A

SELECTION OF LEADING CASES

ON

MERCANTILE AND MARITIME LAW.

WITH NOTES.

BY OWEN DAVIES TUDOR,

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FROM THE SECOND LONDON EDITION.

WITH

ADDITIONAL NOTES AND REFERENCES TO AMERICAN CASES,

BY

GEORGE SHARSWOOD.

PART FIRST.

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ADVERTISEMENT.

In preparing this Edition, it has been deemed most advisable, in view of the size of the work, that the American notes should not be extended by a discussion of the cases. It has been the aim of the Editor after each case to give full references to all the American authorities upon the subject, so arranged that by consulting them the student can be put in possession of the principles which have been recognised in this country. To have given a treatise at large upon each topic would have very much increased the matter; and short of this, a critical examination and discussion would have been imperfect and unsatisfactory. The utmost care has been exercised in the selection and arrangement of the cases.

G. S.

April, 1873.

PREFACE TO THE FIRST EDITION.

THE plan of this selection of Leading Cases is like that adopted in similar collections. Cases frequently cited in our Courts, or in which some important principle was first enunciated in clear and decisive terms, are first chosen, and to these are appended Notes, in which an attempt is made to develop the principles laid down in the cases, great care being at the same time taken to notice the recent authorities.

The Cases in this work may be divided into two important divisions: the first, relating to ordinary mercantile law in time of peace; the second, relating to the effect of war, and especially of maritime war, upon the property and contracts of merchants.

In the first class of Cases will be found principally the judgments of Lord Hardwicke, C., Lord Mansfield, C. J., Eyre, C. J., Lawrence, J., Lord Eldon, C., Sir Wm. Grant, M. R., Lord Redesdale, C., Lord Ellenborough, C. J., Lord Tenterden, C. J., Lord Brougham, C., Lord Abinger, C. B., and Parke, B. (now Lord Wensleydale),—judges than

whom the authority of none can be higher in all questions relating to mercantile law.

The second class of Cases consists principally, as might be expected, of the decisions of Sir William Scott (better known now perhaps as Lord Stowell), whose judgments have, with no undue strain of compliment, been termed models of judicial eloquence.

The subjects illustrated by the decisions selected as "Leading Cases," and the annotations thereon, will be found in the annexed List of Cases reported.

16 Old Square, Lincoln's Inn
March, 1860.

LIST OF CASES REPORTED.

PART FIRST.

THE PAGES REFERRED TO ARE THOSE BETWEEN BRACKETS [ ].

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TO THE

NAMES OF ENGLISH CASES CITED.

THE PAGES REFERRED TO ARE THOSE BETWEEN BRACKETS [ ].

LEADING CASES

ON

MERCANTILE AND MARITIME LAW.

DEVAYNES *v.* NOBLE.

CLAYTON'S CASE.

July 23*d*, 24*th*, 26*th*, 1816.

[Reported 1 Mer. 585.]

Appropriation of Payments.]—*On the death of D., a partner in a banking firm, there was a balance of* 1713*l. in favor of C., who had a running account with the firm. After the death of D. his late partners became bankrupt, but before their bankruptcy C. had drawn out sums more in amount than* 1713*l., and had paid in sums still more considerable:— Held, that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of* 1713*l then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable.*

It appeared in this case that William Devaynes, John Dawes, William Noble, R. H. Croft, and Richard Barwick carried on the business of bankers in partnership together.

William Devaynes died on the 29th of November, 1809. The surviving partners carried on the business on their own proper account, the representatives of William Devaynes
*2] having no continuing share or interest *in the business or the profits thereof. On the 30th July, 1810, the surviving partners became bankrupt.

At the death of Devaynes, Clayton's cash balance in the hands of the partnership amounted to 1713*l.* and a fraction.

After the death of Devaynes, and before Clayton paid in any further sums to his account with the bankers, he drew out of the house sums to the amount of 1260*l.*, thereby reducing his cash balance to 453*l.* and a fraction.

From this time to the bankruptcy, Clayton both paid in and drew out considerable sums; but his payments were so much larger than his receipts that, at the time of the bankruptcy, his cash balance in the hands of the surviving partners exceeded 1713*l.*, the amount of the cash balance at Devaynes's death.

It appeared from the Master's Report, that a notice was given by the executors of Devaynes that they were not connected with the house, and that it had been drawn up by a firm of solicitors of which Clayton was a member, though it appeared that he knew nothing of such notice until after the bankruptcy.

It also appeared that Clayton kept his accounts with the partnership according to the custom of bankers with their country customers. On the 30th of March, 1810, his account was made up and balanced by the surviving partners, and transmitted to him and the balance carried forward, and the account continued to the time of the bankruptcy.

By the amount of the dividends received since the bankruptcy (those dividends being apportioned to the whole debt proved under the Commission), the balance of 1713*l.* would be reduced to 1171*l.* and a fraction; and it was this last sum which Clayton claimed against Devaynes's estate,

and as to which the Master had reported that Clayton had, by his subsequent dealings with the surviving partners, released the said estate.

But now, upon the argument of the exception to the report, and in consequence of the decision in *Miss Sleech's Case*, 1 Mer. 539, that claim was abandoned to the whole extent of the cash balance at Devaynes's death above 453*l.*, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it; and that which was now claimed is the last-mentioned sum of 453*l.*, minus its proportion of the dividends.

Bell and *Palmer*, *Fonblanque*, and *Clayton*, in support of the exception.

*This is a case, the decision of which will be of the greater importance, as it has lately been one of frequent occurrence and has never been decided, either at law or in equity. Suppose that in this case, Devaynes, instead of dying, had merely quitted the partnership; and that public notice had been given of that event tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case, the question would have been a mere legal question; and what we submit is, that in such a case the retiring partner would clearly be liable to the extent of the 453*l.*; and, if so, that then, in the present case, the rule of equity is strictly analogous to the rule of law. [*3

If this view be correct, then all that remains to be considered is, whether there are here any special circumstances which would, in the case we are supposing, have discharged the legal liability.

The legal principle is that which is laid down in *Bois* v. *Cranfield*, Styles 239; Vin. Ab. tit. Payment, M. pl. 1; and

appears to be this, viz.: that if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he (the payor) has a right to say to which account the money so paid is to be appropriated.

Then follows *Heyward* v. *Lomax*, 1 Vern. 24, deciding that if a man, owing another money on security carrying interest, and also on simple contract, pays money generally, without specifying on what specific account, it shall be taken to the advantage of the payor, in discharge of the debt carrying interest. This however has been overruled by subsequent cases.

The next is *Perris* v. *Roberts*, 1 Vern. 34, where there being a mortgage debt, and also a debt by simple contract, and both being cast into one stated account, and a bill of sale being made for securing the balance, which proved deficient, the payment was decreed to be apportioned. In this case there were strong circumstances to have exonerated the debtor altogether.

In *Manning* v. *Westerne*, 2 Vern. 606, however, the rule is strictly brought back within its former limits. There a man indebted both by specialty and by simple contract, having made payments and entered them in his book as made on account of what was due by specialty, this was held not a sufficient appropriation; and the Lord Chancellor (Lord Cowper) said, that the rule of law "quicquid solvitur solvitur secundum modum solventis" is to be understood only *4] when at the time of payment the payor declares *the purpose. If he does not, the payee may direct how it shall be applied. See, to the same purpose, *Anon.*, 2 Mod. 236, and *Bowes* v. *Lucas*, Andrews 55.

Meggott v. *Mills*, Lord Raym. 287, must also be mentioned, because that is a case on which some stress will probably be laid. Lord C. J. Holt there expressed it to be his opinion that, where two sums were due, one of which might make the debtor a bankrupt, and the other (being a debt

incurred after he ceased to trade) could not produce that consequence, the payment should be taken without more, as meant to be applied to the former debt. But this opinion of Lord Holt's has since been called in question.

Goddard v. *Cox*, 2 Stra. 1194, is next in order of time, and has been considered as a ruling case ever since its decision. There a widow, being indebted as executrix to her deceased husband, became also indebted on her own account, and afterwards married again, and her second husband became also indebted on his own account, and made payments without declaring the purpose. It was agreed that he had the first right to appropriate his payments; but having neglected it, that it devolved on the payee, who might apply them as he pleased, either to the debt incurred by the wife *dum sola*, for which the husband was answerable, or to the husband's own debt, but not to the debt of the wife as executrix. And a case of *Bloss* v. *Cutting* was there cited to the same effect as *Manning* v. *Westerne*, and the rest.

The next case is *Hammersly* v. *Knowlys*, 2 Esp. 665, which would have been against us if we had contended for the whole amount of Clayton's claim; but, taking it at the lesser sum only, is in our favor. In that case, Lord Kenyon held that the note of A. being deposited by B. at his bankers', as a security for money, the bankers knowing that it was an accommodation note, and B. afterwards paying money to his bankers without any specific appropriation, the money must be placed, as far as it would go, in discharge of the then existing debt; and the banker could not make the maker of the note responsible for more than the balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money.

Then comes *Dawe* v. *Holdsworth*, Peake N. P. 64, which was an action of trover. The defence was bankruptcy; and the question arose, as it did in the case of Lord Raymond,

whether the petitioning creditor's debt could be established by reason of the bankruptcy. To establish the bankruptcy, the defendant proved that *Pittard was a trader, and so
*5] continued till 1785, when he became indebted to one creditor in 200*l.*, upon whose petition the commission issued. This debt was originally a simple contract debt, but a bond was given after he had ceased to be a trader; and Lord Kenyon held that the question was, not when the bond was given, but when the debt was contracted. There had been dealings between the bankrupt and the petitioning creditor since he ceased to be a trader; and it proved that, though at the time of the commission issued, there was a larger balance than 200*l.* due to the creditor, yet more than 200*l.* had also been paid on account between the time when the trading ceased and the issuing of the commission. Lord Kenyon further held that, as no particular directions had been given for the application of the money paid on account, it must be placed to pay off the old debt first. Consequently, no part of the debt contracted while Pittard was a trader remained due when the commission issued; and the commission itself was therefore unsupported.

Now, *primâ facie*, this seems to be an authority unfavorable to us. But in *Peters* v. *Anderson*, 5 Taunt. 596 (1 E. C. L. R.), after all the cases on the subject had been fully gone through, it was laid down that, although the payor may apply his payment to which of two or more accounts he pleases, and although his election may be either expressed or inferred from the circumstances of the transaction, yet, if not paid specifically, the receiver might afterwards appropriate the payment to the discharge of either account as he pleases. And Lord C. J. Gibbs, referring to the cases of *Meggott* v. *Mills*, and *Dawe* v. *Holdsworth*, observes that, in both, the debts arose on the same account, and it was totally immaterial to which end of the account the payment should be applied; but that Lord C. J. Holt, and after him Lord

Kenyon, went upon this ground, that it would be too hard if a man having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to their operation. "It is an exception," he said, "and founded on the circumstance of bankruptcy."

There is one more case, of *Newmarch* v. *Clay*, 14 East 239, where Lord Ellenborough said, there might be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it. And he said, the payment in that case was evidenced by the conduct of the parties to have been made for the purpose of taking *up the bills which had been antecedently dishonored; for that, upon [*6 receiving that payment, the dishonored bills were delivered up. And upon that ground, the Court of King's Bench were of opinion there ought to be a new trial; the present Lord Chief Baron (Richards, C. B.) having previously decided it upon the general principle that, where there is no express appropriation, the payee has a right to apply the payment at his own option; which general principle is also admitted by the very ground on which the Court of King's Bench granted the new trial. Upon this, therefore, the doctrine of courts of common law rests at the present day.

Now, to apply this doctrine to the circumstances of the present case. In none of those cited does it appear that the payee had actually appropriated the payments made until the matter came into question; and the last case, of *Newmarch* v. *Clay* (as well as the principle of *Goddard* v. *Cox*) shows that the doctrine applies equally in the case of a partnership. Then it is shown that the Court may, from circumstances, infer the intention to apply a payment in discharge of the old debt;—but what were the circumstances from which that inference was drawn in the case referred to? They were of such a nature that no doubt could arise respecting their

tendency. Accordingly, the council acquiesced immediately, and did not even urge an inquiry. The case of *Dawe* v. *Holdsworth* proves, what we do not mean to dispute, that, when the old debt is completely discharged, the payments subsequently made must be applied in discharge of the new debt. This is the only case in which we hear of applying the payments to a first debt in priority to a subsequent debt; and this is the case which Lord C. J. Gibbs afterwards says was rightly decided, upon the principle that one debt would have exposed the party to a commission of bankruptcy, stating that "it is an exception founded on the circumstance of bankruptcy."

Now, still considering the present case as involving the legal question, let us suppose that Devaynes retired from the partnership in November, 1809; from that time till the commission issued in July, 1810, Mr. Clayton continued to deal with the house, both by paying in and drawing out; and in making his payments, he had a right to apply them to whatever demand he thought proper. But it is said there are special circumstances. What are they? First, that Mr. Clayton's partner gave notice to the house that Devaynes
*7] would have nothing more to do with the *house. What would be the effect at law of such a notice? Does it discharge the debt? A release cannot be by parol. How then could the debt be discharged? Not by subsequent payments; for, those payments being made generally, the payee had a right to attribute them to whatever account he pleased. In fact, there was no payment made to the account of the old debt, except as it was actually reduced on the entire balance. Then, was it in any manner altered in consequence of Clayton's accepting the new house as his debtors? He never did accept them as his debtors, any otherwise than as they were and continued to be his debtors in law. But he never, by any acts of his specifically accepted them as such. This might have been more strongly urged in Newmarch *v.* Clay.

Devaynes's executors could not, by giving notice, withdraw themselves from their responsibility. Then what does the notice amount to? Besides, notice to a partner does not bind, except in the case of a co-partnership transaction; and, therefore, even if this notice could operate as a discharge (but which it cannot), if both had been privy to it, it could not at all events have any effect whatever on Mr. Clayton.

Then there is the circumstance of the account delivered in March, 1814. What conclusion can be drawn from that circumstance? Clayton had continued to deal with the house; so had the parties in *Newmarch* v. *Clay*; so they had in *Meggott* v. *Mill*, and in *Peters* v. *Anderson*. There can be no distinction between a banking co-partnership and any other co-partnership. The question is, was the sending this account any admission by Clayton that, so far as his debt had not been paid, he considered this account as a payment? The proper way to try this would be by supposing that the account consisted only of sums drawn out. And this, as your Honor has already decided in *Miss Sleech's Case*, would not have operated in discharge. Does the circumstance of the creditor having paid in, as well as drawn out, make any distinction? It proves that he credited the house for the sums so paid in, not that he credited it for an already existing debt of Devaynes: that remains just as it did before; upon that security he rested, and had a right to rest.

So it would be at law, if Devaynes had only retired from the partnership. What then discharges his estate in equity? We have already your Honor's opinion that, although in this case it is a mere equitable demand, yet it is an equity founded upon the principles of law; and, if so, it is impossible to conceive of *any defence in equity that would not have been an available defence at law, supposing the circumstances of the case were such as to constitute it a legal demand instead of an equitable. [*8

The following cases were also cited in support of this exception: *Wilkinson* v. *Sterne*, 9 Mod. 427; *Hall* v. *Wood*, 14 East 243 n.; *Kirby* v. *Duke of Marlborough*, 2 Mau. & Selw. 18.

Hart, *Wetherell* and *Sidebottom*, and *Hazlewood*, for different parties against the exception.

The four surviving partners, having possessed themselves of all the funds of the five, were bound first to discharge the obligations of the five; and, in taking the accounts between the parties, the Court must consider every subsequent payment as to be carried to the account of that debt which, in a fair and equitable understanding between the parties, first to be discharged, in exoneration of Devaynes's estate.

The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be applied; and if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application to the option of the creditor; and again, that if the creditor neglects to exercise that option, still the application may be regulated by circumstances.

But how is it in the absence of all circumstances except that of the order of time? Suppose A. owes B. a debt of 100*l.* contracted five years ago, and another debt of 100*l.* contracted half a year ago, and pays money equal to the discharge of either of the two debts, without directing to which it is to be applied, and without the creditor's doing any act to appropriate it to either. What then? shall it not, in common sense, be taken as applied to the payment of that debt for which there has been the longest forbearance, and against which, if remaining, unsatisfied, the Statute of Limitations

will soonest operate? *Wentworth* v. *Manning*, 2 Eq. Ca. Ab. 261.

This, however, is not a case between the same debtor and creditor. The relations of the parties are altered. What are the terms to be implied in the very first draft drawn by Clayton after *Devaynes's death? He must be considered as saying to the surviving partners, "You are my [*9 debtors in respect of a debt contracted by you and your deceased partner; and I now call upon you to pay me a certain sum in discharge of that debt." He draws a second and a third draft on the same terms. He then pays in an additional sum, not expressing that he pays it to any new account, and afterwards draws a fourth draft. What is there to show that this fourth draft was drawn upon any other terms than the three preceding? He knows that it is the duty of the four to pay the debts due from the five. He knows equally well that it is not competent to him, by giving credit to the four, to charge the estate of the deceased partner with any sums to which it was not previously liable.

If Mr. Clayton had been asked when he began to draw upon and pay money to the surviving partners, knowing that Devaynes's representatives had nothing to do with the firm, whether he did so considering Devaynes's estate as responsible to him, or whether he did not deal upon the sole responsibility of the surviving partners, would he not, as a man of honor and integrity, have answered, "Certainly, I never had any conception that any other but the surviving partners were responsible"? If he had been asked whether he did not consider that as the ordinary course of his former dealings with the partnership, the first draft he drew on the new partnership was in like manner applicable to the old balance, would he have hesitated for a moment to say, "I drew this draft considering that, whenever there is an item on one side of an account, it is supposed to be in satisfaction of the old standing items on the other side, and that, when-

ever a balance is struck, there is an extinction *pro tanto* of the existing debt"? If, on the other hand, Mr. Clayton had done these acts in contemplation of reserving to himself the double responsibility of the surviving partners, and of the estate of the deceased partner, would not a court of equity have said, this is a fraud in him, to endeavor so to deal with the surviving partners as to be guaranteed by the estate of the deceased partner, without communicating to the representatives of the deceased partner that he is dealing with that intention.

When Lord Eldon said, in *Ex parte Kendall*, 17 Ves. 514, that there may be dealings between the surviving partners and the creditors of the old partnership which would discharge the estate of the deceased partner, could he by possi-
*10] bility have contemplated *a stronger case in respect of such dealings than the present? If it were competent to the creditor thus to deal with the surviving partners, keeping to himself in reserve the responsibility of the deceased partner's estate for nine months after his death, why not for nine years? Why not for thirty years, during which he might have paid in hundreds of thousands; and if at the end of thirty years, one of the survivors were to become insolvent, he might even then, upon this principle, resort to the account *ab initio*, and fixing upon the sum to which the balance was at one time reduced, call upon the Court to give him out of the estate of the deceased partner the amount of that balance?

Now, if Mr. Clayton could show, at any period, he attributed his payments into the banking-house to any particular account, and that he attributed his drafts accordingly to those payments, that might have considerable weight; for he might say, having no doubt his old balance would ultimately be paid, but doubting whether the new house would be able to pay back the sums he paid in, he had taken care to draw upon the recent payments, reserving to himself the liability of Devaynes's estate. Even then, it would be said,

"Whatever was your intention, it was one upon which, if you acted, you were bound to disclose it to Devaynes's representatives. Otherwise you have acted fraudulently towards them, and a court of equity will give you no assistance." But that is not the present case. There was no such intention on the part of Mr. Clayton; and it comes simply to this, whether his dealings with the surviving partners are not such as come within the meaning of Lord Eldon when he says, there may be dealings which would discharge the estate.

In addition to the cases already cited, the following were mentioned: *Simpson* v. *Vaughan*, 2 Atk. 31; *Strange* v. *Lee*, 3 East 484.

Bell, in reply.

If a man is bound in any one bond jointly with another, as principal and surety, and in another bond by himself alone, and pays money on account, nobody can doubt he means to pay off the bond in which he is solely bound, in preference to that in which another is bound with him. If it is asked on one side, how did Mr. Clayton mean to apply this payment? I would ask on the other, how did Mr. Devaynes's partners mean that it should be applied? Certainly in payment of their own debts, not of the debts of the five.

*Where is the authority for the alleged rule as to the priority of the debts? In *Newmarch* v. *Clay* the [*11 Lord Chief Baron was of opinion that payment was not applicable to the first debt, notwithstanding there was a partner concerned in the first who was not concerned in the second; and the Court of King's Bench afterwards varied the decision, not on that ground, but on a ground which was perfectly distinct. If that ground existed, why did Lord C. J. Gibbs say, that *Dawe* v. *Holdswarth* was distinguishable on account of its being a case of bankruptcy? Every argument applicable to this case might have been applied

to *Kirby* v. *Duke of Marlborough*, for Devaynes's estate cannot be placed in a higher degree of responsibility than that of a surety.

In *Ex parte Kendall*, Lord Eldon expressly declared he would not decide the question. Then why refer to that case as containing his Lordship's decision of this?

Whether the continuation of payments and receipts alone amounts to a discharge is a mere legal question in the case of a withdrawing partner, and must be decided on the same principles in the case of a partner who dies. Does a single payment or a single receipt alter the case? They say, Yes. But where is the authority? *Newmarch* v. *Clay* is an authority against them. So are all the cases. They are all cases which decide that it may be inferred from circumstances. But the question remains, what is a sufficient foundation for the inference? The continuance of the transactions, it has been held over and over again, is not enough. It must be a continuance attended with other circumstances.

Then they say, the new firm ought first to pay off the old debts. That depends upon whether they have assets of Devaynes's in their hands. If he was a debtor to them, where was the obligation between them? The obligation, if there was any, must depend on their having assets of his in their hands. But if there had been such an obligation, how would that affect Mr. Clayton as a creditor? *Crawshaw* v. *Collins*, 15 Ves. 218; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

The house was not trading on Devaynes's assets. In fact, the assets of the house, at the period when Mr. Devaynes quitted it, were not got in; and that creates the insolvency of the house. The house had been paying off the debts contracted in Devaynes's lifetime by their new credit; and in this very case of Mr. Clayton's, where we claim only 453*l.*, the difference between that sum and the 1171*l.* has been paid by money lodged with these gentlemen,

*and obtained on their own credit; for the assets of the house are still outstanding. [*12

Then what is the equity of this case? What circumstances are there which apply to the case of a dying partner, and do not apply to the case of a retiring partner? It is said, the debt is extinguished at law; and that equity will not revive it, where there is a superior equity. But this is a fallacy. The debt was not extinguished: for though the remedy was gone at law, it continued in equity; as in *Lane* v. *Williams*, 2 Vern. 277, 292; *Bishop* v. *Church*, 3 Atk. 691, etc., as soon as the securities were found to be given for a partnership debt, they were considered as joint and several. The simple questions therefore are, whether the continuing to deal, by drawing out and paying in, has operated to extinguish the debt, or whether it has been so extinguished by the circumstances of the account delivered. And these questions must be taken as the facts stand upon the report; that is, without any inquiry how the affairs of the house stood as between Devaynes and his partners.

The case of *Wentworth* v. *Manning* was one of a specific payment, and therefore does not apply. But if it were applicable, it would be contradictory to the case of Goddard *v.* Cox, and the others which have been cited, and therefore of no authority, considering the book in which it is printed: 2 Eq. Ca. Ab. 261.

Sir William Grant, M. R.—Though the report, following (I presume) the words of the inquiry directed by the Decree, states the Master's opinion to be that Mr. Clayton has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. Devaynes, released his estate from the payment of the cash balance of 1713*l.*, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. Devaynes's estate, but that the balance due at his death has been actu-

ally paid off,—and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent, it has been admitted at the bar, that such would be the effect of the claim made before the Master, and insisted upon by the exception. To that extent it is therefore very properly abandoned; and all that is claimed is the sum to which the debt had at one time been reduced.

It would indeed be impossible to contend that after the balance, *for which alone Mr. Devaynes was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. Devaynes's representatives however it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at Devaynes's death;—and it is only by applying the payment to subsequent debts that any part of that balance will remain unpaid.

*13]

This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed in the first instance from the civil law. The leading rule, with regard to the option given, *in the first place to the debtor, and to the creditor in the second,* we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, "in re præsenti, hoc est statim, atque solutum est, cæterum postea non permittitur:" Dig. lib. 46, tit. 3, § 1. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the

priority in which they were incurred. And, as it was the actual intention of the debtor that would in the first instance have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence therefore of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was consequently applied to the most burdensome debt; to one that carried interest, rather than to that which carried none; to one secured by a penalty rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted. "In his, quæ præsenti die debentur, constat, quotiens indistinctè quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet (id est, si omnia nomina similia fuerint), in antiquiorem:" Dig. lib. 46, tit. 3, § 5.

But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that in the absence *of express appropriation by either party, it is the presumed intention of the creditor that is to govern; [*14 or at least that the creditor may at any time elect how the payments made to him shall retrospectively receive their application. There is certainly a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard* v. *Cox*, 2 Stra. 1194; by *Wilkinson* v. *Sterne*, 9 Mod. 427; by the ruling of the Lord Chief Baron in *Newmarch* v. *Clay*, 14 East 239; and by *Peters* v. *Anderson*, 5 Taunt. 596 (1 E. C. L. R.), in the Common Pleas. From these cases I should collect, that a proposition which in one sense of it, is indisputably true, namely, that *if the debtor does not apply the payment, the creditor may make the application to what debt he pleases*, has been extended much beyond its original meaning, so as, in general, to authorize *the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing*

the rules of law to operate where no express declaration is then made.

There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott* v. *Mills*, Lord Raymond 287; and *Dawe* v. *Holdsworth*, Peake N. P. 64. The creditor, in each of these cases, elected *ex post facto* to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed;—either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time; if one be more burdensome, or more penal than another, it is to that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule.

The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dawe* v. *Holdsworth* in precise conformity to the principle of the civil law.

The cases then set up two conflicting rules;—the presumed intention of the debtor, which, in some instances at least, is to govern; and the *ex post facto* election of the creditor, which in other instances is to prevail. I should there-
*15] fore feel myself a good *deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were not necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favor. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn.

But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, "This draft is to be placed to the account of the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday." There is a fund of 1000*l.* to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it. A man's banker breaks, owing him, on the whole account, a balance of 1000*l.* It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years, but there is 1000*l.* which I paid in five years ago that I hold myself never to have drawn out; and therefore if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the 1000*l.* that I paid in last week." This is exactly the nature of the present claim. Mr. Clayton travels back into the account till he finds a balance for which Mr. Devaynes was responsible, and then he says, "That is a sum

which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart and left untouched. Sums above it and below it have been drawn out; but none of my drafts ever reached or affected this
*16] *remnant of the balance due to me at Mr. Devaynes's death." What boundary would there be to this method of remoulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. Devaynes, what would hinder Mr. Clayton from saying, "Let us see what the balance was at his death: I have a right to say it still remains due to me, and his representatives are answerable for it; for if you examine the accounts you will find I have always had cash enough lying in the house to answer my subsequent drafts; and therefore all the payments made to me in Devaynes's lifetime, and since his death, I will now impute to the sums I paid in during that period,—the effect of which will be, to leave the balance due at the death of the former partners still undischarged?" I cannot think that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments so placed in opposition to debts, that on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was for any reason to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, "Leave this balance altogether out of the running account between us:" or, "Always enter your payments as made on the credit of your latest receipts, so as

that the oldest balance may be the last paid." Instead of this, he receives the account drawn out as one unbroken running account. He makes no objection to it; and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must therefore be considered as having concurred in the appropriation.

But there is this peculiarity in the case, that it is not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. Clayton considered and treated the balance as a fund out of which, notwithstanding Devaynes's death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when *there [*17
was no fund, except this balance, out of which his drafts could be answered. What was there in the next draft he drew which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there anything from which it could be inferred. I should therefore say that on Mr. Clayton's express authority, the fund was applied in payment of his drafts in the order in which they were presented.

But even independently of this circumstance, I am of opinion, on the ground I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. Devaynes's death, and that such balance has by those payments been fully discharged: the exception must therefore be *overruled.*

Clayton's Case is always cited as a leading authority upon the doctrine of the appropriation of payments. "Clayton's Case," says Abbott, J. (afterwards Lord Tenterden), "was very fully argued.

All the decisions were there before the Master of the Rolls, and he pronounced judgment against Clayton. It was a case decided upon great consideration, and is an authority of great weight:" Bodenham *v.* Purchas, 2 B. & Ald. 46; Stoveld *v.* Eade, 4 Bing. 158 (13 E. C. L. R.); and see Taylor *v.* Kymer, 3 B. & Ad. 333 (23 E. C. L. R.); Brooke *v.* Enderby, 2 Brod. & Bing. 70 (6 E. C. L. R.); Williams *v.* Rawlinson, 10 J. B. Moore 371 (17 E. C. L. R.); Wickham *v.* Wickham, 2 K. & J. 489; Merriman *v.* Ward, 1 J. & H. 376; Re Medewe's Trust, 26 Beav. 592; In re Fitzmaurices Minors, 15 Ir. Ch. Rep. 462.

The law as to the appropriation, or (as it is termed in the Roman law) imputation of payments, comes into operation in this way. Suppose a person, owing another several debts, makes a payment to him, the question arises, to which of those debts shall such payment be appropriated or imputed—a question often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of 100*l.* and 100*l.*, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid 100*l.* to B., and it could be imputed to the earlier debt, B. could still recover from him another 100*l.*: Mills *v.* Fowkes, 5 Bing. N. C. 455 (15 E. C. L. R.); Williams *v.* Griffith, 5 M. & W. 300; whereas, if it were imputed to the later debt, he would be without remedy as to the
*18] earlier. Again, suppose A. owes *B. two sums of 500*l.*, for the first of which C. is a surety; if A. pays B. 500*l.*, and it is imputed to the first 500*l.*, C.'s liability will cease; but if it be imputed to the other 500*l.* the liability will, with the debt, still remain: Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Pearl *v.* Deacon, 24 Beav. 186; 1 De G. & Jo. 461; Thornton *v.* McKewan, 1 Hem. & Mill. 525. Important consequences also follow if, as may be seen, a payment is imputed to a debt by simple contract in preference to a debt by specialty: Peters *v.* Anderson, 5 Taunt. 596 (1 E. C. L. R.).

Questions as to the appropriation of payments arise both at law and in equity; but when the question as to the appropriation of payments is purely a question of law, a bill in equity seeking a declaration as to whether an appropriation was or was not properly made is demurrable: the Aberystwith and Welsh Coast Railway Company *v.* Piercy, 2 Hem. & Mill. 713.

Appropriation by the Debtor.—The first rule upon the appropriation of payments (borrowed, as observed in the principal case, from the Roman law), is that the debtor has in the first instance the option, *at the time of making a payment*, to appropriate it to any of the debts due from him to the creditor.

"Quotiens," says the Digest, "quis debitor ex pluribus causis, unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum." And it gives as a reason, "Possumus enim certam legem dicere ei quod solvimus:" Dig. lib. xlvi. tit. 3, l. 1. See also, French Civ. Code, tit. 1253.

Our own law is well illustrated by an early case. It was as follows: The defendant owed the plaintiff certain money upon a bond, and certain money for wares sold, as it appeared by his book. At the day when the money became due upon the bond, the defendant duly tendered the money according to the bond; the plaintiff accepted it, and said it should be for the debt due by his book, and not for the other debt; but the defendant said he paid it upon his bond and not otherwise; and the plaintiff crossed his book, pretending the book-debt to be discharged, and brought an action of debt upon the bond. And it was adjudged against him; for it was said "the payment is to be in that manner that the defendant would pay it, and not according to the words of the plaintiff how he would accept it:" Anon., Cro. Eliz. 68; see also, Bois *v.* Cranfield, Sty. 239; Pinnel's Case, 5 Co. 117 b.; Peters *v.* Anderson, 5 Taunt. 596 (1 E. C. L. R.); Malcolm *v.* Scott, 6 Hare 570; Smith *v.* Smith, 9 Beav. 80; Attorney-General of Jamaica *v.* Manderson, 6 Moo. P. C. C. 239, 255; Waugh *v.* Wren, 11 W. R. (L. C.) 244.

The intention of the person making the payment, as to the mode of appropriation, may not only be manifested by him in express terms: Ex parte Imbert, 1 *De G. & Jo. 152, but it may be collected either from his conduct at the time when, or from the circumstances under which, the payment was made. For instance, where a creditor to whom several debts are due makes an application for the payment of one of them, and the debtor in consequence thereof makes a payment, it will be implied that it was his intention to appropriate it to the discharge of the debt in respect of which the application was made. Thus in Shaw *v.* Picton, 4 B. & C. 715 (10 E. [*19

C. L. R.), Messrs. Howard & Gibbs, attorneys, having themselves large demands against Lord Alvanley, upon bill transactions with himself, and also as agents for several other persons to whom Lord Alvanley had granted annuities, for which Lord Foley was surety, caused an attorney to make an application to Lord Alvanley and Lord Foley on behalf of the annuitants, and Lord Alvanley, in consequence of that application and the remonstrances of Lord Foley, paid to Howard & Gibbs certain sums of money, without making any express appropriation of them at the time of payment. It was held by the Court of King's Bench, that Lord Alvanley ought to be considered as having appropriated the payment on account of the annuitants.

Upon the same principle, money arising from the realization of a particular security will be presumed to be appropriated in payment of the secured debt. Thus, in Young *v.* English, 7 Beav. 10, the plaintiff, an equitable mortgagee for 600*l.* lent the title-deeds to the defendant, English, the mortgagor, to enable him to arrange a sale of the property, upon an express undertaking that they were to be returned. English paid to the plaintiff 300*l.* received by him as the first instalment of the purchase-money, and afterwards became bankrupt. It appeared that English was, previous to the payment of the 300*l.*, indebted to the plaintiff on a trade account to a larger amount. It was contended by the plaintiff that as no application had been made by English of the 300*l.* paid by him, the plaintiff had a right to attribute it to the trade account, thus leaving the equitable mortgage undischarged. However, Lord Langdale, M. R., held that the payment was to be understood as being made on the mortgage account. "In support of the plaintiff's claims," said his Lordship, "he alleges that nothing was said as to the application of the money which he received; and he insists that, in the absence of express direction, he has a right to make the application most beneficial to himself. But it appears to me, from the *nature of the transaction*, that English paid this money only in respect of the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood, that English meant the payment to be applied towards satisfaction of the mortgage." See also Brett *v.* Marsh, 1 Vern. 468; Stoveld *v.* Eade, 4 Bing. 154 (13 E. C. L. R.); Waters *v.* Tompkins, 2 Cr., M. & R. 723; *Knight *v.* Bowder, 4 De G. & J. 619; Pearl *v.* Deacon, 24 Beav. 186;

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1 De G. & J. 461; Attorney-General of Jamaica *v.* Manderson, 6 Moo. P. C. C. 239, 255.

Again it has been laid down that "the payment of the exact amount of goods previously supplied is irrefragable evidence to show that the sum was intended in payment of those goods," per Lord Ellenborough, C. J., in Marryatts *v.* White, 2 Stark. 102 (3 E. C. L. R.).

So where payment is made to a creditor of sums within the time allowed for discount, and on which discount is allowed, it will afford a strong inference (in the absence of proof to the contrary), that the debtor intended to appropriate the sums so paid, in discharge of debts, with regard to which the time had not expired within which a discount was to be allowed, and not in discharge of others the term of credit for which had expired: Id. 101. See also Newmarch *v.* Clay, 14 East 239; Taylor *v.* Kymer, 3 B. & Ad. 320 (23 E. C. L. R.); Wright *v.* Hinckling, 2 L. R. (C. P.) 199.

It was upon the same principle that the Roman law appropriated a payment to a debt which had become already due, in preference to appropriating it to one not due, and which consequently the debtor was not under any obligation to pay. "Quod si forte à neutro dictum sit, in his quidem nominibus quæ diem vel conditionem habuerunt id videtur solutum, cujus dies venit:" Dig. lib. xlvi., tit. 3, l. 3, § 1. "Nam cum ex pluribus causis debitor pecuniam solvit, Julianus elegantissimè putat ex ea causa eum solvisse videri debere, ex qua tunc cum solvebat, compelli poterit ad solutionem:" (l. 103); Mæcian. lib. ii., Fideicom.

Where there is a subsisting demand between two parties, as for instance, where a customer is indebted in a particular sum to his banker, and the debtor makes a payment generally, it will be considered as a payment and not as a deposit: Hammersley *v.* Knowles, 2 Esp. 666.

Where several debts are due, some of which are barred by the Statute of Limitations, and some not, if a payment is made on account of principal or interest generally, it seems that the inference will be that the payment is made on account of those debts not barred by the statute. Thus in Nash *v.* Hodgson, 6 De G., M. & G. 474, A. gave three joint and several promissory notes to the plaintiff. Two were dated respectively the 29th September,

1839, and the 27th January, 1840, and another for 200*l.* was dated the 12th of June, 1841. In the latter, A. was joined by B. (to whom he afterwards became an executor). The plaintiff, in December, 1846, "applied to A. for payment on account of interest then due to her." On the 16th of that month he paid to her 5*l.*, as she alleged, "on account of interest generally." She afterwards made an endorsement on the promissory note of 1841, that the 5*l.* had
*21] been received "for interest due on this *note." A claim was filed by the plaintiff, on the 16th September, 1850, for payment of the last-mentioned note against the executors of B. The question raised was whether the promissory note, which but for the payment of the 5*l.*, would previous to the filing of the claim have been barred by the Statute of Limitations, was taken out of its operation by such payment. It was held by the full Court of Appeal (reversing the decision of Sir W. Page Wood, V.-C., reported Kay 650), that the payment was attributable to the note of 1841, and that the effect of the payment was to prevent the operation of the Statute of Limitations. "What," said Lord Cranworth, C., "I deduce from the authorities is, that where a payment is made as principal, the effect of it will be to take out of the operation of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt, consisting of several items, some of which are barred and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. I cannot, therefore, concur in the decision of the Vice-Chancellor. It appears to me in this case that, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and if this were not so, the only effect would be to treat it as a payment on account of all, so that in either case the 200*l.* note would be kept alive."

Appropriation by the Creditor.—The second general rule laid down upon this subject is that if the debtor do not make the appropriation, the creditor may do so: Goddard *v.* Cox, 2 Str. 1194; Bloss *v.* Cutting, cited Id.; Hall *v.* Wood, 14 East 243 n.; Kirby *v.* The Duke

of Marlborough, 2 M. & Selw. 18; Hutchinson *v.* Bell, 1 Taunt. 564; Dawson *v.* Remnant, 6 Esp. N. P. C. 26; Peters *v.* Anderson, 5 Taunt. 596, 601 (1 E. C. L. R.); Grigg *v.* Cocks, 4 Sim. 438.

And a court of law will recognise his appropriation in discharge of a purely equitable debt: Bosanquet *v.* Wray, 6 Taunt. 597 (1 E. C. L. R.); Nash *v.* Hodgson, 6 De G., M. & G. 474, 484. This rule we have adopted from the Roman law, according to which "quotiens non dicimus id quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat:" Dig. lib. xlvi. tit. 3, l. 1.

We have not however adopted the restriction placed upon the second rule by the Roman law, namely, that the party receiving the payment must make an *immediate* appropriation of it (Dig. lib. xlvi., tit 3, l. 1), inasmuch as, according to our law, the payee may make the appropriation at **any time* before the matter comes [*22 to trial, and he is not bound to give notice thereof to the payor: Philpott *v.* Jones, 4 N. & M. 16 (30 E. C. L. R.); 2 Ad. & E. 44 (29 E. C. L. R.); Simson *v.* Ingham, 2 B. & C. 65 (9 E. C. L. R.). As to the Scotch law, which is the same, see Campbell *v.* Dent, 2 Moore P. C. C. 292.

If however a payee has made an act of appropriation which he has communicated to the payor, he cannot set up against it a subsequent act of appropriation: Fraser *v.* Birch, 3 Knapp 380, 401; Bodenham *v.* Purchas, 2 B. & Ald. 39; Bank of Scotland *v.* Christie, 8 C. & F. 214; and see Wickham *v.* Wickham, 2 K. & J. 478.

Where there are two debts, the one lawful, and the other claimed upon a contract forbidden by law, the creditor, it seems, would not be allowed to appropriate a payment to the satisfaction of the unlawful demand: Wright *v.* Laing, 3 B. & C. 165 (10 E. C. L. R.); 4 D. & R. 783; Ex parte Randleson, 2 Deac. & Chit. 534; and see Ribbans *v.* Crickett, 1 B. & P. 264.

Where, however, one of two debts is due, on account of a contract not absolutely unlawful, but upon which the creditor is prevented from suing by some statute framed for the protection of the debtor from particular actions and suits, the creditor may appropriate the payment to such demand and sue upon the other debt. Thus where two debts are due to a man, to the first of which the debtor might in an action successfully plead the Statute of Limitations, if he pays a sum generally to his creditor without making any appropriation thereof, the creditor may appropriate it to payment of

such debt, so that he might sue upon the other: Mills *v.* Fowkes, 5 Bing. N. C. 455 (35 E. C. L. R.); Philpott *v.* Jones, 2 Ad. & E. 41 (29 E. C. L. R.), and see Costello *v.* Burke, 2 J. & L. 665.

The same result follows where the right of action for one of two debts is barred by the Act regulating the sale of spirituous liquors on credit: Cruickshanks *v.* Rose, 1 Moo. & Rob. 100; Philpott *v.* Jones, 2 Ad. & E. 41 (29 E. C. L. R.).

Upon the same principle it has been held that where an attorney has claims in respect of costs against a corporation, some of which he can enforce at law, and some of which he cannot recover, by reason of his appointment not having been made under seal, and money has been paid to him by the corporation generally on account, he can appropriate such payments to the latter claims, because although they could not be the subject of an action at law, they are just and equitable: Arnold *v.* The Mayor of Poole, 4 M. & G. 860, 897 (43 E. C. L. R.); 2 D. N. S. 574; 5 Scott N. R. 741; see also Lamprell *v.* Billericay Union, 3 Exch. 283.

But although where there are two debts, one of which is barred by the statute, as for instance, the Statute of Limitations, the creditor upon a payment being made generally, may appropriate it towards satisfaction of the debt already barred, still that appropriation *will have no effect upon the operation of the statute. Thus, in the well known case of Mills *v.* Fowkes, 5 Bing. N. C. 455 (35 E. C. L. R.), a debtor who owes his creditor some debts from a period longer than six years, and others from a period within six years, paid to him a sum of money without appropriating it to any particular debt, it was held by the Court of Common Pleas that such payment was not a payment on account, to take out of the Statute of Limitations the debts due longer than six years, but that the creditor might at any time apply such payment to the debts due longer than six years. "Here," said Tindal, C. J., "as there was no appropriation, nor any evidence of an intention on the part of the debtor to apply the payment in part discharge of one of the earlier items, I think it has not the effect of exempting them from the operation of the statute. Then comes the question, has the plaintiff a right to apply that payment in the satisfaction of the prior debt barred by the statute? For, though the plaintiff is bound by the statute with respect to his right to sue the defendant, yet where the debtor has made no appropriation of the money, the

*23]

law as to its application remains the same as before. The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment,—'solviture in modum solventis;' if he omit to do so, the creditor may make the appropriation; 'recipitur in modum recipientis,' but if neither make an appropriation the law appropriates the payment to the earlier debt. The defendant here contends that, where the creditor fails to make any appropriation at once, the law will appropriate the payment to the more burdensome debt; but the decisions are clearly the other way. Thus in Goddard *v.* Cox, 2 Str. 1194, where the defendant being indebted to the plaintiff for coals delivered to his wife *dum sola*, and to himself after coverture, made a payment without any specific appropriation, it was held the plaintiff might apply the money in discharge of the debt contracted by the wife *dum sola*. Then in Philpot *v.* Jones, 2 Ad. & E. 41 (29 E. C. L. R.), where the debt was for goods and spirits supplied in quantities not amounting to 20*s.* at a time, for which the plaintiff was precluded from recovering by 24 Geo. II., c. 40, s. 12, the plaintiff was allowed to apply to the spirits an unappropriated payment made by the debtor; and Lord Denman, C. J., said he might so apply it at any time. In Peters *v.* Anderson, 5 Taunt. 596 (1 E. C. L. R.), where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment without appropriating them to either debt in particular, it was held that the plaintiff might appropriate them to the debt for which he had *the worst security. [*24
In Bosanquet *v.* Wray, 6 Taunt. 597 (1 E. C. L. R.), it was held that a creditor receiving money without any specific appropriation by the debtor, might be permitted in a court of law to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt.

"These cases show clearly that the *receiver has a right to appropriate, if the payor omit to do so;* and Simson *v.* Ingham, 2 B. & C. 65 (9 E. C. L. R.), *that he may make the appropriation any time before action.* Best, J., was the only judge who said that the appropriation must be made within a *reasonable* time; but if that were necessary, it has been made within a reasonable time here. And

this is not even the case of one debt being more burdensome than another, for if a debtor wishes to do what is just, there are many cases in which he will not set up the Statute of Limitations." See also Williams *v.* Griffith, 5 M. & W. 300; Nash *v.* Hodgson, 6 De G., M. & G. 474. We may therefore consider Meggot *v.* Mills, 1 Lord Raym. 286, and Dawe *v.* Holdsworth, 1 Peake, N. P. C. 64, to be overruled.

Where one debt is certain, and another uncertain or disputed, as for instance, if there be a legal debt, and a claim which would only become a legal debt on a settlement of partnership accounts and a striking of a balance, the general payment will be applicable to the legal debt: Goddard *v.* Hodges, 1 Car. & M. 33, 39 (41 E. C. L. R.); and see and consider Burn *v.* Boulton, 2 C. B. 476 (52 E. C. L. R.).

Upon the same principle, if two debts be due from a man, one from him as executor, the other from him in his own right, and he make a general payment, the creditor will not be allowed to appropriate it in discharge of the debt due in his character as representative, for the validity of such demand may depend on the question of assets, and the manner of administering them: Goddard *v.* Cox, 2 Strk. 1194. See Dig. lib. xlvi. tit. 3, l. 3, § 1, and l. 103 Mæcian. lib. ii. Fideicom.

Where the demand of a creditor is *entire*, he will not be allowed to split it into two demands, and appropriate a general payment to the one which is most advantageous to him to be paid. Thus in James *v.* Child, 2 C. & J. 678, an attorney having delivered a bill containing taxable items, and charges not taxable, and a general payment was made on account, it was held by the Court of Exchequer that the attorney could not appropriate the payment in discharge of the taxable items and sue for the other charges without delivering a signed bill pursuant to the statute.

Appropriation by the Law when not made by the Debtor or Creditor.—Where neither party makes an appropriation, the law will appropriate the payment to the *earlier*, and not, as the Roman law, to the most burdensome debt.

Upon these grounds, as was held in the principal case, where money is paid to one party on a general account, as for instance, a banking
*25] *account, and no direction is given by the payor as to its appropriation, and no appropriation made by the payee, the

money paid will go in discharge of the first items on the other side: Bodenham *v.* Purchas, 2 B. & Ald. 39; Taylor *v.* Kymer, 3 B. & Ad. 333 (23 E. C. L. R.); Field *v.* Carr, 5 Bing. 13 (15 E. C. L. R.); Ex parte Whitworth, 2 Mont., Deac. & De G. 164; Pemberton *v.* Oakes, 4 Russ. 154; Simson *v.* Ingham, 2 B. & C. 65 (9 E. C. L. R.); Brooke *v.* Enderby, 2 B. & B. 70 (6 E. C. L. R.); Sterndale *v.* Hankinson, 1 Sim. 393; Smith *v.* Wigley, 3 M. & Sc. 174 (30 E. C. L. R.); Beale *v.* Caddick, 2 Hurlst. & N. 326. See also Hollond *v.* Teed, 7 Hare 50; Siebel *v.* Springfield, 12 W. R. (Q. B.) 73; and it is immaterial that the parties were ignorant of the rule of law: Re Medewe's Trust, 26 Beav. 592; Merriman *v.* Ward, 1 J. & H. 371, 377; Scott *v.* Beale, 6 Jur. N. S. 559.

Even where trust moneys have been paid into bank to a trustee's own account, and checks are drawn by him in a general manner upon the bank, the payments made by the bank will, as in the principal case, be imputed to the earlier items: Pennell *v.* Deffell, 4 De G., M. & G. 372.

Where debts due to a former partnership are agreed, upon the formation of a new partnership between a partner of the old and a new partner of the new partnership, to be transferred to the new firm, as part of the capital of the new partnership, against the debts due from the old partnership, the moneys received by the new partnership must, in the absence of appropriation by the customers or agreement between the parties, be applied in payment of the earlier debts of the old partnership: Copland *v.* Toulmin, 1 West, H. of Lords Cas. 164; 7 C. & F. 349; and see s. c. in Court below, 3 Y. & C. 625; Jones *v.* Maund, Id. 347; and see and consider Pemberton *v.* Oakes, 4 Russ. 154; Wickham *v.* Wickham, 2 K. & J. 478; Beale *v.* Caddick, 2 Hurlst. & N. 326; Geake *v.* Jackson, 15 W. R. (C. P.) 338.

Although, in ordinary banking accounts, as is laid down in the principal case, the presumption arises that it was intended that the first item of the debit side of the account is to be discharged or reduced by the first item on the credit side, that presumption may be entirely varied by the particular mode of dealing, or any stipulation between the parties, as for instance, one which shows that the original liability was to be regarded as still continuing. Thus in Henniker *v* Wigg, 4 Q. B. 792 (45 E. C. L. R.); 1 Dav. & Mer. 160, it appeared that the defendant Lionel Wigg borrowed from the

plaintiffs, who were bankers, 1000*l.*, to pay off a balance due from him, on his account, to the National and Provincial Bank, and a bond for that sum was executed by the defendants Lionel and Herbert Wigg on the 10th January, and by the defendants Neriah Wigg the elder, Neriah Wigg the younger, and Edward Wigg on the 12th of January, 1837, with a condition simply for repayment
*26] of the 1000*l.* and interest on or upon the 6th of *April, 1837. Before the 10th January, Lionel Wigg had paid into the plaintiffs' bank two several sums, namely: 85*l.* on the 3d of January; 196*l.* on the 7th; and on the 12th, 102*l.* He had also paid 35*l.* on the 11th. The defendant Lionel Wigg ceased dealing with the National and Provincial Bank, after paying to them 1294*l.* 6*s.* through the plaintiffs' bank (which said sum of 1294*l.* 6*s.* was the first item on the debit side of his account in the pass-book of Lionel Wigg, viz., on the 12th of January), but commenced a banking account with the plaintiffs, the first transaction being the payment by him into the bank of the said sums, before the date of the bond, which formed the first items in his pass-book on the credit side. Between the opening of his account and his failure, at the close, on the 10th of September, 1840, when the balance was against him 1505*l.* 17*s.* 11*d.*, *the balance had been in his favor to a greater amount than was due upon the bond, both for principal and interest.* An action of debt on the bond being brought by the plaintiff against the defendants who had severally executed the bond, the plea was, "solvit post diem." And the question which was raised for the decision of the court, upon a special case, was, whether the payments by the defendant Lionel into the bank beyond the amount of the bond, or still more, the balances exceeding its amount, ought to have been applied in discharge of the bond. It did not appear what was the precise nature of the agreement between the parties at the time of giving the bond. It was stated however in the case, that in the month of September, 1840, Herbert, in the presence of Lionel Wigg, expressed a hope that the bank would not stop his brother Lionel, as they had the security of the bond for 1000*l.* In October following, the defendants Neriah and Edward expressly avowed their liability to pay 1000*l.* on the bond. On the 7th of November following, the defendant Neriah wrote to the manager a letter in terms which admitted his liability. Under these circumstances it was held by the Court of Queen's Bench that the plaintiffs were

entitled to recover, as it might, in default of express stipulation, be inferred from the language and conduct of the parties after the execution of the bond, that they intended the bond to stand as a continuing security. "It was contended," said Lord Denman, C. J., in delivering the judgment of the court, "that, as the bond was executed by some of the defendants on the 10th of January, and by all on the 12th, the sum of 1294*l.* 6*s.* above noticed must, from the date, have included the 1000*l.* to secure which the bond was given; that the whole formed one account, and that an ordinary banking, in which, according to the language of Sir W. Grant, M. R., all the sums paid in form one blended fund, the parts of which have no longer any separate existence; and that 'it is the first item on the debit side of *the account that is discharged [*27
or reduced by the first item on the credit side:" Clayton's Case, 1 Mer. 530, 572, and Bodenham *v.* Purchas, 2 B. & Ald. 39, in which case the doctrine of Sir W. Grant was fully adopted. And it is presumed that, generally speaking, and with reference to a case like that which he was considering more especially, the doctrine of that eminent judge admits of no doubt. But it is equally certain that *a particular mode of dealing, and more especially any stipulation between the parties*, may entirely vary the case; and that would be the effect in the present instance, if it should appear that this bond was given to secure the plaintiffs against advances which they might from *time to time* make to the defendant Lionel. That would show that the amount of it was not to be brought into account like any other item, in the manner supposed by Sir W. Grant. What was the precise nature of the agreement between the parties at the time of giving the bond does not very distinctly appear. But the conduct and language of the defendants, or some of them, which we find detailed in the case, has a strong bearing upon this point. . . . From this evidence, which is expressly submitted to our consideration, we know not at what conclusion we can possibly arrive, except that this bond was given as a *continuing security*, and consequently has not been discharged." See also Williams *v.* Rawlinson, 10 J. B. Moore, 371 (17 E. C. L. R.); Simson *v.* Ingham, 2 B. & C. 65 (9 E. C. L. R.); Pease *v.* Hirst, 10 B. & C. 122 (21 E. C. L. R.); Jones *v.* Maund, 3 Y. & Coll. Exch. Cas. 357, and note at p. 358; Wickham *v.* Wickham, 2 K. & J. 478; Merriman *v.* Ward, 1 J. & H. 371.

It is competent, moreover, for a debtor and his creditor to make a new contract, varying the appropriation of past payments: Merriman *v.* Ward, 1 J. & H. 371, 378; but an executor cannot make an appropriation of past payments, so as to revive a lapsed liability against the estate: Merriman *v.* Ward, 1 J. & H. 371, 379.

The rule that where money is paid generally, without any appropriation, it ought to be applied to the first items in the account, is subject also to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others: Thompson *v.* Brown, 1 M. & M. 40 (22 E. C. L. R.).

Where a person is indebted to another for principal and interest, and pays money to him generally, the payment will be in the first place appropriated in payment of the interest, and afterwards of the principal as far as it will go. See Chase *v.* Box, Freem. Rep. by Hovend. 261; Crisp *v.* Bluck, Ca. t. Finch. 89. So where one of two obligors in a joint and several bond had become bankrupt, and
*28] *the obligee having by several dividends in the bankruptcy been paid twenty shillings in the pound upon the amount of principal and interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor, who had died, it was held by Lord Cottenham, C., that the amount due to the obligee, in respect of such claim, was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend in the first place in payment of the interest due at the date of each dividend, and the surplus, if any, in reduction of the principal: Bower *v.* Marris, 1 Cr. & Ph. 351.

The Roman law, which in this respect was the same as our own, says, "Si neuter voluntatem suam expressit, prius in usuras, id quod solvitur, deinde in sortem accepto feretur:" Cod. Lib. viii. tit. 53, l. 1. And even if the creditor declared that he had received the payment "on account of principal and interest," it would have been appropriated first in payment of the interest. "Apud Marcellum, lib. xx. Digestorum, quæritur, si quis ita caverit debitori, *in sortem et usuras se accipere:* utrum pro rata et sorti et usuris decedat; an

vero prius in usuras, et si quid superest in sorte? Sed ego non dubito, quin hæc cautio *in sorte et in usuras*, prius usuras admittat; tunc deinde, si quid superfuerit, in sortem cedat: Dig. lib. xlvi. tit. 3, l. 5, s. 3. Nec enim ordo scripturæ spectatur, sed potius ex jure sumitur id, quod agi videtur:" Id. l. 6. See also, French Civ. Code, art. 1254.

Where interest is unpaid on a sum of money, part of which interest is barred by the Statute of Limitations, and a sum is paid on account of interest generally, without any appropriation either by the debtor or creditor at the time of the payment, the court will not appropriate the sum so paid in payment of the interest barred by the statute, inasmuch as it cannot be held to be really due: In re Fitzmaurices Minors, 15 Ir. Ch. Rep. 445.

Where, moreover, a person has two demands upon another, one arising out of a lawful contract, and the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of payment, the law will appropriate it to the demand recognised by the law, and not to that which it prohibits. Thus in Wright *v.* Laing, 3 B. & C. 165 (10 E. C. L. R.), where (previous to the abolition of the usury laws) distinct sums of money were due to the creditor, one for goods sold, the other for money lent on a usurious contract, and a payment was made which was not specifically appropriated to either debt by the debtor or creditor, it was held by the Court of King's Bench, that the law would afterwards appropriate such payment to the debt for goods sold. See s. c., 4 D. & R. 783 (16 E. C. L. R.).

*Where there has been no appropriation by either party, and there is no reason why a debt should be appropriated to one debt rather than another, it will be apportioned between them. Thus in Favene *v.* Bennett, 11 East 36, where a buyer was indebted to a broker for two parcels of goods, the property of two different persons, and he made a payment to the broker generally, which was larger than the amount of either demand, but less than the two together, upon the broker becoming insolvent, it was held by the Court of King's Bench that such payment ought to be equitably apportioned as between the several owners of the goods sold, who were only respectively entitled to recover the difference from the buyer. See also Nash *v.* Hodgson, 6 De G., M. & G. 474. [*29

The Roman law is the same, "Illud non ineleganter scriptum esse,

Pomponius ait, Si par et dierum et contractum causa sit, ex omnibus summis pro portione videri solutum:" Dig. lib. xlvi. tit. 3, l. 8; see also French Civ. Code, art. 1256.

Appropriation of Securities.—It may be here mentioned that where a security has been deposited, with a creditor generally, and the debtor afterwards becomes bankrupt, owing two debts, one of which is provable and the other not, the creditor may appropriate the security to the debt which is not provable: Ex parte Hunter, 6 Ves. 94; Ex parte Havard, Cook's Bank. L. 147; Ex parte Arkley, Id. 149; Ex parte Johnson, 3 De G., M. & G.

The general principles on the subject of the appropriation of payments, as explained in this note, have been very generally recognised and followed in the United States. That the debtor has the first right to make the application; if he does not, the creditor may do so; if neither does, the law will appropriate it according to the justice of the case, having due regard to the rights of other parties, who may be interested: Postmaster-General *v.* Norvell, Gilpin 106; Harker *v.* Conrad, 12 S. & R. 301; United States *v.* Kirkpatrick, 9 Wheat. 720; Crèmer *v.* Higginson, 1 Mason 323; Gwinn *v.* Whitaker, 1 Har. & Johns. 754; Briggs *v.* Williams, 2 Verm. 283; Oliver *v.* Phelps, 1 Spencer 180; McFarland *v.* Lewis, 2 Scam. 344; White *v.* Trumbull, 3 Green 314; Carson *v.* Hill, 1 McMullan 76; Selleck *v.* Turnpike Company, 13 Conn. 453; Rosseall *v.* Call, 14 Verm. 83; Robinson *v.* Doolittle, 12 Id. 246; Starrett *v.* Barber, 7 Shep. 457; State Bank *v.* Armstrong, 4 Dev. 519; State Bank *v.* Locke, Id. 529; Howland *v.* Rench, 7 Blackf. 236; Rackley *v.* Pearce, 1 Kelly 241; Randall *v.* Parramore, 1 Branch 409; Ayer *v.* Hawkins, 19 Verm. 26; The United States *v.* Bradbury, Davies 146; Bayley *v.* Wynkoop, 5 Gilman 449; Sawyer *v.* Tappan, 14 N. H. 352; Caldwell *v.* Wentworth, Id. 431; Seymour *v.* Marvin, 11 Barb. S. C. 80; McTavish *v.* Carroll, 1 Md. Ch. Decis. 160; Stewart *v.* Keith, 2 Jones 238; Treadwell *v.* Moore, 34 Me. 112; Parks *v.* Ingram, 2 Foster 283; Callahan *v.* Boazman, 21 Ala. 246; Benney *v.* Rhodes, 18 Mo. 147; Hargraves *v.* Cooke, 15 Geo. 321; Carpenter *v.* Goin, 19 N. H. 479; Watt *v.* Hock, 1 Casey 411; Middleton *v.* Frame, 21 Mo. 412; Thayer *v.* Denton, 4 Mich. 192; Crisler *v.* McCoy, 33 Miss. 445; Proctor *v.* Marshall, 18 Texas 63; Gaston *v.* Barney, 11 Ohio (N. S.) 506; Calvert *v.* Carter, 18 Md. 73; Solomon *v.* Dreschler, 4 Min. 278; Slaughter *v.* Milling, 15 La. Ann. 526; Fargo *v.* Buell, 21 Iowa 292. "Although," says Mr. Chief Justice

Gibson, "as between the immediate parties, the creditor has a right to appropriate where the debtor has failed to do so, yet this right must be exercised within, at the farthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial, and, were it otherwise, there would, in the absence of an actual appropriation by the debtor, be no rule on the subject, but the will of the creditor, which would in all cases be decisive. But such is not the fact. In default of actual appropriation, the matter is to be determined by the rules and circumstances of equity. The debtor has a right to make the application in the first instance, and failing to exercise it, the same right devolves on the creditor; but when neither has exercised it, the law, nevertheless, presumes, in ordinary cases, that the debtor intended to pay in the way which, at the time, was most to his advantage. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was actually the fact; it is, therefore, equivalent to an exercise of the party's right, by acts or an express declaration of intention. Where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption, for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases:" Harker *v.* Conrad, 12 S. & R. 305; see, however, Peirce *v.* Knight, 31 Verm. 701.

That the direction by the payer, at the time of payment, is binding upon the receiver, see Gilchrist *v.* Ward, 4 Mass. 692; Hall *v.* Marston, 17 Id. 575; Hussey *v.* Manufacturers' and Mechanics' Bank, 10 Pick. 415; Bonaffe *v.* Woodberry, 12 Id. 463; Taylor *v.* Sandiford, 7 Wheat. 13; Black *v.* Schooler, 2 McCord 292; Martin *v.* Draher, 5 Watts 544; Mitchell *v.* Dall, 2 Har. & G. 159; s. c. 4 Gill & Johns. 361; McDonald *v.* Pickett, 2 Bailey 617; Reed *v.* Boardman, 20 Pick. 441; Selfridge *v.* Northampton Bank, 8 W. & S. 320; Boutwell *v.* Mason, 12 Verm. 608; Runyon *v.* Latham, 5 Ired. 551; Sherwood *v.* Haight, 26 Conn. 432; Semmes *v.* Boykin, 27 Geo. 47; Irwin *v.* Paulett, 1 Kansas 418; Johnson *v.* Johnson, 30 Geo. 857. If payment is offered on an account not due, the creditor is not bound to receive it, but, if he does, he must apply it according to the directions of the debtor: Wetherell *v.* Joy, 40 Me. 325. So, if no appropriation is made at the time by the debtor, the creditor's application is binding: Brewer *v.* Knapp, 1 Pick. 332; Black-

stone Bank v. Hill, 10 Id. 129; Brady v. Hill, 1 Mo. 315; Alexandria v. Patten, 4 Cranch 316; Smith v. Screven, 1 McCord 308; Blinn v. Chester, 5 Day 166; Sneed v. Wiester, 2 A. K. Marsh. 277; Reed v. Boardman, 20 Pick. 441; Washington Bank v. Prescott, Id. 339; Allen v. Kimball, 23 Id. 473; Smith v. Wood, Saxton 74; Driver v. Fortner, 5 Porter 9; Berks v. Albert, 4 J. J. Marsh. 97; Van Sickle v. Ayres, 2 Halst. Ch. 29; Bird v. Davis, 1 McCarter 467; Bobe's Heirs v. Stickney, 36 Ala. 482. The account books of a creditor, with evidence that the entries were made at the time they bear date, are competent to show to which of two accounts he applied a general payment: Van Renselaer v. Roberts, 5 Denio 470.

The application by the debtor must be made at the time of payment: Reynolds v. McFarlane, 1 Overt. 488; Moss v. Adams, 4 Ired. Eq. 42; Caldwell v. Wentworth, 14 N. H. 431. An application by the debtor may be implied from circumstances—as, for example, when the sum paid corresponds precisely with the amount of one of the demands: Seymour v. Van Slyck, 8 Wend. 403; Mitchell v. Dall, 2 Har. & G. 159; West Branch Bank v. Moorehead, 5 W. & S. 542; Moorehead v. West Branch Bank, 3 Id. 550; Howland v. Rench, 7 Blackf. 236; Bayley v. Wynkoop, 5 Gilman 449; Caldwell v. Wentworth, 14 N. H. 431. The rule that a debtor may appropriate payments as he pleases, applies only to voluntary payments, and not to those made by process of law: Blackstone Bank v. Hill, 10 Pick. 129; Forelander v. Hicks, 6 Ind. 448. Where a creditor, having several demands against his debtor, recovers a portion of the entire amount, in a judicial proceeding founded upon them all, the law will apply such a recovery as a payment ratably upon all the demands; and the creditor has no right to apply it to the satisfaction of some of the demands to the entire exclusion of the others: Cowperthwait v. Sheffield, 1 Sandf. S. C. 416; Bridenbecker v. Lowell, 32 Barb. 9. The creditor may make application at any time before suit brought: Moss v. Adams, 4 Ired. Eq. 42. Qu. See Caldwell v. Wentworth, 14 N. H. 431; Taylor v. Coleman, 20 Texas 772; Haynes v. Waite, 14 Cal. 446. But he cannot then apply it to a debt accruing subsequently to the payment: Law v. Sutherland, 5 Gratt. 357; Harrison v. Johnston, 27 Ala. 445; nor can he appropriate it after a controversy has arisen thereon between himself and the debtor: Milliken v. Tufts, 31 Me. 497; Terhune v. Colton, 1 Beasley 233, 312. The provision of the Roman law, which, in the application of a payment, requires the creditor, where the right has devolved on him to consult the debtor's interest in preference to his own, has not been adopted as a part of the common law: Logan v. Mason, 6 W. & S. 9. See Scott v. Fisher, 4 Monr. 387.

There are some cases, however, in which the receiver has not the right

to make the application; but the law will appropriate the payment proportionally among the several debts; as where payment is made to an agent, who has himself also a demand against the payer: Barrett *v.* Lewis, 2 Pick. 123; Cole *v.* Trull, 9 Id. 325. If a payment is made generally to a party, who holds a debt due to himself, and another due to himself and the plaintiff, he is bound, as between himself and the plaintiff, to apply the payment ratably upon the two debts: Colby *v.* Copp, 35 N. H. 434. If one member of a firm make a payment to a person who has an account against him and also against the firm, the creditor must apply the payment to the individual account, unless he can show a consent to have it otherwise applied: Johnson *v.* Boone, 2 Harring. 172; Gass *v.* Stinson, 3 Sumn. 98; Brown *v.* Brabham, 3 Ham. 277; Livermore *v.* Claridge, 33 Me. 428. When payments are made generally upon a usurious security, they will be first applied to the payment of the principal and legal interest: Bartholemew *v.* Yan, 9 Paige 165; Parchman *v.* McKinney, 12 Sm. & M. 631; Stanley *v.* Westrop, 16 Texas 200; Gill *v.* Rice, 13 Wis. 549; Smith *v.* Coopers, 9 Iowa 376; Solomon *v.* Deschler, 4 Min. 278; Welsh *v.* Wadsworth, 30 Conn. 149; Burrows *v.* Cook, 17 Iowa 436. The right of the creditor to make the application is limited to such demands as are legal, valid claims, the payment of which may be enforced: Bancroft *v.* Dumas, 21 Verm. 456; Caldwell *v.* Wentworth, 14 N. H. 431; Rohan *v.* Hanson, 11 Cush. 44; Stone *v.* Talbot, 4 Wis. 442; Keane *v.* Branden, 12 La. Ann. 20; Hall *v.* Clement, 41 N. H. 166; Greene *v.* Tyler, 3 Wright 361; Gill *v.* Rice, 13 Wis. 549; Smith *v.* Coopers, 9 Iowa 376; Solomon *v.* Deschler, 4 Min. 278; Kidder *v.* Norris, 18 N. H. 532. But see contra: Treadwell *v.* Moore, 34 Me. 112; Armistead *v.* Brooke, 18 Ark. 521; Haynes *v.* Nice, 100 Mass. 327. The creditor cannot apply to debts not then payable, if there are other debts then due: Bacon *v.* Brown, 1 Bibb 334; McDowell *v.* Blackstone Canal Company, 5 Mason 11; Seymour *v.* Sexton, 10 Watts 255; Stamford Bank *v.* Benedict, 15 Conn. 437; Effinger *v.* Henderson, 33 Miss. 449; Cloney *v.* Richardson, 34 Mo. 370; Bobe's Heirs *v.* Stickney, 36 Ala 482. In general, an appropriation cannot be made by either debtor or creditor, so as to affect the relative liability or rights of sureties: Postmaster-General *v.* Norvell, Gilpin 106; Brander *v.* Phillips, 16 Peters 121; Merrimack Co. Bank *v.* Brown, 12 N. H. 320; Myers *v.* United States, 1 McLean 493; Donally *v.* Wilson, 5 Leigh 329; Pierce *v.* Sweet, 9 Casey 151. But see State *v.* Smith, 26 Mo. 226; City *v.* Merlatt, Id. 233; Robson *v.* McKoin, 18 La. Ann. 544.

Where, in the absence of application by either party, the law will make such an application as will be most for the benefit of the creditor: see Gwinn *v.* Whitaker, 1 Har. & Johns. 754; Pierce *v.* Sweet, 9 Casey 151;

Johnson's Appeal, 1 Wright 268; Robinson's Administrator v. Allison, 36 Ala. 525; Smith v. Brooke, 13 Wright 147. When to the extinguishment of that debt, which will be most beneficial to the debtor: see The United States v. Bradbury, Davies 146; Dows v. Morewood, 10 Barb. S. C. 183; McTavish v. Carroll, 1 Md. Ch. Decis. 160; Bussey v. Gant, 10 Humph. 238; Hamer v. Kirkwood, 25 Miss. 95; Antarctic, Sprague 206; Calvert v Carter, 18 Md. 73; Solomon v. Deschler, 4 Min. 278; Spiller v. Creditors, 16 La. Ann. 292; Miller v. Trabue, Id. 375; Johnson v. Succession of Robins, 20 La. Ann. 569. In the interest of the creditor, application will be made to those debts for which the security is most precarious: Field v. Holland, 6 Cranch 8; Gordon v. Hobart, 2 Story 243; Chester v. Wheelwright, 15 Conn. 562; Bosley v. Porter, 4 J. J. Marsh. 611; Burks v. Albert, Id. 97; Hammer v. Rochester, 2 Id. 144; Taylor v. Talbot, Id. 49; Hillyer v. Vaughan, 1 Id. 583; Sager v. Warley, Rice Ch. 26; Heilbron v. Bissell, 1 Bailey Ch. 430; Gregory v. Forrester, 1 McCord Ch. 318; Smith v. Wood, Saxton 74; Pattison v. Hull, 9 Cowen 747; Smith v. Loyd, 11 Leigh 512; Planter's Bank v. Stockman, 1 Freem. Ch. 502; Blanton v. Rice, 5 Monr. 253; Moss v. Adams, 4 Ired. Eq. 42; Jones v. Kilgore, 2 Rich. Eq. 63; Baine v. Williams, 10 Sm. & M. 113; The State v. Thomas, 11 Ired. 251; Sash v. Edgerton, 13 Min. 210; King v. Andrews, 30 Ind. 429; Nutall v. Bonnin, 5 Bush 11; McDaniel v. Barnes, Id. 183.

In general, where no special equity intervenes, the payment will be applied to the debts or items of account which are prior in date and due at the time of payment: United States v. Kirkpatrick, 9 Wheat. 720; Fairchild v. Holly, 10 Conn. 175; Postmaster-General v. Furber, 4 Mason 332; McKenzie v. Nevins, 9 Shep. 138; Speck v. The Commonwealth, 3 W. & S. 324; Berghaus v. Alter, 9 Watts 386; Gass v. Stinson, 3 Sumn. 98; Smith v. Loyd, 11 Leigh 512; Upham v. Lefavour, 11 Metc. 174; Allen v. Culver, 3 Denio 284; The United States v. Bradbury, Davies 146; Dulles v. De Forest, 19 Conn 190; Caldwell v. Wentworth, 14 N. H. 431; Millikin v. Tufts, 31 Me. 497; Dows v. Morewood, 10 Barb. S. C. 183; Thompson v. Phelan, 2 Foster 339; Truscott v. King, 2 Selden 147; Thurlow v. Gilmore, 40 Me. 378; Morgan v. Tarbell, 28 Verm. 498; Cushing v. Wyman, 44 Me. 121; Pierce v. Sweet, 9 Casey 151; Pierce v. Knight, 31 Verm. 701; McKee v. Commonwealth, 2 Grant 23; Berrian v. New York, 4 Robertson 538; Horne v. Planter's Bank, 32 Geo. 1; Wendt v. Ross, 33 Cal. 650; Hollister v. Davis, 4 P. F. Smith 508. Where A., being indebted to B. on his own account, and also as surety for another, makes a payment to B., without specifying to which debt it shall be applied, the law will apply it to his own debt: Newman v. Meek, 1 Sm. & M. Ch. 331. Other considerations being equal, applica-

tion will be made, in the first instance, to the payment of a note due absolutely to the creditor, rather than of one held by him as collateral security only: Bank of Portland *v.* Brown, 9 Shep. 295. Payments made by a tenant to his landlord on account of rent generally, will, in the absence of any direction by the tenant and any agreement of the parties, be applied on the rent due at the time, and not on the rent then accruing: Hunter *v.* Osterhoudt, 11 Barb. S. C. 33. Where a public officer has given different bonds with different sureties, his payments must be so applied as to give each bond credit for the moneys respectively due, collected and paid under it: Postmaster-General *v.* Norvell, Gilpin 106; Draffen *v.* Boonville, 8 Mo. 395; Boody *v.* United States, 1 Wood. & M. 150.

When the debtor or creditor has once made the application, he cannot afterwards change it: Bank of North America *v.* Meredith, 2 Wash. C. C. 47; Hill *v.* Southerland, 1 Wash. (Va.) 128; Bank of Muskingum *v.* Carpenter, 7 Ham. 21; Rundlett *v.* Small, 25 Me. 29; Codman *v.* Armstrong, 28 Id. 90; Seymour *v.* Marvin, 11 Barb. S. C. 80; Dorsey *v.* Wayman, 6 Gill 59; Jackson *v.* Bailey, 12 Ill. 159; Chancellor *v.* Schott, 11 Harris 68; Watt *v.* Hoch, 1 Casey 411; Thayer *v.* Denton, 4 Mich. 192; Tomlinson Co. *v.* Kinsella, 31 Conn. 268; Miller *v.* Montgomery, 31 Ill. 350; Hubbell *v.* Flint, 15 Gray 550; Tooke *v.* Bonds, 29 Texas 419.

Payments must first be applied to extinguish interest and the balance to the principal: Gwinn *v.* Whitaker, 1 Har. & Johns. 754; Frazier *v.* Hyland, Id. 98; Peebles *v.* Gee, 1 Dev. 341; Freeman's Bank *v.* Rollins, 1 Shep. 202; Spires *v.* Harnot, 8 W. & S. 17; Smith *v.* Macon, 1 Hill. Ch. 339; Miami Exporting Co. *v.* United States Bank, 5 Ham. 260; Bond *v.* Jones, 8 Sm. & M. 368; Hearn *v.* Cuthberth, 10 Texas 216; Hampton *v.* Dean, 4 Id. 455; Stewart *v.* Stebbins, 30 Miss. 66; Johnson *v.* Johnson, 5 Jones Eq. 167; Anketel *v.* Converse, 17 Ohio St. 11; Johnson *v.* Succession of Robins, 20 La. Ann. 569; Sash *v.* Edgerton, 13 Min. 210. But the debtor making the payment may direct otherwise: Pindall *v.* Bank of Marietta, 10 Leigh 484; Miller *v.* Trevilian, 2 Rob. (Va.) 1; Tooke *v.* Bonds, 29 Texas 419. If the payment is less than the interest, the balance of interest is to be satisfied by the next payment, and not credited to principal and compounded: Hammer *v.* Nevill, Wright 169; Hart *v.* Dorman, 2 Fla. 445; McFadden *v.* Fortice, 20 Ill. 509. Where payment is made before either principal or interest is due, it must be applied first to interest, then to principal: De Bruhl *v.* Neuffer, 1 Strob. 426. See Jencks *v.* Alexander, 11 Paige 619; Starr *v.* Richmond, 30 Ill. 276. It will be applied, after paying interest, ratably to instalments: Righter *v.* Stall, 3 Sandf. Ch. 608.

*30] *THE GRATITUDINE (Mazzoli, *Master*).

Instance Court, December 18th, 1801.

[Reported 3 C. Rob. Adm. Rep. 240.]

Bottomry Bonds.—Hypothecation.]—*Power of a master over his cargo in cases of distress:—A master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage.*

This was a case of considerable importance to the interests of commerce, respecting the power of a master of a vessel to hypothecate his cargo on freight, in a foreign port, for the repairing of damages sustained by the ship at sea; such repairs being absolutely necessary to enable the ship to proceed on her voyage for the purpose of delivering the cargo according to the charterparty.

A statement of all the particular facts, together with the principal documents, will be found in the Appendix, 3 C. Rob. Adm. Rep. (Append. No. 5, p. 29,) as abstracted from a very minute account of the proceedings in the Court of Lisbon, from the petition of the master made to that Court, up to the sentence recording the petition, survey, and estimate, etc.

Arnold and *Robinson* for the petition.

Putting out of the present discussion the justness of the account which has been the foundation of the bond, and the

reality as well as the magnitude of the difficulties which gave occcasion for it, as matters either not disputed, or if disputed, as fit to be settled, as the Court has intimated, by a reference to the Registrar and merchants, we are called upon to show by what authority of law the master of a carrier vessel can pledge the cargo, being the property of a general freighter, for the repairs of the ship. In cases not dependent on the necessities of navigation, it would be idle to *contend for such a power. But in such cases adverting to the peculiar situation in which a master is placed in [*31 times of danger, and to his known power over the cargo in other analogous cases, such as jactus and ransom, adverting to the principles of the maritime law, which imposes on the master a particular trust, and require of him a responsibility in cases of emergency for the benefit of the owner of the cargo: it seems to follow as an essential provision of the same system, that he should have a power and authority over the cargo, adequate to the purpose of discharging his duty, and providing for a safe delivery of his cargo at the port of destination. Freight is not earned but on delivery; it is but reasonable on that ground, that when extraordinary exertion is necessary to effect that purpose on which his whole interest is made to depend, he should have so much authority as may be necessary to counteract the force of temporary accidents. Again, masters are forbidden, even in distress, to delay their voyage for want of money in a foreign port. They are indeed directed to write to the proprietors of the cargo, and supply themselves in that way, if it can be done without delay, but at the peril of answering for damages incurred by delay. This responsibility is enjoined upon them by the laws of Oleron,[1] which are in a peculiar manner

[1] Laws of Oleron, art. 23.—"Une marchant frett une nef et la charge, et la mett en chemin; et entre cette nef en une port, et demeure tant que [denari] lui faillent, le maistre puet bien envoyer en son pays, pour querir de l'argent; mais il ne doit pedre temps, car s'il le faisoit, il est tenu à peudre aux marchands tous les dommaiges qu'ils auront; mais le maistre puet bien prendre des vins aux

incorporated into the maritime jurisprudence of this country, being copied into the Black Book of the Admiralty as part of its substance, and being continually referred to in the public instruments of later times[1] (H. 6) as an important part of the maritime law of this country.

Such a responsibility must, at least, be provided with the means of conforming to it. Accordingly, by the express letter of the codes of all the States of Europe, the cargo is held up as a fund to which in cases of necessity the master is allowed to resort. The master may bind it for a ransom bill (Consolato, art. 287); for if he becomes a pledge for the
*32] payment, the cargo is liable for his *redemption. He may throw it overboard to preserve the ship in time of danger. He may sell a part in port to provide for the necessities of the ship, and enable him to continue his voyage. The Consolato del Mare,[2] art. 104, directs that if the merchant is

marchands, et les vendre pour avoir son estorement. Et quant la nef sera arrivée à droitte descharge, les vins, que le maistre aura pris, doivent etre au feur mys, que les autres seront vendus, ne à greigineur feur ne à moindre. Et aura le maistre son frett diceulx vins comme il prendra des autres. Et c'est le jugement en cest cas."

[1] "Contra leges maritimas et statutum d'Oleron." "Juxta formam et statutum d'Oleron."—*Black Book of the Admiralty.*

[2] Proceeding on the supposition that the merchants were on board, and having money: "Ancora è tenuto il patrone della nave, che se il mercante haverà denari, et che fussero in loco, che il patrone della nave havesse bisogno di esarcie o alcuna cosa che necessaria fusse alla nave, il mercante gli debba prestare in quel modo, che il nocchiero et gli altri mercanti conosceranno che si debbia fare, e per tale ragione tutti li compagni et prestatori che nella nave saranno si debbono tutti obligare al detto mercante; et se il patrone della nave, o gli compagni, o gli prestatori trovassino alcun huomo che gli prestasse, il sopradetto mercante non è tenuto di niente al loco prestare."—

105. Supposing that the merchants on board had no money: "Se il patrone della nave ha bisogna di denari e non ne trova come di sopra è detto, et che fussino in loco sterile, et che quelli denari havesse di bisogno per spacciamento della nave, et se gli detti mercanti non hanno denari, loro debbono vender della lor mercantia per spacciare la nave, et nessuno prestatore nè compagno non possono dir niente, nè contrastare, insino che que' mercanti sieno pagati, salvo che gli salari di marinati. Imperò è da intendere, che il mercante veda et conosca che quello che lui presterà, sia per spacciamento della nave et necessario della nave."

present, having money, he shall lend it; if he has not money, the master may sell part of the cargo, giving him a lien on the ship for his security. The same power is given in the articles of the laws of Oleron before cited, and it is copied into the code of almost every state in Europe. It is true, the words of these ordinances describe a power to sell a part; but that is not to be taken as a less power than the power of hypothecation, but rather as a greater power including the other, and expressed in that form only because in the earlier stages of foreign commerce it would appear best adapted to obtain credit, inasmuch as a bond to be enforced in a distant country would not be so negotiable and so acceptable to a foreign merchant as the absolute sale and delivery of part of the cargo. Nor is this mere inference unsupported by fact. The Ordinance of Antwerp, art. 19, does incidentally mention the power of pledging in the same article: "Le maître du navire ne pourra vendre ni engager aucune marchandise tant qu'il trouvera argent au change ou grosse aventure. Pourra à toute extrémité vendre des marchandises chargées." The object of this article seems to have been to lay restraint on the master in ordinary cases; yet the power of engaging the cargo is forbidden only conditionally, and *sub modo;* and from the manner in which it is mentioned, it appears to have been considered as a more eligible mode of raising the necessary sums than an actual sale. In the same manner the *laws of Sweden, having forbidden the master to sell more of the cargo than should amount [*33 to a fourth part of the value of his ship, prescribe a punishment if he exceeds: "Si petulanti modo vendat vel oppignat navem et bona in universum, ille non modo tenebitur resarcire exercitoribus et conductoribus omnia damna, sed etiam pro delicto suo plectetur:" Jus. Marit. Suec. tit. 4, c. 2, §§ 1, 2. In the same manner later writers speak of the power of hypothecating the cargo in cases of need as the known law: Molloy, vol. i. p. 334. Bynkershoek, in a treatise

on bottomry, describes it, "contractus quo tota navis et partes, et si hoc actum est, etiam onus pro pecunia erogata pignori ponitur. Hæc omnia obligavit magister et obligare potuit:" Q. Jur. Priv. l. 3, c. 16. In the common law-books of this country it appears to have been the settled understanding of the Court of King's Bench in the beginning of the last century (Justin *v.* Ballam, 1 Salk. 34), and it is adverted to by modern writers of high authority, as continuing to be the law at this day: Park, p. 413. In addition to these authorities, it is found to have been the constant practice of this Court to proceed upon such bonds; and numerous instances are produced in a list that has been looked up since this question was first agitated, in which money has been paid out of the court on bonds enforced against the cargo. On these grounds, the bondholder having lent his money under a security sanctioned by all ancient principle, recognised by constant usage and practice, and not vitiated by any misconduct appearing in the transaction, is entitled to the authority of this Court to enforce the payment of his debt.

The *King's Advocate*, *Lawrence*, *Swabey*, *Adams*, for the proprietors of the cargo.

On a question of great importance to the mercantile world, in which the possible mischief arising from an abuse of the power contended for might be immense, it was to be expected that some very cogent and direct authority would have been produced in support of such a demand. Excepting the list that has been extracted from the Registry, of which it does not appear that any one case was a contested case, it may be safely affirmed that nothing in the nature of a judicial precedent has been produced. It may be taken therefore as an admitted fact, that no such authority exists. To supply this deficiency, reference has been made to authorities of another nature, drawn indirectly from principles

*which govern analogous cases, as they are called, and from the loose dicta of ancient foreign ordinances and writers on these subjects. Such authorities, at best, are but very unsatisfactory in cases of great importance. They will appear still further weakened by the observations that may be made upon them. The cases of ransom and jactus depend on other principles, arising out of urgent and instant danger, in which the titles of property are sacrificed, with every other consideration, to the preservation of human life. As to cases of authority exercised over the cargo, deliberately and in safety, in a foreign port, the utmost that is directly sanctioned is a power to sell a part; but this arises from principles very different from those which have suggested this action, and leading to consequences very different from what the proprietors of this cargo will suffer if the demand can be maintained. The master is the appointed agent of the owner of the ship, and, as such, competent to bind him in many instances. He is bound to consult the benefit of the owner of the ship as to the best means of accomplishing his voyage. The ordinance of the Hanse Towns, tit. 6, art. 2, Emer. v. 2, p. 432, contains a minute description of his duty in such situations, and, as we submit, prescribes the proper limitation of his power. If he is in want of repairs, "et istic loci nullum cambium ad exercitores transmittendum obtinere queat, aut etiam in navi nulla bona habeat, quæ meliori cum commodo exercitorum, quam pecunia sub fœnore nautico excepta vendere possit; tum hoc in casu necessitatis, pro servandâ navi et bonis, habeat potestatem, nomine universorum exercitorum, tantum pecuniæ sub fœnore nautico accipiendi, quantum ad reparationem damni et alios similes casu necessitatis opus habet; et taliter quicquid fœnori accepit, universi exercitores solvere tenebuntur." The whole of his discretion is supposed to be exercised *pro meliori commodo exercitorum;* but he is not entitled to lay any burden on the owners of the cargo. If his ship is disabled by [*34

accident and storms from proceeding, he is not bound on their account either to tranship or to repair. It is said that he may repair or that he may tranship, but the law lays no obligation upon him to do either. If he judges it for the advantage of his owner, various modes of raising money are offered to him, and he may so far meddle with the cargo as to sell a part; but not as agent for the proprietor, or as engaging him in the repair of the ship, but as making a forced loan as it is termed, for the benefit of his employer; and for
*35] which the proprietor of the cargo is to *be ultimately indemnified, at the price at which the remaining articles sell at the port of their delivery. In no case was it designed that the proprietors of the cargo should suffer for the repairs of a ship to which they are strangers, and under the direction of a man for whom they are in no degree responsible. The sale of a part would be easily compensated to them by the value of the ship and freight; and according to some ordinances, the master was himself personally liable to them: Em. *v.* 2, p. 445. Of a very different nature and extent is this power of hypothecating the whole cargo, by which the burden of repairing the damages of the ship may be, in the event, thrown upon the cargo; and by which all distinctions of general and particular average may be overturned, and the whole expense be thrown as a particular average upon a person no way interested in the vessel. Neither the Consolato nor any later codes mention such a power. If there are instances in which writers appear to attribute such a power to the master, they will be found to be instances relating to cases where the master is also the consignee of his owner, and the *dominus mercium*, as well as the master of the ship. There is a passage in Targa which points strongly to such a combination of interests, as necessary to support such an act of authority exercised by the master over the cargo:—"Quando il capitano ò esser-citori imbarcano robbe e merci di proprio conto, puono

prender danari a cambio maritimo supra corpo e merci *giontamente*, perchè hanno la dispositione dell' una et l' altra materia; ecchi le dà, hà hypotheca più ampla" (c. 32, n. 1. Erm. p. 477). When the interests were several, as the necessary interpretation of this passage seems to imply, no such power could exist to bind the property of another person. Bynkershoek also, in the passage cited, seems to refer to a situation where the ship and cargo belonged to the same person; at least it is far from appearing that he meant to assert that the master, *qua* master, was empowered to hypothecate the cargo of a general freighter for the repairs of his ship.

Having been speaking of the origin of bottomry, and the simple form in which it continued till the middle of the seventeenth century, as a power given to the master in distress to hypothecate the vessel:—"Ita tamen ut duntaxat de navi dominus teneatur, non ultra," Bynkershoek goes on, "ad solos magistros, et solas, ut dixi, naves obligatas pertinebat hæc causa mutui sed deinceps protracta est ad exercitores sive dominos, et mox etiam ad dominos mercium." So far the powers are described severally according *to the several interests. It is not said that by the latest extension the master was considered as competent to bind the goods, as *dominus mercium*. In a following passage, discussing the personal responsibility of the master, he decides against it: "Nisi magister sit inter ipsos exercitores, vel *onus pro parte ad ipsum pertineat*." In this instance there was clearly a combination of interests, which, it is not improbable, continued to be in the contemplation of the writer during the next page, from whence the passage cited on the other side is taken, if in fact the words "*hæc omnia obligare potuit*," are to include the *onus* mentioned in the preceding sentence. He had been just before referring to some case decided in the Council of Holland, in which the fact might be, that the master was part owner of the cargo; or perhaps, as is more probable, the cargo might not be amongst the [*36

things hypothecated; for he begins the whole paragraph, "Dixi et naves, et instrumenta navium pignori dari," adverting only to the ship; and he concludes immediately after the sentence relied on, "Hæc omnia *instrumenta*, salva creditoribus, non magistro vel exercitoribus; as if his consideration were directed solely to the case of hypothecation of ship and furniture. The other authorities that have been cited will be found in the same manner irrelevant. Molloy relies entirely on the Article of Oleron, and far exceeds his authority in the *dictum* which he advances on the subject. In the same manner the citation from Salkeld is a mere *dictum* of the reporter, not suggested by any of the circumstances of the case, now depending, as far as it appears, on anything that fell from the Court; the same case being reported by Lord Raymond without any such observation. The passage from Mr. Parke rests solely upon Salkeld. The list that has been extracted from the Registry contains no instance of an adjudged case, and therefore cannot be conclusive.

Upon this view of the argument, it is not too much to say that nothing has been produced that can have the force of direct authority to support this demand. It is in its consequence of momentous importance to the interests of commerce; and may be pregnant with incalculable mischief, if a power so easy to be abused should fall into the hands of fraudulent and improvident persons.

Arnold and *Robinson* in reply.

As far as the policy and probable effect of the law are to be considered, it would not be difficult to show that the power
*37] in *dispute could operate only beneficially for the interest of the proprietors of the cargo. The master's power, as an absolute power convertible to purposes of fraud, would in no degree be increased by it. The cargo, in all cases where no supercargo is on board, must be in his possession, and subject, as a possible accident, to misappli-

cation and abuse. The inducement which the allowance of the authority in question would afford, would lead him to come back with his accounts, and submit them to the eye of his employer and the strict investigation of a court of justice; a temptation as little likely to suggest measures of fraud as any that can be conceived. But were the opportunity of abuse greater, would that impeach the soundness or necessary utility of a general principle? or can it be supposed that this danger is predominant over every other consideration of maritime jurisprudence; when as far as the not inconsiderable value of a ship extends, that is allowed to be subjected to this danger by every code that exists? The great object of the law of bottomry is to secure the arrival of the ship and cargo at the port of destination. To this end, a power to sell the ship in a foreign port could not have conduced, and was accordingly never entrusted to the master. His power over the ship is specifically limited to the power of hypothecation. His power over the cargo is described in general terms to be a power to sell a part, but not as excluding the power of hypothecation in the same manner as the power of selling the ship is excluded; for the same reason does not apply. The final success of the voyage never could be frustrated by such an alternative as to the cargo. In the ancient state of commerce, when intercourse with foreign nations was more limited, hypothecation would not be so good a security to the foreign merchant as the sale and delivery of a part, and therefore in the simple language of ancient codes, the most obvious remedy was alone described, not as excluding, but rather including, the alternative of hypothecation, as a milder remedy where it could be effectual. Where it can be applied, it is undoubtedly a milder remedy, inasmuch as it ensures, or tends to ensure, the arrival of the whole adventure at its proper port; and thereby provides, that if a sale of a part is ultimately necessary, it shall be conducted to the best advan-

tage, in the market for which it was assorted, and in the hands of the proprietors or consignees. Such a modification is not only to be inferred from the spirit of the ancient codes, and the nature of the subject, but is incidentally ex-
*38] pressed in some of them in *terms that are too clear to be misunderstood. The regulations of Antwerp use the words, "ni vendre, ni engager;" and the laws of Sweden, making no use of the expression "oppignare," as to the amount to which the master's power to sell was allowed, but passing by that probable contingency without any observation, or without providing any punishment for it, as for an abuse or extension of his power, expressly declare, as to a larger amount, "Si petulanti modo, ... vendat vel oppignat;" he shall be responsible to the owner and freighter, "exercitoribus et conductoribus," etc.

The express prohibition of hypothecating as well as selling ship or goods beyond the fourth part of the value of the ship, connected with the omission of any mention of hypothecating within the limits prescribed for selling, justifies us in supposing that, as far as the master was allowed to sell, he was not prohibited from hypothecating. It appears also that he was equally free to act in this manner with respect to the goods, whether they belonged to the owner of the ship or not; for his responsibility being put severally, when he was responsible, "exercitoribus vel conductoribus;" when he was not responsible (that is, either for hypothecating or selling within the prescribed limits), it would be to the same several interests, to his owner or freighter, that no responsibility was due. It cannot therefore be maintained, that in all cases universally, where a power over the cargo was attributed to the master, it was in contemplation of an union of interest in his employer. Indeed, the whole of that hypothesis seems to be unfounded. It is built upon a passage in Targa; but that passage does not relate to bottomry, properly considered, as the resource for cases of dis-

tress in a foreign port. It applies to the *contrat à la grosse*, at the commencement of the voyage in the port of the proprietors, and is rather to be taken as a contract on *respondentia*. The passage is so cited by Emérigon, in his chapter *Contrat à la grosse*, having been passed over without notice in the preceding chapter, where the writer is treating expressly of the power of the master to sell part of his cargo in a foreign port. The same observation applies to the argument from Bynkershoek. He is evidently speaking in some parts of the chapter on bottomry, of bonds given in the port of departure, which, as to the cargo, must be bonds on *respondentia;* on this account he may have delivered himself with less perspicuity than is generally natural to him. But in the passage cited, the cargo is expressly included, *as being under the power of the master; and the [*39
obvious sense of his terms imports it to have been his opinion, that the master, as master only, was, on particular emergencies, competent to bind the cargo. On any other supposition, if he had been the owner of the cargo, or the constituted agent of the ship and cargo, there would have been no reason for any order or limitation in the manner of doing it; he might have elected his remedy, either on ship or cargo. Instead of that, it is now put subject to the prior hypothecation of the ship, "Si hoc actum est, etiam onus pro pecunia erogata pignori ponitur."

Another argument has been built on a supposition that the master was bound only to act for the benefit of the ship; that he was not called upon to act for the cargo; that the law did not authorize him to bind the proprietor of the cargo; and that his power to sell a part, was understood only as a power to make a temporary loan, for which the proprietor must in all instances be indemnified. It has been before observed, that the master is in some cases made responsible to the owner of the cargo for the delay of his voyage arising from distress. It will be a sufficient answer

to the latter part of this argument to say, that the fact of a supposed indemnification in all cases cannot be maintained. It appears that a difference of opinion has existed in writers and in codes on this point. The laws of Wisbuy had provided for such an indemnification, and directed, "Le navire venant à se perdre, le maître sera néanmoins tenu de payer au marchand les susdites merchandises." Valin and Pothier seem to have concurred in this opinion; but Emérigon opposes them, on the ground that in the older and more general codes it never had been so established, and he cites against them the article of the Consolato 105, and says, "Il ne réserve aux propriétaries des marchandises vendues qu'un simple privilége et préférence sur le navire." He cites also the 23d article of Oleron, and the 19th Règlement d'Anvers, to the same effect, and he concludes a following chapter by giving his opinion on a case so similar to the present, that, excepting the difference of sale and hypothecation, it is directly in point. From that opinion we learn, that it by no means appeared monstrous or unreasonable to one of the best writers on maritime law, that, in some extreme cases, the repairs of a ship, for the prosecution of the voyage, might be greater than the proceeds of the ship and freight, and that on such an occasion a loss might eventually fall upon the cargo, very consistently with sound principle and the
*40] *general interests of commerce. "Si au lieu de prendre des derniers à la grosse, le capitaine avoit vendu pour cause légitime" (which could only be distress in a foreign port) "une partie des marchandises du bord, et que, au retour du voyage, le navire et le fret (aggravés par des engagemens postérieurs et par les salaires de l'équipage) fuissent insuffisans pour reembourser le prix des dits marchandises, cette partie devroit être supportée au sol la livre par les autres marchandises." And further: "Celui dont les effets sont vendus, pendant le voyage, pour les nécessités de la navigation, n'a pu ni s'y opposer ni se procurer aucune

ressource particuliére contre la personne du capitaine. Il est donc juste qu'en cas d'insuffisance du navire et du fret, abandonnées par les propriétaires, la perte soit régalée sur l'universalité des chargeurs, dont la condition doit être égale."

JUDGMENT.

Sir W. Scott.—This case has been learnedly argued; and I have thought it due not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it.

The case comes on upon petition, which states, "That the imperial ship 'The Gratitudine,' having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia to London, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon and unlade; that the master applied for advice and assistance to F. Calvert, who was the correspondent of Mr. Powell, one of the principal consignees in England; that Mr. Calvert wrote a letter to Mr. Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their further conduct; that in answer to that application he received a letter from Mr. Powell, stating, 'that to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo; and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure.' That the master, being in want of money to defray the charges of repairing the vessel and of unlading the cargo, borrowed of the aforesaid F. Calvert the sum of 5273*l.* 12*s.* on a certain bottomry *bond, bearing date 31st January, 1801, binding the ship and appurtenances, cargo and freight, to pay the [*41

said sum of 5273*l.* 12*s.* within twenty-four hours after the arrival of the said ship in the port of London, or any other port; that the said bond had been duly presented to the master, who refused to discharge it; that the holder had no other means of recovering his debt than by proceeding against the ship, freight, and cargo, and prayed the Court to decree a monition against the bail given to answer the action in respect of the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship."

On the other side it is alleged, "That the master had not, under the circumstances stated, a right to hypothecate the cargo for the repairs of the ship, for payment whereof the ship, her master, owners, and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges to which the cargo laden in the said ship was liable, for the unlading and re-shipping the cargo, and other expenses relating thereto; all which, with the freight, the parties had always been and were willing to pay."

The proposition contained in the act does not go the length of asserting universally that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it under the circumstances of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended that the master has no right to bind the owners of the cargo in any case,—upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depository and common carrier as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that in no case has he a right

to bind the owners of the cargo, is, I think, not tenable to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant, and unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can *be supposed to mean that valuable property in his [*42 hand is to be left without protection and care. It must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports into which he may be compelled to enter.

The case of throwing overboard parts of the cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may select what articles he pleases; he may determine what quantity—no proportion is limited—a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So, likewise, with respect to any proportion, he can be justified only by that necessity,—nothing short of that will do. The mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom, in which it is well known that, by the general maritime law, a master could bind by

his contract the whole cargo as well as the ship. He could not go beyond the value of the goods; but up to the last farthing of their entire value, there is not a doubt but he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to our practice of ransoming; but I am speaking of the general maritime law and practice, not superseded by private and positive regulation.

There are instances of authority at sea, there are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time: in such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be *done? He must in such case exercise his judgment whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell. If he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transhipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.

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With respect to practice, I understand from a gentleman very conversant with the commerce of the West Indies, that it is by no means unfrequent for an application to be made to the Vice-Admiralty Courts in that part of the world, for leave to empower the master to sell. I understand it likewise to be matter of complaint, that this power is sometimes abused by an improvident and collusive sale of cargoes,

when no real necessity exists; that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very ground of the defect of power in such cases implies and affirms its existence in cases where the necessity is real.

In all these cases, the character of agent, respecting the cargo, is thrown upon the master by the policy of the law, acting on the necessity of the circumstances in which he is placed. But it is said that this can only be done for the immediate benefit of the cargo, and not for the repairs of the ship. It is very true that this involuntary agent ought, like an appointed agent, in all cases to act for the best respecting the property, even in the case of a universal *jactus*, which appears less likely to conduce to the benefit of the cargo, still it is so; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved; whereas otherwise both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo may eventually consume the whole. The proprietor will not be benefited in such a case, but he cannot be damnified. He will have had the chance of advantage without the danger or possibility of loss, for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It *is therefore true, that if the repairs of the ship produce no benefit [*44 or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs. But it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree, and

under no circumstances, done for the benefit or with the prospect of a benefit to the cargo; whereas the fact is, that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described; being a stranger in a foreign port, in a state of distress, without an opportunity of communicating with the owners or their agent? What is his duty under such circumstances? It may be answered generally, to look out for the means of accomplishing his contract if possible; that is, the safe conveyance of the property entrusted to his care, in that same vehicle which he had contracted to furnish. It is admitted, that though empowered to tranship, he is not bound to tranship. No such obligation exists according to any known rule of the maritime law; and if it did, still he must be affected with the opportunity of transshipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from transshipment, if he has the means by knowing that insurances were made on the original shipment, which might be avoided by such a change, on having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to transship, and it not being shown that he has the opportunity of transshipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising money is the hypothecation of the ship. But the foreign lender has a right to elect his security, for he is not bound to lend at all. He may refuse to lend upon the security of the ship or on that security alone; it is no injustice on his part, and if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise the money on that alone, what is he to do? It cannot be said that he is in all cases to wait till he hears from a *distant country. The repairs may be immediately necessary; it may be hoped that the [*45 repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees; they may be mere consignees, and have no power to direct him, but in a single case of an actual delivery to them. If owners, they may be very numerous; for in a carrier-ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done? I conceive one of two things: to sell a part of the cargo, for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship, or to hypothecate the whole for the same purpose. With respect to the former, the books overflow with authorities, many of which have been stated. They all admit that he may sell a part; some ancient regulations have attempted to define what part, others have not. The general law does not fix any aliquot part, and indeed it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which seems to arise from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes,—that the power of selling cannot extend to the whole, because it never can be for the benefit of the cargo that the whole should be sold to repair a ship which is to proceed empty to the place of her destination; there will in that case be no safe custody and transmission, and therefore the power of selling for the repairs of the ship must be limited to the sale of a part, though it may not be possible to assign the exact part, except where positive regulations have fixed it.

But hypothecation may be of the whole, because it may be for the benefit of the whole that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the sale of a part, and this in the best market, at the place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances as can hardly be expected to happen again, the loss of a part of the whole sold, in the hands of its proper consignees, is all the effect that will be produced; and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe conveyance *of a valuable cargo may be, in many instances, of infinitely more value to the merchant than the whole expense of the repairs, if the whole could be devolved on the cargo. Generally it cannot be so; in the very form and structure of the bonds, the ship and freight being usually the first things that are hypothecated; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of the whole cargo is extremely natural; and, if I am right in considering it as equivalent to a sale of a part, it is little more than what all the books of maritime jurisprudence direct to be done. It is, in truth, but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole; for, as all must finally contribute in the case of an actual sale of a part, what new hardship is now imposed? See *Duncan* v. *Benson*, 1 Exch. 558. All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole

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adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

Cross accidents may intervene in the sequel, to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case, the ship was estimated by public authority at Lisbon, at 2300*l.*, the freight amounted to as much; the sum to which it is admitted the cargo is liable for its own proper charges would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened, by subsequent accidents, that the matter has turned out so as to affect a larger portion of the cargo; but subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by the most perverse combination of circumstances, is, that the whole value of the cargo might be answerable; still I should say, speaking with all caution that is due on such important interests, better is it that this should happen (if it can happen) in a few very eccentric and almost unnatural instances, than that the master should have no discretionary power to act for the preservation of the cargo, but that he should be compelled, in all cases and under all circumstances, to proceed *to the sale of possibly a considerable portion of his cargo, at a most improper port for which his [*47 cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the King's Advocate of a large and valuable ship, with a cargo of inconsiderable value, belonging to Dover, and falling into this distress in a neighboring port, as at Calais: and it is asked if it would be reasonable to consume a small cargo in the service of a ship so situated? It may be sufficient to answer, that it is not the case before the Court, and that it differs from this case in the exact proportion of the difference of the distance

between London and Lisbon, and of that between Dover and Calais. Supposing such a case, it would be expected, undoubtedly, that the master should use his utmost endeavors to correspond with the consignees or proprietors. But a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes, for a fortnight, or three weeks, or more, in adverse or tempestuous weather, and then the same principle would apply. But whatever might be the objection to such a case, just the same objection would lie against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at Dover. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle. How does the matter stand with regard to authorities? In the first place, it is not improper to observe that the law of cases of necessity is not likely to be well furnished with precise rules. Necessity creates the law,—it supersedes rules; and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects. In the next place, if I am right in considering hypothecation of the whole as equivalent to the sale of a part, then all authorities for a partial sale are authorities also for a total hypothecation. Thirdly, I must observe that it is not to be expected that the ancient codes should contain much precise regulation or direct authority on this subject, this contract of bottomry being comparatively of later growth, and arising out of the necessities of an enlarged commerce. Bynkershoek expresses
48*] *himself, I apprehend, with great historical accuracy on this subject, when he says:—"Origo hujus contractus ex jure Romano, sed quæ ibi legimus vix trientem absolvunt totius argumenti. Adeo tenuia etiam apud nos

fuerunt ejus contractus initia, ut non nisi mutuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare." But still I think authorities are not wanting from the ancient codes. The passage which has been cited from the Consolate, art. 105, is applicable. There it is said that a merchant, being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The Ordinance of Antwerp, likewise, seems expressly to recognise it; and the passage of Bynkershoek, which has been cited, seems to me capable of no other interpretation. The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

So far for foreign authorities. Upon the authorities of our own law, it is to be observed, that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the Courts of Admiralty, which can alone give the possession of the *res* which is the actual security in dispute. It is principally in attempts to obtain prohibition, that the power of hypothecation can be noticed by the common law, and what is only incidentally noticed in the Court, is of course but slightly and indistinctly noticed by the writers. It is of importance, however, that whenever occasion has called for incidental observations on this contract, it appears to have met with countenance. A *dictum* expressly recognising such a power appears to have dropped from Lord Hardwicke in the case of *Buxton* v. *Snee*, 1 Ves. 155, where it is spoken of as a power arising out of his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish;

and as a power which both the maritime law and the law of this country allow. An earlier instance is that in *Justin v. Ballam*, 1 Salk. 34. How that *dictum* arose does not sufficiently appear; there was nothing, I find, on reference to the books of the Court of Admiralty, in the circumstances of the case to lead to it, as it was a case of a suit against the ship only, for a *cable and anchor supplied in the
*49] Thames by merchants of this town. Whether it was a *dictum* of the Court, or only of counsel, *non constat*, it might have found its way into the argument, and have received incidentally the countenance of the Court, though it is true the report of the same case by Lord Raymond makes no mention of it. It is at the very lowest the impression of that reporter, although the reason assigned for it is expressed in too general terms, for the master does not ordinarily represent the owner of the cargo as well as of the ship, but only in cases of accidental necessity, in which the policy of the law throws that character upon him. This *dictum*, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron Comyns, tit. Admiralty, E. 10, where it is cited amongst the rules of unquestioned authority. I observe that Mr. Viner, tit. Hypothecation A., in citing the case of *Trantor* and *Shippen* (which in other books is denominated *Trantor* and *Watson*), represents Mr. Justice Powel as expressly extending the master's power of hypothecation to the goods; but from a report of the same case, 6 Mod. 13, he rather appears to have said no more than that "if the master possessed such a power, it would bind the property in the hands of a third party;" on which it is to be remarked, that although this hypothetical form of speaking asserts nothing directly, it pretty strongly implies that that able and learned judge (as I have always understood him to be traditionally reputed) did not feel any of his notions of law or equity offended by the supposition that such a power

legally existed. Of Molloy I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.

These passages are all that I can find affirmatively in the common law writers, but it is no slight negative argument of the understanding of the common law, and no small confirmation of the fitness of this principle, that during a long series of years no instance has happened in which a prohibition to the enforcement of such a contract has issued; and the inference will be the stronger, if it shall appear that numerous suits have actually been entertained in the Court of Admiralty on such bonds. The mention of numerous suits brings me to the result of a research which I directed to be made in the records of this Court, a Court whose practice on a question of this nature—a question of the general maritime law—is not without its authoriry. I find from the list *that has been returned to me, that there has been, in later times at least, a constant practice of [*50 proceeding upon such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient instances of it to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards, there is a list of twenty-three or twenty-four cases, in which the proceeding has been in some, against the cargo only, in others (and much more generally) against the ship and cargo together. In some of these cases, protests have been entered, almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these protests have been either waived or overruled. In the year 1786, there was the case of the "Vier Gebroeders," in which I was of counsel, and although the decision, as it is said by the King's Advocate, proceeded on other grounds, the fact appeared that the master had exercised this power, and it seemed to be admit-

ted, tacitly, at least in the argument, that he possessed generally such a power. It is likewise something in addition to the practice of this Court, that such bonds are frequently occurring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter goes a great way to constitute that *lex mercatoria* which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting therefore to the fair foundation of the general principle, and to the authority of the maritime law as it has been for some years practised in this Court, and countenanced in all the instances in which it has been brought to the notice of the Courts of common law,—adverting also to the practice of what I may call the *lex mercatoria*, I think I am warranted in pronouncing for the power of the master to bind the cargo for the repairs of the ship, in order to effect the prosecution of the voyage, in such a manner as to entitle the party who advances the money to sue for the enforcement of his bond in the Court of Admiralty. At the same time I think myself bound to observe, that it is perhaps the first instance in which a judgment has been demanded on this point; and as I cannot but feel with peculiar weight the insufficiency of the opinion of any one individual to decide on such extensive interests as may depend on this question in such a commercial country as this, it becomes me to suggest that it may perhaps be not improper *that a resort should be had to the collective wisdom of another jurisdiction. *51]

It remains to consider whether the situation of the master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity may belong to him; and secondly, whether the lender has at all acted unfairly under that necessity, by taking undue advantage, so as to vitiate the contract either in the whole or in part; for it must be proved upon the lender that he has taken

such undue advantage. It will not be sufficient, either upon principle or upon determination of the Court, that the master has taken undue advantage against his employer; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction in the fraud that may have been practised.

The protest of the master states, "That he sailed from Trieste with his ship in good condition; that he went to Venice, Zante, and Cephalonia, and took in a cargo of fruit for London; that in the course of his voyage to London he met with tempestuous weather, and sprung a leak, so as to make it necessary to unship and reload; that he proceeded to Gibraltar, but that a gale of wind sprung up and drove him off from that port without a bill of health; that he approached the bar of Lisbon, but was not permitted to enter on account of his not having a bill of health; that he was proceeding on his voyage, when he was again driven back by tempestuous weather into Lisbon, in a state of as complete distress as he could possibly be." What was he to do in this situation? It is admitted that he was not obliged to transship. If at liberty so to do, still he knew that his cargo was insured in that very ship, and that all his policies might be voided upon a transshipment. To have sold the whole or parts of a cargo, consisting generally of fruit, in a fruit country, would scarcely be thought advisable. It is said he might have written to the proprietors, but it does not appear that he knew who the proprietors were. Those to whom he was to deliver might be mere consignees. The Court would undoubtedly be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable; but, taking the obligation to be such, the master has complied with that obligation; he applied to the correspondent of the principal consignee, who is described as owner of a part of the cargo. From him he received an an-

*52] swer sent by that consignee *and proprietor, Mr. Powell, expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct I think that all the authority that might become necessary for the preservation of the cargo was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law. For if he was remitted to his own discretion, everything then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned. Certain it is, that no such directions, given or withheld by that employer, could at all affect the agency of the master with respect to the other parts of the cargo in which that employer was not concerned. With respect to them, he possesses the authority which the general law gives him, and no more.

In the state of consummate distress in which he arrives at Lisbon, what is this man to do? A great deal of argument has been used to show what he should not have done. I could have wished that a word or two had been employed in showing satisfactorily what he ought to have done, or could have done with more propriety in this situation. It has been said, there was the ship and freight. He has acted rightly in binding both in this very bond. It has been added, that he might have bound himself. This also he has actually done; though I presume the mere personal security of such a man, a hired master of a vessel, would go but a little way to satisfy a foreign lender of money.

It is said that he ought to have bound his owners likewise; but those who propose that should first prove his authority to bind his owners personally beyond the value of their ship (which value he has already bound), and likewise find merchants at Lisbon who would be willing to advance money upon the personal security of the owners, living at Trieste, whom they might be under the necessity of ulti-

mately following into a personal suit in the supreme court of the empire. Then the ship and freight being pledged, and the master having no other funds, and being anxious to convey the cargo to the place of its destination, what could he do better than hypothecate the cargo, under the reasonable expectation, which this case afforded, that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond, without calling on the cargo? In pursuing this resolution, it was barely possible for a man to act with more caution than this master appears to have done. He *applied to not only the consul of his nation, but likewise to the [*53 court of justice in the foreign country. It seems to be the particular regulation of that country, that matters of this nature shall not be transacted without the sanction of a court of justice. As to the policy of that regulation, doubts may be entertained whether it might not be safer to leave matters of that sort to the vigilance and honesty of the parties interested, rather than to the superficial attention which may be given by persons employed to inspect the circumstances of the case by a court of justice. The court at Lisbon, however, proceeded to examine the truth of the representation given by the master; witnesses were examined; surveys under public authority were made. The result was, that the ship is reported by the surveyors to be of sufficient authority to warrant the repairs. The repairs are made, and the master has the authority of the court not only for the propriety of the repairs, but likewise for the reasonableness of his expectation that the ship alone would be able to answer the expense of them. Still, however, the foreign lender was not obliged to advance money, but on such security as he liked; and in this situation the master pledges the additional security of the cargo. He proceeds on his voyage to England, and the bond, which became due on the event of his arrival, is put in suit. The consequence is that the ship is sold;

and, being sold as a foreign ship unable to procure a register, sells for not more than half the value at which she was estimated at Lisbon.

Upon this state of the case, it is evident that, instead of the cargo being sacrificed to the ship, which is the present complaint, the ship has been made the martyr of the cargo. For it is in the service of that cargo that she has been brought to a place where the owners suffer this extreme diminution of her value. In her unrepaired state at Lisbon she is valued at six millions of rees,[1] and therefore would have sold there in that condition for a much larger sum than she produced, after her repairs, by a sale in England, for a purpose which absorbs the whole of her value, freight included, and a good deal more. She adheres with fidelity to her engagaments with the cargo, and is a victim to the execution of that duty.

On the whole, I am of opinion that the situation and the conduct of the master has been such as to justify the exercise of that right which belongs to him in cases of necessity, although interests of the owners of the cargo, whose ordi-
*54] nary agent he is not, may be *affected by it, unless it can be shown that the other contracting party, the money-lender, was prevented by contracting by any incompetency which would vitiate the whole of the bond, or has fraudulently charged sums, computing the account for which the bond is given, that would vitiate it *pro tanto*.

With respect to the first, it is true that Mr. Calvert (who advances the money at Lisbon) is the correspondent of one of the consignees of the cargo; and it is argued to be an extraordinary thing, and a proof of collusion on his part that would constitute a total incompetency, that he, the correspondent, should enter into such a contract. See The Hero, 2 Dod. 139, and note. In the first place, it is to be observed, that Mr. Calvert is the correspondent of one con-

[1] About 1600*l*.

signee only, and therefore, with respect to the goods of that consignee, I am still to learn that it is the bounden duty of a foreign correspondent to advance his money without authority, and without such security as he may approve; and thirdly, this consignee having declined to give any orders, and having expressly thrown the whole upon the discretion of the master, I think that Mr. Calvert stood, with respect to these goods, on the same footing as any other merchant; and, if the master was driven to the resource of bottomry, nothing in the relation of Mr. Calvert to those goods created an incompetency in Mr. Calvert to advance his money on such security as any other man might have demanded for it.

There being nothing in the conduct of the parties to invalidate the contract, it remains only to inquire whether any articles have found their way into these charges (see App. vii. 3 C. Rob., p. 33) that ought not to have appeared there. It does not appear that many articles are questionable. I perceive that there is a pretty heavy commission charged. I know that the word commission sounds sweet in a merchant's ear; but whether it is a proper charge or not, on this occasion, I will not take upon myself to determine without reference to the Registrar, properly assisted. The master, being in a situation of distress, was left to act for the best conveyance of his cargo; and I think he may be fairly supposed to have done so. The bondholder advances the money, having a right to elect his security, and he has run his risk on that security.

If the ship and cargo had perished, he would have lost the whole. The owners of the ship have lost all, and there is a great loss besides. On whom is this loss to fall? It can fall only on *the proprietors of the cargo, or on the bondholder who has advanced his money and run his [*55 risk upon the given security, and under circumstances which by no means affect him with incompetency to enter into

such a contract,—a contract from which the cargo has received a considerable benefit. I think that there is no question of the liability of the cargo.

As to some particular goods, for which a further distinction has been taken, on the ground that they are privileged goods, not paying freight, I think that distinction insufficient. They have had in an equal degree the benefit of their conveyance to the place of their destination, and it is not reasonable that they should be exempted from the obligation attaching to the whole of the cargo, of being amenable for contribution to the bond, although the owner of the vessel might, as far as his interests alone were concerned, have been willing to show them a particular indulgence. If they are the goods of the owner of the ship, they can have no more right to be exempted from contributing than the ship itself.

Bond enforced against the cargo.

In the principal case, generally referred to as "the celebrated case of the 'Gratitudine,'" Sir William Scott (afterwards Lord Stowell), in his well-reasoned judgment, shows conclusively that the master of a ship has power, in proper cases, not only to hypothecate, by means of a bottomry bond, the ship and freight, but also the cargo committed to his care, as, for instance, for the repairs of the ship. The rule of law which gives this power to the master, both in the case of the hypothecation of the ship and freight, and of the cargo, is founded upon the prospect of benefit to the proprietor. "It is true," observes the learned judge, "that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree, and under no circumstances, done for the benefit, or with a prospect of a benefit, to the cargo: whereas the fact is, that though the prospect of benefit may

be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly considered as done for the common benefit of both ship and cargo:" Ante, p. 44. See also, The Jacob, 4 C. Rob. Adm. Rep. 245; The Osmanli, 3 Wm. Rob. Adm. Rep. *214; The Jonathan Goodhue, Swab. Adm. Rep. 356. [*56

The power of the master to bind the cargo depends upon the *necessity* of the case; and indeed, as we shall hereafter more fully show, he has no right to hypothecate the ship, freight, or cargo, except in cases of necessity, where funds are wanted for the purpose of enabling the ship to proceed on her voyage, and deliver her cargo to the owners or consignees.

No bottomry bond, however, can be given by the master on a cargo which is not shipped, for this obvious reason that he has not till the cargo comes on board the ship any control over it: The Jonathean Goodhue, Swab. Adm. Rep. 355, 357.

It is proposed in this note, after some preliminary observation relating to bottomry bonds, to show, 1st, what are the circumstances under which the master has power to bind the ship, freight, and cargo thereby; 2dly, when he can sell part of the cargo for the repairs of the ship, or sell the ship and the whole of the cargo; and lastly, under what circumstances the master should transship the cargo.

By a bottomry agreement, whether it be in the shape of a bottomry bond or bottomry bill, either the owner of a ship, or a person acting for him as the master, may, in consideration of money advanced for the use of the ship, bind the ship, freight, and cargo for the repayment of the sum advanced and interest, if the ship terminates her voyage successfully.

A debt for general average contribution arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward: The North Star, 1 Lush. Adm. Rep. 45.

These instruments are called bottomry bonds or bills, because the keel or bottom of the ship, *pars pro toto*, is pledged as a security for the repayment of the sum advanced: The Atlas, 2 Hagg. Adm. Rep. 53.

By statute 19 Geo. II. c. 37, money lent on bottomry or *respondentia* on vessels belonging to *his Majesty's subjects*, bound to or

from the East Indies, must be lent only upon the ship or merchandise, with benefit of salvage to the lender; a previous statute, 7 Geo. I. c. 21 (since repealed, The India, Brown & L. 221), having made void all contracts by his Majesty's subjects on the loan of money, by way of bottomry, on any ship in *the service of foreigners*, bound to the East Indies.

A bottomry bond, being a chose in action, is not assignable at law: Marshall *v.* Wilson, Abb. Ship. 125, 9th ed., but in the Court of Admiralty it is considered a negotiable interest, which may be transferred and sued upon by the person so acquiring it: The Rebecca, 5 C. Rob. Adm. Rep. 104.

A bottomry contract is distinguishable from or differs in some important respects from ordinary loans: in the first place, because a risk must necessarily be run by the holder; and in the next place, *57] because *(even before the abolition of the usury laws) any rate of interest might be charged.

The contract of bottomry differs from that of *respondentia*, inasmuch as the latter does not apply to a loan on the security of the vessel, but only to a loan on the security of the goods or merchandise laden on board of her. In other respects, *respondentia* bonds are similar to bottomry bonds, and the Court of Admiralty has equal jurisdiction over both: Cargo ex Sultan, Swab. Adm. Rep. 504, 510. The contract of *respondentia* is of much rarer occurrence than that of bottomry. And since the passing of 19 Geo. II. c. 37, it has almost fallen into disuse in this country: The Atlas, 2 Hagg. Adm. Rep. 48; The Cognac, Id. 386; and see The Royal Arch, Swab. Adm. Rep. 269; Cleary *v.* M'Andrew, 2 Moo. P. C. C. 216.

As to the Risk to be run by the Lender on a Bottomry Bond.— That it is essential to the validity of a bottomry bond that a *sea-risk* should be incurred by the lender, and that the pledge on the ship should take effect only in the event of its safe arrival, is laid down recently in Stainbank *v.* Shepard, 13 C. B. 418 (76 E. C. L. R.). In that case a vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs and disbursements; to secure which he drew bills of exchange upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo, and freight.

By this instrument the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; and the *master took upon himself and his owner the risk of the voyage, making the money payable at all events*, and subjecting the ship to seizure and sale by virtue of process "out of her Majesty's High Court of Admiralty of England, or any Court of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law and custom of England," in the event of the bills being refused acceptance or being dishonored. It was held by the Exchequer Chamber, affirming the decision of the Court of Common Pleas, that this was not such an hypothecation as could be enforced in the Court of Admiralty, inasmuch as the payment of the money borrowed was not made to depend upon the arrival of the vessel. See also, The Nelson, 1 Hagg. Adm. Rep. 169; The Atlas, 2 Hagg. Adm. Rep. 53; The Emancipation, 1 Wm. Rob. Adm. Rep. 130; The Royal Arch, Swab. Adm. Rep. 269.

It is not, however, necessary that the person advancing his money upon a bottomry bond should take upon himself the peril of the voyage, expressly and in terms, though this is often done; for it is sufficient that the fact can be collected from the language of the instrument, considered in all its parts; for it has been said that such instruments *as bottomry bonds, being drawn up in the language [*58 of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties: Simonds *v.* Hodgson, 3 B. & Ad. 50, 57 (23 E. C. L. R.); 6 Bing. 114 (19 E. C. L. R.); The Nelson, 1 Hagg. Adm. Rep. 169; The Emancipation, 1 Wm. Rob. Adm. Rep. 130; The Vibilia, Id. 5; The Kennersley Castle, 3 Hagg. Adm. Rep. 7; The Alexander, 1 Dods. Adm. Rep. 280.

It seems that a bottomry bond is not invalid, because the bondholder, although he takes an extraordinary and maritime, but not extravagant rate of interest, takes upon himself the risk of the outward voyage only: The Hero, 2 Dods. Adm. Rep. 142, nor because there are transactions between the owner and mortgagee of the vessel, which might render the voyage illegal: The Mary Ann, 1 Law Rep. Adm. 13.

As to the Amount of Interest.—As the title to repayment of the

sum advanced is not certain, but eventual, dependent upon the safe accomplishment of the intended voyage, the lender has always been entitled to demand a much higher rate than the current interest of money in ordinary transactions. It partakes of the nature of a wager; and therefore is not limited to the ordinary interest; the danger lies, not upon the borrower, as in ordinary cases, but upon the lender, who is therefore entitled to charge his *pretium periculi*,— his valuation of the danger to which he is exposed: The Atlas, 2 Hagg. Adm. Rep. 57.

But although the high rate of interest at which money may be lent upon bottomry will not affect the validity of the bond, it will be a proper subject for reference to the registrar and merchants, and if it be found to be excessive or fraudulent, the Admiralty Court will reduce it; but the court will only exercise this authority on clear and undisputable cause shown, and with great caution: The Zodiac, 1 Hagg. Adm. Rep. 326; The Cognac, 2 Hagg. Adm. Rep. 386; The Heart of Oak, 1 Wm. Rob. Adm. Rep. 215; 1 Notes of Cases 214; La Ysabel, 1 Dods. Adm. Rep. 277; The Alexander, Id. 279; The Lord Cochrane, 8 Jur. 716; 3 Notes of Cases 172; The Albion, 1 Hagg. Adm. Rep. 333; The Huntley, 1 Lush. Adm. Rep. 24. And see The Nelson, 1 Hagg. Adm. Rep. 169, as to bills of exchange given as collateral securities to a bottomry bond being drawn at too high a rate of exchange.

And as to the costs of a reference in a cause of bottomry, see The Kepler, 1 Lush. Adm. Rep. 201.

When a ship upon which a bottomry bond was given never went the voyage, it has been held by a Court of Equity that as the bondholder never ran any risk of losing the principal sum advanced, he was only entitled to repayment of it with ordinary interest: Deguilder *v.* Depeister, 1 Vern. 263.

It does not appear to be absolutely necessary that a bottomry bond *59] should carry maritime interest, *and a party may consequently be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance that only an ordinary rate of interest has been demanded: The Emancipation, 1 Wm. Rob. Adm. Rep. 130; The Laurel, 13 W. R. (Adm.) 352.

Where in a bottomary bond blanks had been left where the rate

of interest ought to have been expressed, the Court pronounced for the bond with such interest as the registrar should find to have been usual on such risks at the time when and place where the bond was taken: The Change, Swab. Adm. Rep. 240. As to the allowance of commissions included in the bond, see The Glenmanna, Lush. Adm. Rep. 115.

Who may give a Bottomry Bond.—A bottomry bond may be executed, either by the owner of the ship, even without the concurrence of the master: Duke of Bedford, 2 Hagg. Adm. Rep. 294 or by the master, with the express authority of the owner: The Bonaparte, 3 Wm. Rob. Adm. Rep. 298, or in proper cases (that is to say, as we shall hereafter more fully see, in cases of necessity) by the implied authority of the owner. This implied power may be exercised by the ostensible and acting master: The Jane, 1 Dods. Adm. Rep. 464, although he be not the registered master: The Orelia, 3 Hagg. Adm. Rep. 81; or may have been appointed not by the owner, but by his agent: The Kennersley Castle, 3 Hagg. Adm. Rep. 1, a consignee of the cargo: The Alexander, 1 Dods. 288; The Rubicon, 3 Hagg. 9, or by the British consul in a foreign port: The Zodiac, 1 Hagg. 320. In a case of necessity a bond given by the counsel himself was supported: The Cynthia, 16 Jur. 748.

The Court of Admiralty has, it seems, no jurisdiction when a bottomry bond has been executed by the owner in this country before the beginning of the voyage: The Royal Arch, Swab. Adm. Rep. 269.

When, however, the vessel is in a foreign country, although it may happen to be that in which the owners reside, they may by their consent authorize the master to give a bottomry bond, which the Admiralty Court of this country will in a proper case enforce against the ship: The Bonaparte, 3 Wm. Rob. 298. And the Admiralty Court has jurisdiction in the case of a bottomry bond given by a British subject on the occasion of his purchasing a British ship abroad, and raising money for her outfit to return home and a new voyage: The Helgoland, Swab. Adm. 491.

But it seems that, under ordinary circumstances, it is not competent to the master, even with the consent of the owner, to grant a valid bottomry bond upon a British ship lying in a British port for a new voyage, such bond to be suable in the Court of Admiralty.

*60] *The Royal Arch, Swab. Adm. Rep. 269. The reasons for this appear to be: first, because such a bond would create, if valid, what may be termed a secret lien on the ship, without what the law could consider necessity, and the consequence would be that subsequent *bonâ fide* mortgagees might be injuriously affected; and secondly, in early times such bonds would or might have been used to cover usurious transactions, though fortunately all such useless restrictions as the usury laws are now removed: Id. 276.

What justifies the Master in giving a Bottomry Bond.—In consequence of the high rate of interest usually demanded when money is raised by way of bottomry, it should not, as a general rule, be resorted to except in cases of *necessity*. When the owner gives his express consent, the question as to whether it was necessary to resort to that mode of raising money will of course not arise, at any rate, as to the ship and freight, as it is for his protection that the rule has been laid down.

In the absence of the express consent of the owner the master must, in all cases where he can, in the first instance, if he has not funds in hand, endeavor to obtain them on the personal credit of the owner. See Heathorn *v.* Darling, 1 Moo. P. C. C. 5; Gore *v.* Gardiner, 3 Moo. P. C. C. 79; Wallace *v.* Fielden, 7 Moo. P. C. C. 398, 409; The Gauntlet, 3 Wm. Rob. 92; Stainbank *v.* Fenning, 11 C. B. 88 (73 E. C. L. R.), per Jervis, C. J.; Lyall *v.* Hicks, 27 Beav. 616.

Hence he must, in the first place, endeavor to communicate with the owner of the ship, so as to enable him to raise the funds wanted on his own personal security; or, if he have not the means of raising them, to give him an express authority to resort to hypothecation.

This often gives rise to the question whether the master was able to communicate with the owner within such a period as the necessities of the ship required, for the rule now is that whether the ship be in a foreign port, or in a port of the same country as the owner is residing in, if the master can communicate with the owner within a time commensurate with the necessities of the ship, and he neglect to do so, any bottomry bond which he may give for raising money will be void; on the other hand, if he be unable to communicate with the owner within a time commensurate with the necessities of

the ship, even if the owner were in the same country, the bond would be valid.

The law upon this subject was much discussed in the recent case of Wallace *v.* Fielden, 7 Moo. P. C. C. 398. There a bottomry bond was granted in New York by the master to obtain money for necessary repairs of a ship, the owner whereof was residing at St. John's, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously *acted as the general agent of the owner, and no intimation of the transaction was made by the master to the owner until after the execution of the bond. It was held by the judicial committee of the Privy Council, reversing the decision of the Admiralty Court (see The Oriental, 3 Wm. Rob. Adm. Rep. 243), that the master, having the means of communication with the owner, no such absolute necessity existed as to authorize him to pledge the ship without communication with the owner, and the bond was consequently declared void. "Formerly," said Sir J. Jervis, C. J., in delivering judgment, "the rule of law was this, that whenever the owner of the ship and the master, at the time of the advance, were in ports foreign to each other, then there would, of necessity almost, be such a want of opportunity of communication as to clothe the master with authority to raise money on bottomry, and the converse was supposed to hold, namely, that whenever the vessel and the owner were in the same country, on the other hand, the opportunity of communication did exist, so that the master would not have authority to raise money on bottomry. The authority to borrow on the credit of the owner and on bottomry is the same, only, in the second case, there is this ingredient, the money cannot be raised without the pledge of the ship. [*61

"Now the rule of law was broken in upon by the judgment of Lord Stowell, in the case of La Ysabel, 1 Dods. Adm. Rep. 273; for, in that case, the ship and the owner were in the *same* country, but not in a country where there was the ability of communication; because, as Lord Stowell said, there was a disturbance at the time, and it was as impossible to communicate with the owner in Spain, though the ship was in Spain, as if she was in a foreign country, treating it, not as a matter of law, *but a test of the possibility of the power to communicate.* Therefore, in the absence of the power to communicate, the agency held. Following that up,

the converse has been held. In England, though the owner is in England, and the vessel too, yet, if the power of communication is not correspondent with the necessity, the authority to borrow money exists. According to Arthur *v.* Barton, 6 M. & W. 138; Johns *v.* Simons, 2 Q. B. 425 (42 E. C. L. R.), and Stonehouse *v.* Gent, 2 Q. B. 431, note, if there be no power of communication with the owner correspondent with the necessity, the power to raise the money exists. If there was a great emergency, and the master could not raise the money on the credit of the owner, he must then raise it on the ship by bottomry, whether she is in one country or another, taking it for granted there was an absolute necessity, and that there was no power of communication. Now if this be the real principle, and if this be the proper distinction, what is the rule of law applicable to
*62] a foreign country? You have authority, but that is only *because you have no means of communication. We must, however, look at the circumstances of this case. There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication, not to send money as suggested, but to send a communication on the one hand, and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their lordships are of opinion that there was no authority in the master to raise money on bottomry; therefore he was not clothed with a right which could confer that property on the person who took the bond." See also The Trident, 1 Wm. Rob. Adm. Rep. 29; The Bonaparte, 8 Moo. P. C. C. 459; Duranty *v.* Hart, Cargo ex The Hamburg, 2 Moo. P. C. C. (N. S.) 289, 320; The Bonita, 1 Lush. Adm. Rep. 252; Oliver, Id. 484. The opinion therefore expressed by Lord Cottenham, C., in Glascott *v.* Lang, 2 Ph. 321, where he differed from that of Sir J. L. Knight Bruce, V.-C., seems to be wrong.

A master may, in a case of necessity, grant a bond of bottomry on the ship *and cargo* in a foreign country, where the ship-owners reside, and with their consent, *although he may not have previously communicated with the owners of the cargo.* See the Bonaparte, 3 Wm. Rob. Adm. Rep. 298. There a Swedish vessel, being much

damaged, the master put into Stromstad, and immediately went over to Uddevallah, a distance of about sixty miles, where the owners resided, who not being able to furnish him with the necessary funds for enabling him to prosecute his voyage to England, told him that he must get the repairs effected at Stromstad, and there borrow the requisite sum on bottomry of the vessel, her cargo and freight. The master accordingly, being unprovided with funds, and being unable to raise them on his own personal credit or on that of the owners, granted a bottomry bond on the ship, freight, and cargo, for the necessary advances, *without any communication with the owners of the cargo resident at Hull*, in this country. It was held by the Court of Admiralty that the bond was valid, as against the owners of the cargo. "The question," said Dr. Lushington, "is whether the bond is invalid by the general maritime law as regards the cargo, by reason of such bond having been granted in the country of the owners of the ship, and with their sanction, but without any notice having been given to the owners of the cargo. Now I am of opinion that the principle, as far as it extends (for it is not a universal rule), that a bond shall not be granted in the country where the *owner of the ship resides, is a principle which is directed rather to the protection of the [*63 owner of the ship, than the owner of the cargo; and that this principle must in all cases depend upon the facility, or otherwise, of communication with the owner of the ship or cargo. Where the owner was resident abroad, the principle clearly would not apply, especially in this case, where the owner was a consenting party. . . . It appears that information of the necessities of the vessel was conveyed to the shipper of the cargo, and he refused to advance any money at all. Under these circumstances, does the law require that the master, as a matter of necessary obligation upon him, should have made a communication to the owner of the cargo in England? if, indeed, he knew who that owner was. As far as the evidence before me goes, there is nothing either in the bill of lading or in the other circumstances of the case, which shows that the master knew in whom the property of the cargo was. I know of no authority which renders it imperatively necessary that such a communication should always be made; and I certainly do not perceive that the circumstances of this case particularly required it. So far as the authorities go, in the case of The Gratitudine, Lord Stowell

said, and said truly, it was exceeding desirable that application should be made to the consignee of the cargo where it is practicable; but in no case whatever to my knowledge, and none has been cited, has it ever been laid down by this court that there was an absolute necessity of making such communication. It may undoubtedly be expedient to do so for various reasons,—amongst others, to take away all suspicion of fraudulent intention on the part of those concerned in the bottomry transaction."

Assuming that the master has no other means of procuring funds, and has not been able to communicate with the owners, still the question remains, was there *an absolute necessity* such as justified him in resorting to hypothecation?

The necessity for funds may arise in various ways: such, for instance, as in the principal case, where *repairs* are absolutely necessary, in order to enable the ship to proceed on her voyage for the purpose of delivering the cargo according to her charter-party: *ante*, p. 30; so where the ship may be arrested, and sold in a foreign country, in default of making certain payments: Smith *v.* Gould, 4 Moo. P. C. C. 21, 25; such as port duties, without providing for which the voyage could not be prosecuted: Id. 25, 27; and see The Gauntlet, 3 Wm. Rob. Adm. Rep. 82. But the master cannot hypothecate the ship for any demand in respect of which he himself only is liable to be arrested in a foreign country: 4 Moo. P. C. C. 28. Thus when a bottomry bond was given by a master upon a threat of arrest, for supplies previously furnished on
*64] his personal credit, it was held void: Gore *v. Gardiner, 3 Moo. P. C. C. 79. Upon the same principle, a bottomry bond cannot be granted for a debt incurred on a former voyage: The Hero, 2 Dods. 147; or for debts arising from supplies and necessaries furnished to other ships, though belonging to the same owner: The Osmanli, 3 Wm. Rob. Adm. Rep. 198–212.

Although, on general principles, when work has been done, or advances made upon personal security in the first instance, the party doing the work or making the advances is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; nevertheless where expenses have been incurred by a vessel when the master was out of possession, and was incompetent to take charge of her, a bond subsequently given him by such advances has been held valid. See The Gaunt-

let, 3 Wm. Rob. Adm. Rep. 82. There a vessel having been carried into a foreign port by a mutinous crew, with the master dispossessed and in irons; the expenses incurred by a party employed by the British vice-consul to investigate into the mutiny, and to re-invest the master in his command, was allowed by the Court to be a good foundation for a bottomry transaction, although no mention was made of a bond in the outset of the inquiry, and the bond was taken from the master on the eve of the vessel's sailing from the port.

So where an advance was made for the repairs of a vessel, and at the time of such advance no stipulations were made by the lender for a bottomry bond, nor any agreement by him to make advances on personal security, the *lex loci* conferring a right to arrest the vessel, and make her answerable for repairs, it was held that the lender had a right to demand, and the master to execute, a bottomry bond to cover such advances: The Laurel, 13 W. R. Adm. 352; and see The Prince George, 4 Moo. P. C. C. 21, nom. Smith *v.* Gould. But see The Royal Arch, 1 Swab. Adm. Rep. 269, 278, 279.

From the authorities we have considered, it is clear that a party taking a bottomry bond is bound, in the first place, to see whether the money he advances be wanted for the necessities of the ship: The Roderick Dhu, 1 Swab. Adm. Rep. 177, 182, 183, 184; and in the next place, whether the funds he is about to advance, or the supplies which he is requested to furnish for the purposes of the ship, could not have been procured on the personal credit of the owner: Heathorn *v.* Darling, 1 Moo. P. C. C. 5; for if the funds are not necessary, or could have been procured on the personal credit of the owner, the holder of the bond will not be able to recover upon it.

If, however, persons advancing money upon bottomry, do so after having ascertained that it is wanted for the necessities of the ship, they are not bound to see to its application: The Roderick Dhu, 1 Swab. Adm. Rep. 182.

*The sale of a bottomry bond, pursuant to public advertisement, by auction to the lowest bidder, in a foreign port, is not [*65 sufficient to discharge a purchaser from making reasonable inquiries whether the master is, under the circumstances, justified in granting the bond: Soares *v.* Rahn, 3 Moo. P. C. C. 1, 10.

A bottomry bond may be good in part, though void for the residue. Thus in Smith *v.* Gould, 4 Moo. P. C. C. 21, where a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest at the instance of the consignees, on account of damage done on the voyage to part of the cargo, as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage; the Judicial Committee of the Privy Council, reversing so much of the decision of the Admiralty Court as rejected the bond *in toto*, sustained the bond to the extent of sums advanced for necessary supplies and payment of the port duties. See also the Osmanli, 3 Wm. Rob. Adm. Rep. 198, 218.

It seems, however, that it by no means follows in all cases where a small amount of the sum claimed is properly a subject of bottomry, and the larger proportion of the demand is not properly the subject of a bond, that the Court would consider itself to be under the necessity of pronouncing for that smaller amount, as such a practice might lead to fraud, inconvenience, and litigation: The Osmanli, 3 Wm. Rob. 219.

Where a British vessel has completed a voyage to a foreign port, she can in a case of necessity be bottomried by the master, to cover the expenses of repair and outfit for a *new* voyage, in the same way as she could be for the voyage home, and such bond can be sued upon in the Admiralty Court: The Royal Arch, Swab. Adm. Rep. 269, 277.

Although as we have before seen, it is essential to the validity of a bottomry bond, that the sum advanced should only be repaid in the event of the ship reaching her port in safety; nevertheless, if the ship be lost after having deviated from the voyage stipulated for in the bottomry bond, the bondholder will be entitled to recover: Western *v.* Wildy, Skin. 152; Williams *v.* Steadman, Id. 345; Vachel *v.* Vachel, 2 Ch. Ca. 130; Anon., 4 Vin. Ab. 280, pl. 4; 2 Salk. 444; unless the deviation were justifiable: The Armadillo, 1 Wm. Rob. Adm. Rep. 256.

Where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit is beyond question, and the bond in all essentials apparently correct; then and under such circumstances, the strong presumption of law is in favor

of its validity, and it will not be impugned save when there is clear and conclusive evidence of fraud, or where it is proved beyond *all [*66 doubt, that, though purporting in form to be a bottomry transaction, the money was in truth advanced upon different considerations: The Vibilia, 1 Wm. Rob. Adm. Rep. 5. See also The Rhadamanthe, 1 Dods. Adm. Rep. 203; The Alexander, Id. 278; The Augusta, Id. 287; The Hero, 2 Dods. 142; The Reliance, 3 Hagg. Adm. Rep. 74; The Calypso, Id. 163, 165; The Kennersley Castle, Id. 7; The St. Catherine, Id. 254. Thus where small items were pointed out to the Court as having been expended before there was evidence of any negotiation for a bottomry bond, it was held that those items might be fairly included in the sum to be secured, and that it might be presumed they were advanced in contemplation of such a security: Smith *v.* Gould, 4 Moo. P. C. C. 21, 28.

A bottomry bond may be given by a master to the consignees of the cargo: The Alexander, 1 Dods. Adm. Rep. 278; The Rubicon, 3 Hagg. Adm. Rep. 9; or to an agent of the owner, and more especially if it be so given with the sanction of the owner: The Royal Arch, Swab. Adm. Rep. 269, 279; The Osmanli, 3 Wm. Rob. Adm. Rep. 198, 217.

It seems to be clear that the master has no power to authorize the actual transfer of property by way of mortgage, as distinguished from hypothecation, which gives only a right to be enforced against the subject of it through the medium of process: Stainbank *v.* Stainbank, 13 C. B. 441, 442 (56 E. C. L. R.); and the master by a bottomry bond can only hypothecate the ship, freight, and cargo; he cannot charge the shipowner personally: Id.; and see Benson *v.* Chapman, 6 M. & G. 792 (46 E. C. L. R.); 5 C. B. 330 (57 E. C. L. R.); 8 C. B. 950 (65 E. C. L. R.). The shipowner, however, may hypothecate the ship and freight and bind himself personally, or may authorize an agent to do the same: Willis *v.* Parker, 7 C. B. (N. S.) 340, 360, 361 (62 E. C. L. R.).

Proceedings with regard to Bottomry Bonds and herein as to the Priorities of Parties claiming to have charges on the Ship.—Proceedings by the holder of a bottomry bond are generally taken in the Admiralty Court, and in determining upon its validity, the Court will be guided by the general maritime law, and not by the municipial law of the country where it is granted, so far at least as any

question arises upon the obligatory effect of the bond on persons not being the subjects of the country where the bond was granted: The Bonaparte, 3 Wm. Rob. Adm. Rep. 298, 306.

The proceedings on a bottomry bond in the Admiralty Court are *in rem.* against the ship, freight, or cargo, and not against the owner, see the Rhadamanthe, 1 Dods. Adm. Rep. 203; The Lord Cochrane, 1 W. Rob. Adm. Reg. 312; The Trident, Id. 35; and the jurisdiction of the Court exists even where there has only been an agreement for a bond entered into: The Aline, 1 Wm. Rob. Adm. Rep. *67] 122. In cases of bottomry the *Admiralty Court may decide all questions as to the title or ownership of the ship, or as to her proceeds (3 & 4 Vict. c. 65, s. 4).

Where in a suit in the Admiralty Court upon a bottomry bond, money due for freight has in consequence of a monition been paid into Court, an action for freight cannot be maintained, as the Court of Admiralty has jurisdiction to decide all questions as to freight in such a case: Place *v.* Pott, 8 Exch. 705; 10 Id. 370. See also The Dowthorpe, 2 Wm. Rob. Adm. Rep. 73. And when a vessel has been arrested in a cause of bottomry, she cannot be taken out of the custody of the Admiralty Court by the sheriff under a writ of *fi. fa.*; Ladbroke *v.* Crickett, 2 T. R. 649, nor can any distress be levied on her for seamen's wages: The Westmoreland, 2 W. R. Adm. Rep. 394.

An advance of money to pay off a bottomry bond for which the ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit for a new voyage, in consideration of receiving brokerage and the prepaid freight for the new voyage, is not within the statute, 3 & 4 Vict. c. 65, s. 5, and cannot be recovered in the Admiralty Court: The Onni, 1 Lush. Adm. Rep. 154. As to what constitute necessaries under 3 & 4 Vict. c. 65, s. 6, see The Comtesse de Frègeville, 1 Lush. Adm. Rep. 329; The West Friesland, Swab. Adm. Rep. 454, 456; The Wataga, Id. 165.

The Court of Chancery has also jurisdiction to give relief upon bottomry bonds; and it will interfere by injunction to restrain proceedings in the Court of Admiralty, either in cases of fraud, or where there are equities between the parties, or where the matter can be more conveniently, directly, and effectually dealt with by the Court of Chancery. See Duncan *v.* M'Calmont, 3 Beav. 409; Glascott *v.* Lang, 8 Sim. 358; 3 My. & Cr. 451; 2 Ph. 310; Dobson *v.* Lyall, 3 My. & Cr. 453 n.; 2 Ph. 323 n.

As to Priorities of Bottomry Bonds.—As a general rule, a bottomry bondholder is entitled to priority over all other creditors: The Orelia, Hudson, 3 Hagg. Adm. Rep. 83; The Madonna D'Idra, 1 Dods. Adm. Rep. 40; The Sydney Cove, 2 Id. 13; even over a mortgagee, for when money is advanced on mortgage of a ship, the mortgagee must always be aware that he takes his security subject to all legal liens, and that if he suffers therefrom, his remedy must be against the owners: The Royal Arch, Swab. Adm. Rep. 269. A bottomry bondholder is under no obligation to communicate the existence of the bond to the mortgagees of the ship, and is not affected by the owner concealing it from the mortgagees: The Helgoland, Swab. Adm. Rep. 491.

A mortgagee cannot set up as a defence to a bond the laches of the bondholder, unless his position has been thereby prejudiced: The Helgoland, Swab. 491.

*A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of the ship: The Helgoland, Swab. Adm. Rep. 491. [*68

As an exception to the rule, wages take priority over bottomry bonds: The Hersey, 3 Hagg. Adm. Rep. 408; The Constancia, 10 Jur. 854; The William F. Safford, 1 Lush. Adm. Rep. 69; even, it seems, although they were earned before the bond was taken: The Union, Lush. Adm. Rep. 128; overruling The Mary Ann, 9 Jur. 95; The Janet Wilson, Swab. Ad. Rep. 261.

In rival claims against the proceeds of a ship, seamen's wages are preferred to the master's wages and disbursements: The Salacia, Lush. Adm. Rep. 545.

A master, however, who has given a bottomry bond on ship and freight, whereby he has not bound himself personally to pay the bond, but only covenanted that the ship and freight shall at all times be liable to pay the bond, is entitled to be paid his wages out of the ship and freight in preference to the claim of the bondholder: Id.

But where the master has by the terms of the bottomry bond, bound himself as well as the ship and freight, he cannot enforce his lien for wages against the claim of the bondholder: The Jonathan Goodhue, Swab. Adm. Rep. 524. Secus, where the bondholder would not be prejudiced by the master being paid before him: The Edward Oliver, 1 Law Rep. Adm. 379.

It has been held moreover that a successful suitor in a cause of damage for collision, has a lien on the property condemned para-

mount to the claim of a mortgagee or bondholder prior to the period when the damage was done, and that the lien also extends in case of a deficiency of proceeds to subsequent accretions in the value of the ship arising from repairs effected at the expense of the owner: The Aline, 1 W. Rob. Adm. Rep. 111. Where, however, money has been advanced and repairs effected by a stranger, and a bottomry bond has been *bonâ fide* given for the amount of such repairs, the subsequent bondholder will, it seems, have a lien upon the proceeds to the extent of the increased value of the vessel arising from the repairs: Id.

Where there are two creditors, one with a double, and the other with a single security, the Admiralty Court will compel the former to resort to the security upon which the latter has no claim. Thus, if there be a bottomry bond *on the ship only*, and the ship being afterwards arrested for wages, is insufficient in value to meet both claims, if the bond be held not to extend by implication of law to the freight, payment of the wages will be decreed therefrom, leaving the whole proceeds of the ship available in satisfaction of the claim of the bondholder: The Mary Ann, 9 Jur. 95. The Court of Admiralty in such cases proceeds upon the same principle as the Courts of Equity do, in what they term the doctrine of marshalling. See also The Edward Oliver, 1 Law Rep. Adm. 379.

But the principle of marshalling does not prevail where it cannot *69] *be carried into effect without violating other rules entitled to a preferential observance. Thus, where there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship, freight and *cargo*, the first bondholder cannot compel the last (who is entitled to priority) to resort, in the first instance against the cargo; because, according to a well-known rule, the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted (*post*, p. 70). The result is that the holders of the last bond, are paid out of ship and freight in the first instance: The Priscilla, Lush. Adm. Rep. 1.

With regard to the priority of the holders of bottomry bonds *inter se*, it may be laid down as a general rule that a bottomry bond of later is entitled to priority of payment over one of an earlier date, because in this species of security which is entered into under the pressure of necessity, the property would, without the sub-

sidiary aid of the later bond, be totally lost, both to the owners and the former bondholders: The Rhadamanthe, 1 Dods. Adm. Rep. 204; The Betsey, 1 Dods. Rep. 289; The Sydney Cove, 2 Id. 1; The Eliza, 3 Hagg. Adm. Rep. 89. Where however different bondholders, acting in privity and concert with each other, had advanced money upon the same general invitation for the same repairs in which all were equally interested, and on the same terms, and it was intended that the bonds were to have borne the same date, none of the bondholders were allowed priority merely because the bonds were of a different date, but all of them were paid *pro ratâ*, and without any preference: The Exeter, 1 C. Rob. Adm. Rep. 173.

A voluntary agreement of the holder of a bottomry bond to postpone payment under it, substitutes a personal for the original contract, and is one over which the Court of Admiralty has no jurisdiction: The Royal Arch, Swab. Adm. Rep. 269.

Where a bottomry bond including freight is given, any part of the freight paid before the bond is executed, cannot be claimed by the bondholder: The Standard, Swab. Adm. Rep. 268.

And where advances *on account of freight* have been *bonâ fide* made under a covenant in a charter-party anterior to the time when a bottomry bond is given in which freight is included, the bond will not attach upon the freight so advanced: The John, 3 Wm. Rob. Adm. Rep. 170. And see The Standard, Swab. Adm. Rep. 267.

Where a bottomry bond has been given, a shipowner cannot, without leave of the Court, advance wages or other expenses, and claim to be repaid out of the proceeds, if the ship is afterwards sold by decree of the Court: The Janet Wilson, Swab. Adm. Rep. 261; and so do the expenses home or *viaticum* of a master and crew of a foreign vessel arrested in this country: The Constancia, 15 W. R. Ad. 183.

In a recent case the Court *granted leave to bondholders to pay prior charges, and to have a lien on the ship, cargo and freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid: The Fair Haven, 1 Law Rep. Ad. 67. [*70

Rights of the Owner of the Cargo which has been hypothecated for the Repairs of the Ship.—It must always be remembered that

the ship is the primary, the cargo only the secondary, fund, for the payment of a bottomry bond. Where therefore a bottomry bond attaches upon a cargo, the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted: The Bonaparte, 3 Wm. Adm. Rob. Rep. 302; The Priscilla, Lush. Adm. Rep. 1.

Moreover, as the master who hypothecates the cargo for the repairs of the *ship* acts exclusively as agent for the shipowner, although as regards the person advancing the money, he can bind the cargo, he cannot bind the owner of the cargo as regards the owner of the ship. The owner therefore of the cargo can recover from the owner of the ship for the loss incurred in consequence even of a necessary and justifiable hypothecation of the cargo. Thus, in Benson *v.* Duncan, 3 Exch. 644, the master of the ship "Lord Cochrane," damaged by perils of the sea, hypothecated at a foreign port (Pernambuco), by one bottomry bond, for necessary repairs, the ship, freight, and *cargo*, amongst which were the plaintiff's goods. The ship and freight realized less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer (reported 1 Exch. 537, nom. Duncan *v.* Benson), that the plaintiff might maintain an action against the owner of the ship, on an implied promise to indemnify. "The celebrated case of the 'Gratitudine,'" said Patteson, J., in delivering the judgment of the Court, "was relied on to establish this proposition, that, in hypothecating the cargo, the master acts as a sort of supercargo for the benefit of the owner of the cargo, and that, in hypothecating both the ship and the cargo by one instrument, he cannot bind the owner of the ship beyond the value of the ship, and must be considered, as to any sums beyond the value, as the mere agent of the owner of the cargo. That case was explained, as we think most satisfactorily, by the judgment of the Court of Exchequer upon the demurrer to the sixth plea to the first count in this case (1 Exch. 537), and we agree entirely in that judgment. The case of the 'Gratitudine' dealt only with the authority of the master in respect of binding the cargo to the lender of the money; it determined nothing as to the relative
*71] rights of the *owners of the ship and cargo *inter se*, and any expressions there used by Lord Stowell, which might at first

sight appear to have such a meaning, will be found on examination to be illustrative only, and not even professing to decide on any such relative rights: 2 H. L. Ca. 696, 720.

"In ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship, or his agent, can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry, if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning freight, which the master is bound to enable him to do if he can. Being, then, the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for those repairs? If, in order to borrow that money, he is obliged to pledge, not only the ship, but the cargo, he in effect borrows money on the cargo for the benefit of the shipowner, just as much as he would have done had he sold a part of the cargo to raise the necessary funds, in which case it is not doubted that the shipowner must have indemnified the owner of the cargo. Certainly the master could not, by any bottomry bond, pledge the shipowner to the lender of the money beyond the value of the ship. By such a bond he gives a remedy *in rem* only and not a personal remedy against the shipowner. But that circumstance in no way affects the rights of the owner of the cargo as against the shipowner." See also Benson *v.* Chapman, 6 M. & G. 792 (46 E. C. L. R.); 5 C. B. 320 (57 E. C. L. R.); 8 C. B. 950 (65 E. C. L. R.).

In some countries, however, it appears that the shipowner, by abandoning the ship and freight, escapes all liability in respect of cargo sold under a bottomry bond, and with regard, moreover, to foreign ships it has been decided, that where the contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which the parties have submitted themselves. Thus in Lloyd *v.* Guibert, 1 Law Rep. Q. B. 115, s. c., 6 B. & S. 100 (118 E. C. L. R.); the plaintiff, a British subject, chartered a French ship belonging to French owners, at a Danish West India port, for a voyage to St. Marc, in Hayti, to Havre, London, or Liverpool, at the

charter's option. The charter-party was entered into by the master in pursuance of his general authority as master. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage she sustained sea damage and put into Fayal, a Portuguese port, for repair. There the master properly
*72] *borrowed money on bottomry of ship, freight, and cargo, and repaired the ship, and she completed her voyage to Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; and the deficiency with costs fell on the plaintiff as owner of the cargo, for which he sought indemnity against the defendants, the French shipowners. The defendants gave up the ship and freight to the shipper, so as that, by the alleged law of France, the abandonment absolved them from all further liability on the contract of the master. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Queen's Bench, that the parties must be taken to have submitted themselves, when making the charter-party, to the French law as the law of the ship; and, therefore, that assuming the law of France to be as alleged, the plaintiff's claim was absolutely barred.

In the case, however, of Duranty *v.* Hart, 2 Moo. P. C. C. (N. S.) 289, it was held that the *validity* of a bottomry bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo proceeded against in England, is to be governed by the general maritime law as *administered in England*, and not by the *lex loci contractus*, or the law of the country the ship belongs to. See remarks in 1 Law Rep. Q. B. 125.

It is laid down in the principal case, that if it were to happen that the ship and freight (usually the first things hypothecated) were omitted in the literal terms of a bottomry bond, they would still be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. *Ante*, p. 46.

Power of the Master to sell Part of the cargo for the Repairs of the Ship.—In the principal case it was admitted, on all hands, that the master had power to sell *part* of the cargo, for the purpose of

applying the proceeds to the prosecution of the voyage, by the repair of the ship; and whatever doubt there may have been at that time as to the power to hypothecate the *whole* of the cargo, there appeared to be none as to the power of the master in a proper case to sell a *part* of the cargo.

This in effect is, through the medium of a sale of the goods, to borrow from the shipper or owner of the goods: Duncan *v.* Benson, 1 Exch. 555; Benson *v.* Duncan, 3 Exch. 655; Richardson *v.* Nourse, 3 B. & Ald. 237 (5 E. C. L. R.); who may, at his option, claim to be repaid by the shipowner, either the price of the goods at the place of sale: Richardson *v.* Nourse, 3 B. & Ald. 237; or at the port of destination: Campbell *v.* Thompson, 1 Stark. 490 (2 E. C. L. R.); Hallett *v.* Wigram, 9 C. B. 580 (67 E. C. L. R.); but it has been decided that where the master has sold part of the goods at an intermediate *port, if the vessel *does not arrive* at her port of destination, the shipper is not entitled to receive the [*73 sum for which the goods would have sold at that port: Atkinson *v.* Stephen, 7 Exch. 567, and although the point does not appear to have been decided by our Courts (see 7 Exch. 578), it seems to be the better opinion that he could not, in such a case, recover from the shipowner the sum of money for which the goods actually sold: "Abbott on Shipping," 308, 3d ed.

The reason why the master can sell only a *part* of the cargo for the repairs of the ship, while, as we have before seen, he can hypothecate the *whole* for that purpose, is well laid down in the principal case, where it is said that the master cannot sell the whole of the cargo, "because it never can be for the benefit of the cargo, that the *whole* should be sold, to repair a ship which is to proceed empty to the place of her destination. On the other hand, hypothecation may be of *the whole*, because it may be for the benefit of the whole, that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the *sale of a part*, and this in the best market, at the place of its destination, and in the hands of its proper consignees." *Ante*, p. 45.

As to the cases where the owner of the cargo can proceed against the owner of the ship for the value of the cargo sold, and when he must himself contribute to its payment, under the head of general average, see Birkley *v.* Presgrave, *post*, p. 94, and note.

When the Master has power to sell the Ship or the whole of the Cargo.—When the termination of the voyage becomes hopeless, and no prospect remains of bringing the vessel home, the master has power to do the best for all concerned, and therefore to dispose of her for their benefit: Hunter *v.* Parker, 7 Mees. & W. 342. Thus if a vessel has becomes a camplete wreck: Cambridge *v.* Anderton, 2 B. & C. 691 (9 E. C. L. R.); Ireland *v.* Thomson, 4 C. B. 49 (56 E. C. L. R.); or if, although her timbers hold together, she is in such a position that she cannot be repaired except at an expense greater than her value: Robertson *v.* Clark, 1 Bing. 445 (8 E. C. L. R.); Mount *v.* Harrison, 4 Bing. 388 (13 E. C. L. R.); Hunter *v.* Parker, 7 Mees. & W. 342; Cambridge *v.* Anderton, 4 D. & R. 203 (14 E. C. L. R.); 1 C. & P. 213 (12 E. C. L. R.); R. & M. 60 (21 E. C. L. R.); 2 B. & C. 691 (9 E. C. L. R.); sed vide Knight *v.* Faith, 15 Q. B. 649 (69 E. C. L. R.); or if the vessel is cast away on a foreign coast, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair so that she might rot before the master could hear from his owners: Fanny and Elmira, Edw. Adm. Rep. 117; and see Read *v.* Bonham, 3 B & B. 147; in these and such like cases the master will be justified in resorting to
*74] a sale. See also The Glasgow, 1 Swab. *Adm. Rep. 145; Cammel *v.* Sewell, 3 H. & N. 617; 5 H. & N. 728.

"This principle, however, may be clearly laid down,—that a sale can only be permitted in case of *urgent necessity*, that it must be *bonâ fide* for the benefit of all concerned, and must be strictly watched." Per Lord Gifford, C. J., in Robertson *v.* Clarke, 1 Bing. 450 (8 E. C. L. R.); Lapraik *v.* Burrows, 13 Moo. P. C. C. 132; s. c. nom. The Australia, Swab. Adm. Rep. 480.

Thus, before a sale can be held justifiable, it must be shown that the master attempted to rescue the vessel by all the means in his power; that if she was capable of being repaired, he had failed in getting money for that purpose: Gardner *v.* Salvador, 1 Mood. & Rob. 118; The Fanny and Elmira, Edw. Adm. Rep. 117. The mere difficulty in procuring funds: Somes *v.* Suyre, 4 C. & P. 276 (19 E. C. L. R.), or material for repairs: Furneaux *v.* Bradley, Park on Ins. 365, 8th ed., will not be sufficieut to justify a sale. And even though the vessel may have been in imminent danger: Idle *v.* Royal Exchange Company, 3 B. & B. 151 (7 E. C. L. R.); 8 Taunt. 755 (4 E. C. L. R.); sed vide Hunter *v.* Parker, 7 Mees. & W. 342, if the master

without sufficient examination into the actual state of the vessel, arrived at the conclusion that she ought to be sold: Hayman *v.* Molton, 5 Esp. 65; Reid *v.* Darby, 10 East 143; Doyle *v.* Dallas, 1 Mood. & Rob. 48; or unless in selling he acted upon the best and soundest judgment that could be formed under existing circumstances: Doyle *v.* Dallas, 1 Mood. & Rob. 48, the sale will not be justifiable.

When a sale of a ship, by a master, under such circumstances, is questioned by the owner, the burden of the strict proof of its propriety will be thrown upon the purchaser, for it is his duty to ascertain the authority under which the master acts, or the circumstances which render a sale imperatively necessary; and from this proof, save when there has been a decree by a competent Court, no formality can release him: The Glasgow, 1 Swab. Adm. Rep. 145, 146; Lapraik *v.* Burrows, 13 Moo. P. C. C. 132; The Bonita, 1 Lush. Adm. Rep. 252; The Charlotte, Id. 252.

It is the duty also of the master of a British ship before selling her in a foreign port to consult the British consular officer there resident, the opinion of the consul being much considered by the Court in determining the sale: The Bonita, 1 Lush. Adm. Rep. 252. As to what will amount to confirmation of a sale by the owner, see The Bonita, 1 Lush. Adm. Rep. 252.

The fact of the purchasers being surveyors employed by the master to survey the ship, does not necessarily invalidate the sale: Lapraik *v.* Burrows, 13 Moo. P. C. C. 132, where Lushington, P. C., in giving judgment, says:—"Then comes the objection that the purchasers were surveyors. We should be very sorry to lay down any doctrine *which should in any degree weaken the authority of [*75
Lord Ellenborough in the case of Hayman *v.* Molton, 5 Esq. 65, which has been cited. No doubt it is most desirable that the purchasers upon all these occasions should be persons wholly unconnected with the ship itself, and wholly unconnected with any of the proceedings with respect to the survey or otherwise. But then we must bear in mind the state and condition of the place where the transaction occurred; and if we were to lay down the doctrine that at Honkong, this ship should only be sold to somebody other than Lamont or Ross, we might just as well say that the ship should not be sold at all; because it appears upon the evidence in this case, that those were the only two shipwrights in the place, except one other

person who is said to have had very little or no business; those two persons were the only two purchasers that could be procured, and if they were rejected, there was the strongest possible probability that the vessel would have laid there to rot.

Unnecessary delay on the part of the owner, dissatisfied with the sale of the ship by the master, may import acquiescence in the sale; and if there has been acquiescence by the owner, however unauthorized the sale might have been at the commencement, it amounts to a ratification by him: Lapraik *v.* Burrows, 13 P. C. C. 132; s. c. nom. The Australia, Swab. Adm. Rep. 480.

Upon the sale of a ship, in a proper case, the master has authority to receive the proceeds as incident to his authority to sell, and it seems that the authority to receive the proceeds involves an authority to order payment of them *bonâ fide* to such persons as the master may think fit; a payment under such an order being in effect a payment to the master: Ireland *v.* Thomson, 4 C. B. 149, 169, (56 E. C. L. R.); see Ridgway *v.* Roberts, 4 Hare 106.

With regard to the power of the master to sell the cargo, not for repairs of the ship, but for the benefit of the proprietors of the cargo, it was well observed by Lord Stowell in the principal case, that "though in the ordinary state of things the master is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hands is to be left without protection and care. . . . Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could *76] *be supposed to be the policy of the law that the cargo should be left to perish without care. He must in such case exercise his judgment, whether it would be better to transship the cargo, if he has the means, or sell it. He is not absolutely bound to transship, he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his

acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish." *Ante*, p. 41.

Where a master has erroneously sold the cargo of a ship before arriving at the port of destination, though he may have exercised his discretion *bonâ fide*, the shipowner will be liable to the owners of the cargo in an action of trover, as well as the master, even where the sale has taken place under circumstances not inconsistent with the general authority conferred upon the master by the owner of the cargo: Ewbank *v.* Nutting, 7 C. B. 797 (62 E. C. L. R.); and see Tronson *v.* Dent, 8 Moore P. C. C. 419.

If the master sells the cargo at an intermediate port, no freight will be due. Thus in Vlierboom *v.* Chapman, 13 Mees. & W. 230, it appeared in a special case that a cargo of rice shipped at Batavia was, by the bill of lading, to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into the Mauritius, where the rice, having been found to be damaged and in a state of rapid putrefaction, was sold by the master, who acted *bonâ fide*, but without the knowledge either of the shipper or shipowner. It was held by the Court of Exchequer that no freight was due either for the whole voyage or *pro ratâ itineris*. "According to the statement made in the special case," said Parke, B., "an emergency had arisen, in which, as the law is laid down by Lord Stowell in the case of the 'Gratitudine,' the authority of agent for the shipper necessarily devolved upon the master, to do the best for his interest, and that was to sell, because the cargo was perishable, and would have perished, if it had been left at the Mauritius, or attempted to be carried to its place of destination. This sale, therefore, transferred the property and bound the shipper; but in no other respect did the necessity, under the circumstances of the case, confer upon him any agency. But if we suppose that he had a further authority, and that instead of being the master he had been supercargo, and that this sale of the goods had been equivalent to a sale by the defendants themselves, present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight *pro ratâ*, for the shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were *willing to dispense with the further carriage, and accept the delivery at [*77

the intermediate instead of the destined port. The truth is, that the goods were in the same situation as to the claim for freight as if they had been abandoned by the shipowner and left behind at the Mauritius, and there sold by the owner. This view of the case accords with the decisions in the American courts to which we were referred: Armroyd *v.* Union Insurance Company; Hurtin *v.* Union Insurance Company; cited in the note, p. 239, to Mr. Justice Story's edition of 'Abbott on Shipping,' in both of which it was held, that if the cargo is sold at an intermediate port for the benefit of all concerned, no freight is due."

As to the Transshipment of a Cargo.—When the master in distress in a foreign port, cannot accomplish his contract by the conveyance of the cargo in the same vehicle which he had contracted to furnish, it may become a question whether he ought not to forward it by some other conveyance, or in other words, to transship.

It is clear that if the master can, by repairing his ship, complete his voyage in her, it is his duty so to do; and for that purpose, he may in proper cases raise money for repairs by bottomry bond on the ship, freight and cargo (p. 55, *ante*). And unless it be of a perishable nature (Maclachlan 364), he may retain the cargo until the vessel be ready to proceed with her voyage: Matthews *v.* Gibbs, 3 E. & E. 300 (107 E. C. L. R.) But he ought not to sell the cargo, or any part of it, if he can by transshipping carry it to its destination. (*Ante*, p. 73.)

The master may transship on the high seas, if the opportunity of transshipment occurs, and the occasion for it be pressing. And he is not answerable in that case, although his own ship actually survive the voyage, and the other perish with the cargo: Maclachlan on Shipping 364, 366.

The question then arises whether the master has simply a right to transship in order that he may earn his freight, or whether it is his duty to do so by virtue of his original contract.

It seems, however, that where the ship is by perils of the sea so much damaged as to be incapable of repair, so as to prosecute the adventure, except at an expense exceeding her value, together with the freight when repaired, the master is justified in abandoning the voyage, and is not bound, as agent of his owner, to send the goods on in another bottom: De Cuadra *v.* Swann, 16 C. B. (N. S.) 772 (111 E. C. L. R.).

This, moreover, is not disputed, that if the master, in the proper exercise of his discretion, transship goods and forward them to their destination by another vessel, he will be entitled to the whole freight he originally contracted for, even though the goods were carried by the vessel into which they were transshipped for less than *the freight originally contracted for. See Shipton *v.* Thornton, 9 Ad. & E. 314 (36 E. C. L. R.). There the "James [*78 Scott," a general ship, of which the plaintiff was owner and master, being at Singapore, certain goods were, on behalf of the defendant, their owner, shipped on board of her, under bills of lading, according to which the goods were to be delivered to the defendant at London. The "James Scott" sailed from Singapore with the goods on board, but having suffered much injury from tempest, she put into Batavia for repair. The plaintiff transshipped the goods on board two vessels, the "Mountaineer" and "Sesostris," by which they were delivered to the plaintiff in London. The freight, both of the goods sent by the "Sesostris" and of those sent by the "Mountaineer," was less than the freight would have been respectively of the same goods from Singapore to London by the "James Scott," according to the original bill of lading. The defendant paid the freight by the "Sesostris" and "Mountaineer," and also the freight to the plaintiff by the "James Scott" to Singapore, at the rate agreed upon, but refused to make any further payment. It was held by the Court of Queen's Bench, that the plaintiff was entitled to be paid by the defendant the sum by which the freight on board the "James Scott" from Singapore, at the stipulated rate, exceeded that by the "Mountaineer" and the "Sesostris." "It is clear," said Lord Denman, C. J., "that by the contract, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so, in his own ship, by some event which he has not occasioned, and over which he has no control. . . . Where, however, such an event has occurred to interrupt the voyage, as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point whether or no he is bound to transship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the *vis major* which prevents his accomplishing it in the literal terms of his under-

taking. . . . All authorities, however, are in unison to this extent, that the master is at liberty to procure another ship to transport the cargo to the place of destination. And in these words Lord Tenterden cautiously lays down the rule of our law, p. 240, part iii., c. 3, s. 8. It may, therefore, be safely taken to be either the duty or the right of the shipowner to transship in the case above supposed; if it be the former, it must be so in virtue of his original contract, and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment. On the other hand, *if it be the *79] latter, a right to the full freight seems to be implied; the master is at liberty to transship, but for what purpose, except for that of earning his full freight at the rate agreed on? In the case supposed, we may introduce another circumstance. Let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; there is then no question that the whole freight at the original rate must be paid; and that because the freighter prevents the master, who is able and willing, and has a right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present, and personally exercises no option, still, the shipowner, in forwarding the goods, must have the same rights, and in so doing must be taken to exercise them with the same object in view." See also the Bonaparte, 3 Wm. Rob. Adm. Rep. 298, 308; Matthews *v.* Gibbs, 3 E. & E. 300, 301 (107 E. C. L. R.); Kidston *v.* The Empire Marine Insurance Company, 1 Law Rep. C. P. 535.

Suppose, however, the transshipment can only be effected at a higher than the original rate of freight, the question then arises, which party is to stand to the loss?

It would seem that where the master can only transship at a higher rate than that contained in the original contract, his right to transship, as agent of the owner of the ship, may be at an end; but that if it be beneficial to the freighter to forward the cargo to its destination at an increased rate of freight, the master may do so as agent of the freighter, who will consequently be bound by his act. This subject was much discussed in the important case of Shipton

v. Thornton, 9 Ad. & Ell. 314, 337 (36 E. C. L. R.), where Lord Denman, after observing that no case of the sort, as the Court were aware of, had occurred in this country, and that it was not necessary for them to express any opinion further than as it bore upon the question before them, in that case added, "It may well be that the master's right to transship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced—that of agency for the merchant. For it must not be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in [*80 *another bottom, and therefore the owner's *right* to transship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so it will be the duty of the master as his agent to do so. *In such a case* the freighter will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same whether the transshipment be made by the shipowner or the master; and in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched." See The Cargo ex Galam, 33 L. J. (Adm.) 97; s. c. nom. Cleary *v.* M'Andrew, 2 Moo. P. C. C. (N. S.) 216; Hickie *v.* Rodocanachi, 4 Hurlst. & N. 455; 28 L. J. Ex. 277. See also Luke *v.* Lyde, 2 Burr. 888; Rosetto *v.* Gurney, 11 C. B. 188 (73 E. C. L. R.); Gibbs *v.* Gray, 2 Hurlst. & N. 22.

Where a master entered into a contract by charter-party to forward goods from their port of distress by another vessel, for the same amount of freight as his owners stipulated for in the original charter-party, but by a private and subordinate agreement between himself and the shipowner stipulated that while the freight men-

tioned in the charter-party should be required from the consignees, the shipowner was to hand over to him the difference between that freight and a lower rate of freight agreed upon between them, but whether for the benefit of the master or his owners did not appear, it was held by the Court of Queen's Bench that, as the contract entered into by the master, if made on behalf of his owners, would be a perfectly legitimate transaction; whereas, if made by him as the agents of the charterers, it would be grossly fraudulent, and this to the knowledge of the owners of the vessel which he had chartered; the proper inference from the facts was, that it was a contract entered into by him on behalf of his owners, and therefore that it was not binding on the freighters of the first vessel: Matthews *v.* Gibbs, 3 E. & E. 282, 301, 302 (107 E. C. L. R.).

The implied authority of the master is co-extensive with and limited by the necessity out of which it arises; hence it has been held that although under the circumstances there may be a necessity to transship the cargo to its port of destination, that, as there is no necessity to pay a higher than the current rate of freight, so the master has no implied authority to bind the owner of the cargo to make such payment: Matthews *v.* Gibbs, 3 E. & E. 282 (107 E. C. L. R.).

The master, moreover, will not be justified in transshipping a cargo in a foreign port without consulting with the agent of the shipper, *81] so as to give him the option of *receiving the goods there. Thus in Gibbs *v.* Grey, 2 Hurlst. & N. 22, a cargo of guano was shipped from the Chinca Islands to London by the "Oriente." The "Oriente" having become disabled, put into Valparaiso, was condemned and the cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the "Fairy Queen" to take on the "cargo brought by the 'Oriente,' being 470 tons, more or less, not exceeding what she can reasonably stow," at the rate of 5*l.* 2*s.* 6*d.* per ton. The owner of the cargo had an agent at Valparaiso, of which fact the captains of the "Oriente" and the "Fairy Queen" were aware, but no reference was made to him. After the guano had been loaded on board the "Fairy Queen," the captain of that vessel said he had not more than 350 tons on board; and ultimately, the captain of the "Oriente" agreed that freight should be paid on the full quantity of guano

mentioned in the charter-party; and in order to carry out the agreement a bill of lading was signed by the captain of the "Fairy Queen," making the guano deliverable to M. & Co., the agents for the general average settlement of the "Oriente," or their assigns, he or they paying freight for the guano as 470 tons, as per charter-party. It was held by the Court of Exchequer that the master of the "Oriente" had no power to bind the owners of the cargo to pay the freight mentioned in the bill of lading. "The question," said Pollock, C. B., "is what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the substituted ship when the merchant has an agent or a house of business, to the knowledge of the master, at the intermediate port into which the ship has put in distress? Can he, without communication with them, or giving them the option of receiving the cargo there, put it on board another ship and forward it to the port of discharge? We are not aware of any authority in the English law in which the master is said to have such powers." In Shipton *v.* Thornton, 9 Ad. & E. 314 (36 E. C. L. R.), Lord Denman, in delivering the judgment of the Court, only put the case, "where the shipowner or master has no opportunity of consulting the freighter;" and in "Abbott on Shipping," before referred to (Part iv., c. 5, s. 3, p. 301, 9th ed.), the learned author says, "'The merchant should be consulted if possible.' In the present case the plaintiffs had an agent at Valparaiso, and indeed it would seem that a branch of the house, carrying on business in the same name, was established there; and it is stated in the case, that although all the parties knew this, no reference or communication whatever was made to them."

Another question is, to what freight is the master entitled? First, although it is clear that if the master fails to convey the cargo to its destination, as for instance, if his own vessel cannot be *repaired, or is not worth the expense, and he abandons the voyage, he will not be entitled to any freight: Maclachlan [*82 406; still, if the freighter prevents the master from fulfilling his contract, by sending the cargo to its port of destination in another vessel, he must pay the whole freight at the original rate: Id. 406; Luke *v.* Lyde, 2 Burr. 887; Cleary *v.* M'Andrew, 2 Moo. P. C. C. (N. S.) 216.

If the shipper does not desire the goods to be transshipped to the

port of delivery, but prefers to receive them where they are, he is bound to pay freight *pro ratâ itineris:* Luke *v.* Lyde, 2 Burr. 888, per Lord Mansfield; The Copenhagen, 1 C. Rob. Adm. Rep. 289; Lutwidge *v.* Gray, Abbott, Pt. 3, c. 7, s. 13; The Soblomstea, 1 Law Rep. Ad. 293; not indeed under the original contract of affreightment, but by virtue of a new contract founded on a meritorious service rendered by him, and implied from the acceptance of the goods by the freighter: Luke *v.* Lyde, 2 Burr. 882; Cook *v.* Jennings, 7 Term Rep. 381; Mulloy *v.* Backer, 5 East 316; Mitchell *v.* Darthez, 2 Bing. N. C. 555, 569 (29 E. C. L. R.).

A bottomry bond is a contract for a loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risks to be borne by the lender for a voyage or a definite period: The Draco, 2 Sumn. 157. It is not to be construed strictly, but liberally, so as to carry into effect the intention of the parties: Pope *v.* Nickerson, 3 Story 465.

To constitute a valid contract of bottomry, where more than statutable interest is reserved, the principal and interest must be put at risk.: Jennings *v.* Insurance Company of Pennsylvania, 4 Binn. 244; Rucker *v.* Conyngham, 2 Peters Adm. 295; Wilmor *v.* Smilax, Id., note; The Mary, Paine 671; Thorndike *v.* Stone, 11 Pick. 187; Greeley *v* Waterhouse, 1 Appleton 9; Greeley *v.* Smith, 3 Woodb. & M. 236; The Atlantic, 1 Newberry Adm. 514. When a bond provides for no marine interest or marine risks, and its condition is a mere pledge of a vessel to secure a debt and lawful interest, it is not a bottomry bond: Leland *v.* The Medora, 2 Woodb. & M. 92. To make a valid hypothecation of the ship by the master, the obligee must show that the money advanced was necessary to effect the objects of the voyage or the safety of the ship: Putnam *v* The Polly, Bee 157; The Golden Rose, Id. 131; The Aurora, 1 Wheat. 99; Hurry *v.* The John and Alice, 1 Wash. C. C. 293; Walden *v.* Chamberlain, 3 Id. 290; Crawford *v.* The William Penn, Id. 484; Rucker *v.* Conyngham, 2 Peters Adm. 295; The Mary, Paine 671; Patton *v.* The Randolph, Gilpin 457; Joy *v.* Allen, 2 Woodb. & M. 303; Gibbs *v.* The Texas, Crabbe 236; The Bridgewater, Olcott Adm. 35. The lender is bound to exercise reasonable diligence in order to ascertain whether his advances are necessary and proper. He is not bound to show a positive necessity. It is sufficient, if there is an apparent necessity, so far as the lender is able upon inquiry and diligence to ascertain the facts. He is under no obligation to see to the application of the money: The Ship Fortitude, 3 Sumn. 228.

The point ruled by Lord Stowell in the principal case (The Gratitudine), has been fully affirmed in the United States: Murray *v.* Lazarus, Paine 572; Ross *v.* The Ship Active, 2 Wash. C. C. 226; The Ship Packet, 3 Mason 255. If the property of a shipper be taken and sold for the ship's necessities and to enable her to perform the voyage, the party has a right of contribution over against the other shippers, and his remedy is not confined to the ship-owner: Id. Where the bond is given on ship and freight it binds them only and not the cargo, though in a recital in the bond it is stated that the master was compelled to borrow on the ship, her cargo and freight: The Zepher, 3 Mason 341. When made by the master it vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficacy of the admiralty process. This rule is expressly laid down in the books, and will be found consistent with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry bond executed by an owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom, for it is in his power to execute an express transfer or mortgage. There is strong reason to contend that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamens' wages: Per Chase, J., Blaine *v.* Ship Charles Carter, 11 Cranch 332. The holder has no interest that he can assert in a prize court: The Mary, 9 Cranch 126; The Frances, 8 Id. 420.

In a case of necessity, the master of a ship may hypothecate her as well at the port of destination as at any other foreign port: Read *v.* Commercial Insurance Company, 3 Johns. 352; Selden *v.* Hendrickson, 1 Brock. 395; Sloan *v.* Ship A. E. J., Bee 250; Turnbull *v.* The Enterprise, Id. 345; Tunno *v.* The Mary, Id. 120; Patton *v.* The Randolph, Gilpin 457. Where a voyage is broken up by a capture and compulsory sale of the cargo in an enemy's country, the master may hypothecate the ship for money advanced to enable him to return home with her: Crawford *v.* The William Penn, 3 Wash. C. C. 484; s. c. Peters C. C. 106. "The contract grew out of a real necessity, produced by a state of war, and was itself the offspring of an act of hostility. In a moral point of view, therefore, it cannot be said that this was a voluntary contract." It was objected that the master had no authority to take up money on the security of the vessel, unless it had been necessary to enable him to complete his original voyage. "The master is the servant of the owner; and from the nature of his station as such, he has authority to enter into contracts for the employment of the vessel, as well as such as relate to the means of employing her. His duty is to obey the orders of his owner and to act with fidelity

to him and with a view to his interest. He appears in this character to the world, where it can never be known, by those who transact business with him, what may be his private instructions. . . . . The truth is that the authority of the master to hypothecate is not restricted to necessaries to enable him to complete his original voyage. It extends to the obtaining of supplies necessary for the safety of the vessel and to enable him to perform any voyage which he is authorized by law to undertake: there being no collusion between him and the lender to injure the owner:" Per Washington, J. It must be given in a place where the owner has no personal credit, nor any funds of his own, nor of the master: Forbes *v.* The Hannah, Bee 348; Rucker *v* Conyngham, 2 Peters' Adm 295; Turnbull *v.* The Enterprise, Bee 345; Canizares *v.* Santissima Trinidad, Id. 353; The Packet, 3 Mason 255; The Lavinia *v.* Barclay, 1 Wash. C. C. 49; Hurry *v.* Hurry, Id. 148. The master cannot hypothecate the ship if he had on board goods or money of his own: Cupisino *v.* Perez, 2 Dall. 195; The Packet, 3 Mason 255. The master cannot pledge a vessel by giving a bottomry bond for money borrowed for repairs, when the owners are present at the place where the repairs are made, or where he has funds of the owners, which he has not used for the purpose: Patton *v.* The Randolph, Gilpin 457. Generally the master cannot hypothecate to the consignee or to repay advances made by him: Hurry *v.* The John and Alice, 1 Wash. C. C. 293; Hurry *v.* Hurry, 2 Id. 148; Liebart *v.* The Emperor, Bee 339. He has no power to enter into a charter party in a foreign port for the purpose of giving the creditor of the owner of the vessel a security for the debt due to him: Hurry *v.* Hurry, 2 Wash. C. C. 145. The lender may well trust the credit of the master as auxiliary to his security; and the fact that the master ordered the supplies and repairs before the bottomry was given, can have no legal effect to defeat the security, if they were ordered by the master, upon the faith and with the intention that a bottomry bond should be ultimately given to secure the payment of them: The Ship Virgin, 8 Peters 538. One part owner cannot take from the master a bottomry bond on the share of another part owner for repairs done to the vessel: Patton *v.* The Randolph, Gilpin 457.

A bottomry bond given to pay off a former bond, must stand or fall with the first hypothecation, and the subsequent lenders can only claim upon the same ground with the preceding, of whom they are virtually the assignees: The Aurora, 1 Wheat. 96. "It is undoubtedly true that material men and others, who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the admiralty to enforce that right; and it must be admitted that in such a case, a *bonâ fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts,

may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold that a mere threat to arrest the ship for a pre-existing debt, would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat, which the creditor might never enforce; and until enforced the peril would not act upon the ship itself:" Per Story, J. A bond by the master is not rendered void by his drawing a bill of exchange on his owners for the same amount. The bill is collateral, and subject to the same contingencies as the bond. A discharge of one security is a discharge of both: The Hunter, Ware 249. Previous simple contracts are merged in the bond: Bray *v.* Bates, 9 Metc. 237. If the person be still liable in the event that the vessel be not lost, the obligation may be good as a bottomry, but not so if the person is liable, though the vessel is lost: Greely *v.* Smith, 3 Woodb. & M. 236. Where a bond has been given in the nature of a bottomry, but the circumstances under which it was executed were not such as to warrant the captain in executing a maritime hypothecation, yet the captain having had a power of attorney from the owner of the vessel, to borrow money upon the vessel, such a contract if made by the captain may create a lien on the vessel in a court of common law: Hurry *v.* Hurry, 2 Wash. C. C. 145.

It is not necessary to the validity of a bond made by the owner of a vessel that the money borrowed should be advanced for the necessities of the vessel, cargo or voyage: The Draco, 2 Sumn. 157; The Panama, Olcott Adm. 343. The owner may hypothecate his ship in a foreign port as well as the master, and he may do it for money to buy a cargo: The Mary, Paine 671. So he may hypothecate to the master to secure advances made by him, or wages due to him: Miller *v.* The Rebecca, Bee 151. Bottomry bonds may be executed by the owner of a ship in a home port, and their validity does not depend upon the application of the money to the purpose of the ship or voyage: Greely *v.* Waterhouse, 1 Appleton 9. But where they are given as collateral security for debts due, that fact may be shown, if the interests of third persons are thereby to be affected, notwithstanding it is cited in the bond that they are given for money lent and advanced: Ibid.

It is no objection to a bottomry bond that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part and bad in part; and it will be upheld by courts of admiralty to the extent to which it is valid; as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity: The Ship Virgin, 8 Peters 538; The Packet, 3 Mason 255; The Hunter, Ware

249; The Bridgewater, Olcott Adm. 35; Furniss *v.* The Brig Magoun, Id. 55. A court of admiralty has power to reduce the maritime interest when it is manifestly exorbitant: The Ship Virgin, 8 Peters 538; The Packet, 3 Mason 255; The Hunter, Ware 249. A bottomry bond, given for a larger sum than was advanced for the purpose of defrauding the underwriter on the vessel, is void; nor can it be allowed to stand as security for the sum actually advanced. When the express contract is void for fraud, no recovery can be had upon the footing of an implied contract and lien: The Brig Ann C. Pratt, 1 Curtis C. C. 340; s. c. Carrington *v.* Pratt, 18 Howard (S. C.) 63. A clause of sale in a bottomry bond does not destroy its character or operation: Robertson *v.* The United Ins. Co., 2 Johns. Cas. 250. If the value of the ship fall short of the debt, the lender loses the balance; the master having no right to pledge the owner's personal responsibility: The Ship Virgin, 8 Peters 538.

When the voyage terminates successfully the sum lent and the marine interest becomes due, and form the principle on which common interest is to be afterwards computed: The Packet, 3 Mason 255. The holder will not lose his money when the loss of the voyage has not been occasioned by the enumerated perils, but has arisen from the fault of the master or owner. A loss not strictly total cannot be turned into a technical total loss, by abandonment, so as to excuse the borrower from payment, even though the expense of repairing the ship exceeds her value: Pope *v.* Nickerson, 3 Story 465. A bottomry bond is postponed to claims for seamens' wages; and if the lender be compelled to pay them, he has a right of compensation from the borrower: The Ship Virgin, 8 Peters 538. A bottomry creditor may, by payment of the seamens' wages, entitle himself to a novation in their place for recovery of their demands against the vessel: The Cabot, 1 Abbott Adm. 150.

If after the risk on the bond has commenced the ship be sold or transferred, or the voyage be in any way broken up by the borrower the risk ends, and the bond becomes presently payable: The Draco, 2 Sumn. 157. A bottomry bond will be void, if the voyage on which payment depends be lost in consequence of any of the accidents within the condition, though the borrower eventually lose nothing. In such case, however, the lender may recover in an action for money had and received: Appleton *v.* Crowninshield, 3 Mass. 443; s. c. 8 Id. 340. If the obligee of a bottomry bond permit the ship to make several voyages without asserting his lien, and executions are levied on her his lien is lost: Blaine *v* The Charles Carter, 4 Cranch 328; The Aurora, 1 Wheat. 104. A valid bond will be upheld, if there be no laches on the part of the lender even against a *bonâ fide* purchaser without notice: The Draco, 2 Sumn. 157.

The admiralty courts of the United States have jurisdiction *in rem* to

enforce a bottomry bond made in a foreign country, between foreigners, when the ship is within the United States: The Jerusalem, 2 Gall. 191. A libel cannot be sustained in the District Court brought on a bottomry bond, executed in a domestic port for money neither loaned for nor applied to the purpose of the voyage: Knight *v.* The Attila, Crabbe 326. Admiralty has no jurisdiction of a bond made as a hypothecation, if it be not on the principles which govern such securities: Hurry *v.* John & Alice, 1 Wash. C. C. 293; Hurry *v.* Hurry, 2 Id. 148. But it has jurisdiction over a bottomry bond, when made by the owner, as well as when made by the master: The Mary, Paine 671.

A respondentia bond is a loan upon the pledge of the cargo, though a hypothecation of both ship and cargo may be made in one instrument, and generally it is only a personal obligation on the borrower, and is not a specific lien on the goods, unless there be an express stipulation to that effect in the bond; and it amounts at most to an equitable lien on the salvage. in case of loss. The condition of the loan is the safe arrival of the subject hypothecated, and the entire principal as well as the interest is at the risk of the lender during the voyage: 3 Kent Com. 354; Parsons on Mercantile Law 380. It is of the essence of a respondentia contract, as well as of that of bottomry, that the lender runs the marine risk to be entitled to the marine interest: Thorndike *v.* Stone, 11 Pick. 187. A respondentia bond does not pass the right of property in the goods, being a mere personal contract: United States *v.* Delaware Ins. Co., 4 Wash. C. C. 418. It is not necessary that a respondentia loan should be made before the departure of the ship on the voyage, nor that the money loaned should be expended in fitting out the ship, or invested in the goods on which the risk is run: Conard *v.* Atlantic Ins. Co., 1 Peters 437; s. c. 4 Wash. C. C. 662; United States *v.* Delaware Ins. Co., Id. 418. Where by the form of the bond payment of the debt and marine interest depends on the safe return of the goods, and not on that of the ship, the borrower is obliged to pay if he receives his goods safely, though by another ship: Ins. Co. Penna. *v.* Duval, 8 S. & R. 138.

*83] *BIRKLEY AND OTHERS *v.* PRESGRAVE.

Tuesday, February 3d, 1810.

[REPORTED 1 EAST 220.]

GENERAL AVERAGE.]—*An action upon promises lies by a ship-owner to recover from the owner of cargo his proportion of general average loss, incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.*

In *assumpsit*, the first count alleged that the plaintiffs were owners of the ship "Argo," with the appurtenances of the value of 675*l.*, whereof G. A. was master, which ship, on the 3d of November, 1799, was proceeding upon a voyage with a cargo of wheat, of the value of 855*l.*; that during the voyage part of the furniture of the ship, of the value of 20*l.*, was utterly lost to the plaintiffs, and other parts thereof sustained damage to the value of 50*l.*; which loss and damage were occasioned by certain acts of the master and crew of the vessel, purposely and necessarily done by them, in order to preserve the ship and cargo from perishing by storm. That certain help and assistance were then and there obtained by the master, in order to preserve the ship and cargo from so perishing by storm, and were then and there necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay 20*l.* That the ship and cargo were, by the means used for the general preservation thereof, preserved from the storm and completed

the said voyage, of all which premises the defendant afterwards had notice. That the defendant was, during the time the wheat was on board the ship as aforesaid, and at the time of the loss, damage, help, and assistance aforesaid, the owner of the wheat, and was and is benefited in respect thereof by the acts of the master and crew, and by the said help and assistance; from all which respectively the loss, damage, and expenses accrued. By *reason whereof [*84 the defendant, as the owner of the wheat, became liable to contribute to the said loss, damage, and expenses in a general average; and thereupon, in consideration of the premises, the defendant promised to pay the plaintiffs so much money as he, as such owner of the wheat, was liable to contribute to the said loss, damage, and expenses in a general average, when he should be thereunto afterwards requested. And the plaintiffs averred that the defendant, as such owner of the wheat, was liable to contribute to the loss, damages, and expenses, in a general average, the sum of 40*l.*, whereof he had afterwards notice. The declaration contained two other counts; the one, *indebitatus assumpsit* for money due, payable for a general average; and the other, for money paid, laid out, and expended; with the common breach to the whole. The defendant pleaded *non assumpsit*.

The cause came on to be tried at the last assizes for Durham, before Graham, B., when a verdict was found for the plaintiffs, damages 19*l.* 12*s.*, subject to arbitration as to the quantum, and to the opinion of the Court as to the questions of law upon the following case:—

The ship "Argo," the plaintiffs being her owners, on a voyage from Wisbeach to Sunderland, laden with wheat shipped by the defendant, and of which he was sole owner, as she was entering Sunderland harbor with a fair wind, and had just passed the lower end of the North Pier, was, by the veering of the wind and of a sudden and violent squall, prevented from proceeding further into the harbor, and the

crew were obliged to let go the small bower anchor to bring her up. With the assistance of some men who came to her for that purpose in a pilot-boat, they fastened the ship in order to secure and preserve her and the cargo from the storm, and with a warp which they for that purpose got run out and fastened to the South Pier; but the warp was soon broken by the storm. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was then borne away, and the ship was permitted to drive alongside the North Pier, to which they made her fast with hawser ends and towing-lines, which were proper ropes, and such as were usually provided and employed for that purpose. The master cut *the cable from the best bower anchor, that was then upon the ship's bow*, being afraid that another ship would be adrift and come down upon the "Argo," and being apprehensive that there would not be time enough to undo
*85] that cable if the other vessel should *happen to drive against his ship; and therewith fastened and moored the "Argo" to the Pier; *and this he did for the preservation of the ship and cargo.* Whilst they were so fastening her with the cable, the other ropes (the hawser ends and towing-lines), through the violence of the storm, and by another ship driving against the "Argo," broke; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance into the harbor; but she avoided that peril by means of the cutting and using that cable in manner aforesaid. Afterwards the master, for fear the ship should make water and the corn be thereby spoiled, the ship having a hole through her bottom occasioned by another ship running foul of her in the storm, got twelve men to go on board to keep her clear of water, in order that the cargo should not be damaged or spoiled. Half a guinea apiece was paid by the master for the plaintiffs to those men who went on board for this purpose, they refusing to do so under that sum; and

whilst they continued in the ship they were for that purpose employed at the pumps. The damages found by the jury were calculated as the amount of what was payable to the plaintiffs by the defendant, as the owner of the cargo, in respect of the cutting and wear of the cable, the breaking of the warp, hawsers, and towing-ropes, and of the amount of what was paid by the plaintiffs for the services aforesaid, to the men who went on board the ship, and of the expense of maintaining them whilst in the ship. The question for the opinion of the Court was, whether an action can be maintained for the losss, damage, and expenses above mentioned, or any and which of them?

Holroyd, for the plaintiff.

Two questions arise on this case:—1. Whether any and which of the losses are within general average? 2. Whether the owner of the ship can recover a contribution from the owner of the cargo for his proportion of expense incurred for the general concern? 1. Admitting that the hawser ends and towing-lines which were broken by the storm are not such a loss as falls within the meaning of general average, because they were only applied to the ordinary purposes for which such things are provided, yet the cable which was cut and sacrificed for the purpose of aiding the others, and thereby appropriated to a different use from what it was originally intended for, and which contributed to the preservation *of the ship and cargo, does constitute a [*86
charge of general average. So does the money paid to the men who came to the vessel in the pilot-boat, which was for the preservation of the whole concern. In *Da Costa* v. *Newnham*, 2 T. R. 407, where a ship was obliged to put into port for the benefit of the whole concern, charges which were incurred there for taking care of the cargo, and even provisions for the workmen hired for the repairs of the ship, were deemed general average. Now the above-mentioned

expenses were equally for the benefit of the whole concern, in consequence of the storm. And in Beawes's Lex Merc. 148, the rule is laid down that whatever expenses and losses are voluntarily incurred for the general preservation of the ship and cargo, are general average.[1] But at any rate there is one article of expense which was incurred solely on account of the cargo, and for which the defendant is solely liable, and that is the amount of what was paid to the men who were employed at the pumps on board the ship, in order to prevent the water from damaging the wheat. 2. This action is maintainable for the defendant's proportion of the general average. It is enough to say that such actions have been maintained, and verdicts recovered, without objection. They fall within the general principle of law, that where any person is bound to make contribution to another, the law implies a promise that he will do so; in other words, it is a good consideration for an implied promise. At the common law, where contribution was required, a writ of contribution issued, precedents of which are to be found in Fitzh. Nat. Brev. 378, 2d edit. This has fallen into disuse, because in most instances, as many persons were concerned, a more easy remedy was administered in equity. Bro. Abr. tit. "*Suit and Contribution*," gives several instances where contribution shall be made. So if one surety pay more than his proportion of the debt of the principal, he may recover from another the overplus. It may be said that in some cases there will be a difficulty of ascertaining the quantum of contribution in these cases, as where many have an interest in the cargo. But at any rate that difficulty does not exist in this case, and where it is too great to be be unravelled at law, recourse must be had to a Court of Equity. In *Da Costa*

[1] So in the same book, folio edition, 149: "In settling a gross average, an estimate must be made of all the goods lost and saved, as *well as that of the master shall have sacrificed of the ship's appurtenances to her preservation and that of the cargo.*"

v. *Newnham*, before mentioned, which was *an action against an underwriter, one of the questions which [*87 arose was on the quantum of the sum to be recovered, whether certain items constituted general average or not? for if they did, he was only liable to pay a proportion, and the Court there entered into the consideration of the quantum. Here the loss being under 20*l.*, the plaintiffs could not have any remedy in equity by reason of the smallness of the demand. At any rate, however, the pay of the twelve men employed for the benefit of the cargo, to prevent its being damaged by the water coming in, may be recovered under the count for money paid.

Hullock, for the defendant, contended, first, that the action was not maintainable. The circumstance of there being no instance produced of such an action being maintained where the attention of the Court was expressly called to the question, is itself a strong argument against it, according to Ashhurst, J., in *Le Caux* v. *Eden*, Doug. 601. There is also a good reason why the remedy should be in equity and not at law, in order to prevent a multiplicity of actions. What the interest of each individual was in the cargo could only be ascertained upon a bill filed for a discovery. 2. At any rate, none of the losses incurred fall within general average, being the immediate effects of the storm. In the passage quoted from Beawes's Lex Merc. 148, one of the circumstances stated to be essential to concur to make losses of this sort general average is, that the sacrifice of the ship's furniture should be in consequence of a consultation between the captain, his officers and crew. Now here the loss was incurred by the sole orders of the master, without any deliberation of the crew, and therefore is a case for which the books do not provide. And there seems reasonable ground for this precaution in order to prevent fraud.

Lord Kenyon, C. J.—If the law confer a right, it will also confer a remedy. When once the existence of the right is

established, the Court will adopt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon. Here the only difficulty pretended is the ascertainment of the proportion to be paid out of the general loss in each particular case; and since it is admitted that this may be ascertained in equity, there seems to be no reason why, if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected that this will lead to a multiplicity of actions. The same difficulty, however, must occur in equity. It is not competent in general to file a bill which *88] will conclude the interests *of persons not named. There are, indeed some excepted cases to that rule, as in the instance of creditors, one of whom may file a bill for himself and the rest of the creditors' seeking an account of the estate of their deceased debtor for payment of their demand.[1] But, generally speaking, a Court of Equity will not take cognisance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. I have known the attempt sometimes made, when an estate has been contracted to be sold in parcels to many different persons, to file a bill in the names of all of them to compel a specific performance, which has been constantly refused. Bills in equity for a discovery are for the most part auxiliary to proceedings in a Court of Law, and it does not follow that a Court of Equity has jurisdiction over the subject-matter because it would compel a discovery. Such a proceeding does not change the nature of the jurisdiction over the original matter. The objection, therefore, arising from multiplicity of actions is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several

[1] Vide Mitf. Ch. Pl. ch. 2, s. 2, part 8.

actions for their respective losses, and no objection could be made to their recovery. Upon the whole this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions ; where a loss is to be repaired in damages, where else can they be recovered but in the Courts of Common Law ? and wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay.

With respect to the other question, all ordinary losses and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the shipowners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average.

The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence, in order to avoid dispute, *than in necessity : it may often happen [*89 that the danger is too urgent to admit of any such deliberation. Here, however, there can be no difficulty, for it is found in fact that the cutting of the cable which belonged to the ship was done for the benefit of the cargo as well as the ship.

GROSE, J.—This action is brought to recover a rateable proportion of a certain loss and damage, and expenses which have been incurred by the plaintiffs as shipowners in preventing the owner of the cargo from incurring a loss. That such an action is maintainable I have no doubt. If there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy, for I understand that this sort of damage has been continually settled as general average in the city of London.

Where there is a right, there must be a remedy, and there can be no other remedy than by action to recover damages. It is true, where there are many owners of the cargo there may be as many actions brought, but that arises from the necessity of the thing, and I should still say that they are all liable to answer for their respective proportions.

LAWRENCE, J.—All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a Court of Equity, where he can obtain proof of it more easily, and thereby facilitate his remedy. But that objection does not prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a Court of Equity.

LE BLANC, J.—Unless it be shown by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right it also gives a remedy.

Postea to the plaintiffs.

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*90] *The principle laid down in Birkley *v.* Presgrave, viz., that "*all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested,*" has been approved of, and adopted in subsequent cases. See Covington *v.* Roberts, 2 Bos. & P. N. C. 379; Job *v.* Langton, 6 E. & B. 790 (88 E. C. L. R.).

General average takes its origin from the Rhodian law, and was

subsequently adopted by the Roman law, where it is thus stated:—"Lege Rhodiâ cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est:" Dig. xiv. tit. 2. 1. It is founded upon the clearest natural justice, for in the words of the Digest, "Æquissimum est commune detrimentum fieri eorum, qui propter amissas res aliorum, consecuti sunt, ut merces suas salvas haberent:" Dig. lib. xiv. tit. 2. l. 2. Again, as Lord Tenterden says in his excellent treatise, "When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is laboring on a rock or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake,—no measure that may facilitate the motion and passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out goods in order to lighten the ship for the sake of all. But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss:" Abbott on Shipping 388, 9th edit.

It will be observed that the principle of the Rhodian law has been considerably extended in its operation, and is not merely confined to a jettison of goods, but is equally applicable to many other cases, where *extraordinary sacrifices* have been made, or *extraordinary expenses* incurred, for the joint benefit of the ship and cargo.

Before however proceeding any further with the subject, we may notice the distinction between *general* and *particular* average, for to neglect to do so may give rise to some confusion. The distinction between them has been thus accurately laid down by Lord Stowell:—"*General* average is for a loss incurred, towards which the *whole* concern is bound to contribute *pro ratâ*, because it was undergone for the general benefit and preservation of the whole. *Simple* or *particular* average is not a very accurate expression; for it means damage *incurred by or for *one part* of the concern, which that part must bear alone; so that in fact it is no average at all: but still [*91

this expression is sufficiently understood, and received into familiar use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; and there might be a simple average for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as if a water-spout should fall on a cargo of sugars, and a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both:" Per Sir W. Scott, in The Copenhagen, 1 C. Rob. 293; and see Oppenheim *v.* Fry, 3 Best & Sm. 873 (113 E. C. L. R.); 5 Best & Sm. 348 (117 E. C. L. R.).

In order to give rise to a claim of general average, a loss must have been incurred for the benefit of the *whole* adventure, and not merely where a loss is incurred in consequence of a *part* being put in peril. Thus in Nesbitt *v.* Lushington, 4 T. R. 783, where a mob in Ireland seized a vessel partly laden with corn, and would not leave her until they had compelled the captain to sell them the corn at a very low rate, it was contended that it was a case of general average, as the captain was obliged to let the people have the corn at their own price, inasmuch as if he had resisted their demand they would have destroyed the whole concern. The Court of King's Bench, however, did not accede to that view of the case, and Lord Kenyon, C. J., in delivering judgment, said, "I am of opinion that this is not a general average; because *the whole* adventure was never in jeopardy. There is no pretence to say that the persons who took the corn intended any injury to the ship, or to any other part of the cargo, but the corn, which they wanted, in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average."

Upon the same principle, where a quantity of dollars were thrown overboard *to prevent their falling into the hands of the enemy*, though this was jettison in the general sense of the term, yet it was held not to be that species which is the subject of general average: Butler *v.* Wildman, 3 B. & Ald. 398, 403, 404 (5 E. C. L. R.). It seems

that where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested: Oppenheim *v.* Fry, 3 Best & Sm. 873 (113 E. C. L. R.); 5 Best & Sm. 348 (117 E. C. L. R.).

*At one time it seems to have been thought essential to the claim of general average, that previous to making a sacrifice [*92 for the general safety, there should be a deliberate and voluntary consultation between the master and the men. "The rule, however, of consulting the crew," as observed by Kenyon, C. J., in the principal case, "is rather founded in prudence, in order to avoid dispute, than in necessity; as it may often happen that the danger is to urgent to admit of any such deliberation." *Ante*, p. 88.

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear (in which oath some of the crew must join) that the sacrifice was made for no other cause but for the safety of the ship and the rest of the cargo: 1 Park, Marine Insur. 279, by Hild. 8th ed.

In examining the cases illustrating the subject of general average, we will adopt the classification in the principal case, and consider, *first*, where general average arises in consequence of extraordinary sacrifices made; and *secondly*, where extraordinary expenses have been incurred for the preservation of the ship and cargo. We will then consider what articles are liable to contribute to general average; and lastly, what is the mode in which general average is to be adjusted.

1. *General Average in consequence of extraordinary Sacrifices.*— It is clear that the jettison, or throwing overboard of part of the *cargo* in order thereby to preserve the ship and the rest of the goods, will enable the owner of the part so sacrificed to claim contribution as for a general average loss.

As an exception to the general rule, that all goods thrown overboard for the preservation of the ship and the rest of the cargo must be made good by general contribution, it is established that unless the owner of *goods carried on the deck* can show a custom to place them there (although they must contribute in common with others), they themselves, if lost, are not the subject of general average, and cannot claim contribution from the owners of other goods and insurers: 1 Park, Insur. 284, by Hild. 8th ed. The reason for this

exception seems to be, that goods stowed on deck may either impede the navigation or increase the risk. See and consider Lord Denman's judgment, in Milward *v.* Hibbert, 3 Q. B. 131, 137 (43 E. C. L. R.).

Where, however, there is a usage to carry on board goods of a certain description the owner will be entitled to contribution. Thus timber on a voyage between London and Quebec (Gould *v.* Oliver, 4 Bingh. N. C. 134 (33 E. C. L. R.); 5 Scott 445), carboys of vitriol (Da Costa *v.* Edmunds, 4 Camp. 142), and pigs conveyed in a vessel from Waterford to London (Milward *v.* Hibbert, 3 Q. B. 120 (43 E. C. L. R.)), although carried upon deck, having been sac-
*93] rificed by a jettison for the benefit of *the other parties interested, their owners were held entitled to contribution upon its being proved that they were carried according to the usage of trade; and see Cunard *v.* Hyde, 2 Ell. & Ell. 1 (105 E. C. L. R.); Ell. Bl. & Ell. 670 (96 E. C. L. R.); Wilson *v.* Rankin, 1 Law Rep. (Q. B.) 162; 6 Best & Sm. 208 (118 E. C. L. R.). A custom, however, that underwriters are not liable under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom, and does not contradict the terms of the policy: Miller *v.* Tetherington, 6 Hurlst. & N. 278; 7 Hurlst & N. 954.

Where part of the cargo shipped into lighters or boats in order to save the ship from extraordinary risk, is lost, the owners of that part of the cargo and of the lighters and boats, if they belong to the ship, can claim contribution. This is agreeable to the Roman law, which, in a similar case, says: "Ratio haberi debet inter eos qui in nave merces salvas habent cum his qui in scaphâ perdiderunt, proinde tanquam si jactura facta est:" Dig. lib. xiv. tit. 11, l. 4; Benecke, 209.

If, however, in such a case the ship and the rest of the cargo perish, the goods which were transshipped into lighters will not be obliged to contribute; for the lighters and their cargoes not owing their preservation to the loss of the principal vessel, cannot be liable to contribute towards such loss: Benecke 212; Dig. lib. xiv. tit. 11, l. 4.

Nor, it seems, if the ship be lost, and the cargo or part of it be saved, will the part so saved be compelled to contribute for the goods transshipped, if they or a part of them be lost, although had

there been a regular jettison of the goods the owners might have claimed contribution. For there is this material difference between the two cases, that when goods are cast away, the chance of their preservation is next to nothing; but when shipped into another vessel they retain nearly an equal chance with those left on board. And to this difference it is owing that the rule of not granting a contribution unless the ship be saved, is with full justice applied to the case of unloading here considered, although in the case of jettison it would be manifestly prejudicial to the owners of the goods cast overboard, and therefore ought not to be applied to that case. Goods so transshipped may possibly be entirely saved, while the vessel and the goods left on board are wholly lost. The proprietor of the goods transshipped has therefore no right to complain that his goods may totally perish, and yet those left in the vessel and subsequently saved from shipwreck contribute nothing towards his indemnification. If, in the latter case, he were allowed a claim upon the goods saved from the principal vessel, such as is due in justice to the proprietor of goods thrown overboard, his situation would be more advantageous than that of the other proprietors and the shipowner; *for his chance would in no case be worse, but in some cases better than theirs: Benecke 212. [*94

There will, it seems, be no contribution upon the loss of goods put into lighters or boats merely in the ordinary course of the voyage: 2 Arnould, Mar. Ins. 777, 3d ed.

If part of the cargo be voluntarily given to pirates by way of ransom to save the rest, contribution must take place; but this will not be the case if part of the goods be taken forcibly by pirates: Hicks *v.* Palington, Moore 297; see also Nesbitt *v.* Lushington, 4 Term Rep. 783.

So, it is laid down by Roman law, upon the same principle: "Si navis à piratis redempta sit, Servius, Ofilius, Labeo, omnes conferre deberre aiunt. Quod vero prædones abstulerint, eum perdere, cujus fuerint: nec conferendum ei, qui suas merces redemerit:" Dig. lib. xiv. tit. 11, l, 2, § 3; but ransom to *an enemy* has been made illegal: 22 Geo. III. c. 52; and see 43 Geo. III. c. 160, ss. 34, 35; 45 Geo. III. c. 72, ss. 16, 17; but these acts have been repealed by 27 & 28 Vict. c. 25, which gives the Queen power from time to time, by orders in council, to regulate ransoms: sec. 45.

The law will protect persons who in cases of necessity sacrifice

the goods of others. Thus in Mouse's Case, 12 Co. 63, where an action of trespass had been brought against a passenger for throwing the goods of the plaintiff overboard, upon its being proved by the defendant, that if the things had not been cast out of the vessel the passengers had been drowned; and that *levandi navis causâ* they were ejected some by one passenger, and some by another, the plaintiff was nonsuited; and it was resolved that, "if a tempest arise in the sea, *levandi navis causâ* and for the salvation of the lives of men, it may be lawful for passengers to cast over the merchandises."

It has been said by an eminent writer, that if part of the cargo be *sold* for the necessities of the ship, it is in the nature of a compulsive loan for the benefit of all concerned, and bears a resemblance to the case of jettison: 3 Kent Comm., p. 242, 4th ed. And again, it was laid down by Sir William Scott, that if a master is obliged by tempestuous weather and damage done to his ship, for the safety of the ship and cargo, to put into a port, and not being able to borrow money, is compelled to sell a part of the cargo for the purpose of apply the proceeds to the prosecution of the voyage by the repair of the ship, the money so obtained will be the subject of general average: The Gratitudine, *ante*, pp. 30, 41, 42, 43. The great preponderance, however, of the authorities show that these doctrines must be received with some limitation, and that a case for general average arises only where part of the cargo has been sold in order to defray expenses or repair losses which are of themselves of the nature of general average; such, for instance, as the making good some part of the vessel, or her tackle sacrificed for the general safety; but that where a sale of part of the cargo has
*95] been effected in order to pay for the repairing particular *average losses, such, for instance, as arise from *accidental damage* done to a ship by a storm, the shipowner will alone be liable to the owners of the goods so sold. See Powell *v.* Gudgeon, 5 M. & Selw. 431; Sarquy *v.* Hobson, 4 Bing. 131 (13 E. C. L. R.); Hallett *v.* Wigram, 9 C. B. 580, 586 (67 E. C. L. R.). Upon the same principle, where a part of the cargo was sold in order to raise money to release the master from imprisonment for a private debt in a foreign port, it was held not to be the subject of general average: see Dobson *v.* Wilson, 2 Campb. 480. There the master of a ship then at Copenhagen was arrested by process out of a

court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, partly for repairs and partly in payment of the Sound dues; and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo: it was held by Lord Ellenborough, C. J., that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board which arrived safely at the port of destination. "I am of opinion," said his lordship, "that this is not a case upon which general average can be claimed. Is there here anything like a *jactus mercium lavandæ navis gratiâ?* A jettison to lighten the ship is not the only foundation of general average; but it must arise from that or something analogous. The distinction between general and particular average would otherwise be entirely abolished, and the shippers of goods would be called upon to contribute to losses from which they derive no benefit, and which ought to fall exclusively on the shipowner. Here the agent of the ship arrests the person of the master, both being agents of the owner, who had undertaken to carry the whole cargo safely to its destined port. This is different from the arrest of the captain by a foreign force. Even there I am not aware it has ever been held that the master is so inseparably united to the ship, that to redeem him it is lawful to sell a part of the cargo. The process of the court of justice at Copenhagen was not directed against the ship, and was confined entirely to the person of the master; it was merely an arrest for a personal debt. I was at first struck by what was said about the Sound dues; and had the ship been seized for non-payment of these, I should have thought the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average. But these dues had been paid to the Danish government by the ship's agent, and the money so paid merely constituted a private debt due to him, which he sought to recover by process against the person of the master. It comes to this—whether, if the captain be severed from the ship, whatever be the cause, he may sell *a part of the cargo to redeem himself? I see no distinction between this arrest for [*96 debt and an arrest for an assault he might have committed in the streets of Copenhagen. No case has been cited, or principle ad-

vanced, to show that a claim for general average can arise from an act done to redeem the master of a ship from such an imprisonment. I therefore do not think that any part of the plaintiff's goods was sacrificed for the safety of the ship and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on board. Their proper remedy is against the owner of the ship."

Where, as in the principal case, some part of the ship or her tackle is sacrificed for the safety of the whole concern, the shipowner can claim contribution as for a general average loss.

Thus if in a tempest the sails of a ship are cut down and cast overboard, for the preservation of the ship and cargo, it will be a case for contribution: Marsham *v.* Dutrey, Select Cases of Evidence 58. So likewise by the Roman law, it is said, "Cum arbor, aut aliud navis instrumentum, removendi *communis* periculi causa, dejectum est, contributio debetur:" Dig. lib. xiv. tit. 2, l. 3.

Where, however, the loss sustained by a ship is *accidental*, the loss will fall on the shipowner alone. Thus where a ship, in order to escape from a privateer, carried an unusual press of sail, and succeeded in getting away, but sustained damage in so doing, it was held to be a particular and not a general average. See Covington *v.* Roberts, 2 Bos. & P. N. C. 378, where counsel having cited the principal case, Sir James Mansfield, C. J., observed, "In the case referred to there was an article given up for the benefit of the whole concern. A cable was sacrificed. The language of Mr. Justice Lawrence is, that all loss which arises in consequence of *extraordinary sacrifices* or expenses incurred for the preservation of the ship and cargo, come within the description of general average. This is only a *common sea risk*. If the weather had been rather better, or the ship stronger, nothing might have happened."

Upon the same principle, the expenses which may be incurred in consequence of a successful resistance of an attempt by an enemy to capture a vessel, such as for damage done to the vessel itself and its rigging in the engagement, and the expense of curing the wounded sailors, or in ammunition expended in the defence, will not form the subject of general average. This was decided in the leading case of Taylor *v.* Curtis, 2 Marsh. 309, by the Court of Common Pleas. Gibbs, C. J., in delivering the judgment of the court, said: "The different states of Europe have made different

regulations on this subject, all of them professing to follow the *Rhodian law, but often differing from each other; and the foreign jurists have made very different comments upon that *law. [*97
In this country there are no local regulations on this subject; we should therefore, as in all doubtful cases, resort to the judgments of our municipal courts, if this point had ever arisen there. There is nothing in any of the foreign jurists which we think ought to govern us on these points, unless they had been supported by admitted principles, decided authorities, or general usage. None of the decided cases apply to the present; and we have unfortunately been so long engaged in war, that instances of this kind must frequently have occurred; and as there appears to be no case in which a demand like the present has been made, we must conclude from that silence that no general usage which could justify such a demand has existed; and therefore that such losses cannot be taken to fall within the principle of general average. If it could have been shown that such losses do fall within the general principle, I agree that the plaintiffs would have been entitled to recover, though this had been the first case in which such a demand had been made. But there is great doubt upon the subject; and the inclination of my mind is that they do not. It is true the determination to resist was resolved on for the general interest; but still it is not like the case of casting goods overboard for the general benefit. The loss fell where the chance of war directed it, and where therefore, in point of justice, it ought to fall." See s. c. 6 Taunt. 608 (1 E. C. L. R.); 4 Camp. 334; Holt's N. P. 192 (3 E. C. L. R.); see also Dig. lib. xiv. tit. 2, l. 2, § 1; Id. l.

It seems to be the better opinion that if, in order to escape an enemy or to avoid shipwreck, a ship is *intentionally* run aground in what appears the least dangerous spot, the loss arising therefrom (at all events if the ship is subsequently recovered so as to be able to pursue her voyage) will be a general average loss, because its object was the general safety: Emerigon, c. xii. sect. 13, vol. 1, pp. 405–600, ed. 1827; Abbott on Shipping 400, 9th ed.; 2 Arn. Mar. Ins. 784, 3d ed. And it has been decided in the great case of The Colombian Insurance Company *v.* Ashby, 13 Peters' S. C. 331, by Mr. Justice Story, after an examination of all the authorities upon the subject, that, even if the ship be lost by a voluntary

stranding for the benefit of the general safety, the cargo, if saved, must contribute as for a general average loss. In that case the brig "Hope," with a cargo bound from Alexandria, in the District of Columbia, for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake Bay, by a storm which soon after blew to almost a hurricane. The vessel was steered towards a point in the shore for safety, and was anchored in three fathoms water; the sails were furled, and all efforts were made, by using the cables and anchors, to prevent her going on shore. The gale increased; the brig struck adrift and dragged three miles; the windlass was ripped
*98] up, the chain cable parted, *and the vessel commenced drifting again, the whole scope of both cables being paid out. The brig then brought up below Craney Island, in two and a half fathoms water, where she thumped or struck on the shoals on a bank, and her head swinging round brought her broadside to the sea. The captain, finding no possible means of saving the vessel and cargo and preserving the lives of the crew, slipped her cables and ran her on shore for the safety of the crew and preservation of the vessel and cargo. The vessel was run far up on a bank, where after the storm she was left high and dry, and it was found impossible to get her off. The lives of all the persons were saved, and the whole cargo was taken out safely. It was held that the owners of the cargo were liable for a general average. "According to the Roman law," says Mr. Justice Story, "if the ship was injured or disabled in a storm without any voluntary sacrifice: or if she foundered or was shipwrecked without design, the goods saved were not bound to contribution: Dig. lib. xiv. tit. 2, l. 2, § 1; Id. c. 7; 1 Emerig. on Assur. c. 12, § 39, pp. 601–603. On the other hand, if the object of the sacrifice was not attained; or if there was a jettison to prevent shipwreck, or to get the ship off the strand, and in either case it was not attained; as there was no deliverance from the common peril, no contribution was due: Dig. lib. xiv. tit. 2, l. 5, § 7; 1 Emerig. on Assur. c. 12, § 41, pp. 612–616. The language of the Digest upon this point is very expressive: 'Amissæ navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberaverunt; nam hujus æquitatem tunc admitti placuit, cum jactus remedio cæteris in communi periculo, salvâ nave consultum est.' It is this language which seems in a great measure to have created the only doubt among the commentators

as to the extent and operation of the rule; some of them having supposed that the safety of the ship (*salvâ nave*) for the voyage was in all cases indispensable to found a claim to contribution; whereas others, with far more accuracy and justness of interpretation, have held it to apply as a mere illustration of the general doctrine, to a jettison, made in the particular case for the very purpose of saving the ship and the residue of the cargo. . . . It is true that Emerigon in one place says, 'The damages which happen by stranding are a simple average for the account of the proprietors,' citing the French ordinance; and then adds, 'but it will be a general average if the stranding has been voluntarily made for the common safety, provided always that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is save who can:' Emerigon, Assur. c. 12, s. 13, p. 614. And he then refers to the case of jettison, where the ship is not saved thereby, in which case there is no contribution: Emerigon, Assur. c. 12, s. 13, p. 616. Now the analogy between the two cases is far from being so clear or so close as Emerigon *has supposed. In the case of the jettison to avoid foundering or shipwreck, if the calamity occurs the object is not [*99 attained. But in the case of stranding, whatever is saved, is saved by the common sacrifice of the ship, although the damage to her may have been greater than was expected. Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice; for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost part only, he should receive full compensation. No such principle is applied to the total loss of goods sacrificed for the common safety; why then should it be applied to the total loss of the ship for the like purpose? . . . We agree with the Court below that when a ship is voluntarily run ashore, it does not of course follow that she is to be lost. The intention is not to destroy the ship, but to place her in less peril, if practicable, as well as the cargo. The act is hazardous to the ship and cargo, but it is done to escape a more pressing danger, such as a storm, or the pursuit of an enemy or pirate. But then the act is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because from inevitable calamity the damage has exceeded the intention or expectation of the parties, the whole sacrifice should be borne by the shipowner, when it has thereby accom

plished the safety of the cargo." See also Job *v.* Langton, 6 E. & B. 779 (88 E. C. L. R.).

2. *General Average in consequence of extraordinary Expenditure.*—The cases we have been before considering are those where a sacrifice of something has given rise to the claim of general average; it may also be made where there have been *extraordinary* expenses incurred for the *joint benefit* of the ship and cargo. If, for instance, a ship is compelled to go into a port for repairs, and it is for the common benefit, as well for the preservation of the cargo as for the repair of the ship, that there should be a transshipment of the cargo, the expense thereof will be a general average. The Copenhagen, Mening, 1 C. Rob. 289, 294. The expenses necessarily incurred in such a case, in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution: Hall *v.* Janson, 4 E. & B. 500, 507, 508 (82 E. C. L. R.); Moran *v.* Jones, 7 E. & B. 523 (90 E. C. L. R.).

Where a ship in the course of her voyage was run foul of by another ship and damaged, and the *captain was in consequence obliged to cut away part of her bowsprit rigging*, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage or safely kept the sea; it was held by the Court of King's Bench that the expenses of repairs, *100] *so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further*, and of unloading the goods for the purpose of making the repairs, were a general average; but that the master's expenses during the unloading, repairing, and reloading, and crimpage, to replace deserters during the repairs, were not so. "If," said Lord Ellenborough, C. J., "the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident,—to the violence of the elements or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is con-

cerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of expenses of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to enable the ship with her cargo to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expenses during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses in port, and crimpage must be disallowed, as it does not come within general average:" Plummer *v.* Wildman, 3 M. & S. 482.

Now, although the decision in Plummer *v.* Wildman is right, the rule which might fairly be deduced from the observations of Lord Ellenborough would, according to the subsequent authorities, be clearly wrong. The decision in Plummer *v.* Wildman is right, because the expenses allowed by the Court were incurred in consequence of a general average loss, viz., *the cutting away of the bowsprit rigging;* but the conclusion to be drawn from Lord Ellenborough's remarks is wrong, because if it were followed, the expense of repairs done to the ship in a port of distress, so far as they are just sufficient to enable the ship to complete her voyage, would in all cases be allowed, whatever might be the nature of the loss which rendered the repairs necessary. This doctrine, however, Lord Ellenborough disclaimed in the *subsequent case of Power *v.* Whitmore, 4 M. & S. 141, where it was held that the wages [*101 and provisions of the crew while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair *a damage occasioned by tempest*, were not the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during the detention in port to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press

of sail was necessary for that purpose in order to avoid an impending peril of being driven on shore and stranded. Lord Ellenborough, C. J., said, "That general average must lay its foundation in *a sacrifice* of part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and the weather. That this was not like the case recently before the Court (Plummer *v.* Wildman, 3 M. &. S. 482), where *the master was compelled to cut away his rigging in order to preserve the ship*, and afterwards put into port to repair that which he sacrificed. And still less was the damage incurred while standing out to sea, an object of contribution."

The wages and provisions of a crew during the detention of a ship by an embargo, do not come within general average: Robertson *v.* Ewer, 1 Term Rep. 127; sed vide Sharp *v.* Gladstone, 7 East 24.

The expense of hiring extra hands to work at the pumps in a ship after she has sprung a leak, will be allowed in general average: Birkley *v.* Presgrave, *ante*, p. 83; but not of hiring men in the place of those who have deserted: Plummer *v.* Wildman, 3 M. & Selw. 482; nor gratuities promised to sailors to encourage them to do their duty: Harris *v.* Watson, Peake N. P. 72; Frazer *v.* Hatton, 2 C. B. N. S. 512 (89 E. C. L. R.); Harris *v.* Carter, 3 E. & B. 559 (77 E. C. L. R); Hartley *v.* Ponsonby, 7 E. & B. 872 (90 E. C. L. R.).

The cost of extra coal for an auxiliary steam screw vessel, damaged by collision with an iceberg, and which was incurred for the purpose of preventing the detention of the vessel for several months had she been repaired for sailing, and the unshipping and warehousing of the cargo, has been held not to be chargeable as general average. See Wilson *v.* Bank of Victoria, 2 Law Rep. Q. B. 203. "The case," said Blackburn, J., in delivering the judgment of the Court, "is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions, and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other ex-

*102] penditure which is not only extraordinary *in its amount, but is incurred to procure some service extraordinary in its nature."

Where a vessel is fortuitously stranded, all expenses incurred from the misadventure till all the cargo has been discharged will constitute general average: Job *v.* Langton, 6 E. & B. 779, 791 (88 E. C. L. R.).

Where, however, after the cargo is safe, expenses have been incurred in repairing a ship accidentally stranded, or in bringing her to a place to be repaired, they will not be the subject of general average. Thus in Job *v.* Langton, 6 E. & B. 779 (88 E. C. L. R.), in a case stated between assured and underwriters on ship, it appeared that the ship having sailed from Liverpool with a cargo on board, ran on shore accidentally on the coast of Ireland. In order to get her off it became necessary to discharge the whole of the cargo, which was accordingly taken out and placed in store at Dublin. The ship was then got off by digging a channel for her, and employing a steam-tug, and was towed to Liverpool to be repaired. The cargo was shipped in another vessel, and forwarded to its destination, but for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired. It was held by the Court of Queen's Bench, that the expenses incurred, after the entire cargo was in safety, in getting off the ship and towing her to Liverpool for repair, were not chargeable to general average, but to particular average on the ship alone. "There is no decision," said Lord Campbell, C. J., "on the specific point; and there is no mercantile usage stated to guide us. We must therefore resort to the general principles on which this head of insurance law rests. We begin with the definition of general average by Lawrence, J., in Birkley *v.* Presgrave, 1 East 228: 'All loss which arises in consequence of extraordinary sacrifices made or extraordinary expenses incurred for the preservation of the ship *and* cargo' (meaning for the *joint* benefit of ship and cargo). Here it cannot be said that there was any *sacrifice*, as in case of jettison of part of the cargo, or voluntarily cutting away masts or sails of the ship. The stranding was *fortuitous*, arising directly from perils of the sea. The expenses, to constitute general average, must therefore be brought within the second category, 'extraordinary expenses incurred for the joint benefit of ship and cargo.' They were extraordinary expenses not to be ascribed to wear and tear, and therefore to be borne by the underwriter; but are they to be considered as incurred for the joint benefit of ship and cargo, so

that a portion of them ought to be borne by the owner of the cargo or the underwriter of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure, till all the cargo had been discharged, confessedly constituted general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were *of the same character? The employment of the steam-tug and the cutting of the channel by which the ship was rescued cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that the steam-tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her. We do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship, or the underwriter on ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Under the circumstances, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that the ship should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if the stranded ship, after being repaired, had carried the cargo to its ultimate destination. But in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe. But in the present case, the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner; and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord Ellen-

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borough in Plummer *v.* Wildman, 3 M. & S. 382, 486, we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average." See Great Indian Peninsula Railway Co. *v.* Saunders, 1 B. & S. 41 (101 E. C. L. R); Booth *v.* Gair, 33 L. J. C. P. 99.

Where, however, a vessel has been fortuitously stranded, although the goods have been saved before the vessel, still if their discharge from the ship form part of one continuous operation, the object of which was the saving of the ship and cargo, the expenses incurred in getting the ship off, and without which she could not have proceeded on her voyage or earned freight, will be general average to which *ship, freight, and cargo must contribute. See Moran *v.* Jones, 7 E. & B. 523 (90 E. C. L. R.); Kemp *v.* Halliday, 1 Law Rep. Q. B. 520. [*104

3. *What Articles are liable to contribute to general Average.*— According to our law, whatever was at risk at the time of the loss, *i. e.* the ship, freight, and cargo, must contribute an equal and proportional part to what was sacrificed for the common good: 1 Park, Ins. by Hild., 8th ed., p. 294; and see Da Costa *v.* Newnham, 2 Term Rep. 407; Hill *v.* Patten, 8 East 373; Brown *v.* Stapyleton, 4 Bing. 119 (13 E. C. L. R.).

In the case of Williams *v.* The London Assurance Company, 1 M. & Selw. 318, a ship was chartered from London to the East Indies, there to deliver her outward cargo, and return thence with a cargo, for England into the Thames, and there make a true delivery; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton. The ship sailed on the voyage insured, and in the course of her outward voyage incurred an average loss; but was repaired and afterwards performed her voyage, and the freight was received. It was held by the Court of King's Bench, that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution. "It was contended," said Lord Ellenborough, C. J., "that the whole freight out and home is not liable, but the whole was

affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution; and the difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs: Richardson *v.* Nourse, 3 B. & Ald. 237 (5 E. C. L. R.).

Usually where there is a general average, ship, freight, and goods, all contribute to it; but if there be no goods on board, and, by a voluntary sacrifice, ship and freight are saved from a common peril, the freight ought rateably to contribute to the loss; and where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole of the freight which was in peril is to be received by the owner of the ship, and without insurance the whole of the loss would fall upon him: *Per Lord Campbell, C. J., 7 E. & B. 533 (90 E. C. L. R.).

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Where freight has been partly paid in advance, the charterer who has made the payment in advance and not the owner must, in a case of general average, contribute in respect of such advance. See Frayes *v.* Worms, 19 C. B. N. S. 159 (115 E. C. L. R.). There, by a charter-party, for a voyage from Cardiff to San Francisco with a cargo of coals, the owners engaged to deliver the same "on being paid freight at and after the rate of 4*l.* 10*s.* per ton of 20 cwt. *delivered.*" And the instrument contained the following stipulation. "The freight to be paid by good and approved bills on London, at six months' date from the date of sailing, less cost of insurance, *to be effected by the charterer*, at the ship's expense, or in cash, under discount equal thereto, at charterer's option; less in either case 800*l.*, which is to be paid on delivery of cargo, in cash, at the current rate of exchange." The freight to the extent of 4807*l.* was paid in advance, and a general average loss was sustained on the voyage. It was held by the Court of Common Pleas that

the owners were not liable to contribute to such general average in respect of the freight so advanced, but only in respect of the 800*l.* which was to be paid at the end of the voyage; but that the charterers, who had an insurable interest in that portion of the freight were the parties to contribute. "The general principle of contribution to general average," said Erle, C. J., "has not been disputed. All who are interested must contribute to the expenses incurred for the joint benefit of ship and cargo. The owners of the ship, the freight and the cargo are liable to contribute, each to the extent of what he has at stake. Here the claim is in respect of 480*7l.*, advanced freight on a charter-party—which was not to be returned: that sum, therefore, was no longer at risk. The charterer, under such circumstances, has an interest in the ship and in the value of the goods increased by the amount of the freight advanced. The general rule seems to me to be, that the charterer is liable to contributions for general average in respect of advances on freight."

Wearing apparel and jewels, if carried about the person, do not contribute: Emerig. c. 12, § 42, vol. 1, p. 623; but it has been decided that, if not attached to the person, gold, silver, jewels, precious stones, and all other small articles of value must contribute: Peters *v.* Milligan, Park 296, 8th ed.

As we have already seen, goods carried on the deck must contribute, even although in certain cases they cannot claim contribution (*ante*, p. 92); but provisions and warlike stores have always been considered as an exception to the rule respecting contribution: Brown *v.* Stapyleton, 4 Bing. 119 (13 E. C. L. R.).

4. *As to the mode of adjusting general Average.*—There is a well-known distinction in the case of general average arising from **expenditure*, and that which arises from a *sacrifice* made for the benefit of all. In the case of *expenditure* for the general [*106 benefit, the person making it must be reimbursed, whether the ship and cargo be eventually saved or not: Benecke 251; 2 Arnold, Marine Ins. 802, 3d ed. Where a *sacrifice* has been made of a part of the concern for the benefit of the whole, the property sacrificed is considered as if it had never been lost, and is valued with the rest of the property which is saved, and is made to contribute its share towards making good the average loss occasioned by its sacrifice. Suppose, for instance, a jettison, to be made of property

belonging to A., of the value of 1000*l.*, and that the rest of the property belonging to B. were worth 9000*l.*, there would then be two sources of contribution, viz., the property of A. which had been sacrificed, and the property of B. which had been saved; each would have to make up between them the sum of 1000*l.*; and for that purpose would have to contribute one-tenth of the value of their respective properties, viz., A. in respect of the 1000*l.* would contribute 100*l.*, and B. in respect of the 9000*l.* would contribute 900*l.*; in effect, B. would have to pay A. 900*l.*, and A.'s share of the loss would amount to 100*l.* This is evidently just, for if the goods sacrificed did not contribute, the owner thereof receiving their full value, would suffer no loss by the sacrifice, while the owner of other property would: Boulay Paty Comm. on Emer. vol. 1, p. 632, ed. 1827.

Where however, after a *sacrifice* of part of the property for the general benefit, the rest of the property perishes, there will be no contribution, for there is nothing to contribute from, and nothing to contribute for: 2 Arn. Marine Insur. 802, 803, 3d ed.

It seems that where part of the cargo has been sold for necessary expenses, if they are of a character which a shipowner is bound to defray, he will have to reimburse the owner, whatever may be the result of the voyage; if however the expenses were of an extraordinary character, incurred for the general benefit, and coming strictly within the definition of general average, their sale would be looked upon in the same light as a jettison for the general benefit, and if the whole adventure subsequently perished, no contribution would be due. See 2 Arn. Mar. Insur. 940, 2d ed; see Id. 3d ed. p. 803; Powell *v.* Gudgeon, 5 M. & S. 431.

Where goods are jettisoned, the loss occasioned thereby is ascertained by estimating the net value they would have sold for at their port of destination, deducting freight, duty, and landing expenses: Benecke 289; 2 Arn. Mar. Ins. 800, 3d ed.; Richardson *v.* Nourse, 3 B. & Ald. 239 (5 E. C. L. R.). Where however the ship puts back into the port of departure, and the adjustment takes place there, they will, for the purpose of contribution, be valued at their
*107] cost price, including shipping charges, and premiums of *insurance: Benecke, Pr. of Indem. 289; Tudor *v.* Macomber, 14 Pick. 34.

Where loss has arisen by a sacrifice of a part of a ship, it must

be valued at the cost of the repairs, deducting one-third new for old: 2 Arn. Mar. Ins. 810, 3d ed.

Loss of freight will be estimated at the gross sum which would have been earned by the goods jettisoned or sold: Id. And the expenses of raising money abroad for disbursements, at the amount actually expended, including interest, both ordinary and marine, and the loss incurred by discount and exchange: Id. 111.

The contributory value of the ship is her worth to the owners in the state in which she arrives: 2 Arn. Mar. Ins. 813, 3d ed.; the contributory value of freight is the actual sum finally received as freight by the shipowner, after deducting all the expenses of earning it, as the wages of the master and crew: Id. 815; and see Williams *v.* London Assurance Company, 1 M. & Selw. 318.

Goods contribute on their net actual value, *i. e.* on their market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing: 2 Arn. Mar. Ins. 817, 3d ed.

When a case of general average occurs, if it is settled in a foreign port of destination, or in any other foreign port where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made in case the adjustment had been settled in our own ports: Simonds *v.* White, 2 B. & C. 805 (9 E. C. L. R.); Dalgleish *v.* Davidson, 5 D. & R. 6 (16 E. C. L. R.).

It seems also that the underwriter is in all cases bound by a foreign adjustment of general average when it is regularly settled according to the laws and usages of the foreign port; but unless it be clearly proved to have been settled in strict confirmity with such laws and usages, he is in no case bound thereby, if it would not be general average in this country: 2 Arn. on Mar. Insur. 821, 3d ed.; and see Newman *v.* Cazalet, Park 900, 8th ed.; Walpole *v.* Ewer, Id. 898; Power *v.* Whitmore, Id. 4; M. & Selw. 141.

The sole parties primarily liable to contribution are the owners of the ship, freight, and goods (2 Arn. Mar. Insur. 823, 3d ed.), and the master has a lien on the goods for general average: Scaife *v.* Tobin, 3 B. & Ad. 528 (23 E. C. L. R.), per Lord Tenterden, C. J. Although the Court of Admiralty when called upon to enforce a lien for general average (a lien not depending upon possession), or to adjust the rights which grow out of it, will refuse to interfere,

still when a clear legal right to such lien is proved in the Court of Admiralty to exist, that court cannot dispose of the property without regarding it, and thus in effect decide against it. Cleary *v.* *108] McAndrew, 2 Moo. P. C. C. N. S. *216, where the jurisdiction of the Court of Admiralty to enforce contribution in general average is fully considered.

A mere consignee (not being the owner) of goods receiving them in pursuance of a bill of lading, whereby the shipowner agrees to deliver them to the consignee by name, he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they had become liable to general average: Scaife *v.* Tobin, 3 B. & Ad. 523 (23 E. C. L. R.); and Lord Tenterden said that it might "perhaps be prudent in future to introduce into a bill of lading an express stipulation that the party receiving the goods, shall pay general average:" Id. 528.

If the owner of freight, ship, or cargo, who has sustained an average loss, is insured, he can call upon the underwriters to reimburse him, not the full amount of his contribution, but that proportion of it which the value of his interest as insured bears to its value as estimated for the purposes of contribution: 2 Arn. Mar. Ins. 824, 3d ed.

We may here mention that it seems at one time to have been thought that the Court of Equity had sole jurisdiction in cases of general average contribution: Sheppard *v.* Wright, Show. P. C. 18; the Court of Equity, however, it is clear from the principal case, has only a concurrent jurisdiction; and though in very complicated cases it may be the most convenient tribunal, yet it has been decided that an action at law will lie by one shipper of goods against another: Dobson *v.* Wilson, 3 Camp. 480; or, as in the principal case, by the shipowner against the owners of the cargo (see also Price *v.* Noble, 4 Taunt. 123); or by either the shipper of goods or the shipowner against the underwriter: Milward *v.* Hibbert, 3 Q. B. 120 (43 E. L. C. R.).

"In order to make a case of general average, it is necessary that the ship should be in distress and a part sacrificed to preserve the rest. It is necessary, also, that this sacrifice should be *conducive* to the saving of the rest; and that it should be voluntary; for if the loss is occasioned by the vio-

lence of the tempest, there is no reason for contribution. Nothing can be more equitable than that all should contribute toward the reparation of a loss, which has been the cause of their safety; and nothing more politic, because it encourages the owner to throw away his property without hesitation in time of need. It has been said that there must be a previous consultation, but this may be doubted. Consultation is indeed demonstrative proof that the act was voluntary. But I should think that if it sufficiently appears that the act occasioning the loss was the effect of *judgment*, it is sufficient. For in time of imminent danger, immediate action may be necessary and consultation may be destruction:" Per Tilghman, C. J., Sims *v.* Gurney, 4 Binn. 524; Whitteridge *v.* Morris, 9 Mass. 125; Saltus *v.* The Ocean Ins. Co., 14 Johns. 138; Maggrath *v.* Church, 1 Caines 196; Potter *v.* Providence Wash. Ins. Co., 4 Mason 298; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191; Bevan *v.* Bank of United States, 4 Whart. 301; Rossiter *v.* Chester, 1 Dougl. 154; Lyon *v.* Alvord, 18 Conn. 66; Sturgis *v.* Cary, 2 Curtis C. C. 382; Slater *v.* Hayard Rubber Co., 26 Conn. 128; Dilworth *v.* McKelvy, 30 Missouri 149.

A jettison is not justifiable if made only to prevent harm to the vessel, or to expedite the voyage, or if it is occasioned by the insufficiency of the vessel, or the negligence or incompetency of those employed to navigate her: Bentley *v.* Bustard, 16 B. Mon. 643. No loss or expense is to be considered as general average, and so applied in making up a loss, unless it was intended to save the remaining property, and it succeeded in doing so: Williams *v.* Suffolk Ins. Co., 3 Sumn. 510. If a vessel or cargo takes fire without the fault of the crew, the damage done by the use of water or steam to extinguish it, and by tearing up parts of the vessel to gain access to it, is general average; and it is the same if water is applied by fire engines from the land, or by steam, or by scuttling the vessel: Nimick *v.* Holmes, 1 Casey 366. Although salvage is often in the nature of a general average, it is not universally true that, in the sense of our law, all salvage charges are to be deemed a general average: they are only so when incurred for the benefit of all concerned: Peters *v.* Warren Ins. Co., 1 Story 463.

Where a vessel is voluntarily run on shore to preserve her and her cargo, and is lost, such loss is the subject of general average: Gray *v.* Waln, 2 S. & R. 229; Caze *v.* Richards, Id. 237; Columbian Ins. Co. *v.* Ashby, 13 Peters 331; Merithew *v.* Sampson, 4 Allen 192; Patten *v.* Darling, 1 Clifford C. C. 154. Where a vessel, in inevitable danger of drifting upon a rocky and dangerous part of the coast is voluntarily stranded on a less rocky and dangerous part, whereby the cargo is saved, the cargo must contribute in general average: Barnard *v.* Adams, 10 How. S. C. 270; Rea *v.* Cutler, Sprague 135; Merithew *v.* Sampson, 4 Allen

192. Where a ship is stranded and totally lost, the expense of salvage of the cargo by means of lighters is general average: Heyliger *v.* New York Firemen Ins. Co., 11 Johns. 85. The owners of a ship involuntarily stranded cannot claim a contribution from the owners of the cargo for the destruction of masts and rigging by the master in order to save the ship and cargo and the lives of the crew, as general average, when although the cargo is saved, the ship is finally and totally lost: Marshall *v.* Garner, 6 Barb. S. C. 394. Goods taken from a vessel stranded near her port of destination, placed in lighters and damaged before the lighters reach port, are subjects of general average: Lewis *v.* Williams, 1 Hall 430. Where a vessel, voluntarily stranded to avoid being drawn on a rocky and dangerous part of the coast, is sold and the cargo is taken out, placed in another vessel and carried to the port of destination, the contribution in general average should be assessed on the value of the cargo at the port of destination: Barnard *v.* Adams, 10 How. S. C. 270. Where a vessel is run purposely upon a lee-shore to save the lives of the crew, and it appears that she would have gone ashore at all events, it is not a case of general average: Meech *v.* Robinson, 4 Whart. 360.

Where a ship is compelled to put into a port of necessity, for the preservation of the ship, cargo, and the lives of the crew, the wages and victualling of the crew, from the time of the ship's bearing away for such intermediate port until her departure therefrom, constitute a proper subject of general average: Thornton *v.* United States Ins. Co., 3 Fairf. 150; Walden *v.* Leroy, 2 Caines 262; Henshaw *v.* Marine Ins. Co., Id. 274; Barker *v.* The Phœnix Ins. Co., 8 Johns. 307; Potter *v.* Ocean Ins. Co., 3 Sumn. 27; Wightman *v.* Macadam, 2 Brevard 230; Rogers *v.* Murray, 3 Bosworth 357; The Mary, Sprague 17. The expenses and charges of going to a port of necessity to refit can properly be a general average only when the voyage has been or might be resumed. But it does not apply, if the voyage has been abandoned from necessity: Williams *v.* Suffolk Ins. Co., 3 Sumn. 510. Where a shipper sends to the port of necessity and takes away his goods, he cannot afterwards resist a claim for average on the ground that the goods were not delivered according to contract, there having been no unnecessary delay at the port of necessity: Sherwood *v.* Ruggles, 2 Sandf. S. C. 55. Where a vessel puts into port from necessity during the voyage, and is repaired and afterwards proceeds on her voyage and is totally lost, the insured is entitled to recover the partial loss arising from the repairs and general average consequent thereon, in addition to the total loss: Saltus *v.* Commercial Ins. Co., 10 Johns. 487.

If the captain, after consultation, cut his cables and hoist sail to get to sea, and the vessel notwithstanding is wrecked on the shore, it is not a

case of general average except as to the cables: Walker *v.* United States Ins. Co., 11 S. & R. 61. Where masts and spars, which have been cut away to avoid the destruction of a vessel in distress, and to save the cargo, injure the deck in falling, and destroy rails and bulwarks, or do other damage, the repairs of such damage belong to general average: Patten *v.* Darling, 1 Clifford C. C. 154. If unloading is necessary to the raising of a vessel for repairs, the expense is general average; otherwise, if the cargo was unloaded for its own benefit: Ins. Co. *v.* Fitzhugh, 4 B. Mon. 160.

Where a ship was damaged by tempests, but arrived at her port of destination, and delivered her cargo, but was detained there for repairs, the wages of the master and crew, and provisions on board during such detention, are not general average: Dunham *v.* Commercial Ins. Co., 11 Johns. 315. Repairs made abroad from strict necessity, of no value on the return of the ship, are general average: Brocks *v.* Oriental Ins. Co., 7 Pick. 259. The cutting away of the masts, with the consequent damage, are none the less general average charges, because the vessel was in ballast at the time, and therefore there was neither cargo nor freight to contribute: Greely *v.* Tremont Ins. Co., 9 Cush. 415.

The costs, expenses and counsel fees in relieving a vessel captured and libelled as prize are subjects of general average: Delaware Ins. Co. *v.* Delaunie, 3 Binn. 295; Door *v.* Union Ins. Co., 17 Mass 471. Wages and provisions of a vessel captured and carried in for adjudication are subjects for general average: Leavenworth *v.* Delafield, 1 Caines 573. A sum of money paid by way of compromise to save the cargo from condemnation is not general average: Vandenheuvel *v.* United Ins. Co., 1 Johns. 406.

Everything saved by common expense and labor shall contribute in proportion to its value: Bedford Ins. Co. *v.* Parker, 2 Pick. 1; Maggrath *v.* Church, 1 Caines 196; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456. Where freight is paid in advance, and the vessel is lost, the cargo not delivered nor accepted, so that it does not appear that *pro rata* freight was earned, there is no contribution for freight in general average: Hathaway *v.* The Sun Ins. Co., 8 Bosworth 33. The liability of a cargo to contribute in general average in favor of the ship, does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining: McAndrews *v.* Thatcher, 3 Wallace S. C. 347.

Goods on deck are not the subject of general average, if thrown overboard to save the ship. It is otherwise, however, of the ship's boat: Lenox *v.* United Ins. Co., 3 Johns. Cas. 178; Smith *v.* Wright, 1 Caines 43. See Brown *v.* Cornwall, 1 Root 60; Taunton Copper Co. *v.* Merchants' Ins. Co. 22 Pick. 108; Cram *v.* Aiken, 1 Shepley 229; Sproat *v.* Donnell, 26 Maine 185; Gillett *v.* Ellis, 11 Illinois 579; Harris *v.* Moody,

4 Bosworth 210; Toledo Ins. Co. *v.* Speares, 16 Indiana 52; Harris *v.* Moody, 30 N. Y. 266; Meaher *v.* Lufkin, 21 Texas 383.

The owner of goods chargeable with general average is personally liable for the amount of his contribution, though he has abandoned to the insurer: Delaware Ins. Co. *v.* Delaunie, 3 Binn. 295. See Lapsley *v.* United States Ins. Co., 4 Binn. 502; Faulkner *v.* Augusta Ins. Co., 2 McMullan 158. Where a general average is fairly settled at a foreign port, and the insured is obliged to pay his proportion of it there, he may recover the amount so paid by him from the insurer, though such general average may have been settled differently abroad from what it would have been in the home port: Strong *v.* Firemen Ins. Co., 11 Johns. 323; Depau *v.* Ocean Ins. Co., 5 Cowen 63. See Thornton *v.* United States Ins. Co., 3 Fairf. 150; Peters *v.* Warren Ins. Co., 1 Story 463; Chamberlain *v.* Reed, 1 Shepley 357; Loring *v.* Neptune Ins. Co., 20 Pick. 411; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178. In adjusting the general average, the owners of the vessel contribute according to the value of the vessel at the port of destination and the net amount of her earnings for the voyage. The owners of the cargo saved, contribute according to the value of their property at the port of delivery after deducting the freight due thereon. The property lost must be estimated at the price it would have brought at the port of delivery, the amount of freight thereon deducted, so that each owner will bear his proportional share of the loss: Gillett *v.* Ellis, 11 Illinois 579. There is no maritime lien created by a general average loss, and consequently the admiralty has not jurisdiction *in rem*: Beane *v.* The Mazurka, 2 Curtis C. C. 72. See Dike *v.* The Propeller St. Joseph, 6 McLean 573. In cases of general average, the master and owners may retain all goods of the shippers until their share of the contribution toward the average is either paid or secured: United States *v.* Wilder, 3 Sumn. 308; Gillett *v.* Ellis, 11 Illinois 579. On a general average, interest runs from the time the money was advanced upon which the average arose: Sims *v.* Willing, 8 S. & R. 103.

*WOOLRIDGE *v.* BOYDELL. [*109

Mich. Term, 19 *Geo. III.*, 1778.

[Reported Dougl. 16 a.]

Insurance.—Implied Warranties.]—*If a ship insured for one voyage sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged.*

The ship "Molly" being insured "at and from Maryland to Cadiz," was taken in Chesapeake Bay, in the way to Europe. Upon this, the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at Guidhall before Lord Mansfield, when a verdict was found for the defendant; and a new trial being moved for, the material facts of the case appeared to be as follows: The ship was cleared from Maryland to Falmouth, and a bond given that all the enumerated goods were to be landed in Britain; and all the other goods in the British dominions. An affidavit of the owner stated that the vessel was bound for Falmouth. The bills of lading were "to Falmouth and a market." And there was no evidence that she was destined for Cadiz. The place where she was taken was in the course from Maryland both to Cadiz and Falmouth, before the dividing point. Many circumstances led to the suspicion that she was, in truth, neither designed for Falmouth nor Cadiz, but for the port of Boston, to supply the American army; but there was not sufficient direct evidence of that fact. At the trial, Lord Mansfield told the

jury that if they thought the voyage intended was to Cadiz, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to Cadiz, they must find for the defendant.

The *Solicitor-General*, *Dunning*, and *Davenport*, argued for the new trial.

*110] *They contended that this was like the cases of an intention to deviate where the capture had taken place before the deviation was carried into execution; and they cited *Foster* v. *Wilmer* (H. 19, s. 2), 2 Stra. 1249; *Carter* v. *The Royal Exchange Assurance Company*, cited in *Foster* v. *Wilmer*, and *Rogers* v. *Rogers*, a very late case in this Court. They besides urged, that by "a market" in the bills of lading and in the instructions to the broker (where that expression was used, but which I believe had not been read at the trial), was meant Cadiz. And that "to Falmouth and a market," might be considered as meaning to the market at Cadiz, first touching at Falmouth. (It appeared in evidence at the trial, that the premium to insure a voyage from Maryland to Falmouth, and from thence to Cadiz, would have exceeded greatly what was paid in this case.)

Lee and *Baldwin* showed cause. They argued that here there had been no inception of the voyage insured, and therefore the case was very different from those cited by the counsel for the plaintiff.

Lord Mansfield.—The policy, on the face of it, is from Maryland to Cadiz, and therefore purports to be a direct voyage to Cadiz. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described when the insurance is made, because that would be paying without an

indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described means to give up his policy. But a deviation merely intended, but never carried into effect, is no deviation. In all cases of that sort the *terminus à quo* and *ad quem* were certain and the same. Here, was the voyage intended for Cadiz? There is not sufficient evidence of the design to go to Boston for the Court to go upon. But some of the papers say to Falmouth and a market, and some to Falmouth only. None mention Cadiz, nor was there any person in the ship who ever heard of any intention to go to that port. "A market" is not synonymous to "Cadiz;" that expression might have meant Leghorn, Naples, England, etc. No man, upon the instructions, would have thought of getting the policy filled up to Cadiz. In short, that was never the voyage intended, *and consequently not what the underwriters meant to insure. [*111

WILLES and ASHURST, justices, of the same opinion.

BULLER, J.—I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff, but it does not apply here. This is a question of fact. There cannot be a deviation from what never existed. The weight of evidence is, that the voyage was never designed for Cadiz.

The rule discharged.

DIXON *v.* SADLER.

Exchequer of Pleas. Trinity Term, 2 *Victoria*, 1839.

[Reported 5 Mees. & Welsb. 405.]

To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded, that though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having, at the trial, found a verdict for the defendant, the underwriter, on this issue: Held, on a motion for judgment, non obstante veredicto, *that the plea was bad, and that the underwriters were liable for the consequences of this wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast.*

Assumpsit on a policy of insurance, dated the 22d of January, 1838, on the ship "John Cook," and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all
*112] places, being for the space of *six calendar months. The declaration averred the loss of the ship to have taken place on the 19th of May, 1838, by perils of the sea.

The defendant, pleaded, first, that the vessel was not lost by the perils of the sea; secondly, the following special plea: "That, though true it is that the said vessel was by the perils of the sea wrecked, broken, damaged and injured, and became and was wholly lost to the plaintiffs, for plea nevertheless the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea, as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct [the same not being barratrous[1]] of the master and mariners of the said ship, whilst the said ship was at sea, as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost, as therein mentioned, to wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly [but not barratrously] throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, crank, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured; and by means and in consequence of the said wilful, wrongful, negligent, and improper [but not barratrous] conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured and lost, as in the said first count is mentioned." Verification.

There were other pleas, but the question turned alone on the issue raised by the second plea. The plaintiff replied to it, "that the said wrecking, breaking, damaging, injuring

[1] The words within brackets were inserted in the plea during the argument, at the suggestion of the court.

the said vessel, or the loss of the same by the perils of the sea, as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged," &c.

At the trial before Parke, B., at the last Spring Assizes for Northumberland, it appeared that the plaintiff was a *113] shipowner *residing at Sunderland, and was the owner of the "John Cook," and had effected the policy in question with the defendant, an underwriter at Lloyd's. The vessel left Rotterdam for Sunderland properly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasions. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on, the vessel drifted to the south-east, the ship was upset on her broadside, and her masts lay on the water. Every endeavor was made to right her, but in vain. She afterwards sank off Ryhope, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. It was objected at the trial that this was not a risk which the underwriter had undertaken to indemnify against. The learned judge was of opinion that the word "wilful" in the plea meant that the ballast was knowingly thrown overboard, and in a negligent manner, but said he would reserve that question for the opinion of the Court. And his lordship left two questions to the jury: first, was it negligent conduct to throw the ballast overboard before arriving in harbor?—secondly, did they think the master exercised a reasonable discretion in throwing overboard? They found, as to the first question, that they did think it negligent generally to throw over the ballast;—secondly, that the master did right, supposing the

practice itself authorized him. A verdict was thereupon entered for the defendant on the second issue, the learned judge giving the plaintiff liberty to move to enter a verdict on that issue, if the Court should be of opinion that his construction of the meaning of the word "wilful," as used in the plea was incorrect.

Alexander having, in Easter term last, obtained a rule to enter a verdict accordingly, or for judgment *non obstante veredicto*,—

Cresswell and *S. Temple* showed cause.—The second plea is a good answer to the action, as showing that the vessel was rendered unseaworthy by the act of the master and crew. It must be admitted that there have been cases which show that where a vessel sails in a seaworthy state, but becomes unseaworthy afterwards, the policy attaches, and the assurers are liable; but that law only applies to particular voyages, not to the case of a time policy like the present. It could not apply to a case where the master might set sail again without proper hands [*114 or ballast. No office would insure if that were the law. The owner must not cause the vessel to be put out of repair. [MAULE, B.—What the assured undertakes is, that the vessel shall be seaworthy at the commencement of the voyage.] The case of *Law* v. *Hollingsworth*, 7 Term Rep. 160, decides that it is not enough that a ship sails on a voyage in a seaworthy state; for that voyage she must continue so. There the pilot was dismissed in the port of London, and the vessel after entering it was lost in the Thames; and it was held that the plaintiff could not recover against the underwriter. On the same principle, the assured is prohibited from doing any act that may do harm to the vessel and render her unseaworthy. Suppose a fresh supply of anchors and cables were not obtained in order to make up for articles of that description worn out, would the underwriters be

liable? In *Phillips* v. *Headlam*, 2 B. & Ad. 380 (22 E. C. L. R.), where the underwriters were held liable, the captain had made a signal for a pilot, and used due diligence to get one. That was not a case where the loss arose from the negligence of the master: *Clifford* v. *Hunter*, M. & M. 102 (22 E. C. L. R.), shows that the owners are bound to equip the ship with everything necessary for the voyage; and the ship having sailed in a seaworthy condition, they are bound to keep her so. In *Phillips* v. *Headlam*, Parke, J., says, "The assured is bound to have the vessel seaworthy at the commencement of the risk. He is bound therefore to have a sufficient crew, and a master of competent skill and ability to navigate her at the commencement of the voyage; and if she sails from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. So, if in the course of her voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased." Lord Kenyon, C. J., says, in *Law* v. *Hollingsworth*, "The assured cannot recover on a policy of insurance unless they equip the ship with everything necessary to her navigation during the voyage: the ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot, qualified according to the Act of Parliament referred to." This was not mere negligence; it was an act proceeding from the volition of the captain.

*115] In *Busk* v. *Royal Exchange* *Company, 2 B. & Ald. 73, the underwriters were held liable for a loss by fire occasioned by the negligence of the master and mariners. As far as the master was concerned, the ship there was seaworthy; it was a case of mere negligence by absenting himself from the ship for a few hours. The throwing

over the ballast is not a risk incident to a marine adventure. This was not a mere want of skill, but a voluntary proceeding on the part of the master, to avoid the inconvenience of sending out the ballast in a lighter. It is admitted that mere negligence might not discharge the underwriters; but this was done from volition on the part of the captain, a deliberate exercise of his own will, whereby a loss was occasioned. The word "wilful" does not necessarily mean barratrous. A barratrous throwing overboard means a throwing overboard with a particular object in view. [PARKE, B.—The rule is, that a loss by barratry must be so described.] Yes; if the parties mean to charge barratry, they must so plead it. [It was then suggested by the Court, that in order to avoid this difficulty it would be well to insert in the plea the words "not barratrous," which was accordingly done (see *ante*, p. 112).] They further cited *Hollingsworth* v. *Brodrick*, 7 Ad. & E. 40 (34 E. C. L. R.); 2 N. & P. 608. There is an implied contract to keep the ship in a seaworthy state, which extends to every portion of the voyage.

Alexander and *W. H. Watson*, *contrà*.—The question is, whether this plea is a good answer to the action, and whether the underwriters are discharged in consequence of the negligence of the master and crew. It is submitted that they are not, but that they remain liable notwithstanding. There is no distinction by reason of this being a time policy and not a policy on a particular voyage. Had it been a voyage policy, the owner would clearly be entitled to recover, and would not be affected by the conduct of the master and the crew; and there can be no distinction in principle between the one case and the other. The cases establish distinctly that the owner is not prejudiced by the conduct of the captain and the crew. In *Busk* v. *Royal Exchange Assurance Company*, where, in an action on a policy on ship, by which, among other risks, the underwriters insured against fires and barratry of the master and crew, they were held liable for a

loss by fire occasioned by the negligence of the master and mariners; and it was also held that where the assured had once provided a sufficient crew, the negligent absence of all
*116] the crew at the time of the loss *was no breach of the implied warranty that the ship should be properly manned. That case is identical with the present; the only difference being that the one was negligence in not taking proper care of the fire; the other, misconduct in throwing over the ballast. That decision was much relied on in *Walker* v. *Maitland,* 5 B. & Ald. 171 (7 E. C. L. R.), where it was held that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. There Abbott, C. J., says, "I cannot distinguish this case from that of *Busk* v. *Royal Exchange Assurance Company;* there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here the winds and waves caused the loss; but they would not have produced that effect unless there had been neglect on the part of the crew." And Holroyd, J., says, "The underwriters engage to be responsible for the barratry of the master; they therefore engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and a crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence." So, in *Bishop* v. *Pentland,* 7 B. & C. 219 (14 E. C. L. R.), 1 M. & R. 49 (17 E. C. L. R.), where the vessel was stranded through having an insufficient rope, it was held that the underwriters were liable, although the stranding was occasioned remotely through the negligence of the crew, in not providing a rope of sufficient strength to fasten the vessel to the shore. *Fletcher* v. *Inglis,* 2 B. & Ald. 315, which was the case of a

time policy, was cited, but no such distinction was attempted to be taken as in the present case. Holroyd, J., there says, "It seems to me that in this case there was a stranding within the meaning of the policy. It is clearly established that if there be an actual stranding, although it arise from the negligence of the master and crew, the underwriters are liable. So in *Shore* v. *Bentall*, cited in a note to *Holdsworth* v. *Wise*, 7 B. & C. 798 (14 E. C. L. R.), 1 M. & R. 11 (17 E. C. L. R.), Lord Tenterden said, "We are all of opinion that underwriters are responsible for the misconduct or negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill." The case of *Law* v. *Hollingsworth* has been relied upon, but that stands on a different footing from the present case. It is an implied condition that the owner *shall have a pilot on board whenever necessary, the same as a competent captain and crew. It is very [*117 doubtful on what ground the judgment in that case proceeded. In *Busk* v. *The Royal Exchange Assurance Company*, it was put by counsel that it proceeded on the ground that the ship had not on board the pilot required by the Pilot Act; and that view is adopted by Bayley, J., in giving his judgment in that case (p. 83): it is so treated in Abbott on Shipping 148, and by Lord Tenterden and Parke, J., in giving judgment in *Phillips* v. *Headlam*, *Hollingsworth* v. *Brodrick*, 7 Ad. & E. 40 (34 E. C. L. R.); 2 N. & P. 608 does not apply. [ALDERSON, B.—That was a case where the unseaworthiness was not known to the party; how can that apply to a case where it is the act of the party knowing and wilfully doing the act, even though the word "wilful" is now to be taken in an innocent sense?] In that case, however, the Court disclaimed any distinction between a time policy and any other. In *Eden* v. *Parkinson*, Doug. 732, Lord Mansfield says, "By an implied warranty every ship insured must be tight, staunch, and strong, but it is sufficient if she is so

at the time of sailing. She may cease to be so twenty-four hours after her departure, and yet the underwriters will continue liable." *Bermon* v. *Woodbridge*, Id. 780, is to the same effect. In Park on Insurance 99, it is said, "In the construction of Policies of Insurance for time, which are very frequent, the same liberality, equity, and good sense have always prevailed as in all other insurances." *Hucks* v. *Thornton*, Holt's N. P. C. 30 (3 E. C. L. R.) is another authority that there is no distinction between a time and a voyage policy. It is sufficient in either case that the ship shall be seaworthy at the commencement of the voyage. [ALDERSON, B.—What do you call the commencement of the voyage, sailing from the port?] Yes; sailing from the port. It was so held in *Graham* v. *Barras*, 5 B. & Ad. 1011 (27 E. C. L. R.); 2 N. & M. 125 (28 E. C. L. R.). A ship may be seaworthy for the harbor and not for the voyage. The ballasting being a matter in the conduct of the master, it is within his discretion; and the underwriters are not discharged by the manner in which he may exercise it.

The judgment of the Court was now delivered by

PARKE, B.—In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the *second, for the defendant. *118] This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by the perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for a judgment *non obstante veredicto*, it occurred to the Court

to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration, and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words, "but not barratrously" after the words "negligently and improperly." And the plea therefore in its present shape raises the question whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my brothers, Alderson, Gurney, Maule, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict.

The question depends altogether upon the nature of the implied warranty as to seaworthiness or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an insurance for a *certain voyage*, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk.[1] And, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at

[1] Amen *v.* Woodman, 3 Taunt. 30; Hibbert *v.* Martin, Park on Insurance, vol. i. p. 299, n., 6th ed.

*119] the commencement of each stage *of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall *continue* seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence in an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of *Bush* v. *Royal Exchange Company*, 2 B. & Ald. 72; *Walker* v. *Maitland*, 5 B. & Ald. 171 (7 E. C. L. R.); *Holdsworth* v. *Wise*, 7 B. & C. 791 (14 E. C. L. R.); *Bishop* v. *Portland*, Id. 219; and *Shore* v. *Bentall*, Id. 798, n.; nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the ship unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences.

The only case which appears to be at variance with this principle is that of *Law* v. *Hollingsworth*, in which the fact of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated), appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled

by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions, is, that, *if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect* *or [*120 *misconduct of the master or crew;* and this principle prevents many more and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance.

If the case then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstances of this being a *time policy* makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness or navigation of the vessel, is settled; but it may be safely laid down, that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises on the ground of seaworthiness of the vessel until that unseaworthiness was caused by throwing overboard a part of the ballast, by the improper act of the master and crew; and as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

Rule absolute to enter judgment for the plaintiff, *non obstante veredicto.*

The cases of Woolridge *v.* Boydell and Dixon *v.* Sadler, are printed together because they are generally cited as the leading authorities, when the question arises whether any of the warranties which the law *implies* when policies of maritime insurance have been effected, have or have not been broken.

With regard to *express* warranties, the most usual of which relate to the time of sailing; the safety of the ship at a particular time; her departure with convoy; the neutrality of the property insured; and freedom from liability to be incurred by a seizure in port; it is not intended here to say anything: the reader is referred to the various text-books on the subject. See 2 Arn. on Marine Insurance 550, 3d ed.; Smith's Mercantile Law 369, 7th ed.; Behn *v.* Burness, 3 B. & S. 751 (113 E. C. L. R.).

The warranties usually implied in policies of insurance, and which it is proposed to examine in this note are: 1. Not to deviate. 2. Seaworthiness. 3. That the ship shall be properly documented.

1. *As to the implied Warranty not to deviate.*—Where a vessel is insured from one place to another, *the law implies a warranty on the part of the insured that the vessel shall pursue the regular and usual course from the *terminus à quo* to the *terminus ad quem.* A departure from it, usually termed a deviation, as it *alters* the nature of the risk, will at once discharge the underwriter from all liability.

*121]

The same principle is applicable to other cases where the risk is changed, and the underwriter will consequently be freed from his liability. Thus "if a ship insured for trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her." Per Lord Mansfield, C. J., 3 Doug. 40 (26 E. C. L. R.); and as to the effect of voluntary delay operating as a deviation, see Smith *v.* Surridge, 4 Esp. 26; Williams *v.* Shee, 3 Campb. 469; Samuel *v.* Royal Exchange Company, 8 B. & Cr. 119 (15 E. C. L. R.); Mount *v.* Larkins, 8 Bing. 108 (21 E. C. L. R.); Freeman *v.* Taylor, 8 Bing. 124; Palmer *v.* Marshall, 8 Bing. 79; Pearson *v.* The Commercial Union Assurance Company, 15 C. B. N. S. 304 (109 E. C. L. R.).

It is not material, in order to constitute a deviation, to show that the risk has been increased, it is sufficient to show that it has been

varied: Hartley *v.* Buggin, 3 Doug. 39, 40 (26 E. C. L. R.). And if once a deviation has been made, the underwriter will be discharged from liability for all subsequent loss, even although the vessel may have returned safely after the deviation to the direct course of the voyage, and although the loss may not be in the slightest degree the consequence of the deviation. See Elliot *v.* Wilson, 4 Bro. P. C. 470, Toml. ed.; Clason *v.* Simmonds, 6 Term Rep. 533, cited; Thompson *v.* Hopper, E., B. & E. 1038 (96 E. C. L. R.); 6 E. & B. 172 (88 E. C. L. R.).

The assured, however, may recover for a loss which has taken place *before* the deviation: Green *v.* Young, 2 Salk. 444; Hare *v.* Travis, 7 B. & C. 14 (14 E. C. L. R.).

A deviation, though unintentional, if it be made through the ignorance of the captain, will avoid the policy: Phyn *v.* Royal Exchange Assurance Company, 4 Term Rep. 505, cited.

A mere *intention* to deviate will not discharge the underwriter; in order to have that effect, the deviation must be actual. Suppose, for instance, a vessel leaves a port with the intention of touching at a place out of her course, but is lost before she arrives at the deviating point, the assured can recover on his policy: Kewley *v.* Ryan, 2 H. Black. 343; Thellusson *v.* Fergusson, 1 Doug. 360.

In Kingston *v.* Phelps, cited 7 Term Rep. 165, the vessel was insured from Cork to London. The captain sailed with the intention of touching at Weymouth in his way, but before he had actually deviated for that purpose, a violent storm arose, and he was ultimately driven into the very port of Weymouth. Lord Kenyon held that the underwriter was bound, notwithstanding the intention to deviate, inasmuch as the actual deviation arose *ultimately [*122 from inevitable necessity, and not from choice.

The principal case, of Woolridge *v.* Boydell, shows the distinction which undoubtedly exists between the effect of a mere intention to deviate, and a *change or abandonment of the voyage;* for in the latter case, if there has been a definite intention of changing the *terminus ad quem*, the underwriter will not be liable on the policy, even if a loss should have occurred before the vessel has reached the dividing point between the course mentioned in the policy, and the new course, though, as we have before seen, in the case of a mere intention to deviate, the result would be otherwise. See also Way *v.* Modigliani, 2 Term Rep. 30, 32.

There is often much difficulty in deciding whether there has been a determination to abandon the voyage or merely an intention to deviate. It may, however, be laid down as a general rule that if the *terminus ad quem* is not *definitely* altered, the mere intention of putting into any other port or taking an intermediate voyage, will not amount to a change of voyage: Heselton *v.* Allnut, 1 M. & Selw. 46; Driscol *v.* Passmore, 1 Bos. & P. 200. See also Hall *v.* Brown, 2 Dow, P. C. 367.

A vessel will be considered to have abandoned her course, if she undertake a distinct voyage, not subordinate to, or connected with, the voyage contemplated by the parties as the principal object of the contract: Bottomley *v.* Bovill, 5 B. & C. 210 (11 E. C. L. R.); and see Hamilton *v.* Sheddon, 3 M. & W. 49; and even when a ship is insured "at and from" a particular port to another, if a determination is finally formed by the owners of the ship, or parties duly authorized by them, to proceed to a different port from that mentioned in the policy, the underwriters will be discharged even if a loss has occurred before the vessel sailed from the port where the risk was to commence. See Tasker *v.* Cunninghame, 1 Bligh, P. C. 87.

The mere fact of taking in goods, and clearing out for a different port from that mentioned in the policy, will not be sufficient evidence of an abandonment of the original voyage, for it may have been the intention only to touch at that port and then proceed upon the voyage contemplated, in which case it would amount merely to evidence of an intention to deviate. See Kewley *v.* Ryan, 2 H. Black. 343; Henkle *v.* Royal Exchange Assurance Company, 1 Ves. 317; Planché *v.* Fletcher, Doug. 251.

Although a vessel is insured merely from one port to another, if by the usage of trade it is customary to stop at an intermediate port, the ship, although nothing is said upon the subject in the policy, may go to such intermediate port, without vitiating the policy. Thus, for instance, when a vessel was insured "at and from Stockholm to New York," it was held that it might touch at Elsineur, for convoy, and to pay the Sound dues, that being the regular course
*123] of vessels upon such a voyage: *Cormack *v.* Gladstone, 11 East 347.

As to the custom to make intermediate voyages in the East Indian and Newfoundland trades, see Salvador *v.* Hopkins, 3 Burr.

707; Gregory *v.* Christie, 3 Doug. 419 (26 E. C. L. R.); Valance *v.* Dewar, 1 Campb. 503; Ougier *v.* Jennings, Id. 505 n.; but the usage must be clear, precise, and established, otherwise a stoppage at an intermediate port will be considered a deviation: Salisbury *v.* Townson, Park Ins. 647, 8th ed.

Where the policy gives liberty to touch at any intermediate port, it will be a deviation to touch at any other intermediate port, even although it be customary to call there: Elliot *v.* Wilson, 4 Bro. P. C. 470, Toml. ed.

As to the order in which intermediate ports should be visited, see Glason *v.* Simmonds, 6 Term Rep. 533; Beatson *v.* Haworth, id. 531; Marsden *v.* Reid, 3 East 572; Gairdner *v.* Senhouse, 3 Taunt. 16; Mellish *v.* Andrews, 2 M. & Selw. 27; s. c. 5 Taunt. 96 (1 E. C. L. R.); Bragg *v.* Anderson, 4 Taunt. 229: Lambert *v.* Liddard, 5 Taunt. 480 (1 E. C. L. R.); Ashley *v.* Pratt, 16 Mees. & Wels. 471; 1 Exch. 257.

As to the construction of the clauses giving a liberty "to touch," "to call," to "touch and stay," or "to touch, stay, and trade," and so forth, in cases of deviation, see Levabre *v.* Wilson, 1 Doug. 286; Metcalfe *v.* Parry, 4 Campb. 124; Urquhart *v.* Barnard, 1 Taunt. 54; Hogg *v.* Horner, Park 626, 8th ed.; Ranken *v.* Reeve, Id. 27; Gairdner *v.* Senhouse, 3 Taunt. 16; Viollett *v.* Allnutt, Id. 19; Rucker *v.* Allnutt, 15 East 278; Bragg *v.* Anderson, 4 Taunt. 229; Mellish *v.* Andrews, 2 M. & Sc. 27; 5 Taunt. 496 (1 E. C. L. R.); 16 East 312; Barclay *v.* Stirling, 5 M. & Selw. 6; Ermet *v.* Innes, 4 J. B. Moore 150 (16 E. C. L. R.); Hunter *v.* Heathley, 10 B. & C. 858 (21 E. C. L. R.); s. c. 7 Bing. 517 (20 E. C. L. R.); 5 M. & P. 457; 1 C. & J. 423; s. c. Ll. & Wels. 244; Williams *v.* Shee, 3 Campb. 469; Hammond *v.* Reid, 1 B. & Ald. 72; Solly *v.* Whitmore, 5 B. & Ald. 45 (7 E. C. L. R.); Bottomley *v.* Bovill, 5 B. & C. 210 (11 E. C. L. R.); Hamilton *v.* Sheddon, 3 Mees. & W. 49; Stitt *v.* Wardell, 1 Esp. 10; Sheriff *v.* Potts, 5 Esp. 96; Laroche *v.* Oswin, 12 East 131; Haine *v.* Bell, 9 East 195; Cormack *v.* Gladstone, 11 East 347; Inglis *v.* Vaux, 3 Campb. 437; Warre *v.* Miller, 7 D. & R. 1 (16 E. C. L. R.); 4 B. & C. 538 (10 E. C. L. R.); 1 C. & P. 237 (12 E. C. L. R.); Ashley *v.* Pratt, 16 Mees. & W. 471; 1 Exch. 257; Parker *v.* M'Andrew, 13 W. R. C. P. 779.

If the parties describe in the policy the course to be taken in the

usual terms, both knowing that the vessel has already deviated therefrom, the deviation, it seems, will nevertheless be fatal. Thus in Redman *v.* Lowdon, 5 Taunt. 462, the owner of a vessel bound from London to Berbice, which had deviated by taking in goods at Madeira, insured her, with notice to the underwriter of the circumstances, "at and from London to Berbice," and inserted the words "at sea" in another part of the policy. It was held by the Court of Common Pleas that the assured *could not recover on the *124] policy. "If," says Gibbs, C. J., "the plaintiff meant to insure only from the ship's leaving Madeira, he should have shaped his contract accordingly, and have insured from a certain latitude to Berbice; or, if he meant to include the risk of average loss in the previous part of the voyage, he might have expressed it to be an insurance from London to Berbice, notwithstanding the previous deviation; but since the parties have made the policy in its present form of an insurance on a voyage at and from London to Berbice, the legal requisites of a voyage at and from London to Berbice must be performed in this case, as in any other:" s. c. 1 Marsh. 136; 3 Campb. 503. See, however, and consider Coles *v.* Marine Insurance Company, 3 Wash. C. C. 159.

2. *What will justify a Deviation from the usual course.*—If a vessel departs from the usual course of the voyage from *necessity*, and departs no further than that necessity requires, the voyage will still be protected by the policy: per Kent, C., in Robinson *v.* Marine Insurance Company, 2 Johns. 89; but if the ship insured do not pursue the voyage of necessity in the shortest and most expeditious manner, the underwriter will be discharged: Lavadre *v.* Wilson, Doug. 284, 289, 290.

It has been held that where a ship has been carried out of her course by a ship of the Royal Navy: Scott *v.* Thompson, 1 Bos. & Pul. N. R. 181, or the captain has been compelled to take the vessel out of her course by the mutinous demand of the crew, to which he had no alternative but to submit: Elton *v.* Brogden, 2 Stra. 1264; Driscol *v.* Bovil, 1 Bos. & Pul. 313, it will not amount to such a deviation as will discharge the underwriters.

But nothing short of necessity will justify deviation. Thus, in Phelps *v.* Auldjo, 2 Campb. 350, where the master of a merchantman, while taking in his loading at Iceland, was ordered by the cap-

tain of a king's ship to go out to sea to examine a strange sail discovered in the offing, bearing enemy's colors, and the master, without remonstrating and without any force or threats being employed to influence his determination, obeyed the orders of the captain, and finding the strange sail to be neutral, returned to the port. It was held by Lord Ellenborough, C. J., that the deviation was inexcusable and consequently the policy of insurance was vacated. "Where," said his lordship, "is the *vis major?* The master is not proved to have acted under any duress or compulsion. If a degree of force was exercised towards him which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified. But if he chose to go out in the hope of making a prize, he could not thereby extend the risk of the underwriters. Suppose the ship had been captured when she went out *upon this cruise, were the underwriters to bear the loss? [*125
The purpose might be laudable, and a compensation to the owners would probably have been made by Government; but when the ship engaged in this hostile adventure, the voyage insured was at an end."

Again, if a vessel goes out of her course in order to refit or obtain repairs: Motteux *v.* London Assurance Company, 1 Atk. 545, to get ballast: Guibert *v.* Readshaw, Park 637, to unload part of her cargo: Weir *v.* Aberdeen, 2 B. & Ald. 320; to recruit a disabled crew or procure fresh hands (see 3 Esp. 258); the underwriter, if it were necessary or proper that such steps should be taken, will not be discharged. If however the vessel should stay in a port out of her course for a longer period than was absolutely necessary to enable her to proceed on her voyage: Motteux *v.* London Assurance Company, 1 Atk. 545, or if she was obliged to put into such port in consequence of her having been inadequately equipped or manned in the first instance, the underwriter can take advantage of the deviation: Woolf *v.* Claggett, 3 Esp. 257; Forshaw *v.* Chabert, 3 B. & B. 158 (7 E. C. L. R.); s. c. 6 J. B. Moore 369 (17 E. C. L. R.). But if a vessel be driven off her course by stress of weather, and the captain does all in his power to reach the port of destination: Harrington *v.* Halkeld, Park 639, 8th ed.; or if after he has been driven out of his port he does all in his power to return, and failing to do so, proceeds to the *terminus ad quem:* Delany *v.* Stoddart, 1 Term Rep. 22, the policy will not be vitiated as for a deviation.

It seems that if a vessel is prevented from reaching a port to which she is insured, as, for instance, by an embargo being laid upon all vessels entering, or by the port being inaccessible on account of ice, if she goes as near to the port as she can, and waits with the intention of prosecuting her voyage as soon as she can do so with safety, the underwriters will remain liable; but if she abandons her voyage by returning home, they will be discharged: Blackenhagen *v.* The London Assurance Company, 1 Camp. 454, 456.

Where a captain, on a voyage delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions (although he transmits a letter at the same time), it will not amount to a deviation: Thomas *v.* The Royal Exchange Assurance Company, 1 Price 195.

Again, a ship may go out of her course for the purpose of *bonâ fide* seeking convoy: Gordon *v.* Morley, 2 Stra. 1265; Bond *v.* Gonsales, 2 Salk. 445; Bond *v.* Nutt, Cowp. 601; and it is immaterial whether she be warranted to sail with convoy or not: D'Aguilar *v.* Tobin, Holt N. P. 185 (3 E. C. L. R.); s. c. 2 Marsh. 265 (4 E. C. L. R.); and if a ship warranted to sail with convoy, after she has sailed with convoy, is driven back and sails without it, she will not be held to have made a deviation: Laing *v.* Glover, 5 Taunt. 49 (1 E. C. L. R.). It may however amount to a deviation if a ship instructed to call at a particular port for convoy, goes to another, even though it be nearer, for the risk of the underwriter is thereby varied: Heselton *v.* Allnutt, 1 M. & Selw. 45, 50.

It seems that an underwriter would not be discharged by a captain going out of his course to succor a ship at sea in distress; for it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress: see Lawrence *v.* Sydebotham, 6 East 54, 55; The Beaver, 3 C. Rob. Adm. Rep. 294; The Jane, 2 Hagg. Adm. Rep. 345. The question, however, how far a deviation in a vessel's course, in the performance of salvage services to life or property, may be the voidance of a policy of insurance, is not satisfactorily settled, though the risk of such may operate on the judge's mind in determining the amount to be awarded for salvage services: Kirby *v.* The Owners of the Scindia, 1 Law Rep. P. C. 241.

If a departure from the course of the voyage be rendered necessary by the exercise of an overpowering force, although it be not

of a character insured against, it will not be such a deviation as to discharge the underwriter. Thus, in Scott *v.* Thompson, 1 Bos. & Pul. N. R. 181, a policy was effected on goods on board a ship "at and from Liverpool to Amsterdam, *against sea-risk and fire only.*" In the course of the voyage to Amsterdam she was boarded by a vessel of the Royal Navy and carried into Falmouth, where she was detained for some days. Upon being released, she proceeded towards Amsterdam, and on her voyage the goods insured sustained a sea-damage. It was held by the Court of Common Pleas that the underwriters were liable for the loss. "Nothing is more clear," said Sir J. Mansfield, C. J., "than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to Falmouth has been called) having been voluntary. The ship was carried there by force, and without any consent of those who had the management of the ship. Deviation occasioned by force and deviation occasioned by necessity are the same, for necessity is force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable, it has no effect on the obligation of the insurer. . . . Considering this case, therefore, and the other cases which have been decided, I do not find anything like a real distinction between the present insurance and an ordinary insurance, including all the risks which are inserted in the policies in general." See however and consider O'Reilly *v.* Gonne, 4 Campb. 249; O'Reilly *v.* Royal Exchange Assurance Company, Id. 246.

*3. *As to the implied Warranty of Seaworthiness.*—In the case of an insurance for a certain voyage, or as it is [*127 generally termed, a voyage policy, there is, as is laid down in the principal case of Dixon *v.* Sadler, an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it: *ante*, p. 107; Foley *v.* Tabor, 2 F. & F. 663; see also Douglas *v.* Scougall, 4 Dow 276; Wilkie *v.* Geddes, 3 Dow 60. If a vessel be not so seaworthy, from whatever cause it may arise,

and though no fraud was intended on the part of the assured: Wedderburn *v.* Bell, 1 Campb. 1, and even although the owner of the ship may have had surveyed, and, as he may have thought, fully repaired, the underwriter will not be liable: Douglas *v.* Scougall, 4 Dow 276; Lee *v.* Beach, Park 468, 8th ed.

The warranty of seaworthiness will be implied whether the insurance be effected by the owner of the vessel or the owner of the goods carried by her: Lee *v.* Beach, Park 468, 8th ed.; Oliver *v.* Cowley, Id. 470.

The degree of seaworthiness of a vessel implied by the law, must be such as to fit her for going through the various risks to which she may be subjected in different stages either of her voyage, or before undertaking it, if she be then insured. This is well laid down by Parke, B., in the principal case of Dixon *v.* Sadler, who observes, that "if the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk, and if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it." P. 118, *ante.* Take, for instance, the case of a policy on a ship "at and from London on a whaling voyage to the north, the warranty is for four gradations; that the vessel is fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; and then fit for whaling." Per Erle, J., 6 E. & B. 181 (88 E. C. L. R.). See also Annen *v.* Woodman, 5 Taunt. 299; Knill *v.* Hooper, 2 H. & N. 277; Biccard *v.* Shepherd, 14 M. P. C. C. 471; Bouillon *v.* Lupton, 15 C. B. N. S. 113 (109 E. C. L. R.); Koebel *v.* Saunders, 17 C. B. N. S. 71, 77, 78 (112 E. C. L. R.).

It seems that though a vessel at the outset of her voyage be by mistake or accident unseaworthy, if it be owing to some defect which is immediately discovered, and which with the consent of the underwriters is remedied before any loss happens in consequence of it, and a loss attributable to another cause afterwards takes place, the policy will not be void, and the underwriters will remain liable.

*128] See Weir *v.* Aberdeen, 2 *B. & Ald. 320; there a vessel, insured at and from London to Bahia, sailed on her voyage in an unseaworthy state in consequence of her having a greater cargo

than she could safely carry. The master put into Ramsgate harbor, and there, with the consent of the underwriters stated in a memorandum on the policy, discharged part of the cargo. The vessel afterwards left Ramsgate on her voyage, being then properly laden and in a seaworthy state. It was held by the Court of King's Bench that the underwriters were liable for a subsequent loss not in any degree attributable to the circumstance of her being overladen between London and Ramsgate.

The implied warranty will be satisfied if the vessel be seaworthy when she originally sails on her voyage, nor is it necessary that she should be seaworthy upon sailing on her voyage homeward or from any intermediate port. Thus, in Bermon *v.* Woodbridge, Doug. 781, a vessel was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo and at and from St. Domingo back to Honfleur." The vessel was seaworthy when she first started on her voyage. Lord Mansfield, C. J., said, "By an implied warranty, every ship must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage; so that if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable, though she had not been so at Angola, etc." See also Holdsworth *v.* Wise, 7 B. & C. 794 (14 E. C. L. R.); Redman *v.* Wilson, 14 Mees. & W. 476. The warranty of seaworthiness must be taken to be limited to the capacity of the vessel, and will therefore be satisfied if, at the commencement of the risk the vessel be made as seaworthy as she was capable of being made; though it might not make her as fit for the voyage as would have been usual and proper if the adventure had been that of sending out an ordinary sea-going vessel: Burges *v.* Wickham, 3 B. & S. 669 (113 E. C. L. R.); Clapham *v.* Langton, 5 B. & S. 729 (117 E. C. L. R.).

It may here be mentioned, that as between a shipowner and the owner of cargo, if a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by the perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in an unseaworthy condition, and a loss of cargo in consequence of his doing so will be a good cause of action: Worms *v.* Storey, 11 Exch. 427; and see De Cuadra *v.* Swann, 16 C. B. N. S. 772, 795 (111 E. C. L. R.).

If the master or crew are originally competent, their subsequent negligence or misconduct is no defence to an action on the policy. See Busk *v.* Royal Exchange Company, 2 B. & Ald. 72; Walker *v.* Maitland, 5 B. & Ald. 171 (7 E. C. L. R.); Holdsworth *v.* Wise, *129] 7 B. & C. 794 (14 E. C. L. R.); *Bishop *v.* Pentland, Id. 219; Shore *v.* Bentall, Id. 798, n.; Parfitt *v.* Thompson, 13 M. & W. 392; Redman *v.* Wilson, 14 M. & W. 476; Phillips *v.* Nairne, 4 C. B. 343 (56 E. L. C. R.); Biccard *v.* Shepperd, 14 Moo. P. C. C. 471. The principal case of Dixon *v.* Sadler, 5 M. & W. 405; affirmed in error, 8 M. & W. 895.

The case of Law *v.* Hollingsworth, 7 Term. Rep. 160 (although, as we shall hereafter see, it has been supposed to have been decided upon other grounds), is contrary to these authorities. The facts were shortly as follows: a vessel was insured from Stetten to London; the captain took a pilot on board at Orfordness, but allowed him to quit the vessel at Halfway Reach; after which and before she had come to her moorings higher up the river, the accident happened which occasioned the loss. It was held by the Court of King's Bench that the underwriters were not liable, inasmuch as the ship was not seaworthy at the time of the loss for the want of a pilot, owing to the neglect of duty on the part of the captain.

When the principal case of Sadler *v.* Dixon was heard upon appeal and affirmed in the Exchequer Chamber, Tindal, C. J., in delivering the judgment of the court with reference to the case of Law *v.* Hollingsworth, said, "The ground of decision in that case appears to have been, that there was no pilot on board during the time the ship was sailing up the river Thames, which was required by the statute 5 Geo. II., and that it was an implied contract on the part of the assured that there should be such person. This at least appears to be the ground of Lord Kenyon's judgment, although certainly the other two judges seem to have considered that it was a loss arising from an act of gross negligence. The decision of that case may be maintainable, on the ground of an implied warranty to observe the positive requisitions of an Act of Parliament; but if it is to be taken as an authority, that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew, throughout the voyage, we think it cannot be supported against the weight of the latter authorities:" 8 M. & W. 900.

In fact, as is laid down in the principal case of Dixon *v.* Sadler, "The great principle established by the more recent decisions, is that if the vessel, crew, and equipments be *originally* sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew." *Ante*, p. 119.

It may here be mentioned, that there is an implied condition or warranty of seaworthiness in a voyage-policy of insurance on salvage. Thus where the interest of salvors in a ship and cargo were insured on a voyage from Terceira to a final port of discharge in the United Kingdom, by a policy containing these words, "The vessel having been abandoned by her original crew and taken into Terceira *by the salvors, in whose interest the said assurance was effected." It was held by the Court of Exchequer that [*130 the policy was liable to an implied condition of seaworthiness: Knill *v.* Hooper, 2 Hurlst. & N. 277.

The law, however, does not imply any warranty of seaworthiness from the relation of shipowner and seaman. Thus in Couch *v.* Steel, 3 E. & B. 402 (57 E. C. L. R.), being an action by a seaman against the shipowner, it was alleged in the first count that the plaintiff engaged with the defendant to serve on board the defendant's (a British) vessel as a common seaman, on a specified voyage from and to a British port. The breach alleged was that the vessel was leaky and unseaworthy, by which the plaintiff became unwell and sustained damage. It was held by the Court of Queen's Bench, on demurrer, that the count was bad, there being no allegation of knowledge or deceit nor of any express warranty that the vessel was seaworthy. "The plaintiff," said Coleridge, J., "must rely on a general principle, that in all such cases there is an implied contract that the vessel is seaworthy. I think it enough to say that we are now giving judgment in the year 1853, and that no such action as this has ever been maintained, though, if there were such a contract implied, there must have been numerous instances in which the facts would have supported such an action. The only authority relied on were the *dicta* in Gibson *v.* Small, 4 H. L. Cas. 370, 404; but these were used with reference to the law of marine insurance; and that is a branch of the law having no analogy to that of the law of contract between shipowner and sailor. There are many doctrines which prevail in that contract, *uberrimæ fidei*, between in-

surer and assured, which have no place in any other branch of the law. This is in truth a contract between master and servant, and is to be decided on the principles applicable to that relation."

We have therefore confined our attention to *voyage-policies* in cases of unseaworthiness; with regard to *time-policies*, the important case of Gibson *v.* Small, 4 H. L. Cas. 353, has decided that by the law of England there is no implied warranty, when a time-policy has been effected on a vessel *then abroad*, that she should be seaworthy when the policy was intended to attach. This does not in any way overrule anything laid down by the learned judge who delivered the judgment in the principal case of Dixon *v.* Sadler; on the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled, and it decided merely that the implied warranty on a time-policy was at least not more extensive than that in a policy on a voyage; and that, if there was no contract for the conduct of the crew in one case, there was none in the other. See 16 Q. B. 154 (71 E. C. L. R.). In Gibson *v.* Small, 4 H. L. Cas. 353, a policy of insurance was effected in London, on the 27th of November,
*131] *1843, on a ship then abroad, "lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." It was held by the House of Lords (affirming the decision of the Court of Exchequer Chamber, reported 16 Q. B. 141 (71 E. C. L. R.), reversing the judgment of the Court of Queen's Bench), that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach. "With regard to *voyage-policies*," said Lord Campbell, C. J., "we have usage and authority establishing the implied condition as certainly as any point of insurance-law. These being wanting as to the extension of the doctrine to *time-policies*, the reasoning must be, that as far as this condition is concerned, the contract by time-policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage-policies, from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin; that this state must be supposed to be known to the shipowner; that he has it in his power to put the ship into good repair before the voyage begins; that to

prevent fraud, and to gaurd the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss; and above all, that this implied condition in voyage-policies is essentially conducive to the object of marine insurance, by enabling the shipowner, on payment of an adequate premium, and acting with honesty and securing reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured; but time-policies are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under these circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void; but is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time-policies, their object might often be defeated, and the shipowner, acting with all diligence and with the most perfect good faith, might altogether lose the indemnity for which he had bargained." See also Michael *v.* Tredwin, 17 C. B. 551 (84 E. C. L. R.).

*Extrajudicial but conflicting opinions were also given in Gibson *v.* Small, both by the judges and the peers, as to the [*132 question whether, in certain other cases, a warranty of seaworthiness might not be implied in time-policies; as, for instance, where a ship is about to sail from a given port on a voyage, or from the commencement of every voyage undertaken during the time for which the insurance is effected. And Lord St. Leonards expressed his opinion clearly to be, that "if a ship were about to sail upon a particular voyage, and a time-policy was effected instead of a policy on the intended voyage, a condition would be implied that the ship was seaworthy at the commencement of the voyage:" 4 H. L. Cas. 417. Lord Campbell, however, agreed with those of the judges who thought that in a time-policy "*there is no implied condition whatever* as to seaworthiness." "I never for a moment," said his Lord-

ship, "could concur in the notion that there was an implied warranty that the ship was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and being wholly unsanctioned by usage or by judicial authority, would be legislating instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where ships are employed for years in trading in distant regions from port to port (the instances in which time-policies are chiefly resorted to), there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit. I have hesitated more upon the question *whether, when a time-policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied.* This might be an exception from the general rule, that in time-policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time-policy, and that the general rule is against such a condition, this would be a gratuitous and judge-made exception to the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time-policies. There is a broad distinction which may always be observed between time-policies and voyage-policies; but when you come to subdivide time-policies into such where the ship is in a British port and where the ship is abroad, and still more, if the
*133] residence of the shipowner is to be inquired *into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial, as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, that it should be understood, according to my present impression of the

law, *that there is in all voyage-policies, but that there is not in any time-policies framed in the usual terms, a condition of seaworthiness implied.* This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be easily provided for by express stipulation:" 4 H. L. Cas. 422.

See also Thompson *v.* Hopper, E., B. & E. 1038 (96 E. C. L. R.), (reversing s. c., 6 E. & B. 172 (88 E. C. L. R)); Fawcus *v.* Sarsfield, 6 E. & B. 202, in the Queen's Bench, Erle, J., *dissentiente;* and see Jenkins *v.* Heycock, 8 Moore, P. C. C. 351; Michael *v.* Tredwin, 17 C. B. 551 (84 E. C. L. R.); Biccard *v.* Shepherd, 14 Moo. P. C. C. 471.

Where, however, a vessel insured by a time policy is sent to sea in a state not fit for the particular voyage, and, without encountering any more than ordinary risk, is obliged, owing to the defective state in which she sailed, to put into port for repair, the shipowner, though the defects were not known to him, and he has acted without fraud, cannot recover against the underwriters the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there was no warranty of seaworthiness: Fawcus *v.* Sarsfield, 6 E. & B. 192 (88 E. C. L. R.).

So if a ship insured in a time-policy, is knowingly sent to sea by the assured in an unseaworthy state, and is lost by means of the unseaworthiness, the assured ought not to be allowed to recover on the policy: per Cockburn, C. J., in Thompson *v.* Hopper, E. B. & E. 1054 (96 E. C. L. R.); and in order to constitute a defence in an action on such a policy, it is not necessary that the unseaworthiness should have been the proximate and immediate cause of the loss, provided it can be shown to have been so connected with the loss as that it must necessarily have led to it: Id.

It is difficult to lay down what amounts to seaworthiness; it may perhaps be defined with sufficient accuracy, by saying that the ship ought to be in such a state of repair and equipment as will render her suitable for the voyage she is about to undertake. A want of seaworthiness may arise, either, first, from defects in the vessel itself; or, secondly, from the deficiency or incompetency of the master and crew.

A ship will be considered as unseaworthy not only when her hull (Munro *v.* Vandam, Park on Insurance 469, 8th ed.; Parker *v.*

*134] Potts, 3 Dow 27; Watt *v.* Morris, 1 Dow *32; Douglas *v.* Scougall, 4 Dow 269), masts, or sails (Wedderburn *v.* Bell, 1 Campb. 1), are not such as are suitable for her destined voyage, that is to say, well furnished, tight, sound, and strong; but also when her ground-tackling is not sufficient to encounter the ordinary perils of the sea; and therefore when it appeared that the best bower-anchor was too light and the cable of the small bower-anchor wholly defective, it was held that the vessel was not seaworthy: Wilkie *v.* Geddes, 3 Dow 57; see also Harrison *v.* Douglas, 3 Ad. & E. 396 (30 E. C. L. R.). So also the vessel will not be seaworthy if she have not sufficient stores and supplies, or even sufficient medicines for the voyage (Woolf *v.* Claggett, 3 Esp. 257; and see Stewart *v.* Wilson, 12 M. & W. 11), or if she be so heavily or so improperly laden as to be unable to encounter the voyage: Weir *v.* Aberdeen, 2 B. & Ald. 320.

The ship will not be considered seaworthy unless a master of reasonably competent skill is provided. Thus, in Tait *v.* Levi, 14 East 481, a ship was insured at and from Cork to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean. The captain, through entire ignorance of the coast, went to Barcelona, an enemy's port, which is higher up than Tarragona. It was held by the Court of King's Bench that there was a failure of the implied warranty on the part of the assured, that a captain of competent skill and knowledge for the declared purpose of the voyage should be provided. "On my present view of the case," said Le Blanc, J., "there appears to me to have been an incompetent fitting out of the ship with a proper master for the purpose of the voyage insured. The ship was to be fitted out in an adequate manner to secure her from going higher up the Mediterranean than Tarragona, according to the express intention of the parties: the owners should therefore have put on board a captain of sufficient skill to distinguish the port of Tarragona from the neighboring ports on the coast; and if, from his not knowing one port from another, he goes into an enemy's port instead of the port of Tarragona, which it was his duty to distinguish under this policy, there appears to me to be a want of sufficient skill in the captain and crew for the purpose of the voyage insured."

It has even been decided that a ship was not seaworthy when she

had sailed on a voyage from Mauritius to England without a person on board able to do the duties of the captain, on his becoming so ill as to be incompetent to continue in charge of the ship: Clifford *v.* Hunter, 1 M. & M. 103 (22 E. C. L. R.); s. c. 3 C. & P. 16 (14 E. C. L. R.).

The ship will not be seaworthy unless she is provided with a crew competent, in point of numbers and skill, to perform (Shore *v.* Bentall, 7 B. & C. 798 (14 E. C. L. R.)) and engaged for (Forshaw *v.* Chabert, 3 B. *& B. 158 (7 E. C. L. R.)) the whole voyage insured. The implied warranty will, as we shall [*135 elsewhere see, be satisfied if the crew be originally sufficient. See also and consider Hucks *v.* Thornton, Holt's N. P. Rep. 30 (3 E. C. L. R.).

If a ship sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the vessel will not be seaworthy unless the master take a pilot on board (see Phillips *v.* Headlam, 2 B. & Ad. 383 (23 E. C. L. R.)); and according to the decision of Law *v.* Hollingsworth, 7 Term Rep. 160 (if it is still to be considered an authority, see *ante*, p. 129), if in the course of the voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased.

But if a vessel sails to a port where the establishment is such that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that it can reasonably require in such a case is, that the master use all reasonable efforts to obtain one. If such efforts are used and fail of success, it is not material that in the exercise of his discretion in the navigation of the ship, in the absence of a pilot, the master afterwards commits an error by which a loss is incurred, any more than if he does so in any other part of the voyage, always supposing that he is a person of competent skill and ability: Phillips *v.* Headlam, 2 B. & Ad. 380, 384 (22 E. C. L. R.).

Ordinarily the proof of want of seaworthiness falls upon the underwriter, inasmuch as *primâ facie* a ship will be deemed seaworthy (Parker *v.* Potts, 3 Dow 31, per Lord Eldon, C.); but where the inability of the ship to perform the voyage becomes evident in a short time from the commencement of the risk, the presumption is

that it was from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy; and the *onus probandi* in such a case rests with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. Per Eldon, C., in Watson *v.* Clark, 1 Dow Rep. 336; and see Munro *v.* Vandam, Park on Ins. 469, 8th ed.; Parker *v.* Potts, 3 Dow 23; Douglas *v.* Scougall, 4 Dow 269.

Seaworthiness is a question peculiarly for the determination of a jury: Foster *v.* Steele, 3 Bing. N. C. 892 (32 E. C. L. R.); Foster *v.* Alvez, Id. 896. As to the best evidence to be given of seaworthiness, see Thornton *v.* Royal Exchange Company, Peake 25; Beckwith *v.* Sydebotham, 1 Camp. 116; Burgess *v.* Wickham, 3 B. & S. 669 (113 E. C. L. R.).

It may be here mentioned that the implied warranty of seaworthiness may be dispensed with, by the underwriters admitting the seaworthiness of the vessel insured, as when the policy contains a clause by which the vessel was "allowed to be seaworthy for the
*136] voyage:" Parfitt *v.* Thompson, 13 M. & *W. 392; Phillips *v.* Nairne, 4 C. B. 343 (56 E. C. L. R.).

The warranty of seaworthiness which is implied as to the ship in an ordinary policy of marine assurance does not extend to lighters employed to land the cargo. Therefore where there was a declaration on an ordinary policy on goods from Liverpool to Melbourne, "including all risk to and from ship," the policy to endure until the goods should be discharged and safely landed at Melbourne, alleging damage by perils insured against, it was held that a plea that the damage happened after the goods had been discharged from the ship and while they were in a lighter for the purpose of being conveyed to the shore, and that the lighter was not seaworthy for the purpose, and that the damage was caused solely by such unseaworthiness, afforded no defence to the action: Lane *v.* Dixon, 1 Law Rep. C. P. 412.

4. *Implied Warranty that the Ship shall be properly documented.* —Another implied warranty on the part of the owner of a ship insured, is that it shall be provided with those documents which either the general law of nations or treaties with particular nations require. Thus, in Bell *v.* Carstairs, 14 East 375, a policy of insurance was effected by the plaintiffs, as agents for American citizens, on an

American ship and her cargo, but no express warranty or representation was made that the ship or cargo were Americans. The Americans were then neutrals. The ship and cargo were captured by a French ship, and condemned in a French court as prize, upon the express ground, stated in the sentence of condemnation, that the ship was not properly documented according to the existing treaty between France and the United States of America. It was held by the Court of King's Bench that the neutrals assured could not recover their loss against the British underwriter, although there was no express warranty or representation that the ship was American. "If," said Lord Ellenborough, C. J., "the condemnation has been occasioned by any act or neglect on the part of the assured, it would not be a loss against which the assurer would, upon any principle of reason or justice, as applied to this species of contract, be required to indemnify him. The indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect *on the part of the assured himself*, producing the loss of the property insured. . . . In a policy *on ship* (and this, whether there is a warranty or representation respecting the nation to which a ship belongs or not), as the shipowner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect of such nations; the want of them in the event of capture, and when the production of them becomes necessary, is most material."

*Although where there is an *express* warranty of the ship's national character, the underwriters will be discharged if [*137 the ship be not properly documented at the time of sailing (Rich *v.* Parker, 7 Term Rep. 705), in the case of a mere implied warranty, the existence of the proper documents on board at the *commencement* of the voyage is immaterial, if they are produced at the time of capture: Bell *v.* Carstairs, 14 East 393, 394.

In determining whether a ship has been condemned by a foreign court for want of proper papers, the court will look into the alleged grounds of the foreign sentence as well as at the sentence itself (see Bell *v.* Carstairs, 14 East 374, 392, 394), and not, as in Christie *v.* Secretan, 8 Term Rep. 194, confine itself strictly to the sentence.

There is no implied warranty on the part of *the owner of goods* that a ship shall be properly documented (Carruthers *v.* Gray, 3

Campb. 142; 15 East 35; Dawson *v.* Atty, 7 East 367), for the owner of goods, it has been said, is not liable to suffer in respect of his insurance, on account of any defect in the documents belonging to the ship, with the procurement or existence of which he had no concern. Per Lord Ellenborough, C. J., in Bell *v.* Carstairs, 14 East 394. A similar argument might be used against a warranty of seaworthiness being implied on the part of the owner of goods, but, as we have before seen, such implied warranty is fully established, *ante* 127.

Where, however, the owner of the goods insured is also owner of the ship, the warranty will be implied, so as to discharge the underwriters from all loss on account of the goods, if the vessel be not properly documented: Bell *v.* Carstairs, 14 East 374.

The implied warranty that a ship shall be properly documented, will be satisfied if the ship have on board such documents as are required, either by general international law, or by treaty between her own country and that of any other ship by which she may be captured. If therefore a ship has been condemned for a mere breach of a private ordinance of another country, the underwriters will not be discharged: Price *v.* Bell, 1 East 663; and see Bell *v.* Bromfield, 15 East 368, per Bayley, J.

A register is not a document required by the law of nations as evidence of a ship's national character; unless therefore the possession of one can be shown to be required by some treaty between the country of the captured ship and of the captors, the underwriters will not be discharged from their liability: Le Cheminant *v.* Allnutt, 4 Taunt. 367.

When a ship carries simulated papers without the consent of the underwriters, the owner cannot recover from them upon a loss by capture (Horneyer *v.* Lushington, 15 East 46; 3 Campb. 85; Fomin *v.* Oswell, 3 Campb. 357; 1 M. & Selw. 393), even though it appear, by the sentence of the foreign prize court, that one only of the causes
*138] stated for the condemnation was *the carrying of the simulated papers: Oswell *v.* Vigne, 15 East 70; see also Steel *v.* Lacy, 3 Taunt. 285.

Where, however, by the terms of the policy, the assured has liberty to carry simulated papers, the underwriters will not be discharged from the loss, if the sentence of the condemnation of the ship appears to have been on account of her carrying simulated

papers; or if that circumstance, mixed up with other considerations, operated in proportion at all as the ground of the condemnation. Per Lord Ellenborough, C. J., in Bell *v.* Bromfield, 15 East 369.

In every contract of insurance there is an implied warranty that the vessel is seaworthy; if she be not so, the contract is void, and the premium is to be returned: Porter *v.* Bussey, 1 Mass. 435; Starbuck *v.* New England Ins. Co., 19 Pick. 198; Talcot *v.* Commercial Ins. Co., 2 Johns. 124; Talcot *v.* Marine Ins. Co., Id. 130; American Ins. Co. *v.* Ogden, 15 Wend. 532; Warren *v.* United Ins. Co., 2 Johns. Cas. 231; M'Lanahan *v.* Universal Ins. Co., 1 Peters 183; Hudson *v.* Williamson, 3 Brevard 342; Commonwealth Ins. Co. *v.* Whitney, 1 Metc. 11. The implied warranty of seaworthiness extends to the machinery of a steamer: Myers *v.* Girard Ins. Co., 2 Casey 192. The ship must have a crew adequate to man and sail her, and a competent master: Draper *v.* Commercial Ins. Co., 4 Duer (N. Y.) 234; s. c. 21 N. Y. 378; The Gentleman, Alcott Adm. 110; but need not have a ship's carpenter on board: Walsh *v.* Washington Ins. Co., 3 Robertson 202. It is sufficient on a question of seaworthiness, if the vessel was fit to perform the voyage insured as to ordinary perils; the underwriters are bound as to extraordinary perils: Watson *v.* Ins Co. of North America, 2 Wash. C. C. 480.

The law implies no warranty of seaworthiness except at the commencement of the voyage. Therefore where a vessel which has received damage from a peril insured against, puts into port to repair, the captain or agent who superintends the repairs is only bound to use due diligence. It is not necessary that the vessel should at all events be so repaired as to render her seaworthy: Peters *v.* Phœnix Ins. Co., 3 S. & R. 25. "When a ship which has received damage puts into port to repair, the captain or agent who superintends the repairs is bound to use due diligence. But it may be impossible to make a complete repair, either for want of materials or of skilful workmen or of accommodations for heaving the ship down in order to make a thorough search. * * *. The law implies no warranty of seaworthiness except at the commencement of the voyage. To say therefore that a ship which has suffered damage by a peril insured against, must at all events be so repaired at the port she puts into, as to render her seaworthy, is to add to the contract a condition not contained in it:" Id., per Tilghman, C. J.; Donnell *v.* Ins. Co. 2 Sumn. 366; Miller *v.* Russell, 1 Bay 309; Martin *v.* Fishing Ins. Co., 20 Pick. 389; Copeland *v.* New England Ins. Co., 2 Metc. 432; Starbuck *v.* New England Ins. Co., 19

Pick. 198. Under a policy on unlimited time, the insurer is discharged if the vessel becomes unseaworthy: Cleveland *v.* Union Ins. Co., 8 Mass. 308. "It was the duty of the assured to keep the vessel tight, staunch, and strong; and if she should become unfit from a want of seaworthiness, to commence and perform any voyage she might undertake, the underwriters would be discharged:" Id., per Sedgwick, J.; Hoxie *v.* Home Ins. Co., 32 Conn. 21. In the insurance of a vessel on time the warranty of seaworthiness is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk, and her being subsequently injured and not properly refitted at an intermediate port, does not discharge the insurer from subsequent loss, not occasioned by the omission: American Ins. Co. *v.* Ogden, 20 Wend. 287; Hathaway *v.* Sun Ins. Co., 8 Bosworth 33. In the case of Jones *v.* The Ins. Co., 2 Wallace, Jr. (C. C.) 278, Mr. Justice Grier followed the decision in Small *v.* Gibson, 4 H. L. 353. "The opinion of Baron Parke, which had the concurrence of the whole court, contains a full review of all the cases and arguments bearing on the subject. This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question and shall therefore content myself by referring to that case, where the arguments on both sides of the question have been exhausted by the counsel and the court. It is true this case does not decide that there is no warranty of seaworthiness at all, in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea, that she was not seaworthy when the voyage commenced. It may be true also that there is in a time policy, a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must set forth such facts and circumstances, as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition and so continued till the time of her loss; or that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to have been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship:" per Grier, J.

It is the duty of the insured to keep the vessel seaworthy while the risk attaches, if he can do so; and it seems the insurer will not be liable for a loss occasioned by an unreasonable neglect to keep her seaworthy: Paddock *v.* Franklin Ins. Co., 11 Pick. 227; see Gazzam *v.* Cincinnati Ins.

Ins. Co., 6 Ham. 71; Copeland *v.* New England Ins. Co., 2 Metc. 432; Peters *v.* Phœnix Ins. Co., 3 S. & R. 25; Merchants Ins. Co. *v.* Sweat, 6 Wisc. 670. Where the captain is the owner of a vessel insured, and the vessel becomes unseaworthy during the voyage and he neglects on reaching a port to have proper repairs made, and by reason of such neglect the vessel is afterwards lost on the voyage, the insurers are not responsible: Cudworth *v.* South Carolina Ins. Co., 4 Richardson (Law) 416. A vessel becoming unseaworthy during her voyage, is not a breach of the implied warranty; and of a neglect to keep her seaworthy, the insurer can take advantage only when a loss occurs therefrom: Starbuck *v.* New England Ins. Co., 19 Pick. 198. Overloading is not a breach of the implied warranty of seaworthiness, when the alleged unseaworthiness has supervened during the progress of the voyage, and after the policy has already attached: Merchants Ins. Co. *v.* Butler, 20 Md. 41. If the ship is seaworthy at the time of sailing it is not necessary that she be so at the inception of the risk: Taylor *v.* Lowell, 3 Mass. 331; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Paddock *v.* Franklin Ins. Co., Id. 227. On a policy "at and from" the warranty of seaworthiness attaches from the commencement of the risk. If between that time and the sailing of the vessel she becomes unseaworthy, the insurer is liable: Garrigues *v.* Coxe, 1 Binn. 592.

Where a vessel springs a leak soon after she sails without apparent cause from the winds or waves, she will be presumed to have been unseaworthy: Patrick *v.* Hallet, 1 Johns. 241; Talcot *v.* Commercial Ins. Co., 2 Id. 124; Talcott *v.* Marine Ins. Co., Id. 130; Patrick *v.* Hallett, 3 Johns. Cas. 76; Wallace *v.* Depau, 2 Bay 503; Miller *v.* South Carolina Ins. Co., 2 McCord 336; Watson *v.* Ins. Co. of North America, 2 Wash. C. C. 480; Wallace *v.* Depau, 1 Brevard 252; Cost *v.* Delaware Ins. Co., 2 Wash. C. C. 375. Where a vessel insured from New York to Bordeaux, after being out about thirty days was without firewood, oil, or candles, so that for want of necessary light, she was obliged to slacken sail at night and was retarded in her voyage, it was held that she was unseaworthy: Fontaine *v.* Phœnix Ins. Co., 10 Johns. 58. Seaworthiness of the hull is such a state of the hull as is competent to resist the ordinary action of winds and waves in the voyage for which it is insured. There is no presumption that defects found to exist in the hull during the voyage, were produced by a peril of the sea. The burden is on the assured to prove this: Bullard *v.* Roger Williams Ins. Co., 1 Curtis C. C. 148. If a vessel not meeting with any storm or accident cannot reach her destination, the presumption is that she was unseaworthy: Myers *v.* Girard Ins. Co., 2 Casey 192. Although the unseaworthiness of the vessel occasioned by the want of men at the time the risk commences, may not vacate the policy, provided she is seaworthy when the voyage commences, yet she cannot go out of her course after the

commencement of the voyage, to supply such want: Cruder *v.* Pennsylvania Ins. Co. 2 Wash. C. C. 339.

A non-compliance with the statute of the United States that every vessel bound on a voyage across the Atlantic, shall have on board a certain quantity of water, well secured under deck, under a penalty, does not *ipso facto* render the vessel unseaworthy, or the voyage illegal, so as to avoid a policy of insurance: Warren *v.* Manufacturers' Ins. Co., 13 Pick. 518; Deshon *v.* Merchants' Ins. Co., 11 Metc. 199. Under a Pennsylvania statute, which required the master of an outward bound vessel to take on board a licensed pilot, under a penalty, a policy was not avoided by the master's refusing to receive a pilot on board, although the loss occurred on pilot ground: Flanigan *v.* Wash. Ins. Co., 7 Barr 306.

If a vessel is unseaworthy when she starts on her voyage, it is a sufficient defence to the insurers though she arrives in safety at the end of it: Prescott *v.* Union Ins. Co., 1 Whart. 399. The question of seaworthiness is one of fact for the jury: Chase *v.* Eagle Ins. Co., 5 Pick. 51; Patrick *v.* Hallett, 1 Johns. 241; McFee *v.* South Carolina Ins. Co., 2 McCord 503; Prescott *v.* Union Ins. Co., 1 Whart. 399; Union Ins. Co. *v.* Caldwell, Dudley 263; Fuller *v.* Alexander, 1 Brevard 149; Hudson *v.* Williamson, 3 Id. 342.

Any deviation from the usual course of the voyage without a justifiable necessity discharges the underwriters, although the loss was not the immediate consequence of the deviation: Martin *v.* Delaware Ins. Co., 2 Wash. C. C. 254; Himely *v.* South Carolina Ins. Co., 1 Rep. Const. Ct. 154; Stetson *v.* Massachusetts Ins. Co., 4 Mass. 330; Brazier *v.* Clap, 5 Id. 1; Coffin *v.* Newberryport Ins. Co., 9 Id. 436; Stocker *v.* Harris, 3 Id. 409; Kittell *v.* Wiggin, 13 Id. 68; Vos *v.* Robinson, 9 Johns. 192; Robertson *v.* Columbian Ins. Co., 8 Id. 491; Duerhagen *v.* United States Ins. Co., 2 S. & R. 309; Tenet *v.* Phœnix Ins. Co., 7 Johns. 363; Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340; Garyan *v.* Ohio Ins. Co., Wright (Ohio) 202; Jolly *v.* Ohio Ins. Co., Wright (Ohio) 539; Child *v.* Sun Mutual Ins Co., 3 Sandf. S. C. 26. A deviation, owing to stress of weather, unavoidable accidents, or with a view to avoid the enemy, or the like, does not make a policy void: Miller *v.* Russell, 1 Bay 309; Campbell *v.* Williamson, 2 Id. 237. It seems that it is not a deviation for a vessel driven into a port by stress of weather, to proceed in good faith for repairs to a neighboring port, where the owners reside, though she might have been repaired at the first port: Seiloway *v.* Neptune Ins. Co., 12 Gray 73. The mere apprehension of danger, not founded on reasonable evidence, will not authorize a deviation; it must be imminent and obvious: Riggin *v.* Patapsco Ins. Co., 7 Har. & Johns. 279. If a vessel being pursued by a cruiser, put into an intermediate port to avoid the danger of capture, it is

not a deviation: Post *v.* Phœnix Ins. Co., 10 Johns. 79; Suydam *v.* Marine Ins. Co., 2 Johns. 138; Whitney *v.* Haven, 13 Mass. 172; Goyon *v.* Pleasants, 3 Wash. C. C. 241. If the master, in departing from the usual course of the voyage from necessity, acts *bonâ fide* and according to his best judgment and has no other view but to conduct the vessel by the safest and shortest course to her port of destination, what he does is within the spirit of the contract of insurance, and the voyage will be protected by it: Turner *v.* Protection Ins. Co., 25 Maine 515.

A delay or deviation to save lives, which are in jeopardy, is no deviation; but to save property it is otherwise; The Boston, 1 Sumn. 328; The Henry Ewbank, Id. 400; Little *v.* St. Louis Ins. Co., 7 Missouri 379; Walsh *v.* Horner, 10 Missouri 6; Bond *v.* Cora, 2 Wash. C. C. 80. "If the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the general rule. The humanity of the motive and the morality of the act give it a strong claim to indulgence; but after this object is effected, if the stoppage be continued or the risk increased, by adding to the cargo, diminishing the crew or by other means for the purpose of saving the property found, I think the underwriters are discharged. For let me ask, if salvage be allowed to the owner in consideration of the risk to which his property is exposed, where is the risk if he be insured? and if the act which produces the increased risk, do not discharge the underwriters, upon what fair principle shall they take all the risk and the insured receive all the reward:" per Washington, J., Id. Deviation to put the ship under convoy is allowed: Patrick *v.* Ludlow, 3 Johns. Cas. 10; Snowden *v.* Phœnix Ins. Co., 3 Binn. 457. A voluntary deviation to avoid a peril not insured against, discharges the insurer: Breed *v.* Eaton, 10 Mass. 21. If after sailing a vessel stop at a port for more men it is a deviation, unless such a general usage is shown that the parties must have intended a reference to it: Folsom *v.* Mercantile Ins. Co., 38 Maine 414; Creeder *v.* Penn. Ins. Co., 2 Wash. C. C. 339.

As to when delay in port will constitute deviation: see Earl *v.* Shaw, 1 Johns. Cas. 313; Stocker *v.* Harris, 3 Mass. 409; Seamans *v.* Loring, 1 Mason 127; Oliver *v.* Maryland Ins. Co., 7 Cranch 487; Suydam *v.* Marine Ins. Co., 2 Johns. 138; Gilfort *v.* Hallet, 2 Johns. Cas. 296; Kingston *v.* Girard, 4 Dall. 274; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241; Kane *v.* Columbian Ins. Co., 2 Johns. 264; Columbian Ins. Co. *v.* Catlett, 12 Wheat. 384; Wiggin *v.* Amory, 13 Mass. 118.

A mere intention to deviate where the vessel is lost before arriving at the dividing point will not avoid the insurance: Marine Ins. Co. *v.* Tucker, 3 Cranch 357; Thompson *v.* Barker, 1 Root 64; Lee *v.* Gray, 7 Mass. 349; Coffin *v.* Newburyport Ins. Co., 9 Id. 436; Hobart *v.* Norton, 8 Pick.

159; Henshaw *v.* Marine Ins. Co., 2 Caines 274; Lawrence *v.* Ocean Ins. Co., 11 Johns. 241. If a vessel sail to a port within the policy with intent to go to a port not within the policy, in case the former should be blockaded, this is not a deviation: Maryland Ins. Co. *v.* Wood, 6 Cranch 29.

It is not a deviation within the meaning of that term as used in policies of insurance, if a steamboat engaged in river navigation follows a route less frequented than some others: Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311.

Where the voyage is to several places, if the insured intend to go but to one of them, that one is at his election; but if to more than one, the order prescribed in the policy must be observed: Kane *v.* Columbian Ins. Co., 2 Johns. 264. Where a voyage was described in a policy as at and from A. to B. or C., it does not authorize the vessel to go to both ports: to do so is a deviation, unless sustained by a usage generally known: Buckley *v.* Protection Ins. Co., 2 Paine C. C. 82. A policy on a vessel "at and from" an island, protects her in sailing from port to port of the island to take in her cargo: Dickey *v.* Baltimore Ins. Co., 7 Cranch 327. Liberty to touch at a place does not justify trading there; it will be a deviation: United States *v.* Shearman, Peters C. C. 98.

The protest of the master and mariners is complete evidence to prove the necessity, which justifies a deviation: Campbell *v.* Williamson, 2 Bay 237; Brown *v.* Girard, 1 Binn. 40.

Where the national character of a vessel is not warranted or represented, it is not incumbent on the assured to show that he had a sea letter or other papers required by the laws of the country or by treaties with foreign nations: Etting *v.* Scott, 2 Johns. 157. "I very much doubt, whether it be a part of the implied warranty of seaworthiness that a vessel shall have her proper documents on board. There is no case that goes to that length. These documents are only material when the national character of the vessel is warranted or represented. The sea letter and other documents could only have been required to protect the vessel as a neutral, but it was no part of the contract that she was to sail in that character. . . . . A vessel may be competent to perform the voyage insured without the possession of these documents; and although we do not profess to declare a very strong opinion on this point, we are inclined to think that the want of those documents could not have furnished to the plaintiff a valid defence against the policy:" per Kent, C. J., Id.; Polleys *v.* The Ocean Ins. Co., 2 Shep. 141. Where a loss by capture of a neutral ship arises from the negligence of the master in leaving the ship's register, &c., on shore, the underwriters are not liable: Cleveland *v.* Union Ins. Co., 8 Mass. 308. In the case of a ship warranted neutral "it is a settled rule, that the assured, in order to comply with his warranty, must not only maintain

the property to be neutral, but so conduct himself toward the belligerent parties as not to forfeit his neutrality. He must pursue the conduct and preserve the character of a neutral; and for that purpose must furnish himself and keep in his possession the ordinary evidence of his neutrality; unless deprived of it by some inevitable misfortune:" per Sedgwick, J., Id.

*139] ROUX *v.* SALVADOR.

In the Exchequer Chamber, Mich. Term., 7 Will. IV., Nov. 15, 1836.

[Reported 3 Bingh. N. C. 266 (32 E. C. L. R.).]

Insurance.—Total Loss.—Abandonment.]—*Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio Janeiro, on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio, because by the process of putrefaction they would have been destroyed before they could have arrived at Bordeaux. The assured received the news of the damage to the hides and of their sale at the same time: Held, that the assured might recover as for a total loss without abandonment.*

Assumpsit on a policy of assurance, subscribed by the defendant for 200*l.* Plea, *non-assumpsit.*

By a special verdict it was found in substance that the policy on which the action was brought was effected on goods per the "General La Fayette," and other ship or ships, at and from, among other ports or places in the Pacific ocean, Valparaiso, to any port or ports in France and the United Kingdom of Great Britain, with leave to touch and trade in any place in America or anywhere else, to effect all transshipments, and including the risk of craft to and from the vessel or vessels. The usual perils were insured against, and the policy, which was for 700*l.*, had the following memorandum subscribed:—"N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average,

unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five per cent.; and all other goods; also the ship and freight are warranted free from average, under three per cent., unless general, or the ship be stranded." The policy was declared to be upon goods, specie, or bullion, as interest *might appear, to pay average on each species of goods by following landing numbers of the value of 100*l.* each, as if separately insured. Cocoa and *hides free of particular average unless the ship were stranded:* in cases of average on the hides the assurers were to pay the expense of washing and drying in full. [*140

Under this policy the plaintiff, on the 6th of May, 1831, caused to be shipped on board the ship "Roxalane," at Valparaiso, for Bordeaux, in France, 1000 salted hides of the value of 1117*l.*, his property, which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the captain in the ordinary form.

On the 13th of May, 1831, the said ship being seaworthy, with the said 1000 hides, and other hides on board thereof, set sail from Valparaiso aforesaid, on her said voyage towards Bordeaux. On the 5th of June, 1831, in the course of her said voyage, the said ship, with the said goods thereof, encountered bad weather, and sprung a leak; and it thereby became necessary, for the safety of the ship and cargo, that the said ship should put into a port for repair; and the said ship did accordingly put into Rio de Janeiro, in Brazil, being the nearest port for repair.

On the 7th of July, 1831, the whole of her cargo was there landed, and it was then found that the said hides were damaged by the said perils and dangers of the seas, as follows, that is to say, that they had been washed or wetted by the sea-water which had entered into the vessel through the said leak, and also by the effect of the dampness pro-

duced in the hold by the leak; and in consequence thereof a partial fermentation ensued, the progress of which could not be stopped by any means practicable in Rio de Janeiro; and in consequence of the progressive putrefaction of the said 1000 hides, *it was impossible to carry them, or any part thereof, in a saleable state to the termination of the voyage for which they were insured:* if it had been attempted to take them to Bordeaux, they would by reason of such progressive putrefaction as aforesaid, have altogether *lost the character of hides before they arrived there.* On the 27th of August, 1831, at Rio de Janeiro, the said 1000 hides in the said policy mentioned, according to the ordinances of the French consul-general there, were sold by public auction for the gross sum of 273*l.*; the same were bought by the purchasers for the purpose of being tanned, and were tanned accordingly. The ship "Roxalane" being repaired and the leak stopped which was in her bottom, she, on the 3d of October, *141] 1831, sailed from *Rio de Janeiro without the said hides in the said policy mentioned, but with such part of her cargo reloaded on board as had not been sold; and in the course of her voyage from Rio de Janeiro to Bordeaux, was stranded at the entrance of the river Garonne, on the 29th of December, 1831. The earliest intelligence of the damage and of the sale of said 1000 hides was received at the same time by Messrs. Devaux and Company, the agents for the said plaintiff, by a letter from Bordeaux.

The Court of Common Pleas, after two arguments, having given judgment for the defendant (see 1 New Cases 526), the cause was removed by *error* into the Exchequer Chamber, where it was argued in Easter vacation, 1836, by *Maule* for the plaintiff, and the *Attorney-General* for the defendant.

Maule for the plaintiff.

First, there has been such a stranding of the ship as to entitle the plaintiff to claim and recover an average loss.

The condition in the policy must be taken strictly, and the insurer having consented to abide by it without qualification, it is immaterial whether the stranding was connected with the loss or not. Thus, in *Burnet* v. *Kensington* (see 7 Term Rep. 210), upon a similar condition, the ship having been stranded in the course of the voyage, the underwriters were held liable for an average loss arising from the perils of the seas, though no part of the loss arose from the act of stranding; and so strictly has such a condition been construed, that a loss occasioned by the stranding of a lighter in conveying goods from the ship has been held not to be a stranding of the ship within the meaning of the condition: *Hoffman* v. *Marshall*, 2 New Cases 383 (29 E. C. L. R.).

Secondly, there was a total loss of such a nature as, whether actually or only constructively total, to render unnecessary a notice of abandonment.

Such notice was unnecessary, because notwithstanding a portion of the goods remained in an altered shape, upon the sale of them the adventure was at an end. The Court below, in deciding that notice of abandonment was necessary, relied mainly on *Mitchell* v. *Edie*, 1 Term Rep. 608; *Allwood* v. *Henckell*, Park, Ins. 280; and *Hodgson* v. *Blackiston*, Park, Ins. 281. In the two first of these cases the sale was not rendered necessary by perils insured against, and in neither of them was the state of circumstances before the sale such as to make the prosecution of the adventure impossible, *and to amount to a total loss, independently of the assured choosing to treat it as such; consequently if there had been no sale, a notice of abandonment would clearly have been necessary. In the third of those cases it is not stated what was the nature of the loss; the report only states that notice of abandonment was held necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. It therefore only amounts to an authority that the sale of the [*142

ship and cargo does not of itself render unnecessary a notice of abandonment; a proposition which is not denied by the plaintiff in this cause. The three cases are all of them consistent with the proposition contended for by the plaintiff, that where a loss is of itself total, independently of the election of the assured, that is, where the subject of the insurance is placed, by the peril insured against, in a situation which renders the prosecution of the adventure impossible, notice of abandonment is not necessary. The cases referred to only establish the proposition not inconsistent with the preceding, that where the perils insured against have reduced the subject of insurance to such a state as not to render the adventure impossible, but to give the assured a right, by notice of abandonment, to throw it upon the underwriters; and when the loss therefore is only total at the election of the assured, and a notice of abandonment is necessary to show that he elects so to treat it, a sale will not excuse the want of such notice. Those cases therefore are not authorities for the doctrine in support of which they are cited by the Court of Common Pleas, and the case of *Cambridge* v. *Anderton*, 2 B. & C. 691 (9 E. C. L. R.), 1 Car. & P. 215 (12 E. C. L. R.) (in which *Hodgson* v. *Blackiston* was cited), is directly in point in favor of the plaintiff. There the ship having got on rocks, and experienced persons giving it as their opinion that the expenses of getting off and repairing her would exceed her value when repaired, the captain sold her; and it was held that the assured might recover for a total loss, without abandonment, notwithstanding the purchaser afterwards got her off and dispatched her on a voyage to England. The Court below, however, relied on principle as well as on authorities, and the reasoning of the Court amounts to this: that an abandonment is necessary, because it would be convenient for the underwriter to have early notice of the intention of the assured to call upon him, in order that he may the better prepare his de-

fence, or exercise the rights belonging to him as an underwriter with respect to the subject insured. This would apply to make a notice of abandonment necessary in all cases whatever of total loss, and an early notice of [*143 claim in all cases of partial loss; and indeed to require a prompt notice in all cases, whether arising out of contracts of insurance or not, where the defendant might be prejudiced by delay, an object which the Legislature must be taken to have provided for by the Statute of Limitations. The necessity of notice of abandonment, however, does not rest on this principle, but arises out of the election which the assured has in certain cases to treat the loss as an average loss and to carry out the adventure, or to throw the risk on the underwriters by notice of abandonment; and where the perils insured against have rendered such an election impossible, no notice of abandonment is necessary. In *Read* v. *Bonham*, 3 B. & B. 147 (7 E. C. L. R.), a notice of abandonment having been given, which the Court held sufficient, the plaintiff was not called upon to contend it was unnecessary; and in *Parry* v. *Aberdein*, 9 B. & C. 411 (17 E. C. L. R.), the plaintiffs having heard of the destruction of the ship before they heard of the subsequent occurrences, were bound to abandon if they meant to claim for a total loss. On the other hand, in *Doyle* v. *Dallas*, 1 Moo. & Rob. 48, the want of notice of abandonment appears to have been thought immaterial; in *Robertson* v. *Clarke*, 1 Bing. 445 (8 E. C. L. R.), where the ship was sold, and a total loss recovered, there does not appear to have been any notice of abandonment; in *Mullett* v. *Shedden*, 13 East 304, it is admitted that abandonment is not necessary where goods are sold by the Court of Admiralty; and in *Cologan* v. *London Assurance Company*, 5 M. & S. 447, Abbott, J., says, "Abandonment excludes any presumption which might have arisen from the silence of the assured that they meant to adhere to the adventure." Here it is impossible to suppose the as-

sured could mean to adhere to the adventure when he knew the result was ascertained by a sale of which he had received the proceeds.

Sir *J. Campbell*, Attorney-General, *contrà*.—1st. There was no stranding for which the underwriter is liable. The stranding intended by the parties must be a stranding in the course of the adventure. A stranding before or after the adventure is wholly unconnected with it, and not within the meaning of the policy Some limitation must be put on the time with respect to which the underwriter's liability is to attach, as the liability in respect of the goods commences with their being put on board; so it ceases on their being safely landed.

*144] *2dly. This was not a total loss, for though the hides were damaged, they still existed as hides, were sold as such, and if tanned, might have been carried to Bordeaux. There would not have been a total loss, therefore, even if the goods had not been excepted by the memorandum; but being so excepted *à fortiori*, they could not be deemed totally lost so long as any of them remained *in specie* at the termination of the risk, when they were landed at Rio de Janeiro. The assured cannot by a premature sale throw on the underwriter a liability as for a total loss. In *Dyson* v. *Rowcroft*, 3 B. & P. 474, on which the Court of Common Pleas relied, there was an actual total loss by the article being thrown overboard; and *Manning* v. *Nunham*, 3 Dougl. 130 (26 E. C. L. R.); Park, Ins. 260; 2 Campb. 624 n., where the possibility of a salvage was held not to exonerate the underwriter, is much shaken by *Glennie* v. *London Assurance Company*, 2 M. & S. 371, where the underwriter was discharged, because the goods, although sold for less than their freight, might have been transmitted to their destination. In *Hunt* v. *Royal Exchange Assurance Company*, 5 M. & S. 47, it was held that a loss of voyage for

the season by perils of the sea was not a ground of abandonment upon a policy of goods with a clause of warranty free from average, as where the cargo was in safety, and not of such a perishable nature as to make the loss of a voyage a loss of the commodity, although the ship were rendered incapable of proceeding on the voyage. In *Thompson* v. *Royal Exchange Assurance Company*, 16 East 214, where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the insured, it was held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment. And Lord Ellenborough said, "All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by notice of abandonment, the clause excepting underwriters from particular average may as well be struck out of the policy. We can only look to the time when the loss happened and the goods were landed; and then it was not a total loss, however unprofitable they might afterwards be." And that decision is confirmed by *M'Andrews* v. *Vaughan*, Park, Ins. 185. In *Anderson* v. *Wallis*, 2 M. & S. 240, copper and iron was insured from London to Quebec, warranted free from particular average; the ship was driven into Kinsale, and being detained for repairs, so that *she could not proceed to Quebec that season, the iron, which was [*145 greatly damaged, and the copper were sold; but notwithstanding the ship had lost her voyage, the loss of the goods was held not to be total. So here, though the destined market for the hides was lost, the hides remaining in specie, the loss was not total.

Lastly, in order to enable the assured to recover, an abandonment was necessary, and the cases relied upon in argument and by the Court below, to which may be added *Anderson* v. *Royal Exchange Company*, 7 East 38, are not

outweighed by *Cambridge* v. *Anderton* and *Mullett* v. *Shedden*, —the only conflicting decisions which bear upon the point. The authority of *Cambridge* v. *Anderton* is weakened by the language of Bayley, J., in *Gardner* v. *Salvador*, Moo. & Rob. 116; but in *Cambridge* v. *Anderton*, as well as in *Mullett* v. *Shedden*, abandonment was not necessary, because the loss was indisputably total. If according to *Mitchell* v. *Edie*, *Allwood* v. *Henckell*, and *Hodgson* v. *Blackiston*, a sale does not end the adventure so as to exonerate the assured from giving notice of abandonment, neither will the receipt of the money nor the intelligence of sale coming at the same time as the intelligence of the loss: that does not carry the matter further than the sale. Here the money produced by the sale of the hides became vested in the assured; he has a right to keep it, and if he thought fit, to treat the loss as partial; and whenever the assured may treat a loss as partial, an abandonment is necessary to make it a total loss.

Maule was heard in reply; and with respect to *Hunt* v. *Royal Exchange Assurance Company*, *Thompson* v. *Royal Exchange Assurance Company*, and *Anderson* v. *Wallis*, observed that the goods were not of such a nature or damaged in such a way as to render it impossible, as in the present case, to forward them to their original destination.

Cur. adv. vult.

Lord Abinger, C. B.—This was a writ of error upon the judgment of the Court of Common Pleas, in an action on a policy of insurance upon goods by the "Roxalane" at and from any ports or places in South America to a port in France or in the United Kingdom, with various liberties not material to be mentioned. By a written memorandum at the foot of the policy, the insurance was declared to be on hides shipped at Valparaiso, *free of average, unless the ship should be stranded*, and in case of average loss the *underwriters
*146] were to pay the expenses of washing and drying in

full. The declaration contains the usual averments, and states that the hides were shipped at Valparaiso, that the vessel set sail with them on board for Bordeaux, a port in France, and that in the course of the voyage the hides became lost by the perils of the sea, and never arrived at Bordeaux.

The plea is the general issue.

It appears by the record, that the cause was tried and a special verdict found, which after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss in substance as follows: "That the hides of the value of 1000*l.* having been shipped in the vessel, she set sail on her voyage, in the progress of which she encountered perils of the sea and sprang a leak, in consequence of which she was compelled to put into Rio Janeiro, being the nearest port; that her cargo was taken out and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea, and by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation, which could not be checked; and that, in consequence of their progressive putrefaction, it was impossible to carry them or any part of them in a saleable state to the termination of the voyage; and that if it had been attempted to take them to Bordeaux, they would in consequence of the putrefaction have lost the character of hides before their arrival. The special verdict further states that the hides were in consequence sold at Rio Janeiro, by order of the French Consul there, for the sum of 270*l.*; that they were purchased to be tanned, and were afterwards tanned. That the ship being repaired, set sail for Bordeaux, and was stranded upon entering the Garonne; and that the earliest intelligence of the damage and the sale were received at the same time in a letter from Bordeaux.

The judgment is entered for the defendant, to set aside

which judgment this writ of error is brought. The stranding of the vessel upon entering the river Garonne, in her passage to Bordeaux, is introduced into the special verdict with a view to meet the supposed case of a partial loss; and it has been contended, that the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we *147] *take of this case render it unnecessary to enter into any discussion of the argument or to pronounce any opinion upon it.

It appears from the report of the judgment of the Court of Common Pleas upon the case, that the learned judges were of opinion that there was a constructive total loss in case it had been followed by an abandonment to the underwriters, and that their judgment for the defendant was grounded upon the want of such an abandonment. It has been urged before us in support of the judgment, first, that there was no total loss; secondly, that if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as without an abandonment could have been converted into a total loss.

Upon the first point it has been contended, that even if these goods had not been excepted from the average loss by the memorandum unless upon the condition of stranding, there would not in this case have been a total loss, and that *fortiori* being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained *in specie* at the termination of the risk; that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being distroyed by the perils of the sea that they were actually sold as hides and were capable of being tanned. It appears to us that there is no ground whatever for this as-

sumed distinction between goods that are subject to a partial loss unconditionally and goods excepted by the memorandum from such loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for an abandonment, and in the same view that interest has been adverted to occasionally by judges where the conclusions to be drawn were from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law; whether a loss be total or partial in its nature must depend upon general principles. The memorandum does not vary the rules upon which the loss shall be partial or total; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss or to the principle on which a total loss is to be ascertained.

Dismissing this distinction, then, the argument rests upon the position that if at the termination of the risk the goods remain *in *specie*, however damaged, there is not a total loss. Now the position may be just, if by the [*148 "termination of the risk" is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying these words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel, whether upon such an event the loss is total or partial on doubt depends upon circumstances. But the existence of

the goods, or any part of them, *in specie*, is neither a conclusive nor in many cases a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case the loss can be but a partial loss, and must be so deemed even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel, if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character, if, though imperishable, they are in the hands of strangers not under the control of the assured, if by any circumstances over which he has no control, they can never or within no assignable period be brought to their original destination, in any of these cases the circumstance of their existing *in specie* at *that forced termination* of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle. Accordingly in the case of *Hunt and Others*

*149] *v. *The Royal Exchange Assurance*, 5 M. & S. 47, which was cited by the Attorney-General in support of his argument, the judgment of Lord Ellenborough contains a very important passage, which distinguishes it from the present case. He says, "If indeed the cargo had been

of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured;" and further he says, "I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April, so as to incur any material damage operating a destruction of the thing insured." In the case of *Anderson* v. *Wallis*, 2 M. & S. 240, which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged. The assured by their own agent had possession of them, the ship was capable of repair, and might have prosecuted, and did, in four weeks after the accident, sail upon another voyage; the only pretence for a total loss was the retardation of the voyage, upon which ground combined with the other circumstances, the Court held the loss not to be total. But it is clear from the judgment of the Court, that if by reason of the perils of the sea the goods could never have been sent to their destination, the loss would have been held to be total. In like manner it will be found in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances in combination with that of the goods existing *in specie*, to induce the judgment that the loss was not total, as in *Glennie* v. *The London Assurance Company*, 2 M. & S. 371. The rice had arrived at its port of destination, and though damaged was delivered to the consignees, and in a saleable state as rice. In *Thompson* v. *The Royal Exchange Assurance Company*, 16 East 214, the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at Heligoland, and, as stated by Lord Ellenborough in his judgment, might for anything that appeared have been forwarded to their port of destination. In *Anderson* v. *The Royal Exchange Assurance Company*, 7 East 38, the wheat was partly saved, was in the hands of the shipper at Waterford, was kiln-dried and might have been forwarded, as the rest of the cargo was

after the same operation, to its port of destination; but the owner, after dealing with it for some time as his own, abandoned it too late, even if he ever had a right to abandon it at all. In the case before us, the jury have found that the hides were so far damaged by the perils of the sea, that they never could have arrived in the form of hides. By the
*150] process of fermentation and putrefaction which *had commenced, a total destruction of them before their arrival at the port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold, and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us therefore that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods. They could never arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end. It has indeed been strenuously contended before us that the sale of the hides whilst they remained *in specie* rendered abandonment necessary to make the loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that whenever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not, but his abstaining from his right does not alter the nature of it; and if it be true that the proceeds of the sale vested in him, they would equally have done so if, instead of being sold *in specie*, the hides had actually changed their form and been sold as glue, or manure, or ashes. The argument there-

fore in effect re-resolves itself into this question, *whether when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss.* If any doubt should still exist upon this point, it is important that it should be well considered and determined.

The history of our own law furnishes few, if any, illustrations of the subject of abandonment before the time of Lord Mansfield. That great judge was obliged to resort to the aid of foreign codes, and to the opinion of foreign jurists, for the rules and principles which he had laid down in the leading cases of *Goss* v. *Withers*, 2 Burr. 683, and *Hamilton* v. *Mendez*, 1 W. Black. 276. But even those principles are, comparatively speaking, of modern date. The most ancient codes of the Law Maritime, when it was considered a part of the law of nations, contain no chapter upon assurances, *neither do the earliest municipal codes, nor the earliest treatises upon assurances [*151 make any mention of abandonment; when a policy of assurance was considered in the nature of a wager without reference to any actual interest possessed by the assured, it was needless to treat of abandonment. The code of Florence, which bears date 1523, contains no allusion to that topic. The decisions of the rota of Genoa, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by Straccha. Amongst them are found many cases of insurance upon sea risks; not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a very elaborate treatise upon assurances, but is equally silent upon the subject of abandonment. He has also preserved in that treatise the form of a policy bearing date at Ancona, October 20th, 1567, which he says was at that time in general use amongst the states of Italy. From

the terms of that policy it is difficult to infer any right or duty of abandonment. It contains this clause: "Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro, li assecuratorij debbono dare et pagare quelli danari assecurati al detto assecurato fra mesi due dal dì che in Ancona ne fosse vera nuova. Et si pretendessero per ragione alcuna dire in contrario, non possono esser uditi da corte, giudice, o magistrato alcuno, si prima non averanno pagati effectualmente danari contanti." So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss, but if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was however to be restored to him in the event of his success. There is also a clause in the policy by which if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive,—a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy. But when assurances came to be considered as contracts of indemnity and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the fall measure of his indemnity and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find in the chapter
*152] of assurances in the civil statutes of *Genoa in 1610, the disaster upon which the underwriter is bound to pay is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured. In those cases the assured may either abandon the

goods and demand the full insurance, or make up the amount of the loss and demand it from the underwriters, who, if it amount to fifty per cent., shall have their option either to pay that sum and leave the goods to the assured or to pay the whole and take the goods. By the same law wager policies are prohibited and declared void. Here it is obvious that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in various codes of the other maritime states of Europe in which abandonment is mentioned, though it must be admitted that the rules they have respectively adopted are very different. In some abandonment is merely permissive and limited to very few cases. In others, as in the codes of Rotterdam and Amsterdam, abandonment was imperative, even in the case of an absolute total loss. Such seems to have been the law of France as established by the ordinances of Louis XIV. in 1681. From the words of that code indeed it might be thought that they were only intended to prohibit it in all but the specified cases. and not to enforce it as a preliminary condition for recovering an absolute total loss: "Ne pourra le délaissement être fait qu'en cas de prise, naufrage, bris, échoument, arrêt de prince, ou perte entière des effets assurés: et tous autres dommages ne seront reputés qu'avariés." Emerigon, in his "Treatise des Assurances," c. 17, s. 1, remarks that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence, for it appears absurd to announce to the assurers a thing of which the absolute loss is already established. Nevertheless he says, "According to our Maritime Laws one may abandon to the underwriter a thing entirely lost, and, however singular it may appear, the law requires the form of an abandonment in the process of an *action de délaissement*, though it be stated that the goods have absolutely ceased to exist;" this apparent inconsistency in the law of France is now removed

by the Code Napoleon. Under the title *du Délaissement* in the *Code de Commerce*, there are seven cases enumerated in which abandonment is permitted, amongst which the "perte entière des effets assurés" is not to be found. There is in-
*153] deed a power given to *abandon in case the loss or damage of the goods insured amount to three-fourths, but the necessity of making an abandonment in case of the entire loss seems to be guarded against expressly by the article 372, which provides "that the abandonment shall extend to nothing but those effects which are the object of the assurance and the risk."

But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is indeed satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law; the underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases,—there may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a

forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them or what remains of them to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured. But if he elects to do this, as the thing insured or a portion of it still exists, and is vested in him, the very principle of the indemnity *requires that he should make a cession of all his right to the recovery of it, and that too within [*154 a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases not only the thing assured or part of it is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become cer

tain which was uncertain before. In the language of Lord Ellenborough, in the case of *Mellish* v. *Andrews*, 15 East 13, "it is an established and familiar rule of insurance, that when the thing insured subsists *in specie*, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again in *Mullett* v. *Shedden*, 13 East 304, the same learned judge says, "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship and been restored at last to the owner, I should have thought there was much in the argument, that in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away." In that case, the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authority that no abandonment is necessary where there is a total loss of subject-matter insured. To which may be added the cases of *Green* v. *The Royal Exchange* *155] *Assurance Company*, 6 Taunt. 68 (1 E. C. L. R.); *Idle* v. *The Royal Exchange Assurance Company*, 8 Taunt. 755 (4 E. C. L. R.); *Robertson* v. *Clarke*, 1 Bing. 445 (8 E. C. L. R); *Cambridge* v. *Anderton*, 2 B. & C. 697 (9 E. C. L. R.); this last is in all points similar to the present, and is an express decision that, when the subject-matter insured has, by a peril of the sea, lost its form and species,—where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money,—the assured may recover

a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than or equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell* v. *Edie*, 1 Term Rep. 608, which was cited as an authority for the decision of the Court of Common Pleas. There the insurance was upon sugar from Jamaica to London. The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores, then released, and carried by the remainder of the crew into Charleston, where she arrived on the 18th of February, 1782. The report does not state when the intelligence of this event arrived in London, but it is probable that it must have reached the assured before the month of June following. One of the owners of the ship was resident at Charleston; he took possession of her, and, instead of despatching her on the original voyage, he sold the cargo of sugar in the month of June, and sent the ship on another voyage. He had been connected with the assured in former adventures.

He retained the money in his hands, and came to England in June, 1783. The assured pressed him for payment of
*156] *the money, but took no steps to recover it; he became insolvent the following year; no claim was made upon the underwriters till after this event, and then, after the expiration of three years from the alleged loss of the goods, notice of abandonment was given, and the action brought; upon which the defendant paid into court a sum sufficient to cover a general average, and pleaded the general issue. The court gave judgment against the plaintiff; stating that he had abandoned too late. And it cannot be disputed, that if he ever had any color for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the money, and elected to treat it as his own, till the event of an insolvency, which prevented the underwriter from recovering it. But in fact there never was a total loss by a peril of the sea. The sugars were safe at Charleston, and the sale by the owner of the ship was not a loss by a peril insured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstances of the time. During the war with America, and especially towards the close of it, the intercourse between that country and the West India Islands was much interrupted, and the price of colonial produce was higher in Charleston than in London. It was therefore probably his interest to give up his claim upon the underwriters, and adopt the sale. If therefore the sale of the goods could have been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable, if he had the right, to account to the underwriters for the amount of the sale. If indeed the court must be supposed to have treated the sale at Charleston as a loss, for which the underwriter was at any time responsible, the case may be an authority for establishing

the principle, that even when a total loss has occurred, by a sale of the goods, the assured may, by his own conduct in electing to take the proceeds instead of making his claim upon the underwriter, if he thereby alters the position of the facts so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the Court of Common Pleas, which for these reasons we think ought to be reversed; and a verdict entered for the plaintiff for 27*l.* 15*s.* 6*d.* and 40*s.* costs.

Judgment for plaintiff.

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*"The history of the Law of Abandonment, both in our own and foreign countries," writes a late very eminent author, "will be found learnedly discussed in the judgment of Lord Abinger, in the great case of Roux *v.* Salvador," Smith's Mercantile Law 389, 7th ed. [*157

The doctrine of abandonment comes into question where there has been a total loss of property comprised in a contract of maritime insurance.

A *total loss* is of two kinds, absolute or constructive.

Where the loss is absolute, that is to say, "where the subject insured becomes totally destroyed or annihilated, or if it is wholly out of the power of the assured or of the underwriter to procure its arrival," the assured is entitled by the very letter of his contract to immediate payment of the sum insured without his giving any notice of abandonment of the property insured to the underwriter.

Where however a constructive total loss takes place, that is to say, where the subject of the insurance is not wholly destroyed, but is placed in such peril as to render the successful prosecution of the adventure improbable, and such as a prudent man uninsured would decline any further expense in following up, in such case the insured may treat the case as a total loss, and demand the full sum insured. He must however give notice, within a reasonable time, to the insurer of his intention so to do, and of his abandonment to him of all his right to the thing insured.

The doctrine of abandonment, as observed by the Chief Baron in the principal case, is founded upon this principle, that the contract of insurance *is a contract of indemnity and nothing more*, and the very principle of indemnity requires that the assured should make a cession of all his right to the recovery of the property insured, and that too within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. *Ante*, p. 153, 154.

A policy may limit the liability of underwriters to cases of absolute total loss only, the intention however to exclude cases of constructive total loss must be clear, otherwise the underwriters will be liable for them. Thus in Adams *v.* Mackenzie, 13 C. B. N. S. 442 (106 E. C. L. R.), a policy was effected on a ship "against total loss only." The ship was damaged by perils of the sea to an extent to warrant the jury in finding a constructive total loss. It was held by the Court of Common Pleas that there was nothing in the form of the policy to exclude the liability of the underwriters.

In examining the subject so well discussed in the principal case, it is proposed to consider:—1st. What amounts to absolute total loss, or loss in which notice of abandonment is not required. 2d. *158] *What amounts to constructive total loss, in which notice of abandonment is requisite. 3d. What is necessary to constitute a valid abandonment. 4th. The effect of abandonment on he rights and liabilities of the parties to the contract of insurance.

1. *Total absolute loss.*

As we have before observed, where there is a total absolute loss of the subject-matter insured, the insured may recover the whole sum for which the property lost was insured, without giving any notice whatever of abandonment. In fact, it would be an absurdity to require notice, when the very idea of a total loss supposes either the non-existence of the thing insured, or its existence in such a position or shape as to render its recovery hopeless.

There are two kinds of total absolute loss, as laid down by Lord Abinger, C. B., in the principal case:—1st. Where the subject of the insurance in the progress of the voyage becomes tatally destroyed or annihilated; 2d. Where it is placed by reason of the perils against which he insures, in such a position that it is wholly out of the

power of the assured or of the underwriter to procure its arrival at its destination. To one or other of these classes we shall see that all cases of total absolute loss belong.

Total Loss of Ship.—If a ship has foundered, or been burnt at sea (Murry *v.* Hatch, 6 Mass. 475), or has become a mere wreck so as to be broken in pieces and dismembered (Bell *v.* Nixon, Holt N. P. 425 (3 E. C. L. R.); Irving *v.* Manning, 1 H. L. Cas. 817), it is clear that a total absolute loss has taken place. And not only where the ship is bodily and specifically lost or is a mere wreck, but under other circumstances also, although the ship may hold together, it may be considered that an absolute total loss has occurred; where, for instance, a ship is so shattered in a storm that upon survey it is found the expense of repairing her would exceed the original value (Robertson *v.* Clarke, 1 Bing. 445 (7 E. C. L. R.); Robertson *v.* Caruthers, 2 Stark. 571 (3 E. C. L. R.); Cambridge *v.* Anderson, R. &. M. 60 (21 E. C. L. R.); 2 B. & C. 691 (9 E. C. L. R.)); and *à fortiori* where, in the words of the Chief Baron in the principal case, the ship has become a "wreck or mere congeries of planks" (*ante*, p. 155), the owner may recover as for a total loss, although the vessel or her materials have been sold by the master, if he has done so in the exercise of a sound discretion, as a prudent owner uninsured would have done. Thus in the leading case of Cambridge *v.* Anderson, R. & M. 60 (21 E. C. L. R.); 1 C. & P. 231 (12 E. C. L. R.); 4 D. & R. 203 (16 E. C. L. R.); a vessel, the principal portion of whose cargo consisted of timber and insured from Quebec to Bristol, struck on a rugged shore two hundred fathoms from the land, and about two hundred and twenty miles from Quebec. Her captain failing to get her off, upon the advice of an agent of Lloyd's had the ship examined by three surveyors, who gave it as their *opinion that she could not be repaired under a sum which would exceed her prime cost. Her captain, acting on their judgment, sold the ship with her register and her cargo. The purchasers were shipwrights, who did some repairs to her, and sent her on another voyage; in the prosecution of which she was lost. The captain and the mate and the ship's carpenter proved that they saw her after the repairs were done, and did not think her fit to undertake a voyage, and that they would not have trusted their lives in her. The *plaintiff having given no notice of abandonment*, brought an action [*159

against the underwriters to recover for a total loss, with benefit of salvage to the underwriters. It was argued for the defendant that the plaintiff could not recover as for a total loss, for the ship was not sold as a wreck to be broken up, but was sold *with her register*, to make another voyage, and that it was clear from the circumstance of her having been purchased by shipwrights and repaired, that she must have existed as a ship; and that if a vessel existed *in specie*, and could by any repairs be made fit for sailing, it was not a total loss. Lord Tenterden, C. J., before whom the case was tried at Guildhall, said, "This is a question of considerable importance to shipowners. If the jury are of opinion that this vessel could not be repaired at all, or that she *could not be repaired without incurring an expense equal to or greater than her value*, then I shall hold, that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage to the underwriters:" R. & M. 61 (21 E. C. L. R.). The jury having found a verdict for a total loss, a motion was afterwards made for a new trial, but the rule was refused. Lord Tenterden, C. J., then said, "Whether the ship were repairable or not was left as a question to the jury, and I think that they disposed of it correctly. If the subject-matter of insurance remained a ship it was not a total loss, but if it were reduced to a mere congeries of planks the vessel was a mere wreck; the name which you may think fit to apply to it cannot alter the nature of the thing." Bayley J., observed, "I take the legal principle to be this; if by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in Read *v.* Bonham, 3 B. & B. 147 (6 E. C. L. R.), and although Richardson, J., there differed from the rest of the court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided:" 2 B. & C. 692 (9 E. C. L. R.). See also Gardiner *v.* Salvador, 1 Mood. & Rob. 117; Tanner *v.* Bennett, R. & M. 182 (21 E. C. L. R.); Underwood *v.* Robertson, 4 Campb. 138.

Where, however, the ship, although much damaged, remains all
*160] *the time in the character of a ship, the owner cannot proceed to a sale (Martin *v.* Crokatt, 14 East 465), or to break her up (Bell *v.* Nixon, Holt's N. P. 423 (3 E. C. L. R.)), and after-

wards recover for a total loss without giving notice of abandonment to the underwriters; for it is but just, that they should be enabled to elect whether or not they will incur the expenses of repair: Martin *v.* Crokatt, 14 East 465, 467; Fleming *v.* Smith, 1 H. L. Cas. 513; Knight *v.* Faith, 15 Q. B. 659 (69 E. C. L. R.). As observed by Lord Campbell, C. J., in his able judgment in the case of Knight *v.* Faith, 15 Q. B. 659, "The condition of giving notice of abandonment in such a case is imposed by the law to give the insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure to them all the advantages to which, if liable for a total loss, they would be entitled as owners of the ship from the time when the damage was sustained to which the loss is ascribed." In another passage in his judgment, his Lordship shows the propriety of requiring notice of abandonment in such cases, because "there is reason to apprehend that great frauds are committed in distant parts under pretence that ships insured have received an injury which renders it imprudent to repair them; and such frauds would be much facilitated if the owners were not required to make any communication to the insurer till they came upon him peremptorily to demand payment of the full sum subscribed in the policy:" Id. 663.

If the master, by means within his reach, can make an experiment to save a ship with a fair hope of restoring it to the character of a ship, he cannot, by selling, turn it into a total loss. *Bona fides* in the master will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do: per Bayley, J., in Gardner *v.* Salvador, 1 Mood. & Rob. 117. See also Hodgson *v.* Blackiston, Park on Ins. 400 n. 8th ed.; Allwood *v.* Henckell, Id. 399 n.

As a question may be raised whether, if a vessel reaches her port of destination, though in such a state as not to be worth while repairing, the assured can recover as for *an absolute total* loss, it would be advisable for him to give notice of abandonment to the insurers, for there is no doubt but that, under such circumstances, he would be able to recover as for a total loss: Stewart *v.* Greenock Insurance Company, 2 H. L. Cas. 159; Shawe *v.* Felton, 2 East 109; Allan *v.* Sugrue, Dans. & Ll. 188; 8 B. & C. 561 (15 E. C. L. R.); 3 M. & R. 9; Samuel *v.* Royal Exchange Assurance Company, 8 B. & C. 119 (15 E. C. L. R.).

Total Loss of Goods.—In certain cases of loss of goods, no great difficulty arises in determining whether the total loss is absolute or merely constructive. Thus, *where the goods go down into deep water with a vessel foundered at sea, unless they are in such a position that they may be raised (Kemp *v.* Halliday, 1 Law Rep. Q. B. (Exch. C.) 520), or have been seized in an enemy's port (Mellish *v.* Andrews, 15 East 13; and see Mullett *v.* Shedden, 13 East 307), or have been plundered by wreckers (Bondrett *v.* Hentigg, Holt N. P. 149 (3 E. C. L. R.)), without any hope of recovery *down to the time of action brought*, it will be a case of absolute total loss, and no notice of abandonment will be necessary.

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If however there remains a hope of recovering the goods insured before action brought by the assured, it will not be considered a total loss unless notice of abandonment has been given. Thus if the goods insured were seized and confiscated by the enemy, but there remains a hope of recovering them, as, for instance, by the commencement of negotiations for that purpose by the government of the assured, if the goods are restored before action brought, it will not be considered a total loss unless notice of abandonment has been previously given: Goldsmid *v.* Gillies, 4 Taunt. 803. "Is it not," said Lord Ellenborough, "an established and familiar rule of insurance law, that where the thing insured subsists *in specie*, and there is a chance of recovery, in order to make it a total loss there must be an abandonment?" Tunno *v.* Edwards, 12 East 491. From which *dictum* we may draw the inference that, in order to render abandonment necessary, the thing insured must not only subsist *in specie*, but there must also be a *spes recuperandi.*

As to Perishable Goods warranted "free of average."—Greater difficulties arise in determining these questions in the case of *perishable* goods, and they arise more frequently, because, in the case of perishable goods, they are generally, by the memorandum to the policy, warranted "free of average," that is to say, nothing is to be recovered in respect of them in case only of an average or partial loss, but only when a total loss has taken place.

We may however here remark, as is laid down in the principal case, that whether the loss be total or partial in its nature depends on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss, except on

certain conditions: *Ante*, p. 147. See The Great Indian Peninsular Railway Company *v.* Saunders, 1 B. & S. 41 (101 E. C. L. R.); 2 B. & S. 266 (110 E. C. L. R.); Booth *v.* Gair, 15 C. B. N. S. 291 (109 E. C. L. R.); Kidston *v.* The Empire Marine Insurance Company, 1 Law Rep. C. P. 535; 2 Law Rep. C. P. (Exch. C.) 357; Carr *v.* The Royal Exchange Assurance Corporation, 5 B. & S. 433 (117 E. C. L. R.).

It seems at one time to have been thought, that if goods remained in specie, although so changed as to be no longer of any value in their original character, *it could not be considered [*162 as a total loss, and consequently, when such goods were warranted "free from average," nothing could be recovered from the underwriter. Thus, in Cocking *v.* Fraser, 4 Doug. 295 (26 E. C. L. R.), Park 247, 8th ed., goods were insured with the usual memorandum. "Corn, fish, etc., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, were so much damaged by the perils of the sea, that they were hove overboard for the general preservation of the rest of the fish and cargo. And upon the arrival of the ship at Lisbon, upon a survey being made at the request of the captain, who was also consignee of the fish, by the Board of Health of Lisbon, it appeared that the fish were rendered of no value, and the ship consequently did not proceed. It was held by Lord Mansfield, C. J., that the loss was not total, and that consequently the plaintiff could not recover anything upon the insurance. "What," said his Lordship, "is a total loss? The total loss of a thing is *the absolute destruction* of it, by the wreck of the ship. The fish may all come to port, though from the nature of the commodity it may be damaged,—it may be stinking,—still, as the commodity *specifically remains*, the underwriter is discharged." Buller, J., also made the observation, "that there never was an instance of a payment for a total loss in these cases where the thing existed, though of no value."

The authority of this case was questioned by Lord Kenyon, C. J., in Burnett *v.* Kensington, 7 Term Rep. 222, and indeed it may be now considered as overruled. The first case to be noticed in which Lord Kenyon's views were adopted, is that of Dyson *v.* Rowcroft, 3 Bos. & Pul. 474; there a policy was effected on fruit, from Cadiz to London, which contained the usual memorandum that

fruit, etc., were free from average. In the course of the voyage the fruit was so much damaged by sea-water that it became rotten and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard. It was held by the Court of Common Pleas that the assured were entitled to recover as for a total loss. "If," said Lord Alvanley, C. J., "I understand the policy as restrained by the memorandum, the underwriter agrees that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against; but that he will not be liable to pay for any partial loss on fish, or the other articles contained in the memorandum, because those commodities being liable to deterioration from circumstances independent of the perils insured against, he would continually be harassed with claims for partial loss alleged to have
*163] arisen from the perils mentioned *in the policy. Unless therefore the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed; and the underwriters would have done better, if they had said that they would not be answerable unless the commodities enumerated actually went to the bottom. The question is, what is a total loss? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is matter for the consideration of the jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage; and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction; and is it not as much lost to the assured by being thrown overboard, as if the captain had waited until it had

arrived at complete putrefaction? The case of Cocking *v.* Fraser was the only thing which raised any doubt in my mind; and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord Kenyon upon it, in Burnett *v.* Kensington. I suspect that the words 'of no value,' applied to the cargo in the case of Cocking *v.* Fraser are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord Kenyon, speaking of Cocking *v.* Fraser, says that he cannot subscribe to the opinion there given, that 'if the commodity specifically remain, the underwriter is discharged (Marshall, p. 144): I think myself therefore at liberty to consider the case of Cocking *v.* Fraser as something less strong than it appears to be. The question then is, whether the loss which has happened be not as much a total loss as if the waves had carried the cargo overboard, or as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils which do not end in a total annihilation of the commodity. When the loss arises by capture, the commodity remains in existence in the hands of the enemy; and yet this loss is *as much within the policy as a loss arising from the wreck of the ship. I must now take it that the circumstances [*164 under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity."

In the case of Cologan *v.* London Assurance Company, 5 M. & Selw. 447, where wheat insured "free of average" had been thrown away in a putrid state, Lord Ellenborough, C. J., said:—"Considering the contract of insurance as a contract of indemnity, *it surely cannot be less a total loss because the commodity subsists in specie, if it subsists only in the form of a nuisance.* There is a total loss of the thing, if by any of the perils insured against *it is rendered of no use whatever, although it may not be entirely annihilated.*" See Ralli *v.* Janson, 6 E. & B. 422 (88 E. C. L. R.).

In the principal case, as decided by the Exchequer Chamber, reversing the decision of the Court of Common Pleas, reported (1 Bing.

N. C. 524 (27 E. C. L. R.); 1 Scott 491), this subject was very fully discussed, and the principles upon which the Court proceeded are, to use the words of an able text-writer, "admirably stated by Lord Abinger, in giving the judgment of the Court,—a judgment which should be attentively studied by all who desire to know the present state of our law on this much litigated subject:" 2 Arn. Mar. Ins. 1055, 2d ed. There hides insured free of particular average, having been sold at an intermediate port in a state of incipient putridity, because they would have been destroyed before they could have reached their destination, it was held by the Exchequer Chamber that the assured might recover as for a total loss, without abandonment.

From this and the former decisions it seems to be clear that where perishable goods, although they exist in specie, have by the perils insured against either already lost their original character, in consequence of which they have been thrown overboard, or if they are in such a state that it is clear that they would inevitably lose their original character previous to their arrival at the port of their destination, and they are in consequence sold at an intermediate port, the insured may recover for a total loss, without any notice of abandonment.

Where, however, though much damaged, the goods exist in specie, and there is a reasonable expectation that they may arrive at their port of destination, without their original character being changed, the assured, who has not sent them on, or has sold them at an intermediate port, cannot, at any rate, without notice of abandonment, recover as for a total loss. Thus, in Anderson *v.* The Royal Exchange Assurance Company, 7 East 38, a vessel laden with corn insured "free of average," from Waterford to Liverpool, when *165] *sailing down the river from Waterford, struck upon a rock, which occasioned her immediately to fill with water, and to prevent her from sinking she was run ashore. The hull of the ship was for four weeks entirely submersed at high water. The wheat was got out much damaged; part was thrown into the sea as unfit for use, part was kiln-dried at Waterford, and sold there, although it might have been forwarded to Liverpool had the insured given directions for that purpose. It was held by the Court of Common Pleas that the assured could not recover for a total loss. "It was not," said his Lordship, "in fact, as it turned out, a total loss; but

during the time it was submersed in the water it might have been treated as such. They did not however treat it as a total loss at that time, but continued laboring on the vessel and cargo on their own account for some time afterwards, from the 31st of January till the 18th of February, and had succeeded in preserving part of it, and did not elect to abandon till they found that it would not answer to keep to the cargo; and when they did abandon it was no longer in fact a total loss."

Upon the same principle, in the case Hedburgh *v.* Pearson, 7 Taunt. 154 (2 E. C. L. R.), where there was an insurance "on hogsheads of sugar," warranted "free from particular average," from Gottenburgh to Stralsund, and the ship was stranded and bilged, but every one of the fifty-four hogsheads of sugar on board was saved, and some of the loaves of sugar in each hogshead. But of the whole cargo of sugar, there being about a hundred and twenty loaves to each hogshead, only seventy-eight loaves were saved dry, and forty-five wetted by the sea. It was held by the Court of Common Pleas that, inasmuch as it could not be said that *none* of the sugar was saved, they could not draw any measure of a proportion to be saved, which should be compatible with a total loss. If they should begin to do so, they could not see where they were to stop; and even if this were a fit case for the consideration of the Court, they thought the jury had rightly decided it." See also Thompson *v.* Royal Exchange Company, 16 East 214; the remarks of Lord Abinger, C. B., upon those cases, *ante*, p. 136; and Navone *v.* Haddon, 9 C. B. 36 (67 E. C. L. R.).

Although as a general rule where the whole or any part of a cargo of perishable goods (having suffered from sea damage), is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss; nevertheless, if the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible, and the master, as in the case of a ship similarly situated (see *ante*, p. 158), may sell the cargo, and the assured can recover as for a total loss. See Rosetto *v.* *Gurney, 11 C. B. 176, 187 (63 E. C. L. R.), and the remarks there upon the case of Reimer *v.* Ringrose, 6 Exch. 263. [*166

In determining whether the damage to the goods can or cannot be

repaired at a cost more than their worth, the jury must take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but they are not to take into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not: Farnworth *v.* Hyde, 2 Law Rep. C. P. (Exch. Ch.) 204.

And where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods' owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened: Id.

Moreover, in determining whether a ship submersed with her cargo is a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount: Kemp *v.* Halliday, 1 Law Rep. Q. B. 520. As to the mode of estimating damages by the Court of Admiralty in cases of total loss from collision, see The Clyde, Swab. Adm. Rep. 23; The Canada, Lush. Adm. Rep. 586.

Where goods are insured by a policy of Marine Insurance in the ordinary form, the expression "warranted free from particular average," is not confined to losses arising from injury to, or deterioration of, the goods themselves, but is equivalent to a warranty against total loss and average only, and consequently includes expenses incurred in relation to the goods. In The Great Indian Peninsular Railway Company *v.* Saunders, 1 B. & S. 41 (101 E. C. L. R.); 2 Id. 266 (110 E. C. L. R.), a quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid here, ship lost or not lost. The shippers insured them by a policy in the ordinary form "warranted free from particular average, unless the ship be stranded, sunk, or burnt." The ship was neither sunk, stranded, nor burnt, but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the insured was compelled to pay

freight to an amount not exceeding the value of the rails. It was held by the Court of Queen's Bench and the Exchequer Chamber that this freight was not recoverable under the policy.

As to the construction of the *words "warranted free from capture, seizure, &c., and free from *all consequences* of hostilities, riots, or commotions," see Ionides *v.* The Universal Marine Insurance Company, 14 C. B. N. S. 259 (108 E. C. L. R.). [*167

Where goods warranted "free of average" arrive in specie at the port of destination, however much they may be damaged or deteriorated in value and quality, if they still retain their original character, it will not be held to be a total loss, and consequently there will be no liability on the part of the underwriter. See M'Andrews *v.* Vaughan, Park 252, 8th ed.; Mason *v.* Skurray, Id. 254; Glennie *v.* London Assurance Company, 2 M. & Selw. 376; and it is immaterial that the vessel is wrecked, if the goods or some of them arrive at their destination: Davy *v.* Milford, 15 East 559. The cases of Boyfield *v.* Brown, 2 Str. 1065, and Buller *v.* Christie, cited 2 M. & Selw. 374, must be considered as overruled.

It seems also that although the goods *arrive at their destination* in specie, if they are so deteriorated as to have lost their original character, it will be an absolute total loss, for which the underwriter will be liable, although the goods are warranted free of average. This, at any rate, appears to have been the opinion of Lord Abinger in the principal case, but there has been no express decision upon the point; see also Reimer *v.* Ringrose, 6 Exch. 267. See, however, 2 Arn. Mar. Ins. 906, 3d ed. Where it is said that "in practice it appears far better to disregard all such refinements, and to lay down the broad position that there can be no total loss on perishable goods, and therefore no claim whatever against the underwriter, who by the memorandum has expressly confined his liability to the case of their total loss only, unless the goods either go to the bottom of the sea, or are necessarily destroyed or justifiably sold by the assured, from the impossibility of sending them on in specie to their port of destination.

Where a cargo is made up in packages, and the insurance is upon each package separately, it will be treated as a total loss upon each package lost: per Lord Abinger, in Hills *v.* London Assurance Company, 5 M. & W. 576.

But if goods of *the same species* are shipped, whether in bulk or

in packages, not expressed, by distinct valuation or otherwise, in the policy to be separately insured, though part only, or one or more entire packages be entirely lost or destroyed by the specified perils, it will not be considered a total loss or destruction of such part only; the consequence in such case is, that if the goods lost be "free of average" the underwriter will be exempted from all liability, the loss being only partial: Ralli *v.* Janson, 6 E. & B. 422, 446 (88 E. C. L. R.), overruling the decision on this point in Davy *v.* Milford, 15 East 559, and some of the *dicta* in Hedburgh *v.* Pearson, 7 Taunt. 152 (2 E. C. L. R.), and in Cologan *v.* London Insurance
*168] Company, 5 M. & Selw. 456; and see Entwistle *v. Ellis, 2 Hurlst. & N. 549, in which case on an insurance of goods in "ship or ships" which were declared to be valued "on rice to be declared free from particular average," it was held that the insurer could not by endorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag.

Where, however, goods of *different species* are insured generally "free from average," if some of them be entirely lost, the assured will be able to recover as for a total loss on account of the goods so lost. Thus, in Duff *v.* Mackenzie, 3 C. B. N. S. 16 (91 E. C. L. R.), an insurance was effected on "*master's effects*," valued at 100*l.*, "*free from all average.*" Some of the articles thus insured were totally lost by the perils insured against, but others were saved. It was held by the Court of Common Pleas that the assured was entitled to recover in respect of the goods which had been so totally lost. "The word 'effects'" said Williams, J., in delivering the judgment of the Court, "is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., of which they happen to consist. And although it is stipulated by the warranty that these effects shall be free of all average, or, in other words, that the insurer shall not be liable for any amount of sea-damage to them short of a total loss; we think, looking at the nature of the subject of insurance, and the terms of this exemption, it is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consist. Suppose, instead of the general description of 'master's effects,' the body of the policy had enumerated them, and then the memorandum had

said, 'the chronometer, the sextant, to be free from average,' etc., might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole sub ject of the insurance."

Upon the same principle, in Wilkinson *v.* Hyde, 3 C. B. N. S. 30 (91 E. C. L. R.), an insurance was effected for 240*l.*, "*on goods so valued against total loss only.*" The policy contained the usual memorandum against particular average. The cargo thus insured consisted of *different kinds of goods, in separate cases and packages*, some of which were, by the perils insured against, totally lost, and others were saved. It was held by the Court of Common Pleas that the assured was entitled to recover in respect of the packages so totally lost. "Applying," said Williams, J., "the *doc- [*169
trine of Duff *v.* Mackenzie here, as soon as it is ascertained that goods are of *different species*, it is as if the different species had been enumerated. The words 'against total loss only' cannot mean 'total loss of the whole subject of insurance,' taken collectively, as Mr. Blackburn contends. The object is simply to get rid of the common average memorandum,—to exempt the underwriters from responsibility except in respect of a total loss of the subject-matters of insurance, each taken separately. I see no more reason why the different sorts of 'goods' should be enumerated, than that 'master's effects' should be separately described. The underwriter who insures 'goods' has no right to expect that they shall be all of one species."

Total Loss of Freight.—When a ship founders at sea, and with her cargo is lost beyond hope of recovery, it is clear that a total absolute loss of freight has taken place. And where a chartered ship is lost when about to sail to a distant place to take in her cargo, it will be held that the risk commenced at the time of her sailing, although she had no cargo then on board. The leading case on this subject is Thompson *v.* Taylor, 6 Term Rep. 478, where a ship was *chartered* from London to Teneriffe, there to take

on board a certain number of pipes of wine, and to proceed to Barbadoes, for which the owner was to receive freight at the rate of so much per pipe. The vessel was taken prize on her voyage to Teneriffe. It was held by the Court of King's Bench, that a policy of insurance on such freight attached from the sailing of the ship. "As the plaintiff," observed Lord Kenyon, C. J., "had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight. His contract under the charter-party was entire, and we cannot divide it. The ship was to sail from hence to Teneriffe, where she was to take wine on board and carry it to the West Indies; he was to receive freight for the whole voyage, and the plaintiff had performed part of the contract. Therefore, on the principle on which the case in Strange (Tonge *v.* Watts, 2 Stra. 1251) was decided, though the circumstances of that case are different from the present, I am of opinion that the plaintiff is entitled to recover." See also Horncastle *v.* Stuart, 7 East 400; Mackenzie *v.* Shedden, 2 Campb. 431.

Where an insurance has been effected on freight, to become payable on delivery of the goods, by a *general ship*, if a full cargo has been contracted for, and, though lying at some distance, is ready to be put on board, and the ship is ready to receive it, even though temporarily disabled by the perils insured against, the assured may recover as for a total loss, although, at the time of the loss of the ship, only a part, or even none of the *cargo was on board. Montgomery *v.* Egginton, 3 Term Rep. 362; s. c. cited and commented on, 13 East 330, 331; Devaux *v.* J'Anson, 5 Bing. N. C. 519 (35 E. C. L. R.).

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Where however the ship is lost with only a part of her cargo on board, and the rest of her cargo is not contracted for, and the ship, independently of any disability in consequence of the perils insured against, is not ready to receive it, the assured is not entitled to recover for a total loss, but an apportionment only according to his actual loss. See Forbes *v.* Aspinwall, 13 East 323, 332; *post*, p. 204, 211; Forbes *v.* Cowie, 1 Camp. 520.

In the case of a chartered vessel, where the payment of the freight is in the charter-party made to depend on the delivery of a particular cargo at the ultimate port of destination, if the vessel be

captured before the goods be put in at an intermediate port, the assured can recover for an absolute total loss: Atty *v.* Lindo, 1 Bos. & Pul. N. R. 236.

So the capture and sale of an outward cargo will involve an absolute total loss of *outward* freight, although the vessel, on being repurchased by the master, may succeed in gaining a *homeward* freight: Wilson *v.* Forster, 6 Taunt. 25 (1 E. C. L. R.). Where however the insurance is effected on the *homeward* freight, on goods to be put on board by certain charterers, and no cargo is put on board by them, if a full freight is earned by the vessel returning home with a cargo belonging to other persons, the assured cannot recover for a total loss from the underwriters, even though the expenses of the vessel while detained waiting for another cargo exceed in amount the freight which she thereby earned: Everth *v.* Smith, 2 M. & Selw. 278, 284; Barclay *v.* Stirling, 5 Id. 6; Brocklebank *v.* Sugrue, 1 Moo. & R. 102. And see and consider Mackrell *v.* Simond, 2 Chit. Rep. temp. Mansfield 666.

In the case of an insurance of profits, if there is a total loss of the goods on which the profits were expected to be made, the insurer may recover as for a total loss of the freight; and even if there has been only a partial loss of the goods, if the goods have been abandoned, a separate abandonment of the profits to arise from them is unnecessary: Barclay *v.* Cousins, 2 East 544, 551.

In all these cases the loss must arise from the perils insured against, and there will be no claim against the underwriter unless the loss of freight be by reason of the perils insured against: Scottish Marine Insurance Company *v.* Turner, 1 Macq. H. L. Cas. 340. If, for instance, the loss of freight has been occasioned by reason of a sale of a sea-damaged cargo at an intermediate port, even when such sale took place in exercise of a wise discretion by the master, the underwriter will not be liable. See Hunter *v.* Prinsep, 10 East 378; Mordy *v.* Jones, 4 B. & C. 394 (10 E. C. L. R.); Vlierboom *v.* Chapman, 13 M. & W. 230.

*Upon the same principle, in Philpott *v.* Swann, 11 C. B. N. S. 270 (103 E. C. L. R.), freight under a charter was insured, [*171 for a voyage from the Cape of Good Hope to Hondeklip Bay, an open roadstead 180 miles up the coast, there to load a cargo of copper ore, to proceed therewith to Swansea, at a freight of forty shillings per ton. Arriving at Hondeklip Bay the master received on board part of

the cargo (the whole being ready), when a storm coming on, he was compelled to put to sea with the loss of an anchor, and an injury to his windlass; and, after beating about the offing, he deemed it expedient to sail to St. Helena, a distance of about 1800 miles. Finding, on his arrival there, that he could not get an additional anchor, or the requisite repair, the master discharged the portion of the outward cargo which he had not landed at Hondeklip Bay and proceeded to Swansea with the homeward cargo, short by about 120 tons of a full cargo. The jury, although the master did not run for the Cape, where it appeared that the necessary repairs might have been obtained, found that the master acted throughout as a prudent owner uninsured would have done. It was held by the Court of Common Pleas that under these circumstances, the underwriters were not responsible as for a total loss of the freight of the 120 tons by perils of the sea. "The captain," said Willes, J., "was prudent in avoiding foul weather, but he was not prevented by perils of the sea from procuring the necessary repairs and earning the freight." See also Scottish Marine Insurance Company *v.* Turner, 1 Macq. H. L. Cas. 334.

2. *Of Constructive Total Loss.*—As before observed, a constructive total loss takes place where the subject of insurance is not wholly destroyed, but is placed in such peril as to render the successful prosecution of the adventure improbable, and such as a prudent man uninsured would decline any further expense in following up. In such a case the insured, upon giving notice to the insurers that he abandons all his interest in the subject-matter assured, may treat the case as a total loss. The notice of abandonment, as will be hereafter more fully shown, must be given within a reasonable time, it must be of the whole thing insured and unconditional in its terms.

In the principal case, Lord Abinger, C. B., enumerates the cases in which a constructive total loss takes place. "There may," he observes, "be a capture, which, though *primâ facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibilty of bringing the ship or the goods to their destination. There may be some peril which renders the ship unnavigable, without any rea-

sonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing [*172 *them, or what remains of them, to their destination:" *Ante*, p. 153. These and similar cases it is now proposed to examine in detail.

Constructive Total Loss of Ship.—Where a ship is captured, the assured has immediately a right to give notice of abandonment, and he will be able to recover for a total loss, provided the capture or the total loss occasioned thereby continue to the time of abandoning and bringing the action. See Hamilton *v.* Mendes, 2 Burr. 1212. Where, however, at the time when the notice of abandonment is given, the assured is aware of the recapture (Hamilton *v.* Mendes, 2 Burr. 1198), or the recapture has actually taken place, and he is not aware of it (Bainbridge *v.* Neilson, 10 East 329; Parsons *v.* Scott, 2 Taunt. 363; Naylor *v.* Taylor, 9 B. & C. 718 (17 E. C. L. R.)), and even where the capture continues until the notice of abandonment, if the recapture takes place before action brought, the assured cannot claim to recover for a total loss. See Patterson *v.* Ritchie, 4 M. & Selw. 393; Naylor *v.* Taylor, 9 B. & C. 724 (17 E. C. L. R.); and Brotherston *v.* Barber, 5 M. & Selw. 418. In the last-mentioned case, the vessel insured was captured on the 19th of April. Notice of abandonment was given on the 25th of April, and the recapture and restoration of the ship took place before action brought. It was held by the Court of King's Bench, a partial damage having been sustained, that the assured could only recover for a partial loss. "This is," said Bayley, J., "a contract of indemnity only; the ship was captured in the course of her voyage. Now capture is an event which may or may not terminate in a total loss; if it continue, and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary, and the loss partial, it would be against the spirit as well as the letter of the contract to hold the underwriter bound to take the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription; while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this right, by closing the transaction between the underwriter and as-

sured. But notice of abandonment is no more than a proposal on the part of the assured, which the underwriter may accept, and then there will be a new agreement between them, binding on both parties. But while the transaction rests in abandonment only on one side the underwriter's responsibility may vary, and cannot amount to a total loss, if, by subsequent events, it has become otherwise at the time of action brought."

The mere, recapture, however of a ship, if, in consequence of the improper conduct of recaptors, the ship be not restored to the assured *or they have not the means of recovering her, will not pre- *173] vent their claim for a total loss. Thus, in Dean *v.* Hornby, 3 E. & B. 180 (77 E. C. L. R.), a ship was insured on a time-policy, for a year ending the 21st of April, 1852. In December, 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan. In January, 1852, she was recaptured by an English war-steamer, and a prize-master took the command and brought her to Valparaiso. Intelligence of the facts reached the owners at one time, about the end of April, 1852, and they on the 30th of April, 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to her Majesty's steamer." The underwriters refused to accept notice. The vessel was sent home by the recaptors from Valparaiso, under the command of a prize-master, with instructions to proceed to Liverpool, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into Fayal on the 19th of August, 1852, where she was sold by the prize-master, being then in a state not justifying the sale. In December, 1852, the owners having commenced an action against the underwriters, it was held by the Court of Queen's Bench that they were entitled to recover for a total loss. "The cases referred to," said Lord Campbell, C. J., "establish this principle, that if once there has been a total loss by capture, that is construed to be a permanent total loss, unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. The *right to obtain it is nothing;* if that were enough to prevent a total loss, there never would in this case have been a total loss at all; for pirates are the enemies of mankind,

and have no right to the possession." See Kleinwort *v.* Shepard, 1 E. & E. 447 (102 E. C. L. R).

Where, however, after the capture of a ship, notice of abandonment has been duly given, although she be afterwards restored, if she be in such a state that her repairs would cost more than she is worth, the assured can recover for a total loss. See M'Iver *v.* Henderson, 4 M. & Selw. 576. "The mere restitution of the hull," said Lord Ellenborough, C. J., "if the assured may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one:" Id. 584. See also Brown *v.* Smith, 1 Dow. P. C. 349; Holdsworth *v.* Wise, 7 B. & C. 794 (14 E. C. L. R.); Lozana *v.* Janson, 2 E. & E. 160 (105 E. C. L. R.).

If the ship is restored in such a state as not to justify an abandonment, the mere loss of the voyage will not have that effect: Fitzgerald *v.* Pole, Willes 641; 5 Bro. P. C. 131; Parsons *v.* Scott, 2 Taunt. 363; Falkner *v.* Ritchie, 2 M. & Selw. 290; Brown *v.* Smith, 1 Dow. P. C. 359; Doyle *v.* Dallis, 1 Mood. & Rob. 55; so that the *contrary doctrine upon this subject [*174 laid down in some of the earlier cases (Goss *v.* Withers, 2 Burr. 683; Hamilton *v.* Mendes, 2 Burr. 1198; Milles *v.* Fletcher, 1 Doug. 231; Cazalet *v.* St. Barbe, 1 Term Rep. 187; Rotch *v.* Edie, 6 Id. 413), by Lord Mansfield, Mr. Justice Buller, and Lord Kenyon, may be considered as overruled.

The assured will not however be entitled to recover for a total loss, unless he has, during some period of the risk, been completely deprived of his ship. See Thornley *v.* Hebson, 2 B. & Ald. 513; there the crew of a vessel in distress, worn out by fatigue, deserted her in order to save their lives, and she was *at the same time* taken possession of by eight fresh men from the ship to which the crew had escaped, who volunteered, at the risk of their lives, to go on board the vessel in distress, in the hope of bringing her into port, and thus earning salvage. They succeeded in bringing the vessel into port, where she was sold under a decree of the Admiralty Court to pay for the salvage. Notice of the abandonment had been given. It did not however appear that the assured had taken any means to prevent the sale. It was held by the Court of King's Bench that the assured had no right to abandon, and could only recover for a partial loss. "Where a ship is captured," said Bay-

ley, J., "she is taken possession of by persons *adversely* to the owner, and so it is in the case of barratry; but here the ship was taken possession of by persons acting, not adversely, but for the *joint benefit* of themselves and the owners, and the latter were never dispossessed of the vessel. The desertion of the crew therefore does not amount to a total loss." It was also held that the sale did not amount to a total loss, as it did not appear that the sale was necessary, or that the owners might not have prevented it.

If there be an arrest, detention, or embargo of a ship, unless it is of very short duration (Foster *v.* Christie, 11 East 205), the shipowner will *primâ facie* have an immediate right to abandon; Rotch *v.* Edie, 6 Term Rep. 413.

Although in the event of the recapture or restoration of the ship before action brought, there can be no claim for a total loss (*ante* p. 172), in order to escape from the inconvenience of the rule the parties to the insurance may stipulate that the loss shall be paid for as total, a certain length of time after official news of the capture or embargo. See Fowler *v.* The English and Scottish Marine Insurance Company, 18 C. B. N. S. 818 (114 E. C. L. R.). There a policy was effected on a Prussian ship, valued at 2500*l.*, against such risks only as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempt thereof." With a stipulation that the insurers "should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for consummation." The ship was
*175] detained by an embargo in a Danish *port, after the breaking out of hostilities between that power and Germany. It was held by the Court of Common Pleas that the right of the assured to claim for *a total loss* became invested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, and was afterwards (and after action brought) restored and arrived in safety in London. It was also held that the entry of the fact of the embargo in Lloyd's "Loss Book," however the intelligence might have been received was sufficient to satisfy the term "official news" in the policy.

Where a captured vessel has been bought by the master, if no notice of abandonment has been given, he will be considered as agent for the owners, and upon his restoring her to them, they will

only be entitled to claim for an average loss: M'Masters *v.* Shoolbred, 1 Esp. 236. It was admitted however by the Court in that case, "that when the ship had been captured and carried into port in the enemy's possession, the insured might then have abandoned it, and so have made it a total loss: Id. p. 239. See also Wilson *v.* Forster, 6 Taunt. 25 (1 E. C. L. R.); 1 Marsh. 425 (4 E. C. L. R.).

We have before seen in what cases the assured is entitled to recover for a total loss of the ship without notice of abandonment.

There are, however, as observed in the principal case by the Chief Baron, "intermediate cases." Thus, where the ship has been reduced to such a state by the perils insured against that she cannot keep at sea without repairs, and the repairs either cannot be effected in the place where the injury occurs (Somes *v.* Sugrue, 4 C. & P. 283 (19 E. C. L. R.), or, if being in a place where they may be done, he has no funds in his possession, and is not able to raise any: Read *v.* Bonham, 3 B. & B. 147 (7 E. C. L. R.)), unless his inability arises from the fault of the agents or correspondents of the assured (Tanner *v.* Bennett, R. & M. 182 (21 E. C. L. R.)), then the master is justified in selling the ship, and the assured, on giving due notice of abandonment, may recover for a total loss.

The mere fact that the rate of bottomry interest is extravagantly high (Somes *v.* Sugrue, 4 C. & P. 276 (19 E. C. L. R.); Morris *v.* Robinson, 3 B. & C. 196 (10 E. C. L. R.); 5 D. & R. 34 (16 E. C. L. R.); Cannan *v.* Meaburn, 1 Bing. 243 (8 E. C. L. R.); 8 Moore 127 (17 E. C. L. R.)), or that there is a *difficulty* in procuring materials for repairs (Furneaux *v.* Bradley, Park on Ins. 365), will not justify a sale by a master, nor consequently an abandonment by the assured. For it will be found on an examination of the authorities that the right to abandon depends, not upon the fact that a sale has been effected by the master, but upon the fact whether the sale was or not, under the circumstances, justifiable. See Milles *v.* Fletcher, 1 Doug. 232; Plantamour *v.* Staples, 1 Term Rep. 611 n.; 1 Mood. & Rob. 117.

A sale will be justifiable, and consequently on giving notice the assured can recover as for a constructive total loss, either when *there is no reasonable hope of extricating the vessel at all [*176 (Idle *v.* Royal Exchange Assurance Company, 3 Moore 115 (4 E. C. L. R.); 8 Taunt. 755 (4 E. C. L. R.); 3 B. & B. 151 n.

(7 E. C. L. R.); Hunter *v.* Parker, 7 Mees. & W. 322), or of extricating or repairing her except at a cost greater than her value when repaired: Robertson *v.* Caruthers, 2 Stark. 571 (3 E. C. L. R.); Robertson *v.* Clarke, 1 Bing. 445 (8 E. L. C. R.); 8 Moore 622 (17 E. C. L. R.); Mount *v.* Harrison, 4 Bing. 388 (13 E. C. L. R.); 1 Moo. & P. 14 (17 E. C. L. R.); De Cuadra *v.* Swann, 16 C. B. N. S. 772 (111 E. C. L. R.).

In all these cases the assured will not be able to claim as for a constructive total loss, unless, at the *time* of the sale, that proceeding appeared, in the prudent exercise of the best and soundest judgment that could then be formed, to be most beneficial to all parties concerned: see Morris *v.* Robinson, 3 B. & C. 196 (10 E. C. L. R.); 5 D. & R. 35 (16 E. C. L. R.); Cannan *v.* Meaburn, 1 Bing. 243 (8 E. C. L. R.); 8 Moore 127 (17 E. C. L. R.); Doyle *v.* Dallas, 1 Mood. & Rob. 48; Gardner *v.* Salvador, 1 Mood. & Rob. 116; Knight *v.* Faith, 15 Q. B. 649 (14 E. C. L. R.); Dommett *v.* Young, 1 C. & M. 465 (41 E. C. L. R.); but where such a judgment has been exercised, he can claim for a constructive total loss, even although the vessel has been recovered and repaired by the purchaser at a cost much less than her repaired value: Idle *v.* Royal Exchange Assurance Company, 3 Moore 115 (17 E. C. L. R.); 8 Taunt. 755 (9 E. C. L. R.); Robertson *v.* Caruthers, 2 Stark. 571 (3 E. C. L. R.). And it is immaterial whether the sale be effected by the master alone, or by the master with the sanction of one of the part-owners (Idle *v.* Royal Exchange Assurance Company, 3 Moore 115 (17 E. C. L. R.); 8 Taunt. 755 (4 E. C. L. R.)), or even by the owner or a part-owner who is also master. See Green *v.* Royal Exchange Assurance Company, 1 Marsh. 447 (4 E. C. L. R.); 6 Taunt. 68 (1 E. C. L. R.); Doyle *v.* Dallas, 1 Mood. & Rob. 48; Knight *v.* Faith, 15 Q. B. 649 (69 E. C. L. R.).

A sale, however, of the vessel is not essential in such cases in order to enable the assured to recover for a constructive total loss, for it is clear that where the estimated costs of the repairs of a vessel exceed the repaired value, the assured may, without a sale, upon giving a proper notice of abandonment, recover for a constructive total loss: Allen *v.* Sugrue, 8 B. & C. 561 (15 E. C. L. R.); 3 M. & R. 9; Young *v.* Turing, 2 M. & Gr. 593 (11 E. C. L. R.).

As to the nature of the repairs, the cost of which will exceed the value of the ship, the mode of estimating their cost, and the value

of the ship; see Reid *v.* Darby, 10 East 143; Doyle *v.* Dallas, Mood. & Rob. 48; Thompson *v.* Colvin, Ll. & Wels. 140; Read Bonham, 3 B. & B. 147 (7 E. C. L. R.); Morris *v.* Robinson, 3 I & C. 196 (10 E. C. L. R.); 5 D. & R. 35 (16 E. C. L. R.); Ca nan *v.* Meaburn, 1 Bing. 243 (8 E. C. L. R.); Somes *v.* Sugrue, 4 C. & P. 276 (19 E. C. L. R.); Mount *v.* Harrison, 4 Bing. 38 (13 E. C. L. R.); Gardner *v.* Salvador, 1 Mood. & Rob. 116; Phi lips *v.* Nairne, 4 C. B. 343 (56 E. C. L. R.); Allen *v.* Sugrue, B. & C. 561 (15 E. C. L. R.); 3 M. & R. 9; Dans. & Ll. 188 Young *v.* Turing, 2 M. & G. 593 (40 E. C. L. R.); 2 Scott, N. R 752 (30 E. C. L. R.); Manning *v.* Irving, 1 C. B. 168 (50 E. C L. R.); 6 C. B. 391; 1 H. L. Cas. 287; Grainger *v.* Martin, *B. & S. 456 (101 E. C. L. R.); The African Steamship [*17 Company *v.* Swanzy, 2 K. & J. 660.

Where the master of a ship, instead of selling or abandoning her elects to repair her, raising money for the purpose by a bottomr bond, the owner will not, on the arrival of the vessel at home, b entitled to abandon because the amount spent on repairs is greate than the value of the ship, as shown by her sale in order to satisf the bottomry bond: Benson *v.* Chapman, 6 M. &. G. 792 (40 E. C L. R.); Chapman *v.* Benson, 5 C. B. 330 (57 E. C. L. R.); 2 H L. Cas. 696. And see Rosetto *v.* Gurney, 11 C. B. 176 (73 E. C L. R.).

Where however the owner of a vessel relinquished his intentio of abandonment, in consequence of the underwriters requesting hi not to do so, and ordering repairs for which a bottomry bond wa given, upon the refusal of the underwriters to pay the bottomr bond on the arrival of the ship, in consequence of which the shi was sold, they were held liable for all damage which accrued to th owner in consequence of that refusal: Da Costa *v.* Newnham, Term. Rep. 407.

Constructive total loss of Goods.—As in the case of a ship, if th cargo has been captured, and there is a *spes recuperandi*, it is ne cessary for the assured to give notice of abandonment in order tha he may recover as for a total loss (Tunno *v.* Edwards, 12 East 488 Goldsmid *v.* Gillies, 4 Taunt. 802); but even if he had given notic in such a case, his right to recover as for a total loss will be dives ed if the cargo be restored before action brought: Naylor *v.* Taylo

9 B. & C. 718 (17 E. C. L. R.); 4 M. & R. 526; Dans. & Ll. 240. But this will not be the case where the goods have not been effectively restored to the hands of the owners after a capture, as, for instance, where, after a recapture, they have been detained in consequence of an embargo (Cologan *v.* London Assurance Company, 5 M. & Selw. 447); or where, after the goods have been ordered to be restored to the owners, it becomes impossible to take them to their port of destination in consequence of its being blockaded: Barker *v.* Blakes, 9 East 283. So where after desertion of the ship by the crew, notice of abandonment has been duly given by the owner of the goods, their delivery to his agent abroad, before action brought, so much damaged that they would have been worthless if sent on to their port of destination, will not be considered to be such a restoration as will defeat the abandonment made on the desertion of the ship by the crew: Parry *v.* Aberdein, 9 B. & C. 411 (17 E. C. L. R.); and see Lozano *v.* Janson, 2 E. & E. 160 (105 E. C. L. R.).

The mere fact of goods being sent to this country by persons acting neither as agents nor on behalf of the assured, will not be considered such a restoration as will defeat a notice of abandonment properly given. See Dixon *v.* Reid, 5 B. & Ald. 597 (7 E. C. L. R.); there a ship with its cargo was *barratrously
*178] taken out of her course by the crew to Barbadoes, where the ship was condemned and sold, and part of her cargo (47 logs of timber) was also sold to pay the charges incurred there, and the remainder, consisting of 186 logs, was forwarded to London by another vessel. The insured abandoned to the underwriters. On the arrival of the logs, the plaintiff at first proposed to settle the loss with the underwriters at 69*l.* 9*s.* 6*d.* per cent., but they refused to settle upon those terms, and the logs were afterwards sold, but not by the plaintiff, who brought an action for a total loss. It was held by the Court of King's Bench to be a case of total loss. "Here," said Abbott, C. J., "by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to them a total loss. The payment of the wages at Barbadoes and the sending home of the 186 logs *were not the acts of the assured*, or any person authorized by them. I think therefore that this was a total, and not an average loss."

Notwithstanding some of the older decisions (Manning *v.* Newn-

ham, 3 Doug. 130 (26 E. C. L. R.); Milles *v.* Fletcher, Doug. 231), it appears now to be settled that a mere loss or retardation of the voyage for the season is not a constructive total loss on *imperishable* goods, and will only be considered so with respect to *perishable* goods when they have received such sea-damage as that they could not be forwarded from their port of distress so as to arrive at their port of destination in a merchantable state, or except at an expense exceeding the value of the goods. Thus, in Anderson *v.* Wallis, 2 M. & Selw. 240, there was a policy of assurance on goods, consisting of copper and iron, warranted "free of particular average," at and from London to Quebec, and the ship, owing to sea-damage in the course of her voyage, was obliged to run into the nearest port —Kinsale in Ireland—to undergo repairs. She could not however be repaired in time to prosecute her voyage that season. There was not any ship at Kinsale or Cork to be procured to forward the cargo, so that the voyage was abandoned, and the captain ultimately sailed on another voyage. The cargo was damaged and sold as a damaged cargo at Kinsale, and notice of abandonment was duly given. It was held by the Court of King's Bench that this was not a total loss of the goods, and that the assured could not abandon: "The case of an interruption of the voyage," said Lord Ellenborough, C. J., "does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen on the underwriters. It is unnecessary to pursue the subject farther, as there is not any case or any principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of abandonment."

The result will be the same *where, although the thing insured is of a perishable nature, it is not so sea-damaged [*179 as to render it likely to be spoiled if kept until another vessel can be found to forward it to its port of destination. Hunt *v.* Royal Exchange Assurance Company, 5 M. & Selw. 47. See also Van Omeron *v.* Dowick, 2 Campb. 42; Wilson *v.* Millar, 2 Stark. 1; Underwood *v.* Robertson, 4 Campb, 138; Wilson *v.* Royal Exchange Assurance Company, 2 Campb. 623.

Although the cargo is at one time so far lost (for instance, by submersion) as to give a right to abandon, yet if no notice of abandonment be given, and it is afterwards recovered in such a state as that it can be forwarded to its port of destination in a marketable

condition, the assured cannot by selling treat the case as one of total loss. See Anderson *v.* Royal Exchange Assurance Company, 7 East 38, and *ante*, p. 149, where it is alluded to by the Chief Baron in the principal case. See also Thompson *v.* Royal Exchange Assurance Company, 16 East 214.

So if only a *part* of the cargo can be forwarded by the master to its destination, he cannot by selling the whole make the loss total: Freeman *v.* East India Company, 5 B. & Ald. 617 (7 E. C. L. R.); Morris *v.* Robinson, 8 B. & C. 196 (10 E. L. C. R.); 5 D. & R. 34 (16 E. C. L. R.); Cannan *v.* Meaburn, 1 Bing. 243 (8 E. C. L. R.); 8 Moore 127 (17 E. C. L. R.); Moss *v.* Smith, 9 C. B. 94 (67 E. C. L. R.).

Where however the goods are sold because they are so sea-damaged, that if sent on to their port of destination they would be worth nothing, this would be clearly a case of total loss: Parry *v.* Aberdein, 9 B. & C. 411 (17 E. C. L. R.); and see Reimer *v.* Ringrose, 6 Exch. 263.

On the other hand, if the damage is reparable, the loss is total or partial, according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore as between the underwriters and the assured impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it and the assured cannot recover as for a constructive total loss. And the same rule applies if a part only of the cargo can be saved: per Jervis, C. J., in Rosetto *v.* Gurney, 11 C. B. 186 (73 E. C. L. R.); sed vide Gernon *v.* Royal Exchange Assurance Company, Holt N. P. 52 (3 E. C. L. R.); 6 Taunt. 383 (1 E. C. L. R.); 2 Marsh. 88 (4 E. C. L. R.); Hudson *v.* Harrison, 3 B. & B. 97 (7 E. C. L. R.); 6 Moore 288 (17 E. C. L. R.).

Constructive total loss of Freight.—Primâ facie the assured on freight has a right of abandoning freight where there has been a constructive total loss of ship: per Tindal, C. J., in Benson *v.* Chapman, 6 M. & G. 810 (46 E. C. L. R.). Thus if a vessel be captured or detained by arrest or embargo, and the assured on freight gives notice of abandonment, he may recover as for a total loss of freight if he bring his action before any freight is earned: Thompson *v.* Rowcroft, 4 East 34.

*But although a constructive total loss of freight may have taken place, and notice of abandonment may have been duly given, if the ship arrive earning freight before action brought, the assured cannot recover for a total constructive loss: M'Carthy *v.* Abel, 5 East 388; and if any freight be ultimately earned, it is immaterial whether it be the particular freight contracted for or not: Everth *v.* Smith, 2 M. & Selw. 278. [*180

A mere retardation of the voyage will not give the assured on freight a right to recover as for a total loss, if it does not prevent the freight from being ultimately earned: Id. See also Barclay *v.* Stirling, 5 M. & Selw. 6; Brockelbank *v.* Sugrue, 1 Moo. & Rob. 102. Nor will the loss be rendered total, by the fact that the freight when earned has been swallowed up by bottomry charges: Benson *v.* Chapman, 6 M. & G. 792 (46 E. C. L. R.); 5 C. B. 330 (57 E. C. L. R.); 2 H. L. Cas. 696.

The assured on freight will *primâ facie* have a right to abandon on receiving intelligence of the loss or disability of the ship, but if the goods are transshipped, he will be entitled to recover for a total loss in case the substituted ship does not arrive before action brought: 2 Arn. Mar. Ins. 980, 981, 3d ed.; *secus*, if the substituted ship arrives and the freight be earned before action brought: Id.

When the ship and cargo are justifiably sold abroad, this will amount to a total absolute loss of freight, and no notice of abandonment will consequently be necessary; but when the ship is not justifiably sold, that is to say, where it could have been repaired, or the cargo have been forwarded by another vessel, such notice is inoperative, for it has been well said that, "if the loss of freight be not total in its nature, abandonment cannot make it so:" Chapman *v.* Benson, 5 C. B. 363 (57 E. C. L. R.); and see Idle *v.* Royal Exchange Assurance Company, 8 Taunt. 755 (4 E. C. L. R.); 3 Moore 115 (4 E. C. L. R.); 3 B. & B. 151, n. (d) (7 E. C. L. R.); Parmeter *v.* Todhunter, 1 Campb. 541; Green *v.* Royal Exchange Assurance Company, 6 Taunt. 68 (1 E. C. L. R.); 1 Marsh. 447 (4 E. C. L. R.). Sed vide Knight *v.* Faith, 15 Q. B. 649 (69 E. C. L. R.).

The mere liability to repair a ship so as to send on the *entire* cargo by her will not amount to a constructive total loss of freight. Thus, in Moss *v.* Smith, 9 C. B. 94 (67 E. C. L. R.), a ship valued at 12,000*l.* was

insured from Valparaiso to England. The freight, valued at 4000*l.*, was also insured by a separate policy. The ship having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled, by stress of weather, to put back to Valparaiso, where the master, finding, upon survey, that to repair her, so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her. It was held by the Court of Common Pleas not to be a total loss either of ship or freight. "The only loss in question here," said Maule, J., "is a loss of freight as *incident to the loss of the ship. If the ship was so irreparably damaged,—considering the damage to be irreparable in the view I have mentioned, and which I take to be well established,—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning." *181]

It is clear that there will be a total loss of freight if the cargo be so damaged by the peril of the sea in the course of the voyage as to render it impossible (except at an expense which would greatly exceed its value on arrival) to carry it to its port of destination: Michael *v.* Gillespy, 2 C. B. N. S. 627 (89 E. C. L. R.). See and consider Mount *v.* Harrison, 4 Bing. 388 (13 E. C. L. R.); 1 M. & P. 14 (17 E. C. L. R.).

As to the right of underwriters in questions of total loss to have inspection of documents such as the correspondence between the captain and owner, see Rayner *v.* Ritson, 14 W. R. (Q. B.) 81.

3. *What is necessary in order to constitute a valid Abandonment.* —Where an absolute total loss takes place, in which case, as we have before seen, no abandonment is necessary, the insurer will be entitled to whatever is ultimately saved, and it is termed "Salvage loss without notice of abandonment." Thus in the principal case, where the damaged hides had been sold at an intermediate port, Lord Abinger, C. B., said that "the proceeds of such sale would be considered as salvage to the party who was to sustain the loss," *i. e.* the underwriter. *Ante*, p. 150.

When the assured receive intelligence of such a loss as entitles them to abandon, they have the option to treat the loss either as total or average. If they elect to treat it as a total loss, they must give notice of abandonment to the underwriters within a reasonable time: Mitchell *v.* Edie, 1 Term Rep. 608; and what is a reasonable time is a matter of law for the decision of the Court, and depends upon the peculiar circumstances of each case: Hudson *v.* Harrison, 3 B. & B. 106 (7 E. C. L. R.).

Where the assured has received *certain* intelligence of a disaster such as gives him a right to abandon (Hunt *v.* Royal Exchange Assurance Company, 5 M. & Selw. 47; Aldridge *v.* Bell, 1 Stark. 498 (2 E. C. L. R.); Read *v.* Bonham, 3 B. & B. 147 (7 E. C. L. R.); Fleming *v.* Smith, 1 H. L. Cas. 514), or of the ship's capture or detention in a foreign port (Mullett *v.* Shedden, 13 East 304; Mellish *v.* Andrews, 16 East 13), immediate notice of the intention to abandon must be given to the underwriters by the assured, without waiting to see what will be the result.

The assured however cannot be expected to give notice until after he has had certain and accurate *information of the disaster [*182
(Read *v.* Bonham, 3 B. & B. 147 (7 E. C. L. R.)), and he is entitled to a reasonable time for acquiring a full knowledge of the state and nature of the damage done to the thing insured before he is bound to elect whether he shall abandon to the underwriters for a total loss or not, but he will not be allowed to lie by in order to ascertain, from *the state of the markets* or for any other reasons, whether it will be most for his benefit to treat the loss as total or partial. This is well laid down in the case of Gernon *v.* The Royal Exchange Assurance Company, 6 Taunt. 383 (1 E. C. L. R.). There a cargo of sugar had been insured from Liverpool to Calais, or the ship's port of discharge in the British Channel. The ship sailed on the 1st December, 1814, and meeting with tempestuous weather on the 20th, put back into Liverpool. On the same day, one of the owners there resident apprised his agent in London of her return, and that it was presumed there would be some damage from the sea-water. This was stated to the defendants on the 22d. On the 21st, surveyors were employed to inspect the condition of the sugar. On the 24th the owners wrote that the cargo had been discharged and was about to be surveyed, that from appearances the damage would not be equal to what they had feared, and they

requested the underwriters' permission to proceed to Havre or to the ship's original destination. To this communication the defendants refrained from making any observation. On the 29th the owners again wrote for permission to go to a second port, and added, that after a minute inspection of the sugars, 290 boxes were found to have received damage, and that it was impossible to say how far the real injury might extend. On the 2d of January, the defendants being applied to for instructions, declined giving any directions upon the subject of the damaged goods. On the 7th of January, the owners having obtained a formal protest and certificate of survey and of the damage of the cargo, sent them to the defendants, adding, that by the latter it appeared that the greater part of the cargo was destroyed, and that the whole of it had suffered deterioration, insomuch that they could not think of sending any part of the cargo forward, and they signified to the insurers their intention of abandoning the whole, and that it would be brought to sale on a day named. At the trial, Gibbs, C. J., left to the jury the question whether the time which the plaintiff had taken for making the abandonment was longer than was sufficient for ascertaining and judging the state of the cargo; and the jury found that the assured had abandoned in a reasonable time, and found a verdict for the plaintiff. And the Court of Common Pleas afterwards discharged a rule to set aside the verdict. "It is very true," said Gibbs, C. J., in delivering the judgment of the Court, "that the assured must always *elect in the first instance whether he will consider a loss as partial and take to the property himself, or as total and abandon to the underwriter. This is the law in all cases where the assured has his election, by abandoning or not abandoning, to treat the loss as total or partial. But it is equally true that the first instance means, after the assured has had a convenient opportunity of examining into the circumstances which render abandonment expedient or otherwise, because it is on the result of that examination that he is to make up his mind whether he will abandon or not. Let it not be supposed that I accede to the proposition that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets fall or rise, to elect whether he will abandon or not abandon. He has no right to govern his conduct by any such rule. The only examination he may make is into *the actual state of the cargo*. . . . It was not

*183]

competent to set up the abandonment on the 7th of January, if the assurers were fully apprised of the facts on the 29th of December; but I think it appears, from all the circumstances, that they were not so apprised on the 29th, and that the cargo had not then undergone so full an examination as was afterwards made. They ought to have a reasonable and convenient time for their "inspection;" if they had been dilatory in making their survey it would have been a very different case, though the plaintiff ought not to be pressed too closely on this point; yet, if he had been grossly negligent and had slept over the business, I think it would have been an answer to the plaintiff's demand; but here is no unreasonable delay, and therefore we think there is no ground for saying the abandonment was made at too late a period. See s. c. 2 Marsh. 88 (4 E. C. L. R.); and Hudson *v.* Harrison, 3 B. & B. 106 (7 E. C. L. R.).

The assured will not be allowed to lie by and treat the loss as an average loss, and then afterwards give notice of abandonment to the underwriters because he finds it more to his advantage to treat the loss as total. Thus, in Anderson *v.* Royal Exchange Assurance Company, 7 East 38, where a vessel laden with corn was stranded near Waterford on the 28th of January, and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kilndried. The assured did not give notice of abandonment to the underwriters until the 18th of February. It was held by the Court of Queen's Bench that the notice was not given in time. "It was not in fact," said Lord Ellenborough, C. J., "as it turned out, a total loss; but during the time it was submersed in water it might have been treated as such. The assured, however, did not treat it as a total loss on their own account, but *continued laboring on the vessel and cargo on their own account for some time afterwards, from the 31st [*184 of January till the 18th of February, and had succeeded in preserving part of it, and did not elect to abandon *till they found that it would not answer to keep to the cargo;* and when they did abandon, it was no longer in fact a total loss." And Le Blanc, J., tersely observed, "The assured must not take the chance of endeavoring to make the best of the accident for himself, and when he finds that it does not answer, then to abandon to the under-

writers." See also Allwood *v.* Henckell, Park 399; Baker *v.* Blakes, 9 East 283; Fleming *v.* Smith, 1 H. L. Cas. 513.

Upon the same principle as is laid down in the principal case, the assured may preclude himself from recovering for a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of the money arising from the sale of the property insured. And the learned judge who decided that case gives as an illustration of the principle what was in reality decided in Mitchell *v.* Edie, 1 Term Rep. 608. "Suppose," he says, "that the money received from the sale should be greater than or equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature." *Ante*, p. 155. See also Allwood *v.* Henckell, Park 399, 8th ed.

An abandonment cannot be partial, it must be of the whole thing insured: Smith's Merc. Law 391, 6th ed., and it must be absolute and unconditional: M'Masters *v.* Shoolbred, 1 Esp. 238, and consequently a person who has not an absolute and unconditional right to the possession of the goods injured cannot make a valid abandonment: Conway *v.* Gray, 10 East 536.

Although an abandonment is generally in writing, it may be by parol: Parmeter *v.* Todhunter, 1 Campb. 541; Read *v.* Bonham, 3 B. & B. 147, 149 (7 E. C. L. R.); but in either case it must be express and unequivocal. Thus, in Parmeter *v.* Todhunter, 1 Campb. 541, where the insurance-broker stated to the underwriters that the ship insured had been captured, recaptured, and taken into a foreign port, and required them to settle as for a total loss, and to give direction as to the disposition of the ship and cargo, it was held by Lord Ellenborough, C. J., that this did not amount to an abandonment. "There is," he observed, "no implied abandonment by a demand of a total loss. It would be very well to prevent parol abandonments entirely; but if they are allowed, I must insist upon their being express. An implied parol abandonment *185] is too uncertain and cannot be supported. *The abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." So likewise

where a letter stating the damage done to a cargo insured was shown to the underwriters, and they desired that "the assured would do the best they could with the damaged property," Lord Kenyon, C. J., held that this did not enable the assured to go for a total loss: Thelluson *v.* Fletcher, 1 Esp. 73; see also Lockyer *v.* Offley, 1 Term Rep. 252; Da Costa *v.* Newnham, 2 Id. 407; Havelock *v.* Rockwood, 8 Id. 277.

Notice of abandonment must be given by the assured, or by a person having authority from him to give it. Thus it was held in Jardine *v.* Leathley, 3 B. & S. 100 (113 E. C. L. R.); and 32 L. J. Q. B. 132, that the person with whom a policy of insurance on ship had been simply deposited as a security for a loan to the owner of the ship, had no implied authority to give a notice of abandonment to the underwriters; and that a notice given by him without the express authority of the owner could not enure for the benefit of the latter, so as to enable him to recover as on a constructive total loss.

But the underwriters may by their conduct acquiesce, so as to be bound by an informal notice of abandonment: Hudson *v.* Harrison, 3 B. & B. 97 (7 E. C. L. R.).

Where notice of abandonment has been accepted by the underwriters it is irrevocable, even although the thing insured be restored before action brought: Smith *v.* Robertson, 2 Dow, P. C. 474; and see King *v.* Walker, 3 Hurlst. & C. 209, 214, reversing s. c. 2 Hurlst. & C. 384; and their title to the thing abandoned will have relation back to the time of the alleged loss: Cammell *v.* Sewell, 3 Hurlst. & N. 617.

An acceptance of an abandonment may be either written or parol, or it may be inferred from the acts of the underwriters, without either a written or a verbal communication: Hudson *v.* Harrison, 3 B. & B. 97 (7 E. C. L. R.); 6 J. B. Moore 288 (17 E. C. L. R.); but it should be distinct and unequivocal: Thelluson *v.* Fletcher, 1 Esp. N. P. 72. If the underwriters upon receiving notice of abandonment wish to dispute it, they should do so within a reasonable time; otherwise they will, by lying by, be held to have acquiesced in, and will consequently be bound by the notice. See Hudson *v.* Harrison, 3 B. & B. 97 (7 E. C. L. R.); Smith *v.* Robertson, 2 Dow, P. C. 474.

Abandonment may before its acceptance be revoked or waived by the act of the assured. No acts of the *master*, acting as agent for

both parties with regard to the property insured, will have that effect (2 Arn. Mar. Ins. 863, 3d ed.); nor will the acts of the insured have that effect unless they unequivocally amount to acts of ownership. Thus, after notice of abandonment, a direction by the assured to a Government agent to sell a ship which had been recovered from a mutinous crew (the cargo having been previously sold) was *held not to amount to a waiver of the notice: *186] Brown *v.* Smith, 1 Dow, P. C. 349; and see Allen *v.* Sugrue, Dans. & Ll. 190, note (*a*); Stewart *v.* Greenock Marine Insurance Company, 2 H. L. Cas. 159.

4. *The Effects of Abandonment on the Rights and Liabilities of the parties to the Contract of Insurance.*—The effect of an abandonment operates as an assignment to the insurers, except in the case of an abandonment of a ship where in consequence of the Registry Acts, the abandonment does not absolutely vest the ship in the insurers, for it enures only as a binding agreement to assign the ship, the assured in the meantime being trustees for the underwriters: Scottish Marine Insurance Company of Glasgow *v.* Turner, 1 Macq. H. L. Cas. 334, 342; Stewart *v.* The Greenock Marine Insurance Company, Id. 328, 331.

The thing insured, when thus transferred by abandonment to the underwriters, is termed the *salvage;* and hence it is that losses, which give the right of abandonment, are known, in Insurance law, as *salvage losses, or total losses, with benefit of salvage:* 2 Arn. Mar. Ins. 866, 3d ed.

The result of abandonment is that all incidents to the thing abandoned pass with it; thus any claims on account of damage arising from collision, caused by the fault of another ship, will pass to the underwriters, who may commence an action in the name of the assured: Yates *v.* Whyte, 4 Bing. N. C. 272 (33 E. C. L. R.); 5 Scott 640.

Upon the same principle it was held that underwriters who had paid a total loss on British ships captured by the Spaniards, were entitled as salvage to the proceeds of Spanish ships captured by way of reprisals, which had been distributed by the British Government amongst the assured: Randall *v.* Cockran, 1 Ves. 98. So where, after the abandonment of a ship, the assured on freight becomes entitled to be indemnified against its loss, the underwriters

can claim any other freight earned by the ship in her voyage, instead of that insured: Green *v.* Royal Exchange Assurance Company, 6 Taunt. 68 (1 E. C. L. R.); 1 Marsh. 447 (4 E. C. L. R.); and see Everth *v.* Smith, 2 M. & Selw. 278; Brocklebank *v.* Sugrue, 1 Mood. & R. 102.

Upon the same principle the freight pending at the time of the casualty or earned by a ship after abandonment will belong, not to the shipowner, but to the underwriters on ship. Thus, in Stewart *v.* The Greenock Marine Insurance Company, 1 Macq. H. L. Cas. 328, the "Laurel" sailed from Quebec for Liverpool on the 14th of July, 1842. On the 27th of July she was damaged by an iceberg, but on the 11th of August was brought into the Mersey, where, on the receding of the tide, she took ground, and sustained further injury. Nevertheless, on the 12th of August, she was floated into dock, and moored. On the 13th or 14th of August she delivered *her cargo, which consisted of timber, to the consignees, [*187 who duly made payment of the freight. The ship afterwards being found not worth repairing, was abandoned to the underwriters on ship. It was contended on behalf of the shipowners that they were entitled to the freight, inasmuch as it had been earned before the abandonment, and that a decision in favor of the underwriters would give to the abandonment a retrospective operation. The House of Lords, however, held that the underwriters were entitled to the freight. "In my view of the case," said Lord Cottenham, C., "it is not material whether the total loss is to be considered as having been completed on the 27th of July or on the 12th of August, for the voyage was not completed at either of these two dates. It was indeed argued that the voyage had been completed at the latter date, and the freight earned at that time; *the freight was, in fact, subsequently earned by the delivery of the goods*, but at the last date to which the total loss can be referred, namely, the 12th of August, it had not been earned. . . . In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters. Now the freight which a ship is in the course of earning is a benefit or advantage belonging to it, and is as much to be given up to, or to become the property of,

the underwriters paying for total loss of the ship, as any other matter of value belonging to or incident to the subject insured. It cannot be of importance at what part of the voyage the accident happens, and the property in the vessel is changed by what is accounted in law to be a total loss." See also Samuel *v.* Royal Exchange Assurance Company, 8 B. & C. 119 (15 E. C. L. R.); Benson *v.* Chapman, 6 M. & G. 792 (46 E. C. L. R.); 2 H. L. Cas. 721; Case *v.* Davidson, 5 M. & S. 79; 2 B. & B. 379 (6 E. C. L. R.); 5 J. B. Moore 117 (16 E. C. L. R.); 8 Price 542; Miller *v.* Woodfall, 8 E. & B. 493 (92 E. C. L. R.); Hickie *v.* Rodocanachie, 4 Hurlst. & N. 455.

Where the owners of the ship and the cargo are *distinct* persons, and the freight is insured with one set of underwriters, and the ship with another, and a separate abandonment is made of each, the underwriters on ship will be entitled to the whole freight pending at the time of the casualty, and ultimately earned by the ship (Case *v.* Davidson, 5 M. & Selw. 79; 2 B. & B. 379 (6 E. C. L. R.); 8 Price 542; Stewart *v.* Greenock Marine Insurance Company, 2 H. L. Cas. 159; see also Luke *v.* Lyde, 2 Burr. 882; Thompson *v.* Rowcroft, 4 East 44), and the freight which becomes thus vested in the underwriter on ship cannot be recovered by the shipowner from the underwriter on freight. Thus, in The Scottish Marine Insurance Company of Glascow *v.* Turner, 1 Macq. H. L. Cas. *334, the owners of the ship "Laurel," as appears in the case first noticed of Stewart *v.* The Greenock Marine Insurance Company, having been compelled to surrender the freight received by them from the consignee of the cargo, instituted an action against the insurers on freight, alleging, that as the underwriters on ship had been found entitled to the freight, it must be considered as lost to the assured, and consequently recoverable under the policy. It was held however by the House of Lords, reversing the decision of the Court of Session in Scotland, that the action was not maintainable. "Having regard," said Lord Truro, "to the true construction of the policy,—in other words, the obligation of underwriters on freight,—the facts of this case appear to be conclusive against the claim of the respondents. The decision below however rests upon a different construction of the policy, and it therefore becomes necessary to examine that construction. The expression 'the loss of freight' has two meanings, and the dis-

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tinction between them is material. First, freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight; or, secondly, freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstances unconnected with the contract between the assured and the underwriters on freight. For a loss of freight in the first sense, the underwriter on freight is liable; but for any loss of freight in the second sense, I conceive the underwriter is not answerable. I can extract no obligation whatever from the policy which should subject him to such a liability. He has performed his warranty, the freight has been earned, and he has no concern with the subsequent results. In the present case the owners received the freight on their own account, for their own benefit; and as the facts stood, when they so received it they were entitled to retain it against all the world. The contract between the owners and the underwriters on freight had been entirely performed, and the relation between them determined. The owners were then entitled to claim full compensation from the insurers of the ship for any pecuniary loss they might have incurred by reason of the damage their ship had sustained; but rather than thus claim as for a partial loss, they preferred to claim as for a total loss. The consequence of their electing to take that course was to make the freight which he had received for his own benefit an item in account between them and the insurers of the ship. Therefore the present claim against the insurers of the freight is founded, not on the policy for freight, but upon something else with which the insurers of the freight have nothing to do."

Where, however, the same person is the owner of the ship and cargo, no freight will, upon abandonment, pass to the underwriters *on ship. See Miller *v.* Woodfall, 8 E. & B. 493 (92 E. C. L. R.). There a shipowner loaded his ship, which was bound [*189 for Liverpool, with goods on his own account, and he insured the ship and the freight of the goods by distinct insurances. The ship was stranded at Southport, on the English coast, about twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on ship. After the abandonment, the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool, and he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was

brought to Liverpool. Afterwards the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner. It was held by the Court of King's Bench that nothing in the nature of freight for the carriage of the shipowner's goods to Southport passed to the abandonees, but that they were entitled to an allowance for the carriage of the part of the goods from Southport to Liverpool in the ship after the abandonment, to be estimated at the current rate of freight as if brought from Southport to Liverpool in another ship. "If," said Lord Campbell, C. J., "the goods on board the ship at the time when the casualty to which the abandonment refers occurred had belonged to third persons, for whom they were to be carried on freight from St. John to Liverpool, there can be no doubt that, by our law, the right to the whole of that freight would have passed to the abandonees of the ship. . . . But in the case which we have now to decide, at the time of the casualty there was no freight pending. The goods in the ship were the property of the owner of the ship; he was carrying them on his own account, and he could have no contract with himself. As between him and the underwriter on ship, it was quite immaterial that, under the designation of freight, he had insured with other underwriters the increased value of his goods, by reason of their being carried from St. John to Liverpool. Considering as a test what would have passed to the purchaser on a sale of the ship at the time of the casualty, it seems clear that he could have had no claim against the vendor in respect of the goods having been carried in the ship from St. John to Southport before the sale. No more can the abandonee. At the moment of the casualty, the goods had become more valuable to the owner from being carried the greatest part of the voyage; and he might have sold them afloat at an increased price. This is rather analogous to the case of freight earned and received by the owner of the ship before the abandonment, to which the abandonee of the ship would have no claim. We are therefore of opinion that it is only for any benefit which the owner of the goods may have derived from the use of the ship *190] *subsequent to the casualty, that the abandonees can claim compensation in the nature of freight." And see Dakin v. Oxley, 15 C. B. N. S. 646 (109 E. C. L. R.).

When, however, the freight is earned, not by the abandoned ship,

or a ship engaged by the persons abandoning her, or their agents, but by a vessel into which the cargo has been transshipped by the captain acting as agent for the owners, the underwriters on ship will not be entitled to the freight. Thus, in Hickie *v.* Rodocanachi, 4 Hurlst. & N. 455, the plaintiffs were the owners of a ship called the "Sarah Sands," which they chartered for a voyage to carry troops to Calcutta. By the charter-party a portion of the freight was payable only on the completion of the voyage, so that the plaintiff's right to it depended on that event. The vessel sailed, and when 700 miles beyond the Mauritius took fire, and was compelled to desist from the prosecution of the voyage, and made for the Mauritius, which she reached, having sustained great damage. She was insured by a marine policy in the common form. On notice of the loss the insured abandoned, and the abandonment was accepted. The captain freighted another ship; the troops were forwarded to Calcutta; the freight earned and received by the insured. An action having been brought upon the policy, it was held by the Court of Exchequer that in forwarding the troops the captain acted as agent for the owner, and not for the underwriters; and that the underwriters to whom the ship had been abandoned were not entitled to any benefit from the freight so received. In delivering the judgment of the Court, Bramwell, B., said, "When the injured ship finishes the voyage, it is the ship of the underwriters; and those who make use of it may not altogether unreasonably be held to do so for the benefit of its then owners. But where another ship finishes the voyage, it is not the underwriters' ship, and there is no reason why those who hire it should be supposed to be acting for the benefit of the underwriters, rather than for their own employers, the former owners. Here the captain, when he hired the new vessel, was not the underwriters' captain nor their agent, nor under any duty to them; he was to his former owners. Take the case put in the argument. Suppose the plaintiffs and the defendant had been at the Mauritius, and each had claimed to forward the troops for his own benefit, who would have been entitled to do so? Undoubtedly the plaintiffs. Take the other case of there being a breach of duty to the charterer in not forwarding the troops, who would have been liable? The plaintiffs, not the defendants. Again, suppose the hire and cost of the new ship exceeded the freight earned, who would have been liable for it? The plaintiffs, not the defendants.

Or suppose the case of the owner of the goods arriving at the Mau-
*191] ritius, and insisting *on the goods being there delivered to him, in which case he must pay the whole freight, surely the owner would be entitled to it. On these grounds we are satisfied that the captain in such a case as the present acts for the owners of the ship, and not for the underwriters; and that they are not entitled to any benefit from the freight acquired; that the underwriters may indeed be entitled to advantages attached to the ship, but not to those arising from contracts, the fulfilment of which can be, and is detached from the ship."

As to the deductions made from freight, ultimately earned before its proceeds are paid over as salvage to the different sets of underwriters, see Sharp *v.* Gladstone, 7 East 24; Barclay *v.* Stirling, 5 M. & Selw. 6.

It may be here mentioned that although ordinarily an action lies against the underwriter to recover for a total loss, the insurer and the underwriter may contract that no right of action (to be enforced in a Court of law) shall accrue until an arbitrator has decided, not merely as to the amount of damages to be recovered, but upon any dispute that may arise upon the policy: Scott *v.* Avery, 5 H. of L. 811; Tredwen *v.* Holman, 1 Hurlst. & C. 72.

The principal case of Roux *v.* Salvador was much examined and discussed in American Ins. Co. *v.* Francia, 9 Barr 390. In that case a ship was insured from Spain to the United States. On her voyage, having encountered storms by which her mainmast was sprung and other injuries suffered, the captain bore away for St. Thomas. On his arrival there, surveys were made, and the estimated cost of repairs considerably exceeded what would be the value of the vessel when repaired. The captain sold the vessel, and this was an action for an actual total loss, there having been no abandonment in time. Gibson, C. J. "It is not pretended that the notice was in time; but there is plausibility in the argument that it was not necessary. It is said that if the sale by the master was no more than a wholesome exercise of his discretion under the circumstances, there was a total loss of the title; and that though the brig afterwards existed as a vessel gone from the control of the assured, there was nothing to abandon. On the other hand, it is asserted that the right to contest the validity of

the sale with the master or his vendee ought to have been ceded as a thing of appreciable value, like the *spes recuperandi* between capture and condemnation. But, replies the assured, even that is extinguished by sentence of condemnation which passes the title; and as the validity of the sale must be maintained by the assured, the fact can as well be tried in an action on the policy, as it can be tried in an action against the master and his vendee. Whatever force there may be in these arguments, it seems to be settled by a decisive weight of authority, that in every case of insurance on the ship or cargo, though perhaps not on freight, when the master has sold the thing insured, there must be an abandonment to avoid the conclusion that the assured has elected to go for a partial loss. It is said that if any part of the property survive the peril, as in case of shipwreck, without a total destruction of it; or that, if any claims springing from the ownership of it remain to the assured, they must not be retained but ceded as a foundation to recover the whole. Most of the English authorities have been collected by Chief Justice Tindal, in the comparatively modern case of Roux *v.* Salvador, and from their express bearing in opposition to Cambridge *v.* Anderton, 2 B. & C. 691, he concluded that an abandonment was necessary in that case, which was in principle identical with the case before us. The hides when sold were rapidly becoming a loathsome mass of putrefaction, and if ever the master's right to sell was incontestable, it was in that case. If contestable it could have been tried in the action on the policy there as well as it could be tried in the action on the policy here; but Chief Justice Tindal introduced a new element into the discussion, which seems to be of commanding influence. "For as the assured," said he, "in no case is bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss, if it is to be held that abandonment is unnecessary when there has been a sale, the underwriter can have no certainty as to his rights or liabilities before the assured determines his election by bringing the action for a total loss. This uncertainty of itself and if no other consequence follow, is highly prejudicial to the underwriter. It may be further prejudicial in its direct consequences; agents may fail in whose hands the proceeds are left, and still further the right of the underwriters to dispute the validity of the sale with the purchaser of the ship or cargo, upon the ground of fraud, might by the intervention of time be impaired or entirely defeated." I am at a loss to see how this argument can be refuted. In reviewing the judgment in the Exchequer Chamber, Lord Abinger, who delivered the opinion of the Court, did not attempt to refute it, and we are at liberty to give more weight, on principle, to the judgment of the Common Pleas, accordant as it is with the judgments of the state courts of our Union, and the general course of the British courts, than to the judgment of the Superior Court

in England. He assumed what cannot be maintained, that the underwriters cannot be prejudiced by a protracted ignorance of the responsibility they have to meet, or of the course they have to pursue. The conclusion drawn by Chief Justice Tindal is sustained by Martin *v.* Crokatt, 14 East 465, and Bell *v.* Nixon, 1 Holt 423—cases posterior or not cited by him. Idle *v.* The Royal Exchange Insurance has been thought to bear the other way, but the insurance was on freight, which was entirely lost by the breaking up of the voyage, and there was consequently nothing to abandon. The American cases generally fall in within the current. The authorities were examined by Chief Justice Shaw in Smith *v.* The Manufacturers' Ins. Co., 7 Metc. 449, who laid down the rule that in every case like the present, an abandonment is necessary. Such, too, is the rule of Pierce *v.* The Ocean Insurance Company, 18 Pick. 91; Cohen *v.* The Insurance Company, Dudley S. C. 147, and The American Insurance Company *v.* Ogden, 15 Wend. 532; while we have to the contrary only Gordon *v.* The Insurance Company, 2 Pick. 249, said to have been recognised by Mr. Justice Thompson, 5 Peters 604. It was said in The American Insurance *v.* Ogden, that "the right to abandon does not in all cases depend upon the amount of damages, but exists in all cases where the ship is gone from the control of the assured; where the voyage is broken up and when a sale of the ship has become necessary for the benefit of all concerned." The master had sold the vessel at auction because she was without indispensable repairs, which he had not means to procure; and it was held that the assured might abandon and recover for a total loss; which certainly implies that he could else have recovered only for a partial loss. In Watson *v.* The North American Insurance, 1 Binn. 47, our own court held that the assured might recover without abandonment for an average loss after sentence of condemnation, leaving the jury to estimate and deduct the value of the chance of reversal and restoration of the property; but in Brown *v.* The Phœnix, 4 Binn. 445, the Chief Justice and Mr. Justice Breckenridge seem to have been disposed to carry the necessity of abandonment as far as it is at present proposed to do." The force of this reasoning, as compared with that of Lord Abinger in Roux *v.* Salvador, will have to be considered in the other State or United States Courts in which it may hereafter arise. The dictum of Mr. Justice Thompson of the Supreme Court of the United States above referred to, is to be found in his opinion in The Patapsco Insurance Co. *v.* Southgate, 5 Peters 622, where there had been a sale, and an abandonment, which the Courts held to be valid. "This renders it unnecessary for the Court to express any opinion upon the question made at the bar, whether any abandonment was necessary in this case. It may not, however, be amiss to observe that there is very respectable authority, and that, too, founded upon pretty sub-

stantial reasons for saying that no abandonment is necessary where the property has been legally transferred by a necessary and justifiable sale 2 Pick. 261, 265." In Mutual Safety Insurance Co. *v.* Cohen, 3 Gill. 459, it was decided that if there be an urgent necessity for the sale of an insured vessel, damaged by the perils of the sea, the master has a right to sell the vessel, and such sale constitutes a total loss, although there has been no valid abandonment. When an injury to an insured vessel can be repaired at an expense less than her value, when repaired, the assured cannot recover for a total loss without abandoning to the underwriters; but when an insured vessel is broken up and sold, in consequence of an injury received, without an abandonment to the underwriters, and a suit is brought on the policy, the proceeds of the materials sold, are to be deducted from the sum which the assured would be entitled to recover if there had been an actual total loss of the vessel: Smith *v.* Man. Ins. Co., 7 Metc. 448. If a sale by the master is necessary and warranted by the rules of law, it would, even without an abandonment, constitute a total loss: Fuller *v*, Kennebec Mutual Ins. Co., 31 Maine 325; Greely *v.* Tremont Ins. Co., 8 Cush. 415. When the sale of a disabled vessel is made by the master, no abandonment is necessary, provided the sale be justifiable, to enable the assured to recover for a total loss: Prince *v.* Ocean Ins. Co., 40 Maine 481; Buckman *v.* Merchants' Ins. Co., 5 Duer 342. The necessary sale of a vessel in the course of a voyage to defray salvage expenses, creates of itself, a total loss of the vessel for the voyage: Williams *v.* Suffolk Ins. Co., 3 Sumn. 510. See Paddock *v.* Commercial Ins. Co., 2 Allen 93; Stephenson *v.* Piscataqua Ins. Co., 54 Maine 55; Graves *v.* The Washington Ins. Co., 12 Allen 391; Duning *v.* Merchants' Ins. Co., 57 Maine 108.

When there is an actual destruction of the subject-matter insured, an abandonment is unnecessary, to entitle the assured to recover for a total loss: Gordon *v.* Bowne, 2 Johns. 150; Fosdick *v.* Norwich Ins. Co., 3 Day 108. On a voyage between New York and Curaçoa, the vessel lost her mast, and at Curaçoa had to be abandoned for want of materials to repair her. It was held that she received her death wound on the voyage, and the insured were entitled to recover for a total loss: Stagg *v.* United Ins. Co., 3 Johns. Cas. 34. Abandonment is not always necessary in cases of salvage or total loss: Portsmouth Ins. Co. *v.* Brazer, 16 Ohio 81. A vessel insured was taken by a French cruiser, retaken by a British frigate, libelled in an English Court of Vice-Admiralty of a British island, and decreed to be sold for the payment of salvage. The master purchased her, returned with her and delivered her to the former owner, the assured, who without any abandonment, credited the underwriters with the proceeds of of the sale. It was held to be a total loss; that the underwriters were

entitled to the net proceeds of the sale received by the master and no more, that the assured was not bound to abandon, but might lawfully retain the vessel: Storer v. Gray, 2 Mass. 565. There is a total loss, where by reason of a peril insured against, the cargo is permanently prevented from arriving at the port of destination: Robinson v. The Commonwealth Ins. Co., 3 Sumn. 220. The provision in a policy that the risk is against total loss only, means an absolute, not a mere technical total loss: Buchanan v. Ocean Ins. Co., 6 Cowen 318.

Where an injury is sustained by a vessel insured under a valued policy. the loss is not total, unless the expense of repairs will exceed fifty per cent. of the valuation in the policy, after the deduction of one-third new for old: Deblois v. Ocean Ins. Co., 16 Pick. 303. The insured may abandon a vessel, which has been damaged in the course of her voyage fifty per cent., though she has performed her voyage, and lain twenty-four hours in port: Peters v. Phœnix Ins. Co., 3 S. & R. 25; Wood v. Lincoln Ins. Co., 6 Mass. 479; Hall v. Ocean Ins. Co., 21 Pick. 472; Gordon v. Massachusetts Ins. Co., 2 Id. 249; Deblois v. Ocean Ins. Co., 16 Id. 303; Abbott v. Broome, 1 Caines 292; American Ins. Co. v. Center, 4 Wend. 45; King v. Hartford Ins. Co., 1 Conn. 422; Ralston v. Union Ins. Co., 4 Binn. 386; Clark v. Mass. Ins. Co., 2 Pick. 104; Moses v. Columbian Ins. Co., 6 Johns. 219; Dickey v. New York Ins. Co., 4 Cowen 222; Center v. American Ins. Co., 7 Id. 564; Patapsco Ins. Co. v. Southgate, 5 Peters 604; Humphreys v. Union Ins. Co., 3 Mason 429; Whitney v. New York Firemen's Ins. Co., 18 Johns. 208; Callender v. Ins Co. of North America, 5 Binn. 525; Bradlie v. Maryland Ins. Co., 12 Peters 378; Pezant v. National Ins. Co., 15 Wend. 453; Orrak v. Commonwealth Ins. Co., 21 Pick. 456; Hall v. Ocean Ins. Co., Id. 472; Robinson v. Commonwealth Ins. Co., 3 Sumn. 220; Magoun v. New England Ins. Co., 1 Story 157; Cohen v. Ins. Co., Dudley S. C. 147; Citizens Ins. Co. v. Glasgow, 9 Missouri 411; Hedley v. Nashville Ins. Co., 6 Richardson 130; Allen v. Commercial Ins. Co., 1 Gray 154; Forbes v. Manufacturing Ins. Co., Id. 371; Buckman v. Merchants' Ins. Co., 5 Duer 342; Fiedler v. New York Ins. Co., 6 Id. 282; Ins. Co. v. Goodman, 32 Alab. 108; Lincoln v. Hope Ins. Co., 8 Gray 22. A partial loss of an entire cargo by sea damage, if amounting to more than fifty per cent. may under circumstances be converted into a technical total loss; but not if a distinct part of the cargo be destroyed, and the voyage be not thereby broken up or rendered unworthy of being prosecuted: Seton v. Delaware Ins. Co., 2 Wash. C. C. 175. Where a cargo insured from Havana to Castine was wrecked on the way, and taken from the vessel without damage, and it might have been sent to Castine for less than fifty per cent. of its value, but the master sold it on the beach, it was held that the insurers were not liable for a total loss:

Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543. In determining whether there has been a technical total loss of a vessel, her value in the port of necessity is the standard: American Ins. Co. *v.* Francia, 9 Barr 390; Suarez *v.* Sun Mutual Ins. Co., 2 Sandf. S. C. 482. Where the goods saved do not amount to half in value of the goods insured, the assured may abandon: Gardiner *v.* Smith, 1 Johns. Cas. 141. Where a cargo insured for a round voyage was permanently separated from the ship by the total wreck of the latter on the outward voyage, and it being perishable in its nature it became necessary to sell it, although it was not injured to half its value, it was held to be a case of technical total loss, on account of the breaking up of the voyage: Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383. Where the voyage shall be deemed to be broken up and the assured entitled to abandon for a total loss: see Symonds *v.* Ins. Co., 4 Dall. 417; Buckman *v.* Merchants' Ins. Co., 5 Duer 342; Delaware Ins. Co. *v.* Winter, 2 Wright 176. The insurer may covenant to repair, though the loss exceed one-half the value of the vessel; and if he does so repair, the assured cannot abandon: Ritchie *v.* United States Ins. Co., 5 S. & R. 501; Hart *v.* Delaware Ins. Co., 2 Wash. C. C. 346.

The assured may abandon for a total loss on information of a capture, though the vessel is afterwards released and arrives at her port of destination: Slocum *v.* Ins. Co., 1 Johns. Cas. 151; Brown *v.* Phœnix Ins. Co., 4 Binn. 445; Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Rhineland *v.* Ins. Co., 4 Cranch 29; Murray *v.* United Ins. Co., 2 Johns. Cas. 263; Camel *v.* Marine Ins. Co., 7 Johns. 412.

The assured on learning the capture of his vessel may abandon, and in case of a subsequent condemnation may recover for a total loss: Bohlen *v.* Delaware Ins. Co., 4 Binn. 430; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348. But in case of capture or detention the abandonment must be made before the cause of the loss is removed: Richardson *v.* Maine Ins. Co., 6 Mass. 102; Amory *v.* Jones, Id. 318; Tucker *v.* United Ins. Co., 12 Id. 288; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348; Hallett *v.* Peyton, 1 Caines' Cas. 28; Church *v.* Bedient, Id. 21; Muir *v.* United Ins. Co., Id. 49; Queen *v.* Union Ins. Co., 2 Wash. C. C. 331; Adams *v.* Delaware Ins. Co., 3 Binn. 287; De Peau *v.* Russell, 1 Brevard 441. The redelivery of a captured vessel on bail does not defeat the right to abandon: Lovering *v.* Mercantile Ins. Co., 12 Pick. 348. Restraint and detention by an embargo has been decided to be a technical total loss, or an event by which the voyage insured is lost, although the subject-matter of the contract may remain in safety and under the control of the assured: Delano *v.* Bedford Ins. Co., 10 Mass. 347. Detention by an embargo will justify an abandonment: M'Bride *v.* Marine Ins. Co., 5 Johns. 299; Walden *v.* Phœnix Ins. Co., Id. 310; Ogden *v.* New York Firemen's Ins. Co., 10 Johns. 177; s. c. 12 Id. 25.

If the port of destination be blockaded on arrival, the assured may abandon: Schmidt *v.* United Ins. Co., 1 Johns. 249. The loss of a voyage from mere fear of a capture will not justify an abandonment: Richardson *v.* Maine Ins. Co., 6 Mass. 102; Amory *v.* Jones. Id. 318; Cook *v.* Essex Ins. Co., Id. 122; Lee *v.* Gray, 7 Id. 349; Tucker *v.* United Ins. Co., 12 Id. 288; Brewer *v.* Union Ins. Co., Id. 170; Corp. *v.* United States Ins. Co., 8 Johns. 277; Shapley *v.* Tappan, 9 Mass. 20; Craig *v.* United Ins. Co., 6 Johns. 226; Smith *v.* Universal Ins. Co., 6 Wheat. 176. Where a regular abandonment is made, the property vests in the insurer by relation to the time of capture; but the captain continues the agent of the insured until abandonment: Diderer *v.* Delaware Ins. Co., 2 Wash. C. C. 61; Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1; Lovering *v.* Mercantile Ins. Co., 12 Pick. 348.

An underwriter is not answerable for a partial loss on memorandum articles, except for general average, unless there is a total loss of the whole particular species, whether the particular article be shipped in bulk or in separate boxes: Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33. There cannot be a total loss of part of a cargo consisting of memorandum articles of only one species, such as hides; nor are the underwriters liable for salvage upon such articles, under the clause which authorizes the insured to labor, &c., for the preservation of the cargo, unless perhaps in a case where the salvage may have prevented an actual loss of the cargo: Beays *v.* Chesapeake Ins. Co., 7 Cranch 415; Newlin *v.* North American Ins. Co., 4 Amer. L. J. 272. The insurer on articles in the memorandum is liable only for a total loss, which never can happen where the cargo or a part of it has been sent on by the insured and reaches its original port of destination: Morean *v.* United States Ins. Co., 1 Wheat. 219; s. c. 3 Wash. C. C. 256; Robinson *v* Commonwealth Ins. Co., 3 Sumn. 220; Williams *v.* Cole, 4 Shepl. 207; Bryan *v.* Ins. Co., 25 Wend. 617; Ins. Co. *v.* Bland, 9 Dana 143; Hugg *v.* Augustin Co., 7 Howard S. C. 595; Williams *v.* Kennebec Ins. Co., 31 Maine 455; De Peyster *v.* Sun Ins. Co., 19 N. Y. 272; Tudor *v.* New England Ins. Co., 12 Cush. 554. Under a valued policy on a cargo warranted free from average, it was held that the insured could not recover, though at the end of the voyage, owing to leaks and other damage, the loss on the goods sold was more than fifty per cent. on all the goods shipped and on the whole cargo there was no profit: Waln *v.* Thompson, 9 S. & R. 115. As to memorandum articles: Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220; Williams *v.* Cole, 4 Shepl. 207; Poole *v.* Ins. Co., 14 Conn. 47; Maryland Ins. Co. *v.* Bosley, 9 Gill & Johns. 336; De Pau *v.* Jones, 1 Brevard 437; Wallenstein *v.* Columbian Ins. Co., 3 Robertson 528.

In order to entitle the assured to recover for a technical total, where the thing still remains in specie, the owner must abandon: Norton *v.*

Lexington Ins. Co., 16 Ill. 235. The right of the assured to abandon for a total loss depends upon the state of the fact at the time of the offer to abandon, and not upon the state of information received: Marshall *v.* Delaware Ins. Co., 4 Cranch 202; s. c. 2 Wash. C. C. 54; Dorr *v.* Union Ins. Co., 8 Mass. 502; Robinson *v.* Jones, Id. 536; Rhinelander *v.* Ins. Co., 4 Cranch 29; Alexander *v.* Baltimore Ins. Co., Id. 370; Radcliff *v.* Coster, 1 Hoffm. Ch. 98; Chidd *v.* Sun Mutual Ins. Co., 2 Sandf. S. C. 76; Fuller *v.* Kennebec Mutual Ins. Co., 31 Maine, 325; McConochie *v.* Sun Ins. Co., 3 Bosw. 99; Mordecai *v.* Firemen Ins. Co., 12 Richardson (Law) 512. Where a vessel was stranded, and afterwards before abandonment was gotten off without material injury, but was in the intermediate time sold by the master at public auction and purchased by him, the assured was held not to be entitled to recover for a total loss: Church *v.* Marine Ins. Co., 1 Mason 341. Whether stranding or submersion will justify an abandonment depends on the particular circumstances of each case: Wood *v.* Lincoln Ins. Co., 6 Mass. 479; Sewall *v.* United States Ins. Co., 11 Pick. 90; King *v.* Hartford Ins. Co., 1 Conn. 422. There cannot be a stranding unless the vessel remain stationary some time. If a vessel strike and bilge, but pass on without stopping, it is not a stranding: Lake *v.* Columbian Ins. Co., 13 Ohio 48.

No particular form of abandonment is necessary, nor is it indispensable that it should be in writing: Patapsco Ins. Co. *v.* Southgate, 5 Peters 604; Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268; Pierce *v.* Ocean Ins. Co., 18 Pick. 83; Ins. Co. *v.* Goodman, 32 Ala. 108; Silloway *v.* Neptune Ins. Co., 12 Gray 73. The master of a vessel has not authority by virtue of his office to abandon her to underwriters: Younger *v.* Gloucester Ins. Co., Sprague 236. An abandonment should be explicit, unconditional and on sufficient grounds, and the accident occasioning it should be described with certainty: Suydam *v.* Marine Ins. Co., 1 Johns. 181; Patapsco Ins. Co. *v.* Southgate, 5 Peters 604; King *v.* Delaware Ins. Co., 2 Wash. C. C. 300; Fuller *v.* McCall, 1 Yeates 464; s. c., 2 Dall. 219; Suydam *v.* Marine Ins. Co., 2 Johns. 138; Dickey *v.* New York Ins. Co., 4 Cowen 222; s. c., 3 Wend. 658; Pierce *v.* Ocean Ins. Co., 18 Pick. 83; Reynolds *v.* Ocean Ins. Co., 22 Id. 191; Thomas *v.* Rockland Ins. Co., 45 Maine 116; Heebner *v.* Eagle Ins. Co., 10 Gray 131; McConachie *v.* Sun Ins. Co., 26 N. Y. 477. An abandonment must be made within a reasonable time after notice of a total loss: Livermore *v.* Newburyport Ins. Co., 1 Mass. 264; Smith *v.* Newburyport Ins. Co., 4 Id. 668; Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400; Krumbhaar *v.* Marine Ins. Co., 1 S. & R. 281; Fuller *v.* McCall, 1 Yeates 464; s. c., 2 Dall. 219; Duncan *v.* Koch, Wallace, Sr. 33; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191; Osrok *v.* Commonwealth Ins. Co., 21 Pick 456; Teasdale *v.* Charleston

Ins. Co., 2 Brevard 190. The question whether an abandonment is made in a reasonable time is for the jury under the direction of the Court, being a mixed question of law and fact: Smith *v.* Newburyport Ins. Co., 4 Mass. 668; Peele *v* Suffolk Ins. Co., 7 Pick. 254; Bell *v.* Beveridge, 4 Dall. 272; Livingston *v.* Maryland Ins Co., 7 Cranch 506; Chesapeake Ins Co. *v* Stark, 6 Id. 268; Maryland Ins. Co. *v.* Ruden, 6 Id. 338; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191. What amounts to an acceptance of an abandonment: see Peele *v.* Merchants' Ins Co, 3 Mason 27; Wood *v* Lincoln Ins. Co., 6 Mass. 479; Bell *v.* Smith, 2 Johns. 98; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191; s. c., 1 Metc. 160; Commonwealth Ins. Co. *v.* Chase, 20 Pick. 142; Peele *v.* Suffolk Ins. Co., 7 Id. 254; Badger *v.* Ocean Ins. Co., 23 Id. 347; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monr. 541; Gloucester Ins. Co. *v.* Younger, 2 Curtis C. C. 322; Norton *v.* Lexington Ins. Co., 16 Illinois 235. Whether an abandonment has been waived is a question for the jury: Curcier *v.* Philadelphia Ins. Co., 5 S. & R. 113; King *v.* Middleton Ins. Co., 1 Conn. 184; Ogden *v.* New York Firemens' Ins. Co., 10 Johns. 177; King *v.* Hartford Ins. Co., 1 Conn. 333; Columbian Ins. Co. *v.* Ashby, 4 Peters 139.

An abandonment operates as a transfer to the underwriter of the property insured only to the extent of the indemnity contemplated by the policy: Cincinnati Ins. Co. *v.* Duffield, 6 Ohio N. S. 200. In case of abandonment, the underwriter is entitled to all the proceeds of the thing abandoned and to all the profits arising from the investment thereof, and liable for all the charges: Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400; McBride *v.* Marine Ins. Co, 7 Johns. 431; Hammond *v.* Essex Ins. Co., 4 Mason 196; Pierce *v.* Ocean Ins. Co., 18 Pick 83; Badger *v.* Ocean Ins. Co., 23 Id. 347; Union Ins. Co. *v.* Burrell, Anthon 128; Teasdale *v.* Charleston Ins. Co., 2 Brevard 190; Atlantic Ins. Co. *v.* Storrow, 1 Edw. Ch. 621; Rogers *v.* Hosack, 18 Wend. 319; New York Ins. Co. *v.* Roulet, 24 Id. 505; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Monr. 541; Norton *v.* Lexington Ins. Co., 16 Illinois 235; Mutual Ins. Co. *v.* Cargo of George, Alcott Adm. 89. After a legal abandonment, the insured is considered as the agent of the insurer and may employ the ship to the best advantage: Curcier *v.* Philadelphia Ins. Co., 5 S. & R. 113. The master is the agent of all concerned in the voyage, and whenever an abandonment has been accepted he becomes by relation the agent of the underwriters from the time of the loss, and a sale by him is then on account of the underwriters: The Sarah Ann, 2 Sumn. 206; Gardiner *v.* Smith, 1 Johns Cas. 141; Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268; Smith *v.* Touro, 14 Mass. 112; Pierce *v.* Ocean Ins. Co., 18 Pick. 83; Mowry *v.* Charleston Ins. Co., 6 Richardson 146.

On a policy on freight against a total loss only, a party is not entitled to

abandon for a technical total loss: Willard *v.* Millers' Ins. Co., 24 Missouri 561. The underwriters are liable for freight as a total loss where there is a total destruction in specie of the cargo: Redyard *v.* Phillips, 4 Blatchf. C. C. 443. In the case of a constructive total loss, it is the duty of the master to earn freight by forwarding the cargo by another vessel; and to entitle the assured to recover for the loss of freight he must show that no other vessel could be had: Kinsman *v.* New York Ins. Co, 5 Bosw. 369. The doctrine of abandonment for a constructive loss does not apply to a contract of affreightment: Henderson *v.* Maid of Orleans, 12 Louis. Ann. 352; Lord *v.* Neptune Ins. Co., 10 Gray 109.

The insured is never compelled to abandon. He has an election to do so, but no right to claim for a technical total loss until he makes such election: Bosley *v.* Chesapeake Ins. Co., 3 Gill & Johns. 450; Marcan *v.* United States Ins. Co., 3 Wash. C. C. 256; Earl *v.* Shaw, 1 Johns. Cas. 313.

*192] *LEWIS *v.* RUCKER.

Saturday, 2*d May*, 1761.

[Reported 2 Burr. 1167.]

Maritime Insurance—Adjustment of Average.]—*The nature of the contract of insurance is, that the goods insured shall come safe to the port of delivery; or if they do not, that the insurer shall indemnify the assured to the amount of the prime cost or value in the policy. If the goods arrive lessened in value through damage received at sea, the nature of the contract of insurance being a contract of indemnity requires that the insured should be put in the same condition (relation being had to the prime cost or value in the policy), which he would have been in if the goods had arrived free from damage,—that is, by paying such proportion or aliquot part of the prime cost or value in the policy, as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.*

A rule having been obtained by the plaintiffs (the insured) for the defendant (the insurer) to show cause why a verdict given for the defendant should not be set aside and a new trial had, the Court, after hearing the matter fully debated by counsel on both sides, took time to advise.

Lord Mansfield, C. J., now delivering their resolution, in doing which he stated everything requisite to be known in so full and ample a manner as to render it quite unnecessary, and even impertinent, for the reporter to pretend to

prefix any preface or introduction to it. What he said was to the following effect: This was an action brought upon a policy, by the plaintiffs, for Mr. James Bourdieu, upon the goods aboard a ship called the "Vrow Martha," at and from St. Thomas Island to Hamburg, from the *loading at St. Thomas Island till the ship should arrive and land the goods at Hamburg. [*193

The goods, which consisted of sugars, coffees, and indigo, were valued at 30*l.* per hogshead the clayed sugars, and 20*l.* per hogshead the Muscovado sugars; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under 5*l.* per cent., and all other goods free from average under 3*l.* per cent., unless the cargo of the ship be stranded.

In the course of the voyage the sea-water got in, and when the ship arrived at Hamburg, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold, and the difference between the price which they brought by reason of the damage and that which they might have been sold for at Hamburg, if they had been sound, was as 20*l.* 0*s.* 8*d.* per hogshead is to 23*l.* 7*s.* 8*d.* per hogshead, *i. e.* if sound, they would have been worth 23*l.* 7*s.* 8*d.* per hogshead; as damaged, they were only worth 20*l.* 0*s.* 8*d.* a hogshead.

The defendant paid money into Court by the following rule of estimating the damage. He paid the like proportion of the sum at which the sugars were *valued in the policy*, as the price of the damaged sugars bore to sound sugars at Hamburg, the port of delivery. All this was admitted at the trial, though perhaps, upon an accurate computation, there may be a mistake of about 17*s.* upon the money paid in, but no advantage was attempted to be taken of this slip at the trial. It was admitted that the money paid in was sufficient, if the rule by which the defendant estimated the

loss was right, and the only question at the trial was, by what measure or rule the damage, upon all the circumstances of this case, ought to be estimated.

To distinguish this case, under its peculiar circumstances, out of any general rule, the plaintiff's counsel called Mr. Samuel Chollett, clerk to Mr. Bourdieu, who proved that upon the 15th of February (the time of the insurance), sugars were worth at London and Hamburg 35*l.* a hogshead; that the proposals of a Congress to be holden, and the expectations of a peace, had on a sudden sunk the price of sugars; that before the ship arrived at Hamburg, and before he could know that the sugars had received any damage, Mr. Bourdieu had sent orders, "that the sugars should be housed at Hamburg, and kept till the price should rise above 30*l.* a hogshead;" that he had many hundred hogsheads of sugar lying at *Amsterdam, to which place he sent the like orders; that in fact the Congress not taking place, sugars rose 25*l.* per cent.; that what he sold of the sugars he had at Amsterdam brought 30*l.* per hogshead and upwards; that he might have sold these sugars at the same price if they had been kept according to his orders, and the only reason why they were not kept was because they were rendered perishable from the sea-water which had got in. Therefore, said they, the necessity of an immediate sale and the consequence thereof ought to be computed with the damage.

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The special jury (amongst whom there were many knowing and considerable merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present, and formed their judgment from their own notions and experience, without much assistance from anything that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case.

The counsel for the defendant offered to call witnesses to prove the general usage of estimating the quantity of damage where goods are injured.

I was struck with the argument, "that the immediate necessity of selling in this case might be taken into consideration, as an exception to the general rule," and proposed that the cause might be left to the jury upon that point. Then Mr. Winn, for the defendant, argued "the necessity of selling and the consequence thereof ought not to be regarded." And what he said had so much weight, that it very much changed my way of thinking.

There was nothing to sum up, but the jury asked whether I would give them any directions; I said I left it to them "whether the difference between the sound and the damaged sugars at the port of delivery ought to be the rule," or "whether the necessity of an immediate sale (certainly occasioned by the damage) and the loss thereby should be taken into consideration." I told them, though it had struck me at first, that this case might be an exception, yet what the counsel for the defendant had said to the contrary seemed to have great weight.

The counsel for the plaintiff not having replied nor gone into the general argument, upon an apprehension that my opinion was with them upon the particular circumstances of this case, were dissatisfied with the verdict, and said they would try the *other cause in the paper upon the same policy; but instead of that, they have moved [*195 for a new trial in this cause, which I am extremely glad of.

No fact is disputed. The only question is, "whether (all the facts being agreed) the jury have estimated the damage by a proper measure."

To make the matter more intelligible, I will first state the rule by which the defendant and jury have gone, and then I will examine whether the plaintiff has shown a better.

The defendant takes the proportion of the difference between sound and damaged goods at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or the damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy 30*l.*,—they are damaged but sell for 40*l.*, if they had been sound, they would have been sold for 50*l.*,—the difference is a fifth. The insurer then must pay a fifth of the *prime* cost or value in the policy, that is 6*l.* *E converso*, if they come to a losing market, and sell for 10*l.*, being damaged, but would have sold for 20*l.*, if sound, the difference is one-half; the insurer must pay half the *prime* cost, or value in the policy, that is 15*l.*

To this rule, two objections have been made.

1*st Objection.* That it is going by a different measure in the case of a partial, from that which governs in the case of a total loss, for upon a total loss the prime cost or value of the policy must be paid.

Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage. The insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe." He has nothing to do with the market. He has no concern in any profit or loss which arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, that is, the value of the thing insured at the outset. He has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be 100 hogsheads of sugar and 10 happen to be lost, the

insurer must pay *the prime cost of those 10 hogsheads, without any regard to the price for which the other 90 may be sold. [*196

But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage. But if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. How is this to be found out? not by any price at the outset port, but it must be at the port of delivery, where the voyage is completed and the damage known, whether the price there be high or low; in either case it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently, whether the injury be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged.

2*d Objection.* The next objection with which this case has been much entangled, is taken from this being a *valued* policy.

I am a little at a loss to apply the arguments drawn from thence. It is said "that a valued is a wager policy (like interest or no interest); if so, there can be no *average* loss, and the insured can only recover as for a *total* [loss], abandoning what is saved, because the value specified is fictitious."

Answer. A valued policy is not to be considered as a wager policy, or like "interest or no interest." If it was, it would be void by the Act of 19 Geo. II. c. 37. The only effect of the valuation is *fixing* the amount of the prime cost, just as if the parties had admitted it at the trial. But in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that

the assured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer of the surplus; if it be much overvalued, it must be done with a bad view either to gain, contrary to the 19th of the late king (George II.); or with some view to a fraudulent loss. Therefore the insured never can be allowed in a court of justice to plead that he has greatly overvalued or that his interest was a trifle only.

It is settled that upon valued policies, the merchant need only prove *some* interest, to take it out of 19th Geo. II. c. 37, because the adverse party has admitted the value, and if more were required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured 2000*l.*, and had *interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an evasion the Act of Parliament may be defeated. There are many conveniences from allowing valued policies, but where they are used merely as a cover to a wager, they would be considered as an evasion. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved. In a valued policy it is agreed.

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To argue that there can be no adjustment of an average loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceeds 5*l.* per cent. If it was not, the consequence would be, that every partial loss must thereby become total; but the event, to entitle the insured to recover, would not happen unless there was a total loss. Besides the plaintiffs have taken to the goods, and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend that they ought to be paid the whole value in the policy, upon one of two grounds.

First. Because the general rule of estimating should be

the difference between the price the damaged goods sell for, and the prime cost (or value in the policy). Here the damaged [sugar] sold at 20*l.* 0*s.* 8*d.* per hogshead, and the underwriter should make it up 30*l.*

Answer: It is impossible this should be the rule. It would involve the underwriter in the rise or fall of the market. It would subject him, in some cases, to pay vastly more than the loss; in others it would deprive the insured of any satisfaction, though there was a loss.

For instance, suppose the prime cost or value in the policy 30*l.* per hogshead; the sugars are injured, the price of the best is 20*l.* a hogshead, the price of the damaged is 19*l.* 10*s.* The loss is about a fortieth, and the insurer would have to pay above a third. Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hogshead, and the damaged for 35*l.*, the loss is an eighth, yet the insured would have to pay nothing.

The second ground upon which the plaintiff contends that the 30*l.* should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea-water had not made an immediate sale necessary.

The moment the jury brought in their verdict, I was satisfied *that they did right, in totally disregarding the particular circumstances of this case, and I wrote a memorandum at Guildhall, in my note-book, "that the verdict seemed to me to be right." [*198

As I expected the other cause would be tried, I thought a good deal of the point, and endeavored to get what assistance I could by conversing with some gentlemen of experience in adjustments. The point has now been very fully argued at the bar, and the more I have thought, the more I have heard upon the subject, the more I am convinced that the jury did right to pay no regard to these circumstances. The nature of the contract is, that all goods shall come safe to the port of delivery, or if they do not, to indemnify the

plaintiff the amount of the prime cost, or value in the policy. If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstratively, that it must be by putting the merchant in the same condition (relation being had to the prime cost, or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion, or aliquot part of the prime cost, or value of the policy, as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery. The insured has then a right to demand satisfaction. The adjustment never can depend upon future events or speculation. How long are they to wait? a week, a month, or a year?

In this case the price rose, but if the Congress had taken place, or a peace had been made, the price would have fallen. The defendant did not insure "that there should be no Congress or peace." It is true, Mr. Bourdieu acted upon political speculation, and ordered the sugars to be kept till the price should be 30*l.* or upwards. But no private scheme or project of trade of the insured can affect the insurer. He knew nothing of it. The defendant did not undertake that the sugars should bear a price of 30*l.* a hogshead.

If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them. The orders here were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured *to a satis- *199]
faction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

We are of opinion that the plaintiffs are not entitled to have the price for which the damaged goods were sold,

made up 30*l.* per hogshead. And it seems to us as plain as any proposition in Euclid, that the rule by which the jury have gone is the right measure.

The rule must be discharged.

JOHNSON *v.* SHEDDON.

Wednesday, July 7th, 1802.

[Reported 2 East 581.]

The rule by which to calculate a partial loss on a policy on goods by reason of sea-damage is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. It being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

This case was very fully argued in Easter Term, 41 Geo. III., by *Garrow*, *Parke*, and *Lawes*, against the rule for a new trial, and by the *Attorney-General* and *Gibbs*, in support of it. It is unnecessary to detail the arguments, as the substance of them was so distinctly stated in the judgment of the Court, which was delayed till now, in consequence of a difference of opinion on the Bench while Lord Kenyon presided in the Court.

Lawrence, J. (in the absence of Grose, J.), now delivered the judgment of the Court.

This is a motion for a new trial of an action brough against the defendant, an underwriter, on goods on board a ship called *"The Carolina," from Sicily to Hamburg *200] to recover a *partial* loss sustained by the plaintiff by reason of the sea-water having damaged a cargo of brim stone and shumack; and upon a calculation by Mr. Oliphant to whom it was referred by the parties to ascertain the loss sustained, it has been settled after the rate of 76*l.* 7*s.* 4*d* per cent. And the ground on which the new trial has been moved for is, that Mr. Oliphant has proceeded in his calculation upon a mistake, inasmuch as in estimating the loss he has taken for his foundation the difference between the *net* produce of what the goods have produced, and what they would have produced if sound; instead of the difference between their respective *gross* produces. Upon the fullest consideration that we have been able to give this question (which has been depending a great while, and which was argued before Lord Ellenborough came upon the Bench, and who, if the case were to be argued again, would give no opinion, having been concerned in the cause when at the Bar), my brothers Grose and Le Blanc agree with me in thinking there should be a new trial, and that the calculation is wrong. Some points are agreed on both sides; viz. that the loss is to be estimated by the rule laid down in *Lewis* v *Rucker*, 2 Burr. 1170, that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which the underwriter is responsible is that which arises from the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis* v. *Rucker*, Lord Mansfield says, "Where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the *quantum* of the damage; but if you can fix whether it be a third, a fourth

or a fifth worse, the damage is fixed to a mathematical certainty;" and this he says is to be done "by the price at the port of delivery." From hence it follows, that whatever price at the port of delivery ascertains whether a commodity be a third, fourth, or a fifth the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all the charges have been paid by the person of whom he purchases; or, in other words, by the difference of the gross produce, and not by the difference of the net produce. When a commodity is offered for sale by one who has nothing further to pay than the *sum the seller is to receive, it is the quality of the goods which, in forming a fair and rational judgment [*201 can alone influence him in determining him what he shall pay; he has nothing to do with what it may have cost the seller, and the goodness of the thing is the criterion which must regulate the price; for being liable to no other charges, he has only to consider its intrinsic value, and therefore if a sound commodity will go as far again as a damaged commodity, by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound that he will for the damaged, and so in proportion. To say that this is not the rule will be to assert, what I conceive it will be difficult to prove, that the market price of things is not proportioned to their respective values; and if it be, it is a means of ascertaining whether a commodity be a third, or fourth, or a fifth the worse by any risk it may have met with, and the damage will be thereby ascertained in the degree pointed out in *Lewis* v. *Rucker;* and the underwriter who shall pay by this rule will pay such proportion, or aliquot part of the value in the policy, as corresponds with the diminution in value occasioned by the damage. Lord Mansfield, in laying down the rule, speaks of the *price* of the thing at the port of delivery as the means of ascertaining the damage; by which he must

ıean the *whole* sum which is to be paid for the thing. For ıe net proceeds are not the price, but so much of the price ȝ remains after the deduction of certain charges. Lord Iansfield cannot mean the price before the mast, leaving ıe purchaser liable to the payment of further sums; for ıch payment is in effect but a *part* of the price; it is not ı equivalent for the thing sold; for if the purchaser were ot liable to the duties and charges, he would give as much ıore as the amount of those charges come to. The price f a thing is what it costs a man; and if, in addition to a ım to be paid before the mast, other charges are to be orne, that sum and the charges constitute the cost. It is ot necessary that the whole price should be paid to one erson. To taking the net proceeds to calculate by, there re several objections; one is, that by taking the net proȝeds as the basis of the calculation instead of the gross proȝeds, it will happen, where equal charges are to be paid n the sound and damaged commodity, that the underwriter 'ill be affected by the fluctuation of the market, which he ught not to be. This is obvious, from considering that if ou take equal quantities from two unequal quantities, the smaller such unequal quantities are, *the greater will 202] be the difference between the remainders; *e. g.* suppose sound goods, including all charges, to sell for 600*l.*, amaged for 300*l.*, let the charges on each be 100*l.*, the ifference after they are deducted will be 300*l.*, or threefths. But let the goods come to a fallen market with the ame degree of deterioration, and let the sound sell for 300*l.* nd the damaged for 150*l.*, and deduct from each the harges, the net proceeds of the sound will be 200*l.*, and f the damaged 50*l.*, and the difference will be three-fourths. ut as the deterioration is the same in both cases, the unerwriter should pay the same, whatever be the state of the ıarket; which he will do if the gross produce be taken *il.* half the valued or invoice price. Another consequence

of taking the net produce will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea-damage; but for that loss which the assured suffers from being being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none, the degree of deterioration being supposed the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated; that the demand for the commodity and the state of the market is the same: and that the goods if sound would sell for 1000*l.*, but being damaged, for 500*l.*, and the charges to be 200*l.* On those goods where no charges are to be paid, the insurer will have to pay 50 per cent. The goods on which charges are to be paid, being equally good with the other, will sell in the market for the same sum, and when the charges are deducted, if sound, will produce 800*l.*; but being damaged, after the same deduction, will produce only 300*l.*: and according to that calculation, if the underwriter were to pay, he would pay five-eighths instead of four-eighths or one-half; not because one cargo has suffered more than the other by the sea, for the supposition is, that the sea-damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges. Suppose the same goods sold before the mast; a purchaser for those not liable to the duties would give exactly what he would give if there had been duties which the seller had paid; for as he has nothing further to pay to him, it is just the same, whether the seller had no charges to pay, or whether there were charges which he has paid; the commodity in the one case and in the other comes to the buyer's hands in the *same state. But on these grounds, if liable to the further charges, he would give, if sound, but 800*l.*, [*203

as the duties he would have to pay would make the whole cost 1000*l.*, and if damaged and liable to the same charges, he could give but 300*l.*; for as he would be liable to pay 200*l.* in charges, if he were to give above 300*l.*, the whole amount of what he would ultimately pay for the damaged goods would exceed their value, which by the supposition is but 500*l.*; he would therefore in this case give for the damaged less than in proportion to its degree of deterioration; for in giving 300*l.* he would only give three-eighths instead of four-eighths, or a half; not because the damaged commodity is not half so good as the sound, but because on such damaged commodity he must pay as large charges as on the sound; and as this loss to the assured arises from a purchaser not being able to pay in proportion to the intrinsic quality of the commodity, it shows that a sale before the mast, when equal duties are to be paid, does not correspond with the deterioration of the commodity, nor ascertain whether it be a third, fourth, fifth, or in what degree worse than the sound; consequently that the difference of the net produce cannot be the rule to calculate by, where the charges are not proportioned to the respective values of the sound and damaged commodity. Another objection is, that if the net produce be taken, it may happen that you can have no *data* to calculate by, which will be the case if the gross produce of the sound commodity should only pay the charges, and has no net proceeds, for then there can be no difference between the net proceeds of the sound and the damaged, in proportion to which it is contended that the underwriter is to pay. Upon the whole of this case it is our opinion that the rule should be absolute for a new trial.

Rule absolute.

*FORBES AND ANOTHER *v.* ASPINALL. [*204

Monday Feb. 11*th*, 1811.

[REPORTED 13 EAST 325.]

The valuation upon a freight policy is calculated upon all the goods the ship is intended to carry upon the voyage insured, and if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share; as where freight valued at 6500*l. was insured on a ship from any port or ports in Hayti to Liverpool; and the ship, which had sailed with goods from Liverpool to Hayti on a voyage of barter, after exchanging a part of her outward cargo for fifty-five bales of cotton at the port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the fifty-five bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were, in fact, exchanged for more produce than was sufficient to have covered the freight insured. But if there be a loss by a peril insured against of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened. And in an action on a*

freight policy, it seems sufficient to prove a contract under which the shipowner would have been entitled to demand freight if the voyage were not stopped by a peril insured against.

THIS case came before the Court upon a motion for a new trial *in an action on a policy of insurance, in which the plaintiffs had recovered a verdict at the sittings after last Trinity Term at Guildhall. It was first moved in the last term, when a rule to show cause was granted: and it was afterwards argued at length in the same term by the Attorney-General *Scarlet*, and *Richardson*, on the part of the plaintiffs, and by *Park* and *Littledale* for the defendant. The Court took till this term to consider of their judgment; in delivering which the Lord Chief Justice went so fully into the arguments urged, and the cases cited at the bar, that it is unnecessary to repeat them.

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The insurance, as it concerned this case, was on freight valued at 6500*l.* upon the ship "Chiswick," "at and from any port or ports in Hayti to Liverpool, or her port of discharge in the United Kingdom." The declaration alleged that on the 9th of July, 1808, the ship was in safety in a certain port in Hayti, and that divers goods and merchandises were then and there loaded on board to be carried on the voyage insured; that the plaintiffs were interested in the freight, etc., to the amount insured; and that on the 15th of July the ship, with the goods on board, was lost by the perils of the sea, and the plaintiffs thereby lost their freight, etc.

The facts proved and admitted were, that the plaintiffs were the owners of the ship "Chiswick;" that she sailed from Liverpool with the goods to Hayti to trade there, and to bring home a return cargo of produce, and arrived at Hayti on the 4th of July, 1808, with goods to be there bartered for other goods to be brought back to Liverpool. Part of the goods were accordingly bartered and exchanged for fifty-five bales of cotton, which were shipped on board at

Jaquemel (on the south side of Hayti); the remaining part of her outward cargo was was still on board, and would, in all probability, have been exchanged for other goods, but for the loss after-mentioned. That the ship proceeded from Jaquemel to Au Cayes, another port of Hayti, to barter away the residue of her outward cargo, and to complete her lading home; and with such cargo and fifty-five bales on board, was in safety on the 15th of July, when, by the perils of the seas, she was driven on shore and lost. That the defendant settled for the freight of the fifty-five bales of cotton, without prejudice to the plaintiff's claim for further loss of freight, if they were entitled to it.

That the remaining part of the outward cargo, though damaged, was saved from the wreck, and in twelve days after the loss of the *ship, were exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of larger value than the sum insured on freight, if the ship had not been lost. [*206

Lord ELLENBOROUGH, C. J., now delivered the judgment of the Court.

This was a motion for a new trial in an action upon a policy of insurance "at and from any port or ports in Hayti to Liverpool," etc., on *freight valued* at 6500*l.* The ship had sailed from Liverpool to Hayti with a cargo intended for barter; had bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo; and was proceeding from one port of Hayti to another, viz. from Jaquemel to Au Cayes, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the sea which occasioned a total loss. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend, that as this was a valued policy,

and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss.

Freight is the profit earned by the shipowner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit.

An insurance upon *freight* has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the *ship;* but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight which would have been so earned limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that the goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand *freight; and in either case, if the policy be open, the sum payable to the shipowner for freight, together with premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable.. In this case, therefore, as there was no contract under which the shipowner could claim freight, but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were shipped for this country, and of the premiums and commission thereon.

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And indeed that point has been settled against this very plaintiff, in an action on an open policy on this very risk, in *Forbes and another* v. *Cowie*, in Mr. Park's Addenda to the last edition, p. 604. The question then is, whether it makes any essential difference that this is the case of a *valued* policy? And we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix, by agreement between the parties, an estimate *upon the subject insured*, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of the goods, adding thereto only the premium and commission and, if he think fit, the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commission thereupon. The valuation, however, in the case of goods, looks to *all the goods* intended to be loaded; and in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, *part* only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of *that part;* and so, if by the perils insured against, the *freight* of *part only* of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 on board, can it be contended that the assured shall recover to

*208] the *full amount of the valuation, that is, for the whole 500, when he has lost only 100? So in the case of freight; if the ship would carry 500 tons, and in fixing the valuation the assured calculates his freight upon 500 tons, but when he reaches the loading port he can get 10 tons only upon freight, and sails upon the voyage insured with those 10 tons only; is it to be allowed, that if the ship be lost by any of the perils insured against, and he thereby lose freight upon 10 tons, he shall be entitled to the valuation which includes the freight upon 500 tons? And yet, to this extent the plaintiff's argument in this case is carried. The proposition is monstrous; instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court therefore will look for very strong authorities before they yield to such a proposition.

It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the perils insured against, *of the* WHOLE *subject-matter of insurance to which the valuation applied*, viz., of *all* the intended cargo of goods, where the insurance was on goods, and of all the intended freight, where the insurance was upon freight. But if he meant to carry that position to this extent, that the underwriter is not at liberty to inquire *what* was *intended* to have been included in that valuation; or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that *a part only* of

what was included in the valuation has been lost by a peril insured against; we deny the position when so extended. In *Shaw* v. *Felton*, 2 East 109, which has been strongly relied upon, the interest of the assured was in ship and outfit, including provisions and sea stores laid in for slaves, and wages advanced to the crew: and the chief ground insisted upon for opening the policy was this, that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the *perils insured against. But that ground was resisted with effect, [*209 because the subject insured was to be considered as of the value *ascribed to it when the voyage commenced;* and if the diminution of the provisions were to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon the ship would be opened; because every day, after the voyage commenced, the quantum of the ship's provisions would be proportionably reduced. Mr. Justice Lawrence, in the opinion he gave, intimated distinctly, that upon an *open* policy such a diminution would not have varied the underwriter's liability. That case, when examined, does not appear to have proceeded altogether, if at all, upon a distinction between *valued* and *open* policies; it was not decided upon the ground that if *part only* of the subject intended to be covered by the policy, and included in the valuation, were lost by the perils insured against, the policy could not be opened, and the liability of the underwriters apportioned; but upon this ground merely, viz. that in the case of an insurance upon ship and outfit, if a total loss of ship occurred by a peril insured against, no deduction was to be made for provisions, etc., expended in the voyage before the loss occurred, or for the deterioration of the ship during that time; but that the underwriters were to be answerable for the original value, estimated in whatever manner such original value might be, as though the loss had occurred the instant after the policy attached. Indeed, where

a loss occurred before any freight is earned, it would be unjust not to charge the underwriters to that extent, because by the event it has become of no avail to the assured, that the provisions have been expended, and the ship used; and that case, as applied to the present, only decides that the underwriter is chargeable to the same extent. The only remaining case relied upon by the plaintiffs, which is material to be considered, is that of *Montgomery* v. *Egginton*, which is shortly reported in 3 Term Rep. 362. This was an action on freight valued at 1500*l.* Freight to the amount of 500*l.* only was on board when the ship was lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord Kenyon told the jury that if this were a *bonâ fide* transaction, and not a mere colorable insurance and a gaming policy, the assured was entitled to recover for the whole value in the policy. The jury gave a verdict for that sum: and though a rule *nisi* for setting aside the verdict was obtained, yet the opinion of the Court being *210] *strongly against the rule, it was afterwards abandoned. The grounds of this decision between valued and open policies are not expressly stated: and it might be that upon an *open* policy in such a case, Lord Kenyon and the Court might have thought that the assured would have been entitled to recover in respect of the freight on the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case which would have entitled the shipowner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had sailed with that part only which she had on board; there might have been a contract for giving the ship a full loading; or it might have been considered (though it is difficult to suppose that it was) that, as the residue of the goods to complete a cargo was ready to be shipped, and lying on the quay for the purpose, it was

the same to the assured as if they really had been shipped. If that case, however, is to be considered as having decided that upon a policy estimating the freight upon a *full* cargo at 1500*l.*, a loss by a peril insured against may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of such third could only have been earned, and when it was uncertain whether none ever could have been procured, we should pause long before we allowed ourselves to adopt such a ground of decision; we should hesitate extremely before we should say that 1500*l.*, the calculated amount of the whole intended risk, should be paid for a loss of 500*l.* incurred in respect of a third of the intended risk; in other words, that a *total* loss should be paid for a loss of *only one-third* of that which the parties to the insurance contemplated as *the whole subject insured.* It is sufficient however to say, that that case is distinguishable from this in many of its circumstances. There a full cargo was ready to be laden, and the ship in a state ready to receive it, and nothing but the perils insured against did or (as appears) could prevent its being received; here it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed; so that the ship was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board. In a case, therefore, circumstanced as this is, where the valuation was with reference to freight upon a *complete* cargo; where a complete cargo, or any *thing like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying that there has been a *total* loss, by any peril insured against, of that which the insurance was intended to [*211

cover, and which the valuation contemplated, viz. *freight upon a complete cargo;* but are obliged to pronounce, that no loss by the perils insured against is made out beyond the loss of freight upon part of a cargo only, viz. upon fifty-five bales of cotton; that the assured are therefore not entitled to recover a total loss, but an apportionment only, according to the measure of their actual loss; and as that apportionment has been already allowed to the plaintiffs, that there must be a new trial case.

Lewis *v.* Rucker, Johnson *v.* Sheddon (generally known at Lloyd's as the *Brimstone Case*), and Forbes *v.* Aspinall, are always cited as leading authorities upon the mode of the adjustment of average. They are all worthy of an attentive perusal, and in particular the judgment in Johnson *v.* Sheddon, which has been stated by an eminent author to be "one of the ablest ever delivered in Westminster Hall:" 2 Arn. Mar. Ins. 835, 3d ed.

The principle upon which the underwriters' liability to make good a loss, whether total or partial proceeds, is well stated by Lord Mansfield, C. J., in Lewis *v.* Rucker. It depends upon the nature of the contract of insurance, which is a contract of indemnity against the perils of the voyage, "the insurer engages, so far as the amount of the *prime cost*, or *value* in the policy, 'that the thing shall come safe,' he has nothing to do with the market:" *ante*, p. 195.

In the case of a *valued* policy, the valuation in the policy is the agreed standard; in the case of an *open* policy, the invoice price at the loading port, including premiums of insurance and commission, is for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value: per Lord Ellenborough, C. J., in Usher *v.* Noble, 12 East 646.

Suppose, for instance, in a valued policy the goods were valued in the policy of insurance at 1000*l.*: if there were a total loss, the underwriters would be liable, pursuant to their own agreement, to pay 1000*l.* to the insured; nor could they, except in the case of

a fraudulent overvaluation, an instance *of which is given by Lord Mansfield, C. J., in Lewis *v.* Rucker (see *ante*, p. 196), require the assured to prove the actual value of the subject-matter of the insurance (Shawe *v.* Felton, 2 East 109; Marshall *v.* Parker, 2 Campb. 69; Haig *v.* De la Cour, 3 Campb. 319; Feise *v.* Aguilar, 3 Taunt. 506; Irving *v.* Manning, 1 H. L. Cas. 287; 6 C. B. 391 (60 E. C. L. R.); 2 C. B. 784 (52 E. C. L. R.)); and it is immaterial that the subject-matter of the insurance is diminished in value, as in the case of a ship, by wear and tear, when lost at the end of a long voyage: Shawe *v.* Felton, 2 East 109. [*212

In the case of a total loss, where there has been no valuation of the goods, suppose the prime cost of the goods to be 1000*l.*, the premiums of insurance to be 50*l.*, and commission to be 20*l.*, the insurers upon a total loss of the goods would be liable to pay 1070*l.* to the insured. See Usher *v.* Noble, 12 East 646; Tuite *v.* Royal Exchange Assurance Company, Park 224, 225, 8th ed.

In the case of a *partial* loss, as where the goods have been depreciated in value by damage at sea, there is greater difficulty in determining what is the liability of the underwriter, for the measure of the loss cannot be fixed alone either by the *prime* cost or the *value* in the policy. However, the *prime cost* in the case of an *open policy* and the *sum fixed* in the case of a *valued policy*, if the loss be partial as well as if it be total, is the *standard* by which the liability of the insurers is to be ascertained. The proportion of loss however is calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i.e.* it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i.e.* in the case of a valued policy, to the value in the policy; and in the case of an open policy, to the invoice price, calculated as we have before stated; and then we get the one-half or one-fourth or one-eighth of the prime cost or value to be made good in terms of money. See Usher *v.* Noble, 12 East 647.

This rule is equally applicable whether the goods come to a rising or a falling market. To take an instance given by Lord Mansfield in the principal case of Lewis *v.* Rucker:—"Suppose the value of the goods in the policy be 30*l.*; they are damaged, but sell for 40*l.*, but if they had been sound they would have sold for 50*l.*; the difference between the two latter sums being one-fifth, the insurer must, according to the rule before laid down, pay a fifth of the prime cost or value in the policy—that is 6*l.* Suppose, on the *213] other hand, they come *to a losing market, and sell for 10*l.* being damaged, but would have sold for 20*l.* if sound, the difference is one-half; the insurer must pay one-half the prime cost, or value in the policy—that is 15*l.*" *Ante*, p. 195.

This rule of calculation, in the case of an open policy, is generally favorable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence however of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions before mentioned, as the standard of value for this purpose. Per Lord Ellenborough, C. J., in Usher *v.* Noble, 12 East 647.

The assured, if he wish to keep fairly within the principle of insurances, which is merely to obtain indemnity, ought in the case of *goods* never to go beyond the first cost, adding thereto only the premium and commission, and if he see fit, the probable profit; and in the case of *freight*, he ought not to go beyond the amount of what the ship would earn, with the premiums and commissions thereupon: Forbes *v.* Aspinall, *ante*, p. 207.

After the rule was laid down in Lewis *v.* Rucker, as to the mode of adjusting particular average on goods, a question before in dispute was finally settled in the principal case of Johnson *v.* Sheddon, viz. that the difference between the respective *gross* proceeds of the sale of sound and damaged goods, and not the *net* proceeds, was to be taken for the purpose of calculating a partial loss on a policy. "Lord Mansfield, in laying down the rule in Lewis *v.* Rucker," observed the learned Judge, "speaks of the *price* of the thing at the port of delivery as the means of ascertaining the damage, by

which he must mean the *whole* sum which is to be paid for the thing; for the net proceeds are not the price, but so much of the price as remains after the deduction of certain charges. Lord Mansfield cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums. For such payment is in effect but a *part* of the price: it is not an equivalent for the thing sold; for if the purchaser were not liable to the duties and charges, he would give as much more as the amount of those charges come to. The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum and the charges constitute the cost:" *ante*, p. 201. The learned Judge afterwards goes on, with the most cogent and conclusive reasoning, to show the objections to taking the net proceeds as a basis for the calculation, for which the the reader is referred to the report, *ante*, p. 201. See Hurry *v.* *The Royal Exchange Assurance Company, Bos. & Pul. 308. [*214

Where, in an action on a policy of insurance, the jury found a verdict for an average loss, subject to a reference to determine its amount, the Court would not grant a new trial, on the ground that it should have been left to the jury to determine whether the expenses of the sale of the damaged cargo should be borne by the underwriters or not, as that fact was in the discretion of the arbitrator, by whom the amount of the loss was to be ascertained: Hudson *v.* Majoribanks, 7 Moore 463 (17 E. C. L. R.).

Where, in the case of a valued policy, only a *part* of the intended cargo is on board at the time of a total loss, the underwriters will only have to pay the same proportion of the valuation in the policy as the goods lost bear to the whole intended cargo. Thus, in Rickman *v.* Carstairs, 5 B. & Ad. 651 (27 E. C. L. R.), where a considerable proportion of the intended homeward cargo was not shipped at the time of a total loss, and the part shipped was not equal to the value put on the goods in the policy, it was held by the Court of King's Bench that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss.

The same principle is applicable in the adjustment of particular average on a continuing policy. Thus, in Crowley *v.* Cohen, 3 B. & Ad. 478 (23 E. C. L. R.), an insurance was effected for twelve months upon goods on board of thirty boats named, plying backwards and forwards between London and Birmingham, for 12,000*l.*, as interest might appear thereafter. A loss having been sustained by the sinking of one of the boats, whereby the goods on board were damaged, it was held by the Court of King's Bench that the assured was entitled to recover that proportion of such loss which 12,000*l.* bore to the whole value of the goods afloat at that time, and not the proportion of 12,000*l.* to the whole amount carried during the year.

In the case of a ship, as well as in the case of goods in *valued* policies, the sum fixed, except where there has been fraud (Shawe *v.* Felton, 2 East 109; Haigh *v.* De la Cour, 3 Campb. 319; Barker *v.* Janson, 3 Weekly R. C. P. 19; 37 L. J. C. P. 105), and in *open* policies the value of the ship at the commencement of the risk, forms the standard by which the adjustment of particular average takes place. It may be here mentioned that the value of the ship in the latter case means "what she is worth to her owner at the port where the voyage commences, including all her stores, outfits, and money advanced for seamen's wages, the whole covered with the premium and costs of the insurance:" 2 Arn. Mar. Ins. 995; Stev. Average 190, 5th ed.

*215] *"The rule in adjusting a particular average loss on a ship," says a learned writer, "is very simple, viz.: that in *open* policies the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage, or the expense of repairing it, is of the ship's value at the commencement of the risk; in *valued* policies he pays the same proportion of the valuation in the policy. Thus, suppose in an open policy an underwriter has insured 1000*l.* on a ship, the insurable worth of which is proved to have been 2000*l.* at the outset of the risk, but whose value is reduced, by wear and tear of the voyage, etc., to only 1500*l.* at the time of loss; then if a particular average loss takes place amounting to 500*l.*, as that sum is one-fourth of 2000*l.*, the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one-fourth of 1000*l.*, the sum he has insured, viz. 250*l.*:" 2 Arn. Mar. Ins. 841, 3d ed.

Where the damage done to a ship has been repaired, one-third will be deducted from the whole expense, both of labor and materials, which the repairs have cost, leaving the remaining two-thirds as the amount of damage. "This deduction," says Lord Tenterden, "is founded upon the supposition, that there is a difference between new and old materials, and to avoid discussion in each particular case:" Fenwick *v.* Robinson, 3 C. & P. 324 (14 E. C. L. R.); Da Costa *v.* Newnham, 2 Term Rep. 407; Poingdestre *v.* Royal Exchange Assurance Company, R. & M. 378 (21 E. C. L. R.); Oppenheim *v.* Fry, 3 B. & S. 873 (113 E. C. L. R.); 5 Id. 348 (117 E. C. L. R.).

This rule however is not absolutely universal, for if the loss happens on a first voyage, the underwriter is not entitled to the deduction: per Lord Tenterden, C. J., in Fenwick *v.* Robinson, 3 C. & P. 324 (12 E. C. L. R.).

As to what is to be considered a first voyage, see Fenwick *v.* Robinson, 3 C. &. P. 324; s. c., Danson & Lloyd 8; Pirie *v.* Steele, 2 Mood. & Rob. 49; 8 C. & P. 200 (34 E. C. L. R.).

Upon its being stated, in evidence in a case before Lord Abinger, C. B., that the Marine Insurance Company deduct no thirds *unless the ship was eighteen months old*, his lordship observed that "it was the most sensible rule, and much more certain than the rule of the first voyage, which might be either very long or very short;" Pirie *v.* Steele, 8 C. & P. 202 (34 E. C. L. R.). See Thompson *v.* Hunter, 2 Mood. & Rob. 51, cited.

Where the owner has been unable to regain the ship through the default of the underwriters, as by their refusing to pay a bottomry bond for the costs of repairs ordered by them, there will be no deduction of one-third new for old, because the insured has derived no benefit from the repairs: Da Costa *v.* Newnham, 2 Term Rep. 407; but where the default of the assured has been the cause of his not regaining the vessel, it has been decided in the United States that the usual deduction will be made: Humphreys *v.* Union *Insurance Company, 3 Mason 429. [*216

As to when thirds or other proportions will be deducted, in respect of other parts of the ship's furniture, see 2 Arn. Mar. Ins. 845, 3d ed.

Where expenses have been actually incurred in the repairs of a ship in her port of distress, and she is totally lost before reaching

her port of destination, the cost of such repairs may be recovered in addition to the total loss, either as an average loss or as money expended and labor bestowed about the defence, safeguard, and recovery of the ship: Le Cheminant *v.* Pearson, 4 Taunt. 367; but although a vessel may have sustained an average loss, if no expenses have been actually incurred in repairing it, the assured cannot recover anything for the average loss in addition to the subsequent total loss. See Stewart *v.* Steele, 5 Scott N. R. 927. There a vessel, being damaged by a collision, returned to her port of departure, and was recoppered, and having sailed again, was compelled to return, and was put into dock and her wales were removed for the purpose of examining the condition of her timbers. Ultimately the vessel was found to be so defective as to render it inexpedient to repair her, and she was consequently sold as she lay (the wales not having been replaced), for the purpose of being broken up. It was held by the Court of Common Pleas that the assured was entitled to recover the cost of the recoppering in addition to a total loss, but that he was not entitled to recover anything in respect of the expense which might have been, but which was not incurred in replacing the wales. So, in the case of Livie *v.* Janson, 12 East 648, where an American vessel was insured warranted against American condemnation: after she had sailed on her voyage she sustained damage, which had it been repaired would undoubtedly have fallen upon the underwriters. She was not repaired, and afterwards, being ashore in the St. Lawrence, was captured by the Americans. It was held that the underwriters were not responsible. "There may be cases," said Lord Ellenborough, C. J., "in which though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss which may not be extinguished by the subsequent total loss; actual disbursements for repairs in fact made, in consequence of injuries by perils of the sea prior to the happening of the total loss, are of this description; unless indeed they are more properly to be considered as covered by that authority with which the assured is generally invested by the policy of 'suing, laboring, and travelling, etc., for, in, and about the defence, safeguard, and recovery of the property insured;' in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allow-

ance of this provision of the *policy, than as a substantial average loss to be added cumulatively to the total loss which [*217 is afterwards incurred in consequence of the sea-risks. In the present case, as the immediately operating cause of total loss was one from which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time prior to the total loss in which the assured could have practicably called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion that such prior partial injury forms in this case no claim upon the underwriters of this policy."

The assured will however be entitled to recover for a partial loss, although no expense has been incurred in repairing it, where it has been followed by an improper sale of the ship, in a case held not to amount to a total loss: Knight *v.* Faith, 15 Q. B. 649 (69 E. C. L. R.).

In cases of the adjustment of partial loss on freight, where the sum insured, or the valuation in the policy, is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss that the sum insured, or the valuation in the policy, is of the value of the freight; if the sum insured, or the valuation in the policy, equals the value of the interest, then he pays the whole loss: 2 Arn. Mar. Ins. 848, 3d ed.

Where only part of the full cargo included in the valuation is on board or contracted for at the time of the loss, the underwriter will only be liable to pay upon such proportion of the value in the policy, as the part of the cargo on board or contracted for at the time of the loss bears to the full intended cargo. See the principal case of Forbes *v.* Aspinall, *ante*, p. 204. In Tobin *v.* Harford, 14 C. B. N. S. 528 (108 E. C. L. R.), by a time policy the ship valued at 2000*l.*, and goods valued at 8000*l.* were insured on a barter voyage to the coast of Africa, and it was stipulated that "outward cargo should be considered homeward interest twenty-four hours after arrival at first port, or place of trade," "with liberty to extend the valuation of the homeward cargo." The vessel with the outward cargo on board arrived at Kisembo, the first place of trade on the coast of Africa, and there landed a portion of her cargo,

and, after remaining at Kisembo more than twenty-four hours, she sailed then with the remainder, without having received any other goods there, and was totally lost. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas (reported 13 C. B. N. S. p. 791 (106 E. C. L. R.)), that the assured were only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss.

The general principle of insurance, that the insured shall, in case
*218] *of a loss, recover no more than an indemnity, has been departed from in the case of the insurance by an *open* policy on freight, with regard to which it has been decided, upon the usage of trade, that in case of loss, it shall be adjusted on the *gross* and not on the net amount of the freight. See Palmer *v.* Blackburn, 1 Bing. 61 (8 E. C. L. R.). There it appeared that the ship "Juliana," bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs in the event of the safe arrival of the ship would have been 3068*l.*, but out of this the plaintiffs must have paid 699*l.* 9*s.* for seamen's wages, pilotage, light dues, tonnage duty, and dock dues; from which payment they were altogether exempted by the loss of the vessel. It was held by the Court of Common Pleas, refusing a rule for a new trial, Dallas, C. J., *dubitante*, that the plaintiffs were entitled to recover the 3068*l.*, being the gross freight, without any deduction. "In questions on policies of insurance," said Burrough, J., "the course has always been to ascertain the custom of merchants. There is a strong instance of this in 1 Burr. 341 (Pelly *v.* Royal Exchange), where it being found to be an universal and well-known usage for China ships to unrig and place their tackle in a warehouse on Bank Saul, in Canton river, the insurers on a ship were held liable for a loss happening to her tackle by fire on this Bank Saul. Now the usage in the present instance is as well known to all brokers as that was relating to Bank Saul, and in these cases the usage of trade has always been the ground of decision."

In the case of an *open* policy on freight, if only part of the cargo be on board or contracted for at the time of the loss, and there be a total loss of this part, the underwriters will be liable only for the actual amount of the freight of the part of the cargo so lost, together with premiums of insurance, and commission thereupon.

See Forbes *v.* Aspinall, *ante*, pp. 206, 207; Forbes *v.* Cowie, 1 Campb. N. P. 520.

It may here be mentioned that valuation in a policy is only conclusive in settling a loss upon it between the assured and underwriters who have subscribed it: Bousfield *v.* Barnes, 4 Campb. 228, 229. And the valuation in one policy will not limit the assured to that amount in an action against other underwriters, to another policy where the valuation is fixed at a higher sum; but the amount he has recovered under the former policy must go in reduction of the sum recoverable under the latter. Hence where there are several valued policies of insurance effected upon the same vessel valued *differently*, and upon a total loss the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy. See Bruce *v. Jones, 1 Hurlst. & C. 769. There a shipowner had [*219 effected upon the same ship four policies of insurance, in which respectively the agreed value of the ship was stated to be 3000*l.*, 3000*l.*, 5000*l.*, and 3200*l.*, and upon a total loss received under the three former policies sums amounting to 3126*l.* 13*s.* 6*d.*, and then sued upon the latter policy—that for 3200*l.* It was held by the Court of Exchequer (overruling the case of Bousfield *v.* Barnes, 4 Campb. 228), that as between the assured and the underwriter of that policy, the value of the ship must be taken to be 3200*l.*, and the assured was only entitled to recover the difference between that sum and 3126*l.* 13*s.* 6*d.* "The learned judge who tried the cause," said, Pollock, C. B., "considered that, as between the plaintiff and defendant, the value of the vessel must be taken as 3200*l.*, and it appears to me that is the correct view. It may happen that when a vessel is insured for a long time, or a long voyage, her value may not be the same at the beginning as at the end of the voyage. More freight being carried might increase her value, or she might have met with an accident, and have been so thoroughly repaired that her value might be considerably increased. But in general the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, and so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value, and if he has re-

ceived that amount, he has no further claim upon any other underwriter. If he has received less, he can only recover on other policies the difference."

Where however a person effects two insurances, declaring the *same value* in each, he is bound by that sum, and cannot recover beyond that extent. Thus, in Irving *v.* Richardson, 1 Mood. & Rob. 153, a party insured by one policy for 1700*l.* on a ship valued at 3000*l.*, and by another on the same ship, valued again at 3000*l.* It was held by Lord Tenterden, C. J., "that the assured could not receive more than 3000*l.* on the two policies. See also s. c. 2 B. & Ad. 193 (22 E. C. L. R.); Morgan *v.* Price, 4 Exch. 615.

Where the assured has an interest in any part of a cargo, on a valued policy it will be unnecessary for him to prove the amount of interest, as its value will be taken to be that of the value insured: Feise *v.* Aguilar, 3 Taunt. 506.

A question sometimes arises in badly drawn policies, whether they are *open* or *valued* policies. In these cases it should be borne in mind, that the onus of showing a policy to be a *valued* one lies upon the underwriters: Wilson *v.* Nelson, 5 B. & S. 354 (117 E. C. L. R.).

In estimating a total loss on an open policy, the value of the goods at the commencement of the risk with the usual charges is what the insurer ought to pay, and the prime cost is generally the safest and best rule of ascertaining such value, especially when the goods are purchased for exportation: Le Roy *v.* United Ins. Co., 7 Johns. 343; Bailey *v.* South Carolina Ins. Co., 3 Brevard 354. The insured on a policy, on a ship which sustains a total loss by a seizure for illicit trade, is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship on condemnation and sale: Francis *v.* Ocean Ins. Co., 6 Cowen 404; Jumel *v.* Marine Ins. Co., 7 Johns. 412; Watson *v.* Marine Ins. Co., Id. 57. The rule for fixing the value of a vessel which has been lost, and which has been insured in an open policy, is to take the sum she was worth at the time of her departure including certain expenses: Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468; Snell *v.* Ins. Co., 4 Dall. 430. On a total loss the insured is entitled to recover the invoice price of goods without any deduction for the drawback allowed on exportation: Gahn *v.* Broome, 1 Johns. Cas. 120; Minturn *v.* Columbian Ins. Co., 10 Johns.

75. Goods laden at a foreign port should be valued at their invoice price there: Coffin *v.* Newburyport Ins. Co, 9 Mass. 436; Clark *v.* United Ins. Co., 7 Id. 365.

The rule for calculating a partial loss, is to take the proportion of the difference between the gross price of the sound and damaged articles at the place of delivery, and for the insurer to pay that proportion upon the gross value of the goods specified in the policy: Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217. A partial loss arising from a compulsory sale of the cargo in a foreign port, is to be estimated by deducting the net proceeds of the sale from the invoice amount or cost of the goods: Suydam *v.* Marine Ins. Co., 2 Johns. 138. The assured can recover only the proportion of the valuation in the policy, which the goods and freight at risk bore to the subject-matter valued: Walcott *v.* Eagle Ins. Co., 4 Pick. 420; Alsop *v.* Ins. Co., 1 Sumn. 451; Haven *v.* Gray, 12 Mass. 71. If temporary repairs are made on a vessel in a foreign port, by the authority and for the sole benefit of the insurers, they must bear the whole expense of the temporary repairs as well as of the permanant ones subsequently made in the home port, although the two sums taken together should turn out to be more than the amount for which the vessel was insured: Alexander *v.* Sun Ins. Co., 49 Barb. 475. In adjustment of partial losses, valued policies are to be treated like open policies: Clark *v.* United Ins. Co., 7 Mass. 365. In calculating the loss on an open policy the premium of insurance is to be added: Ogden *v.* Columbian Ins. Co., 10 Johns. 273; Mayo *v.* Maine Ins. Co., 12 Mass. 259; Bailey *v.* South Carolina Ins. Co., 3 Brevard 354; Ins. Co. *v.* Bland, 9 Dana 143; Cox *v.* Charleston Ins. Co., 3 Richardson 331. The expense of salvage is to be added to that of repairing, in estimating a partial loss: Sewall *v.* United States Ins. Co., 11 Pick. 90. The valuation in a policy is conclusive on the insurers, if there is no fraud or imposition: Kane *v.* Commercial Ins. Co., 8 Johns. 229; Deblois *v.* Ocean Ins Co., 16 Pick. 303; Whitney *v.* American Ins. Co., 3 Cowen 210; s. c. 5 Id. 712; Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468.

In adjusting a partial loss on a ship which has been repaired, the proceeds of the old material not used in the repairs are first to be deducted from the gross expenses of the repairs, and then the deduction of one-third new for old is to be made from the balance: Eager *v.* Atlas Ins. Co., 14 Pick. 141; Byrnes *v.* National Ins. Co., 1 Cowen 265. The rule to deduct from the cost of repairs one-third for the difference between new and old materials, applies even when the ship is new: Nickels *v.* Marine Ins. Co., 11 Mass. 253; Sewall *v.* United States Ins. Co., 11 Pick. 90; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; Dunham *v.* Commercial Ins. Co., 11 Johns. 315; Orrak *v.* Commonwealth Ins. Co., 21 Pick. 456. In case of repairs of the damage done to a ship by the perils insured against, the customary

deduction of one-third new for old, is applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to other incidental expenses having no connection with the repairs or new articles furnished, and from which the assured can possibly derive no enhanced value or benefit beyond his loss; such as steamboat towage, boat hire, &c.: Potter *v.* Ocean Ins. Co., 3 Sumn. 27; Hall *v.* Ocean Ins. Co., 21 Pick. 472. In an action on a valued policy to recover for a partial loss, the measure of damages is the difference between the appraisement of the damaged article and that stipulated in the policy with all necessary expenses: Natchez Ins. Co. *v.* Buckner, 4 Howard (Miss.) 63; Stanton *v.* Natchez Ins. Co., 5 Id. 744. Upon a total loss the sum insured in a valued policy is the measure of damages, and is not to be reduced on account of any expenses required in the management and sale of the damaged property: Portsmouth Ins. Co. *v.* Brazee, 16 Ohio 81. Where the insurer is liable beyond the amount of a total loss, for expenses which have been paid by the insured, the latter will be allowed interest from the time of making the advance: Vanderheuvel *v.* United Ins. Co., 1 Johns. 406.

*TYRIE *v.* FLETCHER. [*220

Mich. Term, 18 *Geo. III., B. R., Tuesday, Nov.* 26, 1777.

[Reported Cowp. 666.]

Insurance—Return of Premium.]—*Upon a policy "at and from such a port to any other port or place whatsoever, for twelve months at 9l. per cent., warranted free from capture," the risk is entire; and therefore if once begun there shall be no return of the premium.*

This was an action on the case, for money had and received to the plaintiff's use, brought by the plaintiff, the *insured* in a policy of insurance, against the defendant, the underwriter, for a return of part of the premium.

The cause was tried before Lord Mansfield, at Guildhall, at the Sittings after last Trinity Term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, whether, under the circumstances of the case, a proportionable part of the premium out to be returned or not? If the court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered.

It now came before the court upon a rule to show cause why a nonsuit should not be entered; and the cause, as it appeared from the report, was shortly this: "The policy of insurance was upon the ship 'Isabella,' at and from London to any port or place, where or whatsoever, for twelve months, from the 19th of August, 1776, to 19th of August, 1777, both days inclusive, at 9*l.* per cent., warranted free

from captures and seizures by the Americans and the consequences thereof." In all other respects it was in the common form, against all perils of the sea, &c.

The ship sailed from the port of London, and was taken by an American privateer, about two months afterwards.

*221] *Mr. *Dunning* and Mr. *Davenport* for the plaintiff, showed cause, and insisted that a proportionable part of the premium in this case ought to be returned; that 9*l.*, the compensation estimated for the risk of twelve months, was much more than adequate to the risk actually run in this case, viz. only two months; that from the nature of the insurance, both parties must know the risk was divisible, and of course intended, if it ceased before the twelve months, that the whole premium should not be retained; that this was the law in other cases, where upon a suitable compensation for a given risk, the risk had turned out to be different from what was expected. In *Stevenson* v. *Snow*, 3 Burr. 1237, the risk ceased before the end of the voyage insured, and it was there held there should be a return of the premium in proportion to the risk that had not been run. It is true that was a policy upon a voyage; but it is as easy, or easier, to apportion the risk in a policy upon time as it is in a policy upon distance. In the case of *Bond* v. *Nutt*, Trin. 17 Geo. III., B. R. (Cowp. 601), which was a policy "at and from Jamaica to London," the underwriters paid into Court a part of the premium, in proportion to that part of the voyage from which they held themselves discharged. This case is not like the case of an insurance upon lives, to which it was compared at the trial; because that is in the nature of a wager. But this is, in the true spirit and use of an insurance, an indemnity against a loss. That loss, according to the terms of the policy, might accrue later or earlier, or not at all; but in the case that has happened, namely, a capture by an American privateer, the risk of any such loss as that insured against must totally cease. The

construction therefore of this policy, under these circumstances, ought to be, that it was an insurance for twelve months, at the rate of so much per month; and as the risk in fact was only run for two months, the premium advanced upon the other ten ought to be returned.

Mr. *Wallace* and Mr. *Baldwin, contrà,* for the defendant, and in support of the rule, contended that as soon as the ship sailed from the port of London, the policy attached for the whole time insured against. That there was no calculation of the premium, at so much per month; but it was one entire gross sum of 9*l.* per cent. stipulated and paid for twelve months. The contract therefore was *entire,* without any intention or thought of division or apportionment. That the case of *Stevenson* v. *Snow* did not at all apply; for there the Court went upon the ground of its *being [*222 a policy upon two *distinct* voyages, separately and distinctly in the contemplation of the parties at the time; and the premium calculated accordingly. Of course, if either of the voyages were prevented from taking place, the risk upon it could not attach; and therefore the premium ought to be returned. Upon the principles laid down on the other side, every policy for time might be divided. Suppose an insurance for a month, would the plaintiff have been entitled to restitution for a number of days? It is absurd; and there would be no drawing the line. If there had been a recapture the policy would have been revived. The fault of the party, is not the true ground upon which the return of premium is or is not allowed; but it rests upon this: whether the risk or the voyage insured has begun? If it has, there can be no return of premium: 2 Magens, No. 1071. There are many cases where, notwithstanding the fault of the party, a return of premium is allowed. For instance, if a ship is insured at and from such a port to such a port, and the party goes on another voyage, the premium must be returned, because the risk never commenced. So,

if he is to sail with convoy, and stays behind. But with respect to the present case, it is not distinguishable from an insurance upon a life for a year, with an exception of suicide, where the party destroys himself within a month. No one ever thought of requiring a return of premium in that case, because the risk is entire. So here, it is one *entire, indivisible* risk; which being once begun, there can be no return of premium, and consequently the plaintiff is not entitled to recover.

Lord MANSFIELD, C. J.—It was very proper to save this case for the opinion of the Court, because, in all mercantile transactions, certainty is of much more consequence than which way the point is decided, and more especially so in the case of policies of insurance; because if the parties do not chose to contract according to the established rule, they are at liberty between themselves to vary it.

This case is stript of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable to this question,—the first is, *That where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the* *223] *premium shall be returned* *because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2. Another rule is, that *if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards.* For though the premium is estimated, and the risk depends upon the nature and the length of the voyage, yet, if it has com-

menced, though it be only for twenty-hours or less, the risk is run; the contract is for the whole entire risk. And no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the East Indies agreeably to the terms of the policy in this case, and had been taken twenty-four hours after the risk was begun by an American captor, there is not a color to say that there should have been a return of the premium. So much then is clear; and indeed perfectly agreeable to the ground of determination in the case of *Stevenson* v. *Snow*, 3 Burr. 1237, for in that case the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two* insurances and a division between them. The first object of the insurance was from London to Halifax, but if the ship did not depart from Portsmouth with convoy (particularly naming the ship appointed to be convoy), then there was to be no contract from Portsmouth to Halifax. Why, then, the parties have said, "we make a contract from London to Halifax, but on a certain contingency it shall only be a contract from London to Portsmouth." That contingency not happening, reduced it in fact to a contract from London to Portsmouth only. The whole argument turned upon that distinction. Mr. Yates, who was for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages; and it was the equitable way of considering it; for though it was at first consolidated by the parties, there was a defeasance afterwards, though not in words. I think Mr. Justice Wilmot put it particularly upon that ground, but it was the opinion of the whole Court. There was a usage also found by the jury in that case, that it was customary to return a proportionable *part of the premium in such-like cases, but they could not say [*224

what part. The Court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom, plainly showed the general sense of merchants as to the propriety of returning a part of the premium in such cases. And there can be no doubt of the reasonableness of the thing.

There has been an instance put of a policy where the measure is by time, which seems to me to be very strong and apposite to the present case; and that is an insurance for a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the underwriter would demand double the premium for two years that he would take to insure the same life for one year only. In such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned.

A case of general practice was put by Mr. Dunning, where the words of the policy are, "At and from ——, provided the ship shall sail on or before the 1st of August," and Mr. Wallace considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so; on the contrary, I think with Mr. Dunning, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of the determination in *Stevenson* v. *Snow*, and that there were two parts or contracts of insurance, with distinct conditions. The first is, I insure the ship in port, provided she is lost in port before the 1st of August; and secondly, if she is not lost in port, I insure her then during her voyage from the 1st of August

till she reaches the port specified in the policy. The loss in port must happen before the risk on the voyage could commence; and, *vice versâ*, the risk in port must cease the moment the risk upon the voyage began.

Let us see then what the agreement of the parties is in the present case. They might have insured from two months to two months, or in any less or greater proportion, if they had thought proper so to do; but the fact is, that they have made *no division of time at all;* but the contract entered into is one entire contract *from the 19th August 1776 to the 19th August 1777, which is the same as if it had been [*225 expressly said by the insured, "If you, the underwriter, will insure me for twelve months, I will give you an *entire* sum; but I will not have any apportionment." The ship sails and the underwriter runs the risk for two months, no part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

ASTON, J.—This case depends upon the words of the policy, and I am of opinion, it is one entire contract at a certain gross sum of 9*l.* per cent. for a certain period of time, viz., twelve months; and that no division is to be implied. The determination in *Stevenson* v. *Snow* went expressly upon this consideration, that there were *two distinct* voyages; and no consideration received by the *insured* for the premium upon the second voyage; and there certainly was not, for there never was any point of time when any risk was run from Portsmouth. In *Bond* v. *Nutt,* the losses insured against were distinct, and unconnected with each other: 1st, a loss of the ship in port, if any should happen there; 2dly, a loss in her passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance upon a life, the sum is lumped, and the time is lumped for the year. So in this

case, I think the contract is one entire contract; and therefore, that there ought to be no return of premium.

Mr. Justice *Willes* and Mr. Justice *Ashurst* were of the same opinion.

Per Cur. Let a nonsuit be entered.

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*226] *When an underwriter is able to show that he is not liable upon a policy of insurance, the question often arises whether the insured is entitled to a return of the whole or a part of the premium.

Cases where Risk has not been run.—In the absence of any express stipulations (which are often inserted in policies) the rules laid down by Lord Mansfield, C. J., in the principal case are always referred to for the purpose of determining the question.

"The first rule," in the words of that eminent judge, "is that *where the risk has not been run*, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." The reason he gives is, "Because a policy of insurance is a contract of *indemnity*. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it."

To show the application of this rule, may be cited the case of Martin *v.* Sitwell, 1 Show. 151. There a policy had been effected on goods and a premium paid on behalf of the plaintiff, who had *no goods on board:* it was held that the premium must be returned. "The money," said Holt, C. J., "is not only to be returned by custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use."

So if the insured has no insurable interest in *a ship*, if there be no illegality in the voyage nor fraud in effecting the policy, he will

be entitled to claim a return of the premium from the underwriters, who set up his want of an insurable interest as a defence to his claim upon the loss of the ship. See Routh *v.* Thompson, 11 East 428.

Where however the risk has been run, and the ship or goods insured have arrived in safety, the premium cannot be recovered upon the ground of the plaintiff not having had an insurable interest: M'Culloch *v.* Royal Exchange Assurance Company, 3 Campb. 406.

When either, in a valued or an open policy, only a part of the goods insured are put on board, a proportionable return of the premium must be made for what is termed "short interest." For example, if 100 bales of cotton be insured, valued at 1000*l.*, or at 10*l.* per bale, or if 100 bales of cotton be specified in the policy as the subject of insurance without any valuation, in such and the like cases, if there be only 50 bales on board, "or only half the interest intended, and declared to be insured, a return of half the premium must be made for short interest:" 2 Arn. Mar. Ins. 1224, *2d ed.; Stevens on Average 204, 5th ed.; see also Hornyer *v.* Lushington, 15 East 46; 3 Campb. 90. [*227

So likewise when the *profits* on goods are insured, a return of premium will be made for short interest, which means no more than a short profit on the cargo to the extent of the whole sum insured: Eyre *v.* Glover, 16 East 218, 220.

In the case however of a valued policy, *if all the goods have been put* on board, there will be no return of premium made, upon the ground that the goods were not of the value mentioned in the policy: MacNair *v.* Coulter, 4 Bro. P. C. 450, Toml. ed.; and see Stevens on Average 200, 5th ed.

If an over-insurance has been effected, that is to say, where the assured insures property for a greater amount than its actual value, as he could only recover from the underwriters the amount of the value, and as that is the measure of their risk, he will be entitled to recover from them a part of the premium, proportioned to the amount by which the aggregate sum insured exceeds the insurable value of the property risked. The question then arises, how in the event of there being *several* underwriters, shall they contribute to return the premium? It seems to be clear that where the over-insurance is effected by a *single policy*, all the underwriters, what-

ever may be the date of their subscriptions, must contribute rateably to the return: Marsh on Insurance 649.

The law is also the same where there are several policies of the *same date*, as these are considered as one policy: Fisk *v.* Masterman, 8 Mees. & W. 165.

Where however there are several sets of policies of *different dates*, those underwriters who have at any time been liable to pay the whole amount of their subscriptions are entitled to retain the whole amount of the premium, while the underwriters on the subsequent sets who do not come within that category must make a reteable return for over-insurance. Thus, in Fisk *v.* Masterman, 8 Mees. & W. 165, the plaintiff, a merchant at New Orleans, shipped 1957 bales of cotton from Mobile to Liverpool, consigned to a house there. On the 12th April, insurances were effected on the cotton by five several policies, at the rate of fifty guineas per cent. On the 13th, news of the vessel's safety having arrived, a further insurance was *bonâ fide* effected by six different policies, at ten and five guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not. It was held by the Court of Exchequer that the plaintiff was entitled to have a return of the premiums to the amount of the over-insurance, to which the underwriters who subscribed the policies on the 13th of April were to contribute rateably, in proportion to the sums insured by them respectively on that day,—the amount of the over-insurance to be
*228] *ascertained by taking into account all the policies, but no return of premium was to be made in respect of the policies effected on the 12th of April.

The principle upon which this case proceeds is this: that the return of premium must be proportionable to the risk run. Suppose, for instance, the ship had been lost, and news of her loss had arrived on the afternoon of the 12th, and before the policies of the 13th were effected, the defendants would have been bound to pay the whole amount insured by them, and having once run the risk, they were entitled to keep the premium as compensation for their risk.

Where however the risk underwritten was not begun till after the later policies were executed, the difference of date ceases to be of any importance: 2 Arn. Mar. Ins. 1017, 3d ed.

Again, where the policy is rendered void *ab initio* in consequence of the assured not complying with some express or implied warranty, as no risk will have been run by the insurers, the assured may recover back the premium. Thus, if the assured commits a breach of the express warranty of neutrality (Henckle *v.* Royal Exchange Assurance Company, 1 Ves. 319), or of sailing with convoy (Long *v.* Allen, Marsh on Ins. 608), or of the implied warranty of seaworthiness (Penson *v.* Lee, 2 Bos. & P. 330; Annen *v.* Woodman, 3 Taunt. 299), the premium may be recovered by the assured.

Upon the same principle as will be hereafter more fully shown where the risk has never commenced there will be a return of the premium. The case of Stevenson *v.* Snow, 3 Burr. 1237, commented upon by Lord Mansfield, C. J., in the principal case, is a good illustration of this proposition.

Cases where Risk has commenced.—Another rule laid down and acted upon in the principal case is, "that if the risk of the contract of indemnity has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and the length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned." Upon the same principle as that acted upon in the principal case, where a ship had been insured for twelve months "at 15*s.* per cent. per month 18*l.*" and was lost within the first two months, it was held that there should be no apportionment or return of the premium. Lord Mansfield, C. J., observing that "when the risk has begun, there never shall be a return, although the ship should be taken in twenty-four hours:" Loraine *v.* Thomlinson, 2 Doug. 585.

If a ship insured from A. to B. sail in an unseaworthy condition, as the underwriter's risk never commences (for he is discharged from it by the breach of the *implied warranty of seaworthiness), the premium as we have already observed, must be [*229 returned (Penson *v.* Lee, 2 Bos. & P. 330), but if a vessel be insured "at and from" a port, and she is seaworthy for service in the port, but unseaworthy for the voyage, then as the underwriters

would have been liable for a loss in port, as the risk once attached, there would be no return of the premium: Annen *v.* Woodman, 3 Taunt. 299; Meyer *v.* Gregson, Park 796.

Upon the same principle, although when a ship has deviated from her course the underwriter is discharged, yet inasmuch as *the risk has once attached*, the *assured* will not be entitled to a return of the premium: Moses *v.* Pratt, 4 Campb. 297; Tait *v.* Levi, 14 East 481.

Where however the insurance comprises in effect two or more distinct voyages, then there will be an apportionment and return of the premium in respect of those voyages which have *not commenced*, because with respect to them no risk has been run. This was decided in the case of Stevenson *v.* Snow, 3 Burr. 1237; 1 W. Black. 318, commented upon by Lord Mansfield, C. J., in the principal case, and which it will be observed in a great measure turned upon the usage of the underwriters to make a return in such a case. Upon the same principle in Long *v.* Allen, Park on Insurance 797, 8th ed., 4 Doug. 278, policy was "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August, upon goods on board a ship called the 'Jamaica,' at a premium of twelve guineas per cent." The ship sailed from Jamaica to London on the 31st of July, 1782, but without any convoy for the voyage. At the trial before Lord Mansfield, the jury found a verdict for the plaintiff, subject to the opinion of the Court, stating the facts already mentioned. In addition to which they *expressly* find, that it is the constant and invariable usage in any insurance, at and from Jamaica to London, warranted to depart with convoy, or to sail on or before the 1st of August, when the ship does not depart with convoy, or sails after the 1st of August, to return the premium, deducting one-half per cent. Lord Mansfield, C. J., said, "An insurance being on goods warranted to depart with convoy, the ship sails without convoy, and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them. But where *an express usage* is found by the jury, the difficulty is cured. They offered to

prove the same usage as to the West Indies in general, but I stopped them and confined the evidence to Jamaica." See also *Gale *v.* Machell, Marsh on Insurance 667; Park on Insurance 797, 8th ed. [*230

But should there be no usage of trade proved, to consider such risks as divisible, or to make a rateable return of premium for the risk on part only of the voyage, the risk will be considered as entire, and if once begun then no part of the premium will be returned: Meyer *v.* Gregson, 3 Doug. 402 (26 E. C. L. R.); Park on Insurance 796, 3th ed.; Marsh. on Insurance 666.

Effect of Illegality or Fraud where a return of Premium is claimed.—Where a policy is void on the ground of illegality, as for instance, that it is a wager-policy (Lowry *v.* Bourdieu, Doug. 468; Aubert *v.* Walsh. 3 Taunt. 277), or that it effects a re-insurance void under 19 Geo. II. c. 37, s. 4 (Andree *v.* Fletcher, 3 Term Rep. 266), or covers a voyage to carry on trade with the enemy's country (Vandyck *v.* Hewitt, 1 East 96), at any rate where the risk has been run, and the event taken place, the assured cannot claim a return of the premium. The principle upon which the law on this subject proceeds, depends upon the well-known maxim *in pari delicto potior est conditio possidentis.* See Lowry *v.* Bourdieu, 2 Doug. 468. Ignorance of the law is no excuse even in the case of a foreigner (Morck *v.* Abel, 3 Bos. & Pul. 35; Lubbock *v.* Potts, 7 East 449), where however the policy is effected in ignorance of *facts*, as that war has been declared between our own country and the country the trading to which is covered by the policy (Oom *v.* Bruce, 12 East 225), or where the party assured contemplated a legal and not an illegal voyage by obtaining a license from the proper authorities before the sailing of the vessel, and the vessel departed without a license contrary to the opinion and expectation that he might reasonably entertain (Henry *v.* Staniforth, 4 Campb. 270; s. c. 5 M. & Selw. 122, nom. Hentig *v.* Staniforth), in these and like cases the assured may recover back the premium. See also Siffken *v.* Allnutt, 1 M. & Selw. 39; but if the assured knew that the vessel sailed without a license, although he may afterwards procure one, he will not be able to recover back the premiums: Cowie *v.* Barber, 4 M. & Selw. 16.

The distinction was taken by Mr. Justice Buller, in Lowry *v.*

Bourdieu, 2 Doug. 468, that although a policy be effected for an illegal voyage, nevertheless if the assured brings his action to recover the premium *before the risk is over and the voyage finished*, he might have a ground for his demand. This view was adopted in other cases. See Aubert *v.* Walsh, 3 Taunt. 276; Lacaussade *v.* White, 7 Term Rep. 535; Howson *v.* Hancock, 8 Term Rep. 575; 8 & 9 Vict. c. 109, s. 18; Tappenden *v.* Randall, 2 Bos. & Pul. 467.

But where the insurance is void for illegality, even though the risk was never commenced under the policy, the assured cannot re-
*231] cover back the premium without *some formal renunciation of the contract made known to the underwriter before the bringing of the action. Thus, in Palyart *v.* Leckie, 6 M. & Selw. 290, a policy was effected on goods on board the "Audaz" (a Spanish ship) or any other ships "at and from" New Orleans and Pensacola, to a port or ports in the United Kingdom. Pensacola, at the time of effecting the policy, belonged to Spain, and New Orleans to America; which latter country was at war with Great Britain, Spain being neutral, and the assured intended by the policy to cover an importation of cotton wool from New Orleans to Liverpool. It was held by the Court of King's Bench that the assured, not having given notice of his intention to rescind the contract, could not recover back the premium. "I confess," said Lord Ellenborough, C. J., "that I wish we had never departed from the plain and intelligible rule, that where the contract is founded upon a consideration clearly illegal, neither party should be allowed a *locus standi*, and to receive any assistance in a court of justice. This is a broad principle which no one could well misapprehend, and we have got into some difficulty by receding from it. However, in the present case, giving the utmost latitude to this doctrine, that there ought to be a *locus pœnitentiæ*, and that the party ought not to be compelled against his will to adhere to the contract, I see nothing to lead me to the conclusion that this party withdrew from the contract; he manifested no such intention before the bringing of the action. It cannot be denied that he stood at least *in pari delicto*, perhaps in a higher degree than the defendant. Under these circumstances, I am unable to understand the ground on which this action is to be maintained. I would add, with reference to the party's withdrawing himself from the contract, that there

ought, as it seems to me, to be some notice given of his intention. How is the underwriter to know that the risk is abandoned? The adventure is not confined to any particular ship; it may be in this or any other ship or ships. There was no indication in this case of the plaintiff's abandonment, except by bringing the action, which is but a notice by inference."

If the policy be rendered void by the fraud *of the underwriter*, as if when at the time he subscribes the policy he *knows* that the ship had arrived safe (Carter *v.* Boehm, 3 Burr. 1909), or makes positive misrepresentations in a point of materiality (Duffell *v.* Wilson, 1 Campb. 401), the assured may recover back the premium.

Where however there has been actual and gross fraud on the part of the *assured* or his agent, as, for instance, if they insure a ship which they know has been lost, it has finally been decided, overruling the older authorities (Whittingham *v.* Thornburgh, 2 Vern. 206; Da Costa *v.* Scandret, 2 P. Wms. 170; Wilson *v.* Ducket, 3 Burr. 1361), that the premium shall not *be returned: Tyler *v.* Horne, Marsh. on Insurance 661; Chapman *v.* Fraser, Id. But it seems that where there has been mere misrepresentation on the part of the assured without fraud, provided the risk never attached, the premium will be returned: Feise *v.* Parkinson, 4 Taunt. 640; Anderson *v.* Thornton, 8 Exch. 425. It has been recently decided that an agent whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, ought to do so by electric telegraph, where that means of communication is in general use; and if the agent omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriters, effects an insurance, the insurance is void, on the ground of concealment or misrepresentation: Proudfoot *v.* Montefiore, 2 Law Rep. Q. B. 511 If an underwriter, having knowledge of the loss of the subject-matter, chooses to insure, he cannot afterwards repudiate the policy, for he may have good reasons for taking the risk on the chance that so much of the cargo might be saved as the sum insured would cover, and for the sake of keeping up the course of dealing with the merchants: Gladstanes *v.* Royal Exchange Assurance, 5 B. & S. 797, 809 (117 E. C. L. R.). [*232

Where the assured by his own act renders void the policy, as by

adding in writing, after a subscription by the underwriter, a further subject matter of insurance (Langhorn *v.* Cologan, 4 Taunt. 330), or by tearing off the seal of the policy (Id. 333), without the consent of the underwriter, the underwriter having fulfilled all his part, the assure can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract.

Stipulations for Return of Premium, &c.—As to the return of the premium under express stipulation, see Simond *v.* Boydell, Doug. 268; Aguilar *v.* Rodgers, 7 Term Rep. 421; Horncastle *v.* Haworth, Marsh. on Insurance 68; Kellner *v.* Le Mesurier, 4 East 396; Leevin *v.* Cormac, 4 Taunt. 483, note; Dalgleish *v.* Brooke, 15 East 295; Langhorn *v.* Allnutt, 4 Taunt. 511; Audley *v.* Duff, 2 Bos. & Pul. 111; Hunter *v.* Wright, 10 B. & C. 714 (21 E. C. L. R.).

Unless a stipulation is made to the contrary, where the premium is returned either wholly or in part, the underwriter will be allowed a deduction of one-half per cent.: Stevens on Average 206, 5th ed.

As to the practice of paying the premium into court, see Penson *v.* Lee, 2 Bos. & Pul. 330.

Where the policy never attaches, as if the vessel never sails on the voyage insured, or if it becomes void by the failure of a warranty, there being no actual fraud, the assured is entitled to a return of the premium: Murray *v.* Columbian Ins. Co., 4 Johns. 443; Richards *v.* Marine Ins. Co., 3 Id. 307; Elbers *v.* United Ins. Co., 16 Id. 128; Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310; Penniman *v.* Tucker, 11 Mass. 66; Foster *v.* United States Ins. Co., 11 Pick. 85; Scriba *v.* Ins. Co. of North America, 2 Wash. C. C. 107; Waddington *v.* United Ins. Co., 17 Johns. 23. Where a vessel sails on a voyage different from the one insured, the assured is entitled to a return of the premium: Forbes *v.* Church, 3 Johns. Cas. 159. A note given for a premium of insurance is without consideration, unless the policy is valid and an action upon it cannot be maintained by the insurer: Lynn *v.* Burgoyne, 13 B. Monr. 400; Indiana Ins. Co. *v.* Conner, 5 Ind. 170; Tuckerman *v.* Bigler, 46 Barbour 375. If the interest of the assured be found short of the amount insured, part of the premium must be repaid: Finney *v.* Warren Ins. Co., 1 Metc. 16. An action for return of premium

on account of short interest will not lie, if the plaintiff's interest, to the extent insured, was covered at any time during the voyage: Howland *v.* Commercial Ins. Co., Anthon 26.

Fraud is an answer to an action for a return of the premium: Hoyt *v.* Gilman, 8 Mass. 336; Himily *v.* South Carolina Ins. Co., 1 Rep. Const. Ct. 154; Schwartz *v.* United States Ins. Co., 3 Wash. C. C. 170. Where a policy divides a voyage into distinct risks, affixing a separate premium for each, and after the first risk the vessel is destroyed by the fraud of the assured, whereby the other risks are not incurred, the assured may recover the premium paid for such other risks: Waters *v.* Allen, 5 Hill 421.

If the risk have attached for any period of time, the assured cannot claim a return of the premium: Cleveland *v.* Fettyplace, 3 Mass. 392; Taylor *v.* Lowell, Id. 331; Homer *v.* Dorr, 10 Id. 26; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Hendricks *v.* Commercial Ins. Co., 8 Johns. 1. Insurance at and from A. to B., warranted to have sailed before a certain day, the warranty applies to the voyage and not to the risk in port, and the policy attaches on the subject in port; so that whether the vessel sailed before the day or not, a risk has been run, and the assured has no claim for a return of the premium: Hendricks *v.* Commercial Ins. Co., 8 Johns. 1.

*233] DON *v.* LIPPMANN.

SIR WILLIAM HENRY DON, of Newton, Baronet, *Appellant.*
M. LIPPMANN, residing at Nancy, in France, *Respondent.*

House of Lords, April 21, 28; *May* 3, 26, 1837.

[REPORTED 5 C. & F. 1.]

FOREIGN CONTRACTS.]—*The law of a country, where a contract is to be enforced, must govern the enforcement of such contract. Where, therefore, bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death,*

HELD, *by the Lords (reversing the decision of the Court of Session), that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him.*

A Court which is called on to enforce a foreign judgment, may examine into that judgment to see whether it has been rightfully obtained or not.

THE late Sir Alexander Don, the father of the appellant, happened to be within the French territory in 1802, when

hostilities recommenced between this country and France, after the peace of Amiens, and with many other British subjects was tyrannically detained in France. He remained a prisoner until February, 1810.

Upon the 13th of November, 1809, Charles Fagan, merchant in Paris, drew two bills upon him, which are dated "Versailles," ordering him, as acceptor, to pay the respondent Lippmann, who was named in the bills as payee, the sum of 20,000 francs, each *bill being for that amount. These bills were drawn upon the acceptor at the [*234 "Hôtel de Richelieu, Paris,"—his place of residence; were made payable on the 1st of March; and were drawn and accepted in the following term :—

"*Versailles, le* 13 *9bre*, 1809.

"Bon pour 20,000 fr.

"Au premier Mars prochain, payez par cette première de change, à l'ordre de M. Lippmann, la somme de vingt mille, francs, valeur reçu, sans autre avis.

"A Monsieur, Monsr. Don.

"Bon pour vingt mille francs.

"(Signed) CHAS. FAGAN.

"*Hôtel Richelieu, Rue Neuve-St.-Augustin, Paris.*

"Accepté pour la somme de vingt mille francs, payable le premier Mars, 1810.

"(Signed) ALEXANDER DON."

Before the bills became due, Sir Alexander Don left Paris, and was in England in the month of February, 1810. When the bills became due they were dishonored, and protested for non-payment against the acceptor, and the dishonor was intimated to Charles Fagan, the drawer.

M. Lippmann then commenced proceedings according to the law of France, against both the acceptor and drawer of the bills, and, in the action raised before the Tribunal de

Commerce of the department of the Seine, Charles Fagan, the drawer, made appearance, but he did not deny the validity of the debt. He requested the Court, however, to give him time, in order that he might arrange as to payment of the bills. On the 25th July, 1810, judgment was pronounced against both the drawer, who had made appearance, and against Sir Alexander Don, the acceptor, in absence. All the requisites of the law of France were stated to have been complied with in these proceedings. The decree of the Court was for payment of the contents of the bills, and fifty-nine francs of expenses, exclusive of the expense of registering the judgment. This judgment was, in the pleadings in the present suit, alleged to have been intimated on the 22d October, 1810, by the proper officer, and according to legal form, at the former residence of Sir Alexander Don; and it was stated that he had left the Hôtel Richelieu about six months before, and was believed by the *235] servants at the hotel to have gone to England; *execution then followed against the effects of Charles Fagan, as his person could not be found. That person afterwards died, and about the month of March, 1813, his effects were sold at the instance of M. Lippmann, and the sale was reported by the auctioneer as having produced 434 francs, after deducting expenses; for which credit is given.

A claim was made on Sir Alexander Don, but he positively declared that he had remitted to France ample funds to pay all his just debts; and after a correspondence on the subject, which took place in 1814, no further claim was made on Sir Alexander Don in his lifetime. He died in April, 1820.

The action, now the subject of appeal, was commenced on the 3d of April, 1829, and it was founded both upon the bills and the judgment. The defendant, who, being an infant, appeared by his tutor, set up in defence the Act of 1772, by which it is declared, "That no bill of exchange,

etc., shall be of force in Scotland unless diligence shall be raised and executed, or action commenced thereon within six years from and after the terms at which the sums in the said bills shall become exigible."

The question which was raised was, *whether the law of Scotland or that of France was applicable to the case.* If the former, then the Act of 1772, which limits the right of suing to within six years after the bill, etc., becomes due, had taken effect, and the action was barred by prescription; if the latter, then the bar by prescription would take effect at five years from the date of the instrument, unless proceedings were taken in a French Court on such instrument; but if such proceedings were taken, then after judgment therein obtained, the prescription would not be a bar for thirty years after the date of the judgment, and consequently the decree in the French Court might properly be made the ground of the present suit.

When the case came before the Lord Ordinary, he took the opinions of French counsel on the law of France, and after having taken time for consideration, he pronounced an interlocutor repelling the plea of sexennial prescription, and finding that the defendant was entitled to be reponed against the judgment of the Tribunal of Commerce in France. He therefore appointed the parties to be further heard on the merits of the case. In a note appended to the interlocutor, his Lordship went fully into the question of the particular law by which a claim on bills of this sort was to be decided, and intimated that he looked upon the *proceedings in France as merely sufficient to repel [*236 the plea of prescription, but not as sufficient to preclude the defender from answering the claim by going into the merits of the case. The Lords of the first Division of the Court of Session sustained this interlocutor.

Sir *W. Follett* and Mr. *M. Smith,* for the appellant.—The law by which this case must be decided is that of the

country where the remedy is sought to be enforced.[1] The remedy here was sought to be enforced in Scotland. The bills too became due while the acceptor was domiciled in Scotland, and therefore by the law of Scotland were payable there. The *lex loci solutionis* must therefore prevail over the *lex loci contractûs*. The Scotch plea of prescription is consequently applicable to the suit, and forms a complete bar to it. If a French bill of exchange is sued on in England, it must be sued on according to the law of England, and then the English Statute of Limitations would form a bar to the demand, if the bill had been due for more than six years.[2] *De la Vega* v. *Vianna*, 1 B. & Ad. 284 (20 E. C. L. R.); *The British Linen Company* v. *Drummond*, 10 B. & C. 903 (21 E. C. L. R.). It is admitted that the law of the place where the contract is made, must be employed to expound the contract. But there is a manifest distinction between expounding and enforcing a contract. If this first proposition is established, then it follows that the prescription thus created by the law of the country where the remedy is sought to be enforced, cannot be prevented from taking effect but by something which that law itself admits to be sufficient to defeat the prescription. Now, that cannot be the case with the proceedings in the French Court. Those proceedings were altogether such as neither the Scotch nor the English law would recognise. They were taken in the absence of Sir Alexander Don; in the Courts of a country where he was at the time an alien enemy; where he would not have been permitted, by the law of that country, to appear and claim any civil rights; and where he had neither property to be attached, nor an appointed agent to be answerable for him. All the cases in which the decrees of foreign Courts have been treated as *primâ facie* evidence of the existence of a debt, have been those where the

[1] Voet. De Statutis, lib. 1, tit. 4, part 2, s. 58. Huber, De Conflictu Leg. Div. Ersk. B. iii. tit. 7, s. 48.

[2] Chitty on Bills, 8th edit. 613.

parties did appear, or had full opportunities of appearing, before the tribunal pronouncing the decree, or where they had property situated or agents residing within *the jurisdiction: *Goddard* v. *Swinton*, Morr. 4533; *Edwards* v. *Prescott*, Id. 4535. In the case of *Sinclair* v. *Fraser*, Id. 4542, the Scotch Courts did not carry out the doctrine of the above cited cases, but on appeal to the House of Lords, they were directed to review their decision, and make it conformable to the preceding authorities. The case of *Douglas* v. *Forrest*, 4 Bing. 686 (13 E. C. L. R.), is not opposed to this argument, for though the English Courts there enforced a decree of the Scotch Courts made against a party in his absence, the judgment expressly proceeded on the ground that he had real property in the country, the tribunals of which had pronounced the decision, and that as his property was under the protection of the Scotch law, it must be held liable to the decrees of that law. In effect, therefore, *Douglas* v. *Forrest* adopted the principle of the decision in *Buchanan* v. *Rucker*, 1 Campb. 63; 9 East 192. This last case distinctly settled that a decree obtained against a person who was not within a jurisdiction, and who had no property within it, could not be effectual for any purpose whatever. The Scotch Courts have always recognised the principles laid laid down in these English cases, and it follows, therefore, that the proceedings in France, which were had behind the back of the party, by a tribunal before which he could not appear, and in a country where he had no property, cannot be received as judicial notice of a claim so as to prevent the operation of the Statute of Limitations. The authority of Lord Kaimes is in favor of the appellant, for he says in distinct terms,[1] that it ought never to be a question, "whether a foreign prescription or that of our own country ought to be the rule, for our own prescription must be the rule in

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[1] Principles of Equity, vol. ii. p. 353.

every case that falls under it, and not the prescription of any other country." The same author, noticing the statute of 1579, which introduced the triennial prescription, observes that it directs the judges "not to sustain action after three years" without making any distinction as to the debt being Scotch or foreign. Lord Eskgrove put the same construction on the statute of 1772 in the case of *Della Valle* v. *The York Buildings Company*, March 9, 1786. It is clear, therefore, on all the authorities, as well as on principle, that the prescription of a right of action on any obligation must be regulated by the *lex fori* of the remedy, and not by the *lex loci contractûs*. The decision of the Court below must consequently be reversed.

Dr. *Lushington* and Mr. *Gordon* for the respondent:—The *decision of the Court below was correct in admitting the proceedings in the French Courts as a bar to the prescription. Both the drawer and acceptor of the bills were liable to the payee, and proceedings against one only would have been sufficient to affect both: *Gordon* v. *Bogle*, Morr. 1127. But here there were proceedings against both, and judgment was obtained against both according to the proper forms of the law of the country where those proceedings were had. But then it is said, that the *lex loci contractûs* is not to decide a case of this sort, where one of the parties is subject to another jurisdiction. That argument cannot be sustained. The parties making a contract, make it with reference to the law of the country in which it is made. They cannot anticipate that it is to be broken, and that it will have to be enforced in another country. At all events, they cannot be supposed to make such an anticipation where the contract is for the simple payment of a sum of money. The French Courts had jurisdiction in this case, because the contract was entered into in France, both the parties being resident there, and both expecting the contract to be performed there; and by the

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law of that country, it is not absolutely necessary that, when the performance of such a contract is claimed, the foreigner who made it should actually be in France. Proceedings may, even in his absence, be taken to enforce performance of it. If therefore the French Courts had jurisdiction over the matter, then it is a well-established principle of law, that the judgments or decrees of foreign courts having competent jurisdiction, afford at all events *primâ facie* evidence of a claim, and that effect will be given to them, unless they are impugned on the ground that the judgment given was contrary to the *jus gentium*, and consequently ought not to be respected in the courts of civilized nations. Nothing short of such an objection can be allowed to impugn the judgment. Indeed, in *Geyer* v. *Aguilar*, 7 Term Rep. 681, the Court of King's Bench supported a decree of one of the French Courts condemning an American vessel, although the judges characterized the decree itself as having proceeded on principles more worthy of an Algerine Court than that of any civilized nation, and as actually authorizing an act of piracy. In the cases of *Goddard* v. *Swinton*, Morr. 4533; *Edwards* v. *Prescot*, Id. 4535; *Johnston* v. *Crawford*, Id. 4544, and *Findlater* v. *Drummond*, Brown's Syn. 707, the jurisdiction of foreign courts was recognised in a matter where such courts had jurisdiction, and their judgments were enforced. Now, it is *clear that the courts had jurisdiction, and that the *lex loci contractûs* must govern the present case. In *Robinson* v. *Bland*, 1 Sir William Black. 256, and see p. 234, arg., Lord Mansfield said, "The general rule establish *ex comitate et jure gentium*, is, that the law of the place where the contract is made, and not where an action may be brought, is to be considered in expounding the contract." With regard to a bill of exchange, the Scotch law holds that the place where the bill is made payable decides by what law the contract is to be governed: *Rogers* v. *Cathcart*, Morr. 4507; *Grove* v. *Gordon*, [*239

Id. 4511; *Lord Lovat* v. *Lord Forbes*, Id. 4513; *Parry* v. *M'Lachlan*, 24th May, 1827; *Glynn* v. *Johnston*, 8th June, 1830; *Phillips* v. *Stainfield*, Morr. 4503. The bills here were payable in France; they were drawn by a person residing in France upon another also residing there, and were accepted by him with his address in Paris affixed to the acceptance. Everything therefore showed the intention of the parties to treat these bills as French contracts. The limitation is of the very nature of the contract. The French law is consequently applicable to them. If so, then the proceedings in the French Courts are a complete bar to the prescription. But it is said that they cannot be so, because they were taken in the absence of Sir Alexander Don. But *Douglas* v. *Forrest*, 4 Bing. 686, recognised the principle, that a judgment had in the absence of a party was not on that account alone to be treated as invalid. There is here no other objection to the judgment, which was obtained in a regular suit against Sir A. Don and his co-surety, and the latter must for such a purpose be considered as the agent of the former. The judgment in the French Court must therefore be treated as a judicial recognition of the claim, sufficient to bar the prescription now set up from taking effect.

Lord BROUGHAM: My Lords, there is a case of *Don* v. *Lippmann* which was recently argued before your Lordships, and which, involving as it does a matter of national law, is one of considerable importance.

The facts of the case are these:—The late Sir Alexander Don was the acceptor of two bills of exchange, drawn on him by one Fagan, for the sum of 20,000 francs each, and payable on the 1st of March, 1810, to Fagan's order. He accepted these bills in France, but soon afterwards returned to Scotland, and died there, leaving the present appellant an infant, who now appears with the *concurrence of a tutor. This action was commenced in Scotland, in

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April, 1829, by the payee of the bill against the appellant, as the representative of his father; the payee having previously, namely, in 1810, proceeded in the French Courts against Fagan the drawer and Sir Alexander Don the acceptor, and obtained judgment there. In that proceeding Sir A. Don was not cited, except according to a form known in the French Courts of judicature, by the affixing of notice in a public office. The payee then commenced this action, both on the bills and on the judgment obtained in that proceeding in the French Courts. The appellant defeated himself by setting up prescription under the Scotch Act of 1772. The Lord Ordinary, before whom the case came, after taking the opinions of French counsel for the purpose of informing the Court as to what was the French law, pronounced an interlocutor, repelling the defence of the Scotch limitation of six years, holding that the French judgment did operate as an interruption of the prescription, and was valid as an answer to that defence in this case, and as he held the French law to be valid for the purpose of interrupting the prescription, he allowed the judgment of the French Court to enter into his consideration of the case, but did not hold it to be conclusive. He therefore reponed the defendant below, and allowed him to make out a defence in what manner he could on the merits. On this decision the case was brought before the Lords of the first division of the Court of Session, and they affirmed the judgment of the Lord Ordinary. This appeal was then brought before your Lordships.

It appears that in Scotland,—and it is rather singular that it should be so,—where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due. It becomes of some importance to know where the bills were payable, because this principle, which has been adopted of late years in many of

the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to consider whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases without affording any accuracy of description, for sometimes the debt is called English or French in respect of the place where the contract was made; sometimes it is the place of the origin; sometimes of the payment of the contract; and sometimes of the domicile of one of the parties. But at all events it
*241] becomes important to consider whether this *was a foreign or a Scotch debt. In the present case it was held most properly to be a foreign debt. That is a fact admitted; it is out of all controversy. This therefore must now be taken to be a French debt, and then the general law is, that where the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall therefore deal with this bill as if it was accepted payable in Paris.

On these short and admitted facts, and on this further assumption, that the bill being accepted in France is payable there, the question arises, and it is one which is not only the principal point, but it disposes of all the rest, namely, which of the two laws, the law of France, where the bill is accepted and is payable, or that of Scotland, where the debtor resides, shall rule the decision of the case. That is, in other words, whether the prescription set up is to be that of Scotland or France. The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in *The British Linen Company* v. *Drummond*, 10 B. & C. 903 (21 E. C. L. R.); *De la Vega* v. *Vianna*, 1 B. & Ad. 284 (20 E. C. L. R.); and in *Huber* v. *Steiner*, 2 Scott 304 (30 E. C. L. R.); 1 Hodges 206; 2 Bing. N. C.

202 (29 E. C. L. R.); 2 Dowl. Pract. Cases 781, and 4 M. & Sc. 328 (30 E. C. L. R.); though the reverse had previously been recognised in *Williams* v. *Jones*, 13 East 439. Then assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the contract itself, or to the remedy. When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractûs* should be considered at the time the rule, for the parties would not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. That is the lowest ground on which to place the case. The inconvenience of pursuing a different *course is manifest. Not only the principles of the law, but the known course of the Courts [*242 renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true that there may be no difficulty in knowing the law of the place of contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the Courts where the remedy is to be enforced. No one can say, that, because the contract has been made abroad, the form of action known in the foreign Court must be pursued in the Courts where the con-

tract is to be enforced, or the other preliminary proceedings of those Courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country must necessarily be followed. No one will assert that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the judge only. No one will contend in terms that the foreign rules of evidence should guide us in such cases; and yet it is not so easy to avoid that principle in practice if you once admit, that, though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country. Look to the rules of evidence for example. In Scotland some instruments are probative; in England, until after the lapse of thirty years, they do not prove themselves. In some countries, forty years are required for such a purpose; in others thirty are sufficient. How then is the law to be ascertained which is to govern the particular case? In one Court there must be a previous issue of fact; in another, there need be no such issue. In the latter, then, the case must be given up as a question of evidence. Then come to the law. The question whether a parol agreement is to be given up or can be enforced, must be tried by the law of the country in which the law is set in motion to enforce the agreement. Again, whether payment is to be presumed or not, must depend on the law of that country, and so must all the questions of the admissibility of evidence, and that clearly brings us home to the question on the Statute of Limitations. Until the Act of Lord Tenterden, 3 & 4 Will. IV., c. 27, a parol agreement *or promise was sufficient to take the case out of the Statute of Limitations; but that has never been the case in Scotland. It is not contended here that the practice of England is appli-

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cable to Scotland; but these are illustrations of the inconvenience of applying one set of rules of law to an instrument which is to be enforced by a law of a different kind. It is is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only; that is a strained construction of the obligation. The party does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar, the obligation is to pay a sum certain at a certain day, but the law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitations will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium upon evasiveness.

Then it is said, that by the law of Scotland not the remedy alone is taken away, but the debt itself is extinguished, and thus a distinction is relied on as taken by the law between an absolute prescription and the limitation provided by the statute. But it seems to me that there is no good ground for supposing such a distinction. I do not read the statute in that manner. The Act of 1772 is an act for the limitation of the enforcement of titles to bills and notes, and the enactments of it are strong with respect to the remedy to be enforced. The debt, however, is still supposed to be existing and owing.

It is not necessary to discuss the excellent distinction taken by Mr. Justice Story (Conflict of Laws, § 582), and

approved of in the Court of Common Pleas in the case of *Huber* v. *Steiner*, 1 Hod. 210; 2 Scott 306 (30 E. C. L. R.); 2 Bing. N. C. 202 (29 E. C. L. R.), namely, that where statutes of limitation are held to govern the rights of parties, it must be where the parties are resident within the jurisdiction during the period. That may be taken as the ground for the decision of the Court in that case. But there
*244] is another principle to be considered, *in which there are some Scotch cases that must not be overlooked. *Galbraith* v. *Cunningham*, Morr. 4430, in 1626, where a suit on an Irish bond, not executed according to the law of Scotland, was sustained in the Scotch Courts, is a case of this kind. There was another case of *Salton* v. *Salton*, in 1673, Id. 4431, on a bond made in France; and in both instances, the instrument being valid according to the law of the country where it was made, though not according to the law of Scotland, the suit was sustained. These cases show that in them it was considered that the law of the country where the instrument is made ought to prevail. But a contrary decision occurred in 1691, the *Montrose Case*, and another, *Grey* v. *Grant*, in 1789, Id. 4474, which was brought before the Lords Commissioners, who then refused to admit in the Scotch Courts such proof of a debt contracted in a foreign country as would have been sufficient proof in the country where the debt was contracted, but was not sufficient proof according to the law of Scotland. *Muir* v. *Muir*, decided in 1787, went to the same point. *Glyn* v. *Johnston*, 8 Shaw & Dun. 889, seems to cast some doubt upon this point, as it was held that the foreign law might be imported for such a purpose; and in *Gibson* v. *Stewart*, 9 Shaw & Dun. 525, the same rule was adopted, but there the domicile of the debtor made the whole difference, which was clearly wrong. The grounds of the opinion in this case are to be found in the case of *Glyn* v. *Johnston*. From the judgment there it appears that the whole of the

lex loci contractûs must be adopted from the foreign country. But it is to be observed that Lord Craigie (8 Shaw & Dun. 891) dissented from that judgment, saying that no evidence could be received except such as was allowed by the law of Scotland. The preference of the *lex loci solutionis* is derived from a sounder principle, that of the *lex fori.* The law of the domicile of the debtor comes from the same ground. The consideration of the forum prevails much more than any other throughout the cases, but it must be admitted that there is on the whole a conflict of the cases in the Scotch Courts. But though many of the Scotch authorities cannot well be reconciled with each other, the cases of *Taleyrand* v. *Boulanger,* 3 Ves. 449, in Chancery, and of *Melan* v. *Fitzjames,* 1 Bos. & Pul. 138, in the Common Pleas, furnish better guides for us; nor are those cases impugned by the principles to be drawn from *Groves* v. *Gordon,* Morr. 4511, or *Phillips* v. *Stamfield,* Morr. 4503; *Groves* v. *Gordon* proceeds upon reasons which will not support the decision, and much reliance cannot be placed upon **Phillips* v. *Stamfield.* All the judges agreed, that it was not a case of traffic and of merchants the law [*245 of Scotland must decide, though they were divided on the main point of the case: *Della Vale* v. *The York Buildings Company,* Id. 4472, is not an authority, for the question there arose upon different circumstances, namely, those of the debt being extinguished. The ground of the decision was, that the bond might be sued on in England, and therefore did not fall within the particular words of the statute of 1469 (Scotch Acts, vol. i. p. 95), which declares that certain bonds, etc., there mentioned "shall be of none avail."

Let us now see whether this was a French contract. Suppose a policy of insurance was effected in this country on a ship for a voyage from port to port in America, it could not be said that that was an American debt. *Fawkes* v. *Aiken* and *Wray* v. *Wright* are wholly irreconcilable both with

that which is now admitted to be law, and with the principle which I have stated. Then there are the cases of *Thomson* v. *Lythgoe* and *Renton* v. *Bayley*, in July, 1751, the latter of which is the case to which *Erskine* refers as settling the law. They were followed by *Macniel* v. *Macniel*, in 1761, by *Randal* v. *Innes*, Morr. 4520, in 1768, and by *Ker* v. *Home*, Id. 4522, in 1771, all of the same kind. All the authorities, Hubner de Conf. Leg. (De Confl. Leg. in Div. Imp.), Voet (Dig. Lib. 24, t. 3, s. 12), and Lord Kaimes (Principles of Equity, 3, 8, 6, 1, 5, 3), are cited in that case. *Campbell* v. *Steiner*, 6 Dow. 116, was an action for a bill of costs for business done in this House. The Court below there allowed the rule of Scotch prescription. That judgment was affirmed by Lord Eldon, who however said that he moved it with regret. He said that it had been ruled that the debtor being in Scotland and the creditor in England, the debtor might plead the Scotch rule of prescription; that that was against some of the old authorities, but was in accordance with those of later date. That case cannot be reconciled with the principle that the *locus solutionis* is to prescribe the law. It has nothing to do with the case. Why is it, then, that the law of the domicile of the debtor was there allowed to prevent the plaintiff from recovering? It was because the creditor must follow the debtor, and must sue him where he resides, and by the necessity of that case, was obliged to sue him in Scotland. In that respect, therefore, there was in that case no difference between the *lex loci solutionis* and the *lex fori;* and it must be admitted that in such a case the rules of evidence, and if so, the rules of practice,

*246] *may be varied as they are applied in one Court or the other. But governing all these cases, is the principle that *the law of the country where the contract is to be enforced must prevail in enforcing such contract, though it is conceded that the* lex loci contractûs *may be referred to for the purpose of expounding it.* If, therefore, the contract is made

in one country to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case. In reversing the most material part of the interlocutor appealed from, you do not introduce the law of England or of the commercial world into Scotland, but you are renewing in Scotland the principles of the old law of that country. The appellant was an alien enemy in France, and could not appear in the French Courts; he was, too, out of the country, and he could not possibly possess any property, real or personal, by which he could be rendered amenable.

But supposing that the debt might have been sued for in France, then comes the question, whether the French judgment cannot be sued on as a substantive cause of action. It is, in fact, tendered as one of the grounds of suit here. A foreign judgment is good here for such a purpose, provided that it has not been obtained by fraud, or collusion, or by a practice contrary to the principles of all law. *Fraser* v. *Sinclair*, Morr. 4543, which was affirmed in this House, showed that we regard a foreign judgment only as *primâ facie* evidence of a debt. *Buchanan* v. *Rucker*, 1 Campb. 63; 9 East 192, established that the Court before which a foreign judgment is brought by a proceeding of this sort may examine whether it has been rightly obtained or not, and the principle of the decision cannot be confined to the case of a party not being within the jurisdiction at the time the judgment is obtained. If he is a foreigner, and is not within the jurisdiction, but is by force kept out of it before the action, and is not sued by proper forms, his case is even stronger than that of the defendant in *Buchanan* v. *Rucker*, and he must have the same principle applied to it. The case in the 4 Bing. (*Douglas* v. *Forrest*, 4 Bing. 686 (13 E. C. L. R.)), shows how much the application of the rule is affected by circumstances. In that case, which was an action in an English Court on a Scotch judgment of horning against

a Scotchman born, the Court guards itself against a general inference from the decision. The Chief Justice, in delivering the judgment of the Court, says (Id. 703), "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against *247] *him, and by the laws of which country his property was, at the time those judgments were given, protected." *Beckett* v. *MacCarthy*, 2 B. & Ad. 951 (22 E. C. L. R.) has been supposed to go to the verge of the law, but the defendant in that case held a public office in the very colony in which he was originally sued.

It cannot be doubted that a foreign judgment is the same as to our right to examine into it in the Courts of this country, whether made in the absence of parties or with both of them present *in foro contentioso.*

On the whole of the case, my motion is to reverse the interlocutors of the 10th of June, 1835, and 20th of January, 1836, and to declare that the evidence of the sexennial prescription ought to be sustained, and that it is not affected by the proceedings which have taken place in the French Court.

The following order was afterwards made and entered on the Journals:

"It is ordered and adjudged by the Lords, etc., that the said interlocutors, in so far as complained of in the said appeal, be and the same are hereby reversed; and it is declared that the defence of the sexennial prescription, according to the law of Scotland, ought to be sustained; that this prescription has suffered no interruption by reason of the proceedings in the French Court; that these proceedings do not constitute a new ground of debt, nor evidence of a debt independent of the bill libelled upon; and that the debt can only be proved by the writ or oath of party, reserving all defences for the appellant; and it is further *ordered* and *adjudged*, that with this declaration the cause be remitted

back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment."

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*There are few subjects more interesting than that branch [*248
of private international jurisprudence so ably discussed by Lord Brougham in the principal case, which arises from the conflict of laws in matters relating to contracts,—a subject also of peculiar importance to a mercantile community engaged in transactions with people living under different laws in every part of the civilized world. This has been very clearly shown by Mr. Justice Story in his learned work upon the conflict of laws. "It is easy to see," writes that accomplished jurist, "that in the common intercourse of different countries, many circumstances may be required to be taken into consideration before it can be clearly ascertained what is the true rule by which the validity, obligation and interpretation of contracts are to be governed. To make a contract valid, it is a universal principle, admitted by the whole world, that it should be made by parties capable to contract; that it should be voluntary; that it should be upon a sufficient consideration; that it should be lawful in its nature; and that it should be in its terms reasonably certain. But upon some of these points there is a diversity in the positive and customary laws of different nations. Persons capable in one country are incapable by the laws of another; considerations good in one country are insufficient or invalid in another; the public policy of one country permits or favors certain agreements which are prohibited in another; the forms prescribed by the laws of one country to insure validity and obligation of contracts are unknown to another; and the rights acknowledged by one country are not commensurate with those belonging to another. A person sometimes contracts in one country and is domiciled in another, and is to pay in a third; and sometimes the property which is the subject of the contract is situate in a fourth; and each of these countries may have different and even opposite laws affecting the subject-matter. What then is to be done in this conflict of laws? What law is to regulate the contract, either to determine the rights or the remedies, or the defences

growing out of it, or the consequences flowing from it? What law is to interpret its terms, and ascertain the nature, character and extent of its stipulations? Boullenois has very justly said, that these are questions of great importance, and embrace a wide extent of objects:" Story, Conflict of Laws, § 232.

In examining the subject discussed in the principal case it is proposed to consider, 1st, by what law the capacity of persons contracting in a foreign country is governed; 2d, by the law of what country the validity of a contract is to be determined; 3d, by what law the form of a contract is to be regulated; 4th, according to what law is a contract to be construed; 5th, by what law the discharge or dissolution of contracts is governed; 6th, what law regulates the enforcement of contracts.

*249] *1. *By what Law the Capacity of a Person to contract is governed.*—Where a person enters into a contract in a foreign country, the question may be raised by what law is his capacity to enter into the contract to be determined? Is the *lex domicilii* or the *lex loci contractûs* to govern? Without going into the question as to the validity of contracts of marriage in foreign countries (a subject not within the province of this work), we may observe that however diffuse and contradictory may be the opinions of foreign jurists, our own reports are very bare of authority upon this topic. It is said by Mr. Justice Story, "that foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract:" Story, Conflict of Laws, § 241. Our own law appears to be different, for in a case decided at Nisi Prius it was held that the *lex loci contractûs* is to govern in determining the capacity of a person to enter into a contract. The case alluded to is that of Male *v.* Roberts, 3 Esp. 163: there the plaintiff made an advance to the defendant, an infant (who appears to have had an English domicil) in order to enable him to pay a sum of money for which he had been arrested in Scotland under a writ of *fugé* for liquors supplied to him. An action having been brought in England for the money advanced to the use of the defendant, he set up the defence that he was an infant when the money was so advanced. The plaintiff, not having proved that by the law of Scotland such a contract could be enforced against an infant, was nonsuited. And Lord Eldon, C. J., observed, "The law of the country where the

contract arose must govern the contract; and what that law is should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is without evidence."

In Cosio and Pineyro *v.* De Bernales, 1 C & P. 266 (12 E. C. L. R.), R. & M. 102 (21 E. C. L. R.), the plaintiffs, husband and wife, domiciled in Spain and carrying on trade there as partners, brought an action of *assumpsit* against the defendants, merchants in London, to recover the balance of an account. The plaintiffs however were nonsuited, because by the law of England husband and wife could not join in such an action. But it seems that if it had been shown by evidence that in Spain a husband and wife could be partners, the action might have been maintained; for Abbott, C. J., said, "The plaintiff must give some evidence that by the law of Spain a feme-covert in that country is authorized to have separate property, and trade on her own account." It does not appear from the report, but it is presumed that the contract in respect of which the action was brought was entered into in Spain. See also Stephens *v.* M'Farland, 8 Ir. Eq. Rep. 444.

In a recent case, in which, however, according to the report, neither Male *v.* Roberts nor Cosio *v.* *De Bernales were cited, it was held in the case of a married woman that her [*250 capacity to enter into a contract was to be governed by the law of her domicil. See Guépratte *v.* Young, 4 De Gex & Sm. 217: there Madame Guépratte, a married woman domiciled in France, entered into a contract in England respecting her reversionary interest in trust-money in the English funds to which she was entitled under a marriage settlement executed in France. It was held by Sir J. L. Knight Bruce, V.-C., that although according to the law of England a married woman could not bind her reversionary interest in personal estate not settled to her separate use, yet that as Madame Guépratte's capacity to enter into the contract was to be determined by the law of France—the country of her domicil, it was binding upon her. "The French law," said his honor, "(the law of the country of the marriage contract of M. and Madame Guépratte and of their *domicil*) was competent to give, and did here give the capacity, but permitted to the English law the form, which form was pursued and abided by."

At first sight it might seem that the rule laid down by Lord

Eldon in Male *v.* Roberts, viz., that the capacity to enter into a contract is to be determined by the law of the country where the contract is made, was departed from in Guépratte *v.* Young. It may perhaps, however, be treated as an exception from the rule, and in this light the learned Vice-Chancellor appears to have viewed it, when he observes that "it is notoriously of continual practice in the Court of Chancery, to deal with the personal property of married women domiciled elsewhere than in England, otherwise than it would be dealt with were they domiciled in England; to do so, merely by reason of the domicil. The law of the country of the domicil being attended to, a husband not domiciled here, often, as we all know, exercises power and obtains benefits which an English husband could not." See 4 De G. & Sm. 233.

The cases alluded to by his honor are those where husband and wife are domiciled in a foreign country, according to the law of which the husband is entitled to receive his wife's property without making any provision for her, for there the Court will, upon proof of the law of the domicil, order any money to which the wife is entitled in this country to be paid to her husband without requiring him to make any settlement. See 1 Lead. Cas. Eq., p. 425, 3d ed. The case of Guépratte *v.* Young, if it is opposed to Male *v.* Roberts, is supported by the opinion of Boullenois, cited by the learned judge, "Bona mobilia sequi et regulari debent secundum statuta loci domicilii ejus ad quem pertinent vel spectant." Perhaps, however, the case of Guépratte *v.* Young may be said not to have determined any question relative to the capacity of a married woman to contract in this country with reference to or so as to affect *herself*
*251] *personally*, but to have decided *that any contract which a married woman may enter into in this country with *reference to or so as to affect movables*, which are considered as being at her place of domicil, must, as to her capacity to contract, be governed by the law of the domicil, and in this view Guépratte *v.* Young may not be inconsistent with Male *v.* Roberts.

2. *By the Law of what Country the Validity of a Contract is to be determined.*—As a general rule the validity of a contract (unless it is to be performed in another place), depends upon the law of the country where it is entered into. A good illustration of this rule is to be found in the case of Trimbey *v.* Vignier, 1 Bing. N. C. 151

(27 E. C. L. R.), 4 M. & Sc. 695 (30 E. C. L. R.). There a bill of exchange was made and endorsed in blank in France: the holder having sued the maker in England, it was held by the Court of Common Pleas, that the contract was governed by the law of France, and that as according to the law of France an endorsement in blank (differing in this respect from the law of England) does not pass the property to the holder, he could not recover upon the bill of exchange in this country. "The rule," said Tindal, C. J., "which applies to the case of contracts made in one country, and put in suit in the Courts of law of another country, appears to be this, that the *interpretation* of the contract must be governed by the law of the country where the contract was made, *lex loci contractûs*. . . . Our Courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the Courts of the country where such contract was made; and that such being the case there we must hold in our Courts that he can have no rights of suing here." See also Burrows *v.* Jemimo, 2 Stra. 733; Alves *v.* Hodgson, 7 Term Rep. 241; Sudlow *v.* The Dutch Rhenish Railway Company, 21 Beav. 43; Scott *v.* Pilkington, 2 B. & S. 11 (E. C. L. R.); Branley *v.* The South Eastern Railway Company, 12 C. B. N. S. 63, 72 (104 E. C. L. R.); Lebel *v.* Tucker, 3 Law Rep. (Q. B.) 77.

Upon the same principle, if personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country. Thus in Cammell *v.* Sewell, 5 Hurlst. & N. 728, a cargo of deals was shipped on board a Prussian vessel, "Augusta Bertha," by Russian merchants at Onega, for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A survey was held, when the surveyors recommended, as best for all parties, that the ship and cargo should be sold, and the cargo was sold accordingly. It appeared that by the law of Norway, though the captain might not under such circumstances be able to justify the sale as between himself and the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale. It was held by the Court *of Exchequer Chamber (dissentiente, Byles, J.), affirming [*252 the decision of the Court of Exchequer (3 Hurlst. & N. 617), that the sale in Norway bound the property, and that the goods having come to this country, the owner claiming under such sale had

a good title to them as against the underwriters to whom the cargo had been abandoned. "We think," said Crompton, J., "that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the Court below, where he says, 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere,' and we do not think that it makes any difference that the goods were wrecked and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt or as to the landlord's right of distress, because the owner did not foresee that they would come to England. Very little authority on the direct question has been brought to our notice. The only case which seems at variance with the principles which we have enunciated is the case of the "Eliza Cornish," or "Segredo," 1 Ecc. & Adm. 36, before the judge of the Court of Admiralty. If this case be an authority for the proposition that the law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a Court of Error. We must remark, also, that in the case of Freeman *v.* The East Company, 5 B. & Ald. 617 (7 E. C. L. R.), the Court of Queen's Bench appears to have assented to the proposition that the Dutch law as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law. In the present case, which is not like the case of Freeman *v.* The East India Company, 5 B. & Ald. 617 (7 E. C. L. R.), the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked also

that Lord Stowell, in the passage cited in the case of Freeman *v.* The *East India Company, from his judgment in the case of the [*253
"Gratitudine:" *ante*, p. 30, states that if the master acts unwisely in his decision as to selling, still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of the "Eliza Cornish" (1 Ecc. & Adm. 36), as, on the evidence before us, we cannot treat the original purchaser otherwise than as an innocent purchaser; and as the law of Norway appears to us on the evidence to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that having once so vested it did not become divested by its being subsequently brought to this country, and therefore, that the judgment of the Court of Exchequer should be affirmed." See also Imrie *v.* Castrique, 8 C. B. N. S. 405 (98 E. C. L. R.); Hooper *v.* Gumm, 2 Law Rep. Ch. App. 252.

But although a contract may be valid in the country where it was entered into, it will not be enforced in this country, if it is of an immoral character, or is made in fraud of the laws of this country. This subject was fully discussed in the case of Holman *v.* Johnson, 1 Cowp. 341, where however the contract was held to be good upon the ground that the plaintiffs were not mixed up with the illegal conduct of the defendant, although they were aware of his intentions. There the plaintiffs, who were inhabitants of Dunkirk, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England. They however had no concern in the smuggling scheme itself, but merely sold the tea to the defendant as they would have done to any other person in the ordinary course of their trade: it was held by Lord Mansfield, C. J., that they were entitled to recover the debt. "The question," said his Lordship, "is whether in this case the plaintiff's demand is founded upon the ground of any immoral act, or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What then is the contract of the plaintiff? It is this: being a resident and inhabitant

of Dunkirk together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk, and giving credit for them. The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed *254] *in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk. To what a dangerous extent would this go if it were to be held a crime! If contraband clothes are bought in France, and brought home hither, or if glass bought abroad, which ought to pay a great duty, is run into England, shall the French tailor or the glass-manufacturer stand to the risk of the loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any Act of Parliament. I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question thus (Tit. De Conflictu Legum, vol. ii. p. 539): '*In certo loco merces quœdam prohibitœ sunt. Si vendantur ibi, contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia contractus inde ab initio validus fuit.*' Translated it might be rendered thus: In England, tea which has not paid duty is prohibited, and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid. He goes on thus: 'Verum si merces venditæ in altero loco, ubi prohibitæ sunt, essent tradendæ, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicæ quæ merces prohibuit.' Apply this in the same manner,—*But if the goods sold*

were to be delivered in England, where they are prohibited, the contract is void, and the buyer shall not bring an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained.

"The gist of the whole turns upon this: that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price, and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England." See also Pellecat *v.* Angell, 2 Cromp., Mees. &. R. 311; Eposito *v.* Bowden, 7 E. & B. 736 (90 E. C. L. R.).

It is clear therefore that if in Holman *v.* Johnson the goods had been smuggled into England in pursuance of a contract or of any act done by the vendors to enable the *defendant to smuggle such goods, the plaintiffs would have been unsuccessful [*255 in their action, because although such contract would have been valid by the law of France (as no nations pay any regard to the revenue laws of other nations), yet as it would have been prejudicial to this country, and made in fraud of its laws, our Courts would not have lent their assistance to enforce it. Thus in Waymell *v.* Reed, 5 Term Rep. 599, the plaintiff, a foreigner, living at Lisle, sold the defendants a quantity of lace, which he knew was intended to be smuggled into England, and for that purpose it was packed up for them, pursuant to their direction, in a peculiar manner, for its more easy conveyance without discovery. It was held by the Court of King's Bench, that the plaintiff could not recover the value of the goods. "It is not necessary," said Lord Kenyon, "to inquire now whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in Holman *v.* Johnson (1 Cowp. 341, *ante*, p. 253), to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defend-

ants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid that purpose. He cannot therefore resort to the laws of this country to assist him in carrying this contract into execution. What was said by Lord Mansfield at the end of Holman *v.* Johnson comes up to the present case." See also Clugas *v.* Penaluna, 4 Term Rep. 466; Biggs *v.* Lawrence, 3 Id. 454.

Mr. Justice Story, in his Conflict of Laws, states that "there seems a strong inclination in the Courts of law to hold, that if a contract is made in foreign parts by a *citizen* or *subject* of a country for the sale of goods which he knows are to be smuggled in violation of the laws of his own country, he shall not be permitted to enforce it in the Courts of his own country, although the contract of sale is complete, and might be enforced in the like case of a foreigner:" § 255. It is presumed the learned writer means that *mere* knowledge of, without any overt act of assistance in effecting, a fraud upon the laws of a country, although it would not be a bar to a foreigner, might preclude a subject from proceeding in the Courts of such country to enforce a contract. The English cases cited, notwithstanding the *dicta* of some of the judges, seem scarcely to bear out the supposed distinction, for in the first of them, Biggs *v.* Lawrence, 3 Term Rep. 454, 457, it appears that the goods supplied in Guernsey, viz. spirits, "were sent in slings and half-ankers, ready for smuggling;" and in the second case, Clugas *v.* *Penaluna, 4 Term Rep. 466, 468, which also arose upon spirits sold in Guernsey, "the plaintiff was assisting in the act of smuggling; by means of packing the goods; for the spirits were delivered in ankers which are used for the purpose of smuggling." The overt acts therefore in these two cases clearly brought them within the principle of the case of Waymell *v.* Reed.

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The distinction, however, alluded to was certainly taken by some of the learned judges in the two last-mentioned cases, although it was not material to the decisions. And with reference to it, Story justly observes, "The truer doctrine would seem to be, to make no distinction whatsoever between the case of a sale between citizens or subjects, and the case of a sale between foreigners; but to hold the contract in each case to be utterly incapable of being enforced, at least in the Courts of the country whose laws are thus designedly sought to be violated. Sound morals and a due regard to interna-

tional justice seem equally to approve such a conclusion:" Story, Confl. Laws, § 255.

But a contract will be valid in this country although it may be entered into in evasion of the revenue laws of another country. See Boucher *v.* Lawson, Ca. t. Hardw. 85; Lever *v.* Fletcher, 1 Park. Mar. Ins. 506; Planché *v.* Fletcher, 1 Doug. 251; Simeon *v.* Bazett, 2 M. & Selw. 94; s. c., on appeal, nom. Bazett *v.* Meyer, 5 Taunt. 824 (1 E. C. L. R.); Sharp *v.* Taylor, 2 Phil. Ch. Rep. 801.

If a contract entered into in a foreign country be contrary to morality, it cannot be enforced in the Courts of this country, even although it might have been enforced in the country where it was made. "In many countries," says Lord Mansfield, "a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose such an action to be brought here, upon such a contract which arose in such a country; but that would not be allowed in this country:" Robinson *v.* Bland, 2 Burr. 1084.

Although gambling debts contracted in this country, as well as securities given for them, even in a foreign country, are void and cannot be recovered in this country (Wynne *v.* Callander, 1 Russ. 293,) nevertheless it seems that gambling of itself is not considered to be so contrary to morality, as to prevent money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, from being recovered in the Courts of this country. See Quarrier *v.* Colston, 1 Phil. Ch. Rep. 147. But see and consider the remarks of Lord Mansfield, C. J., in Robinson *v.* Bland, 2 Burr. 1077.

Another class of contracts entered into abroad may be here noticed, which our Courts will not enforce on account of their being contrary to public policy, viz., where subjects of our own country enter into engagements abroad, to raise money to support the subjects of a government in amity with our own, in hostilities against their own *government (De Wütz *v.* Hendricks, 2 Bing. 314 (9 E. C. L. R.); 9 J. B. Moore 586 (17 E. C. L. R.); Jones *v.* Garcia del Rio, 1 T. & R. 297); so likewise where a contract is entered into with a country not recognised by this country, our Courts will not take any step to enforce it: Thompson *v.* Powles, 2 Sim. 194; Taylor *v.* Barclay, Id. 213; Jones *v.* Garcia Del Rio, 1 T. & R. 297, 299; and see Macnamara *v.* D'Evereux, 3 L. J. Ch. 156. [*257

As in our law slavery is not recognised, but is considered "against

the law of nature and the law of God," the question has arisen, and with much conflict of opinion, as to whether our Courts will entertain any action upon contracts for the sale of slaves, entered into in a country where slaves are saleable by law, and slavery is lawful. See Forbes *v.* Cochrane, 2 B. & C. 470, 471 (9 E. C. L. R.), where Best, J., says:—"It is a matter of pride to me to recollect that whilst economists and politicians were recommending to the legislature the protection of the traffic in slaves, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject-matter of property. As a lawyer, I speak of that early determination (Somersett's Case, Lofft's Rep. 1; 20 Howell's State Trials 79), when a different doctrine was prevailing in the senate, with a considerable degree of professional pride. I say there is not any decided case in which the power to maintain an action arising out of the relation of master and slave has been recognised in this country. I am aware of the case in Levinz (Butts *v.* Penny, 2 Lev. 201), but there the question was never decided, and if it had been in the case of Smith *v.* Gould, 2 Ld. Raym. 1274, the whole Court declared that the opinion there expressed is not law. And the same had before been said by Lord Holt in the case of Chamberlain *v.* Harvey, 1 Ld. Raym. 146. The case of Smith *v.* Brown and Cooper, 2 Salk. 666, has been misunderstood. It has been supposed to establish the position, that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law. But that point was not decided."

But as the slave-trade is not contrary to international law, or what may be termed the common law of nations, it has been held that a foreigner who is not prohibited from carrying on the slave-trade by the laws of his own country, may in a British Court of justice recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade: Madrazo *v.* Willes, 3 B. & Ald. 353 (5 E. C. L. R.); and see
*258] Le Louis, 2 Dods. Adm. Rep. 210.

In the recent case of Santos *v.* Illidge, 8 C. B. N. S. 861 (65 E. C. L. R.), this subject was much discussed. There the defendants, British subjects, resident and domiciled in Great Britain, being possessed of certain slaves in the Brazils, where the purchase and holding of slaves is lawful, contracted with the plaintiff, a Brazilian subject domiciled in the Brazils, to sell them to him to be used and employed there. Some of the slaves had been purchased by the defendants in the Brazils after the passing of the 5 Geo. 4, c. 113, but before the passing of the 6 & 7 Vict. c. 98, for the purpose of being employed in the working of certain mines there of which the defendants were the proprietors. The rest of the slaves were the offspring of those first mentioned, and were in the possession of the defendants before the passing of the last-mentioned act. It was held by the majority of the Court of Exchequer Chamber, consisting of Bramwell, B., Hill, J., Channell, B., and Blackburn, J. (Pollock, C. B., and Wightman, J., dissenting), reversing the judgment of the Court of Common Pleas, in which Willes, J., Williams, J., and Byles, J., concurred,—that the contract might be enforced here, there being nothing in the statutes to prohibit a contract by a British subject for the sale of slaves, lawfully held by him in a foreign country, where the possession and sale of slaves is lawful.

3. *By what Law the Form of a Contract is to be regulated.*—A contract made in a foreign country will not be enforced elsewhere, unless it is executed with the forms and solemnities required by such country, for a compliance with them can be deemed as the only criterion of the intention to enter into such contract: Warrender *v.* Warrender, 9 Bligh 111. Thus it was held, in Alves *v.* Hodgson, 7 Term Rep. 241, by the Court of King's Bench, that a man could not recover upon an unstamped promissory note given in Jamaica, the laws of which conntry required a stamp. "It is said," observed Lord Kenyon, "that we cannot take notice of the revenue laws of a foreign country; but I think *we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a Court of law here.*" See also Clegg *v.* Levy, 3 Campb. 166. In the two subsequent cases of Wynne *v.* Jackson, 2 Russ. 351, and James *v.* Catherwood, 3 D. & R. 190 (16 E. C. L. R.), it was held, that though a stamp was requisite in a foreign country, its absence from a document upon which proceedings were

taken in this country were immaterial. In the latter case, Lord Tenterden, C. J., observed, "It has been settled, or at least considered as settled ever since the time of Lord Hardwicke, that in a British Court we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed *in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."

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With reference to the observations of the learned judge in this case, it is perfectly true that in this country it is no objection to the validity of a contract that it offends against the revenue laws of another country, as in the case of smuggling; but in the case under discussion, the question is whether the instrument has been executed with all the formalities required by law of the place were the contract is entered into; and with respect to the objection of the inconvenience of receiving in evidence what the law of that country is in order to ascertain whether the instrument is or is not valid, that falls entirely to the ground, for that would be merely to ascertain a fact which the Courts are continnally in the habit of doing. See Story, Conflict of Laws, § 260 n. In the recent case of Bristow *v.* Sequeville, 5 Exch. 275, an action was brought to recover back 200*l.* paid by the plaintiff to the defendant for shares in a projected mining company in Westphalia. At the trial, Alderson, B., admitted unstamped receipts put in by the plaintiff to prove the payment of the purchase-money, the learned Judge at the same time expressing an opinion that it had not sufficiently been proved that by the law in force where the receipts were given they would be inadmissible for want of a stamp. On motion a rule for a new trial was refused, Rolfe, B. observing, "I agree that if for want of a stamp a contract made in a foreign country is *void*, it cannot be enforced here. But if Alves *v.* Hodgson meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree."

A striking illustration of the rule is to be found in Guépratte *v.* Young, 4 De G. & Sm. 217, where a married woman and her husband, domiciled in France, entered into a contract in England with respect to an interest in the English funds belonging to the wife.

The contract, though duly executed as required by the English law, did not comply with the formalities prescribed by the French law, which requires that there should be as many original instruments as there are distinct parties to the contract. It was held, however, by Sir J. L. Knight Bruce, V.-C., that the English law regulated the form of the contract, and that it was therefore valid. See also Benham *v.* Mornington, 3 C. B. 133 (54 E. C. L. R.).

So in The Peninsular and Oriental Steam Navigation Company *v.* Shand, 3 Moo. P. C. C. 272, a passenger by an English vessel belonging to an English Company, from Southampton to Mauritius, *viâ* Alexandria and Suez, took and signed a ticket, in the body of which the engagement of the company was stated to be subject to the conditions and regulations *endorsed thereon, among [*260 which was this clause: "The Company do not hold themselves liable for damage to, or loss, or detention of passengers' baggage." A package of baggage being lost during the voyage, the passenger sued the company in the Supreme Court at Mauritius for damages for the loss. That Court held that the contract was governed by the French law in force in Mauritius, and held that the company were liable. It was held by the judicial committee of the Privy Council, reversing the decision of the Court below: first, that it was a contract to be interpreted by the law of England, the place where the contract was made; secondly, that (as neither the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, nor the Railway and Canal Act, 17 & 18 Vict. c. 81, applied), the company, as carriers at common law, had power to limit their common law liability by special agreement, and that the limitation imposed by the stipulations endorsed on the ticket with respect to any loss, exempted the company from responsibility for the loss of the baggage. "The general rule," said Turner, L. J., "is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling or, as temporary residents, owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is of course immaterial that such an agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign Court interpreting or enforcing it on any contrary rule defeats the intention of the parties as well as

neglects to observe the recognised comity of nations. . . . This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port, to be continued in vessels which for this purpose carry their country with them."

4. *According to what Law a foreign Contract is to be construed.*— Assuming that a contract entered into in a foreign country is such as there is no objection against enforcing it in another, the question next arises, according to what rule is the contract to be there construed? and it appears to be clear that the law of the country where the contract was entered into must furnish the rule both as to its nature, and extent of obligation, and interpretation: Ferguson *v.* Fyffe, 8 Cl. & Fin. 140; see also Campbell *v.* Dent, 2 Moo. P. C. C. 292; The Peninsula and Oriential Steam Navigation Company *v.* Shand, 3 Moo. P. C. C. 272.

With regard to the law of the country furnishing us with the rule for ascertaining the nature of a contract, we may cite the case *261] *of Burrows *v.* Jemino, 2 Str. 733; 2 Eq. Cas. Ab. 526; there a bill having been drawn upon a person at Leghorn, he accepted it; the drawer having failed, the acceptor discharged himself of the acceptance by a suit instituted at Leghorn, whereby his acceptance was vacated, inasmuch as, according to the law of that country (differing from the law of England, by which an acceptor is liable in all events), if a bill be accepted and the drawer fails, and the acceptor has not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void. Proceedings having been taken in England, Lord Chancellor King was of opinion, that the cause was to be determined according to the local laws of the place where the bill was negotiated, and the acceptance of the bill having been vacated and declared void by a competent jurisdiction, he thought that sentence was conclusive and bound the courts here. See also Wynne *v.* Calendar, 1 Russ. 293; Allen *v.* Kemble, 6 Moo. P. C. C. 314.

The extent of the obligation to which a person renders himself liable by a contract, will depend upon the law of the country where he enters into it, and not upon the law of the country where he seeks to enforce it. For instance, if a person entitled to a Scotch

heritable bond, which is a primary charge upon realty in that country, were to obtain payment from the heir, the latter would not be able to take proceedings in England to be exonerated out of the personal estate there (Drummond *v.* Drummond, 6 Bro. P. C. 601, Toml. ed.; Elliott *v.* Lord Minto, 6 Madd. 16); although it is clear that in the case of an English bond or a Scotch movable debt paid out of the proceeds of Scotch realty, the heir would be entitled to ask for exoneration out of personal assets of the debtor administered in England: Earl of Winchelsea *v.* Garretty, 2 Keen. 293.

Again, if by the law of the country where a contract is made, no personal obligation is created, but a right only is conferred of proceeding *in rem*, such contract will not be held to raise a personal obligation in the country where the contract is enforced: Malan *v.* The Duke de Fitzjames, 1 Bos. & Pul. 138, 141, 142, 143.

Upon the same principle, inasmuch as by the law of France an endorsement in blank does not transfer any property in a bill of exchange, it was held in the Court of Common Pleas, in Trimbey *v.* Vignier, 1 Bing. N. C. 151 (27 E. C. L. R.), that the holder of a bill drawn in France and endorsed there in blank cannot recover against the acceptor. "The question," said Tindal, C. J., "is whether the law of France, by which the endorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for in the former case it must be adopted by our courts; in the latter it may be altogether disregarded, and the *suit commenced in the name of the present plaintiff. And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the endorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed the difference in the consequences that would follow, if the plaintiff sues in his own name or is compelled to use the name of the former endorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing. We [*262

therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." See also Cooper *v.* The Earl of Waldegrave, 2 Beav. 282; Allen *v.* Kemble, 6 Moo. P. C. C. 314.

As a general rule, when a contract made in one country is put in suit in the courts of law of another country, the interpretation of the contract must be governed by the law of the country where the contract was made: per Tindal, C. J., in Trimbey *v.* Vignier, 1 Bing. N. C. 159 (27 E. C. L. R.). See also De la Vega *v.* Vianna, 1 B. & Ad. 284 (20 E. C. L. R.); British Linen Company *v.* Drummond, 10 B. & C. 903 (21 E. C. L. R.). For instance, where a bill drawn in Ireland was sued upon in England at a time when the currencies of the two countries was different, it was held that the sum was payable in Irish currency. See Kearney *v.* King, 2 B. & Ald. 301; Sprowle *v.* Legge, 1 B. & C. 16 (8 E. C. L. R.). So likewise, "in the case of a bill drawn at A., it *primâ facie* bears interest as a debt at A. would do if nothing else appear:" per Alderson, B., 9 Exch. 31.

The country where a bill of exchange is signed and endorsed, is the place of the contract, although blanks in it may be filled up in another country. Thus in Snaith *v.* Mingay, 1 M. & Selw. 87, where Bailey & Co., partners, resident in Ireland, signed and endorsed a copperplate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B., in England for his use, who filled up the blanks and negotiated it, the Court of King's Bench held that this was to be considered a bill of exchange by relation from the time of the signing and endorsing in Ireland, and consequently that an English stamp was not necessary. "The only act," said Bailey, J., "to pledge the credit of the house of Bailey & Co. was the signature in Ireland. Suppose the person subscribing his name as drawer had died whilst the bill was on its *passage, and afterwards the blanks had been filled up and the bill negotiated to an innocent endorsee, I should think that in that case the representatives of the party signing the bill would have been liable. This shows that where the whole is filled up, it has reference to the

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time of the signature, which in this case was made in Ireland." Upon the same principle, in Barker *v.* Sterne, 9 Exch. 684, where a person in Bavaria signed as drawer a bill of exchange, and sent it with a consignment of goods to his correspondent in London for acceptance by the purchaser of the goods, and the correspondent having filled up the blanks by inserting the date, amount, &c., and having got the bill accepted by the defendant, applied it to his own purposes when it was *bonâ fide* endorsed to the plaintiffs, it was held by the Court of Exchequer that the bill was not an inland bill, and therefore did not require a stamp.

So in Sharples *v.* Rickard, 2 Hurlst. & N. 57, a bill drawn and endorsed at Quebec was transmitted by post to the endorsee at Liverpool, and presented by him to the drawee, who resided in England, for acceptance. It was held by the Court of Exchequer that the 17 & 18 Vict. c. 83, did not render it necessary for the endorsee to affix a stamp on such bill before presenting it for acceptance. "I believe," said Pollock, C. B., "that the act was expressly framed to exclude the necessity of stamping a foreign bill before it has been accepted by the drawee here, unless it has been endorsed or negotiated in this country.

Where, however, parties enter into a contract in one country *to be performed in another*, that contract as to its validity, nature, obligation, and interpretation, will be governed by the law of the place of performance: Story, Confl. Laws, § 280. "The law of the place," says Lord Mansfield, C. J., "can never be the rule, where the transaction is entered into with express view to the law of *another* country as the rule by which it is to be governed:" Robinson *v.* Bland, 2 Burr. 1078; Duncan *v.* Cannan, 18 Beav. 128; 7 De G., M. & G. 78; Este *v.* Smyth, 18 Beav. 112; Fife *v.* Round, 6 W. R. 282; Bannatyne *v.* Barrington, 9 Ir. Ch. Rep. 406; Burgess *v.* Richardson, 29 Beav. 487, 494; Van Grutten *v.* Digby, 11 W. R. M. R. 230; Grell *v.* Levy, 12 W. R. C. P. 378. Thus a promissory note payable to bearer, made and payable in England, is transferrable by delivery abroad, although, by the law of the country where the delivery takes place mere delivery is inoperative: Byles on Bills 385, 9th ed., citing De le Chaumette *v.* Bank of England, 2 B. & Ad. 385 (22 E. C. L. R.); 9 B. & C. 208 (17 E. C. L. R.). So likewise the time of payment of a bill is to be calculated according to

the law of the country where the bill is made payable; for example, the days of grace: Byles on Bills, 385, 9th ed.

The notice of dishonor given and received in a foreign country *must be regulated by the law of that country: Byles on Bills 385, 9th ed. And not only the protest, but the notice of dishonor, transmitted from a foreign country, must be regulated by the law of the country where the bill is payable: Id., and see Rothschild *v.* Currie, 1 Q. B. 43 (41 E. C. L. R.); and there in an action by the endorsee against the payee and endorser of a bill of exchange, drawn in England on, and accepted by, a French house, both plaintiff and defendant being domiciled in England, it was held by the Court of Queen's Bench, that due notice of the dishonor by the acceptor was part of the contract, that the bill being made payable by the acceptor abroad, was a foreign bill, and the *lex loci contractûs* must therefore prevail; and that it was sufficient for the plaintiff to show that he had given the defendants such notice of the dishonor and protest as was required by the law of France. See also Hirschfeld *v.* Smith, 1 Law Rep. C. P. 340.

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Upon the same principle it has been held that the validity of a bottomry bond, taken up in a foreign port, upon a foreign ship, freight and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law as administered in England, and not by the *lex loci contractûs*, or the law of the country the vessel belongs to: Duranty *v.* Hart, 2 Moo. P. C. C. N. S. 289; and see Lloyd *v.* Guibert, 1 Law Rep. Q. B. 115, 125.

Where, however, a contract of affreightment does not provide otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves: Lloyd *v.* Guibert, 1 Law Rep. Q. B. 115.

Although, as a general rule, interest will be paid upon a contract according to the rate of interest where it was made, if it is to be performed elsewhere, the rate of interest will be governed by the law of the place of performance. See Connor *v.* Bellamont, 2 Atk. 382; Ranelaugh *v.* Champante, 2 Vern. 395; Ekins *v.* East India Company, 1 P. Wms. 395; Cash *v.* Kennion, 11 Ves. 314; Robinson *v.* Bland, 2 Burr. 1077; Montgomery *v.* Budge, 2 Dow. & C. 297; Fergusson *v.* Fyffe, 8 Cl. & Fin. 121, 140; sed vide Arnott *v.*

Redfern, 2 C. & P. 88 (12 E. C. L. R.). In this we follow the Roman law, where it is laid down, "usurarum modus ex more regionis, ubi contractum est, constituitur:" Dig. Lib. 22, tit. 1, l. 1.

So if a bill drawn at A. be endorsed at B., the endorser is a new drawer, and it may be a question whether this endorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case it would carry interest at the rate at B., in the latter at the rate at A. On this subject we find a difference of opinion in the books, Mr. Justice *Story (Conflict of Laws, § 314) maintaining the former, and [*265 Pardessus (Cours de Droit, Commercial, pt. 7, tit. vii. c. 2, art. 1500), the latter opinion: per Alderson, B., in Gibbs *v.* Fremont, 9 Exch. 31.

Where however a bill of exchange is drawn in one country and is payable in another, if the bill is dishonored, the drawer is liable according to the *lex loci contractûs*, and not the law of the country where the bill was made payable. Thus in Allen *v.* Kembly, 6 Moo. P. C. C. 314, Mr. Carberry, who resided in Demerara, drew a bill in favor of Mr. Allen, who also resided there, payable in London, upon Mr. Mackie, addressed to him at Stranmaer in Scotland, where he was residing. Mackie accepting the bill making it payable in London. Allen endorsed the bill to a firm, who afterwards endorsed it to Mr. Troughton, who shortly afterwards became bankrupt. When Mackie's acceptance became due, he held two bills of exchange accepted by Troughton, which were dishonored and protested for non-payment. Troughton's assignees did not proceed against Mackie, but brought an action in Demerara against Carberry and Allen, the drawer and endorser, who pleaded a right of set-off to the extent of the two bills accepted by Troughton, which the Supreme Court disallowed, and found for the plaintiffs. It was held by the Judicial Committee of the Privy Council, reversing such sentence: First that the bill having been drawn in Demerara, the Dutch Roman law in force in that colony must govern the case, and that by that law the bill accepted by Mackie was compensated or extinguished *pro tanto* by the bills accepted by Troughton; secondly, that a surety was entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; and thirdly, that the drawer and endorser were to be deemed sureties for the acceptor, and entitled to plead this right of set-off.

"The appellants," said the Right Hon. T. Pemberton Leigh, in delivering judgment, "contend that their liabilities are to be governed by the Roman-Dutch law which prevails in Demerara, where the bill was clearly made and signed by Carberry. It does not appear in evidence when the endorsement by Allen was made, but as Carberry's defence that the bills are actually paid *pro tanto*, must, if it prevails protect Allen, the endorser also, this is not material. The appellants then contended, that the principle of compensation, in the civil law, is adopted by the Roman-Dutch law, and applied to bills of exchange; that by the effect of this principle, a debt due by a creditor is compensated, or, in other words, extinguished by a liquid debt, of the same amount due from the creditor to the debtor; that the law operates an extinguishment of the one debt by the other; that a surety is entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; *and that the drawer and endorser of a bill of exchange are deemed sureties for the acceptor, and are entitled to the benefit of this rule. To support this doctrine, various authorities were cited from Pothier, Vander Linden, Heineccius, and other treatises, which appear to us satisfactorily to establish the proposition contended for.

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"These propositions were not much disputed by the respondents, nor was it denied that when a bill is drawn generally, the liabilities of the drawer, acceptor, and endorser, respectively, must be governed by the laws of the countries in which the drawing, acceptance, and endorsement respectively took place. But it was contended, that when payment is to be made, in a place different from that where the contract is made, the parties must be held to have contracted with reference to the law of the place of payment, and not of the place of contract, according to the maxim of the civil law, "*Contraxisse unusquisque in eo loco intelligitur in quo ut solveret, se obligavit.*" And it is argued, that this bill being drawn payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English law.

"This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and endorser of a bill incurs. The drawer, by his contract undertakes that the drawee shall accept and shall afterwards pay the bill according to its tenor, at the place and domicil of the drawee if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and ac-

cepted payable at a different place from the place of domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages and costs, as the law of the country where he contracted may allow. In every case of a bill drawn in one country upon a drawee in another, the intention and the agreement are, that the bill shall be paid in the country upon which it is drawn. But it is admitted, that if this payment be not so made, the drawer is liable, according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn. What, then, is the consequence of altering, in the bill itself and by the acceptance, the place at which the acceptor is bound to pay? Can it be more than this, that, as to the acceptor the *locus solutionis* is altered, and therefore, as to him, the *lex loci solutionis* is altered? But how does this affect the liabilities of the other parties? These bills are addressed to Mr. Mackie, Stranmaer, Scotland; if no place of payment had been mentioned, they would have been payable by the drawee, according to the law of Scotland. London being fixed as the place of payment, they are payable by the *drawee according to the law of England; a different law is imported as regards the [*267 acceptor, but not as affects other parties." See also Robinson *v.* Bland, 1 W. B. 234, 256, and 2 Burr. 1077; Cooper *v.* The Earl of Waldegrave, 2 Beav. 282; Rothschild *v.* Currie, 1 Q. B. (41 E. C. L. R.).

Upon the same principle, in Gibbs *v.* Fremont, 9 Exch. 25, where a bill of exchange, on the face of which no interest was reserved, was drawn in one country payable in another, it was held upon the dishonor of the bill by the drawee that the drawer was liable to pay interest at the current rate in the country where the bill was drawn.

But if a bill of exchange be made in one country and endorsed in another, and again endorsed by a second endorser in a third, the rate of interest in the shape of damages upon the dishonor of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or endorsing the bill: Story Confl. Laws, § 307, § 314. "It has been sometimes suggested," observes Mr. Justice Story, "that this doctrine is a departure from the rule that the law of the place of payment is

to govern; but, correctly considered, it is entirely in conformity to the rule. The drawer and endorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawer; and in default of such payment they agree upon due notice to reimburse the holder, in principal and damages, where they respectively entered into the contract:" Story Confl. Laws, § 315. This subject was much discussed in the case of Cooper *v.* The Earl of Waldegrave, 2 Beav. 282: there a bill was drawn and accepted in Paris, where the drawer and acceptor were living, and made payable in England. No rate of interest was expressed to be payable on the bill. It was held by Lord Langdale, M. R., that interest was payable according to the English and not French law. "The contract of the acceptor," said his Lordship, "which alone is now to be considered, is to pay in England; the non-payment of the money when the bill becomes due is a breach in England of the contract which was to be performed in England. Upon this breach the right to damages or interest immediately accrues; interest is given as compensation for the non-payment in England; and for the delay of payment suffered in England; and I think that the law of England, *i. e.*, the law of the place where the default has happened, must govern the allowance of interest which arises out of that default; and consequently that the exception which relates to the interest is well founded. At the time when there is a breach of the contract of the acceptor by non-payment in the country where payment is contracted to be made, there may be a cotemporaneous breach of contract by the drawer or endorser in
*268] *the country where the contract was entered into,—where the bill was drawn and the endorsement made; and the consequences of that breach of contract may be governed by the law of the country where it takes place."

Upon the same principle, the validity of a contract as to whether it is usurious or not will depend upon the law of the country where it is made and is to be executed. Thus, in Thompson *v.* Powles, 2 Sim. 194, where (previous to the abolition of the usury laws in this country) bonds had been given for a foreign republic (where such rate of interest was valid) at six per cent. interest as a loan, and an objection was raised as to the bonds being usurious, Sir L. Shadwell, V.-C., said, "With respect to the question of usury, in order

to hold the contract to be usurious, it must appear that the contract was made here and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be paid abroad, it would not be usurious." See also Yrisarri *v.* Clement, 2 C. & P. 223 (14 E. C. L. R.).

In Harvey *v.* Archbold (R. & M. 184 (21 E. C. L. R.); 3 B. & C. 626 (10 E. C. L. R.)), the plaintiffs, a firm in England, consigned goods to the defendants, a firm at Gibraltar, to be sold on commission. The defendants, as soon as the bills of lading and invoices were delivered to their agents in London, advanced through them to the plaintiffs two-thirds of the invoice price of the goods, by bills at ninety days, and for these advances received interest at the rate of six per cent., calculated from the date of the bills, *which was the usual rate of interest at Gibraltar.* In an action for the proceeds of the goods it was held by the Court of King's Bench that this could not be considered as a loan of money in England, but anticipated payments, and that the whole must be taken as a Gibraltar transaction, to which the usury laws of the England were not applicable.

Where the place of payment or performance is not the same as that of the contract, a rate of interest may be stipulated for, legal at the former place, although it would be illegal as usurious at the latter: Story Confl. Laws, § 296.

It must be remembered that our own laws against usury have been repealed.

Where damages are recovered for a breach of contract *ex morâ*, the rate of interest allowed in a suit will be according to the *lex loci contractûs:* Ekins *v.* East India Company, 1 P. Wms. 394, 396; Story Confl. Laws, § 307.

Where a contract is made in one country, by which a sum is payable according to the currency of that country, and legal proceedings are afterwards taken in another country where the currency differs, to recover the money due upon the contract, the question sometimes arises, how is the amount of the debt to be ascertained, —whether by the ordinary relative value of the respective currencies when at par, or by the rate *of exchange at the particular time? It has been held that the latter is the correct mode [*269 of making the computation. Thus in Scott *v.* Bevan, 2 B. & Ad. 78 (22 E. C. L. R.), on the 1st of October, 1827, a judgment had

been recovered in Jamaica for 1554*l.* 16*s.* 8*d.* current money of that island, with interest on that sum from the 31st of December, 1825, and also 8*l.* 19*s.* 8½*d.* current money for his costs. The plaintiff brought an action in England for the sum of 1117*l.* 0*s.* 3*d.*, the alleged value of the damages, costs, and charges so recovered, and for 116*l.* 13*s.* 1*d.* interest thereon; 1102*l.* 7*s.* 3*d.* was paid into Court. The plaintiff proved that 140*l.* currency, taking the rate of exchange at par, was equivalent in value to 100*l.* sterling. The defendant proved that on the 1st of October, 1827, when the judgment was obtained, and thence to the commencement of the action, bills upon England were in Jamaica at a premium of 22½ per cent.; 100*l.* sterling at that rate being worth 171*l.* currency; but taking the exchange at 19 per cent. (which was 3½ less than the actual exchange), the value of 100*l.* sterling was 166*l.* 12*s.*, and 1836*l.* 10*s.* 8*d.*—being the amount of the principal sum recovered and costs, together with interest at six per cent. from the 31st of December, 1825, to the 2d of December, 1828, when the money was paid into Court—was in sterling money 1102*l.* 7*s.* 3*d.* It was held by the Court of King's Bench that the sum claimed by the plaintiff ought to be calculated according to the value of the sum recovered in Jamaica in sterling money, which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. "The plaintiff," said Lord Tenterden, C. J., "contended that the value of the sum recovered should be estimated as 140*l.* currency to 100*l.* sterling, without regard to the rate of exchange at any particular time; the defendant, that it should be estimated according to the exchange; and the payment upon that supposition was more than sufficient, taking the rate of exchange at the commencement of the action, or for some time before or afterwards. The practice has probably been in favor of the plaintiff; but there is no case that decides the question. Upon the whole, we think the defendant's mode of computation approximates most nearly to a payment in Jamaica in the currency of that island; though speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion.

"The proportion of 140*l.* to 100*l.* enters into every calculation; when bills in Jamaica are at a premium, a bill drawn upon England for 100*l.* may be sold and turned into currency at Jamaica for more than 140*l.* If such bills are at a discount, a bill for 100*l.*

will sell for and produce less than 140*l.* Such bills were at some premium at the time of the judgment recovered and at all times *since. And it is true, undoubtedly, that if the plaintiff should wish to send the money that he may receive under [*270 the judgment of this Court to Jamaica, where the money was originally due and recovered by the judgment in that island, the mode to be adopted, according to the most general and practicable, if not the only usage, would be to get some person resident in that island to draw upon him for the amount of the sterling money recovered here; and this might be done by bills drawn at the exchange on which the defendant relies, and which is at the rate of more than 140*l.* namely, about 160*l.* currency to 100*l.* sterling; so that a less number of hundred of pounds sterling than in the proportion of 140*l.* to 100*l.* would place him in the situation of receiving his principal and interest, viz. 1836*l.* 10*s.* 8*d.* currency in the island of Jamaica." See also Delegal *v.* Naylor, 7 Bing. 460 (20 E. C. L. R.); The Earl of Dungannon *v.* Hurkell, 1 Eq. Ca. Ab. 288; Ekins *v.* The East India Company, 1 P. Wms. 395; 2 Bro. P. C. 382, Toml. ed.; The Marchioness of Lansdowne *v.* The Marquis of Lansdowne, 2 Bligh P. C. 60; Cockerell *v.* Barber, 16 Ves. 461.

The principle before laid down appears to be adverse to a well-known case in Davys' Reports, p. 18 (*Le Case de mixt moneys*). There, Brett, a Drogheda merchant, having bought some goods from one Gilbert, in London, entered into a bond there to pay Gilbert in Dublin at a certain day the sum of 100*l.* of current and lawful money of England. In the intervening time Queen Elizabeth by proclamation recalled the existing currency in Ireland, and issued a new and debased coinage (called mixed money), declaring it to be the legal and current money of Ireland, Brett tendered 100*l.* of the mixed or debased coin in Dublin in performance of the condition of the bond. The question raised before the Privy Council of Ireland was whether the tender was good, or whether the 100*l.* ought not to have been paid in other or better coin than the mixed moneys, according to their rate and value, at the time of the tender. It was held by the Council that the tender was good, because although the mixed money was made current in the realm of Ireland only, it would nevertheless be considered current and legal money of England, as Ireland was only a member of the

Imperial Crown of England, and moreover, at the time of the tender in Dublin there was no other currency in Ireland than the mixed money.

The subject of the depreciation of the currency, in the time intervening between the contracting of a liability and payment, was very fully discussed in the case of Pilkington *v.* Commissioners for Claims on France, 2 Knapp, P. C. C. 7; there the French Government having, during war with England, by decree confiscated the debts due by French to English subjects, the decree of confiscation
*271] was afterwards repealed. After the repeal of *the decree of confiscation, a French subject paid into the treasury of the French Government, in the name of his creditor, the amount of a debt due to an English subject, in the currency of the time, which however was much depreciated since the declaration of his debt under the decree of confiscation. France having entered into a treaty to make compensation for all under confiscations and sequestrations, it was held by the Privy Council, on appeal from the award of the commissioners for liquidating claims of British subjects and others against the Government of France, that the debt ought to be calculated according to the value in currency at the time of the debtor's declaration. "Great part of the argument at the bar," said Sir William Grant, M. R., in his elaborate judgment, "would undoubtedly go to show that the commissioners have acted wrong in throwing that loss upon the French Government in any case; for they resemble it to the case of depreciation of currency happening between the time that a debt is contracted and the time that it is paid; and they have quoted authorities for the purpose of showing that in such a case the loss must be borne by the creditor, and not by the debtor. That point it is unnecessary for the present purpose to consider, though Vinnius (Ad. Instit. lib. 3, tit. 15, no. 12), whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies' Reports, p. 26 (*Le Case de mixt money*); he takes the distinction, that if between the time of contracting the debt and the time of its payment the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased

money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed; but he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if he were to make the guinea pass for 30*s.*, the debtor may liberate himself from a debt of 1*l.* 10*s.*, by paying a guinea, although he had borrowed the guinea when it was but worth 21*s.* I have said it is unnecessary to consider whether the conclusion drawn by Vinnius, or the decision in Davies' Reports, be the correct one; for this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. It is assumed to be a wrong act, not only in the treaty, but in the repealing decree; they justify it only with reference to that which, as to this country, has a false foundation, namely on the ground of what other Governments *had done towards them; they having confiscated the property of French subjects, therefore, they say, we thought [*272 ourselves justified at the time in retaliating upon the subjects of this country. That being destitute of foundation as to this country, the republic themselves, in effect, confess that no such decree ought to have been made, as it affected the subjects of this country; therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrongdoer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50*d.*, he does not make compensation by returning an assignat which is only worth 20*d.*; he must make up the difference between the value of the assignats at different periods. And that is the case stated by Sir John Davies, (p. 27), where *restitutio in integrum* is stated. He says two cases were put by the judges, who were called to the assistance of the Privy Council, although they were not positively and formally resolved; he says, it is said if a man upon marriage receives 1000*l.* as a portion with his wife, paid in silver money, and the marriage is dissolved *causâ præcontratûs*, so that the portion is to be restored, it must be restored in equal good silver money, though the state shall have depreciated the currency in the mean time. So, if a man recovers 100*l.* damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment-creditor cannot

liberate himself by merely restoring 100*l.* in the debased currency of the time, but he must give the very same currency that he had received. That proceeds upon the principle, that if the act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place. Upon that principle, therefore, undoubtedly the French Government, by restoring assignats at the end of thirteen months, did not put the party in the same situation in which he was when they took from him assignats that were of a very different value.

We have said, that as this point is not directly or immediately before us, it can make no part of our decree. At the same time it may not perhaps have been without some utility to have given an opinion upon it, inasmuch as it was argued and discussed at the bar; and we think, therefore, the commissioners have proceeded on a perfectly right principle in those cases in which we understand they have made an allowance for the depreciation of paper money; and considering that this case does not differ from those in which they have made that allowance, we are of opinion that the claimants ought to have the same equity administered to them in remunerating them for the loss they have sustained."

*273] 5. *Discharge or Dissolution of a *Contract,—by what Law governed.*—As a general rule, a discharge good by the law of the country where a contract was entered into is good everywhere. Thus, in Potter *v.* Brown, 5 East 124, the defendant gave to the plaintiffs in America, where they were all resident, a bill of exchange drawn upon a person in England: The bill was protested in England for non-acceptance, and the defendant afterwards, while still resident in America, became bankrupt there, and obtained a certificate of discharge by the laws of that country. It was held by the Court of King's Bench that such certificate was a bar to an action in England upon an implied *assumpsit* to pay the amount of the bill in consequence of such non-acceptance in England. "The rule," said Lord Ellenborough, C. J., was well laid down by Lord Mansfield in Ballantine *v.* Golding (Cooke's Bankrupt Law 347, 1st ed.), *that what is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere.* And that principle was recognised in Hunter *v.* Potts, 4 Term Rep. 182. Now this debt arose out of a contract in America. The debt was incurred

there for which the bill was given. The bill was drawn in America upon a person in England; but not having been accepted, the parties stood on their original rights, upon a contract made in America, for which security was there agreed to be taken, upon the faith indeed that it would be accepted and paid in England; but of which there has been no performance. No English act has been done to alter the situation of the parties; even the notice of the non-performance, which is one of the circumstances on which the implied *assumpsit* is founded, must have been given in America, where the parties are stated to have resided when the bill was given and when the bankruptcy happened, and nothing appearing to show that they ever changed their residence. Then if the bankruptcy and certificate would have been a discharge of the debt in America, which it clearly would, it must by the comity of the law of nations recognised in the cases I have mentioned, be the same here. It is in every day's experience to recognise the laws of foreign countries as binding on personal property; as in the sale of ships condemned as prize by the sentences of foreign courts; the succession to personal property by will or intestacy of the subjects of foreign countries. We always import together with their persons the existing relations of foreigners as between themselves, according to the laws of their respective countries; except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle, and laid up amongst our acknowledged rules of jurisprudence, it is needless to discuss it any further." See also Quelin *v.* Moisson, 1 Knapp 266 n.; *Quin *v.* Keefe, 2 H. Black. 553; Gardiner *v.* Houghton, [*274
2 B. & S. 743 (117 E. C. L. R.).

It must, however, be remembered that where the effect in a foreign country of bankruptcy, insolvency, or a *cessio bonorum*, is a mere discharge of the person of the debtor and not of his property, they cannot be pleaded in defence to proceedings in this country: Ex parte Burton, 1 Atk. 255; Phillips *v.* Allen, 8 B. & C. 477 (15 E. C. L. R.); Story Conf. of Laws, § 339.

A discharge moreover of a contract by the law of a place where the contract was not made or performed, will not be a discharge of it in any other country. Thus it was held in this country that an order for a discharge from debt generally under an act in Mary-

land for the relief of insolvent debtors, was no bar to a suit for a debt contracted in England. "It is impossible," said Lord Kenyon, C. J., "to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in *this country*, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? how can it be pretended that he is bound by a condition to which he has given no assent, either express or implied? . . . The case of Ballantine *v.* Golding, Cooke's Bankrupt Law 347, 1st ed., is very distinguishable from the present; for there the debt was contracted in Ireland where the commission issued. But in the same page of the book from whence that was quoted is to be found an opinion of Lord Talbot's directly contrary to the conclusion we are desired to draw in this case; for there he held that though the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued *there* for a debt arising *therein*:" Smith *v.* Buchanan, 1 East 6; see also Lewis *v.* Owen, 4 B. & Ald. 654 (6 E. C. L. R.); Phillips *v.* Allan, 8 B. & C. 477 (15 E. C. L. R.); Rose *v.* M'Leod, 4 Shaw & Dunl. 311; Bartley *v.* Hodges, 1 B. & S. 375 (101 E. C. L. R.); In re Robinson, 11 Ir. Ch. Rep. 385; overruling Royal Bank of Scotland *v.* Cuthbert, 1 Rose 486.

However, upon the construction of particular statute (54 Geo. III. c. 137), it was held that a debt contracted in England by a trader residing in Scotland was barred by a discharge under a sequestration in Scotland: Sidaway *v.* Hay, 3 B. & C. 12 (10 E. C. L. R.). This, however, does not at all trench upon the authority of Smith *v.* Buchanan and that *class of cases, because they depend upon the principle that the legislation of another country could not bind the subjects of this country, whereas Sidaway *v.* Hay was decided upon the ground that the statute then in question was binding, both in Scotland and in England.

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Upon the same principle apparently it was held in Edwards *v.*

Ronald, 1 Knapp 259, that a certificate of conformity obtained under a commission of bankruptcy in England, was a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. See and consider Le Feuvre *v.* Sullivan, 10 Moore P. C. C. 1, 13.

So part payment abroad by the drawer to the holder of a bill of exchange drawn abroad, will be held a full satisfaction of the bill, if the payment according to the law of the country where the bill was made was considered to be a full satisfaction of the bill, and such payment will be a good defence to an action on the bill in this country: Ralli *v.* Dennistoun, 6 Exch. 483.

A discharge however in a foreign country, contrary to international laws and usages, will not be recognised: Wolff *v.* Oxholme, 6 M. & Sc. 92.

Although as a general rule, a contract as to its dissolution and discharge will be governed by the *lex loci contractûs*, it by no means necessarily follows that a contract can only be discharged or dissolved by the same law under which the parties entered into it. "If," says Lord Brougham, in a celebrated case, "a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country in which the parties happen to reside, and in whose courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the courts of this country (and we have some restraints upon certain parties, which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other should be effected in Scotland, and that our courts here should (whether right or wrong) recognise such a rule because the Scotch law would affirm it,—surely it would follow that our courts must equally recognise a re-

scission of the contract of sale in Scotland by any act which the
*276] Scotch law *regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done in *pais*, or were merely to produce evidence of the thing so done and proof of its amounting by the Scotch law to a rescission of the contract, I apprehend that the party relying on the contract could never be heard to say, 'The contract is English, and the Scotch proceeding is impotent to dissolve it.' The reply would be, 'Our English Courts have (whether right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo colligatur.*' Suppose, for another example (which is the case), that the law of this country precluded an infant or married woman from borrowing money in any way, or from binding themselves by deed, and that in another country these obligations could be validly incurred, it is probable that our law and our courts would recognise the validity of such foreign obligations. But suppose a feme covert had executed a power, and conveyed an interest under it to another feme covert in England, could it be endured that where the donee of the power produced a release under seal from the feme covert in the same foreign country a distinction should be taken, and the court here should hold that party incapable of releasing the obligation? Would it not be said that our courts, having decided the contract of a feme covert to be binding when executed abroad, must by parity of reasoning hold the discharge or release of the feme covert to be valid, if it be valid in the same foreign country?" Warrender *v.* Warrender, 9 Bligh 125.

As will hereafter be more fully shown, the extinction of an obligation by prescription or the Statute of Limitations, being a matter of procedure, depends upon the *lex fori.*

The defence of infancy depends on the *lex loci contractûs*, and if it be good there, it will be good in every other place: Male *v.* Roberts, 3 Esp. 163.

6. *What Law regulates the Enforcement of Contracts.*—Without going into the question as to the jurisdiction over or proceedings taken with respect to *immovable* property, which are as a general rule regulated by the *lex loci rei sitæ*, nor into the question as to how far such property may be affected by proceedings *in personam*, as to which see Story, Confl. Laws, § 530, § 555; Penn *v.* Lord Baltimore, 2 Tud. L. Cas. Eq. 837, and note, 3d ed., we may here notice the distinction laid down and acted upon by Lord *Brougham in the principal case, viz.: that [*277 although as a general rule the merits or validity of a contract depend upon the law of the country where it is entered into, "yet that whatever relates to the *remedy* to be enforced must be determined by the *lex fori*—the law of the country to the tribunals of which the appeal is made."

A difficulty indeed, as in the principal case, often arises in drawing the distinction between what relates to the *merits or validity* of a contract and what relates merely to the *remedy* to be enforced. It is proposed to give a few examples where the *lex fori* has been considered applicable.

First, in the commencement of a suit, it seems to be clear that the name of the party in which it is brought belongs not so much to the right and merit of the claim, as to the form of the remedy. For instance, as a debt being a mere chose in action is not assignable at law in this country, and the assignee must consequently commence an action in the name of the assignor, it has been held that, even where an assignment has taken place of a debt contracted in a foreign country by the laws of which it is legally assignable, the assignee cannot in this country commence an action in his own name: Wolff *v.* Oxholm, 6 M. & Selw. 92, 99. Upon the same principle it was held that a trustee under the Scotch Bankrupt Act (54 Geo. III. c. 137) could not sue in England for a chose in action,—a balance of an account due to the estate of the bankrupt: Jeffery *v.* M'Taggart, 6 M. & Selw. 126.

But it certainly has been held that where a debt is by the *lex loci contractûs* in its origin legally assignable, so as to pass the *title* to the thing assigned to the assignee, he may commence proceedings in his own name in this country. We may instance the case of the assignee of an Irish judgment (O'Callaghan *v.* Thomond, 3 Taunt. 82), and of a Scotch bond (Innes *v.* Dunlop, 8 Term Rep. 595). See

also Alivon *v.* Furnival, 1 C., M. & R. 277, 296; Stephens *v.* M'Farland, 8 Ir. Eq. 444.

The arrest of a person under proceedings in this country depends upon the *lex fori*, and it may take place, although it would not be allowed in the country where the debt was contracted. Thus in De la Vega *v.* Vianna, 1 B. & Ad. 284, it was held that one foreigner might arrest another in England for a debt which accrued due in Portugal while both resided there, *although the* Portuguese law *did not allow of arrest for debt.* "In Melan *v.* The Duke de Fitzjames," said Lord Tenterden, C. J., (1 Bos. & Pul. 138), "the distinction taken by Mr. Justice Heath, who differed from the other judges, was that in construing contracts the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside. This doctrine is said to correspond with the opinions *of Huber (Hub. Prælect. de Conflictu Legum, pars ii. lib. 1, tit. 3, sect. 7) and Voet (Comm. ad Pand. lib. 1, tit. 8, sect. 30, and lib. 44, tit. 3, sect. 12). I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." See also Imlay *v.* Ellefsen, 2 East 453; Brettillot *v.* Sandos, 4 Scott 201. The cases of Melan *v.* Duke de Fitzjames, 1 Bos. & Pul. 138; Talleyrand *v.* Boulanger, 3 Ves. 447; and Flack *v.* Holm, 1 J. &. W. 405, 417, as to the point in question, may be considered as overruled.

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So, where by the laws of a foreign country criminal proceedings must precede the civil remedy there, the absence of such criminal proceedings will constitute no bar or defence to an action here: Scott *v.* Lord Seymour, 31 L. J. Exch. 457.

Upon the same principle it has been held that proceedings in this country by the master of a foreign vessel against the freight for his wages, belong to the remedy, and must therefore be governed by the *lex fori.* See The Milford, 6 W. R. 554 (Adm.); Swab.

Adm. Rep. 362: there the plaintiff had sailed in a ship belonging to the United States, as second mate, to England. During the voyage, by the death of the original master and the first mate, the command of the ship devolved upon him. It was held by Dr. Lushington, that the plaintiff was entitled to recover his wages by an action against the freight, under 191st section of the Merchant Shipping Act. "This being," said the learned judge, "an American ship, the contract must be taken to have been an American contract; and had any question therefore arisen as to the meaning and true interpretation of the contract, I should undoubtedly have been governed by the law of the United States. I think no such question arises on the present occasion. The learned counsel who argued first for the owners very candidly admitted that the law was to be taken as completely settled by the case of Don *v.* Lippmann, 5 Cl. & Fin. 1. It was said in that case, 'whatever relates to the remedy to be enforced must be determined by the *lex fori*—the law of the country to the tribunals of which the appeal is made.' It seems impossible, therefore, for any one to come to any other conclusion than this, that to arrest the freight was the remedy by which a master was to recover his wages, and consequently that is the law by which such cases must be governed."

The admission of evidence and *the weight to be attributed to it depend on the law of the country where the action is brought, and not on the *lex loci contractûs:* Yates *v.* Thompson, 3 Cl. & Fin. 544; Bain *v.* Whitehaven, &c., Railway Company, 3 H. L. Cas. 1. It is upon this principle that an action will not lie in the Courts of this country to enforce an oral agreement made in France (and valid there), which if made here could not, by reason of the Statute of Frauds, have been sued upon, inasmuch as that statute applies, not to the *validity* of the contract, but only to *procedure.* See Leroux *v.* Brown, 12 C. B. 801 (74 E. C. L. R.): there the declaration stated that the plaintiff had agreed to enter into the defendant's service as clerk and agent *for one year certain*, at certain wages, and evidence was given on the part of plaintiff to show, that by the law of France such an agreement was capable of being enforced, although not in writing. It was held that the 4th section of the Statute of Frauds, which relates solely to the *remedy* upon, and not to *validity* of, the contract, was applicable, and consequently that the contract could not be enforced here. "There is no dispute," said [*279

Jervis, C. J., "as to the principles which ought to govern our decision. My brother Allen admits that if the 4th section of the Statute of Frauds applies, not to the *validity* of the contract, but only to *procedure*, the plaintiff cannot maintain this action, because there is no agreement nor any memorandum or note thereof in writing. On the other hand, it is not denied by Mr. Honeyman—who has argued the case in a manner for which the Court is much indebted to him—that if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the *solemnities* of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made, but not in England." . . . After quoting the words of the 4th section, his Lordship continues, "The statute in this part of it, does not say that unless certain requisites are complied with, the *contract shall be void*, but merely, that *no action shall* be *brought upon it*, and as was put with great force by Mr. Honeyman, the alternative, "unless the agreement *or* some memorandum or note thereof shall be in writing,"—words which are satisfied if there be any written evidence of a previous agreement, shows that the statute contemplated that the agreement *may be good*, though not *capable of being enforced*, if evidenced by writing. This therefore may be a very good agreement, though for want of a compliance with the requisites of the statute, not enforceable in an English court of justice." After referring to Carrington *v.* Roots, *280] 2 M. & W. 248; Reade *v.* Lamb, *6 Exch. 130; Crosby *v.* Wadsworth, 6 East 602; and Laythoarp *v.* Bryant, 2 N. C. 735; 3 Scott 238, his Lordship concludes thus, "I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of 29 Car. II. c. 3, relates only to the *procedure*, and not to the *right* and *validity* of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen (Boullenois, Traité des Statutes réels et personnels, tom. 2, tit. iv. ch. 2, observ. 46, p. 459), it is to be observed that the learned author is there speaking of what pertains *ad vinculum obligationis et solemnitatem*, and not with reference to the mode of procedure."

The decision, however, of Leroux *v.* Brown has been disapproved of in the case of Williams *v.* Wheeler, 8 C. B. N. S. 316 (65 E. C. L. R.), where Willes, J., observes, that he should require much more argument to satisfy him that a contract made in a foreign country without writing, which was valid by the foreign law, was incapable of being enforced in an English Court, by reason of the requirements of the English law as to the formalities of contracts made in England. "The general rule," said his lordship, "is that *locus regit actum*, and although I fully recognise the principle upon which the judgment of this court in Leroux *v.* Brown professes to be founded, viz., that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision. We must, however, act upon Leroux *v.* Brown until it is overruled by a Court of Error."

Set-off or compensation will be treated as part of the remedy, and will therefore be admissible in claims between persons belonging to different states or countries, although it may not be admissible by the law of the country where the debt which is sued for was contracted: Story Confl. Laws, § 575; and see MacFarlane *v.* Norris, 2 B. & S. 783 (117 E. C. L. R.).

Liens also and implied hypothecations, and priorities of satisfaction given to creditors by the law of particular countries, and the order of payment of their debts, are generally treated as belonging to proceedings in suits, *ad litis ordinationem*, and not to the merits of the claim: Id.

The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce it. Thus in the principal case, where proceedings were taken in Scotland upon bills of exchange drawn in France, it was held by the House of Lords that the Scotch law of prescription was applicable, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him. Upon the *same principle it was held in Huber *v.* Steiner, 2 Bing. N. C. 202 (29 E. C. L. R.); 2 Scott 304, that the payee of promissory notes made in France might sue the maker then resident in England, although the action was barred by the law of France, in- [*281

asmuch as the time allowed by the English Statute of Limitations had not elapsed. "We take it," said Tindal, C. J., "to be clearly established, and recognised as part of the law of England, by various decisions, that if the prescription of the French law, which has been opposed to the plaintiff in the present case, is no more than a limitation of the time within which the action upon the note must be brought in the French Courts, it will not form a bar to the right of action in our English Courts; but that the question whether the action is brought within due and proper time, must be governed by the English statute. The distinction between that part of the law of the foreign country where a personal contract is made, which *is* adopted, and that which *is not* adopted by our English Courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates '*ad litis decisionem*' is adopted from the foreign country; so much of the law as effects the *remedy only*, all that relates '*ad litis ordinationem*' is taken from the '*lex fori*' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractûs*, is evident from many authorities. In Huber's treatise, De Conflictu Legum, § 7, he says, 'Ratio hæc est, quod præscriptio (where observe, the term *præscriptio* is used generally for limitation) et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ.'" See also Campbell *v.* Steiner, 6 Dow 116, 134; Fergusson *v.* Fyffe, 8 Cl. & Fin. 140; The British Linen Company *v.* Drummond, 10 B. & C. 903 (21 E. C. L. R.); De la Vega *v.* Vianna, 1 B. & Ad. 284 (20 E. C. L. R.).

It was argued in the principal case that the *lex fori* was not applicable to these cases, inasmuch as prescription is of the very nature of the contract, and that the party contracting is bound for a given time, and a given time only, that is, according to the prescription of the place where the contract was entered into. Lord Brougham, however, very satisfactorily disposed of this argument. "One party," he observed, "does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar the obligation is to pay a sum certain at a certain day, but the law does not sup-

pose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is in the nature of the contract, supposes that the *parties look only to the breach of the agreement. Nothing is more contrary to [*282 good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the statute of limitation will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness: *ante*, p. 243.

A distinction characterized by Lord Brougham in the principal case as "excellent" (*ante*, p. 243), and approved of by Tindal, C. J., in Huber *v.* Steiner, 2 Bing. N. C. 211 (29 E. C. L. R.), has been taken by Mr. Justice Story as follows, "Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and *the parties are resident within the jurisdiction during the whole of that period*, so that it has actually and fully operated upon the case; under such circumstances the question might properly arise, whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by way of extinguishment, or transfer of the claim or title:" Story Confl. of Laws, § 582. This point, however, has not yet been actually decided, nor was it raised in the recent case of Her Highness Ruckmaboye *v.* Mottichund, 8 Moore P. C. C. 4; 5 Moore, Ind. App. Cas. 234.

As to the question how far foreign judgments (in which terms the judgments of the Courts in our own colonies are included) are binding and can be enforced in this country, see 2 Smith's Leading Cases, p. 725, 6th ed., and Westlake, Priv. Internat. Law, p. 361; and see the Bank of Australasia *v.* Nias, 16 Q. B. 717 (71 E. C. L. R.); Imrie *v.* Castrique, 8 C. B. N. S. 405 (98 E. C. L. R.); De Cosse Bressac *v.* Rathbone, 6 Hurlst. & N. 301; Barber *v.* Lamb, 8 C. B. N. S. 95 (98 E. C. L. R.); Frayes *v.* Worms, 10 C. B. N. S. 149 (100 E. C. L. R.); Simpson *v.* Fogo, 1 J. & H. 18; The Griefswald, Swab. Adm. Rep. 430; Scott *v.* Pilkington, 2 B. & S. 11 (117 E. C. L. R.); The Liverpool Marine Credit Company *v.* Hunter, 15 W. R. (V.-C. W.) 758; 4 Law Rep. Eq. 62.

Foreign law must be proved in this country as a matter of fact by appropriate evidence, that is, by properly qualified witnesses who can state from their own knowledge, gained by study and practice, not only what are the words in which the law is expressed, but also what is the interpretation of those words and the legal meaning and effect of them as applied to the case in question. See Earl Nelson *v.* Lord Bridport, 8 Beav. 527; Smith *v.* Gould, 4 Moo. P. C. C. 21; and foreign law must be pleaded as a fact, and not merely in an argumentative and inferential manner: Benham *v.* The Earl of Mornington, 3 C. B. 133 (54 E. C. L. R.); 4 Dowl. & L. 213; M'Leod *v.* Schultze, 1 Dowl. & L. 614. A question of foreign law being one of fact must be proved in each case, the evi-
*283] dence *adduced in another cause, although upon the same point, being clearly insufficient: M'Cormick *v.* Garnett, 5 De G., M. & G. 278.

The inconvenience and uncertainty arising from the mode of proving the law of a foreign country as a matter of fact by skilled witnesses, that is to say, by advocates practising in such foreign country, has been to a great extent remedied by two recent statutes, the first of which is 22 & 23 Vict. c. 63, intituled "An Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part thereof." According to this Act, Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a Court in any part thereof (sect. 1). The opinion when pronounced to be authenticated, and a certified copy given to the parties to the action (sect. 2), the opinion to be applied by the Court remitting the case (sect. 3). Her Majesty in Council or the House of Lords on appeal may adopt or reject such opinion (sect. 4). The second Act is 24 Vict. c. 11, intituled "An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded within Her Majesty's dominions. It enacts that the superior Courts within Her Majesty's dominions may, in any action, remit a case with queries to a court of any foreign state with which Her Majesty may have made a convention for that purpose for the ascertainment of the law of such state (sect. 1). That the Court in which such action depends may apply such opinion to the facts set forth in the case (sect. 3), and the Courts in Her Majesty's domin-

ions may pronounce an opinion on the case remitted by a foreign court (sect. 3). See Act, 7 Jur. N. S., Part 2, pp. 255, 272.

Where a difficult question of foreign law arises, the Court will not decide on the usual evidence, the opinions of advocates of the foreign country, but will settle a case for the opinion of the Courts there: Lord *v.* Colvin, 1 Drew. & Sm. 24.

Lord Cranworth has recently laid down the mode in which our Courts should deal with a foreign contract involving the consideration of foreign law. "When," says his Lordship, "a contract is made in a foreign country, and in a foreign language, an English Court having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to the case; and, fourthly, evidence of any peculiar rules of construction which may exist in that law, and must then itself interpret the instrument on ordinary principles of construction:" The Duchess de Sora *v.* Phillips, 10 H. L. Cas. 653; and see Nelson *v.* Bridport, 8 Beav. 527, 534.

Until a foreign law is proved there is a presumption that it is *the same as that of England: Smith *v.* Gould, 4 Moo. P. C. C. 21; Brown *v.* Gracey, 1 D. & R. N. P. 41, n. (16 E. C. L. R); Lloyd *v.* Guibert, 1 Law Rep., 2 B. 129. [*284

For further information on the subject of this note, the reader is referred to Mr. Westlake's able and recent treatise on Private International Law.

The laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate;* and the courts will exercise a discretion with respect to the laws they may be called on to enforce. If they are manifestly unjust or calculated to injure our own citizens, they will be disregarded: Blanchard *v.* Russell, 13 Mass. 1; Prentiss *v.* Savage, Id. 20; Tappan *v.* Poor, 15 Id. 419; Ingraham *v.* Geyer, 1 Pick. 506; Greenwood *v.* Curtis, 6 Mass. 358 Crosby *v.* Berger, 3 Edw. Ch. 538; Hinds *v.* Brazealle, 2 How. (Miss.) 837; Mahorner *v.* Hooe, 9 Sm. & M. 247; Crosby *v.* Huston, 1 Texas 203; Gardner *v.* Lewis, 7 Gill 377; Martin *v.* Hill, 12 Barb. 631; Groves *v.* Nutt, 13 La. Ann. 117.

They are facts and must be proved as other facts: Baptiste *v.* De Volunbrun, 5 Har. & Johns. 86; Frith *v.* Springer, 14 Mass. 455; Stephenson *v.*

Bannister, 3 Bibb 363; Mason *v.* Wash, Breese 16; Brackett *v.* Norton, 4 Conn. 517; Owen *v.* Boyle, 3 Shep. 147; Martin *v.* Martin, 1 Sm. & M. 176. Written laws must be proved by the laws themselves if they can be procured, if not, inferior evidence of them may be received. The unwritten laws may be proved by parol; and when proved the court have the right to construe them and decide on their effect: Consequa *v.* Willings, Peters C. C. 225; Inga *v.* Murphy, 10 Alab. 885. Whether written or unwritten they are to be construed by the court: Sidwell *v.* Evans, 1 Penna. Rep. 383; De Sobry *v.* De Laistre, 2 Har. & Johns. 191. Where a question arises under a statute, its construction is for the court: Moore *v.* Gwynn, 5 Ired. 187. The jury is to determine what is the law not contained in a statute: Moore *v.* Gwynn, 5 Ired. 187; Ingraham *v.* Hart, 11 Ohio 255. In the trial of an action by jury, when the claim or defence of a party depends upon the construction of a statute of another state, the question of what construction is given to the statute in that state is to be decided by the jury: Holman *v.* King, 7 Metc. 384 Ignorance of the law of a foreign state is ignorance of fact: Haven *v.* Foster, 9 Pick. 112. In the courts of one of the United States, the laws of another state are to be proved, like foreign laws: Ripple *v.* Ripple, 1 Rawle 386; Haven *v.* Foster, 9 Pick. 112; Davis *v.* Curry, 2 Bibb 238; Stephenson *v.* Bannister, 3 Id. 363. The courts of one state will not enforce the revenue laws of another: McFee *v.* South Carolina Ins. Co., 2 McCord 503; Pickering *v.* Fisk, 6 Verm. 102; Skinner *v.* Tinker, 34 Barb. 333. In the absence of evidence the laws of a foreign state will be presumed to be the same as our own: Thurston *v.* Percival, 1 Pick. 415; Harper *v.* Hampton, 1 Har. & Johns. 622; Allen *v.* Watson, 2 Hill (S. C.) 319; Crozier *v.* Bryant, 4 Bibb 174; Tarlton *v.* Briscoe, Id. 73; Robinson *v.* Dauchy, 3 Barb. S. C. 20; Crosby *v.* Huston, 1 Texas 203; Monroe *v.* Douglass, 1 Selden 447; Ellis *v.* White, 25 Alab. 540; Crouch *v.* Hall, 15 Illinois 263; Wright *v.* Delafield, 23 Barb. 498; Whidden *v.* Seelye, 40 Maine 247; Bean *v.* Briggs, 4 Iowa 464; Fouke *v.* Fleming, 13 Md. 392; Chase *v.* Alliance Ins. Co., 9 Allen 311.

The *lex loci contractûs* generally determines the nature and legal quality of the act done: the nature and validity, obligation and legal effect of such contract, and furnishes the rule of construction and interpretation: Carnigee *v.* Morrison, 2 Metc. 381; Bulger *v.* Roche, 11 Pick. 36; Blanchard *v.* Russell, 13 Mass. 1; Vancleef *v.* Thorasson, 3 Pick. 12; Smith *v.* Smith, 2 Johns 235; Ruggles *v.* Keeler, 3 Id. 263; Whittemore *v.* Adams, 2 Cowen 621; Warren *v.* Lynch, 5 Johns. 239; De Sobry *v.* De Laistre, 2 Har. & Johns. 191; Ayres *v.* Audubon, 2 Hill (S. C.) 601; Humphreys *v.* Powell, Breese 231; Warder *v.* Arall, 2 Wash. 282; Cocke *v.* Conigmaker, 1 A. K. Marsh. 254; Carnigee *v.* Morrison, 2 Metc. 381; Loan Co. *v.* Towner, 13 Conn. 249; Watson *v.* Brewster, 1 Barr 381; Watson *v.* Orr,

3 Dev. 161; Martin *v.* Martin, 1 Sm. & M. 176; Pope *v.* Nickerson, 3 Story 465; Cox *v.* Adams, 2 Kelly 158; Dundas *v.* Bowler, 2 McLean 397; Bliss *v.* Houghton, 13 N. H. 126; Hayward *v.* Le Baron, 4 Florida 404; Dakin *v.* Pomeroy, 9 Gill 1; Pomeroy *v.* Ainsworth, 22 Barb. 118; McAllister *v.* Smith, 17 Illinois 328; McDougald *v.* Rutherford, 30 Ala. 253; Walker *v.* Forbes, 31 Alab. 9; Skelton *v.* Marshall, 16 Texas 354; Evans *v.* Kittrall, 33 Alab. 449; Brown *v.* Freeland, 34 Miss. 181; Bliss *v.* Brainard, 41 N. H. 256; Farmers' Bank *v.* Burchard, 33 Verm. 346; Thayer *v.* Elliott, 16 N. H. 102; Atwater *v.* Walker, 1 Green 42; Benners *v.* Clemens, 8 P. F. Smith 24. Where a contract is made in one country to be performed in another, the law of the place of performance is to govern: Thompson *v.* Ketcham, 4 Johns. 285; 8 Id. 189; Sherrill *v.* Hopkins, 1 Cowen 103; McCandlish *v.* Cruger, 2 Bay 377; Gaillard *v.* Gaillard, 1 Nott & McCord 67; Towro *v.* Cassin, Id. 673; Hale *v.* New Jersey Co., 15 Conn. 539; Harwick *v.* Andrews, 9 Porter 9; Goddin *v* Shipley, 7 B. Monr. 575; Broadhead *v.* Noyes, 9 Missouri 56; Dorsey *v.* Hardesty, Id. 157; Sherman *v.* Gassett, 4 Gilm. 521; DaCosta *v.* Davis, 4 Zabriskie 319; Pomeroy *v.* Ainsworth, 22 Barb. 118; Dalton *v.* Murphy, 30 Miss. 59; Kanaga *v.* Taylor, 7 Ohio N. S. 134; Boyd *v.* Ellis, 11 Iowa 97; Bliss *v.* Houghton, 16 N. H. 90; Summers *v.* Mills, 21 Texas 77; Hunt's Ex. *v.* Hall, 37 Ala. 702. The *lex loci contractûs* controls the nature, construction and validity of a contract in relation to personal property; therefore the fact that the place of performance and of the situation of the subject-matter of the contract is in a foreign state, can give no validity to a contract void under the Statute of Frauds of the state where made: DaCosta *v.* Davis, 4 Zabriskie 319.

If nothing appears upon the face of a contract, to show where it is to be executed, the presumption is that it is to be executed in the country where it is made: De Sobry *v.* De Laistre, 2 Har. & Johns. 191. When the performance of a contract made in one country is sought in another, in the absence of evidence that it must necessarily be performed in the former, it must be construed according to the laws of the latter: White *v.* Perley, 3 Shepl. 470. The law of the country where a contract is made, is the law of the contract wherever performance is demanded; and the same law which creates the charge will be regarded, if it operate to discharge: Green *v.* Sarmiento, Peters C. C. 74; Willings *v.* Consequa, Id. 301; Le Roy *v.* Crowninshield, 2 Mason 151. In respect to usury, the law of the place where the contract for the loan of money is made will govern, though the performance be secured by a mortgage on land in another state, unless there is something to show that the parties had in view the laws of the latter state: De Wolf *v.* Johnson, 10 Wheat. 367; Varick *v.* Crane, 3 Green Ch. 128; Turpin *v.* Povall, 8 Leigh 93; Sherman *v.* Gassett, 4

Gilm. 521; Newman *v.* Kershaw, 10 Wisc. 333; Arnold *v.* Potter, 22 Iowa 194; Smith *v.* Muncie Bank, 29 Indiana 158. A contract for the payment of interest may be made with reference to the law of the place where the parties reside, and in such place it will be valid, although the rate of interest exceeds that allowed by the law of the place of payment: Richard *v.* Globe Bank, 12 Wisc. 692; Vliet *v.* Camp, 13 Id. 198; Butler *v.* Myer, 17 Indiana 77.

The law of a place where the note is payable determines what is a default by the maker. But the contract of the endorser is regulated by that of the country where the endorsement is made: Hatcher *v.* McMorine, 4 Dev. 122; Dow *v.* Russell, 12 N. H. 49; Rowell *v.* Buck, 14 Verm. 147; Harrison *v.* Edwards, 12 Id. 648; Bark *v.* Chusan, 2 Story 455; Dunscomb *v.* Bunker, 2 Metc. 8; Allen *v.* Merchants' Bank, 22 Wend. 215; Reddick *v.* Jones, 6 Iredell 107; Tyler *v.* Trabee, 8 B. Monr. 306; Walker *v.* Forbes, 25 Ala. 139; Emerson *v.* Partridge, 1 Williams 8; Miller *v* Mayfield, 37 Mississippi 688; Ring *v.* Doolittle, 1 Head. 77; Blodgett *v.* Durgin, 32 Verm. 361; Lee *v.* Selleck, 32 Barbour 522; Hunt *v* Standart, 15 Indiana 33; Rose *v.* Thames Bank, Id. 292; Pratt *v.* Wallbridge, 16 Id. 149; Artisans Bank *v.* Park Bank, 41 Barbour 590; Hunt *v.* Hall, 1 Ala. Select Cas. 634; Short *v.* Trabue, 4 Metc. (Ky.) 299; Tillotson *v.* Tillotson, 34 Conn. 335. Where a promissory note is made payable generally, without any designation of the place of payment, the law of the place where it is made must determine the construction to be given to it, and the obligation and duty it imposes: Bank of Orange Co. *v* Colby, 12 N. H. 520; Peck *v.* Hibbard, 26 Vermont 698; Pryor *v.* Wright, 14 Ark. 189; Pomeroy *v.* Ainsworth, 22 Barbour 118; Young *v.* Harris, 14 B. Monr. 556; Hawley *v.* Sloo, 12 La. Ann. 815. A. and B., inhabitants of New York, being in Canada for a temporary purpose, A. gave to B. a promissory note, payable on demand, in discharge of an antecedent debt contracted in New York. It was held that the note was to be governed in its construction by the *lex loci contractûs:* Smith *v.* Meade, 3 Conn. 253.

The liability and rights of acceptors of a bill of exchange are to be ascertained by the law of the place where the bill is made payable: Frazier *v.* Warfield, 9 Sm. & M. 220; Lizardi *v.* Cohen, 3 Gill 430; Barney *v.* Newcomb, 9 Cushing 46; Bowen *v.* Nevill, 3 Kernan 290; Bright *v.* Judson, 47 Barbour 29. The law of the place where a bill of exchange is drawn or endorsed, not of that where it is payable, governs and fixes the liabilities of the drawer or endorser, and whether a demand and protest are necessary and the circumstances under which notice may be required or dispensed with, depend on the former, although a protest, if required, must be made at the time, in the manner and by the person prescribed by

the latter: Raymond *v.* Holmes, 11 Texas 54. A. domiciled here, accepts in Manchester, England, a bill drawn by B., an English merchant, resident there, payable to B. or order in London. B. sues A. here upon the bill. This is a foreign bill as if accepted here payable in London: Grimshaw *v.* Bender, 6 Mass. 157 Where bills are accepted, payable in London, on a promise to provide funds to meet them, the contract is governed by the law of England: Bainbridge *v.* Wilcocks, Baldwin 536; Suydam *v.* Barber, 6 Duer 34. A bill of exchange was drawn and endorsed in New Granada, payable in New York; the endorsement was valid by the law of New York but not by the law of New Granada. As between the endorsee and drawer, the law of New York must govern, and on the non-acceptance of the bill the holder could recover against the drawer: Everett *v.* Vendryes, 19 New York 436. A bill of exchange, payable in New York, is governed as to its mode of transfer by the law of New York: Everett *v.* Vendryes, 25 Barbour 383. The law of the place where the bill or draft is drawn must govern as to damages and interest when recourse is had on the drawer; and the liability of the different endorsers is to be regulated by the law of the place where each of the endorsements may have been made: Bailey *v.* Heald, 17 Texas 102.

Although a sale be valid by the law of the place where it is made, yet, if it is invalid by the law of the place where the goods are to be delivered, the vendor cannot recover the price, in a suit in the latter place, if he has done anything beyond the mere act of selling, to aid his vendee in an attempt to violate the law of such place of delivery: Bancker *v.* Mansel, 47 Maine 58; Wilson *v.* Stratton, Id. 120; Dalter *v.* Lane, 13 Iowa 538. The *lex loci contractûs* governs as to the sale of goods, not the law of the place where payment is to be made: Houghtaling *v.* Ball, 19 Mo. 84; s. c. 20 Id. 563. A., a commission merchant doing business here, sues B., his correspondent, living in another state, for the balance of account. The cause of action is regarded as accruing here: Coolidge *v.* Poor, 15 Mass. 427. The liability of a partner is to be determined by the law of the place where the partnership is carried on and not where the debt was incurred: Hastings *v.* Hopkinson, 2 Williams 108.

No title to lands can be acquired or passed unless according to the *lex loci rei sitæ:* Clark *v.* Graham, 6 Wheat. 577; Kerr *v.* Moon 9 Id. 566; Hawley *v.* James, 7 Paige 213; Picket *v.* Johns, 1 Dev. Ch. 123; McCormick *v.* Sullevant, 10 Wheat. 192; Abell *v.* Douglass, 4 Denio 305; Depas *v.* Mayo, 11 Mo. 314; Vertner *v.* Humphreys, 14 Sm. & M. 130; Nicholson *v.* Leavitt, 4 Sandf. S. C. 252; Butterfield *v.* Beall, 3 Ind. 203; Jeter *v.* Fellowes, 8 Casey 465; Loving *v.* Pairo, 10 Iowa 282; Lucas *v.* Tucker, 17 Ind. 41; Goddard *v.* Sawyer, 9 Allen 78. When a contract is made in one state for the purchase of land lying in another, and the

money is to be paid in the state in which the contract is made, the *lex rei sitæ* will govern as to the title to the land, and the *lex loci contractûs* as to the effect of a failure of consideration: Glenn *v.* Thistle, 23 Miss. 42. An instrument in the nature of an assignment for the benefit of creditors purporting to dispose of real property, situated in another state or county, is within the reach of the laws of the state in which it is executed, notwithstanding the rule of law that rights relating to the acquisition, enjoyment and disposition of such property, are prescribed and regulated exclusively by the laws of the country in which the property is situated: D'Ivernois *v.* Leavitt, 23 Barb. 63; King *v.* Johnson, 5 Harring. 31; Wilson *v.* Carson, 12 Md. 54. An instrument legal and efficient, where made and at the domicil of the maker, cannot dispose of his movables situate in another state, in a manner prohibited by the laws of that state: Varnam *v.* Camp, 1 Green 326. Civil incapacities and disqualifications, by which a person is affected by the law of his domicil, are regarded in other countries as to acts done or rights acquired in the place of his domicil; but not as to acts done or rights acquired within another jurisdiction, where no such disqualifications are acknowledged: Polydore *v.* Prince, Ware 402; Huey's Appeal, 1 Grant's Cases 51.

The *lex fori* governs as to remedies: Hinckley *v.* Marean, 3 Mason 88; Titus *v.* Hobart, 5 Id 378; Cox *v.* United States, 6 Peters 172; Blanchard *v.* Russell, 13 Mass. 15; Bulger *v.* Roche, 11 Pick. 36; Smith *v.* Spinolla, 2 Johns. 198; Andrews *v.* Herriott, 4 Cowen 508; Whittemore *v.* Adams, 2 Id. 626; De Sobry *v.* De Laistre, 2 Har. & Johns. 191; Ayres *v.* Audubon, 2 Hill (S. C.) 601; Watson *v.* Brewster, 1 Barr 381; Gulick *v.* Loder, 1 Green 68; Givens *v.* Western Bank, 2 Ala. 397; Smith *v.* Atwood, 3 McLean 545; Wood *v.* Watkinson, 17 Conn. 500; Cox *v.* Adams, 2 Kelly 158; Dundas *v.* Bowler, 3 McLean 397; Broadhead *v.* Noyes, 9 Mo. 56; Dorsey *v.* Hardisty, Id. 157; Sherman *v.* Gassett, 4 Gilm. 521; Mathuson *v.* Crawford, 4 McLean 540; Hodges *v.* Shuler, 24 Barb. 68; Ferguson *v.* Clifford, 37 N. H. 86. The courts will not sustain an action on a foreign contract on the mere ground that the *lex loci contractûs* gave an action. All that relates to the remedy must be determined by the *lex fori*: Pickering *v.* Fisk, 6 Verm. 102.

The Statute of Limitations of a foreign state cannot be pleaded in bar, or set up against the *lex fori*, though the contract was made and the parties resident there: Pearsall *v.* Dwight, 2 Mass. 84; Byrne *v.* Crowninshield, 17 Id. 55; Medbury *v.* Hopkins, 3 Conn. 472; Atwater *v.* Townsend, 4 Id. 47; Smith *v.* Healy, Id. 49; Graves *v.* Graves, 2 Bibb 207; Estes *v.* Kyle, 1 Meigs 34; King *v.* Lane, 7 Mo. 241; De Couche *v.* Savetier, 3 Johns. Ch. 190; Crawford *v.* Childress, 1 Ala. (N. S.) 482; Townsend *v.* Jenison, 9 Howard (S. C.) 407; Caryile *v.* Harrison, 9 B. Monr.

518; Nicolls *v.* Rodgers, 2 Paine C. C. 437; Flowers *v.* Foreman, 23 Howard (S. C.) 132; Hendricks *v.* Comstock, 12 Ind. 238; Walworth *v.* Routh, 14 La. Ann. 205; Gassaway *v.* Hopkins, 1 Head 583; Paine *v.* Drew, 44 N. H. 306; Fletcher *v.* Spaulding, 9 Minn. 64. Where a demand is barred by the existing law of a foreign state, where the contract was made, it is not revived by being transferred to an inhabitant of the state where the action is brought: Woodbridge *v.* Austin, 2 Tyler 364. If the maker of a note remain in the state in which it was made until an action upon it in that state is barred by the Statute of Limitations, that may be pleaded in bar to an action on the note in any other state to which he may remove: Goodman *v.* Munks, 8 Porter 84. Adverse possession of personal property sufficient to bar a claim against the possessor is to be determined by the laws of the place where the adverse possession is had: Brown *v.* Brown, 5 Ala. 508; Fears *v.* Sykes, 35 Miss. 633.

A discharge under an insolvent law of another state, by which the person of the debtor is protected from imprisonment, but which leaves the contract in force, affects the remedy merely, and has no extra territorial operation: Coffin *v.* Coffin, 16 Pick. 323; Whittemore *v.* Adams, 2 Cowen 626; White *v.* Canfield, 7 Johns. 117; Wood *v.* Malin, 5 Halst. 208; Collins *v.* Rodolph, 3 Iowa 290. If a person is discharged from a debt, by a tender and refusal made in one state, by force of the laws of that state, he may defend himself in an action upon the debt in another state, by relying upon such tender and refusal, and the laws under which he was discharged: Warden *v.* Arall, 2 Wash. 282. Where a partnership was composed of a citizen of Massachusetts and a citizen of New York, doing business in both states under the same firm, and an action was brought on a partnership note by a citizen of New York against the Massachusetts partner, it was held that the discharge of the defendant under the insolvent laws of New York was not a bar to the action: Agnew *v.* Platt, 15 Pick. 417.

By the laws of Massachusetts, where usurious interest is reserved in a contract, the owner can recover only the residue of the amount of the contract, after deducting threefold the amount of the usurious interest reserved. In an action, in another state, on an usurious contract made in Massachusetts, it was held, that the forfeiture affected the remedy only and could not be enforced out of the state: Sherman *v.* Gassett, 4 Gilm. 521; McFadin *v.* Burns, 5 Gray 599; Barnes *v.* Whitaker, 22 Illinois 606; Craig *v.* Butler, 9 Mich. 21; Pine *v.* Smith, 11 Gray 38. The laws of Mississippi allowing to the maker of a promissory note the benefit of all defences of want of consideration, failure of consideration, payments, discounts, and set-offs against the endorsee or holder, which he had against the payee, previously to the notice of the endorsement, applies to a suit

brought in another state on a note payable in Mississippi and endorsed in Mississippi: Brabston *v.* Gibson, 9 Howard (S. C.) 263; Emanuel *v.* White, 34 Miss. 56. An action of assumpsit cannot be maintained upon an instrument, which according to the laws of the state where it was executed, is not a specialty, but is so according to the *lex fori:* Trusher *v.* Everhart, 3 Gill & Johns. 234; Watson *v.* Brewster, 1 Barr 381; Broadhead *v.* Noyes, 9 Missouri 56; Dorsey *v.* Hardesty, Id. 157. The assignability of contracts depends on the *lex fori:* Pearsall *v.* Dwight, 2 Mass. 84; McRae *v.* Mattoon, 10 Pick. 49; Kirkland *v.* Lowe, 33 Miss. 423. The exemption of property from execution relates to the remedy and is governed by the law of the place where the contract is sought to be enforced: Newell *v.* Hayden, 8 Clarke 140. The laws of a foreign country, which protects the party to a contract from execution, will in the courts of the United States, protect him from arrest upon the same contract: Camfranque *v.* Burnell, 1 Wash. C. C. 340. Remedies in respect to real property are to be pursued according to the law of the place where the property is situate: Robinson *v.* Campbell, 3 Wheat. 212.

A foreign judgment is *primâ facie* evidence of the indebtedness of the defendant: Bartlett *v.* Knight, 1 Mass. 400; Buttrick *v.* Allen, 8 Id. 273; Bissell *v.* Briggs, 9 Id. 462; Stevens *v.* Gaylord, 11 Id. 256; Jordan *v.* Robinson. 3 Shepl. 167; Pelton *v.* Platner, 13 Ohio 209; Cummings *v.* Banks, 2 Barb. 602. They are considered as simple contract debts, and the limitation of actions thereon is the same: Hubball *v.* Condrey, 5 Johns. 132. They do not merge the original cause of action and cannot be pleaded in bar of an action founded thereon: Lyman *v.* Brown, 2 Curtis C. C. 559.

Judgments of the courts of one of the United States under the Constitution and Act of Congress, if conclusive in the state where they are rendered, are conclusive in the courts of the other states: Wernwag *v.* Pawling, 5 Gill & Johns. 500; McElmoyle *v.* Cohen, 13 Peters 312; Hampton *v.* McConnell, 3 Wheat. 234; Green *v.* Sarmiento, Peters C. C. 74; Adams *v.* Rowe, 2 Fairf. 89; Bissell *v.* Briggs, 9 Mass. 462; Jacobs *v.* Hull, 12 Id. 25; Commonwealth *v.* Green, 17 Id. 515; Kimmel *v.* Shultz, Breese 128; Rust *v.* Frothingham, Id. 258; Benton *v.* Burgot, 10 S. & R. 240; Blodget *v.* Jordan, 6 Verm. 580; Goodrich *v.* Jenkins, 6 Ham. 43; Westerwelt *v.* Lewis, 2 McLean 511; Gulick *v.* Loder, 1 Green 68; Pelton *v.* Platner, 13 Ohio 209; Bellows *v.* Ingham, 2 Verm. 575; Napier *v.* Gidiere, Spear's Ch. 215; Lucas *v.* Bank, 2 Stewart 280; Rogers *v.* Coleman, Hardin 413; Pritchett *v.* Clark, 4 Harring. 280; s. c., 5 Id. 63; Destrehan *v.* Scudder, 11 Missouri 484; Kittredge *v.* Emerson, 15 N. H. 227; Sarchet *v.* Sloop Davis, Crabbe 185; Davis *v.* Lane, 2 Carter 548; Buford *v.* Kirkpatrick, 8 Eng. 33; Morehead *v.* Grisham, Id.

431; Stephens *v.* Roby, 27 Miss. 744; Conway *v.* Ellison, 14 Ark. 360; Topp *v.* Branch Bank, 2 Swan 184; Rocko *v.* Hackett, 2 Bosworth 579; Robert *v.* Hodges, 1 Green 299. The jurisdiction of the court, however, whose judgment is in question may be inquired into: Wernwag *v.* Pawling, 5 Gill & Johns. 500; Bissell *v.* Briggs, 9 Mass. 462; Commonwealth *v.* Green, 17 Id. 515; Woodward *v.* Tremore, 6 Pick. 354; Hall *v.* Williams, Id. 232; Shumway *v.* Stillman, 4 Cowen 292; Holt *v.* Alloway, 2 Blackford 108; Field *v.* Gibbs, Peters C. C. 155; Lincoln *v.* Tower, 2 McLean 473; Gleason *v.* Dodd, 4 Metc. 333; Steel *v.* Smith, 7 W. & S. 447; Davis *v.* Connelly, 4 B. Monr. 136; Middlesex Bank *v.* Rutman, 29 Maine 19; Kittridge *v.* Emerson, 15 N. H. 227; Moulin *v.* Trenton Ins. Co., 4 Zabriskie 222; Smith *v.* Smith, 17 Illinois 482; Rae *v.* Hulbert, Id. 572; Black *v.* Black, 4 Bradf. 174; Judkins *v.* Union Co., 37 N. H. 470; Rape *v* Heaton, 9 Wisc. 328; Brasswell *v.* Downs, 11 Florida 62; Folger *v.* Columbia Ins. Co., 99 Mass. 267. In debt upon such a judgment, it is no defence that the party had no notice of the suit and never appeared or authorized any one to appear for him, the record of the judgment stating that the defendant appeared by his attorney: Field *v.* Gibbs, Peters C. C. 155; Hoxie *v.* Wright, 2 Verm. 269; Wright *v.* Weisinger, 5 Sm. & M. 210; Whiting *v.* Johnson, 5 Dana 390; Pritchett *v.* Clark, 4 Harring. 280; s. c., Id. 63; Lapham *v.* Briggs, 1 Williams 26; Black *v.* Black, 4 Bradf. 174; Westcott *v.* Brown, 13 Indiana 83. *Contra:* Aldrich *v.* Kinney, 4 Conn. 380; Denison *v.* Hyde, 6 Id. 508; Fenton *v.* Garlick, 8 Johns. 194; Shumway *v.* Stillman, 6 Wend. 447; Fullerton *v.* Horton, 11 Verm. 425; Watson *v.* New England Bank, 4 Metc. 343; Pritchett *v.* Pope, 3 Ala. 552; Bimeler *v.* Dawson, 4 Scam. 536; Welch *v.* Sykes, 3 Gilman 197; Wilson *v.* Jackson, 10 Missouri 329; Thompson *v.* Emmert, 15 Illinois 415; Rogers *v.* Rogers, 15 B. Monr. 364; Bissell *v.* Wheelock, 11 Cushing 277; Hindman *v.* Mackell, 3 Iowa 170; Boylan *v.* Whitney, 3 Indiana 140; Norwood *v.* Cobb, 15 Texas 500; Kane *v.* Cook, 8 California 449; Carleton *v.* Bickford, 13 Gray 591; Battzell *v.* Noster, 1 Clarke 588; Norwood *v.* Cobb, 24 Texas 551; Warren *v.* McCarthy, 25 Illinois 95; Sim *v.* Frank, Id. 125; Lawrence *v.* Jarvis, 32 Id. 304; Pollard *v.* Baldwin, 22 Iowa 328. A judgment by default against one not a resident of the state and without notice, is a nullity: Rider *v.* Alexander, 1 Chipman 275; Harrod *v.* Barritto, 1 Hall 155; s. c.. 2 Id. 302; Smith *v.* Rhoades, 1 Day 168; Bigger *v.* Hutchings, 2 Stewart 445; Woodward *v.* Tremere, 6 Pick. 354; Wheeler *v* Raymond, 8 Cowen 311; Wilson *v.* Niles, 2 Hall 358; Miller *v*, Miller, 1 Bailey 242; Williams *v.* Preston, 3 J. J. Marsh. 600; Overstrue *v.* Shannon, 1 Missouri 529; Sallee *v.* Hays, 3 Id. 116; Rangeley *v.* Webster, 11 N. H. 299; Bicknell *v.* Field, 8 Paige 440; Wood *v.*

Watkinson, 17 Conn. 500; Davidson *v.* Sharpe, 6 Iredell 14; Warren Co. *v.* Ætna Ins. Co., 2 Paine C. C. 501; McLawrine *v.* Monroe, 30 Missouri 400. A personal service by notice, in order to give the courts of one state jurisdiction of a cause, the defendant in which resides in another, so that a judgment in such cause may be enforced in the latter state, must be such a notice as a court is competent to direct, and which can be served within its jurisdiction: Ewer *v.* Coffin, 1 Cush. 23. The judgment of a court of a sister state in a proceeding by foreign attachment where the defendant has not been served nor appeared, is not evidence of the debt: Curtis *v.* Gibbs, 1 Penn. 399; Starbuck *v.* Murray, 5 Wend. 148; Holbrook *v.* Murray, Id. 161; Robinson *v.* Ward, 8 Johns. 86; Pawling *v.* Bird, 13 Johns. 192; Chamberlain *v.* Faris, 1 Missouri 517; Phelps *v.* Holker, 1 Dall. 261; Steel *v.* Smith, 7 W. & S. 447; Arndt *v.* Arndt, 15 Ohio 33; Feltus *v.* Starke, 12 La. Ann. 798; Jones *v.* Spencer, 15 Wisc. 583; Price *v.* Hickok, 39 Verm. 292. In a suit upon a judgment obtained in another state from that in which the suit is brought, a plea that the judgment was procured by fraud is not admissible when the court rendering the judgment had jurisdiction of the case and the defendant appeared: Christmas *v.* Russell, 5 Wallace (S. C.) 290. The judgment of a sister state ranks only as a simple contract debt in marshalling the assets of an insolvent estate: Cameron *v.* Wurtz, 4 McCord 278; Brengle *v.* McClellan, 7 Gill & Johns. 434.

*SANDILANDS and Others, Executors of HOWDEN, *v.* MARSH. [*285

K. B. Trin. Term, 59 *Geo. III.* 1819.

[Reported 2 B. & Ald. 672.]

Partnership—Power of Partner to bind the Firm.

The act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners.

In a matter wholly unconnected with the partnership, one partner cannot bind the other.

Where, however, one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner, the latter will be bound by the contract so made.

Assumpsit. The declaration stated that I. Howden, deceased, employed the defendant as his agent to lay out 4000*l.* in the purchase of an annuity, and to receive the arrears thereof, and that in consideration thereof, and of a certain commission, defendant promised to guarantee the payment of the annuity, and alleged a breach in not having so guaranteed. Plea, general issue. At the trial before Abbott, C. J., at the adjourned sittings at Guildhall, after last Michaelmas Term, it appeared that the defendant, who was a navy agent, had formerly been in partnership with a Mr. Creed, and that a firm of Marsh and Creed had been the navy agents to Mr.

Howden. On the 12th of September, 1811, Mr. Creed wrote the following letter to Mr. Howden:—"I have an opportunity of employing your remaining property in the stocks for three or four years in a way that will double, or nearly so, the income that you derive from that source. It is
*286] by annuity of eight *per cent. per annum, on three lives, secured on property, the receipts of which pass through our hands, and will be guaranteed by our house, and not redeemable until after three years. The party granting the annuity is in the receipt of a clear unincumbered income of above 12,000*l.* per annum, and will, as soon as he can after the lapse of three years, redeem the annuity, so that your capital remains untouched. For our trouble in the business, and for guaranteeing the punctual half-yearly payment of the annuity to you, we should expect a commission of five per cent., but the benefit you would derive from the arrangement would very well allow of it. Windsor's and this annuity would soon clear off the advance on our account, and leave your income materially improved. If you see this business in the light I do, and will say aye or no by return of post, I will either go on with it and send you down a bank power for sale of your stock, or else secure it for some other friend." This letter was signed Richard Creed. Howden immediately accepted this offer, and a joint power of attorney was transmitted, empowering Marsh and Creed to sell the stock; and the stock was accordingly sold out on the 7th of January, 1812. On the 23d of January, 1813, the annuity in question was purchased of Mr. Joshua Rowe, and after having been paid for about two years, became in arrear. Howden died 7th March, 1813. By a letter, dated 10th April, 1813, signed Marsh and Creed, in answer to an application made on the part of Mr. Howden's representative, they stated in substance as follows:—"He has two annuities; one yielding a clear 400*l.* per annum, payable quarterly, exclusive of the amount of the annual

premium on the insurance on the life of Mr. Rowe, the grantor, at the Equitable Insurance Office, and the purchase-money for which was 4000*l.* in place of 5000*l.*, which we informed Mr. Howden we should give for it. This is guaranteed by our house on a commission, and is not determinable for three years." Neither of the above letters were entered in Marsh and Creed's letter-book, nor did it appear that Marsh had personally any knowledge of the guarantee.

It was proved, that *it was no part of the ordinary business of navy agents to deal in annuities.* The charge of 5*l.* per cent. commission had never been made, but only 2½ per cent., the usual commission of navy agents, had been charged in the different accounts transmitted by Marsh and Creed. In those accounts, however, there were found several items, referring to the sale of the stock and the receipt of the annuity. Under these circumstances *it was contended, first, that this guarantee by Creed could [*287 not bind his partner, Marsh; and secondly, that if it could it was a security which ought to have been enrolled under the provisions of the Annuity Act (17 Geo. III. c. 26). The learned judge overruled these objections, and left it to the jury to say whether, under the circumstances of the case, Marsh was cognisant of the transactions as to the purchase of the annuity, although he might be ignorant of the facts of the guarantee itself, telling them that in that case he thought the defendant was liable. The jury found this fact in the affirmative, and the plaintiffs obtained a verdict. The defendant had liberty to move to enter a nonsuit on both points; and a rule nisi to that effect having been obtained by Marryat in last Hilary Term—

Scarlett and *Adams* now showed cause.—They contended that the case had been properly left to the jury to say whether Marsh was or was not cognisant of the transaction; and the jury had found that he was. If so, he must

be bound by the representations and acts of his partner in it. As to the second point, the distinction is, that only those securities which come from the grantor or his sureties are required to be registered; but this guarantee was wholly independent of, and, for anything that appears, unknown to the grantor. He was not in any degree responsible over either to Marsh or Creed, in case they were called upon by Howden to pay the annuity. Then it did not require to be memorialized, because the only object of the Act was for the further protection of the grantor, to record all the securities coming directly or indirectly from him.

Marryat and *Wilde, contrà.*—One partner has no power to bind another by a guarantee of this sort. It was not an act done in the ordinary course of business, and its operation might last beyond the duration of the partnership, or even the life of the parties. There was no pretence for saying that Marsh was cognisant of the circumstances of the guarantee itself. The letters containing it were never entered in the letter-book of the firm; and the mere receipt of the 2½ per cent. on the money, which was the consideration for the annuity, is not sufficient of itself to charge him with the guarantee. The 5*l.* per cent., which was the consideration for it, never was received at all. All Marsh's acts are perfectly consistent with the ordinary course of dealing, and no more. The case of *Duncan* v. *Lowndes*, 3 Campb 478, is precisely in point. But *supposing it to be a guarantee binding on Marsh, still the plaintiff cannot recover, not having complied with the Annuity Act (17 Geo. III. c. 26). It would defeat all the provisions of that Act, if this did not require to be memorialized; a person meaning to grant an annuity would then only have to guarantee an annuity granted by a pauper to evade the Act. The case of *Rosher* v. *Hurdis*, 5 Term Rep. 678, shows however that is not the law. But there is another objection. The guarantee, at all events, depends upon the second

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letter alone, for there is nothing to connect the first and second letters together. The price is different, and they relate to different annuities. If so, then, inasmuch as the second letter only states that a guarantee has been given, but omits the terms of the guarantee, it is not sufficient to take the case out of the Statute of Frauds. [ABBOTT, C. J. —Can it be contended, if a person writes a letter, offering to purchase an annuity and to guarantee its payment, and requesting a power to sell out stock to be sent for that purpose, that he will not, after his proposal has been acceded to and the stock has been sold out, be liable to make good his guarantee because exactly the same annuity as that proposed has not been bought?] The question is not whether he would not be bound to make compensation, but whether he would be liable on the guarantee. The second letter admits that a guarantee was given, but is wholly silent as to its terms: *Wain* v. *Warlters*, 5 East 10.

ABBOTT, C. J.—This case has been fully and ably discussed at the bar; but I am of opinion that the rule must be discharged.

Two material questions have been made: the first of which, and the most important and extensive in its consequences, is whether this defendant shall be held to be bound by the guarantee given without his knowledge by his partner Creed; and if the verdict of the jury, finding him to be so bound, be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that *the act and assurance of one partner made with reference to business transacted by the firm, will bind all the partners.*

In this case, the proper business of Marsh and Creed was

to receive the money due from the Navy Board to their customers, and their dividends in the public funds; upon
*289] which business they *charged Howden with a commission of 2½ per cent. It was no part of their ordinary business to guarantee annuities, or to lay out the money of their customers in the purchase of them. Under these circumstances, the original proposal was made by Creed, in answer to which the joint power of attorney was transmitted to Marsh and Creed, under which the stock was afterwards sold. Now that sale must have appeared in the partnership books; and if that fact was doubtful, it is proved by the balance stated in the accounts transmitted in the partnership; that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known or ought to have been known by Marsh. Now, if that whole transaction was known to him, the guarantee which is connected with it becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and, according to the rule previously stated, it will bind both.

To illustrate this position, a case may be put, where two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt, that if upon the sale of a horse, the property of the partnership, one of them gives a warranty, the other would be thereby bound.

As to the second question, whether this guarantee ought to have been enrolled according to the provisions of the Annuity Act, I agree that that statute ought not to receive a narrow construction, so far as the interest of the grantor of the annuity is concerned. Every security, therefore, given by him or on his behalf, and for which the money received by him is the consideration, must be enrolled. But the consideration for this promise is wholly distinct from that given

for the annuity. It is the payment of an additional commission of 2½ per cent.; whereas the consideration for the annuity is the sum of 4000*l.* It is wholly unconnected with the grantor, and collateral to his interest, and does not, I think, require to be enrolled. I am therefore of opinion, on both grounds, that this rule should be discharged.

BAYLEY, J.—I have entertained considerable doubts during the discussion of this case, but I am now entirely satisfied on both points. It is true that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has reference to business transacted by the partnership, although out of the regular course, it is still within the scope of his authority, *and will bind the firm. Now if we apply that rule to this case, we [*290 find a proposal by Creed, concerning business to be transacted by the house. If so, it must have been transacted on the terms stated in the letter of Creed: and if Marsh and Creed were thus agents in laying out Howden's money in the annuity, they must be bound by the terms specified by Creed. For this is a representation made by one partner as to the terms upon which the business is to be done by the firm. This is made still more clear by the letter of the 10th April, 1813.

It is suggested, indeed, that this may have reference to some other guarantee than that of the letter of 12th September, 1811. But if so, it was for the defendant to have proved that fact. Then it is contended, that the second letter by the firm does not specify the amount of the commission, and that this case falls within *Wain* v. *Warlters*. But that difficulty is removed, by connecting it with the former letter, in which the terms are specified. The stamp acts proceed on the same principle, that an agreement may be inferred from several letters; and therefore direct that the stamping of one shall be sufficient

The other question is, whether this guarantee ought to

have been enrolled. The case of *Rosher* v. *Hurdis* does not in terms show whether the security there was not given at the instance of the grantor. And there is a material difference between sureties for a grantor who are identified with him, and other persons wholly unconnected with him. If, in this case, Rowe had been told that Marsh and Creed were to be his guarantees, and he had given them any consideration for so doing, the case would be different. But here these parties guarantee, not at the instance of the grantor, but of the grantee. I am of opinion that this is not within either the terms or the spirit of the Annuity Act.

HOLROYD, J.—I am of the same opinion. It was properly left to the jury to say whether Marsh was cognisant of the contract to lay out this money in the purchase of an annuity: and then whatever engagement Creed might make with reference to it would bind Marsh; for by his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business, as much as any transaction in the ordinary course of dealing. The first letter seems to me to be applicable to any annuity to be purchased with the money to be raised by sale of the funded property; and that the parties themselves so considered it, appears from the second letter. We have, therefore, a *right to connect these two letters together, and by so doing, the objection that the terms of the guarantee are not specified in the second letter is removed. The great difficulty in my mind is as to the enrolment, and it arises from this guarantee having been originally mentioned as one of the terms upon which the grantee was to advance his money. It does not however appear that the grantor had any knowledge of it, and that makes a material difference. For there being nothing in the letter which imports that the terms of the proposal come from the grantor, it may be considered as wholly collateral to the transaction, and as no part of the condition on which the annuity was granted by him. The

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words of the act are, "That a memorial of every deed, etc., *whereby any annuity shall be granted*, shall be enrolled:" and the warrants of attorney, of which the act subsequently speaks, are those given by the grantor. I think, therefore, that the assurances meant in this clause are those connected with the grantor; and that as this guarantee was wholly unconnected with him, it did not require to be enrolled.

BEST, J.—I am clearly of the same opinion on both points. If we were to decide the first point in favor of the defendant, we should place persons who have occasion to deal with partnerships in a new and difficult situation; for, unless they made inquiry from every one of the partners whether they assented to the partnership transaction, which in many cases would be impossible, they would have the security of the individual only, and not that of the firm. In this case it appears that Marsh and Creed acted not merely as navy agents, but also in the procuring of this annuity, and that they have received an advantage from the transaction. For, although it is said they did not receive the 5 per cent. commission, yet at all events they were benefited by receiving 2½ per cent. commission on a larger sum arising from this annuity. Marsh, therefore, who has derived an advantage from the engagement entered into by his partner, must be bound by the consequences of it. This question, therefore, was properly left to the jury, who have in my opinion found the right verdict.

As to the second point, it seems to me that the object of the Annuity Act was to protect inexperienced persons from the frauds of those who lent money on annuities; and the provision for the enrolment of the securities being intended for the benefit of grantor only, I think it is necessary to enrol those securities alone, which show the extent of his responsibility. Now that was necessary *in *Rosher* v. *Hurdis*; for it may be concluded (though it is not expressly so stated in that case) that the grantor was there [*292

liable over to the obligor of the bond. But here there is no such liability on the part of Lowe to Marsh and Creed. I am therefore of opinion that it was not necessary to enrol this guarantee, and that on both grounds this rule must be discharged.

Rule discharged.

As a general rule each partner is the agent of the rest, and has power to bind them, whether they be active, nominal, or dormant, in transactions concerning the business of the firm. "In partnerships," says Eyre, C. J., in a well-known case, "both partners are authorized to treat for each other in everything that concerns or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, when the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances:" Ex parte Agace, 2 Cox 316; and see Armitage *v.* Winterbottom, 1 M. & G. 130 (39 E. C. L. R.); 1 Scott N. R. 23; La Marquise de Ribeyre *v.* Barclay, 23 Beav. 107.

At first sight the principal case might appear scarcely to come within the rule as laid down by Eyre, C. J., as it was not part of the ordinary business of the partnership of Marsh and Creed as navy agents to guarantee annuities or to lay out the money of their customers in the purchase of them; but it will be observed that after Creed had signed the guarantee on behalf of the firm without the knowledge of Marsh, a joint power of attorney was transmitted to Marsh and Creed, under which stock of their customer was sold and the annuity purchased: the question raised was whether the executors of Marsh were bound by the guarantee. The court then seems to have assumed that the sale of stock must have appeared in the partnership books, "and if that fact were doubtful," observed Abbott, C. J., "it is proved by the balance stated in the accounts transmitted by the partnership; that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an

annuity, either were actually known or ought to have been known by Marsh." The conclusion then arrived at by the learned judge was that if the whole transaction was *known to Marsh, the guarantee which was connected with it, became in point of [*293 law, *an assurance made by one partner with reference to business transacted by* the firm, and therefore binding upon both, according to the construction which he had put upon the general rule relative to the power of one partner to bind the firm. "It has undoubtedly," he observed, "been held that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."

Although partners agree among themselves not to do certain acts which would otherwise fall within the usual course of their business, one of them, by doing such acts, may bind the firm to a third party not aware of the arrangement. This is well illustrated in the principal case by Abbott, J., who says, "That if two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet though this be their course of business, there is no doubt, that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound." See also The South Carolina Bank *v.* Case, 8 B. & C. 427 (15 E. C. L. R.); 2 M. & R. 459 (17 E. C. L. R.); Smith *v.* Jameson, 5 Term Rep. 601.

And the law is the same when the persons sought to be bound are dormant partners; Davies, Bank. L. 8; Watson, Partnersh. 169; Cox *v.* Hickman, 8 H. L. Cas. 305, *per* Lord Cranworth. But it seems that a dormant partner would have no implied power to bind the firm. See Nicholson *v.* Ricketts, 2 E. & E. 524 (105 E. C. L. R.); Kelshaw *v.* Jukes, 3 B. & S. 847 (113 E. C. L. R.).

Where, however, a person has notice of any arrangement between the partners, whereby the ordinary power of one to bind the rest is either taken away or limited, he will be bound by such arrangement: Minnit *v.* Whinery, 5 Bro. P. C. 489; 16 Vin. Abr. 244; Vice *v.* Fleming, 1 You. & Jer. 227.; Ex parte Harris, 1 Madd. 583.

To return, however, to the application of the rule laid down at starting, we shall see that one partner may in general bind the rest

in all transactions concerning the business. Thus, an individual partner may obtain a loan (Rothwell *v.* Humphreys, 1 Esp. 406; Thicknesse *v.* Bromilow, 2 C. & J. 431; Brown *v.* Kidger, 3 Hurlst. & N. 853), purchase goods (Hyat *v.* Hare, Comb. 383; Bond *v.* Gibson, 1 Campb. 185; Dyke *v.* Brewer, 2 C. & K. 828 (61 E. C. L. R.); Bottomley *v.* Nuttall, 5 C. B. N. S. 122 (57 E. C. L. R.)), sell (Lambert's Case, Godbolt 244; Fox *v.* Hanbury, Cowp. 445), or pledge (Metcalfe *v.* Royal Exchange Association Co., Barn. Ch. Rep. 343), the partnership effects even in the case of a particular adventure: Raba *v.* Ryland, Gow N. P. C. 132 (5 E. C. L. R.); Ex parte Gellar, 1 Rose 297; Read *v.* Hollinshead, 4 B. & C. 867 (10 E. C. L. R.); 7 D. & R. 444 (16 E. C. L. R.); but see
*294] Ex *parte Copeland, 2 Mont. & A. 177; 3 Dea. & Chit. 199.

A mere *joint purchase* or *subpurchase* made without any view to a sale must be distinguished from a *partnership* in a particular adventure, inasmuch as a person who becomes a mere joint owner as distinguished from a partner, cannot by a sale or pledge affect more than his own share: Barton *v.* Williams, 5 B. & Ald. 395 (7 E. C. L. R.).

It may be here remarked that the implied authority of a partner to bind his copartners for the repayment of money borrowed for partnership purposes, does not necessarily extend to raising money for the purpose of procuring (Grenslade *v.* Dower, 7 B. & C. 635 (14 E. C. L. R.)) or increasing the fixed capital of the firm. Therefore a party advancing money to one partner, knowing that it was for the latter purpose, cannot, as a matter of course, charge the other partners with the loan, unless the transaction took place with their express or actual authority: Fisher *v.* Tayler, 2 Hare 218.

It is clear that one member of a partnership *in trade* has an implied authority to bind the firm by drawing checks on the banker of the firm (Laws *v.* Rand, 3 C. B. N. S. 442 (91 E. C. L. R.)), by drawing, accepting, or endorsing a bill of exchange or giving a promissory note in the name of the firm (Pinkney *v.* Hall, 1 Salk. 126; s. c. Ld. Raym. 175; Anon. Styles, 370; Harrison *v.* Jackson, 7 Term Rep. 210; Sutton *v.* Gregory, 2 Peake 150; Thicknesse *v.* Bromilow, 2 C. & J. 425; and see Ex parte Meyer, De Gex, Bk. 632, where one of a firm had drawn an accommodation bill), and all the partners will be liable whether they are named or

not, and whether they are known or secret partners, unless the title of the person who seeks to charge them can be impeached: Wintle *v.* Crowther, 1 C. & J. 316, 318; Baker *v.* Charlton, 1 Peake 111; M'Nair *v.* Fleming, Mont. Part. 32; Swan *v.* Steele, 7 East 210; 3 Smith 199; Vere *v.* Ashby, 10 B. & C. 288 (21 E. C. L. R.); Lloyd *v.* Ashby, 2 B. & Ad. 23 (22 E. C. L. R.).

When a bill is drawn upon a partnership in their usual style and firm, although it is accepted in the name of one partner only for partnership purposes, it will be binding upon all. See Wells *v.* Masterman, 2 Esp. 731; Mason *v.* Rumsey, 1 Campb. 384; Dolman *v.* Orchard, 2 Car. & P. 104 (12 E. C. L. R.); Jenkins *v.* Morris, 16 M. & W. 8 77; sed vide Kirk *v.* Blurton, 9 M. & W. 284.

Moreover if a partnership is conducted in the name of one of the partners, as if a partnership of A. and B. is carried on in the name of A., a bill drawn and endorsed or accepted in the name of A. will bind the partnership, but it must be shown by the plaintiff that it was drawn by A. not as A., but as A. and B.: Ex parte Bolitho, Buck. 100, 104; see also The South Carolina Bank *v.* Case, 8 B. & C. 427 (15 E. C. L. R.). But under particular circumstances the onus of showing that a single name is not used for the firm may lie upon the defendants. Thus, *where a firm carried on their business under the name of A., and bills were endorsed in [*295 the name of A., and discounted by customers of the firm after A. had ceased to carry on his separate business, it was held by the Court of Queen's Bench, that the onus of showing the endorsements were made on account of the separate business, and not on account of the general and ostensible business, lay on the defendants: Furze *v.* Sharwood, 2 Q. B. 388 (42 E. C. L. R.).

In Stephens *v.* Reynolds, 5 Hurlst. & N. 513, the defendant, who was a cheesemonger at Woolwich, carried on at Walworth the hosiery trade, in partnership with C., but in his own name. C. accepted, in the name of the defendant, a bill of exchange drawn for goods supplied to the partnership, and which was addressed to the defendant at Woolwich: it was held by the Court of Exchequer, Bramwell, B., *dissentiente*, that the acceptance was binding on the defendant, although the bill was not addressed to the place where the partnership business was carried on.

A partner, however, cannot, unless he has special authority (Norton *v.* Seymour, 3 C. B. 792 (54 E. C. L. R.)), bind the firm by any

other than the partnership name (Kirk *v.* Blurton, 9 M. & W. 284). But it seems that one of two partners might have authority to bind the other by signing the true names of both instead of the fictitious name of the partnership: per Maule, J., in Norton *v.* Seymour, 3 C. B. 794 (54 E. C. L. R.). In that case, however, it was held that a special authority had been given to sign the note with the names of the two partners, and it was therefore held to be binding upon them. See also Ex parte Buckley, 14 M. & W. 469; Maclae *v.* Sutherland, 3 E. & B. 1 (77 E. C. L. R.); Forbes *v.* Marshall, 11 Exch. 166.

Although there is a deviation in a signature from the partnership name, it will be binding upon the firm if it appears that there is not substantially any difference between the signature and the name of the partnership. "For instance, if the signature were Coal and Co., and the true designation were Cole and Co., it would no doubt be for the jury to say whether it was in substance the same:" per Alderson, B., 9 M. & W. 289; see also Faith *v.* Richmond, 11 Ad. & E. 339 (39 E. C. L. R.).

A firm may use one name for the general business of the firm, and may use another for the purpose of endorsing negotiable instruments which will be binding on the firm. Thus, in Williamson *v.* Johnson, 1 B. & C. 146 (8 E. C. L. R.), Habgood, Dixon and Lye (who succeeded the firm of Habgood and Fowler) carried on business in partnership together, under the firm of Habgood and Co., and in that name all their transactions of buying and selling were carried on; but Dixon, the manager of the whole business, was in the habit of endorsing bills in the names of Habgood and Fowler, by procuration, for the purpose of getting them discounted; it was held that the firm was bound by such endorsements.

*296] Although a partner is not liable *upon bills or note accepted or given by his copartners before he joined the firm, yet if a bill be accepted on account of a debt which was incurred partly before and partly after such partner joined the firm, he will be liable to so much of the debt for which the bill was accepted as became due after he entered into partnership: Wilson *v.* Lewis, 2 Scott N. R. 115.

A partner can only bind his copartners by a bill or note jointly with himself, hence a joint and several note given by a partner will bind the firm jointly (Maclae *v.* Sutherland, 3 E. & B. 1 (77 E. C. L. R.)) and himself separately (Elliott *v.* Davis, 2 Bos. & P. 338;

Gillow *v.* Lillie, 1 Bing. N. C. 695 (27 E. C. L. R.)), but it will not bind the other members of the firm severally: Perring *v.* Hone, 4 Bing. 32 (13 E. C. L. R.); 2 C. & P. 401 (12 E. C. L. R.).

We must here notice a limitation to the rule that one partner has an implied authority to bind the firm by a bill of exchange or promissory note, for a partner has not such power where the business carried on by it is not strictly of a mercantile character. Thus an attorney (Hedley *v.* Bainbridge, 3 Q. B. 316 (43 E. C. L. R.); Smith *v.* Coleman, 7 Jur. 1053; Levy *v.* Pyne, C. & M. 453 (41 E. C. L. R.); Harman *v.* Johnson, 2 E. & B. 61 (75 E. C. L. R.); 3 C. & K. 272), or a partner in a farming (Greenslade *v.* Dower, 7 B. & C. 635 (14 E. C. L. R.)), or in a mining concern (Dickinson *v.* Valpy, 10 B. & C. 139 (21 E. C. L. R.)) cannot bind the firm by a bill of exchange or a promissory note. The reason why a power of binding the other partners is not implied is, that in such cases the circulating of negotiable instruments is not necessary, as in the case of mercantile partnerships. It has moreover been held, that although a member of a firm of attorneys may have power to bind the firm by a check drawn in the name of the firm, he has no implied power to bind the firm by a post-dated check, which is the same thing as a bill of exchange at so many days date as intervene between the day of delivering the check and the date marked upon the check: Forster *v.* Mackreth, 2 Law Rep. Ex. 163.

But in the case of partnerships which are not of a mercantile character, if it be shown that the power of one partner to draw or accept bills of exchange for the partnership is either necessary in that particular instance, or is usual in similar partnerships, it will be implied by the law. This subject was very fully discussed in the important case of Dickinson *v.* Valpy, 10 B. & C. 128 (21 E. C. L. R.), where it was held by the Court of Queen's Bench, that a partner in a mining concern was not liable upon a bill drawn and accepted by order of the directors, it not having been proved that they had express authority to bind the other partners by drawing and accepting bills of exchange, or that it was necessary in that particular company, or usual in companies of the same kind, that they should have such authority. "In the case of an ordinary *trading* partnership," said Littledale, J., "the law implies that one partner has authority to bind another by drawing and accepting bills, *because the drawing and accepting of bills is necessary for the*

purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes
*297] for which it was instituted, it was necessary that *individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company), to bind the rest by drawing or accepting bills. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a firm, *it was incumbent on the plaintiff in this case to have shown, either, from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual; for, if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it.*"

But a coal mining company may be so constituted as to be considered a trading company; so that individual members of the firm might accept bills of exchange for partnership purposes so as to bind the firm. See Brown *v.* Kidger, 3 Hurlst. & N. 853; there the defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause, "that if any partner *should for his own use, or for any other purpose than the immediate use of the partnership,* draw, accept, or endorse any bill of exchange in the name of the firm," the others might determine his interest in

the partnership. It was held by the Court of Exchequer that the managing partners had authority to bind the partnership by borrowing the money and accepting tho bill. "I do not," said Channel, B., "consider this a mining company as such a company is usually understood, but I look upon it as a *trading company;* and I think that there is nothing in the partnership deed to restrict the rights which the partners would have as ordinary trading partners. On the contrary, the clause referred to *gives an implied* authority to any partner to accept bills for partnership purposes. Still the question arises whether there was any evidence for the jury that the money was lent *on the credit of the firm, and I think there was." [*298

No member, however, of a partnership can bind another by drawing or accepting a bill, unless he have an authority, either express or implied, so to do; as, for instance, where no express authority is given by agreement between the partners, and the partnership is not known to the world. Thus in Nicholson *v.* Ricketts, 2 E. & E. 523 (105 E. C. L. R.), the defendants, carrying on business as merchants in London, entered into a contract with Von Seutter & Co., merchants at Buenos Ayres, for the purpose of transacting exchange operations: the substance of which was, that Von Seutter & Co. should, periodically, draw and sell, at Buenos Ayres, bills for the defendants, to be accepted by them, and should periodically remit other bills to the defendants to the same amount, to keep the defendants out of cash advance; that the proceeds of these operations should be applied to the common purposes of the two firms, and that there should be a community of profit and loss between them. In the course of these transactions, Von Seutter & Co. drew certain bills on the defendants, and sold them to the plaintiffs. These bills the defendants refused to accept, when presented to them in this country for acceptance; and the plaintiffs thereupon brought an action against the defendants, upon the ground that the agreement, and the community of profit and loss, constituted the defendants partners with Von Seutter & Co., and so rendered them liable on the drawing of the bills by the latter. The Court of Queen's Bench, however, held that the plaintiffs had no cause of action against the defendants. "In ordinary cases of commercial partnership," said Cockburn, C. J., "there is no need of express authority, the law implying an authority from the fact that the

drawing and accepting of bills is part of the ordinary course of such a partnership. So, again, in partnerships not strictly commercial, it is obvious from the nature of the partnership, or from the particular purposes to which the bills are to be applied, that the drawing of bills is essential, there also the law implies an authority to each partner to draw them. But here there being no express authority to Von Seutter & Co. to draw so as to bind the defendants, but, on the contrary, an arrangement that the one firm should draw and the other accept, and that each should be bound so far only as their own signature was concerned, it seems to me that no authority can be implied. The existence and purposes of this partnership were unknown to the world. The principle, therefore, that where a partnership for particular purposes is held out to the world as existing, and it is reasonable to consider that the drawing of bills is incidental to those purposes, one partner has an implied authority to bind the others by drawing bills, is here inapplicable:" Kilshaw *v.* Jukes, 3 B & S. 847 (113 E. C. L. R.).

*299] *It seems, that ordinarily one partner cannot bind the firm by a guarantee for collateral purposes (Duncan *v.* Lowndes, 3 Campb. 478; Hasleham *v.* Young, 5 Q. B. 833 (48 E. C. L. R.); Brettle *v.* Williams, 4 Exch. 623); but where it is within the scope of the partnership dealings, one partner has power to do so (Ex parte Gardom, 15 Ves. 286; 2 Hov. Supp. 406; Ex parte Nolte, 2 G. & J. 306); and the firm may be bound although the guarantee may have been given out of the usual course of their business, if, as in the principal case, they have subsequently adopted it (Crawford *v.* Stirling, 4 Esp. 209), a question which will be left for the consideration of the jury: Payne *v.* Ives, 3 D. & R. 664 (16 E. C. L. R.); and see ——— *v.* Layfield, 1 Salk. 292.

This subject was much discussed in the case of Brettel *v.* Williams, 4 Exch. 623, there one of a firm of railway contractors, without the consent or knowledge of his copartners, signed in the name of the firm a guarantee for payment of coals to be supplied to Messrs. Unit & Brothers, who had entered into a subcontract with the firm. It was held by the Court of Exchequer that the guarantee was not binding on the firm. "It was contended for the plaintiffs," said Parke, B., "that though one partner could not bind another by a guarantee for collateral purposes, he had that power where the guarantee was connected with the partnership business, and a reason-

able mode of giving effect to a transaction within the scope of the partnership dealings; and he relied on the case of Ex parte Gardom, 15 Ves. 286. That one of two partners engaged in business as merchants had not by reason of that connection alone, power to bind the other by a guarantee apparently unconnected with the partnership trade, was decided by Lord Ellenborough in the case of Duncan *v.* Lowndes, 3 Campb. 478; and the Court of Queen's Bench gave a similar decision in that of Hasleham *v.* Young, 5 Q. B. 823 (48 E. C. L. R.), where the defendants were in partnership as attorneys. No proof was given in either of these cases of the previous course of dealing or practice of the partners, which it is admitted in both cases, might be sufficient to prove a mutual authority; nor was any evidence given of the usage of similar partnerships to give such guarantees; nor was there any of a recognition and adoption by the other partners, which would have the same effect. The case of Sandilands *v.* Marsh, 2 B. & Ald. 673, proceeded on the latter ground. In the present case no evidence was given to show the usage of the defendants in this particular business, or of others in a similar business, nor was there any evidence of the sanction by the other defendants of the act of their copartner . . . . Simply as railway contractors they could not have any such power. The only question then is, whether they had it in this particular case, in consequence of its being a *reasonable* mode of carrying into effect an acknowledged *partnership contract. [*300
We think that position cannot be maintained. One partner does communicate to the other, simply by the creation of that relation and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course (see Hawtayne *v.* Bourne, 7 Mees. & W. 595), and all such authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might be a reasonable mode of effecting a legitimate object of the partnership business? Our opinion is that one partner cannot bind the others in such a case, simply by virtue of the partnership relation. In the case of Ex parte Gardom, this point was not fully discussed,

but given up by Sir S. Romilly, who had two other objections to the guarantee on which he could rely, and on one of which he succeeded. Besides, we are not sufficiently informed by the report, whether there might not have been some peculiar circumstances in the case which caused the abandonment of that point." And see Ex parte Chippendale, 4 De G., M. & G. 19.

It has been before shown when an individual partner can bind the firm by such contracts as loans, purchases, sales, pledges, bills of exchange, and promissory notes. The implied power, however, of a partner is much more extensive, for in the words of Lord Tenterden in the principal case, "the *act* and *assurance* of one partner, made with reference to business transacted by the firm, will bind all the partners." Hence an acknowledgment (Hodenpyl *v.* Vingerhoede, Chitt. Bills, 381, n. 7th ed.; Gray *v.* Palmers, 1 Esp. 135); account rendered by (Ferguson *v.* Fyffe, 8 Cl. & Fin. 121), or the admission of one partner with reference to the transactions of the firm, will be evidence against the firm (Wood *v.* Braddick, 1 Taunt. 104; Pritchard *v.* Draper, 1 Russ. & My. 199; Cheap *v.* Cramond, 4 B. & Ald. 663 (6 E. C. L. R.)), although it may not necessarily be conclusive (Wickham *v.* Wickham, 2 K. & J. 491). So a promise by one partner to pay a debt as a partnership debt will be considered as a promise by the firm: Lacy *v.* M'Neil, 4 D. & R. 7 (16 E. C. L. R.).

Upon the same principle it has been held that one partner had power to bind the firm by his assent to the transfer of their account, with a balance due from them by their former to a new banker: Beale *v.* Chaddick, 2 Hurlst. & N. 326.

A tender to one partner of a debt due to the firm is equivalent to a tender to all the partners, and a tender by one of the firm is the same as a tender by all: Douglas *v.* Patrick, 3 Term Rep. 682; Peirse *v.* Bowles, 1 Stark. 323 (11 E. C. L. R.).

*301] *Part payment of principal or interest by one of several partners or co-contractors was formerly considered as made by him as agent for all the other partners and co-contractors, and operating as a new promise to pay, was a good answer against the plea of the Statute of Limitations. See Whitcomb *v.* Whiting, Doug. 651; Wyatt *v.* Hodson, 8 Bing. 309 (21 E. C. L. R.); Burleigh *v.* Stott, 8 B. & C. 36 (15 E. C. L. R.); 2 M. & R. 93 (17 E. C. L. R.). The law, however, has been recently altered by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which enacts that "in

reference to the provisions of the Acts of 21 James I. c. 16, s. 3, and of the Act of the 3 & 4 Will. IV. c. 42, s. 3, and of the Act of 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor, or co-debtor, executor, or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators." Sect. 14. Sir R. T. Kindersley, V.-C., in Thompson *v.* Waithman, 3 Drew. 628, held that this section of the Act was retrospective, so that although the right of action had accrued in consequence of a payment made by a co-contractor before the passing of the Act, yet inasmuch as its operation was retrospective, the other co-contractors could take advantage of the Statute of Limitations. This construction of the Act was followed by the Court of Queen's Bench in Jackson *v.* Woolley, 8 E. & B. 778 (92 E. C. L. R.), but that case was afterwards reversed on appeal by the Court of Exchequer Chamber, Id. 784, where it was held that the 14th section of the Mercantile Law Amendment Act, 1856, did not apply to the case of a payment made before the Act. And see Flood *v.* Patterson, 29 Beav. 295; Cockrill *v.* Sparkes, 1 Hurlst. & C. 699.

It seems moreover to be doubtful whether a co-partner is an agent duly authorized under the 13th section of the Mercantile Law Amendment Act, 1856, to make an acknowledgment or promise in writing, so as to keep alive a debt barred by 9 Geo. IV. c. 14: Dix. Part. 33.

Even before this statute, the acts of surviving partners of a firm had not the effect of keeping a debt alive against the representatives of a deceased partner. See Atkins *v.* Tredgold, 2 B. & C. 23 (9 E. C. L. R.); Slater *v.* Lawson, 1 B. & Ad. 396 (20 E. C. L. R.); Ault *v.* Goodrich, 4 Russ. 430; Way *v.* Bassett, 5 Hare 55, 67.

A partner has not an implied authority to bind the firm by a submission to arbitration. This was clearly laid down in Stead *v.* Salt, 10 Moore 389, 3 Bing. 101 (11 E. C. L. R.), where the partnership was not general, but only in dealings to which the award referred. It has however been followed in the case of general partnership. Thus, in Adams *v.* *Bankart, 1 C., M. & R. 681, where the submission to [*302 arbitration was made by one only of three general partners,

it was held by the Court of Exchequer not to be binding on the firm. "The authority," said Parke, B., "to bind a partner to submit to arbitration does not flow from the relation of partnership, and where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. The case of Stead *v.* Salt shows that the relation of partnership does not communicate any such power as that which has been contended for." See also Boyd *v.* Emmerson, 2 Ad. & E. 184 (29 E. C. L. R.); Antram *v.* Chase, 15 East 209; Goddard *v.* Ingram, 3 Q. B. 839 (43 E. C. L. R.); Gale & Dav. 46; Hatton *v.* Royle, 3 Hurlst. & N. 500.

A partner, however, who has entered into a submission to an award, will himself, on the refusal of his partner to be bound by it, be liable to an action for damages: Strangford *v.* Green, 2 Mod. 228.

Upon the same principle one partner has no implied authority to consent to an order for a judgment in an action against himself and his co-partner: Hambidge *v.* De La Croúée, 3 C. B. 742 (54 E. C. L. R.). Or by giving a cognovit to pay the debt and costs: Rathbone *v.* Drakeford, 4 M. & P. 57.

The partnership will not be bound by any contract entered into by one of the partners if *it be not in the name of the partnership*, even although it may have derived a profit thereby. Thus, if one of two or more partners signs a promissory note (Siffkin *v.* Walker, 2 Campb. 308), draws (Emly *v.* Lye, 15 East 7) or accepts (Kirk *v.* Blurton, 9 M. & W. 284) a bill of exchange, executes a warrant of attorney (Bevan *v.* Lewis, 1 Sim. 376) or borrows a sum (Loyd *v.* Freshfield, 2 C. & P. 325 (12 E. C. L. R.)) in his own name only, the firm will not be liable even although the money arising from such transactions be applied by the partner who procured it for the benefit of the firm. See also Ex parte Hunter, 1 Atk. 223; Ex parte Emly, 1 Rose 61; Smith *v.* Craven, 1 C. & J. 500; Wilson *v.* Whitehead, 10 Mees. & W. 503; see and consider Ex parte Raleigh, 3 Mont. & A. 670; 3 Deac. 160; Bishop *v.* Countess of Jersey, 2 Drew. 143.

But if a member of a firm purchases goods in which the firm usually deals, and afterwards applies them to its use, a presumption may arise that he was dealing on behalf of the firm, although such presumption may not have arisen had he borrowed money and applied it to the use of the firm. See Ex parte Emly, 1 Rose 61;

Colley *v.* Smith, 2 M. & Rob. 96; Gouthwaite *v.* Duckworth, 12 East 421; Bottomley *v.* Nuttall, 5 C. B. N. S. 122 (94 E. C. L. R.).

This last class of cases must not be confounded with another at first sight somewhat similar, where the contract is in reality entered into by the partnership, though a security is given only by one of the *partners, for in such case the partnership (at all events where it has derived benefit from the contract), though not liable upon the security, may be liable under their general contract. See Ex parte Brown, 1 Atk. 225 cited; Ex parte Bonbonus, 8 Ves. 542; Denton *v.* Rodie, 3 Campb. 493; Ex parte Bolitho, Buck 100; Robinson *v.* Gleadow, 2 Bing. N. C. 156 (29 E. C. L. R.); Browne *v.* Gibbins, 5 Bro. P. C. 491; South Carolina Bank *v.* Case, 8 B. & C. 427 (15 E. C. L. R.); Loyd *v.* Freshfield, 2 C. & P. 325 (12 E. C. L. R.); Beckham *v.* Drake, 9 M. & W. 79; 11 M. & W. 315. [*303

No contract, however, of one of the partners will bind the firm if it be wholly unconnected with the partnership business. Thus, in Ex parte Agace, 2 Cox 312, one of two partners took an assignment of a bond to the firm in consideration of five acceptances signed by him for the firm. The assignor had been falsely informed by the partner who signed the acceptances, that the other partner was acquainted with the transaction and that it was with his consent, whereas he was a total stranger to it; and when he found it out, immediately expressed his disapprobation in the strongest terms, and insisted upon an immediate dissolution of the partnership. It was held by Lords Commissioners Eyre and Ashurst, upon the bankruptcy of the partners, that the bills could not be proved against the firm. "In partnership," said Eyre, L. C., "both parties are authorized to treat for each other in everything that *concerns or properly belongs to the joint trade*, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, if the transaction *has no apparent relation* to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances." See also Armitage *v.* Winterbottom, 1 Man. & Gr. 130 (39 E. C. L. R.); 1 Scott N. R. 23.

The firm will not be bound by any securities obtained fraudulently from one of the partners by the person claiming against

them. Thus if negotiable instruments, such as bills of exchange or promissory notes, be given by one of the firm in its name, and fraud or collusion can in any way be shown, as for instance where the transaction indicates that the money *was for the individual partner's own use*, and was not raised on the partnership account, the partnership will not be bound by such securities: Arden *v.* Sharpe, 2 Esp. 524; Hope *v.* Cust, 1 East 53, cited; Shirreff *v.* Wilks, Id. 48; Green *v.* Deakin, 2 Stark. 347 (3 E. C. L. R.); Jones *v.* Yates, 9 B. & C. 532 (17 E. C. L. R.); Snaith *v.* Burridge, 4 Taunt. 684; Ex parte Goulding, 2 Glyn. & J. 118; Ex parte Thorpe, 3 Mont. & A. 716.

And if one of the partners in the name of the firm gives a promissory note, or accepts a bill for his own separate debt, the presumption arises that the creditor knew that the transaction was
*304] fraudulent, as being without the *authority of the firm: Shirreff *v.* Wilks, 1 East 53; Richmond *v.* Heapy, 1 Stark. 202 (2 E. C. L. R.); Green *v.* Deakin, 2 Stark. 348 (3 E. C. L. R.); Barber *v.* Backhouse, Peake 61; Wallace *v.* Kelsall, 7 M. & W. 264; Jones *v.* Yates, 9 B. & C. 532 (17 E. C. L. R.); Jacaud *v.* French, 12 East 317; Gordon *v.* Ellis, 7 M. & G. 607 (49 E. C. L. R.); Leverson *v.* Lane, 13 C. B. N. S. 278 (106 E. C. L. R.), and the remarks therein on Ridley *v.* Taylor, 13 East 175; Ellston *v.* Deacon, 2 Law Rep. C. B. 20. Nor will such securities bind the partnership, even in the hands of an endorsee, unless he can prove that he gave a valuable consideration for them: Heath *v.* Sansom, 2 B. & Ad. 291 (22 E. C. L. R.). And see Hogg *v.* Skeen, 18 C. B. N. S. 426 (114 E. C. L. R.), and the remarks therein on Musgrave *v.* Drake, 5 Q. B. 185 (48 E. C. L. R.); Dav. & Mer. 347.

An endorsee for value, however, who obtained them without fraud (Wintle *v.* Crowther, 1 C. & J. 316; Ex parte Bushell, 3 Mont., D. & De G. 615; May *v.* Chapman, 16 M. & W. 355) or without knowing that they had been fraudulently obtained (Swan *v.* Steele, 7 East 210; Lacy *v.* Woolcott, 2 D. & R. 458), might enforce them against the partnership.

Every partner has an implied power as agent of the firm to receive payment of debts due to the firm (Anon. 12 Mod. 446), and such payments even after the dissolution will discharge the debtor (Duff *v.* The East India Company, 15 Ves. 148; Brasier *v.* Hud-

son, 9 Sim. 1), unless there has been an assignment of the debts to another partner, and the debtors have notice thereof (Duff *v.* The East India Company, 15 Ves. 213), or unless there has been an order of a court of competent jurisdiction to pay a sum to another partner: Showler *v.* Stoakes, 2 Dowl. & L. 3. Upon the same principle one partner has power ordinarily to bind the firm by his receipt for debts (Henderson *v.* Wild, 2 Campb. 561), unless it be given in fraud of his copartners, in which case they will still be able to recover notwithstanding the receipt: Farrar *v.* Hutchinson, 9 Ad. & E. 641 (36 E. C. L. R.); Henderson *v.* Wild, 2 Campb. 561.

On the receipt of money by a partner to be employed for any purpose of the firm, if it be part of their business to receive money for such purpose, they will be bound thereby, although the partner who received the money should misappropriate it. Thus, if one of a firm of attorneys receive a sum of money from a client for the purpose of its being invested on a *particular security*, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney: Harman *v.* Johnson, 2 E. & B. 61 (75 E. C. L. R.); Blair *v.* Bromley, 5 Hare 542; 2 Ph. 354; Sims *v.* Brutton, 5 Exch. 802; and see Willett *v.* Chambers, 2 Cowp. 814; Bawkshaw *v.* Parkins, 2 Swanst. 539; Henderson *v.* Wild, 2 Campb. 561.

The receipt, however, of money by one of a firm of attorneys from a client professedly on behalf of the firm, for *the general purpose of *investing it, as soon as he can meet with* a good security, is not an act within the scope of the ordinary business of an [*305 attorney, so as without further proof of authority from his partners to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys as such not necessarily being scriveners: Harman *v.* Johnson, 2 E. & B. 61 (75 E. C. L. R.); Bourdillon *v.* Roche, 6 W. R. 918.

Where, however, one of a firm of solicitors received from a client a sum of money, for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, it was held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount: Atkinson *v.*

Mackreth, 2 Law Rep. Eq. 570. See also St. Aubyn *v.* Smart, 5 Law Rep. Eq. (V.-C. M.) 183; 16 W. R. (V.-C. M.) 394.

Although it is clear from all the cases upon this subject, that it lies upon a separate creditor who has taken a partnership security for the payment of his debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners; yet if there be circumstances to show a reasonable ground of belief that it was given with the consent of the partnership, it will lie upon the partners to prove the fraud. See Frankland *v.* M'Gusty, 1 Knapp. Priv. C. C. 274, 301, 302; Ridley *v.* Taylor, 13 East 178; Ex parte Kirby, Buck. 511; Leverson *v.* Lane, 13 C. B. N. S. 283, 285 (106 E. C. L. R.).

Where money is advanced to an individual partner in the ordinary course of commercial transactions, as upon the discount of a bill of exchange signed by him in the name of the firm, the mere knowledge of the creditor that the money advanced has been carried to the account of the individual partner, will not of itself be sufficient to rebut the liability of the partnership: Ex parte Bonbonus, 8 Ves. 540; 2 Hov. Supp. 132.

Although *primâ facie* the partnership will not be bound by a security given by an individual partner for his own purposes, as to secure an antecedent debt, it will nevertheless be bound if it can be shown that he had the previous authority of the firm or their subsequent approbation—(a strong case of subsequent approbation, raising an inference of previous positive authority): Ex parte Bonbonus, 8 Ves. 540, 543, 544.

As a general rule in the course of proceedings at law or in equity the act or admission of one partner, and likewise notice to one partner, is binding upon the firm. For instance, one partner agreeing to stay proceedings (Harwood *v.* Edwards, Gow. Partn. 65), or entering an appearance (Harrison *v.* Jackson, 7 Term Rep. 207), may bind the rest. Again, notice by one partner, in legal proceedings (Mayhew *v.* Eames, 1 C. & P. 550 (12 E. C. L. R.)), or, in
*306] *the case of an insurance of a cargo, of abandonment (Hunt *v.* Royal Exchange Assurance Company, 5 M. & S. 47), will be sufficient.

So although in an ordinary case one of two or more joint lessors not in trade cannot give a valid notice to quit (Goodtitle *v.* Woodward, 3 B. & Ald. 689 (5 E. C. L. R.)), he can do so if the joint

lessors hold the lease as partners in trade: Doe *v.* Hulme, 2 M. & R. 433 (17 E. C. L. R.).

Upon the same principle a firm will be bound by the frauds committed upon innocent parties by one of the partners in matters connected with the partnership. For instance, if one of the partners purchases for the partnership goods used in the partnership business, which he, without any collusion on the part of the seller, converts to his own use (Bond *v.* Gibson, 1 Campb. 185), if he fraudulently negotiates a partnership security which gets into the hands of an endorsee for value without notice of fraud (2 Esp. 525; Lacy *v.* Wolcott, 2 D. & R. 458 (16 E. C. L. R.); Sanderson *v.* Brooksbank, 4 C. & P. 286 (19 E. C. L. R.); and see Richmond *v.* Heapy, 1 Stark. 202 (2 E. C. L. R.); Johnson *v.* Peck, 3 Stark. 66 (3 E. C. L. R.); Jacaud *v.* French, 12 East 317; Sparrow *v.* Chisman, 9 B. & C. 241 (17 E. C. L. R.); 4 M. & R. 206), converts to his own use moneys of customers lodged with the firm as bankers (Stone *v.* Marsh, R. & M. 364 (21 E. C. L. R.); 6 B. & C. 551 (13 E. C. L. R.); 8 D. & R. 71 (16 E. C. L. R.); Keating *v.* Marsh, 1 Mont. & A. 582; 2 Cl. & Fin. 250; and see Hume *v.* Bolland, R. & M. 371 (21 E. C. L. R.); La Marquise de Ribeyre *v.* Barclay, 23 Beav. 107), makes a fraudulent statement (Rapp *v.* Latham, 2 B. & Ald. 795), or fraudulently colludes with the partner of another firm (Longman *v.* Pole, 1 M. & M. 222 (22 E. C. L. R.); Danson & Lloyd, 126), his own firm will be liable. See also Brydges *v.* Branfill, 12 Sim. 369.

Where, however, a firm is liable for the fraud of an individual partner, it must have been committed in a matter within the scope of the partnership business: Bishop *v.* Countess of Jersey, 2 Drew. 143.

Moreover the firm may be liable for a wrong (Moreton *v.* Hardern, 4 B. & C. 223 (10 E. C. L. R.); 6 D. & R. 275 (16 E. C. L. R.); and see Nicoll *v.* Glennie, 1 M. & S. 588), personal negligence (Ashworth *v.* Stanwix, 30 L. J. Q. B. 183; 7 Jur. N. S. 467; Mellors *v.* Shaw, 1 B. & S. 437), or breach of the revenue laws (The Attorney-General *v.* Stannyforth, Bunb. 97; Attorney-General *v.* Burges, Bun. 223; Edmonson *v.* Davis, 4 Esp. 14; King *v.* Manning, Com. Rep. 616), committed by one of their co-partners. And in some cases not only civilly but criminally: Rex *v.* Almon, 5 Burr. 2686; Rex *v.* Pearce, 1 Peake 75; Rex *v.* Topham, 4 Term Rep. 126.

In bankruptcy it is sufficient if one partner sign the petition for adjudication (21 Rules and Orders of 19th of October, 1852), or the demand and notice in a trader debtor summons (68 Id.) on behalf of the firm. So one partner may prove a debt, or sign a letter of attorney authorizing another to represent the firm in the bankruptcy *307] *(Ex parte Mitchell, 14 Ves. 597; Ex parte Hodgkinson, 19 Ves. 291–298). And it has been recently held that a power of attorney to vote at a choice of assignees by one partner in a firm, may be revoked by a subsequent power executed by another partner: Re Debbs, 15 L. T. (Bkcy.) 53.

As a general rule a partner, unless under an express power by deed (Horsley *v.* Rush, 7 Term Rep. 209, cited; Appleton *v.* Binks, 5 East 148; Berkeley *v.* Hardy, 8 D. & R. 102 (16 E. C. L. R.)), cannot bind the partnership by a deed. Thus, in Harrison *v.* Jackson, 7 Term Rep. 207, where a person signed a deed purporting it to be executed for himself and his partners, the Court of Queen's Bench held that the execution of the deed was not binding on the partners who had not signed it. "The law of merchants," said Lord Kenyon, C. J., "is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the Nisi Prius case of Mears *v.* Serocold, cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. . . . This would be a most alarming doctrine to hold out to the mercantile world. If one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners." See also Hall *v.* Bainbridge, 1 M. & G. 42 (39 E. C. L. R.).

A general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose: per Lord Kenyon, C. J., in Harrison *v.* Jackson, 7 Term Rep. 210.

The subsequent acknowledgement by one partner that he has given another partner power to execute a deed, will not, where the power is not given by deed, be sufficient to bind the partner who did not execute the deed (Steiglitz *v.* Egginton, Holt N. P. C. 141 (3 E. C. L. R.); Brutton *v.* Burton, 1 Chit. 707 (18 E. C. L. R.)),

although it will bind the partner who did so: Elliot *v* Davis, 2 Bos. & Pul. 338.

Where, however, a person executes a deed (Ball *v.* Dunsterville, 4 Term Rep. 313; and see Lord Lovelace's Case, Sir W. Jones 268) or bond (Burn *v.* Burn, 3 Ves. 573; 1 Hov. Supp. 410; Orr *v.* Chase, 1 Meriv. 729) for himself and his partners in the presence of the latter and by their authority, although there be but one seal, all will be bound. See and consider Smith *v.* Winter, 4 Mees. & W. 454.

It seems moreover that, although as a general rule one partner cannot by deed bind the firm except under an express power by deed, the rule must be confined to those cases where the deed operates by way of *grant*, for where it operates by way of *release*, it will, in the absence of fraud and collusion (Aspinall *v.* The London and North-Western Railway Company, 11 Hare 325), be binding on the firm. See 2 Roll. Abr. 410, D; Perry *v.* Jackson, 4 Term Rep. 519; Hawkshaw *v.* Parkins, 2 Swanst. 539, 544; Furnival *v.* Weston, 7 Moore 356 (17 E. C. L. R.). These cases appear to proceed upon the principle that "where a person has received satisfaction for a joint demand, due to himself and others, which puts an end to such joint demand, he cannot afterwards, by joining the other parties with him as plaintiffs, recover that debt:" Wallace *v.* Kelsall, 7 Mees. & W. 264, 274. [*308

A covenant, however, by one partner not to sue for any debt due to him, cannot be pleaded as a release in bar of an action by the two partners for a debt due to them jointly: Walmesley *v.* Cooper, 11 Ad. & E. 216 (39 E. C. L. R.).

"If one of several partners assents to a deed executed by a debtor in favor of his creditors, the firm is bound by the deed, and the doctrine that one partner has no implied authority to bind his copartners by an instrument under seal, has no application to such a case:" 1 Lindley on Partnership 280, citing Morans *v.* Armstrong, Arms., M'Art. & Ogle Ir. N. P. 25; Dudgeon *v.* O'Connell, 12 Ir. Eq. 566.

Although a deed executed by one partner will not bind the firm, by taking effect as the deed of the firm, nevertheless where the transaction itself is one within the authority of the partner, the circumstance of a deed being executed will not invalidate the contract: Ex parte Bosanquet, 1 De Gex 432, 439; and see Hunter *v.* Parker, 7 Mees. & W. 322.

A warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, *but with his consent*, is a sufficient authority for signing judgment against both: Brutton *v.* Burton, 1 Chit. 707 (18 E. C. L. R.). This, however, appears to proceed upon the principle that a warrant of attorney need not be under seal, and that therefore a parol authority to execute it is sufficient. See Kinnersley *v.* Mussen, 5 Taunt. 264 (1 E. C. L. R.).

Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract, and although after notice of the retirement the retiring partner is in a sense a surety, he will not be discharged from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract. See Oakford *v.* The European and American Steam Shipping Company, 1 Hem. & Mill. 182. There, continuing partners under such a contract which gave, amongst other things, their firm the power of appointing an arbitrator in case of dispute, entered into an agreement by which they waived a very doubtful point of construction on the original contract, and referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract. It *309] was *held by Sir W. Page Wood, V.-C., that this "was not such a variation of the original contract as to discharge the retired partner."

It may be here mentioned that the promoters of companies are not, as such, partners, and they will not therefore, in the absence of authority either general or special (Collingwood *v.* Berkeley, 15 C. B. N. S. 145 (109 E. C. L. R.)) be liable for each other's acts: Reynel *v.* Lewis, Wyld *v.* Hopkins, 15 M. & W. 517. Allottees moreover of an unformed company are not, simply as such, liable for the acts of their managers: Bourne *v.* Freeth, 9 B. & C. 632 (17 E. C. L. R.); Dickinson *v.* Valpy, 10 B. & C. 128 (21 E. C. L. R.); Fox *v.* Clifton, 6 Bing. 776 (19 E. C. L. R.); 9 Bing. 115 (23 E. C. L. R.).

The authority of partners to bind each other is not determined by the articles of co-partnership, but by the character of their dealings, and the manner in which they hold themselves out to the world: Cattin *v.* Gil-

ders, 3 Alab. 536; Sauffey *v.* Howard, 7 Dana 367; Frost *v.* Harford, 1 E. D. Smith 540; Gray *v.* Ward, 18 Illinois 32; Saltmarsh *v.* Bower, 34 Alab. 613; Stockwell *v.* Dillingham, 50 Maine 442; Welles *v.* March, 30 N. Y. 344; Barker *v.* Mann, 4 Bush 672. One partner has a right to bind the firm in contracts for the use of the partnership: Manufacturers and Mechanics' Bank *v.* Gore, 15 Mass. 75; Boardman *v.* Gore, Id. 331; Galloway *v.* Hughes, 1 Bailey 553; Winship *v.* Bank of United States, 5 Peters 529; Storve *v.* Hinckley, Kirby 147. The contract to be binding on the firm must be within the scope of the partnership business: Long *v.* Carter, 3 Ired. 238; Barnard *v.* Lapue, 6 Michigan 274; Scott *v.* Bandy, 2 Head 197; Venable *v.* Levick, Id. 351; Hotchir *v.* Kent, 8 Michigan 526; Boardman *v.* Adams, 5 Clark 224. One partner cannot bind his copartner by a bargain made without his consent or knowledge, if the thing to be done be out of the usual course of the partnership business, unless there be evidence of a special usage in relation to such bargains made by such parties: Nichols *v.* Hughes, 2 Bailey 109; Waller *v.* Keys, 6 Verm. 257; Wagner *v.* Clay, 1 A. K. Marsh. 257. Although the engagement of an individual member of a firm may not be within the scope of the partnership dealings, yet if the transaction come within the knowledge of his copartners, and is assented to by them, then it will be binding upon them all: McNeil *v.* Reynolds, 9 Ala. 313. Where one of the members of a partnership for a particular business does an act on account of the firm, *primâ facie* not within the scope of his authority, evidence is admissible to show, that, in the exercise of good faith and reasonable discretion he was justified in so doing, by the course pursued by the firm in the management of their business, and that so the other partners were responsible for his act: Woodward *v.* Winship, 12 Pick. 430; Miller *v.* Hines, 15 Geo. 197; Fant *v.* West, 10 Richardson (Law) 149. If one of the partners of a firm has been in the habit of endorsing the name of the firm on bills of exchange, it is a fact from which the jury may legally infer that he had authority from the other partner so to do: Bank *v.* Brooking, 2 Litt. 41. A partner in the practice of the medical profession, has no power to bind his copartner by a note in the name of the firm for the purpose of raising money for his own accommodation: Crosthwait *v.* Ross, 1 Humph. 23. A promissory note given by one of two partners in the business of farming and coopering, signed A B. & C. D., is binding on both: McGregor *v.* Cleveland, 5 Wend. 475. Ordinarily, a partner in a firm created for the purpose of carrying on a farm, will not have the power to bind his copartners by a bill of exchange given without their consent: Kimbro *v.* Bullitt, 22 Howard (S. C.) 256. The implied authority of one partner to bind his copartner by contract, may be revoked by the refusal of the latter to be thus bound, communicated to the party in whose favor the contract is to be made: Leavitt *v.* Peck, 3 Conn.

124; Feigley *v.* Sponeberger, 5 W. & S. 564; Yeager *v.* Wallace, 7 P. F. Smith 365.

A note made by one partner, in the name of the firm, will be presumed to have been made in the course of the partnership business: Doty *v.* Bates, 11 Johns. 544; Barrett *v.* Swann, 5 Shepl. 180; Ensinger *v.* Marvin, 5 Blackf. 210; Knapp *v.* McBride, 7 Ala. 19; Turston *v.* Lloyd, 4 Maryland 283; Hogg *v.* Orgill, 10 Casey, 344. The presumption is that contracts made by a partner are made on account of the partnership, and the firm will be bound thereby, unless the party with whom he contracts knows the contrary: Le Roy *v.* Johnson, 9 Peters 198; Rochester *v.* Trotter, 1 A. K. Marsh. 54. An acting partner may, for the benefit of his firm, and in order to raise money, use the name of the firm by accepting a bill of exchange, to be exchanged for the acceptance of another firm: Gano *v.* Samuel, 14 Ohio 592. Where money is borrowed by one partner in the name of the firm, the partnership is liable, though the money is appropriated to the use of the partner borrowing: Church *v.* Sparrow, 5 Wend. 223; Onondaga Bank *v.* De Puy, 17 Id. 47; Steel *v.* Jennings, Cheves 183; Bascom *v.* Young, 7 Missouri 1. The rule that a partnership is liable for money borrowed by one of its members on the credit of the firm, within the general scope of its authority and according to the usual course of its business, applies as well to partnerships formed for mechanical or manufacturing purposes, as to commercial partnerships: Hoskinson *v.* Eliot, 12 P. F. Smith 393. If a partner purchase goods in the name of the firm, although he applies them to his individual use, the partnership is liable for the price to the vendor: Dickson *v.* Alexander, 7 Ired. 4. All the members of a firm are liable for goods purchased by one for the use of the firm, although the existence of the partnership was not known to the vendor at the time of the sale: Given *v.* Albert, 5 W. & S. 333; Bisel *v* Hobbs, 6 Blackford 479; Baxter *v.* Clark, 4 Ired. 127; Reynolds *v.* Cleveland, 4 Cowen 282. A note given by a partner in the name of the firm for money received by him individually, is not binding on the other members of the firm, unless the money was applied for partnership purposes and with their knowledge: Whitaker *v.* Brown, 16 Wend. 505. If one partner borrows money on his own credit and gives his note for the amount, the firm is not liable, though the money be used in the partnership transactions: Willis *v.* Hill, 2 Dev. & Bat. 231; Graeff *v.* Hitchman, 5 Watts 454; Jaques *v.* Marquand, 6 Cowen 497; Holmes *v.* Burton, 9 Verm. 252.

If a partner borrow a sum of money on his own security only, it does not become a partnership debt, although applied to partnership purposes. The presumption in such cases is that it is a part of the capital fund, contributed by the individual partner: Logan *v.* Bond, 13 Georgia 192. A note given in the individual name of one partner is *primâ facie* deemed

his individual obligation, unless his partner be a dormant partner: Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Farmers' Bank *v.* Bayless, 35 Missouri 428. A partnership is liable for lumber purchased by and charged to one of the partners, where it was purchased for partnership purposes: Braches *v.* Anderson, 14 Missouri 441. One co-partner may bind the firm by a bill of exchange drawn by him in his own name upon the firm for a partnership debt: Dougal *v.* Cowles, 5 Day 511. To render a firm responsible for a note given by one member thereof in his own name, it must appear that the credit was given to the firm, and that the money obtained by the note went to the business of the firm, otherwise it will be treated as an election by the creditor to trust to the responsibility of the maker of the note alone: Foster *v* Hall, 4 Humph. 346; Staats *v.* Howlett, 4 Denio 559; In re Warren, Davies 320; Crozier *v.* Kirker, 4 Texas 252; Bacon *v.* Hutchings, 5 Bush 595. A note in common form, signed by an individual in whose name a partnership is carried on and who at the same time openly transacts business on his own account, does not, *primâ facie*, bind his copartners: Manuf. & Mech. Bank *v.* Winship, 5 Pick. 11; United States Bank *v.* Binney, 5 Mason 176; Mifflin *v.* Smith, 17 S. & R. 165; Buckner *v.* Lee, 8 Georgia 285; Mercantile Bank *v.* Cox, 38 Maine 500.

Where one of two partners subscribes the partnership name to a note as securities for a third person, without the authority or consent of the other partner, the latter is not bound, and the burden of proving the consent is on the holder of the note: Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Ralston *v.* Click, 1 Stewart 526; Hamill *v.* Purviss, 2 Penna. R. 176; Sutton *v.* Irwine, 12 S. & R. 13; Laverty *v.* Burr, 1 Wend. 529; New York Fire Ins. Co. *v.* Bennett, 5 Conn. 574; Foot *v.* Sabin, 19 Johns. 154; Bank *v.* Bowen, Id. 158; Andrews *v.* Planters' Bank, 7 Sm. & M. 192; Langan *v.* Hewitt, 13 Id. 122; Sweetsser *v.* French, 2 Cush. 309; Rollins *v.* Stevens, 31 Maine 454. An accommodation endorsement, made by one member of a firm, in the firm's name, does not bind the others, unless in the hands of an innocent holder without notice: Whaley *v.* Moody, 2 Humph 495; Bank *v.* Saffarans, 3 Id. 597; Chenowith *v.* Chamberlin, 6 B. Monr. 60; Bank *v.* Cameron, 7 Barb. (S. C.) 143; Lang *v.* Waring, 17 Ala. 145; Beach *v.* The State Bank, 2 Carter 488; Mechanics' Bank *v.* Livingston, 33 Barbour 458; Hendrie *v.* Berkowitz, 37 California 113. One partner cannot bind the firm by the guaranty of the debt of a third person without the assent or ratification of the other partner: Mayberry *v.* Barniton, 2 Harring. 24; Maudlin *v.* Branch Bank, 2 Ala. 502; McQuewans *v.* Hamlin, 11 Casey 517; Selden *v.* Bank, 3 Minnesota 166. Although it appears that each one of a firm has, with the assent of the other members, repeatedly endorsed accommodation notes in the firm name,

it is no evidence that either member was authorized to do so without such assent: Early *v.* Reed, 6 Hill 12. *Contrà:* Dundass *v.* Gallagher, 4 Barr 205. If a promissory note, endorsed by a partner out of the usual course of business, for the accommodation of a third person, is discounted *bonâ fide* and without notice by a bank, the other partners are bound, though they knew nothing of the transaction: Catskill Bank *v.* State, 15 Wend. 364. A *bonâ fide* holder without notice of an accommodation note endorsed with the name of the firm by one of the members without the assent of the others may collect it of the firm: Austin *v.* Vandermark, 4 Hill 259; Maudlin *v.* Branch Bank, 2 Ala. 502; Stall *v.* Catskill Bank, 18 Wend. 466; Wills *v.* Evans, 20 Id. 251; s. c. 22 Id. 324; Bank *v.* Gilliland, 23 Id. 311; Emerson *v.* Harman, 2 Shepl. 271; Waldo Bank *v.* Lumbert, 4 Id. 416; Bank *v.* Saffarans, 3 Humph. 597; Abpt *v.* Miller, 5 Jones (Law) 32. An endorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank, which discounts it, to inquire into his authority to use the firm name: Tanner *v.* Hall, 1 Barr 417; Mecutchen *v.* Kennedy, 3 Dutcher 230.

One partner cannot without the consent of his co-partner, appropriate the assets of the firm to the payment of his individual debts, and such appropriation, if made with a knowledge on the part of the person, receiving them, that they are the joint property of the firm, is no bar to an action instituted against him by the partnership: Burwell *v.* Springfield, 15 Ala. 273; Perry *v.* Butt, 14 Geo. 699; Buck *v.* Mosley, 24 Miss. 170; Jackson *v.* Holloway, 14 B. Monr. 133; Hall *v.* McIntyre, 31 Ala. 532; McNair *v.* Platt, 46 Ill. 211. One partner cannot release a debt due the firm, even during the partnership, in consideration of a debt due from him individually: Cram *v.* Cadwell, 5 Cowen 489. One partner has no right to give to his own separate creditor, an order on a debtor of the firm, without the consent of his copartner; and it matters not that the other partner knew of the order before it was executed, and did not express his dissent to the party, in whose favor it was drawn: McKinney *v.* Bright, 4 Harris 399. A. and B. being partners in one firm, and A. and C. in another firm, A. gave to B. for his own debt, a note of the firm of A. and C. Held, that C. was not liable: Clay *v.* Cottrell, 6 Harris 408. Where one partner, without the knowledge of his copartner, makes a special contract to perform labor or sell goods of the partnership, and to take in pay specific articles for his own use, and the contract is executed by the parties who made it, an action cannot be maintained in the name of the firm, to recover the value of the goods so sold or labor performed, on the ground that the partner has no authority to make such contract: Greeley *v.* Wyeth, 10 N. Hamp. 15. *Contrà:* Cadwallader *v.* Kroesen, 22 Maryl. 200. The

private debt of a partner cannot be set of by his creditor against a debt due from him to the firm: Pierce *v.* Pass, 1 Porter 232; Pierce *v.* Hickenburg, 2 Id. 198; Norment *v.* Johnson, 10 Ired. 89; Ramey *v.* McBride, 4 Strob. 12; Bourne *v.* Wooldridge, 10 B. Monr. 492.

Where a person receives a partnership note for the individual debt of a partner, he is chargeable with notice, and cannot enforce payment of the note against the other members of the firm: Gansevoort *v.* Williams, 14 Wend. 133; Foster *v.* Andrews, 2 Penna. R. 160; Huntingdon *v.* Lyman, 1 Chipm. 438; Baird *v.* Cochran, 4 S. & R. 397; Davenport *v.* Runlett, 3 N. H. 386; Weed *v.* Richardson, 2 Dev. & Bat. 535; Livingston *v.* Roosevelt, 4 Johns. 251; New York Fire Insurance Company *v.* Bennett, 5 Conn. 574; Beckham *v.* Pray, 2 Bailey 133; Taylor *v.* Hillyer, 3 Blatch. 433; Dub *v.* Halsey, 16 Johns. 34; Everingham *v.* Ernsworth, 7 Wend. 326; Brewster *v.* Mott, 4 Scam. 378; Hickman *v.* Reineking, 6 Blackf. 388; Maudlin *v.* Branch Bank, 2 Ala. 502; Miller *v.* Manier, 6 Hill 115; Stainer *v.* Tyson, 3 Hill 279; Williams *v.* Gilchrist, 11 N. Hamp. 535; Smyth *v.* Strader, 4 Howard (S. C.) 404; Elliott *v.* Dudley, 19 Barb. 326; King *v.* Faber, 10 Harris 21; Tutt *v.* Adams, 24 Miss. 186; Hickman *v.* Koehl, 27 Missouri 401; Robinson *v.* Aldridge, 34 Miss. 352; Leonard *v.* Winslow, 2 Grant 139; Porter *v.* Gunnison, Id. 297; Fletcher *v.* Anderson, 11 Iowa 228; Bowman *v.* Cecil Bank, 3 Grant 33. Where a member of a partnership had endorsed his own note with the name of the firm for his own exclusive benefit, without authority from the other copartner, and the endorsee took the note with full knowledge of the facts, it was held that no independent consideration was required to support a subsequent ratification and promise by the other copartner to pay the note: Commercial Bank *v.* Warren, 15 N. Y. 577. Though the payee of a partnership note believed that the proceeds of the note were to be applied to the individual debts of one of the firm, the note would still be binding on the firm, if the proceeds were in fact used by the firm: Hamilton *v.* Sumner, 12 B. Monr. 11. If a partner give a negotiable note, in the name of the firm, for his own private debt, a *bonâ fide* endorsee of the note, who had no notice of the purpose for which it was given, may recover the amount of the co-partnership: Monroe *v.* Cooper, 5 Pick. 412; Chazournes *v.* Edwards, 3 Id. 5; Livingston *v.* Roosevelt, 4 Johns. 25; Babcock *v.* Stone, 3 M'Lean 172; Duncan *v.* Clark, 2 Richardson 587; Gildersleeve *v.* Mahony, 5 Duer 383; Haldeman *v.* Bank of Middletown, 4 Casey 440; Collins *v.* Gross, 20 Geo. 1; Rich *v.* Davis, 4 Cal. 22; s. c. 6 Cal. 141; Gray *v.* Ward, 18 Ill. 32. The rule that a note given by one partner in the firm name for his individual debt is good against the firm in the hands of a *bonâ fide* holder applies only to notes of mercantile partnerships, and not to those for keeping taverns: Cocke *v.* Branch Bank, 3 Ala. 175.

One partner cannot bind another by a sealed instrument without a special authority or assent and ratification, which may be implied from circumstances, or when executed in his presence: Tremble *v.* Coons, 2 A. K. Marsh. 375; United States *v.* Astley, 3 Wash. C. C. 508; Fleming *v.* Dunbar, 2 Hill (S. C.) 532; Modisett *v.* Lindley, 2 Blackf. 119; Posey *v.* Bullitt, 1 Id. 99; Fitchburn *v.* Boyer, 5 Watts 159; Mackay *v.* Bloodgood, 9 Johns. 285; Cady *v.* Shepherd, 11 Pick. 400; Clement *v.* Brush, 3 Johns. Cas. 180; Gram *v.* Seaton, 1 Hall 262; Perron *v.* Carter, 3 Murphy 321; Layton *v.* Hastings, 2 Harring. 147; Anon., 1 Taylor 113; Doe *v.* Tupper, 4 Sm. & M. 261; Morse *v.* Bellows, 7 N. H. 549; Lucas *v.* Sanders, 1 McMullen 311; Lee *v.* Onstott, 1 Pike 206; Montgomery *v.* Boon, 2 B. Monr. 244; McCart *v.* Lewis, Id. 267; Cummings *v.* Carsily, 5 Id. 47; Bentrin *v.* Zierlien, 4 Missouri 417; Turbeville *v.* Ryan, 1 Humph. 113; Henderson *v.* Barbee, 6 Blackf. 26; Swan *v.* Stedman, 4 Metc. 548; Pike *v.* Bacon, 8 Shepl. 280; Lee *v.* Onstoll, 1 Pike 206; Day *v.* Lafferty, 4 Id. 450; Dickinson *v.* Legare, 1 Dessaus. 537; Donaldson *v.* Kendall, 2 Geo. Decis. 227; Napier *v.* Catron, 2 Humph. 534; Smith *v.* Kerr, 3 Comst. 144; Morris *v.* Jones, 4 Harring. 428; Price *v.* Alexander, 2 Greene 427; McDonald *v.* Eggleston, 26 Verm. 154; Snyder *v.* May, 7 Harris 235; Gwinn *v.* Rooker, 24 Missouri 290; Grady *v.* Robinson, 28 Ala. 289; Henry County *v.* Gates, 26 Missouri 315; Little *v.* Hasard, 5 Harring. 291; Shirley *v.* Fearne, 33 Miss. 653; Frombarger *v.* Henry, 6 Jones (Law) 548; Lowery *v.* Drew, 18 Texas 786; Fox *v.* Norton, 9 Mich. 207; Haynes *v.* Seachrist, 13 Iowa 455; Wilson *v.* Hunter, 14 Wisc. 683; Dillon *v.* Brown, 11 Gray 179. One partner may seal a deed of composition, or release of a debt due to the firm: Bruen *v.* Marquand, 17 Johns. 58; Smith *v.* Stone, 4 Gill & Johns. 310; Pierson *v.* Hooker, 3 Johns. 68; McBride *v.* Hagan, 1 Wend. 326; Morse *v.* Bellows, 7 N. H. 549; Wells *v.* Evans, 20 Wend. 251; s. c. 22 Wend. 324; Beach *v.* Ollendorf, 1 Hilton 41; Yandes *v.* Lefavour, 2 Blackf. 371. In a suit by a partnership commenced by attachment, a bond given by one of the partners will bind the firm: Wallis *v.* Wallace, 6 How. (Miss.) 254. One partner may appoint an agent by parol to make and endorse bills, and such power is not void, though given under seal: Lucas *v.* Bank of Darien, 2 Stew. 280. One partner may execute a charter-party under seal so as to bind the other partner: Straffin *v.* Newell, Charlt. 163. The rule that one partner cannot bind his copartner by deed, does not apply when one partner conveys by deed property of the firm which he might have conveyed without deed: Tapley *v.* Butterfield, 1 Metc. 515; Anderson *v.* Tompkins, 1 Brock. 456; McCullough *v.* Sommerville, 8 Leigh 415; Forkner *v.* Stuart, 6 Gratt. 197. A partnership contract, which would be good without a seal will still be valid as a simple contract, although the

partner, who executed the instrument, had no special authority to put the partnership name to such paper: Haman *v.* Cuniffe, 32 Missouri 316; Schmertz *v.* Shreeve, 12 P. F. Smith 457. Where a contract under seal was executed for the erection of a dam for a partnership, an object within the scope of its business, it was held that an action lay against the firm upon an implied promise to pay for the work and materials: Van Deusen *v.* Blum, 18 Pick. 229.

One partner cannot bind his copartner individually by a voluntary confession of a judgment: Crane *v.* French, 1 Wend. 311; Barlows *v.* Reno, 1 Blackf. 252; Bissell *v.* Carvill, 6 Ala. 503; Bitzer *v.* Shunk, 1 W. & S. 340; Sloo *v.* State Bank, 1 Seam. 428; Overton *v.* Tozer, 7 Watts 331; Mills *v.* Dickson, 6 Richardson 487; Remmington *v.* Cummings, 5 Wisc. 138; Shedd *v.* Bank, 32 Verm. 709; Christy *v.* Sherman, 10 Iowa 535; Edwards *v.* Petzer, 12 Id. 607; North *v.* Mudge, 13 Id. 496. Though one partner cannot confess a judgment against another partner, even for a partnership debt, yet a creditor of the firm cannot make objection to the judgment on that account; and a sale of partnership property on an execution issuing upon such judgment, will pass a perfect title to the purchaser; and if the first lien, it will be entitled to the proceeds of the sale; but the judgment will not affect the persons nor the separate property of the other partners: Grier *v.* Hood, 1 Casey 430. One partner cannot bind the firm by a submission to arbitration: Carthaus *v.* Ferrers, 1 Peters S. C. 222; Armstrong *v.* Robinson, 5 Gill & Johns. 412; Buckoz *v.* Grandjean, 1 Manning 367; Wood *v.* Shepherd, 2 Patton & Heath 442; Jones *v.* Bailey, 5 California 345; Martin *v.* Thrasher, 40 Verm. 460. *Contrà:* if not under seal: Taylor *v.* Coryell, 12 S. & R. 243; Buchanan *v.* Curry, 19 Johns. 137; Southard *v.* Steele, 3 Monr. 435; Hallack *v.* March, 25 Illinois 48.

*310] CRAWSHAY *v.* MAULE.

MAULE *v.* CRAWSHAY.

June 9, 10, 27; *July* 11, 23, 31, 1818.

[Reported 1 Swanst. 495.]

Partnership—Dissolution of, by different Modes—Effects of.]—*R. C., being in possession of mines and iron-works held under leases of unequal duration, by his will bequeathed* 25,000*l. to B., "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal. By a codicil, the testator gave to W. C. three-eighths of the concern at the iron-works, "so the partnership will stand at my decease,—W. C. three-eighths, H. three-eighths, B. two-eighths." After the testator's death, W. C., H. and C., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron, purchased for the purpose of manufacture and resale. B., having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter; no agreement having ever been entered into for the duration of the partnership.*

1. *The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H., to the exclusion of his wife.*
2. *The concern is not a mere joint interest in land, but a partnership in trade.*
3. *The purchase of a leasehold interest as part of a stock in*

trade, is not evidence of an agreement to contract a partnership, commensurate with the duration of the lease.

4. *The partnership is dissolved by the death of H.*

5. **In a suit instituted by W. C., praying a sale of the partnership property, the court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold or carried on for the purpose of winding up the concern.* [*311

By articles of agreement, dated the 31st of July, 1794, between Anthony Bacon and Richard Crawshay, Bacon agreed to assign to Crawshay all his interest in certain lands and mines of coal and iron ore, situate at Cyfarthfa, in the county of Glamorgan (of which he then was in possession, under three leases for terms of ninety-nine years each, commencing respectively in the years 1763, 1765 and 1768), subject, after the 29th of September, 1815, to an annual rent of 5000*l.*, and a payment of 15*s.* a ton on all pig-iron annually made on the premises beyond 6400 tons. Richard Crawshay accordingly took possession of the premises, and carried on iron-works there; and in 1801, intending an extension of the works and the erection of new furnaces, it was agreed between him and Bacon that the payment of 15*s.* a ton beyond 6400 tons should cease at 10,700 tons. Disputes having arisen on the subject of that agreement in 1808, Richard Crawshay filed a bill to compel specific performance. The decree pronounced in March, 1810, directed Bacon to execute to Richard Crawshay an underlease of the premises, for all the terms which he or the trustees under his marriage settlement had therein, except the last day, subject to the yearly payments stipulated.

Richard Crawshay being seised and possessed of a considerable real and personal estate, including the iron-works at Cyfarthfa, and the buildings and machinery thereon, and a leasehold wharf at Cardiff, used for shipping iron, by his

will, dated the 26th of September, 1809, after giving, among other legacies, 100,000*l.* to his son William Crawshay, gave to Joseph Bailey 25,000*l.*, "to be transferred from my account in the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profit therefrom to be his own for ever." He then gave to Benjamin Hall, Esq., and his wife, of Abercarne, and to their heirs forever, all the residue of his estate, real and personal, and appointed Mr. Hall sole executor. By a codicil, dated the 4th of May, 1810, the testator gave to his son William Crawshay, "three-eighth shares of my concerns at *this iron-work, and of the premises at Cardiff; so the partnership will stand at my demise,—William Crawshay, three-eighths; Benjamin Hall, three-eighths; Joseph Bailey, two-eighths."

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The testator died on the 27th of June, 1810; Mr. Hall proved his will, and William Crawshay, Hall and Bailey, took possession of the iron-works, and carried them on as co-partners in the shares bequeathed to them under the firm of Crawshay, Hall and Bailey, but without any articles of co-partnership. In October, 1812, William Crawshay purchased the share of Bailey for 30,000*l.*, and from that time the works were conducted by William Crawshay and Hall, till the death of the latter, under the firm of Crawshay and Hall; no written articles of co-partnership were ever executed or prepared between them; but they verbally agreed that the future capital of the concern should be 160,000*l.*, which consisted of an imaginary or estimated value of the whole of the partnership property (100,000*l.* standing to the credit of William Crawshay, in respect of his five-eighth parts, and 60,000*l.*, to the credit of Mr. Hall, in respect of his three-eighth parts); and that the books should be balanced on the 31st of March in each

year, and the annual profits drawn out by William Crawshay and Hall, in proportion to their shares.

No underlease having been executed in the life of Crawshay, by indenture of the 21st of May, 1814, Bacon and his trustees, in obedience to the decree of 1810, assigned to Hall, his executors, &c., all the premises for the residue of the respective terms, except the last day of each, subject to the annual rent of 5000*l.*, and the payment of 15*s.* a ton on all pig-iron made yearly on the premises above 6400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of June, 1814, and endorsed on the assignment, Hall declared that he would stand possessed of the premises, as to three-eighth parts, in trust for himself, and as to five-eighth parts, in trust for William Crawshay; and Hall and William Crawshay entered into covenants for payment of their respective proportions of rent, and for mutual indemnity.

By indenture, dated the 23d of May, 1814, Bacon, in consideration of 32,500*l.*, paid,—three-eighths by Hall and five-eighths by William Crawshay—assigned to Joseph Kaye, his executors, &c., in trust for Hall and Crawshay, in proportion of three-eighths to the former and five-eighths to the latter, the rent of 15*s.* per ton on iron, then due or to become due. By another indenture of the same date, Bacon, in consideration *of 62,500*l.*, assigned to Kaye, in trust for William Crawshay, his reversionary interest in the premises, and the annual rent of 5000*l.* [*313

On the 1st of June, 1814, Bailey, in execution of the agreement of October, 1812, assigned to William Crawshay his share in the partnership property.

On the 31st of July, 1817, Mr. Hall died, leaving four sons (the eldest of the age of fifteen years) and a daughter. By his will, dated the 8th of the same month, he devised to George Maule, John Llewelin, and Joseph Kays, all his freehold, copyhold, and leasehold estate (except trust and

mortgage estates and the estates in which he was interested as a partner with William Crawshay at Cyfarthfa), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of twenty-one years, it should be lawful for his trustees, and the survivors and survivor of them, and the executors, etc., of such survivor, to carry on the iron-works and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will; and that if they should carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same; and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and in the manner thereinafter mentioned. The testator also declares, that if his son who first or alone should attain the age of twenty-one years should be desirous to have the iron-works and concerns or any of them continued, and should signify such desire to his trustees by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees the money at which such stock and effects should be estimated. The testator then directed the application to be made by his trustees of the profits of the iron-works during the suspense of his having a son who should attain twenty-one years, and of the amount of the valuation to be paid or secured by his son as before mentioned; and declared that if his iron-works and other concerns should be so carried on,

and his son who first *or alone should attain the age of twenty-one years should decline to carry on the same, or to give such security for the stock and effects employed therein, or if while it should be in suspense whether he should have any such son, his trustees should deem it advisable to discontinue the said iron-works and concerns, in either of such cases the iron-works and concerns should be discontinued, and the stock and effects employed in the same should be sold and disposed of in such manner as his trustees should judge prudent and reasonable, and the money arising from the sale, and the gains and profits previously arising from the iron-works and concerns, should be disposed of in the manner in which he had directed the gains and profits, and the money to be paid or secured by his son, in the event before mentioned, to be paid or applied, or as near thereto as circumstances would admit. The testator then appointed Maule, Llewellin, and Kaye, executors of his will, and guardians and managers of the estate of his children during their minorities, and he also appointed his executors and his wife guardians of the persons of his children, and he authorized his trustees to employ any persons in the management of the iron-works and concerns, at such salary, and to repose in them such trust or authority in conducting the trade, and in the management and disposal of the estate employed or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit. [*314

On the 12th of August, 1817, William Crawshay sent a written notice to the executors of Hall, that he considered the partnership absolutely dissolved by Hall's death, and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause filed by William Crawshay against the executors of Mr. Hall prayed a declaration that the partnership between the plaintiff and Hall, in the iron-

works and all the trade and business thereof, became absolutely dissolved or determined, by the death of Mr. Hall, or from that period; an account of the partnership dealings, from the foot of the last settlement thereof previous to his death, and payment of the balance (after satisfaction of the partnership debts) between the plaintiff and the executors of Mr. Hall, according to their respective interests; a sale of all the partnership effects, and a division of the proceeds.

The defendants, the executors of Hall, admitted that no written articles were ever entered into between William Crawshay and Hall, any such articles, as they believed, being considered unnecessary, *inasmuch as the pro- *315] portions to which the parties were entitled in the leasehold premises and the leases sufficiently ascertained their rights and interests as long as the leases endured. They denied that by the death of Hall, his interest in the premises and iron-works determined or was in any respect affected, submitting that they were entitled to the premises and iron-works, as tenants in common with William Crawshay, for the residue of the terms of years, for which they were holden, and to carry on iron-works for the benefit of the family of Hall, in the same manner as he carried on the same with William Crawshay, and according to the directions in his will, until one of his sons should attain the age of twenty-one years. They stated that the iron-works were absolutely necessary to the beneficial enjoyment of the leasehold premises; and they insisted, that it appeared from his will and codicil to be the intention of Richard Crawshay that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron-works, commensurate with the terms for which they were holden; that the joint interest which William Crawshay and Hall had therein was not an interest in an ordinary trading partnership, but an interest given by Richard Crawshaw to them for the benefit

of themselves and their respective families, commensurate with the terms of years for which the leasehold premises were holden; and that therefore no sale of the property ought to be directed by the Court in opposition to the bequest of Richard Crawshay, and to the will of Hall, whose family would in that event be deprived of the benefits intended and contemplated by him to be derived from the leasehold premises and iron-works.

The bills in the second cause, filed by the executors and the children of Mr. Hall, against William Crawshay, prayed a declaration that the executors were entitled to the leasehold premises and iron-works, for three-eighth parts thereof, as tenants in common with William Crawshay (who was entitled to the other five-eighth parts), until one of the sons of Hall should attain the age of twenty-one years, and to carry on the iron-works with William Crawshay, for the benefit of the family of Hall, in the same manner as Hall carried on the same, and according to the directions of his will, until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and iron-works, for three-eighths *parts thereof, as tenant in common with William Crawshay, for the remainder of the said terms of years, and to carry on the iron-works with William Crawshay accordingly. The bill also prayed the consequential accounts and directions. [*316

June 9th.—On this day a motion was made on behalf of William Crawshay, that it might be referred to the Master, to consider and approve a proper plan for the sale and disposal of the whole of the co-partnership, iron-works, property, estate, and effects, including the goodwill of the joint trade, and that the Master might proceed to a sale thereof immediately.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Horne*, and Mr. *Rigby*, in support of the motion.

The partnership, subsisting without any agreement for its continuance during a certain term, was dissolved by the death of Mr. Hall. As long as the surviving partner carries on the trade with the original capital, the representatives of the deceased are, according to the doctrine of *Crawshay* v. *Collins*, 15 Ves. 218, entitled to an account of the profits; but it is by no means clear that the surviving partner could render them responsible for a loss; an event of probable occurrence in a business producing very uncertain returns, highly profitable in some years, and in others proportionately disadvantageous. Mr. Crawshay, therefore, insists on his right to a judicial declaration of the dissolution of the partnership. The object of the motion is not to obtain the effect of a hearing; the decree would direct an account as well as a sale. But were the order for a sale decretal, the Court would not, on that objection alone, compel the surviving partner to carry on the trade, during the interval which must elapse before a decree can be obtained, upon the terms of admitting the representatives of the deceased to a participation in the profits, without being entitled to obtain from them contribution for a loss: *Waters* v. *Taylor*, 15 Ves. 10; *Forman* v. *Humfray*, 2 V. & B. 329; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

Sir *Arthur Piggott*, Mr. *Hart*, and Mr. *Winthrop*, against the motion.

The order sought is discretal, and cannot be obtained on motion. The object of Mr. Crawshay's suit is, a judicial declaration of the dissolution of the partnership and a sale. The Court will not, by their summary proceeding, supersede the established rules which protect its suitors and itself from premature decision.

*317] *Were the order in its nature interlocutory, at least it cannot be obtained on this application. The motion though entitled in both causes, can be made only in the first, the object of the second being foreign; and to the

first cause, neither the widow nor the children of Mr. Hall are parties. Under the residuary clause in the late Mr. Crawshay's will, Mrs. Hall became entitled to the residue, including the iron-works and stock-in-trade, as joint tenant with her husband; that interest was not devested by the codicil, and at the death of her husband, the whole devolved on her by survivorship; she is therefore a necessary party; and before the suits can proceed, the posthumous son of Mr. Hall, born since their institution, must be brought before the Court.

Independently of these preliminary objections, the order cannot be obtained on the merits. First, this is a case, not of partnership in trade, but of joint interest in land; each party may apply for a partition, or sell his own share, but cannot compel a sale of the whole. The manufacture of the produce was merely a mode of enjoyment of the land, not a trade. Next, the leases taken during long terms of years, for the purposes of the partnership, amount, in the absence of express agreement on that subject, to evidence of an intention to continue the partnership during the continuance of the leases. Lastly, it was the manifest intention of the late Mr. Crawshay, in the provisions of his will, that the duration of the partnership should be commensurate with the duration of the leases. The legacy of 25,000*l.* to Mr. Bailey is given expressly as a capital for him to become a partner "so long as the lease endures."

Lord Chancellor ELDON.—An important consideration is, whether this business is such as would subject the parties to become bankrupts. The distinction is obvious, and for this purpose material, between a partnership in trade and a joint interest in land. As between tenants in common, the Court does not dissolve the tenancy, but leaves each to sell his share; while in cases of partnership in trade, unless under particular circumstances of the trade, the rule is different.

Sir *Samuel Romilly*, in reply.—If on the death of Mr.

Hall his interest in the trade devolved to his widow by survivorship, his executors have no interest, and the second suit is improperly instituted by them. But the objection is untenable. The codicil of the late Mr. Crawshay withdrawing the trade from the operation *of the residuary clause in his will, disposes of three-eighths in favour of Mr. Hall alone, to the exclusion of his wife.

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The objection that the children are not parties to the first suit is equally unfounded. They have no fixed interest. Mr. Hall's will contains only a contingent bequest in favor of a child who shall attain twenty-one. The motion, however, is made in both causes, and the persons interested under that will are therefore before the Court.

It is clear that the property consists not of a mere joint interest in the land, but of a partnership in trade. The business includes the manufacture of ore purchased from strangers, and is such as subjects the parties to the bankrupt laws. Mr. Crawshay, the testator, described it as a trade. He gives not an interest in leasehold property, but a share in a trade, of the capital of which that leasehold property forms a part. The expression, "so long as the lease endures," assigns no definite period. Among the several subsisting leases, to which is the Court to refer those words? The testator evidently employed them only to denote the intention of passing his whole interest in this stock-in-trade. It is absurd to impute to him the design of imposing on his legatees the obligation of receiving as partners the representatives of such of them as died or became insolvent; a creditor, for example, taking out administration. On that construction, under the bankruptcy of one, his assignees, being competent to sell his interest, might introduce the purchaser as a new partner during the continuance of the leases.

The order sought is in strict confirmity with practice. The Court, more especially where infants are concerned,

takes immediate measures to terminate a trading, which is in effect conducted with the property of others.

Lord Chancellor ELDON.—The object of this motion is a sale of the partnership property; and in whatever terms expressed, the Court, if it directs a sale, will so direct it, that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all or some of the parties have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer, or to apply by motion, are the same in effect, though different in form. The *reason of that practice is, that *if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs; but being by death, or notice, or any other mode of determination, actually ended, no person in possession of the property can make any use of it inconsistent with that purpose.* If any person conducts it otherwise, the Court will appoint a manager to wind up the concern, and will direct inquiries in what manner it can be wound up most beneficially to those interested. The object of this motion, therefore, might be obtained, notwithstanding the objection of form; and the difficulty with regard to parties might also be remedied by allowing the case to stand over for the bill to be amended; and the question is to be considered on the part of Mr. Crawshay, as if the infant children of Mr. Hall had applied for a declaration that the partnership is not dissolved. [*319

The general rules of partnership are well settled. *Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party.* By that notice the partnership is dissolved to this extent, that the Court will compel

the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs.

So *death terminates a partnership*, and notice is no more than notice of the fact that death has terminated it. Without doubt in the absence of express, there may be an implied, contract, as to the duration of a partnership; but I must contradict all authority, if I say that wherever there is a partnership, the purchase of a leasehold interest, of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade are no more than stock-in-trade. I remember a case in the House of Lords about three years ago (the case of the Carron Company) in which the question was much discussed, whether, when partners purchase freehold estate for the purpose of trade, on dissolution that estate must not be considered as personalty with regard to the representatives of a deceased partner? See 1 Lead. Cas. Eq. 174, 3d ed.

The doctrine that death or notice ends a partnership has been *called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better or worse, they must abide by it; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it works a dissolution, there

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is strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative?

If Mr. Crawshay, the testator and owner of this property, had thought proper, by his will, to declare that his legatees should continue the partnership as long as the longest of the leases should endure, no person, I agree, claiming under that will, could enjoy the benefits conferred by it, without submitting to the inconveniences which it imposed; but I find nothing to that effect in his will. It might have been plausibly, though I think not effectually, contended, that Bailey and Hall were bound to continue partners as long as they lived; but the words cannot be represented as imperative on any other person. The difficulty on the part of those who insist that the partnership is to continue as long as the leases, is this, that they cannot insist that it is to continue between the original partners and their representatives; for they have admitted, and must admit, that each partner might assign his interest, and assign it to any number of individuals, in any number of shares; so that in truth the partnership, within two years after its formation, might not contain either an original partner, or a representative of any one of the original partners; but might consist entirely of a multitude of assignees.

In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land distinct from a partnership in trade—a mere interest in land, in which a partition could take place; for when persons having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have

entered into an agreement, which gives to that interest the
*321] *nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view; but both on the merits and on the objections of form the case deserves further consideration.

June 27.

Lord Chancellor ELDON.—It may be assumed, though the observation is not material to the purposes of this application, that the desire of Mr. Crawshay, the testator, was to keep the concern together. He gives a sum of 25,000*l.* to Mr. Bailey, as a capital for him to become a partner with his executor, Mr. Hall; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to Hall and his wife. The effect of the will and codicil combined is this,—by the former, the testator being possessed of the entire concern, bequeathed two-eighths to Bailey, the rest, including the three-eighths given by the codicil to William Crawshay, would have devolved under the residuary clause to Hall and his wife; the codicil, continuing the gift of two-eighths to Bailey, disposes of three-eighths to William Crawshay, and of the remaining three-eighths to Hall, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that Bailey sold his share to William Crawshay, and it has not been disputed in the course of the discussion, that every one of the legatees was at liberty to sell his interest; the consequence is, that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is, whether supposing this the hearing of the cause, the Court could order the property to be sold; and whether the nature of the concern, and of the interest of the several parties in it, is not such that, each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory applica-

tion, call on the Court for a sale of the whole? Mr. Crawshay, having bought the interest of Mr. Bailey, carried on the business jointly with Mr. Hall till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. Crawshay, and various branches of his family as *cestuis que trust* of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. Hall may thus impose on Mr. Crawshay the necessity of continuing *in partnership with his three executors, and their *cestuis* [*322 *que trust*, without admitting that on the same principle he might have imposed the obligation of receiving as partner any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. Crawshay might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. Hall, there being no articles of partnership or agreement for its continuance, without any notice, and for every purpose except that of winding up the concern, the partnership would cease, unless the surviving partner, and the representatives of the deceased, entered into some agreement for its continuance: and in the absence of articles or stipulations to the contrary, Crawshay, in the life of Hall, or Hall in the life of Crawshay, might, on the common principles of the contract, by notice have terminated the partnership. It is contended, that the late Mr. Crawshay, having formed this business, must have had an intention to keep it together as one concern, though he distributed different interests in it among different members of his

family; had he so said, without doubt those who took his bounty must have taken it on the terms which he imposed; but there is no such expression in his will or codicil; nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that Bailey should have an interest to the amount of 25,000*l.* and should be partner with his executor; but neither the terms nor the intent of the will impose on Bailey, or on his executor an obligation to carry on the partnership, except as between themselves; and if Bailey thought proper to sell to Crawshay his interest, a question might have arisen, as long as the executor was living, whether Crawshay, purchasing the interest of Bailey, did not purchase subject to the obligation which, it is said, this will imposes on Bailey; but it seems to me impossible to contend, that when the executor was dead, either Crawshay or Bailey were bound to carry on the trade with the executors of that executor, a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor, to the expiration of the leases.

It has also been insisted that the purchase of leases must be
*323] *considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that *there is no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases.* For ordinary purposes a lease is no more than stock-in-trade, and, as part of the stock, may be sold; nor would it be material that the estate purchased by a partnership was a freehold, if intended only as an article of stock; though a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock,

personal estate in enjoyment, though freehold in nature and quality. It is impossible therefore in my opinion to hold, that there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases or the longest lease. By the will of Mr. Hall, the question, whether his executors and trustees should continue in partnership, is left to their discretion; clear evidence of his opinion, that his interest might be separated from Crawshay's; if so, Crawshay's might be separated from his; and upon that construction of the will of the late Mr. Crawshay, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this, what is the nature of this partnership property? The *general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance, any one of the partners may terminate it;* and admitting the serious inconvenience which sometimes ensues, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested: but whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences; if they omit that precaution, courts of justice have no right to redeem them from the penalties of their imprudence.

With respect to mere joint-interests in land, I apprehend the rule to be different; the parties then becoming tenants in common, each cannot call on his companions to concur in a sale, but must sell his own interest. It is said that this is only the case of *tenancy in common of a mine; if so I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partner- [*324

ships; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy, it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders. On the evidence before me the case is left somewhat doubtful, though I think that the language of Mr. Hall's will, and of all the instruments, describes this as a trading concern; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership, the common principles must be applied.

Then comes the question, can the Court, in such a case, direct a sale by interlocutory order on motion? I have considered that question much, and *I think that the Court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved.* Consider the inconveniences of a contrary proceeding. By the hypothesis, the Court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern; we must then weigh the consequences of permitting the business of a partnership actually dissolved, to proceed until a decree for a sale; a decree which, in those circumstances, must necessarily be pronounced. An universal rule, that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the Court in many cases extremely mischievous; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dis-

solved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

I shall reserve my final decision till I have seen the affidavit; and it may be worth consideration, whether you will not in the meantime bring before the Court the posthumous child of Mr. Hall.

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*The affidavit of Mr. Crawshay, in explanation of the nature of the business, was to the following effect:—That the ironworks at Cyfarthfa had, from the period of their first establishment by his father, being conducted as a trading concern; that the produce of the mines consisted of ironstone, coal, and limestone, and that at the works large quantities of iron (of various specified descriptions) had been and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig-iron and finers' metal purchased in London, Plymouth and Bristol; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron-ore from Lancashire, pig-iron, and finers' metal, and of old wrought-iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and reselling them in that manufactured state; that such purchases (to a large amount), manufacture, and resale, had been made by the successive firms of Crawshay, Hall and Bailey, and Crawshay and Hall, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works, into bar and other iron for resale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first [*325

establishment of the works, the ironstone, coal, and limestone, produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the laborers.

July 23.

Lord Chancellor ELDON. — This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. Hall a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact which in any view of the case, seems clear, that Crawshay could not be constrained to remain a partner, but had the same right to dispose of his interest which was exercised by Mr Hall over his own. I am perfectly satisfied that the relief sought by that bill cannot be given, that is, that the executors of Mr. Hall cannot bind Crawshay to them; whether he can compel dissolution, is quite another *question. Mr. Hall having by his will disposed of his own share, and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership, unless it arises from express or implied contract or from directions in the will under which they all claim. In that will I find no such direction. It is calculated only to render Bailey a partner in the trade, but imposes no conditions on Crawshay. On that point, however, it may be sufficient to say, that had any such conditions been imposed, yet when the interests of Bailey and Crawshay became united in one person, and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintin that an obligation existed among the parties to continue in partnership during the remainder of the leases.

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I am also of opinion that, if this is to be considered as a partnership in trade, the utmost that can be made from the purchase of leases of longer or shorter duration, is to propose that as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases; but I find nothing here to authorize the conclusion that such was the intention. The purchase of a lease by a partnership is no more than the purchase of an article of stock, which when the partnership is dissolved must be sold. I lay aside the affidavit as to the nature of the undertaking, because there is sufficient in the wills of Crawshay and of Hall, to call on the plaintiffs in the second cause to show that this was not a trading partnership, if they meant to insist on that proposition. At present, I think that this was a trade.

The next question is, what is the consequence of Mrs. Hall not being a party? It is said that the effect of Crawshay's codicil is not such as to deprive Mrs. Hall of her interest under the will. That argument, if correct, might raise a question somewhat difficult; for considering the nature of the property, including freehold, leasehold, and personal chattels, and the power of Mr. Hall, as her husband, over her interest in many parts of that property, by reducing them into possession, unless we hold that the codicil deprived her of all the benefit which the residuary clause in the will conferred, it would not be easy to know what is become of her interest. Mr. Hall has taken on himself by his will to dispose of this property, and has given to his wife a provision which would put her to election, if she retains any interest in it; and should she [*327 *elect to take against the will, it requires consideration, that she is not a party. The infant also is not before the court; and some difficulty may arise from acting in their absence. On the other hand, it is impossible to call on Crawshay to continue a partner with the executors of

Hall, and to say that, whether they are considered as having the legal estate only or as trustees for the family of Hall, Crawshay is obliged to unite himself with them as a trustee carrying on the trade for the benefit of their *cestuis que trust;* or that he has not at this moment the same right which Hall by his will supposed his executors would have at his death, and his eldest son at twenty-one.

That brings it again to the question, whether this is a partnership in trade or a tenancy in common in land; and if a partnership in trade, whether the ordinary rule of the Court is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property, if the concern is of such a nature that it cannot be wound up at once? I consider it clear, that the general rule is not to wait for a decree; but at least if the parties differ as to the mode of carrying on the trade, the Court will, without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do, or call on the Court for its opinion, and a reference to the Master to state the best mode of winding up the concern, is what the parties will determine.

Mr. Crawshay says, what I think is not unreasonable, that he will not carry on the trade five-eighths for himself, and three-eighths for the benefit of others. I desire to be understood as not deciding against ordering a sale, if Mrs. Hall and the infant were before the Court. If Mr. Crawshay will not carry on the trade, it is for the benefit of all parties interested, absent as well as present, that a manager should be appointed; and it is clear that the Court possesses the power of making the order on motion, without waiting for a decree.

July 31.

Lord Chancellor ELDON.—The first question that remains to be considered is, whether Mrs. Hall has any interest in

this fund? How does that stand in the opinion of other persons? First, Mr. Hall disposed of the whole interest by his will; and his executors have filed a bill on the supposition that she had no interest; next, if the codicil had not the effect which I imagine on the will, the nature of the property renders it extremely improbable that Mrs. *Hall should retain any interest; lastly I think the codicil a revocation of the will, so far as concerns the [*328 trade. The question follows, is it clear that the partnership was dissolved by the death of Hall, or am I to say that his executors, or any of them, are partners at this day in this concern? After repeated consideration I entertain no doubt, either that if this is to be regarded as a trading concern the partnership was ended by his death, or that it was a trading concern; the consequence is, that being a trading concern, and the partnership being terminated by Hall's death, Crawshay would be justified in dealing with the property, since that event, as a person who is to wind up the concern: that introduces the question, whether I am to place a manager on the estate, or to leave Crawshay to deal with the property as surviving partner? In that character he is at liberty to deal with it for the purpose of winding up the concern; it is true that other parties are at liberty to deal with it in the same way, and in the event of differences between them, the Court can only appoint a manager to act under its direction. If application was made for a manager, it would be the duty of the Court, with regard to the infants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire the expediency of appointing a manager to wind up the business, or ordering a sale. The state of the market varies so much, that a sale, which might be beneficial at one moment and prejudicial at another, cannot be ordered without inquiry. I think that I shall not do wrong in directing a reference to the Master of the vacation to inquire whether it is for the advantage of all

parties that this property should be sold, and if so, on what terms, without prejudice to any question.

"His Lordship doth order, that it be referred to Mr. Courtenay, the Master of the vacation, to inquire and state to the Court, whether it will be for the benefit of all parties concerned in the works, that the same should be sold, and in what manner, as going works, or that they should be carried on for the purpose merely of winding up the concern; and for the purpose of making such inquiries, the parties are to be examined upon interrogatories, if the Master should so think fit, and to produce all books, papers, and writings relating to the said works, the production of which the said Master may think it proper to require; and it is ordered, that the said Master do proceed *de die in diem*." 31 July, 1818, Reg. Lib. A. 1817, fol. 1760.

*329] *By his report, dated 11th December, 1818, the Master, after stating that it was admitted that it would be highly injurious to all parties interested, to stop the works, or to carry them on merely for the purpose of winding up the concern, or to put them up to sale otherwise than as going works, and that William Crawshay has offered to purchase the whole of Mr. Hall's share for 90,000*l.*, certified that it would be for the benefit of the infants, and of all other parties concerned in the works, that the whole of the shares and interests in the said leasehold and other estates, etc., vested in the executors of Mr. Hall, should be sold to Mr. Crawshay at that price. By an order of the Vice-Chancellor, on the petition of Mr. Crawshay, the Report was confirmed, and it was "ordered, that the defendants, G. Maule. J. Llewellyn, and J. Kaye, as executors of the said B. Hall, Esq., the testator in the pleadings named, be at liberty to sell and dispose of, to the petitioner by private contract, at the sum of 90,000*l.*, ascertained and ap

portioned as in the said Report specified, all the estate, shares, right, and interest of them the defendants, as such executors as aforesaid, of and in the said iron-works, and the said late co-partnership of Crawshay and Hall, and in the leases, farms, lands, and buildings, wharf, machinery, etc." 24th December, 1818. Reg. Lib. A. 1818, fol. 204.

WATERS *v.* TAYLOR.

November 4, *December* 24, 1813.

[Reported 2 Ves. & Bea. 299.]

Partnership in the Opera House, dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated.

Decree accordingly for a sale of the whole concern; restraining the managing partner from acting, with liberty to either party to lay proposals before the Master for management until the sale.

This cause[1] coming on to be heard, the plaintiff, who claimed as executor of Mr. Gould, who was entitled by assignment from the defendant, Mr. Taylor, in 1803, to seven-sixteenth parts of the Italian *Opera House, and as mortgagee of the remaining shares, which continued to be the [*330 property of Taylor, by his bill prayed a decree of foreclosure of the mortgage, a dissolution of the partnership, an account of the transactions, and particularly the receipts and payments, of the defendant Taylor, an injunction restraining

[1] See the case stated in the Report upon the motion, 15 Ves. 10.

him from receiving any part of the income, and interfering in the concerns of the Opera House, and a direction to the Master to consider of a scheme for the sale of the joint property or for the future management. The defendant, Taylor, by his answer claiming as a creditor upon the result of the account, insisted on a lien upon the plaintiff's share for the balance, that should appear to be due.

Sir *Arthur Piggott*, Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Johnson*, for the plaintiff. Mr. *Richards*, Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Wetherell*, and Mr. *Shadwell*, for the defendant, Taylor.

For the plaintiff it was insisted, that if he was entitled to a decree, dissolving the partnership, the Court in directing the future management was not bound to the particular stipulations of the contract; but would consult the benefit of the parties.

Upon the question as to the dissolution of the partnership, *Sayer* v. *Bennett*, 1 Cox 107, and *Adams* v. *Liardet* (from a MS. of Sir Samuel Romilly, before Lord Thurlow) were cited. In the former, upon the insanity of a partner, an inquiry was directed, whether he was in such a state of mind as to be capable of conducting the business, but the result does not appear.

The Lord Chancellor (Lord Eldon) in the course of the argument inquired, how the sheriff executes the writ under a judgment against one partner, according to the present doctrine of courts of law, that he takes the interest of the partner; and in some way (it is not very clear how) they take an account of all the concerns; and the creditor sells the interest of the partner. Is not that a dissolution of the partnership?

Mr. *Cooke* (*amicus curiæ*) said, the way in which the sheriff executes the writ in practice, is by making a bill of sale of the actual interest: *Scott* v. *Sholey*, 8 East 467.

Lord Chancellor ELDON.—If the courts of law have followed courts of equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it has been ascertained what is the subject of sale and purchase. According to the old law (16 Vin. Ab. 242, 243, etc.), *I mean before Lord Mansfield's time, the sheriff under an execution against partnership effects took the undivided share of the debtor, without reference to the partnership account; but a court of equity would have set that right by taking the account, and ascertaining what the sheriff ought to have sold; the courts of law, however, have now repeatedly laid down (*Barhurst* v. *Clinkard*, 1 Show. 173; *Eddie* v. *Davidson*, Doug. 650), that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting, that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities; depending upon an account of all the concerns of the partners for years? [*331

By the express contract of these parties, which is the basis of this concern, whether a partnership, or to be described by any other denomination, Taylor was manager, subject to all the engagements to which Gould had been subject. Whether this is a partnership, which might be dissolved by filing the bill (which it is perhaps difficult to maintain), or for a term of years, or, as was contended in the case of the theatre on the other side of the Haymarket (*Morris* v. *Coleman*), without limits, as long as renewals could be obtained, is not extremely material in the view the Court is obliged to take of this case.

The case alleged is: that all these engagements have been violated from day to day; that performers have been employed without mutual consent; that this has been the

habit, and may be persevered in: so, as to the nightly receipt of the money, which, it is represented, being either left in a particular place, or paid to an agent, has in some way got to the disposition of Taylor; and the attempt of this Court to put an end to that has been rendered ineffectual by a slip in the terms of the injunction—a circumstance which I cannot regard, as the effect is, that the parties were under no prohibition. There is hardly one covenant which has not been violated. It is said the remedy is by repeated actions of covenant, and it is supposed that juries may have feelings of vengeance that may subject Mr. Taylor to such damages as may produce the full object of the plaintiff; but a court of equity has power to restrain and enjoin,—a power in many instances recognised by the law, as resting on that very circumstance, that without such interposition the party can do nothing but repeatedly resort to law; and when that has proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches.

*332] *It was supposed, that I had contradicted Lord Kenyon's doctrine in *Sayer* v. *Bennett*, 1 Cox 107. Certainly I did not contradict that doctrine, nor did I make any decree which, duly considered, was an assent to it. The case was no more than this: one partner becoming a lunatic, the others thought proper by their own act to put an end to the partnership, which they had no right to do, if he had been sane; and they continued to carry on the business with his capital, not being able to state what was his as a creditor and what was not his as a partner. That Lord Kenyon thought afforded a sufficient ground for saying the partnership was not determined; and he also held, that one partner cannot on account of the lunacy of another put an end to the partnership, but that object must be attained through the decree of a court of equity.

My decision was not intended either to support or im-

peach that; proceeding upon the particular circumstances of the case before me. The question whether lunacy is to be considered a dissolution, is not before me (*Huddleson's Case*, cited 2 Ves. 34); I shall therefore say no more upon it than this. If a case had arisen, in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it that he could not perform his contract, there could be no damages for the breach in consequence of the act of God; but it would be very difficult for a court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it. It will be quite time enough to determine that case when it shall arise; for as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short, and the degree may admit of great variety, I would not therefore lay down any general rule by anticipation, speculating upon such circumstances. I agree with Lord Thurlow, that the jurisdiction is most difficult and delicate, and to be exercised with great caution.

The real question here is quite different from *Adams* v. *Liardet*, which I take to be that in which Lord Thurlow's opinion was expressed. This question is, whether from the acts of Taylor himself it is not manifest, that this partnership cannot be carried on upon the terms for which the parties engaged: whether a single act has been done by him of late, that is not evidence, on his part, that he can no longer himself be bound by his contract, so as to *observe the terms of it; when he excludes himself from [*333 the concern and the partnership, as far as it is to be conducted upon the terms on which it was formed, and says he will carry it on upon other terms. Taking that to be his conduct, this comes to the common case of one partner ex-

cluding the other from the concern; as, if one will not, because he cannot, continue it upon the terms on which it was formed, the consequence must be, that he says his partner shall not, because he cannot, carry it upon those terms.

That is the true amount of this case. The one cannot engage a performer without the other's consent; having entered into stipulations only with reference to agreement, they have given me no means of extricating them from the difficulties arising from non-agreement. Suppose an opera at this time requires more than 300*l.* per week, or a new exhibition more than 500*l.*, if the plaintiff differs upon that, what is a judge to do but to look at the contract, as the only thing the Court can act upon: and if both parties agree that the contract cannot be acted on, that furnishes the means of saying there is an end of it, and their interests are to be regarded as if no such contract had existed. The parties by consent determine that there is an end of the concern, which cannot be carried on upon the terms stipulated; and the Court cannot substitute another contract.

In this view of the case, my opinion is that this contract is determined, and the parties must be treated accordingly: *Baring* v. *Dix*, 1 Cox 213. The decree as to the mortgage, etc., is of course. But another view of the case arises from the answer of Taylor claiming as a creditor upon the accounts, and that the Court, regarding this as partnership property, shall give him a lien upon the plaintiff's share for the balance that may be due on the account. Upon the same principle then, if the plaintiff shall appear to be a creditor, has not he a right to have Taylor's share sold? and then is the Court, winding up the concern, to sell the share of one, and not the whole joint property? Each has an interest to have the whole sold, which will sell much better than the shares, especially if unliquidated.

The most difficult question is that as to the appointment of a manager in the interval between the decree and the

sale. This joint concern ought to be brought to sale, if at all, upon the principles I have mentioned; placing them in the state in which they would be, if without any stipulation for management they were *respectively owners of given undivided shares, they agree upon given principles and prescribed terms for the management, which can no longer be carried on upon those principles and terms, and the question is, whether the Court can impose a manager before the sale, not upon the prescribed terms, but on such as may be advisable for all the parties concerned. With an inclination, that I shall have great difficulty to make that a part of the decree, without some previous inquiry, I reserve for further consideration that difficulty and material question, having expressed my opinion upon the rest of the case; in a word, that these parties have themselves dissolved this joint concern, as their conduct shows that they cannot carry it upon the terms stipulated. [*334

December 24.—The minutes, as corrected by the Lord Chancellor, declared, that the defendant Taylor was not entitled to act as manager until a sale; and that if the Master's opinion should be, that the property could not be immediately sold, either party was to be at liberty to lay proposals before him for the management until a sale.

Crawshay *v.* Maule and Waters *v.* Taylor are printed together, because they are generally cited as leading cases on the law relating to partnership, more especially whenever the question arises as to what amounts to, or is a sufficient reason for a court of equity to decree, a dissolution of partnership, and as to the important results therefrom, both to the partners themselves or to third parties connected with the partnership. These topics it is proposed to consider somewhat in detail in this note, so far as relates to ordinary private partnerships only.

Before doing so, however, it may be remarked, although it is usual for partners to regulate the terms upon which they agree to associate in any business by articles of partnership, yet that a private unincorporated partnership does not require to be evidenced by writing, and it may be entered into by a mere parol engagement, or be inferred from the acts of the parties: Peacock *v.* Peacock, 16 Ves. 49. See also Norton *v.* Seymour, 3 C. B. 792 (54 E. C. L. R.); Smith *v.* Sherwood, 10 Jur. 214; Beech *v.* Eyre, 5 M. & G. 415 (44 E. C. L. R.); 6 Scott N. R. 327; Heyhoe *v.* Burge, 9 C. B. 431 (67 E. C. L. R.).

We may also notice the different classes of partners. They may be (1) *Ostensible* partners, or those who really are and appear to the world as partners. (2) *Nominal* partners, or those who, though they *335] *have no interest in the firm, appear and are held out to the world as partners. (3) *Dormant* partners, or those who are not known to the world as partners, and do not intermeddle with the partnership affairs; but who, as they share in the profits, are ordinarily liable to third parties.

Having made these preliminary remarks, it is proposed to consider: 1. What constitutes a partnership. 2. The liability of persons as partners to third parties though not partners inter se—quasi partnership. 3. The liabilities of partners. 4. The rights and interests of partners in the partnership property. 5. The rights, duties, and obligations of partners between themselves. 6. The remedies of partners as between themselves. 7. The rights of partners against third parties. 8. The dissolution of partnership, when and how it may be effected. 9. The effects and consequences of a dissolution.

1. *What constitutes a partnership.*—Partnership may be defined to be a voluntary contract, whereby two or more competent persons put, or contract to put, something in common, whether it be money, effects, labor, and skill, or some or all of them, for some *lawful* purpose or business, in order that there may be a communion of profits arising therefrom between or amongst them: Coll. Partn. 2; Story Partn. § 2; Pothier Partn. by Tudor, p. 2.

It is worth while to examine carefully this definition of the contract of partnership, for it will be seen hereafter to have a most

important bearing upon many questions which arise, both between partners themselves and others.

First of all, partnership is said to be a *voluntary* contract, and herein it is clearly distinguishable from those cases in which a community of interest may exist, independently of contract or the will of the parties interested. Persons, for instance, who by deed, will, or gift *inter vivos*, become entitled to property, either as tenants in common or joint tenants, although they enjoy a community of interests, are not partners but part-owners. So if two or more persons purchase goods for the mere purpose of division, and not for the purpose of selling and dividing the profits, although there is a community of interest between them, it is not a partnership: Hoare *v.* Dawes, Doug. 371; Coope *v.* Eyre, 1 H. Black. 37; Gibson *v.* Lupton, 9 Bing. 297 (23 E. C. L. R.); Heap *v.* Dobson, 15 C. B. N. S. 460 (109 E. C. L. R.).

So likewise, although there is a community of interest between the representatives of a deceased partner and the surviving partners, there is not, independently of contract, any partnership between them: Pearce *v.* Chamberlain, 2 Ves. 33.

Upon the same principle, where persons engage to do some particular work, and receive money for it, not on a joint account or for their joint benefit, but to be divisible between them on receipt; the contracting parties, it seems, *will not be partners but joint contractors: Finckle *v.* Stacy, Sel. Ch. Ca. 9. See the remarks of Wigram, V.-C., 7 Hare 174. [*336

In the contract of partnership, moreover, which is founded upon the *delectus personæ*, no third party can be introduced, as a partner in the firm, without the consent of *all* the persons comprising it, although such third person might, without the consent of the rest, become a partner with an individual member of the firm in his share; for it has long since been established that a man may become a partner with A. when A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. See Ex parte Barrow, 2 Rose 255; Sir Charles Raymond's Case, cited 2 Rose 255; Bray *v.* Fromont, 6 Madd. 5; Goddard *v.* Hodges, 1 C. & M. 33; 3 Tyrw. 209.

Upon this ground, as was laid down in the principal case of Crawshay *v.* Maule, a surviving partner cannot, in the absence of a stipulation to that effect, be compelled to receive into the partner-

ship the representatives of a deceased partner: Pearce *v.* Chamberlain, 2 Ves. 33; Godfrey *v.* Browning, ib. 34, cited. So strictly was this principle adhered to in the Roman law, that even a *stipulation* for the admission of the heir of the deceased into the partnership was void. "*Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres succedat societati:*" Dig. lib. 17, t. 2, l. 59; and see Dig. lib. 17, t. 2, l. 35; Dig. lib. 17, t. 2, l. 52, s. 9; Dig. lib. 17, t. 2, l. 65, s. 11; Dig. lib. 17, t. 2, l. 70.

The law of England, however, very rightly does not restrain persons entering into a contract for a partnership, from *expressly stipulating* that upon the death of any of them, any person or class of persons may be introduced into the partnership: Stuart *v.* Earl of Bute, 3 Ves. 212; 11 Ves. 657; 1 Dow. 73; Balmain *v.* Shore, 9 Ves. 500; and see Warner *v.* Cunningham, 3 Dow. 76; Simmons *v.* Leonard, 3 Hare 581; Page *v.* Cox, 10 Hare 163; but such stipulation must be clear, otherwise the onus of showing the existence of a partnership, in order to render any such person or class of persons liable, will lie upon the surviving partners: Tatam *v.* Williams, 3 Hare 347, 356.

The option reserved to the executors of a deceased partner to enter into the partnership with a surviving partner must be accompanied by the obligation on the part of the surviving partner to admit them; and unless the option be confined to the representatives of the partner who shall die first, the surviving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him: Downs *v.* Collins, 6 Hare 418, 436.

With regard to the question, who are *competent* persons to enter into partnership, it may be observed that all persons *sui juris* may
*337] do so. Even in the case of an *infant*, his contract to become a partner is not void, but only voidable, as it may be for his benefit; and if, after attaining his majority, he either expressly intimates his desire to remain a partner, or does so impliedly, by not repudiating the contract within a reasonable time, he will be considered to have affirmed it, and his liability as a partner will attach: Holmes *v.* Blogg, 8 Taunt. 35, 508 (4 E. C. L. R.); Baylis *v.* Dineley, 3 M. & Selw. 477; Goode *v.* Harrison, 5 B. & Ald. 147, 156 (7 E. C. L. R.); and see Keane *v.* Boycott, 2 H. Black. 511, 514, 515.

An alien friend may undoubtedly contract a partnership in this country, but an alien enemy, or a person domiciled in an enemy's country, cannot do so, indeed, as we shall, hereafter see, a war breaking out between the countries of two partners, of itself effectually dissolves the partnership. See M'Connell *v.* Hunter, 3 B. & P. 113; Albretcht *v.* Sussmann, 2 Ves. & B. 323; O'Mealey *v.* Wilson, 1 Camp. 482, and the cases in the note thereto.

At common law a married woman is disabled from entering into the contract of partnership: Cosio *v.* De Bernales, R. & M. 102 (21 E. C. L. R.); 1 C. & P. 266 (12 E. C. L. R.), *ante*, p. 249. She may however do so under a special custom, as by the custom of London (Beard *v.* Webb, 2 Bos. & Pul. 93),—upon the civil death of her husband in consequence of profession or abjuration (Beard *v.* Webb, 2 Bos. & Pul. 93, 105; Lean *v.* Shutz, 2 Wm. Bl. 1199), upon the suspension of his martial rights by transportation for a term of years (Sparrow *v.* Carruthers, cited 2 Wm. Bl. 1197; 1 Term Rep. 6, 7; 1 Bos & Pul. 359; Carroll *v.* Blencow, 4 Esp. 27; Marsh *v.* Hutchinson, 2 Bos. & Pul. 231), or, in case the husband be a foreigner, if he has never come within the realms: De Gaillon *v.* L'Aigle, 1 Bos. & Pul. 357; Kay *v.* Duchesse de Pienne, 3 Camp. 123.

In equity if a woman is possessed of separate property, she may, it is conceived, enter into a contract of partnership so as to bind such property, although it would not be binding as against herself personally. See Hulme *v.* Tenant, 1 Leading Cas. Eq., 3d ed., p. 435, and note.

So likewise a married woman, after a judicial separation from her husband under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, can, it is presumed, as long as the separation continues, enter into the contract of partnership. See sect. 26; Macqueen on Div. and Matrim. Jurisdict. 63.

It is essential to the contract of partnership that each of the partners should put or contract to put something into the partnership; either money, effects, labor, or skill. But it is not necessary that what each of the contracting parties puts or contracts to put into the partnership should be of the same nature. If one brings, or promises to bring, money or goods, it is not necessary that the other *should in like manner bring the same; and it is sufficient that he should contribute his labor and industry. See [*338

Poth. Partnership, by Tudor, p. 6; Peacock *v.* Peacock, 16 Ves. 49; Reid *v.* Hollinshead, 4 B. & C. 878 (10 E. C. L. R.). The Roman law was the same, according to which it is said "Societatem uno pecuniam conferente, alio operam posse contrahi magis obtinuit:" L. i. Cod. Pro. Soc., Cod. 4, tit. 37, l. 1.

If there be any stipulation with regard to the property in the capital stock, either express or implied, such stipulation will of course be binding upon the partners: Ex parte Owen, 4 De G. & Sm. 351.

If there be no such stipulation, and no implication from the circumstances of the particular case leading to a different conclusion, there will be presumed to be a community of interest in the property as well as in the profit and loss: Story Partn. § 27; Baxter *v.* Newman, 8 Scott N. R. 1019; Farrar *v.* Beswick, 1 Mood. & Rob. 527; Collins *v.* Jackson, 31 Beav. 645; Nelson *v.* Bealby, 30 Beav. 472.

A partnership may exist in the capital stock, although the whole price is in the first instance, advanced by one party, the other contributing his time and skill and security in the selection and purchase of the stock. Thus in Reid *v.* Hollinshead, 4 B. & C. 867 (10 E. C. L. R.), A., a merchant in London, by letter directed B., a broker in Liverpool, to purchase 1000 bales of cotton, and stated that B. was to be allowed to be one-third interested *therein*, acting in the business free of commission. B. agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. B. purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. B. transmitted policies of insurance against loss by fire to A. and stated that the cotton was deposited in rooms rented by him (B.), and that he held the key for their joint security. It was held by the Court of King's Bench that B. was interested as a partner in the cotton, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave the pawnee a right to hold the goods against A.

An agreement by a person purchasing goods that another shall be interested in a certain proportion of the profits and loss of their sale, will not give the latter any property in the goods. Thus in Smith *v.* Watson, 2 B. & C. 401 (9 E. C. L. R.), an agreement was

entered into between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses. It was held by the Court of Kings's Bench that B. was not entitled to any share in the *property so purchased, or in the proceeds of it, although the agreement might render him liable as a partner to third persons. "A right to share in the profits of a particular adventure," said Bayley, J., "may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure." See also Meyer *v.* Sharpe, 5 Taunt. 74 (1 E. C. L. R.); Hesketh *v.* Blanchard, 4 East 144; Ex parte Hamper, 17 Ves. 404; Mair *v.* Glennie, 4 M. & Selw. 240. [*339

It is often a very important question to ascertain whether a partner has a property in the capital stock, for if he has he can pledge it (Reid *v.* Hollingshead, 4 B. & C. 867 (10 E. C. L. R.); whereas if he has an interest only in the profits he has not such power, and if he is a mere part-owner he can of course only pledge his own share.

A partnership must moreover be constituted for some *lawful purpose.* Thus if it be for an immoral object, as for the keeping of a house of ill-fame (Poth. Partn. by Tudor, p. 11), or a gambling-house (Watson *v.* Fletcher, 7 Gratt. 1), or if it be in contravention of an act of parliament (Gordon *v.* Howden, 12 Cl. & Fin. 237; and see Armstrong *v.* Lewis, 2 C. & M. 274; 3 Myl. & K. 53), it will be void.

Upon the same principle in the recent case of Hunter *v.* Wykes, 15 W. R. 125, the plaintiff brought an action against the defendant for a breach of contract in not taking him into partnership on a certain day. The defendant pleaded that he was a broker within 6th Anne, c. 16, and 57 Geo. III., and that on the said day, the plaintiff had not been admitted a broker pursuant to those acts. On demurrer it was held by the Court of Queen's Bench to be a good plea. "When," said Cockburn, C. J., "a man enters into partnership with another as a broker, it is plainly implied that he should be able to act as a broker, so that both parties might take their fair share of the work of the business in earning the profits. Here

there were duties on the exchange, therefore it was incumbent on the plaintiff to do all those out-of-door duties, to do which, in order that the law might not be violated, it was necessary that he should be admitted a broker. The defendant in his plea says, that inasmuch as if he had taken the plaintiff as a partner, the plaintiff could not have acted as a broker without a breach of the law, and that if the defendant had suffered the plaintiff so to act, there would have been a breach of the law by the defendant as well as by the plaintiff; that he the defendant was not bound to receive the plaintiff into partnership. That being so, showed that the plaintiff was not legally qualified to act, and that the defendant could not permit him to do so without a breach of the law. The *defendant therefore, is entitled to judgment."

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Another thing essential to the formation of the contract of partnership, at any rate as between the parties themselves, is that there should be a communion of the profits arising therefrom between the parties to the contract, which ordinarily implies a communion of loss: Dry *v.* Boswell, 1 Camp. 329; Radcliffe *v.* Rushworth, 33 Beav. 484. But any partner may enter into a stipulation with his co-partners, that he shall be free from loss, and that will be binding as between him and them (Fereday *v.* Hornderne, Jac. 144; Gilpin *v.* Enderby, 5 B. & Ald. 954 (7 E. C. L. R.); Bond *v.* Pittard, 3 M. & W. 357; Reade *v.* Bentley, 4 K. & J. 663); though his liability to strangers will not be thereby affected: Waugh *v.* Carver, 2 H. Bl. 235; 1 Smith's L. Cases 726, 4th ed.

Although it is clear where there is a community of interest in the capital stock and also a community of profits, that there exists a partnership between the parties themselves (Ex parte Gella, 1 Rose 297; Rawlinson *v.* Clarke, 15 M. & W. 292), it is not essential to constitute a partnership even between the parties themselves that there should be a communion of interest in the capital stock. For although the whole capital stock is contributed by one party and by contract is to remain his property exclusively, nevertheless, if there is between them a community of profit or of profit and loss, they will be partners both as regards themselves individually and with regard to third parties: Ex parte Hamper, 17 Ves. 404.

In the absence of any express stipulation or evidence (Warner *v.* Smith, 1 De G., J. & Sm. 337) showing the intention of the parties, partners will participate equally in the profits and losses of the con-

cern. See Peacock *v.* Peacock, 16 Ves. 49, in which case a father having taken his son into partnership without any express stipulation as to the share he was to have in the concern, upon an issue directed by Lord Eldon, which was tried before Lord Ellenborough, the jury held the son entitled to a fourth part of the profits (2 Campb. 45). On the case coming back to Lord Eldon, it was unnecessary for him to decide the question, as the parties considered themselves bound by the verdict, but he made the following comments in disapproval of it:—"The father," said his Lordship, "employed his son in his business; and as is frequently done by a father, meaning to introduce his son, the business was carried on in the name of "Peacock & Co." It appeared to me that the son, insisting that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners if partners in anything. In that view, the result of the issue that was directed appears to be extraordinary. The proposition being that the son was interested in some *share, not exceeding a moiety, the jury, in some way upon the footing of *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership." In Farrar *v.* Beswick, 1 Mood. & Rob. 527, Mr. Justice Parke held the same opinion as Lord Eldon; as did also Lord Cottenham, in Stewart *v.* Forbes, 1 Macn. & G. 146; and Sir J. Wigram, V.-C., in Webster *v.* Bray, 7 Hare 159, 179. There the question to be decided was in what shares two persons who had accepted the office of solicitors to a railway company were entitled in the emoluments, when they had made no arrangement as to the division of the business or the emoluments of the office, and a much larger portion of the work was done by the defendant than the plaintiff. Sir James Wigram, V.-C., said, "In the absence of previous arrangement between the parties, the remuneration to be paid to either for personal labor exceeding that contributed by the other, must be left to the honor of the other; that where that principle was wanting, a court of justice could not supply it, and that equality in the division of the profits would be the rule." See also Robinson *v.* Anderson, 20 Beav. 98; 7 De G., M. & G. 239. [*341

The law of Scotland, however, differs from that of England upon the point now in discussion, for it has been held by the House of

Lords that where there is no express contract between partners, it is not according to the law of Scotland a necessary presumption of law that the profits are to be divided in equal shares. But it is a question for a jury, upon evidence of all the circumstances, such as goodwill, skill, capital and labor, what the proportion of interest in the loss and profit should be: Thompson *v.* Williamson, 7 Bligh N. S. 432.

Although the contract of partnership itself does not determine in what proportion the partners are to participate in the profits of the business, it may be inferred from their dealings, as, for instance, from the entries in the partnership books, so as to rebut the ordinary presumption of equality. See Stewart *v.* Forbes, 1 M. &. G. 137 (39 E. C. L. R.), where Lord Cottenham, C., said, "The plaintiff puts this case in his bill, and his argument rests upon the supposition, that from 1830 to 1840 Sir Charles Forbes and the plaintiff were equal partners; and Peacock *v.* Peacock was relied on as a foundation for that assumption. In that case it was properly held, that in the *absence of any contract* between the parties, or any dealings from which a contract might be inferred, it would be assumed that the parties had carried on their business on terms of an equal partnership. That case has no application to the present, because there is in this case conclusive evidence, not from any form of contract, but from the books of the business, and the dealings between the parties, that such were not the terms on which the parties carried on their business. An equal partnership implies not *only
*342] an equal participation *de facto* in the profits and loss, but a right in each partner to claim and insist on such participation. But what would have been the decision in Peacock *v.* Peacock, if the books and accounts, instead of absolute silence as to the shares of the partner in each year, had described the shares in which the partners were entitled in the business, and had attributed to the plaintiff four-sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract."

An important question may be raised, when the whole of the capital belongs to one partner, or he has advanced a larger amount of capital than he was bound to do according to the partnership contract, whether, in the absence of any stipulation he shall be

allowed any interest for such capital, beyond his share in the profits.

It seems, however, that as a general rule, in the absence of any agreement, or a usage from which an agreement may be inferred, partners are not entitled as against the firm to interest upon the capital which they may have respectively brought in (Cooke *v.* Benbow, 3 De G., J. & Sm. 1; Millar *v.* Craig, 6 Beav. 433; and see Watney *v.* Wells, 2 Law Rep. Ch. App. 250), and the rule is the same even in the case where one partner has brought in the capital he had agreed so to do, and the other has neglected to do so: Hill *v.* King, 1 N. R. (L. C.) 161, 341.

Where, however, interest is payable on capital, it will be allowed until actual repayment, and not merely up to the day of the dissolution of the partnership: Pilling *v.* Pilling, 3 De G., J. & Sm. 162.

Interest, however, is payable on advances made *bonâ fide* by a partner to the firm for the purposes thereof, at all events, when made with the knowledge of the partners: Ex parte Chippendale, 4 De G., M. & G. 36; Ex parte Bignold, 22 Beav. 167; Troup's Case, 29 Beav. 353; Re Magdalena Steam Navigation Company, Johns. 690.

The rate allowed, unless a different rate is ordinarily paid by the custom of the trade (Fergusson *v.* Fyffe, 8 Cl. & Fin. 121; Bate *v.* Robins, 32 Beav. 73), or of that particular partnership (Re Magdalena Steam Navigation Company, Johns. 690), is simple interest at 5*l.* per cent.: Ex parte Bignold, 22 Beav. 167; Troup's Case, 29 Beav. 353.

As a general rule, however, a partner is not charged with interest on balances in his hands, or on sums drawn out or advanced to him (Webster *v.* Bray, 7 Hare 159; Cooke *v.* Benbow, 3 De G., J. & Sm. 1; Meymott *v.* Meymott, 31 Beav. 445; Rhodes *v.* Rhodes, Johns. 653; 6 Jur. N. S. 600; Stevens *v.* Cook 5 Id. 1415), unless he has fraudulently retained (Hutcheson *v.* Smith, 5 Ired. Eq. 117) or improperly applied the money of the firm: [*343 Evans **v.* Coventry, 8 De G., M. & G. 835.

A surviving partner may disentitle himself to interest by his having kept the accounts so badly that it was impossible for a long time to ascertain the balance due to him from his deceased partner: Boddam *v.* Ryley, 1 Bro. C. C. 239; 2 Bro. C. C. 2; 4 Bro. P. C. 561.

2. *Liability of persons as partners to third parties, though not partners inter se—quasi partnership.*—A person who is not a partner may make himself liable as one to third persons in two ways—1st, By sharing profits; 2d, By holding himself out as a partner.

1st. *Liability as a partner by sharing profits.*—As the law upon this "subject" has been considerably modified and altered by the important decision of Cox *v.* Hickman, 8 H. L. Cas. 268, in the House of Lords, and by the Act 28 & 29 Vict. c. 86 (both of which will be hereafter noticed), it will be more convenient briefly to refer to the result of the decisions prior thereto.

As to the law before Cox v. *Hickman and* 28 & 29 *Vict. c.* 86.—According to the old decisions as we have before observed, a person may be a partner, although he has no community in the partnership stock, if he is entitled to a share of the profits. But where he has a share in the profits, he may not be a partner so far as the firm is concerned, if it was intended that he should be a mere agent or clerk, although he may nevertheless be considered a partner so far as third parties are concerned. A difficulty often arises in ascertaining whether a contract for the payment of a salary dependent on the amount of the profits of a concern makes the recipient a partner or a mere agent. The cases upon this subject, in which very refined distinctions are taken, are ably reviewed in 1 Smith's Leading Cas. 740, 4th ed., and the learned author comes to the conclusion that whenever it appears that the agreement was intended by the partners themselves as one of *agency* or *service*, and the agent or servant is to be remunerated by a *portion of the profits*, then the contract would be considered as between themselves one of agency (Geddes *v.* Wallace, 2 Bligh 270; R. *v.* Hartley, Russ. & Ry. 139); but as between them and third persons as *one of partnership*: Smith *v.* Watson, 2 B. & C. 407 (9 E. C. L. R.); Ex parte Rowlandson, 1 Rose 91: Green *v.* Beasley, 2 Bing. N. C. 110 (29 E. C. L. R.); Ex parte Langdale, 18 Ves. 300. If, however, the agent or servant is to be remunerated not by a portion of the profits, but by part of a *gross fund or stock which is not altogether composed of the profits*, the contract *even as against third persons* will be one of *agency*, although that fund or stock may include the profits, so that in value, and the quantum of the agent's reward, will necessarily fluctuate with their fluctuation (Dry *v.* Boswell, 1 Campb. 329, 330; Cheap *v.* Cra-

mond, 4 B. & Ald. 663, 670 (6 E. C. L. R.); *Waugh *v.* Carver, 2 H. Bl. 235, 246, 247; Saville *v.* Robertson, 4 [*344 Term Rep. 720; Bond *v.* Pittard, 3 M. & W. 357; Pearson *v.* Skelton, 1 M. & W. 504); and it seems that where the agent or servant is not to receive a part of the profits *in specie*, but a sum of money calculated in proportion to a given quantum of the profits, he will not be a partner even as to third persons: Ex parte Hamper, 17 Ves. 404, 412; Ex parte Watson, 19 Ves. 461; and see Grace *v.* Smith, 2 Wm. Black. 998; Pott *v.* Eyton, 3 C. B. 32 (54 E. C. L. R.); Barry *v.* Nesham, 3 C. B. 641; Withington *v.* Herring, 3 M. & P. 30; Stocker *v.* Brockelbank, 3 M. & G. 250 (42 E. C. L. R.); R. *v.* Macdonald, 7 Jur. N. S. 1127; Harrington *v.* Churchward, 6 Jur. N. S. 576.

The option to become a partner and receive a share of the profits of a concern, even from a time past, is not of itself alone, and while it remains unexercised, sufficient to make the person having such option a partner: Gabriel *v.* Evill, 9 M. & W. 297; C. & M. 358; Ex parte Turquand, 2 M., D. & D. 340; Wilson *v.* Whitehead, 10 M. & W. 503. See Courteney *v.* Wagstaff, 16 C. B. N. S. 110 (111 E. C. L. R.).

A person receiving interest or an annuity, fixed as to amount and duration, for money lent to a firm, is not a partner, because he has no mutuality in the profits with the firm (Grace *v.* Smith, 2 Sir W. Black. 998); but if he received an annuity out of (Bond *v.* Pittard, 3 M. & W. 357, 361; Ex parte Wheeler, Buck 25; Ex parte Chuck, 8 Bing. 469 (21 E. C. L. R.); Ex parte Hamper, 17 Ves. 404, 412) or in lieu of the profits of a trade, or determinable on the cessation of the trade (Bloxham *v.* Pell, 2 Wm. Black. 999), or an annuity (Young *v.* Axtell, cited 2 H. Black. 242; Ex parte Wheeler, Buck 25), or a rate of interest (Ex parte Chuck, 8 Bing. 469 (21 E. C. L. R.), although it be contingent (Ex parte Wilson, Buck 48), fluctuating with the trade of the profits, he will be considered to be a partner. See Coll. Part. 26–29; Story Part. § 30–§ 70.

The reason given why in these cases, when it is held there is a community of profits, the person receiving a salary, an annuity, or interest, is considered to be a partner, is, that by taking a part of the profits he takes from the creditors a part of the fund which is their proper security for payment to them of their debts: Waugh *v.*

Carver, 2 H. Black. 235; Barry *v.* Nesham, 16 L. J. (C. P.) 21. And it is upon this ground that a *dormant* partner, that is to say, one who, without being known to third parties as a partner, receives a share of the profits of the firm, is liable for its engagements: Robinson *v.* Wilkinson, 3 Price 538; Wintle *v.* Crowther, 1 C. & J. 316.

Departure in Cox v. *Hickman from the rule as to the effect of sharing profits.*—In the important case of Cox *v.* Hickman, 8 H. L. Cas. 268, the principles upon which those cases which decide that the mere participation in the profits of *a concern is the test for determining whether a person is liable to third persons as a partner, have been departed from, and it was laid down, in a judgment deserving a most careful perusal, that "it is not strictly correct to say that a person's right to share in the profits makes a person liable to the debts of the trade; but that the correct mode of stating the proposition is to say that the same thing which entitles him to the one renders him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e. that he stood in the relation of principal* towards the persons acting ostensibly as traders, by whom the liabilities have been incurred, and under whose management the profits have been made:" per Lord Cranworth in Cox *v.* Hickman, 8 H. L. Cas. 306. Hence it was held in that case that the mere concurrence of creditors in an arrangement under which they permitted their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, did not make them partners with their debtor, or the trustees.

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The material facts of Cox *v.* Hickman were as follows:—

B. Smith and J. T. Smith, trading in the name of Smith & Son, becoming embarrassed, executed a deed to which they were parties of the first part; five of the creditors (of whom Cox and Wheatcroft were two) as trustees of the second part; and the general scheduled creditors (among whom the trustees were named) of the third part. The deed assigned the property of Smith & Son to the trustees, and empowered the trustees to carry on the business under the name of "The Stanton Iron Company," to execute all contracts and instruments necessary to carry it on, to pay out of the gross income the rent of the business premises, interest of a moiety of the debt, and the expenses of carrying on the business, and to *divide the net in-*

come of the business remaining after answering the aforesaid purposes, unto and among the creditors of the Smiths, and each of them in rateable proportions, according to the amount of their respective debts; but it was provided that in distributing such net income the same should be deemed and taken to be the joint property of the Smiths. There was also a power to the majority of the creditors, assembled at a meeting, to make rules for conducting the business, or to put an end to it altogether; and after the debts had been discharged, the property was to be re-transferred by the trustees to the Smiths. Cox, one of the five trustees, never acted. Wheatcroft acted for six weeks, and then resigned. Some time afterwards, the other trustees, who continued to carry on business, became indebted to Hickman for goods supplied to the Company, in payment for which they accepted bills of exchange (drawn by Hickman), "per proc. the Stanton Iron Company." The bills having been dishonored, an action was brought against Cox and Wheatcroft, charging them as partners in the *concern, either as being trustees or creditors for whose benefit the business was carried on, or as being persons who had been held out as partners. [*346

The cause was tried in 1856, before Jervis, C. J., when a verdict was found for the defendants; but on motion on leave reserved, the verdict was entered for the plaintiff: Hickman *v.* Cox, 18 C. B. 617 (86 E. C. L. R.). The case was taken to the Exchequer Chamber, where the judges being equally divided, the judgment of the Common Pleas was affirmed: Hickman *v.* Cox, 3 C. B. N. S. 523 (91 E. C. L. R.).

Upon the case coming on to be heard in the House of Lords, the judges consulted were again equally divided. Their lordships, however, were unanimously of opinion, that there was no partnership created by the deed, so far as regarded the scheduled creditors, and that the defendants (who were not liable as trustees) could not be sued as scheduled creditors as partners in the company. The grounds upon which the decision proceeded are very clearly stated by Lord Wensleydale. "A man," says his lordship, "who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on a trade,

and share the profits of it, each is a principal and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent who had to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract, by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner. Can we then collect from the trust-deed that each of the subscribing creditors is a partner with the trustees, and by the mere signature of the deed constitutes them his agents for carrying on the business on the account of himself and the rest of the creditors? I think not. It is true that by this deed the creditors will gain an advantage by the trustees carrying on the trade; for if it is profitable, they may get their debts paid; but this is not that sharing of profits which constitutes the relation of principal, agent, and partner. If a creditor were to agree with his debtor, to give the latter time to pay his debt, till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him his agent, to contract debts in the way of his trade; nor do I think that it would make any *347] *difference, that he stipulated that the debtor should pay the debt out of the profits of the trade. The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of the existing funds, and partly out of the expected profits of their trade, and all their effects are placed in the hands of the trustees as middlemen between them and their creditors, to effect the object of the deed—the payment of their debts. These effects are placed in the hands of the trustees as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreement to receive this debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees. The trustees are certainly liable, because they actually contract by their

undoubted agent; but the creditors are not, because the trustees are not their agents."

Upon the same principle, in *The English and Irish Church and University Assurance Society*, 1 Hem. & Mill. 85, it was held by Sir W. Page Wood, V.-C., that the holder of a policy of assurance was not liable as a partner with the members of the society, either to the holders of other policies issued by it, or to its other creditors, because he was entitled to be paid, in addition to the sum assured, such further sums as should be appropriated by way of bonus or addition thereto. See also Kelshaw *v.* Jukes, 3 B. & S. 847 (113 E. C. L. R.); Bullen *v.* Sharp, 1 Law Rep. C. P. 86; Shaw *v.* Galt, 16 Ired. Com. Law Rep. 357.

Further limitation of the rule as to the effect of sharing profits by 28 *&* 29 *Vict. c.* 86.—The liability which according to the decisions (especially those before Cox *v.* Hichman) was incurred by persons sharing the profits of a concern, has been to a certain extent limited by the recent Act of 28 & 29 Vict. c. 86, entitled "An Act to Amend the Law of Partnership."

By this Act, which received the royal assent on the 5th July, 1865, it is enacted that, "The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a *contract in writing* with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such." (Sect. 1.)

"No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner." (Sect. 2.)

*"No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader." (Sect. 3.) [*348

"No person receiving by way of annuity or otherwise a

portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall by reason only of such receipt, be deemed to be a partner of or to be subject to the liabilities of the person carrying on such business." (Sect. 4.)

"In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less then twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied." (Sect. 5.)

"In the construction of this Act the word 'person' shall include a partnership firm, a joint stock company, and a corporation." (Sect. 6.)

Liability from a person holding himself out as a Partner.—If a person allow his name to be used in a business, or in any way hold himself out to the world as a partner in a firm, although he does not share the profits or losses (Ex parte Watson, 19 Ves. 461; Kirkwood *v.* Cheetham, 2 Fos. & Fin. 798), he will, as regards third parties, be equally liable as if he were actually one (Ex parte Watson, 19 Ves. 459, 461; Fox *v.* Clifton, 6 Bing. 776 (19 E. C. L. R.); Parker *v.* Barker, 1 B. & B. 9 (5 E. C. L. R.); Goode *v.* Harrison, 5 B. & Ald. 147 (7 E. C. L. R.); Bond *v.* Pittard, 3 Mees. & W. 357; Bonfield *v.* Smith, 12 Mees. & W. 405; Waugh *v.* Carver, 2 H. Black. 235; Young *v.* Axtell, Id. cited 242; Gurney *v.* Evans, 3 Hurlst. & N. 122; Baird *v.* Planque, 1 F. & F. 344; Edmundson *v.* Thompson, 2 F. & F. 564; 8 Jur. (N. S.) 235; Radcliffe *v.* Rushworth, 33 Beav. 484), and it is not necessary that such person should be identified by his Christian and surname: it will be enough that he should be so pointed at as to be distinctly identified: Martyn *v.* Gray, 14 C. B. N. S. 824, 839 (108 E. C. L. R.); and see Maddick *v.* Marshall, 16 C. B. N. S. 378 (111 E. C. L. R.); 17 Id. 829 (112 E. C. L. R.). And it is immaterial whether the person holding himself out as a partner was induced by

fraud so to hold himself out as a partner: Ellis *v.* Schmæch, 5 Bing, 521 (15 E. C. L. R.); Ex parte Broome, Rose 691; Collingwood *v.* *Berkeley, 15 C. B. N. S. 145 (109 E. C. L. R.); Maddick *v.* Marshall, 16 C. B. N. S. 387 (111 E. C. L. R.); [*349 17 Id. 829 (112 E. C. L. R.). And a person may be liable even though it be known that he does not share the profits and losses: Brown *v.* Leonard, 2 Chit. 120 (18 E. C. L. R.); but see Alderson *v.* Pope, 1 Campb. 404, note.

A person will not be liable for having held himself out as a partner, unless the holding out was an act done by himself, or by others by his authority, expressed or implied, and unless it was made known to the person seeking to render him liable as a partner (Fox *v.* Clifton, 6 Bing. 776 (19 E. C. L. R.); Pott *v.* Eyton, 3 C. B. 32 (54 E. C. L. R.); Newsome *v.* Coles, 2 Campb. 617; Edmundson *v.* Thompson, 2 F. & F. 564; 8 Jur. N. S. 235; Cornelius *v.* Harris, 2 F. & F. 758) before the contract was entered into with respect to which the question of liability arises: Baird *v.* Planque, 1 F. & F. 344.

The continuation, however, of the business on the death of a partner by the survivor in the old name, will not constitute such a holding out, even to the old customers or correspondents of the firm, as will render the executor liable for the acts done by the surviving partner after the decease of his co-partner (Webster *v.* Webster, 3 Swanst. 490; Devaynes *v.* Noble (Houlton's Case), 1 Mer. 616; Vulliamy *v.* Noble, 3 Id. 614), but the result might be different if the surviving partner using the old name were the executor, as he might thereby render the estate liable: Vulliamy *v.* Noble, 3 Mer. 614.

3. *Liabilities of Partners.*—One partner by virtue of the relation of partnership is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him by virtue of that relation all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged. Any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to

third persons who acquire rights by its exercise, unless they know that such restrictions have been made: Hawken *v.* Bourne, 8 M. & W. 710. This is a good summary of the law on this branch of the subject, but for further information relating to it the reader is referred to the case of Sandilands *v.* Marsh, *ante*, p. 285, and note.

The liability of one partner for the acts and dealings of the others begins with the commencement of the partnership, and it is immaterial that the deed of partnership was not signed when the alleged liability occurred, if the parties had then acted as partners: Battley *v.* Lewis, 1 M. & G. 155 (39 E. C. L. R.); 1 Scott N. R. 143. He is not liable to third parties for contracts made previous *to the commencement of the partnership (Catt *v.* Howard, *350] 3 Stark. 5 (3 E. C. L. R.); Saville *v.* Robertson, 4 Term Rep. 720; Fox *v.* Clifton, 6 Bing. 776 (19 E. C. L. R.)), even although it may have been agreed by the partners among themselves that the partnership was to have a retrospective operation, so as to relate back previous to the creation of the alleged liability; "for although the retrospective date of the partnership may affect the account between the partners, it will not affect the rights of third persons:" Vere *v.* Ashby, 10 B. & C. 288, 298 (21 E. C. L. R.); Young *v.* Hunter, 4 Taunt. 582; Dickinson *v.* Valpy, 10 B. & C. 142 (21 E. C. L. R.).

Nor is a person liable for goods furnished *while* he was a member of a firm under a contract made *before* he became one: Whitehead *v.* Barron, 2 M. & R. 248; Beale *v.* Mouls, 10 Q. B. 796 (59 E. C. L. R.).

If a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the meantime enter into contracts, it seems to be clear that he is not bound by them, on the simple ground that he has not authorized them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having in substance given that authority): per Parke, J., in Dickinson *v.* Valpy, 10 B. & C. 142 (21 E. C. L. R.); see also Howell *v.* Brodie, 6 Bing. N. C. 44

(36 E. C. L. R.); Hawken *v.* Bourne, 8 M. & W. 703; Gabriel *v.* Evill, 9 Id. 297; Barnett *v.* Lambert, 15 Id. 489.

Another important question is, when does the liability of a person who has entered into a partnership cease with regard to third parties, for the acts of the firm?

In the case of an *ostensible* partner it is clear that after he has retired from the partnership, and given *proper* notice of the dissolution, although he will be liable for previous (Wood *v.* Braddick, 1 Taunt. 104; Ault *v.* Goodrich, 4 Russ. 430), he will not be liable for the subsequent (Pinder *v.* Wilks, 5 Taunt. 612 (1 E. C. L. R.); Abel *v.* Sutton, 3 Esp. 108; Wrightson *v.* Pullan, 1 Stark. 375 (2 E. C. L. R.); Heath *v.* Sansom, 4 B. & Ad. 177 (24 E. C. L. R.)) contracts of his late partners.

If however he has not given proper notice he will be liable for all contracts made even after his retirement, for it is but just that as he holds himself out to the world as being still a member of a firm, he should be responsible for its engagements: Parkin *v.* Carruthers, 3 Esp. 248; Stables *v.* Eley, 1 C. & P. 614 (12 E. C. L. R.); Graham *v.* Hope, 1 Peake 154.

With regard to what is proper notice, it seems that notice in "The Gazette" of the dissolution of partnership is sufficient as against parties who have not previously dealt with the firm: Godfrey *v.* Turnbull, 1 Esp. 371; Wrightson *v.* Pullan, 1 Stark. 375 (2 E. C. C. R.); but actual notice should be sent to those [*351 *with whom the firm has had dealings (Graham *v.* Hope, 1 Peake 154; Kirwan *v.* Kirwan, 2 C. & M. 617 (41 E. C. L. R.); 4 Tyrw. 491); and this is generally done by means of a circular letter: Newsome *v.* Coles, 2 Campb. 617; Jenkins *v.* Blizard, 1 Stark. 418 (2 E. C. L. R.); M'Iver *v.* Humble, 16 East 169; Ex parte Burton, 1 G. & J. 207; Ex parte Leaf, 1 Deac. 176.

Although notice may not have been expressly given, it will under certain circumstances be presumed. Thus where a change had taken place in names of the firm in the printed checks of a banking-house, it was held that it was a sufficeint notice to the customers of a change in the firm: Barfoot *v.* Goodall, 3 Campb. 147; Hart *v.* Alexander, 2 M. & W. 484.

Although a person may have given notice of his retirement from a firm, he will still continue liable if he permits his name to be used by his late partners, where, for instance, he allows his name to re-

main on the door of the house of business: Williams *v.* Keats, 2 Stark. 290 (3 E. C. L. R.); Dolman *v.* Orchard, 2 C. & P. 104 (12 E. C. L. R.); Brown *v.* Leonard, 2 Chit. 120 (18 E. C. L. R.); Smith *v.* Winter, 4 M. & W. 454; Faldo *v.* Griffin, 1 F. & F. 145; but he will not be liable if his name is used by his late partners without his authority: Newsome *v.* Coles, 2 Campb. 617.

A *dormant* partner is only chargeable with respect to the liabilities of the firm contracted when he was actually a partner, receiving the emoluments and profits of the business; and it is not necessary for him to give notice of his retirement (Evans *v.* Drummond, 4 4 Esp. 89, 90; Heath *v.* Sansom, 4 B. & Ad. 177 (24 E. C. L. R.); Brooke *v.* Enderby, 2 B. & B. 71 (6 E. C. L. R.)) except to those who were aware of his being a partner; for unless notice of his retirement be given to such persons he will be liable for debts contracted by the firm after his retirement: Farrar *v.* Deflinne, 1 C. & K. 580 (47 E. C. L. R.); Evans *v.* Drummond, 4 Esp. 89; Heath *v.* Sansom, 4 B. & Ad. 177 (24 E. C. L. R.); Carter *v.* Whalley, 1 B. & Ad. 11 (20 E. C. L. R.); Edmundson *v.* Blakey, 31 L. J. Exch. 207.

When a partnership is dissolved by the *death* of one of the partners, his personal representatives will not be liable at *law* for the contracts entered into by the firm when the deceased was a member of it, inasmuch as at *law* the liability survives, and a remedy only exists against the survivors. In *equity*, however, as a partnership debt is several as well as joint, the estate of a deceased partner remains liable to the creditors of the firm, until the debts which affected him at the time of his death have been fully discharged: Vulliamy *v.* Noble, 3 Meriv. 593; Winter *v.* Innes, 4 Myl. & Cr. 109.

It seems that where the surviving partner is bankrupt or insolvent, the joint creditors in a suit to administer in equity the estate of the deceased partner will be postponed to separate creditors as against the separate estate of the deceased partner: Gray *v.* Chiswell, 9 Ves. 118; Fisher *v.* Farrington, *Seton on Decrees, cited 1 Myl. & K. 583; Ridgway *v.* Clare, 19 Beav. 111, 116; Lodge *v.* Prichard, 4 Giff. 294; 1 De G., J. & Sm. 610; Whittingstall *v.* Grover, 10 W. R. 53.

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The joint creditors however of a deceased partner may in the first instance proceed in equity against his representatives in order to

obtain satisfaction out of his estate, although it be not proved that the surviving partner is insolvent. See Wilkinson *v.* Henderson, 1 Myl. & K. 582. There the plaintiff was a creditor of a firm, and one of the members thereof having died, he filed a bill on behalf of himself and all other joint creditors against the executors of the deceased partner, and against the surviving partner, and it prayed payment of the partnership debts out of the estate of the deceased partner. Sir J. Leach, M. R., held that the plaintiff was entitled to a decree for the benefit of himself and all other joint creditors. "All the authorities," said his honor, "establish that in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and that, the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that, if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering, what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the deceased partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that according to the two decisions in Sleech's Case in the cause of Devaynes *v.* Noble, 1 Meriv. 536, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable, as between the part-

*353] ners, without first having resort to *dividends which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself and all other joint creditors, for the payment of his debt out of the assets of the deceased partner."

Courts of equity moreover will treat a joint security as several where it has been given for an antecedent partnership debt: Burn *v.* Burn, 3 Ves. 573; Orr *v.* Chase, 1 Meriv. 729; but where an obligation executed by partners is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the parties, its extent can only be measured by the words in which it is conceived, and a court of equity will not construe it differently from what a court of law would: Sumner *v.* Powell, 2 Meriv. 30, 36, 37; and see Wilmer *v.* Currey, 2 De G. & Sm. 347. There a firm of three dissolved partnership, one of them retiring; and by the deed of dissolution, the two continuing partners covenanted for themselves, their heirs, executors, and administrators, that they or one of them would pay to the outgoing partner certain specified sums. It was held by Sir J. L. Knight Bruce, V.-C., that this constituted only a joint liability at law, and could not be construed otherwise in equity, and a demurrer to a creditor's bill filed by the outgoing partner against the executrix of one of the covenantors, who died before the other, was allowed.

The claims, however, against a retired partner and the estate of a deceased partner, will be lessened by all payments made by his late companions, and all appropriations of payments subsequent to the dissolution of the partnership, in satisfaction of the demands against the partnership. See Clayton's Case, *ante*, p. 1; 1 Meriv. 572; Brooke *v.* Enderby, 2 B. & B. 70 (6 E. C. L. R.); Newmarch *v.* Clay, 14 East 239; Toulmin *v.* Copland, 3 You. & Col. Exch. Cas. 625; 1 West. App. Cas. 164; Jones *v.* Maund, 3 You. & Col. 347; Pemberton *v.* Oakes, 4 Russ. 154.

Upon the dissolution of a partnership, it is frequently agreed that the debts due to and from the firm shall be received and paid by the new firm, or one of the late partners. No arrangement, however, between the partners alone can vary the right of the creditors. The law, however, is now settled, that by the consent of *all* parties, the creditor, the old firm, and the new firm, or one of

the late partners, the debts of the old firm may be transferred to the new firm, or one of the late partners: Hart *v.* Alexander, 2 Mees. & W. 493; Kirwan *v.* Kirwan, 2 C. & M. 617 (41 E. C. L. R.); 4 Tyrw. 491; Good *v.* Cheesman, 2 B. & Ad. 328 (22 E. C. L. R.); Cartwright *v.* Cooke, 3 B. & Ad. 703 (23 E. C. L. R.).

It will be found that in some cases at law, even where it was clear that the creditor *intended* to take the separate security of the continuing partner, in lieu of the joint liability of the dissolved firm, the retired partner was held not *to be discharged, as in David *v.* Ellice, 5 B. & C. 196 (11 E. C. L. R.), and [*354 Lodge *v.* Dicas, 3 B. & Ald. 611 (5 E. C. L. R.), in which a creditor, with the knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt: but it was held, that he had not thereby released the retired partner upon the ground of want of consideration for his so doing.

But these cases have been disapproved of by the subsequent authorities, and it seems now to be clear, that if a creditor of a firm agree with them to take, and does take the separate security, as, for instance, the bill, of one partner in discharge of the joint debt, the other partner will be discharged: Thompson *v.* Percival, 3 N. & M. 167 (28 E. C. L. R.); 5 B. & Ad. 925 (27 E. C. L. R.); Read *v.* Winter, 5 Esp. 122; Evans *v.* Drummond, 4 Esp. 89; Kirwan *v.* Kirwan, 2 C. & M. 617 (41 E. C. L. R.); 4 Tyrw. 491; Winter *v.* Innes, 4 Myl. & Cr. 109. In Lyth *v.* Ault, 7 Exch. 669, it was held by the Court of Exchequer that the acceptance by one creditor of the sole and separate liability of one of two or more partners was a good consideration for an agreement to discharge all the other debtors from liability. "It is demonstrable," said Alderson, B., "that the sole security of A. may be a better thing than the joint security of A. and B.; for by accepting the sole security of A., instead of the joint security of both debtors, the creditor possesses a legal remedy against A. during his lifetime, and against his assets after his death, and no security whatever against B. Now as to the case where the security is joint, after the death of A., there exists a legal liability of B., and no legal liability of A.'s assets; but an equitable remedy against the assets of A., subject to the necessity of making B. a party to a suit in equity. Now these two securities are different things, and therefore a bargain to take the one for the other is good. Cases may be suggested of A. being rich

and B. poor, in which the advantage of taking A. as the debtor in lieu of A. and B. is clear; or it may be that A. is as rich as B., in which case the creditor may fairly consider that one debtor alone is preferable to both together."

The acceptance however of the note of one of the partners as a collateral security (Bedford *v.* Deakin, 2 B. & Ald. 210) or the receipt of interest from him on the joint debt (Gough *v.* Davies, 4 Price 200), will not be considered as conclusive evidence of the intention of a creditor to exchange the liability of the firm for that of a single partner.

The question whether such an agreement has been made, is one for the determination of a jury: Thompson *v.* Percival, 3 N. & M. 167 (28 E. C. L. R.); 5 B. & Ad. 925 (27 E. C. L. R.); Kirwan *v.* Kirwan, 2 C. & M. 617; 4 Tyrw. 491; Hart *v.* Alexander, 2 M. & W. 484; Kemp *v.* Corington, 28 L. T. 289; in short, as observed by Sir James Wigram, V.-C., "where a partner retires from a firm, and a customer has notice of his *retirement, and afterwards continues his dealing with the new firm, without making any claim on the retired partner, a jury may, from circumstances, presume that the customer agreed to discharge the retired partner, and to accept the new firm as debtors, instead of the old one. In deciding whether such agreement ought to be presumed, the nature of the dealings subsequently to the retirement, the form of the accounts rendered, the time elapsed, and other circumstances may be most material:" Benson *v.* Hadfield, 4 Hare 37.

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The cases at law upon this subject have necessarily arisen where the dissolution of the partnership has taken place by arrangement between the partners, and not by death. In equity, however, when the dissolution has taken place in consequence of the death of one of the partners, the claims against the estates of deceased partners will be regulated by the same principles, and an intention must appear, or an agreement be proved to release the estate of the deceased partner. Hence the estate of one of two partners will not, after his death be discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, and forbears for some years, at the survivor's request, to take any steps to enforce payment of his debt.

But the result will be otherwise where the transactions show that the creditor has accepted the liability of the survivor in discharge

of the liability of the partnership; Winter *v.* Innes, 4 Myl. & Cr. 101.

It may be here mentioned, that payment of a debt by one partner (Innes *v.* Stephenson, 1 Moo. & R. 145; Cheap *v.* Cramond, 4 B. & Ald. 663 (6 E. C. L. R.); Ballam *v.* Price, 2 Moore 235 (4 E. C. L. R.); Clark *v.* Clement, 6 Term Rep. 525; Newton *v.* Blunt, 3 C. B. 675 (54 E. C. L. R.)), or a release or discharge to one partner (Collins *v.* Prosser, 1 B. & C. 682 (8 E. C. L. R.)); though the debt be joint and several (Nicholson *v.* Levill, 4 Ad. & E. 675 (31 E. C. L. R.); Cheetham *v.* Ward, 1 B. & P. 630), will discharge the firm; but a mere covenant not to sue one partner will not release the rest: Hutton *v.* Eyre, Marsh. 608; Thomas *v.* Courtney, 1 B. & Ald. 8. See 2 L. C. Eq. 910, 3d ed.

4. *The Rights and Interests of Partners in the Partnership Property.*—Assuming that partners have a community in the partnership property, the question next arises, What, in the absence of special stipulations which will of course be binding as between them (Garbett *v.* Veale. 5 Q. B. 408 (48 E. C. L. R.); Johnson *v.* Evans, 7 M. & G. 240; Mayhew *v.* Herriott, 7 C. B. 229 (62 E. C. L. R.); Baxter *v.* Brown, 7 M. & G. 198; 8 Scott N. R. 1019), is the interest of each therein.

Partners are joint-owners of the partnership property, and their interest therein differs from that both of ordinary joint-tenants and tenants in common. In the first place, because a partner may, for *partnership purposes and in the partnership name, dispose of the whole of the partnership property, consisting of mere personalty: *ante*, p. 294. Whereas a mere tenant in common or joint-tenant can only dispose of his own undivided share: Story Part. § 89. [*356

It also differs from a joint-tenancy, inasmuch as like a tenancy in common, the interest of a partner in the partnership stock and effects does not go to the surviving partner, but to the representatives of the deceased partner. This is in accordance with the well-known rule, "Inter mercatores pro beneficio commercii jus accrescendi locum non habet:" Bone *v.* Pollard, 24 Beav. 283.

In the case of real property belonging to a *firm*, although *at law* the surviving partners would be deemed either joint-tenants or tenants in common (according to the construction which ought to

be put upon the conveyance), in equity, the legal owners will be held trustees for the partnership, and will consequently hold the share of a deceased partner in trust for his represetatives: Lake *v.* Craddock, 3 P. Wms. 158; s. c. 1 Lead. Case Eq. 3d ed. 162; Morris *v.* Barrett, 3 You. & Jar. 384; Jackson *v.* Jackson, 9 Ves. 591. Indeed, in many cases real property held for partnership purposes is in *equity* treated as mere personalty. And although the cases may, at first sight, seem to be conflicting, the result of them appears to be, that in the absence of any agreement, and except for the purposes of paying the probate duty (Custance *v.* Bradshaw, 4 Hare 315), real estate purchased with partnership capital for the purposes of partnership in trade will in equity be converted into personalty: Townshend *v.* Devaynes, 1 Mont. on Partn. Append. 97; Rop. H. & W. Jac. Ed. p. 346; Selkrig *v.* Davis, 2 Dow 231; Phillips *v.* Phillips, 1 Myl. & K. 669; Broom *v.* Broom, 3 Myl. & K. 443; Morris *v.* Kearsley, 2 You. & Col. Exch. Ca. 140; Bligh *v.* Brent, Id. 268; Houghton *v.* Houghton, 11 Sim. 491. But where real estate belonged to the partners when they entered into partnership, or has been subsequently acquired by them out of their own private moneys, or by gift, although it is used for partnership purposes in trade (Thornton *v.* Dixon, 3 Bro. C. C. 199; Balman *v.* Shore, 9 Ves. 500; Cookson *v.* Cookson, 8 Sim. 529; Brown *v.* Oakshot, 24 Beav. 254), or if, although paid for out of the partnership capital, it is not purchased for the purposes of partnership in trade (Bell *v.* Phyn, 7 Ves. 459; Randall *v.* Randall, 7 Sim. 271), it will, in the absence of any agreement or direction for its sale, which will of course be binding (Ripley *v.* Waterworth, 7 Ves. 425; Thornton *v.* Dixon, 3 Bro. C. C. 199; Essex *v.* Essex, 20 Beav. 441), retain the character of reality. See also 1 Lead. Cas. Eq. 174, 183, 3d ed.

Each partner has moreover a specific lien on the partnership *357] .*property, not only for his own share under the partnership, but also for moneys advanced by him for the use of the firm, and also for the moneys abstracted from the firm by any copartner beyond his share: West *v.* Skip, 1 Ves. 239; Ex parte Ruffin, 6 Ves. Jun. 119. The share however of a partner can only be ascertained after payment of the debts of the firm. See note to Ex parte Ruffin, *post*, p. 387.

With regard to the goodwill of a partnership business, an inter-

est of an outgoing partner in it may be valued: Kennedy *v.* Lee, 3 Mer. 141; Farr *v.* Pearce, 3 Madd. 74.

In selling the goodwill of a business, the book debts and business ought to be sold in one lot, and the purchaser ought to be informed if the fact be so, that the sellers are entitled to carry on business in competition with him: Lindley on Part. 1026; Johnson *v.* Helleley, 34 Beav. 63; 10 Jur. N. S. 1041. When a person purchases the goodwill of a business, not only does he acquire the right to represent himself as the successor of those who carried it on, but also to prevent others from doing the like: 2 Lind. Part. 845, 2d ed.; Churton *v.* Douglas, Johns. 174. When, on a dissolution, one partner obtains exclusively the benefit of the goodwill, and is made accountable for it, the court in ascertaining its value, considers what it would have produced if sold in the most advantageous manner, and at the proper time: Mellersh *v.* Keen, 28 Beav. 453.

But although a goodwill is a valuable and tangible thing in many cases, it is not so unless connected with the business itself from which it cannot be separated. See Robertson *v.* Quiddington, 28 Beav. 529; there A. and B. carried on business in partnership on premises belonging to the firm. A. died, having bequeathed his goodwill (not including the book debts or stock in trade) to the plaintiff. The executors assented to the bequest, but had assigned the testator's interest in the trade premises to the surviving partner. A bill having been filed by the plaintiff against the surviving partner to realize his share of the goodwill, Lord Romilly, M. R., allowed a general demurrer to the bill. "I do not," said his lordship, "express any opinion as to what may occur in a suit for the general administration of assets, if it should appear that the executors have, by realizing the business, made a profit by the sale of this goodwill, or whether thereupon the plaintiff may not have a right to be paid in respect of his interest in it. I should follow, no doubt, my decision in Smith *v.* Everett, 27 Beav. 446, in which the business had been actually sold, and where part of the purchase-money was attributable to the goodwill. That, however, can only be ascertained, if, in the course of administration by the executors, they have been able so to deal with the business as to make something from the goodwill. Here the bill *expressly states [*358
that they have so dealt with the business premises as to

make that impossible, because they have assigned the testator's interest to Quiddington."

As to goodwill in connection with trade marks, see *post*, note to Croft *v.* Day.

Although on the death of one partner, the surviving partner has a right to carry on the business under the name of the old firm (Lewis *v.* Langdon, 7 Sim. 421; Robertson *v.* Quiddington, 28 Beav. 536; Banks *v.* Gibson, 34 Id. 566), the estate of a deceased partner, or in case of a dissolution occurring otherwise than by death, every one of the partners, is entitled to participate in the goodwill of a business, as it does not belong to the surviving or continuing partner except by express agreement: Wedderburn *v.* Wedderburn, 22 Beav. 84; Bradbury *v.* Dickens, 27 Id. 53; Burfield *v.* Rouch, 31 Id. 241; Smale *v.* Graves, 3 De G. & Sm. 706; sed vide Lewis *v.* Langdon, 7 Sim. 421. Upon a sale therefore of the entire partnership under a decree, the court will order the sale to be adjusted so as to give full value to the goodwill: Cook *v.* Collingridge, Jac. 607; s. c. 27 Beav. 456, n.; Smith *v.* Everett, 27 Id. 446.

Although the goodwill of a business has been sold, the surviving partner has still a right to carry on the same business at the same place: Smith *v.* Everett, 27 Beav. 446; Davies *v.* Hodgson, 25 Id. 177.

Where the articles of partnership, although they regulate how the partnership property is to be valued to the surviving or remaining partner, do not specify that any compensation is to be made for the goodwill, the retiring partner will not be allowed anything for his share in it: Hall *v.* Hall, 20 Beav. 139.

These remarks, however, are applicable only to the goodwill in a business of a commercial character. The goodwill of a business in a profession, such as that of a surgeon or solicitor, as it is not considered to have a local existence, but to depend upon purely personal qualifications, is not considered to be susceptible of valuation, and will, therefore, in the absence of contract, go to the surviving partner: Farr *v.* Pearce, 3 Madd. 78; Spicer *v.* James, Coll. Part. 104; Austin *v.* Boys, 24 Beav. 598; 2 De G. & J. 626.

5. *Rights, Duties, and Obligations of Partners between themselves.*—The contract of partnership, both in its inception and

during its continuance, ought to be characterized by perfect good faith between the parties. "In societatis contractibus fides exuberet," says the Code: Cod. Lib. 4, tit. 37, l. 3. Hence, if a man has been induced to enter into a partnership by fraudulent misrepresentation, which however must be clearly proved (New Brunswick and Canada Railway, &c., Company *v.* Conybeare, 9 H. L. Cas. 711; reversing s. c. 1 De G., F. & J. 578, and affirming the *decision of Stuart, V.-C., 1 Giff. 339), he may set it aside *ab initio*: Colt *v.* Woollaston, 2 P. Wms. 154; Green *v.* Barret, 1 Sim. 45; Rawlins *v.* Wickham, 1 Giff. 355; 3 De G. & J. 304. [*359

But mere vague and uncertain allegations affecting the character of a person who has entered into an agreement for a partnership will be no defence to an action for a breach of it: Andrewes *v.* Garstin, 10 C. B. N. S. 444 (100 E. C. L. R.).

So if one partner obtains a renewal of a partnership lease in his own name, behind the backs of his copartners, he will be held a trustee of the renewed lease for the firm: Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 311; Alder *v.* Fouracre, 3 Swanst. 489; Clegg *v.* Edmondson, 22 Beav. 125; 8 De G., M. & G. 787; Clegg *v.* Fishwick, 1 M. & G. 294 (39 E. C. L. R.). See also 1 Lead. Cas. Eq. 44, 3d ed.

If a lease be acquired for the purposes of a partnership, no matter whether acquired in the name of one partner or of all, being acquired for the purposes of the partnership and dedicated to the partnership, that lease is part of the partnership assets: per Stuart, V.-C., in Burdon *v.* Barkus, 3 Giff. 429.

But where the lease is not acquired for the purposes of the partnership, but was antecedently existing, the property of one who, on his engaging in the partnership, agrees that a part only of the property in the lease shall be used for the purposes of the partnership, and containing a demise of other and larger property, which never was dedicated to any purposes of the partnership, such a lease is only affected by the rights of the partner so long as the partnership lasts, unless there be some express agreement to the contrary, or some extraordinary circumstances, such as expenditure of partnership capital on the part dedicated to partnership purposes: Burdon *v.* Barkus, 3 Giff. 412, 429, 430.

So where parties enter into a contract, as, for instance, in making a purchase (Carter *v.* Horne, 1 Eq. Cas. Ab. Account, Tit. pl. 13),

or in negotiating a new partnership (Fawcett *v.* Whitehouse, 1 Russ. & My. 132), one of them will not be allowed to derive any advantage by an underhand bargain for his own advantage. See also Hitchens *v.* Congreve, 1 Russ. & My. 150.

So where one of the partners undertakes clandestinely and for his own benefit, any business properly falling within the province of the firm, and what it was his duty not to have undertaken on his own account, he will be compelled to share his profits with the firm (see Russell *v.* Austwick, 1 Sim. 52), for the principles of courts of equity will not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gives them a direct interest adverse to that undertaking: Glassington *v.* Thwaites, 1 S. & S. 124, 133.

*360] *Upon the same principle as it is the duty of a partner in sales and purchases to act for the best advantage of the firm, he will not be allowed to place himself in such a position as that his interests would conflict with his duty. Thus where two persons were partners in dealing in *lapis calaminaris*, and one of them, who was a shopkeeper, instead of purchasing it from the miners by cash payments, obtained it by way of barter for shop goods, it was held by Sir John Leach, V.-C., that the partnership was entitled to an account and equal division of the profits made by such barter. "The defendant," said his honor, "here stood in a relation of trust or confidence towards the plaintiff which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis calaminaris* he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in the store goods, and as this profit belonged to him individually, and as the saving by a low price of the article purchased, was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the plaintiff:" Burton *v.* Wookey, 6 Madd. 367; see also Glassington *v.* Thwaites, 1 S. & S. 124, 133.

Upon the same principle, where one of several partners is employed to purchase goods for the firm, and he, unknown to his copartners, purchases goods of his own, though at the market price, he will be

accountable to the firm for the profit he makes by the transaction: Bentley *v.* Craven, 18 Beav. 75; Williams *v.* Tyre, Id. 366, 367.

The parties however to the contract of partnership may by express stipulation therein, take themselves out of the operation of the principle laid down in these cases. See Black *v.* Mallalue, 7 W. R. 303.

It is moreover the duty of a partner not to exclude another from the equal management of the concern (Rowe *v.* Wood, 2 Jac. & W. 558), and they ought each to enter receipts in the partnership books, and to keep precise accounts and to have them always ready for inspection, and in short to keep good faith towards each other: Id.; and see Goodman *v.* Whitcomb, 1 Jac. & W. 593; Ex parte Yonge, 3 Ves. & B. 37. "In the case of partnership," says Lord Eldon, "the Court acts upon this principle,—that the good faith of the partners is pledged mutually to each other, that the business shall be conducted with their actual, personal interposition, enabling each to see that the other is carrying it on for their mutual advantage, and not destroying it." See Peacock *v.* Peacock, 16 Ves. 51.

It is the duty also of a partner to devote a due amount of his time and his interest and skill *in promoting the interests of the firm, nor can he, in the absence of any special stipulation, demand any reward or compensation for extraordinary expenditure either of time, labor, or skill. See Thornton *v.* Proctor, 1 Anst. 94; The York and North Midland Railway Company *v.* Hudson, 16 Beav. 485, 500. Even in the case of a surviving partner being executor carrying on the trade after the death of his copartner, he will not, without an express stipulation to that effect, be entitled to any allowance for his management and time, but only for his costs out of pocket: Burden *v.* Burden, 1 Ves. & B. 170. [*361

Having observed what are the duties of partners, resulting from the mere relation between them, independent of express stipulation, we may here remark, that where there are articles of partnership, it will be the duty of the partners to conform to them in all respects.

When the articles are ambiguous or silent, the course of dealing between the partners will regulate the mode by which the Court will deal with them: Coventry *v.* Barclay, 33 Beav. 1.

With regard to the construction placed upon provisions in articles of partnership, the reader is referred to the text-books on the sub-

ject of partnership. See Coll. Partn., p. 136, 2d ed.; Story, § 187, 4th ed.; Bisset on Partn., p. 153; 2 Lindley on Partn., 2d ed., 801, 855.

A departure from the provisions contained in articles of partnership, if it can be shown to be beneficial to infants interested therein, will be sanctioned by the Court of Chancery: Martindale *v.* Martindale, 1 Jur. (N. S.) 932.

As we have before observed, according to the law of England, no writing is necessary to constitute a private unincorporated partnership, the consent of the parties, or their dealings, from which a consent may be implied, being sufficient for that purpose (Peacock *v.* Peacock, 16 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Alderson *v.* Clay, 1 Stark. 405 (2 E. C. L. R.)); and when there is an agreement in writing, it is by the unanimous concurrence of all the partners, open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and their mode of carrying on the business (England *v.* Curling, 8 Beav. 129, 133, 137; and see Geddes *v.* Wallace, 2 Bligh 270, 295, 297; Coventry *v.* Barclay, 33 Beav. 1; Pilling *v.* Pilling, 3 De G., J. & Sm. 152); and special clauses in the partnership articles, for instance, as to the mode of taking accounts, will be considered as expunged from the articles, if the parties have not acted on them: Jackson *v.* Sedgwick, 1 Swanst. 460, 469.

Although some of the clauses in a partnership deed may be presumed from the dealings of the partners to have been waived, a single instance of departure from them is not a sufficient foundation
362*] *for such a presumption: Austen *v.* Boys, 2 De G. & Jo. 626.

Where partners, after the expiration of the term agreed upon by the articles of copartnership, continue to carry on the business at will, without charge, even where one of the partners is a sleeping partner (Parsons *v.* Hayward, 31 Beav. 199), the partnership is regulated by the articles, so far as they are applicable to the new state of circumstances; but such of the articles as are inconsistent with a partnership at will have no application. See Clark *v.* Leach, 1 De G., J. & Sm. 409.

Where by articles for a partnership for seven years, a partner, upon certain default of his copartner, had power to dissolve, and

thereupon the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice, who was to have the option of taking the property and effects of the partnership at a valuation, it was held by Lord Westbury, C., affirming the decision of Lord Romilly, M. R. (32 Beav. 14), that this clause did not apply to a partnership continued at will after the expiration of the seven years: Clark *v.* Leach, 1 De G., J. & Sm. 409.

If two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners. The terms and conditions of the partnership which bind them will bind him, unless a new contract be made between them: Austen *v.* Boys, 24 Beav. 598, 606; 2 De G. & J. 626.

So also if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself: Id.

The mere fact that a lease, being part of the subject-matter of the partnership has a particular duration, as was laid down in the principal case of Crawshay *v.* Maule, *ante*, p. 310, will not, as a matter of course, create any implication as to the duration of the partnership, in the absence of any agreement express or implied. See also Frost *v.* Moulton, 21 Beav. 598.

Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of the sub-partnership is to be co-extensive with the original partnership: Frost *v.* Moulton, 21 Beav. 596; see also Essex *v.* Essex, 20 Beav. 442.

6. *Remedies of Partners as between themselves.*—With regard to the remedies of partners against each other, they are to be followed out either in courts of law or courts of equity.

It is a general rule, that between partners, whether they are so in general or for a particular transaction only, no account can be taken *at law* (Bovill *v.* Hammond, *6 B. & C. 149 (13 E. C. L. R.); Holmes *v.* Higgins, 1 B. & C. 74 (8 E. C. L. R.); [*363 Brown *v.* Tapscott, 6 M. & W. 119; Wilson *v.* Curzon, 15 M. & W. 532); nor can one partner maintain an action at law against

the other partners, or any one or more of them, for moneys advanced or paid or contributed on account of the partnership. The reason given for this is that a court of law could not in such cases do *complete* justice, since the forms of an action would not permit it to enter on such an investigation of the entire state of the partnership accounts as would be necessary in order to ascertain the fair and real claims of the contending parties: Smith's Merc. Law 34, 7th ed.

Where however there is a covenant by deed or a special undertaking, not by deed, for the performance of a duty neglected, an action may be brought at law upon such covenant or undertaking: Smith's Merc. Law 33, 7th ed.; and see Brown *v.* Tapscott, 6 M. & W. 119; Want *v.* Reece, 1 Bing. 18 (8 E. C. L. R.); Bedford *v.* Brutton, 1 Bing. N. C. 399 (27 E. C. L. R.).

A partner may also maintain an action against a copartner for money advanced to him *before* the partnership for the purposes of its formation (Venning *v.* Leckie, 13 East 7; Elgie *v.* Webster, 5 M. & W. 518), for work done for the firm before he joined it (Lucas *v.* Beach, 1 M. & G. 417 (39 E. C. L. R.)), or for a balance of an account after an account has been taken and a balance struck, either by the firm, the Court, or an arbitrator (Moravia *v.* Levy, 2 Term Rep. 483, n.; Foster *v.* Allanson, Id. 479; Winter *v.* White, 1 B. & B. 350 (5 E. C. L. R.); Henley *v.* Soper, 8 B. & C. 16 (15 E. C. L. R.); Brown *v.* Tapscott, 6 M. & W. 119; Carr *v.* Smith, 5 Q. B. 128 (48 E. C. L. R.)); and an implied promise to pay is sufficient, an express promise, although formerly (Fromont *v.* Coupland, 2 Bing. 170 (9 E. C. L. R.); 9 B. M. 318), not being now considered requisite: Rackstraw *v.* Imber, Holt N. P. C. 368 (3 E. C. L. R.); Wray *v.* Milestone, 5 M. & W. 21.

So it seems that where a partner makes advances not to the concern but to another partner, in respect of what he is to contribute to the joint capital, such advances, being altogether *dehors* the partnership, may be recovered back by the partner making them: French *v.* Styring, 2 C. B. N. S. 357–364 (89 E. C. L. R.). And see Sedgwick *v.* Daniell, 2 Hurlst. & N. 319.

Moreover, if any matter be withdrawn from the adjustment of partnership concerns, and made the subject of a distinct settlement, the general rule that one partner cannot sue another in respect of a partnership transaction till the whole partnership concerns are ad-

justed, will not apply. See Jackson *v.* Stopherd, 4 Tyrw. 330; 2 C. & M. 361. There the plaintiff and defendant had worked a coal-pit in partnership till it was exhausted, when the plaintiff said he would join in no more coal-pits, and the defendant said he should work another, whether the plaintiff joined him or not. The materials and utensils belonging to the mine *were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made; and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. The other partnership debts and credits remained unsettled. It was held by the Court of Exchequer that this was a transaction so separate and distinct from the general accounts, that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts. "Upon the general rule of law," said Bayley, B., "there is no difficulty; it being clear that one partner cannot maintain an action against another on the partnership account till the accounts of the firm have been wound up, and the balance due from the partner to be sued to the partner making the claim is ascertained. But by special bargain between them, a particular transaction may be separated from the winding up of the general concern, and, when thus insulated, is taken out of the general law of partnership, constituting between the partners a separate and independent debt, on putting an end to their joint concern." See also Coffee *v.* Brian, 3 Bing. 54 (11 E. C. L. R.); Wray *v.* Milestone, 5 M. & W. 21; Elgie *v.* Webster, 5 M. & W. 518. [*364

Where after the dissolution one of the partners, by using the partnership name, renders the firm liable to a person not having notice of the dissolution, his copartner may maintain an action against him for the amount to which his liability extends: Osborne *v.* Harper, 5 East 225; Hutton *v.* Eyre, 1 Marsh. 603 (4 E. C. L. R.); Cross *v.* Cheshire, 7 Exch. 43.

The remedies of partners in *equity* against each other are much more extensive than at law. In the first place, a court of equity will decree the specific performance of a contract to enter into partnership for a fixed and definite term (Anon., 2 Ves. 629; Buxton *v.* Lister, 3 Atk. 385; England *v.* Curling, 8 Beav. 129); but it will not do so when no term has been fixed, for such decree would

be useless when either of the parties might dissolve the partnership immediately afterwards: Hercy *v.* Birch, 9 Ves. 357. It has, however, been suggested by Mr. Swanston, in his learned note to Crawshay *v.* Maule, 1 Swanst. 513, that in many cases, although the partnership could be immediately dissolved, the performance of the agreement, like the execution of a lease after the expiration of the term (see Nesbitt *v.* Meyer, 1 Swanst. 226), might be important, as investing the party with the legal rights for which he contracted.

Specific performance of a partnership contract for an absolute term of years, leaving undefined the amount of the capital, and the manner in which it is to be provided (the mode of carrying on the business being discretionary) cannot be enforced in a court of equity;

*365] *and the Court, being unable to enforce the entire contract, will not enforce it in part, as against the representatives of a deceased partner, by refusing them a decree for the dissolution of the partnership and the sale of the property, which may, under the contract, have been specifically devoted to partnership purposes: Downs *v.* Collins, 6 Hare 418–437.

A court of equity will not decree specific performance of a covenant to refer disputes to arbitration (Price *v.* Williams, cited 6 Ves. 818; Street *v.* Rigby, 6 Ves. 815; Wilks *v.* Davis, 3 Mer. 507), and a plea of an agreement to refer to arbitration would not constitute a valid objection to a bill either for discovery only or for discovery and relief (Wellington *v.* Mackintosh, 2 Atk. 569; Street *v.* Rigby, 6 Ves. 815; overruling Halfhide *v.* Fenning, 2 Bro. C. C. 336; Wood *v.* Robson, 15 W. R. (V.-C. W.) 756; but see and consider The British Empire Shipping Company *v.* Somes, 3 K. & J. 433), nor will the Court substitute the Master for the arbitrators. "For this," observed Sir John Leach, "would be to bind the parties contrary to their agreement:" Agar *v.* Macklew, 2 Sim. & Stu. 418. It seems to be doubtful how far an action will lie at law for breach of such a covenant (Kill *v.* Hollister, 1 Wils. 129); or, at any rate how other than nominal damages can be obtained: Tattersall *v.* Groote, 2 Bos. & Pul. 136. Covenants, however, to refer to arbitration may be made effectual. "There are," says Lord Eldon, "prudential ways of drawing them; as, for instance, there may be an agreement for liquidated damages, to enforce specific performance, if an action cannot produce sufficient damages, or equity will

not entertain a bill for specific performance:" Street *v.* Rigby, 6 Ves. 818; and see Astley *v.* Weldon, 2 Bos. & Pul. 346.

So where one partner has, in breach of a covenant, carried on any trade on his own separate account, his copartner may file a bill in equity for an account of the profits, and he will be entitled to a due proportion thereof unless it be shown that he acquiesced in such breach. See Somerville *v.* Mackay, 16 Ves. 382, in which case it was held by Lord Eldon that a special consent to one partner sending a small quantity of goods to a foreign country on his separate account, was not to be considered as a general acquiescence in an unlimited trade, contrary to the general obligations in the partnership contract.

Courts of *equity* moreover will take accounts between partners, nor is it essential, as it appears once to have been the opinion (Foreman *v.* Humfray, 2 Ves. & B. 329; Loscombe *v.* Russell, 4 Sim. 10), that a dissolution should be at the same time sought, at all events in a case where one of the partners is misconducting himself by violation of the partnership contract: Harrison *v.* Armitage, 4 Madd. 143; Richards *v.* Davis, 2 Russ. & My. 347; Wallworth *v.* Holt, 4 My. & C. 619; Richardson **v.* Hastings, 7 Beav. [*366
323; Harvey *v.* Bignold, 8 Beav. 343; Deeks *v.* Stanhope, 14 Sim. 57; Fairthorne *v.* Weston, 3 Hare 387.

In examining hereafter at what time a court of equity will order a dissolution of partnership, the subject of taking accounts between partners on such an occasion will be more appropriately considered.

As a general rule, where a partner has committed such acts as would warrant a decree for a dissolution, the Court of Chancery will restrain the repetition thereof by injunction. Thus if a partner has been for his own purposes drawing, accepting, or endorsing bills of exchange (Williams *v.* Bulkeley, 2 Vern. 278 n. Raith. ed. Prec. Ch. 151; Master *v.* Kirton, 3 Ves. 74; Jervis *v.* White, 7 Ves. 412; Lawson *v.* Morgan, 1 Price 303; Hood *v.* Ashton, 1 Russ. 412), has been using the property or resources of the partnership for a rival business (Glassington *v.* Thwaites, 1 Sim. & Stu. 124), or obstructing or interrupting the carrying on of the partnership business (Charlton *v.* Poulter, 1 Ves. Jr. 429, cited; 19 Ves 148 n. Reg. Lib. 1752, A. fol. 73 b, 13 June 1753), excluding his partner from the business (Id., and see Hall *v.* Hall, 12 Beav. 414), removing the partnership books from the place of business (Taylor *v.* Davis, 3 Beav.

388 n.; 4 L. J. N. S. 18 Ch.; Greatrex *v.* Greatrex, 1 De G. & Sm. 692), or doing acts of waste and destruction, or an intentional serious injury to the partnership property (Marshall *v.* Watson, 25 Beav. 501), after a dissolution making use of the partnership property, and carrying on business in breach of an agreement (Turner *v.* Major, 3 Giff. 442), a court of equity will restrain him by injunction. See also Const *v.* Harris, T. & R. 496.

The mere circumstance that a partner gives a partnership bill for his separate debt, may or may not, lay a ground for issuing an injunction against its negotiation; for the person who takes it may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill, holden by his bankers, substitutes for it, by a negotiation with them, a partnership security, made and given without the consent or knowledge of his copartners, and the bankers are aware that it is so given without their consent or knowledge; that is a case which comes within the principle upon which the Court of Chancery has always been in the habit of interfering by injunction: per Lord Eldon, 1 Russ. 415; see Hood *v.* Aston, 1 Russ. 412; Jervis *v.* White, 7 Ves. 413.

It was however at one time thought that the Court would never grant an injunction except upon such facts as, if proved at the hearing, would be a ground for a dissolution. There is however no such universal rule at the present day, and it is essential to *367] *justice that no such universal rule should be sustained, for if, for instance, a bill in no case would lie to compel a man to observe the covenants of a partnership deed, it is obvious that a person fraudulently inclined might of his mere will and pleasure compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continual violation of the partnership contract. See Fairthorne *v.* Weston, 3 Hare 392; Charlton *v.* Poulter, 19 Ves. 148 n.; Goodman *v.* Whitcomb, 1 Jac. & W. 592.

It seems however that there is a reluctance on the part of the court of equity to grant an injunction against a partner unless there be a ground for a dissolution. Thus an injunction will not be granted to restrain the breach by a partner of a particular covenant, unless it be studied, intentional, and prolonged, and there be continued intention to the application of one partner calling upon

the other to observe the contract: Marshall *v.* Colman, 2 Jac. & W. 266, 269.

After the dissolution of the partnership the Court of Chancery will restrain any of the former partners from doing any acts inconsistent with their duty of winding up the concern. Thus if any of the former partners still persist in carrying on the business for their own benefit, the Court of Chancery will restrain them by injunction: De Tastet *v.* Bordenave, Jac. 516; and see Gold *v.* Canham, 1 Ch. Cas. 311; 2 Swanst. 325.

Upon the same principle where a deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, Lord Eldon, C., although he refused to restrain the lessor from granting a lease to the representatives of the deceased partner, nevertheless restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner: Alder *v.* Fouracre, 3 Swanst. 489.

So likewise upon a motion made by the representatives of a deceased partner, an injunction has been granted against a surviving partner proceeding by ejectment to obtain possession of premises of which a joint lease had been made to himself and his deceased partner: Elliot *v.* Brown, 3 Swanst. 489 n.; see also Hawkins *v.* Hawkins, 4 Jur. N. S. 1045.

In proper cases, although generally with some reluctance, the Court of Chancery will appoint a receiver or manager of the partnership property, but to entitle a partner to an order for a receiver against his copartner, he must either show a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution: Smith *v.* Jeyes, 4 Beav. 503. Thus where one partner seeks to exclude another from taking any part in the partnership concern (1 Swanst. 481; Blakeney *v.* Dufaur, 15 Beav. 41), insists on a legal objection as destroying all right of his partner to a share in *the partnership, as that he is a clerk in holy orders (The Rev. John Hale *v.* George Hale, 4 Beav. 369), [*368 a receiver will be appointed.

The reason why the Court of Chancery does not appoint a manager unless a dissolution is sought, appears to be this, that the Court only appoints a receiver or manager temporarily—that is, until the partnership affairs are wound up: *ante*, p. 318, 319, 328.

But partners, if they think fit, may by contract between themselves exclude the interference of the Court; and by express contract provide that on any particular event occurring, one party shall exclude the other, and so prevent the interference of the Court: Blakeney *v.* Dufaur, 15 Beav. 42.

Where however a dissolution is sought, or has already taken place, the Court of Chancery will appoint a receiver if there has been any breach of duty or of the partnership contract committed by one of the partners. Thus if one of the partners improperly takes possession and refuses to account for the partnership effects (Peacock *v.* Peacock, 16 Ves. 49; Milbank *v.* Revett, 2 Mer. 405), or after a dissolution carries on trade with the partnership effects on his own account (Harding *v.* Glover, 18 Ves. 281), or excludes his copartner from the share to which he is entitled on the winding-up of the concern (Wilson *v.* Greenwood, 1 Swanst. 483; Kershaw *v.* Matthews, 2 Russ. 62), or persists in collecting the debts after having agreed upon the dissolution that they should be collected by a third party (Davis *v.* Amer, 3 Drew. 64), a receiver will be appointed.

So likewise where surviving partners insist on continuing the partnership business with the assets of a deceased partner, the representatives of the latter will be entitled to have a receiver appointed: Madgwick *v.* Wimble, 6 Beav. 495.

Where a *primâ facie* case is made out for obtaining a decree for the dissolution of a partnership, the Court of Chancery will, upon an interlocutory application, appoint a receiver and manager until the hearing: Marsden *v.* Kaye, 30 L. T. 197.

The Court of Chancery however will not, upon a motion for a receiver of a partnership, determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights of the parties: Blakeney *v.* Dufaur, 15 Beav. 40.

Where all the partners are dead, and a suit is instituted by their representatives, a receiver will, as a matter of course, be appointed; for "where there is a copartnership there is a confidence between the parties, and if one dies the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and therefore the Court will

appoint a receiver:" per Lord Kenyon, M. R., in Philips *v.* Atchison, 2 Bro. C. C. 272.

7. *Rights of Partners against *third Parties.*—We may next consider what are the rights of partners against third parties. And first, as to the mode in which such rights may be acquired. [*369

Where a person obtains an advance from another without ascertaining whether it is made by him on his own account, or on behalf of a firm of which he is a member, the debtor will become liable to the firm if the advance were made on its behalf: Alexander *v.* Barker, 2 C. & J. 133; Boswell *v.* Smith, 4 C. & P. 60 (19 E. C. L. R.); Sims *v.* Brittain, 4 B. & Ad. 375 (24 E. C. L. R.); Sims *v.* Bond, 5 B. & Ad. 393 (27 E. C. L. R.); Cooke *v.* Seeley, 2 Exch. 746.

So where one of several partners either sells or buys goods for or on behalf of the partnership, the whole of the partners may sue the purchaser for the price, or the vendor for breach of his contract: Skinner *v.* Stocks, 4 B. & Ald. 437 (6 E. C. L. R.); Rodwell *v.* Redge, 1 C. & P. 220 (12 E. C. L. R.); Cothay *v.* Fennell, 10 B. & C. 671 (21 E. C. L. R.); and see Agacio *v.* Forbes, 14 Moo. P. C. C. 160.

But where the partners sue a person for goods supplied by the ostensible partner, he will be able to set off against the demand a debt due from the ostensible partner. See Stacey *v.* Decy, 2 Esp. 469 n. There it appeared that the plaintiffs had entered into partnership as grocers; and it was agreed that Ross should keep the shop in his own name only. Under those circumstances he sold the defendant partnership goods for which the action was brought. The defendant had done business for the plaintiff Ross on his own account, and not on account of the partnership, to a greater amount than the demand now made against him by the partnership, and this he now offered to set off. This was opposed on the ground of the demand accruing in different capacities, and that so it was inadmissible. It was held however by Lord Kenyon, C. J., that the set-off was good. "The plaintiffs," said his Lordship, "had subjected themselves to it by holding out false colors to the world, by permitting Ross to appear as the sole owner. That it was possible the defendant would not have trusted Ross only if he had not considered the debt due to himself as a se-

curity against the counter-demand." See also s. c. 7 Term Rep. 361 n.; George *v.* Claggett, 7 Term Rep. 359; Gordon *v.* Ellis, 2 C. B. 821 (52 E. C. L. R.).

An action may be maintained by several partners of a firm upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all: Garrett *v.* Handley, 4 B. & C. 664 (10 E. C. L. R.).

A guarantee for goods addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed did not carry on any separate business (Walton *v.* Dodson, 3 C. & P. 162 (14 E. C. L. R.)), but a guarantee not addressed to any one must be declared on as given to the party to whom or for whose use it was delivered: Id.; and see Moller *v.* Lambert, 2 Campb. 548.

Where a security, whether by specialty (Arlington *v.* Merrick, 2 *370] *Wms. Saund. 412 and notes; Strange *v.* Lee, 3 East 484; Pemberton *v.* Oakes, 4 Russ. 154; Dance *v.* Girdler, 1 Bos. & Pul. N. R. 34; Wright *v.* Russel, 2 Blatchf. 934; Weston *v.* Barton, 4 Taunt. 673; Chapman *v.* Bickington, 3 Q. B. 703 (43 E. C. L. R.), or by simple contract (Myers *v.* Edge, 7 Term Rep. 254; Dry *v.* Davy, 10 Ad. & E. 30 (37 E. C. L. R.); Ex parte Kensington, 2 Ves. & B. 79; Holland *v.* Teed, 7 Hare 50), is given to a firm for future advances, if it is intended to remain in force notwithstanding any change in the partnership, it must appear either by express words or by implication that such was the intention of the parties, otherwise upon any change in the partnership, as by th coming in of a new partner, or upon the death or outgoing of one of the old partners, the obligation will cease.

The principle on which these cases proceed is well stated in Strange *v.* Lee, 3 East 484. There a bond given by the defendant, after reciting that Blyth intended to open a banking account with Walwyn, Strange and the other plaintiffs as his bankers, was conditioned for payment to *them* of all sums from time to time advanced to Blyth at the banking-house of the said Walwyn, Strange, etc. It was held by the Court of King's Bench that on the death of Walwyn such obligation ceased and did not cover future advances made after another partner was taken in, and that Blyth, who was indebted to the house at the death of Walwyn, having afterwards paid off the balance which was applied at the time to the old debt incurred in

Walwyn's lifetime, the defendant was wholly discharged from his obligation. "The Courts," said Lord Ellenborough, C. J., "will no doubt construe the words of the obligation according to the intent of the parties to be collected from them; but the question is what that intent was? The defendant's obligation is to pay all sums due to '*them*,' on account of their advances to Blyth. Now who are '*them*' but the persons before named, amongst whom is Walwyn; who then constituted the banking-house, and with whom the defendant contracted? The words will admit of no other meaning, and indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is surety. For a man may very well agree to make good such advances, knowing that one of the partners on whose prudence he relies will not agree to advance money improvidently. The *characters therefore of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an agreement.*" See also Barclay *v.* Lucas. 1 Term Rep. 291; Simson *v.* Cooke, 1 Bing. 452 (8 E. C. L. R.); Simson *v.* Ingham, 2 B. & C. 65; 9 E. C. L. R.); Leadley *v.* Evans, 2 Bing. 32 (9 E. C. L. R.); Saunders *v.* Taylor, 9 B. & C. 35 (17 E. C. L. R.); Groux's Soap *Company *v.* Cooper, 8 C. B. N. S. 800 (98 E. C. L. R.) [*371

With regard to a guarantee to or for a firm, see 19 & 20 Vict. c. 97, s. 4.

With regard to the mode in which the rights of a partnership against third persons may be determined, it may be remarked that one of the partners may in the absence of fraud release third parties from their liability to the firm (Wallace *v.* Kelsall, 8 Dowl. 841), and payment of a partnership debt to one of the partners is as valid as a payment to all, even after dissolution (Porter *v.* Taylor, 6 M. & Selw. 156), and although there be a clause in the deed of dissolution, according to which another partner is to receive the debts: King *v.* Smith, 4 C. & P. 108 (19 E. C. L. R.). So one partner may give time to a debtor of the firm, as by taking his acceptance (Tomlin *v.* Lawrence, 3 M. & P. 555; 6 Bing. 376 (19 E. C. L. R.)), or he may by some act of his own prevent the partnership

from suing because it would be unconscientious for himself to do so. See Jacaud *v.* French, 12 East 317; there Jacaud and Blair, after endorsing a bill to Jacaud and Gordon, received securities from the drawer, in order to take up and liquidate the bill, but they applied them to their own purposes. It was held by Lord Ellenborough, C. J., that Jacaud and Gordon could not sue the acceptor on the bill. "It is impossible," said his Lordship, "to sever the individuality of the person. Jacaud, being a partner with Blair, must be considered as having, together with Blair, received money from the drawers to take up this very bill. How then can he, because he is also a partner with Gordon in another house, be permitted to contravene his own act, and sue upon this bill, which has been already satisfied as to him?" See also Richmond *v.* Heapy, 1 Stark. 202 (11 E. C. L. R.); Sparrow *v.* Chisman, 9 B. & C. 241 (17 E. C. L. R.); Jones *v.* Young, Id. 532; Wallace *v.* Kelsall, 7 M. & W. 264; Gordon *v.* Ellis, 2 C. B. 821 (52 E. C. L. R.).

8. *Dissolution of Partnership, when and how it may be effected.* —Partnership may be dissolved in various ways: (1) By operation of law. (2) By the partners themselves, or some of them. (3) By the decree of a court of equity.

1st. *As to dissolution of the partnership by operation of law.*

A dissolution will take place when a person has lost his capacity to act *sui juris*, in consequence of his having been outlawed, or convicted and attainted of felony or treason, and it seems moreover the Crown thereupon becomes entitled not merely to the share of the offending, but also to that of the innocent partner, for by an absurd doctrine still existing, though practically obsolete, it is held that as it is beneath the dignity of the Crown to become a tenant in common, or joint-tenant of anything with a subject, it is therefore entitled to the whole by virtue of its prerogative: 2 Black. Comm. 409; Wats. Partn. 377; Coll. Partn. 71.

*372] *The marriage of a female partner will of itself operate as a dissolution of the partnership, because, in the absence of any contract reserving her personal property to her separate use, it will belong to her husband absolutely, and he cannot be forced upon the firm as a partner; and moreover upon her marriage, except as regards property settled to her separate use, she becomes incapable of binding herself by any contract. See Nerot *v.* Bur-

nand, 4 Russ. 247, 260; 2 Bligh. N. S. 215; Wrexham *v.* Hudleston, 1 Swanst. 517 n.

A general assignment by one or more of the partners will operate as a dissolution of a partnership carried on for no definite period, and therefore determinable at will; and it seems, even where the partnership is for a definite period, if an assignment is *bonâ fide* made within that period, the same result will follow (Heath *v.* Sansom, 4 B. & Ad. 172 (24 E. C. L. R.); Ex parte Barrow, 2 Rose 252); for in neither case can the purchaser be compelled to become a partner, nor can the other partners be compelled to receive him as such, and if they do so, a new partnership will be formed.

The Roman law seems to have been the same in this respect. "Si quis ex sociis, mole debiti prægravatus, bonis suis cesserit, et ideo propter publica aut privata debita, substantia ejus veneat, solvitur societas: sed, hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas:" Inst. Lib. 3, tit. 26, § 8.

Upon the same principle, if a separate creditor of one partner take in execution the whole or part of the partnership effects, he thereupon becomes by operation of law a tenant in common thereof with the other partners, and the partnership will be thereupon, either wholly or partially, dissolved, and upon a sale under the execution the purchaser merely stands in the place of the execution creditor, and is not a partner, but a mere tenant in common with the other partners: Fox *v.* Hanbury, Cowp. 445; Skipp *v.* Harwood, 2 Swanst. 585 n.; Dutton *v.* Morrison, 47 Ves. 193; Waters *v.* Taylor, *ante*, p. 329; Holroyd *v.* Wyatt, 1 De G. & Sm. 125; Habershon *v.* Blurton, 1 De G. & Sm. 121; Aspinall *v.* The London and Northwestern Railway Company, 11 Hare 325.

The insolvency or bankruptcy of *one* or *more* of the partners will of necessity operate as a dissolution of the partnership, for as the property of a bankrupt passes to his assignees he becomes unable to fulfil the partnership contract, and with regard to the assignees, the solvent partners are not obliged to admit them into, and their own duties will not allow them to carry on, the partnership (Fox *v.* Hanbury, Cowp. 445; Ex parte Smith, 5 Ves. 295; Wilson *v.* Greenwood, 1 Swanst. 471, 482, 483; Crawshay *v.* Collins, 15 Ves. 218, 228; and in the event of bankruptcy, the dissolution which takes effect immediately upon the adjudication will

*373] have relation back to the act *of bankruptcy: Barker *v.* Goodair, 11 Ves. 83; Dutton *v.* Morrison, 17 Id. 193, 203, 204; Fox *v.* Hanbury, Cowp. 445; Harvey *v.* Crickett, 5 M. & Selw. 336; Thomason *v.* Frere, 10 East 418.

Where partners are the subjects of different countries, it seems that a declaration of war between those countries will *ipso facto* dissolve the partnership, not only because one alien enemy cannot make a contract binding upon the other, but because it is the inevitable result arising from the new relations created by war, that it becomes unlawful to have any communication or trade with each other as being enemies; in effect, in the words of Chancellor Kent, a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. A partnership formed between aliens must at once be defeated when they become alien enemies. They can no more assist each other than if they were palsied in their limbs, or bereft of their understandings by the visitation of Providence: Griswold *v.* Waddington, 16 Johns. 438, 488, 492.

Lastly, a partnership, although it may have been entered into for a definite period and between many persons, will be dissolved upon the death of *one* of them, unless there be an express stipulation to the contrary: Gillespie *v.* Hamilton, 3 Madd. 254; Crawshay *v.* Maule, *ante*, 210; Bell *v.* Nevin, 15 W. R. (V. C. W.) 85); and this will take place at that time with respect to the other partners and to third persons, irrespective of the consideration whether they have had notice thereof or not: Vulliamy *v.* Noble, 3 Mer. 593, 614.

2d. *As to the dissolution of partnership by the partners themselves.* It is clear that although a partnership may have been entered into *for a limited period*, it may be dissolved by the consent of *all* (clearly and unconditionally expressed: Hall *v.* Hall, 12 Beav. 414); though it is not necessary that the notice should be formal (Pearce *v.* Lindsay, 3 De G., J. & Sm. 139); but not it seems by the mere will of one of the partners: Peacock *v.* Peacock, 16 Ves. 56; Crawshay *v.* Maule, *ante*, p. 310.

Where, however, no time has been fixed for its duration, it is considered to be a mere partnership *at will*, and may consequently be dissolved upon one or more of the partners giving proper notice to the others: Master *v.* Kirton, 3 Ves. 74; Miles *v.* Thomas, 9

Sim. 606–609; Nerot *v.* Burnand, 4 Russ. 247–260; 2 Bligh. N. S. 215. And where a bill is filed by one of the partners seeking a dissolution, such partnership will be dissolved as from the filing of the bill: Shepherd *v.* Allen, 33 Beav. 577.

It seems, however, that we have not adopted the distinction of the *Roman* law, that such dissolution ought to be made at a seasonable time. Mr. Swanston, indeed, in his note to Crawshay *v.* Maule, 1 Swanst. 512, has observed that in *one instance [*374 the Court of Chancery seems to have assumed jurisdiction to qualify the right of renunciation, by reference to that distinction. The case alluded to is that of Chavany *v.* Van Sommer, 3 Woodeson Lect. 416 n. Lord Eldon, however, in a well-known case, was clearly of a different opinion. "With regard," said his lordship, "to what has passed since, the question was much agitated at the bar, whether this partnership is now dissolved by the notice in writing from the defendant, that from and after the date of that notice the partnership should be considered dissolved. The plaintiff insists that it is not dissolved; and that it can be dissolved only upon *reasonable notice.* I have always *taken the rule to be, that in the case of a partnership not existing as to its duration by a contract between the parties, either party has the power of determining it when he may think proper,* subject to a *qualification* I shall mention. There is, it is true, inconvenience in this; but what would be more convenient? In the case of a partnership expiring by effluxion of time, the parties, may, by previous arrangement, provide against the consequences: but where the partnership is to endure so long as both partners shall live, all the inconvenience from a sudden determination occurs in that instance as much as in the other case. I cannot agree *that reasonable notice is a subject too thin for a jury to act upon;* as in many cases juries and courts do determine what is reasonable notice. With regard to the determination of contracts upon the holding of lands, when tenancy at will was more known than it is now, the relation might be determined at any time, not as to those matters which, during the tenancy, remained a common interest between the parties: but as to any new contract the will might be instantly determined. When that interest was converted into the tenancy from year to year, the law fixed one positive rule for six months' notice: a rule that may in many cases be very convenient; in others, that of nursery-grounds for instance, most in-

convenient. As to trades in general, there is no rule for the determination of partnership; and I never heard of any rule with regard to different branches of trade; and supposing a rule for three months' notice, that time might in one case be very large; and in another, in the very same trade, unreasonably short.

"I have, therefore, always understood the rule to be, that in the absence of express contract the partnership may be determined, when either party thinks proper; but not in this sense, that there is an end of the whole concern. All the subsisting engagements must be wound up; for that purpose they remain with a joint interest; but they cannot enter into other engagements. This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some *different doctrine might have fallen from the court at Guildhall; but upon inquiry from the Lord Chief Justice as to his conception of the rule, I have no reason to believe that if this notice had been given before the trial, the jury would not have been directed to find that the partnership was by the delivery of that paper dissolved:" Peacock *v.* Peacock, 16 Ves. 56. See also Featherstonhaugh *v.* Fenwick, 17 Id. 298–308, 309; Crawshay *v.* Maule, 1 Swanst. 495–508.

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It may be here mentioned that although a certain number of partners have the power, under the articles of partnership, of expelling one of their number, and taking to his share at a valuation, still that power must be exercised in good faith, and not against the truth and honor of the contract, inasmuch as it must be understood to exist, not for the benefit of any particular partners, but for the benefit of the whole society or partnership, and it cannot, therefore be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. See Blisset *v.* Daniel, 10 Hare 493, where it was held that such a power of expulsion was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was expelled, and without giving to such partner the opportunity of stating his case and removing any misunderstanding on the part of his co-partners. And see Allhusen *v.* Borries, 15 W. R. (V.-C. M.) 739.

Next, a partnership may expire by the efflux of the time fixed upon by the partners for the limit of its duration: Featherstonhaugh

v. Fenwick, 17 Ves. 228. And where after a partnership has expired by efflux of time, the business is still carried on by the partners, it will be considered as a new partnership for an indefinite period, determinable immediately at the will of any of the partners, although under the original articles of partnership notice for a dissolution of so many months are requisite: Featherstonhaugh *v.* Fenwick, 17 Ves. 298–307.

A partnership may also expire by the thing constituting the subject-matter of the contract ceasing to exist. For instance, suppose two persons buy a ship to be employed by them for their mutual profits as partners, and the ship be afterwards lost, the partnership would necessarily be at an end. "Neque enim ejus rei quæ jam nulla sit, quisquam socius est:" Dig. Lib. xvii. tit. 2, l. 63, § 10.

The same result will follow on the termination of the business, for which solely the contract of partnership was entered into. For example, if two merchants have contracted a partnership to buy a lot of goods and to sell them at a particular place, it is clear that the partnership will terminate when *they have sold them all there: Poth. Partn. § 143. [*376

3d. *As to dissolution by decree of the court of equity.* Although a partnership may not be dissolvable by the operation of law, or by the parties themselves, it may upon a proper case being made out, be dissolved by a court of equity.

In the first place, it may be dissolved from its commencement, where it originated in fraud, misrepresentation, or oppression: Colt *v.* Wollaston, 2 P. Wms. 154; Green *v.* Barrett, 1 Sim. 45; Rawlins *v.* Wickham, 1 Giff. 355; 3 De G. & J. 304; Jauncey *v.* Knowles, 29 L. J. (Ch.) 95. See also Tattersall *v.* Groote, 2 Bos. & Pul. 131; Ex parte Broome, 1 Rose 69; Oldaker *v.* Lavender, 6 Sim. 239; Hue *v.* Richards, 2 Beav. 305.

Another ground upon which the Court will dissolve a partnership, in its origin unobjectionable, is the gross misconduct of one of the partners, amounting to a want of good faith, which is necessary to carry on the partnership concern (Chapman *v.* Beach, 1 J. & W. 594), as, for instance, where a partner raises money for his private use on the credit of the partnership firm (Marshall *v.* Coleman, 2 J. & W. 268); or in the case of a firm of solicitors, where one of them fraudulently sells out trust funds and applies the produce to his own use (Essell *v.* Hayward, 30 Beav. 158), or the conduct of one

partner amounts to an entire exclusion of another from his interest in the partnership (Goodman *v.* Whitcomb, 1 J. & W. 593), or if he receives moneys and does not enter the receipts in the books, or if he does not leave them open to the inspection of the partners (Id., and see Smith *v.* Mules, 9 Hare 556–569; Smith *v.* Jeyes, 4 Beav. 503–505); or if, contrary to the opinion and wish of his partner, he allows a person to draw bills upon the partnership, and directs them to be paid out of the joint effects of the partnership: Master *v.* Kirton, 3 Ves. 74. So where the conduct of one of the partners is such as to prevent the concern from being carried on according to the contract: Waters *v.* Taylor, 2 Ves. & B. 304; Smith *v.* Jeyes, 4 Beav. 503; Harrison *v.* Tennant, 21 Beav. 482.

The same result follows, when from misconduct in both parties the partnership cannot be properly carried on. Thus it is stated in 7 Jarman's Conveyancing, p. 83, upon the authority of a MS case, De Berenger *v.* Hammel, cor. Sir L. Shadwell, V.-C., 13th Nov. 1829, that violent and lasting dissension, as where the parties refuse to meet each other upon matters of business—a state of things which precludes the possibility of the partnership from being conducted with advantage—will be a sufficient ground for a court of equity to decree a dissolution. And see Baxter *v.* West, 1 Drew. & Sm. 173; Watney *v.* Wells, 30 Beav. 56; 2 Law Rep. Ch. App. 250; Pease *v.* Hewitt, 31 Beav. 22; Leary *v.* Shout, 33 Beav. 582.

But the Court will not decree a dissolution for slight misconduct
*377] (especially if there has been acquiescence), *or on the ground of mere ill temper on the part of one of the partners. "Where partners differ," says Lord Eldon, "as they sometimes do when they enter into a different kind of partnership, they should recollect that they enter into it for better and worse, and this Court has no jurisdiction to make a separation between them, because one is more sullen or less good-tempered than the other. Another Court, in the partnership to which I have alluded, cannot, nor can this Court in this kind of partnership, interfere, unless there is a cause of separation, which in the one case must amount to downright cruelty and in the other must be conduct amounting to an entire exclusion of the other partner from his interest in the partnership:" Goodman *v.* Whitcomb, 1 J. & W. 592; and see Wray *v.* Hutchinson, 2 Myl. & K. 235; Astle *v.* Wright, 23 Beav. 77; and the Court has refused to dissolve a partnership as to one of the partners,

although the charge of adultery of the most disgraceful and profligate description had been established against him, as the Court could only deal with moral conduct as it affected property: Snow *v.* Milford, 3 W. R. (M. R.) 62; 16 W. R. (M. R.) 554.

Nor will a court of equity upon the application of a partner whose own misconduct alone is the cause of the partners not being able to act together with harmony, make a decree for a dissolution upon the ground of the impossibility of their being able to act together, when he himself is the cause of such impossibility: Harrison *v.* Tennant, 21 Beav. 493, 494; Fairthorne *v.* Weston, 3 Hare 387.

The Court, however, will dissolve a partnership in some cases where no personal blame attaches upon any of the partners, as, for instance, where it has become impossible to carry it on according to the intent and meaning of the contract, as in Baring *v.* Dix, 1 Cox 213, where the partnership was originally instituted for spinning cotton under a patent, which totally failed and was entirely given up. Lord Kenyon decided that if on a reference to the Master it was reported that the partnership could not be carried on, he would direct the premises to be sold, and would dissolve the copartnership. See also Pearce *v.* Piper, 17 Ves. 1; Buckley *v.* Cater, cited 17 Ves. 11, 15, 16; and in Beaumont *v.* Meredith, 3 Ves. & B. 180, 181; Reeve *v.* Parkins, 2 J. & W. 390.

The Court of Chancery has also jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; and it is not necessary to show that the concern is embarrassed: Jennings *v.* Baddeley, 3 K. & J. 78.

À fortiori if the firm be already insolvent: Bailey *v.* Ford, 13 Sim. 495.

Another ground upon which the Court will dissolve a partnership is the *incurable insanity* of one of the partners (Sayer *v.* Bennet, 1 Cox 107; Kirby *v.* Carr, 3 You. & Col. Excheq. Cas. 184; Wrexham *v.* Hudleston, 1 Swanst. 514 n.; Jones *v.* Noy, 2 Myl. & K. 125), for as Lord Kenyon has well observed, "where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered *incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, [*378 not by the authority of either of the partners, but by application to

a court of justice, and this for the sake of the partner who is rendered incapable as well as of the other; for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another:" Sayer *v.* Bennet, Mont. Part. vol. i. Appen. p. 18; 1 Cox 107; Leaf *v.* Coles, 1 De G., M. & G. 171, 417; Rowlands *v.* Evans, 30 Beav. 302.

Permanent insanity, however, at the time when the relief is sought must be clearly proved; for if it appears to be doubtful whether it may not be of a temporary nature, an inquiry or issue will be directed (Sayer *v.* Bennet, 1 Cox 107; Besch *v.* Frolich, 1 Ph. 175; Anon., 2 K. & J. 441); proof however of a person having been found a lunatic under a commission will be conclusive evidence in a suit for the dissolution of a partnership: Milne *v.* Bartlet, 3 Jur. 358.

On a bill to dissolve a partnership upon the ground of the lunacy of a partner, the Court will not, unless there be a stipulation for dissolution in such an event at a particular time (Pagshaw *v.* Parker, 10 Beav. 532), make its decree retrospective even to the filing of the bill, still less to the time when the defendant first became incapable of attending to business. See Besch *v.* Frolich, 1 Ph. 172, in which case on its being urged that the Court ought to decree a dissolution from the time when the lunacy commenced, Lord Cottingham observed, "How can that be? Suppose the plaintiff became insolvent. The lunatic would be bound, notwithstanding this retrospective decree, to pay the partnership debts contracted during the time that the business continued to be carried on in the joint names. Besides, it must be remembered that there are three considerations between partners. The share of each in the capital; the share of each in the goodwill; and the labor which each undertakes to devote to the business. Your argument is, that because one of these considerations fails, you are entitled from that time to take to yourself the whole benefit of the other two; and that too while your partner remains jointly liable for the debts of the partnership during the intermediate period. How can that be right? It would be contrary to all principles of justice." See also Sander *v.* Sander, 2 Coll. 276.

It seems that the costs of a suit for the dissolution of a partnership on the ground that the defendant has become a lunatic, though

not found so by inquisition, will, after decree declaring the partnership dissolved, be ordered to be paid out of the partnership funds: Jones *v.* Welch, 1 K. & J. 765.

Where a partnership is determinable on one of the partners giving notice to the other, he may *give notice effectually notwithstanding his copartner is insane: Robertson *v.* Lockie, [*379 15 Sim. 285; Mellersh *v.* Keen, 27 Beav. 236.

By the Lunacy Regulation Act, 16 & 17 Vict. c. 70, s. 123, it is enacted that "where a person being a member of a copartnership firm, becomes lunatic, the Lord Chancellor may by order made on the application of the partner or partners of the lunatic, or of such other person or persons as the Lord Chancellor shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the Court of Chancery, or otherwise by due course of law, the committee of the estate, in the name and on behalf of the lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons, upon such terms, and in such manner, and may and shall execute and do such conveyances and things for effectuating this present provision, and apply the moneys payable to the lunatic in respect of his share and interest in the copartnership, in such manner as the Lord Chancellor shall order."

When the court of equity dissolves a partnership, it will determine all the rights of the partners *inter se:* for instance, it will in a proper case direct the return of the whole or part of a premium for entering into the partnership. See Astle *v.* Wright, 23 Beav. 77: there the defendant agreed to pay 1000*l.* for a share in the plaintiff's business of a surgeon in a partnership for fourteen years. The partners disagreed, and the partnership was dissolved by the Court with the assent of both parties. Sir John Romilly, M. R., held that as there were faults on both sides, a due proportion of the premium ought to be returned. "There are certainly," said his honor, "cases where Lord Eldon thought that this Court could not entertain a bill for a return of the premium, and that the party must be left to an action at law. But this certainly is not the way in which in modern times cases of dissolution of partnership have been dealt with, and at the bar I have obtained, and since leaving the bar I have made orders for dissolving partnerships, in which all

the rights of parties have been determined in this Court, including the return of the premium, wholly or in part, and the parties have not been left to work out any portion of their rights at law, the whole of them having been determined here. The rule in which I have followed other judges, is this:—that in the absence of any fraud or gross misconduct on either side, and where the continuation of the partnership has become impossible by reason of incompatibility of temper, or other causes springing from the parties themselves and not accompanied by circumstances which are controlled by the contract, I have treated the premium as having been paid for the whole term of the partnership; I have apportioned so much
*380] of it as belonged *to the period the partnership had lasted, and have ordered a return of the rest. Here a premium of 1000*l.* (500*l.* paid down and 500*l.* by instalments) was to be given for a partnership of fourteen years, and therefore one-fourteenth part of 1000*l.* is, in my opinion, attributable to each year. The interest of the part paid is not to be accounted for, because this was according to the contract, and was the property of the person who received it." See also Baring *v.* Dix, 1 Cox 213; Akhurst *v.* Jackson, 1 Swanst. 85; 1 Wils. C. C. 47; Freeland *v.* Stansfield, 2 Sm. & G. 479; Bury *v.* Allen, 1 Coll. 589; Featherstonhaugh *v.* Turner, 25 Beav. 382; Pease *v.* Hewitt, 31 Beav. 22; Lee *v.* Page, 30 L. J. (Ch.) 857; Mackerra *v.* Parkes, 15 W. R. (V.-C. K.) 217; Atwood *v.* Maude, 3 W. R. 78. See Airey *v.* Borham, 29 Beav. 620, where, under the circumstances, the Court refused to direct the repayment of any part of the premium paid for the share of a business.

Upon a proper submission of all the partners, the partnership may be dissolved by the award of an arbitrator (Heath *v.* Sansom, 4 B. & Ad. 172); and it has been held that where there was a general reference to an arbitration of "all matters in difference" between two partners, the arbitrator had power by his award to direct the partnership to be dissolved: Green *v.* Waring, 1 Wm. Black. 475.

9. *Effects and Consequences of a Dissolution.*—Having seen what will, either of itself or by means of the Court of Chancery, effect a dissolution of partnership, it remains to consider what are the effects and consequences of a dissolution. First as between the partners

themselves; and, secondly, as between the partners and third parties.

As to the effects and consequences of a dissolution between the partners themselves:—

After the dissolution none of the partners can enter into any *new* engagements so as to bind the others, for although a community of interests and a connection, to some extent, remains, it exists only for the purpose of winding up the affairs of the partnership: Ex parte Williams, 11 Ves. 5; Peacock *v.* Peacock, 16 Ves. 57; Crawshay *v.* Collins, 15 Ves. 218, 226; Crawshay *v.* Maule, *ante*, p. 310; Luckie *v.* Forsyth, 3 J. & L. 389.

Each of the partners has a right, upon dissolution, to insist that the funds of the partnership shall be applied in discharge of the partnership debts and liabilities,—a step necessarily preparatory to a division of the surplus among them. And to effect this object a single partner, although he could not bind the partnership by any new engagement, may pay and collect the debts and property of the partnership, and give receipts and discharges which will be binding upon the others: Fox *v.* Hanbury, Cowp. 445; Harvey *v.* Crickett, 5 M. & Selw. 336; Woodbridge *v.* Swann, 4 B. & Ad. 633 (24 E. C. L. R.); Smith *v.* Oriell, 1 East 368.

But the court of equity, as we have before seen, will by injunction *prevent any dealing with the partnership effects in a manner [*381 inconsistent with the purpose of winding up the concern; for instance, when one partner seeks to exclude the others from the part in the concern which they are entitled to take, or carries on the trade on his own account with the partnership property, and if it be necessary to effect these objects, the Court will appoint a receiver or manager to wind up the concern: Harding *v.* Glover, 18 Ves. 281; Crawshay *v.* Maule, *ante*, p. 310; Wilson *v.* Greenwood, 1 Swanst. 481; Dacie *v.* John, McClel. 206; Whitmore *v.* Mason, 2 J. & H. 204.

So long as a partner confines himself to the proper exercise of his duty in winding up the concern, he will be protected by the Court of Chancery; but the Court will at the same time protect the partnership if he acts in a manner inconsistent with the proper performance of his duty. Thus a partner will not be allowed to derive any private advantage by the composition of debts due to or from the partnership: Beak *v.* Beak, Ca. t. Finch 190; s. c. 3 Swanst.

627; Crawshay *v.* Collins, 15 Ves. 218, 229. So where one partner has, without the knowledge of the others, obtained an agreement for a lease for *partnership purposes* in his own name only, on the dissolution of the partnership by death or otherwise, it will be considered as part of the partnership property: Alder *v.* Fouracre, 3 Swanst. 489; Elliott *v.* Brown, 3 Id. 489.

Nor will a partner in a publication on a dissolution of the partnership be permitted to advertise that it will be discontinued, for the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets; but he may advertise the discontinuance of the publication as regards himself: Bradbury *v.* Dickens, 27 Beav. 53.

Nor will any of the partners, in the absence of a stipulation to that effect, be allowed any compensation for his trouble in winding up the concern; for what he may do would only be a performance of his duty as a partner: Heathcote *v.* Hulme, 1 J. & W. 122; Whittle *v.* Macfarlane, 1 Knapp 311; Thornton *v.* Proctor, 1 Anst. 94; Burden *v.* Burden, 1 V. & B. 170; Stocken *v.* Dawson, 6 Beav. 371.

As a general rule, on the death of a partner, in the absence of express stipulation or any direction in his will (Chambers *v.* Howell, 11 Beav. 6), his representative is entitled to have the whole concern wound up and disposed of; and if the surviving partner continues the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivor with interest on the amount of the capital retained and used by him: Clements *v.* Hall, 2 De G. & J. 186; see also Wedderburn *v.* Wedderburn, 2 Keen 722; 4 Myl. & Cr. 41; 22 Beav. 99; Travis *v.* Milne, 9 Hare 141; Bate *v.* Robins, 32 Beav. 73.

If the property of the partnership consists in part of leaseholds, *the representative of the deceased partner may treat the sur- *382] vivor as a trustee; and if the survivor renews the lease he is considered to do so for the benefit of the partnership: Id.; Clegg *v.* Fishwick, 1 Macn. & G. 294.

This rule, however, has been to some extent departed from where the trade is one of a speculative character, requiring great outlay with uncertain returns. There, if the surviving partner renews the lease in his own sole name, and carries on the business with his own capital and in his own name, the Court will not in general assist the

representative of the deceased partner unless he comes forward promptly and is ready to contribute a due proportion of money for the purpose of the business, as it would be unjust to permit the executor of the deceased partner to lie by and remain passive while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous: Norway *v.* Rowe, 19 Ves. 144; Prendergast *v.* Turton, 1 Y. & C. C. C. 98; s. c. on appeal, 13 L. J. N. S. Ch. 268; see also Hart *v.* Clarke, 6 De G., M. & G. 232.

Where, however, a surviving partner has refused to give the representatives of a deceased partner all the information as to the state of the concern, which was necessary in order to enable them to exercise a sound discretion as to whether they should claim an interest in, and take a share in the risks of the concern, they will be allowed to make a claim after the lapse of a considerable length of time: Clements *v.* Hall, 2 De G. & J. 173, reversing the decision of Sir J. Romilly, M. R., 24 Beav. 333.

When a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings as between the surviving and the estate of a deceased partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime, or by the amount of the capital which they were respectively to supply, or by the actual amount of the capital belonging to the surviving, and the estate of the deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and other circumstances of the case: Willett *v.* Blanford, 1 Hare 253; Simpson *v.* Chapman, 4 De G., M. & J. 154, 171.

On the dissolution of a partnership by bankruptcy, as it takes effect from the time when the act of bankruptcy was committed, from that time bankrupt partners cease to have any interest in or power over the partnership effects and concerns, which become vested in the assignees as tenants in common with the solvent partners: Barker *v.* Goodair, 11 Ves. 78; Dutton *v.* *Morrison, [*383
17 Ves. 193; In re Wait, 1 J. & W. 605; Thomason *v.* Frere, 10 East 418. And at law, actions must be brought in the names of the assignees and solvent partners jointly: Thomason *v.*

Frere, 10 East 418; Graham *v.* Robertson, 2 Term Rep. 282; Franklin *v.* Lord Brownlow, 14 Ves. 557. Although it seems actions by third persons should be brought against the solvent partners and the bankrupt: 1 Chit. Pl. 62, 63, 6th ed. And the solvent partners cannot, from the time of the bankruptcy, engage in new transactions: Harvey *v.* Crickett, 5 M. & Selw. 336; Thomason *v.* Frere, 10 East 418. But both the solvent partners, and it seems also the assignees, may do all such acts as are necessary to wind up the partnership.

If the solvent partners combine to carry on the business of the partnership, and enter into new contracts, it will be at their own risk, as they will be liable, at the option of the assignees, to account for the profits, or pay interest on the share of the bankrupt partner, and they will be subjected moreover to all the lossss: Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; Brown *v.* De Tastet, Jac. 295.

The power of a solvent partner, upon the bankruptcy of his copartner, to sell the partnership property, is given to him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such share and interest is taken in execution. Thus when partnership goods had been taken in execution upon a *bonâ fide* judgment against a solvent partner whose copartner was bankrupt, upon a bill filed by the assignee, an injunction was granted by Sir W. Page Wood, V.-C., to restrain the judgment creditor, who had purchased all the share, right, and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser, and it was held that the plaintiff had not deprived himself of his right to this injunction by his own misconduct, in violently putting the defendant out of possession: Fraser *v.* Kershaw, 2 K. & J. 496.

With regard to partnership accounts, if there is any special agreement as to the mode in which they are to be taken it must be abided by (Pettyt *v.* Janeson, 6 Madd. 146), unless the parties have by their acts shown an intention to waive the agreement, in which case, as well as in the absence of any special agreement, the accounts must be taken in the usual way: Jackson *v.* Sedgwick, 1 Swanst.

469, as to which see Story Partn. § 349; Coll. Partn. 197, 2d ed.; 1 Lindley on Partn. 784, 2d ed.

Where a surviving partner endeavors to baffle the Court of Chancery in taking the accounts, *by withholding the partnership books and documents, he will be charged arbitrarily with the profits which it may be presumed have been made by the partnership: Walmsley *v.* Walmsley, 3 J. & L. 556. [*384

Another question sometimes arises on a dissolution how, after discharging the debts and obligations of the concern, the partnership effects are to be distributed. In the absence of any special agreement, it seems that the property of the firm, whether it consists of realty or personal chattels, ought, as was laid down in the principal case of Crawshay *v.* Maule, *ante*, p. 279, to be sold; and not even in the case of a dissolution caused by the death or bankruptcy of a single partner, can the surviving or solvent partners insist upon taking the partnership effects at a valuation: see also Cook *v.* Collingridge, Jac. 607; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Wilson *v.* Greenwood, 1 Swanst. 471; Wilde *v.* Milne, 26 Beav. 504; and see Fox *v.* Hambury, Cowp. 445. Nor can a partner, in the absence of contract, compel his copartners to buy at a valuation: Burdon *v.* Barkus, 8 Jur. N. S. 656.

Where a suit is instituted for the dissolution of a partnership, and it is clear on the bill and answer that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion: Crawshay *v.* Maule, *ante*, p. 279; Nerot *v.* Burnand, 2 Russ. 56; and see Goodman *v.* Whitcomb, 1 J. & W. 589, 592.

It may be here mentioned that there is no such principle in equity that surviving partners cannot become purchasers from the representatives of the share of a deceased partner: Chambers *v.* Howell, 11 Beav. 6. But where the partnership property is sold under the order of the Court, liberty to bid will be given to all the partners (Rowlands *v.* Evans, 30 Beav. 302), except to any one of them having the conduct of the sale: Wild *v.* Milne, 26 Beav. 504, 506.

The question how long the estate of a deceased partner continues liable to the demands of surviving partners, is not, it seems, the subject of any positive enactment, except so far as a court of equity may found its rules upon analogous cases at law. It seems therefore that a court of equity will not, after six years' acquiescence, unexplained by circumstances or countervailed by acknowledgment,

decree an account between a surviving partner and the estate of a deceased partner: Barber *v.* Barber, 18 Ves. 286; Ault *v.* Goodrich, 4 Russ. 430; Martin *v.* Heathcote, 2 Eden 169; Bridges *v.* Mitchell, Gilb. Ex. Rep. 224; Bunb. 217; 15 Vin. Ab., tit. Limitations, F. 2, pl. 7, p. 110; Foster *v.* Hodgson, 19 Ves. 185; but see the remarks of Lord Brougham in Robinson *v.* Alexander, 8 Bligh N. S. 352; 3 Cl. & Fin. 717.

*385] In Tatam *v.* Williams, 3 Hare *347, a bill filed by the surviving partners against the executors of a partner who had died *thirteen* years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram, V.-C., with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen or become known after the death of the deceased partner.

Effects and consequences of dissolution as to the rights of Creditors.—In considering the rights of persons who are creditors before dissolution, it must be remembered that they may be either *joint* creditors of all the firm, or *separate* creditors of individual members of the firm.

The rights of these creditors as against the partners themselves will not be altered by the dissolution of the partnership: Ault *v.* Goodrich, 4 Russ. 430; Ex parte Peakes, 1 Madd. 359. But as the creditors during the partnership have, independent of contract, no lien upon the partnership effects, it is competent for a retiring partner, upon a voluntary dissolution, *bonâ fide* made, to assign his interest in the joint property to the remaining partner, so that it thereupon becomes his separate property, and is no longer liable to the claims of the joint creditors; and it is immaterial that the assignment is wholly or in part in consideration that the assignee shall pay the whole or part of the partnership debts. See Ex parte Ruffin, *post*, p. 387, and note.

Although while the partnership is going on, a creditor has no lien or equity against the joint effects of the partnership, he may bring an action against the partners; and get judgment, and execute the judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execu-

tion, as the fruit of the judgment: clearly not in respect of any interest he had in the partnership effects while he was a mere creditor, not seeking to substantiate or create an interest by suit: Ex parte Williams, 3 Ves. 5.

Where, however, a dissolution takes place by the death or bankruptcy of a partner or by effluxion of time; or where there is a dissolution without any special agreement for the transfer of the property to the remaining partner, in all these cases the *partners* themselves or their representatives or assignees have a lien upon the whole property and an equity amongst each other that the effects should be properly applied in payment of the debts and winding up the accounts, in order that the surplus may be distributed amongst them according to their different interests; the joint creditors therefore, through the medium of the partners and in a derivative and subordinate manner, thus obtain a quasi-lien upon the partnership effects: Ex parte Ruffin, 6 Ves. 119, 126, 127; Ex parte Williams, *11 Id. 3; Ex parte Kendall, 17 Id 514. [*386

The lien of a representative of a deceased partner, in respect of a debt due by the partnership, will, it seems, only attach to the specific partnership property existing at the date of the dissolution, and will not extend to any property acquired by the surviving partner after the dissolution: Payne *v.* Hornby, 25 Beav. 280.

At *law*, where the dissolution takes place in consequence of the death of one of the partners, the joint creditors can only proceed against the survivors: Goodson *v.* Good, 6 Taunt. 587 (1 E. C. L. R.); Richards *v.* Heather, 1 B. & Ald. 29; in *equity*, however, as partnership debts are considered *joint* and *several*, joint creditors, instead of proceeding at law against the survivors, may, whether the survivors are insolvent or bankrupt, proceed against the estate of the deceased partner: Devaynes *v.* Noble, 1 Mer. 530; s. c. 2 Russ. & My. 495; Sumner *v.* Powell, 2 Mer. 37; Wilkinson *v.* Henderson, 1 My. & K. 582; Thorpe *v.* Jackson, 2 Y. & C. Excheq. Ca. 553. But the surviving partners would be properly joined as defendants in such suit in equity, as they would be interested in contesting the demands of the joint creditors. See Wilkinson *v.* Henderson, 1 My. & K. 582.

As to the administration of partnership assets in bankruptcy, see Ex parte Rowlandson, and note, *post*, 407.

In the administration of the assets of a deceased partner in equity, where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts the joint debts thus paid will be allowed in account with the surviving partner: 19 Beav. 115; if the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally proceed against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his own proportion: Id.; but if the estates of the deceased and the surviving partner are insolvent, then the joint creditors must resort in the first instance to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied: Id. If both partners die before administration takes place, the rule is the same: Ridgway *v.* Clare, 19 Beav. 111, 117. And see *ante*, p. 351, 352.

As to the liability of an executor of a partner carrying on business with the surviving partners, see Labouchere *v.* Tupper, 11 Moo. P. C. C. 198.

What constitutes a partnership is a question of law: Gilpin *v.* Temple, 4 Harring. 190; McGrew *v.* Walker, 17 Ala. 824.

The dictum of Lord Chief Justice De Gray in Grace *v.* Smith, 2 Wm. Blackst. 998, "that every man who has a share of the profits of a trade ought also to bear a share of the loss," was adopted as the ground of judgment in Waugh *v.* Carver, 2 H. Blackst. 235, where it was laid down "that he who takes a moiety of all profits indefinitely shall *by operation of law* be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." That case has been followed in England in many other cases down to a very recent period: Smith's Lead. Cas. 504; 3 Kent's Com. 27; Lindley 26. It remained unshaken for more than seventy years. "The reasoning on which it proceeds," said Baron Bramwell, in Bullen *v.* Sharp, *infra*, "seems to have been generally acquiesced in at the time; and when, more recently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to remove it." Notwithstanding all this, it may now be considered as substantially overruled in England by Cox *v.* Hickman, 8 H. L. 268; and Bullen *v.* Sharp, 1 Law Rep. C. P. 86, in the Ex-

chequer Chember, in which it was held that a direct participation in profits as such was cogent but not conclusive evidence of a partnership. Whether the courts of the United States will follow in this lead remains to be seen. The Supreme Court of Pennsylvania has distinctly refused to do so: Edwards *v.* Tracy, 12 P. F. Smith 381.

Participation in profit and loss constitutes persons partners in a purchase and sale: Purviance *v.* McClintee, 6 S. & R. 259; Winship *v.* Bank of United States, 5 Peters 529; Cumpston *v.* McNair, 1 Wend. 457; Brown *v.* Robbins, 3 N. H. 64; Miller *v.* Hughes, 1 A. K. Marsh. 181; Scott *v.* Cosmesnil, 7 J. J. Marsh. 416; Doþ *v.* Halsey, 16 Johns. 34; Bailey *v.* Clark, 6 Pick. 372; Cushman *v.* Bailey, 1 Hill 526; Vanderburgh *v.* Hall, 20 Wend. 70; Bucham *v.* Dodd, 3 Harring. 485; Chapman *v.* Wilson, 1 Robinson 267; Cox *v.* Delano, 3 Devereux 89; Holt *v.* Kernodle, 1 Iredell 199; Motley *v.* Jones, 3 Iredell Ch. 144; Solomon *v.* Solomon, 2 Kelly 18; Heimstreet *v.* Howland, 5 Denio 68; Emanuel *v.* Draughn, 14 Ala. 503; Catskill Bank *v.* Gray, 14 Barb. 471; Wadsworth *v.* Manning, 4 Md. 59; Perry *v.* Butt, 14 Georgia 699; Allen *v.* Davis, 8 English 28; Sheridan *v.* Medara, 2 Stockton 469; Wood *v.* Vallette, 7 Ohio N. S. 172; Ward *v.* Thompson, 22 Howard (S. C.) 330; Bromley *v.* Elliott, 38 N. H. 287; Robbins *v.* Laswell, 27 Illinois 365; Bigelow *v.* Elliott, 1 Clifford C. C. 28. A partnership may exist in a single as well as in a series of transactions. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, this will constitute a partnership: In Re Warren, Davies 320. A joint interest in a patent, however, does not make those interested partners: Parkhurst *v.* Kinsman, 1 Blatch. C. C. 488. To constitute a partnership as between the parties themselves, there must be a joint ownership of the partnership funds and an agreement, either express or implied, to share the profits and loss of the business in a proportion agreed upon: Chase *v.* Barrett, 4 Paige 148; Johnson *v.* Miller, 16 Ohio 431; Pattison *v.* Blanchard, 1 Selden 186; Vassar *v.* Camp, 14 Barb. 341; Mason *v.* Potter, 26 Verm. 722; Hawes *v.* Tillinghast, 1 Gray 289. It is not necessary that each partner should, as between themselves, be liable to share indefinitely in the losses. It is sufficient if they are to share in the profits and the losses so far as they affect the capital advanced: Brigham *v.* Dana, 3 Williams 1. It is not necessary that the partners should be proportionate joint owners of the capital. It is enough that they are jointly interested in the profits and losses: Id. It has been held that a person who receives a portion of the profits of a business is liable as a partner, although he acts only in the character of an agent, and receives such profits as a compensation for his services: Taylor *v.* Terme, 3 Har. & Johns. 505. But there are many cases which hold the contrary. A participation in the profits of a business

by a party as a compensation for his labor or services, without having any interest in the capital stock or any right to control the business, does not make him a partner: Ogden *v.* Astor, 4 Sandf. (S. C.) 311; Price *v.* Alexander, 2 Green 427; Reed *v.* Murphy, Id. 574; Judson *v.* Adams, 8 Cush. 556. To constitute a community of profits, a party must have a specific interest in the profits themselves as profits, in contradistinction to a stipulated portion of the profits, as a compensation for services: Loomis *v.* Marshall, 12 Conn. 69; Ambler *v.* Bradley, 6 Verm. 119; Muzzy *v.* Whitney, 10 Johns. 226; Turner *v.* Bissell, 14 Pick. 192; Blanchard *v.* Coolidge, 22 Id. 151; Denny *v.* Cabot, 6 Metc. 82; Burckle *v.* Eckart, 1 Denio 337; Wilkinson *v.* Jilt, 7 Leigh 115; Hodges *v.* Daws, 6 Ala. 215; Shropshire *v.* Sheppard, 3 Ala. 733; Bartlett *v.* Jones, 2 Strob. 471; Bartlett *v.* Levy, Id. 471; Buckle *v.* Eckhart, 3 Comst. 132; Newman *v.* Bean, 1 Foster 93; Hodgman *v.* Smith, 13 Barb. 302; Bull *v.* Schuberth, 2 Md. 38; Moore *v.* Smith, 19 Ala. 774; Peirson *v.* Steinmyer, 4 Richardson 309; Fitch *v.* Hall, 25 Barb. 13; Berthold *v.* Goldsmith, 24 Howard (S. C.) 536; Smith *v.* Perry, 5 Dutcher 74; Atherton *v.* Tilton, 44 N. H. 452; Conklin *v.* Barton, 43 Barb. 435; Mervin *v.* Playford, 3 Robertson 702; Morgan *v.* Stearns, 41 Verm. 397. An agreement that one shall receive a salary for his services, together with a commission of seven per cent. on the profits, does not constitute him a partner: Miller *v.* Bartlett, 15 S. & R. 137; Dunham *v.* Rogers, 1 Barr 255; Brockway *v.* Burnap, 16 Barb. 309; Good *v.* McCartney, 10 Texas 193. The fact that one is to receive a certain portion of the net profits of a firm, in consideration of his acceptance of certain drafts, will not make him liable as partner, if there was no holding out as such: Polk *v.* Buchanan, 5 Sneed. 721. An agreement by a landlord with his tenant to take a share of the profits of the demised premises by way of rent, does not constitute a partnership between them: Perrine *v.* Hankinson, 6 Halst. 181; Boyer *v.* Anderson, 2 Leigh 550; Christian *v.* Crocker, 25 Ark. 327. So where an agreement is made between two parties, that one shall furnish a farm with a certain amount of teams and labor, and the other shall manage the farm and perform certain work, the crops to be divided between them: Blue *v.* Leathers, 15 Illinois 31. A railroad corporation, who lease to an individual a house owned by them, he paying them a certain sum annually and half the net profits arising from keeping said house as a hotel, do not thereby become partners in the business of keeping the house: Holmes *v.* The Old Colony Railroad, 5 Gray 58. Where several parties had subscribed for the purpose of building, and by the terms of the contract the property was to be owned by them in common in proportion to the amount subscribed by each, and was to be sold only with the approval of a majority, it was held that they were not partners: Woodward *v.* Cowing, 41

Maine 9. So an agreement between two houses to share commissions on sales of goods forwarded by one to the other: Pomeroy *v.* Sigerson, 22 Missouri 177. Where, however, one advances money to a merchant without any fixed premium for its use, but that to depend upon the success in trade, the party advancing the money will be liable to creditors, though he was to risk no part of the advance or share the losses of the trade: Oakley *v.* Aspinwall, 2 Sandf. (S. C.) 7. So it has been held that the lending of money at six per cent., with an agreement that in case the debtor succeeded twenty-five per cent. was to be paid, makes the borrower and lender partners as to third parties: Sheridan *v.* Medara, 2 Stockton 469. But see, to the contrary, Williams *v.* Souther, 7 Clark 435; Polk *v.* Buchanan, 5 Sneed 721.

Parties may agree to stand in the relation of joint purchasers; as where a subject is bought not to be sold again at their profit and loss, but to be divided between them. This does not constitute them partners: Brady *v.* Calhoun, 1 Penna. R. 140; Rice *v.* Austin, 17 Mass. 197; Halsted *v.* Schmelzel, 17 Johns. 80; Harding *v.* Foxcroft, 16 Greenlf. 76; Noyes *v.* Cushman, 25 Verm. 390; Stoallings *v.* Baker, 15 Missouri 481. Nor does the mere conveying an undivided interest in a patent to each of four parties, yet it is otherwise if they agree to make a common interest to sell and divide the net proceeds equally: Penniman *v.* Munson, 26 Verm. 164. Where there were three distinct companies of passenger carriers, one on the Atlantic, one on the Isthmus, and one on the Pacific, forming one connecting line and included by the agent in one advertisement, but each issuing separate tickets and taking no joint interest in the passage-money or joint liability for loss, it was held that this did not constitute a partnership: Briggs *v.* Vanderbilt, 19 Barb. 222; Merrick *v.* Gordon, 20 N. Y. 93. But, on the other hand, it has been held that an association of separate owners of several steamboats into a joint concern to run their steamboats upon the Hudson River, and to collect and receive the earnings in a common fund out of which all the expenses of the boats are to be paid, is a copartnership: The Swallow, Olcott Adm. 334. But where two mercantile firms agree to make contracts in the names of their respective firms for the purchase and sale of merchandise, to be executed with its separate funds, and to share profit and loss on such contracts, they are not copartners, either as between themselves or with respect to third persons: Smith *v.* Wright, 5 Sandf. 113. The master and crew of a ship engaged in a whaling voyage, who are to receive in lieu of wages a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship: Baxter *v.* Rodman, 3 Pick. 435; Boardman *v.* Keeler, 2 Verm. 67; Coffin *v.* Jenkins, 3 Story 108. Part-owners of a ship or cargo are not partners: Holmes *v.* United Ins. Co., 2 Johns. Cas. 329;

Gallop *v.* Newman, 7 Pick. 282; French *v.* Price, 24 Id. 13; Macy *v.* De Wolf, 3 Wood. & M. 193. Owners, however, of the freight and cargo, who share the profit and loss, are partners: Nicoll *v.* Mumford, 4 Johns. Ch. 522; s. c. 20 Johns. 611; Gregory *v.* Dodge, 14 Wend. 593. The members of a private association, as a telegraph company, are not partners. They are tenants in common of the property and franchises belonging to the company, and the majority cannot bind the minority unless by special agreement: Irvin *v.* Forbes, 11 Barb. S. C. 587; Cox *v.* Bodfish, 35 Maine 302. Where one party furnishes a boat and the other sails it, an agreement to divide the gross earnings does not constitute a partnership: Bowman *v.* Bailey, 10 Verm. 110. Although a partnership as to third persons may arise by mere operation of law contrary to the intention of the parties, yet as between themselves it only exists when such is their actual intention, and a mere participation of profits will not make them partners *inter sese* unless such is their intention: Hazard *v.* Hazard, 1 Story 371. Persons may be partners as respects third persons without being partners *inter se:* Gill *v.* Kuhn, 6 S. & R. 333. They are to be treated as such if they so conduct and hold themselves out to others, whether their contract would make them so or not: Stearns *v.* Haven, 14 Verm. 540; Bucknam *v.* Barnum, 15 Conn. 67; Benedict *v.* Davis, 2 McLean 347; Given *v.* Albert, 5 W. & S. 333; Kellogg *v.* Griswold, 12 Verm. 291; Hicks *v.* Cram, 17 Verm. 449; Tabb *v.* Gist, 1 Brock. 33; Buckingham *v.* Burgess, 3 McLean 364, 549; Cotrill *v.* Vandusen, 22 Verm. 511; Kerr *v.* Potter, 6 Gill 404; Morshon *v.* Hobensack, 2 N. J. 372; Furber *v.* Carter, 11 Humph. 231; Crozier *v.* Kirker, 4 Texas 252; Young *v.* Smith, 25 Missouri 341; Shackleford *v.* Smith, Id. 348; Stephenson *v.* Cornell, 10 Ind. 475; Fisher *v.* Bowles, 20 Illinois 396; Wait *v.* Brewster, 31 Verm. 516; Stanchfield *v.* Palmer, 4 Greene 23. It must appear that the creditor had knowledge of such holding out at the time he gave credit to the firm: Benedict *v.* Davis, 2 McLean 347; Wright *v.* Powell, 8 Ala. 560; Irvin *v.* Conkling, 36 Barb. 64; Wood *v.* Pennell, 51 Maine 52.

Partnerships between attorneys are subject to the ordinary incidents of mercantile partnerships: Livingstone *v.* Cox, 6 Barr 360; Smith *v.* Hill, 8 English 173. So also between mechanics: McMullen *v.* Mackenzie, 2 Greene 368. There may be a partnership for the purpose of buying and selling land: Kramer *v.* Carthurs, 7 Barr 195; Dudley *v.* Littlefield, 8 Shepl. 418; Turnipseed *v.* Goodwin, 9 Ala. 372; In Re Warren, Davies 320; Patterson *v.* Brewster, 4 Edw. Ch. 352. An agreement by two to buy lands jointly and share the proceeds constitutes a partnership: Ludlow *v.* Cooper. 4 Ohio N. S. 1; Fall River Co. *v.* Borden, 10 Cush. 458; Gray *v.* Palmer, 9 Cal. 616; Clagett *v.* Kilbourne, 1 Black (S. C.) 346.

Real estate purchased with partnership funds for partnership purposes, and which remains after paying the debts of the firm as between themselves is considered and treated as real estate: Buckley *v.* Buckley, 11 Barb. (S. C.) 54; Lang *v.* Waring, 17 Ala. 145. As to real estate held in partnership, see Pitts *v.* Waugh, 4 Mass. 424; Goodwin *v.* Richardson, 11 Id. 469; Coles *v.* Coles, 15 Johns. 159; Hall *v.* Henrie, 2 Watts 143; Devine *v.* Mitcheson, 4 B. Monr. 488; Hoxie *v.* Carr, 1 Sumn. 173; Sigourney *v.* Munn, 7 Conn. 11; Smith *v.* Jackson, 2 Edw. Ch. 28; Smith *v.* Wood, Saxton 74; Forde *v.* Herron, 4 Munf. 316; Waugh *v.* Mitchell, 1 Dev. & Bat. Ch. 510; Winston *v.* Chiffelle, 1 Harp. Ch. 25; Thayer *v.* Lane, Walk. Ch. 200; Platt *v.* Oliver, 3 McLean 27; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Buchan *v.* Sumner, 2 Barb. Ch. 165; Smith *v.* Tarlton, Id. 336; Averill *v.* Loucks, 6 Barb. (S. C.) 19, 470; Cox *v.* McBurney, 2 Sandf. S. C. 561; Deming *v.* Colt, 2 Sandf. (S. C.) 284; Lancaster Bank *v.* Myley, 1 Harris 544; Boyce *v.* Coster, 4 Strob. Eq. 25; Olcott *v.* Wing, 4 McLean 15; Ridgway's Appeal, 3 Harris 177; Andrews *v.* Brown, 21 Ala. 437; Owens *v.* Collins, 23 Id. 837; Jarvis *v.* Brook, 7 Foster 37; Moderwell *v.* Mullison, 9 Harris 257; Black *v.* Black, 15 Geo. 445; Lang *v.* Waring, 25 Ala. 625; Matlock *v.* Matlock, 5 Ind. 403; Coder *v.* Huling, 3 Casey 84; Moreau *v.* Saffarans, 3 Sneed 595; Galbraith *v.* Gidge, 16 B. Monr. 631; Ludlow *v.* Cooper, 4 Ohio N. S. 1; Tillinghurst *v.* Champlin, 4 R. I. 173; Patterson *v.* Sullivan, 4 Casey 304; Roberts *v.* McCarty, 9 Ind. 16; Buffum *v.* Buffum, 49 Maine 108; Lane *v.* Tyler, Id. 252; Willis *v.* Freesman, 35 Verm. 44.

A dormant partner is liable for all the partnership debts contracted during his connection with the firm, whether credit is given exclusively to the ostensible partner or not, and this liability is founded on his participation in the profits: Lea *v.* Guice, 13 Sm. & M. 656. The liability of a dormant partner may be avoided by proof of fraud in forming the partnership, if no part of the funds have been received by such dormant partner: Mason *v.* Connell, 1 Whart. 381. A dormant partner need not be joined as plaintiff in an action for goods sold where the defendant in making the contract did not deal with him or know him in the transaction: Clarkson *v.* Carter, 3 Cowen 84; Clarke *v.* Miller, 4 Wend. 628; Hilliken *v.* Loop, 5 Verm. 116; Mitchell *v.* Dale, 2 Har. & G. 159; Monroe *v.* Ezzell, 11 Ala. 603; Desha *v.* Holland, 12 Id. 513; Bank of St. Marys *v.* St. John, 25 Ala. 566; Secor *v.* Keller, 4 Duer 416.

In general one partner cannot maintain an action of assumpsit against his copartner for any matter connected with the partnership, without evidence of an express promise, or of a balance struck and agreed to upon settlement: Causter *v.* Burke, 2 Har. & G. 295; Beach *v.* Hotchkiss, 2 Conn. 425; Williams *v.* Henshaw, 12 Pick. 378; Dewit *v.* Staniford, 1

Root 270; Lamalere *v.* Caze, 1 Wash. C. C. 435; Kennedy *v.* McFadon, 3 Har. & Johns. 194; Ozeas *v.* Tolman, 1 Binn. 191; Young *v.* Brick, 2 Penn. 663; Murray *v.* Bogert, 14 Johns. 318; McCall *v.* Oliver, 1 Stew. 510; Haskell *v.* Adams, 7 Pick. 59; Clarke *v.* Dibble, 16 Wend. 601; Gibson *v.* Moore, 6 N. H. 547; Ozeas *v.* Johnson, 4 Dall. 434; Willey *v.* Phinney, 15 Mass. 116; Chase *v.* Garvin, 1 App. 211; Burley *v.* Harris, 8 N. H. 233; Davenport *v.* Gear, 2 Scam. 495; Killam *v.* Preston, 4 W. & S. 14; Gulick *v.* Gulick, 2 Greene 578; Paine *v.* Thatcher, 25 Wend. 450; Glover *v.* Tuck, 24 Id. 153; Rockwell *v.* Wilder, 4 Metc. 556; Dickinson *v.* Granger, 18 Pick. 315; Springer *v.* Cabell, 16 Mo. 640; Rearl *v.* Wilhelm, 3 Gill 356; Pope *v.* Randolph, 13 Ala. 214; Gridley *v.* Doll, 4 Comst. 486; Capen *v.* Barrows, 1 Gray 376; Halderman *v.* Halderman, 1 Hempstead 559; McKnight *v.* McCutchen, 27 Mo. 436; Robinson *v.* Green, 5 Harring. 115; Martin *v.* Solomons, Id. 344; Sikes *v.* Work, 6 Gray 433; Odiorne *v.* Woodman, 39 N. H. 541; Lower *v.* Denton, 9 Wisconsin 268; Wycoff *v.* Purnell, 10 Iowa 332; Lane *v.* Tyler, 49 Maine 452; Nims *v.* Bigelow, 44 N. H. 376; Holyoke *v.* Mayo, 50 Maine 385. Where the partnership is but in a single item or adventure, such an action will lie by one partner to recover the balance of account: Byrd *v.* Fox, 8 Mo. 574; Galbreath *v.* Moore, 2 Watts 86; Hamilton *v.* Hamilton's Exrs., 6 Harris 20; Buckner *v.* Ries, 34 Mo. 357. It may be maintained by one party against the other for a balance due him growing out of a partnership transaction, if there is but a single item to liquidate: Musier *v.* Trumpbour, 5 Wend. 275. One partner may sue another on a note given by the latter to the former, for the payment of a part of the capital stock: Grigsby *v.* Nance, 3 Ala. 347.

The existense of a partnership having been proved at a particular time, it will be presumed to continue until a dissolution is proved, and to have been on equal terms, until the contrary is shown: Reybold *v.* Dodd, 1 Harring. 401; Honore *v.* Colmesnil, 1 J. J. Marsh. 506; Irby *v.* Brigham, 9 Humph. 750. Once formed it is considered as continuing as to third persons, until notice of its dissolution: Thurston *v.* Perkins, 7 Mo. 29; Princeton Turnpike Co. *v.* Gulick, 1 Harring. 161; Lucas *v.* Bank of Darien, 2 Stewart 280; Sanderson *v.* Milton Stage Co., 18 Verm. 107. Where it has been formed for a limited term, it cannot be dissolved by the mere will of either partner: Henn *v.* Walsh, 2 Edw. Ch. 129; Bishop *v.* Brickles, 1 Hoff. Ch. 534. Sed quære: Blake *v.* Dorgan, 1 Iowa 537; Mason *v.* Connell, 1 Whart. 381; Slemmer's Appeal, 8 P. F. Smith 168. An inquisition of lunacy, found against a member of a firm, *ipso facto* dissolves it: Isler *v.* Baker, 6 Humph. 85. Insolvency does not *per se* work a dissolution: Arnold *v.* Brown, 24 Pick. 89; Sigel *v.* Chidny, 4 Casey 279. *Contrà:* Williamson *v.* Wilson, 1 Bland 418. A partnership between persons

residing in two different countries, for commercial purposes is dissolved by the breaking out of war between the two countries: Griswold *v.* Waddington, 15 Johns 57; s. c. 16 Id. 438; Seaman *v.* Waddington, Id. 510. If several persons enter into written articles, and the majority alter the agreement in a material point, the minority may retire from the firm, provided they do so within a reasonable time: Abbot *v.* Johnson, 32 N. H. 9. A sale of partnership property under a separate execution against one partner, operates as a dissolution: Renton *v.* Chaplain, 1 Stock. 62. It has been held that a conveyance by a partner of his interest in all the personal and real estate of the firm to one of his copartners, does not *ipso facto* dissolve the partnership: Taft *v.* Buffum, 14 Pick. 322. But a majority of the cases hold the contrary doctrine: Cochran *v.* Perry, 8 W. & S. 262; Marquand *v.* New York Manufacturing Co., 17 Johns. 525; Edens *v.* Williams, 36 Illinois 252. The death of a partner dissolves the partnership, though it is for a number of years, unless there is an express stipulation to the contrary: Scholefield *v.* Eichelberger, 7 Peters 586; Gratz *v.* Bayard, 11 S. & R. 41; Knapp *v.* McBride, 7 Ala. 19; Burwell *v.* Mandeville, 2 Howard (S. C.) 560; Williamson *v.* Wilson, 1 Bland. 418; Goodburn *v.* Stevens, 5 Gill 1; Ames *v.* Downing, 1 Bradford 321.

To discharge a retiring partner, there must have been actual notice to one who has had dealings with the firm: Prentiss *v.* Sinclair, 5 Verm. 149; Watkinson *v.* Bank of Penna., 4 Whart. 482; Mauldin *v.* Branch Bank, 2 Ala. 502; Vernon *v* Manhattan Co., 17 Wend. 524; s. c. 22 Wend, 183; White *v.* Murphy, 3 Richardson 369; Wardwell *v.* Haight, 2 Barb. S. C. 549; Hutchins *v.* Sims, 8 Humph. 423; Hutchins *v.* Hudson, Id. 426; Hutchins *v.* Bank, Id. 418; Simonds *v.* Strong, 24 Verm. 149; Conro *v.* The Port Henry Iron Co., 12 Barb. 27; Pope *v.* Risley, 23 Missouri 185; Clapp *v.* Rogers, 1 E. D. Smith 549; Shannel *v.* Taylor, 12 La. Ann. 773; Johnson *v.* Totten, 3 Cal. 343; Page *v.* Brant, 18 Ill. 37; Williams *v.* Birch, 6 Bosworth 299; Little *v.* Clarke, 12 Casey 114; Ennis *v.* Williams, 30 Geo. 691; Kirkman *v.* Snodgrass, 3 Head 370; Zoller *v.* Janvrin, 47 N. H. 324. To constitute a person a previous dealer, and entitled to actual notice of dissolution, he must have dealt directly with the firm; and it is not sufficient that he may have dealt in paper for which the firm was responsible: Hutchins *v.* Bank, 8 Humph. 418. Notice of the dissolution of a firm to one of its customers may be inferred from circumstances: Coddington *v.* Hunt, 6 Hill 595; Mauldin *v.* Branch Bank, 2 Ala. 502. Where a partnership is dissolved by war no notice of dissolution is necessary: Griswold *v.* Waddington, 15 Johns. 57. Notice of the dissolution published in the Gazette is notice to all persons, who had not previous dealings with the firm: Lansing *v.* Gaine, 2 Johns. 300; Prentiss *v.* Sinclair, 5 Verm. 149; Graves *v.* Merry, 6 Cowen 701; Shurlds *v.* Tilson, 2

McLean 458; Watkinson *v.* Bank of Penna., 4 Whart. 482; Gallicott *v.* Planters' Bank, 1 McMullan 209; Mauldin *v.* Branch Bank, 2 Ala. 502; Simonds *v.* Strong, 24 Verm. 642. A dormant partner on retiring need not give notice: Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Magill *v.* Merrie, 5 B. Monr. 168; Creghe *v.* Durham, 9 Ind. 375; Deford *v.* Reynolds, 12 Casey 325. A partner whose name has not appeared in the firm will be liable to persons dealing with the firm after his retirement from it, if he was known to such persons as a member of the firm either by direct transactions or public notoriety and they have not been notified of the dissolution: Davis *v.* Allen, 3 Comst. 168. Where the facts are ascertained it is a question of law, whether the notice of dissolution is sufficient or not: Mowatt *v.* Howland, 3 Day 353.

*EX PARTE RUFFIN. [*387

June 6, 1801.

[REPORTED 6 VES. 119.]

PARTNERSHIP—CONVERSION OF JOINT INTO SEPARATE ESTATE.]—*A fair dissolution of partnership between two; one retiring and assigning the partnership property to the other; and taking a bond for the value, and a covenant of indemnity against the debts; the other continued the trade separately a year and a half, and then became bankrupt. Held, that the joint creditors had no equity attaching upon partnership effects remaining in specie; and, at all events, such a claim ought to be by bill, not a petition.*

IN June, 1797, Thomas Cooper, of Epsom, brewer, took James Cooper into partnership.

That partnership was dissolved by articles, dated the 3d of November, 1798; under which the buildings, premises, stock in trade, debts, and effects, were assigned to James Cooper, by Thomas Cooper, who retired from the trade.

Upon the 2d of April, 1800, a commission of bankruptcy issued against James Cooper, under which the joint creditors attempted to prove their debts, but the commissioners refused to permit them; upon which a petition was presented to Lord Rosslyn, who made an order that the joint creditors should be at liberty to prove, with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts, and of the separate estates to

the separate debts. At a meeting for the purpose of declaring a dividend, the commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in consequence of which this petition was presented, praying that the partnership effects remaining *in* *388] *specie*, and possessed by the assignees, may be sold; and that the outstanding debts may be accounted joint estate.

By the articles of dissolution the parties covenanted to abide by a valuation to be made of the partnership property; and James Cooper covenanted to pay the partnership debts then due, and to indemnify Thomas Cooper against them; and Thomas Cooper covenanted not to carry on the trade of a brewer for twenty years within twenty miles of Epsom. A bond for 3000*l.*, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father, as surety.

In pursuance of the covenant, the partnership property, consisting of leases, the premises where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at 2030*l.*, after charging all the partnership debts then due.

James Cooper, by his affidavit, stated that all the joint creditors knew of the dissolution and the assignment of the property; that advertisements were published; and that the deponent, after the dissolution, received many debts due to the partnership; but paid more on account of the partnership. His father, by affidavit, stated that he paid the interest of the bond regularly; and intended to pay the principal when due.

Mr. *Romilly* and Mr. *Cullen* for the joint creditors, and Mr. *Bell* for Thomas Cooper.—If one partner can, by assigning all his interest in the effects, prevent the joint creditors from going against those effects, fraud must be the consequence.

The partners may agree to divide the effects, and carry on business separately. By this agreement between the partners, the whole fund of the joint creditors is taken away. Upon the principles, upon which the effects, joined at the date of the bankruptcy, are applied to the joint debts, effects joint at the dissolution of the partnership, and remaining the same *in specie* at the time the commission issues, should be considered joint property. The ground is, that credit has been given upon the faith of the joint property; and it is a fraud upon the persons giving that credit to apply that fund to the separate creditors, trusting only to the individual and separate effects; and that ground applies equally to this case. Until the partnership accounts are taken, there is no separate property but in the surplus after paying the partnership debts (*Taylor* v. *Fields*, 4 Ves. 396), the creditors standing in the place of the *bankrupt. The joint [*389
creditors therefore have a mediate, if not a direct lien upon the whole of the partnership effects. At law the partnership creditors have more advantage than under a commission; taking the partnership effects exclusively, and the separate effects with the separate creditors. What difference arises from the circumstance, that the partnership did not exist at the time of the bankruptcy? That is not sufficient to take the case out of the common rule. In *West* v. *Skip*, 1 Ves. 239, 456, it is laid down, that upon a dissolution by agreement or by time, the partner out of possession is not divested of his property in and lien upon the partnership effects. The same right remains to an account of the partnership effects; in which the first item always is the payment of the partnership debts. The position that partners can, as between themselves, by any act or agreement alter the partnership stock, so as to affect the rights of third persons, cannot be maintained. Why have they not an equal right, in the same manner, to discharge their persons by such act or agreement; especially, if with the knowledge of

the joint creditors; but *Heath* v. *Percival*, 1 P. Wms. 682, shows, that circumstance will not bind them; the transaction being *res inter alios acta*. That an actual assignment and divesting partnership property out of one partner will not defeat the right against the partnership effects is proved by *Ex parte Barnaby*, 1 Cooke's Bank. Law 253, 4th ed. No evidence is produced to show that the separate creditors thought this was separate property, and gave credit accordingly: it must, therefore, be taken that they knew it was not. The assignment is made upon condition, and subject to the payment of the partnership debts. A considerable part of the property consisted of debts, which are not assignable.

But this question has been decided by the order made by the late Lord Chancellor.

Mr. *Mansfield* and Mr. *Cooke* for the assignees.—No such attempt was ever made before, under such circumstances; a fair dissolution, and an assignment by one partner of all the effects to the other; and trade carried on by that other; and at this distance of time. Upon the petition before the late Lord Chancellor there was no debate; and the separate creditors not appearing, and Thomas Cooper consenting, the usual order was made. The circumstance, that part of the property consisted of debts makes no difference. Thomas Cooper is a solvent partner endeavoring to get what he can, through the medium of the *joint creditors. It is perfectly immaterial to them; for he is solvent, and able to pay them. The petition is in truth his. If this was not a complete assignment, it will be impossible to draw the line. Why may not joint creditors as well, at the end of twenty years, fix upon a house or any specific article, once partnership property? Certainly fraud will vitiate transactions of all sorts; but this would be a singular fraud; for if the bankruptcy does not follow soon enough to prevent the joint creditors from enforcing their remedy at law, the

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object cannot be attained; and it is only in bankruptcy that the question can ever arise; for at law the joint creditor takes joint as well as separate property, and the distribution takes place in bankruptcy only. The object of such a plan must be to serve the separate creditors, not the partners themselves; and the bankruptcy must follow so immediately as to prevent the creditors from pursuing their remedies at law. There is no pretence of fraud. The consideration was a bond; but the question is precisely the same as if it was paid in money. The trade was carried on a year and a half, and there is nothing to show that any one looked on Thomas as a partner. The effect would be, that until all the joint debts are paid, there never could be a complete assignment from one partner to another. Consider, how separate creditors may be defrauded, giving credit to what they see as separate property. Cases infinitely stronger occur in daily practice, as *The case of Shakeshaft, Stirrup, and Salisbury.* One of three partners, by arrangement between them, happens, in the course of trade (he living in London, and the others in the country), to get into his possession a quantity of goods. A commission of bankruptcy issued. Lord Thurlow said he could not take accounts between the respective partners; but finding the effects in the hands of one, whatever might be the demands of the others, or the consequences to the joint creditors, the goods were the separate property of that one, and must be applied to his separate debts. There it happened by accident, that a considerable part of the partnership stock was transferred to one of the partners, not by an actual assignment for consideration, as in this instance, which is in effect a purchase. There is no sound distinction between this transaction and the sale of partnership effects to any other person, a stranger. After the assignment, Thomas Cooper, in whose right the petitioners claim, had no interest whatsoever. None of the cases cited apply. The joint creditors have no lien, though in the

*391] arrangement in bankruptcy *the joint effects are applied to the joint debts. The doctrine of *Skip* v. *West* is not disputed; that a partner put out of possession, whether by agreement or effluxion of time, does not lose his right; what were partnership effects at that time, still remain so; but Lord Hardwicke never said, that notwithstanding a sale of the partnership effects, and a separate trade carried on with them for years afterwards by the person who bought them, they remain joint.

The agreement of partners can neither discharge goods nor the person; but it may change the property in the goods. *Heath* v. *Percival* has not the least relation to this case. There was no agreement to give up the joint bond. The party therefore had a right to enforce it, notwithstanding his giving time to Sir Stephen Evans. In *Ex parte Burnaby* it does not appear that any one of the partners had gone out; nor, when Crispe committed the act of bankruptcy; which might have been prior to the assignment. That assignment was merely of the share of one to the other, not attended with any dissolution of the partnership; which in this case was actually dissolved, and the share legally assigned. The partnership subsisting up to that time, there was a right to insist that the partnership debts should be paid.

With respect to the lien, in the case of *Lodge* v. *Fendall*, to which your Lordship has referred, Dr. Fendall had paid 10,000*l.* into a banker's hands, and immediately afterwards Lodge stopped payment. The utmost contended for there was, that the assignees of the separate estate might be at liberty to prove that sum, not to take it out. Lord Thurlow there established the rule, that, unless there was a transmutation of the estate by fraud, the creditors must take it, as it happened at the time of the bankruptcy. That rule has been since acted upon in other cases, and the law is established, that the date of the act of bankruptcy is the com-

mencement of the lien, and until then there is no lien. At law there is no lien upon the effects of the debtor, until the execution is delivered to the sheriff. At the date of this deed there was neither act of bankruptcy nor execution. There being no lien therefore at law, what objection is there to this deed, public—attended with possession and upon *bonâ fide* consideration? The intent of the deed was to convey all the property to James Cooper. He was to use his capital in the continuing trade. For that purpose the assignment was necessary. It is not necessary in such a case to prove, that *the separate creditors trusted to [*392 the apparent separate stock. To what else could they trust? James Cooper swears, no idea was entertained of his having any partnership property; that he contracted debts to the amount of 5000*l.*; and that he laid out considerable sums upon this very property; and that he paid partnership debts to the whole amount of what he received. But the case is not to be decided upon such circumstances, but on the legal rights of the creditor. The joint property was liable to their execution, but in common with any other property. But suppose a separate creditor had obtained a prior judgment and execution, could that have been superseded by the subsequent execution of a joint creditor?

In *Hankey* v. *Garrett*, 1 Ves. Jun. 236, also referred to by your lordship, the question was the same as in *Ex parte Burnaby;* whether under the separate bankruptcy there was a right to distribute the joint property among the joint creditors: Lord Thurlow's doubt being, whether the solvent partner had not a right to appear. That doubt has been of late got over; the Court having been in the habit of disposing of joint property under a separate commission without a bill, or the appearance of the other partner. But in those cases the question was not what is or is not joint property, but as to the jurisdiction.

Mr. *Romilly*, in reply.—Though this order was not made

by Lord Rosslyn upon argument, it certainly did not pass as a mere matter of course. This must be decided as a general case. There is one very important fact, that there were outstanding debts to a very considerable amount. None of those debts could be collected but by action in the joint names of the two partners until the bankruptcy, and now of the assignees. The effect therefore was not to make James Cooper the legal owner: an equitable interest could only be transferred, subject to all equities and therefore to the equitable lien upon the covenant to pay all the debts; to which these outstanding debts, as well as the other property, were liable. The joint creditors claim, not by way of lien, but as having by the rules established in this Court an equitable claim upon the joint property, in preference to the separate creditors, until the former are paid 20*s.* in the pound. There is an analogy to the case of a partner dying; in which case all survives at law to the other; but this Court either in a suit or in bankruptcy would direct an account of all the debts at the dissolution. So, where an executor becomes bankrupt, all the effects would belong to the assignees, but the *Court considers them trustees, as he was. So in this case the bankrupt was a trustee for the joint creditors after the dissolution of the partnership, as both were before. The case of Lodge and Fendall is materially distinguishable. In this the whole fund of the joint creditors is done away. In that also the question was not as to specific effects, but a sum of money paid in by one partner. These petitioners only say, these specific effects subsisting in the hands of this partner ought to be applied. *Ex parte Burnaby* is an express decision upon the point. The ground of this claim is upon the assignment, not the dissolution, which is immaterial; but how can one partner assign all his property to the other without a dissolution? As to the fraud, suppose the person going out is insolvent, a case extremely likely to happen.

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Lord Chancellor ELDON.—This case is admitted, unless *Ex parte Burnaby* applies to it, to be new in its circumstances. Therefore, if I was of opinion that the petition could be supported, I should be very unwilling to express that in bankruptcy where my opinion would not be subject to review.

If the case I have mentioned has decided the point, there is the authority of Lord Hardwicke upon it; which would weigh down the most considerable doubt that I could be disposed to entertain.

I feel great difficulty in complying with the prayer of the petition, and when I read it was struck with it as a new case, and as one upon which I do not clearly see my way to the relief prayed. It is the case of two partners, who owed several joint debts, and had joint effects. Under these circumstances their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint; his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true, that the separate creditors of each, by bringing actions might acquire a certain interest even in the partnership effects; taking them in execution in the way in which separate creditors can affect such property. But there was no lien in either.

*The partnership might dissolve in various ways:— [*394
First, by death; *secondly*, by act of the parties (that act extending to nothing more than mere dissolution), without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the

others. The partnership might also be dissolved by the bankruptcy of one or of both, and by effluxion of time.

If it dissolved by death, referring to the law of merchants, and the well-known doctrine of this Court, the death being the act of God, the legal title in some respects in all the equitable title would remain, notwithstanding the survivorship; and the executor would have a right to insist that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right, supposing both remained solvent.

So, upon the bankruptcy of one of them, there would be an equity to say, the assignees stand in the place of the bankrupt, and can take no more than he could, and consequently nothing, until the partnership debts are paid.

So upon a mere dissolution without a special agreement, or a dissolution by effluxion of time; to wind up the accounts the debts must be paid, and the surplus be distributed in proportion to the different interests.

In all these ways the *equity is not that of the joint creditors, but that of the partners with regard to each other*, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves.

When the bankruptcy of both takes place, it puts an end to the partnership certainly, but still it is very possible, and it often happens, in fact, that the partners may have different interests in the surplus, and out of that a necessity arises, that the partnership debts must be paid, otherwise the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions, or equally. Many cases have occurred upon the distribution between the separate and joint estates; and the principle in all of them from the great case of Mr. Fordyce (*Harman* v. *Fishar*, Cowp. 117) has been, that if the Court should say, that what has

ever been joint or separate property shall always remain so, the *consequence would be, that no partnership [*395
could ever arrange their affairs. Therefore, *a* bonâ fide *transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors, and therefore the Court always lets the arrangement be, as they* (i. e. *the parties to the arrangement*) *stand, not at the time of the commission but of the act of bankruptcy.*

Thomas Cooper is admitted to be solvent. He certainly has no such equity as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance not his own act. But he dissolves the partnership a year and a half ago; and instead of calling upon these effects according to his equity at the dissolution to pay the partnership debts, he assigns his interest to the other, to deal as he thinks fit with the property, to act with the world respecting it; desiring only a bond to pay a given value in three or four years. Therefore he, or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he has no equity.

It is then said, and the circumstance had struck me, that all the property is not assignable at law: for instance, the debts; but as between the two Coopers they were the property of the bankrupt, for debts are within the statute of James (21 Jac. 1, c. 19, ss. 10, 11), and if left in the order and disposal of the bankrupt, he is proprietor of the debt. Therefore Thomas Cooper could never set up the insufficiency of the legal operation of the assignment against his own deed. The assignment was not made subject to the payment of the debts, but in consideration of a covenant, leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts. The creditors therefore cannot rest upon the equity of the partner going out.

I was struck with the argument of inconvenience: the in-

convenience on all sides is great. To say this seems to me a monstrous proposition: that, which at any time during the partnership has been part of the partnership effects, shall in all future time remain part of the partnership effects notwithstanding a *bonâ fide* act. Suppose an improbable case, that the partners in Child's house chose to shift their shop from Temple Bar to the West End of the town; and that house, now the property of the partnership, was *bonâ fide* bought by one of the partners, and *the money was
*396] invested in the purchase of the new house, in which they were going to reside; suppose, a still more improbable case, that a year and a half or ten years afterwards they became bankrupt, would that house be the partnership effects? It would be so, if it remained without the legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution; but where the effect is a *bonâ fide* transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenient to examine the *bona fides* of each transaction, than to say such transaction shall never take place.

The case of *West* v. *Skip* falls within some of these observations I have made: *Heath* v. *Percival* does not apply at all. The bond in that case was not given up; and therefore the creditor keeping the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. *Hankey* v. *Garret* is also very different. There the partnership was dissolved by bankruptcy or by death, and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon *Burnaby's Case*. I do not know how to understand it; whether there was anything

special in the assignment, I cannot find out from the report. I shall endeavor to find the papers. It looks very like this case, if it is *in specie* this case, as an authority I should think myself bound to submit to it. But it is not *in specie* this case; there is so much doubt, whether this relief can be given, that I am satisfied it ought to be given, if at all in a jurisdiction where my opinion would be subject to revision. My present inclination is, that the creditors have not this equity. I have considerable doubts also, whether, if they have it, Thomas Cooper would be benefited by it; and a further subject of grave and serious doubt is, whether, if the joint creditors disturb the arrangement, the separate creditors would not have a right to set the arrangement right at his expense.

I now think there is a circumstance that distinguishes *Burnaby's Case*. The assignment was not by one to the other two, but by one to one of the other two, which may be very different. I think that circumstance distinguishes the case so much, that I shall *consult the interest of the parties better by saying, they may file a bill,[1] if they think proper, than by further delay. [*397

Petition dismissed.

"If upon the dissolution of a partnership," says a learned author, "the retiring partner *bonâ fide* assigns all his interest in the stock and effects to the remaining partner, who afterwards becomes bankrupt, so much of the partnership stock so assigned as remains in specie will vest in the assignees of the bankrupt as his separate property, and will be distributable accordingly. The leading case upon the subject is Ex parte Ruffin." See Coll. Partn. 603, 2d ed., and Belt's Supp. to Ves. Sen. 135; see also Ex parte Fell, 10 Ves. 347; Ex parte Williams, 11 Ves. 3; Campbell *v.* Mullett, 2 Swanst. 575, where this case has been commented upon and followed.

[1] No bill was filed; see "Cook's Bankrupt Laws," p. 537, *n.*

The decision in Ex parte Ruffin depended upon this principle, that during the solvency and continuance of the partnership the creditors have no lien upon the partnership effects; it therefore followed that any one of them might assign his interest therein to the other partner, without the creditors having any lien upon it; that, in fact, by the assignment the joint effects of the partnership had become the separate property of the partner to whom the assignment was made; and therefore his separate creditors were entitled to be satisfied out of it before the joint creditors of the firm. See Langmead's Trusts, 20 Beav. 20; 7 De G., M. & G. 353.

It is true that upon the dissolution of a partnership, the joint creditors are entitled to have satisfaction out of the joint effects of the partnership before the separate creditors of each partner, but this arises, as is laid down by Lord Eldon, in the principal case, not from any lien of the creditors, but from the equities existing between the partners, or their representatives or assignees.

This was clearly shown by Lord Eldon in the case of Ex parte Williams, 11 Ves. 5, where he explained the grounds upon which he decided the principal case. "The grounds," he observed, "upon which I went in Ex parte Ruffin were these. Among partners clear equities subsist, amounting to something like lien. The property is joint: the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions; or, if there is a defi-
*398] ciency, to call upon each other to make *up that deficiency, according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment; and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment; clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one (which operates like death); or, as in this instance, a dry naked agreement that the partnership shall be dissolved. In no one of these cases can it be said, that to all intents and purposes the partnership is dissolved; for the con-

nection still remains, until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner; but still in either of those cases that community of interest remains, that is necessary, until the affairs are wound up; and that requires that what was partnership property before shall continue, for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require: and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution."

Upon the same principle it has been laid down "that as between themselves, a partnership may have transactions with an individual partner, or with two or more partners having their separate estate engaged in some joint concern, in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner, as if the partnership were transacting business with strangers. For instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership:" per Eyre, C. J., in Bolton *v.* Pullen, 1 B. & P. 546.

In order, however, to convert the joint into separate property, or *vice versâ*, two things are essential. First, the transfer must be *complete; and, secondly, it must be *bonâ fide*. [*399

1. *Transfer in order to convert joint into separate Property must be complete.*—In the principal case, it will be observed, that there was a legal deed of assignment of the partnership effects. Where, however, the partnership effects are *in specie*, it is perfectly immaterial whether the assignment takes place by agreement, or by deed, if there be an actual and corporeal handing over of the property. See Ex parte Clarkson, 4 Deac. & C. 67. Thus in Ex parte Williams, 11 Ves. 3, Shepherd and Smith, two partners, on the 5th of

September, 1803, dissolved their partnership, and on the 25th of the following November inserted a notice in the "London Gazette," stating the dissolution, and that all debts due from the partnership were to be paid, and would be discharged by Shepherd. At the dissolution of the partnership there were effects belonging to the partners to a considerable amount remaining in specie, and several outstanding debts to the partnership were still remaining due. The effects of the partnership appear to have been delivered up to Shepherd. On the 24th of December, 1803, a Commission of Bankruptcy issued against Shepherd. The joint creditors contended before the Commissioners that the specific property and outstanding debts, belonging to the partnership, were to be considered as joint effects, and applicable to joint debts; but the opinion of the Commissioners was, that such effects, remaining in specie, had, by the effect of the dissolution of the partnership, become the separate property of Shepherd, and applicable, in the first instance, to his separate debts; and in taking the accounts they refused to include any part of such specific effects, as forming part of the joint estate (except certain debts owing to the partners). Lord Eldon, C., dismissed a petition of appeal from the decision of the Commissioners. "The question," said his Lordship, "is whether the contract for dissolution has left the equities of the partners attaching upon the possession. If it is competent to partners to say, those equities shall no longer exist, inquiry is necessary to ascertain whether, by the bargain for the dissolution, that which was the property of all has become the property of one. In Ex parte Ruffin, there could be no doubt upon that: a legal instrument being produced, the legal effect of which was such as I have stated, that case was no more than that a bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader in whose hands they were left; and the other was only to come in as a creditor. Upon the facts of this case, without saying whether the conclusion of the Commissioners as to the joint debts is right, there is distinct evidence of an agreement, that the joint effects should be considered separate effects; and *that fact calls upon me to declare the conclusion of law, that these are separate effects." And see Ex parte Gurney; 2 Mont., D. & D. 541.

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Where the instrument affecting to assign the partnership property

is merely an *executory* agreement, and something thereby agreed to be done is left undone at the time of the bankruptcy, it will not convert the joint into separate property. Thus in Ex parte Wheeler, Buck 25, a retiring partner by agreement in writing assigned all the stock and debts to Mallam, the partner continuing in the business, who agreed to pay a debt owing by the former, and also to pay him an annuity, for the due payment of which it was stated that the father of the continuing partner (who was not a party to the agreement) should be security. Mallam's father refused to become a security for his son. It was held by Lord Eldon, C., that the partnership stock was not transferred by the agreement to Mallam. "The first question," said his Lordship, "is whether this is an actual legal assignment or an executory agreement; because if it is only an executory agreement, circumstances have occurred, as appears by the evidence, that may have the effect of putting an end to it. I think it is to be collected from the agreement, that the father was to join in being security for payment by the son. But Mallam's father refused to give such security; therefore that further act which was necessary to be done in order to complete the transfer of the property, did not happen before the bankruptcy." And see Ex parte Cooper, 1 M., D. & D. 358; Hawkins *v.* Hawkins, 4 Jur. N. S. 1044; The Case of the Bank of England, 8 De G., F. & J. 645; 7 Jur. N. S. 715 nom. In re Sheatfield, Lawrence & Co.; Young *v.* Keighly, 15 Ves. 557.

Upon the same principle, where, after a dissolution and an assignment of the partnership effects to one of the partners, the retiring partner filed a bill against him, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and a receiver, which were ordered, it was held by Lord Eldon, C., upon a subsequent bankruptcy, that such interference of the Court restored the property to its original character, as joint property, unless the plaintiff in equity had, by his conduct, between the time of his obtaining the injunction and the bankruptcy, rendered nugatory the effect of such interference: Ex parte Rowlandson, 1 Rose 416; Ex parte Barrow, 2 Rose 252; Ex parte Pemberton, 2 Mont. & A. 548; 1 Deac. 421.

The mere fact, that part of the consideration payable on an agreement, for a dissolution of partnership by which the stock is assigned to one of the partners, is made up of bills of exchange,

payable at a future time, will not be sufficient to render the agreement *executory*, and the joint will be converted into separate property, though the bills may not be paid. In such a case the bills
*401] of exchange are *looked upon as a mere *mode of payment*, and the person taking them has the usual remedies by action in case of their dishonor, or in the event of bankruptcy by proof: Ex parte Clarkson, 4 Deac. & C. 56, 67, 68; Ex parte Gibson, 2 Mont. & A. 4.

In the case of real property, in the event of the non-payment of the purchase-money, the retiring partner would have a lien for the unpaid purchase-money. See Mackreth *v.* Symmons, 1 Lead. Cas. Eq. 263, 3d ed.; Ex parte Peake, 1 Madd. 346; Grant *v.* Mills, 2 Ves. & B. 306; Ex parte Gibson, 2 Mont. & A. 4.

But if, notwithstanding an assignment, the personal effects remain in the order and disposition of the partnership, the joint creditors will be entitled to them: Ex parte Burton, 1 Glyn & J. 207. See also Ex parte Williams, 11 Ves. 3, *ante*, p. 397; Ex parte Usborne, 1 Glyn & J. 358; and see Ex parte Gibson, 2 Mont. & A. 10; 2 Sim. 257; Ex parte Leaf, 1 Deac. 176. And see note to Joy *v.* Campbell, *post*.

A mere dissolution of the partnership or the retirement of one of the partners from trade will not have the effect of converting the joint property of the partnership into separate property, for, in the words of Lord Eldon, "that does no more than declare, that the partnership is not to be carried on any further, except for winding up the affairs: and he who has actual possession has it clothed with a trust for the other, to apply the property to the debts; and that will qualify the nature of his possession, so that it cannot be said he has the sole possession of the specific effects or the debts, to bring it within the doctrine of reputed ownership:" Ex parte Williams, 11 Ves. 6. But see and consider Ex parte Taylor, Mont. 240. There one of four partners having died, and the surviving partners having compromised and obtained securities for a debt due to the original firm, became bankrupts, it was held by Sir L. Shadwell, V.-C., that the securities were, by reputed ownership, distributable among the creditors of the three.

If a partner, upon retiring from the partnership, desires that the partnership effects should remain liable to the joint debts of the

partnership, he should assign such effects upon trust to pay the debts. See Ex parte Fell, 10 Ves. 348.

Although the joint effects of the partnership may, by assignment to one of the partners, be rendered his separate property so as to give his separate creditors a prior claim upon them, nevertheless the joint creditors may *before* his bankruptcy elect to become his separate creditors, though they cannot do so afterwards. "The engagement of one partner with the other," says Sir John Leach, V.-C., "to pay the debts of the firm, can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal *before [*402 the bankruptcy, then a contract to that effect is concluded, and under the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor, *after* the bankruptcy, comes too late, for he is then incapable of contract. . . . I agree that it may be some hardship upon joint creditors, that the joint stock to which they may have given credit, should, by the dealings of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration that he shall pay the joint debts, such joint stock shall not, in bankruptcy, be considered as actually converted into his separate estate, unless he has paid the joint debts. The cases of Ex parte Ruffin, and the other cases of that class which followed it, have established that the legal principle which converts the joint estate into the separate estate by mere force of the contract is too strong for this equity:" Ex parte Freeman, Buck 473; see also Thompson *v.* Percival, 5 B. & Ad. 925 (27 E. C. L. R.); 3 N. & M. 167 (28 E. C. L. R.).

But although the partnership effects have been made by contract the separate property of one of them, and therefore cannot be touched in bankruptcy by the joint creditors, the joint creditors may undoubtedly proceed against the two partners, for the agreement to dissolve does not deprive the joint creditors of their right of applying for payment to those who are responsible to them: Ex parte Peake, 1 Madd. 358, 359.

2. *Transfer in order to convert joint into separate Property must*

be bonâ fide.—In order that the joint property should be converted into separate property, the transaction must be *bonâ fide.* As Lord Eldon observed in the principal case, "a *bonâ fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern."

If partners enter into a contract for the purpose of defrauding their joint creditors, the one agreeing to permit the other to withdraw money out of the reach of the joint creditors, such contract is fraudulent and invalid: Anderson *v.* Maltby, 4 Bro. C. C. 423; 2 Ves. Jr. 244.

Upon the same principle, when at the time of the dissolution the partners both collectively and individually are insolvent, a conveyance from one of them to the other of the partnership effects, in consideration of his covenanting to pay the debts of the partnership, will be fraudulent and void as against creditors, and consequently will not have the effect of converting the joint into separate estate, although at the time of the transfer the partner taking it may have believed that the business of the late firm could be profitably carried on. This was decided in the important case of Ex parte *403] *Mayou, In re Edwards Wood & Greenwood, 34 L. J. (Bktcy.) 25, 11 Jur. N. S. 433. There the bankrupts Wood and Greenwood were partners. Their business was that of brickmakers, and they held a lease or agreement for a lease of a colliery that was expected to be a profitable undertaking. In the month of August, 1863, the partners were in great difficulties. In November, 1863, a trader debtor summons was taken out against them for a debt of 250*l.*, and several writs demanding large sums of money issued against them. On the 9th of December, they went together to a person who had accepted bills for their accommodation to induce him to renew them, and to make a further advance of money. He declined to comply with their application, whereupon the bankrupts determined to dissolve partnership, and a deed was prepared and executed on the same day, by which Mr. Greenwood assigned the whole of the property to Mr. Edwards Wood, taking from Mr. Edwards Wood a covenant to pay the debts of the partnership. At the time of the execution of the deed the partnership was insolvent, and each of the partners was insolvent. There seems, however, to have been some expectation on the part of Mr. Edwards Wood, that if he succeeded in obtaining advances,

the colliery might be profitably worked. It was held by Lord Westbury, C., that the deed of dissolution was fraudulent and void, and did not consequently convert the joint property of the firm into the separate property of Mr. Edwards Wood. "The case," said his Lordship, "was learnedly argued with reference to several decisions of Lord Eldon; but I take it that the principle of all the decisions is that which is shortly stated by Lord Eldon, in the case of Ex parte Williams, 11 Ves. 3, in which he very concisely states that every one of these transactions must depend entirely upon the *bona fides*. The question, therefore, that I have to answer is simply this, whether an assignment of this nature can be made *bonâ fide* by a partner when the partnership is in a state of insolvency, and the partners themselves are equally insolvent in their separate character? Now the principle of law embodied in the 13th Eliz., and also the principle which is expressed and declared by the 67th section of the Bankrupt Law Consolidation Act, 1849, entirely forbid my holding that this assignment was anything but a fraudulent conveyance, fraudulent against creditors, a transaction which cannot have effect given to it, because it would have the effect of delaying and defeating the just creditors of an insolvent person in their attempts to recover and make available the property of that person. I, therefore, applying that test to the matter, hold that there was no *bona fides* in this transaction, that the assignment was fraudulent, that it was void, that it did not operate as a conversion of the bankrupts' property into the separate estate of Wood, that *the whole of the property as it existed belonging to the bankrupts at the [*404 date of that deed must still be considered as remaining the joint property, and must be administered and distributed as such under the bankruptcy among the joint creditors."

It has however been held, though under somewhat peculiar circumstances, that one partner may agree with a retiring partner to give him a sum of money for the concern, and thereby convert the joint assets of the firm into the separate estate of the continuing partner, although they knew at the time of the dissolution that the partnership was insolvent, provided no fraud was intended. The case referred to is that of Ex parte Peake, In re Lightoller, 1 Madd. 346. There the petitioner Peake and Lightoller the bankrupt carried on the business of calico-printers in partnership together (at premises which had been conveyed to them jointly) until the month

of September, 1814, when they agreed to dissolve the partnership, and the petitioner Peake agreed to sell his interest in the premises to the bankrupt, the bankrupt also agreeing to pay the debts due from the firm, amounting to about 670*l.* By indentures of lease and release, dated respectively the 10th and 11th of October, Peake conveyed and assigned to Lightoller his moiety of the premises, and certain implements and utensils. The consideration for the sale being the sum of 2009*l.* (which was not paid), but Lightoller gave his drafts for that amount payable at different dates. The first bill, which became due on the 14th December, 1814, being dishonored, Peake obtained a deposit of the deeds to secure the whole of the purchase-money, and subsequently a memorandum, by which it was agreed that, upon a sale or mortgage of the premises, the 2009*l.* should be paid. The remainder of the bills, when due, were dishonored. After the dissolution of the partnership, Lightoller separately and ostensibly carried on the concern (Peake never interfering), and held himself out as the sole owner of the property, obtained credit with his different creditors upon the credit of the property belonging to him separately and as his own estate. In May, 1815, Lightoller stopped payment, and in the following June he became a bankrupt. A petition presented by Peake prayed for the sale of the premises, the payment of the 2009*l.*, with interest, and of the partnership debts.

The bankrupt swore that when the state of the accounts were examined in the months of September and October, 1814, the partnership estate was insolvent to a very considerable amount. This was denied by Peake. Peake, it appears, was solvent. Some of the joint creditors appeared to contend that the transaction between Peake and the bankrupt had not rendered the property of the former the separate estate of the bankrupt. But the assignees contended that they had a right to go back to the transaction of October, 1814, and that *upon finding the partnership dissolved at that period, and the affairs not wound up, they had a right to take the account against Peake, and to render him responsible for part of the joint debts afterwards paid by Lightoller, those debts being so paid by the sale of goods furnished to Lightoller by the new creditors. Sir Thomas Plumer, however, held that the partnership property had, by the transaction between the partners in 1814, been made the separate property of the bankrupt, and that

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after the payment of the purchase-money it was applicable towards payment of the separate creditors of the bankrupt.

"I will take it," said his honor, "that the two partners were each cognisant at that period, that the effects of the partnership were greatly insufficient to pay its debts, and that Lightoller chose separately to remain conducting the business, and to buy out the retiring partner—there being no deception, no misrepresentation, no concealment, no fraud, on the part of the retiring partner. The first question is—Is it not competent to two partners to make such a bargain, however advantageous or disadvantageous it may be to either party? May not one copartner dissolve publicly his partnership with the other, he knowing the then state of it, but having a better opinion of it, or choosing, for his own advantage, to give a sum of money if the other will convey his interest to him? They certainly might make such an agreement, no fraud being practised or intended." And, after commenting upon the case of Anderson *v.* Maltby, 4 Bro. C. C. 423, s. c. 2 Ves. Jun. 244, his honor said:—"In that case there was strong ground to believe a fraud was intended; and it does not warrant me in declaring generally that the mere circumstance of the partnership being at that time in such a state that their joint effects were not sufficient to pay their joint debts, will *per se* be sufficient to invalidate a dissolution of partnership made fairly between the partners themselves. No fraud was intended by Lightoller—*he paid the joint creditors*—there was therefore no connivance with Peake to put the joint effects into a state to benefit Peake. Anderson *v.* Maltby, therefore does not apply."

It will be observed that this case differs in many respects from In re Edwards Woods, Ex parte Wood & Greenwood, for in the latter case not only the firm, but also the partners individually, were insolvent at the time of the dissolution, which was soon afterwards followed by the bankruptcy of both partners. Whereas in Ex parte Peake, the retiring partner was solvent, and the continuing partner who openly carried on the business for some months, contracting new debts upon the faith of the possession of the former property of the partnership, paid off the joint creditors, so that there was no person before the Court who had any right to insist that a *fraud had been committed upon them by the transfer of [*406
the partnership property upon the dissolution. And as between the partners themselves, it is clear that there was no fraud.

The case of Ex parte Peake seems therefore to be quite consistent with the decision of Lord Westbury in Ex parte Mayou. However, after the latter decision, it may well be doubted whether it would be competent for a partner knowing the insolvency of the firm, to assign the partnership effects to the continuing partner, so as to convert the joint into separate estate, at any rate where the assignment was soon followed up by the bankruptcy of one of the continuing partners, because the effect of the assignment, although no actual fraud was intended, would be that of delaying or defeating the joint creditors.

In the principal case the assignment took place a considerable time—a year and a half—before the bankruptcy, and that lapse of time was no doubt evidence of the *bona fides* (see Ex parte Williams, 11 Ves. 4); but the mere fact that the bankruptcy takes place soon after the assignment will not of itself, in the absence of fraud, render the assignment invalid: Ex parte Williams, 11 Ves. 3.

As to the conversion of real estate held for the purposes of a partnership, see note to Lake *v.* Craddock, 1 L. C. Eq. 174, 3d ed.

As to the equity of the joint creditors, see White *v.* Dougherty, Mart. & Yerg. 309; Bevan *v.* Aller, 3 Harring. 80; Tredwell *v.* Roscoe, 3 Dev. 50; Wilder *v.* Keeler, 3 Paigé 167; Christian *v.* Ellis, 1 Gratt. 396; Lucas *v.* Atwood, 2 Stew. 378; McDonald *v.* Beach, 2 Blackf. 55; Washburn *v.* Bank of Bellows Falls, 19 Verm. 278; Filley *v.* Phelps, 18 Conn. 294; Pearson *v.* Keedy, 6 B. Monr. 128; Black *v.* Bush, 7 Id. 210; Merrill *v.* Neill, 8 How. (S. C.) 414; In re Warren, Davies 320; Muir *v.* Leitch, 7 Barb. (S. C.) 341; Cleghorn *v.* The Insurance Bank of Columbus, 9 Geo. 319; Glenn *v.* Gill, 2 Md. 1; Emanuel *v.* Bird, 19 Ala. 596; Wilson *v.* Soper, 13 B. Monr. 411; Morrison *v.* Kurtz, 15 Illinois 193; Toombs *v.* Hill, 28 Geo. 371; Crooker *v.* Crooker, 46 Maine 250; Black's Appeal, 8 Wright 503; Houseal's Appeal, 9 Id. 484; Burpee *v.* Bunn, 22 Cal. 194; McCormick's Appeal, 5 P. F. Smith 252; Bank of Kentucky *v.* Keizer, 2 Duval 169; Whitehead *v.* Chadwell's Adm., Id. 432. In equity the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; and while the partnership continues, this equitable lien, existing for the benefit and security of the separate partners, may be reached in a court of equity, by the creditors of

the firm for the purpose of securing to themselves a preference over the separate creditors: Bardwell *v.* Perry, 19 Verm. 292; Talbot *v.* Pierce, 14 B. Monr. 195; Huskill *v.* Johnson, 24 Geo. 625; Jones *v.* Lusk, 2 Metc. (Ky.) 356; McNutt *v.* Strayhorn, 3 Wright 269; Backus *v.* Murphy, Id. 397; Matlack *v.* James, 2 Beas. 126; Dean *v.* Phillips, 17 Ind. 406; Dunham *v.* Hanna, 18 Id. 270; Snodgrass' Appeal, 1 Harris 474; O'Bannan *v.* Miller, 4 Bush. 25. Though the creditors of a partnership are entitled to a priority of payment as between them and creditors of an individual partner, out of the partnership funds so long as they continue partnership funds; yet they have no specific lien thereon; and while the partnership remains and its business is going on whether it be in fact solvent or not, there is no legal objection to a *bonâ fide* distribution of the partnership funds among the members of the firm or a *bonâ fide* change of them from joint to separate estate: Allen *v.* The Center Valley Co., 21 Conn. 130; Miller *v.* Estell, 5 Ohio N. S. 508; Sigler *v.* The Knox Co. Bank, 8 Id. 511; Schæffer *v.* Fithian, 17 Ind. 463; Mittnight *v.* Smith, 2 Green 259; National Bank *v.* Sprague, 20 N. J. Eq. 13. The partnership creditors have a right to be substituted to the lien of the partners: Black *v.* Black, 7 B. Monr. 210, If the contract be of such a nature that the partners can enforce no lien for the partnership debts as between themselves, the partnership creditors can claim no preference: Rice *v.* Barnard, 20 Verm. 479; but see Elliott *v.* Stevens, 38 N. H. 311. The only insolvency which will give the chancellor jurisdiction to decree priority of payment in favor of partnership debts is that which is ascertained by a judgment execution and return of "no property" against one or more of the partners: Jones *v.* Lusk, 2 Metc. (Ky.) 356. The rule that the creditors of a firm have no equitable lien upon the co-partnership property, but can only work out such lien through the equities of the copartners, applicable whilst the copartners are administering their own funds, has no application to the case of a copartnership dissolved by the death of one of the copartners, especially if the surviving partner be insolvent, or where, though living, one or both of the partners have become insolvent or bankrupt, so that their property is in the hands of assignees for distribution: Tillinghast *v.* Champlin, 4 R. I. 173. Where one partner sells out his interest to his copartner, his lien upon the partnership property to have the partnership debts paid out of it is gone, and there is no partnership property left; and if such outgoing partner dies insolvent, the partnership creditors may come in and prove their claims against his private estate and take dividends *pari passu* with his separate creditors: Ladd *v.* Griswold, 4 Gilman 25. Where a partner sells his interest in the concern to his copartners, taking their personal covenant as indemnity against the debts, he has no lien on the partnership property for the pay-

ment of debts for which he is liable: Smith *v.* Edwards, 7 Humph. 106; Sage *v.* Chollar, 21 Barb. 596; Upson *v.* Arnold, 19 Geo. 190; Robb *v.* Mudge, 14 Gray 534. Where one of two partners, with the consent of the other, sells and conveys one-half of the effects of a firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sales and conveyances are not *primâ facie* void, as against creditors of the firm, but are *primâ facie* valid, against all the world, and can be set aside only by the creditors of the firm upon their proving the transactions to be fraudulent as against them: Kimball *v.* Thompson, 13 Metc. 283; Flack *v.* Charron, 29 Md. 311. Equity will not sustain an agreement made by partners for the purpose of giving the separate creditors of one of the partners a preference to the creditors of the firm, if the firm be, at the time of making such agreement, insolvent: Collins *v.* Hood, 4 McLean 186; Ransom *v.* Van Deventer, 41 Barb. 307.

*EX PARTE ROWLANDSON. [*407

De Term. S. Hilarii, 1735.

[REPORTED 3 P. WMS. 405; S. C. 2 EQ. AB. 110, PL. 2.]

BANKRUPTCY—DOUBLE PROOF.]—*If A. and B. are bound in a bond jointly and severally to J. S., he may elect to sue them jointly or severally; but if he sues them jointly he cannot sue them severally, for the pendence of one suit may be pleaded in abatement of the other. By the same reason, if A. and B., joint traders, become bankrupt, and there are joint and separate commissions taken out against them, and A. and B., before the bankruptcy become jointly and severally bound to J. S., J. S. may choose under which commission he will come, but shall not come under both.*

If two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt, here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders.

THE case was, John Crossfield and James Birket were partners in trade, and bound *jointly and severally in their joint and several bond* to the petitioner Rowlandson.

On the 27th of October, 1734, a joint commission was awarded against Crossfield and Birket, who were found bankrupts, and their estate and effects made over to assignees in trust for their creditors.

Afterwards a separate commission was sued out against

each of the partners, and each upon this commission was also found a bankrupt.

The petitioner proved his debt under all three commissions, and received a dividend under the joint commission of —— shillings in the pound; and having also applied to the commissioners under each of the separate commissions, to be let into his *dividend under such separate commission, and being by them refused, in regard of his having received the same under the joint commission, he now applied to the Lord Chancellor to be admitted to receive his dividend under the separate, as well as under the joint commissions.

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The Lord Chancellor (Lord TALBOT) at first inclined to think that the petitioner being a joint and separate creditor, ought to be at liberty to come in under each of the commissions, provided he received but a single satisfaction; but the next day his Lordship held that at law[1] when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other. So, by the same reason, the petitioner in the present case ought to be put to his election, under which of the two commissions he would come; and that he should not be permitted to come under both; for then he would have received more than his share; but his Lordship said he would hear counsel, if they had anything to object against this order.

Argument for the petitioner.

Whereupon it was now offered, that it was true, if at law two men are bound jointly and severally in a bond to J. S., the obligee may either sue the bond jointly against both, or severally against each, at his election; but on his suing them

[1] If three are bound jointly and severally, the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally. Roll. Abr. 148.

jointly and severally at the same time, the pendency of one suit may be pleaded in abatement to the other; but the reason of this is, for that if the obligee sues the obligors jointly and recovers judgment, the plaintiff in such case is at liberty to take as well the joint, as the separate effects of each of the obligors in execution. Now, in such case, he can have no more than all the effects of each, consequently during such joint suit it would be fruitless, and indeed vexatious, to bring a separate action against each of the obligors; but that nothing could be inferred from hence against a joint creditor's taking under each of these commissions the utmost advantage allowed him by law; and that the bankruptcy of the debtor ought not to hinder him of such advantage, so as he did not receive a double satisfaction.

For which purpose a case was cited (*Ex parte Rice Vaughan*) *as determined by the Lord King, September 6, 1732, where a joint commission issued *versus* Stainer, Jones, and Prestland, who were partners and joint traders; and one Rice Vaughan proved a debt of 3251*l.* under the commission, and received a dividend of 4*s.* in the pound. Afterwards Rice Vaughan, having likewise a separate bond from Stainer for the same debt, sued out a separate commission for it against Stainer, and petitioned that the commissioners and assignees under the joint commission might deliver up the separate effects of Stainer, in order that the petitioner might receive a further satisfaction towards his debt out of Stainer's separate estate. On the other hand the joint creditors petitioned, that the separate commission might be superseded, forasmuch as Rice Vaughan, on whose petition the separate commission had issued, had been allowed for the same debt under the joint commission, viz. 4*s.* in the pound. But it was ordered, that the assignees under the joint commission should deliver up the separate effects of Stainer, to the end that they might be applied to pay the separate bond. And it was insisted that [*409

this was a case in point; for here Rice Vaughan was a joint creditor of *all* the partners, and also a separte creditor of *one*, and had proved his debt, and taken his dividend under the joint commission; nothwithstanding which he was allowed relief as a separate creditor for the same debt.

Lord Chancellor Talbot said, he observed this difference between the cases. In that which had been cited, there was a single bond given as a collateral security for the same debt, by one of the partners only; but in the principal case, the bond upon which the petitioner would seek relief under the separate commission, was not only for the same debt, but given by both the parties; and the plea in abatement would have been proper, had the bond been sued at the same time both as a joint and several bond, which cannot be, where there is only a separate bond. Then taking this to be the rule at law, that a joint and several bond cannot be sued at one and the same time, both jointly and severally, but that the obligee must make his election; so it ought to be (he said) in the principal case. And this would best answer the general end of the statutes concerning bankrupts, which provide, that all debts shall be paid equally, as in conscience they are all equal; that it is upon this foundation that debts of a partnership have been ordered to be first paid out of the partnership effects (see *Horsey's Case*, 3 P. Wms. 23), and *that afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versâ*, the separate creditors are to come in first on the separate effects of the partners, and if these are not sufficient, then on the joint effects, after the partnership creditors are paid.

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And therefore, that there might be an equality in the principal case, his lordship ordered that the petitioner should make his election, whether he would come in for a satisfaction out of the partnership, or the separate effects, but not

out of both at the same time; however, his having received his dividend out of the joint effects, on the joint commission, whilst this matter was in suspense, was not to bind him; and provided he brought that back again, he might come in for a satisfaction out of the separate effects.

In the often-cited and leading case of Ex parte Rowlandson, Lord Talbot lays down the well-known rule as to the mode in which on the bankruptcy of a firm the joint property of the firm, and the separate property of its various members, is to be distributed amongst the joint and separate creditors, viz., the debts of a partnership (that is to say, the joint debts) will be ordered to be paid first out of the partnership or joint effects, and afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before: and so *vice versâ* the separate creditors are to come in first on the separate effects of the partners, and if these are not sufficient, then on the joint effects, after the partnership or joint creditors are paid: *ante*, p. 409; and see Ex parte Cook, 2 P. Wms. 500; Ex parte Crowder, 2 Vern. 706; Twiss *v.* Massey, 1 Atk. 67.

The question, however, which arose for the decision of Lord Talbot was whether when a creditor has a security which is both *joint* and *several* he has a right to a double proof, that is to say, whether he may prove at the same time against the joint and separate estates, or whether he must elect against which of the estates he will proceed. Lord Talbot ultimately, though evidently after considerable doubt and hesitation, determined that the creditor was bound to make his election.

How far this decision is founded upon correct principles will be hereafter considered; it is proposed however in discussing the doctrine laid down in the principal case, and with a view to their elucidation, to make a few observations under the following heads:— *First*, what is *joint and what is separate estate. *Secondly*, as to joint, separate, and joint and separate debts. *Thirdly*, as to the right of proof as against joint and separate estates. *Fourthly*, proof against both joint and separate estates, and as to the election of proof. [*411

1. *What is joint and what is separate Estate.—Joint* estate is that in which the partners are jointly interested for the purposes of the partnership, at the time of the bankruptcy. *Separate* estate is that in which the partners are each separately interested at the time of the bankruptcy: Coll. Partn. 595, 2d ed.

Partners may by their articles of partnership agree what shall be joint and what shall be separate estate: Id. 596.

What was made joint estate by any such agreement will remain such *joint estate* until it is converted into separate estate, or unless, after a dissolution, it be considered to be separate estate by coming within the reputed ownership clause of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 125. But that will not be the case where after a dissolution the partnership effects are in the actual possession of one of the partners for the purpose of winding up the affairs of the partnership. See Ex parte Williams, 11 Ves. 6.

Formerly it was held that if a dormant partner allowed the joint effects to be in the possession, order, and disposition of the ostensible partner, on the bankruptcy of the latter (Ex parte Enderby, 2 B. & C. 389 (9 E. C. L. R.); 3 D. & R. 636, overruling Coldwell *v.* Gregory, 1 Price 119), even although there might have been an agreement (Ex parte Wood, De G. 134) or an assignment upon trust (Ex parte Dyster, 2 Rose 256; Ex parte Barrow, Id. 252), to pay the partnership debts, the whole of the effects would pass to the assignees. See also Smith *v.* Watson, 2 B. & C. 401 (9 E. C. L. R.); 3 D. & R. 751 (16 E. C. L. R.); Ex parte Chuck, Mont. 364, 457; Ex parte Jennings, Mont. 45; 8 Bing. 469.

So where traders in copartnership having admitted a dormant partner, and his share in the joint stock being in the order and disposition of the ostensible partners, was distributable as such, it was held that the creditors of the new firm and the creditors of the old firm, who had notice that a dormant partner had been admitted, were entitled to prove their debts, *pari passu* with the other creditors of the old firm: Ex parte Chuck, Mont. Rep. 364, 457; 8 Bing. 469 (21 E. C. L. R.).

The doctrine, however, laid down in Ex parte Enderby, 2 B. & C. 389 (9 E. C. L. R.), and similar cases, appears to be overruled in the recent case of Reynolds *v.* Bowley, 2 Law Rep. Q. B. 474, and see the note to Joy *v.* Campbell, *post.*

Property, moreover, whether land (Forster *v.* Hale, 3 Ves. 696;

5 Ves. 308) or shares in a company (Ex parte Connell, 3 Deac. 201; Ex parte Hinds, 3 De G. & Sm. 613), purchased with the *partnership money will, until the contrary be shown, be presumed to be the joint property of the firm, although the [*412 conveyance or transfer may have been taken in the name of one of the partners only. See also Smith *v.* Smith, 5 Ves. 193; Robley *v.* Brooke, 7 Bligh 90; Morris *v.* Barrett, 3 You. & Jer. 384. But this presumption may be rebutted by showing that it was not the intention of the firm to acquire the property, as, for instance, where the purchase-money was lent by the firm to the partner (Smith *v.* Smith, 5 Ves. 189), or was in good faith purchased by him for his own private purposes: Walton *v.* Butler, 29 Beav. 429; Ex parte Emly, 1 Rose 64. Where however an individual partner obtains an advantage in fraud of his copartners, as, for instance, by obtaining a renewal of a lease behind their backs, he will be held a trustee for them, and it will in equity be considered as joint property. See Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 311; and cases cited *ante*, p. 359. *Secus* where the advantage is not connected with the partnership: Campbell *v.* Mullett, 2 Swanst. 551; Moffat *v.* Farquharson, 2 Bro. C. C. 338.

Property acquired by a continuing partner after the dissolution, but before the winding up of the partnership, will not necessarily be considered partnership property, although the business was carried on without the consent of the other partners: Nerot *v.* Burnand, 4 Russ. 247, 2 Bligh, N. S. 215; see also Payne *v.* Hornby, 25 Beav. 280.

Separate Estate.—Whatever is separate estate at the time of the partnership or is agreed by the partners to be separate estate will continue to be such (Smith *v.* Smith, 5 Ves. 189; 1 Hov. Supp. 502; Ex parte Smith, 3 Madd. 63; Buck 149), until it be converted (see note to Ex parte Ruffin, *ante*, p. 387), or unless when it consists of goods and chattels it is in the reputed ownership of the firm at the time of the bankruptcy, and in that case it will be considered as joint estate: Ex parte Hare, 2 Mont. & A. 478; 1 Deac. 16; Ex parte Smith, 3 Madd. 63; Buck 149; Ex parte Hunter, 2 Rose 382; Ex parte Jackson, 1 Ves. 131; Horn *v.* Baker, 9 East 215; Ex parte Arbouin, 1 De Gex 359.

Whatever is converted into separate estate, and is no longer in

the order and disposition of the partnership, is separate estate under the bankruptcy: Coll. Part. 603, 2d ed.; Ex parte Wood, 1 De Gex 134.

As to the conversion of joint into separate and separate into joint estates, see Ex parte Ruffin, *ante*, p. 397, and note.

2. *As to joint, separate, and joint and separate Debts.*—The debts of creditors who in the administration of the assets of a bankrupt firm may prove against their estates are divisible into three classes: *413] *First*, joint debts; *secondly*, separate debts; and **thirdly*, debts which are both joint and separate.

Joint debts are those for which the firm is jointly liable, but for which the individual members of the firm have not made themselves separately liable. For instance, debts contracted by a firm for goods supplied or for money advanced to them, for bills duly accepted or endorsed, although only by one of the partners in the name of the partnership, or even if the partnership name has been improperly or fraudulently used, if the bills are in the hands of a *bonâ fide* holder for value, and although the partner fraudulently using the name of the partnership has alone derived benefit from the transaction. See Sandilands *v.* Marsh, *ante*, p. 304; Ex parte Bonbonus, 8 Ves. 542.

Separate debts are those which an individual partner has contracted for goods or money supplied or advanced to himself, or for bills which he has accepted in his own name (Ex parte Bolitho, Buck 100), or even in the name of the partnership, if the bills were given for a private debt of the individual partner, unless the drawer can show that they were given with the consent of the other partners (Ex parte Thorpe, 3 Mont. & A. 716), and see note to Sandilands *v.* Marsh, *ante*, p. 303.

Where a debt has been contracted by one of a firm without the authority express or implied of the firm—as, for instance, where a partner has borrowed money in his own name, the mere fact that the firm have had the benefit of the money so borrowed, will not make the lender the joint creditor of the firm, and thus enable him to prove against the joint estate: Ex parte Wheatley, Cooke's Bank. Law 534, 8th ed.; Ex parte Peele, 6 Ves. 602; Ex parte Emly, 1 Rose 65.

A debt is *joint and separate* when the firm collectively and each

partner separately is liable for its payment. As, for instance, where a firm gives a bond or a promissory note in which they are bound or promise to pay jointly and severally: Ex parte Christie, Mont. & Bl. 354.

Where breaches of trusts or frauds have been committed by a firm, the members composing it have been held to be jointly and severally indebted to the *cestui que trust* and the persons whom they have defrauded: Ex parte Poulson, De Gex 79; Ex parte Barnwall, 6 De G., M. & G. 291; Ex parte Woodin, 3 M., D. & D. 399; Ex parte The Unity Banking Association, 3 De G. &J. 63; and see cases cited 1 Griff. & Holmes on Bankruptcy, p. 667–669. See cases, p. 431, *post.*

Where a debt is due from a partnership consisting of two partners, one of whom is a dormant partner, the creditor may prove either as a joint creditor of the firm or as a separate creditor of both the dormant and ostensible partner. "In bankruptcy," says Lord Eldon, C., "it has been taken as unquestionable, that if I deal with A., he cannot with reference to that transaction say, there is a contract between him and B. of *whom I know nothing; [*414 thus compelling me to be a joint creditor of those two, whose joint property may be scarcely anything, and not the sole creditor of the only man I knew. I have said in this place, following a series of precedents, that the joint creditors may elect; that a man, purchasing from or selling to A., not knowing of any partner, may consider A. as the sole vendor or vendee. He may, finding that B. has taken a share of the profits, elect to go against him also, but cannot be compelled certainly:" Ex parte Norfolk, 19 Ves. 458; and see Ex parte Hodgkinson, Id. 294; Ex parte Law, 3 Deac. 541.

Upon the bankruptcy of a firm or an individual member of it, an important question sometimes arises, viz., whether a joint may not have been converted into a separate debt, or, on the other hand, a separate into a joint debt. Independently of the doctrine of merger, the conversion of joint into separate or of separate into joint debts may be effected by the assent of all parties.

Thus if a partnership be dissolved upon the terms that one partner is to continue the business and to pay all the debts, that arrangement between the partners merely will not convert the joint debts of the firm into separate debts of the continuing partner; but it

will have that effect, if it be acceded to by the creditors: Ex parte Freeman, Buck 471; Ex parte Fry, 1 G. & J. 96; Ex parte Gurney, 2 M., D. & D. 541; Ex parte Appleby, 2 Deac. 482.

So likewise the creditors of one person who enters into partnership with another, upon the terms that the debts of the one are to become the joint debts of the two, will not thereby become joint debts unless the creditors accede to that arrangement: Ex parte Jackson, 1 Ves. Jun. 131; Ex parte Peele, 6 Ves. 602; Ex parte Williams, Buck 13; Ex parte Parker, 2 M., D. & D. 511; Ex parte Graham, Id. 781; Ex parte Hitchcock, 3 Deac. 507; Rolfe *v.* Flower, 1 Law Rep. P. C. 27.

The best evidence of an intention to convert is by an instrument in writing, and if it imposes any terms upon the creditor, he must show that they have been complied with: Ex parte Fairlie, Mont. 17.

A parol agreement, however, or conduct from which an agreement may be inferred, is sufficient to effect a conversion, and also to extinguish the original obligation. See Ex parte Lane, 1 De Gex 300; 10 Jur. 382; 16 L. J. Bank. 4; there a father and son trading together in partnership became bankrupts. A debt had been due from the father alone to the petitioner, but from the evidence it appeared that at the formation of the partnership all parties considered that the firm became liable to pay the debts, that one of the bankrupts told the petitioner so, and that she assented, and that subsequent transactions proceeded on that footing. It was held by Sir J. L. Knight Bruce, C. J., that the *separate
*415] debt of the father was converted into a joint debt of the firm. "If," said his honor, "A. be a creditor of B., and B. and C. purpose to enter into, or have entered into partnership, and say to A., 'We wish this debt to be a debt from us both, and we will pay it,' and A. accedes to that, although there is no writing, the agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of such an agreement is to extinguish the first debt, and for a valuable consideration to substitute the second debt. These very words need not be used by the parties, if there is sufficient to show that the intention was so; that will be as effectual as if the most formal expression had been given to the intention.

Creditors moreover who seek to show conversion of a debt, must prove that they gave their assent to such conversion *before* the

bankruptcy, because after the bankruptcy the bankrupt becomes incapable of entering into a contract: Ex parte Freeman, Buck 471; see Ex parte Fry, 1 G. & J. 96; Ex parte Hunter, 1 Atk. 223.

As the doctrine of merger by which a lower merges in a higher security, or in a judgment applies to debts in bankruptcy as well as at law, it is sometimes important in determining the question, whether a debt is joint or separate. Thus if a separate bond be given to secure a joint debt, it will destroy the joint debt and create a separate debt: Ex parte Hernaman, 12 Jur. 643; Ex parte Flintoff, 3 M., D. &. D. 726.

Upon the same principle when a creditor obtains a judgment against one of two partners for a joint debt, the joint debt both at law and in equity is merged in the judgment, and the creditor can only prove against the separate estate: Ex parte Higgins, 3 De G. & J. 33; and see King *v.* Hoare, 13 M. & W. 494.

So likewise a joint and several debt, will be merged in a joint judgment. See Ex parte Christie, Mont. & B. 352. Where a creditor having a joint and several bond, took as a security a joint warrant of attorney, upon which judgment was signed, it was held the liability on the bond was merged, and that the creditor was not entitled to prove against the separate estate.

Merger, however, will not take place although a separate judgment be obtained on a joint contract, if the persons against whom judgment was not obtained are out of the jurisdiction of the Court. Thus in Ex parte Waterfall, 4 De G. & Sm. 199, a creditor of a firm of three, two of whom resided in America, recovered judgment against the third alone, who resided in England, and who afterwards became bankrupt, his partners remaining solvent. It was held by Sir J. L. Knight Bruce, V.-C., that the creditor might (notwithstanding the separate judgment) prove against the joint estate. See also Ex parte Dunlop, Buck 253.

*The merger moreover of a debt in a higher security may be prevented by the act and intention of the parties. As for instance, when it appears that a warrant of attorney upon which judgment is entered up (Ex parte Pennell, 2 M., D. & D. 273), or that a bond and judgments entered up thereon (In re Clarkes, 2 J. & Lat. 212) were intended to be collateral securities only. And see Ex parte Bate, 3 Deac. 358. [*416

Where a security given for a debt is not of such a character as to

merge and destroy the debt, the creditor may have recourse to the debt instead of the security. If, for instance, a joint bill given in the name of the partnership, was intended only to be a collateral security for a separate debt, and not in discharge of it, the remedy against the separate estate will remain. Thus in Ex parte Seddon, 2 Cox 49, the petitioners had sold goods to *one* of the bankrupts, which were paid for by a joint note, and a receipt was given by the petitioners as for money paid, not expressing the payment to be made in the manner it really was. It was held by Lord Thurlow, C., that the petitioners had not accepted the security of the joint note in full satisfaction of the debt, so as to preclude their coming on the separate estate. "To be sure," said his Lordship, "on the face of the note it is a joint debt, but the question is whether the creditor may not maintain his debt for the goods sold and delivered; that is, does the note extinguish the debt? If it had been a bond instead of the note, it would clearly have done so; but the note was no payment; and then as to the receipt, if it had remained unexplained, it would have been evidence of the debt being paid; but when it appears how the receipt happened to be given, it is not conclusive. I thing this may be proved as a separate debt." See also Ex parte Lobb, 7 Ves. 592; Ex parte Meinhertzhagen, 3 Deac. 101; Ex parte Roxby, Mont. Part. 124; Ex parte Hay, 15 Ves. 4; Ex parte Kedie, 2 D. & C. 321.

Upon the same principle a joint debt will not necessarily be converted into a separate debt, by the creditor taking a separate security. Thus in Ex parte Hodgkinson, Sir Geo. Coop. Rep. 99, the question arose whether a joint debt was converted into a separate debt by the creditor taking a separate security, namely bills drawn by one of the partners, which never paid. Lord Eldon said, "I think that in this case the bills were taken as a mode of satisfying the debt, and not in discharge of it, and they not having been paid when due, the so taking them goes for nothing." See also Ex parte Raleigh, 3 Mont. & Ayrt. 670; Ex parte Fairlie, Mont. 17.

Where however a security has been given in substitution for the original debt, the creditor cannot upon the securities becoming unavailable fall back upon the original debt. Thus in Ex parte Whit-
*417] more, 3 Deac. 365, upon the formation *of a partnership between Warwick and Claggett, Warwick proposed to J. & Co., to whom he was indebted for previous advances, to "consider

all credits, advices, and instructions then in force from him as extending to the new firm, and to transfer any balances that may be either due to or from him to the new firm." To this proposal J. & Co. acceded, and accordingly drew bills on Warwick & Claggett on account of former dealings with Warwick. The bills were not paid when due, and Warwick & Claggett becoming bankrupt it was held that J. & Co., after this adoption of Warwick & Claggett as their joint debtors could not prove against the separate estate of Warwick, but only against the joint estate of Warwick & Claggett. See also Ex parte Kirby, Buck 511; Ex parte Jackson, 2 M., D. & D. 146.

The question as to whether a debt has been converted with or without extinguishment is of some importance, for if a debt has been converted, and the original obligation has been extinguished, the creditor can only prove for the debt so converted whether it be joint or separate, but if a debt be converted without extinguishment then the creditor can proceed against either the joint or separate estate, for he must, in general, as will hereafter be more fully stated, be put to his election against which estate he will proceed.

3. *As to the Right of Proof against Joint and Separate Estates.*— Without going into the right of proof generally, as to which the reader is referred to the text books on the Law of Bankruptcy, and confining ourselves to the right of proof in cases where there is a joint and separate estate, it may be here observed, that the rule laid down in the principal case, viz., that the joint estate of partners, is on their bankruptcy applicable to the joint debts, and the separate estate to the separate debts, and the surplus of each is to come in reciprocally to the creditors remaining upon the other, has, with the exception of Lord Thurlow in some cases (Ex parte Hodgson, 2 Bro. C. C. 5; Ex parte Page, Id. 119; Ex parte Flintum, Id. 120; Ex parte Copland, Cook's Bank. Law 262), been approved of and followed by subsequent judges. See Twiss *v.* Massey, 1 Atk. 67; Ex parte Cook, 2 P. Wms. 500; Ex parte Clay, 6 Ves. 813; Dutton *v.* Morrison, 17 Ves. 206; In re Plummer, 1 Ph. Ch. Ca. 56, 60.

Moreover, with regard to joint estates, by the 54th of the Bankruptcy Court Orders, of the 19th of October, 1852, it is ordered, "That any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And

under every such adjudication distinct accounts shall be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate shall *be applied in the first *418] place in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate. And that the cost of taking such accounts be paid out of the joint and separate estates respectively as the Court shall direct.

With regard to separate adjudications, the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, s. 140) enacts, "That if one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt, *for the purpose only* of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificates, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt until all the separate creditors shall have received the full amount of their respective debts."

The reason for the rule laid down in the principal case appears to be founded upon the supposition that credit was given by each class of creditors to that fund which is primarily liable to their demands. "Joint creditors," says Lord Hardwicke, C., "as they gave credit to the joint estate, have first their demand on the joint estate; and their separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate:" Twiss *v.* Massey, 1 Atk. 67.

Although the rule is well established, the reasoning by which it is supported has been often condemned as alike artificial and contrary to the doctrines acted upon by the courts of common law.

Lord Thurlow, who, as we have before seen, adopted a course different from that laid down in the rule just referred to, held "that a commission of bankruptcy was an execution for all the creditors, and as the assignees under a separate commission might possess themselves not only of the separate estate, but of the bankrupt's proportion of the joint estate, and as a joint creditor having brought

an action and recovered judgment against all his debtors, might have several executions against each, therefore the bankruptcy preventing his action with effect, should be considered a judgment for him as well as the others; and, consequently, that no distinction ought to be made between joint or separate debts, but that they ought all to be paid rateably out of the bankrupt's property, which was composed of his separate estate and his moiety or other proportion of the joint estate:" Gow, Part. 312; Dutton *v.* Morrison, 17 Ves. 207.

*It is true that the doctrine and reasoning of Lord Thurlow have not hitherto prevailed; the exceptions however to the rule established in opposition to them, may of themselves well lead us to doubt of its soundness. [*419

Proof by Joint Creditors against Joint Estates.—Not only are the joint creditors entitled to be satisfied first out of the joint estate in the full amount of the principal sums due to them, but they can also claim to be paid whatever interest may be due thereon (when their debts bear interest) before the separate creditors can be allowed anything thereout: Ex parte Reeve, 9 Ves. 590; Ex parte Ogle, Mont. 350; Pearce *v.* Slocombe, 3 You. & Col. (Exch.) 84; Ex parte Woodford, 3 De G. & Sm. 666.

A joint creditor of the firm will be allowed to prove the whole of his debt against the joint estate, although he may have a separate security from one of the partners, which is considered as a collateral security only: Ex parte Peacock, 2 Gl. & J. 27; Ex parte Brown, 1 Atk. 225, cited; Ex parte Clowes, 2 Bro. C. C. 595.

Proof by Partners or their Estates against the Joint Estate.—As a general rule, neither a partner in a firm adjudicated bankrupt, nor his separate creditors, can prove in competition with the creditors of the firm, who are in fact his own creditors, nor take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself. He can only prove after all the other joint creditors have been paid. See Ex parte Sillitoe, 1 Gl. & J. 374. There two partners of a larger banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade in respect of *moneys procured for the benefit of the aggregate firm, on the credit of the endorsement* of the separate firm. It was held by Lord Chancellor Eldon that no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. "I apprehend," said his lordship, "that the

principle does not apply more to two persons who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader. I take it to be quite clear, that if an individual partner has nothing more to say than this—that he has lent 100*l.* to his partnership, the strict rule immediately applies to him; and shuts him out from the benefit of proof. If it were sufficient to state that the partner would not have lent the 100*l.* but as a separate trader, the rule is at an end." See also Ex parte Shakeshaft, Stirrup, and Salisbury, 1 Gl. & J. 382; 11 Ves. 414, cited s. c. nom. Ex parte Hargreaves, 1 Cox 440. See also Ex parte Garland, 10 Ves. 110; Ex parte Thompson, 2 M., D. & D. 761; Ex parte Brown, 2 M., D. & D. 718; Ex parte Williams, 3 M., D. & D. 433; Ex parte Butterfield, De Gex 570; Ex parte Reeve, 9 Ves. 350; Ex parte Rawson, Jac. 279; Scott *v.* Izon, 34 Beav. 434; Ex parte Maude, re *Braginton, 15 W. R. (L. J.) 856.

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The rule, however, does not apply so as to prevent a person who was merely in treaty for a partnership, but not actually a partner, from proving for moneys advanced to the firm: Ex parte Turquand, 2 M., D. & D. 339; Ex parte Davis, 9 Jur. N. S. 859.

Exceptions to rule against Proof by Partners against the Joint Estate.—There are, however, certain exceptions to the rule, that a partner or his separate creditors cannot prove against the joint estate. The first exception, manifestly, as Lord Eldon observes, "founded in justice," is that where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership: per Lord Eldon, in Ex parte Sillitoe, 1 Gl. & J. 382. And see Ex parte Harris, 1 Rose 437.

Another exception to the rule is, that where there are two firms carrying on distinct trades, and in such character the one firm becomes creditor of the other upon a demand arising from a dealing in a distinct trade, proof will be admitted against the joint estate, although one or more persons may be partners of both firms. And a proof may be made not only by the larger firm which contains the smaller (Ex parte St. Barbe, 11 Ves. 413; Ex parte Castell, 2 Gl. & J. 124; Ex parte Hesham, 1 Rose 146), but also, although a different opinion seems formerly to have prevailed (see Ex parte Hargreaves, 1 Cox 440; Ex parte Adams, 1 Rose 305; Ex parte Sillitoe, 1 Gl. & J. 382), by the smaller firm against the larger firm in which it is contained: Ex parte Cook, Mont. 228. Thus, if there

are two firms, A. B. and C., and A. B. or A. alone, not only can A. B. and C. prove against A. B., or A., but A. B., or A., can prove against A. B. and C.

But in order to enable proof to be made in any of these cases, it is essential, first, that the firms should be distinct; secondly, that the proof should be made in respect of a dealing between trade and trade. This is well laid down by Lord Eldon in Ex parte Sillitoe, 1 Gl. & J. 384, where he states, "that he had carefully examined all the cases relating to the question of proof by partners as separate traders, in competition with their joint creditors, and that he found they were all cases in which the articles of one trade had been furnished to another trade; that there was no case in which the exception had been allowed where money had been advanced to the partnership by one or more of the partners." See also Ex parte Cook, Mont. 228.

In the case of Ex parte Stroud, 2 Gl. & J. 127, cited, the debt due by the minor firm to the larger firm was in respect of the employment of the surplus moneys which the larger firm had in their hands as bankers. It was held there that as the profit of a banker is made by the employment of such surplus moneys, the debt was therefore *to be considered as due to them in respect of a [*421
dealing in their trade. *Secus* where the advance is not by a firm in their character of bankers: Ex parte Williams, 3 M., D. & D. 339.

Where the joint creditors of two firms are not the same, as when neither firm contains the other, the one firm may prove against the other for money lent, though as we have before seen, where one firm is included in the other that could not be done.

"It has been settled," says Sir G. Ross, "for years, that if A., B., and C., are partners, neither of them can prove against their firm for money lent. So, where A., B., and C., are partners, A. and B. cannot prove against C. But if A. and B. are partners in a distinct firm, the one firm then may prove against the other:" Ex parte Thompson, 3 D. & C. 620.

Proof by Separate Creditors against Joint Estate.—Assuming that joint creditors have been paid in full, whatever surplus remains must in the first place be applied in payment of the lien which any of the partners may have thereon, for any sum due to him from the

partnership. The ultimate surplus then becomes divisible as separate estate among the separate creditors of every partner according to the proportion in which he was entitled to the assets of the partnership, the amount of the lien to which any partner was entitled being treated also as part of his separate estate: Ex parte King, 1 Rose 212; 17 Ves. 115; Ex parte Terrell, Buck 345; Holderness *v.* Schackels, 8 B. & C. 612 (15 E. C. L. R.); Fereday *v.* Wightwick, Taml. 250.

If the joint estate is not sufficient to satisfy the lien of any partner, he can prove for the deficiency against the separate estates of his partners. See Ex parte King, 17 Ves. 115. There a joint commission issued against J. King and his brother, under which the amount of three bills of exchange drawn by J. King in the name of the firm for his separate debt had been proved. A petition was presented by the separate creditors of the other bankrupt claiming a lien in respect of that proof upon Joseph's share of the surplus of the joint estate. Lord Eldon, C., held that they were entitled to the lien, and might prove against the separate estates of the partners for the deficiency. "I do not," said his Lordship, "recollect any case in which this lien has been established by decision, but I think it ought to prevail; and if the surplus of the joint estate should not be sufficient to pay all that is due from one partner to the other, he ought to come in with the other separate creditors of the other. The surplus must be divided between them according to their equitable rights. The separate creditors of the one can have nothing but what he could have; and the separate estate of J. King consists of that part of the partnership effects which shall remain after the demands of his partner upon the partnership are satisfied. *422] *It does not follow that the right of one partner in respect of these bills may not be met by other circumstances; as if he had not brought in his proportion of capital as is now suggested. I shall make the order, therefore, unless some inquiry upon that head is desired." See also Ex parte Terrell, Buck 345; Ex parte Watson, Id. 449; 4 Madd. 477.

Where the surplus of the joint estate has by mistake been paid to one of the partners, the Court has jurisdiction to make him account for it: Ex parte Lanfear, 1 Rose 442.

As to proof against the Separate Estates by the Separate Cred-

itors.—As we have before seen, the separate creditors of every bankrupt are entitled to come in first upon his separate estate (*ante*, p. 410; and see Ex parte Eldon, 3 Ves. 238; Ex parte Clay, 6 Ves. 813); but where they have been paid twenty shillings in the pound upon the principal sums due to them, they are not entitled to prove in respect of interest due on such sums until the joint creditors have been paid twenty shillings in the pound upon all principal sums due to them: Ex parte Boardman, 1 Cox 275; Ex parte Clarke, 4 Ves. 677; Ex parte Minchin, 2 G. & J. 287; Ex parte Wood, 2 M., D. & D. 283.

With regard to the mode in which interest will be allowed in bankruptcy, it seems that it will be calculated upon the whole debt up to the time of the first dividend, then the amount of the dividend will be subtracted from the whole, and interest will be calculated upon the reduced principal up to the payment of the next dividend, and so forward: Re Higginbottom, 2 Gl. & J. 124.

When the separate creditors have been paid twenty shillings in the pound on their debts, the surplus of the separate estate will be carried over to the joint estate, and if a partner is a member of other bankrupt firms, the surplus of his separate estate will be applied in payment of the debts of the several firms, in proportion to the respective amount of the debts proved against the joint estates of such firms respectively: Ex parte Franklyn, Buck 332, 336.

Proof by Joint Creditors against the Separate Estate.—As a general rule, as has been before shown, the joint creditors cannot prove against the separate estate in competition with the separate creditors (*ante*, p. 410).

There are, however, certain exceptions to the rule, as follow.

First exception.—Where a joint creditor is petitioning creditor under a separate petition, he is considered as a separate creditor, and can come in with the separate creditors and receive dividends with them. The reason given for this exception is, that "as the order made upon the petition is in the nature of an execution for a legal debt, all the consequences attached to that must follow, and they must take their legal dividends:" Ex parte De Tastet, 1 *Rose 11; Ex parte Hall, 9 Ves, 349; Ex parte Ackermann, 14 Ves. 604. It is moreover immaterial that the [*423

joint debtor has also a separate debt sufficient to support the petition: Ex parte Burnett, 2 M., D. & D. G. 357.

Where, however, a joint creditor presents a petition against A. "as surviving partner of B.," he can claim only against the joint estate, for in such case the proceedings amount to "a statute execution against joint and separate estate, and the petitioner a joint creditor must claim against the joint estate: Ex parte Barned, 1 G. & J. 309, 311.

Second exception.—In the case of a bankrupt firm where there is no joint estate, and in the case where one of the firm only is bankrupt, and there is no joint estate *and* no living solvent ostensible partner (Ex parte Sadler, 15 Ves. 52; Ex parte Machell, 2 V. & B. 216; Ex parte Wylie, 2 Rose 393; Ex parte Kensington, 14 Ves. 447; Ex parte Janson, 3 Madd. 229), at any rate residing in this country (Ex parte Pinkerton, 6 Ves. 814 n.), the existence of a dormant partner being immaterial (Ex parte Chuck, 8 Bing. 469; Ex parte Hodgkinson, 19 Ves. 294; Ex parte Norfolk, Id. 458), the joint creditors may prove against the separate estate, notwithstanding the estate of a deceased partner may be solvent: Ex parte Bauerman, 3 Deac. 476; Ex parte Kendall, 17 Ves. 514.

This exception will not be applicable, and joint creditors will not be allowed to prove against the separate estate, if there be joint property, however small in amount it may be, even to the amount of five pounds, or five shillings, according to Lord Eldon. See Ex parte Peake, 2 Rose 54; In re Lee, Id. note; Ex parte Harris, 1 Madd. 583.

The joint property, however, must be such as can be reached by the Court, for "if," as observed by Lord Eldon, "the joint property be of such a nature and in such a situation that any attempt to bring it within the reach of the joint creditors must be deemed desperate, or in point of expense an unwarrantable attempt, there would in truth be no joint property:" Ex parte Peake, 2 Rose 54; Ex parte Kennedy, 2 De G., M. & G. 228; Ex parte Hill, 2 Bos. & P. N. R. 191 n.; Ex parte Leaf, 1 Deac. 176; In re Lee and Armstrong, 2 Rose 54.

Thus a person will not be precluded from proving against the separate estate, by his having had pledged with him by the partners some goods belonging to the partnership, which when sold are insufficient to satisfy his debts. For by the term "joint effects" in

the exception to the general rule, is meant such effects as are under the administration of assignees to distribute, and not such as were pledged by the partners to more than their value. See Ex parte Hill, 2 Bos. & Pull. N. R. 191 n.; Ex parte Geller, 2 Madd. 262.

Again, if there be a solvent partner, a joint creditor cannot prove *against the separate estate (Ex parte Kensington, 14 Ves. 447; Ex parte Janson, 3 Madd. 229; Buck 257), except [*424 where a solvent partner cannot be reached, as when he is abroad, and not likely to return: Ex parte Pinkerton, 6 Ves. 814 note.

Mere insolvency, however, of a copartner does not, as his bankruptcy would do, entitle the joint creditors to prove upon the separate estate of the bankrupt partner, the principle being, that whilst there is any fund, however small, to resort to, the joint creditors cannot prove against the separate estate of one of the partners who has become bankrupt: per Sir John Leach, V.-C., in Ex parte Janson, 3 Madd. 231.

Where it is doubtful whether there is any joint estate or not, an inquiry will be directed: Ex parte Birley, 1 M., D. & D. 387; 2 Id. 354.

Where joint creditors have proved against and obtained a dividend out of the separate estate of any partner upon the ground that there was no joint estate, if it turns out afterwards that there is a joint estate, the separate estate must be reimbursed the amount so paid to the joint creditors: Ex parte Willock, 2 Rose 392.

Moreover, where different firms are engaged in a joint adventure, and one of them becomes bankrupt, the creditors of the joint firms in the joint adventure may prove against the joint estate of the bankrupt firm if the partners in the other firms are abroad and insolvent, and there is no joint estate of all the firms: Ex parte Nolle, 2 G. & J. 295, overruling Ex parte Wyllie, 2 Rose 393.

Third exception.—Where there are no separate debts, or if, although there are separate debts, a joint creditor pays them all, all the joint creditors may prove against the separate estate: Ex parte Chandler, 9 Ves. 35; Ex parte Hubbard, 13 Id. 424; Ex parte Taitt, 16 Id. 193.

Fourth exception.—Where a partner has fraudulently converted property belonging to the firm to his own use, it will be treated not

as separate, but as joint estate; and if the firm is bankrupt, the joint estate will be admitted to prove against the separate estate (Ex parte Lodge and Fendall, 1 Ves. Jun. 166, and see *post*, p. 425); and if the firm be not bankrupt, the solvent partners will be admitted to prove as separate creditors against the estate of their bankrupt copartner: Ex parte Yonge, 3 V. & B. 31; 2 Rose 40.

In order, however, to bring a case within this exception, and to give the partners a right to prove against the separate estate of their copartner, they must show that there has been a fraudulent misappropriation to his own purposes of the funds of the partnership (Ex parte Cust (Fordyce's Case), Cooke's Bank. Law 531, 8th ed.; Ex parte Smith, 1 G. & J. 74; Ex parte Crofts, 2 Deac. 102), in which they have not acquiesced (Ex parte *Watkins, *425] Mont. & Macarth 57; Ex parte Yonge, 3 V. & B. 31; Ex parte Hinds, 3 De G. & Sm. 613), nor entered into any arrangement by which the debt arising from the fraud is treated as a mere matter of partnership account: Ex parte Turner, 4 D. & C. 169.

The mere fact that one partner is indebted to the firm, or that he has acted in violation of the contract of partnership, will not itself be considered as evidence of fraud: Ex parte Lodge & Fendall, 1 Ves. Jun. 166. In other words, where the debt does not arise out of contract, but out of a fraudulent breach of the obligations existing between the partners, there the funds so subtracted shall be considered as detached from the general partnership balance, and as a distinct debt from one estate to the other: Ex parte Young, 2 Rose 44.

Fifth exception.—Where one partner, carrying on a distinct trade, becomes indebted in the way of trade to the firm of which he is a partner, the firm may under a separate adjudication against him prove as a separate creditor for the amount of such debt. See Ex parte Hesham, 1 Rose 146; Ex parte Castell, 2 Gl. & J. 124.

So if a firm became bankrupt, proof will be allowed on account of the joint estate of the firm against the separate estate of a partner carrying on a distinct trade, in respect of a debt incurred between trade and trade (Ex parte St. Barbe, 11 Ves. 413), and in the ordinary course of trade: Ex parte Hargreaves, 1 Cox 44; Ex parte Sillitoe, 1 Gl. & J. 382; Ex parte Williams, 3 M., D. & D. 433.

Proof by Partner against Separate Estate.—One partner can prove a debt due to him on the partnership account, upon a separate adjudication against another partner (Ex parte Watson, 4 Madd. 477; Wood *v.* Dodgson, 2 M. & Selw. 195; Affalo *v.* Fourdrinier, 6 Bing. 309 (19 E. C. L. R.)), but he cannot prove in competition with the partnership creditors, and it may be generally laid down that one partner cannot receive a dividend out of the separate estate of his copartner until all the joint creditors have been paid in full: Ex parte Carter, 2 Gl. & J. 233; Ex parte Ellis, Id. 312; Ex parte Rawson, Jac. 274; Ex parte Robinson, 4 D. & C. 499; Ex parte May, 3 Deac. 382; Ex parte Collinge, 9 Jur. (N. S.) 1212; 12 W. R. (L. C.) 30.

Ordinarily a firm cannot prove in competition with the other creditors against the separate estate of one of the partners (Ex parte Turner, 4 D. & C. 177), unless the debt is constituted by fraud as contradistinguished from contract. As if, for instance, it has arisen in consequence of the fraudulent abstraction of the partnership assets by one of the partners: Ex parte Lodge & Fendall, 1 Ves. Jun. 166; Ex parte Smith, 1 Gl. & J. 74; 6 Madd. 2; Ex parte Turner, 4 D. & Ch. 169.

So proof may be made against the separate estate in respect of a *sum paid to the bankrupt by a person whom he had fraudulently induced to become his partner: Hamil *v.* Stokes, Dan. 20; 4 Price 166; Burry *v.* Allen, 1 Cell. 589. And see 2 Lind. Part. 1183, and the comments thereon; Ex parte Broome, 1 Rose 69. [*426.

With regard to the proof by a company against the estate of a shareholder, it has been laid down by a learned author, "that, where a member of a company which though unincorporated may sue and be sued by public officers, and *à fortiori* when the member of an incorporated company becomes bankrupt, the company, whether its debts are paid or not, may prove as a separate creditor of such member for what is due from him to it, either in respect of calls or other matters. But the company, if it holds a security of the bankrupt for what is so due, must realize the security and prove for the difference as in ordinary cases: 2 Lin. Partn. 1185, citing Ex parte Davidson, 1 M., D. & D. 648; 2 Id. 368; Ex parte Cooper, 2 M., D. & D. 1; Ex parte Wallis, Id. 201; Ex parte Connell, 3 Deac. 201.

If however a solvent partner, who is a creditor of the firm, will pay joint creditors either the whole of what is due to them, or part

of what is due to them in discharge of the whole, he may prove against the separate estate of his bankrupt partner in competition with the separate creditors: Ex parte Moore, 2 G. & J. 176; Ex parte Carter, Id. 233; Ex parte Ellis, Id. 312; Ex parte Ogle, Mont. 350.

It is not however sufficient to enable the solvent partner to do so, that he should merely *indemnify* the estate of the bankrupt partner against the joint debts: Ex parte Moore, 2 G. & J. 166. Sed vide Ex parte Ogilvy, 2 Rose 177; Ex parte Taylor, Id. 175; Ex parte Stoveld, 1 G. & J. 303.

In some instances, however, an indemnity may be sufficient, as where the solvent partner cannot obtain a discharge by payment to one of the joint creditors by reason of his lunacy. In such case, upon giving security for the lunatic's debt and paying the residue of the joint debts, he will be allowed to prove against the separate estate: Ex parte Yonge, 3 Ves. & B. 31, 33.

Where an individual partner becomes bankrupt, being indebted to the firm at the time of his bankruptcy, the solvent partners, upon payment of all the partnership debts, though after the bankruptcy, may prove *pari passu* with the separate creditors, in respect of the debt due to the firm: Ex parte King, 17 Ves. 115; Ex parte Younge, 2 Rose 40; 3 V. & B. 31.

Again, where there are no joint debts a solvent partner may prove against the bankrupt partner in competition with his separate creditors: Ex parte Dodgson, Mont. & M'Arth. 445.

The result is the same where all the joint debts have been converted into separate debts. Thus in Ex parte Grazebrook, 2 D. & Ch. 186,

*427] *in September, 1830, the bankrupt, Naylor, and Wills (who was a dormant partner), having been carrying on business together as copartners, dissolved partnership, when the bankrupt was found indebted to Wills upon a stated account in the sum of 2312*l.* At that time the partnership was indebted to several persons to a considerable amount. Wills arrested and brought an action against the bankrupt, in which the bankrupt had given him a cognovit for the debt and costs. The claims in respect of the debts due from the partnership were virtually abandoned as against Wills, and no demand had been made upon him since the dissolution, the bankrupt having been treated as the only person liable to them. Two years after the dissolution Naylor became bankrupt. It was

held that Wills was entitled to prove against his estate, although some of the debts formerly due from the partnership were unpaid. See also Ex parte Hall, 3 Deac. 125; Ex parte Gill, 9 Jur. N. S. 1303; In re Brater, 31 L. J. (Bk.) 15.

If a partner remaining in business covenants to indemnify a retiring partner against all outstanding debts, upon the bankruptcy of the former the latter may, on payment of the partnership debts, for which so far as the creditors were concerned he may have continued liable, prove for what he pays in respect of such debts under the adjudication (Parker *v.* Ramsbottom, 3 B. & C. 257 (10 E. C. L. R.); 5 D. & R. 138 (16 E. C. L. R.)), even although the retiring partner knew, when he left the business, that the firm was insolvent (Ex parte Carpenter, Mont. & M'Arth. 1); but if he neglect to prove, the discharge which the bankrupt partner obtains will be a bar to an action on the covenant of indemnity: Wood *v.* Dodgson, 2 Rose 47.

If a solvent partner pay all the joint debts, the question may be raised, to what extent is he able to prove against the separate estates of his partners? It was held by Sir John Leach, V.-C., in the case of a solvent partner having paid all the joint debts, that his proof against the separate estates of his partners should be limited to the amount of their respective shares of the joint debts so paid; so that if their estates were insufficient to pay 20*s.* in the pound, the solvent partner could not be allowed to prove the deficiency of each estate against the estate of the other, and the principle upon which his honor proceeded was this, that "proof is equivalent to payment, without regard to the amount of the dividend:" Ex parte Watson, Buck 449, 456; Ex parte Smith, Id. 492.

Lord Eldon however dissented from the doctrine of Sir John Leach. See Ex parte Hunter, Buck 552; and Ex parte Moore, 2 G. & J. 166, 172, where Lord Eldon makes the following observations with reference to the doctrine of Sir John Leach:—"His honor," said his Lordship, "has been pleased to say that proof is *payment. Now, with great deference, I doubt whether the expression, that proof is payment, can be correctly used. [*428 If, indeed, the money were paid at the moment the proof was made, it might be a question; but in the case of three partners, and one becoming a bankrupt, and another paying the whole debt, that partner's right of proving a moiety of the whole debt against the other

partner would be quite clear, if it were clear that proof against the bankrupt partner could produce nothing; for the same equity which exists among them, if they all remain solvent, must be the equity which prevails among them when they become bankrupt; and the difficulty of ascertaining, at the time the bankruptcy takes place, who is solvent and who is not solvent, can never interfere with the substantial rights of the parties. . . . I am inclined therefore to agree with the case put by Mr. Montagu, that if A., B., and C. are partners, and there is a deficiency of 30,000*l.*, and that if C. be wholly insolvent, A. paying the whole of such deficiency, is entitled to prove 15,000*l.* against B., B. having the benefit of proof for 5000*l.* against C. I take it to be clear that if A. have two partners, and he pay more than his share, and one of the partners is insolvent, that insolvency is a mischief in which the other partner must partake, as well as he who seeks to prove." See also Ex parte Plowden, 3 Mont. & A. 402; 2 Deac. 456. Ex parte Watson, Buck 449; and Ex parte Smith, Id. 492, must be considered as overruled.

Where the separate creditors are paid 20*s.* in the pound, and there is a surplus, that surplus will not be applied immediately in payment of interest to the separate creditors, but will in the first instance, be applied in making the joint creditors equal with them as to the principal (per Lord Eldon, C., in Ex parte Reeve, 9 Ves. 590); and if one partner make good the deficiency of the joint estate, he will be entitled to any surplus of the separate estate before interest is paid to the separate creditors: Ex parte Rix, Mont. 237.

If, on the bankruptcy of one of several partners, the joint creditors are paid in full, out of the joint estate, but upon the taking of the partnership accounts a balance appears to be due to the solvent partners, the surplus of the joint estate will be paid to the solvent partners, in part payment of the balance due to them, with liberty to prove against the separate estate for the difference, but so that they do not disturb any dividends already made out of it: Ex parte Terrell, Buck 345; Goss *v.* Dufresnoy, Davies, Bankruptcy Law, 371.

It may be here mentioned that the Court of Bankruptcy has jurisdiction to compel a partner who under a separate adjudication has received more than he was entitled to out of the joint estate, to account to the executors of a deceased solvent partner. Thus in

Ex parte *Lanfear, 1 Rose 442, under a separate adjudication against one of the partners, the bankrupt having paid [*429 20*s.* in the pound to all his creditors, obtained an order for the payment of the surplus to himself, it was held by Lord Eldon, C., that the personal representative of his partner was entitled to apply by petition in the bankruptcy, for an account of such surplus, and for payment of his proportion of it, and that the Court had jurisdiction to make the order.

The rule which prevents one partner from proving against the separate estate of his copartner in competition with the joint creditors, is not applicable where the separate estate is insufficient to pay his separate creditors, without taking into consideration what he owes to his partner; and in such case the partner will be able to prove in competition with the other separate creditors, for he does not thereby prejudice the joint creditors, who are no worse off than if he did not prove at all: Ex parte Topping, re Levey, 13 W. R. L. C. 446; but such proof is liable to be expunged if there should ultimately appear to be any surplus of the separate estate available for the joint creditors: Id.

Where one estate has been subjected to a greater charge than it ought to bear, contribution will be compelled from the other estate in order to make it bear its equal share of the burden. See Ex parte Willock, 2 Rose 392; Ex parte Wylie, Id. 393; Rogers *v.* Mackenzie, 4 Ves. 752; Ex parte Rutherford, 1 Rose 201; Ex parte Reid, 2 Id. 84.

4. *Proof against both the Joint and Separate Estates, and as to Election of Proof.*—A joint and separate creditor of a bankrupt firm ought, in the first instance, to prove against both the joint and separate estates: Ex parte Bentley, 2 Cox 218.

But before he takes a dividend he must, as was decided in the principal case, elect whether he will proceed, in the first instance, against the joint and separate estate: Id.; and see also Ex parte Bond, 1 Atk. 98; Ex parte Banks, Id. 106; Ex parte Bevan, 10 Ves. 106; Ex parte Hay, 15 Ves. 4.

Lord Talbot, in the principal case, it will be observed, went upon the analogy to the rule according to which a person having a joint and several bond could not sue the debtor at one and the same time, both jointly and severally, but must make his election. In fact, as

at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other; so according to the same reason the petitioner in the principal case having a joint and several security, he was bound to make his election, under which of two commissions he would come.

*430] *Lord Eldon on several occasions showed his disapprobation of the reasoning of Lord Talbot in the principal case (9 Ves. 225; 10 Id. 109); and its fallacy has been well pointed out in a recent judgment by Mr. Commissioner Hill.

"It is difficult," he observed, "to believe that so eminent a person as Lord Talbot should have supposed any just analogy to exist between the two cases. For the obligee of a bond who has brought a joint action against obligors is precluded from harassing them with separate actions, because on obtaining judgment in his first suit he is entitled to satisfy the debt out of the separate as well as the joint property of the obligors. His rights therefore are not narrowed, but he is precluded from oppressing the defendants with costs occasioned by an unnecessary multiplication of remedies:" Ex parte The Bank of England, 32 L. T.

Lord Eldon, on the other hand, is reported to have derived the rule in bankruptcy from a desire of the Court to restrain attempts on the part of firms to give an air of respectability to their bills by classifying their partners, so that one set should draw upon another, as if the two sets were independent houses: Ex parte Bigg, 2 Rose 38.

But unsatisfactory as these reasons may be, the rule acted upon by Lord Talbot in the principal case as to election of proof in the case of a creditor of a firm having a joint and several security is well established: Ex parte Bond, 1 Atk. 98; Ex parte Parminter, Ex parte Abingdon, Ex parte Banks, cited Id.

It has moreover been laid down that in order to put a creditor, having a joint and several security, to his election, it is immaterial whether the security arises from the same or different instruments (Ex parte Hill, 2 Deac. 249; Ex parte Bevan, 9 Ves. 225), or whether the creditor is only an equitable creditor, as where his right against the firm arises from the members having committed a breach

of trust for which they are jointly and severally liable: Ex parte Barnawall, 6 De G., M. & G. 795, 800.

Upon the same principle, when one of the members of a firm draws a bill of exchange upon the firm, and it is accepted by them, the holders at all events, if they were aware at the time of the taking the bill, of the relation between the drawer and the firm, will be obliged to elect between proof against the joint estate of the firm or the separate estate of the individual partner (see Ex parte Bigg, 2 Rose 37), and although it might be inferred from what Lord Eldon says in Ex parte Bigg, and also in Ex parte Bank of England, 2 Rose 82, that double proof would be allowed under such circumstances where the holders of the bills were ignorant that the drawer was a member of the firm, in a different report of Ex parte Bigg, he does not appear to have laid down any such. distinction (1 Mont. Part. 125). See also Ex parte Liddiard, 2 Mont. & A. 87; 4 D. & C. 603.

*A joint creditor, if he obtains a separate adjudication against one of a firm, has the privilege of election, either to make his proof against the separate or the joint estate: per Lord Eldon in Ex parte Bolton, 2 Rose 391; and see Ex parte Crisp, 1 Atk. 134. [*431

But if he obtains a joint adjudication, he binds himself to resort to the joint property: per Lord Eldon in Ex parte Bolton, 2 Rose 391.

And it has been held that where a separate commission had been taken out either by a joint (Ex parte Smith, 1 G. & J. 256) or by a joint and separate (Ex parte Brown, 1 Rose 433) creditor, upon the commission being superseded in order to give effect to a subsequent joint one, the creditor in each case had a right to elect against which estate he would prove.

Where an individual member of a firm has, by means of collusion with his partners, converted a separate debt due from himself into a joint debt, the debt may be proved against either the joint or the separate estate. Thus, if with the knowledge of the firm of which he is a member, a trustee (Ex parte Watson, 2 Ves. & B. 414; Ex parte Heaton, Buck 386; and see Keble *v.* Thompson, 3 Bro. C. C. 112; Ex parte Bailey, 1 Gl. & J. 167) or assignee of a bankrupt (Smith *v.* Jameson, 5 Term Rep. 601) applies the funds en-

trusted to him in his fiduciary capacity to the use of the firm, proof may be made either against the joint or separate estate.

But if the rest of the firm were not aware of the misapplication of the trust funds, the debt does not become joint, and proof can only be made against the separate estate: Ex parte Apsey, 3 Bro. C. C. 265. In Ex parte Turner, Mont. & Mac. Arth. 255, A. had employed B. and C. as his stock-brokers, and, for the purpose of more convenient transfer, allowed certain stock belonging to him to stand in the name of B. alone. B., without the consent or knowledge of A., sold this stock, and paid the produce into the partnership funds of B. and C. B. and C. having afterwards become bankrupts, it was held by Sir L. Shadwell, V.-C., that A. was entitled to prove against the separate estate of B. or against the joint estate of B. and C. See also Ex parte Hinds, 3 De G. & Sm. 613. See cases collected *ante*, p. 413.

Where a joint and separate creditor makes his election as to whether he will, in the first instance, be a joint or separate creditor, he is entitled to no other advantage over other creditors. For instance, if he elects to go in the first instance against the joint estate, he will have no preference to the other joint creditors: Ex parte Bevan, 10 Ves. 107; Bradley *v.* Miller, 1 Rose 273; and he will be excluded from any dividend from the other fund, unless there remains a surplus, after the discharge of all the debts, having a preference thereon: Story Partn., § 598.

*432] A person who is a joint and *several creditor is entitled to look into the accounts of the joint and separate estates, in order that he may see against which estate it will be most beneficial for him to prove in the first instance (Ex parte Bond, 1 Atk. 98; Ex parte Husbands, 2 Gl. & J. 4; Ex parte Bentley, 2 Cox 218); and under special circumstances a creditor, even after the receipt of a dividend from one estate, will be allowed to waive his proof and prove against the other estate, upon his refunding the dividend (where he has received one) with interest. This he will be allowed to do when the first proof has been made in ignorance of his right to elect, or of the value of both funds (see Ex parte Bond, 1 Atk. 98; Ex parte Masson, 1 Rose 159; Ex parte Bolton, 2 Rose 389; Ex parte Swanzy, Buck 7; Ex parte Law, 3 Deac. 541; Ex parte Jones, 15 Jur. 214; 20 L. J. Bank. 5); but waiver of proof will not be allowed so as to disturb any dividend already made (Ex parte

Bielby, 13 Ves. 70) and it has been refused, where it would affect the certificate of the bankrupt, already signed by the creditor, by reason of the great amount of the debt (Coll. Partn. 643, 2d ed.); but where the bankrupt's certificate would not be affected thereby, a waiver of proof has been allowed even after the creditor has signed the certificate: Coll. Partn. 643, 2d ed. See, however, and consider, Ex parte Solomon, 1 G. & J. 25; Ex parte Husbands, 5 Madd. 421; 2 G. & J. 4

Where a large number of creditors had a right of election to prove against the joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate: Ex parte Arbouin, De Gex 359.

If a creditor proves against the wrong estate, his mistake may be rectified. Thus, where a creditor, having reason to suppose that the goods which he had sold to one of two partners were purchased on the partnership account, proved against the joint estate, and did not discover until seven months afterwards that they were bought on the separate account of one of the partners, it was held that he might transfer his proof from the joint to the separate estate: Ex parte Vining, 1 Deac. 555.

Where a person has, after a full knowledge of the facts, made his election to prove, he cannot afterwards recall it: Ex parte Liddell, 2 Rose 34; Bradley *v.* Millar, 1 Rose 273; Ex parte Solomon, 1 G. & J. 25.

With reference to proof of a debt being an election by a creditor not to proceed against the bankrupt by action, see 12 & 13 Vict. c. 106, s. 182; Coll. Partn. 630, 2d ed.; Shelf. Bank. 373.

As to when double proof is allowed.—We have before seen in what cases a creditor having a joint and several security of a firm will be put to his election of proof. (See *ante*, p. 429.)

*In some cases, however, in which there has been an aggregate firm, and a *distinct* trade has been carried on by some or [*433 one of the members of the firm, creditors to whom both the aggregate firm and the minor firm, or the individual partner carrying on a distinct trade, have been liable, have been admitted to prove against the estates both of the aggregate firm and of the minor firm or individual partner carrying on the distinct trade. It seems however that double proof was admitted in the early cases only *where the*

creditor was ignorant, at the time he took his security, of the connection of the minor firm, or the individual partner carrying on the distinct trade with the aggregate firm. Thus it has been held that the holder of a *bill* drawn by one firm upon another distinct firm, consisting partly of the same members, was entitled to prove against both estates, if the holder took the bill *without notice* that the two firms consisted partly of the same members. See Ex parte Laforest, Cooke's Bankrupt Laws 276; Ex parte Benson, Id. 278; Ex parte Walker, 1 Rose 441; Ex parte Adam, 2 Rose 36; see also Wickham *v.* Wickham, 2 K. & J. 478.

But in subsequent cases, and ultimately in the House of Lords, it was held that whether the creditor had notice of the connection between the aggregate firm and the members or member of it, carrying on the separate trade or not, was of no importance, and whether there had been notice or not, double proof ought to be rejected, and the creditor put to his election: Ex parte Moult, Mont. 321; Mont. & Bl. 28; Re Vanzellar, 1 Mont. & A. 345; Ex parte Hinton, De Gex 550; Ex parte Goldsmid, 1 De G. & J. 257; 7 H. L. Cas. 785, nom. Goldsmid *v.* Cazenove; Re Whitwill, 32 Law Times 358; and see Ex parte Bank of England, 2 Rose 82; Ex parte Husbands, 2 G. & J. 4.

The rule against double proof being of a technical character, and not approved of by the Courts, will not be extended to cases where the joint estate of partners is not being administered in bankruptcy. See Ex parte Thornton, 5 Jur. N. S. 212; 3 De G. & J. 454; Bonser *v.* Cox, 6 Beav. 84.

The legislature has recently made an exception in certain cases in favor of the holders of bills of exchange and promissory notes, for by 24 & 25 Vict. c. 134, it is enacted that, "If any debtor shall at the time of adjudication be liable upon any *bill of exchange* or *promissory note* in respect of distinct contracts as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct
*434] contracts against the estates respectively *liable upon such contracts:" Sect. 152.

Consolidation of Estate.—In certain cases, however, the joint and separate estates may be consolidated and administered as one fund, joint and separate creditors being paid *pari passu.* This may be done first where it is not practicable to keep the estates separate (Ex parte Sheppard, Mont. & B. 415); and secondly, where a meeting of creditors of both classes desire the estates to be consolidated, and the Court is of opinion that it will be for the general benefit of the creditors, an order consolidating the estates will be made: Ex parte Strutt, 1 G. & J. 29; Ex parte Sheppard, Mont. & Bl. 415; Ex parte Part, 2 Deac. & C. 1; Ex parte Smith, 2 M. & A. 60.

But such consolidation will not be allowed to affect debts previously proved. Thus where a joint and several creditors proves his debt under two separate estates, and the joint and separate estates are afterwards consolidated, it has been held that the creditor was entitled to retain both his proofs: Ex parte Fuller, 3 Deac. & C. 520; 1 Mont. & A. 222.

When a secured Creditor may split his demands.—It is a rule in bankruptcy, that if a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realizing his security. This depends upon the principle in the bankrupt laws, that all creditors are to be put on an equal footing, and therefore if a creditor chooses to prove under the adjudication, he must sell or surrender whatever property he holds belonging to the bankrupt. See 1 Phil. Ch. 59; Ex parte Grove, 1 Atk. 103; Lord Loughborough's Order, 8th March, 1794. He may also, it seems, after electing to stand on his security, come in and prove for his debt if the security fail, before the estate is distributed: Ex parte Peake, 3 Law Rep. Ch. App. 453, 458.

Where, however, a creditor of a bankrupt has a security on the estate of a third person, that principle does not apply; and he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound. Thus in Ex parte Parr, 1 Rose 76, the petitioners were holders of bills brawn by the firm of Brummel, Heyliger & Co., and accepted by the bankrupts Leigh and Armstrong. The bills having become due, and the acceptors

being unable to take them up, the petitioners resorted to the drawers; but it being inconvenient for them to pay, it was agreed between the petitioners and Brummel and Heyliger—two of the partners of the firm of Brummel, Heyliger & Co., that they should assign to them a plantation in South America, as a security for the balance then owing upon the bills and the interest, which was accordingly done. A joint commission of bankrupt some time afterwards issued against Leigh and Armstrong. It was held by Lord Eldon, reversing the decision of the Commissioners, that the petitioners might prove the amount *of the bills and interest without deducting the value of the security. "The deduction," said his Lordship, "of a security is never to be made in bankruptcy, but when it is the property of the bankrupt; it is said that it must be so considered in this case, as the House in Demerara and that in Liverpool were partners; but it is quite familiar that the same firm may be in one character drawers, and in another acceptors. . . . The Commissioners must call another meeting, the petitioners to prove without deducting their security." See also Ex parte Bowden, 1 D. & C. 135; Ex parte Smyth, 3 Deac. 597; Ex parte Goodman, 3 Madd. 373; Ex parte Free, 2 G. & J. 250; Ex parte Rodgers, 1 Deac. & Ch. 38; Ex parte Davenport, 1 M., D. & D. 313; Ex parte Adams, 3 Mont. & A. 157; Ex parte Groom, 2 Deac. 265. Sed vide Ex parte Connell, 3 Deac. 201; 3 Mont. & A. 581.

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As in administration under bankruptcy, the joint estate and separate estates are considered as *distinct* estates, it has accordingly been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate, without giving up his security: Ex parte Peacock, 2 G. & J. 27; Ex parte Bowden, 1 Deac. & Ch. 135; In re Plummer, 1 Phil. Ch. Rep. 56, 60; Rolfe *v.* The Bank of Australasia, 1 Law Rep. J. C. 27.

Where a joint debt is due from two partners, and an adjudication is obtained against one of them, the creditor can prove his debt under the adjudication, and also sue the other partner: Heath *v.* Hall, 4 Taunt. 326, 328.

Although "the Court will undoubtedly never suffer a creditor to split a demand, and prove part of it under the adjudication, and prosecute, at the same time, a bankrupt for the remainder at law" (Ex parte Matthews, 3 Atk. 816; and see Ex parte Crinsoz, 1 Bro.

C. C. 270), nevertheless where a debt due from a partnership is secured as to part by a joint security, and as to the rest by a joint and separate security, the creditor may prove the former part against the joint estate, and the latter against the separate estate. Thus, in Ex parte Ladbroke, 2 G. & J. 81, where a debt of 27,620*l.* 19*s.* 10*d.* was due from the bankrupts at their bankruptcy to their bankers on a balance of account, and such balance was covered by joint promissory notes of the bankrupts to the extent of 18,000*l.*, and also by a mortgage of some property belonging to one of the bankrupts, with joint and several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of 17,000*l.*, had been permitted to be proved by the bankers against the joint estate, it was held by Lord Eldon, C., that the bankers were entitled to a proof of the 18,000*l.* against the joint estate and to prove the residue against the separate estate of one of the bankrupts. See also Ex parte Bate, 3 Deac. 358.

Upon the same principle, where the separate debt of one partner *is secured as to part of it by the joint security of the firm as sureties, the creditor may prove as to the latter part [*436 against the firm, and as to the rest against the separate estate of the individual partner. In Ex parte Hill, 3 Mont. & A. 175, a partner covenanted to pay 4000*l.* to the trustees of his marriage settlement by instalments, and assigned 3000*l.* of his portion of the partnership capital to them as security. The firm gave the trustees credit 3000*l.* in their books, and wrote to them, stating that they had done so. The firm became bankrupt before the first instalment was due. It was held that the 3000*l.* might be proved against the firm, and 1000*l.* against the separate estate of the covenantor. See also Ex parte Smith, 1 Deac. 385.

By the existing Bankrupt Law of the United States—Act of Congress approved March 2d, 1867, 14 Statutes at Large 534—it is provided by the thirty-sixth section that "where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners or any one of them, or on petition of any creditor of the partners, a warrant shall issue in the manner provided by this Act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners shall be taken, excepting such parts thereof as are herein

before excepted; and all the creditors of the company and the separate creditors of each partner, shall be allowed to prove their respective debts, and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee, the whole of the expense and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."

The partnership and separate estates are to be administered according to this section: Ex parte Frear, 2 Benedict 467. A firm creditor holding the notes both of the firm and of the individual partners, for a firm debt, is entitled to prove his claim on the firm notes, against the joint estate and on the individual notes against the separate estate of the makers: Mead *v.* Bank of Fayetteville, 6 Blatchf. C. C. 180.

Where there are both joint and separate debts proved on a separate petition, the joint creditors are not entitled to participate in the distribution of the assets until the separate creditors are paid in full: Ex parte Byrne, 16 Amer. L. Reg. 499; s. c. 1 Bankrupt Reg. 122. When there are both individual and firm creditors, but the assets are individual only, though mainly consisting of goods purchased by the bankrupt from the firm, on its dissolution, prior to the bankruptcy, and being principally, the same goods, in the purchase of which the partnership debts had originated, the firm creditors will be entitled to be paid *pari passu* with the individual creditors: Ex parte Jewett, 16 Amer. L. Reg. 291; s. c. 1 Bankrupt Reg. 130; Ex parte Downing, 3 Bankrupt Reg. 182; s. c. 3 Amer. L. Times 165. Where one of two partners sells his interest in the concern to his copartner, taking his notes therefor and the latter becomes bankrupt, leaving some of the notes unpaid, the former cannot receive a dividend until after the firms debts have been paid: Ex parte Jewett, 16 Amer. L. Reg. 294; s. c. Bankrupt Reg. 131. The obligee in a joint and several bond given by the members of a firm, is entitled to dividends out of the several assets;

the firm and its several members having been adjudged bankrupts: Ex parte Bigelow, 2 Bankrupt Reg. 121.

By the twentieth section of the same Act it is provided, that "when a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee or by a sale thereof, to be made in such manner as the court shall direct, or the creditor may release or convey his claims to the assignee upon such property and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor, the bankrupt's right of redemption therein on receiving such excess, or he may sell the property, subject to the claim of the creditor thereon."

A secured creditor can only prove for his balance: Ex parte Bridgman, 1 Bankrupt Reg. 59; Ex parte Bolton, Id. 83; Ex parte Winn, Id. 131. He may prove without surrendering his securities; he is to be deemed a general creditor after exhausting them: Ex parte Ruehle, 2 Amer. L. Times 59; Ex parte Campbell, 16 Amer. L. Reg. 100; Jones *v.* Leach, 1 Bankrupt Reg. 165; Ex parte Bigelow, Id. 186; s. c. 1 Amer. L. Times 95; Davis *v.* Delaney, 2 Bankrupt Reg. 125.

*437] *MACE *v.* CADELL.

November 26th, 1774.

[Reported Cowp. 232.]

Bankruptcy—Reputed Ownership.]—*A woman permitted a man to have the use of furniture—her property, and she had falsely declared that the man was her husband. Held, that the furniture belonged to the assignees of the man who had become bankrupt, as he was the reputed owner, and had the disposition of it as owner.*

Trover for goods. Upon showing cause why the verdict, given in this case for the plaintiff, should not be set aside, and a nonsuit entered, the Court took time to consider.

Lord Mansfield, C. J., now delivered the unanimous opinion of the Court, as follows:—The plaintiff Mace kept a public-house, had a license, and said she was married to one Penrice. She went to the Excise-office, had his name entered in the books, with a note in the margin "married." Penrice had the license, and continued in possession of the house and goods from that time till he absconded and went to Pimlico, which was an act of bankruptcy. Mace, the plaintiff, first claimed the goods in question, under a bill of sale from Penrice; but afterwards as her own original property, and denied that Penrice and she were married. Penrice was examined, and said that it was not till within three weeks before he went away that he knew whether he should marry her or not.

At the trial a doubt occurred to me, whether this case did not come within the statute 21 Jac. I. c. 19, s. 11. For the possession which the bankrupt had of these goods, was emphatically a possession of them *as his own*, and kept by him as such. It was suggested there was a similar case depending in the C. B., where the question was, whether the enacting clause of the eleventh section extends further than the preamble of that section, so as to include **goods not originally the bankrupt's.* The preamble[1] only says, [*438 "And for that it often falls out that many persons, before they become bankrupts, do *convey their goods* to other men, upon good consideration, yet still do keep the same, and are reputed owners thereof, and dispose of the same as their own." But the words of the enacting part are as follows: "Be it enacted, that if any person, at such time as he shall become bankrupt, shall *by the consent* of the true owner, etc., have in his possession, etc., any goods, etc., whereof he shall be reputed owner, the Commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." These words clearly extend to other persons' goods, as well as to those which were originally the bankrupt's property. For the sake of conformity, we were desirous to stay till the Court of Common Pleas had given their opinion. But that case, we understand, is made up.

We have considered the general question; and to be sure there is a variety of mooting in the books without any determination. But if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Because even *before* the statute, if a man had *conveyed* his *own* goods to a third person, and had kept the possession, such possession would have been void, as

[1] The preamble to the 11th section, which was by mistake included in the 10th, gave rise to some doubt, removed however by *Mace* v. *Cadell*, whether the 11th section was not confined in its application to property which had once been the bankrupt's. The preamble or recital, however, which gave rise to the doubt was omitted in 6 Geo. IV. c. 16, s. 17, and also in 12 & 13 Vict. c. 106, s. 125.

being fraudulent, according to the doctrine in *Twine's Case*, 3 Rep. 81. At the same time, the statute does not extend to all possible cases, where one man has another man's goods in his possession. It does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the *use* of their principal; but the goods must be such as the party suffers the trader to sell *as his own*. Therefore upon this ground we are all of opinion that the verdict ought to be set aside.

But in the consideration of this general question another point appeared, upon which we are equally clear; namely, that after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she shall never be allowed to say, that she was not married to him, *and that the goods were her sole property. On either ground, therefore, the verdict is wrong. If such a practice were to be allowed, it would be laying a trap for persons to deal with bankrupts.

*439]

Per Cur. Let the verdict be set aside, and nonsuit entered.

LINGHAM *v.* BIGGS AND ANOTHER.

Trin. Term, 37th Geo. III. 1797.

[REPORTED 1 BOS. & PULL. 82.]

REPUTED OWNEREHIP.]—*The furniture of a coffee-house was taken in execution by a creditor, and without ever being removed, was let by him to the keeper of the coffee-house, who became bankrupt while in possession of it. Held, that the assignees might seize it under the* 21 *Jac. I. c.* 19, *s.* 11.

TROVER against the defendants, who were the assignees of Anne Munday, a bankrupt, for all the household furniture, and other articles belonging to a coffee-house.

This cause was tried before Eyre, C. J., at Guildhall sittings after last Easter Term.

Anne Munday, the bankrupt, was the widow of a person who had kept a coffee-house, and being indebted to the plaintiff, gave him a warrant of attorney for 800*l.*, under which he entered up judgment, and took in execution the goods in question. They were valued by the sheriff at 337*l.* 13*s.* 6*d.*, and thereupon a bill of sale was made out by the sheriff at that price to Thomas Lingham, the plaintiff's brother, in trust for the plaintiff.

In June, 1791, articles of agreement under seal were entered into between the said T. Lingham, the plaintiff, and Anne Munday, by which the plaintiff let the goods to Anne Munday at the yearly rent of 27*l.* for four years, and she covenanted not to remove them from the coffee-house without the plaintiff's consent. The deed contained a proviso that the plaintiff should enter and *take possession [*440 on failure in the payment of rent. Anne Munday continued in possession of the goods beyond the four years, and until they were seized under the commission.

At the trial an objection being taken to the plaintiff's recovery on the 21 Jac. I. c. 19, s. 11, the Chief Justice doubted whether this case were within it, and a verdict was given for the defendant, with liberty to enter a verdict for the plaintiff, damages 337*l.* 13*s.* 6*d.* if the Court should be of opinion that it was.

Adair, Serjt., having accordingly obtained a rule to show cause why the verdict should not be entered for the plaintiff,

Cockell, Serjt., showed cause. The 21 Jac., being a considerable extension of the bankrupt laws in favor of creditors, ought to receive a liberal construction. It differs from

the 13 Eliz., which only provided against fraudulent conveyances; but this statute attaches on all goods left in the hands of a bankrupt, even without fraud, if the bankrupt has thereby obtained a false credit with the world. It was determined in *Stevens* v. *Sole* (cited 1 Atk. 170; Cook's Bankrupt Laws 229), that an ostensible possession of chattels by the bankrupt was sufficient to entitle the assignee under the 21 Jac. Now here Mrs. Munday had as full and ostensible a possession as possible; she had the use of the articles in question, and they were of a perishable nature. Possession of movables imports property; and on that ground a distinction is taken between a mortgage of realty and a mortgage of chattels; in the latter case the supposition of ownership can only be repelled by notice. In *Ryall* v. *Rolle*, 1 Atk. 165, Lord Hardwicke decided on the spirit, not on the words of the act, and thought that the 11th section ought to be governed by the preamble at the end of the 10th section. This case cannot be compared to that of a banker or a factor, because they are known to deal upon commission; nor to that of furniture in lodgings, which is known not to belong to the person in possession; therefore the world is not deceived. The case of *Bryson* v. *Wylie*, 1 Bos. & Pull. 83 n.; Cook's Bankrupt Laws 234, is exactly like the one at bar: now that has been recognised at law, and still remains untouched. The more modern cases, where the rule has been narrowed, are distinguishable from that and from the present. In *Walker* v. *Burnell*, Doug. 317, the bankrupt held the goods for a special purpose, of which the general creditors had notice. In *Collins* v. *Forbes*, 3 Term Rep. 316, the timber was appropriated to a special purpose, and the bankrupt had not *such an ownership as would give him credit with the world. So also in *Jarman* v. *Woolloton*, 3 Term Rep. 618, Buller, J., says, "It is sufficient to say, that the husband

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had not the order and disposition of this property with the consent of the real owner, the trustee."

Adair, Serjt., in support of the rule.—All personal property of which a bankrupt has the possession, is not within the object of the statute. The legislature, not choosing to go that length, added the words "*order and disposition*," etc., "*sale and alteration*," etc., which words must be rejected if the mere circumstances of possession and reputed ownership are sufficient. Indeed, if this were the case, job coaches, and horses, and furniture in lodgings would be brought within the statute. The act was not intended to interfere with anything but the stock in trade, the possession of which necessarily implies the order and disposition, sale and alteration, etc.; for a trader who is left in possession of his stock does acts every day which make him the reputed owner, and give him a degree of credit beyond what arises from the naked possession. All the cases cited for the defendant, except *Bryson* v. *Wylie*, are cases of mortgage. In mortgages of realty the absolute property vests in the mortgagee, though the mortgagor continue in possession; but in mortgages of personalty it is otherwise: there the property is only pledged as a security, and the absolute ownership does not pass *de facto* till default in payment of the money. The doctrine of specific liens agrees with this principle, where a person is always held to have parted with the lien when he parts with the possession. *Bryson* v. *Wylie* was a case of stock in trade and implements of a profession, which come so directly within the act as not to be taken out of it by any private agreement. Lord Mansfield there calls it "a new experiment to defeat the bankrupt laws," which he would not have done if he had considered the act as extending to household furniture. The case of *Collins* v. *Forbes* was within all the mischief contended for: Kent was the ostensible and reputed owner, and all the arguments with respect to false credit were urged: there no visible altera-

tion of the property took place; but here there was an act of notoriety,—there was an execution by matter of record executed in the house, and therefore a visible alteration both by law and fact. *Jarman* v. *Woolloton* is the strongest case for the plaintiff; for the presumption of property in a husband is of course stronger than in a stranger; and the jury
*442] found a verdict *for the defendant as to the stock in trade, and for the plaintiff as to the furniture.

Marshall, Serjt., on the same side.

Cur. adv. vult.

This day the judgment of the Court was delivered by

Eyre, C. J.—This stood over in order to give the Court an opportunity of looking into the case of *Ryall* v. *Rolle*. We were desirous of reading over that case, lest we should at all break in upon what was there so solemnly decided. In effect there were but two points then agitated, and resolved:—1st. Whether a mortgagee of goods were a true owner within the 21 Jac.; and much labor was employed, and learned distinctions taken between Hypothecation and Pignus, absolute and conditional sale, in order to show that he ought not to be so considered; but by the unanimous opinion of the chancellor and judges it was ruled, that a mortgagee was to be considered as the true owner, in opposition to the reputed owner. 2dly. Whether the trustee of the partner of a mortgagee was to be considered as the true owner, and the mortgagor the reputed owner within the statute. But it is very obvious that neither of these points much affects the present case.

Perhaps the cases which fall within the statute of James may be divided into two classes: 1st. Where goods not originally the property of the bankrupt are left in his order and disposition. In *Ryall* v. *Rolle*, Lord Hardwicke intimates a pretty strong opinion that the preamble should govern the eleventh clause, and confine it to cases where the bankrupt was the original owner; but in latter times, *Mace*

v. *Cadell*, Cowp. 232, *ante*, p. 383, the statute has been considered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his possession the goods of another person, they fell within the statute. This has formed a class of cases clearly within the 21 Jac. as the first class. Many cases have certainly been taken out of this class by exceptions, as those of factors.

Though *Ryall* v. *Rolle* goes no further than I have mentioned, yet thus far it may be made use of as an authority here, that it was assumed throughout the whole discussion, both by the bench and the bar, that the words "goods and chattels" in the statute was not to be confined to stock in trade or utensils. The words were there supposed to include choses in action, which might *pass by an Act of Parliament, though they could not by bill of sale. [*443 The case of an assignment by a bankrupt of a bond which he retains in his possession, and consequently of which he has the disposition, so that he may receive the money, shows how the words "order and disposition" and "reputed owner" are to be understood. They are to be understood thus. Being allowed to have possession of goods under circumstances which give the reputation of ownership, brings the case within the statute; and it is fair so to consider them, because every man who can be said to be the reputed owner, has incidentally the order and disposition; not indeed between the parties, but as to general appearance. It is impossible for the world at large to inquire what accounts may exist between the parties; general credit with the world is all; if the party be the reputed owner, it imports that he has the order and the disposition, and that he may sell. Admitting that the words "order and disposition, sale and alteration," might refer to such goods only as a party has in his shop, and ready to sell to customers, yet they cannot refer to the actual sale, as they seem to import; for if the

goods are once sold, they are out of the power of the assignees. The act supposes them to remain in the possession of the bankrupt, and because they remain there the assignees are allowed to take them. The words therefore must not have that absolute sense which they seem to bear, but must have a meaning consistent with the end proposed to be attained by the statute. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, order, and disposition within the meaning of this statute. We must suppose that he has done that which the act supposes; and certainly to hold a construction at this day different from that of all the cases on this remedial law, could not be justified by the mere letter of the act.

The question then comes to this,—Can furniture be distinguished from other goods and chattels, to which the statute would extend? Now, I think it cannot, except so far as it may go to show that this bankrupt was not the reputed owner, did not appear to have, and therefore had not the order and disposition; and it was fairly admitted by my brother Adair, that it was not worth while to go to another trial on that point; Mrs. Munday had been in such possession, that no jury could have hesitated to pronounce her the reputed owner. That being admitted, I think
*444] *it necessarily follows from her being the reputed owner, that she will appear to the world to have the order and disposition, sale and alteration, etc. She must clearly derive a credit from these appearances, and consequently, if the owner allows her to retain the property, however fair that may be between herself and the owner, it must be a fraud upon the creditors.

It has been suggested that this doctrine would go to an inconvenient length; it was said, by way of instance, that no trader could go into a ready-furnished house, or hire horses on a job, because possession would create a reputa-

tion of ownership, and consequently the furniture and horses, would be liable to be seized. I admit that possession is always evidence of ownership, and with nothing to oppose it, would create a reputation of it; but it is evidence which may be opposed, and so satisfactorily opposed as to destroy that reputation. Let us pursue this idea. A respectable tradesman, residing in his own house in London, takes a journey for two months to Brighton, or some other seaport, and hires a ready-furnished house; all the world would say that he was the reputed owner of the furniture of the house in London, and not the reputed owner of that in the house at Brighton. So as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into other evidence to determine of what character the possession was. I have no apprehension of this doctrine going to an inconvenient length.

It has been suggested also, that most of the cases are cases of mortgage, and that they are not in their circumstances like the present. But when once it is determined that a mortgagee is an owner within the statute of James, they will be found to be the same in principle. Two cases have been principally relied on at the bar; that for the defendant was *Bryson* v. *Wylie*, and that for the plaintiff was *Jarman* v. *Woolloton*, which last happened to be a case of furniture, and was held not to be within the statute of James. I am unable to perceive in those two cases, or in *Collins* v. *Forbes*, any difference in the rule of construction with respect to the statute. They are cases where the circumstances to which the statute was applicable lead the Court to different conclusions; perhaps both of them were right; but it is sufficient to say that neither of them has anything in common with the present case: possibly they would not govern other

*445] cases much nearer to them *in circumstances than this. Notwithstanding *Bryson* v. *Wylie*, I can suppose that a dyer may be in possession of a plant, without being the reputed owner; I can also suppose cases where a trustee for a married woman, permitting the husband to take possession of the goods and chattels, and to become the reputed owner to all the world, may lose these goods in consequence. We cannot argue from the circumstance of a dyer being in posession of a plant, and being the reputed owner, that therefore this furniture shall be liable to be taken by the assignee; nor from the furniture being protected in *Jarman* v. *Woolloton*, that the furniture shall also be protected here. As to the case of *Collins* v. *Forbes*,[1] we perfectly agree in that decision; because Kent, the carpenter who was to do the work, was not, at the time he became bankrupt, in possession of the goods which were lying in the king's yard, and were in contemplation of law in the possession of the true owner, whoever he was.

It was well observed by Mr. Justice Buller in *Walker* v. *Burnell*, that questions on the 21 Jac. have much more of fact than of law in them. I believe when once it is ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownership false credit arises; from that false credit arises the mischief; and to that mischief the remedy of the statute applies. This seems a fair and sound construction of the statute; and the present being confessedly a case of reputed ownership, and the other terms of the eleventh section being incidental to reputed ownership, we think the verdict proper.

Rule discharged.[2]

[1] On the decisions in that case, see the opinion of Mr. Justice Lawrence, as reported in Gordon *v.* The East India Company, 7 Term Rep. 237.

[2] See Manton *v.* Moore, 7 Term Rep. 67.

*JOY *v.* CAMPBELL. [*446

May 1, 2, 4, 5, 12, 1804.

[REPORTED 1 SCHO. & LEF. 328.]

REPUTED OWNERSHIP.]—*T. holds shares in a trading company in trust for W., who by his will oppoints T. his residuary legatee, T. continues in possession of the shares and becomes bankrupt. The shares are not within the meaning of the Bankrupt Act,* 11 *&* 12 *Geo. III. c.* 8, *s.* 9, *inasmuch as T. is himself the true owner and proprietor thereof, subject however to the debts and legacies of W.*

The object of the Bankrupt Act, 11 *&* 12 *Geo. III. c.* 8, *s.* 9, *is to prevent deceit by a trader from the visible possession of property to which he is not entitled; that is, where the possession is not in the true owner, but in one whom the true owner unconscientiously permits to have it.*

That credit has been given on the faith of the property does not bring the case within the Act.

WILLIAM BROWN, deceased, was, in and before the year 1787, a dormant partner in a mercantile house at Belfast, called the Sugar House Company, in which he possessed one-half of six shares, part of twenty shares of which the capital stock consisted, the other half of which six shares belonged to John Brown, his brother. William Brown was also a dormant partner and had one-third of a share of the capital stock in another mercantile establishment, called the

Rope-walk Company, in which John and another brother, Thomas Brown, were concerned in the same manner and to the same extent, each having one-third of a share.

In 1787 John Brown, being about to commence business as a banker, assigned his interest in the said two mercantile *447] concerns *to his brother William in trust for himself, and William executed a declaration of trust accordingly; and shortly after, William, intending to enter into another banking-house, prevailed on Thomas (who was apprised of the former trust) to become a trustee both for him and for John, for their respective shares in the said houses. The other partners having agreed to accept Thomas as a partner, an assignment was executed to him for merely nominal consideration, the object being to evade the provisions of the Bankers Act,[1] and soon after the execution of the assignment Thomas cancelled the deed by cutting off the name and seal of William, and delivering back the deed so cancelled to William, in whose possession it remained till his death. Thomas regularly received the dividends accruing from the said companies, and duly paid over to William his shares during his life, and gave credit to John, in his account with him, for the amount of his shares. During the period of these transactions Thomas carried on a distinct trade in partnership with John Oakman, under the firm of Brown and Oakman.

William Brown died in 1794 without issue, seised and possessed of considerable real and personal estates; having shortly before his death made and published his last will and testament, whereby amongst other pecuniary legacies he bequeathed to the plaintiff, William Brown Joy, son of his niece Mary Anne Joy, 1000*l.* to be paid when he should come of age, with interest, or sooner, at the option of his executors; and in case W. B. Joy should die under the age of twenty-one years without having received his legacy, the

[1] 29 Geo. II. c. 16.

testator ordered and directed the same to go to and be paid in equal shares amongst the other children of the said Mary Anne Joy, amongst whom he also bequeathed the further sum of 2000*l.* The testator then devised the farm and premises at the "Throne," which was held under a lease for lives, to his nephew William Brown, son of his brother Thomas, to hold to him, his heirs, executors, administrators and assigns, from the time he should attain the age of twenty-one years; but in case his said nephew should die under the age of twenty-one years, he devised the said farm and premises to the next eldest son his said brother Thomas should happen to have, when such next eldest son should attain the age of twenty-one years, and to his heirs, executors, &c.; and in case no son of his said brother Thomas should attain the age of twenty-one years, then he devised *the said premises amongst the daughters of his said brother, share and share alike: with this special limitation, that none of the said devises should take effect until the decease of Thomas; for that it was the testator's will, and he did thereby direct that his said brother should have and enjoy the free use and benefit, profits and advantages of the said farm and premises from the testator's decease, for the term of his natural life without impeachment of waste. The testator then bequeathed 3000*l.*, in equal shares, among the children of Thomas; and gave, devised, and bequeathed all the rest, residue, and remainder of his lands, tenements, freehold estates, effects, money, and securities for money, goods, chattels and worldly property of every discription and denomination whatsoever and wheresoever, unto his brother Thomas Brown, his heirs, executors, administrators, and assigns; and nominated his good friends John Campbell (to whom also he gave legacy of 100*l.*) and James Joy, with his brother Thomas Brown, to be executors and trustees of his will; directing further, that such of the legacies therein mentioned as should remain unpaid [*448

at the end of twelve months from his decease, should be then well and sufficiently secured upon his freehold or personal estates and assets, and should bear legal interest from thence until paid.

All the executors proved the will, but as James Joy did not live at Belfast, where the property principally lay, it was managed by the others; Thomas Brown continuing until his bankruptcy in October 1798, to receive the dividends of the Sugar-house and Rope-walk Companies, *as trustee*, collecting debts due to the deceased, and paying some of his debts and legacies; and Campbell (who had been the partner of William in the Bank) retaining in his hands a sum of 5285*l.* 1*s.* 5*d.* belonging to his testator, which was lying in the bank at the time of his death, and paying himself his legacy of 100*l.* With respect to this sum of 5285*l.* 1*s.* 5*d.* the following transactions took place. Campbell had in the lifetime of William Brown lent a sum of 4200*l.* to Brown and Oakman, on the joint note of William and John Brown and Brown and Oakman for 1500*l.*, and of William Brown and Brown and Oakman for 2700*l.* Of this, part was paid in William Brown's lifetime, and there remained due at his death the sum of 3232*l.*, which Campbell received from the bank, and lodged the notes in the bank to the credit of William Brown's account. Soon after, the bank settled accounts with Thomas Brown as *executor of William Brown, on which occasion after deducting the said sum of 3232*l.*, and also a sum of 1540*l.* which had been previously paid to Thomas Brown, a balance of 513*l.* 1*s.* 5*d.* appeared due to the estate of William Brown, which was then paid him, and a receipt for the whole sum of 5285*l.* 1*s.* 5*d.* was given to the bank by Campbell and Thomas Brown as executors. At the same time, the notes not only of William Brown but of John Brown and of Brown and Oakman, were given up to Thomas Brown, and no steps were

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ever taken to compel payment against either John Brown or Brown and Oakman.

After the bankruptcy of Brown and Oakman (which did not take place until October, 1798), the assignees insisted on their right to have not only Thomas's original share in the Rope-walk Company, but also that which he held in trust for William, which trust he had admitted on his examination before the Commissioners; and this claim, having been disputed by the executors of William, was submitted to arbitrators, who decided in favor of the assignees; in consequence of which the value of that share was paid over to them by the company.

Thomas Brown died on the 2d of July, 1801, before his son William Brown, or any of his children, had attained their age of twenty-one years.

The present bill was filed on the 14th of January, 1803, by the children of Mary Anne Joy against John Campbell, James Joy, John Brown, and the assignees and children of Thomas Brown, charging that, owing the misapplication of the assets by Thomas Brown and Campbell, there was not a sufficiency left to pay them the legacies bequeathed to them by the will of William Brown, and praying that his executors should account, and that Campbell might answer in particular, for such part of the testator's estate as had been misapplied in the payment of the notes in which William was security for Thomas Brown and Brown and Oakman; or that John Brown should contribute to the payment thereof; and that the award made in favor of the assignees of Thomas Brown might be set aside; and that the whole real and personal estate of William might be decreed subject to his debts and legacies, and might be sold for the payment thereof, or that the plaintiffs might be permitted to claim as creditors on Thomas Brown's estate for the amount, and also for all sums received by him before his bankruptcy for William Brown on account of the two companies.

*450] *The *Attorney-General* and Mr. *Saurin*, Mr. *Mayne* and Mr. *Joy*, for the plaintiffs. Mr. *Dunn* and Mr. *Bushe* for the defendants, Campbell and Joy. Mr. *Ball* and Mr. *Bell*, for the assignees of Thomas Brown.

For the assignees it was urged that they had no knowledge of the alleged trust as to the shares in the two companies; and insisted that when William Brown was about to become a banker, he assigned those interests *bonâ fide* to Thomas, who accordingly had ever after until his bankruptcy exercised the ostensible ownership over them; that no declaration of any trust appeared on the deed of assignment, which had come to the hands of the assignees; but that even though the existence of the trust were proved, and though Thomas might have acknowledged it, such acknowledgment ought not to defeat the claims of his just creditors, who had given him credit on account of such supposed property. They insisted on the clause in the Bankrupt Act 11 & 12 Geo. III. c. 8, s. 9, by which it is enacted, "That if any person or persons shall become bankrupt, and at such time shall by the consent and permission of the true owner and proprietor have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners (such goods excepted as shall be in the custody of such bankrupt by consignment or factorage), in every case the Commissioners or the major part of them shall have power to sell and dispose of the same to and for the benefit of the creditors who shall seek relief by the said commission, as fully as any other part of the estate of the said bankrupt," and cited the cases of *Lingham* v. *Biggs*, 1 Bos. & Pul. 82, *ante*, p. 439; *Bryson* v. *Wyllie*, 1 Bos. & Pul. 83 n.; and *Gordon* v. *East India Company*, 7 Term Rep. 228, to show that being allowed to have possession of goods under circumstances which gave the reputation of ownership brings the case within this clause of the statute. It was

also argued on their behalf, that the trust was created in fraud of the law, for the purpose of defeating the policy of the Bankers Act, and therefore was of such a nature as a Court of Equity should not recognise. If William Brown in his lifetime had quit the business of a banker, and then had filed his bill to compel Thomas to declare the trust, he must have stated in that bill the purpose for which it was created, and in that case could he have been entitled to an execution of the trust? And if not, can the *plaintiffs, claiming as volunteers under him, be in a better situation?. It was urged that if either of the companies had sustained loss in trade, that loss must have been borne by the personal estate of Thomas, and not that of William, inasmuch as the deeds of co-partnership were executed by Thomas only, and there was no indemnity or any other security given by William. It was submitted therefore that the award was right, and that the assignees were entitled to retain these shares for the benefit of the creditors. [*451

On behalf of John Campbell, it was said that he, being an aged and very infirm man, had undertaken the executorship out of respect to the memory of the testator, and without any intention of acting; which was the less necessary on his part, as James Joy and Thomas Brown were both active men, conversant in business, and particularly interested in the due management of the fund; the first, on account of legacies given to his children (the plaintiffs); and the other, as being entitled to the residuum. With regard to the transaction respecting the property of William Brown which remained in the bank at the time of his death (which was the only particular in which Campbell appeared at all to have intermeddled), so far as the amount of the notes in which William Brown had joined, he had made himself debtor to Campbell, who had lent the money on the credit of the balance in the bank, and had a right to distrain for that debt; he was not, as creditor of William Brown, bound

to resort to the other makers of the notes; the acting executor had the notes in his hands from the time the accounts were settled with the bank. At that time, John Brown and Brown and Oakman were in full credit, and Campbell had no reason to suppose that the assets of William Brown were in danger from non-payment of those notes; he had, on the contrary, sufficient reason to rely on Thomas Brown's procuring payment of them, he being a residuary legatee, the person most likely to be interested in them. Then the handing over to Thomas Brown the notes (which had in fact become the property of William Brown instead of the amount of them retained by Campbell) was payment to Thomas Brown, and the circumstance of Campbell's joining in the receipt to the bank ought not to charge him, as it was a mere formal act, and necessary for the satisfaction of his partner in the bank. The signing of the receipt is not of itself conclusive evidence in equity of receiving property (*Scurfield* v. *Howes*, 3 Bro. C. C. 95); *but here there *452] is evidence that the property was not received by Campbell, though he signed the receipt: *Westley* v. *Clarke*, 1 P. Wms. 83 n.

Lord Chancellor Redesdale.—I shall consider further the point with respect to Campbell and the "Throne" property. The only other question is with respect to the shares in the partnership concerns.

There is no ground for holding that the transaction is of such a nature as disabled Thomas Brown from saying that the shares in the Sugar-house and Rope-walk Companies, assigned by William to him, were not the assets of William. I will not enter into a discussion of the question, whether William might not have compelled Thomas to account with him as trustee if he had brought a bill in his lifetime; but as between the creditors and legatees of William and Thomas there is no doubt in point of conscience, Thomas

was bound to consider this a trust for them, and accordingly he does after the death of William acknowledge himself to be a trustee; and I should have conceived that if the question had arisen on an action brought against Thomas by creditors of William, whether there were or were not assets in his hands, the declaration which he made would preclude him from saying that they were not; therefore the case is confined to this question, whether under the operation of the bankrupt laws this property is so bound that notwithstanding the bankrupt himself is so subject in equity and conscience to the creditors, that he might have been charged at law, yet that the property shall not be liable in the hands of the assignees by reason of the clause in the statute. Now that clause refers to chattels in the possession of the bankrupt; "in his order and disposition with consent of the true owner;" that means, *where the possession, order, and disposition, is in a person who is not the owner—to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition.*

The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the *consent* of the *true owner*. Now who was the true owner of this property after the death of *William? The [*453
true owner was Thomas, subject to the payment of the debts and legacies of William. Thomas was the acting executor and residuary legatee, and the possession was therefore according to his right, but even as against him chargeable in favor of creditors and legatees, the creditors having a right to charge at law or in equity; the legatees in equity only. In all those cases in which that clause in the act has been permitted to have the effect of divesting the right in

the person who has a right to the property, the nature of the possession has always been considered, and whether it was according to right.[1] In cases of specific chattels, which are settled on marriage upon the husband for life, and then on the children, the possession has been with the party, the bankrupt, with the consent of the party creating the trust, and so far, with the consent of the true owner; but the possession was according to the title qualified by the rights of others; and wherever that has been the case, I take it the law has never been construed to extend to destroy that right of property; but it has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader, in whose possession it ought not to be.

In *Bryson* v. *Wylie*, 1 Bos. & P. 83, n., and cases of that description, the construction has been this: the property was in the bankrupt; he meant to make a transfer of it, as a security, and to do so by a deed; but a deed was not competent to complete the transfer, that is, to give an absolute title, without delivery; and, consequently, the title was imperfect; and being imperfect and he remaining in possession, it has been held, that the property shall be considered as remaining in possession of the trader, with the consent of the true owner, that is, the mortgagee. If there be a mortgage of household estates, where the possession, according to the nature of the transaction, remains with the mortgagor, the law does not apply; but if there be a sale, the possession remaining with the trader, the law would apply. Now, I think, if we look at all these cases, we shall perceive that the law (which in certain cases is a severe law) must always be construed by this criterion. *Was the possession that of a person not the owner with the consent of the true owner?* If it was the case, it is within the meaning of the statute. Now

[1] *Edwards* v. *Harben*, 2 Term Rep. 587; *Collins* v. *Forbes*, 3 Id. 316; *Jarman* v. *Woolloton*, Id. 618; *Manton* v. *Moore*, 7 Id. 67, *Gordon* v. *East India Co.*, Id. 228.

here, from the death of William, the property *was in that condition that it was perfectly competent to Thomas to acknowledge that he was trustee; he did so acknowledge; and his possession was according to the right of property, qualified by the right of others. [*454

That credit is given on the property is a circumstance which might belong to a variety of other cases not within the statute. In *Marshal's Case*, for instance, the creditor who had the plate could not know that it was settled on the marriage; but possession was according to the ownership; he was the rightful owner, and therefore the rule did not extend to that case. Here, for four years after the death of William, Thomas treated this as the estate of William: he held it indeed in his own possession, but that possession was according to the ownership, and therefore it shall not give a right to the assignees which otherwise would not be in them. I therefore think, with respect to this property, that the right is with the creditors and legatees.

And here I would observe that the effect of this law is not a forfeiture of the property. In *Bryson* v. *Wylie*, Bryson was a creditor of the bankrupt for so much, and his taking that species of security did not avoid his demand for the debt. If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became bankrupt, he would be a creditor to the amount of the money he paid for the purchase.

As to that part of the case, therefore, there is no difficulty in saying that this money must be accounted for: I do not touch on the case of John Brown, nor on what would have been done if William had filed a bill in his lifetime.

I remember a case where a person who was executor to a smuggler, on being called on to account for the estate of the testator, endeavored to avoid a considerable part of the account, by saying that they were smuggling transactions, on which the Courts would not allow any action to be main-

tained. The answer was, all that died with the smuggler; he could not have sued himself; but his executor shall not set up that as a defence against his creditors and legatees.

May 12, 1804.

Lord Chancellor REDESDALE.—I have stated my opinion with respect to the greater part of this case. . . . . I have since that *time thought more and more on the subject, and have looked into the Act of Parliament; and it is impossible to say, within the words of the act, that under the circumstances of the case, these interests were chattels in possession of the bankrupt with the consent of the true owner: with respect to them he was the true owner, subject to the interest which the persons who claimed under W. Brown had. Therefore I must consider this question as I did before, clearly with the plaintiffs.

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Mace *v.* Cadell, Lingham *v.* Biggs, and Joy *v.* Campbell, are printed together, because they are always referred to as the leading cases upon the doctrine of reputed ownership: Whitfield *v.* Brand, 16 M. & W. 286, 288.

This doctrine derives its origin from the 10th and 11th sections of 21 Jac. I. c. 19, with some alterations, incorporated in 6 Geo. IV. c. 16, s. 72, which has since been repealed, and, in effect, re-enacted by the 125th section of 12th and 13th Vict. c. 106. That section is as follows:—"That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. *Provided* that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act of Parliament, holden in the

eighth and ninth years of the reign of her Majesty, intituled, 'An Act for the Registering of British vessels,' or any of the acts therein mentioned."

On comparing this section with the 11th section of 21 Jac. I. c. 19, it will be found to agree with it substantially, except that following 6 Geo. IV. c. 16, s. 72, for the words "possession, order, *and* disposition," it substitutes "possession, order, *or* disposition," and for the words "whereof they shall be reputed owners, and take upon them the sale," etc., it substitutes the words "whereof he was reputed owner, *or* whereof he had taken upon him the sale," etc.

The clause of the Act of 1849 which has been before set out, differs from the corresponding clauses in 21 Jac. I. c. 19, and 6 Geo. IV. c. 16, s. 72, inasmuch as instead of the provision in the two last-mentioned acts as to goods and chattels in the reputed ownership of the bankrupt, that "the *Commissioners* shall have power to sell and dispose of the same for the *benefit of the creditors under the commission:" the Act of 1849, contains a provision that "the *Court* shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." [*456

The proviso as to shipping in the new act, following that in 6 Geo. IV. c. 16, s. 72, is not to be found in the statute of James I., and now by 17 & 18 Vict. c. 104, s. 72, "No *registered mortgage* of any ship, or of any share therein, shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor at the time of his becoming bankrupt may have in his possession and disposition and be reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim, or interest in such ship, or any share thereof, which may belong to the assignees of such bankrupt." See also Boyson *v.* Gibson, 4 C. B. 121 (56 E. C. L. R.); Campbell *v.* Thompson, 2 Hare 140, 143.

"A luminous exposition by Lord Redesdale of the corresponding Irish Act, 11 & 12 Geo. III. c. 8, s. 9," observes Parke, B., will be found in Joy *v.* Campbell, 1 Sch. & Lef. 336; Lord Redesdale there says, "That clause refers to chattels in the possession of the bankrupt, 'in his order and disposition, with consent of the true owner.' That means where 'the possession, order, and disposition' is in a person who is not the owner, to whom they do not properly belong, and who

ought not to have them, but whom the owner permits unconscientiously as the act supposes, to have such order and disposition. *The object was to prevent deceit by a trader from his visible possession of property to which he was not entitled;* but in the construction of the act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner:" Whitfield *v.* Brand, 16 M. & W. 286; and see Belcher *v.* Bellamy, 2 Exch. 309.

Somewhat similar provisions have been made in favor of the assignees of persons taking the benefit of either of the acts for the relief of insolvent debtors (1 & 2 Vict. c. 110, ss. 37, 57; and see 5 & 6 Vict. c. 116, s. 1; 7 & 8 Vict. c. 96, s. 17), since repealed by 24 & 25 Vict. c. 134; see also Macrae's Prac. of Insolvency, p. 429.

It may be here mentioned that the Bills of Sale Act, 17 & 18 Vict. c. 36, requiring the registration of bills of sale of personal chattels, does not give such bills of sale as are duly registered under it any greater validity as against the assignees in bankruptcy or insolvency than bills of sale had previous to the passing of the act, in cases where the goods and chattels were left in the possession of the grantor. See Stansfield *v.* Cubitt, 2 De G. & J. 222. There a bill of sale was executed of goods which remained in the possession of the bankrupt at the time of his bankruptcy. The bill of sale was *duly registered. It was contended that chattels assigned by a registered bill of sale were not liable to the doctrine of reputed ownership. That this was plain on the scope of the act (17 & 18 Vict. c. 36), which says, that if the bill of sale is not registered, it shall be void as against assignees in bankruptcy, and that this would be unmeaning and unnecessary unless a registered bill of sale took goods out of the doctrine of reputed ownership. That the intention that it should do so was reasonable, as the registration of a bill of sale gave it a notoriety which excluded apparent ownership in the grantor. Lord Justice Turner, however, said, "I do not think that the intention of the Legislature in passing 17 & 18 Vict. c. 36, was to alter the law as to reputed ownership. The act does not say, that registration shall give any new effect to a bill of sale; and in the enactment as to the effect of omitting to register it, various persons, with some of whom the

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doctrine of reputed ownership has nothing to do, are classed together." . See also Badger *v.* Shaw, 2 E. & E. 472 (105 E. C. L. R.); Gough *v.* Everard, 2 Hurlst. & C. 1; Re Daniels, Ex parte Ashby, 25 L. T. 188; Re Arthur O'Connor, 27 L. T. 27.

In examining this subject it is proposed to consider,—1st. What property comes within the meaning of the reputed ownership clause. 2. What will be considered as the "possession, order, or disposition of a bankrupt, as reputed owner," within the meaning of the act. 3. What is meant by the "consent and permission of the true owner." 4. As to the time at which the goods and chattels must be in the possession, etc., of the bankrupt to come within the clause. 5. It is next proposed to notice certain exceptions from the operation of the reputed ownership clause. 6. Next, the power given to the Court over goods and chattels coming within the operation of such clause. 7. And lastly, whether the clause applies to deeds registered under sec. 192 of the Bankruptcy Act, 1861.

1. *What Property comes within the Meaning of the reputed Ownership Clause.*—This section of the Bankrupt Act now under consideration operates only upon property coming within the description of "*goods and chattels.*" Thus furniture, as in the principal case of Lingham *v.* Biggs (*ante*, p. 439), utensils of trade not fixed to the freehold (Lingard *v.* Messiter, 1 B. & C. 308 (8 E. C. L. R.); Bryson *v.* Wylie, 1 Bos. & P. 83 n.; Ex parte Dale, 1 Buck 365; Whitmore *v.* Empson, 23 Beav. 313; Shuttleworth *v.* Hernaman, 1 De G. & J. 322; Waterfall *v.* Penistone, 6 E. & B. 876 (88 E. C. L. R.)); unless perhaps such as are usually let to traders, as the custom, in such cases, may rebut the presumption of ownership arising from the possession and apparent order and disposition of them (Horn *v.* Baker, 9 East 215); ships (Stephens *v.* Sole, 1 Ves. 352, cited; Hay *v.* Fairbairn, 2 B. & Ald. 193; Monkhouse *v.* Hay, 2 B. & B. 120 (6 E. C. L. R.)), *unless in the case of a mortgage they are duly registered (*ante*, p. 456); freight of ships [*458 (Leslie *v.* Guthrie, 1 Bing. N. C. 697 (27 E. C. L. R.); Douglas *v.* Russell, 4 Sim. 524); choses in action, such as debts (Ryall *v.* Rowles, 1 Ves. 348); bills of exchange (Hornblower *v.* Proud, 2 B. & Ald. 327); promissory notes (Belcher *v.* Campbell, 8 Q. B. 1 (55 E. C. L. R.)); stock (Ex parte Richardson, Buck 480; Bartlett *v.* Bartlett, 1 De G. & J. 127); policies of assurance (Gale *v.* Lewis,

9 Q. B. 730 (58 E. C. L. R.); Thompson *v.* Speirs, 13 Sim. 469; Ex parte Bromley, Id. 475; Ex parte Styan, 2 M., D. & D. 219; Re Webb's Policy, 15 W. R. (V.-C. M.) 529; Edwards *v.* Martin, 1 Law Rep. Eq. 121); annuities (Ex parte Smyth, 3 M., D. & De Gex, 687; Waldron *v.* Sloper, 1 Drew. 193); the benefit of an admiralty contract (North *v.* Gurney, 1 J. & H. 509); come within the meaning of the term "goods and chattels" in the reputed ownership clause.

So likewise do shares in public companies, where they are either of themselves personal estate, as shares in an assurance company (Nelson *v.* The London Assurance Company, 2 S. & S. 292; Ex parte Nutting, 2 M., D. & D. 302), in a newspaper (Longman *v.* Tripp, 2 Bos. & Pul. N. R. 67; Ex parte Foss, 2 De G. & J. 230), or shares in public companies, as railway, gas, canal, or waterworks companies, which although connected with land have been declared to be personal estate, either by act of parliament or in the deed constituting the company (see Ex parte Harrison, 3 M. & Ayrt. 506; Ex parte Vallance, Id. 224; Ex parte The Lancaster Canal Company, 1 Mont. & Bligh. 94; 1 D. & C. 411; Ex parte Lawrence, 1 De G. 269; Re Sketchley, 1 De G. & J. 163); and it seems that shares in a commercial company possessing lands in a foreign country for the purposes of trade, are not to be considered as real property: Ex parte Richardson, 3 Deac. 496.

It was at one time supposed that a bankrupt's *reversionary* interest in a chose in action not falling into possession until after his bankruptcy, was exempt from the operation of the clause as to order and disposition (In re Rawbone's Bequest, 3 K. & J. 300; Ex parte Hulme, 3 Sm. & G. 325), but such interests are now held to be within it: Bartlett *v.* Bartlett, 1 De G. & J. 127, overruling the decision of Sir J. Stuart, V.-C., reported 3 Sm. & G. 533; In re Rawbone's Trust, 3 K. & J. 476. See also In re Vickress's Trust, 7 W. R. 542 (V.-C. K.); but see Grainge *v.* Warner, 13 W. R. (V.-C. S.) 833.

Real property, however (Ryall *v.* Rolle, 1 Atk. 165; 7 Term Rep. 234; Ex parte Taylor, Mont. 240), chattel interests in real property (Stephens *v.* Sole, cited 1 Ves. 352; Roe *v.* Galliers, 2 Term Rep. 133), debts secured on mortgages of real estate (Jones *v.* Gibbons, 9 Ves. 407), or shares in a public company whose funds arise wholly from real estate (Ex parte Vauxhall Bridge Company, 1 G. & J.

101; Ex parte Barnett, 1 De Gex 194), do *not come within the meaning of the 125th section. [*459

Moneys, however, to arise from the sale of real estate (Lee *v.* Howlett, 2 K. & J. 531; Foster *v.* Cockerell, 3 C. & F. 456), or portions to be raised by trustees out of real estate by sale, mortgage, or otherwise (Re Hughes' Trust, 2 Hem. & Mill. 89), not being considered as of the nature of realty, come within the meaning of the 125th section.

Fixtures affixed to the freehold do not come within the reputed ownership clause, and it is immaterial whether they are such as would be removable as between landlord and tenant or not. See the leading case of Horn *v.* Baker, 9 East 215; 2 Smith's L. Cas. 161, 4th ed.; Whitmore *v.* Empson, 23 Beav. 313. In Boydell *v.* M'Michael, 1 C., M. & R. 177, a lessee of a house for a term of years purchased the fixtures from the lessors at a valuation; and after having assigned the term and the fixtures by way of mortgage, he continued in possession and became bankrupt. It was held by the Court of Exchequer that the fixtures were not "goods and chattels" within the order and disposition of the bankrupt, and did not pass to his assignees. "The real nature," said Parke, B., "of the tenant's interest in this case is, that he has a right to remove the fixtures during the term. That interest has been held sufficient to enable the sheriff to seize them under a *fi. fa.;* but Horn *v.* Baker decides that they are not goods and chattels within the meaning of the clause as to the order and disposition of the bankrupt. The reason is this, that *with regard to real property, the possession is considered as nothing, but the title only is* looked to. In this case it is clear that the mortgage took the interest in the realty and everything affixed thereto, and the tenant's right to remove the fixtures during the term." See also Clark *v.* Crownshaw, 3 B. & Ad. 804 (23 E. C. L. R.); Coombs *v.* Beaumont, 5 B. & Ad. 72 (27 E. C. L. R.); Hallan *v.* Runder, 1 C., M. & R. 266; Minshall *v.* Lloyd, 2 M. & W. 459; Hitchman *v.* Walton, 4 M. & W. 414; Steward *v.* Lombe, 1 B. & B. 511 (5 E. C. L. R.); De Tastet *v.* Walker, 1 Buck 153; Rufford *v.* Bishop, 5 Russ. 346, cited 4 Sim. 336; Hubbard *v.* Bagshaw, 4 Sim. 326; Storer *v.* Hunter, 3 B. & C. 368 (10 E. C. L. R.); Ex parte Watkins, 1 Deac. 296; Ex parte Broadwood, 1 M., D. & D. 631; Ex parte Reynal, 2 M., D. & D. 443; Ex parte Price, Id. 518; Ex parte Bentley, Id. 591; Ex parte

Heathcoate, Id. 711; Fletcher *v.* Manning, 1 C. & K., N. P. 350 (47 E. C. L. R.); Load *v.* Green, 15 M. & W. 216; Ex parte Barclay, 5 De G., M. & G. 403; Freshney *v.* Carrick, 1 Hurlst. & N. 653; In re M'Kibbin, 4 Ir. Ch. Rep. 520; Thompson *v.* Pettitt, 10 Q. B. 101 (59 E. C. L. R.); Cullwick *v.* Swindell, 3 Law Rep. Eq. 249. The case of Trappes *v.* Harter, 2 C. & M. 153 (41 E. C. L. R.); 3 Tyrw. 603, although some of the law there laid down is at least doubtful (see Minshall *v.* Lloyd, 2 M. & W. 456), is correct, because as the fixtures were held not to pass to the mortgagee, the *460] *assignees of the mortgagor were entitled to them, whether they were personal estate or not.

Those cases in which a distinction has been taken between fixtures annexed by the owner of the freehold to his estate, and fixtures put up by a tenant, according to which the latter, at any rate in the case of trade fixtures, have been held not to come within the reputed ownership clause (see Ex parte Lloyd, 1 M. & A. 494, 506; Ex parte Wilson, 2 M. & A. 61, 70; Ex parte Belcher, Id. 162; Ex parte King, 1 M., D. & D. 119; Ex parte Austin, 1 Deac. & C. 208), are inconsistent with the current of authorities, and are not to be relied upon.

It may here be observed that in some of the cases where it has been held that fixtures were not to be considered to come within the doctrine of reputed ownership, the judges seem to rely partially, at any rate, upon the custom in the neighborhood of demising fixtures together with the premises (see Rufford *v.* Bishop, 5 Russ. 346; 4 Sim. 336; Storer *v.* Hunter, 3 B. & C. 368 (10 E. C. L. R.); Watson *v.* Peache, 1 Bing. N. C. 327 (27 E. C. L. R.); Mullett *v.* Green, 8 C. & P. 382 (34 E. C. L. R.); Trappes *v.* Harter, 2 C. & M. 153; Hubbard *v.* Bagshaw, 4 Sim. 326); so that mere possession of them by a bankrupt would not necessarily lead people to believe that he had the property in them, so as to obtain a false credit by the fact of possession; the true principle, however, upon which the decisions rest is that mentioned by Parke, B., in Boydell *v.* M'Michael (*ante*, p. 459), viz. that with regard to realty and everything affixed thereto, the possession is considered as nothing, but the title only is looked to.

Heirlooms are not within the reputed ownership clause: Earl of Shaftesbury *v.* Russell, 1 B. & C. 666 (7 E. C. L. R.).

2. *What will be considered as "Possession, Order, or Disposition" of a Bankrupt as "reputed Owner."*—Confining our attention at first to the question, when goods and chattels, passing by manual delivery, such as utensils or articles of trade, or furniture, will be considered as being in the possession, order, or disposition of a bankrupt as reputed owner, it appears to be clear, as is laid down in the principal case of Lingham *v.* Biggs, that the cases upon this subject may be divided into two classes. The *first*, where the bankrupt was originally the owner of the goods and chattels left in his order or disposition; the *second*, where he was not.

The evidence required to establish reputed ownership in each of these cases is different. In the *former* case, when it is once proved that the bankrupt has been the owner, and has continued in possession until the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and therefore proof of those facts is *primâ facie* evidence that the bankrupt is both reputed and real owner. In the *latter* case, the *mere possession of goods and chattels may not be sufficient [*461 to show that the bankrupt was the reputed owner of them, and then it may be necessary for the assignees to establish that fact by other circumstances: Lingard *v.* Messiter, 1 B. & C. 312 (8 E. C. L. R.). We may illustrate the first class of cases, viz. those where the bankrupt was original owner of the goods left in his possession, by reference to the authorities, where he has sold (Knowles *v.* Horsfall, 5 B. & Ald. 134 (7 E. C. L. R.) or mortgaged (Ex parte Heslop, 1 De G., M. & G. 477; Freshney *v.* Carrick, 1 Hurlst. & N. 653; Ex parte Stoner, 53 L. T. 244) the goods, for he will be presumed to have continued in possession as owner, if it be not shown by the purchaser or mortgagee, as the case may be, not only that there was a change of ownership, but that that change of ownership had become notorious to the world (1 B. & C. 313 (8 E. C. L. R.); Muller *v.* M. & Selw. 335), unless perhaps in those cases where, from the nature of the business carried on by the person with whom goods are left, it is not to be inferred that all the goods in his possession belong to him: Hamilton *v.* Bell, 10 Exch. 545.

The fact of the initials of the purchaser having been written upon goods has been held not to be sufficient evidence of the notoriety of the change of property. Thus in Knowles *v.* Horsfall, 5 B. & Ald.

134 (7 E. C. L. R.), Dixon, a spirit-merchant, sold to the plaintiff, a wine-merchant, several casks of brandy, some of which at the time of the sale were in Dixon's own vaults, and others in the vaults of a regular warehouse-keeper at Liverpool. At the time of the sale, it was agreed that the brandies should remain in the several warehouses in which they were then deposited, rent free, until it suited the convenience of the plaintiff to remove them. Immediately after the sale, the plaintiff caused the letter K. to be marked in chalk on each of the casks by his warehouse-man. It was notorious in the wine trade, that these sales had been made to the plaintiff, but no notice of the sale had been given to the warehouse-keeper with whom some of the casks had been deposited. Dixon having become bankrupt while the brandies remained where they were originally deposited, it was held by the Court of King's Bench that the whole of them passed to his assignees. "It appears," said Abbott, C. J., "that some of the casks remained in the vaults of Dixon, the original seller, and that the others were in the vaults of a warehousekeeper. As to the latter parcel, if the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to the order of Dixon, who had placed them there. It is clear, therefore, that that parcel of goods remained after the sale subject to the order and disposition of the bankrupt. With respect to the brandies which remained in his own vaults, the case is much stronger, because as to *them *462] Dixon united in himself the character of warehouse-keeper and that of merchant or dealer in the commodity. Any person who went for the purpose of purchasing these brandies could not know that Dixon did not continue the owner. He had the corporeal power over them. The letter K, marked on the casks, might speak a language to a certain class of persons intelligible; but to others, who might be induced to become the creditors of Dixon, in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have a good title to them as against the plaintiff; for the real owner ought not to have left the goods, after the purchase, in the hands of Dixon, and suffered him to treat them as his own." See also Lingard v. Messiter, 1 B. & C. 308 (8 E. C. L. R.); Leake v. Loveday, 4 M. & G. 972 (43 E. C. L. R.); 2 Dowl. P. C. N. S. 624.

So the mere handing over to a mortgagee of the key of a house of the mortgagor's in which furniture, the subject-matter of the mortgage, was kept, has been held not to be sufficient to take the furniture out of the order and disposition of the mortgagor: Ex parte Staner, 33 L. T. 244.

In the case, however, of Ex parte Marrable, 1 G. & J. 402, where wine sold by the bankrupt, remained in his cellars, but was set apart in a particular bin, and marked with the purchaser's seal and entered in the bankrupt's books as belonging to the purchaser, it was held by Sir J. Leach, V.-C., to belong to the purchaser, and not to be in the order and disposition of the bankrupt. And in the recent case of Hamilton *v.* Bell, 10 Exch. 552, Alderson, B., said that Knowles *v.* Horsfall "merely sets forth a particular state of facts from which the Court were to draw their own conclusion, and for that reason I regret that I reported it." See also Ex parte Dover, 2 M., D. & De G. 259.

In Shrubsole *v.* Sussams, 16 C. B. N. S. 452 (111 E. C. L. R.), Tomlin, an inn-keeper at Sheerness, being indebted to the defendant, under what the jury thought sufficient pressure, on the 30th of May, 1863, employed his own attorney to prepare a bill of sale of all his effects in favor of the defendant, to secure an existing debt and a small further advance (the amount being about a fair equivalent for the value of the goods) and sent it to the defendant. On the 10th of July the defendant sent a man to Tomlin's premises to paint out Tomlin's name, and on the 13th went down to Sheerness and took possession, leaving Tomlin there to manage the concern on his behalf. On the 15th Tomlin filed a petition in bankruptcy, and on the 16th was duly adjudicated bankrupt. In an action by the assignees to recover the value of the goods thus conveyed, the jury having found that the transaction was *bonâ fide*, and that possession was really and notoriously taken by *the defendant prior to the bankruptcy, it was held by the Court of Common Pleas [*463 that the goods were not in the order and disposition of Tomlin at the time of his bankruptcy.

The fact that goods have been seized under an execution, and the sheriff's officer having been in possession, is not sufficient to show that the change of property has become notorious to the world; it is at most only evidence of the notoriety of the goods having been taken in execution; for when the owner continues in possession, as,

for instance, under a demise from the execution creditor, it may well be supposed that the execution has been withdrawn in consequence of the debt having been paid; and the very circumstance of the bankrupt having afterwards continued in possession of the goods, might well induce others to suppose that such was the fact, and that he still continued owner: Lingard *v.* Messiter, 1 B. & C. 308, 314 (8 E. C. L. R.).

It seems, however, that although the bankrupt was the original owner of the goods, the mere possession of them will not be sufficient in itself to show that he is the reputed owner, if they were left with him under circumstances not calculated to lead the world to believe that he was the true owner. See Hamilton *v.* Bell, 10 Exch. 545. There the plaintiff purchased some clocks of a London tradesman, who kept a shop in which were exposed for sale clocks and watches. A portion of the tradesman's business was to clean and repair clocks, and such as were sent to him for that purpose stood amongst those in the shop which were for sale. The plaintiff left the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. The tradesman some time afterwards became bankrupt, the plaintiff's clocks still remaining in his shop.. In an action by the plaintiff against the assignees for taking these clocks, it was held, under the circumstances, there was no evidence either that the bankrupt was the reputed owner of the goods, or that they were in his possession, order, or disposition, within the meaning of the 125th section of the Bankrupt Law Consolidation Act; and consequently that the goods did not pass to the assignees. "The true exposition of the 125th section," said Alderson, B., "is this. The goods to be sold for the benefit of the creditors are those of which the bankrupt has become the reputed owner by the consent and permission of the true owner, who has made him so by placing the goods in the order and disposition of the bankrupt, under such circumstances as he must reasonably know will lead the world to treat the bankrupt as the true owner. Thus, if property be sent to a shop where goods are sold as the property of the shopkeeper, that property is placed in such a situation as, in the eyes of the *464] world, would fairly lead to the inference that it *belongs to the possessor; and such a case falls within the meaning and spirit of this clause of the statute; and such goods would go to the

assignees, to be disposed of for the benefit of the creditors. But if, as here, the goods are left in a shop where it is notorious that goods are placed for other purposes than sale, namely, for the convenience of the owners, the conclusion cannot be reasonably drawn that the goods are the property of the shopkeeper." So, a carriage left by a purchaser with the builders, first for alterations and afterwards for sale (Carruthers *v.* Payne, 5 Bing. 270 (15 E. C. L. R.)), or even for his own convenience, because he happened to be abroad when it was ready (Bartrum *v.* Payne, 3 C. & P. 175 (14 E. C. L. R.)), a ship left in the yard of a builder for completion (Swainston *v.* Clay, 4 Giff. 187; Holderness *v.* Rankin, 28 Beav. 180; 2 De G., F. & J. 298); and books left with a publisher in the course of trade (Ex parte Greenwood, 6 L. T. N. S. 558; Whitfield *v.* Brand, 16 M. & W. 282), have been held not to come within the reputed ownership clause.

And in Priestley *v.* Pratt, 2 Law Rep. Exch. 101, it was held that lambs and pigs, in Lincolnshire, left by the vendee for his convenience in the hands of the vendor, were not in his order and disposition, as their being so left was in accordance with the notorious usage and custom of the country.

In Ex parte Elmer, 13 W. R. (Bktcy.) 476, the decision was the same, with regard to a horse purchased from a firm of brewers and general contractors, and at the same time let out to hire to them by the purchaser at a weekly sum. See also Re Terry, 7 L. T. N. S. 370; Prismall *v.* Lovegrove, 10 W. R. Exch. 527.

The possession of a servant or manager will be considered as that of his master or employer (Jackson *v.* Irwin, 2 Campb. 48; Toussaint *v.* Hartop, Holt 335; Hoggard *v.* Mackenzie, 25 Beav. 493), the possession of a person to whom goods have been lent, as that of the lender (Hornsby *v.* Miller, 1 E. & E. 192 (102 E. C. L. R.)), and the possession of a carrier, as that of the person who employs him (Hervey *v.* Liddiard, 1 Stark. 123 (2 E. C. L. R.)).

And where a person whose possession of goods and chattels is considered as that of a bankrupt, and they are held to be within his order and disposition, it has been held that such person cannot enforce any lien against such goods and chattels. Thus in Hoggard *v.* Mackenzie, 25 Beav. 493, a Scotch firm had a branch in London, which was wholly conducted by an agent and manager at a salary, but in their name. By contract he was to have a lien on goods

consigned to him for bills accepted by him for the firm. The firm became bankrupt in Scotland. It was held by Sir John Romilly, M. R., that the goods under the manager's control were at the time within the "order and disposition" of the bankrupts, and passed to their assignees unaffected by his lien.

*465] *A question may arise as to what is the effect of a joint possession of the servants of the bankrupt, and of the owner of the goods, with respect to reputed ownership. It was discussed in Ex parte Marjoribanks, 1 De Gex 466, where the chief judge thought that the true owners, the petitioners, were entitled to try the question in an action, the terms of which were settled, but the matter was afterwards compromised.

The possession of the pawnee will not be considered as that of the pawnor. Thus in Greening *v.* Clark, 4 B. & C. 316 (10 E. C. L. R), where the plaintiff bought from one Phillipson goods in the East India Company's warehouses, and left the warrants in Phillipson's hands, who pledged them, and afterwards became bankrupt whilst the warrants were in the possession of the pawnee, it was held by the Court of King's Bench that the goods did not pass to the assignees. It was observed by the Court, that the effect of the statute was to render the property of one person, under certain circumstances, available as a fund for the payment of the debts of another; that such a statute, although in some cases very beneficial, should not be applied to any that did not come within the words of it; . . . that the goods in question certainly were not in the possession of Phillipson at the time of his bankruptcy, nor could he have obtained the possession without repaying the pawnee the money that he had advanced. The case then did not fall within the words of the statute; and as without the statute there was no defence to the action, the verdict was properly found for the plaintiff, and ought not to be disturbed. See also Ex parte Taylor, Mont. 240.

Goods in the custody of the law, although in the house of a bankrupt, will not be considered as being in his possession. See Sacker *v.* Chidley, 13 W. R. Exch. 690, where it was held that goods of a third party which had been seized under a distress for rent in the house of a man who afterwards committed an act of bankruptcy, upon which he was adjudicated bankrupt, were not in his "order and disposition," Pollock, C. B., observing that "in a case where

the goods of a third person, in the possession of a bankrupt, had been seized by the officers of excise under a claim for duty, it was held that they did not pass to the assignees of the bankrupt." See also Ex parte Foss, 2 De G. & J. 230. There Baldwin was the owner of the type and plant used in the publication of certain newspapers. He mortgaged the type and plant to Foss. Afterwards the sheriff entered under an execution issued by a creditor of Baldwin, and though possession was demanded by Foss, remained in possession till Baldwin had become bankrupt. It was held by the Lords Justices of the Court of Appeal in Chancery, reversing the decision of Mr. Commissioner Evans, that the type and plant were not within the order and disposition *of the bankrupt, at the time of his bankruptcy, with the consent of the true owner. [*466 Lord Justice Turner, after distinguishing the case from Barrow *v.* Bell, 5 E. & B. 540 (85 E. C. L. R.), observes, "Now how does this case stand? The sheriff takes possession of the plant. One of the mortgagees gives him notice to withdraw. There is no pretence for saying that the possession afterwards was in any sense the possession of the bankrupt, or that the bankrupt continued in possession after the execution by the sheriff, in the same mode as he had been in possession prior to the execution levied. This state of circumstances, I think, brings the case distinctly within the doctrine of Fletcher *v.* Manning, 12 M. & W. 571, which is in conformity with a long train of previous decisions to be found in Jones *v.* Dwyer, 15 East 21, and Arbouin *v.* Williams, R. & M. 72 (21 E. C. L. R.), and in Ex parte Smith, Buck 149, and Robinson *v.* M'Donnell, 2 B. & Ald. 134. The case seems to me, therefore, to be clearly in favor of the mortgagees as to the plant."

A tortious seizure, however, by a sheriff will not take goods out of the possession of the reputed owner. Thus in Barrow *v.* Bell, 5 E. & B. 540 (85 E. C. L. R.), Eyre, a trader, had in his house goods, not his own property, in his order and disposition with the consent of the true owner. The sheriff entered the house under a *fi. fa.* against the trader, and made a levy. A man was left in possession in the house, but no change was made in the apparent possession of the goods by the trader, until after the filing of a petition for adjudication of bankruptcy against him, under which he was declared a bankrupt. It was held by the Court of Queen's Bench that the act of the sheriff did not withdraw the goods from

the order and disposition of the bankrupt, and consequently that the Court of Bankruptcy might order them to be sold by the assignees, as against the true owner. "It is clear," said Lord Campbell, C. J., "that the sheriff in seizing those goods was a wrongdoer; for the writ authorized him to seize Eyre's goods, not those of the plaintiff in Eyre's possession. The case is, therefore, I think, as if the sheriff had no writ at all, or the person seizing had been any other wrongdoer. It seems to me that what took place between Eyre and the sheriff is, as between the true owner and the assignees, *res inter alios*, having no operation, and leaving their rights as if the sheriff had never entered. See also Jackson *v.* Irwin, 2 Campb. 48.

It has been suggested that the doctrine of reputed ownership applies only where the possession of the bankrupt is purely permissive, so that his ownership is merely apparent; and that where he is in possession under an interest by virtue of which he is true, though only limited, owner, the doctrine in question has no application, and the assignees take no more than the limited interest vested in the bankrupt. Upon the principle just *stated, it has been sug- *467]
gested in a very useful work that where a person mortgages personal chattels by a deed so framed that he takes under it an interest in the chattels mortgaged for a term determinable upon his own default in payment, this limited interest saves him from being merely reputed owner; and by preventing his bankruptcy from passing anything more than the transient and defeasible interest vested in him, in effect, gives complete protection to the mortgagee: 4 David. Convey. 614 n., 4th ed. by Davids. & Waley. This doctrine is supposed to rest upon the cases of Fenn *v.* Bittleston, 7 Exch. 152; Brierly *v.* Kendall, 21 L. J. Q. B. 161; and a *dictum* of Lord Cranworth, in Ex parte Barclay, 5 De G., M. & G. 403.

Although conveyancers may adopt, as a measure of precaution, the form of mortgage thus suggested, it is nevertheless now settled, that even in such a case the mortgagor in possession would be deemed the reputed owner, "as the law will not allow this provision of the Bankruptcy Act to be defeated by this sort of contrivance:" Spackman *v.* Miller, 12 C. B. N. S. 659, 678 (104 E. C. L. R.); and see Freshney *v.* Carrick, 1 Hurlst. & N. 653; Ex parte Staner, 33 L. T. 244; see also Bryson *v.* Wylie, 1 Bos. & Pul. 83 n.; Linard *v.* Messiter, 1 B. & C. 308 (8 E. C. L. R.); Coombs *v.* Beau-

mont, 5 B. & Ad. 72 (27 E. C. L. R.); Reynolds *v.* Hall, 4 Hurlst. & N. 519; Hornsby *v.* Miller, 1 E. & E. 192 (102 E. C. L. R.) And the possession of a portable chattel, as, for instance, that of a portable steam-engine by a person to whom the mortgagor in possession has let it out in the way of his trade, will be considered as that of the mortgagor: Hornsby *v.* Miller, 1 E. & E. 192 (102 E. C. L. R.)

With regard to the second class of cases, viz., those in which the bankrupt was not originally the owner of the goods and chattels in his possession, it has been well illustrated in the principal case of Lingham *v.* Biggs, by the case put of the furniture let with a ready-furnished house, and of horses let on job. In these and such like cases, possession is evidence of ownership, and if there be no evidence to oppose thereto, would create a reputation of ownership. This evidence, however, might be opposed, and so satisfactorily opposed, as to destroy that reputation.

Furniture let to hire with a house will not ordinarily be considered as being in the reputed ownership of the hirer. "If," says Eyre, C. J., "a respectable tradesman, residing in his own house in London, takes a journey for two months to Brighton, or some other sea-port, and hires a ready-furnished house; all the world would say that he was the reputed owner of the furniture in the house in London, and not the reputed owner of that in the house at Brighton. So, as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into *other evidence to determine of what character the possession was:" *ante*, p. 390. See Gurr *v.* Rutton, Holt N. P. 326 (3 E. C. L. R.). [*468

Where, however, furniture has been hired to put into a house, the result may be different, unless a general custom to let furniture to hire at a particular place, or to a particular class of persons, can be proved. See also Mullett *v.* Green, 8 C. & P. 382 (34 E. C. L. R.); Re Hams, 10 Ir. Ch. 100; Re Head, Ex parte Cobbold, 12 W. R. 215; Ex parte Newberry, 10 L. T. N. S. 661.

There is moreover a class of tradesmen, who, although neither brokers nor agents, nevertheless are in possession of property the greatest portion of which belongs to other people; for instance, silversmiths and jewellers, who have in their possession for years,

family plate and jewels of great value; and such articles, whether exhibited or not, in the case of the bankruptcy of the tradesman, ought not to pass to his assignees: per Pollock, C. B., in Hamilton *v.* Bell, 10 Exch. 550.

Upon the same principle, where utensils necessary for carrying on a trade are hired or leased to a trader, they will *primâ facie* be considered as being in his reputed ownership. Thus the vats and utensils of a brewery (Horn *v.* Baker, 9 East 215), and the implements of a mill and iron forge (Clark *v.* Crownshaw, 3 B. & Ad. 804 (23 E. C. L. R.)), have been considered as being in the reputed ownership of the hirer or lessee.

The usage however of certain trades to let out utensils of trade or machinery, and the notoriety of such a usage in the trade, may rebut the presumption of ownership which would otherwise arise from the possession. Thus, for instance, where it is the usage in a country for the owners of collieries to demise the machinery and other things used in the colliery (Storer *v.* Hunter, 3 B. & C. 376 (10 E. C. L. R.); and see Thackthwaite *v.* Cock, 3 Taunt. 490)); for the owners of furniture to let it out to hotel-keepers (Mullett *v.* Green, 8 C. & P. 382 (34 E. C. L. R.)); for the owners of barges to hire them out to coal-merchants (Watson *v.* Peache, 1 Bing. N. C. 327 (27 E. C. L. R.)); in these and such like cases, the usage may rebut the presumption of ownership.

So it is stated that in the counties of Nottingham and Leicester, it was extremely common for the working hosiers to have on hire the possession of stocking-frames—valuable machines, which they were unable to purchase, and which therefore, coming within the reason of job carriages, job horses, and the like, would not be considered as being in the reputed ownership of the hirer. See Thackthwaite *v.* Cock, 3 Taunt. 490.

It is sufficient if the custom be shown to be so general as that all should know it who had dealings or were likely to have dealings with the bankrupt. See Watson *v.* Peache, 1 Bing. N. C. 327 (27 E. C. L. R.). There a coal-merchant at the time of his bankruptcy had in his possession barges which bore his own name and number, and were registered *in his name under the Waterman's Act. *469]
These barges he had hired of the defendant. It was proved to be the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges

passed to the coal-merchant's assignees under his bankruptcy, it was held by the Court of Common Pleas that Tindal, C. J., before whom the cause had been tried, had properly left it to the jury to determine whether the custom to hire barges on which the hirer had painted his own name and number, was generally notorious in the coal trade, and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. "Whether," said Tindal, C. J., "the bankrupt be the reputed owner of the property or not, can only be known by looking to the acts of the trader, his contracts, and his dealings in his trade—*in the world in which he moves.* When the jury are satisfied that the usage relied on is notorious to all who are likely to have any dealings with the bankrupt, there is sufficient to warrant their verdict, and the question which they were directed to consider." See also Ex parte Wiggins, 2 Deac. & Ch. 269; Newport *v.* Hollings, 3 C. & P. 223 (14 E. C. L. R.); Mullett *v.* Green, 8 C. & P. 382 (34 E. C. L. R.).

The custom relied upon must however be clearly proved: Thackthwaite *v.* Cock, 3 Taunt. 487, 491. If moreover a custom be one calculated to deceive the public, it will not have any effect. See Thackthwaite *v.* Cock, 3 Taunt. 487, where it was held, that a custom that purchasers of hops from hop-merchants should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees in case of his bankrupty, as being in his possession, order and disposition. See also Shaw *v.* Harvey, 1 Ad. & E. 920 (28 E. C. L. R.).

A question sometimes arises where goods and chattels have for valuable consideration been vested in trustees upon trust for the separate use of a married woman, and such goods and chattels have been left in her possession in accordance with the terms of the instrument creating the trust, whether upon the bankruptcy of her husband he will be the reputed owner of such goods and chattels. And it seems he will not be so considered, because the trustees, who are the true owners, by allowing the wife to be in possession of the goods and chattels do not thereby *consent* to their being in the possession, order, or disposition of her husband. See Simmons *v.* Bailey, 16 Mees. & W. 838. There household furniture, linen, and plate belonging to B. were assigned by him, by deed, in con-

templation of his marriage, to the plaintiffs, in trust after marriage, to stand possessed thereof during the joint lives of B. the settlor and his intended wife, for her sole and separate use independently
*of B. The marriage took place, and B. afterwards became
*470] bankrupt. The settled furniture and other articles were then in the house in which he resided with his wife. It was held by the Court of Exchequer that they were not at the time of his bankruptcy "in his order and disposition with the consent of the owners," and that the fact that the furniture, etc., not having been the wife's before the marriage was immaterial. For the furniture and other articles passed by the deed to the trustees just as if they had been the property of the wife before the marriage, and the possession which followed the deed was right and consistent with its terms. See also Jarman *v.* Woolloton, 3 Term Rep. 618; Haselinton *v.* Gill, Id. 620 n.; Darby *v.* Smith, 8 Id. 82; Quick *v.* Staines, 1 Bos. & Pul. 293; Ex parte Castle, 3 Deac. & De G. 117; Ex parte Massey, 4 Deac. & Ch. 405; Gardner *v.* Rowe, 5 Russ. 258; Tugman *v.* Hopkins, 4 M. & G. 389 (43 E. C. L. R.).

With regard to choses in action, such as debts, and policies of assurance, which are not capable of actual delivery, such a transfer must be made on a sale or mortgage as is considered equivalent to actual delivery of movables, so as to take them out of the order and disposition of the bankrupt. This is done by giving *notice to the debtor, or other person holding the property at the order or disposition of the bankrupt*, of the assignment of the debt or other chose in action. The reason why notice is necessary is this, that if it were not given the assignor might by a subsequent assignment, to a party giving notice, transfer the property to him, and consesequently the laches of the person omitting to give notice acquire a false credit, by the debt or other chose in action remaining in his order or disposition: Jones *v.* Gibbons, 9 Ves. 410. Thus in Ex parte Monro, Buck 300, a bond debt was assigned and the bond delivered to the assignee, but as no notice of the assignment was given to the debtor, it was held by Sir Thomas Plumer, V.-C., that the debt remained in the order and disposition of the bankrupt. "I find," said his honor, "the practice of the commissioners has been conformable to the rule stated in Ryall *v.* Rolle, 1 Atk. 165; the absence of any decision to the contrary since the time of Lord Hardwicke shows that rule to have been acquiesced in, and I think

rightly for the obligee, where notice is not given, may obtain payment of the debt; which is sufficient to leave it in his ordering and disposition within the meaning of the statute."

Upon the same principle, where the owner of a chartered vessel assigns the freight to a person for valuable consideration, if such person neglects to give notice of the assignment to the charterers or their agent, previous to the bankruptcy of the owner, the freight will be held to be in the order and disposition of the bankrupt: Re The owners and Mortgagees of the ship "Pride of Wales," 15 W. R. (V.-C. M.) 381.

*Notice to the debtor or person liable to pay, of an assignment of a chose in action is sufficient to take it out of the order and disposition of the assignor (Ex parte Smither, 3 M. & A. 693; 1 Deac. 413; Douglas *v.* Russell, 4 Sim. 524; Boyd *v.* Mangles, 3 Exch. 387). The only person however to whom notice of the assignment need be given is the party from whom the assignor is to receive the payment of his money. and not the original debtor. Thus in Gardner *v.* Lachlan, 4 Myl. & Cr. 129, Lachlan on behalf of the owner of a ship entered into a charter-party with the Commissioners of the Navy, by which they agreed to pay to Lachlan, on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to Gardner as a security for a debt, and Gardner gave notice of the assignment to Lachlan, but not to the Commissioners of the Navy. The owner having subsequently become bankrupt, it was held by Lord Cottenham, C., that the notice given to Lachlan took the arrears of freight out of the order and disposition of the owner. "When," said his lordship, "the doctrine was first entertained that debts due to a trader were within the 21st James I. c. 19, it became necessary to lay down some rule by which such property might become capable of a secure assignment. It was considered that the debt, whilst unpaid, was in the order and disposition of the trader, inasmuch as he could demand payment of it when due, or direct payment to be made to any other person; and it was therefore held that notice, authorized by the creditor, to the debtor, of the fact that the debt had been assigned to another, as it prevented it from thereafter being so in the order and disposition of the trader, would prevent the debt from being within the operation of 21 James I. . . The ground of the rule so established rests wholly upon this, that the [*471

party to whom the notice is to be *given is the party from whom the trader trusts to receive payment*—in other words, the party holding the property at the order and disposition of the trader, and which order and disposition is, for the future, to cease in consequence of the notice. . . . Upon this principle, no notice can be necessary to any party from whom the trader is not to receive payment, or who does not hold any property at the order or disposition of the trader. . . . When, indeed, the freight had been paid to Lachlan, he became debtor for the amount. Notice, therefore, was very properly given to him, but was not necessary to any other party. If any cases have required notice, under such circumstances, to any other party, they must have departed from the reasoning in Ryall *v.* Rowles, 1 Ves. Sen. 348, and Jones *v.* Gibbons, 9 Ves. 407); but upon examining the cases cited, I do not find that they have done so." See also Buck *v.* Lee, 3 N. & M. 580 (28 E. C. L. R.); Ex parte M'Turk, 2 Deac. 58.

*472] *Where the bankrupt was himself the assignee of a chose in action, and had given no notice of the assignment, if he himself afterwards assigned the chose in action, and his assignee gave no notice of such second assignment, it was at one time held that the reputed ownership clause did not apply, because it was said that the bankrupt having given no notice, could not be said to have the order and disposition of the property. See Ex parte Newton, 4 D. & C. 138. But this case must be considered as overruled by the subsequent case of Ex parte Wood, 3 M., D. & D. 315; which decides that notice by the person to whom the bankrupt had assigned a chose of action under similar circumstances was necessary, in order to take it out of the order and disposition of the bankrupt. And see the remarks of Lord Justice Turner in Bartlett *v.* Bartlett, 1 De G. & J. 143.

À fortiori would a chose in action if assigned to a bankrupt be in his order and disposition if he gave notice of the assignment, but a person to whom he made a subsequent assignment neglected to give notice of it before the bankruptcy: Ex parte Arkwright, 3 M., D. & D. 129; Ex parte Masterman, 4 D. & C. 751; 2 M. & A. 209.

And notice is equally necessary, where debts are assigned by a retiring partner to a partner continuing in the trade. See Ex parte

Burton, 1 G. & J. 207; Ex parte Usborne, 1 G. & J. 358; Ex parte Colwill, Mont. 110; Ex parte Tennyson, 1 Mont. & B. 67.

A mere notice, however, to pay debts to one of the partners will not take the debts out of the order and disposition of the firm of which he was a member. Thus in Ex parte Sprague, 4 De G., M. & G. 866, a dissolution of partnership was advertised in the "Gazette," and a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner. It was held by the Lord Justices of the Court of Appeal in Chancery, that the notice was insufficient to take the debts out of the reputed ownership of the firm. "At the time of the dissolution of the partnership," said Turner, L. J., "the debts belonged to the partners jointly. They must have so continued until notice was given to the debtors that the debts which had been joint property, had become the sole property of the one. Now there is nothing in the shape of such notice, except the fact that authority had been given by both partners to the debtors to pay the amount of their debts to one of these partners. I take it that a mere authority of that description would not alter the property between the two. Therefore I think that, as to the debts, there was not here sufficient to take the case out of the operation of the statute as to reputed ownership."

An exception to the general rule has been established in the case of negotiable securities, such as bills of exchange or promissory notes, *which do not require notice to the debtor, in order to take them out of the operation of the clause as to reputed ownership: Ex parte Price, 3 M., D. & De G. 586, 595; Ex parte Barnett, 1 De Gex 203; Belcher *v.* Campbell, 8 Q. B. 1 (55 E. C. L. R.). [*473

And it seems that where the acceptor of bills of exchange, endorsed by the drawer, gives a bond in order to secure their payment, and the bond and bills are mortgaged together, notice to the obligor is not necessary, in order to take the bond out of the order and disposition of the mortgagor: Ex parte Barnett, 1 De Gex 203. It should, however, be mentioned that in the case of Ex parte Price, 3 M., D. & De G. 586, which was not cited in Ex parte Barnett, notice was held necessary to give validity to a deposit of a warrant of attorney which was expressed to be executed to secure payment of two bills of exchange, one of which was deposited as part of the

security. But in that case it must be observed, that the deposited bill was not endorsed, and the depositee had only an equitable right to have his security completed by the endorsement of the bill.

Upon the assignment of a chose in action, if there be several co-debtors or co-trustees, notice ought to be given to all of them, although notice to one of them will, it seems, be sufficient notice to all, so long as the circumstances of the case remain unaltered; but it will not be sufficient upon the death of the individual to whom the notice was given, or in the case of his being a trustee upon his ceasing to act in that capacity: Smith *v.* Smith, 2 C. & M. 231; Timson *v.* Ramsbottom, 2 Kee. 35; Meux *v.* Bell, 1 Hare 73; Wise *v.* Wise, 2 J. & L. 403.

The reason is this, that a person who is asked to advance his money on the trust property, whether by way of purchase or of mortgage, ought, for his own safety, to apply to every one of the trustees; and if he omits to take that precaution, it is his own fault if he should suffer loss in consequence of the omission: per Kindersley, V.-C., in Browne *v.* Savage, 4 Drew. 640.

It is not necessary that a notice to a trustee should be a notice formally given in writing; a verbal informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee: per Kindersley, V.-C., in Browne *v.* Savage, 4 Drew. 640; North British Insurance Company *v.* Hallett, 7 Jur. N. S. 1263.

The purpose for which notice to a trustee is given, if a notice be in fact given, is altogether immaterial. See Smith *v.* Smith, 2 C. & M. 231: in that case the plaintiff made advances to Maberly, a trader, and afterwards took from him as a security an assignment of an equitable life-interest in stock, and other property standing in the names of and vested in three trustees under a marriage settlement. There being rumors about the solvency of Maberly, the plaintiff, in the course of conversation subsequently to the assign-
*474] ment, and not with a view of giving *validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment. It was held by the Court of Exchequer that this communication was a sufficient notice to prevent the interest of Maberly passing to his assignees on his bankruptcy, as property in his order and disposition.

Where, however, one of the trustees was also a beneficiary, and

assigned his beneficial interest in the fund to a stranger, it has been held that the notice acquired by such trustee as *assignor* will not constitute notice to the other trustees, it being the interest of such trustee *as assignor* to conceal the assignment: Browne *v.* Savage, 4 Drew. 635.

But where such trustee assigned his beneficial interest to one of his co-trustees, the notice which that co-trustee acquired *as assignee*, constituted during his life notice to the trustees, it not being his interest *as assignee* to conceal the assignment: Browne *v.* Savage, 4 Drew. 635. So it has been held that if the mortgagee of goods and chattels be one of the trustees to whom notice ought to be given, as he must necessarily, from the nature of the transaction, have full notice of his own act, that will be sufficient to prevent reputed ownership: Ex parte Smart, 2 M. & Ayr. 60, and Ex parte Smyth, 3 M., D. & De G. 687, and the remarks thereon in Ex parte Boulton, Re Sketchley, 1 De G. & J. 163.

Notice to the solicitor of the trustees is sufficient: Rickards *v.* Gledstanes, 3 Giff. 298.

Notice must also be given to an assurance office of an assignment of a policy in order to take it out of the order and disposition of the assignor, although the policy be delivered to the assignee, and any rule of the office not to attend to notices is immaterial. Thus in Williams *v.* Thorp, 2 Sim. 257, a policy effected by J. Newman with the Equitable Assurance Company was assigned by him to secure Thorp a sum of money and interest. The policy was given up to the mortgagee, but no notice of the assignment was ever given to the office. Newman became bankrupt. It was held by Sir L. Shadwell, V.-C., that the assignees in bankruptcy were entitled to the benefit of the policy. "In Ex parte Munro," observed his honor, "the Vice-Chancellor says, 'Did the delivery of the bond by the bankrupt take away his power to receive the debt? Certainly not?' Supposing that the executor of Newman had obtained payment of the sum insured from the office, could the office have been compelled to pay it over again to Thorp? I see no ground upon which the office could have been compelled to make a second payment. If this society does not take notice of assignments, it takes all the risk of such conduct upon itself." See also Ex parte Colvill, Mont. 110; Ex parte Tennyson, 1 Mont. & Bligh. 67; Thompson *v.* Speirs, 13 Sim. 469; In re Bromley, 13 Id. 475; Waldron *v.* Sloper,

*475] *1 Drew. 193; Ex parte Patch, 7 Jur. 820; Ex parte Price, 3 M., D. & De G. 586; Thompson *v.* Tompkins, 2 Drew. & Sm. 8; Re Webb's Policy, 15 W. R. (V.-C. W.) 529.

And notice to the insurance office is equally necessary where the bankrupts are not the original insurers, but only equitable mortgagees. See Ex parte Arkwright, 3 M., D. & De G. 129. There the bankrupts being mortgagees of various policies of life assurance, of which the respective offices had notice, deposited them with their bankers to secure the repayment of advances; but the bankers gave no notice of such deposit to the different offices. It was held by Knight Bruce, C. J., that the policies must be considered as being in the order and disposition of the bankrupts.

The cases decided by Sir John Cross, in which he held that reputed ownership of a policy was a fact to be proved, and was not conclusively to be inferred from the absence of notice to the office of a change of ownership (see Ex parte Heathcoate, 2 M., D. & D. 711; Ex parte Cooper, Id. 1), must be considered as overruled by the cases already cited, which establish that notice to the office of an assignment or deposit of a policy is sufficient of itself to take the policy out of the order and disposition of the assignor or depositor.

It has moreover been decided at law, that the question whether a trader was at the time of his bankruptcy the reputed owner of a policy of assurance, is a question of fact, depending not merely upon a notice *in writing* having been given to the office, but upon a consideration of all the circumstances attending the possession of the property, at any rate when a verbal notice has been given to the office. See Edwards *v.* Scott, 1 M. & G. 962 (39 E. C. L. R.); 2 Scott N. R. 266. There trover having been brought by the assignees of Weston, a bankrupt, for a policy of assurance, the defendants pleaded not guilty, and that the plaintiffs were not possessed as assignees; and at the trial it appeared, that in 1836 the policy had been deposited by Weston with the defendants as a security for an advance of money; that in March, 1837, Weston became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud, and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for 3000*l.*, from which sum 1200*l.*, the estimated value of the policy, was deducted, leaving the defendants

creditors for the balance, 1800*l.*; that on the 15th of July, 1837 (the fiat being granted on the 27th), an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, *at the same time stating that policy had been deposited with the defendants;* that the insurance company kept a book for entering *written* notices of assignments and deposits of policies, which book contained no such *entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice. It was held by the Court of Common Pleas that a direction by the judge at the trial, that the defendants had not got rid of the apparent ownership of Weston, by what passed at the meeting of the creditors, and by the conversation at the office, not followed up by a notice in writing—was wrong, it being a question for the jury, whether, under those circumstances, Weston was the reputed owner of the policy at the time of his bankruptcy. [*476

It is submitted that in this case, upon proof being given of the verbal notice to the office, it ought to have been laid down as law, that the policy was taken out of the reputed ownership of the bankrupt: Edwards *v.* Martin, 1 Law Rep. Eq. 121.

Where a policy is deposited with the intention of conferring a lien upon the instrument only, and not with the intention of passing any interest in the debt, the assignee is not entitled to it as being in the possession, order, and disposition of the bankrupt as reputed owner, though no notice of the deposit has been given to the office. See Gibson *v.* Overbury, 7 Mees. & W. 555, where in such a case it was held that the assignee could not recover the policy of assurance in trover. And Lord Abinger, C. B., observed, "In the case of a mere lien from a deposit by the bankrupt, I believe there is no example of the assignees having been held entitled to maintain trover. Our decision in this case will not affect the title of the assignees, who have claimed *the debt;* they may still give a discharge to the office for the debt due upon the policy, to which the bankrupt was entitled, and inasmuch as there was no legal assignment of the policy. But the lien upon the policy remains unaffected by the bankruptcy; and therefore we think the defendants are entitled to judgment:" Broadbent *v.* Varley, 12 C. B. N. S. 214 (104 E. C. L. R.).

Where, however, the policy is handed over with the intention of

giving the party taking it not a mere interest in the paper of the policy, but a claim to the money secured by it, the case will, even at common law, not be considered to come within the decision of Gibson *v.* Overbury. See Green *v.* Ingham, 2 Law Rep. C. P. 525. There A. delivered to B. a policy of insurance on his own life, to secure a loan from B., with the intention of giving B. an interest in the sum assured. No notice of the transaction was given to the insurance office. It was held by the Court of Common Pleas that the policy remained in the order and disposition of A., and that on his bankruptcy his assignee was entitled to recover it from B. "The decision in Gibson *v.* Overbury, 7 M. & W. 655," said Byles, J., "when examined, amounts to this, that if the policy is deposited without any intention that the person with whom it is deposited should have conferred upon him *an equitable right to recover the *477] money payable thereunder, but only with the intention of giving him a dry interest in the paper, such deposit does not fall within the principle applicable to an assignment of a debt, and the instrument so deposited is not in the order and disposition of the bankrupt at the time of the bankruptcy, within the provisions in the Bankruptcy Act; but that, if the deposit was made upon an agreement that the depositee should have confefred upon him a right to the money, then, as the debt would pass to the assignee, so the paper, which is the title-deed to the debt, would pass to him also."

With regard to the question what notice of the assignment of a policy of assurance is sufficient, it is clear that notice to the directors as a body would be effectual notice. So notice may be given to an officer representing the company, and the effect of the notice thus received by that officer is sufficient to bind the company even though not communicated to them (In re Hennessy, 2 Dru. & Warr. 563, per Sugden, L. C.), and even although the notice of the assignment was acquired by the agent in a different capacity, for instance as solicitor for the assignor and assignee: Gale *v.* Lewis, 9 Q. B. 730 (58 E. C. L. R.).

If the agent of the insurance office is himself the assignor, notice to him of the assignment will not, it seems, be sufficient, for he has obviously an interest in withholding it from his employers. In re Hennessy, 2 Dru. & War. 555, 565. See also Ex parte Sketchley, 1 De G. & J. 163.

In some cases where the assignor of a policy in a mutual assu-

rance office was a copartner, in consequence of his being entitled to share in the profits of the company, it has been held that the company would, by implication of law, have notice through the assignor, one of its members, sufficient to take the policy out of his order and disposition. See Duncan *v.* Chamberlayn, 11 Sim. 123; Ex parte Waithman, 2 M. & A. 364; 4 Deac. & Ch. 412. These cases, however, have been overruled, and it is clear now that such notice is insufficient. See Thompson *v.* Speirs, 13 Sim. 469; Ex parte Wilkinson, Id. 475; In re Hennessy, 1 Conn. & L. 559; 2 Dru. & War. 555; Ex parte Arkwright, 3 M., D. & D. 129; In re Styan, 2 M., D. & D. 219.

If a mortgagee of a policy of assurance deposits it by way of submortgage, and gives notice of the submortgage to the insurance office, but not to the original mortgagor, this will be sufficient to take the policy out of the reputed ownership of the mortgagee: Ex parte Barnett, 1 De Gex 194.

Where a bankrupt who was one of the directors of a life assurance office deposited a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office, it was held by the Court of Review that this was sufficient notice to the office so as to prevent the *claim of reputed ownership: Ex parte Waithman, 4 Deac. & Ch. 412; sed vide Ex parte Watkins, 2 Monk. & Ayr. 348. [*478

Where notice of a mortgage of a policy has once been given to an insurance office, it will be sufficient to take the policy out of the order and disposition of the assignor, although no notice may have been given to the office on a subsequent change in the object of the mortgage. See Ex parte Barnett, 1 De Gex 194. There a trader deposited policies of insurance with his bankers to secure the floating balance due from him, and signed a memorandum of the object of the deposit, of which notice was given to the insurance office. Afterwards he took a partner, and the policies remained and were treated as a security for the floating balance due from the firm; but of this change in the object of the security, no memorandum was signed, nor was any notice given to the office. It was held by Sir J. L. Knight Bruce, C. J., that the bankers were entitled to the usual order, as in the case of an equitable mortgagee without a written memorandum. "I am of opinion," said his honor, "that

although of that change the office had not notice, the policy was nevertheless not in the order and disposition of the bankrupt, that being effectually prevented by the prior notice rendering it impossible to deal with the policy without making inquiries."

It is usual and indeed advisable to give notice of an assignment of a policy to the office in writing, nevertheless a verbal notice is sufficient, even although it be not entered in the books of the office (Ex parte Tanner, 1 Bank & Ins. Rep. 156; and see Re Raikes, 4 Deac. & Ch. 412; Edwards *v.* Scott, 1 M. & G. 962; 2 Scott, N. R. 266; Ex parte Masterman, 4 Deac. & Ch. 767); but whichever mode is adopted, it ought to be a clear and distinct notice. Thus a mere direction that all letters from the insurance office are to be sent to a particular person, and that the premiums will thenceforth be paid by him, will not amount to a sufficient notice of an assignment to the client of such persons. See West *v.* Reid, 2 Hare 249; there Daniell in 1816 assigned a policy of insurance on his life to a trustee, to secure a sum of money owing to Woodroffe, and soon after the solicitor of the latter caused a memorandum to be entered in the office of the insurance company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by Woodroffe through the hands of such solicitor; but the insurance company were *not* informed on whose behalf the solicitor acted. In 1826, Daniell became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by Woodroffe through his solicitor, during his life, and by the executors of Woodroffe through their bankers after his death. Daniell died, 1839. It was held by Sir James Wigram, V.-C., that the *policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy to take it out of such order and disposition. See all Burridge *v.* Row, 1 Y. & C. C. C. 183.

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So likewise in the case of Ex parte Carbis, 4 Deac. & Ch. 354; a party to whom the bankrupt had assigned a policy of assurance, sent an agent to the office for the purpose of paying the annual premium, who, *in the course of conversation with one of the clerks in the office*, told him of the policy having been so assigned. It was held that this notice was not sufficient; and see Edwards *v.* Martin, 1 Law Rep. Eq. 121.

It has however been held that the slightest circumstance of notice is sufficient. Thus a letter to a secretary of an insurance company, in which the writer says, "I am *holder of the under-mentioned policies*," and inquires what the office will give for them, is sufficient notice of an assignment: Ex parte Stright, Mont. 502; 2 Deac. & Ch. 314.

The fact that one of the parties to an assignment of a policy is an agent for the assurance office, will not amount to constructive notice of the assignment to the office, if he was not an agent for that particular purpose: Ex parte Patch, 7 Jur. 820. So where an insurance has been effected in a central office of the company, notice of an assignment to an agent in a country office, connected with the central office, will not be sufficient (In re Hennessy, 2 Dru. & War. 555), *à fortiori*, if the agent be himself also the assignor of the policy: Id.

Where the same person is secretary to two insurance companies, it seems to be doubtful whether his knowledge of a deposit of shares acquired by him as secretary to one of the companies, amounts to notice to the other, so as to prevent the operation of the clause as to reputed ownership: Ex parte Bignold, 3 Deac. 151.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee to show that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees to show that it was not: Ex parte Stevens, 4 Deac. & Ch. 117; Ex parte Dobson, 2 M., D. & D. 601.

It has been supposed to have been decided that shares in a public company being personal property, will remain in the order and disposition of a bankrupt, unless upon a transfer of them he has complied strictly with the forms required by the provisions of the Act of Parliament constituting such company, even although notice of the transfer may have been given to the proper parties. And that this rule is applicable not only where the act expressly relates to transfers between third parties, but also where it impliedly relates to cases in which the company are the transferees. See Ex parte The Lancaster Canal Company, Re Dilworth, 1 Deac. & Ch. 411; Mont. & Bli. 94. There Dilworth and his partners—a firm *of [*480 bankers—becoming treasurers of The Lancaster Canal Company, entered into a bond for the purpose of indemnifying the company against any loss which might arise in consequence of their fail-

ing properly to account. In addition to this bond, Dilworth, who at that time was the holder of 345 shares (which were personal estate) by an assignment dated September, 1823, transferred 300 out of the whole number to the company, and at the same time the company executed a trust deed by which they undertook to pay the dividends of the shares to Dilworth, until there should be some default in the accounts of the treasurer; and in case of any default they were to have the power of selling the shares to the extent of making good the deficiency. By the provisions of the Companies Act, 32 Geo. 3, c. 101, a certain course was to be pursued for the transfer of shares, and a particular form of instrument was to be executed which is set out in the Act. It is provided that a duplicate shall also be executed, and that the duplicate shall be lodged with the committee, or with the clerk of the committee, and it shall be entered in a book; and that until these forms are complied with, the party is not to be entitled to receive any profits of the shares, or to act as proprietor. And there is a further provision that the names of the proprietors should be entered in a book to be kept for that purpose by the clerk of the concern.

The provisions of the Act were not complied with, *an instrument of transfer* to the Canal Company alone was executed, *and that was delivered to the clerk.* No duplicate was executed, nor entry made of the execution of the transfer, agreeably with the provisions of the Act. On the 13th of February, 1826, a commission issued against Dilworth and his partners. Lord Lyndhurst, C., held that the 300 shares transferred by Dilworth to the Canal Company, were in his order and disposition. "It is quite obvious," said his lordship, "as I collect from the transaction, that it never was intended that Dilworth should cease to be apparent proprietor; it was intended that this should be a mere security in the hands of the company, to be made use of in case of default of the treasurers, and not otherwise. It is perfectly clear, therefore, taking the provision of the Act of Parliament and the trust-deed together, that during the whole of this period, and at the time of the bankruptcy, Dilworth was entitled to receive the dividends on his shares. It was perfectly clear also, that he was entitled to vote as a proprietor. There seems, therefore, as far as the public are concerned, to have been no alteration in the apparent situation of Dilworth; he had iginally been a proprietor of these 300 shares, receiving the divi-

dends, voting as a proprietor; and those transactions which took place between him and the company did not at all vary his apparent situation, for he was still on the books of the *company as [*481
a proprietor. There is no entry made of his having made any transfer of his shares, he was still entitled to receive his dividends. I should, therefore, think he had the order and disposition of this property as apparent owner."

Upon appeal to Lord Brougham, C., it was argued, on behalf of the appellants, that the forms required by the Act were required merely as an indemnity to the company, and were inserted for its safety alone; that if accompanied by notice, the transfer though informal would be binding; that the notice was complete, inasmuch as the company was at one and the same time the party liable to pay the dividends on the shares, and the transferree of the interest herein; and that any person, by inquiry at the office of the company, might have ascertained who was the true owner. Lord Brougham, C., however, though without giving any reasons, affirms the decision of Lord Lyndhurst, C.

If Ex parte The Lancaster Canal Company can only be supported upon the ground that notice was not sufficient to take such shares out of the order and disposition of the bankrupt, because a legal transfer in the form required by the Act had not been executed, it can scarcely be supported either by principle or by authority.

In the subsequent case of Ex parte Masterman, 2 Mont. & A. 209, the owner of shares in an insurance company assigned them by way of mortgage, but the transfer not being made in pursuance of the clauses in the deed of settlement of the company, the shares still remain in the books of the company in the name of the assignor. Notice, however, of the transfer having been duly given to the company before the bankruptcy of the assignor, it was held by the Court of Bankruptcy that the shares were not in his reputed ownership. Sir George Rose distinguished the case Ex parte The Lancaster Canal Company from the case before him, upon the ground that in the former case the company was regulated by an Act of Parliament, whereas the latter case was a mere joint-stock company. Lord Cranworth, C., however, denies this distinction in the subsequent case of Ex parte Littledale, In re Pearse, 6 De G., M. & G. 714, 726. There in 1846, Littledale lent a sum of money to Pearse to enable him to purchase the requisite amount of shares in two

public companies—The East and West India Dock Company and the Imperial Fire Company—to qualify him for the office of director in each, and Pearse assigned the shares in both companies in which he had become director to Littledale as a security for the loan. The qualification for the office of director in the East and West India Dock Company would have been lost by the disposal or reduction of the amount of that qualification, and the provisions of *482] *the deed by which the other company was constituted required that its directors should be possessed of or entitled to the requisite amount of shares in their own right. The assignment was not made in the form or with the formalities required by the Act of Parliament, incorporating the Dock Company, or by the company's deed of settlement of the Imperial Fire Assurance Company. Five days only before Pearse committed the act of bankruptcy upon which he was adjudicated bankrupt, Littledale gave notice to the directors of both companies of the assignment to him. There was, however, no binding contract which restrained him from giving notice whenever he might think right so to do. At the time of his bankruptcy Pearse was actually a director of one of the companies, and out of office by rotation in the other, in which probably he would have been re-elected. It was held by a full Court of Appeal in Chancery (dubitante Knight Bruce, L. J.) that the shares in neither company were in the possession, order or disposition of Pearse at the time of his bankruptcy, with consent of the true owner.

The judgment of Lord Justice Turner, which clearly distinguishes this case from Ex parte The Lancaster Canal Company, Re Dilworth, is deserving of a careful perusal. "As I understand the transaction between the parties," said his Lordship, "it was simply this:—Mr. Littledale took a security upon the shares of Mr. Pearse in companies of which he was a director. He gave no immediate notice of that security. It was competent to him upon the contract to give notice of the security at any time when he thought proper to do so. The effect of his giving the notice would be at once to determine Mr. Pearse's position as a director of these companies. Under the circumstances of this case, it does not seem to me that if, instantly upon the notice being given by Mr. Littledale, a bill had been filed in a Court of Equity against Mr. Pearse, to compel him to perfect the legal title to that property which had been equitably transferred by

the contract of the parties, it would have been competent to Mr. Pearse to resist the performance of that contract, by the transfer of the legal property, upon the ground that there had been a fraudulent intention on the part of Mr. Littledale to defeat the provisions of the Acts of Parliament. . . . . It seems to me, that the effect of the notice given to the companies, was to take away from Mr. Pearse the capacity of dealing with these shares. That was done at the instance of the person who had the security upon the shares, and who had become the true owner of them; and therefore, there cannot, as I think, be said to be a holding of the possession of these shares by the bankrupt, with the consent of the true owner. . . . . Some cases were cited in the course of the argument which perhaps it may be material to distinguish from the present. I refer *particularly to the case of Ex parte The Lancaster Canal Company, Re Dilworth, 1 Deac. & Ch. 411; Mont. & Bl. 94, and the case of Nelson *v.* The London Assurance Company, 2 Sim. & Stu. 292. The case of Re Dilworth, at first sight, appears to have some bearing upon the question before us, but on looking at the case I find that the intention of the security was this—that in the event of a default being committed by the treasurer, which default had not been and never was committed, the security should be in force. But what was the consequence? that the Lancaster Canal Company could not file a bill in Equity, for the purpose of effectuating that security, until the default had been committed. It would have been a fraud in the Lancaster Canal Company to have set up as against Dilworth any rights under the agreement which had been entered into with them when there had been no default on the part of Dilworth, and the effect, therefore, was that there was no charge in equity upon the shares, by virtue of the transaction which had taken place between Mr. Dilworth and the Lancaster Canal Company, and certainly there was none at law. That, therefore, was a case in which the party claiming under the deposit had no right either at law or in equity. So in the case of Nelson *v.* The London Assurance Society, 2 Sim. & Stu. 292; there the agreement between the parties contained this provision, "and further it was agreed that until there should be some order or resolution of the Court of Directors to the company, it should be lawful for each of those persons to receive their respective salaries, and the dividends upon their stock or shares, and to sell and trans- [*483

fer their stock or shares." Therefore, until the order and resolution of the Company was made, there was no capacity on the part of those with whom the contract had been entered into, to enforce that contract in equity. Those two cases seem to me to be clearly distinguishable from the present; and I am satisfied that in maintaining the decision of the learned Commissioner, we should disturb transactions which have taken place and are constantly taking place with regard to property of this description, and that we should not be giving that effect to equitable rights which we are bound in bankruptcy, administering both law and equity, to give."

Lord Cranworth, C., considered the case distinguishable from Ex parte Lancaster, upon the "broad ground" that "it was clear that no notice had been given" of the assignment in that case up to the time of the bankruptcy. His Lordship however appears to have been laboring under a misapprehension, because in Ex parte Lancaster the assignment was actually made to the Canal Company and deposited with the clerk; they must therefore have had notice of it.

Upon a *deposit* by way of mortgage of shares, even, it seems although a certain form is required by Act of Parliament for their *484] *transfer, they will be taken out of the order and disposition of the mortgagor or depositor, by proper notice being given to the directors or to their secretary (Ex parte Harrison, 3 Deac. 185; Ex parte Dobson, 2 M., D. & De G. 685; Ex parte Richardson, 3 Deac. 496; Ex parte Rayner, 1 Bank. & Ins. Rep. 256); otherwise they will be considered as being in his order and disposition: Ex parte Spencer, 1 Deac. 468; Ex parte Nutting, 2 M., D. & De G. 302; Ex parte Vallance, 2 Deac. 354; Cumming *v.* Prescott, 2 You. & Col. Exch. Cas. 488; Ex parte Stewart, 13 W. R. L. C. 356; 34 L. J. (Bk.) 9.

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares, but the shares belong to another, in whose favor there exists a secret declaration of trust, the shares will be in the reputed ownership of the bankrupt: Ex parte Watkins, 2 Mont. & Ayrt. 348; 1 Deac. 131, reversing s. c. 1 Mont. & Ayrt. 689; 4 Deac. Ch. 87. See also Ex parte Ord, 1 Deac. 166; 2 Mont. & Ayrt. 724.

Notice to a company should ordinarily be given to the person appointed for that purpose, as the secretary or managing director,

for a notice to any other officer of the company might be insufficient: Ex parte Patch, 7 Jur. 820; In re Hennessy, 2 Dr. & War. 555; Ex parte Watkins, 2 Mont. & Ayrt. 348; Ex parte Burbridge, 1 Deac. 131; Ex parte Nutting, 2 M., D. & D. 302.

Where the person who mortgages shares in a company is the person to whom notice is in ordinary cases given, the notice which he necessarily has of such a transaction is not sufficient, but it should be given to the company. Thus in Ex parte Sketchley, 1 De G. & J. 163, a holder of shares in a railway company, which was subject to the provisions of the Companies Clauses Consolidation Act, 1845, was one of the secretaries of the company, and a solicitor. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the company. On the solicitor becoming bankrupt, it was held by the Lords Justices of the Court of Appeal in Chancery, that the shares were in his order and disposition, with the consent of the owner, his client. "The question," said Lord Justice Turner, "is whether there was sufficient notice to the company; and I am of opinion that there was not. Notices of this description operate not only to prevent the property which is the subject of the notice being disposed of without the knowledge of the person by whom or on whose behalf the notice is given, but also to prevent injury to other persons from subsequent dealings with the property affected by the notice, in ignorance of the prior claim upon it. It is the duty therefore of the person by whom or on whose behalf the notice is given, to take care that it reaches *the person who has the [*485 control over the property which it affects; and this, I think, cannot be said to have been done, where, there being other and more effectual means of giving notice, it has been *given only to a person who has an interest in withholding it.* Lord St. Leonards has intimated a strong opinion to that effect in Ex parte Hennessy, 2 Dru. & W. 55, and I agree in that opinion. Besides, in this case I think there was no intention to give notice to the company. The respondent was dealing with the bankrupt as his solicitor, and there was no intention that the company should be affected by that dealing. That the bankrupt was bound, by his position, to give notice to the company, cannot affect the case."

Suppose, however, that a director mortgages his shares by deposit, will the notice which he necessarily has of the transaction be

sufficient to take the case out of his order and disposition? It would seem from the case of Browne *v.* Savage, 4 Drew. 635, *ante*, p. 474 (which, however, was a case where there were several trustees), that it would not, because it would—as laid down by Kindersley, V.-C.—be his interest to conceal the transaction from the other directors.

It has, however, been decided, that where all the directors of a joint stock company, one of whom was both manager and secretary, and being all the persons to whom notice should be given, have made a joint deposit of their shares, that such transaction constitutes sufficient notice to take such shares out of the order and disposition of the depositors upon their bankruptcy, although it is obvious in such a case that there was no independent third party who could have prevented them dealing with the shares. See Ex parte Stewart, Re Shelley, 13 W. R. 356; 34 L. J. Bk. 6; 11 Jur. N. S. 25.

It has been held until recently, though not without some conflict of authorities, that the doctrine of reputed ownership was applicable to cases where a secret partner left goods and chattels belonging to the firm in the order and disposition of the ostensible partner. See Ex parte Enderby, 2 B. & C. 389 (9 E. C. L. R.). There A. and B. were partners, but the whole of the business was carried on in the name of A. alone, B. never appearing to the world as a partner; and at the dissolution of the partnership by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay, by instalments, the capital brought in by B. The business was carried on by A. for a year and a half the same as before, when he became bankrupt. It was held by the Court of King's Bench, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern, were in his order and disposition. See also Ex parte Dyster, 2 Rose 256; Ex parte Jennings, Re Starkey, Mont. 45; Smith *v.* Watson, 2 B. & C. *401 (9 E. C. L. R.); Ex parte Chuck, 8 Bing. 469, 472 (21 E. C. L. R.); overruling the case of Caldwell *v.* Gregory, 1 Price 119. In the recent case, however, of Reynolds *v.* Bowley, 2 Law Rep. Q. B. 474, in the Exchequer Chamber, reversing S. C. in the Court of Queen's Bench, 2 Law Rep. Q. B. 41, it was held that where one partner allows the other *bonâ fide* to carry on the business ostensibly as his own, on the bankruptcy of the latter the share of the dormant partner, in the partnership stock in trade,

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cannot be dealt with as being in the possession, order or disposition of the bankrupt, with the consent of the true owner. This is put in a very clear light by Kelly, C. B., in his able and convincing judgment. His Lordship, after referring to the case of Ex parte Dyster, 2 Rose 256; Ex parte Enderby, 2 B. & C. 389 (9 E. C. L. R.); and Smith *v.* Watson, Id. 401, as adverse to the judgment he was about to deliver, and referring to Joy *v.* Campbell, 1 S. & Lef. 336, *ante*, p. 446; and to the decision of Coldwell *v.* Gregory, 1 Price 119, in the Court of Exchequer, as authorities in support of it, adds:—"We have, besides that, not a direct decision, but the high and clear authority of Parke, B., in delivering the judgment of the Court of Exchequer, in Load *v.* Green, 15 M. & W. 223, where the proposition is clearly pointed out which, I think, lies at the very root of this question, and is fatal for the argument urged for the defendants, viz., that the *apparent owner must be one person, the true owner be another person.* . . . . The question that arises is this:—Had the bankrupt, when he had possession as ostensible partner in a copartnership in which there is also a dormant partner, possession of the partnership effects by the consent and permission of the true owner? Now, if (as Parke, B., observes) the reputed owner who has the actual possession must be one person, and the true owner must be another, if in truth the goods must belong to one person, and the true owner of those goods of his own free will and consent permit another, not the owner, to appear to the world as the reputed owner of them, how can the answer be in the affirmative? We find here (*i. e.* in section 125), that the words are, "by consent and permission of the true owner, has in his possession, order or disposition." The bankrupt was the true owner himself; he was as much the true owner of these goods as the plaintiff was; and when we come to look at the actual facts, and the legal effect of them, we find that he had possession of those goods, not by the consent of any other person, or by the consent of the plaintiff, but in his own right, and by virtue of a contract, to which, indeed, the plaintiff also was a party, and to which the bankrupt also was a party, and which vested in him exactly the same description of ownership, or joint ownership, that the plaintiff himself possessed. The language of the statute seems to point to this, a state of things in which *the owner of the property allows the property to [*487
remain in the possession of another person, so that the other

person appears to be the owner, although not himself the true owner. But it also implies a power in the true owner to resume his rights, to resume possession of the property of which he is the owner, to take it out of the possession of the person to whom he may have entrusted it, and which therefore shows that he is the true owner, and the other person only the apparent owner. Whereas, look at the case existing here: this is the case of a partnership which commenced some years from the time when the bankruptcy occurred. If the plaintiff, who was the joint owner of this property together with the bankrupt, and who only permitted it to be in possession of the bankrupt by virtue of an ordinary partnership deed, had desired at any time to prevent these goods passing into the hands of her brother, in case he became bankrupt, she had no power to do so. Nothing can be held by one person with the consent of another which the other has no power by law, from the nature of the contract, to interfere with, or take possession of. Looking to the language of this statute, it appears to me that the bankrupt held these goods in his own right; he had been the joint owner of them together with another person for more than three years before the bankruptcy, he was carrying on business by means of those and other partnership effects, and was possessed of them under a perfectly honest and lawful contract of partnership entirely in his own right. His possession could no more be disturbed by the person who is said to be the true owner of them than her possession could have been disturbed by him. It seems to me that the statute cannot apply to a case in which there is a joint ownership, even without a joint possession, where there is a joint ownership under a clear and *bonâ fide* contract of copartnership in which no other consent is given by the dormant partner to the possession of the ostensible partner than that which results from the contract of partnership, which, therefore, clothes both of the parties with an equal and joint right of possession, and which neither party is at liberty by law to disturb."

The doctrine, however, of reputed ownership will apply where one of two partners allows goods and chattels of his own to be used as partnership property: Ex parte Hare, 1 Deac. 16; Ex parte Arbouin, 1 De Gex 359; Ex parte Davenport, Mont. & B. 165.

But the doctrine is not applicable where there has been an absolute assignment to the partner in possession of the goods, because

there he is the real owner (Ex parte Gurney, 13 L. J. N. S., Bank Rep. 17; and see Ex parte Wood, 1 De Gex 134; In re Brewster, 22 L. J. N. S. 62, Bank Rep.), nor where two persons being joint owners of goods and chattels, on one becoming *bankrupt, such goods and chattels are in the possession of the *other:* [*488 Ex parte Vardon, 2 M., D. & D. 694.

Where the goods and chattels are vested in trustees, notice should be given to them of the assignment: Matthews *v.* Gabb, 15 Sim. 51; Ex parte Smyth, 3 M., D. & D. 687.

Where a fund in the Court of Chancery is assigned, a stop order should be obtained by the assignee to take it out of the order and disposition of the assignor: Bartlett *v.* Bartlett, 1 De Gex & J. 127. See cases collected, 2 Lead. Cas. Eq. 734, 3d ed.

But unless that which is the subject of the assignment is a share of or an interest in or a charge on a trust fund, it is not necessary to give notice to the trustee or to obtain a stop order. See Lord *v.* Calvin, 2 Drew. & Sm. 82. There the solicitor to a party in a suit assigned the costs due and to become due to him in the suit, and subsequently became insolvent; and an order was *afterwards* made for the payment of the costs out of a fund in the Court, and the provisional assignee in insolvency of the solicitor claimed the costs, as against a person to whom they had been assigned as being in the order and disposition of the insolvent, upon the ground that, though notice of the assignment had been given to the solicitor for the plaintiff in the suit, no stop order had been obtained on the fund in Court. It was held by Sir R. T. Kindersley, V.-C., that it was unnecessary for the assignee to have obtained any stop order, inasmuch as at the respective times when the assignment and the insolvency took place previous to the order for the payment of the costs, the solicitor had no charge or lien on the fund in Court, and that therefore they were not in the order and disposition of the insolvent so as to pass to his assignees in insolvency.

Notice to an executor of an assignment of a fund, part of his testator's estate, paid into Court, in a suit for the administration of the estate, or under the "Trustee Relief Act," will be sufficient for that purpose without a stop order: Thompson *v.* Tompkins, 2 Drew. & Sm. 8. If indeed any subsequent encumbrancer gets a stop order before such notice is given, such stop order takes priority: per Kindersley, V.-C., in Thompson *v.* Tompkins, 2 Drew. & Sm. 20.

If the right to publish a newspaper be assigned by way of mortgage, it seems that the proper way to take it out of the reputed ownership clause would be to give notice of the assignment at the Stamp Office, where the proprietorship of the newspaper is registered: Ex parte Foss, 2 De G. & J. 230; and see 5 Jarm. Byth. 269, 3d ed.

3. *What is meant by the Consent and Permission of the true Owner.*—The meaning of that part of the clause referring to goods and chattels in the possession, order, or disposition of the bankrupt, *489] "with the *consent and permission* of the *true owner, is well explained in the principal case of Joy *v.* Campbell (*ante*, p. 452), viz. that it is where a person who is *not* the owner to whom the chattels do not properly belong, and who ought not to have them, is permitted by the owner, unconscientiously as the act supposes, to have such order and disposition.

The first question which generally arises in discussing this question is, who is the true owner? It is clear that the person who is the purchaser or even the mortgagee of goods is the true owner: Ryall *v.* Rowles, 1 Ves. 348; 1 Atk. 165; 2 Lead. Cas. Eq., 3d ed.

The assignee of a bankrupt is the true owner of his "goods and chattels;" where therefore he permitted them to remain in the order and disposition of the bankrupt as reputed owner, they have been held liable to be seized upon a subsequent insolvency by the assignee of the Insolvent Debtors' Court: Butler *v.* Hobson, 4 Bing. N. C. 290 (33 E. C. L. R.); 5 Scott 824. See also Ex parte Jungmichael, 2 M., D. & De G. 471; Ex parte Butler, Id. 731.

But in such a case, if the true owner has no knowledge of or means of knowing the bankrupt's interest, consent on his part cannot be implied. Therefore where a bankrupt, upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest in a legacy and excluded it from his schedule, and it did not appear that the assignee in insolvency had any knowledge of that circumstance, the latter was held by Sir W. Page Wood, V.-C., to be entitled notwithstanding his title had not been perfected by notice to the trustee, his honor being of opinion under the circumstances that there were no laches on his part (In re Rawbone's Trust, 3 K. & J. 476); but it seems that laches on the part of the assignee in insolvency

would have been equivalent to consent within the meaning of the rule: Id.

Where, however, a bankrupt had agreed to pay his creditors in full, and gave bills for the amount, and the creditors executed a power of attorney to one A. B. to receive their dividends for the bankrupt's use; the bills not being paid, it was held by the Court of Review that the creditors, and not A. B., were entitled to the dividends, and a second commission having issued, that the dividends were not in the reputed ownership of the bankrupt: Ex parte Smither, 3 Mont. & Ayrt. 693.

A trustee having the legal right to the possession of the property, and the power of dealing with it, will be considered as the "true owner," so that his consent and permission "will be sufficient although his *cestui que trusts* be infants:" Ex parte Dale, Buck 365; see also Darby *v.* Smith, 8 Term Rep. 82. An able writer, however, has expressed a different opinion, observing that "whether the permission of a *bare trustee* can be said to be that of the 'true owner,' to the prejudice of innocent *cestuis* *que *trust*, is [*490 a question of some difficulty, but which upon principle should, it is conceived, be answered in the negative." Lewin on Trustees 278, 3d ed., and see cases there cited.

A *cestui que trust* absolutely entitled is, it seems, the true owner, so that if he leaves the goods and chattels to which he is entitled in the possession of the trustee, they will be considered as being in his reputed ownership: Ex parte Burbridge, 1 Deac. 131; 4 Deac. & Ch. 87.

A true owner in order to give consent must have a capacity for doing so; hence as infants cannot give consent, goods and chattels belonging to them in possession of a party who becomes bankrupt will not be considered in his reputed ownership: Viner *v.* Cadell, 3 Esq. 88.

The goods of a woman married to and living as wife with a person who becomes bankrupt or insolvent, he having a former wife living, would not, it seems, pass to his assignees (although such goods were in his possession) if she were ignorant of the former marriage. But if she allowed him the control and management of her property after discovery of the former marriage, such property would, as is laid down in the principal case of Mace *v.* Cadell, pass to his assignees: Miller *v.* Demetz, 1 Mood. & Rob. 479.

Assuming the real owner to have a capacity to consent, it must

appear that the bankrupt had possession with such consent. Thus in Ex parte Bell, 1 De G. 577, some oil merchants gave a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delayed taking possession or giving notice of lien, and the merchants repossessed themselves of the oil, mixed it with their general stock, and became bankrupt. It was held by Sir J. L. Bruce, V.-C., that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owners.

Upon the same principle, in Load *v.* Green, 15 M. & W. 216, where a person bought goods from the plaintiffs with the fraudulent intention of never paying for them, and kept them until his bankruptcy, it was held by the Court of Exchequer, that the goods were not in the possession, order, and disposition of the purchaser, with the consent of the true owner. "In order," said Parke, B., "to bring the case within the statute, there must be a real owner, distinct from an apparent owner, and the real owner must consent to the apparent ownership *as such;* but in this case the plaintiffs never did consent to the apparent ownership *as such;* they never contemplated the permitting the bankrupt to obtain a credit by means of the possession and apparent ownership of property which really did not belong to him. They intended to part with the property itself, and to divest themselves altogether of all right to it; and although, in consequence *of the bankrupt's fraud upon them, they
*491] had a right to annul the contract, and be again the real owners, that right they did not exercise until after the bankruptcy, and consequently at the time of the act of bankruptcy (upon which the title of the assignees depends) the bankrupt was not apparent owner, but real owner, and the statute does not apply. It is to be understood that these observations are not meant to affect that class of cases in which the real owner gives, not the possession only, but an interest to the bankrupt, as where he leaves the goods under such circumstances as that the possession will necessarily, according to the habits of society, carry with it the repute of absolute ownership. These cases proceed upon the principle that the true owner does consent to an apparent ownership in the bankrupt contrary to the truth, because that is the natural result of the consent which he gives. Whether or not this peculiar case would have fallen within the statute if the plaintiffs had discovered the fraud long before the act of bank-

ruptcy, and omitted, for an unreasonable time before that period, to avail themselves of the right to rescind the contract, is no question in the present case; for the act of bankruptcy followed the sale and delivery within a short time." See Ex parte Gowan, 25 L. J. Bank. 1; Ex parte Geaves, Id. 53.

In Smith *v.* Hudson, 6 B. & S. 431 (118 E. C. L. R.), T. M. Hudson, the defendant, on the 3d of November, 1863, entered into a verbal contract with Wilden to sell him 48½ quarters of barley at 35*s.* per quarter. The sale was by sample, and the bulk was taken, on November 7th, by the defendant to the Swaffham Railway Station, and left there with a delivery note—"Great Eastern Railway. To the Station Master, Swaffham Station. Receive 97 combs of barley, consigned to the order of Mr. Wilden, from T. M. Hudson, Charges." It is the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination is not satisfactory to strike it, *i. e.*, either refuse to accept it, or allow it to remain the property of the vendor; and it was in the power of Wilden to strike the corn if it had not proved according to sample. On November the 9th Wilden was adjudicated a bankrupt, and on the 11th the defendant gave notice to the station master not to deliver the corn to the bankrupt or to his assignees, or any other person, without his written consent, which the station master promised. At the time of the notice the bankrupt had given no order or direction respecting the corn, nor had he examined it to see whether the bulk corresponded with the sample, nor had he given any notice to the defendant that he accepted or declined it. On the 1st December the assignees of Wilden claimed the corn. On the 5th the railway company on an indemnity from the defendant delivered it to him. *In an action by the assignees to recover the value of the corn, it was held that there was no acceptance of the goods [*492 sufficient to satisfy the 7th section of the Statute of Frauds, and also that Wilden, at the time he became bankrupt, had not the corn in his possession, order, or disposition as reputed owner with the consent and permission of the true owner. "My judgment," said Blackburn, J., "rests on the ground that there was not and could not be a subsequent acceptance of the goods, and, there being nothing to bind the contract under the Statute of Frauds, they remained the goods of the defendant. As to the last point I entertained some doubts, but the judgment in Load *v.* Green, 15 M. & W. 216,

satisfies me that goods do not pass to the assignees as in the order and disposition of the bankrupt at the time of his bankruptcy, unless it is a case in which the true owner consents that the other party shall be reputed owner, not being the true owner. What the defendant assented to do was that the bankrupt should, as soon as he had accepted the goods, have them as true owner. This was not in fraud of the bankrupt law, nor what the bankrupt law contemplated. The defendant intended the vendee to be the true owner, and therefore there was no apparent ownership."

So where goods sold to a person who afterwards becomes bankrupt are stopped *in transitu*, they will not come within the reputed ownership clause, because it refers to cases where the bankrupt shall "by consent and permission of the true owner," have goods in his possession; whereas in the case before mentioned, the bankrupt, if he has possession, is himself the true owner, under the contract of sale: Townley *v.* Crump, 5 N. & M. 606 (36 E. C. L. R.); 4 Ad. & E. 58 (31 E. C. L. R.).

Goods will not be deemed to be in the possession of a trader with the consent of the true owner, if the latter takes every possible pains to obtain possession of them. Thus in Belcher *v.* Bellamy, 2 Exch. 303, Hawkins, who resided in Australia, being indebted to Hannen in the sum of 771*l.* 3*s.* 4*d.*, the latter on the 8th of January, 1844, *bonâ fide* and for valuable consideration, assigned the debt to Winsland, and on the 22d of January joined Winsland in a letter notifying to Hawkins the assignment, and requiring him to pay the debt to Winsland. This letter was posted on the 1st of February, 1844, in the ordinary way in which letters to New South Wales are posted, and could not have reached Australia before the 10th of February, on which day a fiat in bankruptcy was issued against Hannen. On the 29th of January, 1844, Hawkins remitted by letter 50*l.*, which was received after the fiat, and delivered over to Winsland. The assignees of Hannen having sued Winsland for the amount, it was held by the Court of Exchequer that Winsland having taken every possible step to obtain possession of the debt, it could not be
*493] said to *remain in the order and disposition of the bankrupt with the consent of the true owner. "A person purchasing a chose in action," observed Rolfe, B., "is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice,

and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser. If, as was suggested by Mr. Bramwell, he does not give notice for three months, during that period the debt remains in the order and disposition of the debtor; but the moment he gives notice, it is otherwise; and the fact, that many months must elapse before the notice can take effect, does not alter the case."

So notice given of a previous assignment of shares in a public company before the act of bankruptcy will be sufficient to take the shares out of the reputed ownership of the assignor: Ex parte Littledale, 6 De G., M. & G. 714.

Upon the same principle, in Brown *v.* Heathcote, 1 Atk. 160, a debtor having assigned to his creditor certain goods in two ships then at sea, and delivered to him the bills of lading and invoice; and the debtor having become bankrupt, it was held by Lord Hardwicke, C., that as everything which could show a right to the goods had been delivered over to the creditor, the bankrupt could not be said to have the order and disposition of the goods with the consent of the true owner. See also Carruthers *v.* Payne, 5 Bing. 270, 277 (15 E. C. L. R.); Acraman *v.* Bates, 2 E. & E. 456 (102 E. C. L. R.).

4. *As to the Time at which Goods and Chattels must be in the Possession of the Bankrupt to come within the Clause.*—In order to bring a case within the clause, the possession of the reputed owner, with the consent and permission of the true owner, must continue up "to the time he becomes bankrupt," and by that is meant the time of the committing of any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded: Lyon *v.* Weldon, 2 Bing. 334 (9 E. C. L. R.); 9 Moore 629; Fawcett *v.* Fearne, 6 Q. B. 20 (51 E. C. L. R.); Stansfield *v.* Cubitt, 2 De G. & J. 222; Price *v.* Groom, 2 Exch. 542; Ex parte Marjoribanks, 1 De Gex 466; Morris *v.* Cannan, 8 Jur. N. S. 653.

It must however be remembered that where the true owner takes goods out of the "possession, order, or disposition of a bankrupt, after *a secret act* of bankruptcy, but before the date of the fiat, or the filing of the petition, the true owner may retain such goods, under the 133d section of 12 & 13 Vict. c. 106." See Ex parte

Smith, In re Styan, 2 M., D. & De G. 213, 219; Pariente *v.* Pennell, 2 M. & Rob. 517; Ex parte Majoribanks, 1 De Gex 466; Young *v.* Hope, 2 Exch. 105; Ex parte Dobson, 2 M., D. & D. 685; Burn *v.* Carvalho, 4 Myl. & Cr. 690. In *the recent case of Graham *v.* Furber, 14 C. B. 155 (78 E. C. L. R.), Maule, J., made the following important observations on the construction of this section: "It seems to me that the goods in this case, not being in the possession, order, or disposition of the bankrupt at the time of the filing of the petition, and the true owner *not having notice of any act of bankruptcy*, they are remitted to the situation they would have been in before the act, if they had ceased to be in the possession of the bankrupt before an act of bankruptcy. It was thought, and justly thought, to be hard against the true owner of goods, where he had *bonâ fide* allowed the trader to have the possession, order, or disposition of them, that they should be taken away from him, and disposed of for the benefit of the creditors, merely because he had not been churlishly strict in not allowing anybody to use the goods but himself. It was the intention of the legislature, by this statute, to relieve such a person, and to place him in as good a position where he got back his goods *before notice of an act of bankruptcy*, as if he got them back *before the commission of an act of bankruptcy*. When he got his goods back, they were taken to have been got back before an act of bankruptcy, if got back *without notice* of an act of bankruptcy. The words of the 133d section, 'All contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition,' are sufficient for this purpose. It *is* a 'transaction' between the bankrupt and the true owner of the goods, when the latter resumes possession of them. This construction of the act makes the law simple and clear, and in conformity with the rule as to all other transactions." See also Re Atkinson, Fonb. Bank Rep. 246.

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Where, however, a prisoner for debt is adjudicated bankrupt under the 98th and 99th sections of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), as the adjudication by section 103 of the same Act is to have relation back to the commitment absolutely, and not merely as an act of bankruptcy, a *bonâ fide* dealing with the bankrupt after his commitment is void, and cannot be protected by section 133 of the Bankruptcy Act, 1849. See Bramwell *v.* Eg-

linton, 1 Law Rep. Q. B. 494. There goods were assigned by one Service to the defendant, but Service remained in possession of them up to his arrest under a *ca. sa.*, and after his commitment to gaol the defendant took possession of the goods, and Service was afterwards adjudged a bankrupt on his own petition *in formâ pauperis* under sections 98 and 99 of the Bankruptcy Act, 1861. It was held by the Exchequer Chamber, affirming the decision of the Court of Queen's Bench, that the goods passed to Service's assignee under section 125 of the Bankruptcy Act, 1849, as in his order and disposition with the *consent of the true owner, and that the defendant could not avail himself of the protection of [*495 section 133 of the same Act.

And even if before the date of the fiat, and before notice of an act of bankruptcy, the true owner has *bonâ fide* demanded possession of the goods, and communicating with the bankrupt, has done that which would show that the goods did not longer, *with his consent and permission*, remain in the possession, order, and disposition of the bankrupt, the title of the true owner would not be defeated by a prior secret act of bankruptcy: 5 E. & B. 237 (85 E. C. L. R.); and see Tatham *v.* Andree, 1 Moo. P. C. C. (N. S.) 386, 407.

But a *mere intention* to demand the goods and to get possession of them will not amount to a "*dealing*" or "*transaction*" within the meaning of the 133d section of the Bankrupt Act, so as to take the goods out of the operation of the reputed ownership clause: Brewin *v.* Short, 5 E. & B. 227, 238 (85 E. C. L. R.).

And even after a seizure and attempted sale of the goods, if they are afterwards allowed to remain in the possession of the mortgagor, they will not be considered as having been taken out of his reputed ownership. See Reynolds *v.* Hall, 4 Hurlst. & N. 519. There a trader executed a bill of sale of his stock-in-trade and all other his effects to the defendant an auctioneer. On the 17th of June, in pursuance of an arrangement between the parties, the defendant came on the premises of the trader and attempted to sell the goods; but there were no buyers, and nothing was sold. The defendant then left the premises, and the trader remained there, and continued to carry on the business till the 22d, when he committed an act of bankruptcy. The sale had been advertised, but it did not appear that the goods were advertised to be sold as the goods of the defendant. It was held by the Court of Exchequer that, notwith-

standing the attempted sale, the goods were in the possession of the bankrupt as reputed owner with the consent of the true owner at the time of the bankruptcy.

The assignee for value of a chose in action neglecting to give notice of the assignment thereof before the bankruptcy, so that it remains in the order and disposition of the bankrupt, will not gain any priority over the assignees in bankruptcy by giving notice of the assignment before the assignees give notice of the bankruptcy or obtain an order for a sale. See Re Webb's Policy, 15 W. R. (V.-C. M.); there Webb had insured his life, mortgaged the policy, and became bankrupt, but never entered the policy in his statement of accounts, and paid the premiums and received the bonuses. Shortly after his death the mortgagee gave notice to the insurance office of the assignment, but the assignee in bankruptcy gave no notice to the office of the bankruptcy, and *the Commissioner in Bankruptcy ordered a sale of the policy; the office paid the proceeds into Court under the Trustee Act. It was held by Sir R. Malins, V.-C., that the assignee in bankruptcy was entitled thereto. And see Re Mary Coombe, 1 Giff. 91, and cases cited 2 L. C. Eq. 728.

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5. *Exceptions from the Operation of the Reputed Ownership Clause.*—Where a person has possession of property in *auter droit*, as executor or administrator, or as husband of an executrix or administratrix, the reputed ownership clause will not be applicable: Ludlow *v.* Browning, 11 Mod. 138; Ex parte Marsh, 1 Atk. 158; Ex parte Ellis, Id. 101; Viner *v.* Cadell, 3 Esp. 88. "If," says Lord Mansfield, "an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself:" Howard *v.* Jemmet, 3 Burr. 1369; see also Farr *v.* Newman, 4 Term Rep. 648; Serle *v.* Bradshaw, 2 C. & M. 148; 4 Tyrwh. 69.

Where, however, a person keeps possession of the property of a deceased person, as executor *de son tort*, with the consent of a person who might have taken out administration, upon the bankruptcy of the former, such property will pass to his assignees. Thus, in Fox *v.* Fisher, 3 B. & Ald. 135 (5 E. C. L. R.), Mary Fish, an innkeeper, died intestate in 1807, and her son took possession of the

inn and furniture, and carried on the business until 1819, when he became bankrupt, and the defendants, as his assignees, took the goods and sold them. The son never took out letters of administration to his mother. After the bankruptcy, a creditor of Mary Fish took out letters of administration to her, and in an action of trover claimed the goods from the assignees. It was held, however, that the assignees were entitled to them. "Here," said Abbott, C. J., "the son was entitled to take out letters of administration to his mother, and if he had done so, he would have vested in himself a complete legal right. Now, a creditor of the mother might either have brought an action against him as executor *de son tort*, or might have cited him before the Ecclesiastical Court, to show cause why the creditor, and not the son, should be constituted administrator. Neither of these things was done, and the son continued in possession of these goods for nearly twelve years. I think, therefore, that these goods were clearly within 21 Jac. I. c. 19, as being, with the consent of the true owner, in the possession, order and disposition of the bankrupt. The case of Fairclaim d. Allen *v.* Little (C. P. H. 58 Geo. III., cited 3 B. & Ald. 136 (5 E. C. L. R.)) is distinguishable, because there the person in possession was not entitled to take out letters of administration; but here the bankrupt was so entitled." See also Ray *v.* Ray, Sir G. Coop. 264; In re Thomas, 3 M., D. & De G. 40; 1 Ph. 159, overruling s. c. 2 *M., D. & De G. 294; White *v.* Mullett, 6 Exch. 713; Ex parte Moore, 2 M., D. & De G. 616, and *post* 498. [*497

Where a person at the time of his bankruptcy is in possession of goods and chattels as trustee, inasmuch as the possession is according to the ownership, the case will not fall within the reputed ownership clause; for in order to do so, there must be possession of a person not the owner, with the consent of another person, the true owner. This is well explained in the principal case of Joy *v.* Campbell; there, it will be observed, Thomas Brown held shares in a trading company in trust for his brother William, who, by his will, after giving certain legacies, bequeathed the residue to his brother Thomas, who continued in possession of the shares and acted as executor. Thomas afterwards became bankrupt. It was held by Lord Redesdale, that the shares were not within the reputed ownership clause, inasmuch as Thomas was himself "the true owner and proprietor thereof," subject, however, to the debts and legacies of

William. In the case of In re Bankhead, 2 Kay & J. 560, a sole trustee who had appropriated 4000*l.*, part of the trust property deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds, two policies of assurance, one on his own life for 2000*l.*, the other on the life of his father for 3000*l.*, enclosing them in an envlope with a memorandum, that in the event of his, the trustee's death, the amount of the enclosed policies was to be applied to the payment of 4000*l.* borrowed by him of the *cestui que trust.* Six years afterwards, the trustee became bankrupt. The policy for 2000*l.* was found by the officer of the Court of Bankruptcy enclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death. It was held by Sir W. Page Wood, V.-C., that as between the *cestui que trust* and the assignees in bankruptcy:—First, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement. And, secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words, "the true owner" within the meaning of 12 & 13 Vict. c. 106, and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests—the true owner and reputed owner were the same person, and the 125th section of the Act did not apply. See also Sinclair *v.* Wilson, 20 Beav. 324; Ex parte Graves In the Straham, 8 De G., M. & G. 291; Stapleton *v.* Haymen, 2 Hurlst. & C. 918.

If a trustee were to blend trust funds with his own, and to sell out part of the funds, it would be presumed that those remaining unsold belonged to the trusts, and were not in the order and disposition of *the trustee at the time of his bankruptcy. "If," says Wigram, V.-C., "20,000*l.* consols were standing in the name of a party who was trustee of one moiety and beneficial owner of the other moiety, and that party were to sell and transfer 10,000*l.* of the stock, it cannot, I think, be doubted for a moment, that a court of equity would, as against the trustee and his assignees in bankruptcy, hold that the 10,000*l.* transferred was the property of the bankrupt, and that the remaining 10,000*l.* was not the property or in order and disposition of the bankrupt, but was subject to the trust:" Pinkett *v.* Wright, 2 Hare 129.

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Where, however, goods and chattels are in the possession of a trustee contrary to the title, they will not be considered as trust property. See Ex parte Moore, 2 M., D. & D. 616; there residuary estate was bequeathed to the testator's widow and two other trustees (also the executors and executrix of the will), upon trust to be converted with *all possible speed* into money, to be laid out in the purchase of an annuity for the lives of the widow and children; and the trustees were directed to pay the annuity to the wife, for the sole use and benefit of the children. After the testator's death the widow was permitted by the acting trustee to retain possession of furniture, part of the residuary estate, and *eight years* after the testator's death she married again, and took the furniture to the husband's house, where the testator's children resided with her, and after six years more the second husband became bankrupt. It was held by the Court of Review in Bankruptcy that the trustees could not claim the furniture from the assignees. "I think," said Sir J. Cross, "that this trust was never considered as having any existence before the bankruptcy occurred, which was fourteen years after the property was given to the widow to be converted into money as soon as possible. I consider it as property which she thus appropriated to herself and made her own. She was responsible to the children for her administration of the estate, and of course did not get rid of that responsibility by her conversion of the property to her own use. But I am of opinion, that the property, as regards the world at large, had long since ceased to be the property of the testator. The case of Quick *v.* Staines, 1 Bos. & Pul. 293, is decisive of the question; there, exactly as occurred in this case, the executrix used the goods of the testator as her own, and afterwards married, and then used the goods as those of herself and her husband, and it was decided, that they might be taken in an execution against the husband. Therefore by the general law, independently of the Bankrupt Act, the point is settled against the petitioners."

And where a person holds goods and chattels upon a secret trust for another, who is the absolute owner of them, the exception in favor of trust property will not *apply. See Ex parte Bur- [*499
bridge, 1 Deac. 131. There it appeared by a special case that by the rules of an insurance company no person except a director was permitted to hold more than two shares in his own name. A proprietor who was already the holder of two shares, having pur-

chased two others, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor, but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor, up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder. It was held by the Lords Commissioners, reversing the decision of the Court of Review (reported 4 Deac. & Ch. 97), that the shares were in the order and disposition of the bankrupt as reputed owner. "There was," said Lord Commissioner Shadwell, "no open or honest purpose, like the payment of debts," to be answered by this trusteeship, as in Copeland *v.* Gallant, 1 P. Wms. 314, nor was there any trust for the benefit of third persons, or created by third persons, as in Ex parte Martin, 2 Rose 331; 19 Ves. 491, and Ex parte Horwood, 1 Mont. & M. 169. But the trust was created by the proprietor of the shares for his own sole benefit, and for no other purpose, than that of enabling him to hold more shares than he was allowed by the regulations of the company to hold in his own name. No convenience to society is promoted by such a trust, and great injury to the public may be occasioned by the delusive credit which it confers. It does not appear to us, that the private knowledge which one of the directors and the actuary had of the transaction, could operate as notice of this secret trust to the company, who in fact treated the bankrupt as owner. For anything that appears to the contrary, the dividends were received by the bankrupt. And the shares might have been sold by him, without the intervention of the directors or the actuary. We are of opinion that such a *secret trust* is not within the meaning of the reputed ownership clause in the Bankrupt Act, but it is to be considered as a case of property left in the possession, order, and disposition of the bankrupt, with the consent of the true owner, thereby inducing a reputation of ownership within the meaning of that act."

Another exception, as is laid down in the principal case of Mace *v.* Cadell, is where a person holds goods as a factor. Thus in the

recent case of Whitfield *v.* Brand, 16 M. & W. 282, the author *of a book deposited with a bookseller 1500 copies of it to be sold by commission. The bookseller became bankrupt. [*500 It was held by the Court of Exchequer that the unsold copies did not pass to the assignees. "It is," said Parke, B., "notoriously the practice of booksellers to sell books received by them to be sold on commission. That would rebut the inference that the defendant held these particular goods as owner. But had there been no such evidence, I should not think that these books passed to the assignee, as it is well known that booksellers act also in the capacity of factors. It appears to me that in this case the bankrupt received the deposit of the books in question, not as owner but as factor, and as such he had possession, but with authority to sell, and that is enough to take it out of the statute. It was said, that as he was not shown by the plaintiff to have been known to the world to be such factor, the books would pass to his assignees in respect of his reputed ownership; but that is not so; for if booksellers sometimes act as factors, and it is part of their business to sell books of which they are not the owners, no one had a right to presume those books to be his own without inquiring how the case really stood. Besides, as to the necessity of notoriety, there was enough evidence here to show that all persons interested were put upon inquiring whether the bankrupt held the books as factor or owner. The question of reputed ownership does not arise on these facts. In a very early case on the bankrupt laws, Mace *v.* Cadell, Cowp. 232, it was held that the stat. 21 Jac. I. c. 19, s. 11, did not extend to the case of factors who have the possession of other men's goods merely as trustees, or under a bare authority to sell for the use of their principal. The goods must be such as the party suffers the trader to sell as his own:" Re Kullberg, 12 W. R. (Bk.) 137.

And if goods sent to a factor's be sold and reduced into money, if the money be in separate bags and distinguishable from the factor's other property, the principal may recover it in specie, and is not driven to the necessity of proving his debt in bankrupty: per Lord Kenyon, C. J., in Tooke *v.* Hollingworth, 5 Term Rep. 227.

Where a bankrupt is in possession of the goods of another *bonâ fide* with the consent of the owner at the time of the bankruptcy, for a *specific purpose*, beyond which he has not the right of disposition or alteration, that is not such a possession as comes within the

meaning of the reputed ownership clause. See Collins *v.* Forbes, 3 Term Rep. 316. There Kent by arrangement with Forbes and Co. being about to enter into a contract to erect a stage for rolling barrels on board shipping for the Victualling-office, Forbes and Co. agreed that upon his doing so, Kent was to have one-fourth of the clear profits of the contract, and a guinea a week for his superintendence of the work, and Forbes and Co. were to supply
*501] *the timber and to have the residue of the profits. Kent accordingly entered into the contract with the commissioners, and Forbes and Co. shipped the timber in their own name to the yard, where it was delivered as for Kent's use, and received by the king's officers as such, and they swore that they would not have received it on account of any other person; but that they would not have permitted even Kent to dispose of it in any other manner than for the work contracted for, except such parts of it as were found unfit for the intended purpose, because they considered it as delivered for the purpose of the contract. Before the work was finished, Kent became a bankrupt, on which Forbes and Co. got possession of the timber. It was held that the assignees of Kent were not entitled to recover the timber under 21 Jac. I. c. 19. "In the present case," said Ashurst, J., "there never was any *sale* of the timber to Kent, nor any *general delivery, so as to give him the absolute disposition of it;* for it appeared in evidence that the store-keepers in the yard would not have permitted even Kent to have sold the timber to any other person, unless any part of it had been unfit to be used in performing the contract, as they considered that it was delivered only for the purpose of the contract. Therefore there could be no danger that Kent's creditors would be induced to trust him on the credit of that property, or as supposing it liable to their debts. The possession which he had (as it appeared by the facts in the case) is somewhat similar to that of a carpenter, who receives timber to convert into a wagon, or of a tailor, to whom cloth is sent for the purpose of being worked up. And it is a very different case from that of a person making a sale of any part of his property, and yet continuing in possession and taking upon him the disposition of it with the consent of the vendee; for in such case, as the *property was originally his*, and there never was any visible alteration in it, it is a snare to induce persons to give him credit, to which the vendee, by his neglect to obtain the

possession, lends his assistance, as he concurs in giving a false appearance to the transaction. But in the present case, this timber came into Kent's possession in the natural course of the transaction, in which there was no fraud either actual or constructive, for it appeared by the evidence that the timber was originally sold to the defendants on their own account, and that the vendor did not know that the bankrupt had any concern in the transactions." See also, Rex *v.* Egginton, 1 Term Rep. 370; Ex parte Carlon, 4 Deac. & Ch. 120; Clarke *v.* Spence, 4 Ad. & E. 448 (31 E. C. L. R.). See also and consider Ex parte Batten, 3 Deac. & Ch. 328; Newport *v.* Hollings, 3 C. & P. 223 (14 E. C. L. R.).

Upon the same principle checks (Moore *v.* Barthrop, 1 B. & C. 5 (8 E. C. L. R.)), bills of exchange, or promissory notes (Belcher *v.* Campbell, 8 Q. B. 1 (55 E. C. L. R.); Buchanan *v.* Findlay, 9 B. & C. *738 (17 E. C. L. R.); 4 M. & R. 593; Bruce *v.* Hurly, 1 Stark. 23 (2 E. C. L. R.); and see Took *v.* Hollingworth, 5 Term Rep. 215), placed in the hands of a person for a specific purpose, will not be considered as being within his reputed ownership. [*502

It has been already stated that bills of exchange are considered "goods and chattels" within the meaning of the reputed ownership clause; it is important to consider when, on being deposited by the owner with another, they fall within its operation. In the first place it is clear that where bills are remitted to an agent, as a factor or banker, and entered short while unpaid, and bills paid in generally to be received, and not to be discounted or treated as cash, are not affected by the bankruptcy of the factor or banker, the property in them is not altered, and the bills, or the proceeds thereof, if received by the assignees, must be returned to the principal, subject to such lien as the factor or banker may have upon them: Zinck *v.* Walker, 2 Sir W. Black. Rep. 1154; Brown *v.* Kewley, 2 B. & P. 518; Took *v.* Hollingworth, 5 Term Rep. 215; Bent *v.* Puller, Id. 494; Parke *v.* Eliason, 1 East 544, 550; Ex parte Waring, 19 Ves. 345; Buchanan *v.* Findlay, 9 B. & C. 738 (17 E. C. L. R.); Ex parte Pauli, 3 Deac. 169.

Where bills are delivered to a banker expressly for the purpose of their being discounted, or if in the course of dealing between the customer and banker, bills received by the latter are regarded by *both* parties as cash, *minus* the discount, and the customer is at

liberty to draw on account thereof, beyond the amount of cash in the hands of the banker, then in the event of the bankruptcy of the banker, the assignees will be entitled to the bills: Carstairs *v.* Bates, 3 Campb. 301; Ex parte Rowton, 17 Ves. 426, 431; 1 Rose 15; Ex parte Sollers, 18 Ves. 229; Ex parte Thompson, 1 Mont. & M. 102. So likewise in Hornblower *v.* Proud, 2 B. & Ald. 327, a person having three bills of exchange, applied to a country banker with whom he had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonored. It was held by the Court of King's Bench that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. It was also held that if the exchange had not been complete, still that the banker having become bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy.

In order to change the property in bills so deposited by a customer with his banker, a contract must be shown between the banker and customer, by which the property in the bills is to be changed, as, for instance, a contract by the bankers to buy or discount the bills: Thompson *v.* Giles, 2 B. & C. 428, 432 (9 E. C. L. R.). And a contract of this nature which cannot be considered as beneficial to the customer ought not to be *presumed without strong evidence: Id. 430. Where, for instance, bills are not entered as cash, but as bills, although the amount is carried by the banker into the cash column, it does not follow that the customer assented to their being considered as cash. It is only an undertaking on the part of the banker to answer drafts in advance to the amount of the bills so entered: Thompson *v.* Giles, 2 B. & C. 422, 429 (9 E. C. L. R.). There a customer was in the habit of endorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by check on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they

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thought fit. The bankers having become bankrupt, it was held by the Court of King's Bench that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favor of the customer. "It has been argued for the defendants," said Bayley, J., "that we must infer an agreement to have been made between the banker and his customer, that as soon as bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor, and the bills remaining *in specie* in the banker's hands will, notwithstanding the bankruptcy, continue the property of the customer. . . . It appears that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the customer assented to their being considered as cash. See also Ex parte Armitstead, 2 G. & J. 371; Ex parte Barkworth, 1 De G. & J. (Bk.) 140.

The same principle was acted upon by Lord Cottenham in the important case of Jombart *v.* Woollett, 2 Myl. & Cr. 389: there a merchant abroad sent drafts from time to time to his London correspondent for acceptance under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London to be remitted to him from time to time. It was held by Lord Cottenham, C., that under such an arrangement, the presumption was, until an agreement to the contrary was shown, that the London correspondent was not intended or entitled to treat the bills so remitted as cash, or to discount them before maturity; and therefore that two *of such bills, which were existing in [*504
specie in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who remitted them. "Unless," said his lordship, "there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes bankrupt, the property in bills is not altered, but remains in the party making the remittance. That of course may be regulated by usage, but *primâ facie*, without special con-

tract, the presumption is, that the bills are received by the agent for the purpose of indemnifying him against any eventual loss, and are not to be dealt with as his own, and immediately converted into cash." See also Ex parte Smith, Buck 355; Ex parte Pease, 19 Ves. 25; 1 Rose 232; Ex parte Frere, 1 Mont. & Mac. 263; Ex parte Brown, 3 Mont. & A. 471; 3 Deac. 91; Ex parte Cotterill, 3 Mont. & A. 376; 3 Deac. 12. And even where bills are entered as cash, the assent of the customer to their being so considered must be proved, and the onus of proving it lies upon the banker. Ex parte Sergeant, 1 Rose 153; Thompson *v.* Giles, 2 B. & C. 430 (9 E. C. L. R.).

6. *The power given to the Court over Goods and Chattels coming within the reputed Ownership Clause.*—The goods which at the time of the bankruptcy were in the possession, order, or disposition of the bankrupt, with the consent of the true owner, do not pass by the adjudication, and in order to enable the assignees of a bankrupt to deal with them, an order must be made by the Commissioner, directing the assignees to sell them: Heslop *v.* Baker, 6 Exch. 740; Barrow *v.* Bell, 5 E. & B. 540 (85 E. C. L. R.).

The order to sell should be made upon an ex parte application by the assignees supported by *primâ facie* evidence (Ex parte Barlow, 2 De G., M. & G. 921; Ex parte Wood, 4 Id. 861; Ex parte Young, Id. 864; Ex parte Lucas, Re Gwyer, 3 De G. & J. 113). It may be made retrospectively (Ex parte Heslop, 1 De G., M. & G. 477), and, it seems, cannot be appealed against by the true owner: Mather *v.* Lay, 2 J. & H. 374.

The order for sale must be specifically directed to the particular goods which the assignees are thereby authorized to sell and dispose of, for it has been decided that a mere general order for the sale of all goods which were in the possession, order, or disposition of the bankrupt with the consent of the true owner, does not satisfy the requirements of the statute: Quartermaine *v.* Bittleston, 13 C. B. 133 (76 E. C. L. R.); for as Jervis, C. J., well observes there, p. 158, "inasmuch as the goods to be taken under the authority of the order are confessedly the goods of a third person, it is not unfair that there should be some preliminary inquiry before the Commissioner, and something *like a *primâ facie* case made out, before the true owner is to be called upon to litigate his rights."

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But it is sufficient if the order specifies without going into detail the "goods in or about such a house:" Fielding *v.* Lee, 18 C. B. N. S. 449 (86 E. C. L. R.).

An order under the 125th section of 12 & 13 Vict. c. 106, is sufficient, if it specifies to goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods: Freshney *v.* Carrick, 1 Hurlst. & N. 653; Fielding *v.* Lee, 18 C. B. N. S. 449 (86 E. C. L. R.).

The order for sale, when made, relates back to the act of bankruptcy (see Heslop *v.* Baker, 6 Exch. 740; 8 Exch. 411), and it may be made even after a sale of goods by the assignees. Thus in Ex parte Heslop, 1 De G., M. & G. 477, a mortgagee of goods under a bill of sale allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession, and sold them. The mortgagee brought an action of trover and recovered, on the ground that under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the Commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the Commissioner, who made an order *retrospectively* confirming the sale, and reciting, as a fact, that the goods were in the order and disposition of the bankrupt, at the time of the bankruptcy, with the consent of the true owner. It was held by the Lords Justices of the Court of Appeal in Chancery, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid upon the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs.

The order for sale however, as it may be made upon an *ex parte* application, is not final and binding upon the true owner, who had no opportunity of being heard against it; he may still try the question of reputed ownership at law, through the intervention of a jury: Graham *v.* Furber, 14 C. B. 134 (73 E. C. L. R.); Ex parte Carrick, 4 De G., M. & G. 861.

The Court of Chancery has jurisdiction to restrain a sale ordered by the Court of Bankruptcy, and to determine the rights of the parties: Mather *v.* Lay, 2 J. & A. 375; and an application by the

true owner to the Court of Bankruptcy for a stay of proceedings is no bar to a subsequent bill for an injunction to stay a sale: Id., and see Ex parte Lucas, 3 De G. & J. 113; Ex parte Wood, 4 De G., M. & G. 861.

The effect of the law of reputed ownership is not a forfeiture of the property. In Bryson *v.* Wylie, 1 *Bos. & Pul. 83 n., *506] "Bryson was a creditor of the bankrupt for so much, and his taking that species of security did not avoid his demand for the debt. If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became bankrupt, he would be a creditor to the amount of the money he paid for the purchase." Per Lord Redesdale, in Joy *v.* Campbell, 1 Sch. & Lef. 337; *ante* p. 454.

7. *Whether the reputed Ownership Clause applies to Deeds registered under the* 192*d section of the Bankrupt Act,* 1861.—As the 197th section of the Bankruptcy Act, 1861, gives to trustees of a deed under the 192d section the benefit of all the provisions of the Act (which by the 232 section is to be construed with the unrepealed portion of the Act of 1849, as one Act), in like manner as if the debtor had been adjudged bankrupt, and the trustees had been appointed assignees, and as the Court of Bankruptcy has power to make and enforce all such orders as it might do if the debtor had been adjudged bankrupt, and his estate had been administered in bankruptcy, it would seem that the trustees of a deed in the statutory form, or of any other deed amounting to a *cessio bonorum*, and satisfying the conditions of the 192d section, may obtain from the Court of Bankruptcy an order for the sale and disposition of property of third persons in the debtor's order and disposition, with the consent of the true owner. De Gex and Smith on Debtors' and Creditors' Deeds, p. 85.

There is no provision in the Bankrupt Laws of the United States (Act of Congress, March 2, 1867, 14 Statutes at Large 517) which corresponds with the enactments of the English statutes, discussed in the foregoing note. It has, however, been decided that the rights of action of an assignee are not limited to those of the bankrupt. He may maintain an action to recover any property which might have been reached by the bankrupt's creditors, if he had not become a bankrupt: Shackleford *v.* Collier, 6 Bush (Ky.) 149.