution, which declares,[30] that "the proceeds of all lands belonging to this state, except such parts thereof as may be reserved or appropriated to public use, which shall hereafter be sold or disposed of, together with the fund denominated the common school fund, shall be and remain a perpetual fund, the interest of which shall be inviolably appropriated and applied to the support of common schools, throughout this state."

Such a liberal and efficient provision for the universal diffusion of common and useful instruction, may be contemplated with just pride, and with the most cheering anticipations.

The remaining branch of parental duty, consists in making competent provision, according to the condition and circumstances of the father, for the future welfare and settlement of the child; but this duty is not susceptible of municipal regulations, and it is usually left to the dictates of reason and natural affection. Our laws have not interfered on this point, and have left every man to dispose of

his property as he pleases; aid to point out, in his discretion, the path his children ought to pursue. The writers on general law allow, that parents may dispose of their property as they please, after providing for the necessary maintenance of their infant children, and those adults, who are not of ability to provide for themselves.[31] A father may, at his death, devise all his estate to strangers, and leave his children upon the parish, and the public can have no remedy by way of indemnity against the executor. "I am surprised," said Lord Alvanley,[32] "that this should be the law of any country, but I am afraid it is the law of England."

II. Of the Rights of Parents.

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust. This is the true foundation of parental power; and yet the ancients generally carried the power of the parent to a most atrocious extent over the person and liberty of the child. The Persians, Egyptians, Greeks, Gauls, and Romans, allowed to fathers a very absolute dominion over their off spring, and the liberty and lives of the children were placed within their power.[33] It was not an absolute license of power among the Romans, to be executed in a wanton and arbitrary manner. It was a regular domestic jurisdiction, though in many instances, this paternal power was exercised without the forms of justice. The power was weakened greatly in public opinion by the time of Augustus, under the silent operation of refined manners and cultivated morals. It was looked upon as obsolete, when the pandects were compiled.[34] Bynkershoek was of opinion, that the power ceased under the Emperor Hadrian. The Emperor Constantine made the crime capital as to adult children. In the age of Tacitus, the exposing of infants was unlawful; but merely holding it to be unlawful, was not sufficient.[35] When the crime of exposing and killing infants was made capital, under Valentinian and Valens, then the practice was finally exterminated[36] and the paternal power reduced to the standard of reason, and of our own municipal law, which admits only the *jus domesticae emendationis*, or right of inflicting moderate correction, under the exercise of a sound discretion.[37] In every thing that related to the domestic connections, the English common law has an undoubted superiority over the Roman. Under the latter, the paternal power continued during the son's life, and did not cease even on his arriving at the greatest honors. The son could not sue without his father's consent, nor marry without his consent; and whatever he acquired, he acquired for the father's advantage; and in respect to the father, the son was considered rather in the light of property than as a rational being. Such a code of law was barbarous, and unfit for a free and civilized people; and Justinian himself pronounced it inhuman, and mitigated its rigor so far as to secure to the son the property he acquired by any other means than by his father; and yet even as to all acquisition, of the son, the father was still entitled to the use.[38]

The power allowed by law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education. The father has also the guardianship and custody of the property of his children, during their minority; and he may take the rents and profits thereof, but he will be responsible for the same to the child when he arrives to maturity. The father may, likewise, by deed or will, dispose of the custody and tuition of his children, under age. This power was given by the English statute of 12 Charles II c. 24; and it has been adopted in this state;[39] and the person so invested, may take the care and management of the estate, real and personal, belonging to the infants; and may maintain actions against any person who shall wrongfully take or detain them from his custody.

This power of the father ceases on the arrival of the child at the age of majority, which has been variously established in different countries, but with us is fixed at the age of twenty-one; and this is the period of majority now fixed by the French civil code.[40] In this respect, the Napoleon code was an improvement upon the former law of France,[41] which, in imitation of the civil law, continued the minority to the end of twenty-five years.

In case of the death of the father during the minority of the child, his authority and duty, by the principles of natural law, would devolve upon the mother; and some nations, and particularly the French, in their new civil code,[42] have so ordained. The father is, however, under the French law, allowed, by will, to appoint an adviser to the mother, without whose advice, she can do no act relating to the guardianship. This is analogous to our law, which allows the father, and the father only, to create a testamentary guardianship of the child. But if there be no such testamentary disposition, the mother, after the father's death, is entitled to be guardian of the person and estate of the infant, until it arrives at the age of fourteen, when it is of sufficient age to choose a guardian for itself.[43]

III. Of the Duties of Children.

The duties that are enjoined upon children to their parents, are obedience and assistance during their own minority, and gratitude and reverence during the rest of their lives. This, as well as the other primary duties of domestic life, have generally been the objects of municipal law. Disobedience to parents was punished under the Jewish law with death;[44] and with the Hindus, it was attended with the loss of the child's inheritance.[45] Nor can the classical scholar be at a loss to recollect how assiduously the ancient Greeks provided for the exercise of filial gratitude. They considered the neglect of it to be extremely impious, and attended with the most certain effects of divine vengeance.[46] It was also an object of civil animadversion. Solon ordered all persons who refused to make due provisions for their parents, to be punished with infamy; and the same penalty was incurred for personal violence towards them.[47] When children undertook any hazardous enterprise, it was customary to engage a friend to maintain and protect their parents; and we have a beautiful allusion to this custom in the speech which Virgil puts into the mouth of Euryalus, when rushing into danger.[48]

The laws of this state have, in some small degree, taken care to enforce this duty, not only by leaving it in the power of the parent, in his discretion, totally to disinherit, by will, his ungrateful children; but by compelling the children, and grand children, (being of sufficient ability,) of poor, old, lame, or impotent persons, not able to maintain themselves, to relieve and maintain them.[49] This is the only legal provision (for the common law makes none) made to enforce a plain obligation of the law of nature.[50]

IV. Of Illegitimate Children.

I proceed next to examine the situation of illegitimate children, or bastards, who are begotten and born out of lawful wedlock.

These unhappy fruits of illicit connection were, by the civil and canon laws, made capable of being legitimated by the subsequent marriage of their parents; and this doctrine of legitimation prevails at this day, with different modifications, in France, Germany, Holland, and Scotland.[51] But this

principle has never been introduced into the English law; and Sir William Blackstone,[52] has elaborately and zealously maintained, in this respect, the superior policy of the common law.[53] We have, in relation to t his subject, a memorable fact in English history. When the English bishops, in the reign of Hen. III, petitioned the lords, that they would consent that persons born before matrimony should be legitimate, as well as those born [afterwards, with re]spect to hereditary succession, inasmuch as a canon of the church had accepted all such as legitimate, so far as regarded the right of inheritance, the earls and barons, with one voice, answered, *quod nolunt leges Angliae mutare, quae hucusque usitate sunt et approbatae*[54] [they would not change the laws of England which were hitherto used and approved].

Mr. Selden, in his Dissertation upon Fleta,[55] mentions, that the children of John of Gaunt, Duke of Lancaster, born before marriage, were legitimated by an act of Parliament in the reign of Richard II founded on some obscure common law custom; and Mr. Barrington, in his Observations upon the Statutes,[56] speaks of the Roman law on this subject as a very humane provision in favor of the innocent. The opposition of the English barons to the introduction of the rule of the civil law, is supposed to have arisen, not so much from any aversion to the principle itself, as to the sanction which would thereby be given to the superiority of the civil over their own common law. In the new civil code of France,[57] the rule of the civil law is adopted, provided the illegitimate children were not offspring of incestuous or adulterous intercourse, and were duly acknowledged by their parents before marriage, or in the act of celebration. Voet[58] presses this doctrine of legitimating by a subsequent marriage, to a very great extent. Thus, if A. has a natural son, and then marries another woman, and has a son, who is at his birth the lawful heir, and his wife dies, and he then marries the woman by whom he had the natural son, and has sons by her; according to the doctrine of the Dutch law, as stated by Voet, the bastard thus legitimated, excludes, by his right of primogeniture, not only his brothers of the full blood, by the last marriage, but the son of the first marriage. The latter is thus deprived of the right of inheritance, once vested in him by his primogeniture, by an act of his father to which he never consented. The civil law rule of retrospective legitimation, will sometimes lead to this rigorous consequence.

But not only children born before marriage, but those that are born so long after the death of the husband, as to destroy all presumption of their being his; and, also, all children born during the long and continued absence of the husband, so that no access to the mother can be presumed, are reputed bastards.[59] The question of the legitimacy or illegitimacy of the child of a married woman, is now regarded as a matter of fact, resting on presumptions going to establish a conclusion one way or the other, and it is a question for a jury to determine.[60] It is not necessary that I should dwell more particularly on this branch of the law, and the principles and reasoning upon which this doctrine of presumption applicable to the question of legitimacy, is founded, will be seen at large in the cases to which I have referred.

A bastard being, in the eye of our law, *nullius filius*,[61] or as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelliguntur*,[62] be has no inheritable blood, and is incapable of inheriting as heir, either to his putative father, or his mother, or to any one else, nor can he have heirs but of his own body.[63] This rule, so far at least as it excludes him from inheriting as heir to his mother, is supposed to be founded partly in policy, to discourage illicit commerce between the sexes. Mr. Selden said,[64] that not only the laws of England, but those of all other civil states, excluded bastards from inheritance, unless there was a subsequent legitimation. Bastards are, undoubtedly, incapable of taking in this state, under our law of descents, which speaks

of lawful issue, and we follow the rule of the English law; but in several of these United States, the rigor of the English law has been relaxed, and bastards can inherit to their mother equally as if they were her lawful children.[65] The same rule has been recently declared in Connecticut, in the case of *Heath v. White*,[66] and it had long before been adjudged, that natural children by the same mother were heirs to each other.[67] These decisions rest on a very reasonable principle, that the relation of mother and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity. This was agreeable to the ordinance of Justinian, who, to a certain extent, and with exceptions, allowed a bastard to inherit to his mother;[68] and. in several cases in the English law, the obligations of consanguinity between the mother and her illegitimate offspring, have been recognized. The rule, that a bastard is *nullius filius*, applies only to the case of inheritances.[69] It has been held to be unlawful for him to marry within the levitical degrees,[70] and a bastard has been considered to be within the marriage act of 26 Geo. II which required the consent of the father, guardian, or mother, to the validity of the marriage of a minor.[71] He also takes and follows the settlement of his mother.[72] With the exception of the right of inheritance and succession, bastards, by the English law, as well as by the laws of France, Slain, and Italy, are put upon an equal footing with their fellow subjects;[73] and in this country we have made very considerable advances towards giving them also the capacity to inherit, by admitting them to possess inheritable blood. We have, in this respect, followed the spirit of the laws of some of the ancient nations, who denied to bastards an equal share of their father's estate, (for that would be giving too much countenance to the indulgence of criminal desire,) but admitted them to a certain portion, and would not suffer them to be cast naked and destitute upon the world.[74]

The mother, or reputed father, is chargeable by law with the maintenance of the bastard child, in such way as any two justices of the peace of the county shall think meet; and the goods, chattels, and real estate of the parents, are seizable for the support of such children, if the parents have absconded. The reputed father is liable to arrest and imprisonment, until he gives security to indemnify the town chargeable with the maintenance of the child.[75] These provisions are intended for the public indemnity, and were borrowed from the several English statutes on the subject; and similar regulations to coerce the putative father to maintain the child, and indemnify the town or parish, have been adopted in the several states.

The father of a bastard child is liable upon his implied contract, for its necessary maintenance, without any compulsory order being made upon him, provided he has adopted the child as his own, and acquiesced in any particular disposition of it.[76] The adoption must be voluntary, and with the consent of the mother, for the putative father has no legal right to the custody of a bastard child, in opposition to the claim of the mother; and, except the cases of the intervention of the town officers, under the statute provisions, or under the implied contract founded on the adoption of the child, the mother has no power to compel the putative father to support the child. She has a right to the custody and control of it as against the putative father, and is bound to maintain it as its natural guardian;[77] though, perhaps, the putative father might assert a right to the custody of the child as against a stranger.[78]

There are cases in which the courts of equity have regarded bastards as having strong claims to equitable protection, and have decreed a specific performance of voluntary settlements made by the father its favor of the mother of her natural child.[79] On the other hand, there are cases in which the courts of equity have withheld from the illegitimate child every favorable intendment which the lawful heir would have been entitled to as of course. Thus, in *Fursaker v. Robinson*,[80] a natural

daughter brought her bill against the heir at law to supply a defective conveyance from her father to her, but the Chancellor refused to assist her, on the ground that she was a mere stranger, being *nullius filia*, and not taken notice of by the law as a daughter, and that the father was not under any legal obligation to provide for her as a child, though he might be obliged by the law of nature, and so the conveyance was voluntary, and without any consideration. This hard decision was made by Lord Cowper in 1717; but the language of Lord Ch. King, in a subsequent case, to which I have just alluded,[81] is certainly much more conformable to justice and humanity. "If a man," says he, "does mislead an innocent woman, it is both reason and justice that he should make her reparation. The case is stronger in respect to the innocent child, whom the father has occasioned to be brought into the world in this shameful manner, and for whom, in justice, he ought to provide."

NOTES

1. Paley's Moral Philosophy, p. 223. Taylor's Elements of the Civil Law, 383. Pufendorf's *Droit de la Nature*, b. 4. ch. 11. e. 4. and 5.

2. Grotius, b. 2. c. 7. s. 4.

3. Potter's Greek Antiq. vol. ii. 351. Dig. 28. 2. 30. Novel, 115. ch. 3.

4. Laws of N.Y. sess. 36. ch. 78. s. 21, 22.

5. *Simpson v. Robertson*, 1 Esp. Cases, 17. *Ford v. Fothergill*, ibid. 211. *Stone v. Carr*, 3 Esp. Cas. 1. *Stanton v. Wilson*, 3 Day, 37. *Van Valkinburgh v. Watson*, 13 Johns. Rep. 480.

6. *Hughes v. Hughes*, 1 Bro. 387. *Whipple v. Dow*, 2 Mass. Rep. 415. *Dawes v. Howard*, 4 Mass. Rep. 97.

7. 1 Lord Raym. 699. *Parish of St. Andrews v. Mendez de Bretz*.

8. *Tubb v. Harrison*, 4 Term Rep. 118.

9. *Rex v. Munden*, 1 Str. 190.

10. *Stone v. Carr*, 3 Esp. Cases, 1.

11. *Billingsly v. Critchet*, 1 Bro. 268. *Cooper v. Martin*, 4 East, 76.

12. *Baker v. Keen*, 2 Starkie, 501. *Valkinburgh v. Watson*, 13 Johns. Rep. 480.

13. Lord Eldon, in 3 Esp. Cases, 252. *Rawlins v. Van Dyke*, 3 Day, 37. *Stanton v. Wilson*.

14. 1 Black's Com. 453. Reeves' Domestic Relation, 290.

15. 7 Mass. Rep. 145.

16. 1 N. H. Rep. 28.

17. *The King v. De Manneville*, 5 East, 221.

18. *Archer's case*, 1 Lord Raym 673. *Rex v. Smith*, Str. 982. *Rex v. Delaval*, 3 Burr. 1434. *Commonwealth v. Addicks*, 5 Binney, 520. *The case of McDowles*, 8 Johns. Rep. 328. *Commonwealth v. Nutt*, 1 Brown's Penn. Rep. 143. *Creuzer v. Hunter*, 2 Cox's Cases, 242. *De Manneville v. De Manneville*, 10 Vesey, 52.

19. *Hall v. Hallander*, 4 Barn. & Cress. 860.

20. Pufendorf, b. 4. c.11. s. 5. Paley's Moral Philosophy, p. 224, 225.

21. Plutarch's Life of Solon.

22. States of Massachusetts, Vermont, Connecticut, Pennsylvania, and Indiana.

23. Domestic Relations, p. 287.

24. During the twenty-seven years in which that distinguished lawyer was in extensive practice of the law, he informs us he never found but one person in Connecticut that could not write.

25. Act of 9th of April, 1795, ch. 75.

26. Act of April 2d, 1805, ch. 66.

27. Act of March 13th, 1807, ch. 32.

28. Act of April 9th, 1811, ch. 246. s. 54.

29. Act of June 19th, 1812, ch. 242.

30. Art. 7. sect. 10.

31. Puf. *Droit de la Nature*, lib. 4. ch. 11. sect. 7.

32. 5 Vesey, 444.

33. Taylor's Elements of the Civil Law, p. 395. 397. 402. *Voyage du Anackarsis en Greece*, tom. 3. ch. 26. Caesar de Bel. Gal. lib. 6, ch. 18. The exposition of infants, was the horrible and stubborn vice of almost all antiquity. Gibbon's Hist. vol. viii. p. 55-57. *Noodt de Partus Expositione et Nece apud veleres*; and which is considered to be a singular work of great accuracy on this subject.

34. *Liceat eos exheredare, quos occidere licebat.* Dig. 28. 2. 11.

35. *Numerum liberorum finire, aut quemquam ex agnatis necare, flagilium habetur. plusque ibi boni mores valent, quam alibi bonae leges*. Tac. de mor. Ger. c. 19.

36. Dr. Taylor, in his Elements of the Civil Law, p. 403-406, gives a concise history of the progress of the Roman jurisprudence, in its efforts to destroy this monstrous power of the parent; but Bynkershoek has composed a regular treatise, with infinite learning on this subject. It is entitled, *Opusculum de jure occidendi, vendendi, et exponendi liberos apud veteres Romanos*. Opera, tom. 1. 346. and it led him into some controversy with his predecessor, the learned Noodt, on the doubtful points and recondite learning, attached to that discussion.

37. 1 Hawk. P. C. b. 1. ch. 60. sect. 23.

38. Inst. 2. 9. 1.

39. L. N.Y. sess. 36. ch. 23. sect. 18, 19.

40. No. 488.

41. *Instit. Droit Francois*, par Argou, b. 1. ch. 7

42. No. 390-402.

43. Litt. sect. 123. 3 Co. 38. Co. Litt. 84. b. 2 Atk. 14. 3 Com. Dig. tit. Guardian, B. D. E. 7 Vesey, 348.

44. Deut. 21:18.

45. Gentoo Code. by Halhed, p. 64. The first emigrants to Massachusetts made filial disobedience a capital crime, according to the Jewish law. Governor Hutchinson, in his History of Massachusetts, vol. i. 441. says that he had met with but one conviction under that sanguinary law, and that offender was reprieved.

46. Ibid, b. 9. v. 454. Odyss. b. 2 v. 134. Hesiod's Oper. & Die. b. 1. v. 182-83.

47. Potter's Greek Antiq. vol. ii. 347-351.

48. *Tu, oro, solare inopem et succurre relictae.* Aeneid, 9, 283.

49. Laws of N.Y. sess. 36. ch. 78. s. 21.

50. *Edwards v. Davis*, 16 Johns. Rep. 281. *Rex v. Munden*, Str. 190

51. 2 Domat. 361. Code Civil, No. 331. 1 Ersk. Inst. 116. Inst. 1. 10. 13. Code, 5. 27. 10. Butler's note, 181. to lib. 3. Co.

Litt. Voet. Com. ad Pand. 25. 7. s. 6. and 11. *Dissertation dans laquelle on discute les Principes du Droit Romain, et du Droit Francois, par rapport aux Batards. Oeuvres de Chancelier D'Aguesseau*, tom. 7. 381. 470.

52. Com. vol. i. 455.

53. It is a remarkable fact, however, that in eleven of the United States, the rule of the civil law prevails on this point, *viz.* in Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, and Ohio. Griffith's Law Reg. *passim*.

54. 1 Black. Com. 456. Stat. of Merton, 20. Hen. III. ch. 9.

55. Ch. 9. s. 2.

56. P. 38.

57. No. 331, 332, 333, 335.

58. Com. ad Pand. 25. 7. s. 11.

59. Cro. Jac. 541. Co. Litt. 244. a. 1 Blacks. Com. 456, 457.

60. 3 P. Wms. 275, 276. Str. 925. Salk. 123. Harg. note, No. 192 to lib. 2. Co. Litt. Butler's note No. 178. to lib. 3. Co. Litt. 4 Term. Rep 251. 356. 4 Bro. 90. 8 East, 123. Code Napoleon, No. 312-318. Com. Dig tit. Bastard, A. B.

61. Co Litt. 123. a.

62. Inst. 1. 10. 12.

63. 1 Blacks. Com. 459.

64. Note C. to Fortescue de laud. leg. Ang. ch. 40.

65. This is understood to be the law in Vermont, Virginia, North Carolina, Tennessee, Ohio, Indiana, and, under certain modifications, in Louisiana. Griffith's Register, passim. In Louisiana, if a married man pretending to be single, deceives a woman, the wife and children are entitled to all the rights of a legitimate wife and children. Christy's Dig. tit. Husband and Wife, 2.

66. 5 Conn. Rep. 228

67. *Brown v. Dye*, 2 Root, 280.

68. Code, lib. 6. 57. 5.

69. Buller, J. 1. Term. Rep. 101. *Bow v. Nottingham*, 1 N.H. Rep. 260.

70. *Haines v. Jeffel*, 1 Lord Raym. 68.

71. *King v. Inhabitants of Hodnett*, 1 Term Rep. 96.

72. 3 Johns. Rep. 15. 17 Johns. Rep. 41. 12 Mass Rep. 429. 5 Conn.Rep. 584.

73. *Oeuvres D'Agnesseau*, tom. 7. 384, 385. Butler's note, No. 176. to lib. 3 Co. Litt. 1 Blacks. Com. 459.

74. Potter's Greek Antiq. vol. ii. 340. Gentoo code, by Halhed, p. 73. The protection and tenderness which the Goddess Fortune is supposed to bestow upon foundlings, is, says Mr. Gifford, one of the most amusing and animated pictures that the keen and vigorous fancy of Juvenal ever drew:

Stat fortuna improba noctu,
Arridens nudis infantibus. Hos fovet omnes,
Involvitque situ. Sat. 6. v. 603-605.

75. Laws of N.Y. sess. 36. ch. 12.

76. *Hesketh v. Gowing*, 5 Esp. N. P. Rep. 131.

77. *The King v. Soper*, 5 Term Rep. 278. *The People v. Landt*, 2 Johns. Rep. 375. *Carpenter v. Whitman*, 15 Johns. Rep.

208. *Wright v.Wright*, 2 Mass. Rep. 109.

78. *Rex v. Cornforth*, Str. 1162.

79. *Marchioness of Annandale v. Harris*, 2 P. Wms. 432. *Florton v. Gibson*, 4 S. Car. Equity Rep. 139. *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 338.

80. Prec. in Ch. 475. 1 Eq. Cas. Abr. 128. pl. 9. Gilb. Eq. Rep. 339. Gilb. E. R. 256.

81. 2 P. Wms. 432.

LECTURE 30

Of Guardian and Ward

THE relation of guardian and ward, is nearly allied to that of parent and child; and it takes place on the death of the father, and the guardian is intended to supply his place during the child's minority.

Thee are two kinds of guardianship; one by the common law, and the other by statute; and there were three kinds of guardians at common law, *viz.*: guardian by nature, guardian by nurture, and guardian in socage.[1]

(1.) Guardian by nature, is the father, and on his death, the mother; and this guardianship on the part of the father extends to the age of twenty-one years of the child, and it extends only to the custody of his person.[2] It was doubted for some time in the books, whether the guardian by nature was entitled to the possession of the personal estate of the infant, and could give a competent discharge to an executor on the payment of a legacy belonging to the child; and it was finally understood that he could not.[3] The father has the first title to guardianship by nature, and the mother the second; and according to the strict language of our law, says Mr. Hargrave,[4] only the heir apparent can be the subject of guardianship by nature, and therefore it is doubted whether such a guardianship can be of a daughter, whose heirship is presumptive, and not apparent. But as all the children, male and female, equally inherit with us, the guardianship by nature would seem to extend to all the children. The Court. of Chancery, for just cause, may interpose and control that authority and discretion which the father has in general in the education and management of his child.[5]

(2.) Guardian by nurture, occurs only when the infant is without any other guardian, and it belongs exclusively to the parents, first to the father, and then to the mother, It extends only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. As it is concurrent with guardianship by nature, it is in effect merged in the higher and more durable title of guardian by nature.[6] This guardianship is said to apply only to the younger children, who are not heirs apparent; and as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete.

(3.) Guardian in socage, has the custody of the infant's lands, as well as his person. The common law gave this guardianship to the next of blood to the child, to whom the inheritance[7] could not possibly descend; and therefore, if the land descended to the heir on the part of the father, the mother, or other next relation on the part of the mother, had the wardship; and so if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship.[8] These guardians in socage cease, when the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, and they are then accountable to the heir for the rents and profits of the estate.[9] If the infant, at that age, does not elect a guardian, the guardian in socage continues.[10] The common law, like the law of Solon,[11] was strenuous in rejecting all persons to whom the inheritance might possibly arrive, and its advocates triumph in this respect over the civil law,[12] which committed the burden of the guardianship to the person who was entitled to the emolument of the succession. As we have admitted the half blood to inherit equally with the whole blood, this jealous rule would, still more extensively with us, prevent relations by blood from being guardians in socage. The law of Scotland, and the ancient law of France, took a middle course, and may be supposed, in that respect, to have been founded in more wisdom than either the civil or the common law. They committed the pupil's estate to the person entitled to the legal succession,

because he is most interested in preserving it from waste; but excluded him from the custody of the pupil's person, because his interest is placed in opposition to the life of the pupil.[13] And yet, perhaps, the English, the Scots, and the French laws, equally proceeded on too great a distrust of the ordinary integrity of mankind. They might, with equal propriety, have deprived children of the custody and maintenance of their aged and impotent parents. It is equally a mistake in politics and in law, to consider mankind degraded to the lowest depths of vice, or to suppose them acting under the uniform government of virtue. Man has a mixed character, and practical wisdom does not admit of such extreme conclusions.[14] The old rule against committing the custody of the person and estate of a lunatic, to the heir at law, has been overruled as unreasonable. If a presumption must be indulged, as was observed in one of the cases, it would be in favor of kinder treatment, and more patient fortitude, from a daughter, as committee of the person and estate of an aged and afflicted mother, than from the collateral kindred. The fears and precautions of the lawgiver on this subject, imply, according to Montesquieu, a melancholy consciousness of the corruption of public morals.[15]

This guardianship is a personal trust, and is not transmissible by succession, nor devisable, nor assignable. It extends, not only to the person, and all the socage estate, but to hereditaments, which do not lie in tenure, and to the personal estate. This is the opinion of Mr. Hargrave, and he supports it by strong reasons;[16] notwithstanding, it is admitted, that the title to guardian in socage cannot arise unless the infant be seized of lands held in socage. This guardianship in socage may be considered as gone into disuse, and it can hardly be said to exist in this country, for the guardian must be sonic relation by blood who cannot possibly inherit, and such a case can rarely exist.

(4.) Testamentary guardians, to which I have already alluded, are founded on the deed, or last will of the father, and they supersede the claims of any other guardian, and extend to the person, and real and personal estate of the child, and continue until the child arrives at full age. This power to constitute a guardian by will, was given by the statute of 12 Charles II,[17] and it has been adopted in this state, and, probably, throughout this country. A will, merely appointing a testamentary guardian, need not be proved; and though the statute speaks of appointment by deeds as well as by will, yet, as such a deed is ambulatory and revocable during the testator's life, it is nothing more than a testamentary instrument in the form of a deed. The better opinion is, that such a testamentary guardian will continue till the age of twenty-one, though the infant be a females and marry in the mean time, if the will be explicit as to the duration of the trust; for the statute gives that authority to the father. It has been held, that the marriage of a daughter will determine the guardianship as to her, though not so as to a son until he comes of age; and Lord Hardwicke said, in *Mendes v. Mendes*,[18] that it had been so adjudged in *Lord Shaftesbury's case*. But in the subsequent case of *Roach v. Garvan*,[19] the language of the Chancellor was, that the marriage would not, of itself, determine a guardianship, though the court would never appoint a guardian to a married female infant. The latter cases lead to the conclusion, that the marriage of a female infant does not absolutely determine the guardianship, and that it would require a special order in chancery to do it.[20] The cases are not very clear and consistent on this point. It would be quite reasonable, that the marriage of a female ward should determine the guardianship, both as to her person and estate, if she married an adult. It ought to be so as to her person, but not as to her estate, if she married a minor. Upon the marriage of a male ward, the guardianship continues as to his estate, though it has been thought otherwise as to his person.[21]

(5.) The distinction of guardians by nature, and by socage, seems now to be lost, or gone into oblivion, and those several kinds of guardian have become essentially superseded in practice by the

chancery guardians, or guardians appointed by the Court of Chancery, or by the surrogates in the respective counties of this state, and by courts of similar character, and having jurisdiction of testamentary matters, in the other states of the Union. Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions. The power of the Chancellor to appoint guardians for infants who have no father, is a branch of his general jurisdiction over minors and their estates, and that jurisdiction has been long and unquestionably settled.[22] The chancery guardian continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen.[23] Though the surrogate is authorized by statute[24] to allow of guardians who shall be chosen by infants of the age of fourteen years, and to appoint guardians for such as shall be within that age, in as full and ample a manner as the Chancellor may appoint or allow the same, upon the guardian giving adequate security for the faithful discharge of his trust; yet the surrogate's power extends only to the appointment of the guardian. The general jurisdiction over every guardian, however appointed, resides exclusively in chancery; and a guardian appointed by the surrogate, or by will, is as much under the superintendence and control of the Court of Chancery, and of the power of removal by it, as if he were appointed by that court.[25]

The practice in chancery, on the appointment of a guardian, is to require a master's report approving of the person and security offered. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate, in like manner as in the case of idiots and lunatics, there may be one committee of the person, and another of the estate. The guardian or committee of the estate always is required to give adequate security, but the guardian or committee of the person gives none.

The guardian of the estate has no further concern with, or control over, the real estate, than what relates to the rents and profits.[26] He may lease it during the minority of the ward, and no longer,[27] but he cannot sell without the authority of the Court of Chancery. He may sell the personal estate for the purposes of the trust, without a previous order of the court.[28] Whenever it becomes necessary, in this state, to have the real estate of an infant sold, there must be a guardian specially appointed for that purpose, and the infant is declared, in such cases, to be deemed, in regard to that property, a ward of the court.[29] But the provisions of this act do not apply to the case of a female infant who is married. The power given to the court to order a sale of the real estate of infants, was intended for their better maintenance and education, and not that the proceeds should be placed at the disposition of the husband.[30]

In addition to these general guardians, every court has the incidental power to appoint a guardian ad litem, and, in many cases, the general guardian will not be received as of course without a special order for the purpose.[31]

The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it ai a discount, the advantage is to accrue entirely to the infant's benefit. He is liable to an action of account at common law, by the infant, after he comes of age; and the infant, while under age, may, by his next friend, call the guardian to account by a bill in chancery. If the guardian has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, the guardian will be obliged to sustain that loss. The guardian must not convert the personal

estate of the infant into real, or buy land with the infant's money, without the direction of the Court of Chancery. If he does, the infant, when he arrives at fall age, will be entitled, at his election, to take the land, or the money, with interest; and if he elects the latter, chancery will take care that justice be done, by considering the ward as trustee for the guardian of the lands standing in his name, and will direct the ward to convey, And if the guardian puts the ward's money in trade, the ward will be equally entitled to elect to take the profits of the trade, or the principal, with compound interest, to meet those profits when the guardian will not disclose them. So, if he neglects to put the ward's money at interest, but negligently, and for an unreasonable time, suffers it to lie idle, or mingle it with his own, the court will charge him with simple interest, and, in cases of gross delinquency, with compound interest. These principles are understood to be well established in the English equity system, and the principal authorities upon which they rest were collected and reviewed in the chancery decisions in this state, to which, I apprehend, it will be sufficient to refer, as they have recognized the same doctrine.[32] Those doctrines, undoubtedly, pervade the jurisprudence of every part of the United States.[33]

NOTES

1. Co. Litt. 88. b. 3 Co. 37. b.
2. Co. Litt. 84. a. Litt. sect. 123. Co. Lit. 87. b. 88. 5 Mod. 221. *The King v. Thorp.*
3. *Cunningham v. Harris*, cited in 3 Bro. 186. *Genet v. Tallmadge*, 1 Johns. Ch. Rep. 3. *Miles v. Boyden*, 3 Pickering, 213.
4. Note 66, to lib. 2 Co. Litt.
5. 2 Fonb. Tr. of Equity, 234, note.
6. 3 Co. 38. b. Harg. note 67, to lib. 2 Co. Litt. Com. Dig. Tit, Guardian, D.
7. Con. Dig. tit. Guardian, B.
8. Lift. sect. 123.
9. Ibid.
10. Andrews' Rep. 313. *The King v. Pierson*.
11. Potter's Greek Antiq. vol. i. p. 174.
12. Co. Litt. 88. b. 1 Blacks. Com. 462.
13. Erskine's Inst. p. 79. Hallam on the Middle Ages, vol. 1, 106.
14. *Dormer's case*, 2 P. Wins. 262. *In the matter of Livingston*, 1 Johns. Ch. Rep. 436. Lord Hardwicke, in 2 Atk. 14.
15. *Esprit des Loix*, liv. 19. ch. 24.
16. Note 67. to lib. 2 Co. Litt.
17. Laws of N.Y. sess. 36. ch. 23. sec. 16.
18. 1 Ves. 89. 4 Atk. 619.
19. 1 Vesey, 160.
20. 4 Johns. Ch. Rep. 380. *In the Matter of Whitaker*.
21. Reeve's Domestic Relations, p. 328.
22. Harg. n. 70. to lib. 2 Co. Litt. 2 Fonb. Tr. Eq. 228. n. 10. Vesey, 63.

23. *In the Matter of Nicoll*, 1 Johns. Ch. Rep. 25.

24. Laws of N. Y. sess. 36. ch. 79. s. 30.

25. *In the Matter of Andrews*, 1 Johns. Ch. Rep. 99. *Ex parte Crumb*. 2 Johns. Ch. Rep. 439. *Duke of Beaufort v. Berly*, 1 P. Wms. 702.

26. *Genet v. Tallmadge*, 1 Johns. Rep. 561.

27. *Doe v. Hodgson*, 2 Wits. 129, 135. *Field v. Scheffelin*, 7 Johns. Ch. Rep. 154.

28. 7 Johns. Ch. Rep. 150. *Field v. Scheffelin*. *Ellis v. Essex M. Bridge*, 2 Pickering, 243.

29. Laws of N.Y. sess. 38. Ch. 106.

30. Matter of Whitaker, 4 Johns. Ch. Rep. 378.

31. Harg. note 70. and note 220 to lib. 2 Co. Litt. Carth. 255. *Huckle v. Wye*.

32. *Green v. Winter*, 1 Johns. Ch. Rep. 26. *Dunscomb v. Dunscomb*, ibid. 508. *Schieffelin v. Stewart*, ibid. 620. *Holdridge v. Gillespie*, 2 Johns. Ch. Rep. 30. *Davone v. Fanning*, ibid. 252. *Smith v. Smith*, 4 Johns. Ch. Rep. 281. *Evertson v. Tappen*. 5 Johns. Ch. Rep. 497. *Clarkson v. De Peyster*, 1 Hopkins, 424. *Rogers v. Rogers*, ibid. 515.

33. Reeve's Domestic Relations, p. 325, 326. 2 N.H. Rep. 218. 1 Mason, 345. 5 Conn. Rep. 475. 1 Peters' Rep. 364. 3 S.C. Eq. Rep. 241. 4 S.C. Eq. Rep. 702-705.

LECTURE 31

Of Infants

THE necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years. Within that period, minors cannot, except in a few specified cases, make a binding contract, unless it be for necessaries, or in marriage. Nor can they do any act to the injury of their property, which they may not avoid, or rescind, when they arrive at full age. The responsibility of infants for crimes by them committed, depends less on their age, than on the extent of their discretion and capacity to discern right and wrong.

Most of the acts of infants are voidable only, and not absolutely void; and it is deemed sufficient, if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done, and contracts made, in infancy. But when we attempt to ascertain from the books the precise line of distinction between void and voidable acts, and between the cases which require some act to affirm a contract, in order to make it good, and some act to disaffirm it, in order to get rid of its operation, we meet with much contradiction and confusion. A late writer, who has compiled a professed treatise on the law of infancy, concludes, from a review of the cases, that the only safe criterion by which we can ascertain, whether the act of an infant be void or voidable, is, "that acts which are capable of being legally ratified are voidable only; and acts which are incapable of being legally ratified are absolutely void.[1]

But, the criterion here given, does not appear to free the question from its embarrassment, or afford a clear and definite test. All the books are said to agree in one result, that whenever the act done may be for the benefit of the infant, it shall not be considered void, but he shall have his election when he comes of age, to affirm or avoid it; and this, says Ch. J. Parker,[2] is the only clear and definite proposition, which can be extracted from the authorities. But we are involved in difficulty, as that learned judge admits, when we come also to the application of this principle. In *Zouch v. Parsons*,[3] it was held by the K. B., after a full discussion and great consideration of the case, that an infant's conveyance by lease and release, was voidable only; and yet Mr. Preston[4] condemns that decision in the most peremptory terms, as confounding all distinctions and authorities on the point; and he says, that Lord Eldon repeatedly questioned its accuracy. On the other hand, Mr. Bingham[5] undertakes to show, from reason and authority, that the decision in *Burrow* is well founded; and he insists[6] that all the deeds, and acts, and contracts of an infant, except an account stated, a warrant of attorney, a will of lands, a release as executor, and a conveyance to his guardian, are, in judgment of law, voidable only, and not absolutely void. But the modern as well as ancient cases, are much broader in their exception. Thus it is held, that a negotiable note, given by an infant, even for necessaries, is void;[7] and his acceptance of a bill of exchange is void;[8] and his contract as security for another, is absolutely void;[9] and a bond, with a penalty, though given for necessaries, is void.[10] It must be admitted, however, that the tendency of the moderns decision is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election when they became of age, either to affirm or disallow them. If their contracts were absolutely void, it would follow as a consequence, that the contract could have no effect, and the party contracting with the infant, would be equally discharged.[11] The doctrine of the case of *Zouch v. Parsons*, has been recognized as law in this country, and it is not now to be shaken. On the authority of that case, even the bond of an infant has been held to be voidable only at his election.[12] It is an equitable rule, and most for the infant's

benefit, that his conveyances to and from himself, and his contracts, in most cases, should be considered to be voidable only.[13] Lord Ch. J. Eyre, in *Keane v. Boycott*,[14] undertook to reconcile the doctrine of void and voidable contracts, on the ground, that when the court could pronounce the contract to be to the infant's prejudice, it was void, and when to his benefit, as for necessaries, it was good; and when the contract was of an uncertain nature as to benefit or prejudice, it was voidable only at the election of the infant. Judge Story declared these distinctions to be founded in solid reason,[15] and they are considered to be so, and the point is not susceptible of greater precision.

If the deed or contract of an infant be voidable only, it is nevertheless binding on the adult with whom he dealt, so long as it remains executory, and is not rescinded by the infant.[16] It is also a general rule, that no one but the infant himself, or his legal representatives, can avoid his voidable deed or contract; for while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit; and when dead, those alone should interfere who legally represent him.[17] The infant's privilege of avoiding acts which are matters of record, as fines, recoveries, and recognizances, is much more limited than his privilege of avoiding matters *ex pais*. The former must be avoided by him by writ of error, or *audita querela*, during his minority; but deeds, writings and parol contracts, may be avoided during infancy, or after he is of age, by his dissent, entry, suit, or plea, as the case may require.[18] If any act of confirmation be requisite after he comes of age, to give binding force to a voidable act of his infancy, slight acts and circumstances will be a ground from which to infer the assent: but the books appear to leave the question in some obscurity, when and to what extent a positive act of confirmation on the part of the infant is requisite. In *Holmes v. Blogg*,[19] the Ch. Justice observed, that in every instance of a contract, voidable only by an infant on coming of age, he was bound to give notice of disaffirmance of the contract in a reasonable time. The inference from that doctrine is, that without some act of dissent, all the voidable contracts of the infant would become binding. But there are other cases which assume that a voidable contract becomes binding upon an infant after he comes of age, only by reason of acts or circumstances, amounting to an affirmance of the contract.[20] In the case of *Jackson v. Carpenter*, and *Jackson v. Burchin*,[21] the infant had disaffirmed the voidable deed of his infancy, by an act equally solemn, after he became of age. This is the usual and the suitable course, when the infant does not mean to stand by his contract; and his confirmation of the act or deed of his infancy, may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence. In *Curtin v. Patton*,[22] the court required some distinct act, by which the infant either received a benefit from the contract after he arrived at full age, or did some act of express and direct assent and ratification; but that was the case of a contract considered to be absolutely void. In the case of voidable contracts, it will depend upon circumstances, such as the nature of the contract, and the situation of the infant, whether any overt act of, assent or dissent on his part be requisite to determine the fact of his future responsibility.

Infants are capable, for their own benefit, and for the safety of the public, of doing many binding acts. Contracts for necessaries are binding upon an infant, and he may be sued and charged in execution on such a contract, provided the articles were necessary fur him under the circumstances and condition in which he was placed.[23] The question of necessaries is governed by the real circumstances of the infant, and not by his ostensible situation; and, therefore, the tradesman who trusts him is bound to make due inquiry.[24] Lord Coke considers the necessaries of the infant to include victuals, clothing, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards."[25] If the infant lives with his father or guardian, and their care and protection

are duly exercised, he cannot bind himself even for necessaries.[26] It is also understood, that necessaries for the infant's wife and children, are necessaries for him;[27] and in all cases of contracts for necessaries, the real consideration may be inquired into. The infant is not bound to pay for the articles furnished, more than they were really worth to him as articles of necessity, and, consequently, he may not be bound to the extent of his contract; nor can he be precluded, by the form of the contract, from inquiring into the real value of the necessaries furnished.[28]

Infancy is not permitted to protect fraudulent acts; and, therefore, if an infant takes an estate, and agrees to pay rent, he cannot protect himself from the rent, after enjoying the estate, by pretense of infancy. If he pays money with his own hand, without a valuable consideration for it, he cannot get it back again. If he receives rents, he cannot demand them again when of age.[29] There are, however, many hard cases in which the infant cannot be held bound by his contracts, though made in fraud; for infants would lose all protection if they were to be bound by their contracts made by improper artifices, in the heedlessness of youth, before they had learned the value of character, and the just obligation of moral duties. Where an infant had fraudulently represented himself to be of age when he gave a bond, it was held that the bond was void at law.[30] But where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided payment of the price of the goods, on the plea of infancy, the vendor was held entitled to reclaim the goods, as having never parted with his property in them;[31] and it has been suggested, in a recent case,[32] that there might be an instance of such gross and palpable fraud, committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him. Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, or constructive torts, or frauds. But the fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant in trover, or case, by a change in the form of the action.[33] He is liable in trover for tortiously converting goods entrusted to him;[34] and in detinue, for goods delivered upon a special contract for a specific purpose;[35] and in *assumpsit*, for money which he has fraudulently embezzled.[36]

An infant has a capacity to do many other acts valid in law. He may bind himself as an apprentice, it being an act manifestly for his benefit; but, when bound, he cannot dissolve the relation.[37] The weight of opinion is, that he may make a testament of chattels, if a male, at the age of fourteen, and if a female, at the age of twelve years.[38] He may convey real estate, held as a naked trustee, under an order in chancery. The equity jurisdiction in this case, is grounded on the statute of 7 Ann, c 19. which has been reenacted in this state, and extends only to plain and express trusts.[39] Whatever an infant is bound to do by law, the general rule is, that the same will bind him, if he does it without suit at law.[40] If, therefore, he be a tenant in common, he may make a reasonable partition. He may discharge a mortgage on due payment of the mortgage debt. His acts as executor, at the age of seventeen, will bind him, unless they be acts which would amount to a *devastavit*. There was no occasion, said Lord Mansfield,[41] to enumerate instances. The authorities are express, that if an infant does a right act, which he ought to do, and which he was compellable to do, it shall bind him. We have already seen, that an infant of fourteen, if a male, and twelve if a female, may enter into a valid contract of marriage; but he is not liable to an action, on his executory contract, to marry, though the infant may sue an adult on such a promise.[42] In consequence of the capacity of infants, at the age of consent, to contract marriage, their marriage settlements, when reasonable, have been held valid in chancery; but it has long been an unsettled question, whether a female infant could bind her real estate by a settlement upon marriage. In *Drury v. Drury*,[43] Lord Ch. Northington decided, that the statute of 27 Hen. VIII, which introduced jointures, extended to adult women only, and that,

notwithstanding a jointure on an infant, she might waive the jointure, and elect to take her dower; and that a female infant could not, by any contract previous to her marriage, bar herself of a distributive share of her husband's personal estate, in case of his dying intestate. This decree was reversed in the House of Lords, upon the strength of the opinions of Lord Hardwicke, Lord Mansfield, and the majority of the judges;[44] and the great question finally settled in favor of the capacity of the female infant, to bar herself by her contract before marriage, of her right of dower in her husband's lands, and to her distributive share of her husband's personal estate. The question still remained, whether she had the capacity to bind her own real estate by a marriage settlement. Mr. Atherley,[45] after reviewing the cases, concludes, that the weight of the conflicting authorities was in favor of her capacity so to bind herself. But it seems he did not draw the correct conclusion; for, in *Milner v. Lord Harewood*,[46] Lord Eldon has subsequently held, that a female infant was not bound by agreement to settle her real estate upon marriage, if she did not, when of age, choose to ratify it; and that nothing but her own act, after the period of majority, could fetter or effect it. The case of *Slocombe v. Glubb*,[47] admits, that a male infant may bar himself by agreement before marriage, either of his estate by the curtesy, or of his right to his wife's personal property; and both the male and female infant can settle their personal estate upon marriage. The cases of *Strickland v. Croker*,[48] and *Warburton v. Lytton*,[49] are considered by Mr. Atherley as favorable to the power of a male infant to settle his real estate upon marriage, and that seems to be decidedly his opinion. But since the decision of Lord Eldon, in *Milner v. Lord Harewood*, this conclusion becomes questionable; for if a female infant cannot settle her real estate without leaving with her the option, when twenty-one, to revoke it, why should not the male infant have the same option.[50]

NOTES

1. Bingham on Infancy, 33.
2. *Whitney v. Dutch*, 14 Mass. Rep. 457.
3. 3 Burr. 1794.
4. Treatise on Conveyancing, vol. ii. 249.
5. Law of Infancy, ch. 2.
6. See his work, p. 34, and also his preface.
7. *Swasey v. Administrator of Vanderheyden*, 10 Johns. Rep. 33.
8. *Williamson v. Watts*, 1 Campb. Y. P. 552.
9. *Curtin v. Patton*, 11 Serg. & Rawle, 305.
10. Co. Litt. 172. a. recognized as being still the law by Bayley, J. in 3 Maul & Selw. 482.
11. 1 Fonb. Tr. of Eq. 74.
12. *Conroe v. Birdsall*, 1 Johns. Cas. 123.
13. *Jackson v. Carpenter*, 11 Johns. Rep. 539. *Oliver v. Houdlet*, 13 Mass. Rep. 237. *Roberts v. Wiggin*, 1 N.H. Rep. 73. *Wright v. Steele*, 2 N. H. Rep. 56.
14. 2 H. Blacks 57.
15. 1 Mason's Rep. 82.
16. *Smith v. Bowin*, 1 Mod. 25. *Holt v. Ward*, Str. 937. *Warwick v. Bruce*; 2 Maul. & Selw. 205. *Brown v. Caldwell*, 10 Serg. & Rawle, 114.

17. 8 Co. 42. b. *Keane v. Boycott*, 2 H. Blacks. 511. *Van Bramer v. Cooper*, 2 Johns. Rep. 279. *Jackson v. Todd*, 6 ibid. 257. *Oliver v. Houdlet*, 13 Mass. Rep. 237. *Roberts v. Wiggin*, 1 N. H. Rep. 73.

18. Co. Litt. 380. b.

19. 8 Taunton, 35.

20. *Evelyn v. Chichester*, 3 Burr. 1717. 1 Rol. Abr. tit. *Enfants*. k. Co. Litt. 51. b. *Hubbard v. Cummings*, 1 Greenleaf, 11. In *Holmes v. Blogg*, 8 Taunton, 508, it is remarkable that the distinguished counsel in that case, one of whom is now Lord Chancellor, and the other Ch. J. of the C. B., treat this as an open and debatable point. Sergeant Copely insisted, that the infant's contract was binding on him when he became adult, because there had been no disaffirmance of it; and Sergeant Best contended, that disaffirmance was not necessary, and that infants were not bound by any contract, unless the same was affirmed by them after coming of full age.

21. 11 Johns. Rep. 539. 14 ibid. 124.

22. 11 Serg. & Rawle, 305.

23. *Ive v. Chester*, Cro. J. 560. *Clarke v. Leslie*, 5 Esp. N.P. 28. *Coates v. Wilson*, ibid. 152. *Berolles v. Ramsay*, 1 Holt's N. P. 77.

24. *Ford v. Fothergill*, Peake's N.P. 229.

25. Co. Litt. 172. a

26. *Bainbridge v. Pickering*, 2 Blacks. Rep. 1325. *Wailing v. Toll*, Johns. Rep. 141.

27. *Turner v. Trisby*, Sir. 168.

28. *Makarell v. Bachelor*, Cro. Eljz. 583.

29. *Kirton v. Elliott*, 2 Bulst. 69. Lord Mansfield, in 2 Eden, 72. *Holmes v. Blogg*, 8 Taunton, 508.

30. *Conroe v. Birdsall*, 1 Johns. Cas. 127.

31. *Badger v. Phinney*, 15 Mass. Rep 859.

32. *Stoolfoos v. Jenkins*, 12 Serg. & Rawle, 399.

33. *Jennings v. Rundall*, 8 Term Rep. 335. *Johnson v. Pie*, 1 Lev. 163.

34. *Homer v. Thwing*, 3 Pickering, 492.

35. *Mills v. Graham*, 4 Bos. & Pull. 140.

36. *Bristow v. Eastman*, 1 Esp. Rep. 172.

37. 3 Barn. & Cress. 484.

38. Harg. n. 83. to lib. 2 Co. Litt. Mr. Hargrave has collected all the contradictory opinions on this point. The civil law gave this power to the infant at the age of seventeen years, and this period has been adopted by statute in Connecticut.

39. Sess. 4. ch. 30.

40. Co. Litt. 172. a.

41. 3 Burr. 1801.

42. *Hunt v. Peake*, 5 Cowen, 475.

43. 1 Eden, 39.

44. 1 Eden, 60-75.

45. Treatise on Marriage Settlements, p. 28-41.

46. 18 Vesey, 250.

47. 2 Bro. 545.
48. Cas. in Ch. 211.
49. Cited in 4 Bro. 440.
50. Treatise on Marriage Settlements, p. 42-45.

LECTURE 32

Of Master and Servant

THE last relation in domestic life, which remains to be examined, is that of master and servant. The several kinds of persons who come within the description of servants, may be subdivided into (1) slaves, (2) hired servants and (3) apprentices.

1. Of Slaves.

Slavery, according to Mr. Paley[1] may, consistently with the law of nature, arise from three causes, *viz.*: from crimes, captivity, and debt. In the institutes of Justinian,[2] slaves are said to become such in three ways, *viz.*: by birth, when the mother was a slave; by captivity in war; and by the voluntary sale of himself as a slave, by a freeman of the age of twenty. Sir William Blackstone[3] examines these causes of slavery, by the civil law, and shows them all to rest on unsound foundations; and he insists, that a state of slavery is repugnant to reason, and the principles of natural law. The civil law[4] admitted it to be contrary to natural right, though it was conformable to the usage of nations. The law of England will not endure the existence of slavery within the realm of England. The instant a slave touches the soil, he becomes free, so as to be entitled to be protected in the enjoyment of his person and property, though he may still continue bound to service as a servant.[5] There has been much dispute in the English books, whether trover would lie for a negro slave; and the better opinion is, that it will not lie, because the owner has not an absolute property in the negro; and by the common law, it was said, one man could not have a property in another, for men were not the subject of property.[6] In the case of Somersett, in 1772, who was a negro slave, carried by his master from America to England, and there confined, in order to be sent to the West Indies; he was discharged by the K. B. upon *habeas corpus*, after a very elaborate discussions.[7] The Scotch lawyers[8] mention the case of Knight, a negro slave brought from the West Indies to Scotland, by his master in 1778; and as the slave refused to continue in his service, he applied to the courts in Scotland for assistance to compel his slave to return to him. It was held, that slavery was not recognized by the law of Scotland, and that the claim of the master to the perpetual service of any negro, was inadmissible; for the law of Jamaica did not apply to Scotland, and the master's claim was consequently repelled by the Sheriff's Court, and by the Court of Session.

But though personal slavery be unknown in England, so that one man cannot sell, or confine and export another, as his property, yet the claim of imported slaves for wages, without a special promise, does not seem to receive the same protection and support as that of freemen.[9] Mr. Barrington, who has given a very strong picture of the degradation and oppression of the tenants, under the old English tenure of pure villenage,[10] is of opinion, that predial servitude really existed in England, so late as the reign of Elizabeth; and that the observation of Lilburn, that the air of England was, at that time, too pure for a slave to breathe in, was not true in point of fact. Be that as it may, there is no such thing now as the admission of slaves, or slavery, in the sense of the civil law, or of the laws and usages in the West Indies, either in England, or in any part of Europe; and it is very generally agreed, that the African slave trade is unjust and cruel.

It is no less true than singular, that domestic, slavery prevailed with uncommon rigor in the free states of antiquity; and it cannot but diminish very considerably our sympathy with their spirit, and our reverence for their institutions. A vast majority of the people of ancient Greece, were in a state of absolute and severe slavery. The disproportion between freemen and slaves, was in the ratio of

80 to 400.[11] At Athens, they were treated with more humanity than in Thessaly, Crete, Argos, or Sparta. They were entitled to sue their master for excessive ill-usage, and compel him to sell them; and they had also the privilege of purchasing their freedom.[12] In the Roman republic, the practice of domestic slavery was equally countenanced and abused. There were instances of private persons owning singly no less than four thousand slaves;[13] and by the Roman law, slaves were considered in the light of goods and chattels, and could be sold or pawned. They could be tortured, and even put to death, at the discretion of their masters. By a succession of edicts, which humanity, reason, and policy dictated, and which were enacted by Claudius, Hadrian, Antoninus Pius, and Constantine, the jurisdiction of life and death over slaves was taken from their masters, and referred to the magistrate; and the Ergastula, or dungeons of cruelty, were abolished.[14]

The personal servitude which grew out of the abuses of the feudal system, and to which the Germans had been accustomed even in their primitive settlements, was exceedingly grievous; but it is not supposed to have equaled in severity, or degradation, the domestic slavery of the ancients, or among the European colonies on this side of the Atlantic. The feudal villein of the lowest order was unprotected as to property, and subjected to the most ignoble services; but his circumstances distinguished him materially from the Greek, Roman, or West India slave. No person in England was a villein in the eye of the law, except as to his master. To all other persons he was a freeman; and for excessive injuries his master was answerable at the king's suit. So, also, the life and chastity of the female vassal, even of the lowest degree, were protected, (feebly, probably, in point of fact, but effectually in point of law,) by the right of prosecution of the lord, by appeal, by, or on behalf of the injured vassal.[15]

Domestic slavery existed throughout these United States when they were colonies of Great Britain. It exists to this day in all the southern states of the Union; but it has become entirely extinct in this and the eastern states, and probably it is in a course of abatement and extinction in some others. In Pennsylvania, by an act of March, 1780, passed for the gradual extinction of slavery, this great evil must shortly be removed from them, if it has not already, with the aid of some other provisions, ceased. In Massachusetts, it was judicially declared, soon after the revolution, that slavery was virtually abolished by their constitution, and that the issue of a female slave, though born prior to their constitution, was born free.[16] But though this be the case, yet the effect of the former legal distinctions is still perceived, for it is said,[17] that by statute, a marriage between a white person and a negro, indian, or mulatto, is absolutely void. In Connecticut, statutes were passed in 1784 and 1797, which have, in their operation, totally extinguished slavery in that state.[18] I shall not attempt, nor have I at hand the means, to collect and review the laws of the southern states on this subject of domestic slavery. They are, doubtless, as just and mild as is compatible with the public safety, or with the existence and preservation of that species of property. We will close this division of the subject, with a brief historical detail of our own laws concerning the origin, progress, and final extinction of domestic slavery in this state. Our domestic annals afford sufficient matter for alternate humiliation and pride, for painful and for exulting contemplation.

The system of domestic slavery, under the colony laws of New York, was as firmly and as rigorously established, as in any part of this country; and, as it would seem, with more severity than in either Massachusetts or Connecticut. In the year 1706, it was declared by statute,[19] that no slave should be a witness for or against any freeman, in any matter civil or criminal. The consequence of this was, that a slave found alone, could be beaten with impunity by any freeman, without cause. It was shortly after enacted,[20] that if any slave talked impudently to any Christian, he should be

publicly whipped, at the discretion of any justice of the peace, not exceeding forty stripes. An act in 1730,[21] declared, that slaves were in possession of too great liberty, and the debasement of their civil condition was greatly augmented. The master and mistress were authorized to punish their slaves at discretion, not extending to life or limb, and each town was authorized to appoint a common whipper to their slaves, to whom a salary was to be allowed. 1f guilty of any of the numerous capital offenses of that day, they were to be tried by three justices of the peace, and five freeholders, and were denied the benefit of the testimony of their associates, if in their favor, though it might be used against them; and they were to be put to death in such manner as this formidable tribunal thought proper.[22]

In the year 1740, it was observed by the legislature, that all due encouragement ought to be given to the direct importation of slaves, and all smuggling of slaves condemned as "an eminent discouragement to the fair trader."[23]

Such were the tone and policy of our statute law on the subject of domestic slavery, during the whole period of the colony history; but after the era of our independence, the principles of natural right and civil liberty were better known and obeyed, and domestic slavery speedily and sensibly felt the genial influence of the revolution. The first act that went to relax the system, was passed in 1781, and it gave freedom to all slaves who should serve in the American army for the term of three years, or until regularly discharged.[24] A more liberal provision was made in 1786, by which all slaves becoming public property by attainder, or confiscation of their master's estates, were immediately set free; and if unable to maintain themselves, they were to be supported by the state.[25] These were only partial alleviations of a great public evil. In 1788, a more extensive and effectual stroke was aimed at the practice of domestic slavery. It put an absolute stop to all further importation of slaves after the 1st of June, 1785, by prohibiting future sales of such slaves. Facilities were also given to the manumission of slaves. The penal code was greatly meliorated in respect to slaves. In capital cases they were to be tried by jury according to the course of the common law, and the testimony of slaves was made admissible for, as well as against each other, in criminal cases.[26] In one single case, the punishment of slaves was made different from that of whites. If convicted of crimes under capital, and the court should certify transportation to be a proper punishment, they might be transported to foreign parts by the master.[27] In 1799, the legislature took a step towards the final removal, as well as the intermediate mitigation of this evil. They commenced a system of laws for the gradual abolition of slavery.[28] It was declared, that every child born of a slave within this state, after the 4th of July, 1799, should be born free, though liable to be held as the servant of the proprietor of the mother, until the age of twenty-eight years in a male, and twenty-five in a female, in like manner as if such persons had been bound by the overseers of the poor-service for that period. This law was further enlarged and improved in 1810, and it was then ordained,[29] that the importation of slaves, except by the owner, coming into the state for a residence short of nine months, should be absolutely prohibited, and every slave imported contrary to the act was declared free. All contracts for personal service, by any person held or possessed as a slave, out of this state, were declared to be void; and to entitle a person to claim the services of a person born of a slave, after, the 4th of July, 1799, he must have used all reasonable means to teach the child to read, or, in default, the child would be released from servitude after the age of twenty-one.

These provisions were all incorporated into the act of the 9th of April, 1813, which contained a digest of the existing laws on the subject of slavery. Under the operation of those provisions, slavery very rapidly diminished, and appearances indicated, that, in the course of the present generation, it

would be totally extinguished. Those that were slaves on the 4th of July, 1799, and not manumitted, were the only persons that were slaves for life, except those that were imported prior to the 1st of May, 1810, and remained with their former owners unsold. No slave imported since the 1st of June, 1785, could be sold; and no slave imported since the 1st of May, 1810, could be held as a slave; and no person born within this state since the 4th of July, 1799, was born a slave. At last, by the act of 31st of March, 1817,[30] which digested anew all the former laws on the subject, provision was made for the complete annihilation of slavery in about ten years thereafter, by the section which declared, "that every negro; mulatto, or mustee, within this state, born before the 4th of July, 1799, should, from and after the 4th day of July, 1827, be free." After the arrival of that period, domestic slavery may be considered as extinguished in this state, and unknown to our law, except in the case of slaves brought here by persons as travelers, and who do not reside, or continue in this state, more than nine months.[31] But though slavery be practically abolished, the amended constitution of 1821, art. 2, placed people of color, who were the former victims of the slave laws, under permanent disabilities as electors, by requiring a special qualification as to property, and peculiar to their case, to entitle them to vote.

II. Of hired Servants.

The next class of servants which I mentioned, are hired servants, and this relation of master and servant rests altogether upon contract. The one is bound to render the service, and the other to pay the stipulated consideration.

There are many important legal consequences which flow from this relation of master and servant.

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master. If the servant does an injury fraudulently, while in the immediate employment of his master, the master, as well as the servant, is liable in damages; and he is also liable if the injury proceeds from negligence, or want of skill in the servant, for it is the duty of the master to employ servants who are honest, skillful,[32] and careful. But the master is only answerable for the fraud of his servant, while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which, when he commits, he steps out of the course of the service.[33] It was considered, in *McManus v. Crickett*,[34] to be a question of great concern, and of much doubt and uncertainty, whether the master was answerable in damages for an injury wilfully committed by his servant, while in the performance of his master's business, but without the direction or assent of the master. The Court of K. B. went into an examination of all the authorities, and, after much discussion, and great consideration, with a view to put the question at rest, it was decided, that the master was not liable in trespass for the wilful act of his servant, in driving his master's carriage against another, without his master's direction or assent. The court considered, that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed, so far, a wilful abandonment of his master's business. This, case has received the sanction of the Supreme Court of Massachusetts,[35] on the ground, that there was no authority from the master, express or implied, and the servant, in that act, was not in the employment of his master.

If a servant employs another servant to do his business, and in doing it, the servant so employed is guilty of an injury, the master is liable. Thus, in *Bush v. Steinman*,[36] A. contracted with B. to repair

a house, and B. contracted with, C. to do the work, and C. contracted with D. to furnish the materials; and the servant of D. brought a quantity of lime, to the house, and placed it in the road, by which the plaintiff's carriage was overturned; it was held, that A. was answerable for the damage, on the ground, that all the subcontracting parties were in the employment of A. But to render this principle applicable, the nature of the business must be such as to require the agency of subordinate persons, and then there is an implied authority to employ such persons.

It is said, that the master may give moderate corporal correction to his servant, while employed in his service, for negligence or misbehavior.[37] But this power does not grow out of the contract of hiring; and Doctor Taylor[38] justly questions its lawfulness, for it is not agreeable to the genius and spirit of the contract. It may safely be confined to apprentices and menial servants, while under age, for then the master is to be considered as standing *in loco parentis*. It is likewise understood, that a servant may justify a battery in the necessary defense of his master. The books do not admit of a doubt on this point; but it is questioned whether the master can in like manner justify a battery in defense of his servant. In the case of *Leward v. Basely*,[39] it was adjudged that he could not, because he had his remedy for his part of the injury by the action *per quod servitium amisit*. It is, however, hesitatingly admitted in Hawkins, and explicitly by other authorities, that he may, and the weight of argument is on that side.[40]

III. Of Apprentices.

Another class of servants are apprentices, who are bound to service for a term of years, to learn some profession or trade. The temptations to imposition and abuse to which this contract is liable, have rendered legislative regulations particularly necessary.

It is declared,[41] that no apprentice or journeyman shall be laid under restrictions, as to the exercise of his trade or calling, after his term of service has expired. Infants may be bound by indenture of their own free will, and by their own act, and with the consent of their father, mother, or guardian, or testamentary executors; or by the overseers of the poor, or two justices, or a judge, as the case may be, to a term of service, during infancy. In all indentures, by the officers of the city or town, binding poor children as apprentices or servants, a covenant must be inserted to teach the apprentice to read and write, and the overseers of the poor are constituted the guardians of every such indented servant. The age of the infant must be inserted in the indenture, and the consent of the father or guardian must be signified in the indenture, and by their signing and scaling the same. For refusal to serve and work, infants are liable to be imprisoned in jail, until they shall be willing to serve as such apprentice or servant; and: also to serve double the time they had wrongfully withdrawn themselves from service, infants coming from beyond sea, may bind themselves to service, until the age of twenty-one, and even until the age of twenty-four, provided it be to raise money for the payment of their passage, and the whole term of such service does not exceed four years. Grievances of the apprentice or servant, arising from ill usage on the part of the master, are to be redressed in t he general sessions of the peace, or by any three justices of the peace, who have power to annul the con. tract, and discharge the apprentice, or imprison him, if he should be in the wrong.

The statute of this state, (of which I have here given the material provisions,) contains the substance of the English statute law on the subject, and the English decisions are applicable. Under our statute, the infant himself must be a party to the indenture, except in the special case of an apprentice who is chargeable as a pauper. The father has ne authority under the statute, and the latter English cases

say, he has no authority, even at common law,) to bind his infant son an apprentice, without his assent; and the infant cannot be bound by an set merely in pail, and if he be not a party to the deed, he is not bound.[42] The English statute law as to binding out minors as apprentices, to learn some useful art, trade, or calling, has probably been very generally adopted in this country, with considerable local variations. In the State of Maine, male infants may be bound till the age of twenty-one; but females only till their arrival to the age of eighteen.[43] In Pennsylvania,[44] it has been held, that an infant could not be bound by his father or guardian, as a servant to another; while in Massachusetts, their statute law concerning apprentices, does not make void all contracts binding the minor to service, that are not made in conformity to the statute. It has been held,[45] that the father may, at Common law, bind his infant son to service, and the contract will be good, independent of the statute. This doctrine is contrary to the English law, and to the construction of the statute of this state, and to the rule in Pennsylvania; and it has been questioned in the case of the *United States v. Bainbridge*.[46] It has been decided in that last case, that the father could not bind his infant son, without his consent, to military service, and that where his enlistment has been held valid, it was by force of the statute authority of the United States. Whether an indented apprentice can be assigned by one master to another, is a question which does not seem to have been definitively settled. It was concluded, in the case of *Nickerson v. Howard*,[47] that such an assignment might be good, by way of covenant between the masters, though not as an assignment to pass an interest in the apprentice. As was observed by Lord Mansfield,[48] though an apprentice be not strictly assignable, nor transmissible, yet if he continue with his new master, with the consent of all parties, and his own, it is a continuation of the apprenticeship.

The master is entitled to the wages and fruit of the personal labor of the apprentice, while the relationship continues, and the apprentice is in his service; and there are cases which give the master a right to the wages or earnings of the apprentice, while in another's service, and with or without his master's license, and even though the trade or service be different from that to which the apprentice is bound.[49] But Lord Hardwicke declared in the case before him, that if the master had not done his duty with the apprentice, and had been the unjustifiable cause of his pursuing a different course of life, he would grant relief in equity against the master's legal claim to his earnings.[50]

NOTES

1. Principles of Moral Philosophy, p. 158, 159.
2. Inst. 1. 3. 4.
3. Com. vol. i. 423.
4. Instit. 1. 3. 2.
5. 1 Blacks. Com. 424.
6. *Smith v. Gould*, 2 Salk. 666. 2 Ld. Raym. 1274. *contra Butts v. Penny*, 2 Lev. 201 and Lord Hardwicke, in *Pearne v. Lisle*, Amb. 75.
7. Loft's Reports, l. Harg. State Trials, vol. xi. p. 339.
8. l Ersk. Inst. 158. Kaimes' Principles of Equity, vol. ii. p. 134.
9. *Alfred v. Marquis of Fitz James*, 3 Esp. Cases, 3.
10. Observations on the Statutes, chiefly the more ancient, p. 232-241.
11. 1 Mitf. Hist. 355.

12. 1 Potter's Antiq. of Greece, 57-67-72.

13. 1 Gibbon's Hist. 66-68.

14. 1 Gibbon, *ubi supra*. Taylor's Elem. of the Civil Law. 433-436. The horrible excesses and cruelty inflicted upon slaves, in ancient times, and particularly by the Romans, and the barbarous manners, and loss of moral taste and just feeling, which were the consequence, are strikingly shown and illustrated from passages in the classics, by Mr. Hume, in his very learned Essay on the Populousness of Ancient Nations

15. Littleton's Ten. sec. 189, 190. Hallam's View of the Middle Ages, vol. i. 122, 124. vol. ii. 199.

16. See cases cited in Winchendon v. Hatfield, 4 Mass. Rep. 128.

17. Dane's Abr. ch. 46. art. 2. s. 3.

18. Reeve's Domestic Relations, p. 340.

19. Colony Laws, Smith's edit. vol. i. 62.

20. Colony Laws, vol. i. 72.

21. Colony Laws, vol. i. 193-199.

22. They were occasionally adjudged to the stake, and an execution of this kind, and probably the last of this kind, was witnessed at Poughkeepsie shortly before the commencement of the revolutionary war.

23. Colony Laws, vol. i. 283, 284,

24. Act of 20th of March, 1731, ch. 32. s. 6.

25. Act of 1st of May, 1786, ch. 58. s. 29, 30.

26. Act of 22d of February, 1788, ch. 40.

27. Act of 22d of March, 1790, ch. 28.

28. Art of 29th of March, 1799, ch. 62.

29. Act of 30th of March, 1810, ch. 115.

30. Laws of N.Y. sess. 40. ch. 137.

31. Act supra, s. 15, and act sess. 42. ch. 141. s. 3.

32. 1 Blacks. Com. 431. Dy. 161, pl. 45. Ibid. 238. b. pl. 38. *Grammer v. Nixon*, Str. 653. *Sly v. Edgley*, 6 Esp. N.P. Cas. 6.

33. Lord Kenyon, in *Ellis v. Turner*,8 Term Rep. 533. Parker, Ch. J in *Foster v. The Essex Bank*, 17 Mass. Rep. 508-510.

34. 1 East, 106.

35. 17 Mass. Rep. 508-510. *Croft v. Alison*, 4 B. & Ald. 590. S.P.

36. 1 Bos. & Pul. 404.

37. 1 Blacks. Com. 428. 1 Hawk. P. C. b. 1. ch. 29. sect. 5. b. 1. ch. 60. sect. 23.

38. Elements of the Civil Law, 413.

39. 1 Ld. Raym. 62. 1 Salk. 407.

40. 2 Rol. Abr. 546. D. 1 Blacks. Com. 429. 1 Hawk. P. C. b. 1. c. 60. sect. 23, 24. Reeve's Domestic Relations, p. 378.

41. L. N.Y. act of Feb. 1810, ch. 11.

42. *The King v. Inhabitants of Cromford*, 8 East, 25. *The King v. Inhabitants of Arnesby*, 3 Barn. & A1d. 584. *In the matter of McDowles*, 8 Johns. Rep. 328.

43. 4 Greenleaf, 36, 40.

44. *Respublica v. Keppell*, 2 Dallas, 197.

45. *Day v. Everett*, 7 Mass. Rep. 145.

46. 1 Mason, 71.

47. 19 Johns. Rep. 113.

48. *The King v. The Inhabitants of Stockland*, Doug. 70.

49. *Hill v. Allen*, 1 Vesey, 83. *Barber v. Dennis*, 6 Mod. 69.

50. In taking leave of the extensive subject of the domestic relations, I cannot refrain from acknowledging the assistance I have received from the work of the late Chief Justice Reeve on that title. That excellent lawyer and venerable man, has discussed every branch of the subject in a copious manner; and though there is some want of precision and accuracy in his references to authority, and sometimes in his deductions, yet he every where displays the vigor, freedom, and acuteness of a sound and liberal mind.

I would here further observe, that since the preceding sheets were put to the press, I have met with the late case of *Lewis v. Lee*, in the English Court of K. B., reported in 3 Barn. & Cress. 291, in which it is adjudged, upon demurrer, that though a woman be divorced *a mensa et thoro*. and lives separate and apart from her husband, with an ample allowance as and for her separate maintenance, she cannot be sued as a *feme sole*. This decision had not been seen when the observations were made at pages 132 and 136 of this volume; whether it is to be received as law in this country, in preference to the opinions of the Editor of Bacon, and of Lord Loughborough, there referred to, must be left for future judicial discussion.

LECTURE 33

Of Corporations

A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting, in several respects, however numerous the association may be, as a single individual.

The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law but as one moral person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation, is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine, or vary, upon the death or change of any of the individual members. They continue as long as the corporation endures. It is sometimes said, that a corporation is an immortal, as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is too far from being immortal, that it is well known, that most of the private corporations recently created by statute, are limited in duration to a few years. There are many corporate bodies that are without limitation, and, consequently, capable of continuing so long as a succession of individual members of the corporation remains, and can be kept up.

It was chiefly for the purpose of clothing bodies of men in succession, with the qualities and capacities of one single, artificial, and fictitious being, that corporations were originally invented, and, for the same convenient purpose, they have been brought largely into use. By means of the corporation, many individuals are capable of acting in perpetual succession like one single individual, without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity.

I. Of the History of Corporations.

Corporations were well known to the Roman law, and they existed from the earliest periods of the Roman republic. It would appear, from a passage in the Pandects,[1] that they were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law. But the Romans were not so indulgent as the Greeks. They were very jealous of such combinations of individuals, and they restrained those that were not specially authorized; and every corporation was illicit that was not ordained by a decree of the senate, or of the emperor.[2] A *collegia licita*, in the Roman law, was like our incorporated companies, a society of men united for some useful business or purpose, with power to act like a single individual; and if they abused their right, or assembled for any other purpose than that expressed in their charter, they were deemed *illicita*, and many laws, from the time of the twelve tables down to the times of the emperors, were passed against all illicit or unauthorized companies.[3] In the age of Augustus as we are informed by Suetonius,[4] certain corporations had become nurseries of faction and disorder, and that emperor interposed, as Julius Caesar had done before him;[5] and dissolved all but the ancient and legal corporations – *cuncta collegia, praeter antiquitus constituta*,

distraxit. We find, also, in the younger Pliny,[6] a singular instance of the extreme jealousy indulged by the Roman government of these corporations. A destructive fire in Nicomedia, induced Pliny to recommend to the emperor Trajan the institution, for that city, of a fire company of 150 men, (*collegium fabrorum*,) with an assurance, that none but those of that business should be admitted into it, and that the privileges granted them should not be extended to any other purpose. But the emperor refused the grant, and observed, that societies of that sort had greatly disturbed the peace of the cities; and he observed, that whatever name he gave them, and for whatever purpose they might he instituted, they would not fail to be mischievous.

The powers, capacities, and incapacitates of corporations, under the English law, very much resemble those under the civil law; and it is evident, that the principles of law applicable to corporations under the former, were borrowed chiefly from the Roman law. Under the latter system, corporations were divided into ecclesiastical and lay, civil and eleemosynary. They could not purchase; or receive donations of land, without a license, nor could they alienate without just cause. These restraints bear at striking resemblance to the mortmain and disabling statutes in the English law. They could only act by attorney; and the act of the majority bound the whole, and they were dissolved by death, surrender, or forfeiture, as with us.[7] Corporations or colleges for the advancement of learning, were entirely unknown to the ancients, and they are the fruits of modern invention. But, in the time of the latter emperors, the professors in the different sciences began to be allowed regular salaries from the government, and to become objects of public regulation and discipline. By the close of the third century, these literary establishments, and particularly the schools at Rome, Constantinople, Alexandria, and Berytus, began to assume the appearance of public institutions. Privileges and honors were bestowed upon the professors and students, and they were subjected to visitation and inspection by the civil and ecclesiastical powers.[8] It was not, however, until after the revival of letters, or, at least, not until the 13th century, that colleges and universities began to confer degrees, and to attain some portion of the authority, influence, and solidity, which they enjoy at the present day.[9] The erection of civil corporations, for political and commercial purposes, took place in the early periods of the history of modern Europe. Cities, towns and fraternities, were invested with corporate powers and privileges, and with a large civil and criminal jurisdiction. These immunities were sought after from a spirit of monopoly, and as barriers against feudal tyranny. They afforded protection to commerce and the mechanic arts, and formed some counterpoise to the exorbitant powers, and unchecked rapacity, of the feudal barons. By this means, order and security, industry, trade, and the arts, revived in Italy, France, Germany, Flanders, and England; and to the institution of corporations may be attributed, in some considerable degree, the introduction of regular government and stable protection, after Europe had, for many ages, been deprived, by the inundation of the barbarians, of all the civilization and science which had accompanied the Roman power.[10]

But although corporations were found to be very beneficial in the earlier periods of modern European history, their exclusive privileges have too frequently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry. Dr. Smith[11] does not scruple to consider them, throughout Europe, as generally injurious to the freedom of trade, and the progress of improvement. The propensity in modern times has, however, been to multiply civil corporations, especially in the United States, where they have increased in a rapid manner, and to a most astonishing extent. This branch of jurisprudence becomes, therefore, an object of curious as well as of deeply interesting research. The multiplication of corporations, and the avidity with which they are sought, have arisen in consequence of the power which a large and consolidated capital

gives them over business of every kind; and the facility which the incorporation gives to the management of that capital, and the security which it affords to the persons of the members, and to their property not vested in the corporate stock. The convention of the people of this state, when they amended the constitution, in 1821, endeavored to check the improvident increase of corporations, by requiring the assent of two thirds of the members elected to each branch of the legislature, to every bill, for creating, continuing, altering, or renewing, any body politic or corporate. Even this provision seems to have failed to mitigate the evil, for in the session of 1823, for instance, being the first session of the legislature, under the operation of this check, there were thirty-nine new private companies incorporated, besides numerous other acts, amending or altering charters. The various acts of incorporation of private companies, for banking, manufacturing, and insurance purposes; for turnpike roads and toll bridges; and for many other objects, upon which private industry, skill, and speculation, can be employed, constitute a mighty mass of charters, which occupy by far the largest part of the volumes of the statute law. The demand for acts of incorporation is continually increasing, and the propensity is the more striking, as it appears to be incurable; and we seem to have no moral means to resist it, as was done at Rome, by the unshaken determination of the Emperor Trajan. All these incorporations are contracts between the government and the company, which cannot ordinarily he affected by legislative interference; and it has, accordingly, been attempted to retain a control over these private incorporations, by a clause, now usually inserted in the acts of incorporation, that "it shall be lawful for the legislature, at any time thereafter, to alter, modify, or repeal the act." The value and effect of this provision, we may hereafter consider; and with this general view of the rise and progress of corporations, I shall proceed to a more particular detail of the general principles of law, applicable to the subject.

II. Of the various kinds of Corporations.

Corporations are divided into aggregate and sole.[12] A corporation sole consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he could not have. A bishop, dean, parson, and vicar, are given in the English books as instances of sole corporations; and they and their successors in perpetuity, take the corporate property and privileges; and the word successors is generally as necessary for the succession of property in a corporation sole, as the word heirs is to create an estate of inheritance in a private individual.[13] A fee will pass to a corporation aggregate, without the word successors in the grant, because it is a body, which, in its nature, is perpetual; but, as a general rule, a fee will not pass to a corporation sole, without the word successors, and it will continue for the life only of the individual clothed with the corporate character.[14] There are very few points of corporation law applicable to a corporation sole. They cannot take personal property in succession, and their corporate capacity, in that respect, is confined to real property.[15] Nor do I know of any person in this state, to whom this term may be strictly applicable. The corporations in use with us, may be considered as aggregate, or the union of two or more individuals in one body politic, with a capacity of succession and perpetuity. Besides the proper aggregate corporations, the inhabitants of any district, as counties, or towns, incorporated by statute, with particular powers, are sometimes called quasi corporations. No private action, unless given by statute, lies against them.[16] Having no corporate fund, each inhabitant is liable to satisfy the judgment, if the statute gives a suit against such a community.[17]

Another division of corporations, by the English law, is into ecclesiastical and lay. The former are those of which the members arc spiritual persons, and the object of the institution is also spiritual.

With us, they are called religious corporations. This is the description given to them in the act of this state, providing generally for the incorporation of religious societies,[18] in an easy and popular manner, and for the purpose of managing with more facility and advantage, the temporalities belonging to the church or congregation. Lay corporations are again divided into eleemosynary and civil. An eleemosynary corporation, is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked, hospitals, for the relief of poor, sick and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations.[19] Civil corporations are established for a variety of purposes, and they are either public or private. Public corporations, are such as exist for public political purposes only, such as counties, cities, towns, and villages. They are founded by the government, for public purposes, and the whole interest in them belongs to the public. But if the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So a hospital created and endowed by the government, for general purposes, is a public, and not a private charity. But a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature. The same thing may be said of insurance, canal, bridge and turnpike companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person. A hospital, founded by a private benefactor, is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though from its general and beneficent objects, it may acquire the character of a public institution. Though the uses of an eleemosynary corporation be for general charity, that alone will not constitute it a public corporation. Every charity, which is extensive in its, object, may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private, to be a public one. The charter of the crown, said Lord Hardwicke,[20] cannot make a charity more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish, is a public charity. The charity of almost every hospital and college, is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke.[21]

In England, corporations are created, and exist, by prescription, by royal charter, and by act of Parliament. With us they are created by authority of the legislature, and not otherwise. There are, however, several of the corporations now existing in this country, civil, religious, and eleemosynary, which owed their origin to the crown, under the colony administration. Those charters granted prior to the revolution, were upheld either by express provision in the constitutions of the states, or by general principles of public and common law of universal reception; and they were preserved from forfeiture, by reason of any nonuser or misuser of their powers, during the disorders which necessarily attended the revolution.

III. Of the Powers and Capacities of Corporations.

When a corporation is duly created, and a name given to it, (for that is an indispensable part of its constitution, and if no name be expressly given, one may be assumed by implication,)[22] many powers rights, and capacities, are annexed to it. Some of them are deemed to be necessarily and

inseparably incident to a corporation by tacit operation, without any express provision, though it is now very generally the practice, to specify, in the act or charter of incorporation, the powers and capacities with which it is intended to endow the corporation.

The ordinary incidents to a corporation are, 1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise; 2. To sue and to be sued, and to grant and to receive, by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal; 5. To make bylaws for the government of the corporation; 6. The power of amotion, or removal of members. Some of these powers are to be taken, in many instances with much modification and restriction, and the essence of a corporation consists only of a capacity to have perpetual succession, under a special denomination, and art artificial form, and to take and grant property, contract obligations, and sue and be sued, by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities.[23] According to the doctrine of Lord Holt[24] neither the actual possession of property, nor the actual enjoyment of franchises, are of the essence of a corporation.

There are some persons who have a corporate capacity only for one particular specified end. Thus, the loan officers of each county of this state, created under the act of 18th of April, 1786, were declared to be bodies politic and corporate, with powers necessary for the due execution of the loan office act. The overseers of the poor in each town, are invested, by law,[25] with the right of succession, in respect to the matters of their trust, for they have a capacity to take obligations to them and their successors, and a capacity for them and their successors to sue in the name of the overseers of the poor of the town for the time being. The same thing may be observed of the board of supervisors in each county, for they are authorized to take a bond from the county treasurer in the name of the supervisors generally, and to sue under that general description.[26] Several towns in this state are incorporated so far as to be enabled to hold lands to a certain extent; and all the towns may make orders and regulations touching several purposes of a local and common nature, and are to be considered as bodies politic for certain purposes.[27] At common law every parish or town was a corporation for local necessities.[28] Our laws afford numerous examples of persons hawing corporate powers *sub modo,* and for a few specified purposes only.[29]

There is no particular form of words requisite to create a corporation. A grant to a body of men to hold mercantile meetings, has been held to confer a corporate capacity.[30] A grant of lands to the inhabitants of a county, or hundred, rendering rent, would create them a corporation for that single intent, without saying, to them and their successors.[31]

But, a corporation being merely a political institution, it has no other capacities or powers than those which are necessary to carry into effect the purposes for which it was established. A corporation is incapable of a personal act in its collective capacity.[32] It cannot be considered as a moral agent, and, therefore, it cannot commit a crime, or become the subject of punishment, or take an oath, or appear in person, or be arrested or outlawed.[33] It is said, likewise, that a corporation cannot be seized of lands to the use of another, and that it is incapable of any use or trust.[34] We may say, at least, that a corporation cannot be seized of land in trust, for purposes foreign to its institution.[35] But equity will, at this day, compel corporations to execute any lawful trust which may be reposed in them. Many corporations are made trustees for charitable purposes, and are compelled, in equity, to perform their trusts.[36] Corporations appear to be deemed competent to perform the duties of trustees, and to be proper and safe depositories of trusts; and among the almost infinite variety of purposes

for which corporations are created at the present day, we find them[37] authorized to receive, and take by deed or devise, in their corporate capacity, any property, real and personal, in trust, and to assume and execute any trust so created and declared. The Court of Chancery is vested with the same jurisdiction over these corporate trusts, which it ordinarily possesses and exercises over other trust estates. Corporations are also created with trust powers of another kind; as for the purpose of loaning money on a deposit of goods and chattels, by way of pledge or security.[38] It will soon become difficult to trace the numerous and complicated modifications which corporations are made to assume, and the much greater diversity of objects for which they are created. We are multiplying in this country, to an unparalleled extent, the institution of corporations, and giving them a flexibility and variety of purpose, unknown to the Roman or the English law. The study of this title is becoming every year more and more interesting and important.

It was incident, at common law, to every corporation, to have a capacity to purchase and alien lands and chattels, unless they were specially restrained by their charters, or by statute.[39] Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity. This was so understood by the bar and court, in the modern case of *The Mayor and Commonalty of Colchester v. Lowten*;[40] and this common law right of disposition continued in England until it was taken away, as to religious corporations, by several restraining statutes, in the reign of Elizabeth. We have not reenacted those disabling acts; but the better opinion upon the construction of the statute in this state, for the incorporation of religious societies,[41] is, that no religious corporation can sell any real estate without the Chancellor's order. The powers given to the trustees of religious societies incorporated under that act, are limited to purchase and hold real estate, and then to demise, lease and improve the same for the use of the congregation. This limitation of the corporate power to sell, is confined to religious corporations; and all others can buy and sell at pleasure, except so far as they pray be specially restricted by their charters, or by statute.

In England, corporations are rendered incapable of purchasing lands without the king's license; and this restriction extends equally to ecclesiastical and lay corporations, and is founded upon a succession of statutes front Magna Carta, 9 Hen. 111. to 9 Geo. II, which took away entirely the capacity which was vested in corporations by the common law. These statutes are known by the name of the statutes of mortmain; and they were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the Kingdom, and thereby withdrawing them from public and feudal charges. The earlier statutes of mortmain were originally leveled at the religious houses; but the statute of 15 R. II. c. 5. declared, that civil or lay corporations were equally within the mischief, and within the prohibition; and this statute made lands conveyed to any third person, for the use of a corporation, liable to forfeiture, in like manner as if conveyed directly in mortmain.[42] We have not reenacted the statutes of mortmain in this state; and the only legal check to the acquisition of lands by corporations, consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects; and to the force to be given to the exception, of corporations out of the statute of wills,[43] which declares, that all persons other than bodies politic and corporate, may be devisees of real estate.

The statutes of mortmain are in force in the state of Pennsylvania. It has been there held and declared, by the judges of the Supreme Court of that state,[44] that the English statutes of mortmain have been received, and considered the law of that state, so far as they were applicable to their

political condition; and that they were so far applicable that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, were void, unless sanctioned by charter or act of assembly." In the other states, it is understood, that the statutes of mortmain have not been reenacted, or practiced upon; and the inference from the statutes creating corporations, and not authorizing them to hold real estate to a certain limited extent, is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution.[45]

As we have no general statutes of mortmain, perhaps a legally constituted corporation in another state, can purchase and hold lands *ad libitum* in this state, provided their charter gave then the competent power. They can sue in our courts by their corporate name, and that, too, even upon a mortgage taken upon lands in this state as security for a debt.[46] The same rule, allowing corporations of one state to sue in another, was declared in Louisiana,[47] but doubted in South Carolina.[48]

It has been a question of grave import, and difficult solution, whether a corporation instituted as a charity, could be permitted to become the *cestui que trust* of lands devised for charitable uses. Corporations are excepted out of the statute of wills, and it has been decided, that they cannot be directly devisees at law.[49] But, in England, by the statute of 43 Eliz. c. 4, commonly called the statute of charitable uses, lands may be devised to a corporation for a charitable use, and the Court of Chancery will support and enforce the charitable donation. The various charitable purposes which will be sustained, are enumerated in the statute, and the administration of justice in this, or in any other country, would be extremely defective, if there was no power to uphold such dispositions. The statute of Elizabeth has not been reenacted in this state; and the inquiry then is, whether a court of equity has power to execute and enforce such trusts as charities, independent of any statute, and when no statute declares them unlawful. The statute of wills merely excepts corporations from the description of competent devisees, and there is nothing in the act declaring it unlawful for a corporation to take for a charitable use. They are left in the same state as if the statute of wills had not been passed, and the question is, whether a court of equity may not sustain and enforce a devise to or for the use of a corporation, provided the object be a charity in itself lawful and commendable.

The case of *The Baptist Association v. Hart*,[50] has thrown embarrassment over this question. It was there said, that the statute of Elizabeth did give validity to some devises to charitable uses, which were not valid without the aid of the statute; and the opinion of the Chief Justice seemed rather to be, (for there was no authoritative decision of the court on the point,) that the original interference of chancery on the subject of charities, where the *cestui que trust* had not a vested equitable interest, was founded on the statute of Elizabeth, and that, independent of the statute, a court of equity would not sustain a charitable bequest, where no legal interest was vested. The accuracy of this conclusion remains yet to be established by judicial sanction; and there is a recent and direct authority against it, in the case of *The Orphan Asylum Society v. McCartee*, in which it was decided, in this state, by Chancellor Jones, after a very elaborate discussion and consideration, that a devise of lands to executors, in trust for a charitable corporation, for charitable purposes, was a legal and valid trust, to be enforced in equity. Lord Northington, in the case of *The Attorney General v. Tancred*,[51] affirmed, that devises to corporations, though void under the statute of wills, were always considered as good in equity if given to charitable uses, and that the uniform rule of the Court of Chancery before, as well as at and after the statute of Elizabeth, was, that where the uses were charitable, and the grantor competent to convey, the court would aid even a defective conveyance to uses. This same principle has been advanced in other cases, and by very high authority.[52] The weight of

opinion and argument would seem to be in favor of an original and necessary jurisdiction in chancery, in respect to bequests, and devises in trust, to persons competent to take for charitable purposes, when the general object of the charity was specific and certain, and not contrary to any positive rule of law.

The elements of the doctrine of the English chancery relating to charitable uses, are to be found in the civil laws[53] And it is questionable whether the English system of charities is to be referred exclusively to the statute of Elizabeth. That statute has been resorted to as a guide, be. cause it contained the largest enumeration of just and meritorious charitable uses; and it may, perhaps, be considered rather as a declaratory law of previously recognized charities, than as creating, as some cases have intimated,[54] the objects of chancery jurisdiction over charities. If the whole jurisdiction of equity over charitable uses and devises, was grounded on the statute of Elizabeth, then we are driven to the conclusion, that as the statute has never been reenacted, our courts of equity in this country are cut off from a large field of jurisdiction, over some of the most interesting and meritorious trusts that can possibly be created, and confided to the integrity of men. It would appear, from the preamble to the statute of Elizabeth, that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for breaches of those trusts.[55]

It was an ancient and technical rule of the common law, that a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal.[56] Afterwards, the rule was relaxed, and, for the sake of convenience, corporations were permitted to act, in ordinary matters, without deed, as to retain a servant, cook, or butler.[57] The case in 12 Hen. VII. 25[58] was, that a bailiff, as a servant to a corporation, could justify without being authorized by deed, but that no interest could depart from a corporation as a lease for years, a license to take fees, and a power of attorney to make livery, without deed. So, in *Manby v. Long*,[59] it was held, that a bailiff to a corporation, for the purpose of distress, did not require an appointment in writing. In *Rex v. Bigg*,[60] the old rule was still further relaxed; and it seems to have been established, that though a corporation could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the limit of his authority, would be binding on the corporation. In a case as late as 1783,[61] it was held, that the agreement of a major part of a corporation, entered in the corporation books, though not under the corporate seal, would be decreed in equity. In *Yarborough v. The Bank of England*,[62] it was admitted, that a corporation might be bound by the acts of their servants, though not authorized under their seal, if done within the scope of their employment. At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia v. Patterson*,[63] that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorized agents, were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay. The adjudged cases in England, and in Massachusetts, were considered as fully supporting this reasonable doctrine; and that the technical rule, that a corporation could not make a promise except under its seal, would be productive of great mischiefs. As soon as it was established, that the regularly appointed agent of the corporation could contract in their name without seal, it was impossible to support the other position. Afterwards, in *Fleckner v. U. S. Bank*,[64] it was decided, by the same court, that a bank, and other commercial corporations, might bind

themselves by the acts of their authorized officers and agents, without the corporate seal. Whatever might be the original correctness of the ancient, doctrine, that a corporation could only act through the instrumentality of its common seal, when that doctrine was applied to corporations existing by the common law; it had no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a board of directors. The rule has even been broken in upon in modern times, in respect to common law corporations. The acts of the board of directors, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. With respect to banks, from the very nature of their operations in discounting notes, receiving deposits, paying checks, and other ordinary contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. Where corporations have no specific mode of acting proscribed, the common law mode of acting may be properly inferred; but every corporation created by statute, may act as the statute prescribes, and it is settled doctrine, that a corporation may be bound by contracts not under its corporate seal, and by contracts made in the ordinary discharge of the official ditties of its agents and officers. Lastly, in the case of *Osborn v. United States Bank*,[65] it was declared, that though a corporation could only appear by attorney, the authority of that attorney need not be under seal; and the actual production of any warrant of attorney to appear in court, is not necessary in the case of a corporation more than in the case of an individual.

That corporations can now be bound by contracts made by themselves or their agents, though not under seal, and also on implied contracts to be deduced by inference from corporate acts, without either a vote, or deed, or writing, is a doctrine generally established in the courts of the several states, with great clearness and solidity of argument:[66] and the technical rule of the common law may now be considered as being, in a very great degree, done away in the jurisprudence of the United States.

It is a general rule, that corporations must take and grant, as well as sue and be sued, by their corporate name. Without a name, they could not perform their corporate functions.[67] A misnomer in a grant by statute, or by devise, to a corporation, does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended, be made apparent.[68] So an immaterial variation in the name of the corporation, does not avoid its grant, though it is not settled with the requisite precision, what variations in the name are, or are not deemed substantial. The general rule to be collected from the cases is,[69] that a variation from the precise name. of the corporation, when the true name is necessarily to be collected from the instrument, will not invalidate a grant, by or to a corporation; and the modern cases show an increased liberality on this subject. For a corporation to attempt to set aside its own grant,[70] by reason of misnomer in its own, name, was severely censured, and in a great measure repressed, as early as the time of Lord Coke; and from their inability to be arrested, corporations must be sued by original writ or summons; and at common law, they, might be compelled to appear by distress, or seizure of their property. But the statute law of this state,[71] has simplified the proceeding, by directing that the writ, or first process, against a body corporate, may be served on the president, presiding officer, cashier, secretary, or treasurer; and if the process be returned served, that the plaintiff, instead of being driven to compulsory and vexatious steps to compel an appearance, may enter an appearance for the defendants of course, and proceed, as its cases of personal actions against natural persons.

The same principle prevails in these incorporated societies, as in the community at large, that the

acts of the majority, in cases within the charter powers, bind the whole. The majority, here, means the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body, or not. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation.[72] The power of election, or the supplying of members in the room of such as are removed by death, or otherwise, is said to be a power incident to, and necessarily implied in every aggregate corporation, from the principle of self preservation.[73] But it seldom happens that an opportunity is afforded for the application of this principle, because the power of election, must be exercised under the modifications of the charter or statute, of which the corporation is the mere creature, and which usually prescribes the time and manner of corporate elections, and defines the qualifications of the electors. U this be not done to the requisite extent in the act or charter creating the corporation, it is in the power of the corporation itself by its bylaws, to regulate the manner of election, and the requisite proof of the qualifications of the electors, in conformity with the principles of the charter.[74] It was decided in the case of *Newling v. Francis*,[75] that whet: the mode of electing corporate officers was not regulated by charter or prescription, the corporation might make bylaws to regulate the election, provided they did not infringe the charter.[76] And in the case of *The Commonwealth of Pennsylvania v. Woelper*,[77] it was held, that a corporation might, by a bylaw, give to the president the power of appointing inspectors of the corporate elections and also define by bylaws the nature of the tickets to be used, and the manner of voting. All such regulations rest in the discretion of the corporation, provided no chartered right or privilege be infringed, or the low of the land violated. It is settled, that a bylaw cannot exclude an integral part of the electors, nor impose upon them a qualification, inconsistent with the charter, or unconnected with their corporate character.[78]

It is also understood to be the better opinion, that though the officers of a corporation be required by the charter to be annually elected, yet if the time of election under the charter slips, the old corporate officers continue in office after the year, and until others are duly elected. The general principle is,[79] that where the members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual clay had, by some means, free from design or fraud, been passed by.

The statute of 11 Geo. 1. c. 4, was made expressly to prevent the hazard and evils of a dissolution of the corporation, from the omission to elect on the day; and it seems to admit of a question, whether the statute was not rather declaratory, (for so it has been called,) and introduced to remove doubts and difficulty.[80]

The election, when it does take place, must be when the members of the corporation are duly assembled *collegialiter*, and they must act *simul et semel*, and not shatteringly, and at several times and places.[81]

The power of amotion, or removal of a member for a reasonable cause, is a power necessarily incident to every corporation. It was, however, the doctrine formerly, that no member of a corporation could be disfranchised by the act of the corporation itself, unless the charter expressly conferred the power.[82] But Lord Ch. B. Hale held,[83] that every corporation might remove a member, for good cause; and in *Lord Bruce's case*,[84] the K. B. declared the modern opinion to be, that a power of amotion was incident to a corporation. At last, in the case of *The King v. Richardson*,[85] the question was fully and at large discussed in. the K. B., and the court decided, that the power of

amotion was incident, and necessary for the good order and government of corporate bodies, as much as the power of making bylaws. But this power of amotion, as the court held in that case, must be exercised for good cause, and it must be for some offense that has an immediate relation to the duties of the party as a corporator; for as to offenses which have no immediate relation to his corporate trust, but which render a party infamous and unfit for any office, they must be established by indictment and trial at law, before the corporation can expel for such a cause. If there be no special provision on the subject in the charter, the power of removal of a member for just cause, resides in the whole body.[86] But a select body of the corporation may possess the power, not only when given by charter, but in consequence of a bylaw made by the body at large; for the body at large may delegate their powers to a select body, as the representative of the whole community.[87]

The modern doctrine is, to consider corporations as baying such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine in 1804,[88] and it has been repeated in the decisions of the state courts.[89] No rule of law comes with a more seasonable application, considering how lavishly charter privileges have beet granted. As corporations are the were creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should he obliged strictly to show their authority for the business they assume, and be confined to their operations to the mode, and manner, and subject matter prescribed. The modern language of the English courts is to the same effect; and, in a very recent case,[90] it was observed, that a corporation could not bind themselves for purposes foreign to those for which they were established. Where a corporation was created for purposes of trade, it resulted, necessarily, that they must have power to accept bills, and issue notes. But if a company be formed, not for the purposes of trade, but for other purposes, as, for instance, to supply water, the nature of their business does not raise a necessary implication that they should have power to make notes, and issue bills; and there must be express authority to enable them to do it.

IV. Of the Visitation of Corporations.

I proceed next to consider the power and discipline of visitation to which corporations are subject. It is a power applicable only to ecclesiastical and eleemosynary corporations;[91] and it is understood, that no other corporations go under the name of eleemosynary, but colleges, schools, and hospitals.[92] The visitation of civil corporations is by the government itself, through the medium of the courts of justice.

To eleemosynary corporations, a visitorial power is attached as a necessary incident. The nature and extent of this power were well explained by Lord Holt, in his celebrated judgment in the case of *Philips v. Bury*.[93] If the corporation be public, in the strict sense, the government have the sole right, as the trustees of the public interest, to inspect, regulate, control, and direct the corporation, and;'its funds and franchises, because the whole interest and franchises are given for the public use and advantage. They are to be governed according to the laws of the land. The validity and justice of their private laws are examinable in the courts of justice, and if there be no provision in the charter how the succession shall continue, the law supplies the omission, and says it shall he by election. But private and particular corporations, founded and endowed by individuals, for charitable purposes, are subject to the private government of those who are the efficient patrons and founders. If there be no visitor appointed by the founder, the law appoints the founder himself, and his heirs,

to be the visitors. This visitorial power arises from the property which the founder assigned to support the charily; and as he is the author of the charity, the law gives him and his heirs a visitorial power, that is, ran authority to inspect the actions, and regulate the behavior of the members that partake of the charity. He is to judge according to the statutes and rules of the college or hospital; and it was settled, by the opinion of Lord Holt, in the case of *Philips v. Bury*, (and which opinion was sustained and affirmed in the House of Lords,) that the decision of the visitor (whoever he might be) was final, and without appeal, because the doctrine is, that the founder reposes in him entire confidence that he will act justly. In most cases of eleemosynary establishments, the founders do not retain this visitorial power in themselves, but assign or vest it in favor of some certain specified trustees or governors of the institution. It may even be inferred, from the nature of the duties to be performed, by the corporation or trustees, for the persons interested in the bounty, that the founders or donors of the charity meant to vest the power of visitation in such trustees. This was the case with Dartmouth College, according to the opinion of the Supreme Court of the United States, in the case of *Dartmouth College v. Woodward*.[94] Where governors or trustees are appointed by a charter, according to the will of the founder, to manage a charity, (as is usually the case in colleges and hospitals) the visitorial power is denoted to belong to the trustees; in their corporate character.[95]

The visitors of an incorporated institution are a domestic tribunal, possessing a jurisdiction from which there is no appeal. It is an ancient, and immemorial right given by the common law to the private founders of charitable corporations, or to those whom they have nominated and appointed, to visit the charities they called into existence. The jurisdiction is to be exercised within the bosom of the corporation, and at the place of its corporate existence. Assuming, then, (as is almost universally the fact in this country,) that the power of visitation of all our public charitable corporations, is vested by the founders and donors of the charity, and by the acts of incorporation, in the governors or trustees, who are the assignees of the rights of the founders, and stand in their places; it follows, that the trustees of a college may exercise their visitorial power in their sound discretion, and without being liable to any supervision or control, so far as respects the government and discipline of the institution, and so far as they exercise their powers in good faith, and within the limits of the charter. They may amend and repeal the bylaws and ordinances of the corporation, remove its officers, correct abuses, and generally superintend the management of the trusts.

This power of visitation, Lord Hardwicke admits to be a power salutary to literary institutions, and it arose from the right which every donor has to dispose, direct, and regulate his own property as he pleases; *cujus est dare, ejus est disponere*. Though the king, or the state, be the incipient founder, (*fundator incipiens*,) by means of the charter or act of incorporation, yet the donor or endower of the institution, with funds, is justly termed the perficient founder; (*fundator perficiens*,) and it was deemed equitable and just at common law, that he should exercise a private jurisdiction as founder in his *forum domesticum*, over the future management of the trust.[96] But as this visitorial power was, in its nature summary and final, and therefore liable to abuse, Lord Hardwicke was not disposed to extend it in equity. It is now settled, that the trustees or governors of a literary or charitable institution, to whom the visitorial power is deemed to vest by the incorporation, are not placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the Court of Chancery, not as itself possessing a visitorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trust, to redress grievances, and suppress frauds. Where a corporation is a mere trustee of a charity, a court of equity will yet go farther; and though it cannot appoint or remove a corporator, it will, in a case of gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other

hands.[97]

There is a marked and very essential difference between civil and eleemosynary corporations on this point of visitation. The power of visitors, strictly speaking, extends only to the latter; for though in England, it is said that ecclesiastical corporations are under the jurisdiction of the bishop as visitor, yet this is not that visitorial power of which we have been speaking, and which is discretionary, final and conclusive. It is a part of the ecclesiastical polity of England, and does not apply to our religious corporations. The visitorial power, therefore, with us, applies only to eleemosynary corporations. Civil corporations, whether public, as the corporations of towns and cities; or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to this species of visitation. They are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers.[98] The way in which the courts exercise common law jurisdiction over all civil corporations, whether public or private, is by writ of *mandamus* and by information in the nature of *quo warranto*.[99] It is also well understood, that the Court of Chancery has a jurisdiction over charitable corporations for breaches of trust. It has been much questioned, whether it had any such jurisdiction over any other corporations, than were as held to charitable uses. The better opinion seems, however, to be, that any corporation chargeable with trusts, may be inspected, controlled, and held accountable in chancery, for an abuse of such trusts. With that exception, the rule seems to be, that all corporations are amenable to the courts of law, and there only according to the course of the common law, for nonuser or misuser of their franchises.[100]

V. Of the dissolution of Corporations.

A corporation may be dissolved, it is said, by statute; by the natural death of all the members; by surrender of its franchises; and by forfeiture of its charter, through negligence, or abuse of its franchises.[101]

This branch of the subject affords matter for various and very interesting inquiries.

In respect to public corporations, which exist only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the constitution of the United States. In those public. corporations, there is in reality but one party, and the trustees or governors of the corporation are merely trustees for the public. But a private corporation, whether civil or eleemosynary, is a contract between the government and the corporators, and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared. This great principle of constitutional law was settled in the case of *Dartmouth College v. Woodward*;[102] and it had been asserted and declared by the Supreme Court of the United States, in several other cases, antecedent to hat decision.[103] But it has become quite the practice, in all the recent acts of incorporations for private purposes, for the legislature to reserve to themselves a lower to alter, modify, or repeal the charter, at pleasure; and though the validity of the alteration, or repeal of a charter, in consequence of such a reservation, may not he legally questionable,[104] yet it may be come a matter of serious consideration in many cases, how far the exercise of such a power could he consistent with justice or policy. If the charter be considered as a compact between the

government and the individual corporators, such a reservation is of no force, unless it be made part and parcel of the contract. If a charter be granted, and accepted, with that reservation. there seems to be no ground to question the validity and efficiency of the reservation; and yet it is easy to perceive, that if such a clause, inserted asst formula in every charter and grant of the government, be sufficient to give the state an unlimited control, at its mere pleasure, of all its grants, however valuable the consideration upon which they may be founded, the great and salutary provisions in the constitution of the United States, so far as concerned all grants from state governments, will become of no moment. These legislative reservations of a right of repeal, ought to be under the guidance of extreme moderation and discretion. An absolute and unqualified repeal, at once, of a charter of incorporation of a money or trading institution, would be attended with most injurious and distressing consequences. According to the settled law of the land, upon the civil death of a corporation, all its real estate, remaining unsold, reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors or trustees of the corporation, can recover those debts, or be charged with them, in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown, at common law.[105] A very guarded and moderate example of these legislative reservations annexed to a charter, is that contained m the act of the legislature of this state, of February 28th, 1822, ch. 50. where it is declared, by way of express proviso, that the legislature may, after the expiration of five years, alter and modify and expunge the act, upon condition, nevertheless, that no alteration or modification shall annul or invalidate the contracts made by or with the corporation, and that the corporation may still continue a corporation, so far as to collect, and recover, and dispose of their estate, real and personal, and pay their debts, and divide the surplus.

But there is a check upon this power of repeal in the constitution of this state, which requires the assent of two thirds of the members elected to each branch of the legislature, to every bill altering any body politic or corporate.[106] I think there can be no just ground to doubt of the application of this provision to a bill repealing a charter. To alter is to make a thing otherwise than it would be, and it means every degree and species of change. To curtail or cut down corporate powers, is to alter them, equally as to enlarge them would be to alter them. That construction of the constitution would be very inadmissible, which would prohibit the legislature, without the assent of two thirds, to interfere, and alter, in any degree short of annihilation, the charter of a company, and yet would allow it to be destroyed by a bare majority. Upon such a construction, the legislature could destroy by the will of a majority, because that is not to alter the charter; but they could not reduce the capital to a nominal sum, and deprive the company of a capacity to move, without the assent of two thirds, because that would be to alter. The constitution is susceptible of a more liberal and reasonable construction; and no charter, under any reservation, can be dissolved by a legislative act, without the constitutional majority of two thirds of each house.

A corporation may, also, be dissolved, when an integral part of the corporation is gone, without whose existence the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part, and has become incapable of acting. The corporation becomes then virtually dead or extinguished.[107] But in the case of *The King v. Pasmore*,[108] in which this subject was most extensively and learnedly discussed, the K. B. seemed to consider such a dissolution not entirely absolute, but only a dissolution to certain purposes. The king could interfere and grant a new charter, and he could renovate the corporation, either with the old, or with new corporators. If renovated in the sense of that case, all the former rights would revive and attach on

the new corporation, and, among others, a right to sue on a bond given to the old corporation. But if not renovated, then the dissolution becomes absolute, because the corporation has become incapable of acting. In the case of a new incorporation, upon the dissolution of an old one, the title to the lands belonging to the old corporation does not revive in the new corporation, except as against the state. In England, it would require an act of Parliament to revive the title as against the original grantor, or his heirs;[109] but it would be at least questionable whether any statute with us could work such an entire renovation, because vested rights cannot be divested by statute. When a corporation has completely ceased to exist, there is no ground for the theory of a continuance of the former corporation under a new name or capacity. It becomes altogether a new institution, with newly created rights and privileges.

It is said, that a corporation may be dissolved by a voluntary surrender of its franchises into the hands of government, as well as by an involuntary forfeiture of them, through a total neglect of using them, or using theca illegally and unjustly.[110] But in the case of *The King v. The City of London*, Sir George Treby (afterwards Lord Ch. J.) very forcibly contended, that a corporation could not be dissolved by a voluntary surrender of its property, because a corporation might exist without property; and upon that argument he shook, if not destroyed, the authenticity of the note at the end of the case in Dyer, of *the Archbishop of Dublin v. Bruerton*,[111] in which it was stated, that a religious corporation might be legally dissolved and determined by a surrender of the dean and chapter, even without the consent of the archbishop. So, also, in the case of *The Corporation of Colchester v. Seaber*,[112] the corporation consisted of a mayor, eleven aldermen, eighteen assistants, and eighteen common council; and though the mayor and aldermen were judicially ousted in 1740, and those offices continued vacant until 1763, when a new charter was granted and accepted, it was held by the K. B., that the corporation was not dissolved by all these proceedings, including the natural death of the mayor and aldermen, subsequent to their ouster. This case shows, that a corporation possesses a strong and tenacious principle of vitality, and that a judgment of ouster against the mayor and aldermen, notwithstanding they were integral parts of the corporation, was not an ouster, though a judgment against the corporation itself might be. It was held in argument in that case, that a corporation could, not be dissolved but in three ways; 1. By abuse or misuser, and a consequent judicial forfeiture; 2. By surrender accepted on record; 3. By the death of all the members. It was admitted, on the other side, that the corporation in that case was not dissolved, though it had become incapable of enjoying and exercising its franchises; and the court held, that the loss of the magistracy did not dissolve the corporation. The better opinion would seem to be, that a corporation aggregate may, surrender, and in that way dissolve itself; but then the surrender must be accepted by t government, and be made by some solemn act, to render it complete. This is the general doctrine; but, in respect to the private corporations in this state, which contain a provision rendering the individual members liable for corporate debts due at the time of dissolution, a more lax rule has been indulged. It was held, in the Court of Errors of this state, in *Slee v. Bloom*,[113] that the trustees of a private corporation may do what would be equivalent to a surrender of their trust, by an intentional abandonment of their franchises, so as to warrant a court of justice to consider the corporation as in fact dissolved. But that case is not to be carried beyond the precise facts on which it rested. It ought only to be applied to a case where the debts due at the time of the dissolution are chargeable on the individual members, end then it becomes a safe precedent. It amounts only to this, that if a private corporation suffer all their property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual election, and do no one act manifesting an intention to resume their corporate functions, the courts of justice may, for the sake of the remedy, and in favor of creditors, who, in such case, have their remedy against the individual members, presume a virtual

surrender of the corporate rights, and a dissolution of the corporation. This is the utmost extent to which such a doctrine has been carried, and in such a case it is a safe and reasonable doctrine. The old and well established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or nonuser of its franchises, until the default has been judicially ascertained and declared It was adjudged, in South Carolina,[114] that the officers of a corporation could not dissolve it without the assent of the great body of the society.

The subject of the forfeiture of corporate franchises by nonuser or misuser, was fully discussed in the case of *The King v. Amery*,[115] and it was held, that though a corporation may be dissolved, and its franchises lost, by nonuser or neglect, yet it was assumed as an undeniable proposition, that the default was to be judicially determined in a suit instituted for the purpose. The ancient doubt was, whether a corporation could be dissolved at all for breach of trust. It is now well settled that it may, but then it must be first called upon to answer.[116] In the great case of *The Quo Warranto against the City of London*, in the 34th Charles II, it was a point incidentally mooted, whether a corporation could surrender and dissolve itself by deed; and it was conceded, that it might be dissolved by refusal to act, so as not to have any members requisite to preserve its being. There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power. The one is by *scire facias*, and that process is proper where there is a legal existing body, capable of acting, but who have abused their power. The other mode is by information in the nature of a *quo warranto*, and that proceeding applies where there is a body corporate de facto only, but who take upon themselves to act, though, from some defect in their constitution, they cannot legally exercise their powers.[117] Both these modes of proceeding against corporations, are at the instance, and on behalf of the government. The state must be a party to the prosecution, for the judgment is, that the parties be ousted, and the franchises seized into the hands of the government.[118] This remedy must be pursued at law, and there only; and by a statute of New York, the mode of prosecution by *scire facias*,[119] or information, is directed, where there has been a misuser of the charter, or the franchises of the company surrendered; and the manner of proceeding by action, or information, is prescribed. A Court of Chancery never deals with the question of forfeiture. It may hold trustees of a corporation accountable for abuse of trust, but the court cannot, without special statute authority, divest corporations of their corporate character and capacity. It has no ordinary jurisdiction in regard to the legality or regularity of the election or amotion of corporators. These are subjects exclusively of common law jurisdiction.[120]

The mode of redress in this state, when incorporated companies abuse their powers, or become insolvent, has been the subject of several recent statute regulations, which have committed the cognizance of such cases to the Court of Chancery. The acts of 1817 and 1821,[121] provided for the dissolution of incorporated insurance companies, by order of the Chancellor, upon application of the directors, and for good cause shown; and the Court of Chancery, when it decreed a dissolution of the corporation, was to direct a due distribution of the funds, and to appoint trustees for that purpose. The act of 1825[122] was much broader in its provisions. It contained many directions calculated to check abuses in the management of all moneyed incorporations, and to facilitate the recovery of debts against them. All transfers, by incorporated companies, in contemplation of bankruptcy, were declared void; and if any incorporated bank should become insolvent, or violate its charter, the Chancellor was authorized by process of injunction, to restrain the exercise of its powers, and to appoint a receiver, and cause. the effects of the company to be distributed among the creditors. This was a statute of bankruptcy, in relation to incorporated banks.

NOTES

1. Dig. 47. 22. 4.
2. Dig. 47. 22. 3. 1.
3. Taylor's Elements of the Civil Law, 567-570.
4. Ad Aug. 32.
5. Suet. J. Caesar, 42.
6. Epist. b. 10. Letters 42, 43.
7. 1 Brown's Civil & Adm. Law, 142-8. Wood's Inst. Of the Civil Law. 134.
8. 1 Bro. Civil Law, 151, 162, 163, 164.
9. Ibid. 151, 152, note.
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14. Ibid. 94. b, and note 46, and note 47, to lib. 1 Co. Litt. Viner, tit. Estate, L.
15. 1 Kyd on Corporations, 76, 77. Co. Litt. 46.
16. 2 Term Rep. 667.
17. 7 Mass. Rep. 187. 1 Greenleaf, 361.
18. Act of 5th April, 1813, L.N.Y. vol. ii, 211.
19. 1 Blacks. Com. 471. 1 Kyd, 25-27. 1 Ld. Raym. 6. 8. 1 Vesey, sen. 537. 9 Vesey, 405. 1 Burr. 200. Lord Holt, in *Philips v. Bury*, cited in 2 Term Rep. 353.
20. 2 Atk. 88.
21. *Sutton's hospital*, 10 Co. 23. Lord Hardwicke, in 2 Atk. 87. Lord Holt, in *Philips v. Bury*, cited in 2 Term Rep. 352. The opinions of the Judges in *Dartmouth College v. Woodward*, 4 Wheaton, 518.
22. 1 Salk. 191. 1 Blacks. Com. 474, 475.
23. 1 Kyd on Corporations, 13, 69, 70. 1 Blacks. Com. 475, 476,
24. *The King v. The City of London*, Skinner, 310.
25. Laws of N.Y. vol. i. 289, 291, 292.
26. Laws of N.Y. vol. ii. 139
27. Laws of N.Y. vol. ii. 131.
28. Hobart, 212. 5 Co. 63. *Chamberlain of London's case*. 1 Mod. Rep. 194. *Rogers v. Davenant*.
29. 8 Johns. Rep. 422. 2 Johns. Ch. Rep. 325.
30. 10 Co. 27, 28, 30.
31. Dyer, 100 a. pl. 70, cited as good law by Lord Kenyon, in 2 Term Rep. 672.

32. 1 Kyd on Corporations, 225.

33. 1 Kyd. 71, 72. 1 Blacks. Com. 477.

34. Bro. Abr. Uses, pl. 10. Bacon on Uses, 57. Gilbert on Uses, by Sugden, p. 6, 7.

35. *Jackson v. Hartwell*, 8 Johns. Rep. 422.

36. *Green v. Rutherforth*, 1 Vesey, 462, 468, 470, 475. Gilbert on Uses, by Sugden, 7. note. 1 Kyd, 72. 2 Johns. Ch. Rep. 384. 389.

37. See Farmers' Fire Insurance and Loan Company, Laws of N.Y. 17th of April, 1822, ch. 240.

38. The New York Lombard Association, Laws of N.Y. April 8th,1824. ch. 187.

39. Co. Litt. 44. a. 300. b. 1 Sid. 161, note at the end of the case. 10 Co. 30, b. 1 Kyd, 76, 78, 108, 115. Com. Dig. tit. Franchise, 11, 15, 16, 17, 18.

40. 1 Ves. & Bea. 226, 237, 240, 244.

41. Laws of N.Y. vol. ii. 212.

42. Co. Litt. 2. b. 2 Blacks. Com. 268-274. and I,$lacks. Com. 478.

43. Laws of N.Y. sess. 36. ch. 23.

44. 3 Binney, App. p. 626.

45. *First Parish in Sutton v. Cole*, 3 Pickering, 222.

46. *Silver Lake Bank v. North*, 4,Johns. Ch. Rep. 370.

47. Christy's Dig. tit. Corporation.

48. 1 McCord, 80.

49. *Jackson v. Hammond*, 2 Caines' Cases in Error, 337.

50. 4 Wheaton, 1.

51. 1 Eden, 10. 1 Wm. Blacks. Rep. 91.

52. 2 P. Wms. 119. 2 Vern. 342. Wilmot's Opinions, p. 24, 33. 1 Bro. 15. 7 Vesey, 69.

53. Code, lib. 1. t. 2. s. 19, 26. tit. 3. s. 38. Dig, 33. 2. 16. Strahan's note to Domat, b. 1. tit. 1. s 16. Suinburne, part 6. s. l. 2 Domat, b. 3. tit. l. s. 6. – b. 4. tit. 2. s. 2. 6. – b. 3. tit. l. s. 6.

54. 1 Ch. Cas. 134, 267. 6 Dow. 136.

55. I have assumed the question on the validity of a devise of lands in trust for a charitable corporation, to be still unsettled, notwithstanding the decree in the case of *The Orphan Asylum Society v. McCartee*, because the point is still *sub judice*, on appeal from that decree and when this volume went to the press, the appeal had been argued.and remained undecided.

56. Davies' Rep. p. 121. the case of the *Dean and Chapter of Fernes*.

57. Plowd. 91. b. 2. Saund. 305. 3 P. Wms. 423. arg. and 1 Kyd. 260.

58. Bro. Corpor. 51.

59. 3 Lev. 107.

60. 3 P. Wms. 419.

61. Maxwel v. Dulwich College, cited in 1 Fonb. 296. note.

62. 16 East, 6.

63. 7 Cranch, 299,

64. 8 Wheaton, 338.

65. 9 Wheaton. 738.

66. *Eastman v. Coos Bank*, 1 N. H. Rep. 26. *The Proprietors of the Canal Bridge v. Gordon*, 1 Pickering, 297. *Mott v. Hicks*, 1 Cowen, 513. *The Baptist Church v. Mulford*, 3 Halsted, 182. *The Chesnut Hill Turnpike v. Nutter*, 4 Serg. & Rawl. 16. Duncan, J. in *Bank of Northern Liberties v. Cresson*, 12 Serg. & Rawl. 312. *Colcock v. Garvey*, 1 Nott & McCord, 231. *Bank of U.S. v. Dandridge*, 12 Wheaton, 64.

67. 1 Leon 163. 1 Kyd. 234, 237, 250, 253.

68. 10 Co. 57. b. *Case of the Chancellor of Oxford*.

69. 1 Kyd 246-252. 6 Co. 64 b. 70 Co. 126. a.

70. Jenk. Cent., 243. case 6, 270. case 88. 10 Co. 126. a.

71. Act. 7th Feb., 1817, ch. 28.

72. *Rex v. Varlo*, Cowp. 248. 4 Kyd, 308, 400. 1 Blacks. Com. 478.

73. Hicks v. The Town of Launceston, 1 Rol. Abr. 513, 514. 8 East, 272. n. S. C.

74. 2 Kyd. 20-30.

75. 3 Term Rep. 189.

76. See also, *Rex v. Spencer*, 3 Burr. 1827. 2 Kyd, 26-31.

77. 3 Serg. & Rawl. 29.

78. *Rex v. Spencer*, 3 Burr. 1827. The general law on the subject of valid bylaws, is well digested is 1 Woodd. Lec. 486-500.

79. *Hicks v. Town of Launceston*, 1 Rol. Abr. 513. *Foot v. Prowse, Mayor of Truro*, Str. 625. 3 Bro. P. C. 167. *The Queen v. Corporation of Durham*, 10 Mod. 146. *The People v. Runkel*, 9 Johns. Rep. 147.

80. 3 Term Rep. 238, 245, 246.

81. *The Dean and Chapter of Fernes*, Davies's Rep. 130-132.

82. *Bagg's Case*, 11 Co. 99. a. 2d resolution. See also Sty. 477, 480. 1 Ld. Raym. 392. 2 ibid. 1566

83. *Tidderley's case*, 1 Sid. 14.

84. 2 Str. 891.

85. 1 Burr. 517.

86. *The King v. Lyme Regis*, Doug. 149.

87. Ibid. and 3 Burr. 1837. For the various causes that have been adjudged sufficient or insufficient for the removal or disfranchisement of a member of a corporation, see 2 Kyd on Corporations. 62-94. *Commonweatth v. St. Patrick's Society*, 2 Binney, 441. *The same v. Philanthropic Society*, 5 ibid. 486. *The same v. Pennsylvania Beneficial Society*, 2 Serg. & Rawl. 141.

88. *Head & Amory v. The Providence Insurance Company*, 2 Cranch, 127.

89. *The People v. Utica Insurance Company*, 15 Johns. Rep. 358. *The N.Y. Fire Insurance Company v. Ely*, 5 Com. Rep 560.

90. *Broughton v. The Manchester Water Works Company*, 3 Barn. & Ald. 1.

91. 1 Blacks. Com. 480. 2 Kyd, 174.

92. 1 Woodd. Lec. 474.

93. Skinner's Rep. 447. 1 Lord Raym. 5. S. 2 Term Rep. 316.

94. 4 Wheaton, 518.

95. Story, J. in 4 Wheaton, 674, 675. Blacks. Com. 482. *Case of Sutton Hospital*, 10 Co. 33. a. b. *Philips v. Bury*, supra. Green v. Rutherforth, 1 Verey, 462. *Attorney General v. Middleton*, 2 Vesey, 327.

96. 2 Vesey, 472. l0 Co. 33. a.

97. Story, J. 4 Wheaton, 676.

98. 1 Blacks. Com. 480, 481.

99. 2 Kyd, 174.

100. Attorney General v. Utica Insurance Company, 2 Johns. Ch. Rep. 384-390. 1 Vesey, 468. 2 Atk. 406, 407. 3 Merivale, 375. 4 Wheaton's App. 20, 21.

101. 1 Blacks. Com. 485.

102. 4 Wheaton, 318.

103. *Fletcher v. Peck*, 6 Cranch, 88. *The State of New Jersey v. Wilson*, 7 ibid. 164. *Terret v. Taylor*, 9 ibid. 43. *The Town of Pawlet v. Clark*, ibid 292.

104. Parsons, Ch. J. 2 Mass. Rep. 146.

105. 1 Lev. 237. *Edmunds v. Brown & Sillard*. Co. Litt. 13. b. 3 Burr. 1868. Arg. 1 Blacks. Com. 484. 2 Kyd on Corp. 516.

106. Art. 7. s. 9.

107. 1 Rol. Abr. 514. l. 1.

108. 3 Term Rep. 199.

109. 1 Preston on Abstract of Titles, p. 273.

110. 1 Woodd. Lec. 500. Salk. 191.

111. 3 Dy. 282 b.

112. 3 Burr. 1866.

113. 19 Johns. Rep. 456.

114. *Smith v. Smith*, 3 Eq. Rep. 557.

115. 2 Term Rep. 515.

116. *Slee v. Bloom*, 5 Johns. Ch. Rep. 380. Story, J. in 9 Cranch's Rep., 61.

117. Lord Keynon, and Ashhurst, J. in *Rex v. Pasmore*, 3 Term Rep. 199.

118. *Rex v. Stevenson*, Yelv. 190. *Commonwealth v. Union Insurance Company*, 5 Mass. Rep. 230.

119. Sess 48 ch. 325.

120. 3 Johns. Rep. 134. Van Ness, J. 5 Johns. Ch. Rep. 380. *Slee v. Bloom*. 17 Vesey, 491. *Attorney General v. Earl of Clarendon*, 1 Eq. Cas. Abr. 131. pl. 10. *Attorney General v. Reynolds*. 2 Johns. Ch. Rep. 376, 378, 388. *Attorney General v. Utica Insurance Company*. 5 Term Rep. 85. *The King v. Whitwell*.

121. 9 L. N.Y. sess. 40, ch. 146. and sess. 44. ch. 148.

122. Sess. 48. ch. 325.

PART 5
Of the Law Concerning Personal Property

LECTURE 34

Of the History, Progress, and Absolute Rights of Property

HAVING concluded a series of lectures on the various rights of persons, I proceed next to the examination of the law of property, which has always occupied a preeminent place in the municipal codes of every civilized people. I purpose to begin with the law of personal property, as it has appeared to me to be the most natural and easy transition, from the subjects which we have already discussed. This is the species of property which first arises, and is cultivated in the rudest ages; and when commerce and the arts have ascended to distinguished heights, it maintains its level if it does not rise even superior to property in land itself, in the influence which it exercises over the talents, the passions, and the destiny of mankind.

To suppose a state of man prior to the existence of any, notions of separate property, when all things were common, and when men, throughout the world, lived without law or government, in innocence and simplicity, is quite fanciful, if it be not altogether a dream of the imagination. It is the golden age of the poets, which forms such a delightful picture in the fictions, adorned by the muse of Hesiod, Lucretius, Ovid, and Virgil. It has been truly observed, that the first man who was born into the world, killed the second; and when did the times of simplicity begin? And yet we find the Roman historians and philosophers,[1] rivaling the language of poetry in their descriptions of some imaginary state of nature, which it was impossible to know, and idle to conjecture. No such state was intended for man in the benevolent dispensations of providence; and in following the migrations of nations, apart from the book of Genesis, human curiosity is unable to penetrate beyond the pages of genuine history; and Homer, Herodotus, and Livy, carry us back to the confines of the fabulous ages. The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society.[2] Man was fitted and intended by the author of his being, for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature; and by obedience to this law, he brings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind.

Occupancy, doubtless, gave the first title to property in lands and moveables. It is the natural and original method of acquiring it; and upon the principles of universal law, that title continues so long as occupancy continues.[3] There is no person, even in his rudest state, that does not feel and ac. knowledge, in a greater or less degree, the justice of this title. The right of property, founded on occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions. There have been modern theorists, who have considered separate and exclusive property, and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition, if it were instituted or reorganized upon the basis of such speculations. The sense of property is graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.[4] The exclusive right of using and transferring property, follows as a natural consequence, from the perception and admission of the

right itself.[5] But, in the infancy and earlier stages of society, the right of property depended almost entirely upon actual occupancy. Property, without possession, is said to be too abstract an idea for savage life; and society had made some considerable advances towards civilization, before there was an admission of a right or title to property distinct from the possession. By the ancient law of all the nations of Europe, the *bona fide* possessor of goods had a good title as against the real owner, in whatever way, whether by force, fraud, or accident, the owner may have been divested of the possession. It was the law, in several parts of Germany, so late at least as the middle of the last century, according to Heineccius,[6] that if one person should lend, or hire, or deposit his goods with another, and they should come to the possession of a third person, be would be entitled to hold them as against the original owner. By the Roman law, in its early state, property stolen and sold was lost to the real owner, and the only remedy was by an action (*conductio furtiva*) against the thief. But when the Roman law advanced to maturity, it was held, that theft did not deprive a man of his title to property, and the action of *rei vindicatio* was, in effect, given against the *bona fide* purchaser.[7] The law of the twelve tables, by which the possession of one year was a good title by prescription to moveables, shows what a feeble and precarious right was attached to personal property out of possession.

The ancient laws of Europe confiscating stolen goods, on conviction of the thief, without paying any regard to the right of the real owner, is another instance to prove the prevalence of a very blunt sense of the right of property distinct from the possession. The English doctrine of wrecks was founded on this imperfect notion of the right of property, when it had lost the evidence of possession. By the common law, as it was laid down by Sir Wm. Blackstone,[8] goods wrecked were adjudged to belong to the king, and the property was lost to the owner. This, he admits, was not consonant to reason and humanity, and the rigor of the common law was softened by the statute of Wm. 1. 3 Edw. l. c. 4. which declared, that if any thing alive escape the shipwreck, be it man or animal, it was not a legal wreck, and the owner was entitled to reclaim his property within a year and a day. Upon this statute the legal doctrine of wrecks has stood to this day. St. Germain, the author of the Doctor and Student, did not seem to think, that even the law, under this statute, stood with conscience,[9] for why should the owner forfeit the shipwrecked goods, though it should happen, that no man, dog, or cat, (to use the words of the statute,) should come alive unto the land out of the slip? The only rational ground of the claim on the part of the crown is, that the true owner cannot be ascertained. The imperial edict of the Emperor Constantine was more just than the English statute, for it gave the wrecked goods, in every event, to the owner;[10] and Bracton, who wrote before the statute of 3 Edw. I, and who was acquainted with the edict of Constantine, lays down the doctrine of wreck upon perfectly just principles.[11] He males it, to depend, not upon the casual escape of au animal, but upon the absence of all evidence of the owner. The statute of this state is like the edict of Constantine, and the declaration of Bracton, for it declares, that nothing that shall be cast by the sea upon the land, shall be adjudged wreck, but the goods shall be kept safely for the space of a year and a day for the true owner, to whom the same is to be delivered on his paying reasonable salvage; and if the goods be not reclaimed by that day, they shall be sold, and the proceeds accounted for to the state.[12] In the case of *Hamilton and Smyth v. Davis*,[13] the very question arose in the K. B., whether the real owner was entitled to reclaim his shipwrecked goods, though no living creature had come alive from the ship to the shore. The grantee under the crown claimed the goods as a wreck, because the ship was totally lost, and no living animal was saved; and his very distinguished counsel, consisting of Mr. Dunning, (afterwards Lord Ashburton,) and Mr. Kenyon, (afterwards Lord Ch. J. of the K. B.,) insisted, that, according to all the writers, from the Mirror to Blackstone inclusive, it was a lawful wreck, as no living creature had come to the shore, and that Bracton stood unsupported by any other

writer. But Lord Mansfield, with a sagacity and spirit that did him infinite honor, reprobated the doctrine urged on the part of the defendant, and declared, that there was no case adjudging that the goods were forfeited, because no dog, or cat, or other animal, came alive to the shore; that any such determination would be contrary to the principles of law, justice, and humanity; that the very idea was shocking; and that the coming ashore of a dog, or a cat, alive, was no better proof of ownership, than if they should come ashore dead; that the whole inquiry was a question of ownership; and that if no owner could be discovered, the goods belonged to the king, and not otherwise; and that the statute of 3 Edw. I. was not to receive any construction contrary to the plain and clear principles of justice and humanity.

After reading this interesting case, it appears rather surprising that any contrary opinion should have been seriously entertained in Westminster Hall, at so late a period as the year 1771; and especially that Sir Wm. Blackstone should have acquiesced, without any difficulty, in a different construction of the statute of Westminster the first.

But to return to the history of the law of property. The title to it was gradually strengthened, and acquired great solidity and energy, when it became to be understood, that no man could be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title.

The exception to this rule grew out of the necessities and the policy of commerce; and it was established as a general rule, that sales of personal property in market overt, would bind the property even against the real owner. The markets overt in England depend upon special custom, which prescribes the place, except that, in the city of London, every shop in which goods are exposed publicly to sale, is market overt for those things in which the owner professes to trade. If goods be stolen, and sold openly in such a shop, the sale changes the property. But if the goods be not sold strictly in market overt, or if there be not good faith in the buyer, or there be any thing unusual or irregular in the sale, it will not affect the validity of it as against the title of the real owner.[14] The common law, according to Lord Coke, held it to be a point of great policy, that fairs and markets overt should be well furnished, and to encourage them it did ordain, that all sales and contracts of any thing vendible in markets overt, should bind those who had right; but, he adds, that the rule had many exceptions, and he proceeds to state the several exceptions, which show the precision and caution with which the sale was to be conducted so as to bind the property. It is the settled English law, that a sale out of market overt, or not according to the usage and regulations of the market overt, “ill not change the property

as against the real owner. Thus, we find, in the case of *Wilkinson v. King*,[15] that where the owner of goods bid sent them to a wharf in the borough of Southwark, where goods of that sort were usually sold, and the wharfinger, without any authority, sold the goods to a *bona fide* purchaser, this was considered not to be a sale in market overt so as to change the property, but a wrongful conversion; and the purchaser was held liable in trover to the true owner.

It is understood, that this English custom of markets overt does not apply to this country; and the general principle applicable to the law of personal property throughout civilized Europe is, that *nemo plus juris in alium transferre potest quam ipse habet*. This is a maxim equally of the common, and of the civil law;[16] and a sale *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor. It has been frequently held in this country,[17] that the

English law of markets overt had not been adopted, and, consequently, as a general rule the title of the true owner cannot be lost without his own free act and consent. How far that consent, or a due authority to sell, is to be inferred, in many cases, for the encouragement and safety of commerce, may be discussed in our future inquiries. My object at present is, only to show how the right of the true owner to property kept increasing, in consideration and vigor, with the progress of law from rudeness to refinement.

Title to property resting originally in occupancy, that title ceased, of course, upon the death of the occupant. Sir William Blackstone considers the descent, devise, and transfer of property, equally political institutions and creatures of the municipal law, and not natural rights; and that the law of nature suggests, that on the death of the possessor, the estate should become common, and be open to the next occupant. He admits, however, that, for the sake of peace and order, the universal law of almost every nation gives to the possessor the power to continue his property by will; and if it be not disposed of in that way, that the municipal law steps in, and declares who shall be the heir of the deceased.[18] As a mere speculative question, it may be well doubted, whether this be a perfectly correct view of the law of nature on this subject. The right to transmit property by descent, to one's own offspring, is dictated by the voice of nature.[19] The universality of the sense of a rule or obligation, is pretty good evidence that it has its foundations in natural law. It is in accordance with the sympathies and reason of all mankind, that the children of the owner of property, which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death, than the passing stranger. This better title of the children has been recognized in every age and nation, and it is founded in the natural affections, which are the growth of the domestic ties, and the order of Providence.[20] But the particular distribution among the heirs of the blood, and the regulation and extant of the degrees of consanguinity to which the right of succession should be attached, do undoubtedly depend essentially upon positive institution.

The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience, and mutual wants. It was first applied to moveables; and a notion of separate and permanent property in land, would not have arisen until men had advanced beyond the hunter and shepherd states, and become husbandmen and farmers. Property in land would naturally take a faster hold of the affections, and, from the very nature of the subject, it would not be susceptible of easy transfer, nor so soon as moveable property be called into action as an article of commerce.

Delivery of possession was, anciently, necessary to the valid transfer of land. When actual delivery became inconvenient, symbolical delivery supplied its place; and as society grew in cultivation and refinement, writing was introduced, and the alienation of land was by deed.

The gratuitous disposition of land by will, was of much slower growth than alienations, in the way of commerce, for a valuable consideration, because the children were supposed to have a right to the succession on the death of the parent, though Grotius considers it to be one of the natural rights of alienation.[21] In the early periods of the English law, a man was never permitted totally to disinherit his children, or leave his widow without a provision.[22] Testaments were introduced by Solon into the Athenian commonwealth, in the case in which the testator had no issue; and the Roman law would not allow a man to disinherit his own issue, his *sui et necessarii haredes*, without assigning some just cause in his will. The reason of the rule in the civil law was, that the children were considered as having a property in the effects of the father, and entitled to the management of the estate. The *querela inofficiosi testamenti*, was an action introduced in favor of the children, to

rescind wills made to their prejudice, without just cause. But the father could charge his estate with his debts, and so render the succession unprofitable; and the children could, in that case, abandon the succession, and so escape the obligation of the debts.[23]

In England, the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country; and the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance, to one's descendants, in regular order and succession, is enjoyed in the fulness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others. The state has set bounds to the acquisition of property by corporate bodies; for the creation of those artificial persons is a matter resting in the discretion of the government, who have a right to impose such restrictions upon a gratuitous privilege or franchise, as the sense of the public interest or convenience may dictate. With the admission of this exception, the legislature have no right to limit the extent of the acquisition of property, as is suggested by some of the regulations in ancient Crete, Lacedaemon, and Athens;[24] and has also been recommended in some modern Utopian speculations. A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind, and destroy the happiness of social life.[25] When the laws allow a free circulation to property by the abolition of perpetuities, entailments, the claims of primogeniture, and all inequalities of descent, the operation of the steady laws of nature will of themselves preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate.

Civil government is not entitled, in ordinary cases, and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws, or any other visionary schemes of frugality and equality. The notion, that plain, coarse, and abstemious habits of living, are requisite to the preservation of heroism and patriotism, has been derived from the Roman classical writers. They praised sumptuary laws, and declaimed vehemently against the degeneracy of their countrymen, which they imputed to the corrupting influence of the arts of Greece, and of the riches and. luxury of the world, upon the freedom and spirit of those “lords of human kind,” who had attained universal empire by means of the hardy virtues of the primitive ages.[26] But we need only look to the free institutions of Britain, and her descendants, and the prosperity and freedom which they cherish and protect, to be satisfied, that the abundant returns of industry, the fruits of genius, the boundless extent of commerce, the exuberance of wealth, and the cultivation of the liberal arts, with the unfettered use of all those blessings, are by no means incompatible with the full and perfect enjoyment of enlightened civil liberty. No such fatal union necessarily exists between prosperity and tyranny, or between wealth and national corruption, in the harmonious arrangements of Providence. Though Britain, like ancient Tyre, has her “merchants who are princes, and her traffickers the honorable of the earth,” she still sits “very glorious in the midst of the seas, and enriches the kings of the earth with the multitude of her riches, and of her merchandise.” Nor have the polished manners and refined taste for which France has been renowned in modern ages, or even the effeminate luxury of her higher classes, and of her capital, been found to damp her heroism, or enervate her national spirit. Liberty depends essentially upon the structure of the government, the administration of justice, and the intelligence of the people, and it has very little concern with equality of property, and frugality in living, or the varieties of soil and climate.[27]

Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessment on the part of government. It is not sufficient that no tax or imposition can be imposed upon the citizens, but by their representatives in the legislature. The citizens are entitled to require, that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed.

A just and perfect system of taxation is still a *desideratum* in civil government, and there are constantly existing well-founded complaints, that one species of property is made to sustain an unequal, and, consequently, an unjust pressure of the public burdens. The strongest instance in this state, and probably in others, of this inequality, is the assessments of taxes upon wild and unproductive lands; and the oppression upon this description of real property has been so great as to diminish exceedingly its value. This property is assessed in each town, by assessors residing in each town, and whose interest it is to exaggerate the value of such property, in order to throw as great a share as possible of the taxes to be raised within the town upon the nonresident proprietor. The wild land, which the owner finds it impossible to settle, or even to sell, without great sacrifice, and which produces no revenue, is assessed, not only for such charges as may be deemed directly beneficial to the land, such as making and repairing roads and bridged, but for all the wants and purposes of the inhabitants. It is made auxiliary to the maintenance of the poor, and the destruction of wild animals; and the inhabitants of each town have been left to judge, in their discretion, of the extent of their wants. Such a power vested in the inhabitants of each town, of raising money for their own use, on the property of others, has produced, in many instances, very great abuses and injustice. It has corrupted the morals of the people, and led to the plunder of the property of non-resident landholders. This was carried to such enormous extent in the county of Franklin, as to awaken the attention of the legislature, and to induce them to institute a special commission, to inquire into the frauds and abuses committed under this power, and also to withdraw entirely from the inhabitants of new towns, the power of raising money by assessments upon property, for the destruction of noxious animals.[28] The ordinance of Congress, of the 13th of July, 1787,[29] passed for the government of the northwestern territory, anticipated this propensity to abuse of power, and undertook to guard against it, by the provision that in no case should any legislature within that territory tax the lands of non-resident proprietors higher than those of residents. There is a similar provision in the constitution of Missouri, and one still broader in that of the state of Illinois. It is declared, generally, in that of the latter state, that the mode of levying a tax shall be by valuation, so that every person should pay a tax in proportion to the value of his property in possession.

This duty of protecting every man's property, by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government, and frequently it is found to be the most difficult in the performance. Mr. Hume[30] looked upon the whole apparatus of government, as having ultimately no other object or purpose but the distribution of justice. The appetite for property is so keen, and the blessings of it are so palpable, and so impressive, that the passion to acquire is incessantly busy and active. Every man is striving to better his condition; and in the constant struggles, and jealous collisions, between men of property and men of no property, the one to acquire, and the other to preserve, and between debtor and creditor, the one to exact, and the other to evade or postpone payment, it is to be expected, especially in popular governments, and under the influence of the sympathy which the poor and the unfortunate naturally excite, that the impartial course of justice, and the severe duties of the lawgiver, should, in some degree, be disturbed. One of the objects of the constitution of the United

States, was to establish justice; and this it has done by the admirable distribution of its powers, and the checks which it has placed on the local legislation of the states. These checks have already, in their operation, essentially contributed to the protection of the rights of property.

Government is bound to assist the rightful owner of property, in the recovery of the possession of it, when it has been unjustly lost. Of this duty there is no question. But if the possessor of land took possession in good faith, and in the mistaken belief that he had acquired a title from the rightful owner, and makes beneficial improvements upon the land, it has been a point of much discussion, whether the rightful owner, on recovery, was bound to refund to him the value of those improvements. This was the question in the case of Green v. Biddle,[31] which was largely discussed in the Supreme Court of the United States, and which had excited a good deal of interest in the state of Kentucky. The decision in that case, was founded upon the compact between the states of Virginia and Kentucky, made in 1789, relative to lands in Kentucky, and therefore it does not touch the question I have suggested. The inquiry becomes interesting, how far a general statute provision of that kind is consistent with a due regard to the rights of property. The Kentucky act declared that the *bona fide* possessor of land should be paid, by the successful claimant, for his improvements, and that the claimant must pay them, or elect to relinquish the land to the occupant, on being paid its estimated value in its unimproved state.

By the English law, and the common law of this country, the owner recovers his land by ejectment, without being subjected to the condition of paying for the improvements which may have been made upon the land. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril.[32] But if the owner be obliged to resort to Chancery for assistance, in the recovery of the rents and profits, Lord Hardwicke once intimated, in *Dormer v. Fortescue*,[33] that the rule of the civil law, which is stronger than the English law, would be adopted, and consequently the *bonae fidei* possessor would be entitled to deduct the amount of his expenses for lasting and valuable improvements from the amount to be paid, by way of damages, for the rents end profits. The same intimation was given in the Court of Errors, in this state, in *Murray v. Gouverneur*,[34] and that in the equitable action at law, for the mesne profits, the defendant might have the value of his improvements deducted by way of set off. These were extra judicial dicta; and there is no adjudged case, professing to be grounded upon common law principles, and declaring that the occupant of land was, without any special contract, entitled to payment for his improvements, as against the true owner, when the latter was not chargeable with having intentionally laid by and concealed his title. We have a statute in this state relative to lands, in what was formerly called the military tract, which declares, that the settler on those lands, under color of a *bona fide* purchase, should not be divested of his possession or recovery, by the real owner, until the former had been paid the value of his improvements made on the land, after deducting thereout a reasonable compensation to the owner for the use and occupation of the land.[35] This act is as broad, and liable to the same objections that have been made against the Kentucky statute. There are similar statute provisions in Massachusetts and New Hampshire.[36] So far as the act in the latter state was retrospective, and ex tended to past improvements made before it was passed, it has been adjudged in the Circuit Court of the United States for the District of New Hampshire to be unconstitutional; inasmuch as it divested the real owner of a vested title to the possession, and vested a new right in the occupant, upon considerations altogether past and gone.[37] The statute in New Hampshire applied only to cases of a *bona fide* possession of more than six years standing, and only to the increased value of the land, by means of the improvements, and the real owner is allowed the mesne profits as in this state. The justice of that statute has been ably

vindicated in the case of *Withington v. Corey*, in cases not within the reach of the decision in the Circuit Court of the United States.

The rule of the civil law was, that the *bonae fidei* possessor was entitled to be reimbursed, by way of indemnity, the expenses of beneficial improvements, so far as they augmented the property in value; and the rule was founded on the principle of equity, that *nemo debet locupletari aliena jactura*. It is not the amount of the expenses strictly so considered, but only the amount so far as it has augmented the property in value, that the claimant ought, in equity, to refund. But there are difficulties in the execution of this rule. The expense may have been very costly, and beyond the ability of the claimant to refund, and he may have a just affection for the property, and it might have answered all his wants and means in its original state, without the improvements. The Roman law allowed the judge to modify the rule, according to circumstances, and permitted the occupant to withdraw from the land the materials by which it was improved.[38] In many, and indeed in most cases, that mode of relief would be impracticable; and Pothier[39] proposes to reconcile the interests of the several parties, by allowing the owner to take possession, upon condition, that the repayment of those expenditures, by instalments, should remain a charge upon the land. There are embarrassments and difficulties in every view of this subject; and the several state laws to which I have alluded, do not indulge in any of these refinements. They require the value of the improvements to be assessed, and at all events, to be paid, and they are strictly encroachments upon the rights of property, ai known and recognized by the common law of the laid. There were, however, peculiar and pressing circumstances, which were addressed to the equity of the lawgiver, and led to the passage of those statutes, in reference to wild and unsettled lands in a new country, and where the occupant was not liable to any imputation of negligence or dishonesty. The titles to land, in many cases, had become exceedingly obscure and difficult to be ascertained, by reason of conflicting locations, and a course of fraudulent and desperate speculation; and it is impossible not to perceive and feel the strong equity of those provisions. But in the ordinary state of things, and in a cultivated country, such indulgences are unnecessary and pernicious, and invite to careless intrusions upon the property of others. There are but very few cases in which a person may not, with reasonable diligence, and cautious inquiry, discover whether a title be clear or clouded, and *caveat emptor* is a maxim of the common law, which is exceedingly conducive to the security of right and title. No man ought to be entitled to these extraordinary benefits of a *bona fide* possession of land, unless he entered and improved, in a case, which appeared to him, after diligent and faithful inquiry, to be from suspicion. There is no moral obligation, which should compel a man to pay for improvements upon his own land, which he never authorized, and which originated in a tort.

But there are many cases in which the rights of property may be made subservient to the public welfare. The maxim of law is, that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. If a common highway be out of repair, a passenger may lawfully go through an adjoining private enclosure.[40] So, it is lawful to raze houses to the ground to prevent the spreading of a conflagration.[41] These are cases of urgent necessity; but private property must, in many other instances, yield to the general interest. The right of eminent domain, or inherent sovereign power, it is admitted by all publicists, gives to the legislature the control of private property for public uses, and for public uses only. Roads may be cut through the cultivated lands of individuals without their consent, provided it be done by town officers of their own appointment, upon the previous application of twelve freeholders; and the value of the lands, and amount of the damages, must be assessed by a jury, and paid to the owner.[42] So, lands adjoining the canals which have been recently made in this state, were made liable to be

assumed for the public use, so far as was necessary for the great object of the canals, and provision was made for compensation to the individuals injured, by the assessment and payment of the damages. In these, and other instances which might be enumerated, the interest of the public is deemed paramount to that of any private individual; and yet, even here, the constitutions of the United States, and of this state, and of most of the other states of the Union, have imposed a great and valuable check upon the exercise of legislative power, by declaring, that private property should not be taken for public use without just compensation. A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.[43]

L undoubtedly must rest in the wisdom of the legislature to determine when public uses require the assumption of private property, and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A., and give it to B., the law would be unconstitutional and void. Real property, and the rights and privileges of private corporate bodies, are all held by grant or charter from government; and it would be a violation of contract and repugnant to the constitution of the United States, to interfere with private property, except under the limitations which have been mentioned.[44]

But though property be thus protected, it is still to be understood, that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of. the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, the building with combustible materials, and the burial of the dead, may all be inter dieted by low, in the midst of dense masses of population, or, the general rind rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interest must be made subservient to the general interest of the community.

NOTES

1. Sallust Cat. sect. 6. Jurgur. sect. 18. Tacit. Ann. l. 3. sec. 26. Cic. Orat. pro P. Sextio, sect. 42. Justin, lib. 43. ch. 1.

2. Lord Kames considers the sense of property to be a natural appetite, and in its nature, a great blessing. Sketches of the History of Men, b. 1. sk. 2.

3. Grotius, Jure B. & P. b. 2. c. 3. sec. 4.

4. M. Toullier, in his account of the origin and progress of property, in his Droit Civil Francais, tom. 3. p. 40. insists, that a primitive state of man existed before the establishment of civil society, when all things were common, and temporary occupancy the only title; but he gives no sufficient proof of the fact. The book of Genesis, which he justly regards as the most ancient and venerable of histories does not show any such state of the human race. The first man born, was a tiller of the ground, and the second, a keeper of sheep. The earliest account of Noah and his descendants, after the flood, in Genesis. ch. 9, 10 and 13, prove that they were husbandmen, and planted vineyards, built cities, established kingdoms, and abounded in flocks and herds, and gold and silver. I observe, however, with pleasure that M. Toullier has freely and liberally followed Sir William Blackstone, in his elegant dissertation on the rise and progress of property. President Goguet, in his most learned work. *De l'origine des lois, des arts, des sciences, et de leurs progres chez les anciens Peuples*, b. 2. ch, 1. art. 1. considers agriculture as flourishing before the dispersion at Babel, though after that event mankind relapsed into the most deplorable barbarity.

5. Grotius, b. c. 6. s. 1.

6. Opera, tom. 5, part 2. p. 180, 181

7. This was by the perpetual edict extending the *actio metus*, which differed in nothing but in name from the *rei vindicatio*. Lord Kames' Historical Law Tracts, tit. Property.

8. Com. vol. i. 290, 291.

9. Dr. and Stu. p. 267, 268.

10. Code, 11. 5. 1.

11. Lib. 3. p. 120, s.

12. Laws of N.Y. sess. 10. ch. 28. The colony laws of Massachusetts also preserved all wrecks for the owner, and did not follow the English law. Dane's Abr. vol. 3. 144. Probably the statute law of other states is equally just.

13. 5 Burr. 2732.

14. 5 Co. 83. 12 Mod 521. Bacon's Use of the Law, p. 157. 2 Inst. 713. Com. Dig. tit. Market, E.

15. 2 Campb. N. P. 335.

16. Co. Litt. 309. Dig. 41. 1. 20. Pothier's *Traite du Contrat de Vente*, p. 1. n. 7. Ersk.Inst. 481.

17. *Dame v. Baldwin*, 8 Mass. Rep. 518. *Wheelwright v. De Peyster*, 1 Johns. Rep. 480. *Hosack v. Weaver*, 1 Yeates, 478. *Easton v. Worthington*, 5 Serg. & Rawle, 130.

18. Com. vol. ii. ch. 1. p. 10-13.

19. Grotius, b. 2. c. 7. s. 5.

20. Christian's Notes to 2d Blacks. Com. p. 1. Taylor's Elements of the Civil Law, 519.

21. Grotius, b. 2. c. 6. s. 14.

22. 1 Reeve's Hist. of the Eng. Law, p. 11.

23. Dig. 29. 2. 12.

24. Arist. Politics, by Gillies, b. 2. c. 8. Potter's Antiq. of Greece, vol. i, 167.

25. Harrington, in his *Oceana*, declared an Agrarian law to be the foundation of a commonwealth; and he undoubtedly alluded to the common interpretation and popular view of the Agrarian laws in ancient Rome and not to the new and just idea of M. De Niebuhr, that those laws related only to leases of the public lands belonging to the state. Montesquieu, in his Spirit of Laws frequently suggests the necessity of laws in a democracy establishing equality and frugality. Such suggestions are essentially visionary, though they may not be quite as extravagant as some of the reveries of Rousseau, Condercet, or Godwin. The limit to expenditure and acquisition has been sometimes attempted in this country. In 1778, there was an act of the legislature of Connecticut limiting the price of labor, and the products of labor, and even tavern charges; and the corporation ordinances in some of our cities have regulated the price of meats in the market. Such laws, if of any efficacy, are calculated to destroy the stimulus to exertion; but, in fact, they are only made to be eluded, despised, and broken.

26. No author was more distinguished than Sallust, for his eloquent invectives against riches, luxury, and the arts, which he considered as having corrupted and destroyed the Roman republic. Among other acquired vices, he says, the Romans had learned to admire statues, pictures, and fine wrought plate. Sal. Cat. ch. 11. Juvenal painted the mighty evils of luxury with the hand of a master. In a satire devoted to the delineation of extreme profligacy, he relieves himself for a moment by a brief but lively sketch of the pure and rustic virtues of the old Romans. He recurs again to the desolations of wealth and luxury, and rises to the loftiest strains of patriot indignation:

Saevior armis Luxuria incubuit, victumque ulciscitur orbem.
Sat. 6. v. 291, 292.

27. The sumptuary laws of ancient Rome had their origin in the twelve tables, which controlled the wastefulness of prodigals, and unnecessary expenditure at funerals. The appetite for luxury increased with dominion and riches, and

sumptuary laws were from time to time enacted, from the 566th year of the city down to the time of the emperors, restraining, by severe checks, luxury and extravagance in dress, furniture and food. They were absurdly and idly renewed by the most extravagant and dissipated rulers; by such conquerors as Sylla, Julius Caesar, and Augustus. The history of those sumptuary laws is given in Aulus Gellius, b. 2. c. 24. See, also, Suet. J. Caesar, s. 43.

During the middle ages, the English, French, and other governments, were, equally with the ancient Romans, accustomed to limit, by positive laws, the extent of private expenses, entertainments and dress. Some traces of these sumptuary laws existed in France and Sweden as late as the beginning of the last century. Hallam on the Middle Ages, vol. ii, 287. Catteau's View of Sweden. The statute of 10 Edw. III entitled, *statutum de cibariis utendis*, was the most absurd that ever was enacted. It prescribed the number of dishes for dinner and supper, and the quality of the dishes. Dr. Adam Smith, in his Wealth of Nations, justly considers it to be an act of the highest impertinence and presumption, for kings and rulers to pretend to watch over the economy and expenditure of private persons.

28. L. N.Y. sess. 45. ch. 26. sec. 9, 10 – Ch. 126.

29. Journals of the Confederation Congress, vol. xii. p. 58.

30. Essays, vol. i. 35.

31. 8 Wheaton, 1.

32. Frear v. Hardenburgh, 1 Johns. Rep. 272.

33. 3 Atk. 134.

34. 2 Johns. Cases, 441.

35. L. N.Y. April 8th 1813, ch. 80.

36. *Jones v. Carter*, 12 Mass. Rep. 314. *Withington v. Corey*, 2 N. H Rep. 115.

37. Society for the Propagation of the Gospel v. Wheeler, 2 Gall. Rep. 105.

38. Dig. 6. 1. 38.

39. *Trait du Droit de Propriété*, No. 347.

40. *Absor v. French*, 2 Show. 28. *Young's case*, 1 Lord Raym. 725. This principle does not apply to the case of a private way. The right is confined to public highways out of repair. *Taylor v. Whitehead*, Doug. 745.

41. Dyer, 36. b. 1 Dallas' Rep. 363.

42. Laws of N.Y. sess. 36. ch. 33.

43. Grotius De Jure B. & P. b. 3. c. 19. s. 7. – c. 20. s. 7. Puf. D Jure. Nat. et Gent. b. 8. c. 5. s. 3. and 7. Bynk. Q. J. Pub. b. 2. ch. 15.

44. Puf. b. 8. ch. 5. s. 3. Vattel. b. 1. ch. 20. s. 246, 255. Coup. 269. Com. Dig. tit. By-Law, C. Willes Rep. 388. *The Corporation of New York v. Coates*, decided by Judge Irving, October, 1824.

LECTURE 35

Of the Nature and Various Kinds of Personal Property

PERSONAL property consists of things temporary and moveable, and includes all subjects of property not of a freehold nature, nor descendible to the heirs at law.

The division of property into real and personal, or moveable and immovable, is too obvious not to have existed in every system of municipal law. Except, however, in the term of prescription, the civil law scarcely made any difference in the regulation of real and personal property. But the jurisprudence of the middle ages was almost entirely occupied with the government of real estates, which were the great source of political power, and the foundation of feudal grandeur. III consequence of this policy, a technical and very artificial system was erected, upon which the several gradations of title to land depended. Chattels were rarely an object of notice, either in the treatises or reports of the times, prior to the reign of Henry VI.[1] They continued in a state of insignificance until the revival of trade and manufactures, the decline of the feudal tenures, and the increase of industry, wealth, and refinement, had contributed to fix the affections upon personal property, and to render the acquisition of it an object of growing solicitude. It became, of course, a subject of interesting discussion in the courts of justice; and being less complicated in its tenure, and rising under the influence of a liberal commerce, and more enlightened maxims, it was regulated by principles of greater simplicity, and more accurate justice. By a singular revolution in the history of property and manners, the law of chattels, once so unimportant, has grown into a system, which, by its magnitude, overshadows, in a very considerable degree, the learning of real estates.

I. Chattel is a very comprehensive terra in our law, and includes every species of property which is not real estate, or a freehold. The most leading division of personal property is into chattels real and personal. Chattels real, concern the realty, as a lease for years of land,[2] and the duration of the term of the lease is immaterial. It is only personal estate if it be for a thousand years.[3] Falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner. It does not attend the inheritance, for, in that case, it would partake of the quality of an estate in fee.

There are, also, many chattels, which, though they be even of a moveable nature, yet, being necessarily attached to the freehold, and contributing to its value and enjoyment, go along with it in the same path of descent or alienation. This is the case with the deeds and other papers which constitute the muniments of title to the inheritance;[4] and also with shelves and other fixtures in a house, and the posts and rails of enclosures, for they cannot be dismembered from the freehold without injury to it. So, also, it is understood, that pigeons in a pigeon house, deer in a park, and fish in an artificial pond, go with the inheritance to the heir.[5] But, in modern times, for the encouragement of trade and manufactures, and as between landlord and tenant, many things are now treated as personal property, which seem, in a very considerable degree, to be attached to the freehold. Thus, things set up by a lessee, in relation to his trade, as fats, coppers, tables, and partitions, belonging to a soap boiler,[6] may be removed during the term. The tenant may take away chimney pieces, and even wainscot, if put up by himself;[7] or a cider mill and press erected by him on the land.[8] So, a building resting upon blocks, and not let into the soil, has been held a mere chattel.[9] A post windmill, erected by the tenant,[10] and machinery for spinning and carding, though nailed to the floor,[11] and copper stills, and distillery apparatus, though fixed,[12] are held to be personal property. On the other hand, iron stoves, fixed to the brick work of the chimneys of a house, have

been adjudged to pass with the house as part of the freehold, in a case where the house was set off on execution to a creditor.[13] But in another case in the same court, between mortgagor and mortgagee, the possessor, on the termination of that relation, was allowed to take down and carry away buildings erected by him on the land, and standing on posts, and not so connected with the soil but they could be removed without prejudice to it.[14]

Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. l. Between heir and executor; and there the rule obtains with the most rigor in favor of the inheritance, and against the right to consider as a personal chattel any thing which has been affixed to the freehold. 2. Between the executor of the tenant for life, and the remainder man or reversioner; and here the right to fixtures is considered more favorably for the executors. 3. Between landlord and tenant; and here the claim to have articles considered as personal property, is received with the greatest latitude and indulgence. Lord Ellenborough, in *Elwes v. Maw*[15] went through all the cases from the time of the year books, and the court concluded, that there was a distinction between annexations to the freehold for the purposes of trade or manufacture, and those made for the purposes of agriculture, and the right of the tenant to remove was strong in the one case, and not in the other. It was held, that an agricultural tenant who had erected, for the convenient occupation of his farm, several buildings, was not entitled to remove them. Had the erections been made for the benefit of trade or manufactures, there would seem to have been no doubt of the right of removal. The strict rule as to fixtures, that applies between heir and executor, applies equally as between vendor and vender; and fixtures erected by the vendor for the purpose of trade and manufactures, as potash kettles for manufacturing ashes, pass to the vendee of the land.[16]

The civil law was much more natural, and much less complicated in the discrimination of things, than the common law. It divided them into the obvious and universal distinction of things moveable and immoveable. The moveable goods of the civil law were, strictly speaking, the chattels personal of the common law. Whatever was fixed to the freehold *perpetui usus causa* was justly deemed a part of the *res immobiles* of the civil law.[17]

2. Property in chattels personal is either absolute or qualified.

Absolute property denotes a full and complete title and dominion over it, but qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally divested on the happening of some particular event.

A qualified property in chattels may subsist by reason of the nature of the thing, or chattel, possessed. The elements of air, light, and water, are the subjects of qualified property by occupancy; and Justinian, in his Institutes[18] says, they are common by the law of nature. He who first places himself in the advantageous enjoyment of a competent portion of either of them, cannot lawfully be deprived of that enjoyment; and whoever attempts to do it, creates a nuisance, for which he is responsible.[19] Animals *ferae naturae*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when They return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner.[20] The difficulty in ascertaining with precision the application of the law, arises from the want of some certain determinate standard or rule, by which to determine when an animal is *ferae vel domitae naturae*. If an animal belongs to the class of tame animals, as, for instance, to

the class of horses, sheep, or cattle, he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long only as the tameness and dominion remain. It is the theory of some naturalists, that all animals were originally wild, and that such as are domestic owe all their docility, and all their degeneracy, to the hand of man. This seems to have been the opinion of Count Buffon; and he says, that the dog, the sheep, and the camel, have degenerated from the strength, spirit, and beauty of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power.[21] Grotius, on the other hand, has suggested, that savage animals owe all their untamed ferocity, not to their own natures, but to the violence of man.[22] But the common law has wisely avoided all perplexing questions and refinements of this kind, and has adopted the test laid down by Pufendorf,[23] by referring the question, whether the animal be wild or tame, to our knowledge of his habits, derived from fact and experience. It was held by the Supreme Court of this state, in Picrson v. Post,[24] that pursuit alone gave no property in animals fera na'urce. Almost all the jurists on general jurisprudence agree, that the animal must have been brought within the power of the pursuer, before the property in the animal vests. Actual taking may not, in all cases, be requisite; but all agree, that mere pursuit, without bringing the animal Within the power of the party, is not sufficient. The possession must be so far established, by the aid of nets, snares, or other means, that the animal cannot escape. It was accordingly held, in the case just mentioned, that an action would not lie against a person for killing and taking a fox which had been pursued by another, and was then actually in the view of the person who had originally found, started, and chased it. The mere pursuit, and being within view of the animal, did not create a property, because no possession had been acquired; and the same doctrine was afterwards declared in the case of *Buster v. Newkirk*.[25]

The civil law contained the same principle as that which the Supreme Court adopted. It was a question in the Roman law, whether a wild beast belonged to hire who had wounded it so that it might easily be taken. The civilians differed on the question; but Justinian adopted the opinion, that the property in the wounded wild beast did not attach until the beast was actually taken.[26] So, if a swarm of bees had flown from the hive of A., they were reputed his so long as the swarm remained in sight, and might easily be pursued, otherwise they became the property of the first occupant.[27] Merely finding a tree on the land of another, containing a swarm of bees, and marking it, does not vest the property of the bees in the finder.[28] Bees which swarm upon a tree, do not become private property until actually hived.[29]

A qualified property in chattels may also subsist, when goods are bailed, or pledged, or destined. In those cases, the right of property and the possession are separated, and the possessor has only a property of a temporary or qualified nature, which is to continue until the trust be performed, or the woods redeemed; and he is entitled to protect this property, while it continues, by action, in like manner as if he was absolute owner.

3. Personal property may be held by two or more persons in joint tenancy, or in common; and, in the former case, the same principle of survivorship applies which exists in the case of a joint tenancy in lands.[30] But by reason of this very effect of survivorship, joint tenancy in chattels is very much restricted. It does not apply to stock used in any joint undertaking, either in trade or agriculture; for the forbidding doctrine of survivorship would tend to damp the spirit and enterprise requisite to conduct the business with success. When one joint partner in trade, or in agriculture, dies, his interest or share in the concern does not survive, but goes to his personal representatives.[31] Subject

to these exceptions: a gift, or grant of a chattel interest, to two or more persons, creates a joint tenancy, and a joint tenant, it is said, may lawfully dispose of the whole property.[32] In legacies of chattels, the courts, at one time, leaned against any construction tending to support a joint tenancy in them, and testators were presumed to have intended to confer legacies in the most advantageous manner.[33] But in *Campbell v. Campbell*,[34] the Master of the Rolls reviewed the cases, and concluded, that where a legacy was given to two or more persons, they would take a joint tenancy, unless the will contained words to show that the testator intended a severance of the interest, and to take away the right of survivorship. This same rule of construction has been declared and followed in the subsequent cases.[35]

4. Another very leading distinction, in respect to goods and chattels, is the distribution of them into things in possession, and things in action. The latter are personal rights not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages due for a breach of covenant, for the detention of chattels, or for torts, are included, under this general head of title to things in action. It embraces the most diffusive, and, in this commercial age, the most useful learning in the law. By far the greatest part of the questions arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of personal rights in action.

5. Chattels may be limited over by way of remainder, after a life interest in them is created. The law was very early settled, that chattels real might be so limited by will.[36] A chattel personal, may also be given by will, (and it is said, that the limitation may be equally by deed,)[37] to A. for life, with remainder over to B., and the limitation over after the life interest in the chattel has expired, is good. Anciently. there could be no limitation over of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between the use and the property, and it was held that the use might be given to one for life, and the property afterwards to another, though the devise over of the chattel itself would be void.[38] It was finally settled, that there was nothing in that distinction, and that a gift for life of a chattel, was a gift of the use only, and the remainder over was good as an executory devise. This limitation over in remainder, is good as to every species of chattels; and there is no difference in that respect between money and any other chattel interest. The general doctrine is established by numerous English equity decisions,[39] and it has been very extensively recognized and adopted as the existing rule of law in this country; but not until the question had been very ably and thoroughly discussed, particularly in the Supreme Court of Errors of the state of Connecticut.[40]

There is an exception to the rule in the case of a bequest of specific things, as for instance, corn, hay, and fruits, of which the use consists in the consumption. The gift of such articles for life, is of necessity a gift of the absolute property, and there cannot be any limitation over, for the use and the property cannot exist separately.[41] Nor can there be an estate tail in a chattel interest, for that would lead to a perpetuity, and no remainder over can be permitted on such a limitation.[42] It is a settled rule, that the same words which, under the English law, would create an estate tail as to freeholds, give the absolute interest as to chattels.[43]

The interest of the party in remainder in chattels, is precarious, because another has an interest in possession; and chattels, by their very nature, are exposed to abuse, loss, and destruction. It was understood to be the old rule in Chancery,[44] that the person entitled in remainder could call for security from the tenant for life, that the property should be forth coming at his decease; but that practice has been overruled.[45] Lord Thurlow said, that the party entitled in remainder could call for

the exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. But it is admitted, that the security may still be required, in a case of real danger that the property may be wasted, secreted, or removed.[46]

NOTES

1. Reeve's Hist. of the English Law, vol. iii. p. 15. 369.
2. Co. Litt. 118. b.
3. Co. Litt. 46. a. *Case of Gay*, 5 Mass. Rep. 419. *Brewster v. Hill*, 1 N.H. Rep. 350.
4. Lord Coke said, that charters, or muniments of title, might be entailed. Co. Litt. 20. a.
5. Co. Litt. 8. a.
6. Poole's case, 1 Salk. 368.
7. *Ex parte Quincy*,1 Atk. 477.
8. *Holmes v. Tremper*, 20 Johns. Rep. 29.
9. *Naylor v. Collinge*, 1 Taunton, 21.
10. *The King v. Londenthorpe*, 6 Term Rep. 377.
11. *Cresson v. Stout*, 17 Johns. Rep. 116.
12. *Reynolds v. Shuter*, 5 Cowen, 323.
13. *Goddard v. Chase*, 7 Mass. Rep 432.
14. *Taylor v. Townsend*, 9 Mass. Rep. 411.
15. 3 East, 38.
16. *Miller v. Plumb*, 6 Cowen, 665.
17. Taylor's Elem. of the Civil Law, p. 475
18. Inst. 2. 1. 1.
19. 9 Co. 58. b. Aldred's case.
20. 7 Co. 16-18. Finch's Law, 176.
21. Buffon's Natural History, vol. vii. Smellie's ed.
22. Grotius, Hist. De Belg. lib. 5. cited in Puf. *Droit de la Nat.* 1. 4, ch. 6. s. 5.
23. Liv. 4. ch. 6. s. 5.
24. 3 Caines' Rep. 175.
25. 20 Johns. Rep. 75.
26. Inst. 2. 1. 13. Dig. 41. 1. 5. 2.
27. Inst. 2. 1. 11.
28. *Gillet v. Mason*, 7 Johns. Rep. 16.
29. Inst. 2. 1. 14. *Wallis v. Mease*, 3 Binney, 546.
30. Co. Litt.152. a.

31. Co. Litt. 182. a. Noy's Rep. 55. *Jeffereys v. Small*, 1 Vern. 217. *Elliot v. Brown*, cited in Rathby's note to 1 Vern. 217.

32. Best, J. in *Barton v. Williams*, 5 Barn. & Ald. 395. If this *dictum* be not confined to joint tenancy in merchandise, where it undoubtedly applies, it must at least be restricted to chattel interests, and there it has some color from what Lord Coke says in Co. Litt. 185. a. A joint tenant of an estate in fee can only convey his part, and if he should levy a fine of the whole estate, or convey it by bargain and sale, it would only reach his interest, and amount to a severance of the joint tenancy. Co. Litt. 186. a. *Ford v. Lord Grey*, 6 Mod. 43. 1 Salk. 286.

33. *Perkins v. Baynton*, 1 Bro. 118.

34. 4 Cro. 15.

35. *Motley v. Bird*, 3 Vesey, 628. *Crooke v. De Vandes*, 9 Vesey, 197. *Jackson v. Jackson*, ibid. 591.

36. *Manning's case*, 8 Co. 95. *Lampett's case*, 10 Co. 46. *Child v. Baylie*, Cro. J. 459.

37. 2 Blacks. Com. 298. The cases which I have seen all arose upon wills; but in *Child v. Baylie*, Cro. J. 459 the court speaks of such a remainder as being created equally by grant or devise.

38. 37 H. 6. abridged in Bro. tit. Devise, pl. 13. *Hastings v. Douglass*, Cro. C. 343.

39. *Smith v. Clever*, 2 Vern. 59. *Hyde v. Parralt*, 1 P. Wms. 1. *Tissen v. Tissen*, ibid. 500. *Pleydell v. Pleydell*, ibid. 748. *Porter v. Tournay*, 3 Vesey, 311. *Randall v. Russell*, 3 Merivale, 190.

40. *Moffat v. Strong*, 10 Johns. Rep. 12. *Westcott v. Cady*, 5 Johns, Ch. Rep. 334. *Griggs v. Dodge*, 2 Day's Rep. 28. *Taber v. Packwood*, ibid. 52. *Scott v. Price*, 2 Serg. & Rawl. 59. *Deihl v. King*, 6 ibid 29. *Reyall v. Eppes*, 2 Munf. 479. *Mortimer v. Moffatt*, 4 H.& Munf. 503. *Logan v. Ladson*, 1 S. C. Eq. Rep. 271.

41. *Randall v. Russell*, 3 Merivale, 194.

42. Dyer, 7. p1. 8.

43. *Seale v. Seale*, 1 P. Wms. 290. *Chandless v. Price*, 3 Vesey. 99. *Brouncker v. Bagot*, 1 Merivale, 271. *Tothill v. Pitt*, Maddock's Ch. Rep. 433. *Garth v. Baldwin*, 2 Vesey, 646.

44. 2 Freeman, 206, case 280.

45. *Foley v. Burnett*, 1 Bro. 279.

46. Fearne's Executory Devises, vol. ii. 35. 4th edit. by Powel. *Mortimer v. Moffatt*, 4 H. & Munf. 503.

LECTURE 36

Of Title to Personal Property, by Original Acquisition

TITLE to personal property may accrue in three different ways: 1. By original acquisition; 2. By transfer, by act of the law; 3. By transfer, by act of the parties.

It will not be possible to give to every part of so extensive a subject a minute examination, consistently with the preservation of due symmetry in the arrangement of these elementary disquisitions. I shall endeavor to bring every part of the title at least into view, rind reserve a full examination for those branches of it which may appear to be the most fruitful of instruction.

The right of original acquisition, may be comprehended under the heads of occupancy, accession, and intellectual labor.

I. Of original acquisition by occupancy.

The means of acquiring personal property, by occupancy, are very limited. Though priority of occupancy was the foundation of the right of property, in the primitive ages and though some of the ancient institutions contemplated the right of occupancy as standing on broad ground,[1] yet in the progress of society, this original right was made to yield to the stronger claims of order and tranquillity. Title by occupancy is become almost extinct, under civilized governments, and it is permitted to exist only in these few special cases, in which it may be consistent with the public welfare.

(l.) Goods taken by capture in war, were, by the common law, adjudged to belong to the captor.[2] But now, by the acknowledged law of nations, and the admiralty jurisprudence of the United States, as has been already shown,[3] goods taken from enemies, in time of war, vest primarily in the sovereign, and they belong to the individual captors only to the extent, and under such regulations, as positive laws may prescribe.

(2.) Another instance of acquisition by occupancy, which still exists under certain limitations, is that of goods casually lost by the owner, and unreclaimed, or designedly abandoned by him; and in both these cases they belong to the fortunate finder.[4] But it is requisite, that the former owner should have completely relinquished the chattel, before a perfect, title will accrue to the finder. He is not even entitled to a reward from the owner for finding a lost article, if none had been promised. He is only entitled to indemnity against his necessary expenses incurred on account of the chattel.[5] The Roman law equally denied to the finder of lost property a reward for finding it; and according to the stern doctrine of Ulpian,[6] it was even considered to be theft to convert to one's own use, *animo manendi*, property found, when the finder had no reason to believe it had been abandoned.

This right of acquisition, by finding, is confined to goods found upon the surface of the earth; and it does not extend to goods found hidden in the earth, and which go under the denomination of treasure-trove. Such goods, in England, belong to the king; and in this state, they strictly being to the public treasury, for we have reenacted the statute of 4 Edw. I, by our act concerning coroners[7] which directs the coroner to inquire, by jury, of treasure said to be found, and who were the finders, and to bind the finders in recognizance u) appear in court. 1 presume, however, that this direction has never been put in practice, and that the finder of property has never been legally questioned as

to his right, except on behalf of the real owner. The common law originally, according to Lord Coke,[8] left treasure-trove to the person who deposited at, or upon his omission to claim it, to the finder. The idea of deriving any revenue from such a source, has become wholly delusive and idle. Such treasures, according to Grotius,[9] naturally belong to the finder; but the laws and jurisprudence, of the middle ages ordained otherwise, he says, that the Hebrews gave it to the owner of the ground wherein it was found; and it is now the custom in Germany, France, Spain, Denmark, and England, to give lost treasure to the prince, or his grantee; and such a rule, be says, may now pass for the law of nations. The rule of the Emperor Hadrian, as adopted by Justinian,[10] was more equitable, for it gave the property of treasure-trove to the finder, if it was found in his own lands, but if it was fortuitously found in the ground of another, the half of the treasure went to the proprietor of the soil, and the other ball to the finder, and the French new code has adopted the same rule.[11]

Goods waived, or scattered, by a thief, in his flight, belong likewise, at common law, to the king, for there was supposed to be a default in the party robbed, in not making fresh pursuit of the thief, and reclaiming the stolen goods before the public officer seized them.[12] But this prerogative of the crown was placed at the common law under so many checks,[13] and it is so unjust in itself that it may, perhaps, be considered as never adopted here as against the real owner, and never put in practice as against the finder, though as against him, I apprehend, the title of the state would be deemed paramount. We must, also. exclude from the title by occupancy, estrays, being cattle whose owner is unknown, for they are disposed of in this states[14] and, I presume, generally in this country, when unreclaimed, by the officers of the town where the estray is taken up, for the use of the poor, or other public purposes. All wrecks are likewise excluded from this right of acquisition by occupancy, fur if they be unreclaimed for a year and a day, they are liable to be sold, and the net proceeds paid into the public treasury.[15]

By the colony laws of Massachusetts, wrecks were preserved for the owner; and they are supposed to belong now to the United States, as succeeding, in this respect, to the prerogative of the English crown.[16] The statute law of Massachusetts, since the revolution, pursued the policy of the colony law, and disposed of estrays, lost money, and goods, if unreclaimed for a year, by giving one half of the proceeds to the finder, and the other half to the poor of the town; and those statutes have been extended in practice to all goods, and moneys lost, hidden, waived, or designedly abandoned, when no owner appears.[17] This is, upon the whole, as wise and equitable a regulation as any that has ever been made upon the subject at any period of time. By an act in New Hampshire, in 1791, chattels found, waifs, treasure-trove, and estrays, are given wholly to the town, after deducting the expenses of the finder;[18] and the learned and laborious author of the General Abridgment of American Law, not unreasonably concludes,[19] that in those states where there are no statute regulations on the subject, estrays, treasure-trove, and waifs, belong to the finder, in the absence of the owner.

II. Of original acquisition by accession.

Property in goods and chattels may be acquired by accession; and under that head is also included the acquisition of property proceeding from the admixture or confusion of goods.

The right of accession is defined in the French civil coded[20] to be the right to all which one's own property produces, whether that property he moveable or immovable, and the right to that which is united to it by accession, either naturally or artificially. The fruits of the earth, produced naturally, or by human industry, the increase of animals, and the new species or articles made by one person

out of the materials of another, are all embraced by this definition. I purpose only to allude to those general rules which were formed, digested, and refined, by the sagacity and discussions of the Roman lawyers, and transferred from the civil law into the municipal institutions of the principal nations of Europe. By means of Bracton[21] they were introduced into the common law of England, and, doubtless, they now equally pervade the jurisprudence of these United States. The subject has received the most ample consideration by the French civilians, and all the distinctions of which it, was susceptible are easily perceived, and clearly understood, by means of the pertinency and fulness of their illustrations. [22]

If a person hires, for a limited period, a flock of sheep, or cattle, of the owner, the increase of the flock, during the term, belongs to the usufructuary, who is regarded as the temporary proprietor. This general principle of law was admitted in *Wood v. Ash*,[23] and recognized in *Putnam v. Wyley*.[24] The Roman law made a distinction in respect to the offspring of slaves,[25] and so does the civil code of Louisiana.[26] Though the children were born during the temporary use or hiring of the female slave, they belonged not to the hirer, but to the permanent owner of the slave. Another rule is, that if the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter by right of accession, This rule of the Roman and English law was acknowledged in *Merritt v. Johnson*,[27] and it has been applied by Molloy[28] to the case of building a vessel. According to the doctrine in the Pandects,[29] if one repairs his vessel with another's materials, the property of the vessel remains in him; but if he builds the vessel from the very keel with the materials of another, the vessel belongs to the owner of the materials. The property is supposed to follow the keel, *proprietas totius navis, carinae causam sequitur*. This title exercised to a great degree the talents and criticism of the civilians. If A. builds a house with his own materials upon the land of B., the land, said Pothier, is the principal subject, and the other is but accessary; for the land can subsist without the building, but the building cannot subsist without the land on which it stands, and, therefore, the owner of the land acquired, by right of accession, the property in the building. It is the same thing if A. builds a house on his own land with the materials of another; for the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged (if bound to answer at all) to answer to the owner of the materials for the value of them. The same distinctions apply to trees, or vines planted, or seed sowed by A. in the land of B. When they take root and grow, they belong to the owner of the soil, and the other can only claim, upon equitable principles, a recompense in damages for the loss of his materials. But the Roman law held, that if A. painted a fine picture on the cloth or canvass of B., in that case the rule would be reversed, for though the painting could not subsist without the canvass, and the canvass could subsist without the painting, yet *propter excellentiam artis*, the canvass was deemed the accessary, and went as the property of the painter by right of accession; for it would be ridiculous, say the Institutes of Justinian,[30] that a picture of Apelles, or Parrhasius, should be deemed a mere accessary to a worthless tablet. The Roman law was quite inconsistent on this subject; for if a fine poem or history was written by A., on the paper or parchment of B., the paper or parchment was deemed the principal, and drew to the owner of it, by right of accession, the ownership of the poem or history, however excellent the composition, and however splendid the embellishments of the work.

The French law, according to Pothier and Toullier, does not follow this absurd decision of the Roman law, for it holds, that the paper is a thing of no consideration in comparison with the composition, and that the author has a higher, and, consequently, the principal interest in the written manuscript, and the whole shall belong to him on paying B. for the value of his paper.

The English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser. It was a principle settled as early as the time of the year books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber.[31] So, the civil law, in order to avoid giving encouragement to trespassers, would not allow a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and the materials were incapable of being restored to their original form. The Supreme Court of this state, in Betts & Church v. Lee,[32] admitted these principles, and held, that where A. had entered upon the land of B., and cut down trees, and sawed and split them into shingles, and carried them away, the conversion of the timber into shingles did not change the right of property. But if grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held, in the old English law, that the property is so altered as to change the title.[33] In the civil law there was much discussion and controversy on the question, how far a change of the form and character of the materials would change the title to the property, and transfer it from the original owner of the materials to the person who had effected the change. If A. should make wine out of the grapes, or meal out of the corn of B., or make cloth out of the wool of B., or a bench, or a chest, or a ship, out of the timber of B., the most satisfactory decision, according to the Institutes of Justinian, is,[34] that if the species can be reduced to its former rude materials, the owner of the materials is to be deemed the owner of the new species, but if the species cannot be so reduced, as neither wine nor flour can be reduced back to grapes or corn, then he who made it is deemed to be the owner, and he is only to make satisfaction to the former proprietor for the materials which he had so converted.

The English law has been uniform on this subject, from the time of Bracton, who took these distinctions from the civil law; and they have been gradually incorporated into the common law, by a series of judicial decisions.

With respect to the case of a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them have an equal interest in the subject assonants in common, if the intermixture was by consent. But if it was wilfully made without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost.[35] The common law, with more policy and justice, to guard against fraud, gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed.[36] If A. will wilfully intermix his corn or hay with that of B., or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B.[37] But this rule is carried no farther than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture for instance, when no change of property takes place.[38] So, if the corn or flour mixed together were of equal value, then the injured putty takes his given quantity, and not the whole. This is Lord Eldon's construction of the cases in the old law.[39] But if the articles were of different value or quantity, and the original value not to be distinguished, the party injured takes the whole. It is for the party guilty of the fraud to distinguish his own property satisfactorily, or lose it. No court of justice is bound to make the discrimination for him.

III. Of original acquisition, by intellectual labor.

Another instance of property acquired by one's own act and power, is that of literary property, consisting of maps, charts, writings, and books; and of mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labor. As long as these are kept within the possession of the author, he has the same right to the exclusive enjoyment of them, as of any other species of personal property; for they have proprietary marks, and are a distinguishable subject of property. But when they are circulated abroad, and published with the author's consent, they become common property, and subject to the free use of the community. It has been found necessary, however, for the promotion of the useful arts, and the encouragement of learning, that ingenious men should be stimulated to the most active exertion of the powers of genius, in the production of works useful to the country, and instructive to mankind, by the hope of profit, as well as by the love of fame, or a sense of duty. It is just that they should enjoy the pecuniary profits resulting from mental as well as bodily labor. We have, accordingly, in imitation of the English jurisprudence, secured by law to authors and inventors, for a limited time, the right to the exclusive use and profit of their productions and discoveries. The jurisdiction of this subject is vested in the government of the United States, by that part of the constitution, which declares,[41] that Congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This power was very properly confided to Congress, for the states could not separately make effectual provision for the case.

(1.) As to patent rights for inventions.

Any person being a citizen of the United States, and any alien, who, at the time of his application, shall have resided for two years within the United States, and who has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on the same, not known or used before the application, may apply to the secretary of state, for a patent, for the exclusive right of making, constructing, using, and vending, for fourteen years, his invention or discovery. The applicant must make oath, or affirmation, that he believes he is the true inventor or discoverer of the art, machine, or improvement, and he must give a written description of his invention, and of the manner of using, or process of compounding the same, in full, clear, exact, and intelligible terms, and accompany it with drawings, and references, and specimens, and models, according to the nature of the case, and cause the same to be attested and filed in the secretary's office. In the case of the application for a patent, by a resident alien, he must make oath, that the invention, art or discovery, has not, to his knowledge or belief, been known or used in this or in any other country. The legal representatives and devisees of a person entitled to a patent, and who dies before it is obtained, may procure it, on complying with the general requisitions of the law. Any person who shall have discovered an improvement in the principle of any machine, or in the process of any composition of matter, may obtain a patent for such improvement; but he cannot thereby make, use, or vend the original discovery, nor can the first inventor use his improvement. Simply changing the form, or the proportions of any machine or composition of matter, in any degree, is declared not to be a discovery. If the specification does not contain the whole truth relative to the discovery, or contains more than was requisite to produce the described effect, and the concealment or addition was made for the purpose of deception; or if the thing secured by the patent was not originally discovered by the patentee, or had been in use, or described in some public work, anterior to the supposed discovery, or the patent was surreptitiously obtained for the discovery of another person; in either of those cases, the patent cannot be supported, and may be declared void.[42]

These are the principal statute provisions on the subject, and, under their protection, upwards of four thousand patents have been sued out, and upwards of two thousand ingenious models in the mechanic arts, and relating to every subject connected with domestic and rural economy, manufactures and commerce, have been deposited in the office of the Secretary of State at Washington. In an age distinguished for an active and ardent spirit of improvement in the arts of agriculture and manufactures, and in the machinery of every kind applied to their use, the doctrine of patent rights has attracted much discussion, and become a subject of deep interest, both here and in Europe.[43]

The courts of the United States have exclusive jurisdiction over these rights; and it has been adjudged by them, that the first inventor, who has reduced his invention first to practice, and put it to some real arrd beneficial use, however limited in extent, is entitled to a priority of the patent right, and a subsequent inventor cannot sustain his claim, although he be an original inventor, and has obtained the first patent. The law, in such case, cannot give the whole patent right to etch inventor, even if each he equally entitled to the merit of being; an original and independent inventor; and it therefore adopts the maxim, riui prior cst in tempore, potior cst in jzcre. If the patentee be not the first inventor he is not entitled to a patent, even though he had no knowledge of the previous use, or previous description of the invention, for the law presumes he may have known it.[44] If the first inventor has suffered his invention to go into general use, without taking out a patent, the better opinion, and the weight of authority, is, that he cannot afterwards resume the invention, and hold a patent. It would be unreasonable and injurious, for a person to be permitted to lie by for years, and suffer his invention or improvement to go into use, and expensive undertakings to be assumed, and machinery constructed for the application of that invention, and then sue out a patent, and arrest all such proceedangs. The just inference from such delay is, that he has made an abandonment, or present of his discovery, to the public; and the only limatation to this conclusion is in the case, when it shall be made satisfactorily to appear, as a matter of fact, that the delay was merely with the intention to improve the invention by experiments and practice, before applying for a patent.[45] It has been a point of some discussion and difficulty, to determine to what extent an invention must be useful to render it the subject of a patent. This will, as a matter of fact, depend upon the circumstances of each case. It must be to a certain degree beneficial to the community, and not injurious, or frivolous, or insignificant. [46]

The act of Congress has described, in substance, the requisite parts of a valid specification of the discovery; and yet the defects of the specification is one great source of a vexatious and perplexing litigation in our own, as well as in the English courts. In the present improved state of the arts, it is often a question of intrinsic difficulty, especially in cases of the invention of minute additions to complicated machinery, to decide whether one machine operates upon the same principle as another, and whether that which is stated to be an improvement, be really new and useful.[47] The material point of inquiry generally is, not whether the same elements of motion, and, in some particulars, the same manner of operation, and the same component parts are used, but whether the given effect be produced substantially by the same mode of operation, and the same combination of powers, in both machines. Mere colorable differences, or slight improvements, cannot shake the right of the original inventor. If a machine produce several different effects by a particular construction of machinery, and those effects are produced the same way in another machine, and a new effect added, the inventor of the latter cannot entitle himself to a patent for the whole machine. He is entitled to a patent for no more than his improvement. And if the inventor of an improvement obtain a patent for the whole machine, or mix up the new and the old discoveries together, the patent being broader,

and more extensive than the invention, is absolutely and totally void. The invention must be substantially new in its structure and mode of operation.[48] The English decisions under their patent law are essentially the same. The statute of monopolies of 21 Jac. I. c. 3. contains the provision under which patents for the term of fourteen years, for new and useful inventions, are granted. It does not confine the privilege to British subjects. It applies to "the true and first inventor of any manner of new manufactures within the realm;" and it has been deemed sufficient to entitle the party to a patent, that his invention was new in England, and that it was immaterial whether the patentee acquired the discovery by study or travel. The policy of the law was equally answered in either case.[49] It is allowed in England, as it is with us, to take out a patent for an addition or improvement in any former invention or machine.[50] But he invention must be new and useful, and the specification intelligible, and accurately describe it; and if it covers more than is actually new and useful, it destroys the patent, even to the extent to which it might otherwise have been supported; and a patent was declared void, because it extended to a whole watch, when the invention was of a particular movement only.[51]

In addition to the ordinary remedies by action for violation of a patent right, the party in possession will be protected in the enjoyment of his right, by injunction, provided he has had exclusive possession of some duration. If the right be doubtful, the courts of equity will not interfere by injunction, until the patentee has first established the validity of his patent in a court of law.[52]

(2.) As to copyrights of authors.

The authors of maps, charts and books, being citizens of the United States, or residents therein, arc entitled to the exclusive right of printing, publishing, and vending them, for fourteen 3 ears; and if the author be living, and a citizen of the United States, or resident therein, at the end of the term, then he is entitled to an additional term of fourteen years, on complying with the terms prescribed by the acts of Congress. Those terms are, that the author or proprietor, before publication, deposit a printed copy of the title of the map, chart, or book, in the clerk's office of the district where he resides, and which copy is to be recorded; and that he cause a copy of the record to be printed on the title page, or the page next following, of the book, and within two months thereafter, cause such record to be published in one or more newspapers printed in the United States, for the space of four weeks; and within six months after publishing the book, cause to be delivered a copy to the secretary of state, to be preserved in his office. The benefits of copyright are extended upon the same terms to authors in the arts of designing, engraving, and etching historical and other prints.[53]

It was for some time the prevailing and better opinion in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate; and that the statute of Anne, protecting by penalties that right for fourteen years, was only an additional sanction, and made in affirmance of the common law. This point came at last to be questioned; and it became the subject of a very serious litigation in the Court of K. B. It was debated at the bar and upon the bench, with great exertion of talent, and a very extensive erudition and skill in jurisprudence. It was decided, that every author had a common law right in perpetuity, independent of statute, to the exclusive printing and publishing his original composations.[54] The court were not unanimous; and the subsequent decision of the House of Lords, in *Donaldson v. Becket*, in February, 1774, settled this very litigated question against the opinion of the K. B., be establishing that the common law right of action, (if any existed,) could not be exercised beyond the time limited be the statute of Anne.[55]

The act of Congress is expressly declared not to extend to prohibit the importation or vending, reprinting or publishang within the United States, of any map, chart or book, written, printed, or published, be any person, not a citizen of the United States, in foreign places, without the jurisdiction of the United States.[56]

The statute of Anne had a provision against the scarcity of editions and exorbitance of price. The act of Congress has no such provision; and it leaves authors to regulate, in their discretion, the number and price of their books, calculating (and probably very correctly) that the interest an author has in a rapid and extensive sale of his work, will be sufficient to keep the price reasonable, and the market well supplied. The act of Congress, though taken generally from the provisions in the statute of 8 Anne, ch. 19, varies from it in several respects. The statute of Anne does not discriminate, as the act of Congress does, between natives and foreigners, or require any previous residence of the latter, but grants the privilege of copyright to every author of any book. The statute of Anne renews the copyright, at the expiration of the fourteen years, if the author be then living, for another term of fourteen years, without any reentry and republication, as is required with us. In one respect, authors with us are exempted from an exceedingly onerous burden imposed upon them by the statute of Anne. That statute requires not only the title of the book to be entered at stationer's hall, but nine copies to be deposited there for the use of the libraries of the two universities, and other libraries. In the case of splendid and extensive publications, supporting only a few copies, this requisition is a very heavy tax upon the author. The statute of 8 Geo. 11. ch. 13, securing the privilege of copyright for twenty-eight years to the inventors of prints and engravings, did not require the deposit of any copies for public uses, whereas the act of Congress of the 29th of April, 1802, requires the like entry, publication and deposit, in the case of historical and other prints, as in the case of books. The English law of copyright was more advantageous to the author than that of the United States, even as it stood upon the statute of Anne. But that advantage has been greatly increased by the statute of 54 Gco. III, which gives to the author at once the full term of twenty-eight years, and if he be living at the end of that period, then for the residue of his life.[57]

The cognizance of cases arising under the acts of Congres securing to authors the copyright of their productions, belongs to the courts of the United States; but there are no decisions in print on the subject, and we must recur for instruction to principles settled by the English decisions under the statute of Anne, and which are, no doubt, essentially applicable to the rights of authors under the acts of Congress.

It was decided in *Coleman v. Wathen*,[58] that the acting of a dramatic composition on the stage was not a publication within the statute. The plaintiff had purchased from O'Keefe the copyright of an entertainment called the Agreeable Surprise, and the defendant represented this piece upon the stage. The mere act of repeating such a performance from memory, was held to be no publication. On the other hand, to take down, from the mouths of the actors, the words of a dramatic composition, which the author had occasionally suffered to be acted, but never printed or published. and to publish it from the notes so taken down, was deemed a breach of right, and the publication of the copy so taken down (being the farce entitled Love a la Mode) was restrained by injunction.[59] Since the case above mentioned, injunctions have been granted in chancery even against the acting of a dramatic work without the consent of the proprietor[60] and the narrow and unreasonable construction given to the claims of an author by the K. B., seems to have been very properly enlarged by the Court of Chancery. But as the Lord Chancellor, as late as 1822, took the opinion of the Court of K. B. whether an action would lie for publicly acting, and representing for profit, a tragedy altered for the

stage, without the consent of the owner of the copyright, and as that opinion was against the action,[61] it is probable the rule in chancery will conform to that at law. The preamble of the statute of Anne spoke of books or other writings, but the body of the act spoke only of book or books; and the same words are used in the act of Congress; and it has been made a question whether a musical composition was within the protection of the act. It was so decided in *Bach v. Longman*;[62] but Lord Mansfield, in that case, laid some stress on the words in the preamble to the statute of Anne, "books and other writings," and our act has no such preamble. Afterwards, in *Storace v. Longman*, decided at Guildhall before Lord Kenyon,[63] it was held, that a musical air, tune and writing, on a single sheet of paper, was a book within the act. So, again, in *Clementi v. Goulding*,[64] it was held by the K. B. that a single sheet of music was a book within the meaning of the act; and this liberal interpretation is, doubtless, to be applied to cases arising under the act of Congress, and the construction is to be considered as having been given to the body of the statute of Anne.

If an author first publishes abroad, and does not use due diligence to publish in England, and another fairly publishes his work in England, it is held, that he cannot sue for a breach of copyright. Whether the act of printing and publishing abroad makes the work publici juris, is not decided. It becomes so if the author does not promptly print and publish in England; and the statute of Anne had a reference to publications in England, and it was them only that it intended to protect.[65]

An injunction to restrain the publication of unpublished manuscripts has been frequently granted;[66] but it seemed to be on the ground, that the author had a property in an unpublished work independent of the statute.[67] The act of Congress says, that no person shall be entitled to the benefit of the act, unless he shall, before publication, record the book in the clerk's office of the District Court, by depositing a printed copy of the title with the clerk. There is another section of the act which declares, that if any person shall print or publish any manuscript, without the consent of the author, (he being a citizen or resident in the United States,) he shall be responsible in damages by a special action on the case. The courts of the United States may issue injunctions, when necessary, for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and I see no reason why the courts may not protect manuscripts from piratical publication, since the statute places them under their protection. In England, the publication of private letters forming a literary composition has been restrained. The letters of Pope, Swift, and others, and the letters of Lord Chesterfield, were prevented from a surreptitious and unauthorized publication by the same process of injunction.[68] In the case of *Perceval v. Phipps*,[69] the Vice Chancellor held, that private letters, having the character of literary composition, were within the spirit of the act protecting literary property, and that by sending a letter the writer did not give the receiver the right to publish it. But the Court would not interfere to restrain the publication of commercial or friendly letters, except under circumstances. The publication or production of business letters, might often be necessary in one's own defense. If the publication of private letters would be a breach of trust, the publication has been, and may be restrained.[70] It is easy to perceive the delicacy and importance of this branch of equity jurisdiction, relative to the publication of manuscripts and, private correspondence. The publication of private letters ought to be restrained, when it would be a breach of confidence and trust, as letters of courtship, or when injurious to the character and happiness of others.

A copyright may exist in a translation as much as in an original composition, and whether it be produced by personal application and expense, or by gift.[71] A copyright may exist in part of a work, without having an exclusive right to the whole. Gray's poems were collected and published, with additional pieces, by Mason; and Lord Bathurst protected, by injunction, the unauthorized

publication of the additions.[72] So, Lord Hardwicke restrained a defendant from printing Milton's Paradise Lost, with Doctor Newton's notes.[73] A mere colorable abridgment of a book is an evasion of the statute, and will be restrained; but, as Lord Hardwicke observed, this will not apply to a real and fair abridgment; for an abridgment may, with great propriety, be called a new book. It is very often extremely useful, and displays equally the invention, learning, and judgment of the author.[74] A *bona fide* abridgment of Hawkesworth's Voyages has been held no violation of the original copyright. So, an abridgment of Johnson's Rasselas, given as an abstract in the Annual Register, was held not to be a piratical invasion of the copyright, but innocent, and not injurious to the original work.[75]

A person cannot, under the pretense of quotation, publish either the whole, or any material part of another's work, but he may use what is in all cases very difficult to define, fair quotation. A man may adopt part of the work of another. The *quo animo* is the inquiry in these cases. The question is, whether it be a legitimate use of another's publication, in the exercise of a mental operation, deserving the character of an original work.[76] If an encyclopedia or review should copy so much of a book as to serve as a substitute for it, it becomes an actionable violation of literary property, even without the *animus furandi*. If so much be extracted as to communicate the same knowledge as the original work, it is a violation of copyright. It must be in substance a copy. An encyclopedia must not be allowed, by its transcripts, to sweep up all modern works. It would be a recipe for completely breaking down literary property.[77]

But I cannot be permitted to go further into the details on this subject. The justice and the policy of securing to ingenious and learned men the profit of their discoveries and intellectual labor, were very ably stated by the Court of K. B. in the great case of *Miller v. Taylor*.

The constitution and laws of the United States contain the declared sense of this country in favor of some reasonable provision for the security of their productions. The present law of Congress affords only a scanty and inadequate protection, and does not rise to a level with the liberal spirit of the age. Lord Camden once declaimed against literary property. “Glory,” said he, “is the reward of science, and those who deserve it scorn all meaner views. It was not for gain that Bacon, Newton, Milton, and Locke, instructed and delighted the world.” In answer to this it may be said, that the most illustrious writers in every branch of science, within the last half century, have reaped a comfortable support, as well as immortal fame, from the fruits of their pen. The experiment in Great Britain has proved the utility, as well as the justice, of securing a liberal recompense to intellectual labor, and the prospect of gain has not been found, in the case of such men as Robertson, or Gibbon, or Sir Walter Scott, either to extinguish the ardor of genius, or abate the love of true glory.

NOTES

1. *Quod ante nullius est, id naturali ratione occupanti conceditur.* Inst. 2. 1. 12. Mr. Selden has shown, that among the ancient Hebrews, fruits, fish, animals, and everything found in desert or vacant places, belonged to the first occupant. *De Jur. Nat. et Gent. jucta disciplinam Ebraeorum* cited by Puf. b. 4. c. 6. sect. 5.

2. Finch's Law, 28, 178. Bro. tit. Property, pl. 18. 38. Wright, J. in *Morrough v. Comyns*, 1 Wils. 211.

3. See vol. ii. p. 95.

4. 1 Blacks. Com. 296.

5. *Armory v. Flynn*, 10 Johns. Rep. 102.

6. Dig. 47. 2. 44. sect. 4-10.

7. L. N.Y. sess. 24. ch. 43.

8. 3 Inst. 132.

9. De Jur. Bel. & Pac. b. 2. c. 8. sect. 7.

10. Inst.2. 1. 39.

11. Code Civil, No. 716. But the French code limits this right of the finder to that particular case. The general rule is, that all property vacant, and without a master, belongs to the state. Code, No. 539, 713, 714, 717; and Toullier, in his *Droit Civil Francais*, tom. 4 p. 37-42, complains much of the contradiction, confusion and uncertainty of the French regulations, on this subject of goods without an owner.

12. Foxley's case. 5 Co. 109. Cro. Eliz. 694.

13. Finch's Law, 212.

14. Laws of N.Y. sess. 36. ch. 21.

15. Ibid. sess. 10. ch. 28.

16. Dane's Abr. of American Law, ch. 76. art. 7. s. 12, 21, 23. 38. It is the general law of continental Europe, that wrecks belong to the nation, when the owner does not appear. Heinec. Elem. Jur. ord. Inst. s. 352, 353. Toullier, *Droit Civil Francais*, tom. 4. No. 42-46.

17. Dane's. Abr. *ubi sup*. s. 15, 16.

18. Ibid. s. 22.

19. Ibid. s. 21.

20. Code civil, No. 546, 547.

21. *De acqui. rerum Dom*. b. 2. ch. 2. and 3.

22. Pothier, *Traite du Droit du Propriété*, No. 150. to No. 193. Toullier, Droit Civil Francais, tom. 3. No. 106. to No. 150.

23. Owen, 139.

24. 8 Johns. Rep. 432.

25. Inst. 2. 1. 37.

26. B. 2. tit. 3. sec. 2. art. 539.

27. 7 Johns. Rep. 473.

28. *De Jure Maritimo*, b. 2. c. 1. s. 7.

29. Dig. 6. 1. 61.

30. *De rer div*. 2. 1. s. 34.

31. 5 Hen. VII. 15. 12 Hen. VIII. 10. Fitz. Abr. Bar. 144. Bro. tit. Property, 23.

32. 5 Johns. Rep. 348.

33. Bro. tit. Property, pl. 23.

34. Inst. 2. 1. 25.

35. Inst. 2. 1. 26 and 28.

36. Popham, 38. pl. 2.

37. Pop. *ub. sup*. *Ward v. Eyre*. 2 Bulst. 323.

38. *Colwill v. Reeves*, 2 Campbell's N.P. 575.

39. 15 Vesey, 442.

40. 2 Johns. Ch. Rep. 108. *Hart v. Ten Eyck*. Sir William Scott, in the case of *The Odin*, 1 Rob. Rep. 208.

41. Art. 1. sect. 8.

42. Acts of Congress, 21st Feb. 1793, ch. 11th; and 17th April, 1800, ch.25.

43. Patents are no doubt procured in many cases for frivolous and useless alterations in articles, implements, and machines in common use, under the name of improvements; and the abuses arising from the facility in suing out patents, and provoking litigation, were painted in glowing colors by the district judge at New York. in *Thompson v. Haight*; (U. S. Law Journal, vol. i. 563) and yet the collection of models and machines in the patent office relating to every possible subject constitutes a singularly curious museum of the arts, and one strongly illustrative of the inventive and enterprising genius of our countrymen.

44. *Woodcock v. Parker*, 1 Gallis. 438. *Bedford v. Hunt*, 1 Mason, 302. *Evans v. Eaton*, 3 Wheaton, 454.

45. *Whittemore v. Cutter*, 1 Gallis. 478. *Thompson v. Haight*, U. S. L. Journal, vol. i. 563. *Morris v. Huntington*, 1 Paine, 348. Contra, *Goodyear v. Mathews*, 1 Paine, 300.

46. *Lowell v. Lewis*, 1 Mason, 182. *Langdon v. De Groot*, 1 Paine, 203.

47. The case of *Hill v. Thompson*, 8 Taunton, 375, and *Evans v. Eaton*, 7 Wheaton, 356, may be selected as samples of the intricacy and subtlety of such investigations.

48. *Woodcock v. Parker*, 1 Gallis. 438. *Whittemore v. Cutter*, 1 Gallis. 478. *Odiorne v. Winkley*, 2 Gallis. 51. *Lowell v. Lewis*, 1 Mason, 182. *Evans v. Eaton*, 7 Wheaton, 356.

49. *Edgeberry v. Stephens*, 2 Salle 447. *Darcy v. Allen*, Noy, 182, 183. The recent decisions in England seem, however, to throw some doubt over this point, for they speak generally, and without any qualification, of the necessity of the discovery being new; and in *Wood v. Zimmer*, 1 Holts.N. P. Rep 59. Lord Ch. J. Gibbs held, that the invention must be new to the world, and if it had been sold before, though by the inventor only, the patent would be void. If we were to judge from the language of the statute of James, the patentee himself must have been the true and first inventor, and there would seem to be no foundation for the opinion of Lord Holt, in *Edgeberry v. Stephens*. A recent French publication, however, states the English law precisely as laid down by Lord Holt; and that the English law means only new in England. The writer must have been informed, that such was the received doctrine in England. See M. Renouard's *Traite des Brevets d'Invention*, 197.

50. *Morris v. Branson*, cited in 2 H. Blacks. 489. Boulton v. Bull, ibid. 463. Hornblower v. Boulton, 8 Term Rep. 95.

51. *Hill v. Thompson*, 8 Taunton, 375. 3 Merivale, 629. *Jessop's case*, cited in 2 H. Blacks. 489.

52. *Sullivan v. Bedfield*, 1 Paine. 441. *Hill v. Thompson*, 3 Merivale, 622. *Livingston v. Van Ingen*, 9 Johns. Rep. 507. The law of patents in France is founded on decrees of the constituent assembly of the 31st of December, 1790, and 14th of May, 1791; and it assures to inventors of discoveries in the arts, for a certain period, the exclusive right to make and sell their discoveries, and it makes no distinction between Frenchmen and foreigners. The patent may be taken out for 5, 10, or 15 years, at the option of the patentee, under the charge of a tax proportioned to the time; and whoever first imports a foreign discovery or improvement, is entitled to the privilege of an inventor. The patentee must exhibit a true and accurate specification of the principles, plans, and models of his discovery or importation. If he obtains a patent for the same object in a foreign country, he forfeits his French patent. The French jurisprudence on this point is very fully considered by A. C. Renouard, in his *Traite des Brevets d'Invention, de Perfectionnement et d'Importation*. Paris, 1825. The same questions concerning priority of invention, and the requisite proofs, have disturbed the French tribunals, which have so long been agitated in ours. (*Repertoire de Jurisprudence, tit. Brevet d'Inven. tion. Questions de Droit*, tom. 5. pa. 187.) The law as to patents for new inventions and discoveries in the dominions of the Emperor of Austria, rests upon an imperial decree of the 8th of December, 1820. By that decree foreigners, residents and non-residents, may obtain patents on the same terms as the native subjects. The objects of the patents are new discoveries; but those are considered as new, which, although known in other countries, are not, at the time of the application, in practical use in the Austrian dominions, nor specifically described in any printed work. The patents may be taken out for fifteen years, and the application for them must describe accurately and minutely the invention, discovery, or improvement, and be accompanied with models, if the nature of the case requires them. The patentee must put his invention into practice within one year from the date of the patent, or he forfeits it. See the substance of the Austrian decree, published in April, 1824, by the Austrian consul, at New York. The Spanish patent law is founded on a decree of the King and Cortes of 14th of October, 1820. It grants a monopoly of any art or manufacture, to the

inventor, for ten years; to him who improves it, for six years; and to him who imports it, for five years. The law is well drawn and guarded, and is annexed to the Treatise of M. Renouard.

53. Acts of Congress, May 31, 1790, ch. 15, and April 29, 1802, ch. 36.

54. *Miller v. Taylor*, 4 Burr. 2303.

55. 4 Burr. 2408, *Donaldson v. Becket*. 7 Bro. P. C. 88. S. C. *Beckford v. Hood*, 7 Term Rep. 620.

56. Act of May 31, 1790. sect. 5.

57. The French law of copyright is founded on the republican decree of the 19th July, 1793, which gave to authors of writings of all kinds, composers of music, painters and engravers, a right for life in their works, and to their heirs, for ten years after their deaths, with strong provisions against the invasion of such literary property. One copy was to be deposited in the national library. The imperial decree of the 5th February, 1810, made some modifications of that law, and gave the right to the author for life, and to his wife, if she survived, for her life, and to their children for twenty years, and the right was secured by adequate civil penalties. A number of interesting questions have been discussed and decided in the French tribunals, under the above law, and they are reported in the *Repertoire de Jurisprudence*, par Merlin, tit. Contrefacon, sect. 1 to 15; and in his *Questions de Limit, tit. Propriete litteraire*, sect. 1 and 2. In the case of *Masson & Besson v. Moutardier & Leclerc*, in the latter work, sect. 1, a new edition of the Dictionary of the French Academy, with colorable additions only, was adjudged to be a fraudulent violation of the copyright, and Merlin has preserved his elaborate and eloquent argument in support of literary property. In, the case of *Lahante & Bonnemaison v. Sieber*, the question was concerning the rights of foreign authors, and it was decided and settled on appeal, in March, 1810, that the French assignee of a literary or musical work, not published abroad, acquired in France, after conforming to the usual terms of the French law; before any publication abroad, the exclusive copyright under the law of 1793. See *Questions de Droit. tit. Propriété litteraire*, sect. 3. It is understood to be lawful to publish in France, without the permission of the author a work already published in a foreign country. *Repertoire, ub, sup*. sect. 10. The French law is much more liberal in the protection of intellectual productions to authors and their heirs, than either the English or our American law; and it is a curious fact in the history of mankind, that the French national convention, in July, 1793, should have busied themselves with the project of a law of that kind, when the whole republic was at that time in the most violent convulsions, and the combined armies were invading France, and besieging Valenciennes; when Paris was one scene of sedition, terror, proscription, imprisonment and judicial massacre under the forms of the revolutionary tribunal; when the convention had just been mutilated by its own violent denunciation and imprisonment of the deputies of the Gironde party, and the whole nation was preparing to rise in a mass to expel the invaders. If the production of such a law, at such a crisis, be not resolvable into mere vanity and affectation, then indeed we may well say, with Mr. Hume, so inconsistent is human nature with itself, and so easily do gentle, pacific and generous sentiments ally both with the most heroic courage, and the fiercest barbarity.

There is a disposition in France to enlarge still further the term of an author's property in his works; and the commissioners appointed by the king to frame a new law on the subject reported, in the summer of 1826, the draft of a law, in which they propose to give to authors and artists of works of all kinds, property in their works for life, and to their legal representatives for fifty years, from their death; and copyright in a work to be protected from piracy by representation, as well as from piracy by publication. In Germany, copyright is perpetual; but it cannot be of much value, for there is no one uniform Germanic legislation on the subject, to protect copyright among so many independent states, using a common language. This case of Germany shows how important it was in this country, that the law of copyright should rest on the broad basis of federal jurisdiction.

58. 5 Term Rep. 245.

59. *Macklin v. Richardson*, Amb. 694.

60. *Morris v. Harris*, and *Morris v. Kelly*, cited in Eden on Injunctions, 198.

61. Murray v. Elliston, 5 Barn. & A1d. 657.

62. Cowp. 623.

63. 11 East, 244. note.

64. 11 East, 244.

65. *Clementi v. Walker*, 2 Barn. & Cress. 861.

66. Eden on Injunctions, 199, 200.

7. 2 Eden, 329. *Duke of Queensberry v. Shebbeare*. 2 Merivale, 436. *Southey v. Sherwood*.

68. *Pope v. Curl*. 2 Atk. 342. *Thompson v. Stanhope*, Amb. 737.

69. 2 Ves. & Bea. 19.

70. 2 Ves. & Bea. 27. *Perceval v. Phipps*. 1 Ball. & B. 209. *Earl of Branard v. Dunkin*.

71. *Wyatt v. Barnard*, 3 Ves. & Bea. 77.

72. *Mason v. Murray*, cited in 1 East, 360.

73. Lord Kenyon. in 1 East, 361.

74. *Gyles v. Wilcox*, 2 Atk. 141.

75. *Dodsley v. Kinnersley*, Amb. 403.

76. *Wilkins v. Aikin*, 17 Vesey, 422.

77. *Roworth v. Wilkes*, 1 Campb. N. P. 94.

LECTURE 37

Of Title to Personal Property, by Transfer by Act of Law

Goods and chattels may change owners by act of law, in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy. Those of succession and marriage have already been considered, and I shall now confine myself to the other means of acquiring title to chattels by act of law.

I. By Forfeiture.

The title of government to goods by forfeiture, as a punishment for crimes, is confined in this state to the case of treason. The right, so far as it exists in this country, depends, probably, upon local statute law; and the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity. Every person convicted of any manner of treason, under the laws of this state, forfeits his goods and chattels, as well as his lands and tenements; but the rights of all third persons, existing at the time of the commission of the treason, are saved.[1] Forfeiture of property for crimes in any other case, is expressly abolished;[2] and even the attainder of treason does not extend to corrupt the blood of the offender, or to forfeit the dower of his wife.[3] The forfeiture in treason as to real estate, related, at common law, back to the time of the treason committed, and, therefore, all alienations and encumbrances by the traitor, between the time of the offense and the conviction, were avoided; but the forfeiture of his goods and chattels related only to the time of the, conviction, and all sales made in good faith, and without fraud, before conviction, were good.[4]

Forfeiture of estate, and corruption of blood, under the laws of the United States, and including cases of treason, are abolished.[5] Forfeiture of property, in cases of treason and felony, was a part of the common law, and must exist at this day in the jurisprudence of those states where it has not been abolished by their constitutions, or by statute. Several of the state constitutions have provided, that no attainder of treason or felony shall work corrupt ion of blood or forfeiture of estate, except, during the life of the offender;[6] and some of them have taken away the power of forfeiture absolutely, without any such exception.[7] There are other state constitutions which impliedly admit the existence or propriety of the power of forfeiture, by taking away the right of forfeiture expressly in cases of suicide, and in the case of deadened, and preserving silence as to other cases; and, in one instance,[8] forfeiture of property is limited to the cases of treason and murder.

The English law has felt the beneficial influence of the progress of public opinion on this subject. The statute of 7 Anne, c. 22. abolished, after the death of the pretender, forfeiture for treason beyond the life of the offender; and though the statute of 17 Geo. II. c. 29 postponed the operation of that provision, it was only until the death of the pretender, and his sons. And by a bill introduced into Parliament by Sir Samuel Romilly, in 1814, and afterwards, under modifications, passed into a law, corruption of blood, in cases of felony, except murder, was abolished. The ingenious and spirited defense of the law of forfeiture, which was made by Sir Charles Yorke in the middle of the last century,[9] and in which he insisted, that it stood on “just, social, and comprehensive principles, and was a necessary safeguard to the state, whether built on maxims of monarchy or freedom,” has failed to convince the judgement, or satisfy the humanity of the present age.

Government succeeds, as of course, to the personal and real estate of the intestate, when he has no

heirs, or next of kin, to appear and claim it; but this is for the sake of order and good policy, and the succession by escheat, in such cases, is usually regulated by statute.[10]

II. By Judgment.

On a recovery by law in an action of trespass or trover, of the value of a specific chattel, of which the possession has been acquired by tort, the title of the goods is altered by the recovery, and is transferred to the defendant, and the damages recovered are the price of the chattel so transferred by operation of law *solutio pretii emptionis loco habetur*. The books either do not agree, or do not speak with precision on the point, whether the transfer takes place, in contemplation of law, upon the final judgment merely, or whether the amount of the judgment must first be actually paid or recovered by execution. In *Brown v. Wotton*,[11] Fenner, J. said, that in case of trespass, after the judgment given, the property of the goods is changed, so as that the former proprietor may not seize them again; and in *Adams v. Broughton*,[12] the K. B. declared, that the property in the goods was entirely altered by the judgment obtained in trover, and the damages recovered were the price thereof. On the other hand, the rule is stated in Jenkins[13] to be, that if one person recovers damages in trespass against another for taking his chattel, "by the recovery and execution done thereon," the property of the chattel is vested in the trespasser; and in the Touchstone[14] it is said, that if one recovers damages of a trespasser for taking his goods, the law gives him the property of the goods, "because he has paid for them."

The rule in the civil law was, that when the wrongful possessor of moveable property, who was not in a condition to restore it, had been condemned in damages, and had paid the same to the original proprietor, he became possessed of the title. The Roman and the French law speak of the change of rights as depending upon the payment of the estimated valued.[15] So, also, in the modern case of *Drake v. Mitchell*,[16] Lord Ellenborough observed, that he always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment was recovered, operating as a change of remedy, from its being of a higher nature than before; and that a judgment recovered in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and until then, it would not operate to change any other collateral concurrent remedy which the party might have. This is the more reasonable, if not the more authoritative conclusion on the question.

III. By insolvency.

It has been found necessary in governments which authorize personal arrest and imprisonment for debt, to interpose and provide relief to the debtor in cases of inevitable misfortune; and this has been particularly the case in respect to insolvent merchants, who are obliged by the habits, the pursuits, and the enterprising nature of trade, to give and receive credit, and encounter extraordinary hazards. Bankrupt and insolvent laws are intended to secure the application of the effects of the debtor to the payment of his debts, and then to relieve him from the weight of them.

The constitution of the United States gave to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Bankruptcy in the English law has, by long and settled usage, received an appropriate meaning, and has been considered to be applicable only to fortunate traders, who do certain acts which afford evidence of an intention to avoid payment of their debts.[17] But the line of partition between bankrupt and insolvent laws, is not so distinctly

marked, as to enable any person to say with positive precision, what belongs exclusively to the one and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws; and therefore a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law. The legislature of the Union possesses the power of enacting bankrupt laws,[18] and those of the states, the power of enacting insolvent laws; and a state has likewise authority to pass a bankrupt law; but no state bankrupt or insolvent law can be permitted to impair the obligation of contracts, and there must likewise be no act of Congress in existence on the subject, conflicting with such law.[19] There is this further limitation also on the power of the separate states to pass bankrupt or insolvent laws, that they cannot in the exercise of that power, act upon the rights of the citizens of other states.[20]

At present there is not any bankrupt system in existence under the government of the United States, and the several states are left free to institute their own bankrupt systems, subject to the limitations which have been mentioned. The objection to a national bankrupt system consists in the difficulty of defining, to the satisfaction of every part of the country, the precise class of debtors who can consistently with the constitutional jurisdiction of Congress over the subject, be made the subjects of it; and in the great expense, delay and litigation, which have been found to attend proceedings in bankruptcy; and in the still more grievous abuses and fraud which the system leads to, notwithstanding the vigilance and integrity of those to whom the administration of the law may be committed.

To show the subtlety of the English distinctions on this subject, it may be here observed, that a farmer, grazier, or drover, cannot, from their occupations, be bankrupts; and yet if a farmer buys and sells apples, or potatoes, or other produce of a farm for gain, or manufactures bricks for sale, and becomes a dealer in such articles, he becomes, like any other trader, subject to the English bankrupt laws.[21] So, a farmer who becomes a dealer in horses, for the sake of gain; or an innkeeper, who sells liquor out of his house to all customers who apply for it, will become an object of the bankrupt laws. The question turns upon the person's common or ordinary mode of dealing in the case.[22] If a man exercises a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he is not a trader; but if the produce of his farm be merely the raw material of a manufacture, and that manufacture not the necessary mode of enjoying his land, he is a trader.[23] And with respect to the infirmities of the English bankrupt system, which have been the growth of upwards of two centuries, and been constantly under the review of parliament, and matured by the talents and experience of a succession of distinguished men in chancery, we may refer to the observation of Lord Eldon, when he succeeded to the great seal in 1801, and who took the earliest opportunity to express his strong indignation at the frauds committed under cover of that system. He remarked,[24] that "the abuse of the bankrupt law was a disgrace to the country, and that it would be better at once to repeal all the statutes, than to suffer them to be applied to such purposes. There was no mercy to the estate. Nothing was less thought of than the object of the commission. As they were frequently conducted in the country, they were little more than stock in trade for the commissioners, the assignee, and the solicitor."

The respective states, as we have already seen, may pass bankrupt and insolvent laws. The power given to the United States to pass bankrupt laws, is not exclusive; and the exercise of the power residing in the states to pass bankrupt and insolvent laws, does not impair, in the sense of the constitution, the obligation of contracts made posterior to the law; but the discharge under the state

law is no bar to a suit on a contract existing when the law was passed, nor to an action by a citizen of another state, in the courts of the United States, or of any other state than that where [ob]tained. The discharge under a state law, will not discharge a debt due to a citizen of another state. It will only operate upon contracts made within the state between its own citizens, or suitors subject to state power. The Supreme Court of the United States, in *Ogden v. Saunders*, disclaimed the doctrine of the English jurisprudence, that the discharge of a bankrupt was effectual against contracts of the state in which the discharge was procured, wheresoever may be the allegiance or country of the creditor. The doctrine in that case is, that a discharge under the bankrupt law of one country, does not affect contracts made or to be executed in another. The municipal law of the state is the law of the contract made and to be executed within the state, and travels with it wherever the parties to it may be found, unless it refers to the law of some other country, or be immoral, or contrary to the policy of the country where it is sought to be enforced. This was deemed to be a principle of universal law, and therefore the discharge of the contract, or of the party, by the bankrupt law of the country where the contract was made, is a discharge everywhere.[25]

We have no bankrupt law, technically so called, existing in this state; but we have a permanent insolvent law, enabling every debtor to be discharged from all his debts, upon the terms and in the mode prescribed. The first general insolvent law of this state was passed in the year 1784, and alterations and amendments have from time to time been made, until the system has attained all the consistency, provision and improvement, that the nature of the subject easily admits.[26]

Our insolvent laws enable the debtor, with the assent of two thirds in value of his creditors, to be discharged from all his debts contracted within this state, and subsequent to the passing of the insolvent act, and due at the time of the assignment of his property, or contracted for before that time, though payable afterwards.[27] It would be tedious, and quite unnecessary, to enter into a particular detail of the proceedings under our insolvent acts. They can be easily learned, when the application of the law becomes necessary, by a careful inspection of the several steps precisely pointed out in the statutes, and made requisite on the part of the debtor to the validity of his discharge. Nor can I undertake to examine the various and special provisions of the insolvent laws of the different states, some of which are in continual fluctuation. What I have to say in the discharge of my present undertaking, relative to insolvent and attachment laws, must necessarily be essentially confined to the local law of my own state.[28]

There are other provisions belonging to the insolvent system, which are exclusively applicable to imprisoned debtors, who may, in all cases free from fraud, he discharged from prison, and exempted from future arrest, without the hazard of any constitutional objection. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation.[29] Persons who are not freeholders, and charged with small debts, can be relieved froth prison after thirty or sixty days, and every person charged in execution for debt under 500 dollars, may immediately thereafter, and if for any sum above 500 dollars, may, after the expiration of three calendar months, apply, and be discharged from imprisonment, on the surrender of his property for the payment of his debts.[30] If imprisonment for debt is to be in any degree retained, these provisions would seem to render it as mild and limited as is consistent with its objects and policy, which is simply to coerce the debtor to pay with concealed property which the creditor cannot reach, and to check the disposition to run in debt heedlessly and fraudulently. Imprisonment for debt is not usual unless the debt was contracted, in the first instance, under deceitful assurances, or unless the debtor has applied his property unfairly, or refused to give to his creditor any reasonable and satisfactory explanation. And in all

those cases he deserves imprisonment.

Severity towards fair, but unfortunate debtors, is no part of the character or disposition of our countryman. Every such disposition is sufficiently checked by the all powerful efficacy of public opinion, and the control of a jealous, free, and vigilant public press. It is more often the debtor, than the creditor, who uses menacing language, and dictates terms of settlement. It is the debtor, and not the creditor, who usually has at his command the hopes and fears, the comfort or distress of the adverse party and of his family, and he generally sways that influence in a way to effect a very beneficial compromise for himself.

The case of absconding and absent debtors may be referred to this head of insolvency, our attachment law being, (like our insolvent acts, and the acts for the relief of debtors from imprisonment,) a legal mode by which a title to property may be acquired by operation of law.[31] When the debtor who is indebted within this state, absconds, or is concealed, a creditor to whom he owes 100 dollars, or any two to whom he owes 150 dollars, or any three to whom he owes 200 dollars, may, on application to a judge or commissioner, and on due proof of the departure or concealment, procure his real and personal estate to be attached; and, on due public notice of the proceedings, if the debtor does not, within three months, return, and satisfy the creditor, or appear and offer to contest the fact of having absconded, or offer to appear and contest the validity of the demand, and give the requisite security, then trustees are to be appointed, who become vested with the debtor's estate, and they are to collect and sell it, and settle controversies, and make dividends among all his creditors in the mode prescribed. From the time of the notice, all sales and assignments by the debtor are declared to be void.

If the debtor resides out of the state, his property is liable to be attached and sold in like manner, but the trustees are not to be appointed until one year after public notice of the proceeding. Persons imprisoned in the state prison for a less period than life, are liable to be proceeded against as absconding debtors. Perishable goods, when attached under the absconding debtor acts, may be immediately sold and converted into money; and if the sheriff, under the attachment, seizes property claimed by third persons, he is to summon a jury, and to take their inquisition as to the title to the properly claimed. If any vessel belonging to the debtor be attached under these proceedings, it may be released on giving security to pay the amount of the valuation of the vessel to the trustees; and if it be a foreign vessel, claimed by a third person, the attaching creditor must give security to prosecute the attachment, and pay the damages, if it should appear that the vessel belonged to the claimant.

It has been decided, that a creditor, having an unliquidated demand resting in contract, is a creditor within the absconding debtor act, and con pet eat to apply for the attachment.[32] It was formerly held, that the creditor who instituted proceedings against an absconding debtor, must be a resident within the state;[33] but the statute declares, that any creditor residing out of the state shall be deemed a creditor within the act, and he may proceed by attorney. The act says, that a debtor who resides out of the state is to be proceeded against us an absent debtor; and if a debtor who resides abroad, was to come transiently into the state, without the *animus manendi*, and, while here, should conceal himself to avoid arrest, he is to be deemed an absent debtor; and the charge of an absconding, or concealed debtor, will not lie against. any person whose domicile is not established here.[34] The debt must have been contracted within this state, to bring the case within the act; and its provisions do not apply to a foreign creditor, against a foreign debtor not domiciled here, and whose debt was not

contracted within the state.[35]

The court in which proceedings under the absconding debtor act are pending, has an equitable jurisdiction over all claims between the trustees and the creditors. They are liable to be called to account at the instance of either the debtor or creditor. Trustees, in this case, resemble commissioners under the English bankrupt laws, as they are to liquidate all demands, and declare and pay dividends; and the proper remedy against the trustees is, either by a bill in chancery, or an application to the equitable powers of the court in which the proceedings are pending, to compel an account, and an adjustment. It was accordingly held, in *Peck v. Randall*,[36] that the creditor could not maintain a suit at law against the trustees before the demand had been adjusted, and a dividend declared. In England, it is well settled, in the analogous case of a claim for dividends on a bankrupt's estate, that a suit at law cannot be sustained for a dividend, and that the creditor applies to the Court of Chancery for assistance to obtain it.[37]

A grave and difficult question has been frequently discussed in our American courts. respecting the conflicting claims arising under our attachment laws, and under a foreign bankrupt assignment. If a debtor in England, owing a house in this state, as well as creditors in England, be regularly declared a bankrupt in England, and his estate duly assigned, and if the house in this state afterwards sues out process of attachment against the estate of the same debtor, and trustees are appointed accordingly. the question is, which class of trustees is entitled to distribute the fund, and to whom can the debtors of the absent or bankrupt debtor safely pay. In such a case there are assignees in England claiming a right to all the estate and debts of the bankrupt, and there are trustees in New York claiming the same right.

This question was considered in *Holmes v. Remsen*,[38] and the English, and Scotch, and other foreign authorities examined, and the conclusion was, that by the English law, and by the general international law of Europe, the proceeding which is prior in point of time, is prior in point of right, and attaches to itself the right to take and distribute the estate. It was considered, that as the English assignees in that case were first appointed, and the assignment of the bankrupt's estate first made to them, that assignment carried the bankrupt's property wherever situated, and it consequently passed the debt due by a citizen of this state to the English bankrupt, so that a payment of such a debt to the English assignees was a good payment in bar of a claim for that same debt, by the trustees, under our absconding act. This rule appeared to be well settled, and to be founded in justice and policy, and the comity of nations; and no doubt was entertained, that if the appointment of trustees, under our act, had been the first in point of time, the title of the trustees would have been recognized in the English courts as controlling trolling the personal property in England. By the same rule, the English assignees being first in time, were held entitled to control the personal property of the debtor existing in this state.

But whatever consideration might otherwise have been due to the opinion in that case, and to the reasons and decisions on which it rested, the weight of American authority is decidedly the other way; and it may now be considered as part of the settled jurisprudence of this country, that a prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. This was the rule in Maryland prior to our revolution, according to the opinion of Mr. Dulany, reported in *Burk v. McLean;*[39] and afterwards, in 1790, it

was decided in *Wallace v. Patterson*,[40] that property of the bankrupt could be attached here, notwithstanding a prior assignment in bankruptcy in England. The same doctrine was declared in Pennsylvania,[41] after an elaborate discussion of the question. The court in that state considered that an assignment abroad, by act of law, had no legal operation *extra territorium*, and that they were bound to look to their own law. The same doctrine was declared in North Carolina, as early as 1797.[42]

In South Carolina, the same question arose in the case of the *Assignees of Topham v. Chapman*, in 1817;[43] and the court in that case followed some prior decisions of their own, and the case of *Taylor v. Geary*, decided in Connecticut as early as 1787,[44] and they held that law, justice, and public policy, all combined to give a preference to their own attaching creditors. The point arose in the Supreme Court in Massachusetts, in *Ingraham v. Geyer*, in 1816,[45] and they would not allow even a voluntary assignment by an insolvent debtor in another state, to control an attachment in that state, of the property of the insolvent, made subsequent to the assignment, and before payment to the assignees; and the court denied that any such indulgence was required by the practice or comity of nations. The opinion in the case of *Holmes v. Remsen* was also ably questioned by one of the Judges of the Supreme Court of this state, in a suit at law between the same parties.[46] And still more recently, in the Supreme Court of the United States,[47] the English doctrine (for it is there admitted to be the established English doctrine,) was peremptorily disclaimed in the opinion delivered on behalf of the majority of the court.

IV. By intestacy.

The last instance which was mentioned of acquiring title to goods and chattels by act of law, was the case of intestacy. This is when a person dies, leaving personal property undisposed of by will; and in that case, the personal estate, after the debts are paid, is distributed to the widow, and among the next of kin. To avoid repetition and prolixity, or inextricable confusion, I shall be obliged to confine myself to the discussion of the leading principles of the English law and the law of New York, on this head; and I shall assume them to be the law of the several states, in all those cases in which some material departure from them in essential points cannot be clearly ascertained.

This title will be best explained by examining, 1. To whom the administration of such property belongs, and to whom granted; 2. The power and duty of the administrators; and, 3. The persons who succeed to the personal estate by right of succession.

1. When a person died intestate, in the early periods of the English history, his goods went to the king as the general trustee or guardian of the state. This right was afterwards transferred by the crown to the popish clergy; and, we are told, it was so flagrantly abused, that Parliament was obliged to interfere, and take the power of administration entirely from the church, and confer it upon those who were more disposed to a faithful execution of the trust. This produced the statutes of 31 Edw. III. c. 11. and 21 Hen. VIII. c. 5, from which we have copied the law of granting administration in this state.[48] The power of granting administration, and of superintending the conduct of the administration, was still left in the hands of the bishop, or ordinary, in each diocese. In this country, we have assigned this, as well as other secular matters, to the courts and magistrates of civil jurisdiction. Before the revolution, the power of granting letters testamentary, and letters of administration, with us in this state, resided in the colonial governor, as judge of the Prerogative Court, or Court of Probates of the colony. It was afterwards vested in the Court of Probates,

consisting of a single judge, and so continued until 1787, when surrogates were authorized to grant letters testamentary, and letters of administration, of the estates of persons dying within their respective counties. If the person died out of the state, or within this state, not being an inhabitant thereof, the granting of administration was still reserved to the Court of Probates.[49] This practice continued until the act of 21st of March. 1823,[50] when the Court of Probates was abolished, and all the original powers of that court transferred to the surrogates; and any surrogate has jurisdiction of the cases before referred to the Court of Probates, provided there be in his county personal property of the deceased.

Administration is directed to be granted to the widow, or next of kin, or to some one of them, if they, or any of them, will accept.[51] Among the next of kin, the surrogate has a discretion to elect any one in equal degree in exclusion of the rest, and to grant to such person sole administration. So, he may grant administration[52] to the widow or next of kin, or to both jointly, at his discretion.[53] To guard against imposition or mistake in issuing letters of administration prematurely, the surrogate is required to have satisfactory proof, that the person of whose estate administration is claimed, is dead, and died intestate; and when application is made to administer, by any person not entitled as next of kin, citation to show cause is to be first issued to the next of kin, and duly served, or otherwise published.[54]

If letters of administration should happen to have been unduly granted, they may be revoked; and administration may be granted upon condition, or for a limited time, or for a special purpose.[55] *Feme coverts* dying intestate are excepted out of the statute, and their husbands are entitled to demand and have administration of their estates, and recover and enjoy the same as fully as before the act.[56]

The nearness of kin, under our law, is computed according to the civil law, which snakes the intestate himself the *terminus a quo*, or point from whence the degrees are numbered; and, therefore, the children and parents of the intestate are equally near, being all related to him in the first degree; but in this instance the surrogate has not his option between them, but must prefer the children.[57] And from the children and parents the next degree embraces the brothers and grand parents, and so on in the same order. The law and course is to grant administration, 1. To the husband or wife; 2. To the children, sons or daughters; 3. To the parents, father or mother; 4. To the brothers or sisters of the whole blood; 5. To the brothers or sisters of the half blood; 6. To the grand parents; 7. To uncles, and aunts, and nephews, and nieces, who stand in equal degree; 8. To cousins.[58]

Grandmothers are preferred to aunts, as nearer of kin; for the grandmother stands in the second degree to the intestate, and the aunt in the third.[59] If none of the next of kin will accept, the surrogate may exercise his discretion whom to appoint, and he usually decrees it to the claimant who has the greater interest in the effects of the intestate. If no one offers, he must then appoint a mere trustee *ad colligendum*, to collect and keep safe the effects of the intestate;[60] and this last special appointment gives no power to sell any part of the goods, not even perishable articles, nor can the surrogate confer upon him that power.[61]

The administrator (except it be the husband administering on his wife's estate, or the public administrator in the city of New York) must enter into a bond before the surrogate, with two sureties, for the faithful execution of his trust.[62]

The administrator being thus duly appointed, it is his duty to proceed forthwith to the execution of

his trust. His powers and duties may be summarily comprehended in the following particulars.[63] He is to make an inventory of the goods and chattels of the intestate, in the presence, and with the discretion of two persons who are creditors, or next of kin, or discreet neighbors. Two copies of this inventory are to be made and indented, and one copy is to be lodged with the surrogate under the attestation of the administrator's oath, and the other is to be retained. This inventory is intended for the benefit of the creditors, and next of kin, and the administrator will be obliged to ac. count for the property mentioned in it, and he will also be obliged to show good cause for not collecting the debts that are mentioned to be due, unless he had the precaution to note them in the inventory as desperate.

After completing the inventory, his duty is to collect the outstanding debts, and convert the property into money; and pay the debts due from the intestate. In paying the debts, he must preserve the order prescribed by the rules of the common law, and pay first funeral charges and the expense at the probate office; next, debts due to the state, then, debts of record, as judgments, recognizance, and final decrees; next, debts due for rent, and debts by specialty, as bonds and sealed notes; and lastly, debts by simple contract. The civil law gave no such preference to creditors, except as to debts incurred for funeral expenses, and the expenses of the administration, and debts by mortgage. The heir paid himself first, and he might pay the first creditor who came. All the assets were considered as equitable.[64] When debts are in equal degree, the administrator may pay which he pleases first, and he may always prefer himself to other creditors in equal degree.

If a creditor commences a suit at law, or in equity, he obtains priority over other creditors in equal degree; but an administrator may go and confess judgment to another creditor in equal degree, and thereby defeat the creditor who first sued, by pleading the judgment and *nil ultra*, etc.[65] The rules of law as to the inventory, the collection of the property, and the payment of debts, apply equally to executors; but I do not purpose to dwell more at large on this subject. My principal object in this part of the present lecture, is rather to notice the descent and distribution of personal property, than to discuss the general powers and duties of executors and administrators. In Chancery, the distribution of what is there termed equitable assets, is more liberal and equal. There is no distinction as to the quality of the debts, except they be debts which have acquired a priority by a legal lien; and the creditors are paid rateably, if the assets be not sufficient to pay all of them.

In the jurisprudence of the several states, thee right of administration belongs to the widow or next of kin, wider the same regulations, essentially, as in this state; but in the administration of the assets, the rule is different, and subject to various local modifications. III a few of the states, the English order of preference is preserved.[66] In most of the other states, that order is entirely disturbed, and a more just and equitable rule of distribution adopted. Expenses of the last sickness, and funeral and probate charges, have every where the preference, and generally debts due to the state are next preferred, and then all other debts are placed on an equality, and paid rateably in the case of a deficiency of assets.[67] In Louisiana, there is a particular detail of the order of priority, which is special and peculiar, and minute even beyond the rule of the common law In Maryland, judgments and decrees have preference, and all ocher debts are equal; and in Missouri, expenses of the last sickness, debts due to the state, and judgments, have preference, and all other debts are placed on an equality.[68] In Pennsylvania, the order of administration is to pay, 1. Physic, funeral expenses, and servant's wages; 2. Rents, not exceeding one year; 3. Judgments; 4. recognizances; 5. Bonds and specialties; 6. All of her debts equally, except debts due to the state, which are to be last paid.[69]

When the debts are paid, the administrator is bound, after the expiration of a year from the granting

of administration, to distribute the surplus property among the next of kin. The statutes[70] declares, that after the debts, funeral charges and just expenses are deducted, a just and equal distribution of what remains clear of the goods and personal estate of the intestate, shall be made amongst the wife and children, or children's children, if any such there be, or otherwise to the next of kin to the intestate, in equal degree, or legally representing their stocks, that is to say, one third part of the surplusage to the wife of the intestate, and all of the residue by equal portions to and amongst the children of the intestate, and their representatives, if any of the children be dead, other than such child or children who shall have any estate by settlement, or shall be advanced by the intestate in his lifetime, by portion equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made.

And if the portion of any child who has had such settlement or portion, be not equal to the share due to the other children by the distribution, the child so advanced is to be made equal with the rest. If there be no children, or their representatives, one moiety of the personal estate of the intestate goes to the widow, and the residue is to be distributed equally among the next of kin, who are in equal degree, and those who represent them; but no representation is admitted among collateral after brothers' and sisters' children; and in case there be no wife, then the estate is to be distributed equally amongst the children; and if no child, then to the next of kin in equal degree, and their lawful representatives, in the manner already mentioned. It is further provided, that. if any child shall die intestate after the death of the father, and without wife or children, and in the lifetime of the mother, every brother and sister, and their representatives, shall have an equal share with her.

This is the substance of our act of distributions, which may assert a parentage of very distant antiquity, for it is copied literally from the English statute of 22d and 23d Charles II. ch. 10, and that statute was borrowed from the 118th novel of Justinian, and, except in some few instances mentioned in the statute, it is governed and construed by the rules of the civil law.[71]

The next of kin, within the meaning of the statute, are those who are so determined by the civil law, by which the intestate himself is the *terminus a quo* the several degrees are numbered. Under that rule, the father stands in the first degree, the grandfather and the grandson in the second, and in the collateral line, the computation is from thy: intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person. According to that rule, the intestate and his brother are related in the second degree, the intestate and his uncle in the third degree.[72] The half blood are admitted equally with the whole blood, for they are equally as near of kin; and the father succeeds to the whole personal estate of a child who dies intestate, and without wife or issue, in exclusion of the brothers and sisters; and the mother would have equally so succeeded as against the collaterals, had it not been for a saving clause in the act, which excludes her from all but a rateable share. She is excluded, lest, by remarrying, she would carry all the personal estate to another husband, in entire exclusion, for ever, of the brothers and sisters.

The K. B. declared, in *Blackborough v. Davis*,[73] that the father and mother had always the preference before the brothers and sisters, in the inheritance of the personal estate, as being esteemed nearer of kin; and for the same reason, the grandmother is preferred to the aunt. The grandmother is preferred, not because she is simply in the ascending line, for, under the statute of distributions, a nearer collateral will be preferred to a more remote lineal, but because she is nearer of kin, according to the computation of the civilians, by one degree. And in *Moor v. Barham*, decided by Sir Joseph Jekyll,[74] the grandfather on the father's side, and the grandmother on the mother's side, take in equal moieties

by the statute of distribution, as being the next of kin in equal degree, and the half blood take equally with the whole blood. A brother and a grandfather of the intestate are equally near of kin, and each related in the second degree, and, therefore, it would seem, from the directions in our act, that they would take equally; but it has been decided in England, and it is also the better construction of the novel of Justinian, that the brother of the intestate will exclude the grandfather of the intestate. This was so decided in *Pool v. Wilshaw*, in 1708; and Lord Hardwicke, in *Evelyn v. Evelyn*,[75] followed that determination as being correct, though it may be considered an exception to the general rule. He said it would be a very great public inconvenience, to carry the, portions of children to a grandfather, and contrary to the very nature of provisions among children, as every child may properly be said to have a *spes accrescendi*. This question was very much debated among the civilians in their construction of the 118th novel of Justinian, and the generality of them, of whom Ferriere and Domat are of the number, were of opinion, that the grandfather and, the brother took equally; but Voet was of a different opinion, and his opinion, though without any strong foundation in reason, is the one prevailing in the English courts.[76]

The question whether the half blood took equally with the whole blood, under the statute of distributions, "as debated in the case of *Watts v. Crooks*,[77] and it was determined in chancery, that they were of equal kin, and took equally with the whole blood, and the decree was affirmed upon appeal to the house of Lords. So, posthumous children, whether of the whole or half blood, take equally as other children under the statute.[78]

As the statute of distribution says, that no representation shall be admitted among collaterals after brother's and sister's children, it has been held, in *Pett v. Pett*,[79] that. a brother's grandchildren cannot share with another brother's children. And, therefore, if the intestate's brother A. be load, leaving only grandchildren, and his brother B. he dead, leaving children, and his brother C. be living, the grandchildren of A. will have no share, and cannot take. One half of the personal estate will go to the children of B., and the other half to C.[80] But if all the brothers and sisters and their children be dead, leaving children, those children cannot take by representation, for it does not extend so far, but they are all next of kin, and in that character they would take *per capita*. Representation in the descending lineal line proceeds on *ad infinitum*, restrained by no limits. It has also been decided, that if the intestate leaves no wife or child, brother or sister, but his next of kin are an uncle by his mother's side, and a son of a deceased aunt, the uncle takes the whole, and the representation is not carried down to the representatives of the aunt.[81]

It is the doctrine under the statute of distributions, that the claimants take *per stripes* only when they stand in unequal degrees, or claim by representation, and then the doctrine of representation is necessary. But when they all stand in equal degree, as three brothers, three grandchildren, three nephews, etc. they take *per capita*, or each an equal share, because, in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree, and it would be contrary to the spirit and policy of the statute, which aimed at a just and equal distribution.[82] Aunts and nephews stand in the same third degree, and take equally *per capita*.[83] If a person dies without children, leaving a widow, and mother, brother and sister, and two nieces by a deceased brother, then, according to the established doctrine, the widow would take a moiety, and the mother, brother, and sister, would each take one fourth, and the two nieces the other one fourth of the remaining moiety. This point was ruled in *Keylway v. Keylway*,[84] and the doctrine was declared to be correct by Lord Hardwicke, in *Stanley v. Stanley*.[85]

The distribution of personal property of intestates, in the several states, hits undergone considerable modification. In many of them, the English statute of distributions as to personal property, is pretty closely followed, as it is in this state.[86] In a majority of the states, the descent of real and personal property is to the same persons, and in the same proportions; but then the regulation is, as I apprehend, the same in substance as the English statute of distributions.[87] Such a uniform rule in the descent of real and personal property, gives simplicity and symmetry to the whole doctrine of descent. The English statute of distributions being founded in justice, and on the wisdom of and fully and profoundly illustrated by a series of judicial decisions, was well selected as the most suitable and judicious basis on which to establish our American law of descent and distribution.

There has been much discussion as to the rule of distribution of personal property, when the place of the domicile of the intestate, and the place of the situation of the property, were not the same. But it has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the distribution of personal property, wherever situated, is governed by the law of the country of the intestate's domicile, at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. On the other hand, it is equally settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment transfer and descent, is to be regulated by the *lex loci rei sitae*. Personal property is subject to that law which governs the person of the owner. Huberus lays down this to be the common and correct opinion, though the question had been frequently agitated in the courts in his day;[88] and Bynkershoek says, the principle had become so well established, that no one dared to question it; *adeo recepta hodie sententia est, ut nemo ausit contra hiscere*.[89] The same principle would seem to be the acknowledged law in Germany and France;[90] and Vattel[91] considers the rule to be one that is dictated by the law of nations.

This principle was understood to be settled in England in the time of Lord Hardwicke, in the case of *Thorne v. Watkins*; and Lord Thurlow observed in the House of Lords,[92] in the case of *Bruce v. Bruce*,[93] that to hold that the *lex loci rei sitae* was to govern as to personal property, when the *domicilium* of the intestate was in a different country, would be a gross misapplication of the *jus gentium*. And yet, notwithstanding all this weight of authority in favor of the solidity and universality of the principle, the point was permitted to be very extensively and learnedly debated before Lord Loughborough, in the case of *Bempde v. Johnstone*;[94] and he said that the question had been decided and settled, and the law clearly fixed in England, by repeated decisions in the House of Lords; and that by those decisions, the law of the intestate's domicile at the time of his death carried the distribution of his personal property, wherever it was situated.

The law of Scotland was once different; but the Court of Session has now conformed to the English decisions. He admitted, however, that if the point had been quite new and open, it would be susceptible of a great deal of argument, whether, in the case of a person dying intestate, having property in different places, and subject to different laws, the law of each place should not obtain in the distribution of the property situated there; and many foreign lawyers, he said, had held that proposition. Afterwards, in *Somerville v. Lord Somerville*,[95] the same rule was declared by the Master of the Rolls, to apply to all cases where the fact of the domicile was not in dispute. But in the recent case of *Curling v. Thornton*,[96] Sir John Nicholls doubted whether a British natural born subject could shift his *forum originis* for a foreign domicile, in complete derogation of his rights under the British law; and he said, it must be at least complete and total, to make his property in England liable to distribution, according to the foreign law, and the party must have declared and

carried his intention into full effect.[97]

The rule as settled, in England, and by the general usage of nations, as to real and personal property, has repeatedly been declared to constitute a part of the municipal jurisprudence of this country.[98] The difficulty has been, not in the rule itself, but in the application and execution of it. In *Topham v. Chapman*, it was said, that though the distribution was to be according to the laws of the country of the domicile of the intestate, yet that his debts in a foreign country must be collected and paid, according to the law of that country. Administration must be granted where the debts were, for an administrator has no power beyond the jurisdiction in which he received his letters of administration, and the home creditors must first be paid before the administrator could send the surplus fund to the country of the proper domicile of the intestate.

Much discussion took place on this part of the subject, in *Harvey v. Richards*. It was held, upon a masterly consideration of the case, that whether a Court of Equity would proceed to decree an account and distribution, according to the *lex loci rei sitae*, or direct the assets to be distributed by the foreign tribunal of the domicile of the party, would depend upon circumstances. The *sites rei*, as well as the presence of the parties, conferred a competent jurisdiction to decree distribution, according to the rule of the *lex domicilii*, and such a jurisdiction was sustained by principles of public law, and was consistent with international policy. The court was not bound at all events to have the assets remitted to the foreign administrator, and to send the parties entitled to the estate abroad, at great expense and delay, to seek their rights in a foreign tribunal. Though the property was to be distributed according to the *lex domicilii*, national comity did not require that the distribution should be made abroad. Whether the court here ought to decree distribution, or remit the property abroad, was a matter of judicial discretion, and there was no universal or uniform rule on the subject.

The manner and extent of the execution of the rule was recently considered in the Supreme Court of Massachusetts.[99] A person was domiciled at Calcutta, and died there insolvent, and his will was proved, and acted upon there. Administration was taken out in Massachusetts on the probate of the will in the East Indies, and assets came to the hands of the administrator at Boston, sufficient to pay a claim due citizens of the United Sates, and a judgment debt due a British subject in England, but all the assets were wanted to be applied, in the course of administration, by the executor at Calcutta. It was held, that the administrator here was only ancillary to the executor in India, and the assets ought to be remitted, unless he was compelled by law to appropriate them here to pay debts. It was not decided whether he was compelled to pay here; but if it were the case, it would only be the American creditors, and the British creditor was not entitled to come here and disturb the legal course of settlement of the estate in his own country. If there were no legal claimants with us in the character of creditors, legatees, or next of kin, the administrator would be bound to remit the assets to the foreign executor, to be by him administered. according to the law of the testator's domicile; and if any part of the assets were to be retained, it would form an exception to the general rule, growing big out of the duty of every government to protect its own citizens in the recovery of their debts. The intimation has been strong, that such an auxiliary administrator, in the, case of a solvent estate, was bound to apply the assets found here to pay debts due here, and that it would be a useless and unreasonable courtesy, to send the assets abroad, and the resident claimant after them.

But if the estate was insolvent, the question became more difficult. The assets ought not to be sequestered for the exclusive benefit of our own citizens. In all civilized countries, foreigners, in such a case, are entitled to prove their debts, and share in the distribution. The court concluded, that

the proper course in such a case would be, to retain the funds, cause them to be distributed *pro rata*, according to our own laws, among our own citizens, having regard to all the assets, and the whole aggregate amount of debt here and abroad, and then to remit the surplus abroad to the principal administrator. Such a course was admitted to be attended with delay and difficulty in the adjustment, but it was thought to be less objectionable, than either to send our citizens abroad upon a forlorn hope, to seek for fragments of an insolvent's estate, or to pay them the whole of their debts without regard to the claims of foreign creditors.

A difficult question on the subject of the distribution of the property of intestates, arose in the K. B. in England in 1767, in the case of *The King v. Hay*.[100] A father and his only daughter perished at sea in the same vessel, and in one catastrophe, and a question suggested by the case was, who took under the statute of distributions. If the father died first, the personal estate would have vested in the daughters and, by her death, in her next of kin, who, on the part of the mother, was a different person from the next of kin on the part of the father. The right to succeed depended upon the fact which person died first, and that fact could not possibly he known, as the vessel perished at the same time. It was said to be the rule of the civil law to found its presumptions on the relative strength, arising from the difference of age and sex of two persons, but these presumptions were shifting and unstable. The court did not decide the question. The arguments on each side were equally ingenious and inconclusive. Lord Mansfield recommended a compromise, as he said there was no legal principle on which he could decide it.

The same question arose again in the Prerogative Court in 1793, in *Wright v. Sarmuda*.[101] The husband, wife, and children, all perished together in a vessel which foundered at sea; and Sir William Wynne, after a long and learned discussion, held it to be the most rational presumption, that all died together, and that none could transmit rights to another. So, again, in *Taylor v. Diplock*, in 1815,[102] in a like case, Sir John Nicholl assumed, that the parties (who were husband and wife) perished at the same moment, and he could not decide on any survivorship in the case, and consequently granted administration to the representatives of the husband. The English law has hitherto waived the question, and, perhaps prudently, abandoned as delusive, all those ingenious and refined distinctions which have been raised on this vexed subject by the civilians. The latter draw their conclusions from a tremulous presumption, resting on the dubious point, which of the parties, at the time, under all the circumstances, of vigor and maturity of body, and quickness and presence of mind, was the most competent to baffle and retard the approaches of death.[103]

NOTES

1. Laws of N.Y. sess. 24. ch. 29. s. 9.
2. Ibid. sess. 36. ch. 8. s. 3.
3. Laws of N.Y. sess. 24. ch. 29. s. 10.
4. 2 Hawk. P. C. b. 2. ch. 49. sec. 30. 4 Blacks. Com. 380.
5. Laws of U. S. April 20, 1790. ch. 9. s. 24.
6. Constitutions of Pennsylvania, Delaware, and Kentucky.
7. Constitutions of Ohio, Tennessee, Indiana, Illinois, and Missouri.
8. The constitution of Maryland.

9. Considerations on the Law of Forfeiture for High Treason.

10. Laws of N.Y. sess. 36. ch. 19. Dane's Abr. vol. iv. 537, 538.

11. Cro. J. 73.

12. Andrews' Rep. 18.

13. Jenk. Cent. case 88. p. 189.

14. Sheppard's Touch. tit. Gift.

15. Dig. 6. 1. 35. and 63. Pothier, Traité Droit de Propriété, No. 364.

16. 3 East, 251.

17. 2 Blacks. Com. 285, 471.

18. Marshall, Ch. J. 4 Wheaton 195.

19. *Sturges v. Crowninshield*, 4 Wheaton, 122.

20. *Ogden v. Saunders*, 12 Wheaton, 213.

21. *Mayo v. Archer*, Str. 513. *Wells v. Parker*, 1 Term Rep. 34.

22. *Patman v. Vaughan*, 1 Term Rep. 572. *Bartholomew v. Sherwood*, ibid, note.

23. *Wells v. Parker, ub. sup.*

24. 8 Vesey, 1.

25. *Ogden v. Saunders*, 12 Wheaton, 213. *Sturges v. Crowninshield*, 4 ibid. 122. McMillan v. McNeill, ibid. 209; and see vol. i, 393-396.

26. With respect to the operation, value and policy of our general system of insolvent law, it was observed by the Chancellor and Judges of the Supreme Court of this state, in a report made by [the legislature], the 22d January, 1819, in pursuance of a concurrent resolution of the two houses, that judging from their former experience, and from observation in the course of their judicial duties, they were of opinion, that the insolvent law was the source of a great deal of fraud and perjury. They were apprehensive that the evil was incurable, and arose principally from the infirmity inherent in every such system. A permanent insolvent act, made expressly for the relief of the debtor, and held up daily to his view and temptation, had a powerful tendency to render him heedless in the creation of debt, and careless as to payment. It induced him to place his hopes of relief rather in contrivances for a discharge, than in increased and severe exertion to perform his duty. It held out an easy and tempting mode of procuring an absolute release to the debtor from his debts; and the system had been, and still was, and probably ever must be, from the very nature of it, productive of incalculable abuse, fraud and perjury, and greatly injurious to the public morals.

27. Laws of N.Y. April 12th, 1813, February 28th, 1817, February 20th, 1823, and April 9th, 1823, and the federal decisions last cited.

28. The laws of the individual states on the subject of bankrupt and insolvent debtors, have hitherto been unstable and fluctuating, but they will probably be redigested and become more stable, since the decisions of the Supreme Court of the United States have at last defined and fixed the line around the narrow enclosure of state jurisdiction.

29. *Mason v. Haile*, 12 Wheaton, 370. Marshall, Ch. J. 4 Wheaton, 201.

30. Act sess. 36. ch. 81. — sess. 40. ch. 55. — sess. 42. ch. 106. — sess. 43. ch. 71. — sess. 46. ch. 17.

31. Laws of N.Y. sess. 24. ch. 40, — sess. 45. ch. 228.

32. *Lenox v. Howland*, 3 Caines, 323.

33. *Case of Fitzgerald*, 2 Caines, 318.

34. Ibid.

35. Ex parte Schroeder, 6 Cowen, 603.

36. 1 Johns. Rep. 165.

37. 1 Atk.90. *Ex parte White*, and *Ex parte Whitchurch*. 2 Sch. & Lef. 229. *Assignees of Gardiner v. Shannon*.

38. 4 Johns. Ch. Rep. 460.

39. 1 Harris & McHenry, 236.

40. 2 ibid. 463.

41. *Milne v. Moreton*, 6 Binney, 353.

42. *McNeil v. Colquhoon*, 2 Haywood, 24.

43. Constitutional Reports, 283.

44. Kirby's Rep. 313.

45. 13 Mass. Rep. 146.

46. Pratt, J. in 20 Johns. Rep. 254.

47. *Ogden v. Saunders*, 12 Wheaton, 213.

48. 2 Blacks. Com. 494-496.

49. Laws of N.Y. sess. 1. ch. 12. and sess. 10. ch. 38. *Goodrich, v. Pendleton*, 4 Johns. Ch. Rep. 552.

50. Sess. 46. ch. 70.

51. Laws of N.Y. sess. 36, ch. 79. s. 5.

52. *Taylor v. Delancy*, 2 Caines' Cases in Error, 143.

53. 1 Salk 36. Fawtry v. Fawtry, Str. 552. Anon.

54. Laws of N.Y. sess. 36. ch. 79. s. 6.

55. S. Touch. by Preston, 464.

56. Laws of N.Y. sess. 36. ch. 75. s. 17.

57. 2 Vern. 125, arg. 2 Blacks. Com. 504.

58. S. Touch. by Preston, vol. ii. 453. 1 Atk. 464. *Durant v. Prestwood*.

59. 1 P. Wms. 41. *Blackborough v. Davis*.

60. 2 Addams, 352. *Tucker v. Westgarth*.

61. 1 Rol.Abr. tit. Executor. c. 1. S. Touch. by Preston, vol. ii, 468.

62. Laws of N.Y. sess. 36 ch. 19. s. 10 — sess. 38. ch. 157.

63. Ibid. sess. 36. ch. 75. s. 1.

64. Dig. 11. 7. 45. Ibid. 35. 2. 72. 1 Brown's View of the Civil Law, 307.

65. See Sheppard's Touchstone, by Preston, vol. ii. 475-480, and Bacon's Abridgment, tit. Executors and Administrators, L. 2, for a succinct view of the rules of the common law, touching the order of paying debts by executors and administrators.

66. In Virginia, North Carolina, Tennessee, South Carolina, Kentucky, New Jersey, Delaware, Georgia, Illinois and Indiana, the English order of preference is preserved, with the exception of a few slight variations. Thus, in South Carolina, no preference can be given among debts in equal degree. In Virginia and Kentucky, debts due on protested foreign bills are placed on a footing with judgments. In New Jersey, debts due to the state have no preference over other debts in equal degree. In North Carolina and Tennessee, specialty and simple contract debts are placed on an equality. See Griffith's Law Reporter,

h. t.

67. This is the case in the states of New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Ohio, Mississippi, and Alabama, with some small variations. Thus, in Alabama, debts due to sureties are preferred. Griffith's Reg. *passim*. Dane's Abr. Of American Law, vol. i. 560.

68. Grifith's Law Register, h. t.

69. Frazer v. Tunis, 1 Binney, 254.

70. L. N.Y. sess. 36. ch. 75. sect. 16.

71. See vol. i. 503, note, and also *Carter v. Crawley*, T Raym. 496. *Palmer v. Allicock*, 3 Mod. 58. *Edward v. Freeman*, 2 P. Wms. 436.

72. Sir John Strange, in *Lloyd v. Tench*, 2 Vesey, 213.

73. 1 P. Wms. 41. l Vesey, 215.

74. Cited in 1 P. Wms. 53.

75. 3 Atk.762. Amb. 191. Burns' Eccl. Law, vol. iv. 416.

76. Voct, Com. ad Pand. lib. 38. tit. 17. ch. 13.

77. Shower's Cases in Parliament, 108.

78. *Burnet v. Mann*, 1 Vesey, 156.

79. 1 Salk 250.

80. Pett's case, 1 P. Wms. 25.

81. 1 P. Wms. 593. *Bowers v. Littlewood*. 2 N. Hamp. Rep. 460. *Parker v. Nims*.

82. *Walsh v. Walsh*, Prec. in Ch. 54. *Davers v. Dewes*, 3 P. Wms. 50.

83. *Durant v. Prestwood*, 3 Atk. 454. *Lloyd v. Tench*, 2 Vesey, 213.

84. 2 P. Wms. 344.

85. 1 Atk. 457. The English doctrine of distribution of personal properly, according to the statutes of 22d and 23d Charles II, and 29 Charles II, and 1 James II, is fully and clearly explained by Ch. J. Reeve, in his Treatise an the Law of Descents, under the head of Introductory Explanation. It is the most comprehensive, neat, and accurate view of the English law on the subject, that I have any where met with.

86. This is the case in Tennessee, North Carolina, Maryland, Delaware, and New Jersey.

87. This is the case in Maine, New Hampshire, Vermont, (but there the male children take double the portion of the females,) Massachusetts, Rhode Island, Connecticut. (but there the whole blood are, in certain cases, preferred to the half blood, and even when in equal degree,) Pennsylvania, Virginia, (but there the half blood inherit only half as much as the whole blood,) Ohio, Indiana, Illinois, Georgia, Kentucky, Missouri, (but there brothers, and sisters, and parents, take equally,) Mississippi, (but there brothers and sisters, and their descendants, take before parents,) South Carolina, (but there parents, and brothers, and sisters, take equally, and a brother of the half blood does not share with a mother), and Alabama. See Griffith's Law Register, h. t. 2 N. Hamp. Rep. 461. Dane's Abridgment, vol. iv. p. 538, 539. 5 Conn. Rep. 233. 1 McCord's S. C. Rep 161, 456. Reeve's Law of Descents, *passim*. I do not undertake to mark minutely, or in detail, the many smaller variations from the English, and our New York law of distributions, which have been made by the statute law of the different states. Such a detail would be inconsistent with the plan of these lectures, which were intended as an elementary sketch of the general principles and outline of the law. To descend to minutiae on every subject, would render the work too extensive, and too uninteresting for the study of those persons for whom this is prepared. The doctrine of descent, and, consequently, in a great degree, of distribution in the different states, has been admirably illustrated, and very ably discussed, by the late Ch. J Reeve, of Connecticut, in his laborious Treatise on the Law of Descents in the several United States of America. This work does honor to his memory; but it is not calculated to suit the taste of those general readers who have no mathematical heads, because of the very numerous algebraical statements of hypothetical cases with which the work abounds, and by which it is perplexed.

88. *Praelec*. part 1. lib. 3. *De Success. ab. inst. collat*. sect. 20, tom. 1, 278. Ibid, part 2. lib. 1. tit. 3. *De conflictu legum*, sect. 15, tom. 2, 542.

89. Quaest. Jur. Priv. lib. 1. ch. 16.

90. Heinecc. Opera, tom. 2. 972. *De testament, jure Germ*. sect. 30. Opinion of M. Target on the Duchess of Kingston's will. 1 Coll. Jurid. 240. Toullier's *Droit Civil Francais*, tom. 1. No. 366.

91. Droit des Gens., b. 2. c. 8. sect. 103, 110.

92. 2 Vesey, 35.

93. 2 Bos. & Puller, 229. note.

94. 3 Vesey, 198.

95. 5 Vesey, 750.

96. 2 Addam's Rep. 14.

97. What facts constitute a domicile of the person, has been a question frequently discussed. There is no fixed or definite period of time requisite to create it. The residence to create it may be short or long, according to circumstances. It depends on the actual or presumed intention of the party. A person being at a place, is *prima facie* evidence that he is domiciled there; but it may be explained, and the presumption rebutted. The place where a man carries on his established business, or professional occupation and has a home and residence, is his domicile, and he has all the privileges, and is bound by all the duties flowing therefrom. Though his family reside part of the year at another place, such place is regarded only as a temporary residence, and the home domicile for business takes away the character of domicile from the other. The original domicile of the party always continues until he has fairly changed it for another; and if a party has two contemporary domiciles, and a residence in each alternately of equal portions of time, the rule which Lord Alvanley was inclined to adopt was, that the place where the party's business lay, should be considered his domicile. Lord Thurlow, in *Bruce v. Bruce*, 2 Bos. & Puller, 229. note. 3 Vesey, 201, 202. 5 Ibid. 786-789. See also 1 Johns. Cas. 366. note, and 4 Cowpen, 546. note, for a collection of authorities on this question of domicile.

98. *Dixon v. Ramsay*, 3 Cranch, 319. *United States v. Crosby*, 7 ibid. 115. *Desesbats v. Berguier*, 1 Binney. 336. *Decouche v. Savetier*, 3 Johns. Ch. Rep. 210. *Harvey v. Richards*, 1 Mason, 408. *Topham v. Chapman*, 1 Rep. Const. Court S. C. 292. *Crofton v. Ilsley*, 4 Greenleaf, 134.

99. *Dawes v. Head*, 3 Pickering, 128.

100. 1 Blacks. Rep. 640.

101. 2 Phillimore, 266. note.

102. Ibid. 261.

103. This curious question was much discussed in the civil law, and the presumption as to which was the longest liver, vibrated between the parent and child, according to circumstances. (Dig. lib. 34. tit. 5. ch. 10. s. 1. and 4. and 23, 24. *de Commorientibus*.) It was also very ingeniously and elaborately handled in the *Causes Celctres*, tom. 3. p. 412 to 432; and a number of cases cited. The decisions had not been steady or consistent. M. Talon, the eloquent Avocat General, took a distinguished lead in the discussions. The ancient French jurisprudence had nothing fixed on the subject, and continued floating and uncertain, with a very shifting presumption in favor of one or another person, according to age and sex, and manner of the death, until the law was reduced to certainty by the code Napoleon. (Toullier's *Droit Civil Francais*, tom. 4. No. 76.) By the Napoleon code, No. 720, 721, 722, when two of the next of kin perish together, without it being possible to be known which died first, the presumption of survivorship is determined by circumstances. If the parties were both under fifteen years of age, the eldest shall be presumed to have survived. If above sixty, the youngest shall be presumed to have survived. If they were between the ages of fifteen and sixty, and of different sexes, the male shall be presumed to have been the survivor, provided the ages were within a year of each other. If of the same sex, then the youngest of the two is presumed to have survived.

LECTURE 38

Of Title to Personal Property, by Gift

TITLE to personal property by transfer by act of the party, may be acquired by gift, and by contract.

There has been much discussion among the writers on the civil law, whether a gift was not properly a contract, inasmuch as it is not perfect without delivery and acceptance, which imply a convention between the parties. In the opinion of Toullier,[1] every gift is a contract, for it is founded on agreement; while, on the other hand, Pufendorf had excluded it from the class of contracts, out of deference to the Roman lawyers, who restrained the definition of a contract to engagements resulting from negotiation. Barbeyrac, in his notes to Pufendorf, insists, that upon principles of natural law, a gift *inter vivos*, and which ordinarily is expressed by the single term gift, is a true contract; for the donor irrevocably divests himself of a right to a thing, and transfers it gratuitously to another, who accepts it, and which acceptance, be rationally contends, to be necessary to the validity of the transfer. The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary, and without consideration;[2] whereas a contract is defined to be an agreement upon sufficient consideration to do, or not to do, a particular thing;[3] and yet every gift which is made perfect by delivery, and every grant, are executed contracts, for they are founded on the mutual consent of the parties, in reference to a right or interest passing between them.

There are two kinds of gifts: 1. Gifts, simply so called, or gifts *inter vivos*, as they were distinguished in the civil law; 2. Gifts *causa mortis*, or those made in apprehension of death. The rules by which they are governed are different, and quite distinct, and they were taken from the Rowan law.

1. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a gift, and it is the same whether it be a gift *inter vivos*, or *causa mortis*. Without actual delivery the title does not pass. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. There exists the *locus paenitentiae* so long as the gift is incomplete, and left imperfect in the mode of making it; and a court of equity will not interfere and give effect to a gift left inchoate and imperfect.[4] The necessity of delivery has been maintained in every period of the English law. *Donatio perficitur possessione accipientis*, was one of its ancient maxims.[5] The subject of the gift must be certain, and there must be the mutual consent and concurrent will of both parties. It is, nevertheless, hinted or assumed, in ancient and modern cases,[6] that a gift of a chattel, by deed or writing, might do without delivery, for an assignment in writing would be tantamount to delivery. But in *Cot teen v. Missing*[7] a letter to executors expressing a consent that a specific sum of money be given to a donee, was not a sufficient act in writing; and it was held not to be a gift of so much money in their hands, because the consent was not executed and carried into effect, and a further act was wanting in that case to pass the money. The Vice Chancellor held, that money paid into the hands of B., for the benefit of a third person, was countermandable so long as it remained in the hands of B. A parol promise to pay money as a gift is not binding, and the party may revoke his promise,[8] and a parol gift of a note from a father to a son, was held not to be recoverable from the executors of the father.[9]

Delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing

be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property.[10] If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. Therefore, where a donor expressed by letter his intention of relinquishing his share of an estate, and directed the preparation of a release of the personal estate, and he died before it was executed, it was held, that his intention, not being perfected, did not amount to a gift.[11]

When the gift is perfect, it is then irrevocable, unless it be prejudicial to creditors, or the donor was under a legal incapacity, or was circumvented by fraud. A pure and perfect gift into r vivos was also held by the Roman law to be in its nature irrevocable; and yet in that law it was nevertheless revocable for special reasons, such as extreme ingratitude in the donee, or the unexpected birth of a child to the donor, or whets sufficient property was not left with the donor to satisfy prior legal demands.[12] The English law does not, and cannot indulge in these refinements, though it controls gifts when. made to the prejudice of existing creditors.

By the statute of 3 Henry VII. e. 4, all deeds of gifts of goods and chattels in trust for the donor, were declared void; and by the statute of 13 Eliz. c. 5, gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder and defraud creditors, were rendered void, as against the person to show such fraud would be prejudicial. These statutes have been reenacted in this state,[13] and doubtless the principle in them, though they may have not been formally or substantially reenacted, prevails throughout the United States. All the doctrines of the courts of law and equity, concerning voluntary settlements of real estates, and the presumptions of fraud arising from them, are applicable to chattels, and a gift of there is equally fraudulent and void against existing creditors.[14] Voluntary settlements, whether of lands or chattels, even upon the wife and children, are void in these cases, and the claims of justice precede those of affection.[15] The English cases were extensively reviewed and considered in the case of *Reade v. Livingston*;[16] and the doctrine of that case had not only been previously established in the state of New Jersey,[17] but it has since been explicitly recognized by the Supreme Court of this state,[18] and by the Supreme Court of the United States, and it prevails equally in other states.[19] A voluntary conveyance, if made with fraudulent views, would seem to be void, even as to subsequent creditors, but not to be so, if there was no fraud in fact.[20]

It has been said by the elementary writers,[21] that the statute of 13 Eliz. does not extend to voluntary settlements of property, which a creditor could not reach by legal process, in case no settlement had been made, such as choses in action, money in the funds, &r.; and therefore that a voluntary settlement of that species of property must be good against creditors, even if made by an insolvent debtor. The difficulty se reaching that species of personal property was discussed and considered in the case of *Bayard v. Hoffman*.[22] The cases were found to be contradictory, and the question unsettled; but there appeared to be much good authority, and much strong reason for the opinion, that personal property not tangible by execution at law, could be reached by the assistance of a Court of Equity. Without such assistance, there would be great temptations to fraudulent alienations; and a debtor, under the shelter of it, might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice. In *Spader v. Davis*,[23] the Court of Chancery assisted a creditor at law to reach personal property which the debtor had previously conveyed away in trust. That case was affirmed upon appeal;[24] and the language of the Court of Errors was, that a court of equity would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands, and that it made no difference

whether that property consisted of choses in action, or money, or stock. This disposition of the Courts of Equity to lend assistance in such cases, was afterwards checked by the argument and opinion in *Donovan v. Finn*,[25] where the Chancellor held, that the doctrine of equitable assistance to a judgment creditor at law, to enable him to reach choses in action of his debtor, was to be restricted to special cases of fraud or trust; and that without some such specific ingredient, the case was not of equitable jurisdiction.

2. Gifts *causa mortis* have been a subject of very frequent and extensive discussion in the English courts of equity. Such gifts are conditional like legacies, and it is essential to them that the donor make them in his last illness, and in contemplation and expectation of death, and with reference to their effect after his death, and if he recovers the gift becomes void.[26] The apprehension of death may arise from infirmity, or old age, or from external and anticipated danger.[27]

The English law on the subject of this species of gift, is derived wholly from the civil law. Justinian was justly apprehensive of fraud in these gifts, and jealous of the abuse of them, and he required them to be executed in the presence of five witnesses. We have not adopted such precautions, though it has been truly declared, that such donations amount to a revocation *pro tanto* of written wills; and not being subject to the forms prescribed for nuncupative wills, they were of a dangerous nature. By the civil law they were reduced to the similitude of legacies, and made liable to debts, and to pass for nothing, and to be returned, if the donor recovered, or revoked the gift, or if the donee died first.[28] It was a disputed point with the Roman civilians, whether donations *causa mortis*, resembled a proper gift, or a legacy. The final and correct opinion was established, that a gift *inter vivos* was irrevocable, but that a gift *causa mortis* was conditional, and revocable, and of a testamentary character, and made in apprehension of death.[29] The first case in the English law on the subject of gifts *causa mortis*, was that of *Jones v. Shelby*[30] in 1710, in which the Lord Chancellor ruled, that a *donatio causa mortis* was substantially a will, with a like revocable character during the life of the donor. Afterwards, in *Drury v. Smith*,[31] a person, in his last sickness, gave a 100 pound bill to a third person to be delivered to the donee, if he died, and this was held to be a good gift, and Lord Hardwicke subsequently[32] approved of that decision. In *Lawson v. Lawson*,[33] and in *Miller v. Miller*,[34] a delivery to the wife as donee was held good; but in the last case it was held, that a note of hand not payable to bearer, and being a mere chose in action, to be sued in the name of the executor, did not pass by delivery, or take effect as a gift *causa mortis*. The delivery of bank notes which circulated as cash, was held at the same time to be a valid donation, and the same point has been since established.[35]

But the case of *Ward v. Turner*,[36] was that in which the whole doctrine was, for the first time, fully and profoundly examined in the English Court of Chancery; and Lord Hardwicke gave to the subject one of his most elaborate and learned investigations. He held, that actual delivery was indispensable to the validity of a gift *causa mortis*, and that a delivery to the donee of receipts for south sea annuities, was not sufficient to pass the property, though it wag strong evidence of the intent. The delivery of the receipt was not the delivery of the thing. He examined very accurately the leading texts of the civil law, and the commentators on the point, and concluded, that though the civil law did not require absolute delivery of possession in every kind of donation *causa mortis*, that law had not been received and adopted in England in respect to those donations, only so far as the donations were accompanied with actual delivery. The English late required delivery throughout, and in every case. In all the chancery cases, delivery of the thing was required, and not a delivery in the name of the thing. In *Jones v. Shelby*, a symbol was held good, but that was in substance the same as delivery

of the article, and it was the only case in which such a symbol had been admitted. Delivery of a symbol in the name of the article was not sufficient. The delivery of the receipts was merely legatory, and amounted to a nuncupative will, and was a breach of the statute of frauds.

Symbolical delivery is very much disclaimed by Lord Hardwicke in this case, and yet he admits it to be good when it is tantamount to actual delivery; and in *Smith v. Smith*,[37] it was ruled, that the delivery of the key of a room, containing furniture, was such a delivery of possession of the furniture, as to render the gift *causa mortis* valid. Ch. J. Gibbs said, that was a confused case; but the efficacy of delivery, by means of the key, was not a questionable fact.

The doctrine of this species of gift, was afterwards disc mussed with ability and learning, in *Tate v. Hilbert*.[38] Lord Loughborough pressed the necessity of actual delivery to the efficacy of such a gift, except in the case of a transfer by deed or writing. He held, that where a person in his last sickness, gave the donee his check on his banker, for a sum of money, payable to bearer, and he died before it was realized, it was not good as a *donatio causa mortis*, for it was to take effect presently, and the authority was revoked by his death. He likewise held, that where the same person, at the same time, gave to another donee his promissory note for a sum of money, that was not good as such a gift, for it was no transfer of property. So, where a person, supposing himself in his last sickness, caused India bonds, bank notes, and guineas, to be sealed up and marked with the name of the donee, with directions to have them delivered after his death, and still retained possession of them, it was held,[39] that there was no delivery, and the act was void as a gift *causa mortis*, for there must be a continuing possession in the donee until the death of the donor, and he may revoke the donation any time before his death.

The cases do not seem to be entirely reconcilable on the subject of donations of choses in action. A delivery of a note, as we have seen, was not good, because it was a mere chose in action; and yet in *Smallgrove v. Baily*,[40] the gift of a bond *causa mortis*, was held good, and passed the equitable interest; and Lord Hardwicke afterwards, in the great case of *Ward v. Turner*, said he adhered to that decision; and the same kind of gift has been held in this country to be valid.[41]

By the admirable equity of the civil law, donations *causa mortis* were not allowed to defeat the just claims of creditors, and they were void as against them, even without a fraudulent intent.[42] It is equally the language of the modern civilians, that donations cannot be sustained to the prejudice of existing creditors.[43]

NOTES

1. *Droit Civil Francais*, tom. 5. *Des Donations entre vifs*, sec 4, and 5 and n. 1.
2. Droit des Gens, liv. 5, ch. 3, s. 10, note 6.
3. 2 Blacks. Com. 442.
4. *Antrobus v. Smith*, 12 Vesey, 39.
5. Jenk. Cent. p. 109. case 9. *Bracton de acquirendo rerum Dominio*, lib. 2. p. 15, 16.
6. *Flower's case*, Noy's Rep. 67. *Irons v. Smallpiece*, 2 Barnw. & Ald. 551.
7. 1 Maddock's Ch. Rep. 176.

8. *Pearson v. Pearson*, 7 Johns. Rep. 26.

9. *Fink v. Cox*, 13 Johns. Rep. 145.

10. *Hawkins v. Blewitt*, 2 Esp. Rep. 663. *Noble v. Smith*, 2 Johns.Rep. 52.

11. *Hooper v. Goodwin*, 1 Swanston, 486.

12. Code, lib. 8, tit. 56. *De revocandis Donationibus*, l. 10. Ibid. l. 8. Code, lib 3. tit. 29. *De insufficiosis Donationibus.* Puf. *Droit des Gens*., Par. Barbeyrac, tome 2, 43, note.

13. L. N.Y. sess. 10. ch. 44.

14. *Bayard v. Hoffman*, 4 Johns. Ch. Rep. 450.

15. This sentiment is strongly inculcated and sententiously expressed by Cicero, (De Off. 1. 14.) *Videndum est igitur, ut ea liberalitate utamur, quae proxit amicis, noceat nernini. Nihil est enim liberale, quod non idem justum*.

16. 3 Johns. Ch. Rep. 481.

17. *Den v. DeHart*, 1 Halsted's Rep. 450.

18. *Jackson v. Seward*, 5 Cowen, 87.

19. *Sexton v. Wheaton*, 8 Wheaton, 229. *Hinde v. Longworth*, 11 ibid. 199. *Thompson v. Dougherty*. 12 Serg. & Rawl. 448. *Parker v. Procter*, 9 Mass. Rep. 390. *Bennet v. Bedford*, 11 Ibid. 421. *Meserve v. Dyer*, 4 Greenleaf, 52.

20. *Reade v. Livingston*, 3 Johns Ch. Rep. 501, 502. *Bennet v. Bedford Bank*, 11 Mass. Rep. 421. *Damon v. Bryant*, 2 Pickering, 411. But according to the case of *Meserve v. Dyer*, 4 Greenleaf 52, a deed cannot be impeached for fraud, by a person who was not a creditor at the time of the conveyance; and a party whose claim at the time rested in damages for a tort, and which damages had not been ascertained, admitted, and made certain by judgment, was not such a creditor. This case contradicts the conclusion to be drawn from the language of the other cases; (for it was not a direct ground of decision in any of them;) and as far as it denied to the claimant the benefit of his character as a creditor at the time of the conveyance, it is not is harmony with the cases of *Fox v. Hills*, 1 Conn. Rep. 295. and *Jackson v. Myers*, 15 Johns. Rep. 425. The reasoning of the court on the principal point, was reserved for another case involving the same question, and which is not yet reported. In this state of the authorities, we must consider the general question involved in them as remaining to be definitively settled in our American jurisprudence.

21. Atherly on Marriage Settlements, 220. 1 Roberts on Fraudulent Conveyances, 421, 422.

22. 4 Johns. Ch. Rep. 450.

23. 5 Johns. Ch. Rep. 280.

24. 20 Johns. Rep. 554.

25. 1 Hopkins, 59.

26. Swinb. 18. *Drury v. Smith*, 1 P. Wms. 404. *Blount v. Burrow*, 1 Vesey. jun. 546.

27. Dig. 39. 6. s, 3, 4, 5, 6.

28. Inst. 2. 7. l. Code, 8. 58. 4.

29. Dig. 39. 6. 2. and 27. Inst. 2. 7. t. Vide Dig. lib. 39. tit. 5. *De Donationibus*, and tit. 6. *De mortis causa Donationibus*, for the Roman law at large on the subject.

30. Prec. in Ch. 300.

31. 1 P. Wms. 404.

32. 3 Atk. 214.

33. 1 P. Wms. 440.

34. 3 P. Wms. 356.

35. *Hill v. Chapman*, 2 Bro. 612.

36. 2 Vesey, 431.

37. Str. 955.

38. 2 Vesey, jun. 111. 4 Bro. 286.

39. *Bunn v. Markham*, 7 Taunton, 224.

40. 3 Atk. 214.

41. *Wells v. Tucker*, 3 Binney, 366.

42. Dig. 39. 6. 17.

43. Voet *Com. ad Pand*. 39. 5. sect. 20. Pothier, *Traite des donat entre vifs*, sect. 3. art. I. sect. 2. Toullier's *Droit Civil Francais*, tom. 6. p. 733.

LECTURE 39

Of the Contract of Sale

IN entering upon so extensive and so complicated a field of inquiry as that concerning contracts, we must necessarily confine our attention to a general outline of the subject; and endeavor to collect and arrange, in simple and perspicuous order, those great fundamental principles which govern the doctrine of contracts, and pervade them under all their modifications and variety.

I. Of the different kinds of contracts.

An executory contract, is an agreement upon sufficient consideration, to do or not to a particular thing.[1] The agreement is either under seal, or not under seal. If under seal, it is denominated a specialty, and if not under seal, an agreement by parol; and the latter includes equally verbal and written contracts not under seal.[2] The agreement conveys an interest either in possession, or in action. If, for instance, one person sells and delivers goods to another for a price paid, the agreement is executed, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time, and for a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is executory, and rests in action merely. There are also express and implied contracts. The former exist when the parties contract in express words, or by writing; and the latter are those contracts which the law raises or presumes by reason of some value or service rendered, and because common justice requires it.

A contract valid by the law of the place where it is made, is valid every where *jure gentium*, and on that broad foundation all contracts were introduced.[3] If it were otherwise, the citizens of one nation could not contract, or carry on commerce in the territories of another. The necessities of commerce, require that acts valid where made, should be recognized in other countries, provided they be not contrary to the independence of nations, and do not proceed from the public power.[4]

II. Of the consideration.

It is essential to the validity of a contract, that it be made by parties competent to contract, and be founded on a sufficient consideration. There must be something given in exchange, something that is mutual, or something which is the inducement to the contract; and it must be a thing which is lawful, and competent in value to sustain the assumption. A contract without a consideration is a *nudum pactum*, and not binding; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety.[5] Whether the [contract] be verbal, or in writing, it is still a nude pact, and will not support an action if a consideration be wanting. This was finally settled in England in the House of Lords in *Rann v. Hughes*,[6] and the rule has been adopted, and probably prevails extensively in this country.[7] The rule, that a consideration is necessary to the validity of a contract, applies to all contracts and agreements not under seal, with the exception of bills of exchange, and negotiable notes, after they have been negotiated and passed into the hands of an innocent endorser. The immediate parties to a bill or note, equally with parties to other contracts, are affected by the want of consideration, and it is only as to third persons, who come to the possession of the paper in the usual course of trade, and for a fair and valuable consideration, without notice of the original defect, that the want of a consideration cannot be alleged.[8] The rule, with this attending qualification, is well settled in English and American law, and pervades the numerous cases with which the books abound.

A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.[9] A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time, and in that case the one promise is a good consideration for the other. If the consideration be wholly past and executed before the promise be made, it is not sufficient unless the consideration arose at the instance or request of the party promising; and that request must have been expressly made, or necessarily implied, from the moral obligation under which the party was placed; and the consideration must have been beneficial to the one party, or onerous to the other.[10] Though a promise to do a thing be merely gratuitous, and not binding, yet, if the person promising enters upon the execution of the business, and does it negligently, or amiss, so as to produce injury to the other party, an action will lie for this misfeasance.[11] The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals. *Ex turpi contractu actio non oritur*; and no person even so far back as the feudal ages, was permitted by law to stipulate iniquity.[12]

The reports in every period of the English jurisprudence, abound with cases of contracts held illegal on account of the illegality of the consideration, and they contain striking illustrations of the general rule, that contracts are illegal when founded on a consideration *contra bonos mores*, or one against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. The courts of justice will allow the objection, that the consideration of the contract was immoral or illegal, to be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy.[13] A *particeps criminis* has been held to be entitled in equity, on his own application, to relief against his own contract, when the contract was illegal, or against the policy of the law, and relief became necessary to prevent injury to others. It was no objection, that the plaintiff himself was a party to the illegal transactions.[14] 1 shall not enter into more particular details on this head, but proceed at once to an examination of the leading doctrines of contracts for the sale of personal property.

III. Of the subject matter of the contract.

A sale is a transfer of chattels front one person to another for a valuable consideration, and three things are requisite to its validity, *viz.* the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.[15]

The thing sold must have an actual or potential existence to render the contract valid.[16] If A. sells his horse to B., and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So, if A., at New York, sells to B. his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house and not the ground on which it stood, was the essential inducement to the purchase. The civil law comes to the same conclusion on this point. But if the house was only destroyed in part, then if it was destroyed to the value of only half or less, the opinion stated in the civil law is, that the sale would remain good, and the seller would be obliged to allow a rateable diminution of the price. Pothier thinks, however,[17] that in equity the buyer ought not to be bound to any part or modification of the contract, when the inducement to the contract had thus failed; and this would seem to be the reasoning of Papinian, from another passage in the Pandects,[18] and it is certainly the more just and reasonable doctrine. The code Napoleon[19] has settled the French law in favor of the opinion of Pothier, by

declaring, that if part of the thing sold be destroyed at the time, it is at the option of the buyer to abandon the sale, or to take the part preserved, on a reasonable abatement of price; and, I presume, the principle contained in the English and American cases tend to the same conclusion, provided the inducement to the purchase be thereby materially affected.

Where the parties had entered into an agreement for the sale and purchase of an interest in a public house, which was stated to have had eight years and a half to come, and it turned out on examination that the vendor had an interest of only six years in the house, Lord Kenyon ruled,[20] that the buyer had a right to consider the contract at an end, and recover back any money which he had paid in part performance of the agreement for the sale. The buyer had a right to say it was not the interest he had agreed to purchase. So, in another case, and upon the same principle, Lord Eldon held,[21] that if A. purchases a horse of B. which was warranted sound, if it turned out that he was unsound, the buyer might keep the horse, and bring an action on his warrantee for the difference in value; or he might return the horse, and recover back the money paid; though, if he elected to pursue that course, he must be prompt in rescinding the contract.[22] There are other cases, however, in which it has been held,[23] that it was no defense at law to a suit on a note or bill, that[24] the consideration partially failed, by reason that the goods sold were of an interior quality, unless clear fraud in the sale be made out; and the courts refer the aggrieved party to a distinct and independent remedy. But if a title to a part of the chattels sold had totally failed, so as to defeat the object of the purchase, as if A. should sell to B. it pair of horses for carriage use, and the title to one of them should fail, it is evident, from analogous cases, that the whole purchase might be held void even in a court of law. In the case of a sale of several lots of real property at auction, the purchaser purchased three lots, and paid the purchase money, heat the title to two of the lots failed; and Lord hen) on ruled, that it was one entire contract, and if the seller failed in making title to any one of the lots, the purchaser might rescind the contract, and refuse to take the other lots. The same principle was advanced in the case of *Judson v. Wass*,[25] which was the purchase of several lots of land, and the purchaser was held to be entitled to have a perfect title according to contract, without any encumbrance, or he might disaffirm the sale, and recover back his deposit.

On the subject of the claim to a completion of the purchase, or to the payment or return of the consideration money, in a case where the title, or the essential qualities of part. of the subject, fail, and there is no charge of fraud, the law does not seem to be clearly and precisely settled, and it is difficult to reconcile the cases, or make the law, harmonize on this vexatious question. The rules on this branch of the law of sales are in constant discussion, and of great practical utility, and they ought to be distinctly understood. The principles which govern the subject as to defects in the quality or quantity of the thing sold, are the same in their application to saps of lands and chattels.

In the case of a purchase of land where the title in part fails, the Court of Chancery will decree a return of the purchase money, even after the purchase has been carried completely into execution by the delivery of the deed, and payment of the money, provided there had been a fraudulent misrepresentation as to the title.[26] But if there be no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase money, or for rescinding the purchase. and claiming restitution of the money. The party is remitted to his remedies at law on his covenants to insure the title.[27] In *Frisbie v. Hoffnogle*,[28] the purchaser, in a suit at law, upon his note. Given to the vendor for the purchase money, was allowed to show in his defense, in avoidance of the note, a total failure of title, notwithstanding he had taken a deed with full covenants, and had not been evicted. But the authority of that case, and the doctrine of it,

were overruled by the Supreme Court in the state of Maine, in a subsequent case, founded on like circumstances;[29] and they were afterwards in some degree restored, by the doubts thrown over the last decision by the Supreme Court of Massachusetts in *Knapp v. Lee*.[30] The same defense was made to a promissory note in the case of *Greenleaf v. Cook*,[31] and it was overruled, on the ground that the title to the land, for the consideration of which the note was given, had only partially failed; and it was said, that to make it a good defense in any case, the failure of title must be total. This case at Washington is contrary to the defense set up and allowed, and to the principle established, in the case of *Gray v. Handkinson*;[32] and it leaves the question, whether a total failure of title be not a good defense, as between the original parties, to an action for the consideration money on a sale of lands, in its former state of painful uncertainty.

The justice of the case is with the defense, but I apprehend the technical rule to be otherwise, and that it remits the party back to his covenants in his deed, and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money even on a failure of title. This is the strict rule of the English law, both at law and in equity, and it applies equally to chattels when the vendor sells without any averment of title, and without possession.[33] The same rule has been considered to be the law in this state;[34] but in South Carolina their courts of equity will allow a party suffering by the failure of title, in a case without warranty, to recover back the purchase money, in the sale of real as well as of personal estates.[35] This is, no doubt, the law here as to sales of chattels of which the vendor had possession, for a warranty is implied; but the weight of authority is against its more enlarged application.

In one case,[36] Lord Kenyon observed, when sitting in chancery, that the Court had gone great lengths in compelling parties to go on with purchases, contrary to their original agreement and intention; but he said, a case might be made out sufficient to put an end to the whole contract, when the seller could not make a good title to part of the subject sold. In the case of the Cambridge wharf, the seller made title to all the estate but the wharf, and that part of the land was the principal object of the buyer in making the purchase; and the buyer, who had contracted for the house and wharf, was compelled to complete the purchase without the wharf; but that, as Lord Kenyon truly observed, was a determination contrary to all justice and reason. There have been a number of hard cases in chancery,[37] and in which performance has been enforced, though there was a material variance between the actual and supposed circumstances of the subject, and when those circumstances were wanting which were the strong inducement to the contract. These cases had gone to such extravagant lengths, that Lord Erskine declared [38] he would not follow them, nor decree specific performance when the main inducement to the purchase had failed. In many cases, however, where the title proves defective in a part, or to an extent not very essential, specific performance will be decreed, with a rateable reduction of the purchase money, by way of compensation for the deficiency.[39] This is analogous in principle to the case of goods sold as of a certain quality, and they turn out to be of an inferior quality, and in which an abatement of price was allowed in the suit brought by the seller to recover it.[40] The good sense and equity of the law on this subject is, that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but. be left at liberty to rescind it altogether. This is the principle alluded to by Pothier, and repeatedly by Lord Erskine and Lord Kenyon.

In South Carolina, it has been held, that if the deficiency in the quantity of land be so great as to defeat the object of the purchase, the vendee may rescind the bargain; and if the defects were not

so great as to rescind the contract entirely, there might be a just abatement of price; and this doctrine was applied equally to defects in the quantity and quality of land, and for unsoundness and defects in personal property.[41] The same principle was declared in Pennsylvania, in the case of *Stoddart v. Smith*,[42] on a contract for the purchase of land. If there be a failure of title to part, and that part appears to be so essential to the residue, that it cannot reasonably be supposed the purchase would have been made without it, as in the case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*. But the court, in the last case, limited very much the right of rescinding a contract for a partial failure of title; for if the sale was of lots in different parts of a city, it was not dissolved by the failure of title to some of the lots not adjoining or particularly connected with the others, nor essential to their use or enjoyment. It is to be regretted, that the embarrassment and contradiction which accompany the English and American cases on this subject, cannot be relieved by the establishment of some clear and definite rule, like that declared in France, which shall be of controlling influence and universal reception.

IV. Of the implied warranty of the articles sold.

In every sale of a chattel, as one's own property, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril.[43] But if the seller has possession of the article, and he sells it as his own property, he is understood to warrant the title.[44] A fair price implies a warranty of title, and the purchaser may have a satisfaction from the seller, if he sells the goods as his own, and the title proves deficient. This was also the rule of the civil law in all cases, whether the title wholly or partially failed.[45] But with regard to the quality or goodness of the articles sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he bath made a fraudulent representation concerning them; and to attend, when he makes his contract, to those qualities of the article he buys, which are supposed to be within the reach of his observation and judgment, and which the common law very reasonably requires the purchaser distinction between the responsibility of the seller as to the title, and as to the quality of goods sold, is well established in the English and American law.[46] In *Seixas v. Wood*,[47] the rule was examined and declared to be, that if there was no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects equally unknown to both parties; and the same rule was again declared in *Swett v. Colgate*.[48]

There is no doubt of the existence of the general rule of law as laid down in *Seixas v. Wood*; and the only doubt is, whether it was well applied in that case, where there was a description in writing of the article by the vendor, which proved not to be correct, and from which a warranty might have been inferred. But the rule fitly applies to the case where the article teas equally open to the inspection and examination of both parties, and the purchaser chose to rely on his own information and judgment, without requiring any warranty of the quality; and it does not reasonably apply to those cases where the purchaser has ordered goods of a certain character, or goods of a certain described quality are offered for sale, and when delivered, they do not answer the description directed or given in the contract. They are not the articles which the vendee agreed to purchase; and if there be no opportunity for inspection, there is an implied warranty that the article is saleable.[49]

When goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, and give him notice to take them back, and thereby

rescind the contract; or he will be presumed to acquiesce in the quality of the goods.[50] In the case or a breach of warranty, he may sue upon it without returning the goods; but he must return them and rescind the contract in a reasonable time before he can maintain an action to recover back the price.[51] An offer to return the chattel in a reasonable time, on I reach of warranty, is equivalent in its effect upon the remedy to an offer accepted by the seller, and the contract is rescinded.[52] But a contract cannot be rescinded without mutual consent, if circumstances be so altered by a part execution, that the parties cannot be put *in statu quo*, for if it be rescinded at all, it must be rescinded *in toto*.[53]

In South Carolina the rule of the civil law is followed, and a sale for a sound price is understood to imply a warranty of soundness against all faults and defects.[54] The same rule was for many years understood to be the law in Connecticut; but if it did ever exist, it was entirely overruled in *Dean v. Mason*, in favor of the other general principle which has so extensively pervaded the jurisprudence of this country.[55] Even in South Carolina, the rule that a sound price warrants a sound commodity was said to be in a state of vibration; and it is not applied to assist persons to avoid a contract, though made for an inadequate price, provided it was made under a fair opportunity of information as to all the circumstances, and when there was no fraud, concealment, or latent defect.[56]

If the article be sold by the sample, and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot rescind the sale. Such a sale amounts to a warranty that the sample, and equally sound and good throughout, and it article is in bulk of the same kind and quality with the amounts to nothing more.[57] if the article should turn out not to be merchantable, from some latent principle of infirmity in the sample, as well as in the bulk of the commodity, the seller is not answerable. The only warranty is, that the whole quantity answers the sample.

V. Of the duty of mutual disclosure of facts material to the contract.

If there be an intentional concealment or suppression of material facts in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract. There may be some difference in the facility with which the rule applies between facts and circumstances that are intrinsic, and form material ingredients of the contract, and those that are extrinsic, and form no component part of it, though they create inducements to enter into the contract, or affect the price of the article. As a general rule, each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of there, and they be not open and naked, or equally within the reach of his observation. Thus, in the sale of a ship which had a latent defect known to the seller, and which the buyer could not by any attention posssibly discover, the seller was held to be bound to disclose it, and the concealment was justly considered to be a breach of honesty and good faith.[58] So, if one party suffers the other to buy an article under a delusion created by his own conduct, it will be deemed fraudulent and fatal to the contract; as if the seller produces an impression upon the mind of the buyer, by his acts, that he is purchasing a picture belonging to a person of great skill in painting, and which the seller knows not to be the fact, and yet suffers the impression to remain, though he knows it materially enhances the value of the picture in the mind of the buyer.[59] One party must not practice any artifice to conceal defects, or make any representations for the purpose of throwing the buyer off his guard.

The same principle had been long ago declared by Lord Hardwicke, when he stated,[60] that if a vendor, knowing of an encumbrance upon an estate, sells without disclosing the fact, and with knowledge that the purchaser is a stranger to it, and under representations inducing him to buy, he acts fraudulently, and violates integrity and fair dealing. The inference of fraud is easily and almost inevitably drawn, when there is a suppression or concealment of material circumstances, and one of the contracting parties is knowingly suffered to deal under a delusion. It was upon this ground that Lord Mansfield must have considered,[61] that selling an unsound article for a sound price, knowing it to be unsound, was actionable. It is equivalent to the concealment of a latent defect. The same rule applies to the case where a party pays money in ignorance of circumstances with which the receiver is acquainted, and does not disclose, and which if disclosed, would have prevented the payment. In that case, the parties do not deal on equal terms, and the money is held to be unfairly obtained, and may be recovered back.[62] It applies, also, to the case where a person takes a guaranty from a surety, and conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions. Such concealment is held to be fraud, and vitiates the contract.[63]

The writers on the moral law hold it to be the duty of the seller to disclose the defects which are within his knowledge.[64] But the common law is not quite so strict. If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee. Even a warranty will not cover defects that are plainly the objects of the senses;[65] though if the vendor says or does any thing whatever, with an intention to divert the eye, or obscure the observation of the buyer, even in relation to open defects, he would be guilty, of an act of fraud.[66] A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, [or cir]cumstances, which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design. When, however, the means of information relative to facts and circumstances affecting the value of the commodity, be equally accessible to both parties, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract.[67] There is no breach of any implied confidence that one party will not profit by his superior knowledge, as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence, because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill and diligence.

The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply. Even against this maxim he may provide, by requiring the vendor' to warrant that which the law would not imply to be warranted; and if the vendor be wanting in good faith, *fides servanda* is a rule equally enforced at law, and in equity.[68]

A mere false assertion of value, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment.[69] If the seller represents what he himself believes as to the qualities or value of an article, and leaves the determination to the judgment of the buyer, there is no fraud or warranty in the case.[70] The cases have gone so far as to hold, that if the seller should even falsely affirm, that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded, for the buyer should have informed himself from proper sources of the value, and it was his own folly to repose on such assertions, made by a person whose interest might so readily prompt him to invest the property with exaggerated value. *Emptor emit quam minimo potest; venditor vendit quam maximo potes*t.[71]

The same principle was laid down in a late case in the K. B., where it was held,[72] that a false representation by the buyer in a matter merely *gratis dictum*, in respect to which the buyer was under no legal pledge or obligation to the seller for the precise accuracy of his statement, and upon which it was the seller's own indiscretion to rely, was no ground of action. There was no recognized principle of law which rendered a party legally bound to allege truly, if he stated at all, the motives and inducements to the purchase, or the chances of sale to the seller. The true rule was stated to be, that the seller was liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold in some particulars which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which, for his own security and advantage, he would otherwise have made.

The rule in equity is more rigid on this subject than it is at law. Lord Hardwicke held,[73] that where the seller had falsely affirmed a farm to have been valued by two persons at a certain price, and that assertion had induced the purchaser to contract, it was such a misrepresentation as would induce a court of equity to withhold a decree for a specific performance. But there is a settled distinction in equity between enforcing specifically and rescinding a contract; and an agreement may not be entitled to be enforced, and yet not be so objectionable as to call for the exercise of equity jurisdiction to rescind it. It does not follow, that a contract of sale is void at law, merely because equity will not decree a specific performance.[74]

An action will lie against a person not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage by trusting the purchaser on the credit of such misrepresentation.[75] This principle was first established in England after great discussion and opposition, in the case of *Pasley v. Freeman*;[76] and though that case met with powerful resistance, it has been repeatedly recognized, and the doctrine of it is now well settled both in the English and American jurisprudence.[77] The principle is, that fraud, accompanied with damage, is a good cause of action, and the solidity of the principle was felt and acknowledged by the writers on the civil laws.[78] Misrepresentation, without design, is not sufficient for an action. But, if the recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge that he was not of good credit, and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller.[79]

Lord Thurlow, in *Fox v. Mackreth*,[80] allowed of much latitude of concealment on the part of the purchaser. The latter, according to his opinion, would not be bound, in negotiating for the purchase

of an estate, to disclose to the seller his knowledge of the existence of a mine on the land, of which he knew the buyer was ignorant. If the estate was purchased for a price in which the mine formed no ingredient, he held, that a court of equity could not set aside the sale, because there was no fraud in the case, and the rule of nice honor must not be drawn so strictly as to affect the general transactions of mankind. From this and other cases it would appear, that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not, and cannot undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery.[81] It is a rule in equity,[82] that all the material facts must be known to Loth parties to render the agreement fair and just in all its parts; and it is against all the principles of equity, that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance.

Pothier[83] contends, that good faith and justice require that neither party to the contract of sale should conceal facts within his own knowledge, which the other has no means at the time of knowing, if the facts would materially affect the value of the commodity. But he concludes, in conformity with the doctrine of Lord Thurlow, that though misrepresentation or fraud will invalidate the contract of sale, the mere concealment of material knowledge which the one party has touching the thing sold, and which the other does not possess, may affect the conscience, but will not destroy the contract, for that would unduly restrict the freedom of commerce, and parties must, at their own risk, inform themselves of the value of the commodities they deal in.[84] He refers to the rules of morality laid down by Cicero, and he justly considers some of them as being of too severe and elevated a character for practical application, or the cognizance of human tribunals.[85]

VI. Of passing the title by delivery.

When the terms of sale are agreed on, and the bargain is struck, and every thing that the seller has to do with the goods is complete, the property and the risk of accident to the goods, vest in the buyer, even before delivery or payment.[86] The buyer is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment. The payment, or tender of the price, is, in such cases, a condition precedent implied in the contract of sale, and the buyer cannot take the goods, or sue for them, without payment; for though the vendee acquires a right of property by the contract of sale, he does not acquire a right of possession of the goods, until he pays or tenders the price.[87] But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; though the right of possession is not absolute, but is liable to be defeated, if he becomes insolvent before he obtains possession.[88]

If the seller has even dispatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transtitu*; for though the property is vested in the buyer, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right, equally after the *transitus* has begun, as before the seller has parted with the actual possession of the goods. Whether

default in payment when the credit expires, will destroy that right of possession, if the vendee has not before that time obtained actual possession, and put the vendor in the same situation as if there had been no bargain for credit, was left undecided in *Bloxam v. Sanders*,[89] though I apprehend that as between the original parties the same consequence would follow.

To make the contract of sale valid in the first instance, there must be a delivery or tender of it, or payment, or tender of payment, or earnest given, or a memorandum in writing signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of his goods as he pleases.[90] The English statute of frauds of 29 Car. II. c. 3. sect. 17, which we have reenacted,[91] and the provisions of which prevail generally in the United States, declares that no contract for the sale of goods, for the price of £10 or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless some note or memorandum in writing of the bargain be made and signed by the parties to be charged, or their agents thereunto lawfully authorized.

If, therefore, earnest money be given, though of the smallest value, or there be a delivery or payment in whole, or in part, or a note or memorandum of the contract, duly signed, the contract is binding, and the property passes to the vendee with the risk and under the qualifications already stated.[92] Whether a delivery of part of an entire stock, lot, or parcel of goods, be a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, without payment. was a point much debated in *Hanson v. Meyer*,[93] and left undecided by the court. It was held in that case, not to amount to such a delivery, provided any other act was necessary to precede payment or delivery of the residue; but if every thing to be done on the part of the vendor be completed, a delivery of part of a cargo or lot of goods has, under certain circumstances, been considered a delivery of the whole, so as to vest the property.[94]

The vendee cannot take the goods, notwithstanding earnest he given, without payment. Earnest is only one mode of binding the bargain, and giving to the buyer a right to the goods upon payment; and if he does not come in a reasonable time after request, and pay for and take the goods, the contract is dissolved, and the vendor is at liberty to sell the goods to another person.[95] If any thing remains to be done, as between t he seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is a well established principle in the doctrine of sales.[96] But when every thing is done by the seller, even as to parcel of the quantity sold, to put the goods in a deliverable state, the property, and consequently the risk of that parcel, pass to the buyer; and as to so much of the entire quantity as requires further acts to be done on the part of the seller, the property and the risk remain with the seller.[97] The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass.[98] It is a fundamental principle pervading every where the doctrine of sales of chattels, that if the goods be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified.[99]

Where no time is agreed on for payment, the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment. If he does deliver freely and absolutely, and without any fraudulent contrivance on the part of the vendee to obtain possession, and without exacting or expecting simultaneous payment, there is confidence and credit bestowed, and the precedent condition of payment is waived, and the right of property passes.[100] This rule is understood not to apply to cases where payment is expected simultaneous with delivery, and is omitted, evaded, or

refused, by the vendee, on getting the goods under his control; for the delivery in such case is merely conditional, and the nonpayment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have a right instantly to reclaim the goods.[101] The obtaining goods upon false pretenses, under color of purchasing them, does not change the property.[102] If it was even a condition of the contract, that the seller was to receive, upon delivery, a note, or security for payment at another time, he may dispense with that condition, and it will be deemed waived by a voluntary and absolute delivery without a concurrent demand of the security.[103]

But if the delivery in that case be accompanied with a declaration on the part of the seller, that he should not consider the goods as sold until the security be given, the sale is conditional, and the property does not pass by the delivery as between the original parties, though as to subsequent *bona fide* purchasers or creditors of the vendee, the conclusion might be different.[104] Where there is a condition precedent attached to a contract of sale, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it, and the right continues in the vendor, even against the creditors of the vendee.[105] If the delivery of the goods precedes for a short time the delivery of the note to be given for the price, according to particular usage in that species of dealing, and which usage is known to the buyer, the case falls within the same principle, and the delivery is understood to be conditional. The condition is not deemed to be waived, and the seller will have a right in equity to consider the goods as held in trust for him, until the vendee performs the condition, and gives the note with security; and his right to the goods will be good as against the buyer and his voluntary assignee, though not as against a bona. fade purchaser from the vendee.[106]

By the civil law the right of property was not vested is the purchaser even by delivery, without payment of the price, unless the goods were sold on a credit.[107] The risk of the goods was, nevertheless, thrown on the buyer before delivery, and as soon as the contract of sale was completed, even though the title was still in the vendor. *Periculum rei venditae, non dum traditae, est emptoris*.[106] Pothier endeavors to vindicate this principle of the civil law, in answer to the objections of Pufendorf, Barbeyrac, and others, who insisted, that the civil law in this respect was not founded on principles of natural justice.[109] We think the common law very reasonably fixes the risk where the title resides; and when the bargain is made, and rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attaches to the purchaser. But though the seller has parted with the title, he may retain possession until payment, and he has even the equitable right of stoppage *in transitu*, in the case of the insolvency of the purchaser; and that right assumes that the vendor has divested himself of the legal title, and that the property has passed to the vendee, while the actual possession is in some third person in its transit to the vendee.

Delivery of goods to a carrier, or master of a vessel, when they are to be sent by a carrier or muster, is equivalent to a delivery to the purchaser; and the property with the correspondent risk, immediately vests in the purchaser, subject to the vendor's right of stoppage *in transitu*.[110] A delivery by the consignor of goods, on board of a ship chartered by the consignee, is a delivery to the consignee;[111] and the rule is the same if they were put on board a general ship for the consignee.[112] The effect of a consignment of goods by a bill of lading, is to vest the property in the consignee. A delivery to any general carrier is a constructive delivery to the vendee; and the rule is the same whether the goods be sent from one inland place to another, or beyond sea.

Symbolical delivery will, in many cases, be sufficient, and equivalent in its legal effects to actual delivery. The delivery of the key of the warehouse in which goods sold are deposited, is a delivery sufficient to transfer the property.[113] So, the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods.[114] There may be a symbolical delivery when the thing does not admit of actual delivery. The delivery must be such as the nature of the case admits. [115] We have a striking instance of this in the Pandects,[116] where the delivery of wine is held to be made by the delivery of the keys of the wine cellar; and the consent of the party upon the spot is a sufficient possession of a column of granite, which, by its weight and magnitude, was not susceptible of any other delivery, and possession was taken by the eyes, and the declared intention.

In the sale of a ship, or goods at sea, the delivery trust be symbolical, by the delivery of the documentary proofs of the title; and a delivery of the grand bill of sale is a delivery of the ship itself.[117] A bill of sale of timber, and materials of great bulk, lying on the banks of a canal, or marking the timber, has been held to be a delivery sufficient to make the possession follow the right. It was as complete a delivery and possession as the subject matter reasonably admitted.[118] Taking a bill of parcels, and an order from the vendor on the storekeeper for the goods, and going and marking them with the initials of one's name, has been held a delivery. The mere communication of the vendor's order on a wharfinger or warehouseman for delivery,[119] and assented to by him, passes the property to the vendee.[120] Even the change of mark on bales of goods in a warehouse by direction of the parties, has been held to operate as an actual delivery of the goods.[121] If the vendor takes the vendee within sight of ponderous articles, such as logs lying within a boom, and shows them to him, it amounts to a delivery, though the vendee should suffer them to lie within the boom as is usual with such property, until he have occasion to use them.[122] Delivery of a sample has been sufficient to transfer the property, when the goods could not be actually delivered until the seller had paid the duties; that fact being known and understood at the time, and when the buyer accepted of the sample as part of the quantity purchased.[123] The delivery must always be according to the subject matter of the delivery, and the property must be placed under the control and power of the vendee.[124]

The facts and circumstances which may amount to an acceptance of part of the goods sold, so as to take the case out of the statute of frauds, has been a fruitful source of discussion, and subtle and refined distinctions have been raised and adopted.

Cutting off the spills of wine casks, and marking the initials of the purchaser's name on them, has been held an incipient delivery sufficient to take the case out of the statute.[125] So, if the purchaser deal with the commodity as if it were in his actual possession, by selling part, this supersedes the necessity of proof of actual delivery.[126] Where a purchaser, at the merchant's shop, marked the goods which he approved of, and laid them aside on the counter, and went for a porter to remove theme, without receiving a bill of parcels, or stipulating a time of payment, or tendering the merchant's note which he was to offer in payment, it has been held, that the property in the goods was not changed by that transaction.[127] But. since that decision, a more relaxed rule has been adopted; and it has been held, that if the purchaser writes his name upon the article purchased, it is a sufficient delivery within the statute of frauds, though the article remained with the vendor.[128] It has been even decided, that on the purchase of a horse without memorandum, payment, or actual delivery, the verbal request of the buyer that the vendor keep the horse in his possession for a special purpose, and the consent on the part of the vendor, amounted to a constructive delivery, sufficient

to take the sale out of the statute.[129]

That case has since been questioned, as carrying the doctrine of constructive delivery to the utmost verge of safety; and the purchase of part of a heap of grain, if it be not measured off and separated at the time, is not valid by means of such a request, even though the seller afterwards measured it off, and set it apart for the vendee.[130] In short, probity in dealing, the interests of commerce, and the variety, extent, and rapidity of circulation of property which it has introduced, require that delivery should frequently be presumed from circumstances, and a destination of the goods by the vendor to the use of the vendee; the marking them, or making them tip to be delivered, or the removing them for the purpose of being delivered, may all entitle the vendee to act as owner.[131] But the presumption fails when positive evidence contradicts that presumption, as in the case of a refusal on the part of the vendor to part with the goods until payment;[132] and on the part of the vendee to take the goods when inspected;[133] or when the vendee leaves part of the articles bought unmarked;[134] or the delivery be of a sample which is not part of the bulk of the commodity sold.[135]

If the subject matter of the contract does not exist *in rerum natura*, at the time of the contract, but remained to be thereafter fabricated out of raw materials, it is, consequently, incapable of delivery, and not within the statute of frauds, and the contract is valid without a compliance with its requisitions.[136]

If the buyer unreasonably refuses to accept of the article sold, the seller is not obliged to let it perish on his hands, and run the risk of the solvency of the buyer. The usage, on the neglect or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sale.[137]

The place of delivery is frequently a point of consequence in the construction of the contract of sale.

If no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is silent as to the place. Thus appears to be the general doctrine on the subject.[138] Pothier distinguishes between contracts for a thing certain, as for all the wine of the vintage of the vendor, and a contract for any thing indeterminate, as a pair of gloves, a certain quantity of corn, wine, etc. In the former case, the delivery is to be at the repository where the wine was at the time of the contract, and this is reasonably supposed to be the understanding of the parties, as the purchaser would then be able to see that he had the whole quantity agreeably to the, contract.

In the latter case the property is to be delivered at the debtor's place of residence, unless the parties lived near each other, and the thing be portable, in which case the place of payment would be the creditor's residence.[139] The common law on the subject of the delivery of specific articles which are portable, makes a distinction between the contract of sale, and the contract to pay a debt at another time in such articles. We have seen, that in the contract of sale the delivery is to be at the place where the vendor has the article, but in the other case, the weight of authority would seem to be in favor of the rule, that the property was to be delivered at the creditor's place of residence, though the cases on the subject are not easily reconcilable with each other.

Lord Coke lays down the rule,[140] that if the contract he to deliver specific articles, as wheat or timber, the obligor is not bound to carry the same abroad, and seek the obligee, (as in the case of payment of money,) but he must call upon the obligee before the day, to know where he would receive the articles, and they must be delivered at the place designated by the obligee. This doctrine was admitted in the case of *Aldrich v. Albee*,[141] in which it was declared, that if no place be mentioned in the contract, to deliver specific articles, (and which, in that case, were hay, bark and shingles,) the creditor had the right to name the place. It is evident, however, that this rule must be received with considerable qualification, and it will depend, in some degree, upon the nature and use of the article to be delivered. The creditor cannot be permitted to appoint an unreasonable place, and one so remote from the debtor, that the expense of the transportation of the articles might exceed the price of them. If the place intended by the parties can be inferred, the creditor has no right to appoint a different place. But if no place of performance be designated, and none can be clearly inferred from collateral circumstances, it seems to have been again admitted, that the creditor may designate a reasonable place for the delivery of the articles.[142] Mr. Chipman[143] lays it down also as a rule of the common law, well understood and settled in Vermont, that if a note be given for cattle, grain, or other portable articles, and no place of payment. be designated in the note, the creditor's place of residence at the time the note is given, is the place of payment.

If the articles be not portable, but ponderous and bulky, then Lord Coke's rule prevails, and the debtor must seek the creditor, or get him to name a place; and if no place, or an unreasonable one be named, the debtor may deliver the articles at a place which circumstances shall show to be suitable and convenient for the purpose intended, and presumptively in the contemplation of the parties when the contract was made.[144] There is a material difference in the reason of the thing, between a tender of cumbersome goods, and those which are portable, and the same removal from one place to another is not equally required in the two cases.[145] There is another class of cases, in which the position is assumed, that if the parties have not designated any particular place of delivery, it is to be at the debtor's residence, or where the property was at the time of the contract, as in the case of a note payable in farm produce, without mentioning time or place, the place of demand and delivery is held to be at the debtor's farm.[146] It is likewise adjudged, that where a person, in the character of bailee, promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling house, or place of business, will be sufficient.[147]

If the debtor makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is, that the debt is thereby discharged.[148] If the debtor he sued, he may plead the tender and refusal, and he will be excused by the necessity of the case from pleading *uncore prist*, and bringing the cumbersome articles into court;[149] and it is not like the case of a tender of money which the party is bound to keep good, and on a plea of tender to bring the money into court.

The creditor is entitled to the money at all events, whatever may be the fate of the plea,[150] and there is equal reason that he should be entitled to the specific articles tendered. But in *Weld v. Hadley*,[151] it was decided, after a very able discussion, that on a tender and refusal of specific articles, the property did not pass to the creditor. This was contrary to the doctrine declared in other cases,[152] and the weight of argument, if not of authority, and the analogies of the law, would appear to lead to the conclusion, that on a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor.[153] The debtor may

abandon the goods so tendered; but if he elects to retain possession of the goods, it is in the character of bailee to the creditor, and at his risk and expense.[154]

I have thus endeavored to mark the prominent and most practical distinctions, on the very diffusive subject of the delivery requisite to pass the title to goods, or to take the case out of the operation of the statute of frauds. But even in this general view of the subject, it has been difficult to select t hose leading principles, which were sufficient to carry us safely through the labyrinth of cases, that overwhelm and oppress this branch of the law.

VII. Of the memorandum required by the statute of frauds.

The signing of the agreement by one party only is sufficient, provided it be the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party who sues for a performance.[155] It is sufficient, likewise, if the note or memorandum be made by a broker employed to effect the purchase, and the instrument is liberally construed without a scrupulous regard to forms. The signature may be with a lead pencil, according to the practice in cases of hurried business. The mark of one unable to write, is a sufficient signature; and if the name be inserted in such a manner as to have the effect of authenticating the instrument, it is immaterial in what part of it the name be found.[156] The contract must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof.[157] Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement he thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent.[158]

VIII. Of sales of goods, as affected by fraud.

Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not of itself affect the validity of the sale of personal property. But if the purchaser, knowing of the judgment, purchases, with the view and purpose to defeat the creditor's execution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends upon the motive. The purchase must be *bona fide*, as well as upon a valuable consideration. This rule has been repeatedly declared and established.[159] Whether it would be an act of fraud sufficient to vacate the contract, if the purchaser, knowing of his own insolvency, and utter incapacity to make payment, but without using any device or contrivance to deceive the vendor, purchases goods of another, who is ignorant of his insolvency, and sells them under the relief of the solvency as well as good faith of the buyer, is a question which was raised, but left undecided, in *Conyers v. Ennis*.[160] It has been since decided in another case,[161] that the mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself, and not disclosed to the vendor, would not of itself avoid the sale. In that case, there was no false assertion, or fraudulent misrepresentation or deceit practiced, or concert, or secret agreement, with any other person, and there was no direct evidence that the vendee knew at the time that he was insolvent. The decision was put upon the ground that the credit was in fact, obtained without any fraudulent intent, and the validity of the sale would depend upon the decision of the question, whether there was fraud in fact.

If the vendee discovers that he is insolvent, and not in his power to pay for the goods, the courts have allowed him to rescind the contract, and return the goods to the seller, with his assent, provided he did it before the contract was consummated by an absolute delivery and acceptance. He cannot rescind the contract after the goods have been actually received into his possession, and the rights of other creditors have attached.[162]

On the subject of fraudulent sales, another, and a very vexatious question has arisen, as to the legal consequence and effect of an agreement between the parties at the time of the sale, that possession was not to accompany and follow the bill of sale of the goods. There is no doubt of its being evidence of fraud; but the great point has been, whether the fraud which was to be inferred in such a case, was an inference of law to be drawn by the court, and resulting inevitably from the fact, or whether the fact was only evidence of fraud to be drawn by the jury, and susceptible of explanation. The history and diversity of the decisions on this subject, form a curious and instructive portion of our jurisprudence.

By the English statutes of 3 Hen. VII. and 13 Eliz. c. 5. which have been reenacted in this state,[163] and the essential provisions of which have been adopted generally throughout the United States, all conveyances of goods and chattels in trust for the use of the person conveying them, or made to delay, hinder, or defraud creditors, are declared to be void; and it is every where admitted,[164] that the statutes of fraud of 13 and 27 Eliz. were declaratory of the principles of the common law, and the decisions of the English courts are, therefore, applicable to questions of constructive fraud arising in this country.

Twyne's case,[165] which arose in the Star Chamber in the 44th Eliz. is the basis of the decisions, on the question of fraud arising from possession being retained by the vendor.

Among other indicia of fraud upon which the court relied, and adjudged the deed fraudulent in that case, a prominent one was, that the vendor, after a bill of sale of chattels for a valuable consideration, to a creditor, continued in possession, and exercised acts of ownership over the goods. Afterwards, in *Stone v. Grubham*,[166] upon a bill of sale of chattels, being a lease for years, the vendor continued in possession, but as the conveyance was only conditional upon payment of money, it was held, that the possession did not avoid the sale, as by the terms of the deed the vendee was not to have possession until he had performed the condition. The rule was explicitly declared in *Sheppard's Touchstone*, in the time of James I, that if a debtor secretly made a general deed of his goods to one creditor, and continued the use and occupation of the goods as his own, the deed was fraudulent and void against a subsequent judgment and execution creditor, notwithstanding the deed was made upon good consideration.[167] Again, in *Bucknal v. Roiston*,[168] a bill of sale of goods was given by way of security or pledge for money lent, and a trust in the vendor to keep the goods, and sell them for the benefit of the vendee, appeared on the face of the deed; and for that reason it was held by the Lord Chancellor not to be fraudulent. One of the counsel in that case observed, that it had been ruled forty tithes in his experience at Guildhall, that if a man sells goods, and still continues in possession as visible owner of them, the sale wits fraudulent and void as to creditors.

The case of a mortgage of goods was afterwards held, in *Ryall v. Bowles*, not to form an exception to the general rule recognized in the former cases. It was declared by very strong authority in that case, that a mortgagee of goods permitting the mortgagor to keep possession, had no specific lien against general assignees under a commission of bankruptcy, and he was understood to confide in

the personal credit of the vendor, and not in any security. Though that case was decided upon the bankrupt act of 21 J. I., and not upon the statutes of Elizabeth, the reasoning of the court relative to the distinction between absolute and conditional sales or mortgages, was founded on general principles applicable to every case. It was the doctrine of the case, that in a mortgage of goods the mortgagee takes possession. and that there was no reason, unless in very special eases, why an absolute or conditional vendee of goods, should leave them with the vendor, unless to procure a collusive credit.[169] There was no distinction, it was admitted, under the 13th Eliz., between conditional and absolute sales of goods, provided they were fraudulent; and continuance in possession by the mortgagor was fraudulent at common law, and void by the statutes of Elizabeth.

The doctrine of that case was powerfully sustained by Lord Mansfield in *Worseley v. Demattos & Slader*.[170] That case arose under the bankrupt act of 21 James I, and it was held by the K. B., that a mortgage of goods, with possession retained by the mortgagor, was fraudulent in law equally as it would be upon an absolute sale. To give a creditor priority by such a mortgage, when the mortgagor is allowed to appear and act as owner, is enabling him to impose upon mankind by false appearances; for where possession is not delivered, goods may be mortgaged a hundred times over, and open a plentiful source of deceit. But in *Cadogan v. Kennet*,[171] where household goods, by settlement before marriage, in consideration of the marriage, and of the wife's marriage portion, were conveyed to trustees in trust for the settler for life, remainder to his wife for life, and remainder to the sons of the marriage, it was held, that those goods were protected from execution in favor of a creditor existing at the time of the settlement, though the grantor continued in possession of the goods. The transaction was fair and honest in point of fact, and it was part of the trust that the goods should continue in the house.

Other subsequent cases have established the rule, that the wife's goods may, before marriage, be conveyed to trustees with her husband's assent, for her use during coverture, and such property will not be liable to his debts.[172] Again, in *Edwards v. Harben*,[173] the K. B. laid down the principle emphatically, that if the vendee took an absolute bill of sale to take effect immediately by the face of it, and agreed to leave the goods in the possession of the vendor for a limited time, such an absolute conveyance without the possession, was such a circumstance per se as made the transaction fraudulent in point of law. It was admitted, however, that if the want of immediate possession be consistent with the deed as it was in *Buckland v. Roiston*, and *Lord Cadogan v. Kennet*, and as it is if the deed be conditional, and the vendee is not to have possession until he has performed the condition, the stile was not fraudulent, for there the possession accompanied and followed the deed within the meriting of the rule.

After the English rule on this subject had been discussed, declared and settled, it was repeatedly held, that an absolute bill of sale of chattels, unaccompanied with possession, was fraudulent in law, and void as against creditors.[174] The change of possession was required to be substantial and exclusive, and not concurrently with the assignor. But, on the other hand, there have been many exceptions taken, and many qualifications annexed to the general rule; and it has become difficult to determine when the circumstance of possession not accompanying and following the deed, be *per se* a fraud in the English law, or only presumptive evidence of fraud, resting upon the facts to be disclosed att the trial. It certainly is not anything more if the purchaser was not a creditor at the time, and the goods were under execution, and the transaction notorious, and not, in point of fact, either clandestine or fraudulent.

In *Kidd v. Rawlinson*,[175] goods were purchased on execution by a stranger, and left in possession of the debtor for a temporary, and honest, and humane purpose, and as the parties did not stand in the relation of debtor and creditor, Lord Eldon, as Ch. J. of the C. B. held, that the title was in the vendee. He admitted, that a bill of sale of goods might be taken as security on a loan of money, and the goods fairly and safely left with the debtor. The decision in this case was conformable to one made by Lord Holt under similar circumstances;[176] and Lord Eldon, many years afterwards, when Lord Chancellor,[177] adhered to the same doctrine, and declared, that possession of chattels by the vendor was only *prima facie* evidence of fraud. If the property cannot be reached by bankruptcy, and the possession be according to the deed which creates the title, and the title be publicly created, it is not fraudulent.

Other cases have protected the purchaser of goods seized on execution, (and whether the purchase was from the sheriff or the defendant seemed to be immaterial,) from subsequent executions, though the goods were suffered to continue in the possession of the defendant, on the ground that the transaction was necessarily notorious to the whole neighborhood, and the execution notice to the world, and the cases being free from fraud in fact, were, under those circumstances, free from the inference of fraud in law.[178] The question of fraud in such cases is declared to be a question of fact for the jury. The purchaser of goods sold at auction, by trustees, under an assignment by an insolvent debtor, is also protected, though he leave the goods in the possession of the prior owner, provided it be a matter of fact to be found by a jury, that the assignment was not made with a fraudulent intent, and that the sale was notorious.[179]

So, a person may lend his goods for another's use, and, except in cases of bankruptcy under the statute of 21 J. I. they will be protected from the creditors of the person for whose use they were supplied.[180] In *Steward v. Lombe*,[181] so late as 1820, the Court of C. B. even questioned very strongly the general doctrine in *Edwards v. Harben*, that actual possession was necessary to transfer the property in a chattel, and the authority of the case itself was shaken.

The law on this subject is still more unsettled in this country than it is in England.

In the Supreme Court of the United States, the doctrine in *Edwards v. Harben* has been explicitly and fully adopted, and it is declared, that an absolute bill of sale is itself a fraud in law, unless possession accompanies and follows the deed.[182] This decision, of course, leaves open for discussion the distinction taken in that case between a bill of sale absolute, and one conditional upon its face, and also the conclusions in the other cases where the continuance of possession in the vendor is consistent with the deed. The principle of the decision at Washington has been adopted in the circuit courts of the United States, and we may consider it to be a settled principle in federal jurisprudence. In pursuance of the rule, if property be abroad, and incapable of actual delivery at the time, as in the case of a ship at sea, the possession must be assumed as soon as possible on the arrival of the vessel in port.[183]

In Virginia, the same principle has been directly and repeatedly adjudged to be well settled; and it is declared, that an absolute bill of sale of personal property, with possession continuing in the vendor, is fraudulent *per se* as to creditors without other evidence of fraud, or being connected with other circumstances.[184] In South Carolina, the same doctrine was alluded to as being founded on the better authority;[185] and in one case in equity[186] it was decided, that if possession did not accompany a bill of sale of chattels which was not recorded, it was void as to creditors, though there was no

doubt of the fairness of the transaction. Afterwards, in the Constitutional Court, the doctrine of the English law in *Edwards v. Harben*, was declared by all the judges to be a settled rule.[187] In Tennessee, also, the doctrine of the English law as stated in *Edwards v. Harben*, is clearly asserted.[188] So, in Kentucky, the same principle, under the modifications it has subsequently undergone in England, seems to have been adopted; fur after an absolute bill of sale, if the property remains in the possession of the vendor, it is held to be fraudulent, and evidence of a fair intent is inadmissible; and yet when such possession is not inconsistent with the sale, the fraud becomes a matter of fact for a jury.[189]

In Pennsylvania, the English doctrine is adopted and followed in its fullest extent. The general principle is explicitly and emphatically recognized, that on an absolute sale or assignment of chattels, possession must accompany and follow the deed, and vest exclusively in the vendee, or it is fraudulent in law, though there be no fraud in fact.[190] But as an exception to the general rule, it is admitted, that goods may, after they have been levied upon, or after a fair purchase of them at a sale on execution, be safely left in the possession of the defendant, without a necessary inference of fraud; though the exception in the case of a levy merely, was afterwards restricted to household furniture.[191]

Delivery of the goods is held to be as requisite in the case of a mortgage of goods, as of an absolute sale of goods under the statutes of 13 and 27 Eliz.; and merely stating on the face of the deed, that possession was to be retained, is not sufficient to take the case out of the statute, even in the case of a mortgage of goods; and the transaction has been adjudged to be fraudulent *per se*, and void against a subsequent *bona fide* purchaser without notice.[192] The just policy and legal solidity of the rule that holds all such deeds of chattels fraudulent in law, were asserted in the case to which I have last alluded, with distinguished ability and effect. The retention of possession must not only be part of the contract, but it must appear to be for a purpose, fair, honest and necessary, or conducive to some fair object in view. Appearances must not only agree with the real state of things, but the real state of things must be honest and consistent with public policy. Such were the cases of *Bucknel v. Royston*, and *Cadogan v. Kennet*.

But where the motive of the sale is the security of the vendee, and the vendor is permitted to retain the visible ownership for the convenience of the parties, it is a fraud, though the arrangement be inserted in the deed of mortgage. The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stay to inquire whether there was actual fraud or not, and will infer it at all events, for it is against sound policy to suffer the vendor to remain in possession, whether an agreement to that effect be or be not expressed in the deed. It necessarily creates a secret encumbrance as to personal property, when to the world, the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.

If the possession be withheld pursuant to the terms of the agreement, some good reason for it beyond the convenience of the parties, must appear, and the parties must leave nothing unperformed within their power, to secure third persons from the consequences of the apparent ownership of the vendor. If it be the sale or mortgage of articles undergoing a process of manufacture, to be delivered when finished, or of various other goods and chattels, and possession can properly be retained, there ought to be a specific inventory of the articles, so as to apprize creditors of what the conveyance covered, and to prevent the vendor from changing and covering property to any extent by dexterity and fraud.

The Supreme Court of Pennsylvania have regretted, that even in the excepted case of household furniture, the goods seized on execution may be left in the hands of the defendants. This was contrary to the common law, which would not endure the levying on goods only as a security,[193] and wisely gave a subsequent execution creditor the preference, if goods levied on by execution were suffered to remain in the hands of the defendant. The exception of household furniture, has notoriously occasioned collusion and fraud, and been productive of gross abuse. The levy was a very imperfect notice to third persons.[194]

The same doctrine has been declared to be the law in New Jersey and Connecticut. In the former state, it was assumed as being too clear to be doubted; and in the latter, the point has been recently and fully discussed. Delivery of possession in the case of a sale or mortgage of chattels is necessary whenever it be practicable; and to permit the goods to remain in the hands of the vendor, is declared to be an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. There must be an actual, and not a colorable change of possession. The leading decisions in England, and in this country, in favor of the legal inference of fraud in such cases, are referred to, and the conclusion adopted, that on a sale or mortgage of goods, an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons to be shown to and approved by the court fraudulent and void, equally against creditors and *bona fide* purchasers.[195]

Thus far the American decisions harmonize with those in England; and the stern conclusions of the doctrine, that fraud in the given case is an inference of law, are asserted in this country not only in a tone equally explicit and decided as in the English cases, but with much greater precision, and more powerful and convincing argument. There is another series of decisions, however, which have, under equal sanction, established a more lax and popular doctrine.

In North Carolina it is held, that whether a deed be fraudulent or otherwise, from the want of possession in the vendee, or within the operation of the statute of 13 Eliz. c. 5., was a question of fact, and not of law.[196] The Supreme Court of that state, in a very recent case,[197] carried the relaxation of the English rule to a very great extent. A bill of sale of a horse was absolute on its face, but taken as a security for a debt, and possession was left with the vendor. The property, after being kept by the debtor for six years, was seized on execution by another creditor, and the court decided; that such a transaction was only presumptive evidence of fraud for a jury, and as they had found no fraud in fact, the verdict was sustained.

In this state, the current language of the court originally was,[198] that the non-delivery of goods at the time of the sale or mortgage, was only *prima facie* evidence of fraud, and a circumstance which admitted of explanation. But in *Sturtevant v. Ballard*,[199] the subject received a more full and deliberate consideration, and the English and American authorities were extensively reviewed, and it was decided, that on a bill of sale of goods partly for cash, and partly to satisfy a debt, with an agreement in the instrument, that the vendor was to retain the use and occupation of the goods for the term of three months, the goods were liable to the intervening execution of a judgment creditor. It was considered to be a settled principle of law, that if the vendor be permitted to retain possession in the case of an absolute bill of sale of chattels, it was an act of fraud in law as against creditors, and that though the agreement appear on the face of the deed, it would be equally so unless some good motive was at the same time shown.

The rule applied equally to conditional as well as absolute sales, unless the intent of the parties in creating the condition was sound and legal. Fraud was the judgment of law on facts and intents, and it was a question of law when there was no dispute about the facts. The result of the investigation was, that. a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors.

This decision was supposed to have established, on sound foundations; the rule of law in this state, so far as that rule depended upon the judgment of the Supreme Court. But though the decision has been cited and approved of in other states,[200] it was doomed to have a very transient influence over its own tribunal. In *Ludlow v. Hurd*,[201] the late Chief Justice left it as a debatable point, whether the retaining possession of chattels by the vendor, after an absolute sale of them, was *ipso facto* fraudulent, or only a badge of fraud for the consideration of a jury; and in *Bissell v. Hopkins*,[202] the doctrine of the case of *Sturtevant v. Ballard* was entirely subverted.

In *Bissell v. Hopkins*, a debtor executed a bill of sale of a horse, and other chattels, to a creditor, in security for a preexisting debt. Nothing was said in the instrument about possession, or time of payment, though the bill averred a sale and delivery. The property, in fact, remained in the possession and use of the vendor by permission of the vendee, and after a period of fifteen months the debtor executed another instrument to the creditor, stating that there had been a settlement of accounts, and a balance adjusted, and that so much of the property "as remained on hand," should remain liable, and that the horse, which it seems had retrained on hand, was "to remain for the present" with the debtor. At the time of the bill of sale, the vendor was indebted to other persons, and one of them, about six months thereafter, sued him, and obtained judgment and execution, and levied on the horse in possession of the debtor, at the period of sixteen months from the execution of the bill of sale. The horse was sold by the officer to the execution creditor, who had notice before the sale of the claim of the first vendee.

These facts being found by special verdict, and the conclusions to be drawn from them referred to the court, it was adjudged, that the first vendee was entitled to the property, for that there was neither fraud in law, nor fraud in fact, and that possession continuing in the vendor was only *prima facie* evidence of fraud, and might be explained.[203]

The Supreme Court of Massachusetts, in *Bartlett v. Williams*,[204] declared the general rule to be, that possession must follow and accompany the deed, and that the possession of the vendor after the bill of sale, unexplained, would render the conveyance void as to the creditors. The doctrine in *Edwards v. Harben* was declared to be unquestionably sound, and it was not deemed inconsistent with it, but agreeable to the case of *Robinson v. Donell*,[205] to adjudge, that if the vendee or mortgagee did not take possession immediately, it was sufficient if they did it before the right of a third person had intervened. But afterwards, in *Holmes v. Crane*,[206] the court recede from their former doctrine on this point, and they concede, that on an absolute sale or mortgage of goods, the subsequent possession by vendor or mortgagor, is only *prima facie* evidence of fraud, and may be explained by proof; and that a mortgagor of goods may retain possession until the condition be broken, and that there must be fraud in fact to make it void.

The same relaxed doctrine was declared in *Wheeler v. Train*.[207] It was there adjudged, that a debtor in failing circumstances, may convey furniture in payment, and stipulate with the creditor to have

a lease of it for a year. The possession by the vendor, after a sale, was only evidence of fraud to be explained to a jury, and a debtor may mortgage, or make an absolute sale, under an agreement for possession for a given time, and it would not be fraud *per se*, but only evidence of fraud.

The Supreme Court of New Hampshire have established the same rules of law on this subject as those recently declared in Massachusetts and New York, and they have vindicated their opinion in a neat and able manner.[208] They insist that the principal cases in England and in this country, on the other side, are borne down by the current of opposite authority. The position that devolves the question of fraud upon the court, requires the opinion to be formed on a single circumstance, and admits no explanation. The other position, which refers the question of fraud to a jury, looks to the whole transaction, and admits of every honest apology and explanation. If the vendor or mortgagor retains possession, no person suffers, unless a new credit be given, or an old one extended, under a mistaken belief that the property remained unsold. The few cases of that kind which may happen, ought not to introduce so stern a rule, as to make such conveyances void against every description of creditors.

It is greatly to be regretted, that the rules of law in so material a point, and one of such constant application, are so various and so fluctuating in this country. Since the remedy against the property of the debtor is now almost entirely deprived of the auxiliary coercion, intended by the arrest and imprisonment of his person, the creditor's naked claim against the property ought to receive the most effective support, and every rule calculated to prevent the debtor from secreting or masking it to be sustained with fortitude and vigor. There is the same reason for the inflexible stability of the rule of law, that a vendor of chattels should not, at the expense of his creditors, sell them, and yet retain the use of them, as there is for that greatly admired rule of equity, that a trustee shall not be permitted to buy or speculate in the trust food on his own account; or for that other salutary and fixed principle, that the voluntary settlement of property shall be void against existing creditors. Such rules are made to destroy the very temptation to fraud, in cases and modes that are calculated to invite it, and because such transactions may be grossly fraudulent, and the aggrieved party not able to show it from the character of private agreements, and the infirmity of human testimony.

However innocent such transactions may be in the given case, they are dangerous as precedents, and poisonous in their consequences; and the wise policy of the law puts the sting of disability into the temptation, and bars the door against every species of imposition, which might be inaccessible to the eye of the court. If a debtor can sell his personal property, and yet, by agreement with the vendee, continue to enjoy it for six years, as in North Carolina, or for sixteen months, as in this state, in defiance of his creditors, who can set bounds to the term of enjoyment, or know when and where to be stow credit, or how he is to make out a case of actual fraud? Fraud, in fact, is reluctantly drawn by a jury, and their sympathies must be overcome by strong and positive proof, before they will readily assent to the existence of a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer.

The validity of assignments of their property by insolvent traders and others, has been another and a fruitful topic of discussion. A debtor, in failing circumstances, pray, by assignment of his estate in trust, and made in good faith, prefer one creditor to another, when no bankrupt, or other law, prohibiting such preference, and no legal lien binding on the property assigned, exists. This is a well settled principle in the English and American law, and admitted by numerous authorities.[209] The assent of the creditors to be benefitted by the assignment, has been held to be essential to its validity,

and the intervening attachment of another creditor, who is no party to the assignment, issued before such assent be given, has been preferred.[210]

But this doctrine seems to be very much qualified and controlled, for the assent of the creditors need not be given at the time of the assignment, and a subsequent assent iii terms, or by actually receiving the benefit of the assignment, will be sufficient.[211] The assignment has been held to be good against a subsequent attachment, if the creditor had assented to the assignment prior to the attachment;[212] and the assignment has been supposed to be valid, even without such intervening assent, in the case of an assignment to trustees, fur the benefit of the preferred creditors. The legal estate passes and vests in the trustees; and a court of equity will compel the execution of the trust for the benefit of the creditors, though they be not, at the time, assenting and parties to the conveyance.[213] The assent of absent persons to an assignment, will be presumed, unless their dissent be expressed, if it be made for a valuable consideration, and be beneficial to them.[214]

It is admitted, that the debtor may indirectly exert a coercion over the creditors through the influence of hope and fear, by the insertion of a condition to the assignment, that the creditors shall not be entitled to their order of preference unless within a given and reasonable time (for if no time, or an unreasonable time be prescribed, the deed is fraudulent:[215] they execute a release of their debts by becoming parties to the instrument of assignment containing such a release, or by the execution of a separate deed to that effect.[216] In *Jackson v. Lomas*,[217] there was a proviso to the assignment, that in case any creditor should not execute the trust deed, which contained, among other things, a release of the debts, by a given day, he should not be entitled to the benefit of the trust deed, and his share was to be paid back to the debtor. It seems to have been assumed throughout that case, that such a provision would not affect the validity of the assignment.

Whatever might have been the understanding in that case, such a conclusion is not well warranted by the language of the American cases, and a deed with such a reservation would be invalid in this country. The debtor may deprive the creditor who refuses to accede to his terms, of his preference, and postpone him to all other creditors, but then he will be entitled to be paid out of the residue of the property, if there should he any, after all the other creditors who released and complied with the condition of the assignment are satisfied. If the condition of the assignment be, that the share which would otherwise belong to the creditor who should come in and accede to the returns and release, shall, on his refusal or default, be paid back to the debtor, or placed at his disposal by the trustees, it is deemed to be oppressive and fraudulent, and destroys the validity of the whole assignment.[218]

Nor can the debtor, in such an assignment, make a reservation, at the expense of his creditors, of any part of his property or income for his own benefit. Such a reservation, if not made intentionally to delay, hinder, and defraud creditors, has been supposed not to affect the validity of the residue, or main purpose of the assignment, and that if the part of the estate assigned to the creditors should prove insufficient, they might resort to the fund so reserved by the aid of a court of equity. The case of *Estwick v. Caillaud*,[219] and the language of other cases, were in favor of this opinion.[220] But later authorities have given to such reservations the more decided effect of rendering fraudulent and void the whole assignment, and no favored creditor or grantee can be permitted to avail himself of any advantage over the creditors, under an assignment which, by means of such a reservation, is fraudulent on its face.[221] These latter decisions contain a just and salutary check of the abuse of the debtor's power of assignment and distribution; for, as was observed in the case of *Riggs v. Murray*,[222] “if an insolvent debtor may make sweeping dispositions of his property to select and favorite

creditors, yet loaded with durable and beneficial provisions for the debtor himself, and encumbered with onerous and arbitrary conditions and penalties, it would be impossible for courts of justice to uphold credit, or to exact the punctual performance of contracts.[223]

IX. Of sales at auction.

An auctioneer has not only possession of the goods which he is employed to sell, but he has an interest coupled with that possession. He has a special property in the goods, and a lien upon them for the charges of the sale and his commission, and the auction duty. He may sue the buyer for the purchase money, and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk.[224] If the auctioneer has notice, that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of the sale.[225] So, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages for its non-performance.[226]

In the sale of real property at auction, care should be taken that the description of it be accurate, or the purchaser will not be held to a performance of the contract. But if the description be substantially true, and be defective or inaccurate in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair, and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and, therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price by way of compensation for any small deficiency in the value by reason of the variation.[227]

A bidding at an auction may be retracted before the hammer is down. Every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to, and that assent is signified on the part of the seller by knocking down the hammer.[228]

If the owner employs puffers to bid for him at an auction, it has been held to be a fraud upon the real bidders. He must not enhance the price by a person privately employed by him for that purpose. It would be contrary to good faith, as persons resort to an auction under a confidence that the articles set up for sale will be disposed of to the highest real bidder. A secret puffer employed by the owner is not fair bidding, and is a fraud upon the public; nor can the owner privately bid upon his own goods. All secret dealing on the part of the seller is deemed fraudulent. If he be unwilling that his goods should be sold at an under price, he may order them to be set up at his own price, and not lower, or he may previously declare, as a condition of the sale, that he reserves a bid for himself. This was the doctrine declared by Lord Mansfield in *Bexwell v. Christie*,[229] and again by Lord Kenyon in *Howard v. Castle*,[230] and in each case with the approbation of the Court of K. B. The governing principle was, that the buyer should not be deceived by any secret maneuver of the seller.

But the doctrine of those cases has since been considered as laid down rather too broadly. Lord Rosslyn and Sir William Grant have each questioned the soundness of the doctrine.[231] The latter seemed to think, that if bidders were employed by the owner merely for the purpose of taking advantage of the eagerness of them to screw up and enhance the price, it would be a fraud; but that he might lawfully, even without making the fact publicly known, employ a person to bid for

defensive precaution, and with a view to prevent a sale at an under value. This relaxation of the former rule was also approved of in *Steel v. Ellmaker*,[232] and the Chief Justice in that case suggested, that the tone of Lord Mansfield's morality was, perhaps, too lofty for the common transactions of business. He held, that the owner might lawfully instruct the auctioneer to bid in the goods for him at a limited price to prevent a sacrifice. In *Bramley v. Alt*,[233] it was held, that a sale was not fraudulent because a puffer had been employed, if there were real bidders who bid after the puffers had ceased; and in *Smith v. Clarke*, a specific performance was decreed against a vendee, though the person who bid immediately before him was employed to bid under the private direction of the vendor, for the purpose of preventing a sale under a specified sum.

It would seem to be the conclusion from the latter cases, that the employment of a bidder by the owner would or would not be a fraud, according to circumstances tending to show innocence of intention, or a fraudulent design. If he was employed *bona fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate a sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner to mislead the judgment, and inflame the zeal of others, it would be a fraudulent and void sale.[234]

But the original doctrine of the K. B. is the better doctrine, and the most just and salutary. In sound policy, no person ought, in any case, to be employed secretly to bid for the owner against the *bona fide* bidder at a public auction. It is fraud in law on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of sale; and such a doctrine is understood to have been recently declared at Westminster Hall.

It has been made a question, how far auction sales were within the provisions of the statute of frauds; but it is now understood to be settled, that the auctioneer is the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds, so as to bind the purchaser. Entering the name of the buyer by the auctioneer, in his book, is just the same thing as if the buyer had written his own name. The purchaser who bids, and announces his bid to the auctioneer, gives the auctioneer authority to write down his name. There is no difference in the construction of the fourth and seventeenth sections of the statute of frauds of 29 C. II. ch. 2.[235] as to what is a sufficient signing of the contract by the party to be charged. The English law, as originally declared in the case of *Simon v. Motivos*,[236] has been repeatedly recognized, and considered as the established doctrine in respect to auction sales of lands and chattels, by the English and American courts.[237]

X. Of the vendor's right of stoppage *in transitu*.

This right, which has been already alluded to, requires a more particular discussion. It is the right which the vendor, when he sells goods on credit to another, has of resuming the possession of the goods, while they are in the hands of a carrier or middle man, in their transit to the vendee, and before they arrive into his actual possession, on his becoming bankrupt or insolvent. The right exists only as between the vendor and vendee; and as the property is vested in the vendee by the contract of sale, it call be revested in the vendor during its *transitus* to the vendee, under the existence of the above circumstances.[238]

This right is very analogous to the common law right of lien. The latter right enables the vendor to detain goods before he has relinquished the possession of them; and this right of stoppage enables him to resume them before the vendee has acquired possession, and to retain them until the price he paid or tendered. If the price be paid or tendered, he cannot stop or retain the goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien.[239] It assumes its existence and continuance; and, as a consequence of that principle, the vendee, or his assignees, may recover the goods, on payment of the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment,[240] if he has been paid in part, he may stop the goods for the balance due him, and the part payment only diminishes the lien *pro tanto* on the goods detained.[241] There must be actual payment of the whole price, before the right to stop *in transitu*, in case of failure of the vendee, ceases. Though a bill of exchange has been accepted by the vendor, for the price, and endorsed over by him to a third person, even that will not take away the right; and if the bill be proved under a commission of bankruptcy against the vendee, it will only be considered a payment to the extent of the dividend.[242]

The right of stoppage *in transitu* came from the courts of equity, and was first established in *Wiseman v. Vandeput*,[243] and its apparent equity recommended the adoption of it in the courts of law as a legal right. It would be very unreasonable to allow the goods of the vendor to be appropriated to the payment of other creditors of the vendee, who fails before payment, and before the goods have actually reached him. The right has, accordingly, been greatly favored and encouraged, and many distinctions made relative to its continuance and termination; and yet it is now declared, that a court of equity, from whence the right originated, has no jurisdiction to interfere and support it by process of injunction. Lord Eldon said, there was no instance of stopping *in transitu* by a bill in equity.[244] The English law on the subject of this right, and the class of cases by which it is asserted and established, have been very generally recognized and adopted in our American courts.[245]

(1.) *Of the persons entitled to exercise this right.*

The right extends to every case in which the consignor is substantially the vendor, and it does not extend to a mere surety for the price, nor to any person who does not stand in the character of vendor or consignor, and rest his claim on a proprietor's right.[246] A factor or agent, who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor, as to be entitled to stop the goods.[247] So, a principal who consigns goods to his factor upon credit, is entitled to stop them if the factor becomes insolvent; and a person who consigns goods to another to be sold on joint account, is likewise to be considered in the character of a vendor, entitled to exercise this right.[248] The vendor's right is so strongly maintained, that while the goods are on the transit, and the insolvency of the vendee occurs, the vendor may take them by any means not criminal. The validity of the right depends entirely on the insolvency of the vendee.[249] It is not requisite that he should obtain actual possession of the goods before they come to the hands of the vendee. A demand of the goods of the carrier, or notice to him to stop the goods, or an assertion of the vendor's right by an entry of the goods at the customhouse, or a claim and endeavors to get possession, is equivalent to an actual stoppage of the goods.[250]

(2.) *Of that situation of the goods, which allows or defeats the right.*

The *transitus* of the goods, and consequently the right of stoppage, is determined, by actual delivery

to the vendee, or by circumstances which are equivalent to actual delivery.

There are many cases in which a constructive delivery will not destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. It will continue until the place of delivery be, in fact, the end of the journey of the goods, and they have arrived to the possession, or under the direction of the vendee himself. If they have arrived at the warehouse of the packer, used by the buyer as his own, or they are landed at the wharf where the goods of the vendee were usually landed and kept, the t:ansitus is at alt end, and the right of the vendor extinguished.[251] The delivery to the master of a general ship, or of one chartered by the consignee, is, as we have already observed, a delivery to the vendee or consignee, but still subject to this right of stoppage, which has been termed a species of *jus postliminii*.[252] And yet, if the consignee had hired the ship for a term of years, and the goods were put on board. to be sent by him on a mercantile adventure, the delivery would be absolute, as much as a delivery into a warehouse belonging to him, and it would bar the right of stoppage.[253]

The idea that the goods must come to the corporal touch of the vendee is exploded; and it is settled, that the *transitus* is at an end, if the goods have arrived at an intermediate place, where they are placed under the orders of the vendee, and are to remain stationary until they receive his directions to put them again in motion for some new and ulterior destination.[254] In many of the cases where the vendor's right of stopping *in transitu* has been defeated, the delivery was constructive only; and there has been much subtlety and refinement on the question, as to the facts and circumstances which would amount to a delivery sufficient to take away the right. The point for inquiry is, whether the property was to be considered as still in its transit; for if it has once fairly arrived at its destination, so as to give the vendee the actual exercise of dominion and ownership over it, the right is gone.[255] A complete delivery of part of an entire parcel or cargo, terminates the *transitus,* and the vendor cannot stop the remainder.[256]

A delivery of the key of the vendor's warehouse to the purchaser,[257] or paying the vendor rent for the goods left in his warehouse,[258] or lodging an order from the vendor for delivery with the keeper of the warehouse,[259] or delivering to the vendee a bill of parcels, with an order on the storekeeper for the delivery of the goods;[260] for demanding and marking the goods by the agent of the vendee at the inn where they had arrived, at the end of their journey;[261] or suffering the goods to be marked and resold, and marked again by the under purchaser;[262] have all been held to amount to acts of delivery, sufficient to take away the vendor's lien, or right of stoppage *in transitu*. On the other hand, if the delivery be not complete, and some other act remains to be done by the consignor, the right of stoppage is not gone.[263] So, while a vessel is performing quarantine at the port of delivery, and the voyage not at an end, the consignor's right of stoppage has been held not to be divested, even by a premature possession on behalf of the consignee.[264] That doctrine has, however, been since contradicted and overruled by Lord Alvanley, in *Mills v. Ball*,[265] and by Mr. J. Chambre, in *Oppenheim v. Russell*;[266] and the better opinion now is, that if the vendee intercepts the goods on their passage to him and takes possession as owner, the delivery is completed, and the right of stoppage is gone. But if the goods have arrived at the port of delivery, and are lodged in a public warehouse for default of payment of the duties, they are not deemed to have come to the possession of the vendee so as to deprive the consignor of his right.[267]

(3.) *Of acts of the vendee affecting the right*.

A resale of the goods by the vendee does not of itself, and without other circumstances, destroy the vendor's right of stoppage *in transitu*.[268] But if the vendor has given to the vendee documents sufficient to transfer the property, and the vendee, upon the strength of them, sells the goods to a *bona fide* purchaser without notice, the vendor would be divested of his right. A bill of lading usually has the word assigns: the goods are to be delivered to the consignee or his assigns, he or they paying freight; and a great question has accordingly arisen, and been very elaborately discussed and litigated in the English courts, whether the bill of lading could be negotiated by the consignee like a bill of exchange, and what legal rights were vested in the assignee. In the case of *Lickbarrow v. Mason*,[269] it was decided by the K. B. that a *bona fide* endorsement, for a valuable consideration, of a bill of lading by the consignee, to an assignee, who had no notice that the goods were not paid for, was an absolute transfer of the property, so as to divest the consignor of his right of stoppage *in transitu* as against such assignee. There is no case on mercantile law which has afforded a greater display of acute investigation. The judgment of the K. B. was reversed in the Exchequer Chamber, and Lord Loughborough took a masterly view of the whole subject, and completely overthrew the doctrine of the negotiability of bills of lading.[270] The case then went to the house of Lords, where Mr. Justice Butler most ably supported the decision of the K. B.[271] A new trial was awarded,[272] and a special verdict taken, and judgment given thereon without discussion; the judges of the K. B. declaring, that notwithstanding the decision in the Exchequer Chamber, they retained their former opinions.[273]

The question, therefore, remains to a certain degree, still floating and unsettled; though it seems now to be considered as the law at Westminster Hall, that if a bill of lading be assigned *bona fide* for a valuable consideration, it is a transfer of the property; and in the case of the consignee, if it be made without notice of the insolvency of the consignee, the property is absolutely vested in the assignee of the consignee, and the consignor has in that case lost his right to stop.[274] It is likewise considered to be the law in this country, that the delivery of the bill of lading transfers the property to the consignee; and it seems to be conceded, that the assignment of it by the consignee will pass the property.[275]

But it must not be understood that the consignee can, in all cases, by his endorsement of the bill of lading to a third person, even for a valuable consideration, and without collusion, defeat the right of the consignor to stop the goods. It will depend upon the nature and object of the consignment, and the character of the consignee. As a general rule, no agreement made between the consignee and his assignee, can defeat or affect this right of the consignor; and the consignor's right to stop *in transitu* is prior and paramount to the carrier's right to retain as against the consignee.[276] A factor having only authority to sell, and not to pledge the goods of his principal, cannot divest the consignor of the right to stop the goods *in transitu*, by endorsing or delivering over the bill of lading as a pledge, any more than he could by delivery of the goods themselves by way of pledge; and it is the same thing whether the endorsee was or was not ignorant that he acted as factor.[277]

If the assignee of the bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the assignee is not gone; and any collusion or fraud between the consignee and his assignee will, of course, enable the consignor to assert his right. But the mere fact that the assignee has notice that the consignor is not paid, does not seem to be sufficient to render the assignment defensible by the stopping of the cargo in its transit, if the case be otherwise clear of all circumstances of fraud; though if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of

the consignor.[278]

Sir William Scott observed,[279] that this privilege of stoppage was a proprietary right, recognized by the general mercantile law of Europe, as well as by that of England. The French law has gone very far towards the admission of the right, to the full extent of the English rule. It allows the vendor to stop the goods in their transit to the consignee, in case of his nonpayment or failure, provided the goods have not been in the mean time sold *bona fide* according to the invoices and bills of lading, or altered in their nature or quantity; and the estate of the insolvent vendee be indemnified against all necessary expenses and advances on account of the goods; and the assignees of the vendee will be entitled to the goods or, payment of the price,[280] The civil law, and the laws of those European nations which have adopted the civil law, do not consider the transfer of property to be complete, even by sale and delivery, without payment or security for the price, unless credit be given. In case of insolvency, the seller may reclaim the goods as being his own property, even from the possession of the buyer.[281]

NOTES

1. 2 Blacks. Com. 442. The definition of a contract in the English law, is distinguished for its neatness and precision. The definition in the Napoleon Code, No. 1101, is more diffuse; “a contract,” says that code, “is an agreement, by which one or more persons bind themselves to one or more others, to give, to do, or not to do, some thing.” This definition is essentially the same with that in Pothier, *Traite des Oblig*, No. 3.

2. *Rann v. Hughes*, 7 Term Rep. 350. note. *Ballard v. Walker*, 3 Johns. Cas. 60.

3. Inst. 1.2.2. *ex hoc jure gentium, omnes pene contractus introducti sunt*.

4. This principle of public law, says Toullier, Droit Civil, tome 10, 117 is well explained and enforced by M Bayard, in the *Nouvelle Collection de Jurisprudence*, tome 9, p. 759. and which he undertook in conjunction with M. Camus.

5. Dig. 19. 5. 5. Sir William Blackstone, in his Commentaries, vol. ii. 444, has borrowed and explained the distinctions in the Pan[dects], upon the four species of contracts, of *do ut des*, *do ut facias*, *facio ut des*, and *facio ut facias*.

6. 7 Term Rep. 350 note. 7 Bro. P. C. 550. S. C.

7. *Burnet v. Bisco*, 4 Johns. Rep. 235. *Thatcher v. Dinsmore*, 5 Mass. Rep. 301, 302. *Homer v. Hollenbeck*, 2 Day's Rep. 22.

8. *Bay v. Coddington*, 5 Johns. Ch. Rep. 54.

9. *Jones v. Ashburnham*, 4 East, 455. *Lent v. Padelford*, 10 Muss, Rep. 236.

10. *Livingston v. Rogers*, 1 Caines' Rep. 584. *Comstock v. Smith*, 7 Johns. Rep. 87. *Hicks v. Burhans*, 10 Johns. Rep. 243.

11. *Coggs v. Bernard*, 2 Lord Raym. 909.

12. Fitz Abr. tit. Obligation, pl. 13.

13. *Holman v. Johnson*, Cowp. 343. *Mackey v. Brownfield*, 13 Serg. & Rawle, 241, 242. *Griswold v. Waddington*, 16 Johns. Rep. 486.

14. *Eastbrook v. Scott*, 3 Vesey, 456. *St. John v. St. John*, 11 Vesey, 526. *Jackman v. Mitchell*, 13 Vesey, 581. The cases on the subject of considerations are well collected and stated in Comyn's Dig. tit. Action upon the Case upon Assumpsit, B. and F. 5, 6, 7, 8.; and the recent edition of Mr. Day is enriched with a view of the American cases. They may also be seen digested in Comyn on Contracts, vol. i. part. 1. ch. 2 and by Sir Wm. D. Evans in his Appendix, No. 2. to his Pothier on Obligations.

15. Pothier's *Traité du Contrat de Vente*, n. 3.

16. Dig. 18. 1. 57.

17. *Traité du Contrat de Vente*, n. 4.

18. Dig. 18. 1. 58.

19. No. 1601.

20. *Farrer v. Nightingal*, 2 Esp. Rep. 639.

21. *Curtis v. Hannay*, 3 Esp. Rep. 82.

22. Buller, J. 1 Term Rep. 136, and in *Compton v. Burn*, Esp. Dig. 13.

23. *Morgan v. Richardson*, 1 Campb. N. P. 40, note. *Fleming v. Simpson*, ibid. *Tye v. Gwynne*, 2 Campb. N. P. Rep. 346.

24. *Chambers v. Griffiths*, 1 Esp. Rep. 150.

25. 11 Johns. Rep. 525.

26. *Edwards v. McLeary*, Cooper's Eq. Rep. 308. *Fenton v. Browne*, 14 Vesey, 144.

27. *Abbott v. Allen*, 2 Johns. Ch. Rep. 519. *Barkhamsted v. Case*, 5 Conn. Rep. 528.

28. 11 Johns. Rep. 50.

29. *Lloyd v. Jewell*, 1 Greenleaf, 352.

30. 3 Pickering, 452.

31. 2 Wheaton, 13.

32. 1 Bay, 273.

33. Tanfield, Ch. B. in *Roswell v. Vaughan*, Cro. Jar. 196. *Medina v. Stoughton*, 1 Salk. 211. *Bree v. Holbech*, Doug. 654. Lord Alvanley, in *Johnson v. Johnson*, 3 Bos. & Pull. 170. *Urmston v. Pate*, cited in Sugden's Law of Vendors, 3d. ed. 346, 347, and in 4 Cruise's Dig 90. and in Cooper's Eq. Rep. 311. 1 Fonb. 366 note.

34. *Frost v. Raymond*, 2 Caines' Rep. 188. *Abbot v. Allen*, 2 Johns. Ch. Rep. 523.

35. *Tucker v. Gordon*, 4 S. C. Eq. Rep. 53, 58.

36. P*oole v. Shergold*, 1 Cox's Cas. 273.

37. Several cases of that kind are alluded to by Lord Eldon, in 6 Yesey, 678.; and see also *Oldfield v. Round*, 5 ibid. 508.

38. *Halsey v. Grant*, 13 Vesey, 78. *Stapylton v. Scott*, ibid. 426.

39. *Milligan v. Cooke*, 16 Vesey, 1. *King v. Bardeau*, 6 Johns. Ch. Rep. 38.

40. *Miller v. Smith*, 1 Mason, 437.

41. *Pringle v. Witten*, 1 Bay, 256. *Grey v. Handkinson*, ibid. 276. *Glover v. Smith*, 1 S. C. Eq. Rep. 433. *Wainwright v. Read*, ibid. 573.

42. 5 Binney, 355, 363.

43. Tanfield, Ch. Baron, Cro. J. 197.

44. *Medina v. Stoughton*, 1 Ld. Raym. 593. 1 Salk. 210.

45. Dig. 21. 2. 1.

46. Co. Litt. 102. a. 2 Blacks. Com. 452. Bacon's Abr. tit. Action on the Case, E. Comyn on Contracts, vol. ii. 263. Doug. 20. *Parkinson v. Lee*, 2 East, 314. *Defreeze v. Trumper*, 1 Johns. Rep. 274. *Dean v. Mason*, 4 Conn. Rep. 428. *Boyd v. Bopst*, 2 Dallas, 91. *Emerson v. Brigham*, 10 Mass. Rep. 197. *Swett v. Colgate*, 20 Johns. Rep. 196. *Kimmel v. Litchly*, 3 Yeates, 262. *Willing v. Consequa*, 1 Peters' Rep. 317. 12 Serg. & Rawl. 181. Tilghman, Ch. J. *Chism v. Woods*, 1 Hard. Ken. Rep. 531. *Lanier v. Auld*, 1 Murphy, 138. *Erwin v. Maxwell*, 2 ibid. 245. *Westmoreland v. Dixon*, 4 Haywood's Tenn. Rep. 227.

47. 2 Caines' Rep. 48.

48. 20 Johns. Rep. 196.

49. *Laing v. Fidgeon*, 6 Taunton, 108. *Gardiner v. Gray*, 4 Campbell's N P. 44. *Hastings v. Lovering*, 2 Picketing, 214. Woodworth, J. in *Swett v. Colgate*, 20 Johns. Rep. 204.

50. *Fisher v. Samuda*, 1 Camp. 190.

51. *Fielder v. Starkin*, 1 H. Black. 17. *Weston v. Downes*, Doug. 23. *Towers v. Barrett*, 1 Term Rep. 133. *Curtis v. Hannay*, 3 Esp. Rep. 82.

52. *Thornton v. Wynn*, 12 Wheaton, 183.

53. *Hunt v. Sylk*, 5 East. 449.

54. *Timrod v. Shoolbred*, 1 Bay, 324. *Whitefield v. McLeod*, 2 Bay, 380. *Lester v. Graham*, 1 Const. Rep. 182. *Crawford v. Wilson*, 2 Co Rep. 353.

55. 4 Conn. Rep. 428.

56. *Whitefield v. McLeod*, 2 Bay, 384.

57. *Parkinson v. Lee*, East, 314. *Sands v. Taylor*, 5 Johns. Rep. 395. *Bradford v. Manly*, 13 Mass. Rep. 139. Woodworth, J. in 20 Johns. Rep. 204.

58. *Mellish v. Motteaux*, Peake's Cases, 115. This case was afterwards overruled by Lord Ellenborough in *Baglehole v. Walters*, 3 Campb. 154. and the latter decision confirmed in *Pickering v. Dowson*, 4 Taunton, 779, but it was upon another point respecting the effect of a sale with all faults, and the principle of the decision as stated in the text remains unmoved. The same principle was urged in *Southerne v. Howe*, 2 Rol. Rep. 5, and it was stated, that if a man sells wine knowing it to be corrupt, an action of deceit lies against him, though there be no warranty.

59. *Hill v. Gray*, 1 Starkie's Rep. 352.

60. 1 Vesey, 96.

61. *Stuart v. Wilkins*, Doug . 18.

62. *Martin v. Morgan*, 1 Brod. & Bing, 289.

63. *Pidcock v. Bishop*, 3 Barnw. & Cressw. 695. *Malthy's case*, cited by Lord Eldon in 1 Dow's P. C. 294. *Smith v. Bank of Scotland*, 1 Dow, 272.

64. Grotius. b, 2. c. 12. sec. 9. Paley's Moral Philosophy, b. 3. ch. 7.

65. *Schuyler v. Russ*, 2 Caines, 202. *Dyer v. Hardgrave*, 10 Vesey, 507.

66. 3 Blacks. Com. 165. 2 Rol. Rep. 5.

67. *Laidlaw v. Organ*, 2 Wheaton, 178.

68. 1 Fonb. Tr. of Equity, 371, 372.

69. *Harvey v. Young*, Yelv. 21. *Baily v. Merrell*, 3 Bulst. 94. Cro. Jac. 386. *Davis v. Meeker*, 5 Johns. Rep. 354.

70. *Jendwine v. Slade*, 2 Esp. Rep. 572.

71. 1 Rol. Abr. 101. pl. 16. In the case of *Leakins v. Clissel*, 1 Sid. 146, 1 Lev. 102, the same law was declared, but a distinction was there taken between the false assertion touching the value of the property, and touching the rate of the previous rent, for the rent was of a matter of fact resting in the private knowledge of the landlord and his tenants, and the tenants might refuse to inform the purchaser, or combine with the landlord to mislead him. The court, in *Lysney v. Selby*, 2 Lord Raym. 1118. followed the decision in *Leakins v. Clissel*, though they considered it to be questionable; and the distinction seems to have been essentially disregarded in the Scotch case of *Kinaird v. Lord Dean*, cited by Mr. Sugden from 1 Coll. of Decis. 332. The doctrine in the case in Rolle was recently adopted by the Chief Justice of Maine, in the case of *Cross v. Peters*, 1 Greenleaf 389, and by the Chief Justice of North Carolina, in the case of *Fagan v. Newson*, 1 Badg. & Devereaux, 22.

72. *Vernon v. Keys*, 12 East, 632.

73. *Buxton v. Lister*, 3 Atk. 356.

74. *Seymour v. Delancey*, 6 Johns. Ch. Rep 222, where the cases on this point are collected and reviewed. Though the decision in that case was afterwards reversed in the Court of Errors, the general doctrines in it were not affected, but admitted. On one point, it was indeed essentially affected, for the reversal assumed the ground, that inadequacy of price was no obstacle to a decree in equity for a specific performance, unless it were so inadequate as to be conclusive evidence of fraud! (3 Cowen, 445.) On the reversal, the Court of Errors stood 14 to 10, and the Ch. J. was the only member of the Supreme Court who gave any opinion, and he was for affirming the decree. Such a reversal can hardly be deemed of sufficient force, on the mere footing of authority, to overturn old, and establish new principles.

Mr. Verplanck, in his learned and ingenious Essay on the Doctrine of Contracts, published at New York, in 1825, has arraigned, with considerable severity, the common law doctrine of *caveat emptor*; and he goes upon the ground, that the suppression by either party of any knowledge materially affecting the average market value of the commodity, is a fraud upon the other party, because there is an implied confidence, that each party in making the bargain, will communicate to the other his superior knowledge of facts affecting that value. On this ground, he condemns the decision in *Laidlaw v. Organ*. The fundamental error of his theory, consists in the assumption of a breach of implied confidence in the ten thousand cases in which no such implied confidence exists, and in which men deal with each other at arm's length, and with an entire and exclusive reliance upon their own judgment, knowledge, and examination. The case of marine insurance is different, and the parties do not deal in that instance on the presumption of equal knowledge and vigilance as to the subject matter of the contract, and hence a different rule of law prevails. The insurer is essentially passive, and is known to act, and professes to act, upon the information of the assured. In an insurance contract, the special facts, as Lord Mansfield has observed, Carter v. Boehm, 3 Burr. 1905, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. "The underwriter trusts to his representation," and proceeds upon confidence that he does not keep back any circumstance in his knowledge. Though the suppression should happen through mistake, without any fraudulent intention, the policy is void. The contract of insurance is formed upon principles peculiar to itself, and the common law maxim of *caveat emptor* has no application, and professes to have none. The common law doctrine of sales, and the doctrine of insurance, are each perfectly consistent with the facts and the mutual understanding which they respectively assume. They rest on different, but equally just and rational principles, and there is no jar between them, as the learned author of the essay I have alluded to very mistakingly supposes. So in the case of work done and articles made by a mechanic, the buyer professes to repose upon the superior knowledge and skill of the mechanic in his trade, and to know nothing of the mystery of the art; and if the latter does not furnish his work done in a workmanlike manner, he is guilty of a breach of an implied contract; *spondet peritiam artis*. The reason of the distinction between that case and the ordinary contract of sale, is very apparent; and I have no hesitation in saying, that the common law has carried the doctrine of disclosures by each party in the formation of the contract of sale, to every reasonable and practicable extent that is consistent with the interests of society. The maxim of *caveat emptor*, and that other maxim, *vigilantibus et non dormientibus jura subveniunt*, when discreetly applied, as in the English law, are replete with sound and practical wisdom.

75. *Upton v. Vail*, 6 Johns. Rep. 181.

76. 3 Term Rep. 51.

77. *Eyre v. Dunsford*, 1 East, 318. *Haycraft v. Creasy*, 2 East, 92. *Carr ex parte*, 3 Ves. & Bea. 110. *Harner v. Alexander*, 5 Bos. & Pull. 241. *Wise v. Wilcox*, 1 Day, 22. *Russell v. Clark*, 7 Cranch, 92. *Hart v. Tallmadge*, 2 Day, 381. *Patten v. Gurney*, 17 Mass. Rep. 182.

78. Dig. 50. 17.47.

79. Pothier, *Traité du Contrat de Mandat*. art. 21.

80. 2 Bro. 420.

81. *Parker v. Grant*, 1 Johns. Ch. Rep. 630.

82. 1 Ball & Beatty, 251, *Ellard v. Lord Llandaff*. 3 Atk. 383, *Buxton v. Lyster*.

83. *Traité du Contrat de Vente*, n. 233-241.

84. Pothier, ibid. No. 298.

85. Cicero de Officiis, lib. 3. s. 12-17, states the case of a corn merchant of Alexandria arriving at Rhodes in a time of great scarcity, with a cargo of grain, and with knowledge that a number of other vessels with similar cargoes had already sailed

from Alexandria for Rhodes, and whom he had passed on the voyage. He then puts the question, whether the Alexandrine merchant was bound in conscience to inform the buyers of that fact, or to keep silence, and sell his wheat for an extravagant price; and he answers it by saying, that in his opinion good faith would require of a just and candid man, a frank disclosure of the fact. *Ad fulem bonam statuit pertinere notum esse emptori vitium, quod nosset venditor. Ratio postulat ne quid indiose, ne quid simulate*. Grotius, (b. 2. c. 12. s. 9) and Pufendorf, (Droit de la Nature, liv. 5. ch. 3. s. 4) as well as Pothier and others, dissent from the opinion of Cicero, and hold, that the one party is only bound not to suffer the other to be deceived as to circumstances relating intrinsically to the substance of the article sold. Rutherforth, on the other hand, in his Institutes, vol. i. 226. coincides with Cicero as to the case of the merchant of Rhodes, and disagrees with Grotius, on whom he comments. It is a little singular, however, that some of the best ethical writers under the Christian dispensation, should complain of the moral lessons of Cicero as being too austere in their texture, and too sublime in speculation, for actual use. There is not, indeed, a passage in all Greek and Roman antiquity, equal in moral dignity and grandeur, to that in which Cicero lays it down as a fixed principle, that we ought to do nothing that is avaricious, nothing that is dishonest, nothing that is lascivious, even though we could escape the observation of gods and men. (De Of: 3. 8) How must the accomplished author, even of so exalted a sentiment, have been struck with awe, humiliation and reverence, if he had known that there then existed in the province of Judea, the records of sublimer doctrines; in which were taught the existence, the unity, the power, the wisdom, the justice, the benevolence, and all pervading presence of that high and lofty One that inhabits eternity, and searches all hearts, and understands all the imaginations of the thoughts of the children of men.

86. Noy's Maxims, ch. 24. 2 Blacks. Com. 448. 7 East, 571.

87. Hob. 41. 1 H. Blacks. 363. *Bloxam v. Sanders*, 4 Barn. & Cress. 941.

88. *Hanson v. Meyer*, 6 East 641.

89. 4 Barn. & Cress. 941.

90. Noy's Maxims, ch. 24. *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680.

91. L. N.Y. sess. 10 ch. 44. sect. 15.

92. Noy, *ub. sup*. S Touchstone, 224. *Bach v. Owen*, 5 Term Rep. 409.

93. 6 East 614.

94. *Sluby v. Hayward*, 2 A. Blacks. 504. *Hammond v. Anderson*, 4 Bos. & Puller, 69. *Sands & Crump v. Taylor & Lovett*, 5 Johns. Rep. 395.

95. *Langfort v. Tiler*, 1 Salk. 113. *Goodall v. Skelton*, 2 H. Blacks. 316

96. *Hanson v. Meyer*, 6 East 614. *Withers v. Lyss*, 4 Campb. 237. *Wallace v. Breeds*, 13 East. 522. *Busk v. Davis*, 2 Maule & Selw. 397. *Shepley v. Davis*, 5 Taunton, 617. *McDonald v. Hewett*, 15 Johns. Rep. 349.

97. *Rugg v. Minett*, 11 East, 210.

98. *Austen v. Craven*, 4 Taunton, 644. *White v. Wilks*, 5 ibid. 176.

99. Pothier, *Traité du Contrat de Vente*, No. 308. Code Napoleon, n, 1585. Civil Code of Louisiana, art. 2433.

100. *Haswell v. Hunt*, cited by Buller, J. in 5 Term Rep. 231. *Harris v. Smith*, 3 Serg. & Rawl. 20. *Chapman v. Lathrop*, 6 Cowen, 110.

101. *Leedom v. Philip*s, 1 Yates, 529. *Harris v. Smith*, 3 Serg. & Rawl. 20. *Palmer v. Hand*, 13 Johns. Rep. 434.

102. *Noble v. Adams*, 7 Taunton 59.

103. *Payne v. Shadbolt*, 1 Campb. 427.

104. *Hussey v. Thornton*, 4 Mass. Rep. 405. *Marston v. Baldwin*, 17 ibid. 606. S. P.

105. *Barrett v. Pritchard*, 2 Pickering, 512.

106. *Haggerty v. Palmer*, 6 Johns. Ch. Rep. 437, and see Lord Seaforth's case, 19 Vesey, 235, in which the vendor's lien was carried at least equally far.

107. Inst. 2. 1. 41. Pothier, *Traité du Contrat de Vente*, n. 322.

108. Ibid, n. 307.

109. The Code Napoleon, No. 1583, has dropped the rule of the civil, and followed that of the English common law, and it holds, that the property passes to the buyer as soon as the sale is perfected, without either delivery or payment. The civil code of Louisiana, art. 2431, follows the words of the Napoleon code.

110. *Evans v. Martell*, 1 Lord Raym. 271. *Dutton v. Solomonson*, 3 Bos. & Pull. 582. *Dawes v. Peck*, 8 Term Rep. 330. *Ludlows v. Bowne & Eddy*, 1 Johns. Rep.15. *Summerill v. Elder*, 1 Binney, 106. *Griffith v. Ingledew*, 6 Serg. & Rawle, 420. *King v. Meredith*, 2 Campb. 639.

111. *Inglis v. Usherwood*, 1 East, 515

112. *Coxe v. Harden*, 4 East. 211. *Brown v. Hodgson*, 2 Campb. 36.

113. Lord Hardwicke, 1 Atk. 171. Lord Kenyon, 7 Term Rep. 71.

114. *Wilkes & Fontaine v. Ferris*, 5 Johns. Rep. 335.

115. Lord Kenyon, 1 East, 194

116. Dig. 41. 2. 1. 21.

117. *Atkinson v. Maling*, 2 Term Rep. 462.

118. *Manton v. Moore*, 7 Term Rep. 67. *Stovald v. Hughes*, 14 East 303.

119. *Hollingsworth v. Napier*, 3 Caines, 182.

120. *Lucas v. Dorrion*, 7 Term Rep. 278. *Searle v. Keeves*, 2 Esp Rep 598.

121. Lord Ellenborough, 14 East 312.

122. *Jewett v. Warren*, 12 Mass. Rep. 300

123. *Hinde v. Whitehouse*, 7 East, 558,

124. 2 N. H. Rep. 318.

125. *Anderson v. Scott*, 1 Campb. 235, note.

126. *Chaplin v. Rogers*, 1 East, 192.

127. *Dutilk v. Ritchie*, 1 Dallas, 171.

128. *Hodgson v. Le Bret*, 1 Campb. 233.

129. *Elmore v. Stone*, 1 Taunton, 458.

130. *Howe v. Palmer*, 3 Barn. & Ald. 321.

131. Lord Loughborough, 1 H. Blacks. 363.

132. *Goodall v. Skelton*, 2 H. Blacks. 316.

133. *Kent v. Huskinson*, 3 Bos. & Pull. 233.

134. *Hodgson v. Le Bret*, 1 Campb. 233.

135. *Cooper v. Elston*, 7 Term Rep 14.

136. *Groves v. Buck*, 3 Maule & Selw. 178.

137. *Sands & Crump v. Taylor & Lovett*, 5 Johns. Rep. 395. *Adams v. Minick*, cited 5 Serg. & Rawle, 32. *Girard v. Taggart*, 5 Serg. & Rawle. 19.

138. Pothier, *Traité des Oblig*. No. 512. *Traité du Contrat de Vente*, No. 45, 46. 51, 52. Code Napoleon, n. 1609. Toullier's *Droit Civil Francais*, tom. 7, n. 90. Civil code of Louisiana, art. 2460. *Adams v. Minnick*, cited in Wharton's Dig. of Penn.

Cases, tit. Vendor, n. 76. *Lobdell v. Hopkins*, 5 Cowen, 516. Chipman's Essay on the Law of Contracts, p. 29, 30.

The code Napoleon, in respect to the contract of sale, and in respect to all other contracts, seems to be in a great degree a concise abridgment or summary of the writings of Pothier. The utility of the latter, and their great merit in learning, perspicuity, and accuracy of illustration, are far from being superseded or eclipsed by the simplicity and brevity of the code. The aid of the French civilians of the former school has been found as indispensable as ever. The Code Napoleon, and *Code de Commerce*, deal only in general rules and regulations. They are not sufficiently minute and provisional to solve, without judicial discussion, the endless questions that constantly arise in the business of life. M. Toullier has undertaken a commentary upon the French civil law, according to the order of the Code, which has already extended to twelve volumes, and, as far as I may be permitted to judge from a very imperfect knowledge of the French law, he appears to rival even Pothier himself, in the comprehensiveness of his plan, and in the felicity of its execution.

139. Pothier, *Traité des Oblig*. No. 5 12, 513.

140. Co. Litt. 210, b.

141. 1 Greenleaf, 120.

142. *Currier v. Currier*, 2 N.H. Rep. 75.

143. Essay on the Law of Contracts, for the Payment of Specific Articles, p. 25, 26.

144. Essay on the Law of Contracts, for the Payment of Specific Articles, p. 27.

145. *Stone v. Gilliam*, 1 Shaw 149.

146. *Lobdell v. Hopkins*, 5 Cowen 514.

147. *Scott v. Crane*, 1 Conn. Rep. 255. 5 ibid.76. *Mason v. Briggs*, 16 Mass. Rep . 453. *Slingerland v. Morse*, 8 Johns. Rep. 474.

148. Co. Litt. 207. a. Peytoe's case, 9 Co. 79. a. Bro tit. *Touts temps prist*, pl. 31.

149. Bro. *ub. sup.*

150. *Le Grew v. Cooke*, 1 Bos. & Puller, 332.

151. 1 N. H. Rep. 295.

152. *Nicholas v. Whiting*, 1 Root, 448. *Rix v. Strong*, 1 ibid. 55. *Slingerland v. Morse*, 8 Johns. Rep. 474.

153. Code Napoleon, No. 1257. Pothier, *Traité des Oblig*. No. 545.

154. Mr. Chipman, in the able essay to which I have already referred, supposes that the debtor may sell the goods which he so retains, if they be perishable articles, and he will be accountable for the net proceeds. He has reasoned well, and upon sound legal principles, in support of his position, that on the tender and refusal of specific articles, the debt is discharged on the one hand, and the title to the property transferred to the creditor on the other.

155. *Allen v. Bennet*, 3 Taunton, 199. *Ballard v. Walker*, 3 Johns. Cas, 60. *Seton v. Slade*, 7 Vesey, 265. *Clason v. Bailey*, 14 Johns. Rep. 484. *Douglas v. Spears*, 2 Nott & McC. 207.

156. *Stokes v. Moor*, 1 Cox 219. *Selby v. Selby*, 3 Merivale, 2. *Ogilvie v. Foljambe*, 3 ibid. 33. *Clason v. Bailey*, 14 Johns. Rep. 484. *Thornton v. Kempster*, 5 Taunton, 786. *Penniman v. Hartshorn*, 13 Mass. Rep. 87.

157. *Bailey & Bogert v. Ogdens*, 3 Johns. Rep. 399.

158. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 281. Abeel v. Radcliff, 13 Johns. Rep. 297. It was said, upwards of sixy ears ago, at Westminster Hal, that the statute of frauds, of 29 Charles II, had not been explained at a less expense than £100,000 sterling. I should suppose from the numerous questions and decisions which have since arisen upon it, that we might put down the sum at a million and upwards. How hazardous it would now seem to be to attempt to recast the statute in new language, or to disturb the order and style of its composition, considering how costly its judicial liquidation has been, and how applicable its provisions are to the daily contracts and practical affairs of mankind. It has been affirmed in England, that every line of it was worth a subsidy; and uniform experience shows how difficult it is by new provisions, to meet every contingency, and silence the tone of sharp, piercing criticism, and the restless and reckless spirit of litigation.

159. Lord Mansfield, 1 Burr. 474. Cowp 434. Ch. J. Dallas. 8 Taunton, 678. *Beals v. Guernsey*, 8 Johns. Rep. 446. Duncan,

J. 7 Serg. & Rawle, 89.

160. 2 Mason. 236.

161. *Cross v. Peters*. 1 Greenleaf, 376.

162. *Barnes v. Freeland*, 6 Term Rep. 80. *Richardson v. Goss*, 3 Bos. & Pull. 119.

163. Laws of N.Y. sess. 10. ch. 44. s. 1. and 2.

164. Lord Mansfield, Cowp. 434. Marshall, Ch. J. 1 Cranch, 316. *Robertson v. Ewell*, 3 Munf. 1. Story, J. 1 Gallison, 423.

165. 3 Co. 87.

166. 2 Bulst. 225.

167. S. Touch. p. 66.

168. Prec. in Ch. 285.

169. 1 Vesey, 348. 1 Atk. 165.

170. 1 Burr. 467.

171. Cowp. Rep. 432.

172. Haselinton v. Gill, 24 Geo. III. 3 Term Rep. 620, note. *Jarman v. Woolloton*, 3 Term Rep. 618.

173. 2 Term Rep. 587.

174. *Paget v. Perchard*, 1 Esp. N. P. Rep. 205. *Wordall v. Smith*, 1 Camph.,N. P. 332.

175. 2 Bos. & Pull. 59.

176. *Cole v. Davies*, 1 Lord Raym. 724.

177. *Lady Arundell v. Phipps*, 10 Vesey, 145.

178. *Watkins v. Birch*. 4 Taunton, 823. *Joseph v. Ingram*, 8 ibid. 838. *Latimer v. Batson*, 4 Barn. & Cresw. 652.

179. *Leonard v. Baker*, 1 Maule & Selw. 251.

180. *Dawson v. Wood*, 3 Taunton, 256.

181. 1 Brod. & Bing. 506

182. *Hamilton v. Russell*, 1 Cranch, 309.

183. *United States v. Cunningham*, 4 Dallas, 358. *Meeker v. Wilson*, 1 Gallison, 419. *Mair v. Glennie*, 4 Maule & Selw. 240.

184. *Alexander v. Deneale*, 2 Munf. 341. *Robertson v. Ewell*, 3 Munf. 1.

185. 3 South Carolina Eq. Rep. 229. *Croft v. Arthur*.

186. *De Bardeleben v. Beekman*. 1 South Carolina Eq. Rep. 346.

187. *Kennedy v. Ross*, 2 Const. Court, 12.

188. *Ragan v. Kennedy*, 1 Tenn. Rep. 91.

189. *Baylor v. Smithers*, 1 Littell. 112

190. *Daws v. Cope*, 4 Binney, 268. *Babb v. Clemson*, 10 Serg, & Rawle, 419.

191. *Levy v. Wallis*, 4 Dallas, 167. *Waters v. McClellam*, ibid. 208. *Chancellor v. Phillips*, ibid 213.

192. *Clow v. Woods*, 5 Serg, & Rawle, 275.

193. Bradley v. Wyndham, 1 Wils. 44.

194. *Cowden v. Brady*, 8 Serg. & Rawle, 510. *Dean v. Patton*, 13 ibid, 345.

195. *Chumar v. Wood*, 1 Halsted, 155. *Patten v. Smith*, 5 Conn. Rep. 196.

196. *Vick v. Kegs*, 2 Haywood, 126. *Falkner v. Perkins*, ibid. 224. *Smith v. Niel*, 1 Hawks. 341. *Trotter v. Howard*, ibid. 320.

197. *Howell v. Elliott*, 1826. 1 Badger & Dev. 76.

198. *Burrow v. Paxton*, 5 Johns. Rep. 258. *Beal v. Guernse*y, 3 Johns. Rep. 452.

199. 9 Johns. Rep. 337

200. 5 Serg. & Rawle, 285. 5 Conn. Rep. 200.

201. 19 Johns. Rep. 221.

202. 3 Cowen, 166.

203. The Chief Justice, in giving his opinion in this case, says, that the former Chief Justice who delivered the opinion of the Court in *Sturtevant v. Ballard*, intended, no doubt, to say, that possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained, I apprehend, with great respect, that the present Chief Justice is mistaken in his assumption. The Chief Justice who gave the opinion in that case in 1812, must have intended to be understood to maintain, that the fraud in the case of an absolute sale with possession continuing in the vendor, was an inference of law, for the following reasons: 1. Because that was the whole drift and purport of his argument and authorities; 2. Because he said, in so many words that no reason appeared in that case for withholding delivery of possession, and "the sale must, therefore, be considered, in judgment of law, as fraudulent and void against the creditor," and that "fraud was a question of law when there was no dispute about the facts, and that it was the judgment of law on facts and intents;" 3. Because he concluded by saying, "a voluntary sale of chattels, with an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors."

204. 1 Pickering, 288.

205. 2 Barn. & Ald. 134.

206. 2 Pickering, 607.

207. 3 Ibid. 255.

208. Haven v. Low, 2 N.H. Rep. 13.

209. *Pickstock v. Lyster*, 3 Maule & Selw. 371. *The King v. Watson*, 3 Price's Excheq. Rep. 6. *Wilt v. Franklin*, 1 Binney, 502. *Hendricks v. Robinson*, 2 John. Ch. Rep. 307, 308. It is also said to have been decided in Connecticut, in 1826, in the case of *Catlin v. The Savings Bank*, that the directors of an insolvent corporation may, equally with individuals, give preferences by assignment of their effects.

210. *Wiggery v. Haskell*, 5 Mass. Rep. 144. *Stevens v. Bell*, 6 ibid. 339.

211. *Marbury v. Brooks*, 7 Wheaton, 556. *Brooks v. Marbury*, 11 ibid. 78.

212. *Brown v. Minturo*, 2 Gallison, 557.

213. *Nicoll v. Mumford*, 4 Johns. Ch. Rep. 529. *Brooks v. Marbury*, 11 Wheaton, 97. *Gray v. Hill*, 10 Serg. & Rawle, 436.

214. *North v. Turner*, 2 ibid 243. *De Forest v. Bacon*, 2 Conn. Rep. 633.

215. Wharton's Dig tit. Deed, n. 70. *Pierpont & Lord v. Graham, MS*.

216. *Cheever v. Clark*, 7 Serg. & Rawle, 510. *Scott v. Morris*, 9 Serg, & Rawle, 123. *Wilson v. Kneppley*, 10 Serg. & Rawle, 439.

217. 4 Term Rep. 166.

218. *Burd v. Smith*, 4 Dallas, 76. *Hyslop v. Clarke*, 14 Johns. Rep. 458. *Seaving v. Brinckerhoff*, 5 Johns. Ch. Rep. 329. *Austin v. Bell*, 20 Johns. Rep. 442.

219. 5 Term Rep. 420.

220. *Riggs v. Murray*, 2 Johns. Ch. Rep. 580. *Murray v. Riggs*, 15 Johns. Rep. 571. *Austin v. Bell*, 20 Johns. Rep. 442. Southerland, J. and Wood worth, J., 5 Cowen, 547.

221. *Mackie v. Cairns*, 1 Hopkins, 373. 5 Cowen, 547, *Harris v. Summer*, 2 Pickering, 129. *Chartres v. Cairns*, decided in Louisiana, 1825, and cited in 5 Cowen, 578, note. *Passmore v. Eldridge*, 12 Serg. & Rawle, 198.

222. 2 Johns. Ch Rep. 582.

223. In the case of *Murray v. Riggs*, 15 Johns. Rep. 571, the Court of Errors held a debtor's assignment to be valid, though it in the first place reserved to the use of the grantors, until one year after they should be discharged by law from their debts, 2,000 dollars a year, and then gave preferences, and a power in the assignees to settle with the creditors on certain terms, and that the creditors who did not accept the conditions in one year, or should knowingly embarrass the objects of the deed, should be forever barred from any share under the assignment. Such a deed was held good, and the decree in chancery setting it aside reversed. Now, the same Court of Errors, in *Mackie v. Cairns*, have retraced their steps, and very properly held a deed much less obnoxious than that in *Murray v. Riggs*, absolutely and *in toto* fraudulent and void. This last decision appears to have been guided by sound policy and enlightened justice.

224. *Williams v. Millington*, 1 H. Blacks 81.

225. *Hardacre v. Stewart*, 5 Esp. N P. Rep. 103.

226. *Hanson v. Roberdeau*, Peake's Rep. 120.

227. *Calcraft v. Roebuck*, 1 Vesey. jun. 221. *Dyer v. Hargrave*, 10 Vesey, 505. *King v. Bardeau*, 6 Johns. Ch. Rep. 38.

228. *Payne v. Cave*, 3 Term Rep. 148.

229. Cowp. 395.

230. 6 Term Rep. 642.

231. *Condly v. Parsons*, 3 Vesey, 625. n. *Smith v. Clarke*, 12 Vesey, 477.

232. 11 Serg. & Rawle, 86.

233. 3 Vesey, 620.

234. *Hazul v. Dunham*, N.Y. Mayor's Court, July, 1819. *Morehead v. Hunt*, 1 Badger & Dev. N.C. Rep. in equity, 35.

235. Re-enacted, Laws of N.Y. sess. 10. ch. 44. sec. 11 and 15.

236. 3 Burr. 1921.

237. *Hinde v. W hitehouse*, 7 East, 558. Heath, J. in 1H. Blacks. 85. *Emmerson v. Healis*, 2 Taunton, 30. *White v. Proctor*, 4 Taunton, 209. *Kemeys v. Proctor*, 3 Ves. & Beam. 57. *McComb v. Wright*, 4 Johns. Ch. Rep. 659. *Cleaves v. Foss*, 4 Greenleaf, 1.

238. *Mason v. Lickbarrow*, 1 H. Blacks. 357. *Hodgson v. Loy*, 7 Term Rep. 440. *Bothlingk v. Inglis*, 3 East, 381. Burghall v. Howard, 1 H. Blacks. 365, n. *Oppenheim v. Russell*, 3 Bos. & Pul. 44.

239. 1 Kenyon, in *Hodgson v. Loy*, 7 Term Rep. 445.

240. Bremer v. Sowercropp, 1 Campb. 109.

241. *Hodgson v. Loy*, 7 Term Rep. 440. *Feise v. Wray*, 3 East, 93.

242. *Feise v. Wray*, 3 East, 93

243. 2 Vern. 203.

244. *Goodhart v. Lowe*, 2 Jacob & Walker, 349.

245. *Ludlows v. Bowne & Eddy*, 1 Johns. Rep. 16. *Parker v. McIver*, 1 S. C Eq. Rer. 281. *Stubbs v. Lund*, 7 Mass. Rep. 453. *The St. Joze Indiano*, 1 Wheaton, 212. *Wood v. Roach*, 2 Dallas, 180. *Walter v. Ross*, MS. Wharton's Dig. tit. Vendor, n. 80, 85. *Howall v. Davis* and C. 5 Munf. 34.

246. *Siffken v. Wray*, 6 East, 371.

247. *D'Aquela v. Lambert*, Amb. 399. *Feise v. Wray*, 3 East, 93;

248. Kinloch v. Craig, 3 Term Rep. 119. Newsom v. Thornton, 8 East, 17.

249. *The Constantia*, 6 Rob. Adm. Rep. 321.

250. *Walker v. Woodbridge*, Cooke's B. L. 494. *Northey & Lewis v. Field*, 2 Esp. Rep. 613. *Mills v. Ball*, 2 Bos. & PuL. 457. *Litt v. Cowley*. 7 Taunlon,169.

251. *Snee v. Prescott*, 1 Atk. 249. *Stokes v. La Riviere*, cited in 3 Term Rep. 466, and 3 East, 397. *Ellis v. Hunt*, 3 Term Rep. 464. *Richardson v. Goss*, 3 Bos. & Pul. 119. *Scott v. Pettit*, 3 Bos. & Pul. 469. *Smith v. Goss*, 1 Campb. 282. Lord Alvanly, in 3 Bos. & Pul. 48. *Dutton v. Solomonson*, 3 Bos. & Pul. 582. *Rowe v. Pickford*, 8 Taunton, 83.

252. *Bothlingk v. Inglis*, 3 East, 381. *Cox v. Harden*, 4 East, 211.

253. *Fowler v. McTaggart*, cited in 1 East. 522. *Wright v. Lawes*. 4 Esp. 82.

254. *Dixon v. Baldwon*, 5 East, 175.

255. *Wright v. Lawes*, 4 Esp. Rep. 82.

256. *Slubey v. Heyward*, 2 H. Blacks. 504. *Hammond v. Anderson*,4 Bos. & Pul. 69. Lord Ellenborough, 6 East, 627.

257. Lord Kenyon, 3 Term Rep. 468.

258. *Hurry v. Mangles*, 1 Camp 452.

259. *Harman v. Anderson*, 2 Campb. 243.

260. *Hollingsworth v. Rapier*, 3 Caines, 182.

261. *Ellis v. Hunt*, 3 Term Rep. 464.

262. *Stoveld v. Hughes*, 14 East, 308.

263. *Withers v. Lyss*, 4 Campb. 237. Bush v. Davis, 2 Maul. & Selw. 397.

264. Holst v. Pownal, 1 Esp. Rep. 240.

265. 2 Bos & Pul. 461.

266. 3 Bos & Pul. 54.

267. *Northey v. Field*, 2 Esp. Rep. 613. *Nix v. Olive*, cited in Abbott on Shipping, 426.

268. *Craven v. Rider*, 6 Taunton, 433. Lord Alvanley, 3 Bos. & Pull. 47. *Whitehouse v. Frost*, 12 East, 614. *Stoveld v. Hughes*, 14 East, 308.

269. 2 Term Rep. 63.

270. *Mason v. Lickbarrow*, 1 H. Blacks. 357.

271. 6 East, 17, *in notis.*

272. 2 H. Blacks. 211. 5 Term Rep. 367.

273. *Lickbarrow v. Mason*, 5 Term Rep. 683.

274. *Cumming v. Brown*, 9 East, 506. *Morrison v. Gray*, 2 Bingham. 260. *Walter v. Ross*, Wharton's Dig. tit. Vendor, n. 80.

275. *Griffith v. Ingledew*, 6 Serg. & Rawle, 429.

276. *Oppenheim v. Russell*, 3 Bos & Pull. 42.

277. *Newson v. Thornton*, 6 East, 17.

278. *Cumming v. Brown*, 9 East, 506.

279. 6 Rob. Rep. 325.

280. *Code de Commerce*, No. 576-580, 582.

281. Dig. 1. 1. 19. Domat., b. 4. tit. 5. s. 2, art. 3. Van Leewen's Comm. on the Roman Dutch Law, b. 4. c. 17. s. 3.

LECTURE 40

Of Bailment

BAILMENT is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered.[1]

There are five species of bailment, according to Sir William Jones, in his correction of Lord bit s enumeration of the different sorts of bailments. (1.) *Depositam*, or a naked deposit without reward. (2.) *Mandatum*, or commission, which is gratuitous, and by which the mandatary undertakes to do some act about the thing bailed. (3.) *Commodatum*, or loan for use without pay, and when the thing is to be restored *in specie*. (4.) A pledge, as when a thing is bailed to a creditor as a security for a debt. (5.) *Locatio*, or hiring for a reward.[2] I shall examine each of them in their order.

I. Of *depositam*.

This is a bailment of goods to be kept for the bailor, without a recompense; and as the hailee or depositary derives no benefit from the bailment, he is responsible, if there be no special undertaking to the contrary, only for gross neglect, or, in other words, for a violation of good faith.[3] He is not answerable for mere neglect, if the goods be injured or destroyed while in his custody, if he take no better care of his own goods, and they be also spoiled or destroyed. Mere neglect, in such a case, is not gross neglect; since the latter implies a breach of good faith, and means the want of that care which every man of common sense, how inattentive soever, takes of his own property.[4]

The main inquiry in this case is, what is the duty, and what is. the responsibility of the bailee.

In *Bonion's case*,[5] the delpositary had a chest containing plate and jewels deposited with him. The chest was locked, and he was not informed of the contents. In the night his house was broken open, and plundered, as well of the chest with its contents, as of his own goods. An attempt was made to charge the bailee; but there was no foundation for the charge, since the bailee used ordinary diligence, and the loss was by a burglary; and it was accordingly held, that the bailee was not answerable. Such a bailee, who receives goods to keep *gratis*, is under the least responsibilty of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them, for the keeping them as he keeps his own is an argument of his honesty.[6] "If," says Lord Holt, "the bailee be an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, by reason whereof the goods deposited are stolen, together with his own, he shall not be charged, because it is the bailor's own folly to trust such an idle fellow." As he assumes the trust gratuitously, he is bound to good faith. He is only answerable for fraud, or for that gross neglect which is evidence of fraud. Indeed, if such a bailee had undertaken to keep the goods safely, yet, as he has nothing for keeping them, he would not be responsible for the loss of them by violence.[7]

The Roman law was the same as to the responsibility of a depositary. He was only answerable under that law for fraud, and not for negligence. He was not answerable if the thing had been stolen from him, even though it had been carelessly kept. He who commits his goods to the care of a negligent friend, must impute the loss, not to his friend, but to his own want of prudence; or, as Bracton,[8] who copied this rule from the Institutes of Justinian,[9] observed, he must set down the loss to the account

of his own folly.

Lord Coke[10] laid down a different doctrine on the subject of the responsibility of a depositary. It was held in *Southcote's case*, that where a person received goods to keep safely, and they were stolen by one of his servants, he was responsible to the bailor for the loss. The reason of the decision was, that there was a special acceptance to keep safely, and the case afforded an inference that the bailee had not used that ordinary care and diligence which such a special acceptance required, and the goods were stolen by one of his own servants. It is supposed by Sir William Jones,[11] that the case itself may be good law; but the doctrine which Lord Coke deduced from it was not warranted by the case, nor by reason, or the general principles of law. Lord Coke said, there was no difference between a general acceptance to keep, and a special acceptance to keep safely; and he advised every one who received goods to keep, to accept specially to keep as his oven, and then he would not be responsible for the loss by theft. But the judges of the K. B. in *Coggs v. Bernard*,[12] expressly overruled every such deduction from *Southcote's case*; and they insisted that there was a material distinction between a general bailment and a special acceptance to keep safely. Lord Holt was of opinion, that Coke had improved upon *Southcote's case*, by drawing conclusions not warranted by it; and this has been shown more fully, and with equal acuteness and learning, by Sir William Jones; and I would recommend what he says upon that case, as a fine specimen of juridical criticism.

If the depositary be an intelligent, sharp, careful man in respect to his own affairs, and the thing entrusted to him be lost by a slight neglect on his part, the better opinion would seen to be, that he then is responsible. Pothier, says,[13] that this has been a question with the civilians, and he is of opinion, that the depositary would be liable in that case, for he was bound to that same kind of diligence which he uses in his own affairs, and an omission to bestow it was a breach of fidelity. But he admits that it would not be a very suitable point for forensic discussion, to examine into the character of the depositary; and that the inquiry into the comparative difference between the attention that he bestows on his own affairs and on the interest of others, would be a little difficult. An example is stated by Pothier,[14] to test the fidelity of the depositary. His house is on fire, and he removes his own goods, and those of the bailor are burned; is he then responsible? He certainly is, if he had time to remove both. If he had not, Pothier then admits, that a breach of faith cannot be imputed to him, for having saved his own effects in preference to those of another entrusted to his keeping. But if the goods intrusted to him were much more valuable than hisown, and as easily removeable, then he ought to rescue the deposited goods, and to look to them for an average indemnity for the loss of his own.

There are several cases in which a naked depositary is answerable beyond the case of gross neglect. He is answerable, 1. When he makes a special acceptance to keep the goods safely. 2. When he spontaneously and officiously proposes to keep the goods of another. He is responsible in such a case for ordinary neglect; for he may have prevented the owner from entrusting the goods with a person of more approved vigilance. Both those exceptions to the general rule on the subject, are taken from the digest,[15] and stated by Pothier and Sir William Jones. 3. A third exception is, when the depositary is to receive a compensation for the deposit. It then becomes a lucrative contract, and not a gratuitous deposit, and the depositary is held to ordinary care, and answerable for ordinary neglect; and the same conclusion follows, when the deposit is made for the special accommodation of the depositary.[16] A warehouseman, or depositary of goods for hire, being bound only for ordinary care, is not liable for loss arising from accident, when he is not in default; and he is not in default when he exercises due and common diligence.[17] In the case of goods bailed to be kept for hire, if

the hire be intended as a compensation for house room, and not a reward for diligence and care, the bailee is only bound to take the same care of the goods as of his own; and if they be stolen by his servants, without gross negligence on his part, he is not liable. This was so ruled by Lord Kenyon, in *Finucane v. Small*.[18]

While on the examination of this contract of gratuitous bailment, and which Lord Host calls a *depositam*, I have been struck with the learning and sagacity of Sir William Jones. But after studying Lord Holt's masterly view of the doctrine, and especially the copious treatise of Pothier, the admiration which was excited by the perusal of the English treatise has ceased to be exclusive. Pothier's essay on that particular species of bailment, is undoubtedly superior in the extent, precision and perspicuity of its details, and in the aptitude of the examples by which he explains and enforces his distinctions.[19]

It has been made a question, whether the depositary could lawfully restore the article deposited, to one out of two or more joint owners, and when the thing was incapable of partition. Sir William Jones refers to a case in 12 Hen. IV. 18, abridged in Bro. tit. Bailment, pl. 4. where it was held, that one joint owner could alone bring the action of detinue against the bailee, for if they were to sue separately, the court could not know to which of them to deliver the chattel. The Roman law,[20] states the case of a bailment of a sum of money sealed up in a box, and one of the owners comes to demand it. In that case, it is said the depositary may open the box, and take out his proportion only, and deliver it. But if the thing deposited cannot be divided, then it is declared, that the depositary may deliver the entire article to the one that demands it, on taking security from him for that proportion of the interest in the article which does not belong to him, and if he refuses to give the security, the depositary is to bring the article into court. This implies that it would not be safe to deliver the thing to one alone; and the rule was correctly laid down by Sir William Jones. The deposit cannot safely be restored by the bailee unless all the proprietors are ready to receive it, or one of them demands it with the consent of the rest.[21]

II. Of *mandatum*.

Mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed.

If the mandatary undertakes to carry the article from one place to another, he is responsible only for gross neglect, or a breach of good faith. But if he undertakes to perform some work relating to it, he is then bound to use a degree of diligence and attention suitable to the undertaking, and adequate to the performance of it.[22] In some cases he is answerable for slight neglect, and in others he is only bound to act with good faith.

A distinction exists between nonfeasance and misfeasance, that is, between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it. It is conceded in the English, as well as by the Roman law, that if a party makes a gratuitous, engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance. But Sir William Jones contends, that by the English law, as well as by the Roman law, an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be purely gratuitous. There is no doubt that this is the doctrine of the civil law; but it was

shown by the Supreme Court of this state, in *Thorne v. Deas*,[23] that Sir William Jones had mistaken some of the ancient English cases on this point, and that the uniform current of the decisions from the time of Henry VII. to this day, led to the conclusion, that a mandatary, or one who undertakes. to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages be averred.[24]

In the great case of *Coggs v. Bernard*, the defendant undertook *gratis* to carry several hogsheads of brandy from one cellar, and deposit them in another, and he did it so negligently and improvidently, that one of the casks was staved, and the brandy lost. The K. B. held, that the defendant was answerable for the damage on the ground of his neglect and carelessness, though he was not a common carrier, and though he was to have nothing for his trouble. If the mischief had happened by any person who had met the cart in the street, the bailee would not have been chargeable, but the neglect or want of ordinary care in that case was a breach of trust; and a breach of trust undertaken voluntarily is a good ground of action. Lord Holt admitted, that if the agreement had been executory, or to carry the brandy at a future time, the defendant would not have been bound to carry it; but in the case before him the defendant had actually entered upon the execution of the trust, and having done so, he was bound to use a degree of diligence and attention adequate to the performance of his undertaking.

The case of *Elsee v. Gatward*[25] is a decision of the K. B. to the same point. It was decided upon the doctrine of *Coggs v. Bernard*, and of the ancient authorities refer, red to by the court in that case. The court recognized, the justness of the distinction, that if a party undertakes to perform a work, and proceeds to the employment, he makes himself liable for any misfeasance in the course of that work. But if he undertakes without consideration, and does not proceed on the work, no action will lie against him for the nonfeasance, unless it be in special cases, at in the case of a common carrier, porter, ferryman, farrier or innkeeper, who are bound, from their situations in life, to perform the work tendered to them, or the employment assumed by them.

A similar decision to that in the K. B., was made in the C. B. in *Shiells v. Blackburne*.[26] A general merchant undertook, voluntarily, and without reward, to enter a parcel of goods for another, together with a parcel of his own of the same sort, at the custom house, for exportation; but he made an entry under a wrong denomination, whereby both parcels were seized. It was held, that he was not liable for the loss, inasmuch as he took the same care of the goods of his friend as of his own, and had not any reward for his undertaking, and he was not of a profession or employment that necessarily implied skill in what he undertook. The defendant in that case acted with good faith, and that was all that could be required. The case would have been different, if a ship broker, or a clerk in the custom house, had undertaken to enter the goods, because their situation and employment would necessarily imply a competent degree of knowledge in making such entries. So, if a surgeon should undertake gratis to attend a wounded person, and should treat him improperly, he would be liable for improper treatment, because his profession implied skill in surgery. It was held to be an act of negligence sufficient to render a gratuitous bailee responsible, for him to have turned a horse, after dark, into a dangerous pasture to which he was unaccustomed, and by which means the loss of the horse ensued.[27]

If a mandatary undertakes specially to do the work, he may, like a depositary, be answerable for casualties. So, if he spontaneously and officiously offers to do the act, he way be responsible beyond

the case of gross negligence, and be held to answer for slight lieglect.[28] There is reason to believe, that this head of *mandatum*, in the Essay on Bailment, was not examined with perfect accuracy, when the distinguished author undertook to prove from the English law, what he certainly failed to show, that an action lay for the nonfeasance in promising to do a thing gratuitously, and omitting altogether to do it. The civil law did undoubtedly contain such a principle; and Pothier, in his elaborate treatise, on the contract of *mandatum*,[29] adopts the powerful reasoning and very sound maxims of the civil law on the subject of the responsibility of the mandatary.[30] But the English law, as has been abundantly shown from the cases already referred to, never carried the liability of the mandatary to the same extent.

III. Of *commodatum*.

This is a bailment, or loan of an article for a certain time, to be used by the borrower without paying for it. Such a borrower is responsible for slight negligence. This loan for use is to be distinguished from a loan for consumption, or the *mutuum* of the Roman law. The latter was the loan of corn, wine, oil, and other things that might be valued by weight or measure, and the property was transferred. The value only was to be returned in equal quantity, and the borrower was to bear the loss of them, even if destroyed by inevitable accident. In the case of the *commodum*, or loan for use, as a horse, carriage, or book, the same identical article or thing is to be returned; and as it is a loan without pay or reward, the borrower is liable for slight neglect.

The Roman and the English law coincide in respect to the conclusions on this head. The borrower cannot apply the thing borrowed to any other than the very purpose for which it was borrowed, nor keep it beyond the time limited, nor detain it as a pledge for any demand he may otherwise have against the bailor. If the article perish, or be lost by accident, without any blame or neglect imputable to the borrower, the owner must abide the loss.[31] The owner cannot require greater care on the part of the borrower, than he had a right to presume the borrower was capable of bestowing. If a spirited horse be lent to a raw youth, and the owner knew him to be such, the circumspection of an experienced rider cannot be required, and what would be neglect in the one would not be so in the other.[32]

Pothier, who has given to the public an excellent treatise on this loan, says, that the borrower is bound to bestow upon the preservation of the thing borrowed, not merely ordinary, but the greatest care, and that he is responsible not merely for slight, but for the slightest neglect. The reason is, that this is a loan made gratuitously for the sole benefit of the borrower.[33] But the borrower its not liable for the loss of the thing by external and irresistible violence; as if he hire a horse for a journey, and he be robbed of the horse, without any neglect or imprudence on his part.[34] If, however, his house should be destroyed by fire, and he saved his own goods, and was not able to save the article borrowed without abandoning his own goods; in that case he must pay for the loss, because he had less care of the article borrowed than of his own property, and gave the preference to his own.[35] But if his own goods were more valuable than the articles borrowed, and both could not be saved, was the borrower bound in that case to prefet the less valuable article borrowed?

Pothier admits this to be a question of some difficulty; but he concludes, that the borrower must answer for the loss, because he was not limited to bestow only the same care of the borrowed article as of his own. He was bound to bestow the exactest diligence in the preservation of it, and nothing will excuse him but vis major, or inevitable accident.[36] The borrower is also responsible for the loss

of the article even by *vis major*, when the accident has been owing to his own imprudence; as if he borrows a horse to ride, and he quits the ordinary and safe road, or goes at a dangerous hour of the night, and is beset by robbers, and loses the horse, he is liable.[37] He is liable also for inevitable accident, if he had borrowed a horse of his friend in order to save his own, and concealed from his friend that he had one of his own equally proper for the occasion; as if a person borrowed of his friend a cavalry horse to use in battle, and concealed from him that he had one of his own, and the borrowed horse should be killed, he must pay for it, for this was a deceit practiced upon the lender; and nothing would exempt him from this responsibility but the fact that he had previously disclosed to his friend the truth of the case, and his disinclination to hazard his own horse.[38] The borrower is also responsible for loss by inevitable accident, if he has detained the article borrowed beyond the time he ought to have returned it, for the loss is then to be presumed to have arisen from his breach of duty.[39]

I have taken these explanations of the degrees of responsibility. in the case of a borrower for use without reward, from Pothier. In *Coggs v. Bernard*, Lord Ch. J. Holt lays down the same rules precisely; and he took them from Bracton, who borrowed them from the civil law, the great fountain from whence all the valuable principles on the subject of these various kinds of bailments have been extracted. It was reserved, however, for Pothier, to methodize, vindicate, and illustrate those principles, by a clearness of analysis which is admirable; and to shed light and luster, by means of his chaste style and elegant taste, upon this branch of the science of jurisprudence.

IV. Of pledging.

This is a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged. It is the *pignori acceptum* of the civil law; and, according to that law, the possession of the pledge (*pignus*) passed to the creditor; but the possession of the thing hypothecated (*hypotheca*) did not.[40] The pawnee is bound to take ordinary care, and is answerable for ordinary neglect, and no more; for the bailment is beneficial to both the debtor and creditor. The pawnee is secured in the payment of his debt and the pawnor is enabled thereby to procure credit.

Lord Holt, in *Coggs v. Bernard*, gives a clear and excellent summary of the English law on this species of bailment. The pawnee has a special property in the goods pawned; and if they be such as to be injured by use, as clothes or linen, for instance, then the pawnee cannot use them. But if they be such as not to be the worse for use, as jewels, earrings, or bracelets pawned to a lady, she to whom they are pawned may use them, though the use is at her peril, because she is at no charge in keeping the pawn. She will be responsible in every event for the loss or damage which may happen while she is using the jewels. If the pawn be of such a nature as to be a charge upon the pawnee, as a horse or cow, he may, in that case, use the pawn in a reasonable manner. He may ride the horse moderately, and milk the cow regularly, as if he were the owner; and if he derives any profit from the pledge, he must apply those profits towards his debt.[41]

In general, the law requires nothing extraordinary of the pawnee, but only that he shall take ordinary care of the goods; and if they should then happen to be lost, he may, notwithstanding, resort to the pawnor for his debt. If however, he refuses to deliver the pawn on tender of the debt, his special property then ceases, and he becomes a wrongdoer, and will be answerable, at all events, for any loss or damage which may afterwards happen to the pawn.[42] It was likewise admitted in *Morse v. Conham*, that the pawnee might assign over the pawn, and the assignee would take it under all the

responsibility of the original pawnee.

If the pawn be stolen from the pawnee, he is *prima facie* liable; for it would be evidence that he had not used ordinary care, and it would lay upon him to show, by the circumstances, that he was in no default. Sir William Jones[43] enters into a critical examination of the cases to prove that the pawnee is responsible, if the pawn be stolen or taken from him clandestinely, and not if it be robbed or taken from him by violence. The ground he takes is, that the loss of the pawn by theft is evidence of ordinary neglect; and he vindicates his principle against a contrary doctrine of Lord Coke, with great acuteness and learning. Lord Coke held,[44] that if the goods were delivered to one in pledge, and they were stolen, he should not be answerable for them; for he only undertook to keep them as his own. The opinion of Lord Holt would rather seem to agree with that of Coke, as he refers to him on this point without objection; and he says, that if the pawnee uses true diligence, and the pawn be lost, he is not responsible. Bracton uses the same language. If the pawnee bestows an exact diligence, and the pawn be lost by chance, he is not responsible for the loss.[45]

Bracton took all his principles from the Roman law; and Pothier has written a particular treatise upon this identical species of contract.[46] He discusses the question, what degree of care the pawnee is bound to bestow upon the pawn; and as it is a contract made for the reciprocal benefit of the contracting parties, the creditor is bound to bestow upon the preservation of the pledge ordinary care. He is bound, according to the civil law, to bestow that care which a careful man bestows upon his own property. He is not bound to bestow the exactest diligence, as in the case of a loan to use, which is beneficial to the bailee only, nor is he responsible for the smallest neglect. He is responsible for light, but not the lightest neglect, *de levi culpa*, and not *de lexissima culpa*.[47]

The rule would appear to be, that the pawnee was neither absolutely liable, nor absolutely excusable, if the pledge be stolen. It would depend upon circumstances, whether he was or was not liable. A theft may happen without even a slight neglect on the part of the possessor of the chattel; and I think it would be going quite far enough, to hold that such a loss is *prima facie* evidence of neglect, and that it lays with the pawnee to destroy the pre,uttrption. It is not sufficient, says Pothier, that the pawnee allede that the pledge is lost. He must show how it was lost, and that it was not in his power to prevent it. This was also the decision of the civil law.[48]

In the case of *Cortelyou v. Lansing*,[49] it was shown, by a careful examination of the old authorities, to have been the ancient and settled English law, that delivery was essential to a pledge, and that the general property did not pay, as in the case of a mortgage, but remained with the pawnor. If the pledge was not redeemed by the stipulated time, it did not then become the absolute property of the pawnee, but he was obliired to have recourse to process of law to sell the pledge; and until that was done, the pawnor was entitled to redeem. If the pledge was for as indefinite term, the creditor might, at any time, call niion the debtor to redeem by the same process of demand. Where no time was limited for the redemption, the pawnor had his own lifetime to redeem, unless the creditor, in the mean time, called upon him to redeem; and if he died without such call, the right to redeem descended to his personal representatives. The English law now is, that after the debt is due, the pawnee has the election of two remedies. He may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels, pledged for the payment of the debt.[50] But the pawnee is not now bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land; (though Lord Chancellor Harcourt once held otherwise;) and he may sell without judicial process, upon

giving reasonable notice to the debtor to redeem. This was so settled in the cases of *Tucker v. Wilson*,[51] and of *Lockwood v. Ewer*.[52] The notice to the party in such cases is, however, indispensable. This was conceded in *Tucker v. Wilson*, and it has been since so ruled in this country.[53]

The old rule existing in the time of Glanville, and which is now the rule on the continent of Europe and in Scotland, required a judicial sentence to warrant the sale.[54] The code Napoleon[55] has retained the same check, and requires a judicial order for the sale; and the code of Louisiana[56] has followed to same regulation. The civil law allowed the pawnee to sell it, case of default of payment on his own authority, but it required a two years notice to the debtor, by an ordinance of Justinian.[57] The English and American law, with the exception of Louisiana. is peculiar in the prompt and easy remedy which it places in the hands of the creditor, when the pawn is not under the control of a special agreement. But the creditor will be held at his peril to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale. The English law, especially in the equity courts, is vigilant and jealous in its circumspection of the conduct of trustees.

By the *lex commissoria* at Rome, the debtor and creditor might agree, that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of Constantine abolished this power, as unjust and oppressive, and having a growing asperity in practice.[58] Every agreement preventing the right of redemption, in mortgages of chattels as of lands, would, no doubt, be equally condemned in the English law.

A lien upon a pawn may, by agreement, be created to extend to cover subsequent advances. This has been considered to be the law in respect to mortgages and judgments;[59] but the power is subject to some qualification, as respects the rights of third persons. Lord Chancellor Cowper gave validity and operation to such a mortgage, as against a subsequent mortgagee, who had notice of the agreement appearing on the face of the first mortgage;[60] and in Connecticut it has been justly held, that the mortgage must contain within itself reasonable notice of the encumbrances, by stating the nature of those thereafter to arise, and the manner in which they were to be created, so that collusion and fraud may be avoided, and the extent of the encumbrances ascertained, by the exercise of ordinary discretion and diligence.[61] Though there be no express agreement that a pledge for a debt shall be held as a security for future loans, yet if circumstances warrant the presumption that a further loan was made upon the credit of the pledge, a court of equity will not suffer the debtor to redeein the pledge without payment of the further loan.[62] If, however, there be no reasonable ground for such a presumption, the better opinion is, that the pawnee will not be allowed to retain the pledge for any other debt than that for which it was made.[63]

In *Jarvis v. Rogers*,[64] this question was extensively discussed and the weight of opinion would seem to have been, that the pawnee could not retain the pledge, independent of a special agreement, for any other debt than that for which the chattel was specifically given, and that good faith would require the restoration of it, without deduction on account of any cross demand. This I think to be the better opinion. It was, however, stated in that case, that by the civil law the pawnee might retain the pledge, not only for the sum for which the pledge was taken, but for the general balance of accounts, unless there were circumstances to show that the parties did not so intend.[65] And if the pawnor has only a limited interest in the articles pawned, the pawnee cannot hold them against the person entitled in remainder, after the particular interest has expired;[66] and if a factor pledges the goods of his principal, the pawnee cannot detain them, not even to the extent of the loan.[67]

As every bailee has a qualified property in the subject of the bailment, and is responsible to the bailor in a greater or less degree for the custody of it, he, as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference, and a judgment obtained by one of them is a good bar to the action of the other.[68]

V. Of *locatum*, or hiring for a reward.

This is the fifth and last species of bailment remaining to be examined. This letting to hire is of three kinds; *locatio rei*, by which the hirer, for a compensation in money, gains the temporary useof the thing; *locatio operis faciendi*, or letting out of work and labor to be done, or care and attention to be bestowed by the bailee on the goods bailed, for a pecuniary recompense; *locatio operis mercium vehendarum*, or when goods are bailed to a public carrier or private person, for the purpose of being carried from one place to another, for a stipulated or implied reward.[69]

(1.) In the case of the *locatio rei*, or letting to hire, the hirer gains a qualified property in the thing hired, and the owner an absolute property in the price. This is a contract in daily use in the common business of life; and it is very important that the rules regulating it should be settled with clear and exact precision. The hirer is bound only to ordinary care and diligence, and is answerable only for ordinary neglect. This is sufficiently shown by Sir William Jones, in his subtle, but perfectly judicious criticism on the cases in the English and the Roman law.[70] The hirer is bound to bestow the same degree of diligence that all prudent men use in keeping their own goods; and if the thing hired be lost or damaged, by him, or by his servants acting under him, from the want of ordinary care and diligence, he is responsible. The care must rise in proportion to the demand for it; and things that may easily be deteriorated require an increase of care and diligence in the use of them. Negligence is a relative term; and the value of the article, and the means of security possessed by the bailce, are material circumstances in estimating the requisite care and diligence. That may be gross negligence in the case of a parcel of articles of extraordinary value, which in the case of another parcel, would not be so; for the temptation to theft is in proportion to the value.[71] Gaius uses the word *diligentissimus*, when the rule is applied in the Roman law to the case of an undertaking to remove a column from one place to another.[72]

(2.) The case of *locatio operis faciendi*, is where work and labor, or care and pains, are to be bestowed on the thing delivered, for a pecuniary recompense; and the workman for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. Every mechanic who takes any materials to work up for another in the course of his trade, as where a tailor receives cloth to be made into a coat, or a jeweller a gem to be set or engraved, he is bound to perform it in a workmanlike manner; he must bestow ordinary diligence, and that care which every man of common prudence, and capable of governing a family, takes of his own concerns. The bailee in this case is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force; he is only answerable for ordinary neglect.

The extent of the responsibility of an innkeeper for the horse or goods of his guest, whom he receives and accommodates for hire, has been a point of much discussion in the books. In general he is responsible for the acts of his domestics, and for thefts, and is bound to take all possible care of the goods and baggage of his guests deposited in his house, or entrusted to the care of his family or servants.

In *Calye's case*,[73] it was decided, upon the authority of the original writ in the register, (and which Lord Coke said was the ground of the common law on the subject,) that if a guest came to an inn, and directed that his horse be put to pasture, and the horse was stolen, the innkeeper was not responsible, in his character of innkeeper, for the loss of the horse. However, it was agreed in that case, that if the owner had not directed that the horse be put to pasture, and the innkeeper had done it of his own accord, he would be responsible. Perhaps this rule might admit of some limitations; for if the putting the traveler's horse to pasture in the summer season be the usual custom, as it is in many parts of this country, the consent or direction of the owner to that effect would be fairly presumed.

It was laid down in the same case in Coke, that the innkeeper was bound absolutely to keep safe the goods of his guest deposited within the inn, and whether the guest acquainted the innkeeper that the goods were there, or did not, and that he would in every event be bound to pay for the goods if stolen, unless they were stolen by a servant or companion of the guest. The responsibility of the innkeeper extends to all the moveable goods and chattels of his guest which are placed within the inn, (*infra hospitium*,) but it does not extend to trespasses committed upon the person of the guest. It is no excuse for the innkeeper that he was, at the time the goods of his guest were lost, sick or insane, for he is bound to provide careful servants.[74] In the modern case of *Bennet v. Mellor*,[75] the responsibility of innkeepers was laid down with great strictness, and even with severity. The plaintiff's servant came to an inn to deposit some goods for a week. The proposal was rejected, and the servant sat down in the inn as a guest, with the goods placed behind him, and very shortly thereafter they were stolen. It was held, that the innkeeper was liable for the goods, for the servant was entitled to protection for his goods during thetime he continued in the inn as a guest. It was not necessary that the goods should have been in the special keeping of the innkeeper, in order to make him liable. If they be in the inn, that is sufficient to charge him. It is not necessary to prove negligence in the innkeeper, for it is his duty to provide honest servants, according to the confidence reposed in him by the public, and he ought to answer civilly for their acts, even if they should rob the guests who sleep under his roof.

Rigorous as this law may seem, and hard as it may actually be in some instances, it is, as Sir William Jones observes, founded on the principle of public utility, to which all private considerations ought to yield. Travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers. and it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord. The Roman praetor held innkeepers responsible for the goods of their guests, on the same principle of public utility. It was necessary to confide largely in the honesty of such men, and if they were not held very strictly to their duty, they might yield to the temptation to commit a breach of trust.[76]

The responsibility of innkeepers, to the full extent of the English law, has been recognized in the courts of justice in this country. Thus, in *Quinton v. Courtney*,[77] the innkeeper was held liable for money stolen out of the saddle bags of the guest, which he had delivered to the servant, without informing him, or his master, that there was money in them. And in *Clute v. Wiggins*,[78] the innkeeper was held responsible for a theft of bags of grain in a loaded sleigh of a guest, which had been placed for the night in a wagon or outhouse appurtenant to the inn, with fastened doors. The sleigh was deemed *infra hospitium*, and the innkeeper liable, without any negligence being proved against him.

Under so extended a responsibility, it becomes very important that the nature of inns and guests, and

to whom the description applies, should be precisely understood.

In *Calye's case* it was declared, that common inns were instituted for passengers and wayfaring men, and that a neighbor who was no traveler, and lodged at the inn as a friend, at the request of the innkeeper, was not a guest whose goods would be under special protection. A house merely for lodging strangers for a season who came to a watering place, and furnishing hay, and stable room for their horses, and selling beer to them, and to none else, has been held not to be a public inn.[79] It must be a house kept open publicly for the lodging and entertainment of travelers in general for a reasonable compensation. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large indiscriminately, it is not a common inn.

In *Thompson v. Lacy*,[80] this subject was fully discussed; and it was decided, that a house of public entertainment in London, where provisions and beds were furnished for travelers, and all others capable of paying a suitable compensation for the same, was a public inn. The owner was subject to all the liabilities of an innkeeper, even though he kept no stables, and was not frequented by stage coaches and wagons from the country, and even though the guest did not appear to have been a traveler, but to have previously resided in furnished lodgings in the city. A lodging house keeper was one that made a contract with every person that came; but an inn, said one of the judges in that case, is a house, the owner of which holds out, that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received. If a guest applies for a room in an inn for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend to goods lost or stolen from that room.[81] Though a landlord cannot exonerate himself by merely handing over a key to his guest, yet if the guest takes the key, it will be a question of fact, whether he took it *animo custodiendi*, so as to exempt the landlord.

In this and other states, where inns and taverns are under statute regulations, their definition and character are contained in the statute. Inns and taverns in this state, are to be licensed[82] by the commissioners of excise; and it is usually a part, though not an essential part of the license, to retail strong and spiritous liquors under five gallons. There are licenses merely to sell strong and spiritous liquors under five gallons, granted to merchants and grocers, but they cannot be sold to be drank in the house or store where merchant's goods are sold; and there are other licenses to retail strong and spirit ous liquors granted to persons for the purpose of keeping an inn or tavern. Those persons so licensed are the true and proper innkeepers within the contemplation of our statute law, and probably the only persons to whom the rights and resposibility of an innkeeper attaches.

Every person to whom the license is granted for that purpose, must enter into a recognizance not to keep a disorderly inn or tavern; and the license is only to be given to persons of good moral character, and of sufficient abilities to keep an inn or tavern, and who have accommodations to entertain travelers. Every keeper of a public inn or tavern, except in the city of New York, is required by the act to keep at least two spare beds for guests, well provided, and good and sufficient stabling, grain, hay, or pasturage, for horses and other cattle belonging to travelers. Every innholder or tavernkeeper, who is licensed as such, is also required to put and keep up a proper sign on or adjacent to the front of his house; and every person who erects or keeps up such a sign without a license as an innkeeper, or sells spiritous liquors by retail to be drank in his house, outhouse, yard, or garden, without entering into recognizance as an innkeeper, is subjected to a penalty for every

offense.

Such a license is deemed to be indispensable for retailing liquors; and it is a personal trust, and cannot be assigned so as to enable one man to keep a tavern under a license to another.[83] It has, however, been held,[84] that a person may act as a tavern keeper, and retail liquors without license, when he acts *ex necessitate*; as when the tavern licenses of the town are expired, and the commissioners of excise are prevented from meeting to renew them.

In the case of letting to hire, the bailee must exercise a care, diligence and skill, adequate to the business he assumes: and if he fails in the ordinary care and skill which belong to his undertaking, and the bailor sustains damage he must answer for that damage. If, however, the delivery was of a nature to transfer the property, a different result would follow. In the case of a delivery to a goldsmith of a bar of silver to be made into vases, or an ingot of gold to be made into rings, by the civil law the whole property passed to the smith, and the employer was merely entitled as a creditor to have metal equally valuable returned in a certain shape.[85] If the metal in that case should be lost, even by irresistible force, the smith, as the owner of it, would be held to bear the loss, and the creditor to be entitled to his vase or ring; though it would be otherwise, if the same metal was to be returned in its new form.[86]

In the case of *Seymour v. Brown*,[87] a quantity of wheat was sent to a miller to be exchanged for flour, at the rate of a barrel of flour for every five bushels of wheat. The miller mixed the wheat with the mass of wheat of the same quantity belonging to himself and others, and before the flour was delivered, the mill, with all its contents, was destroyed by fire. It was held, upon the question who was to bear the loss, that as there was no fault or negligence imputable to the miller, he was not responsible for the loss, and that the property was not transferred. It was considered, that there was no sale within the intention of the parties. If the same identical wheat was to have been returned in the shape of flour, the decision was correct, according to the general principles of law applicable to the case. But as it did not appear to have been understood, that the wheat delivered was to be kept separate, and returned in flour, but only flour equal to wheat of such quantity and quality, and as the miller himself acted upon that understanding, the decision was not conformable to the true and settled doctrine. There was in that case a transfer of the property in the wheat to the miller, and he was bound, at his own risk, and at all events, to have returned the flour.

(3.) The *locatio operis mercium vehendarum*, is a contract relating to the carriage of goods for hire; and this is by far the most important, extensive and useful of all the various contracts that belong to the head of bailment. The carrier for hire, in a particular case only, is answerable for ordinary neglect; but if he be a common carrier, he is answerable for all accidents and thefts, and even for a loss by robbery. He is answerable for all losses that do not fall within the excepted cases of the act of God, or public enemies; and this has been the settled law of England for ages; and the rule is founded on the same broad principles of policy and convenience which govern the case of innkeepers.[88]

Common carriers are those persons who undertake to carry goods generally, and for all people indifferently, for hire, and with or without a special agreement as to price.[89] In this class of persons are included the owners of stage wagons and coaches, who carry goods, as well as passengers, for hire, wagoners, teamsters, cartmen, the masters and owners of ships, vessels, and all watercraft, belonging to internal, as well as coasting and foreign navigation, lightermen, ferrymen, and

wharfingers. They are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action.[90]

In *Morse v. Slue*,[91] it was decided, in the reign of Charles II by the court of K. B., upon great consideration, that the master of a vessel employed to carry goods beyond sea, in consideration of the freight, was answerable as a common carrier. It was admitted in that case, and afterwards declared by Lord Hardwicke in *Boucher v. Lawson*,[92] that, the action lay equally against masters and owners of vessels. The doctrine in those cases has been recognized ever since,[93] and it applies equally to the carrier of goods in the coasting trade from port to port,[94] and to a bargeman and hoyman upon a navigable river,[95] and to wharfingers.[96] They are all liable in their respective characters as common carriers, and to the whole extent of inland carriers, except so far as they may be exempted by the exceptions in the contracts of the charter party and bill of lading, or by statute. There is no distinction between a land and a water carrier; and so it was declared by Lord Mansfield, and the other judges of the K. B., in the case of *The Proprietors of the Trent Navigation v. Wood*; and the carrier is equally liable for the acts of his servants or agents as for his own.[97]

The proprietors of a stage coach do not warrant the safety of passengers in the character of common carriers, and they are not responsible for mere accidents to the persons of the passengers, but only for the want of due care.[98] It was held, also, by Lord Holt, that they were not answerable as carriers for the baggage of the passengers, unless a distinct price was paid for the baggage, and that it was not usual to charge for baggage unless it exceeded a certain amount in weight or quantity.[99] Whenever the owner of the coach becomes answerable as a carrier for the safety of the baggage, he is not discharged in consequence of any particular care over his baggage which the passenger may have voluntarily assumed.[100] The responsibility of the proprietors of post coaches is now usually so limited by means of special notice,[101] as probably to render this point quite unimportant.

The books abound with strong cases of recovery against common carriers, without any fault on their part; and we cannot but admire the steady and firm support which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case. In *Morse v. Slue*, armed persons had entered on board the vessel in the night time in the river Thames, under pretense of impressing seamen, and plundered the vessel; and in *Forward v. Pittard*,[102] the common carrier lost a parcel of hops by a fire, which in the night originated within one hundred yards of the place where he had deposited the hops, and, raging with irresistible violence, it reached and destroyed them.

The loss in both those cases was by inevitable misfortune, without the least shadow of neglect or fault imputable to the carrier; and yet Sir Matthew Hale in the one case, and Lord Mansfield in the other, delivered the unanimous opinion of the K. B. in favor of a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations. The rule was to prevent the necessit.y of going into circumstances impossible to be unravelled; and the law presumed against the public carrier, unless he could show it was done by public enemies, or such acts as could not happen by the intervention of man, as lightning and tempests. If it were not for such a rule, the carrier might contrive, by means not to be detected, to be robbed of his goods in order to share the spoil.[103] Sheriffs and jailers, in respect to debtors in custody, have been placed under the same responsibility as common carriers.[104]

The common carrier is answerable for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance.[105] But the rule is subject to a reasonable qualification; and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation which he is entitled to, in proportion to the value of the article entrusted to his care, and the consequent risk which he incurs; and it tends to lessen the vigilance that the carrier would otherwise bestow.[106]

If goods be destroyed by necessity, as by throwing them overboard from a vessel or barge, for the preservation of the vessel and crew in a tempest, the carrier is not liable.[107] The responsibility of the common carrier does not commence until there has been a complete delivery to him; and if, according to the usage of the business, it be a sufficient delivery to leave the goods on the dock, by or near the carrier's boat, yet this must be accompanied with express notice to the carrier.[108] When the responsibility has begun, it continues until there has been a due delivery by him, or he has discharged himself of the custody of the goods in his character of common carrier.[109] There has been some doubt in the books, as to what facts amounted to a delivery, so as to discharge the common carrier. If it be the usage of the carrier to deliver goods at the house to which they were directed, he is bound to do so, and to give notice to the consignee.[110]

In *Hyde v. The Trent and Mersey Navigation Company*[111] it was much discussed whether the carrier was bound to deliver to the individual at his house, or whether he discharged himself by delivery to a porter, at the inn in the place of destination. The opinion of the majority of the court, (though there was no decision on the point,) was, that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee with notice. The actual delivery to the proper person, is generally conceded to be the duty of the carrier;[112] and the consignee may take charge of the goods on their passage, and before they have arrived at the extreme or ultimate place of delivery, and the carrier's risk will then terminate.[113] In this state it was held, in *Ostrander v. Brown*,[114] that placing goods on the wharf is not a delivery to the consignee, so as to discharge the carrier, even though there was a usage to deliver goods in that manner. The carrier must not leave the goods on the wharf, even though there be an inability or refusal of the consignee to receive them.

As carriers by water were liable at common law to the same extent as land carriers, and as their responsibility was more extensive, and their risk greater, from the facilities for fraud and violence upon the water, it was deemed in England a proper case for legislative interference to a guarded and limited extent. The statutes of 7 Geo. II. c. 15. and 26 Geo. III. c. 86. and 53 Geo. III. c. 159. exempted owners of vessels from responslhlllty as common carriers for losses by fire; and provided further, that the owner should not be liable for the loss of gold, silver, diamonds, watches, jewels, or precious stones, by robbery or embezzlement, unless the shipper inserted in the bill of lading, or otherwise declared in writing to the master or owner of the vessel, the nature, quality, and value of the articles; nor should he be liable for embezzlements without his fault or privity, beyond the value of the ship and freight; nor should part owners in those cases be liable beyond their respective shares in the ship and freight.[115]

We have no such statute provisions in this country; but according to the modern English doctrine, which may be applicable with us, carriers may limit their responsibility by special notice of the extent of what they mean to assume. The goods in that case are understood to be delivered on the

footing of a special contract; and it is necessary, in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailee, and be clear, explicit, and consistent.[116] The doctrine of the carrier's exemption, by means of notice, from his extraordinary responsibility, is said not to have been known until the case of *Forward v. Pittard* in 1785;[117] and it was finally recognised and settled by judicial decision in *Nicholson v. Willan*,[118] in 1804. The language of the court in *Bodenham v. Bennett*,[119] and in *Garnett v. Willan*,[120] is, that those notices were introduced to protect the carrier only from extraordinary events, or from that responsibility which belongs to him as an insurer, and not from the consequences of the want of due and ordinary care and diligence. It has been strenuously urged in some of the cases, that there was no sound distinction as to the responsibility of the common carrier, between negligence and misfeasance of him or his servants. Be that as it may, it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants.[121]

The English judges have thought that the doctrine of exempting carriers from liability by notice had been carried too far; and its introduction into Westminster Hall has been much lamented.[122] I do not know whether the doctrine of restricting the responsibility of the carrier by notice, has been judicially established in this country; but I presume, it will readily be received, for there seems to be a disposition to abate the severity of the English rule.

In this state, the English law on the subject has been fully, explicitly, and repeatedly recognized in its full extent; and equally in respect to carriers by land and water, and equally in respect to foreign and inland navigation.[123] In *Elliott v. Rossell*, the whole doctrine was extensively considered; and it was uuderstood and declared, that a common carrier warranted the safe delivery of goods, in all but the excepted cases of the act of God and public enemies, and that there was no distinction between a carrier by land and a carrier by water, and whether the water navigation was internal or foreign, except so far as the exception is extended to perils of the sea by the special terms of the contract contained in the charter party or bill of lading. It was further shown, that the marine law of Europe went to the same extent, as did also the civil law, and the law of those nations in Europe which have made the civil law the basis of their municipal jurisprudence. It was supposed to be a principle prevailing equally in our American courts; and the cases of *McClure v. Hammond*,[124] and of *Bell v. Reed*,[125] were referred to as evidence of that fact. The principle appeared to be sound and wise, and to have a very general reception among nations.

But the late case of *Aymar v. Astor*,[126] would seem to have gone far to unsettle and reverse the former doctrine in this state, in respect to carriers by water. The case arose on error, from the Court of Common Pleas in New York, which had charged the jury that the owners of a vessel bringing goods from New Orleans to New York were liable as common carriers. The judgment was reversed on account of that charge; and it was held, that a master of a vessel was not responsible like a common carrier for all losses, except they happen by the act of God or the enemies of the country. He was responsible only for ordinary neglect; and it was a proper question of fact for a jury, whether the master had used ordinary care and diligence in carrying the goods.

In Pennsylvania, there has been a disposition also shown, to relax the stern policy of the English law in respect to carriers by water, though their Supreme Court have proceeded with great caution, and have not disturbed the rule in its foundations. It is adunitted,[127] that the English law is the law in Pennsylvania, as to carriers by land; but with respect to carries by water, the law was considered as

locally unsettled, particularly in respect to their interior waters, and as fairly open to investigation. The carrier on inland waters was held to be clearly liable for every accident which skill, care, and diligence could have prevented; but beyond that, it was competent for the common carrier to prove a usage different from the common law.[128] In Louisiana it is also stated, that the owners of a steamboat are not liable to the freighters for a loss, when the boat was destroyed by fire, in a case where proper diligence had been used.[129]

It has been the settled law in England since the case of *Lane v. Cotton*, [130] that the rule respecting common carriers does not apply to postmasters, and there is no analogy between them. The post office establishment is a branch of the public police created by statute, and the government have the management and control of the whole concern. The post masters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. In the case last referred to, the Post Master General was held not to be answerable for the loss of the exchequer bills stolen out of a letter while in the defendant's office.

The subject was elaborately discussed in *Whitfield v. Lord Le Despencer*,[131] and the same doctrine asserted. The Post Master General was held not to be responsible for a bank note by one of the sorters out of a letter in the post office. But a deputy postmaster is still answerable in a private suit for misconduct or negligence; as for wrongfully detaining an unreasonable time.[132] The English law on this subject was admitted in *Dunlop v. Munroe*,[133] to be the law of the United States, and a post master was considered to be liable in a private action for damages arising from misfeasance, or for negligence in his office in not safely transmitting a letter. Whether he was liable himself for the negligence of his clerks or assistants, was a point not decided; though if he were to be deemed responsible in that case, it would only result from his own neglect in not properly superintending the discharge of his duty in his office.

The general doctrines of agency and lien have a material bearing on this subject of bailment; but as they are essentially connected with mercantile transactions, their extent and importance will require a separate discussion.

NOTES

1. 2 Blacks Com. 452. Pothier, *Traité du Contrat de Dépŏt*, No. 1.
2. Jones' Essay on the Law of Bailments, p.27, 1st edit. 1790.
3. *Foster v. The Essex Bank*, 17 Mass. Rep. 479, in which the doctrine of bailment was very ably and learnedly discussed.
4. Jones' Essay, p. 90-93. Lord Holt, in *Coggs v. Bernard*, 2 Lord Raym. 913.
5. Year Book, 8 Edw. II. Fitz. Abr. tit. Detinue, p1. 59. and cited by Lord Holt in 2 Lord Raym. 914, and in Jones on Bailment, p. 28.
6. Wood's Institutes of the Civil Law, 218.
7. Lord Holt, in *Coggs v. Bernard*, 2 Lord Raym. 915. Jones on Bailment, p. 34.
8. Lib. 3. c. 2. 99. b.
9. Inst. 3. 15. 3.
10. Co. Litt. 89. a. b. 4 Co. 83.

11. Jones on Bailment, 32, 33.

12. 2 Lord Raym. 909.

13. *Contrat de Dépôt*, No. 27.

14. Ibid. No. 29.

15. Dig. 16. 3. 1. 35.

16. Pothier, ibid. n. 30, 31, 32. Jones on Bailment, 37, 38.

17. *Garside v. The Proprietors of the Trent Navigation*, 4 Term Rep. 581. *Cailiff v. Danvers*, Peake N. P. 114. *Thomas v. Day*, 4 Esp. N. P. 262.

18. 1 Esp. N. P. Rep. 315,

19. Essay on Bailment, p. 39.

20. Dig. 16. 3. 1. 36.

21. *May v. Harvey*, 13 East, 197. The Code Napoleon says, that the depositary must not give up the thing deposited, except to the order of him who deposited it; and if he who made the deposit dies, and there be several heirs, it must be yielded up to them each according to his share and portion; and if the thing deposited cannot be divided, the heirs must agree among themselves as to the receiving it. Art 1937, 1939. The Civil Code of Louisiana has adopted the same provisions; art. 2920, 2922, and both those codes leave the inference to be drawn, that if the thing be indivisible, it cannot safely be delivered to one of two or more claimants, without their joint agreement or consent.

22. Wood's Inst. of the Civil Law, 212. Jones on Bailment, 40. 93. *Shiells v. Blackburne*, 1 H. Blacks. 158.

23. 4 Johns. Rep. 84.

24. *Elsee v. Gatward*, 5 Terra Rep. 143.

25. 5 Term Rep. 143.

26. 1 H. Blacks. 158.

27. Booth v. Wilson, 1 Barn. & Ald. 59.

28. Jones on Bailment, 41. 48. 94.

29. *Traité du Contrat de Mandat.*

30. See Dig. 17. tit. 1. and Inst. 3 tit. 27, and Code 4 tit. 35. on the Contract of *Mandalum*.

31. Noy's Maxims, ch. 43. p. 91. Jones on Bailment, p. 49, 50.

32. Jones on Bailment, p. 49, 50. Pothier, *Traité du Prêt à Usage*, No. 49.

33. *Traité du Prêt à Usage*, No. 48, 49.

34. Ibid. No. 55, 66.

35. Ibid. No. 56.

36. Ibid. No. 56.

37. Ibid. No. 57.

38. Pothier, *Traité du Prêt à Usage*, No. 59.

39. Ibid. No. 60.

40. Dig. 13. 7. 9. 2.

41. *Mores v. Conham*, Owen, 123. Pothier, *Contrat de Nantissement*, 23, 35, 36. Civil code of Louisiana, art. 3135.

42. 2 Lord Raym. 916, 917.

43. Essay on Bailment, p. 33, 59, 60, 62, 63.

44. Co. Litt. 89. a. 4 Co. 83. b.

45. Bracton. 93. b.

46. Pothier, *Contrat de Nantissement*.

47. Ibid. n. 32, 36.

48. *Contrat de Nantissement*. No. 31.

49. 2 Caines' Cases in Error, 200.

50. *Demandray v. Metcalf*, Prec. in Ch. 419. Gilbert's Eq. Rep. 104. *Kemp v. Westbrook*, 1 Vesey, 278. *Vanderzee v. Willis*, 3 Bro. 21.

51. 1 P. Wm. 261. 1 Bro. P. C. 494.

52. 2 Atk. 303.

53. *De Lisle v. Priestman*, 1 Brown's Penn. Rep. 179.

54. Glanville, lib. 10. c. 6 and 8. Huber's *Praelec* tom. 3. 1072. s. 6. *Perezius in Cod*. tom. 2. 63. s. 8. Domat, vol. i, 362. s. 9, 10. Ersk. Inst. vol. 2. 455. Pothier, *Contrat de Nantissement*, No. 24.

55. Art. 2078.

56. Art. 3132.

57. Code 8. 34. 3. 1. See also Dig. 13. 7. 4.

58. Code 8. 35. 3. Hub tom. 3. 1038. s. 17. 1 Domat. 362. s. 11.

59. *United States v. Hooe*, 3 Cranch, 73. *Skirras v. Caig & Mitchell*, 7 Cranch, 34. *Hendricks v. Robinson*, 2 Johns. Ch Rep. 309. *Livingston v. McInlay*, 16 Johnson, 165. *Lyle v. Ducomb*, 5 Binney, 585.

60. *Gordon v. Graham*, 7 Viner, 52. E. pl. 3.

61. *Pettibone v. Griswold*, 4 Conn. Rep. 158. *Stoughton v. Pascq*, 5 Conn. Rep. 442.

62. *Demandray v. Metcalf*, Prec. in Ch. 419. 2 Vern. 691.

63. *Ex parte Ockenden*, 1 Atk. 236. *Jones v. Smith*, 2 Vesey, jun. 372. *Vanderzee v. Willis*, 3 Bro. 21. But see *Adams v. Claxton*,6 Vesey, 226, where the authority of the two last cases is somewhat disturbed.

64. 15 Mass. Rep. 389.

65. Code, 8. 27. Heinecc. *Elem. Jur*. sec. ord. pand, p. 4. s. 46. and Hub. *Praelec*. lib. 20. tit. 6, s. 1. were referred to in support of the doctrine in the civil law, though there were other cases to show that good faith required a restoration of a deposit, upon payment of the specific debt only. Code 4. 31. 14. 4. 34. 11.

66. *Hoare v. Parker*, 2 Term Rep. 376.

67. *Paterson v. Tash*, 2 Str 1178. Daubigny v. Duval, 5 Term Rep. 604. *McCombie v. Davies*, 7 East. 5.

68. *Flewellin v. Rave*, 1 Bulst. 68. Booth v. Wilson, 1 Barn. & Ald. 59.

69. Jones on Bailment, 27. 90.

70. Essay on Bailment, p. 66-69.

71. *Batson v. Donovan*, 4 Barn. & Ald. 21.

72. Dig. 19. 2. 25. 7. Sir William Jones, in his Essay, p. 67 says, that the superlative *diligentissimus* was here improperly

applied, and that it would be a case only of ordinary care. But Ferriere, in his Commentaries upon the Institutes, tom. 5. 138, thinks otherwise; and that Gaius was speaking of things that might easily be deteriorated, and would require the most exact diligence for their preservation. The case would depend upon circumstances. Gaius was speaking not of unhewn blocks of granite, but of columns, which implied, in the midst of the splendid architecture of Rome, productions of great labor and skill; and in such a case it would, no doubt, require the utmost attention, to avoid injury to the polished shaft or capital; and especially if that capital was finished in the Corinthian style, or surmounted by an entablature, adorned with all the beauty and elegance of the Grecian art.

73. 8 Co. 32.

74. *Cross v. Andrews*, Cro. E. 622.

75. 5 Term Rep. 273.

76. Dig. 4. 9. 1.

77. 1 Haywood's N. C. Rep. 40.

78. 14 Johns. Rep. 175.

79. *Parkhurst v. Foster*, 1 Salk. 387. Carth. 417, S. C.

80. 3 Barn. & Ald. 283.

81. *Burgess v. Clements*, 4 Maule & Selw. 306. *Farnworth v. Packwood*, 1 Ho1t's N. P. 209.

82. Act for regulating Inns and Taverns, Laws of N.Y. sess. 24. ch. 164.

83. *Alger v. Weston*, 14 Johns. Rep. 231.

84. *Palmer v. Doney*, 2 Johns. Cas. 346.

85. Dig. 19. 2. 31.

86. Jones on Bailment, 78, 79.

87. 19 Johns. Rep. 44.

88. Co. Litt. 89. a. 1 Rol. Abr. 2. c. pl. 5. *Woodleife v. Curtis*. Lord Holt in *Coggs v. Bernard*, 2 Lord Raym. 918. Lee, Ch. J in *Dale v. Hall*, 1 Wils. 231. *Proprietors of the Trent Navigation v. Wood*, 3 Esp. Rep. 127.

89. *Gisbourn v. Hurst*, 1 Salk. 249. Lawrence, J. in *Harris v. Packwood*, 3 Taunton, 264.

90. *Jackson v. Rogers*, 2 Shaw. 332. Lord Kenyon, and Ashhurst, J. in *Elsee v. Gatwood*, 5 Term Rep. 143. Holroyd, J. in 4 Barn. & Ald. 32.

91. 1 Vent. 190, 238. 2 Lev. 69.

92. Cases temp. Hardw. 183.

93. See *Goff v. Clinkard*, cited in 1 Wils. 282.

94. *Dale v. Hall*, 1 Wils. 281. *Proprietors of the Trent Navigation v. Wood*, 3 Esp. 127.

95. *Kich v. Kneeland*, Cro. Jac. 338. *Wardell v. Mourillyan*, 2 Esp. N. P. Cas. 693.

96. *Ross v. Johnson*, 5 Burr. 2825.

97. *Cavenagh v. Such*, 1 Price's Exch. Rep. 328.

98. *Aston v. Heaven*, 2 Esp. N. P. 535. *Christie v. Griggs*, 2 Campb. 79.

99. *Middleton v. Fowler*, 1 Salk. 282. *Upshare v. Aidee*, Comyn's Rep. 25.

100. Chambre. J. in *Robinson v. Dunmore*, 2 Bos. & Pull. 416.

101. *Clarke v. Grey*, 6 East, 564.

102. 1 Term Rep. 27.

103. Jones on Bailment, 79-85. Lord Holt in *Coggs v. Bernard*, 2 Lord Raym. 909. *Barclay v. Heygena*, cited in 1 Term Rep. 33. *Trent Navigation v. Wood*, 3 Esp. N.P. Rep. 127. *Hyde v. Trent and Mersey Company*, 5 Term Rep. 389.

104. *Elliott v. Duke of Norfolk*, 4 Term Rep. 789. *Alsept v. Evles*, 2 H. Blacks. 108. The Code Napuleon, and the Civil Code of Louisiana have declared in the same words that carriers and watermen were subject to the like obligations and duties as tavern keepers, and that they were responsible for goods entrusted to them, against loss and damages by theft or otherwise, unless they could show, that the loss proceeded from *force majeure*, or uncontrollable events. Code Napoleon, art. 1929, 1953, 1954, 1782, 1784. Code Louis, art. 2722, 2725, 2910, 2939.

105. *Tichburne v. White*, 1 Str. 145.

106. *Gibbon v. Paynton*, 4 Burr. 2298. *Clay v. Willan*, 1H. Blacks. 298. *Batson v. Donovan*, 4 Barn. & Ald. 21.

107. *Mouse's case*, 12 Co. *Smith v. Wright*, 1 Caines' Rep. 43.

108. *Packard v. Getman*, 6 Cowen, 757, and see also Selway v. Holloway, 1 Lord Raym. 46. *Cobban v. Downe*, 5 Esp. Rep. 41.

109. *Garside v. Trent and Mersey Navigation*. 4 Term Rep. 581. *Hyde v. The Trent and Mersey Navigation*, 5 Term Rep. 389.

110. *Golden v. Manning*, 2 Wm. Blacks. Rep. 916.

111. 5 Term Rep. 389.

112. *Smith v. Horne*, 8 Taunton, 144. *Bodenham v. Bennett*, 4 Price, 31. *Garnett v. Willan*, 5 Barn. & Ald. 53. *Duff v. Budd*, 3 Brod. & Bing. 177.

113. *Strong v. Natally*, 4 Bos. & Pul. 16.

114. 15 Johnson's Rep. 39.

115. *Wilson v. Dickson*, 2 Barn. & Ald. 2.

116. *Butler v. Heane*, 2 Campb. 415. *Cobden v. Bolton*, ibid. 108. *Gouger v. Jolly*, Holt, 317. *Mayhew v. Eames*, 3 B. & Cresswell, 601.

117. Purrough, J., 8 Taunton, 146.

118. 5 East, 507.

119. 4 Price Exch. Rep. 31.

120. 5 Barn. & Ald. 53.

121. *Ellis v. Turner*, 8 Term Rep. 531. *Beck v. Evans*, 17 East, 247. *Smith v. Horne*, 8 Taunton, 144. *Bickett v. Willan*, 2 Barn. & Ald. 356. *Batson v. Donovan*, 4 Barn. & Ald. 21. *Garnett v. Willan*, 5 Barn. & Ald. 52. *Sleat v. Fagg*, 5 Barn. & Ald. 342.

122. See *Smith v. Horne*, 8 Taunton, 144.

123. *Colt v. McMechan*, 6 Johns. Rep. 160. *Schieffelin v. Harvey*, 6 Johns. Rep. 170. *Elliott v. Russell*, 10 Johns. Rep. 1. *Kemp v. Coughtry*, 11 Johns. Rep. 107.

124. 1 Bay's Rep. 99.

125. 4 Binney, 127.

126. 6 Cowen, 266.

127. *Gordon v. Little*, 8 Serg. & Rawle, 533.

128. I apprehend, with great deference, that the case of *Aymar v. Astor*, so far as it meant to decide that masters of vessels were not liable as common carriers, (and it appears to have meant that, and that only,) is not to be taken for sound law. A

distinguished rule of commercial policy, which had been settled in England, and regarded as fundamental ever since the great case of *Morse v. Slue*, and, which had been recognized, and acted upon, and indicated, by the Supreme Court of this state, in the cases of *Colt v. McMechan*, *Schieffelin v. Harvey*, *Watkinson v. Laughton*, *Elliott v. Russell*, and *Kemp v. Coughtry*, cannot be thus suddenly demolished. If the court had placed the decision on the ground that the damage to the goods was occasioned by a peril of the sea, the rule would have been preserved, and the carrier would have been protected by the exception in his bill of lading. But the Court did not decide the cause on that point, nor could they, upon the facts stated, without overruling the English authority. They went upon the broad ground that masters of vessels were not common carriers, nor liable as such; and this appears to me to be overturning first principles, and rendering the law of the land vague and uncertain. No such judicial reformation of the law is thought of in England: and in relation to this very subject, a bill was introduced into parliament, and passed the House of Commons, since the year 1795, to reduce the liability of owners and masters of vessels navigating the high seas as common carriers, to the cases of robbery, embezzlement, and actual default of the owner, master, or mariners, but the bill was rejected in the House of Lords. Abbott on Shipping, part 3. ch. 4. s. 1. note c.

129. Christy's Dig. tit. Carrier, n. 5.

130. 1 Lord Raym. 646.

131. Cowp. 754.

132. *Bowning v. Goodchild*, 3 Wils .443.

133. 7 Cranch, 242.

LECTURE 41

Of Principal and Agent

THE law of principal and agent is of very general interest, and incessant application in the commercial world; and the rights and duties which belong to that relation ought to be accurately, as well as universally understood. And while recommending that title to the attention of the student, as well as of the practicing lawyer, I will give a summary view of those general principles, which apply at large to every branch of the subject, and more especially to agencies that relate to commercial concerns.

(1.) *Agency, how constituted.*

Agency is founded upon a contract either express or implied, by which one of the parties confines to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business, and to render an account of it. The authority of the agent may be created by deed, or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient.[1] The agency may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment.[2] It is sufficient, that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust. The extent of the authority of an agent will sometimes be extended or varied on the ground of implied authority, according to the pressure of circumstances connected with the business with which he is entrusted.[3] If an agent, however, is to convey real estate, or any interest in land, or to make livery of seizin, the appointment must be in writing according to the statute of frauds of 29 Charles II.[4] and adopted with us; and where the conveyance is required to be by deed, the authority to the attorney to execute it must be commensurate in point of solemnity, and be by deed also.[5]

The agency must be antecedently given, or be subsequently adopted; and in the latter case, there must be some act of recognition. But an acquiescence in the assumed agency of another, when the acts of the agent. are brought to the knowledge of the principal, is equivalent to an express authority. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent. Thus, where a person sent his servant to a shopkeeper for goods upon credit, and paid for them afterwards and sent the same servant again to the same place for goods, and with money to pay for them, and the servant receives the goods, but embezzles the cash, the master was held answerable for the goods, for he had given credit to his servant by adopting his former act.[6] So, where a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills on another, the authority was implied from the fact that the principal had assumed and ratified the acts, and he was held bound by a repetition of such acts, where there was no proof of notice of any revocation of the power, or of collusion between a third party and the agent.[7] It is the prior conduct of the principal that affords just ground to infer a continuance of the agency in that particular business, and the rule is founded on obvious principles of justice and policy. It was familiar to the Roman law,[8] and is equally so in the law of modern Europe, and in the jurisprudence of this country.[9]

Emerigon states an interesting case within his experience, of the presumption. of ratification of an act from omission in due season to dissent from it. A merchant of Palermo wrote to a house at

Marseilles, that he had shipped goods consigned to them, to be sold on his account. The ship being out of time, the consignees at Marseilles caused the cargo to be insured on account of their friend at Palermo, and gave hirn advice of it. He received the letter and made no reply, and the vessel arriving safe, he refused to account for the premium paid by the consignees, under the pretense they had insured without orders. But the reception of the letter, and the subsequent silence, were deemed by the law merchant equivalent to a ratification of the act. At this day, and with us, the authority would be implied from the duty of the consignee, without the aid of the subsequent silence, though the ground taken at Marseilles was undoubtedly sufficient; and it is a very clear and salutary rule in relation to agencies, that where the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them, under the pretense that they were done without authority, or even contrary to instructions. *Omnis ratihabitio mandato aequiparatur*. When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time, and if he does not, his assent and ratification will be presumed.[10]

The Roman law would oblige a person to indemnify an assumed agent acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement.[11] But the English law has never gone to that extent; and, therefore, if A. owes a debt to B., and C. chooses to pay it without authority, the law will not raise a promise in A. to indemnify C., for if that were so, it would be in the power of C. to make A. his debtor *nolens volens*.[12] If there be any relation between the parties, a payment without authority may be binding on the person for whose use it was made, if it be made under the pressure of a situation in which one party was involved by the other's breach of faith. A surety, from his relation to the principal debtor, has an interest, and a right to see that the debt be paid, and if he pays to relieve himself, it is money paid to and for the use of the other.[13] So, in the case mentioned by Lord Kenyon,[14] from Rolle's Abridgment, where a party met to dine at a tavern, and all except one went away after dinner without paying their quota of the tavern bill, and the one remaining paid the whole bill; he was held entitled to recover from the others their aliquot proportions. The recovery must have been upon the principle, that as a special association they stood in the light of sureties for each other, and each was under an obligation to see that the bill was paid.

(2.) *Of the power and duty of agents*.

An agent who is entrusted with general powers, must exercise a sound discretion. If his powers are special, and limited, he must strictly follow them. If A. authorizes B. to buy an estate for him at 50 dollars per acre, and he gives 51 dollars an acre, A. is not bound to pay that price; but the better opinion is, that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate. This case is stated in the civil law, and the most equitable conclusion among the civilians is, that A. is bound to take the estate at the price prescribed. *Majori summae minor inest*.[15] So, where an agent was directed to cause a ship to be insured at a premium not exceeding three percent., and the agent not being able to effect insurance at that premium, gave three and a quarter percent. The assured refused to reimburse any part of the premium, under the pretense that his correspondent had exceeded his orders; but the French admiralty decreed, that he should refund the three percent.; and Valin thinks they might have gone further, and made him pay the quarter percent, *ex bono et aequo*, because, he says, it is permitted, in the of trade, for factors to go a little beyond their orders when they are not very precise and absolute.[16] The decree was undoubtedly correct, and the injustice of the defense disturbed in some degree the usually accurate and severe judgment of Valin.

If the agent executes the commission of his principal in part only, as if he be directed to purchase fifty shares of bank stock,and he purchases thirty only; or if he be directed to cause 2,000 dollars to be insured on a particular ship, and he effects an insurance for 1,000 dollars, and no more, it then becomes a question, whether the principal be bound to take the stock, or pay the premium. The principal may perhaps be bound to the extent of the execution of the commission in this case, though it has not been executed to the utmost extent; and this seems to have been the conclusion of the civil law.[17] But a distinction is to be made according to the nature of the subject. If a power be given to buy a house, with an adjoining wharf and store, and the agent buys the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. So, if he be instructed to purchase the fee of a certain farm, and he purchase an interest for life or years only, or he purchases only the undivided right of a tenant in common in the farm, in these cases the principal ought not to be bound to take such a limited interest, because his object would be defeated. It might be otherwise, if the agent was directed to buy a farm of 150 acres, and he buys one corresponding to the directions as nearly as possible, containing 140 acres only. The Roman lawyers considered and discussed those questions with their usual sagacity and spirit of equity; and whether the principal would or would not be bound by an act executed in part only, depends in a measure upon the reason of the thing, and the nature and object of the purchase.[18]

If the agent does what he was authorized to do, and something more, it will be good, as we have seen, so far as he was authorized to go, and the excess only would be void. If an agent has a power to lease for twenty-one years, and he leases for twenty-six years, the lease in equity would be void only for the excess, because the line of distinction between the good execution of the power and the excess, can be easily made.[19] But, at law, even such a lease would not be good *pro tanto*, or for the twenty-one years, according to a late English decision in the K. B.[20] If, however, the agent does a different business from that he was authorized to do, the principal is not bound, though it might even be more advantageous to him; as if he was instructed to buy such a house of A., and he purchased the adjoining house of B. at a better bargain; or if he was instructed to have the ship of his correspondent insured, and he insured the cargo. The principal is not bound, because the agent departed from the subject matter of the instruction.[21]

There is a very important distinction on the subject of the powers of an agent, between a general agent and one appointed for a special purpose. The acts of a general agent. will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary to prevent fraud, and encourage confidence in dealing. But an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds his power.[22] The special authority must be strictly pursued; and whoever deals with an agent constituted for a special purpose, deals at his peril, wvlien the agent passes the precise limits of his power. Thus, where the holder of a bill of exchange desired A. to get it discounted, but positively refused to endorse it, and A. procured it to be endorsed by B., it was held, that the original holder was not bound by the act of B., who was a special agent under a limited authority not to endorse the bill.[23]

So, in the case of *Batty v. Carswell*,[24] A. authorized B. to sign his name to a note for 250 dollars, payable in six months, and he signed one payable in sixty days; and the court held that A. was not liable, because the special authority was not strictly pursued. On the other hand, if the servant of a horse dealer, and who sells for hire, but with express instructions not to warrant as to soundness, and he does warrant, the master is held to be bound, because the servant, having a general authority to

sell, acted within the general scope of his authority, and the public cannot be supposed to be acquainted with the private conversations between the master and servant.[25] So, if a broker, whose business it is to buy and sell goods in his own name, be entrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale. There would be no safety in mercantile dealings if it were not so. If the principal sends his goods to a place where it is the ordinary business of the person to whom they are confided to sell, a power to sell is implied. If one sends goods to an auction room, it is not to be supposed they were sent there merely for safe keeping. The principal will be bound, and the purchaser safe, by a sale under those circumstances.

The presumption of an authority to sell in these cases, is inferred from the nature of the business of the agent, and it fails when the case[26] will not warrant the presumption of his being a common agent for the sale of property of that description. If, therefore, a person entrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as owner, and credit is not given to him as such merely because he has possession of the watch, and the owner would not be bound by his sale.[27]

A factor or commission merchant may sell on credit, without any special authority for that purpose. It is now the well settled usage, that a factor or agent employed to sell, may sell in the usual way, and consequently, he may sell on credit without incurring risk, provided he be not restrained by his instructions, and does not unreasonably extend the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser.[28] But the factor cannot sell on credit in a case in which it is not the usage, as the sale of stock for instance, unless he be expressly authorized, because this would be to sell in an unusual manner.[29] Nor can he bind his principal to other modes of payment, than a payment in money at the time of sale, or on the usual credit. He cannot bind his principal to allow a set-off on the part of the purchaser.[30] If the factor, in a case duly authorized, sells on credit, and takes a negotiable note payable to himself, the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payrnent, the circumstances of the factor having taken the note in his own name, would not render him personally responsible to his principal.[31]

Even if the factor should guarantee the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might waive the guaranty, and claim possession of the note, or give notice to the purchaser not to pay it to the factor. In such a case, if the factor should fail, the note would not pass to his assignees to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due to them, but to the principal, and did not pass under the assignment.[32] Though payment to a factor, for goods sold by him, be valid, the principal may control the collection, and sue for the price in his own name, or, for damages for non-performance of the contract; and it is immaterial whether the agent was an auctioneer or a common factor.[33]

There are some cases in which a factor sells on credit at his own risk. When he acts undera *del credere* commission, for an additional premium, he becomes liable to his principal when the purchase money falls due; for he is substituted for:the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance. The principal may call on him without looking to the actual vendee. This is the language of the case of *Grove v. Dubois*,[34] and it seems to have been

adopted and followed in *Leverick v. Meigs*,[35] and yet there is some difficulty and want of precision in the cases on the subject. It is said, that a factor under a *del credere* commission, is a guarantor of the sale, and that the notes he takes from the purchaser belong to his principal, equally as if he had only guaranteed them. If he sells under a *del credere* commission, he is to be considered, as between himself and the vendee, as the sole owner of the goods; and yet he is considered only as a surety.[36] In some late cases in the C. B. in England,[37] the doctrine of the case of *Grove v. Dubois* was much questioned; and it was considered to be a *vexata quaestio*, whether a *del credere* commission was a contract of guaranty merely on default of the vendee, or one altogether distinct from it, requiring a previous resort to the purchaser.

Though a factor may sell and bind his principal, he cannot pledge the goods as a security for his own debt, not even though there be the formality of a bill of parcels and a receipt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of factor, is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor, for the lien which the factor might have had for such a balance is personal, and cannot be transferred by his tortious act, in pledging the goods for his own debt. Though the factor should barter the goods of his principal, yet no property passes by that act any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover.[38]

The doctrine that a factor cannot pledge, is sustained so strictly, that it is admitted that he cannot do it by endorsement and delivery of the bill of lading, any more than by delivery of the goods themselves.[39] To pledge the goods of the principal, is beyond the scope of the factor's power; and every attempt to do it under color of a sale, is tortious and void. If the pawnee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover, say the cases, that the possessor held the goods as factor, and not as vendee, and he is bound to know, at his peril, the extent of the factor's power.[40] There may be a question, in some instances, whether the *res gesta* amounted to a sale on the part of the factor, or was a mere deposit or pledge as collateral security for his debt. But when it appears that the goods were really pledged, it is settled, that it is an act beyond the authority of the factor, and the principal may look to the pawnee. There is an exception to the rule in the case of negotiable paper, for there possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as a security for his own debt, and it will bind the principal, unless he can charge the party with notice of the fraud, or of want of title in the agent.[41]

But though the factor cannot pledge the goods of his principal as his own, he may deliver them to a third person for his own security, with notice of his lien, and, as his agent, to keep possession for him. Such a change of the lien does not divest the factor of his right, for it is, in effect, a continuance of the factor's possession.[42] So, if a factor, having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, according to the ordinary usage in such cases.[43] But if the goods be put into the hands of an auctioneer to sell, and instead of advancing money upon them in immediate reference to the sale according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnor, instead of seller, he has no lien on the goods. It may be difficult, perhaps, to discriminate in all cases between the two characters. It will be a matter of evidence, and of fact, under the circumstances.

The distinction was declared in *Martini v. Coles*,[44] and it was observed in that case, that it would have been as well if the law had been, that where it was equivocal whether the party acted as principal or factor, a pledge in a case free from fraud should be valid. To guard against abuse and fraud, it is admitted, that if the factor be exhibited to the world as owner with the assent of his principal, and by that means obtains credit, the principal will be liable. It was suggested, in the case last mentioned, that perhaps if a consignment of goods to a factor to sell, be accompanied with a bill drawn on the factor for the whole, or part of the price of the consignment, an advance to take up the bill of the consignor, and appropriated to that end, might be considered as an advance under the authority given by the principal, so as to bind him to a pledge by the factor for that purpose.

But in *Graham v. Dyster*,[45] it was decided by the K. B., that though the principal draws upon his factor for the amount of the consignment, and the goods were sent to the factor to be dealt with according to his discretion, the factor could not pledge the goods, even in that case, to raise money to meet the bills. This was a very hard application of the general rule, and the cases go so far as to hold, that though there should be a request of the consignor accompanying the consignment, that his agent, the consignee, would make remittances in anticipation of sales, that circumstance does not give an authority to pledge the goods to raise money for the remittance.[46] In this last case, which was so late as 1824, the judges of the K. B. expressed themselves decidedly in favor of the policy and expediency of the general rule of law, that a factor cannot pledge. They considered it to be one of the greatest safeguards which the foreign merchant had in making consignments of goods to England; and that, as a measure of policy, the rule ought not to be altered. It operated to increase the foreign commerce of the kingdom, and was founded, it was said, upon a very plain reason, *viz.* that he who gave credit should be vigilant in ascertaining whether the party pledging had, or had not, authority so to deal with the goods, and that the knowledge might always be obtained from the bill of lading, and letters of advice.[47]

Every contract made with an agent in relation to the business of the agency, is a contract with the principal, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal; and the principal, and not the agent, is bound to the party. It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible, and not the agent.[48] The agent becomes personally liable, only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power.[49] If he makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable, not even though he should take a note for the goods sold payable to himself.[50] But if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal, in case the agent had authority to bind him.[51] And if the agent even buys in his own narne, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods come to his use.[52]

The attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes in his own name, though he describes himself to be the agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal[53] But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible,

though he should, in the contract or covenant, give himself the description or character of agent.[54] And though the attorney, who acts without authority, but in the name of the principal, be not personally bound by the instrument he executes, if it contain no covenant or promise on his part, yet there is a remedy against him by a special action upon the case, for assuming the act when he had no power.[55]

When goods have been sold by a factor, the owner is entitled to call upon the buyer for payment, before the money is paid even to the factor; and a payment to the factor, after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal.[56] If, however, the factor should sell in his own name as owner, and not disclose his principal, and act ostensibly as the real and sole owner, though the principal may afterwards bring his action upon the contract against the purchaser,[57] the latter, if he *bona fide* dealt with the factor as owner, will be entitled to set off any claim he may have against the factor, in answer to the demand of the principal.

There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation.[58] The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn frorn all the cases, and it is expressly declared in some of them.[59]

An agent, ordinarily, and without express authority, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing.[60] And if the authority, in a matter of mere private concern, be confided to more than one agent, it is requisite that all join in the execution of the power; though the cases admit the rule to be different in a matter of public trust, or of power conferred for public purposes, and if all meet in the latter case, the act of the majority will bind.[61]

(3.) *Of the agent's right of lien.*

The lien here referred to is the right of an agent to retain possession of property until some demand of his be satisfied. It is created either by common law, or by the usage of trade, or by the express agreement or particular usage of the parties.[62]

A general lien is the right to retain the property of another for a general balance of accounts; but a particular lien is a right to retain it only for a charge on account of labor employed, or expenses bestowed upon the identical property detained. The one is taken strictly, but the other is favored in law.[63] The right rests on principles of natural equity and commercial necessity, and it prevents

circuity of action, and gives security and confidence to agents.

Where a person, from the nature of his occupation, is under obligation, according to his means, to receive, and be at trouble and expense about the personal property of another, he has a particular lien upon it; and the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the public. Upon this ground, common carriers, innkeepers, and farriers, had a particular lien by the common law;[64] for they were bound, as Lord Holt said,[65] to serve the public to the utmost extent and ability of their employment, and an action lies against them if they refuse without adequate reason. But though the right of lien probably originated in those cases in which there was an obligation arising out of the public employment to receive the goods, it is not now confined to that class of persons, but in a variety of cases a person has a right to detain goods delivered to him to have labor bestowed on them, who would not be obliged to receive the goods in the first instance contrary to his inclination. A tailor or dyer is not bound to accept an employment from any one that offers it, and yet they have a particular lien, by the common law, upon the cloth placed in their hands to be dyed, or worked up into a garment.[66] The same right applies to a miller, printer, tailor, wharfinger, or whoever takes property in the way of his trade or occupation to bestow labor or expense upon it; and it extends to the whole of one entire work upon one single subject, in like manner as a carrier has a lien on the entire cargo for his whole freight.

The lien exists equally whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price. The old authorities, which went to establish the proposition, that the lien did not exist in cases of a special agreement for the price, have been overruled as contrary to reason, and the principles of law; and it is now settled to exist equally, whether there be, or be not, an agreement for the price, unless there be a future time of payment fixed, and then the special agreement would be inconsistent with the right of lien, and would destroy it.[67]

If goods come to the possession of a person by finding, and he has been at trouble and expense about them, he has a lien upon the goods for a compensation in one case only, and that is the case of goods lost at sea, and it is a lien for salvage.[68] This lien is dictated by principles of commercial necessity, and is thought to stand upon peculiar grounds of maritime policy.[69] It does not apply to cases of finding upon land; and though the taking care of property found for the owner, be a meritorious act, and one which may entitle the party to a reasonable recompense, to be recovered in an action of assumpsit, it has been adjudged,[70] not to give a lien in favor of the finder, and he is bound to deliver up the chattel upon demand, and may then recur to his action for a compensation. If the rule was otherwise, says Ch. J. Eyre, ill designing persons might turn floats and vessels adrift, in order that they might be paid for finding them; and it is best to put them to the burden of making out the quantum of their recompense to the satisfaction of a jury. The statute of this state[71] gives to the person who takes up strayed cattle the right to demand a reasonable charge for keeping them; and, independent of that provision, there is no lien upon goods found.

A general lien for a balance of accounts is founded on custom, and is not favored; and it requires strong evidence of a settled and uniform wage, or of a particular mode of dealing between the parties, to establish it. General liens are looked at with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors.[72] But by the custom of the trade an agent may have a lien upon the property of his employer entrusted to him in the course of that trade, not only in respect to the management of that property, but for his general

balance of accounts. The usage of any trade sufficient to establish a general lien, must, however, have been so uniform and notorious, as to warrant the inference, that the party against whom the right is claimed had knowledge of it.[73] This general lien, may also be created by express agreement; as where one or more persons give notice that they will not receive any property for the purposes of their trade or business, except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their account. All persons who afterwards deal with them with the knowledge of such notice, will be deemed to have acceded to that agreement.

This was the rule laid down by the Court of K. B. in *Kirkham v. Shawcross*;[74] but the judges in that case declared, that the notice would not avail in the case of persons who, like common carriers and innkeepers, were under a legal obligation to accept employment in the business they assume, for a reasonable price to be tendered to them, and who had no right to impose any unreasonable terms and conditions upon their employers, or refuse to serve them. The same intimation that a common carrier could not create any general lien as against the person who employed him, by means of notice, was given by the judges in *Oppenheim v. Russell*,[75] but a contrary doctrine was strongly implied in the subsequent case of *Rushforth v. Hadnell*,[76] and the court in that case, while they condemned the justice and policy of these general liens, seemed to admit, that a common carrier might establish such a right against his employer, by showing a clear and notorious usage or a positive agreement. It was again stated as a questionable point, in *Wright v. Snell*,[77] whether such a general lien could exist as between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered as a point still remaining to be settled by judicial decision.

Possession of the goods is necessary to create the lien; and the right does not extend to debts which accrued betore the character of factor commenced;[78] nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight.[79] And though there be possession, a lien cannot be acquired, where the party came to that possession wrongfully.[80] This would be as repugnant to justice and policy, as it would be to allow one tort to be set off against another.

The right of lien is also to be deemed waived, when the party enters into a special agreement, inconsistent with the existence of the lien, or from which a waiver of it may fairly be inferred, as when he gives credit by extending the time of payment, or takes distinct and independent security for the payment. The party shows, by such acts, that he relies, in the one case, on the personal credit of his employer; and, in the other, that he intends the security to be a substitution for the lien; and it would be inconvenient that the lien should be extended to the period to which the security had to run.

This was the doctrine sustained in *Gillman v. Brown*,[81] in respect to the vendor's right of lien as against the vendee, and the principle equally applies to other cases; and it was also explicitly declared by Lord Eldon, in *Cowell v. Simpson*.[82] The lien is also destroyed, when a factor makes an express stipulation, on receiving the goods, to pay over the proceeds.[83] So, if the party comes to the possession of goods without due authority, he cannot set up a lien against the true owner; as, if a servant delivers a chattel to a tradesman without authority, or a factor, having authority to sell, pledges the goods of his principal.[84]

Possession is not only essential to the creation, but also to the continuance of the lien; and where the

party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien. If the lien was to follow the goods after they had been sold or delivered, the encumbrance would become excessively inconvenient to the freedom of trade, and the safety of purchasers.[85] But if the delivery to a third person be merely for the benefit of the factor, and as a servant to the factor, and with notice of the lien, it is in effect a continuance of the factor's possession, and the lien is retained.[86] Nor is it universally true, that the actual delivery of part of the goods sold on an entire contract, is equivalent to an actual delivery of the whole. It will depend upon the terms of the contract and the intention of the parties; and whenever the property in the part of the goods not delivered does not pass to the vendee, the vendor's right of lien for the price is, of course, preserved on the part retained.[87]

A factor has not only a particular lien upon the goods of his principal in his possession, for the charges arising on account of them, but he has a general lien for the balance of his general account, arising in the course of dealings between him and his principal; and this lien extends to all the goods of the principal in his hands in the character of factor.[88] The factor has a lien also on the price of the goods which he has sold as factor, though he has parted with the possession of the goods; and he may enforce payment from the buyer to himself, in opposition to his principal. This rule applies, when he becomes surety for his principal, or sells under a *del credere* commission, or is in advance for the goods by actual payment.[89]

Attorneys and solicitors, as well as factors, have a general lien upon the papers of their clients, for the balance of their professional accounts; but the lien is liable to be waived or divested, as to papers received under a special agreement or trust, or where they take security from their clients.[90] The solicitor or attorney has two kinds of liens for his costs; one on the funds recovered, and the other on the papers in his hands. The client cannot get back the papers, without paying what is due, (whatever becomes of the suit,) not only in respect of that business for which the papers were used, but for other business done by him in his professional character.[91] The attorney's lien for costs extends to judgments recovered by him; and yet a *bona fide* settlement or payment by the debtor, before notice of the lien, will prevail against it, and the attorney's lien upon a judgment yields to the debtor's equitable right of set-off.[92] We follow in this state the rule of the English Court of Chancery, and of the Court of C. B.; and consider the lien as subject to all the equities that may attach on the fund, and as extending only to the clear balance resulting from the equity between the parties.[93] Dyers have likewise a lien on the goods sent to them to dye, for the balance of a general account.[94] A banker, like an attorney, has also a lien on all the paper securities which come to his hands for the general balance of his account, subject equally to be controlled by special circumstances.[95] The same thing may be said of an insurance broker, and his lien exists even though the consignor should assign the interest covered by the policy, for the assignee would take subject to the lien.[96] If, however, the insurance broker be employed by an agent of the principal, and with knowledge that he acted as agent, the broker has no lien upon the policy, for any general balance that may be due to him from the agent.[97]

But it would be inconsistent with my general purpose, to pursue more minutely the distinctions that abound in this doctrine of lien; and I will conclude by observing, that a lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. It was once said by Popham, Ch. J., in the *Hostler's case*,[98] that an innkeeper might have the horse of his guest appraised and sold, after he had eaten as much as he was worth. But this was a mere extra-judicial *dictum*, and it was contrary to the law, as it had

been previously, and as it has been subsequently adjudged.[99] The right to sell, in such a case, is allowed by the custom of London, but not by the general custom of the realm. I presume that satisfaction from a lien may be enforced by a bill in chancery; and a factor, having a power to sell, has the means of payment within his control; and a right to sell may, in special cases, be implied from the contract between the parties. It would be very convenient to allow an innkeeper to sell the chattel without suit, in like manner as a pawnee may do, in a case of palpable default, and on reasonable notice to redeem; for the expense of a suit in equity by an innkeeper would, in most instances, more than exhaust the value of the pledge.

(4.) *Of the termination of agency*.

The authority of the agent may terminate in various ways. It may terminate by the death of the agent; by the limitation of the power to a particular period of time; by the execution of the business which the agent was constituted to perform; by a change in the state or condition of the principal; by his express revocation of the power; and by his death.

1. The agent's trust is not transferable either by the act of the party, or by operation of law. It terminates by his death, and this results, of course, from the personal nature of the trust.[100] According to the civil law, if the agent had entered upon the execution of the trust in his lifetime, and left it partially executed, but incomplete at his death, his legal representatives would be bound to go on and complete it.[101] Pothier adopts this principle as just and reasonable, and there can be no doubt, that the principal will be bound to complete a contract partly performed by him by the act of his agent, by a suit at law, or in equity, according to the nature of the case, but the representatives of the agent will have nothing to do with it unless the business be in such a situation, that it cannot be performed without their intervention. The cases stated in the civil law, and by Pothier, were between the principal and the agent, and not between a third person and the representatives of the agent dealing in the character of agent. Nor can an authority given for private purposes to two persons, be executed by the survivor, unless it be so expressly provided, or it be an authority coupled with an interest.[102]

2. A power of attorney is, in general, from the nature of it, revocable at the pleasure of the party who gave it.[103] But where it constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable.[104] In the case of a lawful revocation of the power by the act of the principal, it is requisite that notice be given to the attorney, and all acts *bona fide* done by him under the power, prior to the notice of the revocation, are binding upon the principal.[105] This rule is necessary to prevent imposition, and for the safety of the party dealing with the agent; and it was equally a rule in the civil law.[106] Even if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such, that the public had no just ground to presume a revocation, his acts done under his former power would still be binding upon his principal.[107] He can, likewise, according to Pothier, conclude a transaction which was not entire, but partly executed under the power when the notice of the revocation was received, and bind the principal by those acts which were required to consummate the business. The principal may, no doubt, be compelled to act in such a case; but it seems difficult to sustain the act of the agent after his power has been revoked, for he becomes a stranger after the revocation is duly announced.

3. The agent's power is determined likewise by the bankruptcy of his principal;[108] but this does not

extend to an authority to do a mere formal act which passes no interest, and which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy.[109] Nor will the bankruptcy of the principal affect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal before his bankruptcy, but received afterwards.[110] If the principal was a *feme sole* when the power was given, it is determined likewise by her marriage; for the agent, after the marriage, cannot bind the husband without his authority, nor a *feme covert* without her husband.[111] Her warrant of attorney to confess judgment is countermanded by her marriage before the judgment be entered up.[112]

The authority of an agent may be revoked by the lunacy of the principal; but the better opinion would seem to be, that the fact of the existence of lunacy must have been previously established by inquisition before it could control the operation of the power. Neither the agent nor third persons dealing with him under the power, have any certain evidence short of a finding by inquisition of the state of the mind of the principal; and, in case of partnerships, it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy.[113]

4. The authority of an agent determines by the death of his principal; and a joint authority to two terminates by the death of one. This is the general and a settled doctrine.[114] By the civil law, and the law of those countries which have adopted the civil law, the acts of an agent done *bona fide* after the death of the principal, and before notice of his death, are valid and binding.[115] But this equitable principle does not prevail in the English law; and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest.[116] Even a warrant of attorney to confess judgment, though it be not revocable by the act of the party, is, nevertheless, revoked by his death; and all that the courts can do is to permit the creditor to enter up judgment as of the preceding term, if it was prior to the party's death. Such a power is not, in the sense of the law, a power coupled with an interest.[117]

NOTES

1. Chitty on Commercial Law, vol. 3. 104. Lord Eldon, 9 Vesey, 250. *Stackpole v. Arnold*, 11 Mass. Rep. l7. Long v. Colburn, ibid. 97. *Northampton Bank v. Pepoon*, ibid. 238. *Ewing v. Tees*, 1 Binney, 450.

2. *Whitehead v. Tuckett*, 15 East, 400. *Hooe v. Oxley*, 1 Wash. 19. *Long v. Colburn*, *ub. sup*.

3. *Judson v. Sturges*, 5 Day, 556.

4. Laws of N.Y. sess. 10. ch. 44. sec. 10.

5. Co. Litt. 52. a. *Horsley v. Rush*, cited in 7 Term.Rep. 209. *Cooper v. Rankin*, 5 Binney, 613. *Plummer v. Russel*, 2 Gibb. 174. Sedgwick, J. 5 Mass. Rep. 40. *Shamburger v. Kennedy*, 1 Badg. & Dev. 1. Mellen, Ch. J. in 2 Greenleaf, 260.

6. *Hazard v. Treadwell*, 1 Str. 506. Rusby v. Scarlett, 5 Esp. Rep. 76.

7. *Neal v. Irving*, 1 Esp. Rep. 61. *Hooe v. Oxley*, 1 Wash. Rep. 16.

8. Dig. 17. 1. 6. 2. Ibid. 50. 17. 60.

9. Emerigon, *Traité des Assurances*, tom. 1. 144. *Nickson v. Brohan*, 10 Mod. 109. *Williams v. Mitchell*, 17 Mass. Rep. 98. *Bryan v. Jackson*, 4 Conn. Rep. 288.

10. *Towle v. Stevenson*, 1 Johns. Cas. 110. *Cairns & Lord v. Bleecker*, 12 Johns. Rep. 300. *Erick v. Johnson*, 6 Mass. Rep. 193. *Frothingham v. Haley*, 3 Mass. Rep. 70. *Clement v. Jones*, 12 Mass. Rep. 60.

11. Dig. 3. 5. 45. Ibid. 3. 5. 10. 1.

12. Lord Kenyon, 3 Term Rep. 310.

13. *Exall v. Partridge*, 8 Term Rep. 303.

14. 8 Term Rep. 614.

15. Inst. 3. 27. 8. Ferriere, *sur Inst. h. t.* Pothier, *Contrat de Mandat*, No. 94. and n. 96.

16. Valin's *Com. sur l'ord. de la Mer*. tom. 2. p. 32, 33.

17. Dig. 17. 1. 33.

18. Dig. 17. 1. 36. Pothier, *Contrat de Mandat*, 95. 1 Livermore on the Law of Principal and Agent, p. 100, 101.

19. Sir Thomas Clarke, in *Alexander v. Alexander*, 2 Vesey, 644. *Campbell v. Leach*, Amb. 740. Sugden on Powers, p. 545.

20. *Roe v. Prideaux*, 10 East, 158.

21. Dig 17. 1. 5. 2. Pothier. *Contrat de Mandat*, No. 97. Grotius, Jure B. & P. b. 2. c. 16. s. 1 says, that the famous question stated by Aulus Gellius whether an order or commission might be executed by a method equally or more advantageous than the one prescribed, might easily be answered by considering whether what was prescribed was under any precise form, or only with some general view that might be effected as well in some other way. If the latter did not clearly appear, we ought to follow the order with punctuality and precision, and not interpose our own judgment when it had not been required.

22. *Munn v. Commission Company*, 15 Johns. Rep. 44. *Beals v. Allen*, 18 Johns. Rep. 363. *Thompson v. Stewart*, 3 Conn. Rep. 172. *Andrews v. Kneeland*, 6 Cowen, 324. Buller, J. 3 Term Rep. 762. *East India Company v. Hensley*, 1 Esp. Rep. 131. *Allen v. Ogden*, Wharton's Dig. tit. Agent and Factor, A. 1. *Blane v. Proudfit*, 3 Call. Rep. 207.

23. *Fenn v. Harrison*, 3 Term Rep. 757.

24. 2 Johns. Rep. 48.

25. Ashhurst, J. in 3 Term Rep 757. Bailey, J. in 15 East, 45.

26. *Pickering v. Busk*, 15 East, 38.

27. Lord Ellenborough. 15 East. supra.

28. *Van Allen v. Vanderpool*, 6 Johns. Rep. 69. *Goodenow v. Tyler*, 7 Mass. Rep. 36. James & *Shoemaker v. McCredie*, 1 Bay's S. C. Rep. 294. *Emery v. Gerbier*, and other cases cited in Wharton's Dig. of Penn. Rep. tit. Agent and Factor, art. 2. *Burrill v. Phillips*, 1 Gallison, 360. Willes, Ch. J. in *Scott v. Surman*, Wi1les' Rep. 400. *Leverick v. Meigs*, 1 Cowen. 645. *Greenly v. Bartlett*, 1 Greenleaf, 172.

29. *Wiltshire v. Sims*, 1 Campb. N. P. Rep. 258.

30. *Guy v. Oakley*, 13 Johns. Rep. 332.

31. *Messier v. Amery*, 1 Yeates' Rep. 540. *Goodenow v. Tyler*, 7 Mass. Rep. 36.

32. *Kip v. Bank of N.Y.* 10 Johns. Rep 63. *Garrett v. Cullam*, cited in *Scott v. Surman*, Willes' Rep 405, and also by Chambre, J. in 3 Bos. & Pul. 490.

33. *Girard.v. Taggart*, 5 Serg. & Rawl. 19.

34. 1 Term Rep. 112.

35. 1 Cowen, 645.

36. Chambre, J. 3 Bos. & Pul., 489.

37. *Gall v. Comber*, 7 Taunton, 558. *Peele v. Northcoke*, ibid. 478.

38. *Guerreiro v. Peile*, 3 Barn. & Ald. 616.

39. *Martini v. Coles*, 1 Maule. & Selw. 140. *Shipley v. Kymer*, ibid. 484.

40. *Patterson v. Tash*, 2 Str. 1178. Daubigny v. Duval, 5 Term Rep. 604. *De Bouchout v. Goldsmid*. 5 Vesey, 211.

McCombie v. Davies, 7 East, 5. *Martini v. Coles*, 1 Maule. & Selw. 140. *Fielding v. Kymer*, 2 Brod. & Bing. 639. *Kinder v. Shaw*, 2 Mass. Rep. 393. *Van Amringe v. Peabody*, 1 Mason, 440. *Bowie v. Napier*, 1 McCord, 1.

41. *Collins v. Martin*, 1 Bos. & Pull. 648. *Treuttel v. Barandon*, 3 Taunton, 100. *Goldsmyd v. Garden*, in Chancery, and cited in *Collins v. Martin*.

42. *McCombie v. Davies*, 7 East, 5. *Urquhart v. Mulver*, 4 Johns Rep. 103.

43. *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386.

44. 1 Maule & Selw. 140.

45. 2 Starkie, 21.

46. *Queiroz v. Trueman*, 3 Barn. & Cress. 342.

47. The rule that a factor cannot pledge the goods consigned to him for sale, even for *bona fide* advances, in the regular course of commercial dealing, originated in the case of *Patterson v. Tash*, in 2 Str. 1178. which was a *nisi prises* decision of Ch. J. Lee; though it has been suggested that the report of that case was inaccurate. In the year 1823, the merits of that rule were discussed in the British Parliament, and a statute passed in July of that year, for the better protection of the property of merchants and others, in their dealings with factors and agents by which a factor was authorized to pledge, to a certain extent, the goods of his principal. A great deal may be properly said against the principle of the rule; and with the exception of England, it is contrary to the policy of all the commercial nations of Europe. On the European continent, possession constitutes title to moveable property, so far as to secure *bona fide* purchasers, and persons making advances of money or credit on the pledge of property by the lawful possessor. The late Ch. Justice of Pennsylvania, in *Laussatt v. Lippincott*, 6 Serg. & Rawl. 386, while he admitted the establishment of the rule that a factor cannot pledge, and that it advanced the commercial credit of the country, declared it to be an extremely hard rule. He said it would seem reasonable, that the loss should fall on him who put it in the power of the factor to deceive innocent persons who dealt with him *bona fide*; and that there was some inconsistency in the law, which declares that a factor cannot pledge the goods of his principal, and yet permits a purchaser who buys the goods, supposing them to be the property of the factor, to set off a debt due from the factor to himself; for the principle of *caveat emptor*, which avoids the pledge, would forbid the setoff. An effort was made in this state in the winter of 1825, to relax the rule, to the extent, at least, of the British statute; and though the application was enforced by a memorial from the New York Chamber of Commerce, and by the strong recommendation of Governor Clinton in his message, it failed of success. There may be something in the commercial policy of the rule alluded to by the English judges; but it would seem to be a conclusion of superior justice and wisdom, that a factor or commercial agent, clothed by his principal with the apparent symbols of ownership of property, should be deemed the true owner in respect to third persons, dealing with him fairly in the course of business, as purchasers or mortgagees, and under an ignorance of his real character.

48. Emerigon, *Traité des Assurances*, tom. 2, 465. Lord Erskine, 12 Vesey, 352. *Davis v. McArthur*, 4 Greenleaf, 82, note.

49. *Thomas v. Bishop*, 2 Str. 955. *Leadbitter v. Far row*, 5 Maul. & Selw. 945. *Dusenbury v. Ellis*, 3 Johns. Cas. 70. Parker, Ch. J. *Stackpole v. Arnold*, 11 Mass. Rep. 29 and *Hastings v. Lovering*, 2 Pickering, 221. *Hampton v. Speckengale*, 9 Serg. & Rawl. 212

50. *Owen v. Gooch*, 2 Esp. Rep. 567. *Rathbone v. Budlong*, 15 Johns. Rep. l. *Goodenow v. Tyler*, 7 Mass. Rep. 36. *Greely v. Bartlett*, 1 Greenleaf, 172. *Corlies v. Cumming*, 6 Cowen, 181.

51. *Mauri v. Hefferman*, 13 Johns. Rep. 58.

52. *Upton v. Gray*, 2 Greenleaf, 373.

53. *Combes' case*, 9 Co. 76. *Frontin v. Small*, 2 Lord Raym. 1418. *Wilks v. Bac*k, 2 East, 142. *Bogart v. De Bussy*, 6 Johns. Rep, 94. *Fowler v. Shearer*, 7 Mass. Rep. 14. 19. *Stinchfield v. Little*, 1 Greenleaf, 231. *Hopkins v. Mehatty*, 11 Serg. & Rawl. 126.

54. *Appleton v. Binks*, 5 East, 148. *Forster v. Fuller*, 6 Mass. Rep. 58. *Duvall v. Craig*, 2 Wheaton, 56. *Tippets v. Walker*, 4 Mass. Rep. 595. *White v. Skinner*, 13 Johns. Rep. 307.

55. *Long v. Colburn*, 11 Mass. Rep. 97. *Harper v. Little*, 2 Greenleaf, 14.

56. *Lisset v. Reave*, 2 Atk. 394.

57. *Rabone v. Williams*, cited in 7 Term Rep. 360. note. *George v. Clagett*. 7 Term Rep. 359. *Gordon v. Church*, 2 Caines, 299. Chambre, J in 3 Bos. & Pull. 490.

58. *Macbeath v. Haldimand*, 1 Term Rep. 172. *Unwin v. Wolseley*, ibid. 674. *Brown v. Austin*, 1 Mass. Rep. 208. *Dawes v. Jackson*, 9 Mass. Rep. 490. *Hodgson v. Dexter*, 1 Cranch, 345. Walker v. Swartwout, 12 Johns. Rep. 444. *Rathbone v. Budlong*, 15 Johns. Rep, 1. *Adams v. Whittlesey*, 3 Conn. Rep. 560. *Stinchfield v. Little*, 1 Greenleaf, 231.

59. 12 Johns. Rep. 385. 15 Johns. Rep. 1

60. *Combe's case*, 9 Co. 75. *Ingram v. Ingram*, 2 Atk. 88. *Attorney General v. Beveyman*, cited in 2 Vesey, 643. *Solly v. Rathbone*, 2 Maule & Selw. 298. *Cochran v. Irlam*, ibid. 303. *Schmaling v. Thomlinson*, 6 Taunton, 147. *Coles v. Trecothick*, 9 Vesey, 234, 251.

61. *Grindley v. Barker*, 1 Bos. & Pull. 229. *Town v. Jaquith*, 6 Mass. Rep. 46. *Green v. Miller*, 6 Johns. Rep. 39. *Baltimore Turnpike*, 5 Binney, 481. *Patterson v. Leavitt*, 4 Conn. Rep. 50.

62. Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2221.

63. Heath, J. 3 Bos. & Pull. 494.

64. *Naylor v. Mangles*, 1 Esp. Rep. 109. *York v. Grenaugh*, 1 Salk. 388. 2 Lord Raym. 866. S. C. Chambre, J. 3 Bos. & Pull. 55. *Rushforth v. Hadfield*, 7 East, 224. 21 Hen. VI. 55. Keilw. 50. Popham, Ch. J. Yelv. 67.

65. *Lane v. Cotton*, 12. Mod. 484. 1 Lord Raym. 646.

66. Hob. 42. Yelv. 67. *Green v. Farmer*, 4 Burr. 2214. *Close v. Waterhouse*, 6 East, 523, *in notis*.

67. *Blake v. Nicholson*, 3 Maule & Selw. 168. *Chase v. Westmore*, 5 Maule & Selw. 180. *Crawshay v. Homfray*, 4 Barn. & Ald. 50.

68. *Hartford v. Jones*, 2 Salk. 654. 1 Lord Raym. 393. S. C. *Hamilton v. Davis*, 5 Burr. 2732. *Baring v. Day*, 8 East, 57.

69. Storv, J. 2 Mason 88.

70. *Nicholson v. Chapman*, 2 H. Blacks. 254.

71. Laws of N.Y sess. 36. ch. 21.

72. *Rushforth v. Hadfield*, 6 East, 519. S. C. 7 East, 224.

73. Rooke, J. 3 Bos. & Pull. 50.

74. 3 Bos. & Pull. 42.

75. 6 Term Rep. 14.

76. 7 East, 224.

77. 5 Barn. & Ald. 350.

78. *Houghton v. Matthews*, 3 Bos. & Pull. 458.

79. *Kinlock v. Craig*, 3 7 Term. Rep. 119. 783.

80. *Lempriere v. Pasley*, 2 Term. Rep. 485. *Madden v. Kempster*, 1 Campb. N. P. Rep. 12.

81. 1 Mason's Rep. 191.

82. 16 Vesey, 275. Mr. Metcalf. in his neat and accurate digest of the cases on the doctrine of lien, contained in a note to his edition of Yelverton's Rep. 67. a. shows, by cases as ancient as the Year Books, 5 Edw. IV. 2. p1. 20. and 17 Edw IV. 1. that the lien is extinguished by a postponement of credit to a future day.

83. *Walker v. Birch*, 6 Term Rep. 258.

84. *Daubigny v. Duval*, 6 Term Rep. 604. *Hiscox v. Greenwood*, 4 Esp. 174. *McCombie v. Davies*, 7 East, 5.

85. *Jones v. Pearle*, Str. 556. *Sweet v. Pym*, 1 East. 4.

86. *McCombie v. Davies*, 7 East, 5. *Urquhart v. Mulver*, 4 Johns. Rep. 103.

87. *Blake v. Nicholson*, 3 Maul. & Selw. 167. Wilde, J. in *Parks v. Hall*, 2 Pickering, 213.

88. *Kruger v. Wilcox*, Amb. 252. Lord Kenyon, in 6 Term. Rep. 262. Chambre, J. 3 Bos. & Pull. 489.

89. *Drinkwater v. Goodwin*, Cowp. 251. Chambre, J. 3 Bos. & Pull, 489. *Hudson v. Granger*, 5 Barn. &.Ald. 27.

90. Lord Mansfield, Doug. 104. *Ex parte Sterling*, 16 Vesey, 258. Cowell v. Simpson, ibid. 275. *Ex parte Nesbitt*, 2 Sch. & Lef. 279.

91. Sir Thomas Plumer, 2 J. & Walk. 218.

92. *Vaughan v. Davies*, 2 H. Blacks. 440.

93. *Porter v. Lane*, 8 Johnson's Rep. 357. *Mohawk Bank v. Burrows*, 6 Johns. Ch. Rep. 317.

94. *Savill v. Barchard*, 4 Esp. Rep. 53

95. *Davis v. Bowsher*, 5 Term Rep. 488. *Jourdaine v. Lefreve*, 1 Esp. Rep. 66.

96. *Gordin v. London Assurance Company*, 1 Burr. 469. *Whitehead. v. Vaughan*, Cooke's B. L. 316.

97. Maanss v. Henderson, 1 East, 385.

98. Yelv. 66.

99. *Waldbroke v. Griffin*, 2 Rol. Abr. 85. A. pl. 5. Moore, 876. *Jones v. Pearle*, 1 Str. 556. *Pothonier v. Dawson*, 1 Holt's N. P. Rep. 383.

100. Dig. 17. 1. 27. 3. Pothier, *Contrat de Mandat*, No. 101.

101. Dig. 17. 1. 14. and 17. 2. 40.

102. Pothier, *Contrat de Mandat*, No. 102. Co. Litt. 112. b. 181. b.

103. *Vinyor's case*, 8 Co. 81. b

104. *Walsh v. Whitcomb*, 2 Esp. Rep. 565. Lord Eldon, in *Bromley v.Holland*, 7 Vesey, 28.

105. Pothier, *Traité des Oblig*. No. 80. Buller, J. in *Salter v. Field*, 5Term Rep. 211. *Bowerbank v. Morris*, Wallace's Rep. 126. *Spencer &White v. Wilson*, 4 Munf. 130. Mellen, Ch. J. in *Harper v. Little*, 2 Greenleaf, 14.

106. Dig. 17. 1. 15.

107. *Harrison's case*, 12 Mod. 346. Pothier, *Contrat de Mandat*, No. 121.

108. *Minett v. Forrester*, 4 Taunton, 541. *Parker v. Smith*, 16 East, 382.

109. *Dixon v. Ewart*, 3 Merivale, 322.

110. *Alley v. Holson*, 4 Campb. 525.

111. *White v. Gifford*, 1 Rol. Abr. 331. tit. Authoritie, E. pl, 4. Anon. Wm. Jones, 388. *Charnley v. Winstanley*, 5 East, 266.

112. Anon. 1 Salk. 117. 399.

113. *Huddleston's case*, cited in 2 Vesey, 34. 1 Swanston, 515. n. *Sayer v. Bennett*, 2 Cox's Cases, 107. *Waters v. Taylor*, 2 Ves. & Bea. 301. The principle in the Roman law was, that no valid transaction whatever, was destroyed by subsequent lunacy. *Neque testamentum recte factum, neque ullum aliud negotium recte gestum, postea furor interveniens perimit*. Inst. 2. 12. 1.

114. Litt sec. 66. Co. Litt. ibid. Moore, 61. pl. 172. *Mitchell v. Eades*, Prec. in Ch. 125.

115. Inst. 3.27. 10. Dig. 17. 1. 26. Ibid. 46. 3. 32. Pothier *Traité des Oblig*. n. 81. Pothier, *Traité du Contrat de Charge*, part 1. ch. 6. sec 168. Emerigon, *Traité des Assurances*, tom. 2. 120.

116. *The King v. The Corporation of Bedford Level*, 6 East. 356. *Watson v. King*, 4 Campb. N. P. Rep. 272. *Harper v. Little*, 2 Greenleaf, 14. *Shipman v. Thompson*, Willes' Rep. 103. note. *Wynne v. Thomas*, ibid. 563. *Bergen v. Bennett*, 1 Caines'

Cas. in Error, 1. *Hunt v. Ennis*, 2 Mason, 244.

117. *Oades v. Woodward*, 1 Salk. 87. Fuller v. Jocelyn. 2 Str. 882. *Hunt v. Ennis*, 2 Mason, 244. The law of principal and agent has been extensively considered, and the judicial decisions at Westminster Hall digested in several English works; but the Treatise of Mr. Livermore on the Law of Principal and Agent published in two volumes at Baltimore, in 1819, is a work of superior industry and learning. He has illustrated every part of the subject by references to the civil law, and to the Commentators upon that law, and he has incorporated into the work the leading decisions in our American courts.

LECTURE 42

Of the History of Maritime Law

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

The marine law of the United States is the same as the marine law of Europe. It is not the law of a particular country, but the general law of nations; and Lord Mansfield applied to its universal adoption the expressive language of Cicero, when speaking of the eternal laws of justice: *Nec erit alia lex Romae, alia Athaenis; alia nunc, alia posthac; sed et omnes gentes, et omni tempore una lex et sempiterna, et immortalis continebit*.[1]

In treating of this law, we refer to its pacific character as the law of commerce and navigation in time of peace. The respective rights of belligerents and neutrals in time of war constitute the code of prize law, and that forms a distinct subject of inquiry, which has already been sufficiently discussed in the former volume. When Lord Mansfield mentioned the law of merchants as being a breach of public law, it was because that law did not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but consisted of certain principles and usages which general convenience, and a common sense of justice had established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.

(1.) *Of the maritime legislation of the ancients.*

Though the marine law of modern Europe has its foundations laid in the jurisprudence of the ancients, there is no certain evidence that either the Phoenicians, Carthaginians, or any of the states of Greece, formed any authoritative digest of naval law. Those powers were distinguished for navigation and commerce, and the Athenians in particular were very commercial, and they kept up a busy intercourse with the Greek colonies in Asia Minor, and on the borders of the Euxine and the Hellespout, in the islands of the Aegean sea, and in Sicily and Italy. They were probably the greatest naval power in all antiquity. Themistocles had the sagacity to discern the wonderful influence and controlling ascendancy of naval power. It is stated by Diodorus Siculus, that he persuaded the Athenians to build twenty new ships every year. He established the Piraeus as a great commercial emporium and arsenal for Athens, and the cultivation of her naval superiority and glory was his favorite policy; for he held the proposition which Pompey afterwards adopted, that the people who were masters of the sea would be masters of the world.

The Athenians encouraged, by their laws, navigation and trade; and there was a particular jurisdiction at Athens for the cognizance of contracts, and controversies between merchants and mariners. There were numerous laws relative to the rights and interests of merchants, and of their navigation; and in many of them there was an endeavor to remove, as much as possible, the process and obstacles which afflicted the operations of commerce. In a pleading of Demosthenes against Lacritus, there is the substance of a loan upon bottomry, with all the provisions and perils appertaining to such contract, carefully noted.[2] As a consequence of the commercial spirit and enterprise of the Greeks, their language was spoken throughout all the coasts of the Mediterranean

and Euxine seas. Cicero was struck with the comparison between the narrow limits in which the Latin language was confined, and the wide extent of the Greek.[3] The universality and stability of the Greek tongue were owing, no doubt, in a considerable degree, to the conquests of Alexander, to the loquacity of the Greeks, and the inimitable excellence of the language itself; but it is essentially to be imputed to the commercial genius of the people, and to the factories which they established, and the trade and correspondence which they maintained throughout the then known parts of the eastern world.

The Rhodians were the earliest people that actually created, digested, and promulgated a system of marine law. They obtained the sovereignty of the seas about nine hundred years before the Christian era, and were celebrated for their naval power and discipline. Their laws concerning navigation were received at Athens, and in all the islands of the Aegean sea, and throughout the coasts of the Mediterranean, as part of the law of nations. Cicero, who in early life studied rhetoric at Rhodes, says,[4] that the power and civil discipline of that republic continued down within his time of memory, in vigor and with glory. We are indebted to the Roman law for all our knowledge of the commercial jurisprudence of the Rhodians. Not only their arts and dominion have perished, but even their nautical laws and usages would have entirely and forever disappeared in the wreck of nations, had it not been for the superior wisdom of their masters, the Romans; and one solitary title in the pandects,[5] contains all the fragments that have floated down to modern times, of their once celebrated maritime code.

The collection of laws, under the title of Rhodian laws, published at Basle, in 1561, and at Frankfort, in 1596, were cited as genuine by such civilians as Cujas, Godefroi, Selden, Vinnius, and Gravina; and yet it has since been discovered and declared by equally learned jurists, as Bynkershoek,[6] Heineccius,[7] Emerigon,[8] and Azuni,[9] that the collection of laws which had been thus recognized as the ancient Rhodian laws, (and of which a translation was given in the collection of sea laws published at London in the reign of Queen Anne,) are not genuine, but spurious. The emperor Augustus first gave a sanction to the laws of the Rhodians, as rules for decision in maritime cases at Rome; and the emperor Antoninus referred one of his subjects, aggrieved by the plunder of his shipwrecked property, to the maritime laws of Rhodes, being the laws which, he said, were the sovereign of the sea.[10] The Rhodian laws, by this authoritative recognition, became rules of decision in all maritime cases in which they were not contrary to some express provision of the Roman law. They were truly, as Valin has observed; the cradle of nautical jurisprudence.

We are, therefore, to look to the collections of Justinian, for all that remains to us of the commercial law of the ancients. The Romans never digested any general code of maritime regulations, notwithstanding they were pre-eminently distinguished for the cultivation, method and system which they gave to their municipal law. They seem to have been contented to adopt as their own the regulations of the republic of Rhodes. The genius of the Roman government was military, and not commercial. Mercantile professions were despised, and nothing was esteemed honorable but the plow and the sword. They encouraged corn merchants to import provisions from Sardinia, Sicily; Africa and Spain; but this was necessary for the subsistence of the inhabitants of Rome, as Italy did not afford a sufficient supply for the city.

The Romans prohibited commerce to persons of birth, rank, and fortune;[11] and no senator was allowed to own a vessel larger than a boat sufficient to carry his own corn and fruits.[12] The navigation which the Romans cultivated, was for the purposes of war, and not of commerce, except

so far as was requisite for the supply of the Roman market with provisions.[13] This is the reason, that amidst such a vast collection of wise regulations as are embodied in the fabric of the Roman law, affecting almost every interest and relation in human life, we meet with only a few brief and borrowed details on the interesting subject of maritime affairs. But those titles atone for their brevity, by their excellent sense and practical wisdom. They contain the elements of those very rules which have received the greatest expansion and improvement in the maritime codes of modern nations. Whatever carne from the pens of such sages as Papinian, Paul, Julian, Labeo, Ulpian, and Scaevola, carried with it demonstrative proofs of the wisdom of their philosophy, and the elegance of their taste.[14]

(2.) *Of the maritime legislation of the middle ages.*

Upon the revival of commerce, after the destruction of the Western empire of the Romans, maritime rules became necessary. The earliest code of modern sea laws was compiled for the free and trading republic of Amalphi, in Italy, about the time of the first crusade, towards the end of the eleventh century. This compilation, which has been known by the name of the Amalphitan Table, superseded the ancient laws; and its authority was acknowledged by all the states of Italy.[15] Other states and cities began to form collections of maritime law; and a compilation of the usages and laws of the Mediterranean powers was made and published, under the title of the *Consolato del mare*. This commercial code is said to have been digested at Barcelona, in the Catalan tongue, during the middle ages, by order of the kings of Arragon. The Spaniards vindicate the claim of their country to the honor of this compilation; and the opinion of Casaregis, who published an Italian edition of it at Venice, in 1737, with an excellent commentary, and of Boucher, who in 1808 translated the *Consolato* into French, from an edition printed at Barcelona, in 1494, are in favor of the Spanish claim.[16]

But the origin of the work is so far involved in the darkness of those ages, as to render the source of it very doubtful; and Azuni, in a labored article,[17] endeavors to prove that the *Consolato* was compiled by the Pisans, in Italy, during the period of their maritime prosperity. Grotius,[18] on the other hand, and Marquardus, in his work *De Jure Mercatorum*, hold it to be a collection made in the time of the crusades, from the maritime ordinances of the Greek emperors, of the emperors of Germany, the kings of France, Spain, Syria, Cyprus, the Baleares, and from those of the republics of Venice and Genoa.[19] It was probably a compilation made by private persons; but whoever may have been the authors of it, and at whatever precise point of time the *Consolato* may have been compiled, it is certain that it became the common law of all the commercial powers of Europe. The marine laws of Italy, Spain, France, and England, were greatly affected by its influence; and it formed the basis of subsequent maritime ordinances.[20] It has been translated into the Castilian, Italian, German, and French languages; and an entire translation of it into English has long been desired and called for by those scholars and lawyers who were the most competent to judge of its value.[21]

We are naturally induced to overlook the want of order and system in the *Consolato*, and the severity of some of its rules, and to justify Emerigon and Boucher in their admiration of the good sense and spirit of equity which dictated its decisions upon contracts, when we consider that the compilation was the production of a barbarous age.[22] It is, undoubtedly, the most authentic and venerable monument extant, of the commercial usages of the middle ages, and especially among the people who were concerned in the various branches of the Mediterranean trade. It was as comprehensive

in its plan as it was liberal in its principle. It treated of maritime courts, of shipping, of the ownership and equipment of ships, of the duties and responsibilities of the owners and master, of freight and seamen's wages, of the duties and government of seamen, of ransoms, salvage, jettisons, and average contributions. It treated also of maritime captures, and of the mutual rights of neutral and belligerent vessels; and, in fact, it contained the rudiments of the law of prize. Emerigon very properly rebukes Hubner for the light and frivolous manner in which he speaks of the *Consolato*; and he says in return, that its decisions are founded on the law of nations, and have re-united the suffrages of mankind.[23]

The laws of Oleron were the next collection in point of time and celebrity. They were collected and promulgated in the island of Oleron, on the coast of France, in or about the time of Richard I. The French lawyers in the highest repute, such as Cleirac, Valin, and Emerigon, have contended, that the laws of Oleron were a French production, compiled under the direction of Queen Eleanor, Dutchess of Guienne, in the language of Gascony, for the use of the province of Guienne, and the navigation on the coasts of the Atlantic; and that her son, Richard I, who was King of England, as well as Duke of Guienne, adopted and enlarged this collection. Selden, Coke, and Blackstone, on the other hand, have claimed it as an English work, published by Richard I in his character of King of England.[24] It is a proof of the obscurity that covers the early history of the law, that the author of such an important code of legislation as the laws of Oleron, should have been left in so much obscurity as to induce profound antiquaries to adopt different conclusions, in like manner as Spain and Italy have asserted rival claims to the origin of the *Consolato*. The laws of Oleron were borrowed from the Rhodian laws, and the *Consolato*, with alterations and additions, adapted to the trade of western Europe. They have served as a model for subsequent sea laws, and have at all times been extremely respected in France, and perhaps equally so in England, though not under the impulse of the same national feeling of partiality. They have been admitted as authority on admiralty questions in the courts of justice in this country.[25]

The laws of Wisbuy were compiled by the merchants of the city of Wisbuy, in the island of Gothland, in the Baltic sea, about the year 1288. It had been contended by some writers, that these laws were more ancient than those of Oleron, or even than the *Consolato*. But Cleirac says, they were but a supplement to the laws of Oleron, and constituted the maritime law of all the Baltic nations north of the Rhine, in like manner as the laws of Oleron governed in England and France, and the provisions of the *Consolato* on the shores of the Mediteranean. They were, on many points, a repetition of the judgments of Oleron, and became the basis of the ordinances of the Hanseatic League.[26]

The renowned Hanseatic association was begun at least as early as the middle of the thirteenth century, and it originated with the cities of Lubec, Bremen, and Hamburgh. The free and privileged Hanse Towns became the asylum of commerce, and the retreats of civilization, when the rest of Europe was subjected to the iron sway of the feudal system, and the northern seas ware infested by "savage clans, and roving barbarians." Their object was mutual defense against piracy by sea, and pillage by land. They were united by a league offensive and defensive, and with an intercommunity of citizenship and privileges. The association of the cities of Lubec, Brunswick, Dantzick and Cologne, commenced in the year 1254, according to Cleirac, and in 1164, according to Azuni; and it became so safe and beneficial a confederacy, that all the cities and large towns on the Baltic, and on the navigable rivers of Germany, to the number of eighty-one, acceded to the union. One of the means adopted by the confederates to insure prosperity to their trade, and to protect them from

controversies with each other, was the formation of a code of maritime law. The consuls and deputies of the Hanseatic league, in a general convention at Lubec in 1614, added to their former ordinances of 1597, (or 1591, as Azuni insists,) from the laws of Oleron, and of Wisbuy, and establish a second and larger Hanseatic ordinance, under the title of the *Jus Hanseaticum Maritimum*. This digest of nautical usages and regulations, was founded evidently on those of Wisbuy and Oleron, and from the great influence and character of the confederacy, it has always been deemed a compilation of authority.[27]

(3.) *Of the maritime legislation of the moderns.*

But all the former ordinances and compilations on maritime law, were in a great degree superseded in public estimation, their authority diminished, and their luster eclipsed by the French ordinance upon commerce in 1673, which treated largely of negotiable paper; and more especially by the celebrated marine ordinance of 1681. This monument of the wisdom of the reign of Louis XIV, far more durable and more glorious than all the military trophies won by the valor of his arms, was erected under the influence of the genius and patronage of Colbert, who was not only the minister and secretary of state to the king, but inspector and general superintendant of commerce and navigation. It was by the special direction of that minister, and with a view to illustrate the advantages of the commerce of the Indies, that Huet wrote his learned history of the commerce and navigation of the ancients.[28] The vigilance and capacity of the ministry of Louis communicated uncommon vigor to commercial inquiries. They created a marine which shed splendor on his reign, and corresponded, in some degree, with the extent of his resources. It required such a work as the ordinance to which I have referred, to consolidate the establishment of the maritime power which had been formed by the sagacity of his counsels.

That ordinance, says Valin, was executed in a masterly manner. It was so comprehensive in its plan, so excellent in the arrangement of its parts, so just in its decisions, so wise in its general and particular policy, so accurate and clear in its details, that it deserves to be considered as a model of a perfect code of maritime jurisprudence. The whole law of navigation, shipping, insurance, and bottomry, was systematically collected and arranged. It required the greatest extent of knowledge, and the most correct discernment and liberality of views, to form and execute such a work. It was necessary to examine the commercial usages of all other nations, and select from amidst a contrariety of practice the most approved rules. It was necessary to retrench that which was superfluous, to enlighten that which was obscure, and to supply those things which had escaped the observation of the earlier founders of nautical law, or been recommended by the lights of experience. It is, however, an extraordinary fact, that the able civilians, and perhaps the distinguished merchants, who assumed the task of legislators, and compiled the ordinance, are unknown to fame; and though the event be of so recent a date, and occurred at the most polished and literary era in French history, neither letters, nor gratitude, nor national vanity, have been able to rescue their name from oblivion.[29]

Valin supposed he had discovered the source of the materials of the ordinance in a curious and vast compilation of ancient maritime laws, among the manuscript collections in the library of the Duke of Penthievre. The compilation consisted of the Rhodian and Roman law; of the *Consolato*, and of the use and customs of the sea; of the ordinances of Charles V. and Philip II., kings of Spain; of the judgments of Oleron; of the ordinance of Wisbuy, and of the Teutonic Hanse; of the insurance codes of Antwerp and Amsterdam; of the Guidon, and of all the French ordinances prior to the year 1660.

This magnificent repository of commercial science is supposed to have been the true and solid foundation of the fabric erected by artists who had too much modesty to make their work the vehicle of their own immortality. Every commercial nation has rendered homage to the wisdom and integrity of the French ordinance of the marine, and they have regarded it as a digest of the maritime law of civilized Europe. Valin has written a commentary upon every part of it, and it almost rivals the ordinance itself in the weight of its authority, as in the equity of its conclusions.[30]

In addition to these general codes of commercial legislation, there have been a number of local ordinances, of distinguished credit, relating to nautical matters and marine insurance, such as the ordinances of Barcelona, Florence, Amsterdam, Antwerp, Copenhagen, and Konigsberg. There have also been several treatises on nautical subjects by learned civilians in the several countries of Europe, which are of great authority and reputation.[31]

The English nation never had any general and solemnly enacted code of maritime law, resembling those which have been mentioned as belonging to the other European nations. This deficiency was supplied, not only by several extensive private compilations,[32] but it has been more eminently and more authoritatively supplied, by a series of judicial decisions, commencing about the middle of the last century. Those decisions have shown, to the admiration of the world, the masterly acquaintance of the English judiciary with the principles and spirit of commercial policy and general jurisprudence, and they have afforded undoubted proofs of the entire independence, impartiality and purity of the administration of justice. The numerous cases in the books of reports which have arisen upon maritime questions, resemble elementary treatises in the depth, extent, and variety of their researches, while they partake, at the same time, of the precision and authority of legislative enactments. Lord Mansfield, at a very early period of his judicial life, introduced to the notice of the English bar, the Rhodian laws, the *Consolato del mare*, the laws of Oleron, the treatises of Roccus, the laws of Wisbuy, and, above all, the marine ordinances of Louis XIV., and the commentary of Valin. These authorities were cited by him in *Luke v. Lyde*,[33] and from that time a new direction was given to English studies, and new vigor, and more liberal and enlarged views communicated to forensic investigations.

Since the year 1798, the decisions of Sir William Scott, (now Lord Stowell) on the admiralty side of Westminster Hall, have been read and admired in every region of the republic of letters, as models of the most cultivated and the most enlightened human reason. The English maritime law can now be studied in the adjudged cases with at least as much profit, and with vastly more pleasure, than in the dry and formal didactic treatises and ordinances professedly devoted to the science. The doctrines are there reasoned out at large, and practically applied The arguments at the bar, and the opinions from the bench, are intermingled with the gravest reflections, the most scrupulous morality, the soundest policy, and a thorough acquaintance with all the various topics that concern the great social interests of mankind.

Nor has our learned profession in this country been wanting in the study and cultivation of maritime law. Our improvement has been rapid, and our career illustrious, since the adoption of the present constitution of the United States. There have been several respectable treatises on subjects of commercial law, and some of them we may notice when we are upon the branches to which they are applied. The decisions in the federal courts in commercial cases, have done credit to the moral and intellectual character of the nation; and the admiralty courts in particular have displayed great research, and a familiar knowledge, of the principles of the marine law, of Europe. But I should omit

doing justice to my own feelings, as well as to the cause of truth, if I were not to select the decisions in Gallison's and Masons's Reports, as specimens of pre-eminent merit. They may fairly be placed upon a level with the best productions of the English admiralty, for deep and accurate learning, as well as for the highest ability and wisdom in decision.

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

END OF VOLUME 2

NOTES

1. Frag, *de Repub*. lib. 3.
2. 1 Potter's Greek Antiq., 84. *Voyage du jeune Anacharsis*, tom. 6. ch. 55. 2 Mitf. Hist. 182-185.
3. *Graeca leguntur in omnibus fere gentibus: Latina suis finibus exiguissane, continentur*. *Orat, pro Archia Poeta*, s. 10.
4. *Orat. pro. Lege Municia*, ch. 18.
5. Dig. 14. 2. *De Lege Rhodia de Jactu*.
6. Opera, tom. 2. *De Lege Rhodia*. ch. 8.
7. *Hist. Jur. Civilis Rom. ac. Germ*. lib. 1. s. 296.
8. *Traité des Ass*. pref.
9. Maritime Law of Europe, vol. 1, 277 to 295, N.Y. edit. In the note to p. 286, William Johnson, Esq the learned translator of Azuni, detects many gross errors in the pretended collection of Rhodian laws, contained in the English “complete body of Sea Laws.” Mr. Johnson’s opinion is, of itself, of great authority; and his notes to his translation of Azuni, show a familiar and accurate acquaintance with legal and classical antiquities. Yet notwithstanding all the authority against the authenticity of that collection, M. Boulay Paty, in his Cours de Droit Commercial Maritime, tom. 1. p. 10-21. does not hesitate to give

a succinct analysis of that collection, as containing at least the sense and spirit of the original laws, and as being an exposition of the true text.

10. Dig. 14. 2. 9

11. Code 4. 63. 3. The decree in the code speaks contemptuously of commerce, and as being fit only for plebeians, and not for those who were *honorum luce conspicuos, et patrimonio ditiores*. Even Cicero regarded commerce as being inconsistent with the dignity of the masters of the world: *nolo eundam populum Imperatorem, et Portitorem esse terrarum*.

12. Livy, lib. 21. ch. 63. Dig. 50. 5. 3. Cicero, Orat. in Verrem, lib. 5, s. 18.

13. Huet, *Histoire du Com. Et de la Navig. des ancients*, p. 278, 279.

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

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

The title *Furti adversus Nautas, Caupones, Stabularios,* (Dig. 47. 5.) related to the same subject, and the owner and master were therein held answerable for thefts committed by any person employed under them in the ship. But the law distinguished between thefts by mariners and by passengers, and the Master was not liable for thefts by the latter.

The title *De Exercitoria actione* (Dig. 14. 1.) treated of the responsibility of ship owners for the acts of the master. This, said Ulpian, was a very reasonable and useful provision, for as the shipper was obliged to deal with masters of vessels, it was right that the owner, who appointed the master, and held him out to the world as an agent worthy of confidence, should be bound by his acts. This responsibility extended to every thing that the master did in pursuance of his power and duty as master. It extended to his contracts for wages, provisions, and repairs for the ship, and for the loan of money for the use of the ship. The owner was not responsible, except for acts done by the master in his character of master; but if he took up money for the use of the ship, and afterwards converted it to his own use, the owner was bound to respond, for he first gave credit to the master. A case of necessity for the money must have existed; and in that case only, the power to borrow came within the master's general authority. The lender was obliged to make out at his peril, the existence of such necessity; and then he was entitled to recover of the owner, without being obliged to prove the actual application of the money to the purposes of the voyage. So if the master went beyond his ordinary powers, as for instance, if he was appointed to a vessel employed to carry goods of a particular description, as hemp or vegetables, and he took on board shafts of granite or marble, the owner was not answerable for his acts; for there were vessels destined on purpose to carry such articles, and others to carry passengers, and some to navigate on rivers, and others to go to sea. If several owners were concerned in the appointment of the master, they were each responsible *in solido* for his contracts.

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

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

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

The title *De Incendio, Ruina, naufragis, Rate, nave expugnata*, (Dig 47. 9.) related to the plunder of vessels in distress; and it did great honor to the justice and humanity of the Roman law. The edict of the praetor gave fourfold damages to the owner, against any person who, by force or fraud, plundered a ship in distr ss. The guilty persons were liable, not only to be punished criminally on behalf of the government, but to make just retribution to the aggrieved party: and the severity of the rule, said Ulpian, was just and necessary, in order to prevent such abuses in cases of such calamity. The same provision was

extended to losses by those means during a calamity by fire. The law applied equally to the fraudulent receiver and original taker of the shipwrecked articles, and he was held to be equally guilty.

This cursory view of the leading doctrines of the Roman maritime law, (for I have not thought it necessary to take notice of all the refined and intelligent distinctions,) is sufficient to show how greatly the maritime codes of the moderns are indebted to the enlightened policy and cultivated science of the Roman lawyers. The spirit of equity, in all its purity and simplicity, seems to have pervaded those ancient institutions.

15. Azuni's Maritime Law, vol. 1, 376.

16. Hallam, in his View of Europe during the Middle Ages, vol. 2, 278. thinks the reasoning of Boucher, in his *Consulat de la Mer*, tom. 1, 70- 76 to be inconclusive, and that Pisa first practiced those usages, which a century or two afterwards were formally digested and promulgated at Barcelona.

17. Maritime Law, vol. 1. 326-372.

18. Lib. 3. ch. 1. s. 5 note.

19. Boulay Paty. in his *Cours de Droit Commercial Maritime*, tom. 1. 80. insists, that Azuni has refuted Grotius and the other publicists on the point in a triumphant manner.

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

21. There has been a translation of two chapters on prize by Dr. Robinson, and of some chapters on the ancient consular or commercial courts, and on re-captures. inserted in the 2d, 3d, and 4th volumes of Hall's American Law Journal.

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

23. *Traité des Assurances*, pref.

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

25. See *Walton v. The Ship Neptune*, 1 Peters' Adm. Dec. 142. *Natterstrom v. Ship Hazard*, in the District Court of Massachusetts, 2 Hall's L. J. 359. *Sims v. Jackson*, 1 Peters' Adm. Dec. 157, all of which were decided on the authority of the laws of Oleron. Cleirac published in the middle of the seventeenth century, the laws of Oleron, in his work entitled, *Les Us et Coutumes de la Mer*, with an excellent commentary. They were translated into English, with the notes of Cleirac, considerably abridged, and published in the collection of sea laws made in the reign of Queen Anne. They have likewise been published in this country in the Appendix to the first volume of Peters' Admiralty Decisions; from the copy in the Sea Laws. There is, likewise, annexed to these reports, a copy of the laws of Wisbuy, of the Hanse Towns, and of the marine ordinances of Louis XIV., and they have given increased interest to a valuable publication.

26. Cleirac, in his preamble to the ordinances of Wisbuy, (*Les Us et Coutumes de la Mer*. p. 136) gives from Johannes Magnus, and his brother Olaus, the historians of Sweden, and the Goths, a very glowing account of the former wealth and commercial prosperity and splendor of Wisbuy, the ancient capital of Gothland, and then a free and independent city. It was once the most celebrated and flourishing emporium in Europe, and merchants from all parts came there to traffic, and had their shops and warehouses and enjoyed the same privileges as the native inhabitants. But, in Cleirac's time, this bright vision had vanished, and the town, with its trade and riches, was destroyed and nothing was to be seen but heaps of ruins, the sad evidence of its former splendor and magnificence. Here is one ground for the melancholy admonition of the Poet, "That trade's proud empire hastes to swift decay." But the logic of the muse is entirely refuted by the stability of commercial power in other illustrious examples.

27. *Les Us et Coutumes de la Mer*, p. 157-165. Ward in his History of the Law of Nations, vol. ii. 276-290, adduces proofs, that the Hanseatic league exercised the rights of sovereignty as a federal republic, and with considerable strength and vigor, until the fifteenth century. No less than four commercial treaties were concluded between England and the Hanse Towns in the space of three years, from the year 1472 to 1474. But the league was dissolved as soon as the great powers of Europe withdrew their cities from the association; and the members of this confederacy are now reduced to the cities of Lubec, Hamburgh, and Bremen. Rym, Foed. tom. 9. cited in Henry's Hist. of Great Britain, b. 5. ch. 6. Putter's Constitutional History

of Germany, vol. ii. p. 208.

28. *Hist. du Comm. et de la Navig. des Anciens*, Pref.

29. Valin's *Com sur Pord*, Pref. p. 4

30. The ordinance has been translated and printed in England, and published in the collection entitled Sea Laws, and it is annexed to the second volume of Judge Peter's Admiralty Decisions in the District Court of Pennsylvania. It has been redigested, with some few modifications and additions in the new Commercial Code of France of 1807; and that code was translated by Mr. Rodman, and published in the city of New York in 1814. The commercial code was presented to the French legislative body by the counselors of state in 1807, as having been conceived, meditated, discussed and established, by the inspiration of the greatest man in History, the Hero Pacificator of Europe, while he was bearing his triumphant eagles to the banns of the astonished Vistula; and yet, in contradiction to much of this adulation and incense, the code will be found, upon sober examination, to be essentially a republication, in a new form, of the marine ordinance of Louis XIV., digested under the orders of Colbert, and illustrated by the commentaries of Valin.

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

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

33. 2 Burr. 882.

