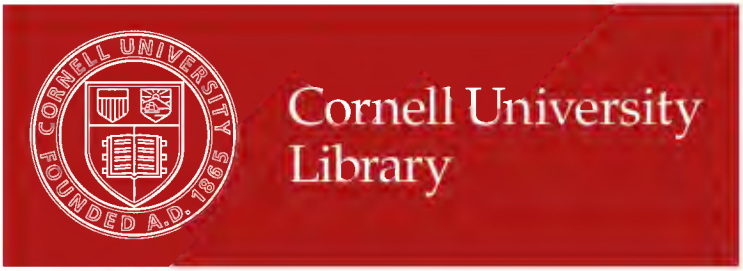

A

SELECTION OF LEADING CASES

ON

MERCANTILE AND MARITIME LAW.

WITH NOTES.

By OWEN DAVIES TUDOR,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW, AUTHOR OF "A SELECTION OF LEADING CASES IN EQUITY," ETC.

FROM THE SECOND LONDON EDITION.

WITH

ADDITIONAL NOTES AND REFERENCES TO AMERICAN CASES,

BY

GEORGE SHARSWOOD.

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LIST OF CASES REPORTED.

PART SECOND.

THE PAGES REFERRED TO ARE THOSE BETWEEN BRACKETS [ ].

PAGE

BETSEY, THE, Murphy (Blockade) 875

BREMEN FLUGGE, THE, Meyer (Capture of Enemy's Goods on board Neutral Ship) 906

CHASE *v.* WESTMORE (Lien) 679

CROFT *v.* DAY, (Trade Marks) 563

FORTUNA, THE, Tadsen (Capture of Enemy's Ship—Cargo belonging to Neutral restored) . . 902

FREDERICK MOLKE, THE, Boysen (Blockade) . . 873

HANSON *v.* MEYER (Personalty—Property in, as distinguished from Possession—When it passes to Purchaser) 600

HARMAN *v.* FISHAR (Bankruptcy—Fraudulent Preference) 525

HOOP, THE, Cornelis (Trade with the Enemy—Licenses) 787

IMMANUEL, THE, Eysenberg (Colonial Trade of Enemy—Rule of War of 1756) 814

JONGE MARGERETHA, THE, Klausen (Contraband of War) 847

KRUGER *v.* WILCOX (Lien) 676

MARIA, THE, Paulsen (Right of Visitation and Search) 757

MARKET OVERT, THE CASE OF (Sale in Market Overt) 713

SANTA CRUZ, THE, Picoa (Recapture from the Enemy —Salvage) 908
TARLING *v.* BAXTER (Sale of Personalty—Property in, as distinguished from Possession—When it passes to Purchaser 596
TWEE GEBROEDERS, THE, Northolt (Protection of Neutral Territory) 735
WHILELMINA, THE, Otto (Colonial Trade of Enemy—Rule of War of 1756) 829
WHITEHEAD *v.* ANDERSON (Stoppage *in transitu*) . . 632
WISEMAN *v.* VANDEPUTT (Stoppage *in transitu*) . . 631
WORSELEY *v.* DE MATTOS (Act of Bankruptcy—Fraudulent Conveyance) 507

LEADING CASES

ON

MERCANTILE AND MARITIME LAW.

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*507] *SIR EDWARD WORSELEY ET AL., ASSIGNEES OF RICHARD SLADER, A BANKRUPT, *v.* DE MATTOS AND SLADER.

Court of King's Bench, Hil. Term, 31 *Geo. II., Feb.* 7, 1758.

[REPORTED 1 BURR. 467; S. C. 2 LD. KEN. 218.]

ACT OF BANKRUPTCY—FRAUDULENT CONVEYANCE.]—*A trader by deed transferred and assigned all his estate and interest in certain premises, and also all his stock used and employed in the several trades he carried on, and all his changeable stock, debts, etc., to a banker, in order to secure to him the repayment of money he should advance; at the same time continuing himself in possession of everything conveyed by the deed, and having nothing of value but what was comprised therein. Held, that the trader, by this transfer of all his property, though by way of security, and for valuable consideration, had committed an act of bankruptcy.*

THE present question came before this Court, after a trial at law before Lord Mansfield, C. J., upon a feigned issue out of the Court of Chancery, to try whether one Richard

Slader, a trader, was a bankrupt; and, secondly, if he was a bankrupt, then upon what particular day he became so; and that particular day on which he should be found to have become a bankrupt, was to be endorsed upon the *postea.*

It was soon agreed as to the first point, "That he certainly *did become* a bankrupt" by an undoubted clear act of bankruptcy, committed on the 13th of November, 1756. But upon the second point, as to *the time when* he *first* became a bankrupt, it was insisted on behalf of the plaintiffs, that he became a bankrupt anterior to that 13th of November, viz., upon the 23d of October; namely, by the very executing the deed in question which bore the *latter date, for they alleged this deed to be *fraudulent*, and the executing it to be *ipso facto* an act of bankruptcy within the statute of 1 Jac. I. c. 15, s. 2, which statute expressly makes any fraudulent grant or conveyance of the trader's lands or goods, whereby his creditors may be defeated or delayed of their just debts, a specific act of bankruptcy.

*508]

If the deed was fraudulent, within the true intent and meaning of the statute, he certainly committed an act of bankruptcy on the 23d of October. If it was not, he did not commit any act of bankruptcy till the 13th of November.

The jury found him a bankrupt; and by consent the following order was made at *nisi prius*, viz. that either party be at liberty to move the Court. And if the Court shall, upon such motion, be of opinion "that the deed of the 23d of October, 1756, is under all the circumstances *fraudulent*, and the execution of it by Richard Slader an act of bankruptcy," then the *postea* shall be marked on the back thereof, "That the said Richard Slader became a bankrupt on the said 23d of October, 1756;" but if the said Court should be of opinion that the execution of the said deed, under all the circumstances, by the said Richard Slader be *not* an act of bankruptcy, then the said *postea* shall be marked on the back,

"That the said Richard Slader became a bankrupt on the 13th day of November."

The form of the rule under which it came before the Court was thus:—"It is ordered that the plaintiffs show cause why the *postea* in this cause should not be endorsed, 'That Richard Slader became a bankrupt on the 13th day of November, 1756.'"

Lord Mansfield, C. J., first repeated the whole evidence very particularly and minutely, which, after the counsel had done, was resolved, by the opinion of the whole Court, into the following case, viz.:—

James Davis, an agent of Isaac de Mattos, knowing Slader to be indebted, and that he could not carry on his trade unless somebody in London, in the nature of a banker, would pay his drafts, negotiated, in the month of July, 1756, an agreement between the said Isaac de Mattos and Richard Slader, "that De Mattos should pay Slader's drafts, upon having security."

The nature of the security, and the terms of agreement, appear only by the deed of the 23d of October prepared, and procured to be executed by James Davis and James Whitehead, both of them agents of Isaac de Mattos.

*The deed in question bears date the 23d of October, 1756; and recites Slader's title to the mill [*509 and premises, and also his being concerned in and carrying on divers branches of merchandise, and other business; and his having frequent occasion to draw and remit sums of money from and to London; and his having requested Isaac de Mattos to be his agent or banker there; and that in order to indemnify him from so doing, Slader had agreed to transfer and assign all his estate and interest in the premises aforementioned in the said indentures, and also all his stock used and employed in the trades of brewing and making malt, and in the business of a corn-factor and miller, to the said Isaac de Mattos, his executors, administrators, and

assigns, for that purpose; and then the deed imports that for the purposes aforesaid, and in part performance of the said agreement, and in consideration of five shillings, he the said Slader grants, assigns, etc., his said messuage, corn water-mill, and divers other things (subject to a mortgage then subsisting, on part thereof). And further, in full performance of the said agreement, and for the consideration aforesaid, he grants, etc., all his stock, utensils, and other things used in his trades of brewing and malting and of a corn-factor and miller, consisting of coppers, tuns, backs, coolers, pumps, cisterns, screens, and other implements; and also all his changeable stock, consisting of debts, horses, carts, casks, hops, beer, ale, wheat, barley, malt, coals, wood, and all other goods and commodities belonging, employed, or made use of *in the said several trades* or any of them; and all his estate, right, title, interest, property, claim, and demand whatsoever thereto and to every or any part thereof to the said Isaac de Mattos, his executors, etc., defeasanced however on his the said Slader's paying and making good to the said Isaac de Mattos, all the sums of money which he should advance and pay on any note, draft, bill, or other writing of the said Slader; and on his indemnifying De Mattos against the same, and all matters any ways touching or concerning the said agency. This deed further contains the common covenants; and there is a receipt endorsed for the five shillings consideration money. In it is also a covenant that in case of breach of a failure in the conditions, etc., or any part thereof, *then and from thenceforth* it should be lawful for the said Isaac de Mattos, his executors, etc., to *enter, possess, and enjoy* the said land and premises, etc., and also *to take to his and* their own use, and uses absolutely, all and singular the premises last before-mentioned, viz., the stock, etc.

*510] *Upon the 8th of October, Richard Slader drew a bill upon Isaac de Mattos, by authority from him,

for 200*l.* But to give it credit it was made payable to the said James Davis, and endorsed by him.

Upon the 23d of October, Richard Slader drew another bill upon Isaac de Mattos, by authority from him: but to give it credit, it was made payable to the said James Whitehead, and endorsed by him.

Isaac de Mattos himself personally knew that the affairs of Richard Slader were in confusion, and hired Samuel Sills, whom he sent down in the month of October, to be book-keeper to this Richard Slader. Sills accordingly went, and had examined all Slader's accounts and affairs by the 20th of October.

The deed (which had been a considerable time in preparing) was executed on the 23d of October, and it is witnessed by the said James Whitehead, James Davis and Samuel Sills.

The bankrupt continued in possession of everything conveyed by the said deed, and James Davis took occasion to tell the creditors of Richard Slader "that the said Slader would do very well," that "he had recommended him to two good men," and that "Slader had given a mortgage of the mill, and other leasehold premises;" but James Davis concealed, and did not mention Slader's having assigned his general effects.

Upon the 11th of November, Slader told Davis and Sills, both together, "*that he could not stand*," and consulted them what to do. The result of which consultation was—that Sills, by order of Slader, the same day gave possession to Davis, as agent of De Mattos, who immediately set out for London. The next day (the 12th of November) Slader ordered Sills to deny him. On the 13th Sills did deny him accordingly, and told the reason, "that it was to commit an act of bankrupty."

Slader had nothing of value *but* what was comprised in the deed of the 23d of October, and he traded as a brewer,

maltster, corn-factor, and miller, but carried on no other trade.

After the 13th of November, Isaac de Mattos paid the said two drafts endorsed by Davis and Whitehead.

Serjt. *Prime*, Mr. *Gould*, Serjt. *Davy*, for the plaintiffs, (after Lord Mansfield had reported the evidence), proceeded to show cause. And they urged the deed to be merely
*511] colorable, and so fraudulent *as to constitute in itself an act of bankruptcy, being to the intent to *defeat and delay* his creditors, or whereby they might be defeated or delayed.

They cited *Twyne's Case*, 3 Co. 80, and the rules and resolutions contained in it, and urged that the present case was fully within it. They also cited 13 Eliz. c. 7, and 1 Jac. I. c. 15, s. 2, which goes further than 13 Eliz.; likewise 2 Inst. 110, on the statute of Marlebridge; *Curson's Case*, 6 Co. 75; s. p. *Lord Pagett's Case*, Moore 193, upon the statute of fugitive beyond seas made anno 13 Eliz. (in which they observed that 13 Eliz. c. 3, is in Rastal and not elsewhere); *Tucker* v. *Cosh*, Style 288; *Small* v. *Oudley et al.*, 2 P. Wms. 427, where a goldsmith assigned *two-thirds* of his stock in the wine trade, and it was holden good, but *contrà* if it had been of *all* his goods, &c. Also *Dr. Goodfellow's Case*, Lucas Rep. 489, s. c. nom. *Cock* v. *Goodfellow*, 10 Mod. 489, and *Ryall* v. *Rowles*, in Canc. 27 Jan., 1749, 1 Ves. 348; 1 Atk. 165. And they observed that here there was no possession altered; no estimate or account taken of the stock, &c., nor any consideration paid.

Mr. *Norton* and Mr. *Morton*, for the defendants, insisted, that even if it was granted that this deed was fraudulent, as against creditors or purchasers, yet it would not be an act of bankruptcy, for the act has a proviso to except deeds made *bonâ fide* and upon good consideration: see 13 Eliz. c. 7, § ult. This deed was made *bonâ fide* and upon good con-

sideration. It was made by Mr. Slader, a trader in the country, to secure Mr. De Mattos, who agreed to become his banker or agent in London; and to permit Slader from the country to draw upon him in town; and the only intent of it was to indemnify De Mattos against Slader's overdrawing: *Unwin* v. *Oliver*, in Canc. Tr. 12 Geo. II., was a like case determined by the Lord Chancellor. And this transaction tended to enable the country trader the better to carry on his trade, and was far from being intended to deceive his creditors.

As to *the owner's continuing in possession.*—The case of *Megget* v. *Mills*, 1 Ld. Raym. 286, B. R. 1697, was so, and yet not fraudulent. *Bucknal* v. *Roiston*, Prac. Ch. 285, was the like. And in the *nature of the thing, possession could not be delivered in the present case, [*512 because the debt to be secured was future and uncertain. So that this continuing in possession was no *mala fides*—no badge or evidence of fraud, because it did not give the owner a false and fallacious credit. Neither was it secret, but notorious, and it was not with intent to defeat and delay his creditors, but to their benefit, and calculated to support Slader's credit, and to enable him to pay his creditors.

The *generality* of a deed is not always and necessarily an evidence of fraud; for unless there be a trust, either expressed or implied, there is no fraud; and here is no trust, either expressed or implied, nor could De Mattos recover more than was fairly owing to him.

The case of *Ryall* v. *Rowles*, was rightly determined, "that a security may be lost, by suffering a continuance in possession;" but it does not follow that our continuance in possession constituted an act of bankruptcy. Here was neither imposition nor collusion. It is only a mortgage of his personal property, and for a fair consideration.

To prove it not to be an act of bankruptcy, they cited several cases. In the case of *De Gols* v. *Ward*, in 1739, the

quo animo was indeed clear and plain. The next case where a deed was considered as an act of bankruptcy, was *Ashley's Case*, but that was also quite clear. So again in *Mackrell's Case*, lately, where it was indeed given up. But there is nothing intentionally ill in the present case.

If this mere giving security to indemnify his banker was an act of bankruptcy, it could never afterwards be purged, which would be a great inconvenience to trade, because it is a common case. And this man gave it to his former banker as well as to De Mattos.

It is no act of bankruptcy, unless the deed be fraudulent, as well as intended to give unjust preference to one creditor before another. And there is no pretence in the present case that any bad use has been made of this deed.

The 5th clause of 1 Jac. I. c. 15 would be nugatory, if the 2d was to be understood to make the executing such a deed as this an *ipso facto* act of bankruptcy. It was only a contingent and collateral security, depending upon future events and circumstances, and therefore there could not, in the nature of the thing, be either delivery of immediate possession or any particular consideration *money expressed. And De Mattos's being liable to be damnified was of itself alone a good consideration.

*513]

The case of *Unwin* v. *Oliver*, P. 12 Geo. II. in Canc., was this:—Unwin being appointed receiver by the Court, and thereupon obliged to give security, assigns his debt as a security (amongst other things) to the persons who were bound for him in a recognisance upon that occasion. And afterwards he became bankrupt. This assignment of his debts was holden good.

Bankruptcy is considered by the Acts of Parliament as a crime;[1] the description of an act of bankruptcy or of per-

[1] "Whatever may have been thought in former times, an act of bankruptcy is not now a crime:" per Parke, J., in *Cumming* v. *Bailey*, 6 Bing. 374 (19 E. C. L. R.).

sons becoming bankrupt, must be therefore taken strictly. And the acts that constitute bankruptcy must be done with intent to defraud or delay creditors. Put the case of an officer in the revenue appointing a trader his deputy, and for his indemnity taking from such deputy such a deed as this is; would the executing it make the trader a bankrupt?

The Act 21 Jac. I. c. 19, ss. 10, 11, takes care of any inconvenience to the creditors arising from the trader's continuing in possession. But such assignments have never been considered as constituting an act of bankruptcy: *Small* v. *Oudley*, 2 P. Wms. 427; *Jacob* v. *Shepherd*, there cited; *Ryall* v. *Rowles*, in Canc. 27 Jan. 1749, which was an assignment by Harvest the bankrupt, of *all* his goods, utensils, etc., and was made liable to *future* moneys to be advanced.

The plaintiff's counsel, in reply, urged the inconvenience that must arise to trade from such general assignments of *all* a trader's effects in trade, unvalued and unappraised, in order to secure eventual debts, not existing at the time of executing the deed, and insisted that 1 Jac. I. c. 15, s. 2, expressly makes such conveyance acts of bankruptcy.

Here is no consideration of any money paid, or any debt really contracted, nor was any money afterwards advanced upon this deed. And for what was then owing to Mr. De Mattos, he had at that time a warrant of attorney to confess and enter up a judgment. Though it was afterwards destroyed, when he actually took possession under the deed now in question. And indeed if there had been a real debt subsisting, yet this had been an undue preference within the act. But as it was not so, nor anything done in consequence of this deed, it is merely fraudulent; none of the cases, *on either side, are in point. In *Unwin's Case*, there [*514 was a consideration, for an indemnity is a good consideration. And the case goes no further than to prove "that it is so."

But of movable chattels possession ought to be instantly

and actually given, and of immovable or remote chattels possession of every title to it and everything that can in the nature of the thing be done towards it. Whereas here was no attempt to take possession till the man was determinately going to become bankrupt, by a plain, indisputable act, on the 11th of November. Therefore this general provision for *one* particular creditor implied a secret trust of conciliating favor, which is a badge of fraud and collusion. And no argument can be drawn from mortgages of land (where it is the usual method for the mortgagor to remain in possession) to the keeping possession of goods assigned over. And if this had been an honest transaction, there would have been an appraisement and a schedule, and it would not have been thus left at large.

As to its not being to be afterwards purged. That does not alter the case at all, for no act of bankruptcy can be purged but by obtaining a certificate.

As to 21 Jac. I. c. 19, s. 11, continuing in possession was always looked upon as an evidence of fraud. The law is only declarative of what was the law before. The cases cited of *Ward*, *Ashey*, and *Mackrell*, prove nothing against us at all.

Lord MANSFIELD, C. J., said the Court would consider it, both upon the particular circumstances and upon the general principles, and it would be proper to consider the subject with regard to traders in general under 13 Eliz. c. 7, as well as to traders becoming bankrupts. And they would give notice when they were ready to declare their opinion.

Lord MANSFIELD, C. J., now delivered the opinion of the Court. The question is, whether upon all the above circumstances, Slader became a bankrupt on the 23d of October, or on the 13th of November, and the *postea* is to be endorsed as to the time of Slader's becoming bankrupt according to the opinion of the Court.

All the acts concerning bankrupts are to be taken together, as making one system of law. They are all to be construed favorably *for creditors and to suppress fraud. Whether a transaction be fair or fraudulent, [*515 is often a question of law. It is the judgment of law upon facts and intents.

The indemnity, which is the consideration of the deed in question, I allow to be a good, valuable, and true consideration, and I allow this deed to be a valid transaction, *as between the parties.* But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person. For instance, A. buys an estate from B. and forgots to register his purchase deeds. If C., with express or implied notice of this, buys the estate for a full price, and gets his deeds registered, this is fraudulent, because he assists B. to injure A. (see *Le Neve* v. *Le Neve*, 2 Lead. Cas. Eq. 23), or if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man, knowing that an executor is wasting and turning the testator's estate into money, the more easily to run away with it, buys from the executor *with that view*, though for a full price, it is fraudulent.

Marriage, brocage bonds, secret agreements different from the open treaty of marriage, and many other cases that might be put, though for true and valuable consideration as between the parties, are fraudulent by reason of deceit or injury consequentially brought upon third persons. *Twyne's Case* (3 Co. 80 b. 81 a.), even in a criminal prosecution, was of this sort. The consideration of the sale was more than sufficient and undoubtedly true.

Whether this deed be of that sort, will depend upon the whole purpose of it. As to *all* (except the leasehold), it could not have the effect of a conveyance, if De Mattos permitted Slader to continue in possession.

By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact, he was permitted to continue in possession, and act as owner. They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt-law that he could neither have sold or mortgaged, and in case of a misfortune, that his effects might be equally distributed. They were imposed upon by false appearances. To deceive the more under a fictitious show of credit, the bills drawn upon De Mattos were made payable to and endorsed by his own agents. Davis, one of his agents, expressly told the creditors, "That Slader would do very well; that two good men, upon *516] *security of the leasehold, would pay his drafts," but concealed that he had mortgaged anything else.

A false show by collusion to deceive third persons is generally connected with a secret confidence. So here, the trust put in Slader manifestly was, that when he could stand no longer, he should give notice to De Mattos or his agents to deliver possession, and then commit a positive act of bankruptcy. From the nature of the fund, possession never could be meant to be taken, but as the immediate forerunner of a commission in bankruptcy. He could not stand a moment after his whole trade, fixed and fluctuating stock, and credits, were taken from him. To watch Slader, De Mattos put Sills about him as his book-keeper. Agreeably to the confidence put in him, when Slader saw he could stand no longer, he acquainted Sills and Davis, the agents of De Mattos, with it, and by their advice first gave an order to deliver possession, and then to be denied. This shows to a demonstration, that they were all aware that possession was necessary and intended from the first, by a formal delivery of possession, when he was determined to break, to evade the clause (s. 11) in 21 Jac. I. c. 19, for the measure was instantly taken without any new advice.

I will consider this transaction more particularly in two

great views. 1. In respect to the end. 2. In respect of the means.

As to the first.—The end proposed by the secret trust was, that in case Slader should become bankrupt, his whole estate should first be vested in De Mattos, for payment of what was justly due to him. The *preference* aimed at was *fraudulent and unlawful.* Suppose *after* the consultation on the 11th of November this deed had been prepared and executed, accompanied with such formal delivery of possession, we are of opinion that it would have been fraudulent and an act of bankruptcy.

Such preference is a fraud upon the whole bankrupt law; and would defeat the two main objects it has in view; to wit, the *management* of the bankrupt's estate, and an *equal distribution* among his creditors.

The law gives the management to persons chosen by the creditors, under the direction of commissioners and the control of the great seal. But if a bankrupt may convey all to a favorite and friendly creditor, just before he orders himself to be denied, the whole power of selling his effects, calling in his debts, and settling *his accounts must [*517 be in such single and particular creditor,—he must have a right even to the custody of the books and papers.

An equal distribution among creditors, who equally gave a general personal credit to the bankrupt, is anxiously provided for, ever since the act of 21 Jac. I. c. 19. (See ss. 9, 10, 11.) It was thought mischievous to suffer priorities to be gained by secret liens, as by judgment, statute, recognisance, bond, specialties, attachments by custom in London or elsewhere, assignment of debt to the king's debtor. Unless they took out execution, these all equally gave a personal credit to the bankrupt, and trusted him to manage his effects.

Conveyances of *personal chattels* by way of security, where possession was left with the bankrupt, fell within

the same reason. *Land* is held without perception of the profits by the *title*. But there is no hold of goods, which the mortgagor is allowed to possess and dispose of. Therefore by a clause in the same Act (s 11) any priority by such secret lien is also taken away; and, as such mortgagee equally gives a general credit, he is levelled with the other creditors. But if a bankrupt may, just before he orders himself to be denied, convey *all* to pay the debts of favorites, the worst and most dangerous priority would prevail, depending merely upon the unjust or corrupt partiality of the bankrupt.

A case lately happened (*Ex parte Foord and others, re Gayner*, a bankrupt, 31st July, 1755), where a conveyance calculated to postpone one creditor to the rest, was held an act of bankruptcy. It came on before Lord Hardwicke, the late Lord Chancellor, at Lincoln's Inn Hall. One Gayner, a trader, had made an assignment on the 7th of June, 1755, of all his effects, goods, stock in trade, and book debts (except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash, then by him) to trustees, in trust to pay themselves and all the rest of his creditors *except* Foord, the petitioner. But the trustees declining to act under this assignment, he executed another on the 9th of June, 1755, wherein the trustees were to pay themselves and all the creditors mentioned in a schedule (in which schedule the petitioner was not included), and in this second assignment a large parcel of ginger as well as the things above mentioned were excepted. The petitioner insisted that he alone could choose assignees, since the other creditors claimed under the assignment. Lord Hardwicke, C., was clear, that the executing the deed of the 9th of June, was an act of bankruptcy. *And all that had heard his determination were of the same opinion. And everybody concerned acquiesced in it, whereupon the creditors mentioned in the schedule consented to waive all

*518]

benefit or advantage under that assignment, and all proved their debts, in order to receive an equal dividend with the petitioner, and the creditors proceeded to a choice of new assignees.

The framers of this deed executed by Gayner, took for granted that if it had been a conveyance of all his effects, it must be bad, and therefore *colorably excepted parts*. But the contrivance did not prevail, even so far as to bear an argument, or to be thought by anybody worthy of a trial.

There is a great difference between the conveyance of *all*, and of a *part*. A conveyance for part may be public, fair, and honest. As a trader may sell, so he may openly transfer many kinds of property by way of security. But a conveyance of *all must either be fraudulently kept secret or produce an immediate absolute bankruptcy*.

It has been argued, that after a resolution taken by a trader to commit an act of bankruptcy, the trader so resolving to become a bankrupt might lawfully prefer a just creditor, by conveying part of his effects to satisfy that creditor's debt. It is not necessary to determine that question in this cause, for here the conveyance is of *all*, and therefore I will say that no such proposition is yet established, much less to the extent whereto it has been urged. (See *Harman* v. *Fisher*, *post*, p. 525.) The cases mention were *Cock* v. *Goodfellow*, 10 Mod. 489; *Jacob* v. *Shepherd*, 2 P. Wms. 430, 431, cited; *Small* v. *Oudley*, Id. 427, and *Unwin* v. *Oliver*.

In the case of *Cock* v. *Goodfellow*, the fact did not give rise to any question. An immediate prospect of a certain bankruptcy was not the motive to what Mrs. Cock did. She was solvent at the time, and that very day lent 40,000*l*. Besides, her children, to whom she was guardian and trustee, were not upon the foot of the common creditors. The Court of Chancery would have decreed her to place their fortune out upon Government or real securities.

As to the case of *Jacob* v. *Shepherd*, I have looked into the Register's book upon this occasion, and I have a note of it, as stated by Lord Hardwicke in the cause of *Bourne* v. *Dodson*, 1 Atk. 154, and it was this Mr. Thomas Leigh, the bankrupt, who was a Turkey merchant, by deed dated the
*519] 8th of June, 1709, *sold and conveyed *particular goods* in the hands of his factors to Mr. William Snelling, upon trust to apply the money arising thereby in satisfaction, in the first place, of a debt of 1500*l.* due to Snelling himself, and then of a debt of 1551*l.* and interest due to George Morley, and out of the residue to pay such of the bankrupt's creditors as he, with Morley's consent, should direct. And if there should be any surplus after the said Snelling's and Morley's debts were paid, and sums for which they were bail, or security for the said bankrupt, the same was to be paid to the said bankrupt, his executors, administrators, and assigns. Afterwards, by deed dated 16th December, 1709, and by deed dated 20th January, 1709, other debts were appointed to be paid, agreeably to the power reserved by the former deed. On the 11th of February, 1709, Thomas Leigh failed, and committed an acknowledged act of bankruptcy, and a commission was taken out, and his estate and effects assigned. The trusts of the deeds of the 8th of June, 1709, were immediately and openly carried into execution, so that no question ever did or could arise upon the clause of 21 Jac. I. c. 19, s. 11. But the assignees brought a bill against all the parties claiming under the deed of the 8th of June, 1709, and the subsequent deeds, to have them set aside, and to have an account of the money which they had received, upon two grounds, 1st. That the deeds were obtained by fraud and imposition on Leigh the bankrupt. 2dly. That they were an imposition upon the other creditors. The cause came on to be heard at the Rolls, upon the 16th of June, 1725. Sir Joseph Jekyll took time to consider of it, and ordered all

the pleadings and proofs to be left with him; and upon the 17th of December, Sir Joseph gave judgment. He thought these deeds could not be looked upon or set aside upon the former ground, viz., as a fraud upon the bankrupt; but he declared the said deeds to be fraudulent, and an imposition upon the creditors of the bankrupt, and decreed them to be set aside with costs.

In making this decree he went upon right principles, but did not attend to its being a bankruptcy, if it was really fraudulent, and that a Court of Equity could not decree it to be fraudulent unless it was fraudulent at law, in which case it would constitute an act of bankruptcy of itself.

On the 6th of August, 1726, Lord King, C., upon appeal, directed an issue at law to try "whether, by the execution of the deed of the 8th of June, 1709, Thomas Leigh became a bankrupt, *or at any other and what time." The jury found he became a bankrupt on the 11th of February, 1709. Upon the equity reserved Lord King established the deeds, held the plaintiffs to be only entitled to the surplus after the trusts in the deeds were performed, and decreed the proper accounts against the defendants, of the money they had received, in order to find out that surplus. Many very obvious observations occur upon this case. Sir Joseph Jekyll was so struck with the objections of fraud from preference, that he set aside the deeds, with costs. Lord King reversed his decree, because no deed made by a trader can be fraudulent in Chancery, which is not fraudulent in a Court of Law and an act of bankruptcy. Therefore he directed an issue. [*520

There might be many reasons why it was not found fraudulent upon the trial. The deed was executed the 8th of June, of specific goods, and was immediately carried into execution. The act of bankruptcy was not till the 11th of February following, and I see no suggestion that in June Leigh thought of committing an act of bankruptcy. Besides,

one ground upon which the assignee brought his bill was fraud and imposition upon the bankrupt himself in obtaining the deeds; therefore, most probably, he was frightened into giving this security by threats of legal diligence against him.

The case of *Small* v. *Oudley* was determined very soon after, viz. upon the 4th of December, 1727; the best report of it is in 2 P. Wms. 427, but is nowhere fully stated. I have a copy of the decree from the registrar's book, as follows:—On the 21st of September, 1720, Small, to accommodate Daniel and Joseph Nercott Brothers, goldsmiths, and partners, upon a pressing occasion, transferred to them 500*l.* S. S. stock, upon their engaging to transfer to him the like sum in the S. S. stock in a week or ten days at furthest, and giving a note for that purpose. They sold the S. S. stock for 1800*l.* On the 29th of September, 1720, they made the assignment of their share in a wine partnership with Oudley, carried on solely in his name (in which they had two-thirds and Oudley one-third), as a security for transferring 500*l.* S. S. stock and reciting the truth of the case. They at the same time assigned two leasehold estates to Small for the same purpose. Their interest in the wine trade was but 300*l.*, and Oudley had a right to carry on the trade till Christmas, 1723. The bill, which was against Oudley and against the assignee, under a commission issued against the Nercotts, was not brought by Small till after *521] *that time, but an issue had been directed in another cause to try "whether the said Nercotts were bankrupts at the time they executed an assignment to Small of a lease of certain houses, on the said 29th of September, 1720." The above facts are admitted by the answers, no fraud is suggested, and they do not mention any desire to have the time of the bankruptcy tried over again. Sir Joseph Jekyll, in 2 P. Wms., pp. 429–431, gives strong reasons against the decree he thought he was bound to make, because Lord King had just established that a deed

by a bankrupt could not be set aside as fraudulent in Chancery. This case too was very particular. The fraud was upon Small, and not upon the creditors. His stock was to be replaced, in a week or ten days at furthest, by the original agreement. 1800*l.* of Small's money went to the creditors, and this security amounted but to about 300*l.* So that the whole transaction was beneficial to the bankrupt's creditors. The S. S. stock was got from Small, with a view to save the Nercotts from breaking. The security was given at the very time they were obliged to replace the 500*l.* S. S. stock, and there was no pretence that Small afterwards permitted them to continue one moment in possession.

The case of *Unwin* v. *Oliver*, T. 12 Geo. II., is not entered in the Registrar's book, but I have seen a fuller note of it than was cited at the bar. It was an assignment of several debts mentioned in a schedule, to indemnify his securities in a recognisance. Martin Unwin had been appointed receiver of a lunatic's estate, and the plaintiffs became his securities, by recognisance "that he should account for what he should receive under the orders of the Court. Two years after Martin Unwin, by deed reciting "that 604*l.* was due from him to the lunatic's estate," assigned to the plaintiffs several debts, mentioned in a schedule annexed to the assignment, to discharge the 604*l.*, and to indemnify them against this security which they had entered into for him. A month after this assignment, Martin Unwin became a bankrupt. The act of bankruptcy was admitted to be a month after the assignment. No question was made upon the clause 21 Jac. I. c. 19; and there was no suggestion that the immediate prospect of a certain bankruptcy was the cause of the assignment. Lord Hardwicke held that it could not be set aside as fraudulent in Chancery unless it was fraudulent in a Court of Law and an act of bankruptcy, and he held that indemnity was a good consideration, of which there can be no doubt.

*522] *But *secondly*, to consider this transaction in respect of the means. Suppose a bankrupt could, after a resolution to commit an act of bankruptcy, prefer *one* of his creditors, by an assignment of *all* (which we think he cannot), yet in this case, the *means* to attain such preference were fraudulent. A false credit is industriously given the bankrupt upon a secret trust to deliver possession so as to avoid the clause in the 21 Jac. I. c. 19.

The second argument of fraud in *Twyne's Case*, 3 Co. 81, is "the donor continued in possession, and used them as his own; and by means thereof traded with others, and deceived and defrauded them."

But three cases have been cited to show, that upon a mortgage of goods by a trader, the leaving possession does not infer fraud, though it may upon an absolute sale. These are the cases of *Meggott* v. *Mills*, 1 Ld. Raym. 286; *Bucknal* v. *Roiston*, Prec. Ch. 285; *Ryall* v. *Rowles*, 1 Ves. 348; 1 Atk. 165, in Chancery, 27th of January, 1749. The first is a direct authority to the contrary, for Lord Chief Justice Holt says, "If these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors." But he very justly distinguished that case, and seems to have considered the landlord (who lent his tenant money to buy the goods to furnish his house) as the original owner of the goods.

Bucknal v. *Roiston* was not a case of bankruptcy, but upon the course of administration of assets where secret liens give priority, and it is expressly distinguished by my Lord Chancellor from the case of a bankrupt. Besides, the possession was there a trust under an authority to negotiate and sell, and could not be meant to give any false credit. In the case of *Ryall* v. *Rowles*, the act of bankruptcy upon which the commission proceeded was long after the mortgages; the assignees did not wish to carry it further back,

and therefore never objected, that the bankrupt's keeping possession made the mortgages fraudulent; but if they had, in that case the presumption of fraud would have been disproved. The same fund was mortgaged six times over. They all trusted to their conveyances (like mortgages of land) as a title without possession, though a bankruptcy should happen. They mistook the law, but did not evade it.

Whereas here the parties manifestly were aware that possession was necessary. The solemn determination in the case of *Ryall* v. **Rowles* had made that point notorious. [*523 Possession was here left, upon a secret trust to deliver it so as to avoid the clause in 21 Jac. I. c. 19, which in fact was accordingly done.

Two general *objections* from inconvenience have been urged which deserve an answer. 1st. That it will hurt credit, if traders may not raise money by mortgaging their goods without quitting possession.

The answer to this is, the policy of the bankrupt law introduced by 21 Jac. I. c. 19, and followed ever since, is to level all creditors who have not actually recovered satisfaction, or got hold of a pledge which the bankrupt could not defeat. A trader is trusted upon his character, and visible commerce. That credit enables him to acquire wealth. If by secret liens a few might swallow up all, it would greatly damp that credit.

If he mortgages and parts with possession of goods, the world has notice; but to give priority from mortgaging goods, of which the trader is allowed to act and appear as the owner, would be enabling him to impose upon mankind and draw them in by false appearances. No injustice is done to such mortgagee, because he really trusts only to the general credit of the trader. The conveyance is not a fraud against him, but against his other creditors. Mortgages of land are checked by the title. But where possession is not

delivered, goods may be mortgaged a hundred times over, and open a plentiful source of deceit.

The other general *objection* from inconvenience was, that a fraudulent deed is an act of bankruptcy upon the face of it, and can never be purged. I am sorry the phrase has crept into use, because it confounds the idea which ought to be annexed to it. Every equivocal fact may be explained by circumstances. If a trader orders himself to be denied, circumstances may show that he did not do it to avoid payment, but on account of sickness or particular business. So if he leaves his house, circumstances may show it was not to abscond.

Of all the equivocal facts which can amount to acts of bankruptcy, deeds are most open to be explained by a variety of circumstances. Hardly any deed is fraudulent upon the mere face of it. It is a good sale if the consideration be true; fraudulent, if false; good, if possession immediately follows; bad, if it do not; nay, the not taking possession being only evidence of fraud may be explained.

The use to which a deed is applied, shows *quo animo* it
*524] was *made. Leaving possession till after the act of bankruptcy, in the case of *Ryall* v. *Rowles*, showed there was no fraud, and that they trusted to the conveyance.

In this case, consultation and delivery of possession upon the 11th of November proves the secret trust, in confidence of which the false credit was given the bankrupt before. It shows that evading the clause in 21 Jac. I. c. 19, was in the view and contemplation of the parties. There was no other reason for delivering possession on the 11th of November, because no default had happened, which gave De Mattos more pretence to enter then than before.

Under all the circumstances, we are of opinion that this conveyance of the bankrupt's *whole* substance to De Mattos, though by way of security and for valuable consideration,

is fraudulent and an act of bankruptcy. The determination here is upon the assignment of *all.*

PER CUR.: The *postea* must be endorsed, "That Richard Slader became bankrupt on the 23d of October."

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*HARMAN AND OTHERS, ASSIGNEES OF FORDYCE, *v.* FISHAR. [*525

Trin. Term, 14*th Geo. III., June* 13, *April* 29.

[REPORTED COWP. 117.]

BANKRUPTCY—FRAUDULENT PREFERENCE.]—*A trader, in contemplation of absconding, encloses certain bills to F., a particular creditor, in discharge of his debt; saying he has the honor to show him that preference which he conceives is his due. This is done without the privity of F., and followed by an act of bankruptcy before the notes could possibly be delivered. Per Cur.: The essential motive being to give a preference, and the act itself incomplete, is clearly void though in favor of a very meritorious creditor.*

Legal preference is where property is duly and regularly transferred, and the transfer itself is complete before an act of bankruptcy. As where payment is made by a trader in the ordinary course of dealing, or enforced by legal process, though but the evening before he becomes bankrupt.

THIS was an action of trover, brought by the assignees of Fordyce against the defendant, to recover two promissory

notes. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case.

That the defendant, Fishar, was a creditor of the partnership of Fordyce & Co., and on various occasions had done them many acts of friendship, and being already a creditor for 1300*l.*, upon the 6th of June, 1772, paid into the shop of Fordyce & Co., as bankers, the further sum of 7000*l.*, and had it written in his book according to the usual course; which sum he had borrowed for the purpose of accommodating the shop during the holidays; and at the *time the money was paid in, he ordered the person who paid it to tell them he should not draw the money out before the Friday following, which they were told accordingly.

*526]

On the 9th of June, Fordyce sat up all night settling his books and affairs *in contemplation of absconding;* and being possessed in his own separate right of the two notes described in the declaration, about five o'clock in the morning he enclosed them in a letter to Mr. Fishar, as follows:—To Mr. Fishar, "Mr. Fordyce conceiving that the money lodged by Mr. Fishar with his house on Saturday last, was a sum about which perhaps even some pains had been taken to place it there, he has the honor *to show him that preference* which he conceives is certainly his due."

5,500*l.* Collins & Co., 3d July.
11,702*l.* 18*s.* 4*d.*, T. W. Jolly, 20th June.

That Fordyce delivered the letter and notes to Mr. Harrison, his clerk, with directions to carry them to Mr. Fishar's office and give them to him. About six o'clock the same morning Fordyce absconded and went to France. At half an hour after eleven o'clock the same morning a commission of bankruptcy duly issue dagainst him. Harrison, about ten o'clock the same day, called at the defendant's office: not finding him at home, he returned again about twelve; but it being holiday time, the office was shut up. That on Thursday the 11th, Harrison delivered the letter with the notes to Mr.

James, one of the partners of Fordyce, who sent for the defendant, when Mr. James, in the presence of the defendant and Mr. Bellamy, opened the said letter and delivered it with the notes to the defendant, who having read the same to the company present, took them away with him; that they remain in his possession, and that he refused to deliver them up. That Fordyce was indebted to the partnership in a larger sum than the amount of the notes in question.

The question in the opinion of the Court upon this state of the case was, "Whether the plaintiffs are entitled to recover in this action?"

This case was twice argued; first, in Easter Term by Mr. *Buller* for the plaintiffs, and Mr. *Allen* for the defendant; and now in this Term by Mr. *Lee* for the plaintiffs, and Mr. *Dunning* for the defendant.

On the part of the plaintiffs it was insisted, that under the circumstances of this case it was not competent to Mr. Fordyce to give this preference to the defendant. For however fair the transaction *might be as between the parties, yet a trader, in contemplation of an act of bankruptcy, cannot give a preference to any particular person, because it is a fraud upon the rest of the creditors, and against the general spirit of the bankrupt laws. This principle is fully settled in the case of *Worseley* v. *De Mattos*, 1 Burr. 474, where the Court held that an assignment of all the bankrupt's effects, though a fair transaction between the parties, and for a good and valuable consideration, was nevertheless fraudulent in respect of the other creditors; the object aimed at, being to give a preference which was unlawful. [*527

The case of *Small* v. *Oudley*, cited in the case just mentioned, may be thought to be an authority the other way; but there no fraud was meant against the creditors: on the contrary, the Court said the whole transaction was benefi-

cial to them, and the only person defrauded was Small. Besides, the only point decided in that case was, that a deed cannot be fraudulent in equity which would not amount to an act of bankruptcy at law.

But the present case is clearly distinguishable from *Small* v. *Oudley*. For here the defendant knew the shop to be in a desponding state when he advanced the money; the repayment was voluntary and without the knowledge of the defendant, in the very moment of absolute bankruptcy, and with a professed view of giving an undue preference. An additional circumstance is, that the notes were not delivered till after a clear act of bankruptcy was actually committed. For want therefore of the defendant's assent, the transaction was not complete, which alone is sufficient to render the payment void. There are two cases in which this objection made a principal ground in the determination the Court gave, *Hague* v. *Rolleston*, Hil. 8 Geo. III. (since reported, 4 Burr. 2174), and *Alderson* v. *Temple* (since reported likewise, 4 Id. 2238, Pasch. 8 Geo. III.). But the reasoning and principles laid down in the latter case upon the question of preference are decisive of the present. Mr. *Buller* stated the opinion of the Court at large, *quod vide*, 4 Burr. 2829.

This doctrine is confirmed and strengthened by a case of very late date. *Linton* v. *Bartlett*, Hil. 10 Geo. III. C. B. M. S. The case was thus. The plaintiff's brother carried on his trade in two separate shops, an upper and an under one; being indebted to his brother, upon the 3d of August he assigned over to him such of his goods as were in his upper shop, being one-third part only of his stock in trade; and
*528] this he did for the purpose of giving his *brother a preference. The question was, whether this assignment was an act of bankruptcy? *Per Curiam:* "This is a very plain case; the deed and the transaction may have been very fair as between the parties; but in all these cases the

object to be attended to is, *quo animo* the transaction is done." Now the single question is, whether a man shall be allowed to commit a fraud upon the whole system of the laws concerning bankrupts, by giving a preference to one creditor in prejudice to the rest? Clearly he shall not; and here it being by deed, it is itself an act of bankruptcy. The great criterion is, whether the act be done in contemplation of becoming a bankrupt?

This is a decision expressly upon the point of preference in contemplation of bankruptcy; and no inconvenience can arise from fixing that as the moment when the curtain should drop. Here it is expressly found that the notes were sent in contemplation of committing an act of bankruptcy, and professedly with a view to give the defendant a preference. The act therefore is void, and the plaintiffs are well entitled to recover.

Mr. *Dunning* and Mr. *Allen* for the defendant.

Two questions arise in this case: First. Whether it is competent in law for a trader, in contemplation of an act of bankruptcy, to give a preference under any circumstances?

Secondly. If there be any case in which that preference may be given, whether this is one of those cases?

With respect to the first, it has been settled that a trader at the eve of bankruptcy may do everything that he might have done at any period antecedent to that time. But it has never been established that a trader shall at no time give a preference to a *bonâ fide* creditor. On the contrary, the case of *Small* v. *Oudley*, 2 P. Wms. 427, is an authority expressly the other way. The circumstances were very like the present. On the 21st of September, 1720, Small, to accommodate his friends D. and J. Nercott, transferred 500*l.* South Sea stock to them upon condition it should be returned in ten days. Upon the 29th they made an assignment of *part* of their effects to Small, as a security for transferring 500*l.* South Sea stock, reciting the truth of the case, and the next

day absconded. Sir Joseph Jekyll, M. R., was clearly of opinion that this assignment was good. "That there may be just reason for a sinking creditor to give a preference to one creditor before another; to one that had been a faithful friend, and for a just debt lent to him in extremity; when *529] the rest of his debts might be due from *him as a dealer in trade, wherein his creditors might have been gainers; whereas the other may not only be a just debt, but all that such creditor has in the world to subsist upon. In this case, and so circumstanced, the trader honestly may, nay ought to give a preference." He says further: "The time of the assignment is not material, provided it be before the bankruptcy; but the justness of the debt is very material, and the circumstance of the non-privity of the creditor to the assignment was very much in his favor."

It is plain therefore from this case, that antecedent to an act of bankruptcy actually committed, there may exist a case in which by law it is permitted to a trader to give a preference. The observation made by Lord Mansfield upon this case of *Small* v. *Oudley*, in the decision of *Worseley* v. *De Mattos*, tends to explain that the ground of the opinion was right. For, his Lordship said, "This case was very particular. The fraud was upon Small, and not upon the creditors. His stock was to be replaced in a week or ten days at furthest, 1800*l.* of Small's money went to the creditors, and this security amounted but to 300*l.* So that the whole transaction was beneficial to the creditors." Now every syllable and every circumstance upon which Sir Joseph Jekyll founded his opinion in that case, is not only applicable but actually to be found in the present.

The case of *Linton* v. *Bartlett* is inapplicable to this case; for the ground of that decision was that the assignment was an act of bankruptcy itself, and, being of *all* the goods in that shop, was within the same mischief as if it had been an assignment of the goods in both. It has been insisted that

no inconvenience can arise if the line was to be drawn at the beginning of an insolvency. This is not so; for then all the creditors subsequent to the time when the Court determines that the line of distribution should be drawn, must be involved in the wreck. The contemplation of becoming bankrupt, is equally difficult to ascertain; but neither the point of insolvency nor the resolution to become bankrupt, is the period of bankruptcy; nor can the contemplation of bankruptcy be the true line to be drawn; for each is so indefinite and uncertain that the rule in either case would tend to endless litigation. It were to be wished, therefore, that the Court would settle the rule of preference according to the honesty or dishonesty of the transaction.

In *Alderson* v. *Temple*, Mr. Justice Yates said, there is no *doubt but that an act of this sort may be done on the eve of a bankruptcy under fair and honest circumstances; and that in *Small* v. *Oudley* the justice of the case required it. With respect to the act heing incomplete for want of the defendant's assent, in *Atkins* v. *Barwick*, 1 Stra. 165, the assent was subsequent to the act of bankruptcy, and the only question was, whether a subsequent dissent was necessary to devest the property. The Court held, that delivery vests property, unless devested by a subsequent dissent; and if founded upon good consideration is not countermandable. Here the delivery was unquestionably upon good consideration; and therefore as to the point of non-privity and assent, the authority is decisive. [*530

The second question is, whether this is a case in which a preference may be given. And this, we have seen, depends upon the honesty of the transaction.

Now the purpose for which Mr. Fishar advanced this money was meritorious and friendly in the highest degree; the use to which Mr. Fordyce applied it, namely, to lessen the partnership debt, was just and honest; but his distresses were such as defeated the object, and therefore, what could

be more fair, what more reasonable, what more distant from fraud than to return it? When returned, the creditors were precisely in the same situation as they would have been in, if it had never been advanced; and no doubt in itself the loan of the money was as friendly and in its consequences might have been as beneficial to them as it was intended to be to Mr. Fordyce.

Lord MANSFIELD, C. J., after stating the case, delivered his opinion as follows:—The defendant, Mr. Fishar, is certainly a very meritorious creditor of Mr. Fordyce; and in this last transaction did him a very great act of friendship. I have therefore been very sorry, as far as one can be said to be sorry in the administration of justice, that I could not see in this case any circumstance which could give rise to a question; for they are so very particular as not to lay the least foundation for one.

The question is, "whether the plaintiffs are entitled to recover in this action?" which depends on this: whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I say duly and regularly, because that excludes fraud.

There has been much argument upon a general question,
*531] *"whether a trader, in contemplation of an act of bankruptcy, can give a preference to a *bonâ fide* creditor? Perhaps the stating it as a general question involves a great impropriety; because no trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. He cannot assign his effects to all his *other* creditors in exclusion of *one* whom he thinks dishonest or unjust; nor even to be equally divided amongst all his creditors, because he cannot take his estate out of that management which the laws put it into. If any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed. If without deed, it is void in respect of those whom it prejudices.

But all questions of preference turn upon the action being complete before an act of bankruptcy committed; for then the property is transferred; otherwise, an act of bankruptcy intervening vests the property in the hands and disposal of the law.

In the case of *Worseley* v. *De Mattos*, whatever the Court might think of the case of *Small* v. *Oudley*, there was no intention to lay down that the determination of that case was wrong at that time. But no case ever came before us where we were warranted to say, that no case can exist of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the Act of Parliament and in a course of dealing and trade, it would be good; or suppose legal diligence used by a creditor, and an execution or *ca. sa.* is in the house, and under terror of that he makes an assignment and delivery of his effects, it would be valid, the object not being to give a preference but to deliver himself. In *Cock* v. *Goodfellow* the act done was fair; it was done several months previously to the act of bankruptcy, and was no more than what the Court of Chancery would have compelled the party to do. Where an act is done, and the single motive is not to give an unjust preference, the creditor will have a preference. In *Small* v. *Oudley*, upon a stipulation to replace so much stock, the day agreed upon was past; the estate had had the benefit of the solemn agreement, and the bankrupts gave a security for part of the debt only; a distinction was likewise taken because the security was upon their effects in a separate trade. That was a very favorable case, but I think it extremely shaken by the case of *Linton* v. *Bartlett* in the Common Pleas, which goes further than any other; for that case has determined that though the act be complete, yet if the mere and sole motive of the trader *were to give a preference, it shall be void; and if by deed, is in itself an act of bankruptcy. In that case the money was advanced [*532

by the brother from motives of friendship and without interest. Possession of the goods was delivered instantly upon the assignment being made; and a clear act of ownership exercised by the brother, by his exposing them to sale, and carrying on the trade; nor had he the least knowledge or suspicion of the insolvency. But the material circumstances which made that a fraudulent act were these: the brother did not arrest, or threaten or even call upon the bankrupt for money; but the bankrupt of his own voluntary act gave him the assignment, with what intent? Why to give him a preference. The goods assigned were not more than one-third of his effects. Upon what then was the opinion of the Court founded? Not upon one-third being the same as an assignment of all his effects; but upon the trader's giving a preference: and upon his sole motive being to do so. If he can give it to one he can give it to another; which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper. The case goes further than any former decision. It had before been held, in *Worseley* v. *De Mattos*, that an assignment of *all* was a clear act of bankruptcy, and an exception of part, if colorable or fraudulent, will not take it out of the general rule.

But the present case affords no circumstances that can give rise to a question. A trader at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt, pursuant to no contract—in the performance of no obligation—in no course of dealing, without the privity of the creditor or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects shall be apportioned after his bankruptcy. He delivers the letter to his own servant, and might have countermanded it; here it falls in with the case of *Temple* v. *Alderson* and

Hague v. *Rolleston.* The act was not complete; and therefore the act of the bankruptcy revoked it. Suppose the drawers had been insolvent: was Mr. Fishar bound to take the notes in satisfaction of his debt? Besides, the amount of the notes exceeded the debt by several hundred pounds. But what is the nature of the transaction upon the face of the letter? It is in terms a declaration that he means to give a preference. This the law does not allow; and if it had *been by deed it would itself have been an act of bankruptcy. But it is much stronger where the trader mentions that to be his sole motive; and where the act cannot be completed till after an act of bankruptcy actually committed. [*533

The three other judges were of the same opinion.

Lord Mansfield, C. J., added, that if a preference were only consequential, the case might be different; as if a payment were made or an act done in pursuance of a prior agreement. His lordship further observed that with respect to the case of *Atkins* v. *Barwick*, 1 Stra. 165, the judgment seemed to be right, but the reasons wrong. The true ground was, that the trader very honestly refused to accept the goods and returned them.

In the well-known cases of Worseley *v.* De Mattos and Harman *v.* Fishar (commonly called Fordyce's Case), the doctrine relative to fraudulent preferences, and also the law relative to fraudulent conveyances and transfers of property which, on the part of a trader, constitute acts of bankruptcy, were very fully discussed, and the policy of the bankrupt laws upon these important subjects, and the rules by which it is carried out, were very clearly enunciated by Lord Mansfield.

The policy of the bankrupt laws has in view two main objects, viz., the management of the bankrupt's estate, and an equal division thereof among his creditors. It will be found upon the examination

of the authorities, *first*, that the Courts have continually endeavored to render void all acts by which debtors attempt to give a preference to any creditors or class of creditors, which, being in fraud of the bankruptcy laws, is termed a fraudulent preference; and, *secondly*, that the legislature having the same object in view, has enacted that fraudulent conveyances, gifts, or transfers by a debtor of his property, with the intent to defeat or delay his creditors, shall be deemed acts of bankruptcy.

It is proposed to consider in this note, *first*, what constitutes a fraudulent preference; and, *secondly*, when a conveyance or transfer by a debtor of his property is fraudulent and an act of bankruptcy.

1. *What constitutes a fraudulent preference.*—It may not be unimportant to observe how the law as to fraudulent preference has arisen. The statutes relating to bankruptcy contained no provision invalidating payments made prior *to the act of bankruptcy; but the Courts, from the time of Lord Mansfield, held that if a trader, in contemplation of bankruptcy, with a view to evade the bankrupt law, preferred a particular creditor, to the detriment of the rest, such a preference was a fraud upon the law, and the transaction could not stand: per Cockburn, C. J., 6 B. & S. 319 (118 E. C. L. R.); and see Crosby *v.* Crouch, 2 Campb. 166; 11 East 256; Alderson *v.* Temple, 4 Burr. 2235.

*534]

Where a person, with a view to bankruptcy, voluntarily pays, delivers, or transfers goods, money, or other property to one of his creditors, with the intention of giving him a preference over the others, such payment, delivery, or transfer upon the bankruptcy (Westbury *v.* Clapp, 12 W. R. (V.-C. W.) 511) of the person making such preference, is void as against the other creditors, and his assignees may by an action at law recover the money, goods, or property from the creditor to whom such preference has been given.

To constitute however a fraudulent preference in such cases two things must concur: first, such payment, delivery, or transfer, must be made in contemplation of bankruptcy; secondly, it must be made voluntarily.

With regard to what will be considered a payment made in contemplation of bankruptcy, this is a matter of fact for a jury to determine (Flook *v.* Jones, 12 Moor. 96; Abbott *v.* Burbage, 2 Scott

656 (30 E. C. L. R.); Pannell *v.* Heading, 2 F. & F. 744; Bills *v.* Smith, 6 B. & S. 314 (118 E. C. L. R.)), and a Court of Equity may if it think fit grant an issue: Davison *v.* Robinson, 3 Jur. N. S. 791. The onus lies on the party endeavoring to set aside a gift, payment, or transfer as fraudulent to show that it was made in contemplation of bankruptcy (Morgan *v.* Brundrett, 5 B. & Ad. 289 (27 E. C. L. R.); 2 N. & M. 280 (28 E. C. L. R.)), although it is not necessary to give evidence of an intention to commit any definite act of bankruptcy, it is enough to give in evidence such facts as will, taken together, satisfy the jury that bankruptcy was at the time of the gift or transfer in the contemplation of the person making it (Cook *v.* Pritchard, 5 M. & G. 329 (44 E. C. L. R.); 6 Scott N. R. 34; Pritchard *v.* Hitchcock, 6 Scott N. R. 851; Ex parte Simpson, De Gex 9). And it seems that embarrassed circumstances are not conclusive evidence of the contemplation of bankruptcy: per Park, J., in Belcher *v.* Pittie, 10 Bing. 419 (25 E. C. L. R.).

Moreover a disposition made under a mere consciousness of insolvency, will not be sufficient to enable the assignees of a bankrupt to recover back the money or chattels so disposed of, inasmuch as it is essential, in order to enable them to do so, that the disposition should be made in *contemplation of bankruptcy*. Thus in Atkinson *v.* Brindall, 2 Bing. N. C. 228 (29 E. C. L. R.), a fiat had been issued against Potter on February 14th, 1834. This was not proceeded *with; but on the 15th of March, Potter executed an assignment of his effects in trust for creditors, under which [*535 they were to have only 15*s.* in the pound. Between that time and January, 1835, the defendant had lent him upwards of 200*l.* On the 13th of January, two bills due from Potter were dishonored, and he was obliged to ask for time; but on the 15th, without any demand on the part of the defendant, Potter sent him cash and bills to the amount of 205*l.* On the 23d of January, a second fiat issued, under which Potter was declared a bankrupt, and the plaintiffs were his assignees. Williams, J., before whom the cause was tried, told the jury that to entitle the plaintiffs to recover, Potter must have had bankruptcy in contemplation at the time of the payment; that it would not avail them that he was in insolvent circumstances, and contemplated insolvency. A verdict having been found for the defendant, a new trial was moved for upon the before-mentioned

state of facts, it being contended that Potter's knowledge of his own insolvency, when he paid the defendant, must render it a payment made in contemplation of bankruptcy; that contemplation of bankruptcy meant a reasonable expectation that bankruptcy must ensue, and that therefore the jury ought not to have been directed as the learned judge had directed them on the subject of insolvency. The rule however was refused by the Court of Common Pleas, Tindal, C. J., making the following observations:—"In Morgan *v.* Brundrett, 5 B. & Ad. 296, Mr. Justice Littledale says, 'The late cases, with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they ought.' Mr. Justice Park: 'In order to render the deposit void, it was incumbent on the plaintiffs to show, first, that it was made in contemplation of bankruptcy; and secondly, that it was voluntary. There was very slight evidence that it was made in contemplation of bankruptcy. The meaning of those words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far.' And Mr. Justice Patteson: 'The recent cases have gone too great a length; they seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent, but yet not contemplate bankruptcy.' I think therefore that the direction to the jury in this case was substantially correct.

*536] *Up to the time of an act of bankruptcy, every trader has dominion over his own property; the only exception is, that where he contemplates bankruptcy and the protection afforded by the bankrupt laws, a disposition of property made with a view to defeat the equal distribution provided by those laws is fraudulent and void, but not a disposition made under a consciousness of mere insolvency. I agree in thinking that the cases on this subject have gone too far. As to the evidence here, I am not prepared to say that the jury were wrong, and we ought not lightly to infringe on their province." See also Aldred *v.* Constable, 4 Q. B. 674 (45 E.

C. L. R.); In re Ryan, 3 Ir. Ch. Rep. 33; Kinnear *v.* Johnson, 2 F. &. F. 753; Bills *v.* Smith, 6 B. & S. 314 (118 E. C. L. R.).

Lord Chief Justice Tindal, in a passage which has been cited with approbation by Lord Justice Knight Bruce (Ex parte Simpson, 1 De Gex 19), takes rather a different view from that to be gathered from the cases before cited, for he says: "Where a party is in so hopeless a state of insolvency that he cannot reasonably expect to avoid bankruptcy, though he chooses to fight it off as long as possible, I cannot look upon a payment voluntarily made by him to a favored creditor in any other light than as a payment calculated and intended to defeat the bankrupt laws:" Gibson *v.* Boutts, 3 Scott 229 (36 E. C. L. R.).

A payment or transfer made to a creditor, is clearly not fraudulent as *being voluntary*, if it be made in consequence of an act of the creditor, as when he threatens proceedings against the debtor in any of the courts of law (Thompson *v.* Freeman, 1 Term Rep. 155) or bankruptcy (Ex parte Whitby, Mont. & C. 671), or in a criminal court (De Tastet *v.* Carroll, 1 Stark. 88 (2 E. C. L. R.); Ex parte De Tastet, Mont. 138, 153. See, however, Ex parte the Hibernian Bank, 14 Ir. Ch. Rep. 113), or where there is a demand accompanied with pressure on the part of the creditor: Cosser *v.* Gough, 1 Term Rep. 156 n.; Smith *v.* Payne, 6 Term Rep. 152; Crosby *v.* Crouch, 2 Campb. 166; 11 East 256; Shrubsole *v.* Sussams, 16 C. B. N. S. 452, 459, (111 E. C. L. R.).

A mere demand moreover for a debt, even if it be not then due, will be sufficient to render a payment or transfer good; for it appears to be clear that a threat or pressure, with an immediate power of rendering it available by taking legal steps, is not essential. Thus, for instance, "a surety for a bankrupt, or one to whom a debt is due, but not payable, may obtain a valid preference though he has no present power of proceeding against the bankrupt. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors entitled under the fiat, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the *creditor, it is not voluntary:" per Parke, B., in Van Casteel *v.* Booker, 2 [*537 Exch. 706; and see Hale *v.* Allnutt, 18 C. B. 505 (84 E. C. L. R.); Belcher *v.* Prittie, 10 Bing. 408 (25 E. C. L. R.); Mogg *v.* Baker,

4 M. & W. 348; Johnson *v.* Fesemeyer, 25 Beav. 90, 91; 3 De G. & J. 13.

Where goods sent to a trader were under circumstances of deliberation, consent of creditors, and advice of counsel, given up by him to the vendor claiming a right to stop them *in transitu*, it was held that the jury under these circumstances rightly found that the goods were not given up through a fraudulent preference, although the trader was at that time in a state of insolvency and impending bankruptcy, and the vendor, as it turned out, had no right to stop the goods, as the transitus was at an end: Dixon *v.* Baldwin, 5 East 175.

A request by a surety that the money for the payment of which he is ultimately responsible may be paid over by the debtor to the creditor, prevents such payment by the debtor from being a voluntary payment just as much as a request by the creditor himself: Edwards *v.* Glyn, 2 E. & E. 29, 47 (105 E. C. L. R.).

The effect of pressure in legalizing payment is only that it rebuts the presumption of an intention on the part of a debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction: per Cockburn, C. J., in Bills *v.* Smith, 6 B. & S. 321 (118 E. C. L. R.).

Mere pressure, however, for payment of a debt is not of itself a sufficient test for determining whether a transfer or payment by a creditor was voluntary or not, because the very pressure may have been pre-arranged. The question is, whether a transfer or payment was made really by reason of the pressure, or merely from a desire on the part of the debtor to prefer a particular creditor: Kinnear *v.* Walmisley, 2 Fos. & Fin. 756, 758; Kinnear *v.* Johnson, Id. 753.

Other circumstances besides the fact of pressure may operate to repel the presumption of fraudulent intention; for instance, if a debtor, although he knows that bankruptcy is unavoidable, and though no application has been made to him for payment, pays a debt simply in discharge of an obligation he had entered into to pay on a given day and without any veiw of giving a preference to that particular creditor at the expense of the rest, such payment will not be a fraudulent preference within the meaning of the bankrupt law (Bills *v.* Smith, 6 B. & S. 314, 317 (118 E. C. L. R.)),

even although he may have been mistaken as to his being under such obligation: Id. 322.

The result is the same if under like circumstances a debtor makes an assignment, or returns specific goods to the creditor: Edwards *v.* Glyn, 2 E. &. 29 (105 E. C. L. R.); Pinkett *v.* Murray, 12 Cl. & Fin. 764; Harris *v.* Rickett, 4 Hurlst. & N. 1; Bills *v.* Smith, 6 B. & S. 314 (118 E. C. L. R.); Sinclair *v.* Wilson, 20 Beav. 324; *Payne *v.* Hornby, 25 Beav. 280. Secus, it seems where [*538 there is merely a general duty to make good a default by an assignment of property in general, as this amounts to no more than a general obligation to pay a debt. See 1 Griff. & Holmes, Bank. 432, citing Watson *v.* Balfour, 2 Campb. 579, and the comments on that case.

If in a fair course of business a man pays a creditor who *comes to be paid*, notwithstanding the debtor's knowledge of his own affairs, or of his intention to break, yet, being a fair transaction in the course of business, the payment is good; for the preference is there got consequentially, and not by design: per Lord Mansfield, C. J., in Rust *v.* Cooper, Cowp. 634.

The pressure of a solicitor against his client for payment will render an assignment to him good; for the fact of the creditor being also the solicitor of the debtor makes no difference in a question of fraudulent preference, except that it gives greater facilities to the parties to disguise a voluntary transaction under the appearance of a demand and submission, and that therefore it requires to be watched with more cautious jealousy: Johnson *v.* Fesemeyer, 3 De G. & J. 13, 26.

It is not essential in order to render a preference fraudulent, that the person making it should be intended to benefit, or in fact benefit a particular creditor. Thus in Marshall *v.* Lamb, 5 Q. B. 115 (48 E. C. L. R.), the plaintiffs were assignees of a bankrupt who had borrowed 700*l.* from the defendant on a mortgage of his wife's estate, settled to her separate use for life, of some leaseholds belonging to his sister, and a policy of insurance belonging to the bankrupt, who also covenanted to pay the 700*l.* and interest. When he was in desperate circumstances, and in contemplation of bankruptcy, he took the money to the defendant, who at first declined to receive it, but on being paid the then accruing half-year's interest, accepted the money, and gave the bankrupt the title-deeds

and the policy. It was held by the Court of Queen's Bench that the payment of the 700*l.* and interest amounted to a fraudulent preference. "The plaintiff's counsel," said Lord Denman, C. J., "contended that all which is required to constitute a fraudulent preference is found in these circumstances; the undisputed contemplation of approaching bankruptcy, the subtraction of his money from the fund to be distributed among his creditors, the voluntary selection of one of these creditors without pressure or application on his part; and though the object was admitted to be a direct benefit to the plaintiff, his wife and sister, and the creditor was in no wise benefited, as he gave up the deeds on receiving the money, yet he was the party *preferred* at the expense of the estate; and the ulterior object can make no difference in the application of the law. On the other hand, the language of the exceptions *in the bankrupt acts was said to confine their operation to cases where a personal benefit to the preferred creditor is intended. Reliance was placed on some expressions of Lord Abinger and the Court of Exchequer in Turquand *v.* Vanderplank, 10 M. & W. 180. We cannot relieve ourselves from the sense of the great difficulty that surrounds this question; but upon consideration we adhere to the opinion expressed by the learned judge on the trial. If the property in mortgage had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property, and it is indifferent to them whether they have the property free from the mortgage (supposing it to exceed in value the amount of the mortgage), or the property subject to the mortgage, and the amount by the mortgage money in cash; but here the *property*, except the policy, *belonged to others*. Yet the defendant was a creditor of the bankrupt, because the money was lent to him, and he covenanted to repay it; the payment therefore was emphatically a payment of the bankrupt's debt in order to release the property of his friends which they had mortgaged for his benefit; the defendant therefore did receive twenty shillings in the pound out of the bankrupt's estate to the prejudice of other creditors, although it was no benefit to him, for he would have been as well off if he had kept the mortgage deeds. Suppose the bankrupt had borrowed money from the defendant on the joint and several note of himself and a perfectly sufficient solvent surety, and had voluntarily and in contem-

*539]

plation of bankruptcy paid off the note in order to relieve the surety, the defendant (the lender) would derive no benefit, for the solvent surety would be as good to him as money; yet would not this be a fraudulent preference? In that, as in the present case, it seems to us that the creditor (*quoad* the bankrupt's estate) is preferred; he receives out of that estate twenty shillings in the pound, whereas the other creditors do not; and he is preferred fraudulently, *quoad* the bankrupt's intention; and though the motive for giving that preference was ultimate advantage to himself and his own family, and not to the creditor, we think the preference fraudulent and the payment void." See, however, Abbott *v.* Pomfret, 1 Bing. N. C. 462 (27 E. C. L. R.); 1 Scott 470; Belcher *v.* Jones, 2 M. & W. 258.

Payment by a trader who contemplates bankruptcy, of a debt not then due, upon a *bonâ fide* request of the creditor, is not a voluntary payment. Thus if a bill of exchange were falling due on a Monday, and the creditor on the Saturday before asked his debtor as a favor, honestly and *bonâ fide*, to take up the bill, and the debtor paid the amount; it would not necessarily amount to a fraudulent preference, it would only be a circumstance for the jury: *Strachan *v.* Barton, 11 Exch. 647, 64; 25 L. J. Exch. 182, 184. See also Hartshorn *v.* Slodden, 2 B. & P. 582. [*540

Where money is paid under a special contract for repayment entered into when the money was lent, this will not amount to a fraudulent preference: Hunt *v.* Mortimer, 10 B. & C. 44 (21 E. C. L. R.); Vacher *v.* Cocks, 1 B. & Ad. 145 (20 E. C. L. R.); Bills *v.* Smith, 6 B. & S. 322 (118 E. C. L. R.).

Where a sum of money had been given by a trader shortly before his bankruptcy to his son, whom he was in the habit of maintaining, Lord Tenterden left it to the jury to say whether the money was given in the ordinary course of maintaining his son, or for the purpose of securing an advantage to the latter over the creditors, and with a view to benefit him at their expense: Abell *v.* Daniell, 1 M. & M. 370 (22 E. C. L. R.); and see Bills *v.* Smith, 6 B. & S. 324 (118 E. C. L. R.).

In all these cases the whole question turns on the intention of the trader in disposing of his effects to the particular creditor. *Primâ facie*, a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law;

but, if circumstances exist which tend to explain and give a different character to the transaction, and to show that the debtor acted from a different motive, these circumstances must be left to the jury, who should be told, that unless they come to the conclusion that the debtor had the intention of defeating the law, and preventing the due distribution of his assets by preferring one creditor at the expense of the rest, the transaction will stand good at law: per Cockburn, C. J., in Bills *v.* Smith, 6 B. & S. 324 (118 E. C. L. R.).

The mere form of the transaction is immaterial, for if there appear to be a contrivance to prefer one creditor over the others, with intent to defeat the policy of the bankrupt law, it will be void as a fraudulent preference. See Rust *v.* Cooper, Cowp. 629; there a trader in contemplation of bankruptcy made a bill of parcels to the defendant, one of his creditors, and sent it to him, together with an order to the person in whose possession the goods were deposited for sale, to deliver the goods to the defendant, who thereupon got them. It was held by the Court of Queen's Bench that the transaction, though purporting to be a *bonâ fide* sale, was merely a secret clandestine contrivance, with no other view or intention than to give a preference and to defeat the consequences of a certain bankruptcy; that it was therefore void, and the assignees of the debtor upon his bankruptcy were held to be entitled to recover the value of the goods from the creditor. "In all its circumstances," said Lord Mansfield, "there is perhaps no case exactly similar to it. But the law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them. The *general principle applicable to the present case is this: that a fraudulent contrivance, with a view to defeat the bankrupt law is void, and annuls the Act." See also Nixon *v.* Jenkins, 2 H. Black. 135.

*541]

The accidental consequence of a trader's giving notice of his being about to stop payment, whereby he is compelled to pay a debt, will not amount to a fraudulent preference. Thus in Belcher *v.* Jones, 2 M. & W. 258, a banking firm was in insolvent circumstances, and about to stop payment. Lee, a partner in the firm, informed his brother-in-law of the fact, in order that Cooke, the brother-in-law's father, and one of the managing directors of an insurance company, which banked with the firm, might draw his private balance out of the bank; but Lee desired Cooke not to give any information

of the matter to a Mr. Davies, who was a shareholder in the insurance company, as he did not wish any of the directors to know anything of it. Cook's private balance was in consequence drawn out the next day. On the evening of that day, Lee informed Cooke of the state of the house. Cooke, being a managing director of the insurance company, took measures by which the company's account was drawn out by a check. Two days afterwards the house stopped payment. It was held by the Court of Exchequer that this was not a fraudulent preference of the insurance company.

The questions whether a transaction on the part of a bankrupt is made in contemplation of bankruptcy, and whether it is voluntrry, are questions of fact for the determination of a jury: Fidgeon *v.* Sharpe, 5 Taunt. 539 (1 E. C. L. R.); Cook *v.* Pritchard, 5 M. & G. 329 (44 E. C. L. R.); Bevan *v.* Nunn, 9 Bing. 107 (23 E. C. L. R.); Belcher *v.* Prittie, 10 Bing. 408 (25 E. C. L. R.); Strachan *v.* Barton, 11 Exch. 647. It seems even when importunity and pressure have been made use of by a creditor to obtain payment, it will still remain a question for the jury whether the payment has been made in consequence of such importunity and pressure or with a view of giving one creditor a fraudulent preference over the rest: Cook *v.* Pritchard, 6 Scott N. R. 34; 5 M. & G. 329 (44 E. C. L. R.). And on a motion for a new trial the Courts require to be fully satisfied that the verdict is wrong before they can take upon themselves to disturb it: Belcher *v.* Prittie, 10 Bing. 414, 421 (25 E. C. L. R.). "Because," as observed by Tindal, C. J., "where a case involves not matter of law, but that which is purely a question of fact, and that fact has been submitted to those whom the law has constituted the *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. Before we send the party down again, we ought to perceive, if not with moral certainty, at least with a degree of clearness approaching *to it, that the jury [*542 have done wrong. . . . The question what is the intention of a man performing a certain act, is to be judged of, not by the judges of the land, but a jury. It is a question involving the consideration of fraud, which upon all occasions has been said to be solely and peculiarly for the consideration of a jury."

As to when a rule for a new trial will be granted, see Gibson *v.*

Muskett, 3 Scott N. R. 427; 4 M. & G. 160 (43 E. C. L. R.); Gibson *v.* Bruce, 6 Scott N. R. 309; 5 M. & G. 399 (44 E. C. L. R).

As to how far the declarations of the bankrupt are admissible to show the intention with which a transfer or payment have been made, see Phillips *v.* Eamer, 1 Esq. 355; Lees *v.* Martin, 1 M. & Rob. 210; Ridley *v.* Gyde, 9 Bing. 349 (23 E. C. L. R.); Smith *v.* Cramer, 1 Bing. N. C. 585 (27 E. C. L. R.); Rouch *v.* Great Western Railway, 1 Q. B. 51 (41 E. C. L. R.)

It seems that a fraudulent preference may be impeached under an adjudication obtained by a creditor: Ex parte Jackson, De Gex 609; and also under an adjudication on a bankrupt's own petition, not only where there is a sufficient creditor's debt at the time of such fraudulent preference (Ex parte Norton, 1 De Gex 528), but it may also be impeached as voidable, even without the circumstance of there being such a creditor: Stevenson *v.* Newnham, 13 C. B. 301 (76 E. C. L. R.); Monk *v.* Sharp, 2 Hurlst. & N. 540; Nicholson *v.* Gooch, 5 E. & B. 999 (85 E. C. L. R.); Shrubsole *v.* Sussams, 16 C. B. N. S. 452 (111 E. C. L. R.).

The effect of bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once by the bankruptcy in the assignees, independently of any election on their part other than their acceptance of the office of assignee, but by a transfer, which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, at their election, and the title of the transferee is perfect except so far as it is avoided by the assignees: Newnham *v.* Stevenson, 10 C. B. 713 (70 E. C. L. R.).

A *bonâ fide* purchaser from a person who has acquired goods or chattels by means of a fraudulent preference will acquire an indefeasible title to them. "Acts of fraudulent preference," observes Parke, B., "cannot be valid against the assignees, if they choose to avoid them; but they are not absolutely void. They are on the same footing as the obtaining goods by one person from another person by fraud or deceit, though in the case of fraudulent preferences they may be avoided, where the party obtaining them may be perfectly innocent. The right in the assignees to avoid such transactions is founded on the policy of the bankrupt law, which favors the equal division of the bankrupt's property. But we entirely

agree with the learned Chief Justice and the Court of Common Pleas (see 10 C. B. *722 (70 E. C. L. R.)), that the [*543 effect of this, as of ordinary frauds, is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives the right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is voidable between the original parties. This was decided in the recent case of White *v.* Garden, 10 C. B. 919 (70 E. C. L. R.), and had been so before in Parker *v.* Patrick, 5 Term Rep. 175; in 1 Sumner's Reports of Mr. Justice Story's Decisions 309; and by Lord Kenyon, in Wright *v.* Lames, 4 Esp. 82, 221; and Campbell *v.* Fleming, 1 Ad. & E. 40 (28 E. C. L. R.); 3 N. & M. 843 (28 E. C. L. R.). It must be considered therefore as established that fraud only gives a right to avoid a contract or purchase, that the property rests until avoided; and that all mesne dispositions to persons not parties to, or at least not cognisant of the fraud, are valid:" Stevenson *v.* Newnham, 13 C. B. 302 (76 E. C. L. R.).

The doctrine of fraudulent preference is not applicable to the case of a trustee restoring, previous to his bankruptcy, the property of his *cestui que trust.* See Sinclair *v.* Wilson, 20 Beav. 324. There a trustee, with the consent of his *cestui que trust*, pledged, for the benefit of a firm of which he was partner, Madras government notes, held by him in trust. The notes were afterwards redeemed and delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the trustee redeemed the notes with the partnership assets, endorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt. It was held by Sir J. Romilly, M. R., that there was no fraudulent preference. "It has been contended," said his honor, "that assuming the bills to have been trust property, there was a fraudulent preference; but I think that if they were trust property, the principle does not apply, because a fraudulent preference must be made in *favor of a creditor;* and if I am right in the view I take of this case, the plaintiff was not a creditor of the firm, but was the owner of certain specific property in the possession of the firm, who had notice of the trust."

Trustees of a deed of assignment registered under the provisions of the 192d section of the Bankruptcy Act, 1861, by virtue of the 197th section of that act (which renders such deed upon registration equivalent to an adjudication in bankruptcy), have the same power to set aside a fraudulent transaction with the debtor as the assignees would have had: Topping *v.* Keysell, 16 C. B. N. S. 258 (111 E. C. L. R.); and see Wood *v.* Dunn, 2 Law Rep. Q. B. 73, reversing s. c. 1 Id. 77.

*544] *2. *When a Conveyance or Transfer by a Debtor of his Property is fraudulent, and an act of Bankruptcy.*—A conveyance or transfer of property by a trader may be fraudulent, and as such an act of bankruptcy, either as being within 13 Eliz. c. 5, or as being in contravention of the statutes relating to bankruptcy.

Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent and an act of bankruptcy under the Bankrupt Act (see Smith's Lead. Cas. vol. 1, p. 16), and has been held void also as against the assignees upon an insolvency: Doe d. Grimsby *v.* Ball, 11 M. & W. 531.

This being the case, it is not considered necessary in a work of this kind to examine the authorities upon the statute of Elizabeth, but the reader is referred to the note to Twyne's Case, 1 Smith's Lead. Cas. 10, where they are collected and commented on.

With regard to the doctrine of fraudulent conveyances, transfers, &c., constituting acts of bankruptcy, under the bankrupt laws, it is at present regulated, as to traders, by the 67th section of 12 & 13 Vict. c. 106 (re-enacting the 3d section of 6 Geo. IV. c. 16, which repealed 1 Jac. I. c. 16, s. 2, so much commented on in the principal cases, and which was in effect substantially the same), and as to non-traders by 24 & 25 Vict. c. 134, s. 70.

The 67th section of 12 & 13 Vict. c. 106, is as follows:—"That if any trader liable to become bankrupt shall . . . . make, or cause to be made, either within this realm or elsewhere, any *fraudulent* grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds,

or matters aforesaid, *with intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy."

The 70th section of 24 & 25 Vict. c. 134, enacts that if any person, *not being a trader*, shall, with intent to defeat or delay his creditors .... make any fraudulent conveyance, gift, delivery, or transfer of his real or personal estate, or any part thereof respectively, such person shall be deemed to have thereby committed an act of bankruptcy, and there is a proviso requiring certain rules to be observed before any adjudication can be obtained against a non-trader.

With regard to the act of bankruptcy now under discussion, viz., a fraudulent conveyance, gift, delivery, or transfer, it must, like other acts of bankruptcy under the same statutes, be made with intent to defeat or delay creditors. With regard to most acts of bankruptcy, evidence of the intent may be *afforded either [*545 by collateral circumstances or admissions; with regard, however, to the act of bankruptcy now under consideration, to use the words of Lord Ellenborough, C. J., "it has never been held necessary, in proof thereof, to do more than to prove the execution of the deed, *under such circumstances* as rendered it a fraudulent one in respect of creditors; without going on to show that any creditor had been in fact ever delayed or defeated thereby: Robertson *v.* Liddell, 9 East 494, per Lord Ellenborough, C. J. It lies, however, on the party impeaching the conveyance to show the circumstances from which the fraudulent intent may be inferred, and the question whether there was such fraudulent intent or not, should, when the trial is at law, be left as a question of fact for the jury: Wedge *v.* Newlyn, 4 B. & Ad. 831 (24 E. C. L. R.); Bell *v.* Simpson, 2 Hurlst. & N. 410.

The corresponding section of the Act of James the First (sect. 2, 1 Jac. I. c. 16), was confined to fraudulent deeds, so that fraudulent transactions which are now reached by the words, "gift, delivery, or transfer," under the 67th section of the 12 & 13 Vict. c. 106, were not acts of bankruptcy, as it was generally laid down "that no fraudulent transaction which was not a deed, was in itself an act of bankruptcy:" per Lord Mansfield, C. J., in Rust *v.* Cooper, Cowp. 633; and see Martin *v.* Pewtress, 4 Burr. 2478; Alderson *v.* Temple, Id. 2235; Manton *v.* Moore, 7 Term Rep. 71.

The deed also must have been complete and perfect, hence it was

held that a deed defective in consequence of its not having been executed by a necessary party, was not an act of bankruptcy: Dutton *v.* Morrison, 17 Ves. 193; 1 Rose 213; Outram *v.* Chase, 15 East 21.

A deed can be used as an act of bankruptcy against the persons who executed it, although it be unstamped and unregistered: Ex parte Wensley, 1 De G., J. & S. 273; Re Mew & Thorne, 5 L. T. N. S. 436; Ponsford *v.* Walton, 16 W. R. (C. P.) 363; which are followed in practice in preference to Ex parte Potter, Re Barron, 13 W. R. (L. C.) 189; 3 Law Rep. C. P. 167; see Coppock *v.* Bower, 4 M. & W. 361; Rex *v.* Hall, 3 Stark. 67 (3 E. C. L. R.); Rex *v.* Reculist, 2 Leach 706; Evans *v.* Prothero, 1 De G., M. & G. 572; Parmeter *v.* Parmeter, 1 J. & H. 135; Ex parte Drayson, 12 L. T. N. S. 28.

A fraudulent deed has been held to be an act of bankruptcy, although kept by the party executing it in his own possession. And although he continued to carry on trade for three years, at the end of which time a commission issued. Pulling *v.* Tucker, 4 B. & Ald. 382 (6 E. C. L. R.); and see Grugeon *v.* Gerrard, 4 Y. & C. 130.

Formerly a conveyance or assignment executed abroad was held not to be an act of bankruptcy in England: Norden *v.* James, 2 Dick. 533; Ingliss *v.* Grant, 5 Term Rep. 530. The Bankrupt Law Consolidation Act, 1849, now comprehends such conveyances and assignments (sect. 67), though the 70th section of the *Act of 1861, which relates to non-traders, does not.

*546]

A bill of exchange has been held to be "a chattel," the fraudulent delivery of which has been held an act of bankruptcy: Cummins *v.* Baily, 6 Bing. 363 (19 E. C. L. R.).

There may be an act of bankruptcy committed by a voluntary payment of money in preference to a particular creditor, on the part of a man who knows himself to be so insolvent, that he must expect bankruptcy to be the necessary consequences of the payment: Ex parte Wensley; 1 De G., J. & Sm. (Bk.) 57, per Lord Chancellor Westbury. So in Ex parte Simpson, De Gex 9. The bankrupts being in insolvent circumstances, at a consultation with their solicitor, on the 10th of September, 1841, came to a resolution of stopping payment. Afterwards, but on the same day, they drew and delivered three checks. The first of these checks was for 1200*l.*,

and was given to a firm of the name of Vaughan and Co., to meet an accommodation acceptance of that firm in favor of one of the bankrupts; another check was for 575*l.*, and was given in respect of an acceptance by consignees, whom the bankrupts had engaged to keep clear of cash advances; the remaining check, which was for 200*l.*, was given to the solicitor of the bankrupts, in respect of business already done, but for which no bill of costs had been delivered. After the checks were given, but on the same day, a notice in writing was sent to the London bankers of the bankrupts to make no further payments. It was held by Sir J. Lewis Knight Bruce, L. J., under the circumstances of the case, that the checks having been delivered without pressure, and after a resolution had been come to by the debtors to suspend payment of their debts generally, the bankrupts had committed an act of bankruptcy, inasmuch as the payment of money by debtor to his creditors by checks under such circumstances amounted to a fraudulent delivery of "goods and chattels." But see Bevan *v.* Nunn, 9 Bing. 107 (23 E. C. L. R.).

In determining what is an act of bankruptcy under the 67th section of 12 & 13 Vict. c. 106, and the 70th section of 24 & 25 Vict. c. 134, it is proposed to consider, 1st, When an absolute conveyance or transfer of property by way of sale is an act of bankruptcy; 2d, When the conveyance or transfer by way of mortgage or upon trust is an act of bankruptcy.

1. *When an absolute conveyance or transfer of Property by way of sale is an act of Bankruptcy.*]—An absolute conveyance by a man, in consideration of an antecedent debt, of *all* his property and effects to his creditor (per Lord Mansfield in Hooper *v.* Smith, 1 Wm. Black. 441), or of all his property and effects with some colorable exception (Id.), is of itself an act of bankruptcy; and see Seibert *v.* Spooner, 1 M. & W. 714, 717.

A sale, however, even of *all* a *trader's goods, to a *bonâ fide* purchaser, at a fair price and for actual pecuniary value, [*547 is not an act of bankruptcy, because he receives an equivalent for his goods which might be made equally available for the benefit of his creditors (Baxter *v.* Pritchard, 1 Ad. & E. 456 (28 E. C. L. R.); 3 N. & M. 638 (28 E. C. L. R.); Rose *v.* Haycock, 1 Ad. & E. 460 n. (28 E. C. L. R.); Whitwell *v.* Thompson, 1 Esp. 68), and this has been so held even where the intention of the trader was to ab-

second, the purchaser having no knowledge of such intent: Baxter *v.* Pritchard, 1 Ad. & E. 456 (28 E. C. L. R.); 3 N. & M. 638 (28 E. C. L. R.).

A sale if *bonâ fide* for valuable consideration, is not invalidated by knowledge that an execution is intended: Wood *v.* Dixie, 7 Q. B. 892 (53 E. C. L. R.); Hale *v.* Saloon Omnibus Company and Others, 4 Drew. 492.

And a bill of sale by a trader of all his property to a canal company in consideration of a former advance and a present advance to enable him *pay all his creditors* in full, was held not to be an act of bankruptcy: Manton *v.* Moore, 7 Term Rep. 67.

Moreover, it seems that a sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th section of 12 & 13 Vict. c. 106. To render the transaction fraudulent within that Act, the seller must have intended by such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller. See Lee *v.* Hart, 11 Exch. 880. There a trader from time to time, during several months, sold his goods to the defendant at prices from 40*l.* to 50*l.* per cent. less than he paid for them, and afterwards became bankrupt. It was held in the Exchequer Chamber that it was properly left to the jury (see 10 Exch. 555) to say whether the dealings between the defendant and the bankrupt were real sales by the bankrupt to the defendant, each endeavoring to make the best bargain he could for himself, and, if so, such sales were not acts of bankruptcy as fraudulent transfers. "The statute," said Wightman, J., delivering the judgment of the Court, "does not mention 'sales' as one of the fraudulent modes by which an act of bankruptcy may be committed; but a sale of goods at a low rate may be a fraudulent transfer, if the seller did not intend to sell the goods *bonâ fide* for the purpose of carrying on his business, but for the purpose of defeating or delaying his creditors, and the purchaser has reason to know that such is the object of the seller. That is the effect of Lord Tenterden's opinion in the case of Cook *v.* Caldecott, M. & M. 552 (22 E. C. L. R.), which was much relied upon by the Court of Queen's Bench in the case of Baxter *v.* Pritchard, 1 Ad. & E. 456 (28 E. C. L. R.). Neither of these cases, nor the cases of Graham *v.* Chapman, 12 C. B. 85 (74 E. C. L. R.) and Young *v.* Waud, 8 Exch. 221), apply to a case like the present,

where the bankrupt sold *goods at various times to the defendant at very low rates for the purpose, as it would appear by the evidence, not of defeating or delaying his creditors, but of distributing the proceeds amongst them, and so enabling him to continue to carry on his business for some time longer. The sales were *bonâ fide* sales, though at less prices than the goods were worth; and it does not appear that at the time of any of the sales the bankrupt could have obtained better prices for ready money, which it seems to have been his object to procure. See also Harwood *v.* Bartlett, 8 Scott 171; 6 Bing. N. S. 61 (37 E. C. L. R.); Daves *v.* Venables, 3 Bing. N. S. 400 (32 E. C. L. R.); Cook *v.* Caldecott, 1 M. & M. 522 (22 E. C. L. R.); Ward *v.* Clarke, Id. 499; Cash *v.* Young, 2 B. & C. 413 (9 E. C. L. R.); Bishop *v.* Crawshaw, 3 B. & C. 415 (10 E. C. L. R.); Hill *v.* Farnell, 9 B. & C. 45 (17 E. C. L. R.). [*548

If, however, a trader raises money by selling his goods at an under value (not for the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose of cheating his creditors) to one who has notice either by express information, or from the nature of the transaction, that he is selling his goods not in order to carry on his business, but with the fraudulent intention, the sale is an act of bankruptcy and void, and the assignees may recover the goods from the purchaser: Fraser *v.* Levy, 6 Hurlst. & N. 16.

Where, at the time of the dissolution of a partnership, 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, is fraudulent and void, and an act of bankruptcy under the 67th section of the Act of 1849, the immediate and necessary operation of it being to convert the joint into separate assets, and so to defeat and delay the joint creditors: Ex parte Mayou, In re Edwards-Wood and Greenwood, 34 L. J. (Bktcy.) 25; 11 Jur. N. S. 433, *ante* pp. 402, 403, 404.

2 *When a conveyance or transfer by way of Mortgage or upon trust is an act of Bankruptcy.*]—A conveyance by a trader of *all* his property to secure a present advance by way of mortgage is not an act of bankruptcy: Whitwell *v.* Thompson, 1 Esp. 68, 72; Bittlestone *v.* Cooke, 6 E. & B. 296 (88 E. C. L. R.).

A mortgage, however, of all a debtor's property will be an act of bankruptcy, if a fresh advance made at the same time is only colorable: Graham *v.* Chapman, 12 C. B. 85 (74 E. C. L. R.).

An assignment made with a view to relieve the debtor's property from charges upon it, will be considered as equivalent to a present advance, and such assignment will not therefore be fraudulent or an act of bankruptcy, although it comprised all the debtor's property. See Whitmore *v.* Claridge, 33 L. J. Q. B. 87; 31 L. J. Q. B. 141.

*549] *A bill of sale given to a creditor in consideration of his taking up a bill accepted by the debtor in his favor will be considered as equivalent to a present advance to the debtor. See Mercer *v.* Peterson, 2 Law Rep. Exch. 304; affirmed, 8 Law Rep. Exch. (Exch. C.) 104; there a trader being indebted to the defendant gave his acceptance to him for the amount of the debt. *Three days* before the acceptance was due, he agreed to give the defendant a bill of sale upon all his goods, chattels, and stock-in-trade, in consideration of the defendant taking up the acceptance, and in order to cover any further advance which might be made to him by the defendant. The defendant accordingly took up the acceptance, and afterwards lent an additional sum to the trader. A bill of sale was subsequently executed in pursuance of the agreement, whereby the whole of the trader's personal estate, of which he was then, or should in future become possessed, was assigned to the defendant as security for the debt due from the trader to him. Less than twelve months from the date of this bill of sale, but more than twelve months from the date of the agreement to give it, the trader was adjudicated bankrupt. In an action of trover by the assignee in bankruptcy against the defendant for the goods included in the bill of sale, it was held by the Court of Exchequer that the bill of sale conferred a good title to them on the defendant as against the plaintiff.

An assignment, moreover, by a trader of all his property as security for an advance of money which he afterwards applies in payment of existing debts, is not necessarily fraudulent within the meaning of the Bankruptcy Acts. In order to make such an assignment fraudulent, the lender must be aware that the borrower's object was to defeat and delay his creditors: In re Colemere, 1 Law Rep. Ch. App. 128.

Such an assignment, however, cannot be an act of bankruptcy unless it is also void as fraudulent: Id.

A conveyance or assignment by a trader of *all* his property as a security to a creditor for a *pre-existing debt*, is fraudulent and an act of bankruptcy, not only because he thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but, according to Lord Mansfield's language in the principal case of Worseley *v.* De Mattos, because such a conveyance must either be fraudulently kept secret, or produce an immediate absolute bankruptcy. See Lindon *v.* Sharpe, 7 Scott N. R. 745; Hassels *v.* Simpson, 1 Doug. 89 n.; 1 Cook, B. L. 88; Butcher *v.* Easto, 1 Doug. 295; Law *v.* Skinner, 2 Bl. 996; Porter *v.* Walker, 1 Scott N. R. 568; Graham *v.* Chapman, 12 C. B. 85 (74 E. C. L. R.); Smith *v.* Cannan, 2 E. & B. 35 (75 E. C. L. R.); Lacon *v.* Liffen, 4 Giff. 75; 32 L. J. Ch. 315.

And it is immaterial that at the time when the trader executed such a conveyance or assignment *he was pressed by his creditor (Johnson *v.* Fesemeyer, 25 Beav. 88, 91; 3 De G. & J. 12; Goodricks *v.* Taylor, 2 Hem. & Mill. 380; 2 De G., J. & Sm. 135), or even that he was under arrest for a just debt at his suit. Thus in Newton *v.* Chantler, 7 East 138, a trader being under arrest at the suit of a creditor for a just debt, executed to him a bill of sale of all his effects, in trust to satisfy his debt, and pay over the surplus, if any, to the trader. It was held by the Court of King's Bench to be an act of bankruptcy. "As," said Lawrence, J., "the necessary consequence of this deed of conveyance was to take the whole effects of the trader, which the law says shall be distributed equally amongst all the creditors, and to give them to a particular creditor, this is within all the cases an act of bankruptcy, and it is not the less the grant or conveyance of the bankrupt to the prejudice of his other creditors, because at the time he made it he was under arrest at the suit of the defendant." See also Butcher *v.* Easto, 1 Doug. 295. [*550

It is immaterial, likewise, that the trader executing such assignment of all his goods retains possession of them (Stewart *v.* Moody, 1 C., M. & R. 777; Simpson *v.* Sikes, 6 M. & Selw. 314), or that possession is immediately taken by the grantee: Newton *v.* Chantler, 7 East 138.

And it is likewise immaterial that the deed does not on the face of it purport to transfer all the bankrupt's property, if the evidence satisfactorily shows that it did in fact substantially convey all the

property he had at that time: Lindon *v.* Sharp, 7 Scott N. R. 730, 744.

A surety is no more justified in placing the whole of his property out of the reach or liability to pay the debt, than if he were the principal debtor. See Goodricke *v.* Taylor, 2 De G., J. & Sm. 135; there a tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of 1100*l.*, for which he was liable as surety, which exceeded the value of the mortgaged property. His other property was of very trifling amount. He was at the same time liable as surety on a promissory note for 2000*l.*, and afterwards the other makers having become insolvent, he was called upon for payment, and became bankrupt. It was held by the Lords Justices of the Court of Appeal in Chancery affirming the decision by Sir W. Page Wood, V.-C. (reported 2 Hem. & Mill. 380), that the mortgage was void as against the assignees in bankruptcy, as being an assignment made to defeat or delay creditors. "Reliance," said Turner, L. J., "was placed, on the part of the appellants, upon the bankrupt being a surety only in the promissory notes, and evidence was referred to as showing that he had reason to expect that he would not be called upon for payment of the notes; but every surety must be taken to contemplate that he *may be called upon to pay the debts for which he is surety, and he can no more be justified in placing the whole of his property out of the reach of liability to pay them than if he was principal debtor, as in truth this bankrupt was, as between him and his creditors on the notes. Possibly in some cases, in which the question of intent may be doubtful, the fact of the debtor being a surety only may be material; but I do not well see how it can be so where the whole property is assigned and the law imputes the intent as a necessary consequence of the act."

*551]

A conveyance by a trader of all his effects at a given place is not an act of bankruptcy, unless it be shown that he has no other property: Chase *v.* Goble, 3 Scott N. S. 245; 2 M. & G. 930 (40 E. C. L. R.).

A mere exception of a *part* of a trader's property from a general assignment of all, if colorable or fraudulent, as is laid down in Worseley *v.* De Mattos and Harman *v.* Fishar, will not take the case out of the general rule, inasmuch as it will be considered an

act of bankruptcy. See Wedge *v.* Newlyn, 4 B. & Ad. 831 (24 E. C. L. R.); Ex parte Bailey, 3 De G., M. & G. 534; Lindon *v.* Sharp, 6 M. & G. 895 (46 E. C. L. R.); Ex parte Bland, 6 De G., M. & G. 757; Ex parte Sparrow, 2 Id. 907; Stanger *v.* Wilkins, 19 Beav. 626; Hale *v.* Alnutt, 18 C. B. 505 (86 E. C. L. R.); Bell *v.* Simpson, 2 Hurlst. & N. 410; Young *v.* Waud, 8 Exch. 221; Goodricke *v.* Taylor, 2 De G., J. & Sm. 135, affirming s. c. 2 Hem. & Mill. 380.

From what has been before said it will be observed that it is immaterial when a trader assigns the whole, or the whole with a mere colorable exception, of his property, whether the assignment be absolute or merely by way of security; nor will the result be different, although the property assigned as a security exceeds very considerably the value of the liabilities for which it is pledged, or that there is an express trust of the surplus for the benefit of the assignor: Smith *v.* Cannan, 2 E. & B. 35, 44 (75 E. C. L. R.). The reason given for this is that "the whole property is conveyed, and put out of the immediate reach of the trader and of his creditors; the fact that there is a substantial surplus may prevent the deed from ultimately defeating the creditors; but it does *delay* them; for they are deprived of the power of taking that surplus under a *fieri facias*. In equity it is true that the debtor's interest in the surplus may be taken, but the real test is, has the trader by the deed put his property out of his control, so as to deprive himself of the present power to satisfy his creditors, as but for the deed he might do?" Id.

It is true that in some cases the judges seem to have confined the operation of the rule to cases where the assignment had the effect of stopping the trade of the assignor; but on examining them it will be seen that the language *of the judges must be taken with reference to the facts under discussion before them, and that [*552 in all those cases the facts were such that the trade was stopped, and the minds of the judges were directed to that effect only. The real test, according to the more recent decisions, in ascertaining whether an assignment of a trader's property with the exception of a part amounts to an act of bankruptcy, is not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect *is to delay the creditors* of the trader. Hence it has been held that an assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety

of the whole of his effects, is not *per se* an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business: Young *v.* Waud, 8 Exch. 221; Carr *v.* Burdiss, 1 Cr., M. & Rosc. 443; Smith *v.* Cannan, 2 E. & B. 45 (75 E. C. L. R.); Young *v.* Fletcher, 3 Hurlst. & C. 732.

A conveyance of all a trader's property, which has the effect of delaying the *general* creditors, even though all the stock in trade is excepted, and the *trade* creditors are not delayed, will, it seems, be an act of bankruptcy. Thus in Smith *v.* Cannan, 2 E. & B. 35 (75 E. C. L. R.), Garnham, a farmer, conveyed all his farming stock and goods to Smith by bill of sale, by way of security for 900*l.*, with a power of sale. The property comprised in the bill of sale was of about the value of 2800*l.*, and there was a trust for the assignor of the surplus of the property comprehended in the bill of sale, which was the whole of the assignor's property, with the exception of two shares in a joint stock bank of the value of 17*l.* 10*s.* each. Smith seized and sold enough of the stock and goods to pay the amount secured. Garnham was declared a bankrupt as a banker. The bill of sale was *bonâ fide* given under pressure, and the trade of the bank was not affected by giving it. On trover by the assignees of the bankrupt against Smith, issues being joined on pleas of not guilty and not possessed, and the judge at *nisi prius* having ruled that these facts were evidence on which a jury might find a verdict for the plaintiff, it was held by the Exchequer Chamber on a bill of exceptions that the direction was right. "The only question," said Parke, B., "is whether there can be such a complete assignment of the trader's property as necessarily to delay his creditors, *when the assignment does not include his trade effects.* There can be no doubt that when the whole of the trader's property passes, that is evidence that the assignment is an act of bankruptcy. I am clearly of opinion that the exception in this case makes no difference. The supposition that it does is founded on a misapprehension of the reasons given by the judges in the older cases, *553] founded on expressions used *by them with reference to the particular circumstances under discussion in these cases. The test is, not whether the necessary effect of the deed is to stop the trade, but whether the necessary effect is to delay the creditors of the trader."

A conveyance of all a trader's property when in insolvent circum-

stances, even although made in consideration of marriage, where it was shown that the intended wife was aware of the state of the trader's affairs, has been held an act of bankruptcy: Colombine *v.* Penhall, 1 Sm. & G. 228.

The result will be the same where a trader mortgages the whole of his property to secure past and future advances (Lacon *v.* Liffen, 4 Giff. 75; 32 L. J. Ch. 315; and see Oriental Bank *v.* Coleman, 4 Giff. 11); and in the principal case of Worseley *v.* De Mattos, *ante*, p. 507, it was held that a conveyance of all a trader's property, including his stock in trade, defeazanced on the trader paying the mortgagee all advances on any note or bill of the trader and indemnifying the mortgagee from the same, was an act of bankruptcy. Lord Mansfield, C. J., admitted in his judgment that the indemnity, which was the consideration of the deed, was valid as between the parties themselves, but his Lordship considered, taking the whole of the circumstances together, that it was a fraud upon third parties; he relied principally upon the fact that the trader was by the express tenor of the deed to have the absolute order and disposition as before, so that those who dealt with him would trust to his visible trade and stock; that the bills were drawn in a particular manner, so as to deceive by a fictitious show of credit, and the fact that the trader had mortgaged everything but his real property was concealed; and that it was intended from the first that when the trader could no longer stand, he should give up possession to the mortgagee. See also Hassells *v.* Simpson, 1 Doug. 88 n.

An assignment by a trader of goods, with a view to obtain *future advances*, is not necessarily as a matter of law an act of bankruptcy, although the whole of the trader's stock, present and future, be included in the conveyance. If for instance, the conveyance be *bonâ fide*, with a view to obtain advances for the purpose of carrying on the trade, it will not be an act of bankruptcy. Per Lord Campbell, C. J., in Bittlestone *v.* Cooke, 6 E. & B. 307 (88 E. C. L. R.).

Where, however, a trader, in consideration of a *present payment and a bygone debt*, by deed conveys all his property, including the advance, and any property purchased with the advance, as he will by such deed necessarily defeat and delay his creditors, it is therefore an act of bankruptcy. See Graham *v.* Chapman, 12 C. B. 85 (74 E. C. L. R.). There a trader, in consideration of a past debt of 240*l.* and a present advance of 200*l.*, conveyed by deed sub-

*554] stantially the whole of his property, giving the transferee a *right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer. It was held by the Court of Exchequer Chamber, that the execution of the deed was an act of bankruptcy within the statute 12 & 13 Vict. c. 106, s. 67. "The sale of the *whole* of a trader's stock," said Jervis, C. J., "to a *bonâ fide* purchaser, for a fair price, has been held not to come within the rule, even though creditors may ultimately be delayed or defeated, and the misapplication of the proceeds was contemplated by the trader at the time of the sale, because the trader gets a present equivalent for his goods, and the sale is strictly in the course of his business; and of course the sale of part of a trader's stock for the fair price by that part cannot be objected to. But the sale of the whole for the price of a part, not because the trader is obliged, under pressure, to sell his stock for less than its value, but because an old debt is taken as part of the price, though it may not be the moving cause of the transfer, admits of a different consideration, and might be held to be an act of bankruptcy without conflicting with former decisions. It comes within all the mischiefs referred to by the counsel for the plaintiffs, as deduced from the older cases. The trader gets no equivalent for his stock; and the transfer having the effect of defeating and delaying his creditors, would be a fraudulent transfer with intent to effect that object. But in this particular case, the form of the deed makes it unnecessary further to consider the general question. It recites that the transfer was made, not only for the further advance, but also for the old debt; and it passes not only all the trader's stock, and the money advanced, if he then had it in his possession, but it also professes to give to the defendant a right to take all future-acquired property, even though it should be purchased with the money which is alleged to be the consideration for the transfer. The trader therefore gets no equivalent for any part of the stock transferred; and such a transfer necessarily defeats and delays his creditors, and is an act of bankruptcy without fraud in fact." See the remarks on this case in Hutton *v.* Cruttwell, 1 E. & B. 15, 25 (72 E. C. L. R.); and Smith *v.* Cannan, 2 E. & B. 35 (75 E. C. L. R.); sed vide Young *v.* Waud, 8 Exch. 221; Bell *v.* Simpson, 2 Hurlst. & N. 410.

So in Woodhouse *v.* Murray, 2 Law R. Q. B. 634, an execution

was levied by seizure on the goods of a trader, and he being then insolvent, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the whole of his property, and ceased to carry on business. Under the 73d section of 24 & 25 Vict. c. 134, if an execution for a debt exceeding 50*l.* be levied by seizure and sale of the goods of a trader debtor, he is to be deemed to have committed an act of bankruptcy; *and if within fourteen days from the day of sale he is adjudged a bankrupt, the money is to be paid to the assignee under the bankruptcy. It was held by the Court of Queen's Bench that as the creditors at large could have interfered and taken the proceeds of the execution under the 73d section, there was no sufficient equivalent for the assignment to the execution creditor, which was therefore void, and an act of bankruptcy. [*555

An assignment, however, even of all a trader's goods, will be valid if it be made in pursuance of a legal obligation. See Payne *v.* Hornby, 25 Beav. 280.

And the result will be the same where an assignment is made to secure an antecedent debt, if when the advance was made there was an understanding that such assignment should be executed: Hutton *v.* Cruttwell, 1 E. & B. 15, 19 (72 E. C. L. R.); Pennell *v.* Dawson, 18 C. B. 355 (86 E. C. L. R.).

And it seems that if on a certain day there be a *bonâ fide* agreement founded on good consideration, for the subsequent giving of a bill of sale, and if that bill of sale be afterwards given accordingly, it will have a retrospective effect, and must be considered as having been made on the day on which the agreement was entered into: per Kelly, C. B., Mercer *v.* Peterson, 2 Law Rep. Ex. 309. See Johnson *v.* Fesemeyer, 3 De G. & J. 15; Mercer *v.* Peterson, 2 Law Rep. Ex. 309.

So in Harris *v.* Rickett, 4 H. & N. 1, a trader indebted to various persons, procured from A. an advance of 200*l.*, for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the money he gave to A. a promissory note for 200*l.*, a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of assurance, and also another memorandum of agreement to pay 10*l.* yearly as a bonus. At a later period, on being requested, he executed a bill of sale of all his property to A. It was held by the

Court of Exchequer, first, that such bill of sale having been executed in pursuance of the original agreement, was not an act of bankruptcy; secondly, that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain, and was not intended to contain the whole agreement between the parties. See also Morris *v.* Venables, 15 W. R. (M. R.) 2.

The inadequacy of the advance as compared with the value of the property pledged, will not make the assignment fraudulent as a matter of law; and it will be valid provided it were not fraudulent in fact—that is to say, provided the money were raised by the trader not with the intent of delaying his creditors, but of meeting them: Bittlestone *v.* Cooke, 6 E. & B. 296, 307, 308, 309 (88 E. C. L. R.); Whitmore *v.* Claridge, 31 L. J. (Q. B.) 141, s. c., affirmed upon appeal in the Exchequer Chamber, 33 L. J. (Q. B.) 87.

*556] *The principle, however, of the cases which have just been considered will not be applicable to the case where an assignment is made by a trader to secure a surety to a composition deed, who has given acceptances for the amount under the composition deed, inasmuch as the trader does not receive an equivalent which he can deal with in carrying on his trade. See Leake *v.* Young, 5 E. & B. 955 (85 E. C. L. R.). There a composition deed was made between Leake a trader, of the first part, Bracebridge his surety, of the second part, and his creditors, of the third part, which after reciting that the creditors had agreed to accept a composition of 12*s.* in the pound, to be paid by four instalments, at the end of four, six, nine, and twelve months, in full satisfaction and payment of their "several debts," the first three of such instalments to be secured by bills drawn by Leake on Bracebridge, and accepted by him, the last by Leake's promissory note. The deed contained a covenant by the creditors not to sue Leake until default should be made in payment of the bills and notes, or some of them, and upon payment of the bills and notes at maturity, to grant a release. Before executing the deed, Bracebridge stipulated with Leake for a security to himself over all Leake's property. Waller, one of Leake's creditors, executed the deed and received the bills and notes. On its maturity the first were dishonored. Waller immediately commenced an action against Leake for his whole debt, in

which he ultimately obtained judgment. Leake, under pressure from Bracebridge after the commencement of Waller's action and before he obtained judgment, assigned all his property to Bracebridge. This was *bonâ fide* in fulfilment of his promises to give Bracebridge security. Leake was declared a bankrupt on Waller's petition. It was held by the Court of Queen's Bench that the assignment to Bracebridge was an act of bankruptcy, it being an assignment of all the trader's property, and not being for such an equivalent as to make it not necessarily delay his creditors. "A transaction," said Lord Compbell, C. J., "whereby the property is conveyed to secure a surety against liabilities which he has incurred to the particular creditors who come in, and which surety can stop the trade at any moment, is not in our opinion a case where the bankrupt receives an equivalent which he can deal with in carrying on his trade, if he chooses, within the doctrine of Rose *v.* Haycock, 1 Ad. & E. 460 n. (28 E. C. L. R.) and Baxter *v.* Pritchard, 1 Ad. & E. 456 (28 E. C. L. R.). The whole power is entirely taken out of the hands of the bankrupt, and his trade may be stopped at any moment at the will of the assignee, while he is to receive nothing; and no part of the property or its proceeds is under his control, but the whole is in effect to be applied to secure a creditor, who is to pay instalments to the *particular body of creditors who have come in and agreed to receive his acceptances. It seems impossible to us to treat such a transaction as one where the trader obtains an equivalent within the principle of the cases on which the plaintiff relies; and we therefore, on principle as well as on authority, give our opinion that the deed in question was an act of bankruptcy." See also Ex parte Zwilchenbart, 3 M., D. & D. 671; Re Marshall, 1 De Gex 273. [*557

A *bonâ fide* agreement by a trader for a transfer of property for valuable consideration, even by way of security, amounting to an equitable assignment, will entitle the transferee to receive it, subject of course to any question which may be raised as to reputed ownership. See Hunt *v.* Mortimer, 10 B. & C. 44 (21 E. C. L. R.); Hutchinson *v.* Heyworth, 9 Ad. & E. 375 (36 E. C. L. R.); Dangerfield *v.* Thomas, Id. 292; Belcher *v.* Oldfellow, 6 Bing. N. C. 102 (37 E. C. L. R.); Crowfoot *v.* Gurney, 9 Bing. 372 (23 E. C. L. R.); Parnham *v.* Hurst, 8 M. & W. 743; Walker *v.* Rostron, 9 M. & W. 411.

A conveyance by a trader of all his property upon trust either for a particular creditor (Wilson *v.* Day, 2 Burr. 827; Hassel *v.* Simpson, 1 Bro. C. C. 99; Doug. 89 n.; Hooper *v.* Smith, 1 W. Black. 442; Newton *v.* Chantler, 7 East 138), or for a certain number of creditors (Ex parte Foord, cited *ante*, p. 517; Alderson *v.* Temple, 4 Burr. 2240; Butcher *v.* Easto, Doug. 295; Devon *v.* Watts, Doug. 86; Hooper *v.* Smith, 1 W. Black. 442), or even for all his creditors at large, and although it be for the purpose of effecting an equal distribution amongst them (see Eckhart *v.* Wilson, 8 Term Rep. 140; Tappenden *v.* Burgess, 4 East 230; Kettle *v.* Hammond, 1 Cooke B. L. 108, 3 ed., Simpson *v.* Sikes, 6 M. & Selw. 312; Turner *v.* Hardcastle, 11 C. B. N. S. 683 (103 E. C. L. R.); Hobson *v.* Thelluson, 2 Law Rep. Q. B. 642), will be an act of bankruptcy. But it seems that in order that such deed may be avoided, it is material to show the continued existence of a debt due at the time of the execution of the deed (Ex parte Taylor, 5 De G., M. & G. 395; Ex parte Thomas, 1 De Gex 612), as it is not void as against future creditors: Oswald *v.* Thompson, 2 Exch. 215; sed vide Stevenson *v.* Newnham, 13 C. B. 295 (76 E. C. L. R.).

It might at first sight appear difficult to say how such a deed as an assignment in favor of all creditors should be considered as a *fraudulent deed*, so as to bring it within the provision of the 67th section of the Bankrupt Act. Perhaps the difficulty may be got over by such reasoning as was used by Jervis, C. J., in a recent case, viz. "that every person must be taken to intend that which is the necessary consequence of his own act; and if a trader make a deed which has the effect if not of defeating, at any rate of delaying his creditors, he *558] must be taken to have made the debt with that intent. *But a deed which has the effect of defeating or delaying a trader's creditors, is by the policy of the bankrupt law a fraudulent deed; and therefore a deed which has that effect is, in the terms of the Act, a fraudulent transfer of the trader's goods with intent to defeat or delay his creditors:" Graham *v.* Chapman, 12 C. B. 103 (74 E. C. L. R.); Ex parte Wensley, 1 De G., J. & Sm. 273.

Lord Eldon, moreover, with reference to those cases in which it has been held that a conveyance of all a trader's property in trust for his creditors, is an act of bankruptcy, lays down two principles: first, that by that act the trader necessarily, perhaps not intending

it, deprives himself of the power of carrying on his trade; secondly, that he endeavors to put his property under a different course of application and distribution among his creditors from that which would take place under the bankrupt law: Dutton *v.* Morrison, 17 Ves. 199; Ex parte Bourne, 16 Ves. 148; Lindon *v.* Sharp 7 Scott N. R. 745; Stewart *v.* Moody, 1 C., M. & R. 777; Leake *v.* Young, 5 E. & B. 955 (85 E. C. L. R.); The Oriental Banking Company *v.* Coleman, 3 Giff. 11; Goodricke *v.* Taylor, 2 De G., J. & Sm. 135, affirming s. c. 2 Hem. & Mill. 380.

Such a trust-deed executed by a trader in favor of creditors will be an act of bankruptcy, though there be in the deed a proviso declaring it void, if the trustees think fit (Tappenden *v.* Burgess, 4 East 230), or, if all the creditors shall not execute, the acts of the trustees to be good in the meantime (Back *v.* Gooch, 4 Campb. 232; s. c. Holt 13); or if all the creditors to a certain amount shall not execute by such a time, or a commission in bankruptcy shall issue (Dutton *v.* Morrison, 17 Ves. 193), and though the deed was not intended to be carried into execution, but was merely intended for the purpose of making the trader a bankrupt: Tappenden *v.* Burgess, 4 East 230, 237; Simpson *v.* Sikes, 6 M. & Selw. 295.

The execution of a deed of assignment of all a debtor's property, for the benefit of his creditors, intended to be registered under the provisions of the 192d section of the Bankruptcy Act, 1861, constitutes an act of bankruptcy (Ex parte Wensley, 1 De G., J. & Sm. 273); but by the 199th section of the same Act, "In case any petition shall be presented for adjudication against a debtor, after his execution of such deed or instrument as is therein before described (*i. e.* in the 192d section), and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed, if the court shall think fit; and in case such deed or instrument shall be duly registered, the petition shall be dismissed.

Even after such deed is registered, it may be made an act of bankruptcy where the registration is invalid in consequence of the *requirements of the 192d section not having been complied with. [*559

The registration of a deed under the 194th section of the Bankruptcy Act, 1861, containing an assignment of all the debtor's pro-

perty for the benefit of his creditors, will not prevent its being treated as an act of bankruptcy: Ex parte Morgan, In re Woodhouse, 1 De G., J. & Sm. 288.

If a deed of assignment purporting to be made by all three partners of a firm, and to convey all their personal estate and effects whatsoever in trust for the benefit of creditors, be executed by one of them only, it will operate to convey the share of the one who so executes, and operates as an act of bankruptcy by him: Bowker *v.* Burdekin, 11 M. & W. 128; sed vide Dutton *v.* Morrison, 17 Ves. 196. It would be otherwise if the deed were executed merely as an escrow.

It has been held in equity that where a trader making an assignment of all his property to trustees, retains the whole beneficial interest in it, and merely vests it in their hands for the more ready conversion of the profits, to enable him to arrange with his creditors, it will not be an act of bankruptcy. See Greenwood *v.* Churchill, 1 Myl. & K. 546. There a trader entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the proceeds as he should direct. It appeared that the trust was executed under advice for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health. It was held by Sir J. Leach, M. R., that the trust-deed was not an act of bankruptcy. "By the trust-deed," said his honor, "the whole beneficial interest in the property continues as open as it was before, to the execution of the creditors; and unquestionable evidence proves that the deed was not executed with the intent to defeat or delay the creditors of the bankrupt, but rather with a view to advance the arrangement with them, by placing in more efficient hands the conversion of that property to which the bankrupt, from the state of his health, was considered to be unequal." See also Berney *v.* Davidson, 1 B. & B. 408 (5 E. C. L. R.); 4 Moore 126 (16 E. C. L. R.); but see the remarks, 12 C. B. 102 (74 E. C. L. R.); 2 E. & B. 44 (77 E. C. L. R.).

An assignment of a *part* merely of a trader's effects, even on account of a pre-existing debt, does not, like an assignment of the *whole*, contain within itself the evidence of a fraud: Balme *v.* Hut-

ton, 2 Y. & J. 101; Hale *v.* Allnutt, 18 C. B. 505 (86 E. C. L. R.); and see Chase *v.* Goble, 2 M. & G. 930 (40 E. C. L. R.). This distinction is well pointed out by Lord Mansfield, C. J., in the principal case of Worseley *v.* De Mattos, where he observes that "there is a great *difference between the conveyance of *all* and of a *part*. A conveyance of a part may be public, fair, [*560 and honest, for as a trader may sell, so he may openly transfer many kinds of property, by way of security; but a conveyance of all must either be fraudulently kept secret, or produce an immediate absolute bankruptcy:" *ante*, p. 518.

A conveyance by a debtor of part of his property in contemplation of bankruptcy with intent to defeat and delay or defraud his creditors, will be an act of bankruptcy (Devon *v.* Watts, 1 Doug. 86; Morgan *v.* Horseman, 3 Taunt. 241; Linton *v.* Bartlett, 3 Wils. 47); secus if it be made *bonâ fide*: Wheelwright *v.* Jackson, 5 Taunt. 109 (1 E. C. L. R.); Manton *v.* Moore, 7 Term Rep. 67; Chase *v.* Goble, 3 Scott N. R.; Cattell *v.* Corrall, 4 You. & Col. Exch. 228; and see Jacob *v.* Sheppard, cited in Worseley *v.* De Mattos, *ante*, p. 518, and Unwin *v.* Oliver, Id. p. 521; Ex parte Wensley, 1 De G. J. & Sm. 273.

So likewise an assignment of a *part* of a trader's effects, or a payment made in satisfaction of, or to secure a pre-existing debt, will be fraudulent, if it were made in contemplation of bankruptcy, and with the view of giving a particular creditor an advantage over other creditors—the intent being in fact "to defeat or delay" them. See Ex parte Simpson, De Gex 9.

There may be an act of bankruptcy by a fraudulent gift of part of a man's property to a particular creditor on the part of a man who knows himself to be so insolvent, that he must expect bankruptcy to be the necessary consequence of the payment: Ex parte Wensley, 1 De G., J. & S. 28, per Lord Westbury, C.

No creditor who has executed (Bamford *v.* Baron, 2 Term Rep. 594), or been privy to, or acted under a deed of assignment by a debtor in favor of his creditors, nor any person as his representative, can afterwards set up such a deed as an act of bankruptcy: Back *v.* Goch, 4 Camp. 234; Ex parte Cawkwell, 1 Rose 313; Ex parte Shaw, 1 Madd. 598; Ex parte Kilner, Buck 104; Ex parte Battier, Id. 426; Ex parte Tealdi, M., D. & D. 210; Marshal *v.* Barkworth, 4 B. & Ald. 508 (24 E. C. L. R.); Ex parte Alsop, 6 Jur. N. S.

182; 1 De G., F. & Jo. 289; Ex parte Stay, 2 Law Rep. Ch. App. 374. It is no objection, however, that some of the assignees may have executed such a deed: Tappenden *v.* Burgess, 4 East 230.

Although a creditor gives his assent to a proposal of a trader to assign his effects for the benefit of his creditors, yet if the deed contains an unexplained stipulation in favor of a particular creditor, the first-mentioned creditor is not bound by the deed, but may take proceedings upon it as an act of bankruptcy: Ex parte Marshall, 1 M., D. & D. 575.

A trustee may be a petitioning creditor (Hope *v.* Meek, 10 Exch. 829), but not, it seems, unless his *cestui que trust* acquiesce: Ex parte Gray, 2 Mont. & Ayr. 283.

From the observations already made, it is evident that any one *561] *creditor who had not either executed or been privy to or acted under a deed of conveyance by a trader in favor of his creditors, might by taking proceedings in bankruptcy nullify the deed, although its provisions might be most beneficial to all parties. To prevent this being done to an injurious extent, it has been enacted "that if any such trader shall execute any conveyance or assignment by deed of *all* his estate and effects to a trustee or trustees for the benefit of *all* the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the 'London Gazette,' and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the 'London Gazette,' and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor:" 12 & 13 Vict. c. 106, s. 68.

Where a fraudulent conveyance is not the act of bankruptcy upon which the adjudication is founded, or where it could not be so, in

consequence of its having been executed more than three months before a petition for adjudication be filed, and coming within the province of the 68th section of 12 & 13 Vict. c. 106, it seems that in order to entitle the assignees to set the deed aside as being fraudulent it may be necessary to show the continued existence of a debt due at the time of the execution of the deed (Ex parte Taylor, 5 De G., M. & G. 392, 395); and in one case it seems to have been decided that a deed of assignment, amounting to an act of bankruptcy, is not void as against future creditors: Oswald *v.* Thompson, 2 Exch. 215.

It has, however, been held under the statute of Elizabeth, c. 5, that if at the time the assignment is impeached creditors remain unpaid who were such at the date of the assignment, subsequent creditors may impeach it: Jenkyn *v.* Vaughan, 3 Drew 419; Holmes *v.* Penney, 3 K. & J. 90; Collins *v.* Burton, 4 De G. & J. 617; Barling *v.* Bishopp, 6 Jur. N. S. 812. And where a man was adjudicated bankrupt upon his own petition it was held that a deed whereby the bankrupt had assigned all his property upon trust for his creditors, was incapable of being impeached, because there was no creditor nor any number of creditors who could have sued *out a fiat grounded on the trust deed as an act of bankruptcy: Ex parte Philpott, De Gex 346. [*562

If the debt of the creditor, by whom a voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement: Spirett *v.* Willows, 13 W. R. 329, per Lord Westbury, C.

But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to "delay, hinder, or defraud creditors," or that after the settlement the settlor had no sufficient means, or reasonable expectation of being able to pay his then existing debts—that is to say, was reduced to a state of insolvency—in which case the law infers that the settlement was made with intent to "delay, hinder, or defraud creditors," and is therefore fraudulent and void: Id.

And the fact of a voluntary settlor retaining money enough to

pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of the creditors are "delayed, hindered, or defrauded:" Id.

Where a fraudulent conveyance might be impeached in bankruptcy by being made an act of bankruptcy, the Court will annul an adjudication obtained upon a bankrupt's own petition, in order that a creditor may file a new petition under which the conveyance may be impeached: Ex parte Louch, De Gex 463; Ex parte Taylor, 1 De G., M. & G. (Bk.) 346.

A conveyance or transfer, to come within the meaning of the statutes relating to acts of bankruptcy, must amount to a change of property. Hence the sale to *bonâ fide* purchasers of property through an agent in contemplation of bankruptcy for the benefit of the bankrupt and the agent (Harwood *v.* Bartlett, 8 Scott 171; 6 Bing. N. C. 61 (37 E. C. L. R.)), and the secret removal by a debtor of goods out of his house to prevent their being taken in execution (Cole *v.* Davies, 1 Ld. Raym. 724) have been held not to be acts of bankruptcy.

By the Bankrupt Law of the United States, Act of Congress passed March 2, 1867, 14 Statutes at Large 534, it is enacted by the thirty-fifth section that "if any person being insolvent or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him or who is under any liability for him, procures any part of his property to be attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance or to be benefited thereby or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited. And if any person being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or

other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer or other conveyance is made with the view to prevent his property from coming to his assignee in bankruptcy or to prevent the same from being distributed under this act or to defeat the object of or in any way impair, hinder, impede or delay the operation and effect of or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *primâ facie* evidence of fraud."

The Bankrupt Act of 1867 operates directly on the rights of preferred creditors, making void their preference and postponing their claims in favor of the assignee, as the owner of the fund derived from the sale. He claims not upon an adverse title, but under and through the bankrupt by virtue of the Act. This claim is adverse to the creditors only in the sense that they are postponed and he preferred: Rohrer's Appeal, 12 P. F. Smith 498.

An assignee in bankruptcy may recover personal property fraudulently conveyed by the bankrupt to one knowing that the pretended sale was made while the vendor was in insolvent circumstances and to hinder and defraud his creditors: Bolander *v.* Getz, 36 California 105. Judgments given within four or six months of the commencement of proceedings in bankruptcy are valid, if not given as preferences or taken with knowledge of insolvency or contemplated bankruptcy: Biddle's Appeal, 18 P. F. Smith 13; Ex parte Wright, 2 Bank. Reg. 155. A *bonâ fide* assignment for the benefit of creditors is good against the assignee: Ex parte Arledge, 1 Bank. Reg. 195; Sedgwick *v.* Place, Id. 204; Beck *v.* Parker, 15 P. F. Smith 262. The assignee cannot recover the value of property transferred by the bankrupt within four months of the adjudication, without showing that a preference was thereby intended: Wadsworth *v.* Tyler, 2 Bank. Reg. 101; Tuttle *v.* Traux, 1 Id. 169; Ex parte Foster, 2 Id. 81; Ex parte Meyer, Id. 137; Ex parte Locke, Id. 123; Ex parte Lawson, Id. 125. It is of no consequence whether a preference given to a creditor was voluntary or the result of threats or coercion; in either case it is void: Foster *v.* Hackley, 2 Amer. Law Times 8; Wilson *v.* Brinkman, 2 Bank. Reg. 140. The assignee may recover property fraudulently conveyed before the passage of the act: Bradshaw *v.* Klein, 16 Amer. Law Reg. 505.

*563] CROFT *v.* DAY.

Rolls, December 18th, 1843.

[Reported 7 Beav. 232.]

Trade Marks.]—*A blacking manufactory had long been carried on under the firm of Day and Martin, at* 97, *High Holborn. The executors of the survivor continued the business under the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at* 90½, *Holborn Hill, and sold blacking as of the manufacture of Day and Martin,* 90½, *Holborn Hill, in bottles and with labels having a general resemblance to those of the original firm. He was restrained by injunction.*

Principles on which Courts of Equity interfere to prevent the use of trade-marks.

This was a motion on behalf of the executors of Mr. Day, the well-known blacking maker, to restrain the defendant, his nephew, from selling blacking manufactured by him, in bottles having affixed thereto labels, being copies or facsimiles or imitations, with colorable variations only, of those used by the firm of Day and Martin, or any labels which should represent, or have the appearance of representing, the said firm of Day and Martin, as manufacturers of the composition or blacking described in such labels, and from using trade cards of the same description.

It appeared from the case of the plaintiffs, that in 1801,

Charles Day and Benjamin Martin entered into partnership as blacking manufacturers, for the term of twenty-one years, and carried on the business at 97, High Holborn. In 1808, Martin transferred his interest to Day, who was to be at liberty to use Martin's name for the remainder of the twenty-one years. This term was afterwards extended for twenty-five years, from the year 1820, determinable *on the death of Martin, and they agreed (but how did not appear) to be partners for that period. [*564

Martin died in 1834, and Day died in 1836, and the business was carried on in the names of Day and Martin by Day's executors. The defendant Day, the testator's nephew, had recently set up as a blacking maker at No. 90½, Holborn Hill, and had sold blacking in similar bottles and with similar labels (with some variations) to those which had heretofore been used by Day and Martin, and to those now used by the executors of Day. The variation was thus described in the affidavit:—"Saith, that the name of the article sold as being real Japan blacking, made by Day and Martin, and the description and directions for the use of the said article, and the price and signature of the names Day and Martin, contained in the labels of the defendant, are in the same precise words, and (with very trifling and unimportant variations) are in the same character and description of type as the name of the article to be sold, and the description, and directions for use, and the price, and the signature of the said firm in the label used by the firm of Day and Martin as aforesaid; and the only difference in the label is, that the defendant has substituted the royal arms, in the centre of the label, for the representation or drawing of the manufactory of the firm contained on the labels of the firm, and has substituted in the label the figures and words 90½, Holborn Hill, for the figures and words 97, High Holborn, contained in the label of the firm, and has omitted to insert in the figures 90½ the names Day and Martin, in the

manner in which those words or names are inserted by the firm in their said figures 97."

The defendant by his affidavit stated, that the carts of the plaintiffs now bore the names of Charles Day and Richard, and not Benjamin Martin. That previously to his, the defendant's, vending or offering for sale any blacking, he applied to an intimate acquaintance of his of the name of Martin, to join him in the manufacture and sale thereof, and obtained permission to use his name in conjunction with his own as manufacturers and vendors of blacking, and that he, the defendant, was now in treaty, and only waiting the result of this suit, finally to settle the terms of a partnership with Mr. Martin for carrying on the said business of blacking manufacturers.

Mr. *Tinney*, Mr. *Purvis*, and Mr. *Toller*, in support of the *motion, argued that the defendant was intentionally
*565] practising a fraud upon the plaintiffs, and a deception on the public; and that whatever might be his right to manufacture and sell blacking in his own name, still he had no right or authority to assume the additional name of Martin and use labels, etc., whose general character was so similar to that which the plaintiffs and the testator had long been in the habit of using, as to induce purchasers to believe that the article sold by the defendant was manufactured by and purchased from the plaintiffs.

Mr. *Turner* and Mr. *Mylne*, *contrà*, contended that the defendant had an undoubted right to affix his own name to his own manufacture, and that he had authority to add that of Mr. Martin, with whom he was in treaty for a partnership. That there was a marked difference between the labels, and as to those points in which there was a resemblance, they had long been adopted by the trade in general.

That the plaintiffs had practised a deception on the public, by representing the manufacture to be that of Day and

Martin, while no person of those names was concerned therein; that consequently the plaintiffs came before the Court under circumstances to disentitle them to its assistance. *Knott* v. *Morgan*, 2 Keen 313, and *Perry* v. *Truefitt*, 6 Beav. 66, were referred to.

Lord Langdale, M. R. (without hearing a reply).

What is proper to be done in cases of this kind must more or less depend upon the circumstances which attend them.

There are cases, like that of the London Conveyance Company, in which the injunction is granted at once; there are cases, like that of the Mexican Balm, in which the injunction is refused until the plaintiff has established his right at law. In short, in such cases there must be a great variety of circumstances; and the Court must deal with each case according to the nature of its peculiar circumstances.

The accusation which is made against this defendant is this; that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been correctly said that the principle in these cases is this,—that *no man has a right to sell his own goods as the goods of another*. You may express the same principle in a different form, and say that **that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own.* It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that in my opinion, the right which any person may have to the protection of this [*566

Court, does not depend upon any exclusive right which he may be supposed to have to a particular name or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others.

It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And secondly, a sufficiently distinctive individuality must be preserved, so as to procure for the person himself the benefit of the deceptions which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception, by preserving his own individuality.

There are many distinctions even more than have been stated, between these two labels. It is truly said, that if any one takes upon himself to study these two labels, he will find several marks of distinction.

On the other hand, the colors are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me, that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is, to persuade the public that this

new establishment is, in some way or other, connected with the old firm or manufacturer, and at the *same time [*567 to get purchasers to go to 90½ Holborn Hill, and not 97, High Holborn. I think what has been done here is quite calculated to effect that purpose, and the defendant must be restrained.

My decision does not depend on any particular or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction, restraining the defendant from carrying on that deception. He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit him in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage.

The form of the injunction was discussed, when—

The Master of the Rolls, after stating that he was inclined to rely on the terms of the injunction in *Knott* v. *Morgan*, as that case had been the subject of appeal, said he would himself settle the terms of the injunction.

By the terms of the injunction, the defendant, his servants, etc., were restrained from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as or purporting to be blacking manufactured by

Day and Martin, in bottles having affixed thereto such labels as in the complainant's bill mentioned, or any other labels so contrived or expressed as, by colorable imitation or otherwise, to represent the composition or blacking sold by the defendant, to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards, so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant, is the same as the composition or blacking manufactured or sold by John Weston.

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*568] *The principle upon which courts of justice ordinarily interpose, in cases when one man uses the trade-mark of another, appears to be this, *that no one has a right to sell his own goods as the goods of another.* "You may," says Lord Langdale, M. R., in Croft *v.* Day, "express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud:" *ante*, p. 566. See also Holloway *v.* Holloway, 13 Beav. 209; Ransome *v.* Bentall, 3 L. J. (Ch.) 161, N. S.

In the case, however, of Millington *v.* Fox, 3 Myl. & Cr. 338, Lord Cottenham, C., held that a person may acquire a title to a particular trade-mark, and that the Court of Chancery, looking upon the use of it by another as an *invasion of the rights of property*, will *grant an injunction to restrain such use, even although there may have been no fraudulent intention on the part of the defendant.*" In the case of Millington *v.* Fox, 3 Myl. & Cr. 338, an injunction was granted to restrain the defendant from using as marks on steel, manufactured by him, the words "Crowley," or "Crowley Millington," although he was not aware that they

were trade-mnrks, and believed that they were merely technical terms. "Having come to the conclusion," said Lord Cottenham, C., "that there was sufficient in the case to show that the plaintiff had a title to the marks in question, they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time the case is very different from the cases of this kind which usually occur, where there has been a fraudulent use by one person of the trade-marks or names used by another trader. I see no reason to believe that there has in this case been a fraudulent use of the plaintiff's marks. It is positively denied by the answer; and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel; for although there is no evidence to show that the terms "Crowley" and "Crowley Millington" were technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of the right to the exclusive use of those names; and therefore I stated that the case is so made out as to entitle the plaintiffs to *have the injunction made perpetual." [*569

Ground of interposition at Law in respect of the wrongful use of Trade-marks.—In examining the cases *at common law* upon the subject of trade-marks, it will be found that the mere use by a person of a mark similar to that of another will not give the latter a right of action, for it must be shown that it was used with the fraudulent intention of passing off the goods of the defendant as those of the plaintiff.

The action in such cases is in the nature of an action for deceit; and it is laid down in Com. Dig. tit. "*Action upon the case for Deceit*," (F. 3.), that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he was deceived; and that he did it *falsò et fraudulenter:*" per Cresswell, J., 4 M. & G. 385 (43 E. C. L. R.).

The earliest case upon this subject at law is cited in Southern *v.* How, Pop. 144, by Doderidge, J., who said that "22 Eliz. an action upon the case was brought in the Common Pleas by a clothier, that

whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his benefit and profit, and that he used to set his mark to his cloth, whereby it should be known to be his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose *to deceive him*, and it was resolved the action did well lie:" Poph. 144. The more recent cases at law are Blofeld *v.* Payne, 4 B. & Ad. 410 (24 E. C. L. R.); Sykes *v.* Sykes, 3 B. & C. 541 (10 E. C. L. R.); 5 D. & R. 292 (16 E. C. L. R.); Morison *v.* Salmon, 2 M. & G. 385 (40 E. C. L. R.); 2 Scott N. R. 449; Singleton *v.* Bolton, 3 Doug. 293 (26 E. C. L. R.); Crawshay *v.* Thompson, 4 M. & G. 357 (43 E. C. L. R.); 5 Scott N. R. 562; in all of which the proof of a fraudulent intention, or attempt to deceive others, on the part of the defendant has been either held or assumed to be essential to the plaintiff's success.

It has even been held at law, that notice of the resemblance of the mark given by the plaintiff to the defendants, will not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action: Crawshay *v.* Thompson, 4 M. & G. 357 (43 E. C. L. R.).

It is not, however, necessary to show that the persons to whom articles are sold are deceived by the trade-mark they bear, if through their means the public generally may afterwards be induced to purchase such articles, believing them to be manufactured by the person whose trade-mark has been adopted or imitated. Thus although persons who have adopted the trade-marks of another do not themselves sell their own goods as of his manufacture, yet if they sell them to retail dealers, for the express purpose of being resold as his goods, the fraudulent intention will be sufficiently shown: Sykes *v.* Sykes, 3 B. & C. 541 (10 E. C. L. R.); Edelsten *v.* Edelsten, 1 De G., J. & Sm. 200.

*570] And where it appears that the *defendant has fraudulently used the plaintiff's trade-marks, the latter will at law be entitled to some damages, although no specific damage be proved, because it is "to a certain extent an injury to his right:" Blofeld *v.* Payne, 4 B. & Ad. 410, 411 (24 E. C. L. R.).

A person cannot obtain damages at law against another person for having assumed the same name or style for the purpose of carrying on business, unless he shows that he has himself actually carried on business under such name or style. See Lawson *v.* The Bank

of London, 18 C. B. 84 (86 E. C. L. R.). There the declaration stated that the plaintiff had *established* a bank in London, called "The Bank of London," and was the first person who had established a bank by or under that name, and had established the said bank at great expense, and caused the name to be published and affixed on the offices of the said bank, so that the same might be seen and known by the public, and had caused prospectuses by the said bank to be printed and circulated, with the same name and title of "The Bank of London" thereon; and the said bank was then commonly known by the name of, and was the only bank named and styled "The Bank of London," whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to allege that the defendants, intending to injure the plaintiff in his said bank and the said business of his said bank, afterwards and while his said bank was the only bank named or styled "The Bank of London," wrongfully and fraudulently established a certain other bank in London under the name, style, and title of "The Bank of London," *in imitation of, and as representing the said Bank of London of the plaintiff*, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under false color and pretence that the same was the bank established by the plaintiff; and thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him so fully and extensively as he would otherwise have done, and had been deprived of profits, and that by means of the premises divers persons were induced to believe and did believe that the bank so established by the defendants was the bank called "The Bank of London" established by the plaintiff. It was held by the Court of Common Pleas, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker. "It does not appear," said Jervis, C. J., "that the plaintiff has ever carried on the business of banking, or that he had a single customer, or that he was in a position to be damnified by the acts of the defendants. I therefore think enough has not been alleged in this declaration to show that the plaintiff has sustained any injury, and consequently the action will not lie."

The question has been raised, *but not determined, how far an action will lie against a corporation for carrying on a [*571

business under the same name as and for the purpose of making it to be believed that it was the business of another person; but Willes, J., in Lawson *v.* The Bank of London, 18 C. B. 95 (86 E. C. L. R.), observed that he was not prepared to say that the corporation would not be liable if the cause of complaint were properly alleged. For as the corporation would have capacity to do the act, it might possibly be responsible for its consequences.

Ground of interposition in Equity in respect of the wrongful use of Trade-marks.—It will be observed that when a person uses the trade-mark of another, relief may sometimes be had by injunction in equity, when damages could not be obtained in an action on the case at law, inasmuch as it is necessary at law to charge in the declaration that the defendant used the trade-marks of another *scienter*, knowingly, for the purpose of deceiving others; where therefore that allegation cannot be made or proved, resort should be had to a court of equity, as it is a sufficient ground for relief there, if the defendant actually does deceive others, by the use of another's trade-mark, whatever may be his own intention. This distinction was noticed by Sir W. Page Wood, V.-C., in the recent case of Welch *v.* Knott, 4 K. & J. 747, 751, where his honor, although he refused the injunction upon other grounds, made the following important remarks, "That the defendant would not be entitled to use the plaintiff's bottles in such a manner as, in *fact*, to mislead the public, although there might be no intention on his part to mislead, is clear. In Millington *v.* Fox, 3 Myl. & Cr. 338, 352, Lord Cottenham felt satisfied that in using the plaintiffs' trade-marks, the defendants had no intention to mislead the public; yet inasmuch as the public were in fact misled, he held that the plaintiffs were entitled to a perpetual injunction. It was not sufficient for the defendants to say that they used the marks in ignorance of their being the plaintiffs' trade-marks. How far that doctrine is capable of being reconciled with cases at law in which the *scienter* has been held to be essential, in order to enable the plaintiff to recover, it is not material to consider. In this Court the rule is clear, as laid down in Millington *v.* Fox. And in accordance with that rule, I held in Bass's Case, that no one was at liberty to sell ale not made by Bass in bottles marked with his label, so as to mislead the public." See also Clement *v.* Maddick, 1 Giff. 98; Kinahan *v.* Bolton, 15 Ir. Ch. Rep. 75, 82.

There does not, however, appear to be any inconsistency between the cases at law and the cases in equity, when we consider the different nature of the remedies usually administered in each. Indeed it seems only consistent with natural justice and common sense, that a person should not be liable to pay *damages [*572 for having unwittingly, and therefore without fraudulent intention, used the trade-mark of another; but at the same time he would, with equal justice, be restrained in equity from making a further use of it, inasmuch as, after notice (assuming the title of the plaintiff either to be clear or capable of being established), it could not be said that any further use of the trade-mark by the defendant could be otherwise than fraudulent. See The Leather Cloth Company *v.* The American Cloth Company, 1 Hem. & Mill. 287.

Lord Cottenham's expressions in Millington *v.* Fox have been often criticized, but after a careful examination of the cases in which they are noticed it will be found that the learned judges who comment upon them mean, if not quite, nearly the same thing, although they express themselves in a different manner. Thus in a recent case it has been laid down, that although there is no property whatever in the use of a trade-mark, nevertheless a person may acquire a right of using a particular mark for articles he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark: The Collins Co. *v.* Brown, 3 K. & J. 426, per Wood, V.-C.

This is put in a very clear light by Lord Chancellor Westbury in the case of Hall *v.* Barrows, 12 W. R. (L. C.) 322, where it was argued, on behalf of the defendant, that there was no property in a trade-mark, and that the right to relief was merely personal, founded on the fraud that is committed where one man sells his own goods as the goods of another. His Lordship, however, in his judgment, which deserves a most careful perusal, observes, "It is true that in some cases are found dicta by eminent judges, that there is no property in a trade-mark, which must be understood to mean that there can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus an ironfounder,

who uses a particular mark for his manufactures in iron, could not restrain the use of the same mark when impressed upon cotton or woollen goods; for a trade-mark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture, and such exclusive right is property. Nor is it correct to say, that the right to relief is founded on the fraud of the defendant, for, as appears by Millington *v.* Fox, the plaintiff is entitled to relief even if the defendant can prove that he acted innocently, and without any knowledge of the right of the plaintiff. Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the
*573] plaintiff's right of property; *for there is no injury if the mark used by the defeudant is not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of this Court's jurisdiction is property, and the necessity for interfering to protect it is by reason of the inadequacy of the legal remedy. See also Ainsworth *v.* Walmesley, 1 Law Rep. Eq. 524.

Different kinds of Trade-marks.—The instances in which the Courts have interposed in cases of the violation of trade-marks are various; such as the user of the same or a similar name or address, fancy name, system of numbers, stamp, label, or packets for goods; or in the case of a book or periodical, the user of a similar title-page or wrapper: Millington *v.* Fox, 3 Myl. & Cr. 338; Franks *v.* Weaver, 10 Beav. 297; Holloway *v.* Holloway, 13 Beav. 299; Shrimpton *v.* Laight, 18 Beav. 164; Spottiswoode *v.* Clarke, 2 Ph. 154; Kinahan *v.* Bolton, 15 Ir. Ch. Rep. 75; Stephens *v.* Peel, 16 L. T. (V.-C. W.) 145; Blackwell *v.* Crabb, 36 L. J. Ch. 504.

Trade-marks have been divided by Lord Romilly, M. R. into two classes—local, denoting where the goods were manufactured; and personal, or those which denote the person who manufactures them (see Hall *v.* Barrows, 32 L. J. Ch. 551; 11 W. R. (M. R.) 525); but to these may be added a third class, which may be called symbolical trade-marks, as, for instance, the figure of a crown, an elephant; a fourth class, where fancy names are used to distinguish the goods (see Browne *v.* Freeman, 12 W. R. 305; Braham *v.* Bustard, 1 Hem. & Mill. 447; Young *v.* Macrae, 9 Jur. N. S. 322); and there is a fifth class, where the mark may be more or less com-

pounded of all, or some of the other classes: The Leather Cloth Company *v.* The American Cloth Company, 11 H. L. Cas. 525; Seixo *v.* Provezende, 1 Law Rep. Ch. Ap. 193.

It is not, however, necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; it is sufficient that the Court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff. But in such a case, it is essential that the imitation should necessarily be calculated to deceive; and where it did not appear that any one had been, in fact, deceived, and a material part of the plaintiff's peculiar marks had been omitted, the Court, notwithstanding strong circumstances of suspicion, refused to interfere: Woolam *v.* Ratcliffe, 1 Hem. & Mill. 295.

It is not necessary for relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other: Edelsten *v.* Edelsten, 1 De G., J. & Sm. 200, per Lord Westbury, C. [*574

So where in a stamp used by the defendant the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs that any person with reasonable care and observation must see the difference, and could not be deceived into taking the one for the other, it was held that there was no infringement: The Leather Cloth Company *v.* The American Cloth Company, 11 H. L. Cas. 523, affirming the decision of Lord Westbury, C. (12 W. R. L. C. 289); reversing S. C. 1 Hem. & Mill. 271.

In Knott *v.* Morgan, 2 Keen 213, an injunction was granted to restrain the defendant from running an omnibus having upon it such names, words, and devices as to form a colorable imitation of the words, names and devices on the omnibuses of the plaintiffs.

Upon the same principle, no person has a right, by the use of the name of a rival shopkeeper, to induce the public to believe that his own shop is that, or connected with that, of such shopkeeper. See Glenny *v.* Smith, 13 W. R. (V.-C. K.) 1032. There the defendant having been in the service of Thresher and Glenny, for two years in the Strand, opened a shop in Oxford Street, with the words

"From Thresher and Glenny," on an awning and two brass plates, the word "From" being in comparatively very small characters—and instances were proved of persons considering that it was a branch shop of Thresher and Glenny, although others deposed that it was not calculated to mislead the public. It was held by Sir R. T. Kindersley, V.-C., that the defendant had no right so to use the names of "Thresher and Glenny," and granted a perpetual injunction, with costs. "There is no question," said his honor, "that if a person has been in the employ of a firm of reputation and sets up for himself, he has a right in any way he thinks fit (provided it is entirely consistent with truthfulness) to communicate to every member of the public that he has had the advantage of being in such service, and may appropriate to himself some of the benefit arising from the character and reputation of his late employers. But it is obvious that it behoves him in so doing to take special care that it is done in such a manner as not to deceive the public." And see Howard *v.* Henriquez, 3 Sand. S. C. 722, where a proprietor of an hotel called the "Irving House," or "Irving Hotel," obtained an injunction to restrain the defendant from using the same title for his place of business, although the name did not appear upon any part of the building of the plaintiff. See also Boalnois *v.* Peake, 3 W. R. (V.-C. G.).

Upon the same principle, a defendant will be restrained from publishing a work, or newspaper, or carrying on a trade, under a fraudulent representation that such work or trade is that of the plaintiff. *Thus in Hogg *v.* Kirby, 8 Ves. 215, the defendant was restrained from publishing a magazine, which it was evident from its title-page and wrapper he intended to represent to be a continuation of the plaintiff's magazine in numbers. See also Seixo *v.* Provezende, 1 Law Rep. Ch. Ap. 192.

*575]

So also where the proprietor of a newspaper bequeathed to his widow the benefit of that trade, subject to a trust for maintaining and educating her family, and she having formed an attachment for the foreman, assisted him in publishing a paper with the same name, an injunction was granted upon the application of the executors: Keene *v.* Harris, 17 Ves. 342, cited; see also Lewis *v.* Langdon, 7 Sim. 421; Spottiswoode *v.* Clarke, 2 Ph. 154; Purser *v.* Brain, 17 L. J. Ch. 141; Chappell *v.* Davidson, 2 K. & J. 123; Prowett *v.* Mortimer, 2 Jur. N. S. 414. And see Clement *v.* Maddick, 1 Giff.

98; where the proprietors of "Bell's Life" obtained an injunction to restrain the defendant from publishing a newspaper under the title of the "Penny Bell's Life."

An injunction was also obtained to restrain the publication of poems represented to be the work of Lord Byron: Lord Byron *v.* Johnston, 2 Meriv. 29.

And although upon a sale of the good-will of a business, the vendor is not precluded from carrying on a generally similar business even next door to the place where the former business was carried on (Crutwell *v.* Lye, 17 Ves. 335), he is not at liberty to do so under the old style or firm, although his name should be the only one appearing in that firm; nor is he at liberty in any other manner to hold out that he is carrying on business in continuation of, or in succession to the business carried on by the late firm: Churton *v.* Douglas, 1 Johns. 174.

Property in a Trade-mark how acquired.—The right of an individual or a firm to a trade-mark is acquired in the first instance by exclusive user. But although in many of the cases the user, as in the principal case, has extended over a considerable time (Motley *v.* Downman, 3 Myl. & Cr. 13; Millington *v.* Fox, Id. 338); and it has been laid down that the Court will always have regard to the fact whether there has been such a length of exclusive usage as to justify it in interfering in a summary way, that is to say, by injunction: London and Provincial Assurance Society *v.* London and Provincial Joint Stock Life Assurance Company, 11 Jur. 938.

According, however, to a recent decision, a clear publication and user of the trade-mark is sufficient to acquire a title in it, although the user may have been but for a short period. Thus in M'Andrew *v.* Basset, 12 W. R. 777: in July, 1861, the plaintiffs established a manufactory for liquorice, the *sticks of which they stamped with the word "Anatolia." At the end of August or beginning of September, 1861, liquorice so stamped was sent into the market. The defendants, who had formerly used a different stamp, soon after the 13th of September, procured a stamp to be made in imitation of the plaintiffs', and used it in executing orders for liquorice which they had received. A bill being filed in the December following, it was held by Lord Chancellor Westbury, affirming the decision of Sir W. Page Wood, V.-C., 10 L. T. (N. S.) V.-C. W. [*576

65, that the plaintiff was entitled to an injunction to restrain the defendants from stamping liquorice with the word "Anatolia." "It has been pressed," said his Lordship, "that the plaintiffs had no time to acquire a property in this trade-mark, property in a mark of this kind requiring antecedent user to establish a repute in the name. It was not, however, necessary to say when property in such a mark was capable of being acquired; probably it might be necessary to support a bill of this kind—that the mark should have been applied to the goods rightfully by the plaintiff; secondly, that the article to which it is applied should be an article vendible in the market; thirdly, that the defendant knowing this, has imitated it for the purpose of passing goods into the market."

Property in a trade-mark cannot be acquired before the vendible articles bearing the name have actually been put upon the market for the purpose of sale. See Maxwell *v.* Hogg, 2 Law Rep. Ch. App. 307. There Hogg in 1863 registered an intended new magazine, to be called "Belgravia." In 1866, such magazine not having appeared, Maxwell, in ignorance of what Hogg had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September as about to appear in October. Hogg, knowing this, made hasty preparations for bringing out his own magazine before that of Maxwell could appear, and in the meantime accepted an order from Maxwell for advertising Maxwell's magazine on the covers of his own publications, and the first day on which he informed Maxwell that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of Hogg's magazine appeared. Maxwell's magazine appeared in October. It was held by the Lords Justices of the Court of Appeal on a bill filed by Maxwell (affirming the decision of Sir J. Stuart, V.-C.), that Maxwell's advertisements and expenditure did not give him any exclusive right to the use of the name "Belgravia," and that he could not restrain Hogg from publishing a magazine under the same name, the first number of which appeared before Maxwell had published his. "The question," said Lord Justice Cairns, "reduces itself to this, can property of that *character which is had in a trademark be acquired in a name, before the vendible articles bearing the name have actually been put upon the market for the purpose of sale? It is admitted that the case is a new one, and that there is no authority

*577]

precisely in point, but it must be admitted that the dicta in equity are opposed to the view that such a bill as this can be maintained; and the case of Lawson *v.* Bank of London, 18 C. B. 84 (86 E. C. L. R.), and all the definitions which have been given in this Court of the nature of the right to protection in the case of trade-marks, seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached. The definition given by Lord Westbury in M'Andrew *v.* Bassett, 10 L. T. N. S. 445, seems to be on this question precisely in point. Speaking of the argument which had been adduced before him in that case, that the Anatolia liquorice was a word common to all, and that there could be no property in it, Lord Westbury said, 'Property in the word for all purposes cannot exist, but property in that word as applied by way of stamp upon a stick of liquorice does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public.' It is quite clear that, according to this definition, a property in the word could not be acquired until the vendible article was put upon the market; and again, in speaking of the three essential qualities which should be found in any case, in order that it might obtain the protection of the Court, Lord Westbury, in another part of his judgment, mentions this as a second ingredient, 'That the article so marked is actually a vendible article in the market;'—that is to say, in the market at the time protection is asked for, and at the time the right to that protection is said to have accrued. So far, therefore, as the definitions go, they are entirely opposed to the plaintiff. Now let us consider how the plaintiff's right could be acquired. He says it was acquired either by advertisement, or by expenditure of money, or both combined. What is the advertisement? No doubt the advertising was very extensive, and made at considerable expense, but the advertisement as I read it, is nothing more than an announcement that the plaintiff will at a future period offer for sale a certain article by a particular name; or in other words (connecting the subject with the decisions as to trade-marks), that he will endeavor at a future time to acquire property in this name by the process by which property in a name for this purpose is acquired

according to the doctrine of this Court. . . . I am prepared to hold, without any hesitation, that the mere intention, and the
*578] *declaration of intention, to use a name will not create any property in that name, and to hold also that there can be no protection in this Court for the intended name during the course of manufacture of the article which is to bear that name."

Although a person may acquire the exclusive use to a fancy term, such for instance as the word "chlorodyne," "excelsior," Browne *v.* Freeman, 12 W. R. V. C. W. 305; Braham *v.* Bustard, 1 Hem. & Mill. 447; nevertheless when a word, although of a fanciful character, has found its way into the dictionaries, or the subject designated is known as an article of commerce, a person cannot claim an exclusive right to use the word. See Young *v.* Macrae, 9 Jur. N. S. 322, where it was held that there was no exclusive right to the use of the word "paraffin."

Upon the same principle, in The Colonial Life Assurance Company *v.* The Home and Colonial Assurance Company Limited, 33 Beav. 548, an application by the "Colonial Life Assurance Company" for an injunction to restrain another company, lately established, from using the style of "The Home and Colonial Assurance Company Limited," was refused by Sir John Romilly, M. R. "If," said his honor, "a company which does colonial business cannot call itself "Colonial," it is obvious that, under a species of assertion that the word colonial is symbolical, the plaintiffs might prevent every other person from using it as descriptive of his trade. It is obvious that such a claim cannot be maintained. It would establish a monopoly of the use of the words 'Home,' and 'Colonial.' You may find in the Directory 'The London Assurance Company' and 'The London and Liverpool Assurance Company,' 'The Law Life Company' and 'The Equity and Law Life Company,' where the same words are used in both cases. So you have the 'Times' and the 'Hereford Times,' but no one ever supposed that the 'Times' newspaper could apply for an injunction."

Where, however, a person introduces into the market an article, which, though previously known to exist, is new as an article of commerce, and has acquired a reputation therefrom in the market, by a name not merely descriptive of the article, another person will not be allowed to sell a similar article under the same name: even, although the peculiarity of the name in question has long been in

common use as applied to goods of a different kind. And it will make no difference, that the plaintiff has also a trade-mark, which has not been taken by the defendant. See Braham *v.* Bustard, 1 Hem. & Mill. 447. There the plaintiffs had introduced into the market a superior white soft soap, which they sold under the name of "The Excelsior White Soft Soap." It was admitted that white soft soap, as a chemical product, had been known for a long time; but it was asserted and proved that there was *little or no demand for it in the market until after the plaintiffs had so introduced it: and that, for commercial purposes, it was thus a substantially new article. The defendants subsequently began to manufacture, and sold soap under the name of "Bustard and Co.'s Excelsior White Soft Soap." The plaintiffs adopted a specific trade-mark on their labels, which it was admitted the defendants had not attempted to copy. Sir W. Page Wood, V.-C., granted an injunction to restrain the defendants from selling, advertising, or exposing for sale, any soap under the name of "Excelsior White Soap," or any words so contrived as to represent or lead to the belief that the articles sold by the defendants were the plaintiff's article of manufacture. And his honor said, "If the defendants had not desired to obtain an unfair advantage of the reputation of the plaintiffs' goods, they should have called their soap 'Victoria White Soft Soap,' or 'Royal White Soft Soap,' or by some similar name." [*579

Trade-mark, Devolution, or Transfer of.—A right to a trade-mark being considered either as property, or an incident to property, it follows that it may be transferred by act *inter vivos*, and may be lawfully used by the purchaser: Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Cas. 523. And as to the distinction taken between the transfer of real and personal trade-marks, see Hall *v.* Barrows, 12 W. R. (S. C.) 322, 323; Bury *v.* Bedford, 11 W. R. (M. R.) 973.

So it may, as in the principal case, be bequeathed by will; upon the decease of one member of a firm, it will survive to the others; and upon the intestacy of a sole owner, would belong to the owner's personal representatives. Hence it may happen that two or more persons may have by devolution of law, a right to use a trade-mark formerly used by one person; as, for instance, a common ancestor.

See Dent *v.* Turpin, 2 J. & H. 139, where it was held that although where two persons having an equal right to use the same trade-mark, might seek redress from the piracy thereof in one suit, two separate bills filed by them with that view against the same person, will not be demurrable. In that case the plaintiff and another person, who carried on distinct trades at different places of business, had derived from a common predecessor in their respective business the right to use the name of Dent as a trade-mark. The defendants having infringed this right, it was held by Sir W. Page Wood, V.-C., on demurrer, that the plaintiff, without averring special damage, might sue alone for an injunction, and for delivery up of the articles so marked to have the name erased, and also that he might sue alone for an account of the profits made by the defendant out of the articles so marked, and for payment to the plaintiff of
*580] such part of such profits as the plaintiff should be *entitled to. Ultimately, the two plaintiffs combined, and Sir W. Page Wood, V.-C., granted an injunction at the instance of both, considering that it was a valuable privilege to both of them to have the benefit of the reputation which the old name possessed. See 1 Hem. & Mill. 290, per Wood, V.-C.

Jurisdiction of the Court of Chancery to protect Trade-marks.— The Court of Chancery, when it interferes in cases of trade-marks, as observed by Lord Cottenham, C., exercises a jurisdiction over legal rights, and although sometimes, in very strong cases, that is to say, where the legal right is clear, as in the principal case, and as in case of the London Conveyance Company (Knott *v.* Morgan, 2 Keen 213; and see Franks *v.* Weaver, 10 Beav. 296; Shrimpton *v.* Laight, 18 Beav. 164; Millington *v.* Fox, 3 Myl. & Cr. 338), alluded to by Lord Langdale, it interferes by injunction, yet in a general way it puts the party upon asserting his right, by trying it in an action at law. If it does not do that, it permits the plaintiff notwithstanding the suit in equity, to bring an action. In both cases, the Court is only acting in aid of, and is ancillary to the legal right. And Lord Cottenham even said, that he could hardly conceive a case in which the Court would at once interfere by injunction and prevent a defendant from disputing the plaintiff's legal title: Motley *v.* Downman, 3 Myl. & Cr. 14; see also Blanchard *v.* Hill, 2 Atk. 485, 487; Hogg *v.* Kirby, 8 Ves. 215, 226; Perry *v.*

Truefitt, 6 Beav. 66; Rodgers *v.* Nowill, 6 Hare 325, 331; Purser *v.* Brain, 17 L. J. 141, Ch.; Spottiswoode *v.* Clarke, 2 Ph. 154, 156; Welch *v.* Knott, 4 K. & J. 747; *sed vide* Hine *v.* Lart, 10 Jur. 106. Until that is tried, the Court may direct the defendant to keep an account of sales: Spottiswoode *v.* Clarke, 2 Ph. 154, 158.

The trade-mark of an alien friend will be protected in the same manner as that of a subject of this country (Farina *v.* Silverlock, 1 K. & J. 509; 4 K. & J. 747; The Collins Company *v.* Reeves, 6 W. R. (V.-C. S.) 717; 28 L. J. 56 Ch.; The Collins Company *v.* Walker, 7 W. R. (V.-C. K.) 222); and it is immaterial that the goods so marked are not sold in this country. Id.; and see The Collins Company *v.* Brown, 3 K. & J. 423; The Collins Company *v.* Cowen, Id. 428.

The law is the same in the United States, where it has been held that a subject of this country is entitled to an injunction against a native of the United States to prevent the use of his trade-mark; but it seems to have been assumed there by counsel that in England the trade-marks of foreigners are not protected; and it was therefore argued that the trade-marks of Englishmen were not entitled to protection in the United States; however, both the Chancellor of New York and the Court of Appeals decided in favor of *the plaintiff; and Lott, Senator, in giving judgment, made [*581 the following observations:—"I trust our courts will never recognise a different rule of right and justice between any class of suitors; that their records will never show that fraud by a citizen is sanctioned, because it is practiced on a foreigner in the prosecution of a legitimate business within our jurisdiction, or that a suitor is denied the ordinary remedy to protect him in the enjoyment of his rights, because he is a 'foreigner.' The honor of our country and the character of its jurisprudence forbid that justice and equity shall ever be administered on such narrow, prescriptive, and inequitable principles. Every dictate of enlightened wisdom requires that a foreigner, especially in a commercial country, shall be entitled to the same protection of his rights as a citizen. If other nations are chargeable with wrong and injustice in this respect, it is certainly no reason why we should follow their example. Retaliation in a course of injustice, is not a salutary principle to enforce in the administration of justice. But I do not think that England is amen-

able to the charge, to the extent suggested by the counsel for the appellant. All that was decided in Delondre *v.* Shaw, 2 Sim. 237, cited by him in support of it, is that 'the court will not protect the copyright of a foreigner.' The Vice-Chancellor, however, expressly recognises the rule, that an injunction will be granted to restrain the fraudulent sale of a spurious article, but he says that he could not intend a fraud where none was alleged:" Taylor *v.* Carpenter, 2 Sandf. Ch. 603, 614; Coats *v.* Holbrook, Id. 586.

As to the doctrines of foreign tribunals on this subject, see "Lloyd on the Law of Trade-Marks," p. 25, 2d ed.

In cases of alleged colorable imitations of trade-marks, the Court, as is laid down in the principal case, has not to consider whether manufacturers could distinguish between them, but whether the ordinary run of persons, who may be more easily misled, would probably be deceived: Shrimpton *v.* Laight, 18 Beav. 164; Perry *v.* Truefitt, 6 Beav. 72; Holloway *v.* Holloway, 13 Beav. 209. In Franks *v.* Weaver, 10 Beav. 297, the plaintiff had invented and sold a medicine under his own name. The defendant had also made and sold a similar medicine, and on his labels he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine, in such an ingenious manner as *primâ facie*, though not in fact, to appropriate and apply them to his own medicine. It was held by Lord Langdale, M. R., that although there were other differences in the mode of selling, the proceeding was wrongful, and the plaintiff was entitled to an injunction. "It is very true," said his Lordship, "that if any one compares the plaintiff's wrapper with the labels used by the defendant, he will find a very considerable difference, the *582] *difference is even striking; but it is not by similarity of form or the mode of printing that we can get at any result in this case. Again, if anybody critically reads the advertisement of the defendant, he will find that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say that the preparation he is selling is made by the plaintiff; and yet, for all that, nobody can look at all these things without observing that the name and testimonials of the plaintiff are so craftily employed, as to be well calculated to produce, in the minds of ordinary readers, the impression that the mixture or solution prepared and sold by the defendant is the same as that to which these testimonials are applicable: that is to say, the mixture or solu-

tion of the plaintiff." See also Day *v.* Binning, 1 C. P. Coop. Rep. 489; Motley *v.* Downman, 3 Myl. & Cr. 1, 15.

As was laid down in the principal case, the Court of Chancery will not prevent a person from selling an article in his own name, although that name is one in which another has long been selling a similar article. See Burgess *v.* Burgess, 3 De G., M. & G. 896; Burgess *v.* Hills, 26 Beav. 244.; Burgess *v.* Hately, Id. But he will not be allowed to do so under such circumstances as to deceive the public and make them believe that he is selling an article manufactured by another. See Holloway *v.* Holloway, 13 Beav. 209. There the plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant, Henry Holloway, commenced selling pills as "H. Holloway's Pills," but in boxes, labels, and wrappers similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. Lord Langdale, M. R., restrained him by injunction. "The defendant's name," said his Lordship, "being Holloway he has a perfect right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say anything tending to abridge any such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe that he is selling the plaintiff's pills and ointment." And see Rodgers *v.* Nowell, 6 Hare 325.

Where a person is selling goods under a particular name, and another person *not having that name* is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses. It is a question of evidence in each case whether there is a false representation or not: Burgess *v.* Burgess, 3 De G., M. & G. 905, per Turner, L. J. This is well illustrated in the principal case, where the injunction was granted, not because the defendant carried on the trade of blacking manufacturer in his own name, but because he sold the blacking when manufactured in bottles and with labels so contrived as by colorable imitation to represent the blacking he *manufactured to be the same as [*583 that manufactured by another firm.

Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, the Court refused to grant an injunction, leaving the plaintiffs to bring their action at law: London and Provincial Law Assurance Society *v.* London and

Provincial Joint Stock Life Assurance Company, 11 Jur. 938; and see The Colonial Life Assurance Company *v.* The Home and Colonial Assurance Company, 33 Beav. 549.

It must not be supposed, from what has been said, that a person can obtain an exclusive right in a subject not protected by patent, so as to prevent the sale thereof by another person under the same title, if he does not thereby endeavor to sell his own goods as the goods of another. Thus in Canham *v.* Jones, 2 Ves. & B. 218, where the plaintiff, who was the legatee of a secret or recipe for preparing a medicine called "Velno's Vegetable Syrup," filed a bill against the defendant to restrain him from selling a spurious preparation under the name of "Velno's Vegetable Syrup," stated by him to be the same medicine in composition and quality as that made by the plaintiff, Sir Thomas Plumer, V.-C., allowed a demurrer to the bill. "If," said his honor, "this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee; but the violation of right with which the defendant is charged does not fall within the cases in which the Court has restrained a fraudulent attempt by one man to invade another's property; to appropriate the benefit of a valuable interest in the nature of a goodwill, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same, as in Hogg *v.* Kirby, 8 Ves. 215, combining imposition on the public with injury to the individual. This is not that sort of case. The observation is correct, that the bill, stating the defendant's medicine to be spurious, asserts it not to be the same as the plaintiff's. The defendant does not hold himself out as the representative of Swainson, setting up a right in that character to the medicine purchased by him, but merely represents that he sells *not the plaintiff's medicine, but one of as good a quality.* He is at liberty to do so." See, however, and compare Browne *v.* Freeman, 12 W. R. (V.-C. W.) 305.

A court of equity will, however, restrain the use of a secret, as, for instance, in the compounding of a medicine not being the subject of a patent, and restrain the sale thereof by a person who has acquired a knowledge of the secret *by means of a violation of a contract or a breach of trust and confidence* (Yovatt *v.* Winyard, 1 J. & W. 394; Morison *v.* Moat, 9 Hare 241; and see Newbery *v.*

James, 2 Meriv. 446; Williams *v.* *Williams, 2 Meriv. 157); and the same relief will be granted against a party to whom [*584 it has been divulged by another who acquired it by means of a breach of faith or contract: Green *v.* Folgham, 1 Sim. & Stu. 398; Morison *v.* Moat, 9 Hare 241, 263; and see Tipping *v.* Clarke, 2 Hare 393; Prince Albert *v.* Strange, 2 De G. & Sm. 652; 1 Macn. & G. 25.

A person manufacturing trade-marks belonging to one person, in order to sell them to others for the purpose of their making *a fraudulent use of them*, will be restrained by injunction from so doing. Thus, in the case of the well-known manufacturer of Eau de Cologne, Johann Maria Farina, who was in the habit of having paper labels and wrappers pasted on and wrapped around his own manufactures, it was held that he might restrain a printer who had made and printed, and was in the habit of selling imitations of his labels to persons for the purpose *of using them fraudulently* to pass off other goods, as those of the plaintiff, though the printer himself made no such use of them, and notwithstanding the possibility that some labels so printed and sold might be purchased *bonâ fide* and for the purpose of being applied to articles of the plaintiff's own manufacture, and Sir W. Page Wood, V.-C., in this case granted an injunction upon interlocutory motion; Farina *v.* Silverlock, 1 K. & J. 509. Lord Cranworth, C., however, refused to restrain the printing and sale of the labels until the plaintiff, who alleged they were used for a fraudulent purpose, had established his case by an action at law, inasmuch as it was shown by the defendant, that in very many instances the same or similar labels might be sold for a legitimate purpose: Farina *v.* Silverlock, 6 De G., Macn. & G. 214. On the case being tried at law, the jury found a verdict for the plaintiff, and the full Court discharged a rule nisi for a new trial (Farina *v.* Silverlock, 6 W. R. 501, Q. B.), and thereupon a perpetual injunction was granted, and upon the defendant insisting on an adverse right after being made aware that the plaintiff had been defrauded through his agency, he was ordered to pay the costs of all the proceedings at law and in equity: Farina *v.* Silverlock, 4 K. & J. 650; see also s. c., 1 De G. & J. 434.

An innocent person who has been employed by another fraudulently to make articles with the trade-mark of another upon them,

will be entitled to damages against him in an action at law for the loss he may sustain thereby: Dixon *v.* Faucus, 9 W. R. (Q. B.) 414.

It seems, however, that an injunction would not be granted to restrain the engraving or sale of labels or seals used as trade-marks, where it has not been shown that they have been used for the purpose of selling a spurious article, inasmuch as the Court cannot intend a fraud where none is alleged: Delondre *v.* Shaw, 2 Sim. 237, 240.

*585] A person may, it seems, in some *cases lawfully procure and use the trade-mark of another. Thus, if a person buys an article from another without the usual trade-mark, as, for instance, without a label, or if the label were by some means or other worn out, he might employ any printer he might think fit to print or engrave for him a label which should be the exact counterpart of that used by the vendor, and it can be no ground of complaint by the vendor, that the person sells the article with something upon it to represent his trade-mark, though it is not a genuine trade-mark. See Farina *v.* Silverlock, 1 K. & J. 520; 6 De G., M. & G. 219; and see Id. 6 W. R. 501 (Q. B.).

Defences to an application for an Injunction to restrain use of Trade-mark.—Where a person has made a misstatement of any material fact with regard to the article which he sells, and which is calculated to deceive the public, courts of equity will not in the first instance interfere on his behalf by injunction, to protect him in the enjoyment of a trade-mark, but will leave him to take proceedings at law. See Pidding *v.* How, 8 Sim. 477. There the plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture." Sir L. Shadwell, V.-C., refused to restrain the defendant from selling tea under the same name until the plaintiff had established his title at law, upon the ground that the plaintiff had made false statements to the public, as to the teas of which his mixture was composed and as to the mode in which they were procured. "It is a clear rule," said his honor, "laid down by courts of equity, not to extend their protection to persons whose cases are not founded in truth. And as the plaintiff in this case had thought fit to mix up that which *may* be true with that which *is* false, in introducing his tea to the public, my opinion is, that, unless he established his title at law, the Court cannot interfere on

his behalf." See also Perry *v.* Truefitt, 6 Beav. 66; Leather Cloth Company, 12 W. R. (L. C.) 289; 11 H. L. Cas. 523, reversing s. c. 1 Hem. & Mill. 271.

If a trade-mark represents an article as protected by a patent, when it is not so protected, such a statement *primâ facie* amounts to a misrepresentation of an important fact, which will disentitle the owner of the trade-mark to relief in a court of equity against any one who pirated it. Thus in Flavel *v.* Harrison, 10 Hare 467, one of the grounds upon which Sir W. Page Wood, V.-C., refused to grant an injunction at the suit of Flavel to restrain Harrison from making and selling a stove by the name of "Flavel's Patent Kitchener," was, that Flavel had falsely assumed to describe the article as patented, whereas it *never* had been the subject of a patent.

The result, however, may be different where the article to which the trade-mark belongs has originally been the subject of a patent *which has expired, and the statement in the trade-mark, being true when first introduced, had been continued after it had ceased to be true. See Edelsten *v.* Vick, 11 Hare 78. [*586 There the plaintiffs who represented the original patentees of an article (Taylor's solid-headed pins), the patent for the manufacture of which had expired, continued to use labels on their goods printed from the original blocks belonging to the patentees, on which labels the goods were described as patented: the defendants adopted and issued labels closely resembling those of the plaintiffs. A bill being filed against the defendants for an injunction, it was contended by them that the plaintiffs, by describing their manufacture as a patented article, without any explanation that the exclusive privilege of the patent had expired, were guilty of misrepresentation, disentitling them to relief in equity. Sir W. Page Wood, V.-C., however, granted the injunction. "If in this case," said his honor, "there had never been any patent granted for the manufacture of these pins, or if after the term of the patent had expired, the plaintiffs had taken up the use of the term 'patented' as descriptive of their manufacture, and had first circulated the labels in that form, I should probably have thought that the case came within this ground of objection to the interference of the Court. But here that was not so. The blocks for the labels had been made during the existence of the patent, when the representation was perfectly true. The plaintiffs became the proprietors of the rights of the original

patentees, and of the blocks, labels, and other property; and those labels, which as the external demonstration of the article, had acquired a certain value, or had attracted a certain degree of confidence, they continued to use. It is no doubt to be much preferred that no representation should be issued to the public which is not strictly true; but in a case in which the goods have become known by a description which was originally accurate in every part, if I were to hold that the continued use of this description disentitled the party to the assistance of the Court, it would be going much further than I did in refusing to interfere by injunction where the plaintiff had adopted and used the word 'patent' untruly and without foundation."

Lord Kingsdown, however, in the case of Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Cas. 543, appears not to assent to the distinction laid down by the Vice-Chancellor in Edelsten *v.* Vick. "If," said his lordship, "the word 'patent' be not so used as to indicate the existing protection of a patent, but merely as part of the designation of an article known in the market by that term (and this I collect to have been the main ground of his honor's decision), then I quite agree in his view. In such case nobody is meant to be deceived, or is deceived. A patent may have *expired, and be known to have expired fifty years ago, and yet the name 'patent' may have become attached to the article, and be used in the trade as designating it; but if the trade-mark represents the article as protected by patent, when in fact it is not so patented, I cannot think it can make any difference whether the protection never existed or has ceased to exist."

*587]

It was argued in the principal case, that the use of the name of the old firm of Day and Martin by the plaintiffs, while no person of that name was concerned therein, was a fraud upon the public, disentitling the plaintiffs to relief within the principle of the cases just mentioned. Lord Longdale, however, very rightly declined to allow the principle to be pressed to such an extent; because, by the usage of trade, the name of a firm is understood not to be confined to those who first adopted it, but to extend to and include those who have afterwards been introduced as partners or persons to whom the original partners have transferred their business. The name of the firm continues to be used in many cases long after all the original traders have died, or ceased to have any interest in the

concern, as in the great banking houses of Child and of Coutts, and many other mercantile houses: per Lord Kingsdown in Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Cas. 542.

If a manufacturing house uses the name of a firm, and stamps the name of its firm upon its goods, though the name of the firm no longer represents the same persons as at first, it is no fraud upon the public, for the reasons already alluded to: Id.

For the same reason, the use of the old trade-mark of the firm by the new partners, or their successors, is no fraud upon the public, it is only a statement that the goods are the goods of the firm whose trade-mark they bear: Id. 543.

Though a person may have a property in a trade-mark, in the sense of having a right to exclude any other trader from the use of it in selling the same description of goods, it does not follow that he can in all cases give another person a right to use it, or to use his name. If an artist or an artisan has acquired, by his personal skill and ability, a reputation which gives to his works in the market a higher value than those of other artists or artisans, he cannot give any other person the right to affix his name or mark to the goods, because he cannot give to them the right to practice a fraud upon the public: per Lord Kingsdown in Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Cas. 544.

Upon the same principle, suppose an individual or a firm to have gained credit for a particular manufacture, and that the goods are marked or stamped in such a way as to denote that they are made by such a person or firm, and that the name has gained currency *and credit in the market (there being no secret process or invention), such person or firm on ceasing to carry on business could not sell and assign the right to use such name and mark to another firm carrying on the same business in a different place. Suppose a firm of A. B. & Co. to have been clothiers in Wiltshire for fifty years, and that broad-cloth marked "A. B. & Co., makers, Wilts.," has obtained a great reputation in the market, and that A. B. & Co., on discontinuing business, sell and transfer the right to use their mark to a firm of C. D. & Co., who are clothiers in Yorkshire, the latter would not be protected by a court of equity in their claim to the exclusive right to use the name and mark of A. B. & Co.: per Lord Westbury, C., in Leather Cloth Company *v.* Ameri- [*588

can Leather Cloth Company, 12 W. R. 290; and see Motley *v.* Downman, 3 Myl. & Cr. 1.

So in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, of cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods if they were not really the produce of the places from which they purported to come: per Lord Cranworth in Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Cas. 533.

It has been held, however, that the vendor of quack medicines, as in the case of Holloway's pills, is entitled to be protected in the use of his trade-mark, although in puffing off his articles he may use language not altogether consistent with truth, as, for instance, that his pills will cure all the diseases in the world, that they have been recommended by the faculty, and that the vendor is a professor: Holloway *v.* Holloway, 15 Beav. 209. See also Perry *v.* Truefitt, 6 Beav. 66; Gout *v.* Aleplogu, Id. 69 n.

The Court of Chancery, moreover, will only interfere in cases of *mischief being done to property* by the fraudulent misuse of the name of another, by which his profits are diminished; it will not do so, although a person's name may be made use of in order to deceive the public, even if it be in a manner calculated to do him injury. Thus in Clark *v.* Freeman, 11 Beav. 112, Lord Langdale, M. R., refused to grant an injunction to prevent a chemist from selling a quack medicine, under a false and colorable representation that it was the medicine of the plaintiff, Sir James Clark, an eminent physician. "I am very much inclined," said his Honor, "to think this is an attempt to impute to a gentleman of high position and character, that he is somehow concerned in vending quack medicines; then, no doubt it is a serious injury to him in the way of slander; and it may also be an injury to the public, who may be induced, by reason of the sanction of the plaintiff's name, to adopt as a remedy *589] a medicine which *may be in the highest degree prejudicial. This, I conceive, would be in the nature of a public offence. Now if this Court had jurisdiction in cases of this kind, you must first establish the offence at law. A judge sitting here cannot decide it. If after that has been done, you find that an injury is thereby done to the plaintiff's property, or to his means of sub-

sistence or of gaining a livelihood, I will not say that in such a case the Court might not interfere by injunction. . . . . *If Sir James had been in the habit of manufacturing and selling pills*, it would be very like the other cases in which the Court has interfered *for the protection of property.*"

Upon the same principle the Court will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff. See Batty *v.* Hill, 1 Hem. & Mill. 264. There the defendant, a person who had not obtained a prize medal awarded by the Commissioners of the International Exhibition, issued his goods with labels affixed to them bearing the words "Prize medal, 1862." Afterwards the plaintiff obtained such a medal. Sir W. Page Wood, however, refused to grant an injunction against the defendant.

Since this judgment was delivered, and partly in consequence of it, a special Act of Parliament (26 & 27 Vict. c. 119) was passed for the prevention of this particular fraud.

As incident to the injunction to restrain the use of trade-marks, the plaintiff is ordinarily entitled to an account of the profits which the defendant has made by such use (Seton on Decrees, vol. 2, p. 916), even although the defendant may not have known to whom the trade-marks belonged: Carter *v.* Carlile, 31 Beav. 292, 298; but where the trade-mark has been used in ignorance of its belonging to any one the plaintiff will not be entitled to any account of profits (Moet *v.* Couston, 33 Beav. 578), except in respect of any user after the defendant became aware of the prior ownership: Edelsten *v.* Edelsten, 1 De G., J. & Sm. 199.

Where a decree has been made directing the defendant to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped: Leather Cloth Company *v.* Hirschfeld, 1 Hem. & Mill. 295.

Sometimes the plaintiffs may be put to their election either to have an account taken of the profits made by the defendants using their trade-mark, or an account of what damages had accrued to

them by such user: Leather Cloth Company *v.* Hirschfeld, 1 Law Rep. Eq. 299, 301.

*590] *On an inquiry whether any and what damage has accrued to the plaintiffs from the unlawful use by the defendant of their trade-mark, the onus lies on the plaintiffs of proving some special damage by loss of custom or otherwise, and it will be intended in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade-mark would have been sold by the plaintiffs but for the defendant's unlawful use of the plaintiffs' mark: Leather Cloth Company *v.* Hirschfield, 1 Law Rep. Eq. 299.

As a general rule in these cases, the Court of Chancery will make the costs follow the result; because, however doubtful the title to a trade-mark may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be re-imbursed, as far as giving him the costs of the suit can reimburse him: per Lord Cottenham, C., in Millington *v.* Fox, 3 Myl. & Cr. 353. And see Edelsten *v.* Edelsten, 1 De G., J. & Sm. 185. There is, however, another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights: 3 Myl. & Cr. 353. Hence, if before the bill is filed, the defendant offers to concede everything which the plaintiff seeks, the plaintiff is not justified in filing a bill, or if he does the same after a bill has been filed, the plaintiff ought not to apply *ex parte* for an injunction, or if he has obtained an order for it, he should not draw up such order: Id. 353, 354.

If after an injunction has been obtained on motion to restrain the use of a trade-mark, the defendant offers to consent to a perpetual injunction and to pay the costs up to the time when the offer was made, all subsequent costs will be thrown on the plaintiff: Millington *v.* Fox, 3 Myl. & Cr. 338, 353; and see Nunn *v.* D'Albuquerque, 34 Beav. 595; but if the defendant makes no offer to pay the costs, the plaintiff is entitled to bring on the cause to a hearing for his costs: Burgess *v.* Hills, 26 Beav. 244; The Collins Company *v.* Walker, 7 W. R. 222 (V.-C. K.).

Where, however, both parties are wrong, the plaintiff insisting upon too much, and the defendant offering too little, both parties will be left to pay their own costs. See Moet *v.* Couston, 33 Beav.

578. There a plaintiff, who was only entitled to an injunction and costs, insisted also on an account. The defendant offered to submit to the injunction without costs. The plaintiff having brought his cause to a hearing, it was held by Sir John Romilly, M. R., that both parties were wrong, and gave no costs to either side.

In Pierce *v.* Franks, 15 L. J. (Ch.) 122; 10 Jur. 25, 26, the bill alleged that the defendant sold brushes on which the trade-mark of the plaintiff was stamped, and prayed for an account and an injunction. The defendant by his *answer stated, that he had sold such brushes on two occasions only, when he believed that [*591 he had sold them to agents of the plaintiff; that he had no intention to sell them without the leave or to the injury of the plaintiff; and that if the plaintiff had made any application to him, he would have undertaken never to stamp any more articles with the plaintiff's trade-marks. The plaintiff set the cause down on the answer of the defendant, without entering into evidence; and waiving the account, asked for a perpetual injunction. It was held by Sir J. L. Knight-Bruce, V.-C., that there had not been any unnecessary litigation on the part of the plaintiff, and that he was entitled to a perpetual injunction and the costs of the suit, except so far as they had been increased, if at all, by an allegation in the bill of certain marks being private marks. See also Burgess *v.* Hately, 26 Beav. 249.

In dealing with costs, the Court will not take notice of negotiations antecedent to a suit (save in cases of bad faith), unless they amount to a release, or binding agreement, with respect to the cause of action: per Lord Westbury, C., in Edelsten *v.* Edelsten, 1 De G. J. & Sm. 203.

As to costs where the plaintiff has been successful in an action at law, see Rogers *v.* Nowill, 6 Hare 325; Farina *v.* Silverlock, 4 K. & J. 650.

Rights of third parties with respect to Goods having fraudulent Trade-marks upon them.—A person with whom goods having counterfeit trade-marks are deposited will be justified in retaining them if he has notice of the fraud, and that an application for an injunction is about to be made to the Court. See Hunt *v.* Maniere, 34 Beav. 157. There spurious champagne, having a counterfeit brand, was deposited with wharfingers, who having notice of the fraud, and

that an injunction was about to be applied for, refused to deliver it over to the holder of the dock warrants. Sir John Romilly, M. R., upon bill being filed, restrained an action for damages for non-delivery, commenced by the holder of warrants against the wharfingers.

Persons making an advance *bonâ fide*, without notice, upon the security of goods having a counterfeit trade-mark, will be entitled to the goods upon the removal of the counterfeit trade-marks. See Ponsardin *v.* Peto, Ex parte Uzielli, 33 Beav. 642. There champagne, marked with a counterfeit of the plaintiff's brand, "Veuve Cliquot, Ponsardin & Co.," had been imported into this country, and Uzielli had made *bonâ fide* advances thereon on the security of the dock warrants. An injunction having been granted to restrain the dock company parting with it, Sir John Romilly, M. R., on the application of Uzielli, ordered the wine to be delivered to him on the counterfeit brands being removed, but made him pay the costs of the application. And it was held also *that the priority of the *592] charges on the wine were, first, the expenses of the dock company; secondly and, Uzielli's claim; and, thirdly, the plaintiff's cost of the suit.

On breach of an injunction against the use of a trade-mark, the defendant will be liable to be committed for contempt of Court, even although in the case of such breach by a firm all the partners are not before the Court (Rodgers *v.* Nowill, 3 De G., M. & G. 614), and in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, there must be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against, as would entitle him to maintain a bill against others for doing that act. In fact, the party enjoined against must, it seems, show such acquiescence as would be sufficient to create a new right in him: Id. 619, per Turner, L. J.

Additional jurisdiction conferred upon Courts of Law and Equity, by the Merchandise Marks Act, 1862.—Additional jurisdiction is conferred upon the courts of law and equity by the Merchandise Marks Act, 1862, which enacts that "in every case, in any suit at law or in equity against any person for forging or counterfeiting any trade-mark, to any chattel or article, or for selling, exposing

for sale, or uttering any chattel or article with any trade-mark falsely or wrongly applied thereto, or with any forged or counterfeit trade-mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the committal of any similar act, in which the plaintiff shall obtain a judgment or decree against the defendant, the Court shall have power to direct every such chattel and article to be destroyed, or otherwise disposed of; and in every such suit in a court of law, the Court shall or may, upon giving judgment for the plaintiff, award a writ of injunction or injunctions to the defendant, commanding him to forbear from committing, and not by himself or otherwise to repeat or commit any offence or wrongful act of the like nature as that of which he shall or may have been convicted by such judgment, and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of Court; and in every such suit at law, or in equity, it shall be lawful for the Court, or a judge thereof, to make such order as such Court or judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant, in which any such forged or counterfeited trade-mark, or any such trade-mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade-mark, or any trade-mark falsely or wrongfully *applied, and every or any instrument in the possession or power of the defendant used or intended to be or [*593 capable of being used for producing or making any forged or counterfeit trade-mark, or trade-mark alleged to be forged, or counterfeit, or for falsely or wrongfully applying any trade-mark; and any person who shall refuse or neglect to obey any such order, shall be guilty of a contempt of Court:" 25 & 26 Vict. c. 88, sect. 21.

Piracy of Trade-marks, how far an indictable offence at common law.—The printing and using of labels, being the trade-marks of another person, will not amount to forgery. See Regina *v.* John Smith, Dears. & Bell, C. C. R. 566. There it appeared that one Borwick, the prosecutor, sold powders, called "Borwick's Baking Powders," and "Borwick's Egg Powders," which powders he invariably sold in packets wrapped up in printed papers. Smith procured 10,000 wrappers to be printed similar, with some exceptions,

to Borwick's wrappers. In these wrappers Smith inclosed powders of his own which he sold for Borwick's powders; Smith was indicted for the forgery and uttering of these wrappers, and was convicted, the jury finding that the wrappers so far resembled Borwick's as to deceive persons of ordinary observation, and to make them believe them to be Borwick's and that they were procured and used by the prisoner with intent to defraud. It was held, however, by the Court of Criminal Appeal, that the conviction was wrong. "I agree," said Willes, J., "in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, and it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth, and done no more, he would have committed no offence. The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into the spurious wrappers, and spurious powder into the genuine wrappers, he would not have been guilty of forgery. This is not one of two different kinds of instruments which may be made the subject of forgery. It is not made the subject of forgery, simply by reason of the assertion of that which is false. In cases like the present the remedy is well known: the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences; but it would be straining the law to hold that this was a forgery.

*594] *Criminal procedure under Merchandise *Marks Act, 1862, with regard to Trade-marks.*—Recently the legislature has made the fraudulent marking of merchandise a criminal offence by the Merchandise Marks Act, 1862, (25 & 26 Vict. c. 88). By this Act forging a trade-mark, falsely applying any trade-mark with intent to defraud (sect. 1), applying a forged trade-mark to any thing in or with which any article is sold or intended to be sold (sect. 2) is made a misdemeanor. Every person selling articles with trade-marks known to be forged or false, is to be liable to a penalty equal to the value of the article sold, and a sum not exceeding 5*l.* nor less than 10*s.* (sect. 4), additions to and alterations of trade-

marks made with intent to defraud, to be deemed forgeries (sect. 5), and any person who after the 31st of December, 1863, shall have sold an article having a false trade-mark is bound to give information where he procured it. With power to justices to summon parties refusing to give information (sect. 6), persons marking any false indication of quantity upon any article with intent to defraud (sect. 7), or knowingly selling or exposing for sale articles so marked (sect. 8) are rendered liable to penalties.

There are other provisions with regard to proceedings under the Act (sects. 10 & 11), persons aiding in the commission of the offences thereunder (sect. 13), punishments (sect. 14), recovery of penalties (sect. 15), summary proceedings before justices (sect. 16), the mode of accounting for penalties (sect. 17), and the limitation of actions or proceedings under the Act (sect. 18). After 31st December, 1863, the vendor of an article with a trade-mark is to be deemed to contract that the mark is genuine, unless the contrary is expressed in writing delivered to and accepted by the vendee (sect. 19), and the vendor of an article with description upon it is likewise to be deemed to contract that the description is true, unless the contrary is expressed in writing delivered to and accepted by the vendee (sect. 20). Persons aggrieved by forgeries or counterfeits of any trade-marks may recover damages against the guilty parties (sect. 22), and a defendant obtaining a verdict is to have a full indemnity for costs (sect. 23). A plaintiff suing for a penalty may in certain cases be compelled to give security for costs (sect. 24). The Act is not to affect the Corporation of the Cutlers of Hallamshire, nor to repeal 59 Geo. 3, c. 7, intituled, "An Act to regulate the Cutlery Trade of England," sect. 25. See The Merchandise Marks' Act, 1862, with notes by Poland.

Merchandise Marks Act does not affect former legal and equitable remedies.—The provisions in this Act contained, of or concerning any act, or any proceeding, judgment, or conviction, for any act thereby declared to be a misdemeanor or offence, shall not nor shall any of them take away, diminish, or prejudicially affect any suit, process *or proceeding, right or remedy which any person [*595 aggrieved by such act may be entitled to at law, in equity, or otherwise, and shall not nor shall any of them exempt or excuse any person from answering or making discovery, upon examination

as a witness or upon interrogatories or otherwise, in any suit or other civil proceeding: Provided always, that no evidence, statement, or discovery, which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanor at common law, or otherwise, or of any proceeding under the provisions of this Act, 25 & 26 Vict. c. 88, s. 11.

Abandonment of right to a Trade-mark.—A person may abandon his exclusive right to a trade-mark, as for instance by dismissing a bill filed in Chancery to enforce his exclusive right to use it: Browne *v.* Freeman, 12 W. R. (V.-C. W.) 305.

As to the general doctrine of trade-marks, see Coats *v.* Holbrooke, 2 Sand. Ch. 586; Taylor *v.* Carpenter, Id. 603; s. c. 11 Paige 292; Partridge *v.* Menck, 2 Sand. Ch. 622; Amoskeag Manufacturing Company *v.* Spear, 2 Sand. S. C. 599; Coffeen *v.* Brunton, 4 McLean 516; s. c. 5 Id. 256; Stokes *v.* Landgraff, 17 Barb. 608; Samuel *v.* Berger, 24 Id. 163; Clark *v.* Clark, 25 Id. 76; Williams *v.* Johnson, 2 Bosw. 1; Barrows *v.* Knight, 6 R. I. 434; Burnet *v.* Phalon, 9 Bosw. 192; Guilhon *v.* Lindo, Id. 605; Bradley *v.* Norton, 33 Conn. 157; Newman *v.* Alvord, 49 Barb. 588; Smith *v.* Woodruff, 48 Id. 438; Stephens *v.* De Conto, 7 Robert. 343; Amoskeag Manufacturing Company *v.* Garner, 55 Barb. 151.

As to the assignment of a trade-mark, see Dixon Crucible Company *v.* Guggenheim, 2 Brewster 321; Lockwood *v.* Bostwick, 2 Daly 521.

In a suit to restrain the use of trade-marks alleged to be simulated, if it appear that the marks used by the defendants, though resembling the complainants' in some respects, would not probably deceive the mass of purchasers, an injunction will not be granted. But an imitation will be enjoined where it requires a careful inspection to distinguish it from the genuine: Partridge *v.* Menck, 2 Sand. Ch. 622; Clark *v.* Clark, 25 Barb. 76; Brooklyn White Lead Company *v.* Masury, Id. 416; Williams *v.* Johnson, 2 Bosw. 1; Merrimack Manufacturing Company *v.* Garner, 4 E. D. Smith 387; Walton *v.* Crowley, 3 Blatch. C. C. 440; Bradley *v.* Norton, 33 Conn. 157; Rodgers *v.* Tainter, 97 Mass. 291; Falkenburg *v.* Lucy, 35 Cal. 52; McCartney *v.* Garnhart, 45 Missouri 593; Filley *v.* Fassett, 44 Id. 168; Lockwood *v.* Bostwick, 2 Daly 521; Boardman *v.* Meriden Britannia Company 35 Conn. 402; Rowley *v.* Houghton, 2 Brewster 303. Where one intentionally uses or closely imitates another's trade-marks on merchandise or manufactures, the law presumes that he did it fraudulently

for the purpose of inducing the public or those dealing in the article to believe that the goods are those made and sold by the latter and of supplanting him in the good-will of his trade or business: Taylor *v.* Carpenter, 2 Sand. Ch. 603. Where the public is in fact misled whether intentionally or otherwise: Amoskeag Manufacturing Company *v.* Spear, 2 Sand. S. C. 599; Coffeen *v.* Brunton, 4 McLean 516. The imitation must be of some mark or sign which a person has a right to appropriate: Amoskeag Manufacturing Company *v.* Spear, 2 Sand. S. C. 599. A party cannot acquire an exclusive right to the use of the letters of the alphabet to designate the quality of an article: Amoskeag Manufacturing Company *v.* Spear, 2 Sand. S. C. 599. No property can be acquired in words, marks or devices which do not indicate the goods or property or particular place of business of a person, but only the nature, kind or quality of the articles: Stokes *v.* Landgraff, 17 Barb. 608; see Gillot *v.* Kettle, 3 Duer 624; Corwin *v.* Daly, 7 Bosw. 222; Filley *v.* Fassett, 44 Missouri 168; Ferguson *v.* Davol Mills, 2 Brewster 314; Boardman *v.* Meriden Brittania Company, 35 Conn. 402. A manufacturer has the right to put or stamp his own name on the goods made by him, and any injury which another manufacturer of the same name suffers therefrom is *damnum absque injuria:* Faber *v.* Faber, 49 Barb. 357. Where the proprietor of a hotel has established a high reputation for his house under a certain name, and the same name was used by another person for another house, it was held that the latter could be enjoined against using such name, as the case came within the principle which made trade-marks property: Howard *v.* Henriques, 3 Sand. S. C. 725; Woodward *v.* Lazar, 21 Cal. 448. See also Colton *v.* Thomas, 2 Brewster 308. It is no defence that the maker or one who sells to retailers informs those who purchase that the article is spurious or an imitation: Coats *v.* Holbrook, 2 Sand. Ch. 586. An action to enjoin the use of a trade-mark cannot be resisted by showing that the names on the trade-mark are false and fictitious: Stewart *v.* Smithson, 1 Hilt. 119; Smith *v.* Woodruff, 48 Barb. 438. But see *contrà*, Palmer *v.* Harris, 10 P. F. Smith 156. It is no defence that the simulated article is equal in quality to the genuine: Coats *v.* Holbrook, 2 Sand. Ch. 586; Partridge *v.* Menck, Id. 622; Taylor *v.* Carpenter, 11 Paige 293; s. c. 2 W. & M. 1. B. had acquired a reputation as a watchmaker; all watches made by him were stamped with his name. He sold S. the right to stamp his (B.'s) name on watches made by S. S. assigned to the plaintiffs the right to stamp B.'s name on watches made by them. Defendant sold watches made by B. and stamped with his name. An injunction was denied: Samuel *v.* Borger, 24 Barb. 163. An alien manufacturer may maintain a bill for an injunction against a citizen of the United States using his trade-mark: Taylor *v.* Carpenter, 11 Paige 292; s. c. 2 W. & M. 1.

*596] *TARLING v. BAXTER.

Hil. Term, 7 & 8 *Geo. IV.*, 1827.

[Reported 6 Barn. & Cress. 360 (13 E. C. L. R.).]

Sale of Personalty.—Property in, as distinguished from Possession.—When it passes to Purchaser.]—*A., on the 4th of January, agreed to sell to B. a stack of hay for the sum of* 145*l.*, *to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for. Held, that this was a contract for an immediate and not a future sale; and that the property in the hay passed by it immediately to the vendee; and that the same having been subsequently destroyed by fire, the loss fell upon him.*

Assumpsit to recover back 145*l.* paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered, and bargained and sold. At the trial, before Abbott, C. J., at the London sittings after Hilary Term, 1826, a verdict was found for the plaintiff for 145*l.*, subject to the opinion of this Court on the following case :—

On the 4th of January, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note, signed by the defendant and delivered to the plaintiff, was in these words: "I have this day agreed to

sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the 1st day of May next." And the following note was signed by *the plaintiff, and delivered to the defendant: "I [*597 have this day agreed to buy of Mr. John Baxter a stack of hay, standing in Canonbury Field, Islington, at the sum of 145*l.*, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4th, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the 8th of the same month of January, took a bill of exchange for 145*l.* to the plaintiff, drawn upon him by the defendant, dated the 4th of January, 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards endorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when in became due. The stack of hay remained on the same field entire until the 20th of January, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant to know what he meant to do when the bill became due. The defendant said, "I have paid it away, and you must take it take it up to be sure; I have nothing to do with it; why did you not remove the hay?" The plaintiff said "he could not, because there was a memorandum 'that it should not be removed until the bill was paid.' Would you have suffered it to have been removed?" And the defendant said, "Certainly not." The defendant's set-off was

for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the Court was, whether the plaintiff, under the circumstances, was entitled to recover the sum of 145*l.*, or any part thereof.

Chitty for the plaintiff.—The loss in this case must fall upon the defendant. There is a difference between the two contracts: the one contains a stipulation not in the other, that the hay was not to be cut till paid for. Now if that be a material part of the contract, then there was no one sufficient contract in writing to satisfy the Statute of Frauds; but assuming that there was a complete contract of sale without the stipulation, and that the plaintiff thereby consented to waive a right which he otherwise would have had, still the property in the hay had not passed to the vendee, because this was a sale upon credit, and the vendee was not entitled to *have possession of the goods until the credit expired: and, if so, the property did not vest in him until the credit expired.

*598]

Holroyd, J.—In Comyn's Dig. tit. Agreement (B. 3), it is laid down, "that if a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid;" and R. 10 H. 7, 8 a, 14 H. 7, 20 a, and Dyer 30 a, are cited. And again, "If A. sell a horse to B., upon condition that he pay 20*l.* at Christmas, and afterwards sell it to D., the sale to D. is void, though B. afterwards do not pay;" and Plowden's Com. 432 b. is cited, and the reason there given is, that A. at the time of the second contract had no interest in, nor property, nor possession of the horse, nor anything but a condition, and therefore the second contract was merely void. It is true that in Noy's Maxims, p. 88, it is laid down, that "if I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse

is by the bargain in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse or have an action of detinue." But that relates clearly to the case of a ready-money bargain. In *Goodall* v. *Skelton*, 2 H. Black. 316, A. agreed to sell goods to B., who paid a certain sum as earnest. The goods were packed in cloth furnished by the buyer, and deposited in a building belonging to the seller until the buyer should send for them, but the seller declared at the same time that they should not be carried away till he was paid. It was held that the seller could not maintain an action for goods sold and delivered. In the present case the hay was to remain in possession of the seller, and not to be cut till paid for. This is distinguishable, therefore, from *Hinde* v. *Whitehouse*, 7 East 558, where sugars in the King's warehouse were held to pass to the buyer by the contract of sale, although the duties were not paid. It is more like *Tempest* v. *Fitzgerald*, 3 B. & Ad. 680, where the purchaser of a horse for ready-money rode the horse, and requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price. This was assented to by the seller, and it was held that the seller could not recover on a count for horses bargained and sold, there having been no acceptance of the horse within the meaning of the Statute of Frauds.

Bayley, J.—It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed *by fire. And the question is in whom the property in this hay was vested at that time. By the note of the contract delivered to the plaintiff, the defendant agreed to *sell* the plaintiff a stack of hay standing in Canonbury Field at the sum of 145*l.*, the same to be paid for on the 4th day of February next, and to be allowed to stand on the premises until the 1st day of May next. Now this was a contract for an *immediate*, not a pros- [*599

pective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of *property* and the right of *possession* are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in those goods may be in the vendee.

The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price.

The rule of law is, that *where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee,* and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale; and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a non-suit must therefore be made absolute.

HOLROYD, J.—I think that in this case there was an immediate sale of the hay, accompanied with a stipulation on the part of the vendee, that he would not cut it till a given period. Now in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller, but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. I am of opinion,

therefore, in this case, not only that the property immediately passed to the buyer by contract, but that the seller thereby immediately *acquired a right in the price stipulated to be paid for the goods, although that was not to be paid until a future day. The property having passed to the vendee, and having been accidentally destroyed before the day of payment, the loss must fall upon him. [*600

LITTLEDALE, J.—The parties on the 4th of January stipulated for the sale and purchase of a stack of hay, to be paid for in a month. Thus the case would have stood, but for the note of the contract delivered to the buyer, and in that there was a stipulation, that the purchaser should not cut until the money was paid, but the property in the hay had already passed by the contract of sale to the purchaser, and the latter afterwards merely waived his right to the immediate possession. Then the property having passed to the buyer, the loss must fall upon him, and consequently, this rule for entering a nonsuit must be made absolute.

Rule absolute.

HANSON AND ANOTHER, ASSIGNEES OF WALLACE AND HAWES, BANKRUPTS, *v.* MEYER.

Trin. Term, 45 *Geo. III.* 1805, *Tuesday, July* 2.

[REPORTED 6 EAST 614.]

Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and fourteen days were

to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: held, that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name and at the expense of the vendor.

*601] *THIS was an action of trover brought to recover the value of 33 cwt. 1 qr. 21 lb. of starch, which was tried before Lord Ellenborough, C. J., at the sittings at Guildhall after Trinity Term, 1803, when there was a verdict for the defendant; and a motion being made for a new trial, which was argued in last Michaelmas Term, the Court by consent in Hilary Term last ordered a case to be made of the facts that were proved at the trial, which are as follows:—

The plaintiffs are assignees of J. Wallace and W. Hawes, under a commission of bankrupt issued against them. The defendant is a merchant in London. In January, 1801, the bankrupts employed Wright, their broker, to purchase of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the Bull Porters' warehouse in Seething Lane; and Wright accordingly purchased the starch of the defendant at 6*l.* per cwt. and sent to the bankrupts, his principals, the following note:—"Dear Sirs, I have bought that small parcel of starch which you saw of Mr. James Meyer for your account, 6*l.* per cwt. by bills at two months; fourteen days for delivery from the 14th instant. January 15, 1801. Yours etc., T. Wright. The starch lay at the Bull Porters." The

broker purchased for the bankrupts all Meyer's starch that lay there, more or less whatever it was, at 6*l.* per hundredweight: it was in papers: *the weight was to be afterwards ascertained at the price aforesaid.* The mode of delivery is as follows:—The seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. The following note was given by the defendant:—"To the Bull Porters, Seething Lane. Please *to weigh and deliver* to Messrs. Wallace and Hawes all my starch. January 17, 1801. Per James Meyer, William Elliott." This order was lodged by the bankrupts at the Bull Porters' warehouse, on the 21st of January, 1801, on which day the bankrupts required the Bull Porters to weigh and deliver to them 540 papers of the starch which weighed 21 cwt. 1 qr. 6 lb.

And on the 31st of January	250	9 "	1 "	20 "
And on the 2d of February	400	15 "	1 "	4 "
papers	1190	46	0	2

*At which respective times the Bull Porters, in consequence of their order, weighed and delivered [*602 the same to the bankrupts, who immediately removed the same: the residue thereof, being 33 cwt. 1 qr. 21 lb., remained at the Bull Porters' warehouse till the failure of Wallace and Hawes. The above quantities of starch continued at the Bull Porters' warehouse, in the name and at the expense of the defendant, till they were weighed and delivered: and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expense. On the 8th of Febrbary, 1801, Wallace and Hawes became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had *not been so weighed.* The question for the opinion of the

Court was, whether the defendant was entitled to the above verdict? If the Court should be of opinion that he was, then the verdict was to stand: if not, then a new trial was to be granted upon such terms as the Court should direct.

Humphreys for the plaintiffs.—This was an entire contract which could not be served or apportioned, and therefore upon the delivery of any part of the starch to the bankrupts, the property of the whole became vested in them. It was not a contract for so many cwt. of starch, but for all the defendant's starch which lay at the Bull Porters' wharehouse; the weight only of which was to be afterwards ascertained; but the whole was to be paid for by one bill. And there is the more reason for holding such a contract to be entire, because the price of the whole may be governed by the average quality, and the part received may be the worst: or, at any rate, it may be an inducement to a purchaser to give more for the whole than he would for a part, in order to withdraw so much competition out of the market. After the order for delivery the bankrupts might have taken the whole as well as a part. In Bro. Ab. Apportionment, pl. 7, it is said, that "a contract cannot be severed or apportioned, etc., because it is entire; and if it be destroyed in part, it is destroyed in the whole." Again, Bro. Contract, pl. 34, "If a man sell a lease of land and certain cloaths for 10*l.*, the contract is entire, and cannot be severed; though one of the things were by a defeasible title," etc. So in *Hawkins* v. *Cardy*, 1 Ld. Raym. 360, it was ruled that a bill of exchange, being one entire contract, could not be apportioned by endorse-
*603] ment so as to make the drawer liable *in part to different holders. If the vendees had continued solvent, and after taking part of the starch a fire had consumed the remainder in the warehouse, they would still have been liable; for after the sale, the commodity is at the risk of the vendee: Bro. Abr. Contract, pl. 26. Upon

the same principle, if goods purchased are to be paid for before they are taken away, and afterwards the vendor gives the vendee liberty to take away a part without payment, that would dispense with the condition as to the remainder, according to the doctrine in *Dumpor's Case*, 4 Co. 119, b.; and the only remedy of the vendor would be upon the contract for the value of the goods sold. It is clear from the cases of *Slubey* v. *Heyward*, 2 H. Black. 504, and *Hammond* v. *Anderson*, 1 Bos. & Pul. N. C. 69, that after a part delivery there can be no stopping *in transitu*, which is decisive as to the property of the whole being absolutely vested in the vendee. And yet in the latter case the vendor put in his claim before the expiration of fourteen days, during which time the goods were to remain at his charge in the wharfinger's warehouse. The only distinction between the two cases is, that here the starch was to remain in the warehouse at the expense of the vendor till it was weighed; but that was merely to ascertain the price, and would not alter the legal property. It was also observed, that no cases in equity had occurred which applied pointedly to the present. *Fawell* v. *Heelis*, Amb. 724, was mentioned as coming nearest; where it was holden that a vendor of an estate who had taken a bond for the consideration-money had no lien on the estate against the creditors of the vendee, for whose benefit the estate was assigned; and here the vendor had relied on the security of a bill which was to be given payable at a future day.

Holroyd, contrà, after observing that it was just and reasonable that upon every sale of goods the vendor should either receive the stipulated price, or should have power to retain the goods, or so much of them as were not absolutely delivered over to the vendee upon credit, contended first, that the legal property of so much of the starch as remained unweighed in the warehouse did not pass to the vendees:

or, 2dly, if it did, yet the vendor retained a lien upon it for the stipulated price of the whole. 1st. On a sale of specific goods (and these may be taken to be so, being a specific quantity of starch, though the amount was not ascertained at the time of the contract), the property does not pass except upon payment, *or tender of payment by the buyer, or where the time of payment is by consent postponed: 2 Black. Comm. 446, 447. Now here, by the terms of the contract, 14 days were to be allowed for the delivery on the one hand, and on the other, the payment was to be by a bill at two months: the vendees, therefore, were not bound to pay for the starch till it was delivered, nor was the vendor bound to part with it till he received the bill. In *Knight* v. *Hopper*, Skin. 647, where the note of the contract of sale was to this purpose:—"Bought by Knight, of Hopper, 100 pieces of muslin, at 40*s.* per piece, to be fetched away by 10 pieces at a time, and paid for as taken away," what was relied upon by Holt, C. J., as altering the property immediately was, that the pieces were *marked and sealed* by the vendee; and there too the price was fixed; but here there was no act done by the vendees to mark the goods as their own. It was not an order simply to *deliver*, but to "*weigh* and deliver," the weighing was to precede the *delivery*: and even the price could not be ascertained till they were *weighed*; so that till then it could not be known whether the vendees would pay the price or not; but certainly the vendor was not bound to part with the goods till he had a bill at two months for the ascertained value. In a case (*Anon.*, 12 Mod. 344) where a son employed his father to buy a frame for him, and the father purchased it in his own name, and paid part of the money, and gave a note for the rest; Holt, C. J., held, that by the payment of the money *and giving the note*, the property of the frame was immediately vested in the father; and that the bill of sale which was made a month afterwards to the

*604]

son did not divest the property out of the father and vest it in the son; though it would have vested it in the son if it had been made at the time of the sale. And he added, that *earnest* does not alter the property, it only binds the bargain; and the property remains in the vendor *till payment or delivery of the goods.* In 2 Black. Comm. 443, it is said that a contract *executory,* as if two agree to change horses *next* week, vests only a *right,* and their reciprocal property in each other's horse is not in possession but in *action,* &c., for a contract *executory* conveys only a *chose in action.* Here then till the goods were weighed and the price ascertained, and the bill given or at least tendered, the contract remained executory, and no property passed; but each only had his remedy upon the contract on failure of performance by the other. 2dly. At any rate, however, if the property did pass to the vendees, the vendor had a lien on the *goods for the price, or the bill, provided the vendees had remained solvent and capable of giving such a [*605 security. If the rest of the goods had remained in the vendor's own possession, there could have been no doubt that he might have retained any part for the price at least of that part. If one ordered a hundred pair of shoes of a shoemaker at so much a pair to be paid for by a bill; though the shoemaker had delivered half, yet if the vendee became insolvent the tradesman would not be bound to deliver the remainder without payment. And yet the insolvency does not rescind the contract; but the vendor has an equitable lien for the price, and this lien continues notwithstanding even a part payment, as in *Hodgson* v. *Loy,* 7 Term Rep. 440, 5, and *Feise* v. *Wray,* 3 East 93, where part payment of the goods was holden not to divest the vendor's right to stop *in transitu;* and *à fortiori* it cannot divest his lien upon the goods while they still continue in his possession; for Lord Kenyon himself put it upon that ground; saying, "that the right of the vendor to stop goods *in transitu* in case of

the insolvency of the vendee was *a kind of equitable lien* adopted by the law for the purposes of substantial justice, and that it did not proceed on the ground of rescinding the contract. Then it cannot vary the case that the goods here were in the hands of a middleman, for they remained all the time in the Bull Porters' warehouse, *in the vendor's name* and *at his expense*. In the cases in the Common Pleas there was a severance by the vendees themselves of part of the goods from the rest, which could not have been done without a possession of the whole by them, so as to bar the vendor's right of stopping any part as *in transitu*. And in *Hammond* v. *Anderson*, 1 Bos. & P. N. R. 69, there was this further material circumstance, that all the goods had been weighed out to the vendee. But cases of *transitus* do not affect the question of *lien*, which can only arise when the goods are in the actual or constructive possession of the vendor. Liens are mutual; and a sale is only an exchange of goods for money; but if a delivery of part of the goods contracted for, without payment, be a waiver of the vendor's lien for the price, then by payment of part of the money by the purchaser he would waive his lien on the remainder, which might be recovered from him by action without a delivery of the goods. Suppose an exchange of two horses for one, would a delivery of one of these two preclude the owner's lien on the other till the delivery of the one horse for which the two were to be exchanged? There is no distinction in reason between an exchange *of goods for goods, and of goods for money. If an action be brought by a vendee, after part of the price of goods paid, he must allege that he paid or offered to pay the remainder. The principle is general, that he who sues another for a breach of contract must aver performance, or what is equivalent to performance on his part; as in *Morton* v. *Lamb*, 7 Term Rep. 125, and *Callonel* v. *Briggs*, Salk. 112; and therefore the vendor of goods has a lien on any part of them for the price of the

*606]

whole; he only lessens his security by delivering up any part before payment. Thus in *Sodergren* v. *Flight* and *Jennings*, before Lord Kenyon, at Guildhall sittings after Trin. Term, 1796, in action for freight, it appeared that the plaintiff was the captain and owner of a Swedish ship freighted by Schenling and Co. for London, with a cargo of tar and iron consigned to Hippius, a merchant in London, who held two bills of lading for the same. The defendants, in December, 1795, before the arrival of the ship, purchased all the tar of Hippius, and gave him three acceptances for the value, including a proper allowance for freight and duty, which were to be paid by Hippius, and Hippius endorsed the two bills of lading to the defendants or their order, one of which was for tar alone, 900 barrels, the other for 850 barrels of tar and a quantity of iron. Hippius sold the iron to Crawshay and Co.; and for this purpose obtained from the defendants the possession of the bill of lading which included the iron, and delivered it to Crawshay and Co., concerning which there was no question. On the 11th January, 1796, the ship arrived, and was entered and reported by Hippius, and before the 25th, 721 barrels of tar were delivered to the defendants. On that day Hippius stopped payment, on which the captain refused to deliver the remainder of the tar to the defendants, unless they would pay the freight not only of what remained, but of what had been before delivered, which they refused to do; but after some dispute, the whole cargo of tar was agreed to be delivered to the defendants, and that an action should be brought by the captain for the whole freight, in order to try the right of his lien, the defendants having offered to pay the freight of that which remained on board the ship, but refusing to pay the freight of that part which had been before delivered to them, and also of a certain portion which had been delivered out of the ship on board a lighter sent by the defendants to receive it, but which still lay alongside of the ship,

fastened thereto by the captain's orders, to prevent its final
*607] *removal. The defendants paid into Court in the action 353*l.* 1*s.* 2*d.*, being as much as would cover the plaintiff's demand for freight on all the tar comprised in one of the bills of lading; and each being made "unto order, he, or they *paying freight for the said goods.*" And the plaintiffs, under the direction of Lord Kenyon, recovered 300*l.* 15*s.* 10*d.* beyond the money paid into Court, being the entire amount of the freight for the tar; his Lordship being of opinion that the captain had a lien on the tar remaining on board for the whole freight, as well the freight of the barrels delivered as of those remaining on board, belonging all to the same person and under one consignment. But he thought that if Hippius had sold the tar to different persons, the captain could not have made one pay for the freight of what had been delivered to another. [LE BLANC, J.—That was where all the goods were received on board under one contract.] So in *Langfort* v. *Administratrix of Tiler*,[1] the defendant in the lifetime of the intestate, her husband, having bought of the plaintiff four tubs of tea, one of which she paid for and took away, leaving 50*l.* earnest for the other three. Holt, C. J., held that notwithstanding the earnest (which only bound the bargain, and gave a right to demand the rest *on payment of the money*), the money must be paid upon fetching away the goods, because no other time for payment was appointed; and that if the vendee did not come and pay for the goods in a reasonable time, after request, the agreement was dissolved, and the vendor was at liberty to sell them to any other person. In detinue (*Anon.* Dy. 296) where there had been a part delivery of a certain

[1] Salk. 113. The same case is reported in 6 Mod. 162, where the case is stated to be, that the goods were contracted to be sold by the defendant to the plaintiff, who paid for one of the tubs and gave 50*s.* earnest for the remainder; and the declaration contained two counts, one on the agreement, as it appears for the non-delivery of the other tubs; the other to receive back the 50*s.* as so much received to the plaintiff's use. The result of the doctrine is the same in both books.

quantity of corn contracted for, and payment for what was so delivered, the Court considered that the vendor had a lien upon the remainder for the residue of the money, and was not bound to deliver it till payment, and might plead *non detinet*. And the distinction was taken, that if goods be bought outright, the bargain is void if the vendee do not pay the price agreed upon immediately; but if a day of payment be appointed, the vendor shall have his action of debt, the vendee an *action of *detinue*. As to the position in [*608 *Dumpor's Case*, 4 Co. 119, b., that a *condition* waived in part is waived *in toto*, it cannot apply to *liens*, which at most are only conditions in law founded on principles of equity, and not like conditions stipulated for by the parties themselves, which are always construed strictly, being in general to defeat an estate or to create a forfeiture.

Humphreys, in reply, said, that the property was altered by a sale as well where a future day of payment was given as where the goods were paid for at the time. 1 Com. Dig. 313, Agreement, 2, 3, cites 10 H. 7, 8 a.; 14 H. 8, 20 a.; Dy. 30 a. It is true the vendor might have withheld the order for delivery till he received the bill which was agreed to be taken for payment; but he waived that benefit, and gave an order for the delivery of the whole. Then the severance of the part was as much evidence of a possession of the whole by the vendee in this case as in the late cases in the Common Pleas. Those cases went on the ground that the sale of the goods being by one entire contract, possession of part was possession of the whole out of which such part was taken. And if the property passed by the contract, the payment of the warehouse rent afterwards by the vendor cannot alter it. *Cur. adv. vult.*

Lord ELLENBOROUGH, C. J., now delivered judgment.

By the terms of the bargain formed by the broker of the bankrupts on their behalf, two things, in the nature of con-

ditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for. The first of them is one which does so according to the generally received rule of law in contracts of sale, viz. the *payment* of the agreed price or consideration for the sale. The second, which is the act of *weighing*, does so in consequence of the particular terms of this contract, by which the *price* is made to depend upon the *weight*. The weight, therefore, must be ascertained in order that the price may be known and paid; and unless the weighing precedes the delivery it can never, for these purposes, effectually take place at all.

In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. *The question is, what is the legal effect of such part-delivery of the starch on the right of property in the undelivered residue thereof? On the part of the plaintiffs it is contended, that a delivery of part of an entire quantity of goods contracted for is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, although the price for the same should not have been paid. This proposition was denied on the part of the defendant, and many authorities have been cited on both sides. But, without deciding at present what might be the legal effect of such part delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property, in this case another act, it will be remembered, was necessary to precede both payment of the price and delivery of the goods bargained for, viz., weighing. This preliminary act of weighing it certainly never was in the contemplation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from

*609]

the defendant to the Bull Porters, his agent, is *to weigh and deliver all his starch.* Till it was *weighed*, they, as his agents, were not authorized to deliver it. Still less were the buyers themselves or the present plaintiffs, their assignees, authorized to take it by their own act from the Bull Porters' warehouse. And if they could not so take it neither can they maintain this action of trover, founded on such a supposed right to take, or in other words, founded on such a supposed right of property in the subject-matter of this action. If anything remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends upon such supposed perfect right of property is not maintainable. The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to undelivered residue of the starch, if the case had stood mainly on that ground, as it did in the case of *Hammond* v. *Anderson*, 1 Bos. & P. N. R. 69, where the bacon sold in that case was sold for a certain fixed price, and where the weighing, mentioned in that case, was merely for the buyer's own satisfaction, and formed no impediment in the contract between him and the seller; though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer. In like manner *as the taking 800 bushels of wheat out of the whole quantity [*610 sold and then on board the ship, was holden to be in the case of *Slubey* v. *Heywood*, 2 H. Black. 504. Without therefore touching the question which has been the main subject of argument in this case, and upon which my opinion at *nisi prius* principally turned, and without in any degree questioning the authority of the above-mentioned two cases from the Common Pleas, this verdict may be sustained on the ground

that the weighing, which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought. The verdict therefore must stand, and judgment be entered for the defendant.

In Tarling *v.* Baxter and Hanson *v.* Meyer, the question was much discussed when and how far on a sale the *property* in movable goods and chattels passes to the vendee, although they may still remain in the *possession* of the vendor. This is a question of great importance, not only because the form of the remedy may frequently depend upon the answer to it, but because in the event of the destruction of the goods, the loss will in general fall upon the owner; and moreover in the event of the bankruptcy of the owner, his assignees will be entitled to them. *In the case of the purchaser being owner* becoming bankrupt, the goods will vest in his assignees, but the vendor will have his lien upon the goods if in his possession for the unpaid purchase-money, and may stop them *in transitu* before they have got into the actual or constructive possession of the purchaser; *in case of the vendor being owner* becoming bankrupt, the purchaser, though he may have paid the purchase-money, can not recover the goods, as they will vest in the assignees, while he only be able to go in with the other creditors, and prove the payment of the purchase-money as a debt against the bankrupt's estate.

It may easily be seen what numerous and difficult questions may arise upon this subject. "It is impossible," says a learned judge, "to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers or their representatives have with equal ingenuity endeavored to show that they had, or had not, acquired the property in that for which they had contracted; and judges have not unnaturally *appeared anxious *611] to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances it

cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcilable with each other:" per Cresswell, P. C. 11 Moo. P. C. C. 566.

It is not intended here to go into the question as to what is essential to the validity of a contract for the sale of goods, but we will assume that a binding contract of sale, either according to the 17th section Statute of Frauds, 29 Car. II., c. 3, and 9 Geo. IV., c. 14, s. 6, or in cases not coming within these statutes according to common law, has been entered into by the vendor and purchaser themselves, or through the intervention of agents, or of a broker acting as agent for both parties.

The first rule which we will notice, is that which is applicable to an immediate sale of a specific chattel, and which is well laid down in the principal case of Tarling *v.* Baxter, viz., "That where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow." See also Wait *v.* Baker, 2 Exch. 1; Aldridge *v.* Johnson, 7 E. & B. 900 (90 E. C. L. R.); Hoare *v.* Dresser, 7 H. L. Cas. 290. The reason given for the rule is, "That where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee:" Dixon *v.* Yates, 5 B. & Ad. 340 (27 E. C. L. R.).

But although the property in such a case passes to the vendee, the vendor will be entitled to retain possession of the chattel until the price agreed upon be paid. "If, for instance, I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the property in the horse is, by the bargain, in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse, or

have an action of detinue. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer:" Noy's Maxims 88. See also Waterhouse v. Skinner, 2 Bos. & Pul. 447.

But in a present contract of sale, if the day of payment be deferred, *that is to say, if the goods are sold upon credit, the right to possession of the goods, in the absence of any intention appearing to the contrary, will, as well as the property, pass immediately to the vendee. Thus, in Spartali v. Benecke, 10 C. B. 212 (70 E. C. L. R.), a contract had been entered into for the sale of thirty bales of goat-wool at a certain price per pound, containing the following stipulation, "Customary allowance for tare and draft, and to be paid for by cash in one month, less five per cent. discount." It was held by the Court of Common Pleas that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of a month. "It is now undoubted law," said Wilde, C. J., "that by a sale of specific goods for an agreed price, the property passes to the buyer and remains at his risk: Rugg v. Minett, 11 East 210; Hinde v. Whitehouse, 7 East 558, and many other cases; and it is equally clear law, that where by the contract the payment is to be made at a future day, the lien for the price which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract, for a future day of payment: Chase v. Westmore, 5 M. & Selw. 186; Crawshay v. Homfray, 4 B. & Ald. 50 (6 E. C. L. R.); Cowell v. Simpson, 16 Ves. 275." Martindale v. Smith, 1 Q. B. 389 (41 E. C. L. R.); Chinery v. Viall, 5 Hurlst. & N. 288.

*612]

But although the right of possession as well as the property passes at once to the vendee on an immediate sale of goods, if the time of payment be deferred, nevertheless, as was done in the principal case of Tarling v. Baxter, the vendor may enter into a stipulation according to which the right of possession will remain with him until payment of the price. And see Walker v. Clyde, 10 C. B. N. S. 381 (100 E. C. L. R.); Moakes v. Nicolson, 19 C. B. N. S. 290 (115 E. C. L. R.). Even in that case, although the

right of possession remains in the vendor, the property having passed to the vendee, the goods will be at his risk.

Evidence, moreover, of commercial usage is admissible in the case of a sale to show at what time delivery is to take place, provided it introduces nothing repugnant to or inconsistent with a written instrument: Field *v.* Lelean, 6 Hurlst. & N. 617, 628.

In order that the property in a thing sold should pass without delivery to the vendee, it must be a specific and ascertained chattel. "Till the parties," says a learned author, "are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description; and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer *the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold:" Black. Cont. of Sale 122. [*613

And it is immaterial that the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. This has been laid down as law from a very early period (see 18 Edw. IV. 14; Heyward's Case, 2 Co. 36), and has been adhered to and also frequently illustrated by modern decisions. Thus in Busk *v.* Davis, 2 M. & Selw. 397, the plaintiffs sold ten out of eighteen tons of Riga flax, then lying in mats at the defendant's wharf, at 118*l.* per ton, to be paid for by the vendee's acceptance at three months' date. The plaintiffs gave the vendee an order on the defendants (the wharfingers) to deliver ten tons to the vendee or order, which the defendants entered in their books. While the flax remained at the wharf in the same state as at the time of the sale, the vendee stopped payment, and the plaintiffs gave an order countermanding the delivery. The plaintiffs having brought an action of trover for the flax, it appeared that the quantity before delivered was usually ascertained by being weighed by the wharfinger, the mats being of unequal quantities, so that a fraction of a mat might be required, and an allowance for tare and draft had likewise to be made; but the plaintiffs had received no return of the weight from the wharfingers. It was held by the Court of King's Bench that the sale was not complete so as to pass the property, inasmuch as the anterior process of weighing had not taken

place, and that the plaintiffs were therefore entitled to a verdict. "The question," said Lord Ellenborough, C. J., "in this case is whether the property has been so ascertained as to be considered in law as effectually delivered, the order to deliver having been given to the wharfingers, and entered in their books. That would not of itself be sufficient unless the flax were in a deliverable state, and if further acts were necessary, for the flax was to be weighed and the portion of the entire bulk to be delivered was to be ascertained, and if the weight of any number of unbroken mats were insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him. If the weight did not divide itself in an integral manner, it would be necessary to break up and take some fraction of another mat. Every component part therefore was uncertain; it was uncertain how many gross mats there would be, or what fraction of a broken mat; for, as it has been suggested, any certain number of mats might fall short of the entire, precise quantity of ten tons. That is only one cir-
*614] cumstance to show *that there was some uncertainty at the time of the contract, which was to be reduced to certainty by something to be done afterwards, that is, by weighing, in order to ascertain the entire quantity. If then some further acts were to be done in order to regulate the identity, and (if I may use such a phrase) the individuality of the thing to be delivered, I cannot say that it was in a fit state for immediate delivery, and that the order to deliver entered in the wharfinger's books operated as a complete delivery." See also Shepley *v.* Davis, 5 Taunt. 617 (1 E. C. L. R.); Withers *v.* Lyss, 4 Campb. 237. In White *v.* Wilkes, 5 Taunt. 176 (1 E. C. L. R.), there was a contract for the sale of "twenty tons of linseed oil, at 60*l.* per ton, usual allowance; to be delivered in one month, and paid for in four days by acceptance at four months." The defendant was possessed of large quantities of oil lying in several different cisterns at different warehouses, nor was any specific quantity of twenty tons weighed out for the purchasers. An action of trover having been brought by the assignees of the purchasers (who had become bankrupt), it was held by the Court of Common Pleas that no property in any oil passed by the contract to the purchasers. "The objection here is," said Mansfield, C. J.,

"that no specific quantity of oil was sold. The quantity agreed to be sold was mixed with a much larger quantity; and not only that, but it was mixed with several different quantities. How was it to be separated? . . . This too is the case of a liquid, which makes the difficulty much greater than in the case of a solid substance." Heath, J., also well observed: "Suppose a part of the oil in some of these cisterns were lost or burnt, who is to know whether it is the vendor's or the purchaser's oil that is destroyed?" See also Wallace *v.* Breeds, 13 East 522; Austen *v.* Craven, 4 Taunt. 644. See and consider the case of Whitehouse *v.* Frost, 12 East 614.

Although the parties to a contract may not originally have selected specific goods to which it may be applied, there will be no difficulty if they both subsequently do so, as where one of them appropriates specific goods to the fulfilment of the contract, and where the other party assents to such appropriation. See Rhode *v.* Thwaites, 6 B. & C. 388 (13 E. C. L. R.). There the plaintiff, having in his warehouse a quantity of sugar in bulk, more than sufficient to fill twenty hogsheads, agreed to sell twenty hogsheads to the defendant, but there was no note or writing of the contract sufficient to satisfy the Statute of Frauds. Four hogsheads were delivered to and accepted by the defendant. The plaintiff filled up and appropriated to the defendant sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. The defendant said he would take them as soon as he could. It was held by the Court of Queen's *Bench that the appropriation having been made by the plaintiff, and assented to by the defendant, the [*615 property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by the plaintiffs under a count for goods bargained and sold. "The sugars," said Holroyd, J., "agreed to be sold being part of a larger parcel, the vendors were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant; and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant. That acceptance made the goods his own, subject to the vendor's lien as to the price. If the sugars had afterwards been destroyed by fire, the loss must have fallen on the defendant. I am of opinion that the selection of the sixteen hogsheads by the plaintiffs, and the adoption of that act by the defendant, converted that which was

before a mere agreement to sell into an actual sale, and that the property in the sugars thereby passed to the defendant, and consequently that he was entitled to recover the value of the whole under the count for goods bargained and sold."

So in Young *v.* Matthews, 2 Law Rep. C. P. 127, A., a brickmaker, who was in embarrassed circumstances, agreed to sell to B., to whom he was largely indebted, 1,300,000 bricks. B. sent an agent to the brickfield with an order for the delivery of the bricks, and A.'s foreman told him he was ready to commence delivering them, if a man who was in possession under a distress put in by the landlord was paid out, and he pointed out three clamps—one consisting of finished bricks, a second of bricks still burning, and a third of bricks moulded but not burnt, as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks, it was held by the Court of Common Pleas that the conduct of A.'s foreman was a sufficient appropriation of the bricks, and that the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties. See also, Sparkes *v.* Marshall, 2 Bing. N. C. 761 (29 E. C. L. R.); Aldridge *v.* Johnson, 7 E. & B. 885 (90 E. C. L. R.); Morgan *v.* Gath, 13 W. R. (Ex.) 756.

In order however that an assent to an appropriation of chattels by the vendor should be valid, it is essential (except in cases where the vendor has of himself alone authority to make the appropriation) that the vendee should agree to all the terms upon which the appropriation is made: Godts *v.* Rose, 17 C. B. 230, 237, 238 (84 E. C. L. R.); Campbell *v.* The Mersey Dock, 14 C. B. N. S. 412 (108 E. C. L. R.).

A question of considerable difficulty arises when the original *agreement does not ascertain the specific goods, and one *616] party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, *unless it was made in pursuance of an authority to make the election conferred by the agreement;* or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final

and irrevocably binding on both parties: Black. Cont. of Sale 127.

The question of whether there has been a subsequent assent or not, is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or a determination of a right of election, is one of law, and sometimes of some nicety: Id. 128.

The rule laid down in Heyward's Case, 2 Co. 36, upon this subject seems to have been generally adopted, namely, that "in case election be given of two several things, always he who is the first agent, and who ought to do the first act, shall have the election." See Com. Dig. "Election."

It is said by a learned author that "where from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods, or to do anything to them which cannot be done till the goods are appropriated, he has a right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made finally and conclusively, by the authority conferred in the agreement, and, in Lord Coke's language, 'the certainty, and thereby the property, begins by election:'" Black. Cont. of Sale 128. In Fragano *v.* Long, 4 B. & C. 219 (10 E. C. L. R.), it was held that goods ordered to be sent from this country abroad, vested in the purchaser by the vendor's act of appropriation on his despatching them from his warehouse on their journey.

In other cases the act of appropriation may take place at an earlier period, as, for instance, when the vendor, in pursuance of his contract, places the goods bought in bags or bottles furnished by the purchaser. Thus, in Aldridge *v.* Johnson, 7 E. & B. 885 (90 E. C. L. R.), the plaintiff agreed with Knights to purchase from him 100 out of 200 quarters of barley which the plaintiff had seen in bulk and approved of, and he paid part of the price. It was agreed that the plaintiff should send sacks for the barley; and that Knights should fill the sacks with barley, take them to a railway, place them upon trucks free of charge, and send them to the plaintiff. The plaintiff sent sacks enough for a part only of the 100 quarters; these Knights filled, and endeavored to find trucks for them, but was unable to do so. The plaintiff *repeatedly sent to Knights, [*617
demanding the barley. Knights emptied the barley from

the sacks back into the bulk, and afterwards became bankrupt. It was held by the Court of Queen's Bench that the property, in so much of the barley only as was put into the sacks, passed to the plaintiff, and that the assignee having removed the whole of the barley, had thereby converted the plaintiff's barley which had been put into the sacks. Crompton, J., expressed, it is true, some doubt as to whether the barley put into the sacks passed to the plaintiff, on the ground that it did not appear quite clearly that at the time when the plaintiff demanded the barley, he knew that any portion had been put into the sacks, and that therefore his assent to the particular appropriation was doubtful. The rest of the Court, however, considered that even if the assent of the purchaser were doubtful, the appropriation was complete, inasmuch as the right of ascertaining the thing sold rested solely in the vendor. "I am clearly of opinion," said Erle, J., "that the property in what was put into the sacks passed to the plaintiff. It is clear that where there is an agreement for the sale and purchase of a particular chattel, the chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained. Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only—the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown, by sending the goods by the railway; and in such case the property would not pass till the goods were despatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that, his election has been indicated; the decisive act was putting the portion into the sacks. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent; for the vendee demanded over and over again, the portion which had been put into the sacks. I think Mr. Blackburn has expressed the law with great clearness and accuracy. He first takes the case where one party appropriates and the other assents, and then the case where, by virtue of the original agreement, the authority to appropriate is in one party only. As to the question

of conversion, I am of opinion on the grounds which have already been stated, that the assignee has converted the plaintiff's property."

This case was followed by the Court of Exchequer in Langton *v.* Higgins, 4 Hurlst. & N. 402: there in January, 1858, Carter *agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in that year at 21*s.* per pound. In [*618 September, Carter wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and Carter having weighed the oil, put it in the plaintiff's bottles, labelled them with the weight, and made out the invoices. Before however he had completed the filling of the bottles he sold and delivered several of them to the defendant. The plaintiff had for many years past bought of Carter his crop of oil of peppermint, and it was usual for Carter, when the bottles were filled, to deliver them to a carrier to take to a railway-station. In detinue, by the plaintiff against the defendant, for the bottles of oil of peppermint to be delivered to him, it was held by the Court of Exchequer, that the putting the oil in the plaintiff's bottles was an act of appropriation, which vested the property in the plaintiff. "The case of Aldridge *v.* Johnson, 7 E. & B. 885 (90 E. C. L. R.)," said Bramwell, B., "is precisely in point. Lord Campbell, C. J., there said, 'Looking to all that was done when the bankrupt (the vendor) put the barley in the sacks, *eo instanti* the property in each sackful passed to the plaintiff.' It is true that in the "Law Journal," (26 L. J. Q. B. 296), Erle, J., is reported to have said that the outward act indicating the vendor's intention, was by filling the sacks, '*and directing them to be sent to the railway.*' But Crompton, J., who doubted upon another point, said that 'when the barley was put into the sacks, it was just as if it had been sent by a carrier.' There is not only reason and general authority, but also the case of Aldridge *v.* Johnson, to warrant our judgment." See also Logan *v.* Le Mesurier, 6 Moore P. C. C. 116.

But however clearly the vendor may have expressed his intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with respect to those particular goods, yet until the act has actually commenced, the appropriation is not final; for it is not made upon the authority of the other party nor binding upon him: Black. Cont. of Sale 129;

and see Atkinson *v.* Bell, 8 B. & C. 277 (15 E. C. L. R.). The result would be otherwise if the other party assented to such an intended appropriation: Sparkes *v.* Marshall, 2 Bos. & Pul. N. R. 761.

As a general rule, delivery to the agent of the vendee will be equivalent to a delivery to the vendee himself. "If," says Parke, B., "the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether the depositary be a common carrier or shipmaster employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents
*619] *this is effected:" Bryans *v.* Nix, 4 M. & W. 791. See the cases collected in Abbot on Shipping 269, 9th ed.; Henekey *v.* Earle, 8 E. & B. 410 (92 E. C. L. R.); Meredith *v.* Meigh, 2 E. & B. 364 (72 E. C. L. R.); Schuster *v.* M'Kellar, 7 E. & B. 704 (90 E. C. L. R.); Sheridan *v.* The New Quay Company, 4 C. B. N. S. 618 (93 E. C. L. R.); Turner *v.* Trustees of Liverpool Docks, 6 Exch. 543; Ellershaw *v.* Magniac, Id. 570 n.; Orr *v.* Murdock, 2 Ir. Com. L. Rep. 9 (N. S.); Hale *v.* Rawson, 6 W. R. 339 (C. P.); Hart *v.* Bush, E., B. & E. 494 (96 E. C. L. R.); Stray *v.* Russell, 1 E. & E. 888 (102 E. C. L. R.); Currie *v.* Anderson, 2 E. & E. 592 (105 E. C. L. R.); Smith *v.* Hudson, 6 B. & S. 431 (118 E. C. L. R.).

But the property in the goods will not pass by such delivery if it was not the intention of the owner to part with the control over it. See Falk *v.* Fletcher, 18 C. B. N. S. 403 (114 E. C. L. R.); and cases there cited: Browne *v.* Hare, 4 Hurlst. & N. 822; s. c. 3 Hurlst. & N. 484.

Although as a general rule, where, by the original contract for sale, or subsequently, the goods which are the subject-matter of it are either specified or ascertained, the property in such goods will pass to the vendee, because that is presumed to be the intention of the parties; the result will be different if their intention appears to have been otherwise.

The parties for instance, may agree that the property in goods sold shall not be transferred until certain acts have been performed, and this will be binding upon them, whether such agreement be in

express terms, or is to be implied from the whole contract taken together. Where, for instance, according to the contract of sale, some act is to be done by the vendor to the goods, for the purpose of putting them into a deliverable state, that is to say, into that state in which the vendee would be bound to receive them, until such acts are done, the property will not (in the absence of a contrary intention appearing) vest in the vendee.

So where the sale is of things which are sold by weight, number, measure, or quality, the sale will not be complete, and the property therein will not pass, although the specific goods are ascertained, until they have been either weighed, counted, measured, or tested, so as to ascertain the price which is to be paid for them. The principal case of Hanson *v.* Meyer is the first in which these rules were assumed in this country to be law, as was also done in the case of Hinde *v.* Whitehouse, 7 East 558. They appear however to have been first acted upon in the case of Rugg *v.* Minett, 11 East 210. There Rugg bought twenty-four lots of turpentine out of twenty-seven which were sold by auction. According to the terms of the contract of sale, twenty-five out of the twenty-seven lots were to be filled up by the sellers from the other two, and so made to contain each a specified quantity, and the two last lots were then to be measured and paid for according to their contents. Rugg's purchase included the two *lots of uncertain quantities. The three [*620 lots which were not purchased by Rugg were filled up and removed, so that Rugg was clearly entitled to have what remained, and no difficulty could arise from the subject-matter not being ascertained. Rugg paid about 2000*l.* on account of the turpentine; the greater parts of the lots were filled up, and the others were being filled up, when, by an accidental fire, the whole was consumed, no part having been delivered. Rugg brought an action in the King's Bench to recover the 2000*l.* he had paid on account, and the Court held that all those lots which were filled up before their destruction were the property of the purchaser, and that the sellers were entitled to retain their price, but that the others remained the property of the sellers, who were bound therefore to refund the price received on account of them. With regard to the casks in the first lots which were filled up, Lord Ellenborough, C. J., said, that "according to the case of Hanson *v.* Meyer, and the other cases, everything having been done by the sellers which lay upon them to

perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them."

In Zagury *v.* Furnell, 2 Campb. 239, the contract of sale in the bought note was as follows:—"Bought of Mr. S. Z. 289 bales of goat-skins from Mogadore per 'Commerce,' containing five dozen in each bale, at the rate of 57*s.* 6*d.* per dozen, to be taken as they now lay, with all faults, paid for by good bills at five months." It appeared that by usage of trade it is the duty of the seller of goat-skins by bales in this manner, to count them over, that it may be seen whether each bale contains the number specified in the contract, and that before any of the skins in question had been counted over, the whole were destroyed by fire at the wharf where they lay at the time of the sale. It was held that an action could not be maintained against the purchaser for not accepting bills of exchange for the price of the skins, and that the loss fell entirely upon the seller, Lord Ellenborough, C. J., being of opinion that the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller, and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. The number of skins actually contained in the 289 bales being uncertain, the plaintiff had failed to show that he was authorized by the terms of the contract to draw the bills which the defendants had refused to accept. See also Wallace *v.* Breeds, 13 East 522; Busk *v.* *Davis, 2 M. & Selw. *621] 397; Austen *v.* Craven, 4 Taunt. 644; Sheply *v.* Davis, 5 Id. 617 (1 E. C. L. R.); Withers *v.* Lyss, 4 Campb. 237.

If there is a contract for sale by weight or measure, and acts are to be done in order to identify the thing to be delivered before it is in a fit state for delivery, no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case gave him a right to complain of a breach of contract) is by an action for non-acceptance. There is no material difference between the old French law

prevaling in Lower Canada and the English law in this respect: Boswell *v.* Kilborn, 15 Moo. P. C. C. 309.

A delivery of part of the goods sold will not be considered as a constructive delivery of the whole, if anything remains to be done either to ascertain the specific goods or their price. Thus, in Simmons *v.* Swift, 5 B. & C. 857 (11 E. C. L. R.), a contract of sale, signed by both of the parties, was entered into in the following terms:—"I have this day sold the bark stacked at Redbook, at 9*l.* 5*s.* per ton of twenty-one hundredweight, to Hezekiah Swift, which he agrees to take, and pay for it on the 30th of November." Two persons were appointed on behalf of the parties to see the bark weighed. Soon afterwards, 8 tons and 14 cwt. of the bark were delivered to the purchaser. Before the rest of the bark was weighed, an extraordinary flood of the river Wye rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. The purchaser offered to pay for the 8 tons and 14 cwt., but refused to pay for the remainder. It was held by the Court of King's Bench, in an action for goods sold and delivered, that the property in the residue of the bark did not vest in the purchaser until it had been weighed, as that was necessary in order to ascertain the price to be paid, and consequently that it remained at the risk of the vendor, who was not entitled to maintain an action for the price against the purchaser. "Two questions," said Bailey, J., "are involved in this case; first, whether the property in the bark was vested in the defendant, so as to throw all risks upon him; secondly, whether there had been such a delivery of the bark as would support this form of action. It is not perhaps necessary to give any opinion upon the first point, but I think it right to do so, as it is most satisfactory to determine the case upon the main ground taken in the argument. I think that the property did not vest in the defendant so as to make him liable to bear the loss which has occurred. Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risks, if nothing remains to be done to the goods, although he cannot take *them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed. In Rugg *v.* Minett, 11 East 216 and Wallace *v.* Breeds, 13 East 522, the [*622

thing which remained to be done was to vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases, the thing sold was to be separated from a larger quantity of the same commodity. This case was different; the subject-matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at Redbrook, meaning of course all the bark stacked there; but it was to be paid for at a certain price per ton. The bargain does not specify the mode in which the weight was to be ascertained; but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he were anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done, it remained at his risk. In Hanson *v.* Meyer (*ante*, p. 600), weighing was the only thing which remained to be done; there was not any express stipulation in the contract that the starch (the subject-matter of the contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here, the contract made weighing necessary, for without that *the price could not be ascertained.* Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to a certain sum. The case of Hanson *v.* Meyer differs from this in one particular, viz. that the assignees of the vendee, who had become bankrupt, were seeking to recover the goods sold; but the language of Lord Ellenborough, as to the necessity of weighing in order to ascertain the price before the property could be changed, is applicable to the present case, and decides it. I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller." See also Cunliffe *v.* Harrison, 6 Exch. 903; Logan *v.* Le Mesurier, 6 Moo. P. C. C. 116.

The same principle was acted upon in Acraman *v.* Morrice, 8 C. B. 449 (65 E. C. L. R.). There the defendant had contracted with one Swift to purchase of him the trunks of certain oak trees, then felled and lying at Hadnock, about twenty miles from Chepstow. The usual course of trading between the parties was for the vendee's

agent to select and mark such portions of the trees as he intended to purchase, and for Swift to sever the tops and sidings, and float the trunks down the river Wye to the vendee's *wharf at Chepstow, and there deliver them. After a portion of the [*623 timber had been delivered, and the whole paid for, Swift became bankrupt; whereupon the defendant sent his men to the premises of the vendor at Hadnock, and severed and carried away such of the trees as had been marked. It was held by the Court of Common Pleas, that no property in the trees, or in any portion of them, which had not been delivered by the vendor, passed to the defendant by the contract; and that there was no delivery or acceptance to satisfy the Statute of Frauds, and consequently that the assignees of the vendor were entitled to recover the value of the trees carried away in trover.

Though, upon a contract for the sale of any goods, something remains to be done by the buyer, such as weighing, measuring, or testing the goods, if it appears by the terms of the contract that it was the intention of the parties that the property should pass to the buyer, it will pass though he has not done the act. Thus in Turley *v.* Bates, 2 Hurlst. & C. 200, where the plaintiff sold to the defendant a quantity of fire-clay, at a certain price per ton, the clay to be carted away by the defendant, at his own expense, and weighed by him at the weighing-machine of a third person; it was held by the Court of Exchequer, that the property in the clay passed to the defendant on the completion of the bargain, and the plaintiff might recover the price under a covenant for goods bargained and sold, although the clay had never been weighed: Kershaw *v.* Ogden, 3 Hurlst. & C. 717; 13 W. R. (Ex.) 755.

Where moreover the identity of the goods and the quantity and price are known, if the weighing and measuring of the goods is only necessary for the purpose of satisfying the purchaser that he has got what he contracted for, the sale will be complete, and the property will pass to him at once: Swanwick *v.* Sothern, 9 Ad. & E. 895, 900 (36 E. C. L. R.).

When the measurement of several things sold has been taken, the mere adding up of the whole will not be considered as necessary to complete the measurement, so as to prevent the property from passing to the vendee: Tansley *v.* Turner, 2 Bing. N. C. 151, 154 (29 E. C. L. R.); 2 Scott 241 (30 E. C. L. R.).

When the vendors have done every act on their part to be done, to put goods which they have sold into a deliverable state, the property in them will pass to the vendee: Logan *v.* Le Mesurier, 6 Moo. P. C. C. 116; Gilmour *v.* Supple, 11 Moo. P. C. C. 551. The fact that the vendors, either by the custom of trade, or by express contract, are bound to pay warehouse-rent for the goods during a certain period is immaterial: Hammond *v.* Anderson, 1 Bos. & Pul. N. R. 69; Greaves *v.* Hepke, 2 B. & Ald. 131; Castle *v.* Sworder, 6 Hurlst. & N. 828, reversing s. c. 5 Hurlst. & N. 281.

There may, it seems, be a complete contract so as to pass the *624] *property in goods from the seller to the buyer, although the price has not been definitively agreed on between them: Joyce *v.* Swann, 17 C. B. N. S. 84 (112 E. C. L. R.).

Under a contract for making a thing, not existing in specie at the time of the contract, as, for instance, for building a vessel, or making a machine, in the absence of contract, or of circumstances from which a contrary conclusion may be drawn, no property vests in the party whom, for distinction, we may call the purchaser, during the progress of the work, nor until the thing is finished and delivered, or at least ready for delivery, and approved of by the purchaser; and that even where the contract contains a specification of the dimensions and other particulars of the thing, and fixes the precise mode and time of payment by months and days. The reason is that the maker or builder is not bound to deliver to the purchaser the identical thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract: per Williams, J., 4 Ad. & E. 466 (31 E. C. L. R.). And see Mucklow *v.* Mangles, 1 Taunt. 318; Goode *v.* Langley, 7 B. & C. 26 (14 E. C. L. R.); Atkinson *v.* Bell, 8 B. & C. 277 (15 E. C. L. R.); 2 M. & R. 301 (40 E. C. L. R.); Laidler *v.* Burlinson, 2 M. & W. 602; Tripp *v.* Armitage, 4 M. & W. 687. See Lee *v.* Griffin, 1 B. & S. 272 (118 E. C. L. R.).

Although, however, a mere contract for the making of a chattel to order does not, *per se*, vest in the person giving the order the property in the chattel when completed, nevertheless if there be an appropriation and setting apart of the chattel on the one side, and an assent to such appropriation on the other side, that will pass the property in the article made to order, as clearly as it would have

done had it been in existence at the time of the original contract (Wilkins *v.* Bromehead, 7 Scott N. R. 921), although subsequent additions have been ordered to be made to the article, after its completion according to the original order: Carruthers *v.* Payne, 2 M. & P. 441; see also Elliott *v.* Pybus, 4 M. & Sc. 289 (30 E. C. L. R.); 10 Bing. 512 (25 E. C. L. R.).

So where the intention is, either expressed or to be inferred from the attendant circumstances, that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, that intention will be effectuated. See Woods *v.* Russell, 5 B. & Ald. 942 (7 E. C. L. R.); Reid *v.* Fairbanks, 13 C. B. 692 (76 E. C. L. R.). Upon this principle, where a contract provides that a thing shall be made, or vessel built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the things used in the progress of the work vests in the purchaser at the time when they are put into the fabric, under the approval of the superintendent, or as soon as the first instalment is paid: Clarke *v. Spence, 4 Ad. & E. 448, 466 (31 E. C. L. R.); and see Wood *v.* Bell, 5 E. & B. 772 (85 E. C. L. R.); 6 E. & B. 355 (88 E. C. L. R.). [*625

A mere license in such a contract, for the purchaser in the event of the contractor not completing his work in a particular time, to use such of the materials of the contractor as shall be applicable to that purpose, will not, on the happening of that event, give the purchaser any property in such materials: Baker *v.* Gray, 17 C. B. 462 (84 E. C. L. R.).

While goods are afloat, the bill of lading represents them, and the endorsement and delivery of the bill of lading while the ship is at sea operate exactly the same as the delivery of the goods themselves to the assignees after the ship's arrival would do: Meyerstein *v.* Barber, 2 Law Rep. C. P. 45; affirmed, 2 Law Rep. C. P. (Exch. Ch.) 661.

A bill of lading, moreover, remains in force until there has been a *complete* delivery of the goods thereunder to a person having a right to receive them, and is not spent or exhausted by the landing and warehousing of them at a sufferance-wharf,—at all events so long as they are under stop for freight: Meyerstein *v.* Barber, 2 Law Rep. C. P. 38. If from all the facts it may be inferred that a

bill of lading was taken in the name of the seller, in order to retain dominion over the goods, that shows there was no intention to pass the property; but if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result: per Williams, J., in Joyce *v.* Swann, 17 C. B. N. S. 102 (112 E. C. L. R.). And see Wait *v.* Baker, 2 Exch. 1; Browne *v.* Hare, 4 Hurlst. & N. 822.

A sale of goods by deed,—in other words a bill of sale, passes the property in the goods comprised within the deed upon the delivery of the deed: Carr *v.* Burdiss, 1 C., M. & R. 782; Brighton Railway Company *v.* Fairclough, 2 M. & G. 674 (40 E. C. L. R.); Gale *v.* Burnell, 7 Q. B. 850 (53 E. C. L. R.). See Mill & Coll. on Bills of Sale, p. 4.

A grant of goods which do not at the time belong to the grantor, but which he expects to acquire, will *at law* pass no property in them: Robinson *v.* Macdonnell, 5 M. & Selw. 228; Lunn *v.* Thornton, 1 C. B. 379 (50 E. C. L. R.); Gale *v.* Burnell, 7 Q. B. 850 (53 E. C. L. R.); Hope *v.* Hayley, 5 E. & B. 830 (85 E. C. L. R.). Such an assignment is valid in equity, as for instance, the assignment of the future cargo or freight of a ship (In re Ship Warre, 8 Price 269, n.; Curtis *v.* Auber, 1 J. & W. 826; Douglas *v.* Russell, 4 Sim. 524; s. c. 1 Myl. & K. 488; Langton *v.* Horton, 3 Beav. 464; 1 Hare 549); or of machinery at a future time, to be added to or substituted for existing machinery (Holroyd *v.* Marshall, 10 H. L. Cas. 193, reversing the decision of Lord Campbell, C., in s. c., 2 De G., F. & J. 596; Reeve *v.* Whitmore, 33 L. J. Ch. 63; Brown *v.* Bateman, 2 Law Rep. C. P. 272), will be made available in equity.

But even at common law, after-acquired or substituted goods may be seized by a creditor under a *power conferred upon him by deed. See Chidell *v.* Galsworthy, 6 C. B. N. S. 470 (95 E. C. L. R.); Lunn *v.* Thornton, 1 C. B. 379 (50E. C. L. R.) Congreve *v.* Evetts, 10 Exch. 298; Hope *v.* Hayley, 5 E. & B. 830 (85 E. C. L. R.); Carr *v.* Allat, 27 L. J. (Exch.) 385.

*626]

When the parties, by their contract, make any condition precedent to the vesting of the property the subject of the contract, their intention will be carried into effect. If, for instance, goods are sent for sale "on approval or returned," no property will vest in the purchaser until he has intimated his approval, because such was

the intention of the parties. See Swain *v.* Shepherd, 1 M. & Rob. 223, Com. Dig. Condition, B. 3. See also Bannerman *v.* White, 10 C. B. N. S. 884 (100 E. C. L. R.).

On fulfilment, however, of the condition the property will pass at once. Thus in Evans *v.* Thomas, Cro. Jac. 172, it is said, "If one covenants with another, that if he will marry his daughter he shall have such a flock of sheep. He marries his daughter, the property of the sheep was presently in him, for it was but a personal thing, and the covenant is as a grant." See also Barrow *v.* Coles, 3 Camp. 92.

Upon the same principle, where goods are delivered "on sale or returned," and they are not returned by the purchaser within a reasonable time, the sale of the goods becomes absolute, because it will be presumed that he has fulfilled the condition precedent by accepting them: Moss *v.* Sweet, 16 Q. B. 493 (71 E. C. L. R.).

In the period intervening between the making of the contract and the performance of the condition, a *bonâ fide* purchaser may acquire an interest in the chattel, of which the first purchaser (whose remedy will be only against the vendee for a breach of contract) cannot deprive him: Mires *v.* Solebay, 2 Mod. 243.

In certain cases, although the property in goods may not have passed, the persons in whose possession they are, may, by their admissions to another, estop themselves from disputing his title. Thus in Stonard *v.* Dunkin, 2 Campb. 344, Knight gave the defendants, who were warehousemen, an order to hold some malt on the plaintiff's account, and the defendants thereupon gave a written acknowledgment that they held it on the plaintiff's account. The plaintiff had advanced 7500*l.* to Knight, for which the malt was to be a security. Knight became bankrupt, and in an action of trover for the malt, the question was whether the plaintiff or the assignees of Knight were entitled to the malt. It was contended for the defendants, that the malt passed to the assignees under the commission, inasmuch as from the universal usage and consent of the trade, *re-measuring* was necessary to a transfer of property in articles of this nature, and the bankruptcy took place before the malt in question was re-measured. Lord Ellenborough however said, "Whatever the rule may be as between the buyer and seller, it is clear the *defendants cannot say to the plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him; and I should entirely overset the [*627

security of mercantile dealings, were I now to suffer them to contest his title."

A verbal acknowledgment is equally binding upon the warehouseman. Thus in Gosling *v.* Birnie, 7 Bing. 339 (20 E. C. L. R.). Ross contracted to sell some timber to Allum, who paid him part of the price on account, and the timber was sent to the defendant's wharf, who was apprised that it was sold to Allum, who marked the whole with the letter A. Ross afterwards gave Allum notice that unless he paid him the whole of his demand the timber should be resold. Ross afterwards sold the timber to the plaintiff, and gave a written order to the defendant to deliver it on receiving a sum of money for cartage. The defendant, on receiving the written order and the money for cartage, said, "Very well, I will hold the timber for you." Some time afterwards he told the sawyers that the timber belonged to the plaintiff and not to Allum. Afterwards Allum, not knowing of the transfer to the plaintiff, paid the balance of the price of the timber into a bank to Ross's account, and the defendant gave him possession of the timber. The plaintiff thereupon brought an action of trover against the defendant, and the defence was, that the timber belonged to Allum, to whom it had been first sold. The Court of Common Pleas, without deciding in whom the property in the timber vested, held that the defendant could not dispute the plaintiff's title. "This," said Tindal, C. J., "is an action of trover, in which I agree that the question is, whether the plaintiff can show the property to be in himself: as to which, in the present case, the defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted out from the law. . . . The only question is, whether after what he has done, the defendant can set up the title of a third person, which is the less allowable, because at the time he made the admissions, he was fully acquainted with the claim of Allum. The plaintiff having relied on these expressions, was entitled to suppose that the defendant kept the timber for him." See also Hawes *v.* Watson, 2 B. & C. 540 (9 E. C. L. R.); Gillett *v.* Hill, 2 C. & M. 530; Douglas *v.* Watson, 17 C. B. 685 (84 E. C. L. R.).

Upon the same principle it has been held, that where on a contract of sale of a portion of a large quantity of goods in the warehouse of the vendor, the vendee has resold the goods to a third

person, whose right to them the vendor has recognised, he cannot afterwards dispute the title of such third person, although the specific goods have never been appropriated to him. See Woodley *v.* Coventry, 2 Hurlst. & C. 169; there the defendants sold 348 barrels of flour to C., who sold them to the plaintiffs, and gave them a delivery order, upon presenting which to the *defendants [*628 they said it was all right, and transferred the flour in their books from the name of C. to that of the plaintiffs, it was held by the Court of Exchequer that the plaintiffs were estopped from saying that no property in the flour passed to the plaintiffs, although no specific portion of a larger quantity had been appropriated to them.

But this would not be the case where no property in the goods passed to the original vendee, and the right of a sub-purchaser from him was not recognised by the vendor. See Moakes *v.* Nicolson, 19 C. B. N. S. 290 (115 E. C. L. R.). There coals were sold at Hull and shipped on board a vessel chartered by the buyer, to be paid for in cash against a bill of lading in the hands of the seller's agent in London. It was held by the Court of Common Pleas, first, that no property passed to the buyer until the condition was fulfilled, and that the price being unpaid the seller was entitled to intercept the delivery; and, secondly, that a third person who had agreed with the vendee to purchase the coals of him by a verbal contract entered into before the quantity was ascertained and shipped, could be in no better position than the original vendee.

It may be here mentioned, that in order to transfer a chattel by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee: Irons *v.* Smallpiece, 2 B. & Ald. 551, 552. And so essential has delivery been held, that a mere verbal gift of a chattel to a person in whose possession it is, will not pass any property to the donee: Shower *v.* Pilck, 4 Exch. 478.

In equity a voluntary transfer or assignment in order to be effectual must be complete, but the donor may without any delivery and while retaining the legal ownership, constitute himself a trustee for the donee. See note to Ellison *v.* Ellison, 1 Lead. Cas. Eq. 232, 3d ed.

The question sometimes arises how far the vendor is able to rescind a contract of sale, so as to revest the property in himself. It

is laid down as a rule in an old case, "that if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person:" Langfort *v.* Tiler, 1 Salk. 113. And see Hinde *v.* Whitehouse, 7 East 571.

Whether this would be considered to be good law at the present day is perhaps doubtful; it seems clear, however, that where the property in goods has by the contract passed from the vendor to the purchaser, the former will not be able to rescind the contract so as to revest the property in himself, upon mere non-payment of the price at the stipulated time. Thus in Martindale *v.* Smith, 1 Q. B. 389 (41 E. C. L. R.), the defendant sold the plaintiff six stacks of oats then standing on his ground under *the following written
*629] contract:—"April 23d, 1838. Sold to Mr. John Martindale, of Catterlen, six oat stacks for 85*l.*

"John Smith gives John Martindale liberty to let the stacks stand, if he thinks fit, until the middle of August next; and John Martindale to pay John Smith for the stacks in twelve weeks from the date hereof."

The defendant, at the end of twelve weeks, called on the plaintiff to pay, which he did not do. After the expiration of the twelve weeks the plaintiff tendered payment, which the defendant refused to accept, and sold the oats, on which the plaintiff brought trover, and it was held by the Court of Queen's Bench that he was entitled to recover. "Having taken time," said Lord Denman, C. J., "to consider of our judgment owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale at an end, and revest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by Holroyd, J., from Com. Dig. Agreement (B. 3), in Tarling *v.* Baxter, 6 B. & C. 360, 362 (13 E. C. L. R.), and *ante*, p. 596,

with all the numerous cases referred to in the course of the argument . . . . . Pothier in his *Traité du Contract de Vente* (part v. ch. 2, s. 6, art. 475) cites the Civil Code (Cod. lib. iv. tit. 44, s. 14) for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. '*Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur:*' Cod. lib. iv. tit. 44, s. 14. He adds, however, that from the difficulty of enforcing payment from debtors, the French law had departed from the rigor of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day; which passed, and no payment made, the vendor, was permitted to resume possession of the thing sold. But even after sentence of dissolution, the purchaser may prevent that effect, and keep what he has bought, by appealing, and offering, on that appeal, the price which he owes with interest and expenses. The vendor's right, therefore, to detain the thing sold against the purchaser, must be considered as a right of him till the price is paid, not a right to rescind the bargain. And here the lien was gone by tender of the price." See Page *v.* Cowasjee Eduljee, 1 *Law Rep. P. C. C. 127, 145; The Danube Company *v.* Zenos, 13 C. B. N. S. 825 (106 E. C. L. R.). [*630

But although in a sale of chattels time is not of the essence of the contract, unless it is made so by express agreement, that may be easily done by introducing conditional words into the bargain: per Lord Denman, C. J., in Martindale *v.* Smith, 1 Q. B. 395 (41 E. C. L. R.).

Where goods are sold on condition that, if they are not paid for at the time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute. If, therefore, the vendee do not pray at the time, and the vendor resell at a loss, he cannot maintain assumpsit for goods bargained and sold, or goods sold and delivered: Lamond *v.* Davall, 9 Q. B. 1030 (58 E. C. L. R.).

A contract can of course be rescinded, as well as entered into, by the mutual consent of the parties to it: Heinekey *v.* Earle, 8 E. & B. 422 (92 E. C. L. R.); see also Douglas *v.* Watson, 17 C. B. 685 (84 E. C. L. R.).

The doctrine of the leading case of Hanson *v.* Meyer, that where anything remains to be done in order to ascertain the price, the sale is not complete and the property does not pass, is sustained by Andrew *v.* Dieterich, 14 Wend. 31; Davis *v.* Hill, 3 N. H. 382; Ward *v.* Shaw, 7 Wend. 404; Rapeleye *v.* Mackie, 6 Cowen 250; Outwater *v.* Dodge, 7 Id. 85; Houdlette *v.* Fallman, 2 Shepl. 400; Devane *v.* Fennell, 2 Ired. 36; Riddle *v.* Varnum, 20 Pick. 280; Barnard *v.* Poor, 21 Id. 378; Dixon *v.* Myers, 7 Gratt. 240; Messor *v.* Woodman, 2 Foster 172; Lester *v.* McDowell, 6 Harris 91; Stone *v.* Peacock, 35 Maine 385; Joyce *v.* Adams, 4 Seld. 291; O'Keefe *v.* Kellogg, 15 Ill. 347; Nesbit *v.* Bury, 1 Casey 208; Fuller *v.* Bean, 34 N. H. 290; Hudson *v.* Weir, 29 Ala. 294; Moffatt *v.* Green, 9 Ind. 108; Gilman *v.* Hill, 36 N. H. 311; Nicholson *v.* Taylor, 7 Casey 128; Beller *v.* Black, 19 Ark. 566; Chapin *v.* Potter, 1 Hilton 366; Cook *v.* Logan, 7 Clarke 142; Hening *v.* Powell, 33 Mo. 468.

Where the terms of sale are agreed on and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute without actual payment or delivery, and the property in the goods is in the buyer; and if they are destroyed by accident he must bear the loss: Wing *v.* Clark, 11 Shepl. 366; Goodrum *v.* Smith, 3 Humph. 542; Smith *v.* Nevitt, Walker 370; Potter *v.* Coward, 1 Meigs 22; McCoy *v.* Moss, 5 Porter 88; Shindler *v.* Houston, 1 Denio 48; Frazer *v.* Hilliard, 2 Strobh. 309; Costar *v.* Davies, 3 English 213; Olyphant *v.* Baker, 5 Denio 379; Ingersoll *v.* Kendall, 13 Sm. & M. 611; Bowen *v.* Burk, 1 Harris 56; McCandlish *v.* Newman, 10 Id. 460; Chapman *v.* Campbell, 13 Gratt. 105; Henlin *v.* Hall, 4 Ind. 189; Webbes *v.* Davis, 44 Maine 147; Rice *v.* Codman, 1 Allen 377; Terry *v.* Wheeler, 25 N. Y. 520; Connor *v.* Williams, 2 Robertson 46; Dexter *v.* Norton, 55 Barb. 272. Where a purchase is made, the goods selected, put into a box with the purchaser's name and place of residence marked thereon, and the box is sent by the vendor by a carrier designated by the vendee, the sale is complete: People *v.* Haynes, 14 Wend. 546. The fact that the quantity of a thing sold remains to be ascertained does not itself prevent the right of property in a chattel from passing by the sale. It is only when something is to be done for the ascertainment of the quantity, by the very terms of the contract, that the sale is incomplete: Dennis *v.* Alexander, 3 Barr 50; Morgan *v.* Perkins, 1 Jones (Law) 131. If rum and molasses, in the vendor's possession, are sold in discharge of an antecedent debt, and the casks specifically ascertained and marked by the vendee, and the agreement is that they are to be gauged, and the price to be fixed at the purchaser's warehouse by a third person named, and afterwards the vendor refuses to permit them to be taken to the warehouse,

this prevention may be taken for performance—and the property will pass: Smyth *v.* Craig, 3 W. & S. 14. A. being indebted to B. agreed to sell him a horse for $45, or such sum as C. should determine, and the horse was accordingly delivered to B., but C. refused to fix the price; held that the sale to B. at $45 was complete: Hollingsworth *v.* Bates, 2 Blackf. 340.

Where part of a larger quantity of goods is sold, such part must be selected and set apart before any property passes: Woods *v.* McGee, 7 Ham. (Part 2) 127; Young *v.* Austin, 6 Pick. 280; Valentine *v.* Brown, 18 Id. 549; Dunlap *v.* Berry, 4 Scam. 327; Hunter *v.* Hutchinson, 7 Barr 140; Waldo *v.* Belcher, 11 Ired. 609; Stevens *v.* Eno, 10 Barb. S. C. 95; Golder *v.* Ogden, 3 Harris 528; Warren *v.* Buckminster, 4 Foster 336; McCandlish *v.* Newman, 10 Harris 460; Ockington *v.* Richey, 41 N. H. 275; Leonard *v.* Winslow, 2 Grant 139; Pennsylvania Railroad Co. *v.* Hughes, 3 Wright 521; Courtright *v.* Leonard, 11 Iowa 32; Rosenthal *v.* Risley, Id. 541; Bailey *v.* Smith, 43 N. H. 141; Ropes *v.* Lane, 9 Allen 502; Haldeman *v.* Duncan, 1 P. F. Smith 66; Cleveland *v.* Williams, 29 Texas 204; Browning *v.* Hamilton, 42 Ala. 484. But see Pleasants *v.* Pendleton, 6 Rand. 473; Downer *v.* Thompson, 6 Hill 208; Crofort *v.* Bennett, 2 Comst. 258; Sahlman *v.* Mills, 3 Strobh. 384; Smith *v.* Sherwood, 2 Texas 460; Kimberly *v.* Patchin, 19 N. Y. 330.

In determining the character of a contract of sale, as executed or executory, the question is whether the intention was to vest in the purchaser an immediate and absolute title to the thing sold, without reference to the payment of the price, or whether the delivery of the thing and the payment of the price were to be simultaneous acts, in which last case the title remains until delivery to the seller: Kelley *v.* Upton, 5 Duer 336. A contract was entered into for the sale of an entire crop of cotton, then in a storehouse, at so much a pound. The cotton had been weighed by a public weigher seven days before, the price was to be paid when called for within a few days, and an order was given to the purchaser on the warehouseman to deliver the cotton. Held that the sale was complete, weighing not being necessary to ascertain the price, and the law could not imply an agreement that the cotton should be again weighed: Magee *v.* Billingsley, 3 Ala. 679. Where a quantity of goods bargained for at a certain rate are actually delivered, the sale is complete, although the goods are to be counted, weighed or measured, in order to ascertain the price: Macomber *v.* Parker, 13 Pick. 175; Scott *v.* Wells, 6 W. & S. 357; Cole *v.* Champlain Co., 26 Verm. 87; Richmond Ironworks *v.* Woodruff, 8 Gray 447; Bogg *v.* Rhodes, 4 Greene 133; Burr *v.* Williams, 23 Ark. 244. When all the terms are arranged and the goods selected so as to be distinguished from all others, the property passes even though the price be not paid:

Thompson v. Gray, 1 Wheat. 75; Bates v. Conkling, 10 Wend. 389; Crawford v. Smith, 7 Dana 59. If the payment of the price is not a condition precedent to the transfer, and it appears that the parties intended that the sale should be complete before the articles are weighed or measured, the property passes immediately: Riddle v. Varnum, 20 Pick. 280. Where the vendor relying on the vendee's promise to pay on delivery, makes an absolute delivery, the right of property is changed without payment: but it is otherwise, where the vendor does not rely on such promise, but claims the property as soon as he learns that the vendee cannot pay him: Henderson v. Lauck, 9 Harris 359; Foley v. Mason, 6 Md. 37; Ferguson v. Clifford, 37 N. H. 86; Welsh v. Bell, 8 Casey 12; Visher v. Webster, 13 Cal. 58. Upon a sale of merchandise to be paid for on delivery, the vendee offered the vendor's servant, who made the delivery, a note of the vendor's, which had become payable, for nearly the amount and cash for the residue, which the vendor declining to receive, the vendee refused to give up the goods or pay the money. Held that no title passed to the vendee: Leven v. Smith, 1 Denio 571. The vendor when the sale is for cash has a right to retain possession until the price is paid: Chapman v. Lathrop, 6 Cowen 110; Clarkson v. Carter, 3 Id. 84; Bradley v. Michael, 1 Smith (Ind.) 346; Broyles v. Lowery, 2 Sneed 22; Barr v. Logan, 5 Harring. 52; Robbins v. Harrison, 31 Ala. 160.

Where a sale is on credit, not only the property but the right of possession passes immediately, unless it be otherwise agreed: Carleton v. Sumner, 4 Pick. 516; Hunter v. Talbot, 3 Sm. & M. 754.

A contract was made with a coachmaker to make a buggy for a specified price, and before completion of the buggy, the parties came to a settlement, and the price was paid, with an understanding that it was to be finished and then delivered. Held that the property in the buggy vested in the purchaser from the time of the payment of the money: Butterworth v. McKinley, 11 Humph. 206. A. delivered cotton yarn to B. on a contract that the same should be manufactured into plaids: B. was to find the filling and weave so many yards of the plaids at 15 cents a yard as was equal to the value of the yarn at 65 cents per pound. Held that the property in the yarn was in B.: Buffum v. Merry, 3 Mason 478. Where by contract raw materials are delivered to a manufacturer, and manufactured articles of the same value are to be returned, the transaction is a sale, and the title to the raw material is changed: Foster v Pettibone, 3 Seld. 433. Where the thing sold is yet to be manufactured, the title does not pass until there has been some act equivalent to delivery and acceptance: Comfort v. Kiersted, 26 Barb. 472; Forsyth v. Dickson, 1 Grant 26; Pettingill v. Merrill, 47 Maine 109; Schneider v. Westerman, 25 Ill. 514; Green v. Hall, 1 Houston 506, 546.

Though it is true that the sale of a thing not in existence is upon general principles inoperative, being merely executory, yet when the thing afterwards to be produced is the produce of land or other thing, the owner of the principal thing may retain the general property of the thing produced: Smith *v.* Atkins, 18 Verm. 461. But see Rider *v.* Kelly, 32 Id. 268; Van Hoozer *v.* Cory, 34 Barb. 9.

A contract of sale of goods to arrive, at the price ruling at the time of arrival, does not pass any present property in the goods: Benedict *v.* Field, 4 Duer 154.

*631] WISEMAN *v.* VANDEPUTT.

De Term. S. Hill, Jan. 27*th, March* 21*st,* 1690.

[Reported 2 Vern. 203; s. c. 1 Eq. Ca. Abr. 56, Pl. 2.]

Stoppage in Transitu.]—*A. being beyond sea, consigns goods to B., then in good circumstances in London, but before the goods arrive B. becomes a bankrupt. If A. can by any means prevent the goods coming into the hands of B. or the assignees, it is allowable in equity, and B. or the assignees shall have no relief in equity.*

The plaintiffs, being assignees under a statute of bankruptcy taken out against the Bonnells, brought their bill for a discovery and relief, touching two cases of silk at first consigned by Altoniti and Antinori to the Bonnells, then considerable merchants in London; but before the ship set sail from Leghorn, news came that the Bonnells had failed, and thereupon Altoniti and Antinori alter the consignment of the silks, and consign them to the defendant.

Upon the first hearing, the Court ordered all letters, papers, etc., to be produced, and that the parties proceed to a trial in trover, to see whether the first consignment, notwithstanding the altering thereof, and new consignment made before the ship sailed, vested the property of those silks in the Bonnells; and upon the trial, the verdict being given for the plaintiffs, the cause now came on upon the equity reserved.

The Court declared the plaintiffs ought not to have had

so much as a discovery, much less any relief in this Court, and ordered the cause to be heard *ab origine* (Reg. Lib. 1690, B. 221, 27th January), in regard that the silks were the proper goods of the two Florentines, and not of the Bonnells, nor the produce of their effects; and therefore they having paid no money for the goods, if the Italians could by any means get their goods again into their hands, or prevent *their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity. [*632

And it was so ruled in the like case between Wigfall and Motteux, etc., and lately between Hitchcox and Sedgwick, in case of a purchase, without notice of bankruptcy; therefore decreed an account, if anything due from the Italians to the Bonnells, that should be paid the plaintiffs, but they should not have the value of the silks by virtue of the consignment or verdict, and put the Italians to come in as creditors under the Statute of Bankrupts.

WHITEHEAD AND OTHERS, ASSIGNEES OF RICHARD BENBOW, A BANKRUPT, *v.* ANDERSON AND OTHERS.

Hilary Term, 5 *Vict.*, *Jan.* 31*st*, 1842.

[REPORTED 9 M. & W. 518.]

STOPPAGE IN TRANSITU.]—*A notice of stoppage* in transitu *to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody at such a time, and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the*

consignee. Therefore where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor, was held not to be a sufficient notice of stoppage in transitu.

The vessel arrived in port on the 8th of August; on which day, before the captain had received his owner's letter, the agent of the assignees of the vendee (who had become bankrupt) went on board, and told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession,

*633] *the captain made no reply, *but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They then went on shore together. Shortly afterwards the agent of the vendor came on board, and served a notice of stoppage* in transitu *upon the mate, who had charge of the cargo, and in a few days after received possession of the cargo from the captain. Held, that under these circumstances there was no actual possession taken of the goods by the assignees; and as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them.*

Quære, *whether the act of marking or taking samples or the like, without any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, will amount to a constructive possession, unless accompanied by circumstances denoting that the carrier was intended to keep, and assented to keep, possession of the goods as the agent of the vendee?*

Before the consignor knew of the bankruptcy of the consignee he had sent three letters to the manager of a bank in Liverpool,

enclosing bills drawn by himself upon certain parties, and he referred them to the defendants as persons who would settle any irregularity that might occur respecting the acceptances. These letters were communicated to the defendants, and assented to by them. Another letter to the same party enclosed a bill drawn upon the consignee for the price of the timber in question. Held, that the letters were admissible in evidence, and were some evidence to show an authority in the defendants to stop the cargo in transitu.

The consignor before the stoppage in transitu *wrote a letter to the defendants, in which he assumed that they had stopped the cargo, and gave directions as to the sale of it. This letter did not reach the defendants until after the stoppage.* Quære, *whether it gave authority to them to stop the cargo at the time of the stoppage, or amounted to a valid ratification of that act.*

TROVER for timber, alleging the possession by the plaintiffs as assignees, and a conversion by the defendants after the bankruptcy. Pleas: first, not guilty; secondly, a denial of the plaintiffs' possession of the goods. All points as to any right of stoppage *in transitu* were to be raised upon the first and second pleas.

At the trial, at the Liverpool Spring Assizes, 1844, a verdict was found by consent for the plaintiffs,—damages 2000*l.*, subject to a *special case for the opinion of this Court, to be stated and settled by a barrister; [*634 wherein it was agreed, that if the opinion of the Court should be in favor of the defendants, then the verdict so found for the plaintiffs should be set aside, and a verdict entered for the defendants; but if the opinion of the Court should be in favor of the plaintiffs, then that the damages should be subject to reduction, according to the finding of the barrister.

Richard Benbow, before his bankruptcy, was a timber-merchant at Liverpool, and on the 12th of March, 1840,

contracted with Charles Birnie, owner of the ship "Monarch," that the ship should proceed to Quebec, and there load a full cargo of timber; and should proceed therewith to Wyrewater, otherwise called Port Fleetwood, in the county of Lancaster, and deliver the same, on being paid freight for the timber at a certain rate. It was also agreed that the ship should be consigned to Thomas Benbow, of Wyrewater, the brother of Richard Benbow.

On the 1st of April, 1840, R. Benbow contracted with George Burnes Symes, a merchant at Quebec, then at Liverpool, for a cargo of timber for the "Monarch," to be shipped at Quebec, and to be paid for by the purchaser's acceptance of the seller's draft at ninety days; and on the 25th of June the "Monarch" sailed with the cargo. On the 1st of July, 1840, Symes wrote a letter to John Chaffers, the manager of the Royal Bank in Liverpool, with which bank Symes had an account, enclosing in the letter a bill of exchange, drawn by him on R. Benbow, for 533*l.* 8*s.* 6*d.*, the price of the "Monarch's" cargo.

On the 27th of June, 1840, a fiat of bankruptcy issued against Benbow, founded on an act of bankruptcy committed on the 26th of June, 1840, and he was duly declared a bankrupt, and the plaintiffs were, on the 8th of July, 1840, appointed his assignees.

On the 9th of July Mr. Birnie, the owner of the "Monarch," having heard some rumors affecting the credit of R. Benbow, wrote from Montrose a letter to the captain of the "Monarch," stating the rumors, and requesting the captain to intimate to Thomas Benbow that, before the delivery of the cargo, he, T. Benbow, must produce approved security. The plaintiffs directed T. Benbow, to take charge of the cargo of the "Monarch" for the assignees, on her arrival at Wyrewater. The bill drawn by Symes on Benbow for the price of the cargo was not accepted, and has not been paid.

The defendants, who are merchants at Liverpool, are cor-

respondents *of Symes, and on the 18th of July, [*635
1840, despatched Richard Grindley, one of their clerks, to Wyrewater, with instructions to go on board the "Monarch" on her arrival there, to serve the notice of stoppage *in transitu* on the master. The defendants also wrote a letter from Liverpool, on the 18th of July, to Birnie, in consequence of the receipt of which Birnie, on the 20th of July, wrote a letter to the captain, apprising him of the failure of Benbow, and appointing Grindley, or Mr. Lewtas, of Garstang, near Wyrewater, to take charge of the cargo.

The "Monarch" arrived at Wyrewater between seven and eight o'clock on Saturday evening, the 8th of August, 1840. As she was entering the harbor T. Benbow saw her, and having hailed the captain and ascertained her name, took a boat to go on board. The vessel let go her anchor, and he got on board about eight o'clock, P. M., as the crew were furling the sails. The "Monarch" was then at the usual anchoring and discharging ground, opposite to the custom-house, and there came to anchor with a single anchor, at the spot where her cargo was subsequently discharged; but in such a tideway as there is at Wyrewater, it was necessary that the vessel should be moored with a second anchor, in order to discharge in safety, and the second anchor was not in fact got out until four o'clock next morning, the 9th of August, until which time the pilot remained on board in charge of the vessel. Thomas Benbow so went on board the "Monarch" for the purpose of taking possession of the cargo, and told the captain that the ship was consigned to him by the charter-party, and that he had come to take possession of the cargo. He told the captain that he, Benbow, had got the bill of lading, but he did not produce it. The captain invited Thomas Benbow into the cabin. The bulkheads of the cabin had been removed, as is usual in timber vessels, and the ends of the timber, part of the cargo, projected into the cabin, and Thomas Benbow saw and touched them.

When Thomas Benbow first stated that he came to take possession, the captain made no reply; but he subsequently at the interview told Thomas Benbow that he would deliver him the cargo when he was satisfied about the freight; and he did not, at this interview, consent to deliver immediate possession, or to waive his lien on the cargo for the freight. Thomas Benbow offered to advance the captain any money he might want; the captain said he would require money for for various purposes, and that he expected a letter from his owner; and he then accompanied Thomas Benbow ashore.

*636] At this time *the captain received his owner's letter of the 9th of July. T. Benbow, at the same time, advanced him 40*l.* on account of freight, to be applied by the captain for the disbursements of the ship. At this time T. Benbow had not informed the captain, nor had the captain any knowledge of the bankruptcy of R. Benbow; and this payment being only a partial satisfaction on account of the freight, did not alter the captain's intention to withhold his consent to deliver the cargo until he was satisfied for the whole of the freight.

Grindley, the defendant's clerk, on the same 8th of August, got on board the "Monarch" about half an hour after the captain had gone on shore with T. Benbow. He there told the mate that the consignees had failed, and that he had come to prevent the cargo falling into their hands. He then delivered to the mate the notice, stating that it was intended for the stoppage *in transitu* of the cargo. Grindley then went on shore, and delivered to the captain the letter of the shipowner of the 20th of July, whereupon the captain promised and consented to deliver the cargo to Grindley. The following day the captain tendered to T. Benbow the 40*l.* that he had received from him; but the latter declined to receive it. The cargo was afterwards entered at the custom-house by Benbow, and the captain consented to deliver the cargo to him. This entry, however, was not acted

on; and it was subsequently entered by Grindley, to whom the captain again promised to deliver it. Part of the timber was afterwards put over the ship's side, and delivered to Grindley; Benbow, who was present, making claim to, and demanding possession of it. The rest of the cargo was also subsequently delivered to Grindley. The "Monarch" never moved from the place where she first came to single anchor, and where Benbow first got on board, until after the delivery of the cargo was completed.

It has been already stated, that the defendants were agents for Symes; but the extent of their authority as agents was disputed. Part of the evidence tendered to show such a general authority from Symes as would warrant the defendants in stopping this cargo *in transitu*, consisted of letters written by Symes on the 27th of May, the 28th of May, and the 12th of June, 1840, to Mr. Chaffers, the manager of the Royal Bank of Liverpool, which letters had been received, communicated to the defendants, and had been assented to by them, before they interfered to stop *in transitu*, as stated in the present case. In these three letters, *which [*637 enclosed bills drawn by Symes on the various parties, and which he directed Chaffers to forward for acceptance, he stated that if any irregularity or informality should occur respecting them, the defendants would assist in getting them in order. There was also a letter of the 1st of July, 1840, written by Symes to Chaffers, in which he enclosed a bill drawn by him on the bankrupt, Richard Benbow, for the amount of the cargo in question, and requested Chaffers to get it accepted. The admissibility of all these letters was objected to. If these letters or any of them are admissible, and are any evidence to show such general authority, they together with the other evidence given suffice to prove such general authority; and it must be assumed as a fact in the case, that the defendants had authority from Symes to stop this cargo *in transitu*, before they took any steps for that purpose. If these

letters are not any evidence to prove such authority, then it must be assumed that the defendants had no authority from Symes to stop the cargo *in transitu*, when they interfered for that purpose, unless such authority was conveyed by the letter next hereinafter mentioned.

On the 24th of July, 1840, Symes wrote a letter to the defendants, in which he assumes that they have taken possession of the cargo, and sold it on his account. This letter was posted on the 24th of July, 1840, and received by the defendants in Liverpool on the 15th of August, 1840. If this letter could give the defendants authority from Symes to stop this cargo *in transitu* at the time they interfered for that purpose, it must be taken that they then had such authority. If this effect cannot be legally attributed to this letter, Symes by it ratified and confirmed all that was done by the defendants to stop this cargo *in transitu* and take possession of it.

If the Court should be of opinion that the plaintiffs are entitled to recover, the verdict is to be entered for them,—damages 460*l.*; but if the Court should be of opinion in favor of the defendants, then the verdict found for the plaintiff is to be set aside, and a verdict entered for the defendants.

The case was argued at the sittings after last Michaelmas Term (November 27), by *Crompton*, for the plaintiffs.—First, the notice given by the defendants to Birnie, the shipowner, by the letter of the 18th July, did not amount to a stoppage *in transitu*, not being directed to the party who had possession of the goods, and could act upon it. Could a notice given to an owner, residing in Canada *or in the East Indies, operate to stop *in transitu* goods on their way to England? To have that effect, it ought to be given to the captain, or at all events to the owner, within such reasonable time and distance that he may communicate with the captain. [PARKE, B.—Suppose it were a case of carriage by land; would a notice to Pickford's in London be

*638]

sufficient, or must it be given to the carrier on the road?] A notice to them might be sufficient, if given in time for them to write and stop the goods. The test is, whether the party receiving the notice would be liable in trover as for a conversion by non-delivery of the goods pursuant to the notice. [PARKE, B.—Then in the case of a ship at sea, there must always be a sort of race, and the vendor must take the chance of the consignee's first reaching the port of the discharge.] The notice ought surely to be given to the person who can act upon it at the time; otherwise parties who may have assumed the possession, and acted as owners of the goods, and their rights may afterwards be divested by a communication coming from the owner abroad, of a notice of stoppage given to him. The rule of law used to be, that a stoppage *in transitu* could be effected only by the corporal touch of the goods, but that undoubtedly is now otherwise: *Lett* v. *Cowley*, 7 Taunt. 169 (2 E. C L. R.). But in that case trover would have lain against the carrier for not delivering the goods accordingly; but not so here, unless laches were shown, or it appeared that the shipowner could have acted on the notice in time. If the defendants had gone to him at Montrose, and there demanded the goods, his refusal to deliver them would clearly not have amounted to conversion.

Secondly, the goods came to the possession of the assignees on the 8th of August, before any act of stoppage *in transitu*. On that day their agent went on board, declaring his intention to take possession, and had actual corporal touch of the goods; and the captain agreed to hold the goods for them, and attorned to their title, for he promised to deliver them on payment of certain freight, which was afterwards paid accordingly. He became thenceforward the agent of the plaintiffs, to hold the goods for them. In *Crawshay* v. *Eades*, 1 B. & C. 181 (8 E. C. L. R.); 2 D. & R. 228 (16 E. C. L. R.); which may be cited for the de-

fendants, the carrier had not delivered the property to the consignee, nor agreed to hold it for him, but expressly retained it by way of lien for his freight. There was in that case nothing to amount to an attornment by the bailee in possession of the goods. In *Hawes* v. *Watson*, 2 B. & C. 540 (9 E. C. L. R.); *4 D. & R. 22 (16 E. C. L. R.), it was held, that an
*639] attornment by a warehouse-man to the title of the vendee, subject to the payment of warehouse rent and charges, put an end to the right of stoppage. So in *Gosling* v. *Birnie*, 7 Bing. 339 (20 E. C. L. R.); 5 M. & P. 160, where a wharfinger had agreed to hold timber on his wharf for the plaintiff, a vendee, he was held liable in trover for the value, notwithstanding his claim for wharfage. These cases show that the continuance of the carrier's lien does not prevent the right of stoppage *in transitu*. *Allan* v. *Gripper*, 2 C. & J. 218, and *Rowe* v. *Pickford*, 8 Taunt. 83 (4 E. C. L. R.) are authorities to the same effect. If it were otherwise, the right of stoppage never would be gone in cases where the goods are held by warehousemen or wharfingers as agents for the vendee, for in all such cases there is an existing lien. Then as to the mode of taking possession, *Ellis* v. *Hunt*, 3 Term Rep. 464, is an authority to show that it was sufficient in this case. There possession taken by the consignee's putting his mark upon the goods in the carrier's warehouse was held sufficient. The present case is stronger; here the plaintiffs, by their agent, had actual touch of the goods, and had the carrier's assent to hold for them. More could not have been done; for the goods were to be delivered afloat. In *Jackson* v. *Nichol*, 5 Bing. N. C. 508 (35 E. C. L. R.); 7 Scott 577, where the right of stoppage was held to be undetermined, there was a mere *demand* by the vendee, without any delivery; and the holder had refused to deliver the goods. Here they had come to their ultimate destination, and the captain had agreed to hold them for the benefit of the plaintiffs; and all that was afterwards done

by Grindley on behalf of the vendors could not affect the previous transaction of the 8th of August.

But, thirdly, the defendants had no sufficient authority to stop the goods *in transitu*. The letters prove no *prior* authority, and a subsequent ratification is not sufficient for such a purpose. [The learned counsel read the letters stated in the case.] The letter from Symes of the 24th July, although written before the stoppage, was not communicated to the defendants until after that event, and therefore cannot be considered as having authorized them to stop the cargo. [ALDERSON, B.—Can you say the letters are not *some evidence* towards proving a general authority? And if they are, the fact is found that the defendants had such authority.] It is submitted that they are not evidence at all. The other letters refer to other transactions, and have no relevancy to this issue. They amount at most to evidence of a special *authority, to interfere with respect to the bills mentioned in them. And with respect to [*640 that of the 24th of July, it can only be regarded as a subsequent ratification of the defendant's act, which is not sufficient. In *Nicholls* v. *Le Feuvre*, 2 Bing. N. C. 81 (29 E. C. L. R.), the Court appeared to doubt whether a stoppage *in transitu* made by an unauthorized party could afterwards be ratified. See also *Siffkins* v. *Wray*, 6 East 371. A subsequent ratification cannot be equivalent to a previous authority, where the rights or estates of third parties are to be affected thereby. In this case, if it were sufficient, the captain would be made a wrongdoer by relation, and the assignees would be left in an uncertainty whether they had a right to the possession or not. On the same principle, a recognition of a notice to quit, given by an authorized person after it has begun to run, is ineffectual: *Right* v. *Cuthell*, 5 East 491; *Doe d. Mann* v. *Walters*, 10 B. & C. 626 (21 E. C. L. R.); 5 M. & R. 357. The law is laid down in

accordance with this distinction in Story on Agency 208, 209; and Paley's Principal and Agent 345, 346 (3d. ed.)

Cresswell for the defendants.—In the first place, the letters are amply sufficient to show an authority given to the defendants to exercise the right of stoppage *in transitu* on behalf of the vendors. They are obviously the same for this purpose as if they had been addressed to the defendants themselves, having been communicated to and assented to by them. They are not merely *admissible*, but the best evidence for the purpose; and they clearly tend to show a general authority to act on behalf of the vendors, in all cases with relation to unpaid bills which should render such interference necessary. And the finding in the case is express, that if the letters are admissible, and are any evidence to show such general authority, they suffice, with the other evidence in the case, to prove it. But further, the letter of the 24th of July, which was written before the stoppage, is no mere act of *ratification;* it professes to *confer* an authority and takes effect from its date. It is in this respect like a power of attorney, which would become operative from the period of its execution and delivery, though it might not come into the agent's hands until after he had done the act authorized by it. But even if this be not so, it is as good as a ratification of the acts of the defendants. This case differs essentially from those which have been cited, of unauthorized notices to quit afterwards ratified. There a party is called upon to give up a right, or his position is sought to be *altered, by force of a document which, at the time, gives him no countervailing protection, for the tenant would remain liable to the rent, notwithstanding the receipt of the unauthorized notice. The same doctrine may perhaps apply as between the principal and the *carrier*, with relation to the stoppage of goods *in transitu;* and if this were an action by the vendees against the carrier for delivering the goods to the buyers notwithstanding this

*641]

notice, it might not be sufficient; but the case is different as between these parties. In *Bailey* v. *Culverwell*, 8 B. & C. 448 (15 E. C. L. R.); 2 M. & R. 564, the general doctrine that the ratification of an act done for the benefit of the party is equivalent to a previous authority was distinctly recognised, and has never been disputed, except in the instances falling within the principle stated in *Right* v. *Cuthell*. The same law is broadly laid down in *Whitehead* v. *Taylor*, 10 Ad. & E. 210 (37 E. C. L. R.); 2 P. & D. 367.

Secondly, there was in fact a sufficient stoppage *in transitu*. According to *Litt* v. *Cowley*, the letter to Birnie of the 18th of July, if not *per se*, yet coupled with his consequent letter to the captain, was a sufficient exercise of the right of stoppage. In *Litt* v. *Cowley* the goods were delivered to Pickford and Co. at Manchester; before they arrived at London, notice of stoppage was served on Pickford and Co. in Manchester; and that was held sufficient. It is said the notice in this case was insufficient, because it did not come to the hand of the captain in time, and he did not act upon it; the same fact existed and the same argument might have been used in the case of *Litt* v. *Cowley*. Birnie, who is the *carrier*, assents to stop the goods, and communicates that intention to the master, who then has the goods in his possession, as his servant. That is a sufficient act of stoppage.

Thirdly, there was no such previous delivery of the cargo as could defeat the right of stoppage *in transitu* on the 8th of August. The voyage was not ended at the time when the agent of the assignees came on board, for the ship was not so moored as to be ready for the delivery of the cargo. And it clearly never was in the contemplation of the parties that the ship should be the warehouse of the purchaser for the deposit of the goods. There is no agreement on the part of the captain to give up the goods *on board the ship*,

but only that the assignees should receive them afloat, at the usual place of mooring. The question then comes to this, was there an *intention to deliver* the cargo, or a delivery in fact? In *Crawshay* v. *Eades* the delivery on the wharf would *primâ facie* have appeared to be a delivery to the purchaser, but the Court held that it could not be so construed, because there the party could not have intended to part with his lien. So the purchaser's act of marking the goods does not of itself import a delivery. [PARKE, B.—No, the question is *quo animo* the act is done. My notion has always been, that the question is whether the consignee has *taken* possession, not whether the captain has *intended* to *deliver* it.] Suppose he refuses to deliver, can the consignee take possession *in invitum?* [PARKE, B.—Yes, subject to his lien. In *Ellis* v. *Hunt* and *Rowe* v. *Pickford* there was no intention on the part of the carrier to deliver, so as to divest his lien.] But there was no intention to withhold the possession—no *adverse demand* of lien. Those cases proceeded on the ground of the place being treated as the warehouse of the purchaser, and the contemplated end of the *transitus*. But further, here there was no actual delivery or taking possession of the goods. There was no assent to their immediate delivery, nor is it said that the agent touched them with intent thereby to take possession; his doing so might be merely accidental. There was no such taking possession as would have imposed upon the assignees the duty of taking the cargo out of the vessel. The cases as to an attornment are of quite a different character, and amount to this only, that, as between the warehouseman and a second purchaser, the former is estopped by the entry and transfer in his books; such are *Hawes* v. *Watson* and *Gosling* v. *Birnie;* but in such cases the rights of the original vendor remain unaffected. A *symbolical* taking of possession cannot be made operative, and equivalent to actual possession, without the consent of both parties. Suppose the

*642]

captain had received authority to stop *in transitu*, could this transaction have prevented it? It clearly amounts to no more than *evidence* of possession, which is rebutted by the other circumstances of the case: *Dixon* v. *Yates*, 5 B. & Ad. 313 (31 E. C. L. R.), shows that the whole question, whether there has been a delivery or not, depends on the intention of the parties. Here the captain shows his intention, by refusing to deliver till the freight is paid; he merely promises to deliver *in futuro*, on being satisfied as to the freight, and enters into no engagement to hold for the vendees in the meantime.

Crompton, in reply.—First, no sufficient authority in the defendants is found for the Court to act upon it. [PARKE, B.—Surely every evidence of a special is evidence of a general authority. ALDERSON, B.—The letters are not admissible, because not *relevant *otherwise* than as showing a general authority; but surely they are some evidence of that.] The letter of the 24th of July could give no authority, except from the time when it was received. [ALDERSON, B.—That question is material only in case the other letter are inadmissible; and the Court have little doubt that they are admissible.] [*643

Secondly, the letter to Birnie, even coupled with his letter thereupon to the captain, was no sufficient stoppage *in transitu*. Birnie never communicated his assent *to the defendants*. No doubt, his letter to the captain would have been a sufficient authority to him to stop, if he had received it before the 8th of August. Those letters would not have been sufficient evidence to make Birnie liable in trover, if the captain had delivered the goods to the assignees. In *Litt* v. *Cowley*, the facts established that the carriers had the immediate power of doing the act necessary to the stoppage.

Thirdly, there was a sufficient taking of possession by the assignees. It is argued that there was no *intention* on the part of the captain to *deliver*, but that was immaterial.

What it is necessary to prove is, either that *actual possession* has been taken, or that the master has become the agent of the vendee, to hold for him; and in this case there was evidence of such agency. It is strictly a case of estoppel, by attornment of the master to the title of the assignees.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question for our decision in this case is, whether the unpaid vendor of a cargo of timber legally stopped it *in transitu*, before the transitus was at an end.

The material facts may be stated in a few words:—Benbow, a merchant of Liverpool, ordered a cargo of timber of Symes, a merchant at Quebec, which was despatched from thence on board a ship belonging to Birnie, of Montrose, chartered by Benbow. The timber was deliverable at the port of Fleetwood, in Lancashire. The price was not paid; and before the arrival of the vessel in England, Benbow became bankrupt; thereupon the defendants, who were the correspondents of the vendor, gave, on the 18th of July, to Birnie, the owner at Montrose, a notice of stoppage *in transitu*, on behalf of the vendor; and Birnie, on the 20th, wrote to the captain, directing him to hold the cargo at the disposal of the defendant's agents, and sent the letter to await the arrival of the vessel *at Fleetwood. On the 8th of August, the captain arrived there with the vessel and cargo; but, on that evening, and before the receipt of the letter by the captain from his employer, an agent of the assignees of Benbow went on board to take possession of the cargo, and had a communication with the captain on the subject, and did certain acts on board, which are stated in the special case. The captain went on shore with the agent of the assignees, and soon after, on the same evening, the defendant's agent went on board the vessel, and delivered a notice of stoppage *in transitu* to the mate, who was left in

*644]

charge of the cargo. Afterwards, the defendants got the actual possession of the cargo, and the plaintiffs, the assignees of Benbow, bring this action to recover it.

Upon these facts, the first question is, whether the notice given by the defendants to Birnie, on the 18th of July, was a sufficient stoppage *in transitu*; for if it was, the alleged taking possession of the cargo by the agent of the assignees of the purchaser was too late. We think it was not.

It being admitted by the plaintiffs that a notice to the carrier, on the part of the unpaid vendor, is generally a sufficient stoppage *in transitu*, two objections were taken to this notice; the one, that the defendants, the correspondents of the vendor, were not authorized by him to give it (and the same objection applies to every other act of the defendants which is put forward as a stoppage *in transitu*); and the other objection is, that the notice to the shipowner, who had not himself personally the custody of the goods, was, under the circumstances of this case, insufficient.

Whether the defendants had authority to make a stoppage *in transitu* for the vendor, turns upon this point. Certain letters were offered in evidence, written and sent by Symes at a prior time from Quebec to a Mr. Chaffers, the manager of a bank at Liverpool, all referring to the defendants as persons who were to act for Symes in case any difficulty should arise, with respect to different bills of exchange mentioned in those letters, or to any others (among which latter was a bill drawn by Symes in favor of Chaffers, on account of the very cargo of timber in question). All these letters had been communicated to and assented to by the defendants, before they interfered; and the special case, in which the facts were found by an arbitrator, states, that if those letters, or *any* of them, were admissible to show such a general authority as would warrant a stoppage *in transitu*, they, together with other evidence in the cause, were, in the

*645] judgment of the arbitrator, sufficient *to prove it; and it must be assumed as a fact, that there was such an authority. We have no difficulty in saying, that the appointment of the defendants by Symes to act for him with respect to other dishonored bills, and particularly the bill for the cargo in question, is some evidence of a general authority to act for him, or at least an authority to take such steps as they should think fit for the purpose of securing those bills; and by implication, an authority to stop the cargo, for the price of which one of the bills was drawn. And if it be any evidence, the mode of stating the special case precludes any question (if there were any) as to its weight.

There is no doubt, therefore, of the authority of the defendants to make a stoppage *in transitu.*

The next question is, whether the notice to Birnie, the shipowner, living at Montrose, given on the 20th of July, is such a stoppage of the cargo then being on the high seas on its passage to Fleetwood. We think it was not; but to make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt* v. *Cowley*, 7 Taunt. 169 (2 E. C. L. R.), at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is, to use reasonable

diligence to prevent the delivery; and in the present case such diligence was used.

The case, therefore, is resolved into this question, whether the circumstances which occurred on the evening of the 8th of August, when the agent of the assignees went on board, amounted to a taking possession, so as to determine the right to stop *in transitu*.

The law is clearly settled, that the unpaid vendor has a right to retake his goods before they have arrived at their destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of *the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action. This is a case of *actual* possession, which certainly did not occur in the present instance. A case of *constructive* possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him. [*646

It appears to us to be very doubtful, whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody. In the case of *Foster* v. *Frampton*, 6 B. & C.

107 (13 E. C. L. R.); 9 D. & R. 108 (22 E. C. L. R.), it is clear that there were such circumstances. Whether in that of *Ellis* v. *Hunt*, 7 Term Rep. 46, is doubtful; but it is unnecessary to determine this point, as there is no finding in this case even of any act done to the timber *with intent to take possession*. It is said, indeed, that the agent of the assignees touched the timber, but whether by accident or design is not stated. There being then no such act of ownership, it seems to us that unless, by contract with the captain, express or implied, the relation in which he stood before, as a mere instrument of conveyance to an appointed place of destination, was altered, and he became the agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee.

There is no proof of any such contract. A promise by the captain to the agent of the assignees is stated, but it is no more than a promise, without a new consideration, to fulfil the original contract, and deliver in due course to the consignee, on payment of freight, which leaves the captain in the same situation as before; after the agreement he remained a mere agent for expediting the cargo to its original destination.

*647] *We therefore think the transaction on the 8th of August did not amount to a constructive possession by the vendees, and therefore the defendants are entitled to our judgment.

Judgment for the defendants.

Although a vendor may actually have parted with the possession of goods, sold upon credit, nevertheless in case of the purchaser becoming bankrupt or insolvent, he may retake them, if he can do so before they get into the possession of the purchaser. This is called the vendor's right of stoppage *in transitu*,—a mercantile remedy of

a most equitable character, for nothing would be more unjust than that such goods should be applied in payment of the purchaser's general creditors, and, as it has been tersely said by Lord Northington, C., "it has been determined on solid reasons, that the goods of one man should not be applied in payment of another's debts:" D'Aquila *v.* Lambert, 2 Eden 77.

The history of the law relating to stoppage *in transitu* has been ably stated by Lord Abinger in the well-known case of Gibson *v.* Carruthers, 8 M. & W. 337, which was decided in the year 1841. "Although," said his Lordship, "the question of stoppage *in transitu* has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted.' This was strongly insisted upon by Mr. Justice Buller in his celebrated judgment in the House of Lords, in the case of Lickbarrow *v.* Mason, 4 Bro. P. C. 57. It has also been said by Lord Kenyon, that it was a principle of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that have gone by, were unanimous in repudiating it as the offspring of a court of equity. The first case that occurred upon this subject affords some authority for the opinion of Mr. Justice Buller and Lord Kenyon. It is the case of Wiseman *v.* Vandeputt, 2 Vern. 203, in 1690. The Lord Cnancellor directed an action of trover to be brought by the plaintiffs *upon which they recovered a verdict. It is clear, therefore, that [*648 the rule had not at that time been adopted at law. The Lord Chancellor, however, adopted it in equity, and, notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of Snee *v.* Prescot, 1 Atk. 245. Lord Hardwicke again applied the rule to a certain extent in equity. 'But it is remarkable that he received evidence of what was the custom of merchants on this point; and he expressly founds his decree upon the evidence of the custom of merchants, as well as upon the justice of the case. This decision occurred about the year 1742 or 1743.

The next case is that of Ex parte Wilkinson, in 1755, referred to in D'Aquila *v.* Lambert, Amb. 399, which took place in 1761. There the Lord Chancellor again grounded his decree on the usage of merchants, and stated that the several previous decisions which had taken place to the same effect, had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage *in transitu*, under certain circumstances, is now part of the common law.

"Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. It is to be observed, however, that the right of stoppage *in transitu* is not peculiar to the law of England. It existed, I believe, in the commercial states of Europe. The cases I have already referred to, show that it was practised in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough, and mentioned by him in his judgment in the case of Lickbarrow *v.* Mason, 1 H. Black. 364. That it is the law of Russia was also proved in the cases of Inglis *v.* Usherwood, 1 East 515, and of Bohtlingk *v.* Inglis, 3 East 381. It appears also, on reference to the *Chapitre de Faillité*, in the Code Napoléon, that the law of France on this subject is in all points similar to our own. It is known that this celebrated Code is chiefly a digest of the law of France as it existed before the Revolution. Indeed the right of stopping *in transitu* had, before the composition or digest of that code, acquired in the French law the name of 'Revendication.' It may, therefore, be presumed to be a part of the law of merchants which prevails generally on the Continent. The proof of which from time to time, combined with its manifest justice and utility, has at length introduced it into the common law of England, of which the law merchant properly understood has always been reckoned to form a part."

Lord Abinger is no doubt right in the conclusion at which he arrives, that the right of stoppage *in transitu* was introduced into England as part of the law merchant. *The assertion however that the right of stoppage *in transitu* as understood in England, existed in those continental countries where the laws are founded upon the Roman law, is doubtful, and it seems to have

*649]

been introduced into France by the Code de Commerce. Previous to that time, in France, and in other countries where the principles of the Roman law were adopted, the remedy of the vendor was more extensive than in England, inasmuch as he might when unpaid reclaim the goods even after they had reached the hands of the purchaser. "In this respect," says Lord Tenterden, "the law of England is more favorable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods than the ancient civil law or the modern law of many European nations, which is chiefly founded on the civil law; for the civil law did not in general consider the transfer of property to be complete by sale and delivery alone, without payment or security for the price, unless the seller agreed to give a general credit to the buyer for it; but allowed the seller to reclaim the goods out of the possession of the buyer, as being still the seller's own property. And by the general law of France (since altered by Code de Commerce) in the case of insolvency. 'The seller who has sold a thing, and still lies out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may seize on it, and he is not obliged to share it with the other creditors of the buyer.' Whereas by the general law of England, when goods have been delivered into the actual or constructive possession of the buyer, they cannot be reclaimed:" Abbott on Shipping 418, 9th edit.

As to the jurisdiction of courts of equity to enforce the right of stoppage *in transitu*, see the recent case of Schotsmans *v.* Lancashire and Yorkshire Railway Company, 2 Law Rep. Ch. App. 332.

The refusal by the master of a ship to deliver goods under a claim to stop *in transitu* has been held to be a breach of duty, which gives to the Court of Admiralty jurisdiction under section 6 of "The Merchant Shipping Act, 1854:" The Tigress, 32 L. J. (Ad.) 97.

Having made these preliminary remarks, we may, in examining this subject, consider:—1. By whom the right of stoppage *in transitu* may be exercised. 2. When such right arises. 3. During what period it continues. 4. How it may be exercised. 5. The effect of the right of stoppage *in transitu* being exercised. 6. How such right may be defeated.

1. *By whom the Right of Stoppage in transitu may be exercised.* —The right of stoppage *in transitu* can be exercised only by a vendor, or a person standing in the position of a vendor of goods: Feise *v.* Wray, 3 East 93; Siffken *v.* Wray, 6 East 371; Tucker *650] *v.* Humphrey, 4 Bing. 516 (13 E. C. L. R.); Patten *v.* Thompson, 5 M. & Selw. 350; Turner *v.* The Trustees of Liverpool Docks, 6 Exch. 543; Ellershaw *v.* Magniac, 6 Exch. 570 n.

Where a trader in this country gave an order to his correspondent abroad to ship him certain goods, which the latter procured upon his own credit, without naming the trader, and shipped to him at the original price, charging only his commission, it was held by the Court of King's Bench that the correspondent abroad was so far a *vendor* as between him and the trader in this country, that on the bankruptcy of the latter he might stop the goods *in transitu:* Feise *v.* Wray, 3 East 93; and see Hawkes *v.* Dunn, 1 Tyrw. 413; Oakford *v.* Drake, 2 Fos. & Fin. 493.

A person to whom a transfer of a bill of lading has been made *bonâ fide* by the vendor may stop the goods *in transitu:* Morison *v.* Gray, 2 Bing. 260 (9 E. C. L. R.); 9 Moo. 484 (17 E. C. L. R.).

And it seems that even where the vendor has not actually any property in goods, but merely an interest in them under a contract for the delivery of them to him, he may nevertheless stop them *in transitu.* See Jenkyns *v.* Usborne, 8 Scott N. S. 505, 522 (98 E. C. L. R.).

A mere surety, however, for the price of goods is not entitled to stop *in transitu:* Siffken *v.* Wray, 6 East 371; Gurney *v.* Behrend, 3 E. & B. 622 (77 E. C. L. R.); Pennell *v.* Alexander, 3 E. & B. 283 (77 E. C. L. R.).

A person also who has a mere lien upon goods, if he has once parted with the possession, cannot retake them. See Sweet *v.* Pym, 1 East 4. There Pym, the defendant, who was a fuller, had a lien for his general balance upon clothes sent to him by Gard to be fulled. Afterwards, in consequence of orders from Gard, Pym shipped the clothes on a vessel to be forwarded to Gard, and sent to him the invoice. No bill of lading was signed by the captain at the time of the shipment; but soon after the vessel sailed, Pym, hearing of Gard's bankruptcy, followed and overtook the captain in his passage, and procured him to sign a bill of lading to Pym or

his order, by virtue of which Pym obtained the goods when then arrived at the end of their voyage. The assignees in trover recovered a verdict under the direction of Lord Eldon, he being of opinion that no person having a lien on goods can, if he part with the possession, afterwards stop them *in transitu*, and thereby revive his lien against the owner. The Queen's Bench took the same view, and Lord Kenyon, C. J., said, "The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage of them; *the custody therefore was changed by the delivery to the captain.* In the case of Kinloch *v.* Craig, 3 Term Rep. 119; Dom. Proc. Id. 786, where I had the misfortune to differ from my brethren, *it was strongly insisted that the right of lien extended beyond the time of actual possession, [*651 but the contrary was ruled by this Court, and afterwards by the House of Lords, though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived." See also Nicholls *v.* Le Feuvre, 2 Bing. N. C. 81 (29 E. C. L. R.); Leuckhart *v.* Cooper, 3 Bing. N. C. 99 (32 E. C. L. R.); Morley *v.* Hay, 3 M. & R. 396; Freeman *v.* Birch, 3 Q. B. 492 n. (43 E. C. L. R.).

It is clear, as is laid down in the principal case of Whitehead *v.* Anderson, that an agent acting under a sufficient authority from the vendor, can effect a stoppage *in transitu.* See also Nicholls *v.* Le Feuvre, 2 Bing. N. C. 81 (29 E. C. L. R.); Straker *v.* Ewing, 34 Beav. 147. And even where the stoppage is effected by a general agent of the vendor without any specific authority for that purpose, a ratification of the act of the agent by the vendor after the *transitus* is ended will render the stoppage valid: Hutchings *v.* Nunes, 1 Moo. P. C. N. S. 243.

Where a stoppage is made by a person without any previous authority from the vendor, his subsequent ratification will not make it good, if the ratification takes place after the *transitus* has determined. Thus in Bird *v.* Brown, 4 Exch. 786, the defendants, without any authority from Illins the consignor, stopped goods consigned to Carne & Telo, to whom the plaintiffs were the assignees, the stoppage was ratified by Illins after the *transitus* was ended; it was held by the Court of Exchequer that the ratification of the

stoppage after the conversion by the defendants, had not the effect of altering retrospectively the ownership of the goods, which had already vested in the plaintiffs. "The doctrine," said Rolfe, B., "*Omnis ratihabitio retrotrahitur et mandato æquiparatur*, is one intelligible in principle and easy in its application, when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, and has the same equities against me, if I sue, which he would have had against A. B.

"In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser, unless I can justify the act, which is to be deemed as having been done by *my previous sanction. So far there *652] is no difficulty in applying the doctrine of ratification even in cases of tort. The party ratifying becomes as it were a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized.

"But the authorities go much further, and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification, that *the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies.* Thus in Lord Audley's Case, Cro. Eliz. 561; Moore 457; Poph. 176, nom. Lord Awdeley's Case, a fine with proclamation was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years,

and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such ratification within the five years would probably have been good. Now the principle of this case, which is reported in many books, and is cited with approbation by Lord Coke in Margaret Podger's Case, 9 Co. 104 a, appears to us to govern the present. There the entry, to be good, must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine. By the ratification, it became the act of the party in whose name it was made; but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and *he did not ratify until it was too late* to do so. In the present case, the stoppage could only be made during the *transitus*. During that period the defendants, without authority from Illins, made the stoppage. After the *transitus* was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage."

Even the actual possession of goods by the vendor's agent will not amount to a stoppage *in transitu*, unless it were taken with that intent (Siffken *v.* Wray, 6 East 371); but where a person takes possession of goods with the intent of effecting a stoppage *in transitu*, it will not be rendered invalid in consequence of its having been suggested by the purchaser: Mills *v.* Ball, 2 B. & P. 457.

*2. *When the Right of Stoppage in transitu arises.*—The right to stop goods *in transitu* is limited to cases where the *bankruptcy* or *insolvency* of the vendee has taken place: Wilmshurst *v.* Bowker, 2 M. & Gr. 792 (40 E. C. L. R.). By insolvency is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence. See Biddlecombe *v.* Bond, 4 Ad. & E. 332 (31 E. C. L. R.); Mills *v.* Ball, 2 B. & P. 457; Newsom *v.* Thornton, 6 East 17; Vertue *v.* Jewell, 4 Campb. 31; Dixen *v.* Yates, 5 B. & Ad. 313 (27 E. C. L. R.); Edwards *v.* Brewer, 2 M. & W. 375; James *v.* Griffin, 2 M. & W. 623; Bird *v.* Brown, 4 Exch. Rep. 786. [*653

But the vendor should be cautious not to assume the right to

stop *in transitu* unless he have good ground for believing the vendee to be insolvent. For "if," as observed by Lord Stowell, "the person to whom goods are consigned is *not* insolvent; if from misinformation, or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of England, as far as I can collect it, and in all books into which I have looked, it is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose, of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded:" "The Constantia," 6 Rob. Ad. Rep. 321, 326; and see Wilmshurst *v.* Bowker, 2 M. & Gr. 792 (40 E. C. L. R.).

The vendor cannot exercise the right to stop *in transitu* unless the whole or part of the purchase-money is unpaid. It has never been doubted but that he might do so if the purchase-money was wholly unpaid. A question however was raised, whether he could do so when he had received a part payment thereof. It was however ultimately determined that the circumstance of a vendee having partially paid for goods, does not defeat the vendor's right to stop them *in transitu:* Hodgson *v.* Loy, 7 Term Rep. 440; Feise *v.* Wray, 3 East 93; Van Casteel *v.* Booker, 2 Exch. 702.

A purchaser may even, on the bankruptcy or insolvency of the vendee, stop goods *in transitu*, although they may have been sold on credit, so that the price was not actually due at the time of the stoppage: Inglis *v.* Usherwood, 1 East 515; Bohtlingk *v.* Inglis, 3 Id. 381.

*654] *Where the vendor has only received securities for the purchase-money, such as bills of exchange accepted by the purchaser, he may stop the goods upon the purchaser becoming bankrupt or insolvent, even although he may have negotiated the bills, and they are still outstanding and not yet at maturity. See

Feise *v.* Wray, 3 East 93; Patten *v.* Thompson, 5 M. & Selw. 350; Edwards *v.* Brewer, 2 M. & W. 375; sed vide Davis *v.* Reynolds, 4 Campb. 267. *A fortiori* if the bills on arriving at maturity have been dishonored: Dixon *v.* Yates, 5 B. & Ad. 345 (27 E. C. L. R.).

Where however the vendor had the option of taking payment by bill at six months, or in cash less discount, and he elected to take the bill, he was held to have waived the right of stoppage *in transitu:* Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

It seems however that "although the vendee may have become insolvent, still if the state of his accounts with the vendor be such that the vendor is, on account of the balance upon the whole, indebted to the vendee, he cannot stop *in transitu* goods of less value consigned to the vendee, on account of the balance; for the delivery of them to the vendee's representatives can, in that case, be productive of no injustice; and if the balance against him be occasioned by the vendee's being under acceptances for his accommodation, he cannot stop *in transitu* until the bills are paid: Smith's Mercantile Law 557, 6th ed.; see also Vertue *v.* Jewell, 4 Campb. 31; Haille *v.* Smith, 1 B. & P. 563. See however the remarks in 1 Griffiths and Holmes on Bankruptcy, p. 349.

Moreover, the vendor cannot stop goods *in transitu* where payment has been properly made to his agent, although the agent may have embezzled the money: Bunney *v.* Poyntz, 4 B. & Ad. 568 (24 E. C. L. R.).

3. *During what period the Right of Stoppage in transitu continues.*—The right of the vendor to stop goods consigned to the vendee continues during the period of their transit from the former to the latter, while they are in the possession of the vendor he has a lien upon them. The question therefore which generally arises in these cases is, whether the transit was or was not at an end before the stoppage of the goods by the vendor or his agents.

As a general rule, the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee: per Tindal, C. J., in Jackson *v.* Nichol, 5 Bingh. N. C. 516 (35 E. C. L. R.).

Before, however, considering when the *transitus* begins and when it ends, we may perhaps first more conveniently notice those cases where there is in reality no *transitus*, though they are often

spoken of as cases of stoppage *in transitu*, but which in reality decide when the vendor's possession ends and that of the vendee begins. Thus if after goods are sold, they remain in the warehouse *of the vendor, and he receives warehouse rent for them from a sub-vendee, after the time when according to the terms of the original sale they ought to have been taken away, this will amount to a delivery of the goods to the sub-vendee, so as to put an end to the vendor's right of stoppage *in transitu*. See Hurry *v.* Mangles, 1 Campb. 452. "The acceptance of warehouse rent," said Lord Ellenborough, in that case, "is a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. It is an executed delivery by the seller to the buyer. . . . It would be overturning all principles to allow a man to say, after accepting warehouse rent, 'The goods are still in my possession, and I will detain them till I am paid.' The *transitus* is at an end. The goods are transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key." See also Stoveld *v.* Hughes, 14 East 308; Anderson *v.* Scott, 1 Campb. 235, n.; Hodgson *v.* Le Bret, 1 Campb. 233; sed vide Elmore *v.* Stone, 1 Taunt. 458; Carter *v.* Toussaint, 5 B. & Ald. 855 (7 E. C. L. R.).

*655]

It seems, however, that even where goods are sold under an invoice which expresses that they remain at a rent in the warehouse of the vendor, the *transitus* will not be at an end as between the original vendor and purchaser, and the goods being in the possession of the vendor, he may retain them until the price and the rent be paid: Miles *v.* Gorton, 2 C. & M. 504. In Townley *v.* Crump, 4 Ad. & E. 58 (31 E. C. L. R.), Crump, who was a warehouseman, sold wine to Wright and gave him a note in these terms: "Mr. B. Wright. We hold to your order 39 pipes and 1 hhd. red wine, marked J. C., J. M., No. 41 a, 67—69 a., 80—pipes, No. 105 hhd., rent free to 29th November next. J. Crump & Co." The wine remained in Crump's warehouse. Wright accepted a bill for the price and then became bankrupt. It was held by the Court of Queen's Bench that the right of lien was not devested by giving such delivery order. "There was a total failure of proof," said Lord Denman, C. J., "that, where a vendor who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates,

by reason of this custom, to prevent a lien from attaching; and I think it is not contended that there is any general usage which could devest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original vendor and vendee."

But if the vendor give a delivery order to the purchaser for goods remaining in his warehouse, and the purchaser resells the goods to a sub-purchaser whom the original vendor accepts as owner of the goods, and enters him in his books as such without notice of any contingent claim, the vendor cannot *afterwards upon the bankruptcy of the original purchaser stop the delivery of [*656 the goods to the sub-purchaser, because the goods have not been paid for: Pearson *v.* Dawson, E., B. & E. 448 (96 E. C. L. R.).

Sometimes goods are sold when they are not in the actual possession of the vendor, but of a third party, as a warehouseman, or wharfinger, and the question often arises, when can an unpaid vendor intercept the goods, or countermand their delivery to the vendee? In the first place this proposition seems to be clear that, when the goods sold are in the hands of a third party, and when everything is done which ought to be done to render the contract complete, the right of stoppage *in transitu* is gone, if the possession has been changed: per Pigot, C. B., in Orr *v.* Murdock, 2 Ir. Com. Law Rep. N. S. 16. Thus, if the warehouseman gives actual possession of the goods to the purchaser, the right of stoppage *in transitu* will be gone; but mere equivocal acts, such as marking, taking samples, or coopering, without any removal of the goods, from the possession of the warehouseman, will not, it seems, have that effect, unless accompanied by such circumstances as to denote that the warehouseman was intended to keep, and assented to keep the goods in the nature of an agent of custody for the purchaser: Dixon *v.* Yates, 5 B. & Ad. 313 (27 E. C. L. R.). See Whitehead *v.* Anderson, *ante*, p. 646. And the mere giving of a delivery order will not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the vendor of his right to retain the goods: M'Ewan *v.* Smith, 2 H. L. Cas. 309.

But where the vendor gives an absolute authority to the vendee to take possession of goods in the hands of a third party, as for instance a wharfinger or warehouseman, if such third party consents

to hold the goods for the vendee, then it is clear the vendor's right of stoppage *in transitu* is put an end to. The consent of the third party to hold goods for the vendee may be shown in various ways, —by transferring the goods on receiving the delivery order into the name of the purchaser (Harman *v.* Anderson, 2 Campb. 242; Re Hughes, 12 Ir. Ch. Rep. 450); and indeed his mere assent verbally or by acquiescence, on receipt of the delivery order, will have the same effect: Id.; Lucas *v.* Dorrien, 7 Taunt. 279 (2 E. C. L. R.). In the case of Harman *v.* Anderson, 2 Camp. 242, Dudley bought 600 casks of butter then lying in the defendants' warehouses. The vendors gave him a delivery order, which he immediately lodged with the defendants, who thereupon transferred the goods in their books into his name, and actually debited him with the warehouse rent. Immediately after the goods had been transferred, Dudley became insolvent, and the vendors gave the defendants notice to hold the goods on their account. The defendants in consequence of this delivered the goods back to the vendors. Dudley's assignees *657] brought trover *against the warehousemen and obtained a verdict. "The goods," said Lord Ellenborough, C. J., having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage *in transitu.* From that moment the defendants became trustees for the purchaser, and there *was an executed delivery as much as if the goods had been delivered into his own hands.* The payment of the rent in these cases is a circumstance to show on whose account the goods are held, but it is immaterial here, the transfer in the books being of itself decisive. I am clearly of opinion that the assignees are entitled to recover." Afterwards a motion was made to reduce the damages, inasmuch as it was proved by affidavits that, as to one parcel of butter, Dudley having received the delivery note from the vendor, sent it to the defendants, and that they neither made any transfer in their books to his name, nor did anything to testify that they accepted the delivery note, or held these goods on his account. The Court of Queen's Bench however held that this was immaterial. "After the note was delivered to the wharfingers," said Lord Ellenborough, C. J., "they were bound to hold the goods on account of the purchaser. The deliver note was sufficient, without any actual transfer being made in their books. From thenceforth they became the agents of Dudley the bankrupt. They themselves might have

a lien on the goods, and be justified in detaining them till that was satisfied; but as between vendor and vendee, the delivery was complete, and the right to stop *in transitu* was gone." See also Cooke *v.* Lawder, 9 Ir. Law Rec. 21; Keyser *v.* Suse, Gow 58 (5 E. C. L. R.); Barton *v.* Boddington, 1 C. & P. 207 (12 E. C. L. R.); Tucker *v.* Ruston, 2 C. & P. 86 (12 E. C. L. R.).

A question may arise how far, when a warehouseman or wharfinger absolutely refuses, on the receipt of a delivery order, to hold the goods at the disposal of the vendee, the vendor's right of stoppage *in transitu* will remain. It has been decided however where the goods are not in the name of the vendor, when the vendee hands the delivery order to the warehouseman, that on his declining to act upon it, the vendor, if unpaid, may still stop the goods, inasmuch as there was no actual or constructive delivery of them to the vendee: Lackington *v.* Atherton, 8 Scott N. S. 38. The result, however, would probably have been different if the goods had been in the name of the vendor, for then the warehouseman would, in the words of Lord Ellenborough, C. J., in Harman *v.* Anderson, 2 Campb. 242, have "been bound to hold the goods for the purchaser."

Where the authority in a delivery order to give possession is conditional upon some act being done, as for instance payment of ready money (Goodall *v.* Skelton, 2 H. B. 316; Loeschman *v.* Williams, 4 Campb. 181), giving security (Bothlink *v.* Scheider, 3 Esp. 58), that of weighing, as was the *case in Hanson *v.* Meyer, *ante* p. 600, the right of the vendor to stop *in transitu*, if that [*658 act be not done, will not be put an end to on the receipt of the delivery order by the warehouseman, or even by a symbolical delivery by transfer in the books of the warehouseman. See also Wallace *v.* Breeds, 13 East 522; Busk *v.* Davis, 2 M. & Selw. 397; Shepley *v.* Davis, 5 Taunt. 617 (1 E. C. L. R.).

But where the identity of the goods and the quantity are known, and the weighing can only be had for the satisfaction of the buyer, in such case the transfer of the goods in the books of the warehouseman to the name of the purchaser will defeat the vendor's right of stoppage *in transitu*: Hammond *v.* Anderson, 1 Bos. & Pul. N. R. 69; Swanwick *v.* Sothern, 9 Ad. & E. 895 (36 E. C. L. R.); Tansley *v.* Turner, 2 Bing. N. C. 151 (29 E. C. L. R.); Hawes *v.* Watson, 2 B. & C. 540 (9 E. C. L. R.).

The mere fact that a delivery order, directed to the excise with whom

goods are warehoused, requests them to receive the duty, will not be considered to render the payment of the duty a condition precedent so that on presentation of the delivery order by the vendee the goods will be considered as having been delivered to the vendee. See Haig *v.* Wallace, 2 Ir. Law Rep. N. S. 11, cited, where there had been an actual transfer in the books of the excise to the name of the vendees. The result is the same when there has been no such transfer. Thus in Orr *v.* Murdock, 2 Ir. Com. Law Rep. N. S. 9, Graham and Co., Scotch distillers, consigned ten puncheons of whiskey to Purdy, an Irish spirit dealer residing in Newry. With the consignment Graham and Co. sent to Purdy an invoice of the whiskey, and *a delivery order* directed to the collector of excise at Newry, as follows:—"Sir,—Receive the duty and deliver to the order of Mr. Purdy the undernoted ten casks of British plain spirits, warehoused at Newry on the 20th of April, 1850, by Graham and Co. (Signed) Graham and Co." Purdy lodged the delivery order with the storekeeper of the excise, and removed six of the ten casks, having paid the duty on them, but no transfer of the whiskey was made to the name of Purdy in the excise books. Purdy afterwards became bankrupt, and Graham and Co., transferred the four puncheons which remained in the excise stores to Cattarack, who paid the duty and removed them. It was held by the Court of Exchequer in Ireland, that the possession was transferred from the vendor to the vendee by the lodgment of the delivery order, without any transfer in the books of the excise, and that the right of stoppage *in transitu* by the unpaid vendors was therefore gone. "It has been argued," said Pigot, C. B., "that by the delivery order the condition that the purchaser should pay the duty was annexed, and therefore that the sale was not absolute until that was done, as the vendor
*659] remained liable for it to the *Crown. But the property was altered by the sale and passed to the vendee, subject to the Crown's right to duty; bills were given for the price exclusive of duty, for which the possession of the whiskey was a sufficient security to the Crown. The words of the order do not make a condition precedent. Such language if addressed to the agent of the vendor would have that effect, but not to a servant of the Crown. It amounts merely to an intimation from the vendor apprising the officer that he has put the vendee into his own place, and that the goods are transferred to him, with their liability to the Crown. In

Haig *v.* Wallace, the officer acted on the delivery order by transferring the goods in the books of the excise to the name of the vendee; but that act of the officer could not alter the effect of the acts of the parties."

An agreement, however, to pay the duty may be made conditional. See Winks *v.* Hassall, 9 B. & C. 372 (17 E. C. L. R.).

To return now to the consideration of the right of stoppage *in transitu*, rightly so called; it may be laid down as a general rule that the *transitus* continues whilst the goods having left the possession of the vendor, are in the hands of an agent to *forward* them, who neither has possession as bailee for the vendor, nor as agent to hold them under the orders of the purchaser.

While goods are in the hands of a *public* carrier, either by land or by water, and the journey is incomplete, they will be *in transitu*, inasmuch as the carrier clearly holds them only in the capacity of an agent to forward: Black. Cont. of Sale 241; and see Stokes *v.* La Riviere, 3 Term Rep. 466; 3 East 397, cited.

If however goods are put in the purchaser's own cart or vessel, the *transitus* is immediately at an end, inasmuch as the carter or master is not a mere agent to forward to the purchaser, but is his servant, and holds the goods to his order: Black. Cont. of Sale 242; Blakey *v.* Dinsdale, Cowp. 664; Ogle *v.* Atkinson, 5 Taunt. 759 (1 E. C. L. R.); Coxe *v.* Harden, 4 East 211.

And where the goods are delivered on board a ship known to be the purchaser's, it is immaterial whether the ship is trading generally or is sent expressly for the purpose of receiving the goods. See Schotmans *v.* Lancashire and Yorkshire Railway Co., 2 Law Rep. Ch. App. 332. There goods were shipped by a vendor on board the "Londos," a ship which the vendor knew to belong to the purchaser, but which was *employed as a general trader*. Four bills of lading were made, under which the goods were deliverable to the purchaser or assigns. Three of the bills were kept by the vendor, and one by the master of the ship. It was held by the Court of Appeals in Chancery, reversing the decision of Lord Romilly, M. R. (1 Law Rep. Eq. 349), that the delivery on board the purchaser's ship was delivery to the purchaser, *so as to preclude stoppage *in transitu* before the delivery of the goods [*660
at the port of consignment. "If," said Lord Chelmsford, C., "the goods are actually delivered to an agent of the vendee, employed

by him to receive delivery, the vendor is divested of his right of stoppage *in transitu.* On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case, the goods were shipped on board the consignee's own ship, and delivered into the possession of his own servant, the master, who signed bills of lading making the goods deliverable to the consignee or assigns. There was therefore a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the vendor. The possession of three out of the four bills of lading by the agent of the vendor, was a fact of no importance. It gave him no authority over the delivery of the goods, nor any power to transfer the bills of lading themselves. . . . . The plaintiff placed his goods in the ship with the full knowledge that the consignee was the owner—can it be said that the delivery was not absolute and complete?

"The authorities upon this subject appear to make the distinction between the case of the ship of the vendor being sent out expressly to receive the goods, and that of the goods being shipped without any previous arrangement for the purpose. In either case, the words of Parke, B., in Van Casteel *v.* Booker, 2 Exch. 691, apply. 'The delivery in the purchaser's own ship is a final delivery at the place of destination.' If the vendor desires to protect himself under these circumstances, he may restrain the effect of such delivery, and preserve his right of stoppage *in transitu*, by taking bills of lading, making the goods deliverable to his order or assigns. Not only was this precaution not taken in the present case, but the bill of lading, which is always made out by his direction, or at least with the assent of the shipper, makes the goods deliverable to the consignee or assigns. The Master of the Rolls thought that the whole case was involved in the question, 'Whether the "Londos" was a ship trading generally, or was specially sent for the express purpose of receiving the flour?' I cannot discover that this distinction has ever been made the ground of any previous decision."

If, however, the vendor were ignorant of the fact that the vessel in which he shipped his goods belonged to the consignee, a question might arise, whether the delivery could properly be held to be complete. It would seem to be scarcely just to a person who has deliv-

ered goods to be carried to a consignee, under the belief that he could exercise the ordinary right of an unpaid vendor over them, to deprive him of that right because he had ignorantly placed the goods on *board the consignee's own vessel, and therefore must be taken to have made an absolute delivery of them: per Lord Chelmsford, C., in Schotsmans *v.* Lancashire and Yorkshire Railway Co., 2 Law Rep. Ch. App. 335. [*661

The question then which often arises is, whether the person who holds the goods holds them as a mere carrier, or as servant of the purchaser.

Thus where goods are put on board a vessel chartered by the purchaser, the question whether a delivery on board puts an end to the *transitus* turns upon the fact whether the master is to be considered as the servant of the charterer or the shipowner, and this depends upon the construction of the charter-party. In general the master is merely the servant of the shipowner, and in that case he is a mere agent to forward, so that a delivery of the goods on board the ship will not put an end to the *transitus*. See Inglis *v.* Usherwood, 1 East 515; Bohtlingk *v.* Inglis, 3 Id. 381; Gurney *v.* Behrend, 3 E. & B. 622, 623 (77 E. C. L. R.). And it is immaterial that the bills of lading are made out in the name of the vendor or assigns, and are then by him endorsed on blank: Berndtson *v.* Strang, 4 Law Rep. Eq. 481, 489.

It was held, however, in the case of Fowler *v.* Kymer (cited 1 East 522, 3 Id. 396) that where a vessel had been *chartered for a term of years*, during which period the charterer was to have the entire disposition and control of her, that the vessel was the charterer's own, and that the delivery of goods to his order on board was the same thing as delivery into his warehouse: Abbott on Shipping 240, 9th ed.; see also Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165; Jones *v.* Jones, 8 M. & W. 431; Van Casteel *v.* Booker, 2 Exch. 691; see also Turner *v.* Trustees of the Liverpool Docks, 6 Id. 566; Key *v.* Cotesworth, 7 Id. 595; Green *v.* Sichel, 7 C. B. N. S. 747 (97 E. C. L. R.).

As to the construction of charter-parties on this point, see *post.*

Although a delivery of goods on board the purchaser's own ship is a delivery to him, nevertheless the vendor may protect himself by special terms restraining the effect of such delivery. If, for instance, the bill of lading makes the goods deliverable to the order of the con-

signor or his assigns, this will be decisive to show that no property passed to the consignee, it being clearly the intention of the consignor to preserve his title to the goods until he did a further act (see Wait *v.* Baker, 2 Exch. 1; Van Casteel *v.* Booker, 2 Id. 691; Ellershaw *v.* Magniac, 6 Id. 570 n.), and the want of authority of the master to accept the goods on such terms is immaterial: Turner *v.* Trustees of the Liverpool Docks, 6 Exch. 543, 568.

The mere possession of the bill of lading by the consignee or his agent will not in general prevent the right of stoppage *in transitu:* per Lord Chelmsford, C., in Schotsmans *v.* The Lancashire and Yorkshire Railway Company, 2 Law Rep. Ch. App. 337. *662] And although such bill of lading is afterwards endorsed to the order of the consignee, and the property in the goods passes to him (Browne *v.* Hare, 4 Hurlst. & N. 822), the consignor may on the insolvency of the consignee still exercise the right of stoppage *in transitu:* Fearon *v.* Bowers, 1 H. Bl. 364 n.; Mills *v.* Ball, 2 B. & P. 457.

The right of a vendor to stoppage *in transitu* may be preserved where goods are to be delivered on board a ship named by the purchaser, by the vendor's taking a receipt from the person in charge of the vessel, that the goods are shipped to the account of the vendor (Craven *v.* Ryder, 6 Taunt. 433 (1 E. C. L. R.)), and even by the vendor's asking the captain of the vessel to sign such receipt, although he has refused to do so: Ruck *v.* Hatfield, 5 B. & Ald. 632 (7 E. C. L. R.). *Secus* if the shipment be held a complete delivery of the goods to the purchaser under the contract: Cowasjee *v.* Thompson, 5 Moo. P. C. C. 165.

It is immaterial that the goods after having been sent from the vendor are not actually on their journey when he attempts to stop them, as his right to do so will depend upon the fact whether they have reached the hands of a person who has custody of them as an agent to forward, or as an agent to hold subject to the orders of the buyer. This is well illustrated in the case of Dixon *v.* Baldwin, 5 East 175 (the marginal note of which is not quite accurate). There persons, who afterwards became insolvent, ordered goods from the defendants "to be forwarded to Metcalfe and Co. at Hull, to be shipped for Hamburg as usual." It was proved that the "goods were to remain at the Metcalfes' warehouse for the orders of the insolvents, and that the Metcalfes had no other authority to forward

them, and that at the time the goods were stopped they were waiting for their orders. It was held by the Court of King's Bench that the goods in the hands of the Metcalfes were not *in transitu.* "If the transit," said Lord Ellenborough, C. J., "be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and *ulterior destination.* . . . The late cases of Leeds *v.* Wright, 3 Bos. & P. 320, and Scott *v.* Pettit, Id. 469, are authorities to the same effect. In the former the *transitus* was holden to be at an end when the goods had reached the defendant, who was the packer of one Morsseron, a general agent of Le Grand and Co. at Paris, and who had a general power of disposal in respect to them, and might have sent the goods either to his principals at Paris, or to Holland, Germany, or such other market as he should think best. And the latter case, similar in many circumstances to the former, was decided on the same ground, viz., *that the *transitus* of goods is only not at an end upon their reaching [*663 the packer, where they remain with him for the purpose of being forwarded to some ulterior appointed place of destination. But here, as in those cases, the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationery." See also Wentworth *v.* Outhwaite, 10 M. & W. 436; Dodson *v.* Wentworth, 5 Scott N. R. 821; 4 M. & Gr. 1080 (43 E. C. L. R.); Cooper *v.* Bill, 3 Hurlst. & C. 722; Smith *v.* Hudson, 4 B. & S. 431 (116 E. C. L. R.).

Where a person receives the goods from the vendor, as a mere middleman or agent to forward them to their destination, the *transitus* will not be determined on their coming into his possession. See Jackson *v.* Nichol, 5 Bing. N. C. 508 (35 E. C. L. R.). There Crawhall, an agent of the insolvents, purchased lead from the plaintiff at Newcastle, without specifying any place of delivery. Crawhall for some years previous to the purchase had been in the habit of purchasing lead for the insolvents, and his general course was to hold it in his possession until he received directions from them. In this instance, however, the insolvents previous to the vendor parting with the lead by letter had ordered it to be forwarded to London; the vendor thereupon gave a delivery order to Crawhall

(who endorsed it to a wharfinger), as follows, "Deliver the above to the bearer to go on board the Esk." The wharfinger handed the order to a keelman, who got the goods and put them on board the "Esk." The "Esk" sailed for London, and moored in the Thames. The defendants, who were wharfingers, by the orders of the insolvents received the goods on board a lighter, and then they were stopped by the plaintiff, as being an unpaid vendor. It was held by the Court of Common Pleas that the lead was still *in transitu*. "If," said Tindal, C. J., "the lead had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end. The case would then have fallen within the principle laid down in Dixon *v.* Baldwin. But upon the facts stated in this special case, the lead in question never came into the actual possession of Crawhall the agent; for it was delivered from the premises of the plaintiff, the seller, to a keelman in the employ of the defendants, for the purpose of being put on board the defendants' vessel, the 'Esk,' a general trader between Newcastle and London, and by him was so taken and put on board accordingly. Neither again does Crawhall appear to have been an agent of the buyer for the purpose *of receiving the lead into his possession, either as a place of deposit, until he received directions from the buyer for its ulterior destination, or for sending it on to the buyer under general directions for that purpose; for whatever may have been his course of dealing on former occasions, in this particular transaction he acted on and was clothed with no other authority than that which he derived from the letter of the buyer, that is, merely upon a desire expressed in that letter that the lead should be forwarded without delay. And we think the order given by the plaintiff to deliver the lead to the order of Crawhall, and the subsequent order by Crawhall 'to deliver it to the bearer' (who was the keelman) to go on board the 'Esk,' did not amount to any taking possession by Crawhall, but merely formed a link in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyer's in London; the legal consequences being precisely the same as if the order to forward the lead had come direct from

*664]

the buyer to the seller, instead of circuitously through Crawhall's hands; and further, that the putting the lead on board the 'Esk' was only a continuance of such *transitus*." See also Smith *v.* Goss, 1 Campb. 282; Coates *v.* Railton, 6 B. & C. 422 (13 E. C. L. R.); Mills *v.* Ball, 2 Bos. & Pul. 457.

In some cases the question is somewhat more complicated when the carrier acts also in another capacity, for instance as warehouseman or wharfinger; it will however be seen on an examination of the authorities that they all depend upon the same principle, viz. that as the possession of the goods is ambiguous, the intention of the parties as to whether the possessor is to hold them merely as an agent to forward, or as an agent to hold them at the order of the purchaser, must be gathered from the acts of the parties. See James *v.* Griffin, 2 M. &. W. 623; Jackson *v.* Nichol, 5 Bing. N. C. 508 (35 E. C. L. R.); Lackington *v.* Atherton, 8 Scott N. S. 38.

The carrier may, as is laid down in the principal case of Whitehead *v.* Anderson (*ante*, p. 646), enter expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him; and in such a case the *transitus* will be at an end; but if the carrier refuse to hold the goods as agent for the purchaser, it will continue, unless, as we shall hereafter see, the purchaser himself does some acts whereby he takes possession of the goods.

The purchaser may himself anticipate the natural termination of the *transitus*, and take them into his own possession, and by that means put an end to the vendor's *right of stoppage *in transitu* (Mills *v.* Ball, 2 Bos. & Pul. 457; Wright *v.* Lawes, 4 Esp. 82; Oppenheim *v.* Russell, 3 Bos. & Pul. 42; Jackson *v.* Nichol, 5 Bing. N. C. 508 (35 E. C. L. R.); sed vide Holst *v.* Pownal, 1 Esp. 242); and the result will be the same even where the purchaser takes possession of the goods without the consent of the carrier, "though," it is observed in Whitehead *v.* Anderson, "in the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action:" *ante*, p. 646. [*665

The question may next arise what is sufficient to amount to a taking of possession by the purchaser. As is laid down in the principal case of Whitehead *v.* Anderson, "it appears to be very doubtful whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was *intended to keep, and assented to* keep the goods in the nature of an agent for custody; *ante*, p. 646. See Nicholson *v.* Bower, 1 E. & E. 172 (102 E. C. L. R.), there Pavitt and Co. purchased of the defendant by sample some wheat, to be delivered in London: the contract was not in writing. The defendant sent the wheat by railway to the London station of the railway company, consigned to Pavitt and Co., and informed them of such consignment. The company warehoused the wheat, gave notice to Pavitt and Co. and entered the wheat in their books as from "defendant to Pavitt and Co." The usual course of business of the company, in warehousing corn, is to keep it for fourteen days free of charge, after which time it is removed by the consignee or delivered to him by the company at his expense. It is also the custom for the consignee, before finally accepting the corn, to take a bulk sample and compare it with the purchase sample. The day after the arrival of the wheat, Pavitt and Co. sent for a bulk sample. One of the partners examined it the next day, and said "Do not work it" (i. e., do not bring it home) "at present." Afterwards, on the same day, Pavitt and Co., being in difficulties, sent to their creditors to call a meeting of them to take place two days afterwards. The defendant and other creditors attended on that day. The defendant asked for an order for the wheat, which Pavitt and Co. would have given, but the other creditors interfered. The defendant then went down to the railway station, stopped the wheat, and directed the company to hold it to his order. On an issue to try whether the wheat were the property of Pavitt's assignees or of the defendant, it was held by the Court of Queen's Bench that, assuming the *transitus* to have been at an end on the arrival of the wheat at the company's warehouse, there was no acceptance of the wheat by Pavitt and Co. within section 17 of the Statute of Frauds *(29 Car. 2, c. 3), and that therefore the property never vested in Pavitt and Co.

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In Foster *v.* Frampton, 6 B. & C. 107 (11 E. C. L. R.), it is clear that there were circumstances showing an intention to accept the goods. There the defendants, wholesale grocers in London, had by order of the bankrupt, who carried on business as a grocer at Birmingham, sent to him a quantity of lump sugar and three hogsheads of raw sugar by a carrier, who on his reaching Birmingham gave notice of their arrival. The bankrupt thereupon removed the lump sugar to his premises, and took samples from the three hogsheads of raw sugar, but desired that they might remain in the carrier's warehouse until he received further directions. It was held that the *transitus* was at an end, and that the vendor was not entitled to stop them. "Where," said Bayley, J., "a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business, for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the *transitus* is at an end. Now here the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples, and directed the carrier to keep the goods in his warehouse until he received further directions. From that time the carrier became the warehouseman of the bankrupt, and the goods were as much in the possession of the latter as if he had taken them into his own warehouse." See also Allan *v.* Gripper, 2 C. & J. 218; 2 Tyr. 217; Richardson *v.* Goss, 3 Bos. & Pul. 119; Scott *v.* Pettit, Id. 469.

In the principal case of Whitehead *v.* Anderson, it was held that the mere touching of the timber by the agent of the assignees of the purchaser did not amount to an act of ownership on his part, and as there was no contract either express or implied on the part of the captain to alter the relation in which he stood before, as a mere instrument of conveyance to an appointed destination, into an agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee, so as to put an end to the *transitus*. See also Ellis *v.* Hunt, 3 Term Rep. 464.

A mere demand of the goods when on their journey, by the vendee, from the holder, who refuses to deliver them up to him, will not determine the vendor's right to stop *in transitu:* Jackson *v.* Nichol, 5

Bing. N. C. 508 (35 E. C. L. R.); 7 Scott 577. So it has been held, that the mere presentation of an "overside order" by the pledger of the consignees to the chief officer of a ship arrived with the goods in port, and he promises to deliver them to the pledgee as soon as they could be got at, does not defeat the consignor's right to stop *in transitu*: Coventry *v.* Gladstone, 3 W. R. (V.-C. W.) 88.

Another question sometimes arises, viz., how far a delivery of part of goods sold, either by the vendor himself or his agent as a warehouseman or carrier, will amount to a delivery of the whole, so as to prevent in the first case his retaining, in the second case *his stopping *in transitu*, the remaining goods until the pur- *667] chase-money be paid. It seems now to be settled that the result depends upon the intention with which the vendee took possession. If the vendee takes possession of part of the goods, *not meaning thereby to take possession of the whole, but to separate that part*, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more; and the right of lien or the right of stoppage *in transitu* on the remainder still continue: Tanner *v.* Scovell, 14 M. & W. 28; Jones *v.* Jones, 8 M. & W. 431; Wentworth *v.* Outhwaite, 10 M. & W. 451; Bunney *v.* Poyntz, 4 B. & Ad. 570 (24 E. C. L. R.); Payne *v.* Shadbolt, 1 Camp. 427; Crawshay *v.* Eades, 1 B. & C. 181 (8 E. C. L. R.); Simmons *v.* Swift, 5 B. & C. 857 (11 E. C. L. R.); Bolton *v.* The Lancashire and Yorkshire Railway Co., 1 Law Rep. C. P. 431.

If, however, the vendee takes possession of a part of the goods, in the progress of and with the intention of taking posesssion of the whole, that will be held to divest the vendor's rights of stopping *in transitu*: Hammond *v.* Anderson, 1 Bos. & Pul. N. R. 69; and see Sluby *v.* Heyward, 2 H. Black. 504; Hanson *v.* Meyer, 6 East 614; and *ante*, p. 601.

With regard to the actual possession, it is clear upon the authorities that if a man orders goods to be delivered at a particular place, the *transitus* will be at an end when they are delivered to the consignee (Foster *v.* Frampton, 6 B. & C. 107 (13 E. C. L. R.), or in case of his bankruptcy to his assignees (Bird *v.* Brown, 4 Exch. 786) at that place. See also Heinekey *v.* Earle, 8 E. & B. 410 (92 E. C. L. R.).

It has been suggested by some able judges, that goods which arrive at the warehouse of a purchaser after his bankruptcy should

not vest in his assignees: 3 Bos. & Pul. 471. It has however been decided in many cases, that notwithstanding the bankruptcy of a purchaser, his warehouse continues open for the reception of goods, and his assignees may take possession of goods delivered to the bankrupt, leaving the vendor to come in as a creditor under the adjudication. See Hanswell *v.* Hunt, 5 Term Rep. 231 cited; Ellis *v.* Hunt, 3 Term Rep. 467; Tooke *v.* Hollingworth, 5 Term Rep. 226, 230; Scott *v.* Petit, 3 Bos. & Pul. 469; Inglis *v.* Usherwood, 1 East 515.

Both parties to the contract of sale may rescind it (Salte *v.* Field, 5 Term Rep. 211); but after the transit is at an end, the vendee cannot return the goods so as to defeat the rights of third parties that may have intervened. See Smith *v.* Field, 5 Term Rep. 402. There the vendee wished to return the goods, but the vendor attached them in the hands of a packer as the property of the vendee. The vendee having become bankrupt, it was held by the Court of Queen's Bench that the proceeding by way of attachment by the vendor was an election by him not to rescind the contract, and that as afterwards the interests of other parties intervened, viz. [*668 *those of the general mass of his creditors, the vendor was not entitled to recover the goods from the packer in trover. See also Neate *v.* Bull, 2 East, 123; Richardson *v.* Gross, 3 Bos. & Pul. 119.

Upon the same principle, where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent before they are paid for, he cannot rescind the contract and return the goods with the consent of the vendor, so as to give the vendor a preference over his other creditors: Barnes *v.* Freeland, 6 Term Rep. 80; see also Harman *v.* Fishar, Cowp. 125, *ante*, p. 525; Dixon *v.* Baldwin, 5 East 175.

A mere delivery, however, at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee; and although they are landed at the place to which they are destined, unless the consignee has taken possession of them, they are still in transit, and the consignor on the insolvency of the consignee may still exercise his right to stop them *in transitu*: per Lord Campbell, C. J., in Heinekey *v.* Earle, 8 E. & B. 423 (92 E. C. L. R.). *A fortiori* where the purchaser declines to receive the goods: Bolton *v.* The Lancashire and Yorkshire Railway Co., 1 Law Rep. C. P. 431; Atkin

v. Barwick, 1 Stra. 165; Bartram *v.* Farebrother, 4 Bing. 579 (13 E. C. L. R.); 1 M. & P. 515 (17 E. C. L. R.); James *v.* Griffin, 2 M. & W. 623; Crawshay *v.* Eades, 1 B. & C. 181 (8 E. C. L. R.).

But where the goods arrive at their place of destination, if the purchaser or those standing in his place as his assignees, demand the goods and tender the amount due for freight, the carriers are bound to deliver them up, and cannot by their wrongful detainer of them and delivery of them over to other parties, prolong the *transitus*, and so extend the period during which the stoppage may be made: Bird *v.* Brown, 4 Exch. 786, 797.

The right to stop *in transitu* when the goods have once come into the possession of the purchaser will not be revived by their being re-delivered by the purchaser to the vendor for a special purpose, as for instance, in order that they may be repacked: Valpy *v.* Gibson, 4 C. B. 837 (56 E. C. L. R.).

4. *How the Right of Stoppage in transitu may be exercised.*— Although at one time it was thought that in order to stop goods *in transitu*, it was necessary that there should be an *actual* possession of them obtained by the vendor or his agent before they came to the hands of the vendee, it is now clearly settled *that notice* on the part of the unpaid vendor, that is to say, either by himself or his agent, to the carrier to stop the goods *in transitu*, is sufficient to attach the vendor's lien upon them for the unpaid purchase-money, and the carrier becomes liable for the consequences of his delivering them after such notice, either to the purchaser or his assignees, against whom the purchaser may also bring trover for them. See *669] *Litt *v.* Cowley, 7 Taunt. 169 (2 E. C. L. R.): there it appeared that the plaintiffs pursuant to an order had on the 9th December delivered the goods to Pickfords, carriers at Manchester, to be brought by a canal to London, addressed to Neale and Warner. Afterwards seeing cause to stop them *in transitu, they gave notice* to the Pickfords, the carriers in the country at the place whence the boats started, to deliver the goods not to Neale and Warner, but to an agent of the plaintiff's own; and the Pickfords in the country wrote to Pickfords in London acccording to the notice they had received from the plaintiffs; the Pickfords in London, however, in consequenee of a mistake of a clerk, delivered them on 23d December to Neale and Warner, and debited them with the freight.

They unpacked them and sold a part. On the 19th January following a commission of bankrupt issued against against Neale and Warner, and the defendants, who were their assignees and had taken possession of the goods, refused, on demand, made on 3d February, to restore them to the plaintiffs. It was held by the Court of Common Pleas that the vendor might maintain trover for the goods. "It was formerly held," said Gibbs, C. J., "that the only way of stoppage *in transitu* was by actual corporal touch of the goods. It has since been held, that after notice to a carrier not to deliver, he is liable for the goods in trover against himself, if he does deliver them. It is clear, therefore that after this notice, Pickfords delivering them to Neale and Warner are liable in trover for the goods, and I thought it monstrous to say that their delivery of them by mistake, under such a liability, would confirm the property in the bankrupt. The law of stoppage *in transitu* says that the property which was before in the bankrupts may be revested in the seller by notice to the carrier. The plaintiffs give that notice to the carrier, and thereby revest the property. Before such notice to the carrier to stop the goods, the purchaser may bring trover for them; after such notice the seller may bring trover. A vendor could not maintain trover against a carrier, unless he could revest the property in himself; and if he can revest it, then the subsequent delivery by mistake will not perfect the sale." See also Hunter *v.* Neale, cited Term Rep. 466; Stokes *v.* La Rivière, cited 3 East 397; Mills *v.* Ball, 2 B. & P. 457; Bohtlingk *v.* Inglis, 3 East 381.

"To make," as is laid down in Whitehead *v.* Anderson, "a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given as it was in the case of Litt *v.* Cowley, 7 Taunt. 169 (2 E. C. L. R.), at such a time and under such circumstances, that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance *is sufficient to revest the property in the unpaid vendor, and render the principal [*670 liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible from the distance and want of means of communication, to prevent that delivery, would be the height of injustice:" per Parke, B., *ante*, p. 645.

5. *The Effect of the Exercise of the Right of Stoppage in transitu.*—It is a question not yet decided whether the effect of stoppage *in transitu* is to rescind the contract, or merely to replace the vendor in the same position as if *he had not parted with the possession*, by giving him a lien for the price unpaid. The latter seems to be the prevalent opinion. Thus in Hodgson *v.* Loy, 7 Term Rep. 445, where it was held that part payment of the price did not take the case out of the ordinary rule as to stoppage *in transitu.* Lord Kenyon, C. J., said "that the right of the vendor to stop goods *in transitu* in case of the insolvency of the vendee was a kind of *equitable lien* adopted by the law for the purposes of substantial justice, and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract." See also Clay *v.* Harrison, 10 B. & C. 99 (21 E. C. L. R.); Stephens *v.* Wilkinson, 2 B. & Ad. 323 (22 E. C. L. R.); Wentworth v. Outhwaite, 10 M. & W. 452; sed vide Jenkyns *v.* Usborne, 8 Scott N. R. 525. Moreover the acceptance of bills for the *whole* price by the vendee becoming bankrupt, being upon proof under the bankruptcy only equivalent to a part payment, will not conclude the right to stop *in transitu*, as "it only diminishes the vendor's lien *pro tanto* on the goods detained:" Feise *v.* Wray, 3 East 93; see also Nichols *v.* Hart, 5 C. & P. 179 (24 E. C. L. R.).

Upon this principle, "the buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are are both requisite, unless they have both those rights:" per Bayley, J., in Bloxam v. Sanders, 4 B. & C. 949 (10 E. C. L. R.); see also Edwards v. Brewer, 2 M. & W. 365; Van Casteel *v.* Booker, 2 Exch. 702.

The carrier in whose possession the goods are stopped *in transitu* has only a lien upon them for the sum due for carriage, and upon tender made of that sum the person sending the goods has a right to resume them, and the carrier cannot claim to retain them on account of any *general* balance between him and the consignee: Op-

penheim *v.* Russell, 3 Bos. & Pul. 42; and see Butler *v.* Woolcott, 2 Bos. & Pul. N. R. 64; Morley *v.* Hay, 3 M. & R. 396; Leuckhart **v.* Cooper, 3 Bing. N. C. 107 (32 E. C. L. R.). [*671

Upon the same principle it has been decided that the right of a vendor to stop *in transitu* cannot be defeated by process of attachment out of the Lord Mayor's Court, issuing against the consignee, inasmuch as the attaching creditor has no greater right in the goods than the vendee. See Smith *v.* Goss, 1 Campb. 282, where Lord Ellenborough, C. J., observed: "The vendor's power of intercepting the goods was the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customers' goods for his general balance, which had been decided against the carrier." And see Oppenheim *v.* Russell, 3 Bos. & Pul. 42; Butler *v.* Woolcott, 2 B. & P. (N. R.) 64; Morley *v.* Hay, 3 M. & R. 396.

Assuming the contract of sale not to be rescinded by a stoppage *in transitu*, it would follow that the goods when stopped would remain at the risk of the vendee.

If the stoppage *in transitu* be *wrongful*, it clearly will not effect a rescission of the contract or affect the vendor's right of suing for the price of the goods: In re Humberston, 1 De Gex 262; Gillard *v.* Brittan, 8 M. & W. 575.

6. *How the Right of Stoppage in transitu may be defeated.*—If a vendee sell goods to a third party *before* they have been delivered to him, the subvendee will take them subject to the right of stoppage *in transitu* for the purchase-money, as he cannot in general stand in a better situation than his vendor: Dixon *v.* Yates, 5 B. & Ad. 313, 339 (27 E. C. L. R.); Small *v.* Moates, 9 Bing. 574 (23 E. C. L. R.); Jenkyns *v.* Usborne, 8 Scott N. R. 505; 7 M. & Gr. 678.

Where, however, the vendee, a shipper, has had a bill of lading from the vendor, if he or his consignee with his authority endorse it to a subvendee for valuable consideration, *bonâ fide* and without notice, the right of stoppage *in transitu* will be thereby defeated. The leading case upon this subject is Lickbarrow *v.* Mason, 2 Term Rep. 63; 1 H. Black. 357; 6 East 21; 1 Smith's L. C. 595, 4th ed.; Pennell *v.* Alexander, 3 E. & B. 283 (77 E. C. L. R.); Gurney *v.* Behrend, 3 Id. 622 (77 E. C. L. R.); Pease *v.* Gloahec, 3 Moo.

P. C. C. (N. S.) 556; s. c. 1 Law Rep. P. C. 219; "The Tigress," Brown & Lush 538; 32 L. J. (Ad.) 97; Kemp *v.* Canavan, 15 Ir. C. L. Rep. (N. S.) 216.

But although a bill of lading may have been endorsed to a *bonâ fide* purchaser, it is essential in order to defeat the right to stop *in transitu*, that the bill of lading should have come into his possession with the authority of the original vendor. *Primâ facie*, indeed, unpaid vendors have a right to stop the goods sold while they are *in transitu;* but the onus lies on the holder of the bill of lading, to prove that they have become the owners of the goods, and that the *672] right to stop *in transitu* has gone. For this purpose it is *not enough that they have become *bonâ fide* holders of the endorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods:" per Lord Campbell, C. J., 3 E. & B. 634 (77 E. C. L. R.).

If the assignee of a bill of lading acts *malâ fide;* if, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that being accepted it was not likely to be paid; in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would therefore be unavailing to the party taking an assignment of the bill of lading under such circumstances and for such a purpose:" per Lord Ellenborough, C. J., in Cuming *v.* Brown, 9 East 514; see also Wright *v.* Campbell, 4 Burr. 2046; Salomons *v.* Nissen, 2 Term Rep. 674; Schuster *v.* M'Kellar, 7 E. & B. 704 (90 E. C. L. R.).

The mere fact that the endorsee of a bill of lading has notice that the vendor has not been paid, is not sufficient to render the transfer fraudulent. See Cuming *v.* Brown, 9 East 506. In that case, in

1808, Jean, the vendor of goods, consigned them to Maine, the purchaser, and sent him the bills of lading, and drew on him for the price. Afterwards Maine pledged the bill of lading to Cuming, who at the time was aware of these facts, but did not know that at that time Maine had stopped payment, and had not even any suspicion of his insolvency. It was held by Lord Ellenborough, C. J., that the vendor's right to stop *in transitu* was gone. "If," said his lordship, "a bill of lading should be held by us not assignable under these circumstances, the consequence would be that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing; a position which would overturn the general practice and course of dealing of the commercial world on this subject. . . . The doubt which has been thrown on this subject has arisen principally from the words 'without notice,' which are to be found in the case of Salomons *v.* Nissen, 2 Term Rep. 674, and other cases on the subject. But *we think that, according to the general scope and meaning of the passages in the opinions of the judges where this expression occurs, it is not to be understood in the restrained sense contended for, viz., '*without notice that the goods had not been paid for;*' but '*without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable,*' the criterion being, according to Mr. Justice Buller in that case (p. 681), *Does the purchaser take it fairly and honestly?*" [*673

If there be a condition annexed to a bill of lading, as, for instance, if there be an endorsement making the goods deliverable to the purchaser, "if he should accept and pay a draft," no endorsee, even for valuable consideration, will take any property in the goods unless the condition be fulfilled: Barrow *v.* Coles, 3 Campb. 92.

But where goods are put on board a vessel by the vendor for the account and at the risk of the vendee, and at the same time transmits and endorses a bill of lading to the vendee, the vendor parts with his property and right of possession, and will not be able to stop the goods *in transitu* on failure of the vendee to accept a bill according to agreement on the receipt of the invoice and the bill of lading (Wilmshurst *v.* Bowker, 7 M. & G. 882 (49 E. C. L. R.); Key *v.* Cotesworth, 7 Exch. 595); if in such a case the vendor in-

tends to preserve his right of property in the goods until the bill is accepted, he should transmit the bill of lading endorsed in blank, to an agent, to be delivered over only in case the bill is accepted: Key *v.* Cotesworth, 7 Exch. 595, 607. See Hoare *v.* Dresser, 7 H. L. Cas. 290.

If bills of lading are presented to the master by two different holders, and he delivers to one, a right of action against him accrues to the disappointed holder, as it is for the master to inquire who has the best right. See The Tigress, 32 L. J. (Ad.) 97, (the marginal note of which is inaccurate), where Dr. Lushington said it was objected by the defendant, that, assuming the plaintiffs had a right to stop *in transitu*, and duly asserted that right, yet the master was guilty of no breach of duty in refusing to deliver, but simply is retaining the custody of the wheat for the right owner, as soon as the claim shall be established; but to this argument I cannot accede, for I think there are cases without number to show that the right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor. Were it otherwise, the right to stop would be useless, and trade would be impeded. The refusal of the master to deliver upon demand is in cases like the present sufficient evidence of conversion. The master may, indeed, sometimes suffer from an innocent mistake, but he can always protect himself from liability by a bill of interpleader in Chancery."

The right of the vendor to stop goods *in transitu*, although de-
*674] feated in *law* by the endorsement *of a bill of lading *for a limited purpose*, as for instance to secure a sum of money, will remain in *equity*, subject to a lien for the endorsee's demand. This was first laid down in a case at law In the matter of Westzinthus, 5 B. & Ad. 817 (27 E. C. L. R.), and it has since been recognised and followed in equity. See Spalding *v.* Ruding, 6 Beav. 376. There the plaintiffs consigned goods to Thomas, to whom a bill of lading was also sent. Thomas transferred the bill of lading to Ruding to secure 1000*l.* Thomas having afterwards stopped payment, notice was given by the agent of the plaintiffs to the master not to part with the goods. It was held by Lord Langdale, M. R., that the plaintiffs retained their right of stoppage *in transitu* subject to the lien of Ruding for the 1000*l.*, and that their remedy against him for the surplus of the proceeds of the goods was in

equity. "I apprehend it to be clear," said his Lordship, "that the endorsement and delivery of the bill of lading by Thomas the consignee to Ruding, for valuable consideration, gave to Ruding the legal right to the delivery, and possession of the goods. That right is not disputed by this bill, but the plaintiffs insist that under the contract subsisting between Thomas and Ruding the right to the possession of the goods was vested in Ruding, only as a security for the repayment to him of his advance and charges, and that, subject to that security, the plaintiffs in the consideration of a court of equity retained their right to a stoppage *in transitu* against the assignee or endorsee of the bill of lading; it appears that in the case of Westzinthus, 5 B. & Ad. 817 (27 E. C. L. R.), the Court of Queen's Bench held that in such a case a court of equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods in equity, subject only to the lien for the advance. The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against Thomas, I think the plaintiffs had a right to stop the goods *in transitu;* and although the legal right to the goods was transferred with the bill of lading, yet I think that in equity the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the plaintiffs an equitable interest in the surplus value:" s. c. affirmed on appeal, 15 L. J. Ch. 374; see also Berndtson *v.* Strang, 4 Law Rep. Eq. 481; Meyerstein *v.* Barber, 2 Law Rep. C. P. 38, 53; affirmed, 2 Law Rep. C. P. (Exch. Ch.) 661.

It has been held that by the usage of trade, West India Dock warrants, endorsed *bonâ fide* and for good consideration, transferred the right of property in the goods like a bill of lading, so as to prevent the right of stoppage *in transitu:* Zwinger *v.* Samuda, Holt's N. P. C. 395 (3 E. C. L. R.); *sed vide* s. c. 7 Taunt. 265; M'Ewan *v.* Smith, 2 H. L. Cas. 309; Lucas *v.* Dorrien, 7 Taunt. 278 (2 E. C. L. R.).

But it is doubtful whether a document similar in form to a bill *of lading, given by the master of a boat navigating an inland canal, has the effect of such an instrument in transferring the property in the goods: Bryans *v.* Nix, 4 M. & W. 775. [*675

The mere handing over of a shipping note or a delivery order by the consignee of goods to a third person will not pass the pro-

perty in them so as to prevent a stoppage *in transitu*, for they will not amount to a bill of lading, which is similar to a bill of exchange, and the property in it passes by endorsement, but not by delivery without endorsement, whereas a shipping note, from its nature, is not endorsible: Akerman *v.* Humphery, 1 C. & P. 53 (12 E. C. L. R.); Tucker *v.* Humphrey, 4 Bing. 523 (13 E. C. L. R.); M'Ewan *v.* Smith, 2 H. L. Cas. 309.

The right to stop *in transitu* is not affected by the Act to amend the Law relating to Bills of Lading, 18 & 19 Vict. c. 111. See sect. 2.

As to the right of factors to deal with bills of lading and other documents of title, to goods and merchandise, see the Factor's Acts, 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39. See Smith's Mercantile Law, p. 133, 7th ed.; Houston's Law of Stoppage in Transitu, p. 192.

As to the right of stoppage *in transitu* generally, see Wood *v.* Roach, 2 Dall. 180; Jordan *v.* James, 5 Hammond 88; Stanton *v.* Eager, 16 Pick. 467; Stubbs *v.* Lund, 7 Mass. 453; Ilsley *v.* Stubbs, 9 Id. 65; Allen *v.* Mercier, 1 Ash. 103; Bell *v.* Moss, 5 Whart. 189; Conyers *v.* Ennis, 2 Mason 236; Lupin *v.* Marie, 2 Paige Ch. 169; Sawyer *v.* Joslin, 20 Vt. 172; Hays *v.* Mouille, 2 Harris 48; Lane *v.* Robinson, 18 B. Monr. 623; Atkins *v.* Colby, 20 N. H. 154; Stevens *v.* Wheeler, 27 Barb. 658; O'Neil *v.* Garrett, 6 Clarke 480; Holbrook *v.* Vose, 6 Bosw. 76; White *v.* Welsh, 2 Wright 396; Schmertz *v.* Dwyer, 3 P. F. Smith 335; Wenger *v.* Barnhart, 5 Id. 300; Thompson *v.* Baltimore Railroad Company, 28 Md. 396. The vendor's right of stoppage *in transitu* does not proceed on the ground of rescinding the contract, but rests expressly upon its continuance on the ground of an equitable lien; and if the goods are stopped, the vendee may recover them on his complying with the contract or paying the price: Jordan *v.* James, 5 Hammond 88; Rowley *v.* Bigelow, 12 Pick. 307; Newhall *v.* Vargas, 3 Shepley 314. If goods are stopped *in transitu* and applied to the payment of the price, and a balance still remains unpaid, the vendor may recover it of the vendee: Newhall *v.* Vargas, 3 Shepley 314. Where goods are stopped *in transitu*, the vendee cannot recover back a partial payment made thereon: Id.

The vendor's right does not cease on the arrival of the goods at the port of delivery, until they have come to the vendee's actual possession, or his constructive possession by a delivery to his agent; and the entry of the

goods by the vendee at the custom house, without the payment of the duties, is not a termination of the *transitus:* Mottram *v.* Heyer, 5 Denio 629. The deposit of goods when they have reached their destination in a warehouse, subject to the order and control of the vendee, is an executed delivery as effectual to defeat the right as if they had been deposited in the vendee's own warehouse; and a deposit in like manner in the warehouse of the vendor, divests his right to retain for the price which may be unpaid: Frazer *v.* Hilliard, 2 Strob. 309. Where the consignees having received the bill of lading, paid the freight, and entered the goods at the custom house. After this they were taken to the public store, and while remaining there and before the duties were paid, the consignees became bankrupt. It was held that the transitus had ended: Mottrom *v.* Heyer, 1 Denio 483; s. c. 5 Denio 629. Where a vendee, to whom the goods had been shipped, paid the freight and gave his note for the price, but in consequence of the loss of the invoice, the goods on their arrival, were stored in the custom house, where they remained until the note fell due, which was not paid and the vendee became insolvent, it was held that the vendor's right of stoppage was not lost: Donath *v.* Broomhead, 7 Barr 301. Where a vendor delivers to a vendee a bill of parcels lying in a public store and an order on the storekeeper, his right of stoppage ceases against a third person, who purchases for a valuable consideration and *bonâ fide:* Hollingsworth *v.* Napier, 3 Caines 182. The right ceases when the entry of the goods in a bonded warehouse is perfected: Cartwright *v.* Wilmerding, 24 N. Y. 521. Where goods are by direction of the vendee, delivered by the carrier to a particular warehouseman, the question, as to whether the right of stoppage still exists, depends upon the question as to the capacity in which the warehouseman received the goods, whether as the agent of the vendee or the carrier: Hoover *v.* Tibbit, 13 Wis. 79. A vendor may stop the residue of goods, which have not arrived at their final destination: Buckley *v.* Furniss, 17 Wend. 504.

Where goods sold to be paid for on delivery, were put on board a vessel appointed by the vendee, not to be transported to him or delivered to his use at a place of his appointment, but to be shipped by such vessel in his name to a third person, it was held that there was no right of stoppage after the goods were embarked: Rowley *v.* Bigelow, 12 Pick. 307; Stubbs *v.* Lund, 7 Mass. 453. Where goods are shipped to a foreign port on board the consignee's own ship and the master gives a bill of lading to deliver them to the consignee, the *transitus* is at an end by such delivery to the master: Bolin *v.* Huffnagle, 1 Rawle 9. But see Stubbs *v.* Lund, 7 Mass. 453; Ilsley *v.* Stubbs, 9 Id. 65; Newhall *v.* Vargas, 1 Shepley 93. If goods are delivered on board the ship of the consignee or vendee to be transported to him, the vendor has the right, where the vendee becomes

insolvent, to stop the goods, at any time before they come into the actual possession of the consignee in the same manner as if delivered on board a general carrying ship: Newhall *v.* Vargas, 1 Shepley 93; Parker *v.* McIvor, 1 Dessaus. 274. A constructive delivery of goods to an agent of the vendee, for the purpose of being transmitted to him, though vesting the property in him for all other purposes, will not destroy the vendor's right to stop *in transitu:* Parker *v.* McIvor, 1 Dessaus. 274. The right does not exist after the goods have been delivered on board of the vendee's vessel, by which they are to be carried to another port: Piqueno *v.* Taylor, 38 Barb. 375. A vendor cannot exercise the right after the goods have been delivered by the carrier to a third person on the vendee's order, although they have never been delivered to the vendee at the place directed by him at the time of purchase: Stevens *v.* Wheeler, 27 Barb. 658.

The right is lost when the goods come into the actual possession of the vendee, whether at the place of destination of the goods, or at one intermediate: Wood *v.* Yeatman, 15 B. Monr. 270; Secomb *v.* Nutt, 14 Id. 324. Where an intermediate delivery occurs, before goods sold reach their ultimate destination, if the party to whom they are thus delivered has authority to receive them and give them a new destination not originally intended, the right of stoppage is gone. But if the middleman be a mere agent to transmit the goods in accordance with the original directions, the vendor's right continues: Cabeen *v.* Campbell, 6 Casey 254. Where goods sold, in the course of their *transitus*, come to the hands of a shipping agent of the vendee, who has no authority to dispose of them in his discretion, but only holds them to await further directions from the vendee as to the time and conveyance by which to ship them to such vendee at a place previously determined, the vendor's right of stoppage is not terminated: Harris *v.* Pratt, 17 N. Y. 249; s. c. 6 Duer 606. If a party, to whom goods are delivered, is clothed with a general and unlimited power to receive them and alter their destination, the transit ends when they reach his hands, as between vendor and vendee: Pottinger *v.* Hecksher, 2 Grant's Cas. 309. Goods purchased by one at a distance, forwarded to a point, and there taken by a carrier of the purchaser to be transported to the residence of the purchaser, may be stopped *in transitu*, before they reach his residence: Buckley *v.* Farniss, 15 Wend. 137. If goods are consigned to a certain place, where they are to be subject to the vendee's order as to their further transportation, the transitus is ended on their arrival at such place: Hays *v.* Mouille, 2 Harris 48. Depositing goods at an intermediate point, with the vendee's agent to be forwarded does not determine the right: Markwald *v.* Creditors, 7 Cal. 213; Blackman *v.* Pierce, 23 Id. 508. If an agent be clothed only with specific and limited authority to forward goods to a particular destination, the *transitus* is not at an end until the goods have reached the place

named by the buyer to the seller as such destination: Pottinger *v.* Hecksher, 2 Grant's Cas. 309. When goods are delivered at a place where they will remain, until a fresh impulse is communicated to them by the vendee, the *transitus* is at an end and the vendor's right of stoppage ceases: Guilford *v.* Smith, 30 Verm. 49. If the vendee intercept goods forwarded to him, on the passage, and takes possession as owner, the delivery is complete and the right of stoppage gone: Jordan *v.* James, 5 Hammond 88. The right of stoppage continues while the goods remain in the hands of a warehouseman, though at the place to which they were directed to be sent, if that be an intermediate point between the place of sale and the ultimate destination of the goods: Covell *v.* Hitchcock, 20 Wend. 167; s. c. 23 Wend. 611. If goods are sent to a forwarding merchant to await in his hands the instructions of the purchaser, respecting any further transit, the *transitus* is at an end when they reach his hands, so that they cannot be stopped by the vendor: Biggs *v.* Barry, 2 Curtis C. C. 259. If a transit is once at an end, the delivery is complete and the transit cannot commence again, because the goods are sent to a new and ulterior destination: Pottinger *v.* Hecksher, 2 Grant's Cas. 309.

When goods are purchased and paid for by the order, note, or accepted bill of a third party without the endorsement or guaranty of the purchaser, the vendor has no right of stoppage: Eaton *v.* Cook, 32 Verm. 58. Where goods have been shipped by an agent indebted to his principal or by any one to pay a precedent debt, the right of stopping them does not exist: Wood *v.* Roach, 1 Yeates 117; s. c. 2 Dall. 180; Summeril *v.* Elder, 1 Binn. 106; Clark *v.* Mauran, 3 Paige 373. It does not affect the right that the vendor took bills on the vendee drawn by his agent, nor that he charged commissions for doing the business; nor that he accepted part payment; nor is he obliged to refund the payment or pay the freight: Newhall *v.* Vargas, 1 Shepley 93. Nor does the fact that the vendor purchased the goods on his own credit for the vendee affect the right: Id. When goods are sold to one person, who, before delivering to him, resells them to another, and this is known to the original vendor, who consigns them to the second purchaser, the original vendor will have no right of stoppage: Eaton *v.* Cook, 32 Verm. 58.

This right though adverse to that of the consignee is not defeated by a writing from him to the consignor, revoking the order for the goods, declining to receive them, and requesting the carrier or any one else, who has charge of them, to deliver them to the consignor: Naylor *v.* Dennie, 8 Pick. 198. If a consignee of goods should make a bill of sale of them, before they come to his possession at the termination of the voyage and before he has received the bill of lading, and the consignor should stop them *in transitu*, the vendee would derive no title by the bill of sale: Ilsley

v. Stubbs, 9 Mass. 65. The right is not affected by an assignment of the goods for the payment of the vendee's debts: Harris *v.* Hart, 6 Duer 606. Nor can it be superseded by an attachment at the suit of a general creditor, levied while the goods are in transit: Woodman *v.* Yeatman, 15 B. Monr. 270; Kitchen *v.* Spear, 30 Verm. 545; Cox *v.* Burns, 1 Clarke 64; O'Brien *v.* Norris, 16 Md. 122; Benedict *v.* Shaettle, 12 Ohio N. S. 515; Blackman *v.* Pierce, 23 Cal. 508. It continues where goods are transmitted by water after the arrival of the vessel, until the consignee takes possession of them, even against his attaching creditors: Naylor *v.* Dennie, 8 Pick. 198. Where goods are sold *bonâ fide*, while at sea by assignment of the bill of lading, the right of the consignor to stop *in transitu* ceases: Walter *v.* Ross, 2 Wash. C. C. 283; Curry *v.* Roulston, 2 Overt. 110; Dows *v.* Perrin, 16 N. Y. 325; Blossom *v.* Champion, 28 Barb. 217; Lee *v.* Kimball, 45 Maine 172; O'Neil *v.* Garrett, 6 Clarke 480; Dows *v.* Greene, 32 Barb. 490. A consignee of goods has such a property in them by possession of the bill of lading, and having made advancements, that the consignor cannot stop the goods *in transitu* without paying all expenses incurred on account of the goods by the consignee or for which he is liable: Jordan *v.* James, 5 Hammond 88.

The death of the vendee insolvent, after the goods are transmitted to him, but before the receipt of them, does not revest the goods in the vendor, unless he stops them before they come to the possession of the vendee's representatives: Mactier *v.* Frith, 6 Wend. 103. The demand must be made of the carrier or middleman, in whose custody the goods are at such time and under such circumstances that their delivery to the vendee may be prevented. A demand of the vendee while the goods are in the custom house is not sufficient: Mottram *v.* Heyer, 5 Denio 629. A claim by the consignor upon the carrier or person having the goods, at any time before the transit ends, is sufficient to revest the property in him; but actual possession by the consignee is necessary to prevent a stoppage: Newhall *v.* Vargas, 1 Shepley 93. A notice to the carrier not to deliver the goods is enough; a demand of delivery is not necessary: Reynolds *v.* Boston Railroad Company, 43 N. H. 580. Any agent authorized to act for the consignor, either generally or in relation to the consignment in question, may stop goods *in transitu*, without special authority to adopt that particular measure: Id.

The insolvency of the vendee must consist not merely in a general inability to pay his debts, but in his having taken the benefit of an insolvent law, or a stoppage of payment or a failure in his circumstances evinced by some overt act: Rogers *v.* Thomas, 20 Conn. 53. The right is not defeated by showing that the vendee was actually insolvent at the time of the purchase, unless it be shown that such insolvency was known to the

vendor, and that he contracted with such knowledge: O'Brien *v.* Norris, 16 Md. 122; Benedict *v.* Schaettle, 12 Ohio N. S. 515; Reynolds *v.* Boston Railroad Company, 43 N. H. 580. But see Rogers *v.* Thomas, 20 Conn. 53. No peculiar evidence is required to prove the insolvency such as proceedings in bankruptcy or an assignment. Any competent evidence which will satisfy a jury is sufficient: Hays *v.* Mouille, 2 Harris 48; O'Brien *v.* Norris, 16 Md. 122; Benedict *v.* Schaettle, 12 Ohio N. S. 515; Reynolds *v.* Boston Railroad Company, 43 N. H. 580. To establish the right it is sufficient to show that the vendee is embarrassed and probably not able to pay his debts: Secomb *v.* Nutt, 14 B. Monr. 324.

*676] *KRUGER *v.* WILCOX.

Jan. 25*th and* 27*th,* 1755.

[Reported Ambl. 253; s. c. 1 Dick. 269.]

Lien.]—*Factor gains a lien on goods consigned to him from his correspondent for the general balance of his account, as well as for the duties, etc., paid on account of the particular cargo so consigned to him: and this lien of the factor will remain even when the goods are turned into money. But if the factor parts with the possession of the goods to the owner, he loses the lien for the balance of accounts.*

A factor to whom goods had been consigned informed a broker employed by his principal that the principal would sell the goods himself, and gave an order to the warehouseman to deliver to the broker, who sold and made out the bills of parcel to the principal. Held, that this amounted to a delivery in specie to the principal, and that the factor had lost his lien for his general balance.

This cause coming on for further directions, the case was as follows:—Mico was a general agent in England for Watkins, who was a merchant abroad, and at different times had received considerable consignments of goods, and upon the balance of accounts was in disburse. Afterwards Watkins consigned to him a parcel of logwood, for which he paid the charges, etc.[1] Watkins coming *to England, Mico said, as he was here, he might dispose of the goods

*677]

[1] It appears from Lib. Reg. that upon the arrival of the ship, Mico ordered the logwood to be unloaded, and hired a warehouse to lodge it in; and that he

himself. Watkins accordingly employs a broker to sell them, and Mico tells the broker that Watkins intends to sell them himself, to save commission, and Mico gave orders to the warehouseman to deliver the goods to that broker.

The broker sells them, and makes out bills of parcels to Watkins, and opens an account with Watkins, but takes no notice of Mico.

After the goods were sold, Mico begins to suspect Watkins's circumstances, and resorts to the broker to know whether he has opened an account with Watkins.

The great question in the cause was, supposing Mico had a lien on these goods and produce, so as to be entitled to retain them for the balance of the account, whether he has not parted with that right?

After argument at the bar, the Lord Chancellor adjourned the cause to the 27th, and desired the four merchants, who were examined in the cause on the different sides, might attend in Court, in order to be consulted by him upon the

employed Hudson, a broker, to sell it; but that before any sale was made, Watkins arrived in London, and acted in all respects as the owner; that afterwards Hudson applied to the plaintiffs to purchase the logwood, which they agreed to do, and received part of it from the warehouse, and paid the amount of the purchase-money for that part to Hudson by the order of Watkins, after which Mico, suspecting the solvency of Watkins, who had become considerably indebted to him on account of previous business transacted for him as factor, served the plaintiffs with a notice not to pay any more of the purchase-money without his order. It was subsequently agreed by the assignees of Watkins, who had become bankrupt, and by Mico, that the plaintiffs should receive the rest of the logwood, and hold the purchase-money for the benefit of the persons who should appear to be entitled to it. The assignees having brought an action against the plaintiffs for the remainder of the purchase-money, the bill of interpleader in the present suit was filed. Mico had by the direction of Watkins effected the insurance on the cargo, and was in advance on this account to the amount of 500*l.*; he had also paid to the captain of the ship by order of Watkins the sum of 160*l.*, and was otherwise under an advance on account of the ship. The Master of the Rolls, at the original hearing, directed an account of what was due to Mico, an account of the insurance, advance to the captain, and ship's account, and for his costs of the suit, and that he should be paid what was due to him out of the money in the hands of the plaintiff. The case now coming on for further directions, the Lord Chancellor ordered the residue of the money to be paid over to the assignees of Watkins."—*Note to Blunt's Ed. of Amb.*

point. And accordingly this day they attended, viz.: Mr. Alderman Baker and Bethell, Mr. Willetts and Fonnereau; and after having asked them several questions upon the custom and usage of merchants relating to the matter in doubt, his Lordship gave his opinion with great clearness as follows:—

Lord HARDWICKE, Chancellor.—This is a case of bankruptcy, in which this Court always inclines to equality, yet if any person has a specific lien, or a special property in
*678] goods, which is clear *and plain, it shall be reserved to him notwithstanding the bankruptcy.

The question is whether in this case Mico is entitled to a special lien, and consequently a preference in point of satisfaction out of the money arising by the sale of these goods?

Two things are to be considered :—

1st. What lien a factor gains on goods consigned to him by a merchant abroad? and whether Mico gained such lien in this case?

2d. If he did, whether he has done anything to part with it?

As to the first. All the four merchants, both in their examinations in the cause and now in Court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account as well as for the charges, customs, etc., paid on account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this Court, if the goods remained in specie; nor do I doubt of its being so where they are turned into money.

To the second question, I am of opinion Mico has parted

with his right, and that it is for the benefit of trade to say he has.

All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases.

Question, whether this case amounts to the delivery up of the logwood to the principal? I think it does. Mico suffers Watkins to employ a broker, and tells the broker that Watkins intends to sell them himself, to save commission. Mico gives orders to the warehouseman to deliver the goods to the broker. The broker sells them, and makes out bills of parcels to Watkins, and takes no notice of Mico. It amounts to the same thing, as if Mico had delivered the goods in specie to Watkins.

It is safer for trade to hold it in this manner than otherwise; for by that manner of acting, Mico gave Watkins a credit with other people (for the sale was public, and by that the goods *appeared to be Watkins's), which would not have been the case if Mico had retained for the balance of his account. [*679

It is better to allow that which is the public notorious transaction, than that which is secret. Suppose an action had been brought by Watkins against the broker for money had and received, the broker could not have defended himself by saying, So much is due to Mico.

The merchants have admitted that the specific lien as to the Customs charges, etc., does continue; even the law would have allowed it if the goods had remained *in specie;* the goods being sold makes the case stronger. But that is not now before me, being determined by his late honor the Master of the Rolls, and acquiesced in by the parties.

CHASE AND OTHERS, ASSIGNEES OF WILLIAM AND THOMAS HURST, BANKRUPTS, *v.* JAMES AND DAVID WESTMORE.

Tuesday, May 21st, 1816.

[REPORTED 5 M. & SELW. 180.]

LIEN.]—*A workman having bestowed his labor upon a chattel in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid, and this though the chattel be delivered to the workmen in different parcels and at different times, if the work to be done under the agreement be entire.*

Semble, that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of the contract.

TROVER for a quantity of wheat-meal, fine pollard, coarse pollard, and bran, together with some sacks which were stated in the first *count of the declaration to be the property of the bankrupts, and in the second count, of the plaintiffs, as their assignees.

*680]

On the trial before Graham, B., at the Hants Spring Assizes, 1815, a verdict was found for the plaintiff for 1200*l.*, subject to the opinion of the Court upon the following case:—

The bankrupts were, before their bankruptcy, in partnership as mealmen; the defendants were partners as millers.

One of the bankrupts, before the act of bankruptcy, applied to the defendants to grind a quantity of wheat, when it was agreed between them that the wheat should be sent by the bankrupts in their vessels, and that the defendants should grind it at 15*s.* per load, for which sum the defendants were to unload the wheat from the vessels, grind it, find sacks to manufacture it in, and return the meal, etc., when ground, into the bankrupts' vessels in the river near to which the mill was situated. About 19 loads of the wheat were sent at first, afterwards other quantities, making in the whole 146 loads. It was agreed that if any mixture was to take place, one of the bankrupts should correspond with the defendants on the subject, and, in fact, some of the grain was afterwards mixed at his request. At the time of the bankruptcy there remained in the defendants' possession 7 loads of wheat unground, 10 of meal produced by wheat which had been ground, 60 bushels of fine pollard, 20 bushels of coarse pollard, 20 bushels of bran, also produced from the wheat ground, and 80 sacks which had been delivered by the bankrupts to the defendants, for the purpose of being filled with the meal ground from the corn. The defendants, on demand made on the part of the plaintiffs after the bankruptcy, refused to deliver up this property.

And two questions were argued in the last Term, by *A. Moore* for the plaintiffs, and by *Gifford* for the defendants :— First, whether the defendants had a right to detain this property for their general balance, under the statute 5 Geo. II. c. 30, s. 28. Secondly, whether they had a lien on it, in whole or in part, that is to say, for the balance due to them for grinding all the wheat which had been ground by them, or for the grinding only of such part as had been and remained ground in their hands at the time of the bankruptcy. Upon the last point it was argued for the plaintiffs, that a general lien, if it existed, should have been found as a part, or at least should clearly be deducible from the contract;

that here the case was silent as to any lien, and the contract neither expressed nor implied any such right; on the
*681] contrary, it *was stipulated that the defendants were to grind and return the wheat when ground; so that possession was to be given without reference to payment. And the rule laid down by Lord Ellenborough, in *Stevenson* v. *Blakelock*, 1 M. & Selw. 543, was this, "that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise;" so that by the special contract in this case, the general lien is gone: 2 Roll Abr. tit. Justification, pl. 1, 2. Upon the first point the case *Ex parte Ockenden*, 1 Atk. 235, was referred to; which was said to have been recognised by Lord Mansfield in *Green* v. *Farmer*, 4 Burr. 2214, as a case which had been well considered; and although *Ex parte Ockenden* had been supposed adverse to *Ex parte Deaze*, 1 Atk. 229, yet upon examination this would be found otherwise.

For the defendants it was argued, that there was not any authority to warrant the position, that, because a party stipulated for the price, he shall therefore be deprived of his right to detain until that price be paid. In *Stevenson* v. *Blakelock*, where payment was taken in bills, and thereby the time of credit was postponed, the lien was nevertheless held to exist. And this right may be enforced in respect of the whole work done, as in the case of the printer who was employed to print certain numbers, not all consecutive, of an entire work, and who was held to have a lien upon the numbers not delivered for his general balance: *Blake* v. *Nicholson*, 3 M. & Selw. 167.

This was also an entire work. If the parties had sued upon the agreement, they must have averred that the price was tendered. So in this action they must prove that they were ready and willing to pay. Upon the second point, he referred to *Ex parte Deaze*, 1 Atk. 229, where Lord Hardwicke expresses his opinion that "it is hard to say that

mutual credit shall be confined to pecuniary demands." And to the remarks of Gibbs, J., in *Olive* v. *Smith*, 5 Taunt. 58.

Lord Ellenborough, C. J., observed, that the Court did not think this case necessarily involved the doctrine of mutual credit; but on the other point, as it involved the consideration of several ancient authorities, the Court would take time to consider.

Cur. adv. vult.

Lord Ellenborough, C. J., now delivered the judgment of the Court.

*This case was argued before us last Term, and stood over for our consideration, upon the single question whether a workman having bestowed his labor upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner at the time of its delivery to him, can by law detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question, for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels and at different times. [*682

The general question is of very great and extensive importance. Several authorities were referred to (which I shall hereafter notice) against the right to detain; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires that our decision should not be governed by them; and we believe the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price and the implied contract to pay a reasonable price or sum; and that the

right of detainer has been practically acknowledged in both cases alike. In the case of *Wolf* v. *Summers*, 2 Campb. 631, Mr. J. Lawrence does not appear to have been aware of any such distinction. It is impossible, indeed to find any solid reason for saying that if I contract with a miller to grind my wheat at 15*s*. a load, he shall be bound to deliver it to me, when ground, without receiving the price of his labor, but that if I merely deliver it to him to grind without fixing the price, he may detain it until I pay him, though probably he would demand, and the law would give him the very same sum.

Certainly, if the right of detainer, considered as a right at common law (and it must be so considered in this case), exists only in those cases where there is no manner of contract between the parties except such as the law implies, this Court cannot extend the rule, and authorities were quoted to establish this proposition; but upon consideration we are of opinion that those authorities are contrary to reason and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 Ro. Ab., p. 92, which, however, is only a dictum of Williams, *J.; and it does not appear on what occasion it was pronounced, or that it governed the decision of any case. It is in these words, "If I put my clothes to a tailor to make, he may keep them until satisfaction for the making. T. T. 3 Ja. K. B. by Williams, J." "But if I contract with a tailor, that he shall have so much for making my apparel, he cannot keep them until satisfaction for the making. T. T. 3 Ja. K. B. by Williams, J." This distinction appears to have been acknowledged by Lord Holt, in a case of *Collins* v. *Ongly*, Selw. N. P. 1280, 4th edit., as quoted by Rider, C. J., in the case of *Brenan* v. *Currint*. But the point was not in judgment before Lord Holt, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision

*683]

of that very learned judge. The latter case of *Brenan* v. *Currint*, is reported in Sayer 224; and it is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any Court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is no more than the law would have implied if the parties had not expressed it. The opinion of Popham, C. J., in the case of the *Hosteler*, Yelv. 66, has sometimes been cited, as an authority for this distinction, but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal; the Chief Justice there says, "That an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price," but the power of sale in the case there put has been since denied. See *Jones* v. *Pearle*, 1 Stra. 556. The case in Yelverton was an action for the keep of the horse; and all that was said by the Chief Justice as to detainer and sale was extrajudicial. It was in the very same year, term, and Court, in which the opinion of Williams, J., is said to have been delivered; and if, as seems very probable, his opinion was delivered on this occasion, it was extrajudicial also. The case of *Chapman* v. *Allen*, Cro. Car. 271, has also been quoted on this subject; that case, however, does not appear to have been decided on the ground supposed; but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to *a third person, on receiving from such third person the amount of his demand. In *Cowell* v. *Simpson*, 16 Ves. 275, the Lord Chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment he [*684

is reported to have said, "If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other; but it is evident, from other parts of the report, that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession, and consequently will defeat a claim to the exercise of such a right. And we agree that where the parties contract *for a particular time or mode of payment*, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract. And if Williams, J., is to be understood to speak of a contract *for the time*, as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. And we are inclined to think that he must have intended to express himself to that effect; because the earliest authority that we have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a contract for a determinate price. This authority is in the Year-Book, Easter Term, 5 Edw. IV. fol. 2, b. "Note also by Haydon, that an *hosteler* may detain a horse, if the master will not pay him for his eating. The same law is, if a tailor make for me a gown, he may keep the gown until he is paid for his labor. And the same law is, if I buy of you a horse for 20*s*. you may keep the horse until I pay you the 20*s*.; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid." In this passage the law, as applied to the cases of the *hosteler*, the tailor, and the vendor, is said to be the same, and in the latter the sum is supposed to be fixed. The distinction drawn is where *a future time of payment is fixed*. If so material a distinction as that which depends upon fixing the amount of the price had been supposed to

exist at that time, we think it would have been noticed in this place; and not being noticed, we think it was not then supposed to exist. So in the case of *Cowper* v. *Andrews*, Hobart's Rep. 41. Lord Hobart, speaking of the word "pro," "for," says that this word "works *by condition precedent in all personal contracts. As if I sell [*685 you my horse for ten pounds, you shall not take my horse except you pay me ten pounds, 18 Edw. IV. 5, and 14 Hen. VIII. 22, except I do expressly give you day; and yet, in this case, you may let your horse go, and have an action of debt for your money; and so may the tailor retain the garment till he be paid for the making, by a condition in law." The reason in the case of sale is given in the 14th Hen. VIII. 20 a.; "The cause is, for that each has not the same advantage the one against the other; for the one will have the thing in possession, the other but an action, which is not reason, nor the same advantage."

Considering the operation of the word "for," as noticed by Lord Hobart, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15*s.*, as in a contract to sell a load of wheat for 15*l.* The former, indeed, is in substance a sale of a certain portion of the time and labor of the miller and of the use of his machinery. And as it is clear that the miller could not maintain an action upon the contract without averring that he had ground and was ready to deliver the wheat, if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller; for he will have his goods, and the miller will only have an action.

If the distinction which has been contended for on the part of the plaintiff should be allowed, what must be said in those cases where a workman is not only to bestow a por-

tion of his labor on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price? As in the case of a picture-frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the workman, on the ground of his having applied to it his paint or varnish or thread or other materials, or must he deliver these to his employer without payment, because he has bestowed his own personal labor in addition to them?

Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given; and, therefore, we think *the case of *Brenan* v. *Currint* and the dicta on which it appears to have been founded are not law, and that the judgment in the present case must be for the defendants.

*686]

Postea to the defendants.

Kruger *v.* Wilcox and Chase *v.* Westmore are printed together, as being two of the most important judgments delivered upon the doctrine of lien, which may be defined as being a right which a person has to retain that which is lawfully in his possession belonging to another, till certain pecuniary demands of him the person in possession are satisfied: Hammonds *v.* Barclay, 2 East 235.

That the possession must in its origin be lawful is clear, for a creditor cannot tortiously seize his debtor's goods and then claim to retain them by virtue of a lien. See Taylor *v.* Robinson, 2 J. B. Moo. 730 (4 E. C. L. R.); Nichols *v.* Clent, 3 Price 547; Sunbolf *v.* Alford, 3 M. & W. 248.

Before examining, as will be done hereafter somewhat in detail, n what manner liens are created or arise, it may be here observed

that they are divisible into two great classes, viz., "*particular* liens, and *general* liens. *Particular* liens are where persons claim a right to retain goods in respect of labor or money expended upon them; and those liens are favored in law. *General* liens are claimed in respect of a general balance of account; and these are founded in custom only, and are therefore to be taken strictly:" Houghton *v.* Matthews, 3 Bos. & Pul. 494, per Heath, J.

The principal case of Chase *v.* Westmore falls within the first class of cases, for there it was held that the miller had a right to retain the meal, pollard, and bran which arose from the labor which he had expended upon the wheat delivered to him to be ground, until he was paid the sum due to him for grinding such wheat.

The principal case of Kruger *v.* Wilcox is a good illustration of the second class of cases, for there it was laid down for the first time in a court of justice (what appears before to have been doubtful, see Green *v.* Farmer, 4 Burr. 2218), that a factor to whom goods have been consigned has not merely a right to retain them until he has been paid all charges which he may have incurred or which he can claim in respect of those particular goods, but he has also a lien upon them for the general balance due to him as factor in respect of dealings with other goods no longer in *his hands. It is true that in Kruger *v.* Wilcox the lien claimed in respect of the general balance due [*687 to the factor was not enforced, but it was for this reason—that he had delivered up to his principal the goods upon which he claimed a lien, and therefore by his own act he had put an end to the right which he would otherwise clearly have had.

Having made these preliminary remarks, we may examine liens arising in various ways, but which are all referable to one or other of these two classes of liens—particular or general, as before mentioned; the most convenient order will be as follows, to consider—1st. Liens at common law. 2d. Liens arising by express contract. 3d. Liens arising by implication, either from the usage of trade or from the manner of dealing between the parties; and 4th. How the right to a lien may be lost.

1*st. As to Liens at Common Law.*—The first kind of lien which seems to have been recognised at common law, was that of innkeepers and common carriers, for as it is compulsory upon the former to receive guests and their goods, and upon the latter to convey

all goods tendered if there be room for them, it is but just that they should be entitled to retain them by way of indemnity: Skinner *v.* Upshaw, Ld. Raym. 752; Smith *v.* Dearlove, 6 C. B. 132 (60 E. C. L. R.); and it is immaterial in either case that the goods belong to another person, for if they had no notice they will still have a lien upon or right to detain them until they have been paid their just charges. This is well put in the case of Yorke *v.* Grenaugh, Ld. Raym. 867, where it is said, supposing a traveller be a robber and had stolen a horse, yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper (*who does not know it*) the innkeeper is obliged to accept the horse, and then it is very reasonable that he should have a remedy for payment, which is by retainer. And he is not obliged to consider who is the owner of the horse, but whether he who brings him is his guest or not. And Holt, C. J., cited the case of the Exeter carrier, Ld. Raym. 867, where A. stole goods and delivered them to the Exeter carrier to be carried to Exeter; the right owner finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held he might justify detaining them against the right owner for the carriage, for when A. brought them to him, he was obliged to receive them and carry them; and therefore, since the law compelled him to carry them, it would give him remedy for the premium due for the carriage."

Upon the same principle, in the recent case of Turrill *v.* Crawley, 13 Q. B. 197 (76 E. C. L. R.), it was held that an innkeeper had a lien on a carriage brought to the inn by a guest for its standing-room, though the carriage, being merely a *hired one, belonged* *688] **to a third party.* "Doubts," said Wightman, J., "have been suggested as to the innkeeper's lien on the goods of a third person; and the doubts of judges in former times have been referred to. The judges were equally divided in the first case (Skipwith *v.* ——, 1 Bulst. 170; 3 Id. 271); then in the next case (Robinson *v.* Walker, 3 Bulst. 269; s. c. 1 Roll. Rep. 449; Poph. 127) there were three to one in favor of the lien; and in subsequent cases these doubts disappear altogether. In Johnson *v.* Hill, 3 Stark. N. P. 172 (3 E. C. L. R.), it was stated by counsel to have been 'held by all the judges that even in the case where a robber had brought a horse which he had stolen to an inn,' the innkeeper

had a lien for its keep against the owner; and Abbott, C. J., said he had no doubt as to the law as stated. I can see no distinction between a carriage and a horse for the purposes of this question. An innkeeper may charge for the standing of a carriage as well as for the meat of a horse, and his lien is as good in the one case as the other." See also Snead *v.* Watkins, 1 C. B. N. S. 267 (87 E. C. L. R.).

But the lien of an innkeeper will not extend to goods not brought to the inn by a traveller *as his own goods*, either upon his coming to or whilst staying at the inn, but which had been furnished for his temporary use by a third person, and are known by the innkeeper to belong to that person: Broadwood *v.* Granara, 10 Exch. 417.

An innkeeper has not any right to take the clothes from the person of his guest in order to secure the payment of his bill, "for if he had, then if the innkeeper take the coat off his back, and that prove to be an insufficient pledge, he may go on and strip him naked, and that would apply either to a male or female, a consequence so utterly absurd that it could not be entertained for a moment:" Sunbolf *v.* Alford, 3 M. & W. 248, 254. *A fortiori*, an innkeeper has no right to detain the *person* of his guest, for "that would give him a right to imprison a poor guest perpetually:" Id.; and see Wolf *v.* Summers, 2 Campb. 631, overruling the dictum of Eyre, J., in Newton *v.* Trigg, 1 Show. 269; Ward *v.* Clark, 9 Wentworth's Pleader 362.

The lien of an innkeeper gives him in general only a right to detain the goods of the guest, but by the custom of London and Exeter, when a horse has eaten out its worth, the innkeeper may, upon the reasonable appraisement of four of his neighbors, sell it or take it as his own: Mosse *v.* Townsend, 3 Bulst. 271; Bac. Abr. tit. "Inns and Innkeepers," D. 451; Robinson *v.* Walter, 3 Bulst. 269; The Thames Iron Works Company *v.* The Patent Derrick Company, 1 J. & H. 93, 97.

As the lien of an innkeeper is only a particular lien, if he suffers his guest to depart without paying him his demand, taking his goods with him, such as horses, carriages, or luggage, he cannot at any subsequent *period detain those goods of his guest for the same demand, but can only proceed to enforce it by action at law: Jones *v.* Thurloe, 8 Mod. 172; Warbrook *v.* Griffin, 2 Brownl. 254; Jones *v.* Pearle, 1 Stra. 557, and 6 East 25 n. [*689

But an innkeeper will not lose his lien by occasional absence of his guest with the things upon which a lien is claimed. See Allen *v.* Smith, 12 C. B. N. S. 638 (104 E. C. L. R.): there a man went to an inn with two race-horses, and a groom in the character of guest. They remained there for *several months*, taking the horses out every day for exercise and training, and being occasionally absent for several days together at races in different parts of the country, but always with the intention of returning to the inn. It was held by the Court of Common Pleas, that in the absence of evidence of any alteration in the relation of the parties, that of innkeeper and guest must be presumed to continue, and that the occasional absences did not destroy the innkeeper's lien upon the horses for his bill: s. c. affirmed in the Exchequer Chamber, 11 W. R. (Ex. C.) 440.

An innkeeper does not lose his lien on the goods of his guest by letting him go away without paying his bill, for the innkeeper never wants to assert his right of lien until the customer goes off without paying: Snead *v.* Watkins, 1 C. B. N. S. 267, 272 (87 E. C. L. R.).

The right of lien of an innkeeper depends upon the fact that the goods came into his possession in *his character of innkeeper as belonging to a guest.* Where therefore an innkeeper had received horses and a carriage *to stand at livery*, the circumstance that the owner at a *subsequent period* occasionally took refreshment at the inn, or sent a friend to be lodged there at his charge, was held not to entitle the innkeeper to a lien in respect of any part of his demand: Smith *v.* Dearlove, 6 C. B. 132 (60 E. C. L. R.); see Parsons *v.* Gingell, 4 C. B. 545 (56 E. C. L. R.).

An innkeeper cannot detain goods as a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the stat. 11 & 12 Will. III., c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied with.

The landlord of an inn has a lien for money lent to his guest, if it was agreed between them at the time of the loan that the guest's goods should be a security for the sum lent: Proctor *v.* Nicholson, 7 C. & P. 67 (32 E. C. L. R.).

The lien of a common carrier being a common law lien, he cannot, in the absence of express contract or usage from which a con-

tract may be implied, detain the goods of his employers for anything beyond the price of the carriage of the goods so conveyed: Skinner *v.* Upshaw, Lord Raymond 752; Rushforth *v.* Hadfield, 6 East 519; 7 East 224.

The right of a common carrier to retain goods for his general balance may be established by proving a general usage, but the claim is not encouraged by the courts. Thus in the *[690 case of Aspinall *v.* Pickford, 3 Bos. & Pul. 44 n., in an action of trover for goods before Lord Kenyon, the defence was that the goods were put by Howarth into the hands of the defendant as a carrier, to be forwarded from Manchester to his warehouse in London, and that the defendant was entitled to retain against the estate for the general balance due from Howarth for the carriage of goods. This right was established by evidence of the defendant having before claimed and been allowed to retain for his general balance both against bankrupt estates and solvent customers, and also by evidence of the principal carrier on the western road to the same effect respecting himself. In the subsequent case of Rushforth *v.* Hadfield, 6 East 519, 7 East 224, the usage of the carriers to have a lien for their general balance was not proved, and the claim of carriers for a lien for their general balance was viewed with much disapprobation by the Court of Queen's Bench. Lord Ellenborough, C. J., said: "Growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. . . . It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have a right in negativing the lien claimed by the defendant on the score of general usage." See also Holderness *v.* Collinson, 7 B. & C. 212 (14 E. C. L. R.).

A carrier may indeed, by contract or by giving notice of which his employer is cognisant, detain his goods for his general balance; but he cannot by giving any such notice affect the interest of third parties. See Wright *v.* Snell, 5 B. & Ald. 350 (7 E. C. L. R.);

there a carrier had given notice that "all goods would be considered subject to a lien, not only for the freight of such particular goods, but also for any general balance due from their respective owners." Goods having been sent by the carrier to the order of a mere factor, it was held by the Court of Queen's Bench that the carrier had not as against the real owner any lien for the balance due from the factor. "Where," said Abbott, C. J., "goods are consigned to A. B. or order, the carrier has a right to consider A. B. as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on the goods as *against the owner*, in re-
*691] spect of a general balance due from the consignees; *nor will any prejudice arise to the carrier from our holding this to be the law, for he need not deliver the goods in any case till the price of the carriage of them is paid."

Upon the same principle it has been held, that although a common carrier may have acquired by usage or special agreement a lien for a general balance of account between him and a consignee, this lien shall not affect the right of the consignor to stop *in transitu:* that is in effect that this right of general lien shall not operate upon or against the rights of third persons: Oppenheim *v.* Russell, 3 Bos. & Pul. 42; and see Leuckhart *v.* Cooper, 3 Bing. N. C. 107 (32 E. C. L. R.).

A carrier cannot claim a lien on goods for booking or warehouse-room when they have not been booked, and where they have only been taken from the wagon to the scales, in order to weigh them so as to ascertain the sum to be paid by the owner: Lambert *v.* Robinson, 1 Esp. 119.

Where by the custom of a particular trade a carrier is to be paid for the carriage of goods by the consignor, he has no right to detain them against the consignee, who has paid the price of them, for a general balance due for the carriage of other goods of the same sort sent by the consignor: Butler *v.* Woolcott, 2 Bos. & Pul. N. R. 64.

As to the lien of a coach proprietor on luggage, see Middleton *v.* Fowler, 1 Salk. 282; Higgins *v.* Bretherton, 5 C. & P. 2 (24 E. C. L. R.).

A *shipowner* has a lien upon the cargo for freight properly so called, that is for the carriage, conveyance, and delivery of goods (Sodergren *v.* Flight, 6 East 622, cited; Gledstanes *v.* Allen, 12

C. B. 202 (74 E. C. L. R.); Campion *v.* Colvin, 3 Bing. N. C. 17, 26 (32 E. C. L. R.); How *v.* Kirchner, 11 Moo. P. C. C. 34), but he has no lien in the absence of express stipulation for dead freight demurrage (Phillips *v.* Rodie, 15 East 547), wharfage (Bishop *v.* Ware, 3 Campb. 360), or port charges (Faith *v.* East India Company, 4 B. & Ald. 630 (6 E. C. L. R.)), or in respect of breaches of covenant, other than those relating to the payment of freight for goods actually carried: Birley *v.* Gladstone, 3 M. & Selw. 205; Gladstone *v.* Birley, 2 Mer. 401; Faith *v.* East India Company, 4 B. & Ald. 630 (6 E. C. L. R.).

The lien of a shipowner will not be confined to the charterer's goods, where the freight regulated by the tonnage of the vessel is payable by the charterer for her use, but will extend to goods consigned to others: Campion *v.* Colvin, 3 Bing. N. C. 17 (32 E. C. L. R.); and Faith *v.* East India Company, 4 B. & Ald. 630 (6 E. C. L. R.).

Where the ship has been employed by the freighter as a general ship for the goods of subfreighters, they will be liable to the lien to the amount only of the freight they have contracted to pay: Faith *v.* East India Company, 4 B. & Ald. 630 (6 E. C. L. R.); Mitchell *v.* Scaife, 4 Campb. 298; and see Michenson *v.* Begbie, 6 Bing. 190 (19 E. C. L. R.); and Paul *v.* Birch, 2 Atk. 621; Alsager *v.* St. Katherine's *Dock Company, 14 M. & W. 794; Lucas *v.* Nockells, 4 Bing. 729 (13 E. C. L. R.). [*692

Where however the parties, instead of trusting to the general rule of law with respect to the lien for freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist; for when the contract gives no lien, a court of law will not supply one by implication. Thus the lien for freight will be destroyed if the shipowner has entered into a contract inconsistent with it, as, for example, where the contract is to pay freight *after* the delivery of the cargo (How *v.* Kirchner, 11 Moo. P. C. C. 21, 34; Alsager *v.* St. Katherine's Dock Company, 14 M. & W. 794; Lucas *v.* Nockells, 4 Bing. 729 (13 E. C. L. R.); Tamvaco *v.* Simpson, 19 C. B. N. S. 453 (115 E. C. L. R.); or "one month after sailing of the vessel, lost or not lost." See Kirchner *v.* Venus, 12 Moo. P. C. C. 360. There Dixon and Co., of Liverpool, shipped goods for Sydney. The bill of lading stated the goods to be to the ship-

per's order or assigns, "he or they paying freight for the goods here as per margin." In the margin it was stipulated as follows: "*Freight payable in Liverpool to Æneas Macdonnell one month after sailing, vessel lost or not lost.*" The bill of lading passed into the hands of Kirchner and Co. as endorsees for value. On the ship's arrival at Sydney, the port of delivery, the master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool, had not been paid, and he refused to deliver the goods to Kirchner and Co., the assignees of the bill of lading, unless freight was paid, claiming a lien on the goods for the unpaid freight. It was held by the judicial committee of the Privy Council, reversing the judgment of the Supreme Court of New South Wales, that there was no right of lien on the goods by the shipowner in respect of the money he was to be paid by the shippers for taking the goods on board, and undertaking to carry them. "The right of lien," said Lord Kingsdown, "may arise either by implication of law, or by express contract between the parties. Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery; if the goods are lost on the voyage, nothing is payable. On the other hand, if the goods are safely carried, the master of the ship has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight be paid. These incidents to freight exist by rule of law, without reference to any bill of lading or other written contract between the parties. But a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is, in effect, *693] *money to be paid for taking the goods on board, and undertaking to carry, and not for carrying them. This was, in substance, decided by the cases of Blakey *v.* Dixon, 2 B. & P. 321; and Andrew *v.* Moorhouse, 5 Taunt. 435 (1 E. C. L. R.) . . . No doubt parties who have superseded by a special contract the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered, and they may do this either by express conditions contained in the contract itself, or

by agreeing that in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight. But in such case the right of lien depends entirely on the agreement, and if the parties have not, in fact, made such a contract, it is very difficult to understand upon what grounds it can be implied, or why, upon failure of performance of the agreement which they have made, the law is to substitute for it another and very different contract which they have not made. To use the language of Lord Ellenborough in Stevenson *v.* Blakelock, 1 M. & Selw. 543, 'where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise.' The inconveniences of establishing such a lien are very serious. If the shipowner has a lien on the goods, unless the money agreed to be paid at the port of shipment has actually been paid, what, on arriving at the port of discharge, is the master to do? In many cases, probably in most cases, he can have no means of knowing whether the payment has or has not been made. The fact itself may be a matter of uncertainty, depending on the state of disputed accounts between the shipowner and the merchant; or the money, though not paid at the day, may have been subsequently paid; or securities may have been taken, or other arrangements made for giving time. Is the master to withhold the goods from the consignee till by communication with the port of shipment, all these matters have been cleared up? This communication may occupy weeks, or even months, and the profit or loss on the adventure, and even the well-being or ruin of the consignee, may depend, from the state of the markets, on the delivery of the goods a day or two sooner or later. Take, again, the case of an endorsement of a bill of lading. We know how largely these instruments are used for the purpose of raising money on the credit of the goods consigned by them. If an endorsee, on looking at the bill, sees that the goods are subject to the payment of freight, he calculates the value of the goods, and measures his own advances accordingly. So, if he knows that the goods are not subject to freight, and that the bill of lading is what is termed 'a clean bill,' he is equally relieved from embarrassment; but how can he make advances with any safety, *if it be left in doubt on the bill of lading whether the goods are to be liable to charge for carriage or not; if the liability of the goods to the payment of freight depends, not on the agreement [*694

appearing on the bill of lading, but on the question whether that agreement has or has not been actually performed, and if the title to receive the goods is liable to be suspended till these facts have been ascertained? . . . Having again considered the law laid down in How *v.* Kirchner, 11 Moo. P. C. C. 21, with the most earnest desire to correct our view of it, if we could discover it to be erroneous, we must say that, upon principle, it appears to us to be right, and that we are bound to abide by it. It was contended, indeed by the appellants, that whatever the law may be in the cases of Gilkinson *v.* Middleton, 2 C. B. N. S. 134 (89 E. C. L. R.), and Neish *v.* Graham, 8 E. & B. 505 (92 E. C. L. R.), there is a circumstance to be found in the present case sufficient to distinguish it in their favor from those authorities. That circumstance is, that the freight is here made payable, not to the shipowner, but to a third person, namely, Æneas Macdonnell; that it does not appear that he was to receive the freight as agent for the shipowners; that he may have made, and probably has made, advances on account of the freight, and that in such case payment of the freight to the master at Sydney would be no answer to an action in England for non-payment of freight to Macdonnell; that although Macdonnell could have brought no action in his own name, as the contract was not made with him, yet that he might have brought an action in the name of the shipowners, and that in such action payment to the shipowners, or the master as their agent, would be no sufficient defence.

"There appears to their lordships to be great weight in these arguments; but it is of so much importance to the public interest that questions of general mercantile law should be determined rather upon broad principles than upon nice distinctions in each particular case, that they prefer to rest their decision on the ground that, where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist, and that when the contract made gives no lien, the law will not supply one by implication." The cases of Gilkinson *v.* Middleton, 2 C. B. N. S. 134 (89 E. C. L. R.); and Neish *v.* Graham, 8 E. & B. 505 (92 E. C. L. R.) may be considered to be overruled.

So when by the terms of the charter-party the freighter has a right to the goods, upon his giving a good and approved bill for the freight

to the owners of the ship, upon the negotiation of a bill given by the freighter to the shipowners the latter will lose their lien, even although they may have expressed their disapprobation of the bill: *Horncastle *v.* Farran, 3 B. & Ald. 497 (5 E. C. L. R.). [*695

As possession of the goods is essential to the existence of the right to a lien upon them, at any rate in the absence of a contract preserving it, it follows that when the owner of a ship demises it, and so gives up the possession of the vessel to the charterers, so that the master is the agent for the charterer and not the servant of the owners, the latter will have no lien on the goods for the earnings of the ship. The solution of the question whether the owner has parted with the possession of the ship depends on the construction of the charter-party, a question upon which Tindal, C. J., made the following important observations: "It must be admitted," said his Lordship, "that there is some contradiction in the authorities bearing upon this point, viz. the right of lien in the owners of the ship, and that in the latter cases the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of Hutton *v.* Bragg, 7 Taunt. 14 (2 E. C. L. R); 2 Marsh. 339 (4 E. C. L. R.). But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising upon the construction of written instruments, arises more from the variety of terms employed by the parties themselves in framing their contracts than from difference of opinion in the judges who interpret them; for in each of the cases in which the owner's lien has been supported, notwithstanding the terms of express demise, other stipulations will be found sufficient to rebut the inference that the owners meant to part with the possession of the ship. Thus in Mitchell *v.* Scaife, 4 Camp. 298; Birley *v.* Gladstone, 3 M. & Selw. 205; Yates *v.* Railston, 8 Taunt. 293 (4 E. C. L. R.); 2 J. B. Moo. 294 (4 E. C. L. R.), and Christie *v.* Lewis, 2 B. & B. 410 (6 E. C. L. R.); 5 J. B. Moo. 211 (16 E. C. L. R.), there were terms that showed that the payment of the hire was to be either precedent to or concomitant with the delivery of the goods whereas in Smalls *v.* Moates, 9 Bing. 574 (23 E. C. L. R.); 2 M. & Sc. 674 (28 E. C. L. R.), the lien of the owner was expressly reserved by the charter-party. In each

case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other, and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found." See Belcher *v.* Capper, 4 M. & G. 540 (43 E. C. L. R.); Tate *v.* Meek, 8 Taunt. 280 (4 E. C. L. R.). The fact that the owners have appointed the master does not afford any presumption that they intend to retain possession of the vesvel: Newberry *v.* Colvin, 7 Bing. 190 (20 E. C. L. R.); C. & F. 283; Campion *v.* Colvin, 3 Bing. N. C. 17 (32 E. L. R.); Marquand *v.* Banner, 6 E. & B. 232 (88 E. C. L. R.).

*696] As to what is sufficient to show *an intention on the part of the owners to give up possession of the ship, see The Trinity House *v.* Clark, 4 M. & Selw. 288; Fletcher *v.* Braddick, 2 Bos. & Pul. N. R. 182; Parish *v.* Crawford, 2 Stra. 1251; Vallejo *v.* Wheeler, 1 Cowp. 143; Reeve *v.* Davis, 1 Ad. & Ell. 312 (28 E. C. L. R.); Fenton *v.* Dublin Steam Packet Company, 8 Ad. & E. 835 (35 E. C. L. R.).

The master being turned out of possession upon the vessel's being captured does not deprive him of his lien for the freight in case of her recapture. Thus where a vessel was captured and the master was taken out, and afterwards she was recaptured, it was held that this removal from possession made no difference, and that the shipowner on her arrival received the vessel as trustee for the master, and that consequently his lien for freight still existed: Ex parte Cheeseman, 2 Eden 181.

In connection with this subject, it may be here mentioned that an underwriter who has paid a shipowner a sum of money on account of damages sustained by a collision, has a lien upon the sum which the shipowner may recover for damages, and may file a bill in equity to restrain the owner of the ship which has occasioned the damage from paying the sum recovered to the insurer: White *v.* Dobinson, 14 Sim. 273; and see Randal *v.* Cockran, 1 Ves. 98; Blaauwpot *v.* Da Costa, 1 Eden 130; Brooks *v.* Macdonnell, 1 Y. & C. Exch. Ca. 500.

Upon principles of public policy and commercial necessity, the common law has given a lien for salvage, that is to say where a person by his own labor preserves goods which the owner or those entrusted with the case of them have either abandoned in distress at

sea or are unable to protect and secure, he may retain possession of the goods saved until proper compensation is made to him for his trouble: Abbott, Shipp. 453, 9th ed., and see Hartfort *v.* Jones, 1 Lord Raym. 393; Nicholson *v.* Chapman, 2 H. Black. 254; Baring *v.* Day, 8 East 57.

A lien at common law, of which instances are to be found in our oldest reports, is that where a bailee has expended his labor and skill in the improvement of a chattel delivered to him, for he can detain it for his charge in that respect. "Thus the artificer to whom the goods are delivered for the purpose of being worked into form; or the farrier by whose skill an animal is cured of a disease; or the horsebreaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges:" per Parke, B., in Scarfe *v.* Morgan, 4 M. & W. 283. So a shipwright to whom a ship has been delivered up to be repaired (Franklin *v.* Hosier, 4 B. & Ald. 341 (6 E. C. L. R.); a printer to whom paper has been delivered to be printed upon (Blake *v.* Nicholson, 4 M. & Selw. 167); a miller to whom corn has been delivered to be ground (Chase *v.* Westmore, 5 M. & Selw. 180); a tailor to whom cloth has been delivered to be worked up into a garment (Y. B. *5 Ed. IV. fol. 2; Yelv. 67; Cowper *v.* Andrews, Hob. 42; Chapman *v.* [*697 Allen, Cro. Car. 271; Hussey *v.* Christie, 9 East 433), have all of them a lien for their charges, whether they be fixed by express contract or depend upon the implied contract to pay a reasonable sum: Chase *v.* Westmore, 5 M. & Selw. 184. So likewise a trainer will have a lien for the expense of keeping and training a race-horse (Bevan *v.* Waters, M. & M. 236 (22 E. C. L. R.)); and the owner of a stallion upon the mare which has been covered: Scarfe *v.* Morgan, 4 M. & W. 270.

All such specific liens being consistent with the principles of natural equity, are favored by the law, which is construed liberally in such cases: per Parke, B., in Scarfe *v.* Morgan, 4 M. & W. 283. Hence it has been held that the common law lien of a shipwright for labor expended upon a ship is superior to all claims, except liens actually attaching at the time of the ship coming into his hands. Thus, although salvage and mariners' wages, earned before the shipwright's lien, accrued, have precedence over it, wages subsequently earned and claims for necessaries cannot compete with such lien. The Gustaf, 1 Lush. 506, overruling The Perseverante,

cited Id. 507, 508, where the same learned judge in Chambers held that the shipwright's common law lien prevailed against all liens. See also The Nordstjernen, Swab. Ad. Rep. 260.

Where however a bailee does not confer any additional value on an article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, he will have no lien. Thus it has been held that an agister, or person who receives horses, cows, or other cattle to pasturage, will not in the absence of contract be entitled to a lien for the pasturage: Chapman *v.* Allen, Cro. Car. 271; Jackson *v.* Cummins, 5 M. & W. 342; Stone *v.* Lingwood, 1 Stark. 651.

Upon the same principle a livery-stable keeper has been held to have no lien on a horse delivered to him to be stabled and fed: Wallace *v.* Woodgate, R. & M. 193 (21 E. C. L. R.). In Judson *v.* Etheridge, 1 C. & M. 743; 3 Tyrw. 954, to a count in detinue for detaining a horse, the defendant pleaded that the plaintiff had delivered the horse to him to be stabled and taken care of and fed, and kept by him for the plaintiff for reward, and that 10*l.* became due as a reasonable reward, and so justified the detainer for that sum; but it was held by the Court of Exchequer on general demurrer, that the plea was bad, and that he had no lien. "The present case," said Lyndhurst, C. B., "is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labor performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way. In Chapman *v.* Allen, Cro. Car. *271, it was decided that a person re-
*698] ceiving cattle to agist had no lien. In York *v.* Greenaugh it was held, not merely by Lord Chief Justice Holt, but by the whole Court in their decision, that a livery-stable keeper had no lien. As to the case of Jacobs *v.* Latour, 2 M. & P. 201; s. c. 5 Bing. 130 (15 E. C. L. R.), that, so far from establishing the right of lien, confirms the former decisions; for Lord Chief Justice Best expressly draws the distinction between a trainer who bestows his skill and labor, and a livery-stable keeper—between horses taken in by a trainer and altered in their value by the application of his skill and labor, and horses standing at livery without such alteration. When the case came on before the Court of Common Pleas, that distinction seems to have been supported. It appears to me

that the present case is decided by the concurrence of all the authorities." See also Orchard *v.* Rackshaw, 19 L. J. C. P. 303; Sanderson *v.* Bell, 2 C. & M. 304; 4 Tyrw. 244.

An artificer, who in exercise of his right of lien, detains a chattel in the making or repairing of which he has expended his labor and materials, has no claim against the owner for taking care of the chattel while it was so detained. See The British Empire Shipping Company *v.* Somes, 27 L. J. Q. B. 397; 1 E., B. & E. 353 (96 E. C. L. R.): there a shipwright received a ship into his dock to be repaired (no separate charge being made for the use of the dock during the repairs), and the repairs being complete, he detained the ship in the dock until the charges were paid, giving notice to the owner that he should demand 21*l.* a day for the use of the dock during the detention. It was held by the Court of Queen's Bench that the shipwright was not entitled to any payment for dock-room during the detention. "This claim," said Lord Campbell, C. J., "appears to be quite novel, and on principle there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of a chattel can hardly be supposed to have promised to pay for the keeping of it while against his will he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained. When does this debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given to him to remove it: Hartley *v.* Hitchcock, 1 Stark. 408 (2 E. C. L. R.). The right of detaining goods on which there is a *lien is a remedy to the party aggrieved, which is to be enforced by his own act; and where such a [*699 remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (Henly *v.* Walsh, 2 Salk. 689), the distrainor of goods which have been replevied cannot claim any lien upon them: Bradyll

v. Ball, 1 Cro. C. C. 427. So where a horse was distrained to compel an appearance in a hundred court, it was held that after appearance the plaintiff could not justify detaining the horse for his keep: Buller's Nisi Prius 45. If cattle are distrained damage-feasant, and impounded in pound overt, the owner of the cattle must feed them; if in a pound covert, or close, the rule is laid down in the words of Lord Coke, 'The cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefor:' Co. Litt. 47, b." See s. c. affirmed in the Exch. Chamber, 1 E., B. & E. 367 (96 E. C. L. R.), and in the House of Lords, 8 H. L. Cas. 338, nom. Somes *v.* The British Shipping Empire Company.

A common law lien does not in general authorize a sale. This rule is subject to some exceptions, as in the case of a horse, according to certain local customs, that has eaten more than its worth (see *ante*, p. 688); but these exceptions do not extend so far as to give a right to sale in every case where the retaining of the chattels involves considerable expense: The Thames Iron Works Company *v.* The Patent Derrick Company, 1 J. & H. 93.

If in any case a common law right of sale exists, the mere fact that after the sale accounts might require adjustment by the court, will not give jurisdiction to a court of equity to decree a sale: Id.

Whenever a lien cannot be established as existing at common law, it must arise either from express contract, or from usage from which a contract will be implied; and if no such contract can be shown, the claim to a right of lien will fail. See Naylor *v.* Mangles, 1 Esp. 109; Kirkman *v.* Shawcross, 6 Term Rep. 14; Pratt *v.* Vizard, 5 B. & Ad. 808 (27 E. C. L. R.); Castellain *v.* Thompson, 13 C. B. N. S. 105 (106 E. C. L. R.).

2. *As to Liens arising by Express Contract.*—A lien may be created by express contract, and that is stated by an eminent judge to be the "strongest and surest ground upon which the right of lien can in any case be placed:" Small *v.* Moates, 9 Bing. 590 (23 E. C. L. R.); and see Swainston *v.* Clay, 11 W. R. (L. J.) 811. So likewise by express contract a right of lien may be in any way modified, either by extending, confining, or even by altogether excluding its ordinary operation: Owenson *v.* Morse, 7 Term Rep. 64.

A right to a lien may be excluded even without express words,

by the terms of a contract or the usage in similar cases being inconsistent with the existence of such right. Thus, as it is a well-established *principle that without the right of continuing possession there can be no lien, it has been held that even if [*700 an agister had a lien for the agistment of milch cows, it would be excluded from the very nature of the subject-matter, inasmuch as the owner was to have possession of them during the time of milking: Jackson *v.* Cummins, 5 M. & W. 342, 350.

Upon the same principle it has been held by the Court of Queen's Bench, in the recent case of Forth *v.* Simpson, 13 Q. B. 680, that although the labor and skill employed on a race-horse by a trainer are a good foundation for a lien, nevertheless if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. "Here it appears," said Patteson, J., "that the owner of the horses might send them to be ridden by a jockey of his own choice, at any race he chose. The trainer could not refuse to deliver them to the owner for this purpose. This state of things is inconsistent with a lien; the trainer, as to the right of uninterrupted possession, was on the same footing with a livery-stable keeper, who it is admitted has no lien. An innkeeper's lien stands on a different principle: he has a lien on a guest's horse, because the law obliges him to take it in. My brother Parke's view of the trainer's lien, as stated by him in Jackson *v.* Cummins, 5 M. & W. 351, exactly supports our decision, which is also quite consistent with his observation in the same case, that where a horse is to be trained for a specified race, the trainer may have a lien for his charges until the horse is given up." See also Boardman *v.* Sill, 1 Campb. 410 n.; Walker *v.* Birch, 6 Term Rep. 258; Weymouth *v.* Boyer, 1 Ves. Jun. 416; Crawshay *v.* Homfray, 4 B. & Ald. 50 (6 E. C. L. R.); Lucas *v.* Nocketts, 10 Bing. 157 (25 E. C. L. R.).

So where an agreement has been entered into between the parties, that the work to be done, on account of which a lien is claimed, should be paid for in a particular manner and out of a particular fund, the right of lien might be lost in consequence of such agreement being inconsistent with it: Pinnock *v.* Harrison, 3 M. & W. 532, 539. See also Kirchner *v.* Venus, 12 Moo. P. C. C. 360, *ante*, p. 692.

The mere existence however of a special agreement, as, for instance,

for the payment of a fixed sum, for work to be done to a chattel, will not, as was clearly decided in the principal case of Chase *v.* Westmore, exclude the right of lien, its terms not being inconsistent with such right. See also Hutton *v.* Bragg, 2 Marsh. 345, 349 (4 E. C. L. R.); 7 Taunt. 25, overruling the doctrine laid down in Brenan *v.* Currint, Say. Rep. 224; Collins *v.* Ongly, Selw. N. P. 1280, 4th ed.

By contract a lien may be either particular or general. Thus in Kirkman *v.* Shawcross, 6 Term Rep. 14, an agreement had been entered into by a number of dyers, dressers, bleachers, &c., at a public *701] *meeting, that they would not receive any more goods to be dyed, dressed, bleached, &c., unless they should respectively have a lien on those goods for *their general balance;* it was held by the Court of King's Bench that a person *who having notice of* such agreement delivered his goods to one of such persons, being a bleacher, to be bleached, must be taken to have assented to these terms, and consequently could not demand back his goods without paying the balance of his general account.

A contract likewise by a common carrier with his customer, for a lien for his general balance is good (Rushforth *v.* Hadfield, 6 East 527; 7 Id. 228), and might, it seems, be implied by his giving a public notice that he would only carry upon such terms (Wright *v.* Snell, 5 B. & Ald. 353 (7 E. C. L. R.)); the goods however of third parties, consigned to the customer, cannot be made liable under such an agreement for the general balance due from such customer to the carrier: Brandao *v.* Barnett, 2 Scott N. C. 113; Wright *v.* Snell, 5 B. & Ald. 353 (7 E. C. L. R.).

Where however the law imposes an obligation upon a person carrying on certain trades or callings, to exercise them in favor of all persons indiscriminately, as is the case with common carriers and innkeepers, they will not be at liberty to refuse to carry goods or to receive guests except upon the terms of having a lien for their general balance. See Add. Contracts 1183, 4th ed.; and 26 & 27 Vict. c. 41, being "An Act to amend the Law respecting the Liability of Innkeepers, and to prevent certain frauds upon them."

As to the lien of a banking company, by its articles, on the shares of its shareholders, see In the London, &c., Banking Co., Limited, 34 Beav. 332.

3. *As to Liens arising by Implication, either from Usage of Trade, or from the Manner of Dealing between the Parties.*—

Having noticed liens arising from *express* contract, we may now proceed to examine liens resulting from *usage*, which depend upon implied contract, making this preliminary remark, that a general lien cannot be claimed according to any general law of principal and agent, but only as arising from dealings in some particular trade, as to which a custom to that effect has been established: Bock *v.* Gorrissen, 2 De G., F. & J. 434. Thus in the principal case of Kruger *v.* Wilcox, it was held that a factor having by custom a lien upon goods entrusted to him for his general balance, there was an implied contract on the part of his principal that he should have that lien. And such lien will be supported both in the case of a home factor as in that of a foreign factor (Houghton *v.* Matthews, 3 Bos. & Pul. 485, 489; and see Gardiner *v.* Coleman, cited 1 Burr. 491; 6 East 28 n.; Man *v.* Shiffner, 2 East 523); but his claim is limited to those goods which come into his hands as factor, a point of law which should be borne in mind, where a *factor claiming a lien for his general balance acts for the person against whom he makes the claim, and by whom he has goods entrusted to him, in different capacities. See Dixon *v.* Stansfield, 10 C. B. 398 (70 E. C. L. R.): there A. and Co., who carried on business at Hull as merchants, factors, ship and insurance brokers, and general agents, had had various dealings, as *factors*, with B. and Co., of London. Whilst these dealings were going on between them, B. and C. wrote to A. and Co. requesting them to get a policy of insurance effected for them on the ship "Exporter," for a voyage from the Downs to South America, and thence to the West Indies. A. and Co. procured the insurance to be effected, and B. and Co. remitted to them the premiums—the policy remaining in the hands of A. and Co. It was held that A. and Co., as they had effected the policy as insurance-brokers, were not entitled to hold it as a lien for the general balance due to them, *as factors*, from B. and Co. "A man," said Jervis, L. J., "is not entitled to a lien simply because he happens to fill a character which gives him such a right, unless he has received the goods, or done the act, in the particular character to which the right attaches. There is no evidence of usage, or course of dealing between the parties, to justify the claim of a general lien; and that there is no particular lien upon this policy is conceded, for it is admitted that the premiums due in respect of it have been paid."

[*702

A factor has not only a general lien upon the goods entrusted to him in that capacity, while they remain in his possession, but also on the *proeeeds* of such goods which he has sold as factor. And, on the bankruptcy of the factor, his assignees will have the same rights as the bankrupt had before, the bankruptcy of the factor operating not to destroy the lien, but merely as a revocation of his authority as to receive any money on account of his principal. See Hudson *v.* Granger, 5 B. & Ald. 27 (7 E. C. L. R.). There the owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale. The factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt, and on a settlement of the accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved for the residue of his claim against the estate. It was held by the Court of King's Bench, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on account of the original owner. See also Drinkwater *v.* Goodwin, Cowp. 251; Siebel *v.* Springfield, 12 W. R. (Q. B.) 73.

It follows from what has been before stated, that a factor is not entitled to any general lien in respect of debts which arise prior to *the time at which his character as factor commences. For the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien were allowed in such cases, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. See also Walker *v.* Birch, 6 Term Rep. 263; Olive *v.* Smith, 5 Taunt. 56 (1 E. C. L. R.); Weldon *v.* Gould, 3 Esp. 268.

*703]

It has also been held that packers have a lien for their general balance. See Ex parte Deeze, 1 Atk. 228; Greene *v.* Farmer, 1 Black. Rep. 651; 4 Burr. 2222; Savil *v.* Barchard, 4 Esp. 53.

Bankers, by the usage of trade, which being part of the law merchant, and is therefore judicially noticed, have a general lien on all securities deposited with them as bankers by a customer (Davis *v.* Bowsher, 5 Term Rep. 488; Bolton *v.* Puller, 1 Bos. & Pul. 539; Bolland *v.* Bygrave, 1 My. & Moo. 279; Giles *v.* Perkins, 9 East 12; Bosanquet *v.* Dudman, 1 Stark. 1 (2 E. C. L. R.); even although in the case of negotiable instruments they may happen to be the property of a third party. See observations of Lord Campbell in Brandão *v.* Barnett, 3 C. B. 530 (54 E. C. L. R.).

The general lien will not exist if there be an express contract, or circumstances that show an implied contract, inconsistent with such lien. Thus in Brandão *v.* Barnett, 3 C. B. 519 (54 E. C. L. R.); 12 C. & F. 787, Burn bought on account of Brandão, and with Brandão's money, certain exchequer bills, which Burn deposited in a box that he kept at his bankers, himself retaining the key. Whenever it became necessary to receive the interest on the exchequer bills, and to exchange them for new ones, Burn was in the habit of taking them out of the box, and giving them to the bankers for that purpose (such being the usual course of business), which being accomplished, the new exchequer bills were, as soon as conveniently might be, handed over to and locked up by Burn in the box, the amount of interest received by the bankers being passed to the credit of Burn's account. The exchequer bills themselves were never entered to Burn's account, nor had the bankers any notice or knowledge that they were not the property of Burn himself. On the 1st of December, 1836, Burn took the exchequer bills out of the box, and *delivered them to the bankers, for the purpose of receiving the interest and exchanging them for new ones.* The bills were accordingly exchanged; but the new bills (Burn being absent from business on *account of illness) remained in the possession of the bankers down to the time of Burn's failure on [*704 the 23d of January, 1837, his account in the meantime having been considerably overdrawn. In an action at the suit of Brandão, the true owner, it was held by the House of Lords, reversing the judgment of the Exchequer Chamber (see 1 M. & Gr. 903 (39 E. C. L. R.); 6 M. & Gr. 630 (46 E. C. L. R.)), that the bankers had no lien upon these exchequer bills for the general balance due to them from Burn, although such securities are transferable by delivery, the circumstances under which they came to their hands being in-

consistent with the existence of a general lien. "It is hardly denied," said Lord Campbell, "that if there had been an express undertaking by the defendants to exchange the bills, and return the new ones as soon as obtained to Burn, that he might lock them up, no lien would have been acquired. But the special verdict shows the course of dealing between the parties, and states facts which raise an implied promise on the part of the defendants, which operates as if it were express. This seems to me to be like the case put, of bank notes given to a banker to procure a bank-post bill for a customer, or a promise by a purchaser to pay ready money, which excludes set-off. There can be no implied right against a positive obligation." See also Bock *v.* Gorrissen, 2 De G., F. & J. 434; Locke *v.* Prescott, 32 Beav. 261; Wylde *v.* Radford, 12 W. R. (V.-C. K.) 38; Macnee *v.* Gorst, 4 Law Rep. Eq. 315, 325.

So in Vanderzee *v.* Willis, 3 Bro. C. C. 21: there a customer deposited with his bankers some securities to secure a sum of 1000*l.* which they advanced to him. These securities were frequently changed for others, and as one was taken away, another of equal value was deposited in its room. Afterwards, *when the customer owed the* 1000*l.*, *and also* 400*l. on his banking account*, in consequence of the bankers requiring an assignment of the securities, the customer *executed a bond and a deed poll for securing the* 1000*l.* After the execution of these securities the customer overdrew his account, and was at the time of his death indebted to the bank in the sum of 541*l.* over and above the 1000*l.* On a bill being filed by the representatives of the customer, a decree for redemption was made by Lord Thurlow, C., on payment of the 1000*l.* and interest, although the bankers insisted upon their right to retain the securities for the amount of their whole demand. This decree is clearly right, for it was evidently the intention of the parties to confine the security of the deposit to the 1000*l.*, inasmuch as when it was made, a larger sum, to which it might readily have been extended, was then due.

A deposit of securities to secure a specific sum, will not ordinarily prevent a general lien from attaching. Thus in Jones *v.* Peppercorne, *705] Johns. 430, it was held by *Sir W. Page Wood, V.-C., that stockbrokers who had advanced to bankers, their customers, a specific loan upon specific securities, had thereon not only a special lien in respect of such loan, but also a general lien in respect

of whatever else might be due to them from the bankers on account of their general business transactions. "There is," said his honor, "no special contract inconsistent with the general lien. The two things are perfectly consistent. The broker is to apply the securities in the first instance, according to the special contract, in raising the specific loan, and he is to have on the surplus a lien in respect of his general balance."

A banker will have no lien on the deposit of a partner on his separate account for a balance due to the bank from a firm of which he is a member (Watts *v.* Christie, 11 Beav. 546), nor will he have any lien on muniments of title left casually or by mistake in his place of business after he has refused to advance money on them as a security: Lucas *v.* Dorrien, 7 Taunt. 278 (2 E. C. L. R.).

In the absence of all special circumstances a consignee has a lien for the general balance on the proceeds of all goods consigned to him by the consignor (per Sir John Romilly, M. R., 10 W. R. 659; Hoare *v.* Dresser, 7 H. L. Cas. 318), but if the consignee thinks proper to accept a consignment, with express directions to apply it, or the proceeds of it, in a particular way, he cannot set up his general lien in opposition to those directions. In such a case only what remains after answering the particular directions, can become the subject of a general lien: Frith *v.* Forbes, 11 W. R. (L. J.) 4, reversing s. c., 10 W. R. (M. R.) 658.

Brokers have a lien for their general balance. See Jones *v.* Peppercorne, Johns. 430.

A policy broker will have a lien against his employers for his general balance, even although they be merely agents for another person, if they did not actually disclose their principal (Mann *v.* Forrester, 4 Campb. 60; Westwood *v.* Bell, Id. 349; Bell *v.* Jutting, 1 J. B. Moore 155 (4 E. C. L. R.)), or do in effect the same thing by indicating to the policy broker that they were acting as agents for another party: Maans *v.* Henderson, 1 East 335; Snook *v.* Davidson, 2 Campb. 218; Sweeting *v.* Pearce, 7 C. B. N. S. 449 (97 E. C. L. R.). The principle on which these cases proceed is well explained by Gibbs, C. J. "If," he says, "goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bonâ fide* dealt with

him as the owner of the goods, and gave him credit in that capacity. The lien of the policy broker rests on the same foundation. The only question is whether he knew or had reason to believe that the
*706] person by whom he was *employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal till the contrary is proved:" 4 Campb. 353.

When a broker employs a factor to insure, he will merely have a lien on the policy to the extent of the factor's balance against his principal. See Mann v. Schiffner, 2 East 523, 529; M'Combie v. Davies, 7 East 5.

It has been decided that dyers (Savill v. Barchard, 4 Esp. 53), calico-printers (Weldon v. Gould, 3 Esp. 268), and wharfingers (Naylor v. Mangles, 1 Esp. 109; Spears v. Hartly, 3 Id. 81; but see Dresser v. Bosanquet, 4 B. & S. 460, 486 (116 E. C. L. R.), have a lien for their general balance. But the general balance must arise from work done in the course of the same business, in respect of which the goods on which they claim a lien are in their hands. Thus it is laid down by Lord Kenyon, that calico-printers "could not claim a lien for money lent, or for any collateral matter: it should be confined to the work done in the particular business:" Weldon v. Gould, 3 Esp. 268.

With regard to the wharfingers' lien, under 10 & 11 Vict. c. 27, The Harbors, Docks, and Piers Clauses Acts, 1847, and 14 & 15 Vict. c. 43, it seems that these statutes displace any general lien, if any, at common law: Dresser v. Bosanquet, 4 B. & S. 460 (116 E. C. L. R.).

With regard however to dyers, the decisions do not appear to be uniform, for although in Kirkman v. Shawcross, 6 Term Rep. 14, dyers, dressers, whisters, and calenderers of Manchester and its neighborhood, established a lien for their general balance, this decision appears to have been arrived at upon proof of a special advertisement to that effect, and notice of it to the contracting party, and may therefore be said to depend upon contract. In Close v. Waterhouse, 6 East 523 n., and Bennett v. Johnson, 2 Chitty 455 (18 E. C. L. R.), it was held that a dyer had no general lien. See also Green v. Farmer, 4 Burr. 2214.

It has been determined that fullers have no lien, on clothes deposited with them, for their general balance: Rose v. Hart, 8 Taunt. 499 (4 E. C. L. R.); 2 J. B. Moore 547 (4 E. C. L. R.).

The usage of trade as to whether any of the persons we have last mentioned may or not be entitled to a lien for their general balance, may vary in different localities, and with respect to wharfingers, it has been said that "the onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed connsant of it, then he will be bound by the terms of that usage; but then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself *by imposing [*707 special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of a general lien for anything beyond the mere wharfage:" per Bayley, J., in Holderness *v.* Collinson, 7 B. & C. 216 (14 E. C. L. R.).

An attorney has a lien for his general balance for business done as attorney, on papers of his clients which come to his hands in the course of his professional employment as attorney (Stevenson *v.* Blakelock, 1 M. & Selw. 535); but he will not have a general lien either for business done or on papers come to his hands in a different capacity, as, for instance, in the capacity of town-clerk (The King *v.* Sankey, 5 Ad. & E. 423 (31 E. C. L. R.); Worrall *v.* Johnson, 2 J. & W. 214), or mortgagee (Annesley's Case, 2 Drew. 409; Pelly *v.* Wathen, 7 Hare 351).

As to the lien of attorneys and solicitors, which scarcely comes within the plan of this work, see 2 Selwyn's Nisi Prius 1364, 12th ed.; Maugham's Law of Attorneys 303–323.

The master of a ship has no lien on the ship or freight for wages, or for any expenditure he may take in the ordinary discharge of his duties as master, however necessary for the performances of the voyage: Hussey *v.* Christie, 9 East 426; Bristow *v.* Whitmore, 9 H. L. Cas. 391; s. c., 4 De G. & J. 325.

How the right to a Lien may be lost.—It is essential to the validity of a lien, as we have before seen (see *ante*, p. 695), that there should be a possession of the thing in respect of which it is claimed; in other words, where there is no possession there can be no lien. Thus in Hutton *v.* Bragg, 7 Taunt. 14 (2 E. C. L. R.), where the

owner of a vessel claimed a lien for the hire stipulated by the charter-party for the voyage, on goods shipped by the charterer, who had become bankrupt, it was held by the Court of Common Pleas that the former was not entitled to a lien. "There is in this case," said Dallas, J., "no possession in the defendant, and there can be no lien unless there is possession. It may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship; the bankrupt had put these goods on board in that character, and the defendant had no legal right to resume the possession of the ship until the goods were unloaded, and therefore he had no right to detain the goods." See also Kinlock *v.* Craig, 3 Term Rep. 119, 783.

Upon the same principle, where a person entitled by contract to a lien upon a balance in hand pays it over to another, he will lose his lien. See Bligh *v.* Davies, 28 Beav. 211; there the plaintiffs were merchants in London and Melbourne. The defendant conveyed goods to the Melbourne house, on an agreement that the
*708] advances made to him by the plaintiffs in *London and Melbourne should be retained out of the proceeds of the goods, and that the surplus should be handed over to the defendant. The Melbourne house remitted to the defendant a sum as the balance, but omitted to retain the advances made in London. It was held by Sir John Romily, M. R., that the plaintiffs had merely a right of lien or of retainer, which they had abandoned by remitting the balance, and a bill to make the remittance available for their debt was dismissed.

The principal case of Kruger *v.* Wilcox is a good illustration of the rule, that a lien will be lost by the abandonment of the possession of the goods in respect of which it is claimed. There a factor entitled to a lien on goods consigned to him by his principal, informed a broker employed by the principal, that the principal would sell the goods himself, and gave an order to the warehouseman to deliver the goods to the broker, who accordingly sold and made out the bills of parcels to the principal: it was held by Lord Chancellor Hardwicke, that this amounted to a delivery of the goods in specie to the principal, and that the lien was therefore gone. "Although," said his lordship, "a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the spe-

cific lien. Such is the law of the land as to retainers in other cases:" North *v.* Gurney, 1 J. & H. 509; Cooper *v.* Bill, 3 Hurlst. & C. 722.

And after a person has voluntarily parted with goods on which he has a lien, it will not revive on his recovering possession of them (Sweet *v.* Pym, 1 East 4); secus if they had been stolen or taken away by a trespasser or by fraud: Wallace *v.* Woodgate, R. & M. 194 (21 E. C. L. R.).

A lien will not be lost by the goods being put into the possession of a depositary or bailee for safe custody, as in the case of goods put into the possession of a warehouseman or wharfinger for those purposes: Wilson *v.* Kymer, 1 M. & Selw. 157.

A shipowner may preserve his lien for freight on goods after they have been discharged from his ship, by notice in writing given to the wharf or warehouse owner under the 68th section of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63). The subsequent sections prescribe a course of procedure which the wharf or warehouse owner is to adopt, after such notice shall have been given, in order to liberate the goods from the lien and to discharge the claim for freight: sects. 69–78. And see Lawther *v.* The Belfast Harbor Commissioners, 16 Ir. Com. Law Rep. 182.

The shipowner's lien will remain over goods placed in bonded warehouses without payment of the custom dues, it being expressly reserved by the warehousing Acts, 8 & 9 Vict. c. 91, s. 51; 3 & 4 Will. IV. c. 57, s. 47; 6 Geo. IV., *c. 112, s. 45; and see [*709
7 & 8 Vict. c. 31, as to goods carried inland and placed in bonded warehouses at Manchester.

It has been decided that a shipping agent having a lien on the bill of lading of goods he has shipped may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order that he may retain his lien on them, and is not liable to any action for so doing: Edwards *v.* Southgate, 10 W. R. (Ex.) 528.

A person may even lose a lien on goods, although he never parts with them. Thus, if a person having a lien on goods causes them to be taken in execution at his own suit, he will lose his lien thereby, although the goods are sold to him under the execution, and are never removed off the premises: Jacobs *v.* Latour, 5 Bing. 130 (15 E. C. L. R.).

When the debt, in respect of which the lien is claimed, is satisfied, the lien or right of retainer will necessarily be lost. Thus, if a person releases a debt, as, for instance, by executing a composition-deed, he will thereby put an end to any lien which he may claim in respect of the debt: Cowper *v.* Green, 7 M. & W. 633; Buck *v.* Shippam, 1 Ph. 694.

So "if a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a *distant day*, the lien is gone:" per Tindal, C. J., in Hewison *v.* Guthrie, 2 Bing. N. C. 759 (29 E. C. L. R.). Thus in Cowell *v.* Simpson, 16 Ves. 275, an executor confessed judgment to a firm of solicitors for the amount of their demand against the testator, and afterwards gave them two promissory notes payable with interest three years after date. The solicitors declined to deliver the papers to him without payment of the money secured by the judgment and the notes, though the executor had not since the judgment possessed assets, and the notes had not become payable. Lord Eldon, C., held that the lien on the papers was superseded by the solicitors taking security. "The exigences of mankind," said his Lordship, "requiring goods to be delivered up for consumption, the implication from an engagement for security, of an engagement to deliver the goods without payment, is necessary: otherwise from a promissory note payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So in this instance, if the solicitor says he will not proceed in the business, and will not deliver up the papers, the consequence is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact that he has taken this security, you can imply that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract."

*710] And it seems to be immaterial *that the securities taken are already due: Cowell *v.* Simpson, 16 Ves. 282.

A person having a lien may also lose it by his misconduct. Thus "if a person having a lien, abuses it by pledging the goods, the owner's right to the possession revives, and he may maintain an action of trover:" per Tindal, C. J., in Scott *v.* Newington, 1 M. & Rob. 252; see also Jones *v.* Cliffe, 3 Tyrw. 576; 1 C. & M. 540 (41 E. C. L. R.).

A set-off, however, cannot be considered as destroying a lien, unless it be so agreed upon between the parties. Thus in Pinnock *v.* Harrison, 3 M. & W. 532, where an action in trover was brought for certain carriage iron-work, the defendant set up as a defence a lien on the iron-work for work done to it, at the plaintiff's request. It was held in the Exchequer Chamber that, in the absence of a special agreement, the plaintiff could not claim a right of set-off against the lien. "Here," said Alderson, B., "are two parties having mutual claims on each other, with this difference, that the defendant claims the advantage of a security for it, which the plaintiffs have not; unless there is a specific agreement to that effect it would be unreasonable that the defendant should lose the benefit of his lien." See also Clarke *v.* Fell, 4 B. & Ad. 408 (24 E. C. L. R.).

If, however, an arrangement has been entered into between the parties that the "work to be done, on account of which the lien was to be claimed, should be paid for in a particular manner and out of a particular fund; and that being the only debt on which the lien was claimed, it might be an answer to it in that way; or if the debt having been created, the parties came to a new arrangement, and agree that the debt shall be satisfied in a particular way, then the lien is lost; for then it would be in truth a debt paid:" per Alderson, B., in Pinnock *v.* Harrison, 3 M. & W. 539.

Upon a sale of the goods to a third party he will take them subject to the lien. Thus, "where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage or are sold, before delivery, to a stranger; or in other words, the extent of the shipowner's lien remains unaltered, whether the bill of lading is endorsed to a third person for a valuable consideration or the goods are deliverable to the original consignee:" per Tindal, C. J., in Small *v.* Meats, 9 Bing. 592 (23 E. C. L. R.). And see Gledstanes *v.* Allen, 12 C. B. 202 (74 E. C. L. R.); Kern *v.* Deslandes, 10 C. B. N. S. 205 (100 E. C. L. R.).

"Upon the same principle it would seem to follow, that if the

*711] *lading of the ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charter-party, such lading, if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the shipowner had before the sale: Id.; see also Dixon v. Yates, 5 B. & Ad. 313 (27 E. C. L. R.). It is not necessary, in order to entitle a plaintiff in an action of trover to recover, that he should prove an actual tender of the money, if it appears he was ready to pay it, but that the defendant refused to deliver the goods, except on payment of an alleged old balance, which the jury find not to have been really due: Jones v. Tarleton, 9 M. & W. 675.

If one having a lien upon goods, when they are demanded of him claims to retain them upon a different ground, making no mention of the lien, he will be held to have waived it, and trover may be maintained against him, without evidence of any tender having been made of the amount in respect of which the lien is claimed: Boardman v. Sill, 1 Camp. 410 n.; Dirks v. Richards, 4 M. & G. 574 (43 E. C. L. R.); Weeks v. Goode, 6 C. B. N. S. 367 (95 E. C. L. R); but it seems that the right to detain a chattel on account of a specific lien will not be lost by a claim to retain it for a general balance: Scarfe v. Morgan, 4 M. & W. 270; sed vide Sanderson v. Bell, 2 C. & M. 304; 4 Tyrrh. 244.

A person retaining goods in his possession does not lose his right to a lien upon them by lapse of time, inasmuch as the Statute of Limitations only bars the remedy at law, and not the debt: Higgins v. Scott, 2 B. & Ad. 413 (22 E. C. L. R.); Spears v. Hartly, 3 Esp. 81; Re Broomhead, 16 L. J. Q. B. 355.

A claim of lien for a larger amount or on a different account than that for which the party is entitled to it, may in some cases amount to a dispensation with a tender: per Willes, J., in Allen v. Smith, 12 C. B. N. S. 645 (104 E. C. L. R.). But it was held there that the fact of the defendant, who was an innkeeper, having claimed a lien for the keep of the horses of the plaintiff (who was a guest) and the lodging of the defendant and his servant for a longer time than the defendant was in strictness entitled to it, did not exonerate the plaintiff from making a tender, for if the defendant had been shown the lesser amount, he might have been quite willing to accept it: Id.

As to the lien of vendors of realty for unpaid purchase-money, see Mackreth v. Symmons, 1 L. Cas. Eq. 263, 3d ed.

As to the lien of a person who has advanced money upon a deposit of title deed, see Russel *v.* Russel, 1 L. Cas. Eq. 603, 3d ed.

As to the lien of a consignee of a West-Indian estate on the corpus of the estate, see Fraser *v.* Burgess, 13 Moo. P. C. C. 314; Bertrand *v.* Davies, 31 Beav. 429; In re Leith's Estate, 1 Law Rep. J. C. 296. As to an auctioneer's lien, see Purcell *v.* Douglas, 16 W. R. Ex. (Ir.) 438.

*As to the Roman Dutch law of lien see Tatham *v.* Andree, 1 Moo. P. C. C. 386. [*712

It may be here mentioned that no person is entitled as against the official or creditor's assignee, to withhold possession of the books of account of the bankrupt or to claim any lien thereon: 24 & 25 Vict. c. 134, s. 121.

As to the doctrine of liens generally, see Jarvis *v.* Rogers, 15 Mass. 389, 394; Meany *v.* Head, 1 Mason 319; Allen *v.* Ogden, 1 Wash. C. C. 174; Mecker *v.* Wilson, 1 Gallis. 419; Townsend *v.* Newell, 14 Pick. 332; Rankin *v.* Schatzell, 12 Wheat. 177; Oakes *v.* Moore, 11 Shepley 214; Ex parte Foster, 2 Story 131; Newhall *v.* Dunlap, 2 Shepley 180; Hall *v.* Jackson, 20 Pick. 194; Randel *v.* Brown, 2 Howard (S. C.) 406; Williams *v.* Price, 5 Munf. 507; Pharis *v.* Leachman, 20 Ala. 662.

A party may create a lien by contract where none exists by law, and the only difference is in the mode of establishing the lien; thus, where the owner of a canal boat, sunk in the Hudson river, after trying to raise it himself, and hiring men for that purpose, requested the persons about there to continue the search, and promised to see them paid, and afterwards promised to pay the expense, it was held, that the party raising the boat had a lien on it and the cargo for his expenses: Baker *v.* Hoag, 7 Barb. (S. C.) 113. It is the very essence of a lien that the person claiming it has the possession of the chattel upon which the lien is claimed to operate: Jordan *v.* James, 5 Hammond 88; Holly *v.* Huggeford, 8 Pick. 13, 76; Baker *v.* Fuller, 21 Pick. 318; Desha *v.* Pope, 6 Ala. 691; Brackett *v.* Hayden, 3 Shepley 347; Bailey *v.* Quint, 22 Verm. 474; Walcott *v.* Keith, 2 Foster 196; Boyd *v.* Mosely, 2 Swan 661; King *v.* Indian Orchard Canal Company, 11 Cush. 231; Nevan *v.* Roup, 8 Clarke 207. But see Tibbitts *v.* Fowle, 3 Fairfield 341; Matthews *v.* Menedger, 2 McLean 145; Spaulding *v.* Adams, 32 Maine 211. A party having a lien on goods,

loses it when he parts with the possession of them to third persons, though it was stipulated between the parties that the lien should continue after the removal: McFarland *v.* Wheeler, 26 Wend. 467. Where a person has a lien on certain articles for work done upon them, a delivery of the articles without his consent does not affect his rights: Partridge *v.* Dartmouth College, 5 N. H. 286.

An artizan has a lien upon the article manufactured by him until he is paid for his labor or parts with the possession, pursuant to the terms of the agreement: Moore *v.* Hitchcock, 4 Wend. 292; Nevan *v.* Roup, Clarke 207. The manufacturer of goods has a lien for the price of manufacturing them: Townsend *v.* Newell, 14 Pick. 332. Every bailee who has by his labor or skill conferred value on specific chattels bailed to him for that purpose has a particular lien upon them: McIntyre *v.* Carver, 2 W. & S. 392; Gregory *v.* Striker, 2 Denio 628; Chappell *v.* Cady, 10 Wis. 111. By the common law no lien exists generally for repairs and work done on a domestic ship, but a shipwright has a lien for the repairs and work done on such ship so long as she remains in his possession; and the owner can only divest that possession by a discharge of the lien. Yet if the owner regain possession during the repairs, or if after the repairs are made, the shipwright voluntarily yield up the possession, his lien is gone: Schooner *v.* Marion, 1 Story 68; Pritchard *v.* Muir, 2 Brev. 371. A. contracted with B. to manufacture boards for him and to transport them to market for a stipulated price, and by the contract A. was to have a lien upon the boards, which should be delivered by him after the delivery of a specified quantity. The whole quantity of boards made was not sufficient to enable A. to deliver the specified quantities and satisfy his lien, owing to B.'s neglect to supply him with sufficient logs to manufacture the boards. Held that the common law lien attached to the last quantity manufactured, notwithstanding the special agreement: Mount *v.* Williams, 11 Wend. 77. One having exclusive custody of the goods of another for the purpose of carrying on a store, who pays for goods to replenish the stock and becomes personally liable for them, has not a lien on the goods to secure him against such liability: Gray *v.* Wilson, 9 Watts 512. If a lame horse be left with a person to be kept and cured, such person has a lien in the character of a farrier, upon the horse for his cure and keeping: Lord *v.* Jones, 11 Shepley 439. A workman, who does piece work for a master mechanic, has a lien upon the article delivered to him: McIntyre *v.* Carver, 2 W. & S. 392. There is no lien in favor of a journeyman or day laborer: Id. An agent purchasing goods on his own credit or paying for them with money raised on his credit, may retain the goods until he is indemnified: Matthews *v.* Menedger, 2 McLean 145. Where a large number of logs were sawed into boards by A. for B. under one contract, it was held, that

A. had a lien on every parcel of the boards for the price of sawing the whole: Partridge *v.* Dartmouth College, 5 N. H. 286. A driver of logs has a lien for his services on the logs which he is employed to drive. If each of several owners hires a different person to drive his logs and the logs of all get intermixed, the lien of the respective drivers is only on such logs as they were employed to drive: Hamilton *v.* Buck, 36 Maine 536.

Wherever, a banker has advanced money to another, he has a lien on all the paper securities, which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement: Bank of the Metropolis *v.* New England Bank, 1 Howard (S. C.) 234; s. c. 17 Peters 174; Russell *v.* Hadduck, 3 Gilman 233; Baltimore Railroad Company *v.* Wheeler, 18 Md. 372; Sweeney *v.* Easter, 1 Wallace (S. C.) 166. A trustee, who acts in good faith, in the execution of his trust, has a lien upon the trust property for his necessary expenses and disbursements in the execution of the trust: Murray *v.* De Rottenham, 6 Johns. Ch. 52. Even if a trustee has a lien on the trust property, until the expenses in relation to it are paid, he loses it by voluntarily parting with the possession as between him and a purchaser: Johnson *v.* Packer, 1 N. & M. 1.

If A. deposit with B. a quantity of grain for safe keeping and at the time of making the deposit, borrow money and buy goods on credit of B., the law creates no lien for the debt on the grain, in the absence of any agreement to that effect: Picquit *v.* McKay, 2 Blachf. 465. Where one, who had contracted to finish a machine, employed a mechanic, without the knowledge of the owner, to perform the work, disclosing to him the contract with the owner, it was held, that such mechanic did not acquire a lien in his own right for his labor upon the machine, as against the owner, although the owner knew that he was performing the work, while it was in progress: Hollingsworth *v.* Dow, 19 Pick. 228. The purchaser of a chattel in good faith from one, who has no title to the same, has no lien against the lawful owner for necessary repairs of the chattel made without the knowledge of the owner: Roberts *v.* Kain, 6 Robertson 354. If goods be deposited by a debtor in the hands of his creditor, for a particular purpose or on a particular trust or confidence, the creditor has no such lien upon them, by reason of his possession, as will entitle him to retain them as security for his debt: Jarvis *v.* Rogers, 13 Mass. 389; Allen *v.* Maquire, Id. 490. Where goods are delivered by A. to B. to sell and B. delivers them to a third person to sell, such third person has no lien upon the goods as against the principal: Phelps *v.* Sinclair, 2 N. H. 554. The owner of land has no lien on property cast on it by drift: Forster *v.* Juniata Bridge Company, 4 Harris 393. In cutting and removing timber from the land of another at an agreed price and for the purpose of being sawed into

boards, no lien without a special contract therefor, can be acquired: Oakes *v.* Moore, 11 Shepley 214. An incorporated insurance company has no implied lien on the shares of the capital stock for debts due to the company from any of the stockholders: Sargent *v.* Franklin Insurance Company, 8 Pick. 90.

Neither the keeper of a livery stable nor an agistor of cattle has a lien on a horse delivered to him for keeping: Fox *v.* McGregor, 11 Barb. (S. C.) 41; Miller *v.* Marston, 35 Maine 153; Goodrich *v.* Willard, 7 Gray 188; Bissell *v.* Pearce, 28 N. Y. 252; Lewis *v.* Tyler, 23 Cal. 364; Wills *v.* Barrister, 36 Verm. 220; Jackson *v.* Holland, 31 Geo. 339; Hoover *v.* Epler, 2 P. F. Smith 522; Saint *v* Smith, 1 Cold. 51. Under a written contract to keep sheep for a certain period, wash, shear and do up their wool, for a certain sum, the keeper has no lien on the sheep for his pay: Cummings *v.* Harris, 3 Verm. 245.

A factor has a lien for all advances on account of his principal, for balances due or for liabilities incurred in the course of their business: Matthews *v.* Bradley, 2 Williams 118; Gragg *v.* Brown, 44 Maine 157; Owen *v.* Iglanor, 4 Cold. 15. Factors have a lien on the goods of their principals in their possession, for their general balance, as well as for their particular advance: Baker *v.* Fuller, 21 Pick. 318; The State *v.* Levy, 1 McMullen 431; Hogdson *v.* Payson, 3 Har. & J. 339; Archer *v.* McMeehan, 21 Missouri 43; Winne *v.* Hammond, 37 Ill. 99. A factor or purchasing agent, in actual possession of two parcels of goods, obtained under distinct orders for both of which he is in advance, although paid for one of the parcels, has a lien on the whole of the property: Brooks *v.* Bryce, 21 Wend. 14; s. c. 26 Wend. 367. The lien of an agent and factor on the goods of his principal for specific expenses, does not exist, when the general balance of account is against him: Enoch *v.* Wehrkamp, 3 Bosw. 398. The general lien of a factor does not extend to debts, which arose prior to the time at which his character of factor commenced, nor in respect to torts: Sturgis *v.* Slocum, 18 Pick. 318. A factor's lien for a general balance, accrued in the lifetime of his principal, does not attach to property coming into the factor's possession after the principal's death by order of his representatives: Wylly *v.* King, Geo. Dec. Part II., 7; Farnum *v.* Boutelle, 13 Metc. 159. Possession of the property is necessary to create a factor's lien thereon; but the possession may be either actual or constructive: Kollock *v.* Jackson, 5 Geo. 153; Elliott *v.* Bradley, 23 Verm. 217; Bank of Rochester *v.* Jones, 4 Comst. 497. A consignee of goods, which are to be sold on commission for account of the consignor and the proceeds of each sale remitted to him, has no lien upon them before they are actually delivered to him: Bruce *v.* Andrews, 36 Missouri 593. Delivery of cotton to a common carrier for the consignee, and the carrier's acceptance

of it for the consignee, is delivery to the consignee, so that his lien attaches: Wade *v.* Hamilton, 30 Geo. 450. The lien of a factor is a personal privilege and cannot be set up by any other person in defence of an action by the principal: Holly *v.* Huggeford, 8 Pick. 73. Where a factor contracted for the purchase of merchandise for his principal, part of which had been delivered to him and he had received from his principal more than enough to pay for the part delivered, including all charges, it was held that the factor had a lien upon the merchandise in his possession to indemnify him against his liability for the residue: Stevens *v.* Robins, 12 Mass. 180. The plaintiff, residing at London, made advances on a cargo of iron to A. at Gottenburg, who consigned the cargo to the defendants at New York, with instructions to remit the proceeds to the plaintiff, as the consignor's agents or bankers, but the defendants were not informed that the plaintiffs had made any advances. Held, that the defendants had all the usual rights of factors, and that the plaintiffs had no lien as against the claim of the defendants for their general balance against the consignor: Reynolds *v.* Davis, 3 Sandf. 267. After the consignor of goods has changed their destination while *in transitu*, the first consignee, if he does not obtain possession of them before the carrier has received notice thereof, acquires no lien on them for any general balance against the consignor: Strahorn *v.* Union Company, 43 Ill. 424. A factor loses his lien on the goods of his principal by tortiously pledging them: Jarvis *v.* Rogers, 15 Mass. 389, 396; Holly *v.* Huggeford, 8 Pick. 73, 76. A commission merchant is entitled to a lien on a part of a lot of goods consigned to him after he has sold the residue, for his commissions and advances on account of the whole: Sewall *v.* Nichols, 34 Maine 582.

By the common law, a carrier has both a lien on the goods and an action against the consignor for the freight: Hayward *v.* Middleton, 1 Rep. Const. Ct. 186; Langworthy *v.* New York & Harlem Railroad Company, 2 E. D. Smith 195. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner of the goods and the carrier, so that an action at law might be maintained for the payment of the debt sought to be enforced by the lien: Fitch *v.* Newburry, 1 Douglas 1. A common carrier, receiving goods from a wrongdoer, has no lien thereon against the rightful owner, even for freight which he had paid to a previous carrier, by whom the owner had directed them to be carried: Stevens *v.* The Boston Railroad Company, 8 Gray 262; Clark *v.* Lowell Railroad Company, 9 Id. 231. Where the goods of different shippers are covered by the same bill of lading, the consignee has no right to hold the goods of one shipper for charges upon the goods of the other: Hale *v.* Barrett, 26 Ill. 195. The lien of a common carrier is extinguished by the unqualified delivery of the property to the consignee,

without fraud on the part of the latter, and the waiver of the lien does not depend upon the intention of the carrier, if his intention to retain his lien is not expressed: Bigelow *v.* Heaton, 4 Denio 496. A carrier cannot hold goods by virtue of a lien for back freights: Leonard *v.* Winslow, 2 Grant's Cas. 139; Travis *v.* Thompson, 37 Barb. 236. A mere forwarding agent has no lien upon goods sent to him to be shipped to the consignee resident in another city: Farwell *v.* Bice, 30 Missouri 587. A carrier can have no lien on property of the United States: Dufolt *v.* Gorman, 1 Minn. 301; The Undaunted, 2 Sprague 194. A carrier has no right to enforce his lien by a sale of the goods: Briggs *v.* Boston Railroad Company, 6 Allen 246.

An attorney has a lien upon a judgment for his fees and his disbursements in the suit; and such lien is not defeated by a discharge given by his client to the judgment debtor: Gammon *v.* Chandler, 30 Maine 152; Sweet *v.* Bartlett, 4 Sandf. (S. C.) 661; Sexton *v.* Pike, 8 English 193; Ward *v.* Wardsworth, 1 E. D. Smith 598; Smith *v.* Goode, 29 Geo. 185; Carter *v.* Davis, 8 Florida 183; McGregor *v.* Comstock, 28 N. Y. 237; Adams *v.* Fox, 40 Barb. 442; Warfield *v.* Campbell, 38 Ala. 527. An attorney has no lien on the papers on his client in his hands or on any money collected by him, for professional services: Walton *v.* Dickerson, 7 Barr 379. But see Frisnell *v.* Haile, 18 Missouri 18; Hill *v.* Brinkley, 10 Ind. 102; Howard *v.* Osceola, 26 Wis. 453. The lien of an attorney upon a judgment is confined to his fees, and disbursements in that cause and does not extend to commissions upon the amount recovered: Wright *v.* Cobleigh, 1 Foster 339; Ex parte Kyle, 1 Cal. 331; Mansfield *v.* Dorland, 2 Cal. 507; Currier *v.* Boston and Maine Railroad Company, 37 N. H. 223; Wells *v.* Hatch, 43 N. H. 246; Newbut *v.* Cunningham, 50 Maine 231. An attorney, who has money in his hands which he has recovered for his client, may deduct his reasonable fees therefrom, and payment of the balance is all that can be lawfully demanded: Balsbaugh *v.* Frazer, 7 Harris 95; Dubois' Appeal, 2 Wright 231. The lien of an attorney, who assigns his claim for services to a third person, is lost by such assignment: Chappell *v.* Dunn, 21 Barb. 17.

Insurance brokers have a lien upon all policies in their hands, procured by them for their principals, for the payment of the sums due to them for commissions, disbursements, advances, and services in and about the same: McKenzie *v* Nevius, 9 Shepley 138. The lien of an insurance broker on a policy for the premium, although he has parted with the policy, revives, if it be again placed in his hands to be put in suit, unless the manner of parting with it show his intention to abandon such lien: Spring *v.* South Carolina Insurance Company, 8 Wheat. 268. An insurance broker, who receives premiums and pay losses, has a lien on the policies and abandon-

ments in his hands, for a general balance against the underwriter: Moody v. Webster, 3 Pick. 424. An insurance broker having retained the policy, has a lien upon a fund paid under a treaty with a foreign power for the benefit of his principal, and all others interested: Id. One, who procures insurance in his own name for another person, not as a broker or general agent, but in pursuance of a specific order, has no lien on the policy and although ship's husband, has no lien for the balance of his account: Reed v. Pacific Insurance Company, 1 Metc. 166.

An innkeeper has a lien on the baggage of his guest: Willard v. Reinhardt, 2 E. D. Smith 148; though an infant: Watson v. Cross, 2 Duval 147. An innkeeper has a lien upon the goods of guests only, not upon the goods of persons boarding with him under a special contract: Hursh v. Byers, 29 Missouri 469. An innkeeper has no lien upon a horse put into his stable to keep, except belonging to a guest: Fox v. McGregor, 11 Barb. (S. C.) 41; Hickman v. Thomas, 16 Ala. 666.

A warehouseman has no lien on goods in his possession for any indebtedness to him from the owner, disconnected with charges on the goods: Scott v. Jester, 8 English 437. A warehouseman, having placed his refusal to deliver goods on the ground of a claim against the owner disconnected with the goods, cannot afterwards set up his particular lien for storage as an excuse for not having delivered them: Id. A warehouseman has no lien for freight charges paid: Bass v. Upton, 1 Minn. 408. One not engaged in the business of warehousing or storage, who allows the goods of another to be placed in his room, does not thereby acquire any lien for the storage: Alt v. Weidenberg, 6 Bosw. 176.

A wharfinger has a lien on a vessel for wharfage: The Phœbe, Ware 354; Wooster v. Blossom, 5 Jones' Law 244. He has no power to sell coal deposited on his wharf for unpaid wharfage: Kusenberg v. Browne, 6 Wright 173.

A finder of lost property, for the restoration of which the owner has offered a certain reward, has a lien on the property, and may retain possession of it, if on his offer to restore it, the owner refuses to pay the reward: Wentworth v. Day, 3 Metc. 352; Wilson v. Guyton, 8 Gill 213; Cummings v. Gann, 2 P. F. Smith 484. But where "a liberal reward" merely is offered, the finder has no lien: Wilson v. Guyton, 8 Gill 213.

A vendor of goods has a lien upon them as long as they remain in his possession and the vendee does not pay the price according to the terms of the sale: Parks v. Hall, 2 Pick. 206, 212; Barrett v. Prichard, Id. 512, 515; Moore v. Newbury, 2 McLean 472; Boyd v. Mosely, 2 Swan 661. Where goods are to be paid for on delivery, if, on delivery the vendee refuses to pay for them, the vendor has a lien for the price and may resume possession of the goods: Palmer v. Hand, 13 Johns. 434. A person gave

a bill of parcels of goods to another, and a certificate that he held them for him on storage. The bill was receipted, a negotiable note having been given for the amount. It was held that the lien of the vendor for the price was extinguished: Chapman *v.* Searle, 3 Pick. 38.

A party having a lien upon goods may transfer the possession, subject to the lien, to a third person, who may lawfully hold the property until the lien be paid: Nash *v.* Mosher, 19 Wend. 431. A person to whom the owner of a lien has assigned it, without a delivery of the property to which it has attached, has no claim against a person who subsequently obtains possession of the property: Wing *v.* Griffin, 1 E. D. Smith 162; Coit *v.* Waples, 1 Minn. 134. Where it was stipulated by a brickmaker that the lessees of a brickyard should retain the bricks to be made, as security for advances to him, it was held that the bricks became pledged as fast as they were made. It was also held that such a lien with the consent of the brickmaker was assignable: Macomber *v.* Parker, 14 Pick. 497.

If a person have a lien on goods, for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing on that ground to deliver them to the owner, is a waiver of the lien: Picquet *v.* McKay, 2 Blackf. 465. But a lien is not waived by the mere omission to place the refusal to deliver on demand, on the specific ground of lien: Everett *v.* Coffin, 6 Wend. 603; see, however, Dows *v.* Morewood, 10 Barb. (S. C.) 183. Where labor is bestowed on articles under an agreement to receive a note in payment, the lien on them is waived; and where there was no such antecedent agreement, the subsequent taking of a negotiable note waives the lien: Hutchins *v.* Olcutt, 4 Verm. 549. A tender of charges must be made before suit, where a lien exists, unless the subject of the lien has been parted with; in which latter case the defendant can only claim a mitigation of damages by way of recoupment: Saltus *v.* Everett, 20 Wend. 267.

If in any case where a lien would recognised or implied there is a special agreement for payment at a particular time or in a particular mode, the right of lien otherwise implied does not exist: Trust *v.* Pirsson, 1 Hilton 292. An agreement by a clothier to dress what flannel should be furnished him during the year and to receive his pay quarterly, is a waiver of the lien on the cloth: Woollen Manufactory *v.* Huntley, 8 N. H. 441. A person, who undertook to perform work and labor in relation to goods, failed to fulfil his contract, and performed but part of the service. Held, that he could not retain the goods against the owner on the ground of a lien for what he had done: Hodgden *v.* Waldson, 9 N. H. 66. Where goods in the possession of a party, having a lien on them, were attached at the suit of such party, it was held that he had waived the lien thereby: Legg *v.* Willard, 17 Pick. 140.

*THE CASE OF MARKET OVERT. [*713

Hil. 38 *Eliz.*

[Reported 5 Co. 83 b.; s. c. 1 Anders. 344; Moore 360.]

Sale in Market Overt.]—*If plate be stolen and sold openly in a scrivener's shop in the city of London on market-day, this shall not alter the property; otherwise, if it had been in a goldsmith's shop.*

Every day, except Sunday, is a market-day in London.

If a sale be not in the shop, but in the warehouse or other place in the house, the property is not changed.

Every shop in London is a market overt for such things only which by the trade of the owner are put there for sale.

At the sessions of Newgate now last past, it was resolved by Popham, Chief Justice of England, Anderson, Chief Justice of the Common Pleas, Sir Thomas Egerton, Master of the Rolls, the Attorney-General, and the Court, that if plate be stolen and sold openly in a scrivener's shop on the market-day (as every day is a market-day in London except Sunday), this sale should not change the property, but the party should have restitution; for a scrivener's shop is not a market overt for plate, for none would search there for such a thing; *et sic de similibus*, etc. But if the sale had been openly in a goldsmith's shop in London, so that any one that stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed

by the shop could not see it, it would not change the property. So if the sale be not in the shop, but in the warehouse or other place of the house, it would not change the property, for that is not in market overt, and none would *search there for his goods. So every shop in London is a market overt for such things only which by the trade of the owner are put there to sale; and when I was Recorder of London, I certified the custom of London accordingly. Note, reader, the reason of this case extends to all markets overt in England.

*714]

[*Nota.* If goods are sold in a market overt, although no toll is paid, yet the sale is good. But if horses, mares, or geldings, be sold in a market overt, without paying toll there, the sale is void, and does not alter the property by the stat. 2 Ph. & Mar. c. 7, and 31 Eliz. c. 12. See 2 Black. Com. ch. 30, fol. 449, 450, 451.]

As a general rule at common law, subject to the important exceptions we shall hereafter mention, a person who is not the true owner of chattels, and who has no power express or implied from the true owner for that purpose, cannot confer any property in such chattels upon another. If, for instance, a person having feloniously obtained chattels, sells them, although to a *bonâ fide* purchaser, the owner may maintain trover for them against the purchaser. And this the owner may do even although he has not prosecuted the felon to conviction. See Stone *v.* Marsh, 6 B. & C. 551 (13 E. C. L. R.); 9 D. & R. 643 (22 E. C. L. R.); R. & M. 364 (21 E. C. L. R.); Marsh *v.* Keating, 1 Bing. N. C. 198 (27 E. C. L. R.); 1 Scott 5; and White *v.* Spettigue, 13 M. & W. 603; and Lee *v.* Bayes, 18 C. B. 599 (86 E. C. L. R.); Chowne *v.* Baylis, 31 Beav. 351, overruling on this point Gimson *v.* Woodfull, 2 C. & P. 41 (12 E. C. L. R.); Peer *v.* Humphey, 2 Ad. & E. 495 (29 E. C. L. R.); 4 N. & M. 430 (30 E. C. L. R.). It being now clear "that the obligation which the law imposes on a plaintiff to prosecute the party who has stolen his goods does not apply where the action is

against a third party innocent of the felony:" 18 C. B. 602 (86 E. C. L. R.). So if goods be let out on hire, although the person who hires them has the possession of them for the special purposes for which they are lent, yet if he sell them the owner may maintain trover for them against the purchaser. See Loeschman *v.* Machin, 2 Stark. N. P. 311 (3 E. C. L. R.); Cooper *v.* Willomatt, 1 C. B. 672 (50 E. C. L. R.).

We purpose now to consider briefly the exceptions to the general rule, viz. first in the case of sales in market overt; secondly, in the case of *bonâ fide* purchases out of market overt from fraudulent vendees; thirdly, in the case of the transfer of negotiable instruments; lastly, we propose to notice the cases in which a power of sale over the chattels of another is expressly conferred or implied by law.

*1. *Sales in Market overt.*—Where a person has found or stolen the goods of another, and sells them in a market overt to a *bonâ fide* purchaser, the property therein will pass to him, nor can the owner (save in the cases hereafter mentioned) recover back his property. The policy upon which this exception to the common law was established has been stated to have been for "the encouragement to trade and to render contracts in fairs and markets secure, so that however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men:" Bac. Abr. tit. Fairs and Markets, E. 1. [*715

In the city of London, as is laid down in the principal case, every day, except Sunday, is a market-day (*ante*, p. 713), and every shop there is a market overt, but for such things only which by the trade of the owner are put there for sale: Id. Thus in the principal case it was held that a scrivener's shop was not a market overt for plate, though a goldsmith's shop similarly situated would clearly have been so. See also s. c. nom. The Bishop of Worcester's Case, Moore 360; 1 Anders. 344.

Upon the same principle it was laid down in the same case that Smithfield is a market overt for horses and cattle, and not for clothes (Moore 360); and also that as Cheapside is not a place where horses are usually sold, a sale of horses in that place will not change the property in them as against the owner (Id.); and see Clifton *v.* Chancellor, Moo. 624; Taylor *v.* Chambers, Cro. Jac. 68.

A sale of a carriage at Aldridge's is, it seems, not a sale in

market overt: Marner *v.* Banks, Weekly Notes (C. P.), Nov. 16, 1867, p. 261.

A market overt in the country is held by charter or prescription, in certain places and during certain times, and a sale of chattels belonging to another in order to be valid must take place during those times and at those places. Thus in Peer *v.* Humphrey, 4 N. & M. 430 (30 E. C. L. R.); 2 Ad. & E. 495 (29 E. C. L. R.), upon an action of trover for three oxen, it appeared that the plaintiff had directed his servant to drive the oxen to Northampton Market, but, instead of doing so, he sold them to the defendant *on the high road*, and not in market overt, and absconded with the money. The plaintiff gave notice of the felony to the defendant, who afterwards sold the oxen in market overt, after which the plaintiff prosecuted the felon to conviction. It was held by the Court of Queen's Bench that the plaintiff might recover from the defendant the value of the property in trover. "Here," said Williams, J., "there was no legal sale at all; the property therefore was still in the plaintiff." See also Taylor *v.* Chambers, Cro. Jac. 69; Mosley *v.* Walker, 9 D. & R. 863 (22 E. C. L. R.); 7 B. & C. 54 (14 E. C. L. R.); Mayor of Macclesfield *v.* Chapman, 12 M. & W. 18.

*716] As to what constitutes a legally established *market see Benjamin *v.* Andrews, 5 C. B. N. S. 299 (94 E. C. L. R.).

A shop in a country town, it seems, is not, as is the case in the city of London, a market overt, even for things usually sold there. See The Prior of Dunstable's Case, 11 Hen. VI. 19, pl. 2; Harris *v.* Shaw, Cas. temp. H. 349; Anon., 12 Mod. 521; and see Lee *v.* Bayes, 18 C. B. 599 (86 E. C. L. R.), where it was held that a sale by public auction at a horse repository, out of the city of London, was not a sale in market overt. And see Marner *v.* Banks, Weekly Notes (C. P.), Nov. 16, 1867, p. 261.

A wharf is not a market overt, even for things usually sold there. Thus in Wilkinson *v.* King, 2 Campb. 335, the owner of some lead sent it to a wharf in the borough of Southwark, where lead was usually sold. The wharfinger, without any authority, sold it to a *bonâ fide* purchaser, who duly paid for it. In an action of trover for the lead by the owner, he obtained a verdict in his favor, and Lord Ellenborough held that the sale did not change the property in the lead, observing that "the doctrine contended for would give wharfingers the dominion over all the goods intrusted to them; but

that a wharf could not be considered even in London as a market overt for the articles brought there. The wharfinger had no color of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion."

Even when a sale is made in a shop in market overt, it must be made *openly* in order to change the property. If, for instance, as is laid down in the principal case, plate be stolen and sold in the shop of a goldsmith, either behind a cupboard upon which the plate stands, so that one that stood or passed by the shop could not see it, such sale would not change the property; so if the sale was not in the shop, but in the warehouse or other place, it would not change the property, and the reason given is, that "that is not in market overt, and none would search there for his goods."

A shop, however, in the city of London, although it is not sufficiently open to the street for a person on the outside to see what passes within, is a market overt, and a sale there of goods in which a shopkeeper usually deals will be valid. Thus in Lyons *v.* De Pass, 11 Ad. & E. 326 (39 E. C. L. R.), which was an action of trover for 1000 pairs of slippers sold by the person who had stolen them from the plaintiff to the defendant. The place of sale was mentioned by a witness at Nisi Prius as an "open shop," which on cross-examination he described as an "open warehouse," with slippers in the window; it was held on a motion to enter a verdict for the plaintiff, that it was a market overt within the custom of London, and the sale was consequently good. "In the case of the Market Overt (5 Co. 83 b)," said Littledale, J., "the sale which was held not to pass property was a sale of plate in a scrivener's ship, which is not a market for goods of that kind. But *if no such objection arises, it cannot be made a difficulty that there is now [*717 glass in the windows of shops, whereas in former time they were entirely open. Many shops now are more open in their construction than others; but no difference can be made on that account."

A sale even in market overt will not be binding in certain cases, as, for instance, if the goods there sold were the king's (2 Inst. 713); or if the buyer knew whose goods they were (Id.); or if the sale were fraudulent on the part of the vendor and vendee (Id.); or without valuable consideration (Id.); or if the sale were made by an infant of such tender years that it must be apparent that he was under age; or by a feme covert, if the vendee knows her to be so,

it will not pass the property in the goods sold, unless in the case of the feme covert the things sold were such as she usually deals in, or were sold by the consent of her husband: Id.

Nor will a sale be valid if made in the night, nor unless made between sun-rising and sunset (Id.); nor unless the contract were originally and wholly made in the market overt; and it will not be sufficient merely to have had its inception out of and its consummation in the market: Id.

Hence it has been held, that a sale by sample is not entitled to the privileges of a sale in market overt: Crane *v.* The London Dock Co., 5 B. & S. 313 (117 E. C. L. R.). And see the Bailiffs, &c, of Tewkesbury *v.* Diston, 6 East 438, 451, 452.

Again, a man will not be bound by a sale to him of his own goods in market overt: 2 Inst. 713. And if a sale be made of goods by a stranger in a market overt, whereby the right of the owner is bound, yet if the seller acquires the goods again, the owner may take them, because the seller was the wrongdoer, and he shall not profit by his own wrong: Id.

A mere pawn in market overt will not bind the true owner: Hartop *v.* Hoare, 2 Stra. 1187; 1 Wills. 8; 3 Atk. 44; Packer *v.* Gillies, 2 Campb. 336.

A sale in market overt will not only bind those who are *sui juris*, but also "infants, feme coverts, idiots, or lunatics, men beyond sea or in prison, and whether they were possessed of them in their own right or as executors or administrators:" Id.; and see Bac. Ab. tit. Fairs and Markets (E.) 1.

The question has been raised, whether the privilege of market overt is to be extended to what a shopkeeper *purchases* as well as to what he *sells* in his shop. It was discussed in the case of Crane *v.* The London Dock Co., 5 B. & S. 313 (117 E. C. L. R.). But it was unnecessary to decide the point. Cockburn, C. J., however, observed that "several cases affecting the question of market overt have arisen where the sale was *to* a shopkeeper in his own shop, and in none of them was the point started; which raises a presumption that the able judges before whom those cases were brought, *718] and the able counsel by whom they were argued, *considered it not tenable." Blackburn, J., observed, that "perhaps the question in each case depends on the custom of the shop, or the usage of the trade carried on in it."

In the case of goods sold in an open shop or warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods; and if it turns out otherwise, as where the goods are claimed by the true owner from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed: Eicholz *v.* Bannister, 17 C. B. N. S. 708 (112 E. C. L. R.).

In order to encourage the prosecution of offenders, it has been enacted by 7 & 8 Geo. IV. c. 29, s. 57 (re-enacting in effect, 21 Hen. VIII. c. 11), "That if any person guilty of any such felony or misdemeanor as is thereinbefore mentioned, in stealing, taking, obtaining or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in *such case the property shall be restored to the owner or his representative*; and the court before whom any such person shall be so convicted shall *have power to award from time to time writs of restitution* for the said property, or to order the restitution thereof in a summary manner.' The act then provides, "that if it shall appear *before* any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate, liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security."

It has been held under this statute that the property in a stolen chattel, although sold in market overt, revests in the owner on the conviction of the felon, and that he may maintain trover for it, though there has been no order for restitution. See Scattergood *v.* Sylvester, 15 Q. B. 506 (69 E. C. L. R.). There one Daykin having stolen a cow sold it in market overt to the defendant, who purchased and paid for it *bonâ fide* and without any notice of knowledge that it had been stolen or was not the property of Daykin. Daykin was convicted for the theft and transported. It was held by the Court of Queen's Bench, that the plaintiff was entitled to maintain

trover for the cow. "In this case," said Lord Campbell, C. J., "it is admitted that sale in market overt would be no answer to the action if an order of restitution had been made. We are now to determine *719] *what is the consequence of the want of such an order. The plaintiff must rely on the statute, for at common law the property was changed permanently by sale in market overt. On reference to the statutes 21 Hen. VIII. c. 11, and 7 & 8 Geo. IV. c. 29, we are satisfied that the property is revested on conviction. By the statute 21 Hen. VIII. c. 11, the owner was restored to his goods. How could that be unless he had a right to recover them? By the subsequent statute the property 'shall be restored.' How is this provision to be executed effectually, unless the right is restored? It may be matter of regret, certainly, when an order of restitution is not made so as to obviate the necessity of an action. But the order is not a condition precedent to the revesting of the property. The dictum of Buller, J., in Horwood *v.* Smith, 2 Term Rep. 750, that the plaintiff's property revested after conviction, accords with this view and is quite in point."

The owner however of stolen goods, although he prosecute the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, if he sell them again before the conviction take place, notwithstanding the owner may give him notice of the robbery while they are in his possession. See Horwood *v.* Smith, 2 Term Rep. 750, which was a case where sheep had been stolen, and sold by the thief in market overt to a person to whom the owner gave notice of the theft, but who resold the sheep before the conviction of the offender; and it was held by the Court of Queen's Bench, that although the owner had a right to a restitution of the sheep, he could not maintain an action against the first purchaser, who was not in possession of them at the time of the attainder. "The plaintiff," said Buller, J., "could not demand the goods of the defendant, merely because they had been stolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. This is an action of trover for sheep; and in order to maintain it, the plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. Now when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property

had been altered by a sale in market overt. From the time of the conviction, the defendant never had the possession of the sheep, then it cannot be said that he converted the plaintiff's sheep to his use, having parted with them before the time when the property was revested in the plaintiff." And Grose, J., said, "If this action could be maintained, it would defeat the object of the Act of Parliament which entitles the owner of stolen goods, prosecuting to conviction, to a restitution of them. For if third persons in whose possession goods *which had been stolen came fairly and for a valuable consideration, were compelled to deliver them up before a conviction of the felon, it would take away the incitement to the prosecutor to convict the felon, which it was the intention of the Legislature to give." [*720

Where, however, property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased *bonâ fide, but not in market overt*, and the plaintiff gave notice of the felony to the defendant, who afterward, but *before* the conviction of the felon, sold the property in market overt, it was held that the plaintiff might recover from the defendant: Peer *v.* Humphrey, 2 Ad. & E. 495 (29 E. C. L. R.).

The statutes 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, provide for the sale of horses in markets and fairs, and impose "sundry good ordinances touching the manner of selling and tolling horses for the purpose of repressing or avoiding horse stealing." They prevent the property in any stolen horse from being altered by sale in market overt until six months have elapsed from the time of the sale, and enable the owner at any time afterwards to recover the horse on payment of the price given by the purchaser. The names and addresses of all the parties to contracts for the sale of horses are to be entered in the toll-gatherer's book, together with the price of the horse, its color, marks, etc., and if the requisites of the acts as regards these and other particulars are not complied with, the sale is void: Addison on Contracts 218, 4th ed.

The question sometimes arises how far judgment-debtors, and parties against whom execution has issued, can dispose of their goods. It seems that since the Statute of Frauds (29 Car. II. c. 3, s. 16), the right which was given to the sheriff by the writ to seize property, no longer speaks from the *teste* of the writ, but from the time of its delivery upon the receipt of which the sheriff is to levy.

Now after the writ of execution has been delivered to the sheriff, the judgment-debtor may transfer his goods, but the sheriff has a right to the execution notwithstanding the transfer; subject therefore to the execution, the debtor can pass the property in his goods by a *bonâ fide* transfer (Samuel *v.* Duke, 3 M. & W. 629, 630), but if he transfers his goods in market overt, the right of the sheriff ceases altogether: Id. In Bowen *v.* Bramege, 6 C. & P. 140 (25 E. C. L. R.), A., expecting an execution, executed a deed, assigning all his property to trustees for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by J. S. against A. This deed was executed at nine A.M., on the 25th of February. A writ of *fi. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at ten A.M., on the 25th. It was held that the deed was good, notwithstanding the proviso to retain, *and that the goods could not be taken under the *fi. fa.*

*721]

A delivery to the sheriff's deputy in London, amounts to a delivery to the sheriff: Woodland *v.* Fuller, 11 Ad. & E. 867 (39 E. C. L. R.); and see Lowthal *v.* Tonkins, Barn. 42.

And now, by 19 & 20 Vict. c. 99, s. 1, it is enacted that "no writ of *fieri facias*, or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for valuable consideration before the actual seizure or attachment thereof by virtue of such writ: Provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, undersheriff, or coroner." See Williams *v.* Smith, 2 Hurlst. & N. 443.

2. *Bonâ fide Purchasers out of Market overt from fraudulent Vendees.*—Where a person enters into a fraudulent contract for the purchase of goods, as, for instance, where he never intends to pay for them, the vendor may, before the goods have left the hands of the purchaser or his assignees in bankruptcy, elect to consider the sale void, and it will be so treated: Load *v.* Green, 15 M. & W. 216; Noble *v.* Adams, 7 Taunt. 59 (2 E. C. L. R.); Abbotts *v.*

Barry, 5 J. B. Moo. 98 (16 E. C. L. R.); Milne *v.* Leisler, 7 Hurlst. & N. 786.

A carrier delivering goods to a person who has fraudulently purchased them without any intention of paying the price, may be liable to the owner in trover for a wrongful delivery of the goods where they are left at a different place from that to which they were directed by the consignors. See Stephenson *v.* Hart, 4 Bing. 476 (13 E. C. L. R.); there the plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. West, 27 Great Winchester Street, London. The defendants found that no such person resided there, but upon receiving a letter, signed "J. West," requesting that the box might be forwarded to a public-house at St. Alban's, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box. That person having disappeared, and the box having been originally obtained by the plaintiff by fraud, it was held by the Court of Common Pleas, dissentiente Gaselee, J., that the defendants were liable to him in an action of trover. "At the outset," said Burrough, J., "no doubt the contract was between the carrier and the consignee; but when it was discovered that no such person as the consignee was to be found in Great Winchester Street, that contract was at an end, and the goods remaining in the hands of the carriers as the goods of the consignor, a new implied contract arose between the carrier and the consignor, to take care of the goods for the use of the consignor. **It is clear the property in them never passed out of the plaintiff, the consignor.*" [*722

The mere consciousness of a person, at the time when he purchased goods, that he will be unable to pay for them, will not amount to a case of fraud that will vitiate the contract. See dictum of Tindal, C. J., in Irving *v.* Motly, 7 Bing. 551 (20 E. C. L. R.).

So trover will lie against a person to whom the plaintiff has made a fictitious sale of his goods, in order to defraud his creditors, by means of an invoice and a false receipt for the purchase-money: Bowes *v.* Foster, 2 Hurlst. & N. 779.

Where, however, goods have been obtained from a person by means of a fraudulent purchase, he cannot, as against a *bonâ fide* purchaser to whom they have subsequently been sold, declare his

election to consider the original sale void. See White *v.* Garden, 10 C. B. 919 (70 E. C. L. R.); there Parker bought of the defendants seventy tons of iron, paying for it partly in cash, and giving bills for the residue. Parker afterwards sold the iron to the plaintiff, to whom it was by Parker's order delivered by the defendants. Subsequently the defendants, having discovered that the proposed acceptor of the bills was a fictitious person, and that they had been defrauded, sent and took away from the plaintiff's wharf a barge containing twenty-nine tons of the iron, which was left with the delivery order, alongside the plaintiff's wharf to be unloaded. The defendants also gave the plaintiff notice of the fraud, and desired him not to part with any of the iron in his possession. The purchases were *bonâ fide* on the part of the plaintiff, and had been made at the fair market price, and through the intervention of a broker. It appeared that Parker had given the defendants a false address: but it did not appear that the defendants had made any inquiry either about him or the acceptor of the bills, until after the iron had been sent by them to the plaintiff's wharf. Trover being brought by the plaintiff for the twenty-nine tons of iron, it was insisted on the part of the defendants, that, the transaction being a fraud on the part of Parker, no property in the iron passed to him, and consequently none could be acquired by his vendee, though no party to the fraud. For the plaintiff it was submitted, that the right in the original vendors to rescind the sale was at an end when the goods had come to the hands of a *bonâ fide* purchaser for value. The plaintiff obtained a verdict for the value of the iron removed from his wharf, leave being reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that no property in the iron passed by the sale from Parker to the plaintiff. In discharging a rule *nisi* it was unanimously held by the judges of the Court of Common Pleas, that the property in the iron passed from Parker to the plaintiff. "The question," said Cresswell, J., *723] "is whether the plaintiff, who it is *admitted acted *bonâ fide*, by this purchase obtained a property in the iron. It seems to me that the case of Parker *v.* Patrick, 5 Term Rep. 175, as explained in Load *v.* Green, 15 M. & W. 219, well warrants us in discharging this rule. Parke, B., there says that that case may be supported on the ground that the transaction is not absolutely void, except at the option of the seller; that he may elect to treat it as

a contract, and he must do the contrary before the buyer has acted as if it were such, and resold the goods to a third party; and that Wright *v.* Lawes, 4 Esp. 82, is an authority to the same effect. I think it is. And I see no difficulty or hardship in so deciding. One of two innocent parties must suffer: and surely it is more just that the burthen should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves." See also Sheppard *v.* Shoolbred, 1 C. & M. 61 (41 E. C. L. R.), and the remark of Jervis, C. J., thereon, in White *v.* Garden, 10 C. B. 928 (70 E. C. L. R.); Powell *v.* Hoyland, 6 Exch. 67.

And the result is the same if, before the vendor interferes, the vendee pledges the goods for a *bonâ fide* advance. See Kingsford *v.* Merry, 11 Exch. 577.

And in the case of North *v.* Jackson, 2 Fos. & Fin. 198, where a *bonâ fide* purchaser of a horse from a person who had bought it (as the second purchaser knew) at a fair, without any evidence that he knew it was obtained dishonestly, although it had been purchased on credit, and not paid, it was held by Blackburn, J., that he was entitled to maintain trover against the original owner for retaking it.

Where, however, a person has obtained goods from another under what turns out not to amount to a contract of sale, a pledgee of the former will be liable in trover to the original owner of the goods for their proceeds when sold. See Hardman *v.* Booth, 1 Hurlst. & C. 803: there the plaintiff, a manufacturer, called at the place of business of Gandell & Co. for orders for goods. At that time the firm consisted of Thomas Gandell only, and the business was managed by Edward Gandell, a clerk. On inquiring for Messrs. Gandell the plaintiff was directed to a counting-house where he saw Edward Gandell, who led the plaintiff to believe that he was one of the firm of Gandell & Co., and under that belief, at the request of Edward Gandell, the plaintiff sent goods to the place of business of Gandell & Co., and invoiced them to Edward Gandell & Co. Edward Gandell, who unknown to the plaintiff carried on business with one Todd, pledged the goods with the defendant for advances *bonâ fide* made to Gandell & Todd, and the defendant afterwards sold the goods under

a power of sale. It was held by the Court of Exchequer that there
*724] was no contract *of sale, inasmuch as the plaintiff believed that he was contracting with Gandell & Co., who never authorized Edward Gandell to contract for them, consequently no property passed, and the defendant was liable in trover for the amount realized by the sale.

A *bonâ fide* vendee or pawnee will not be able to retain goods unless he has obtained them from a person between whom and the original owner *the relation of vendor and purchaser existed*, and a contract existed between them which the original owner might either affirm or disaffirm. It was upon this principle that Kingsford *v.* Merry was decided in the Exchequer Chamber, 1 Hurlst. & N. 503, and although the decision of the Court of Exchequer (11 Exch. 577) was there reversed, it was not upon the question of law, but upon a different assumption of the facts of the case, the Court of Exchequer assuming that a contract of sale existed between the original owner and the fraudulent pledgor (which, had it been really the case, would have justified the decision they arrived at), the facts before the Court of Exchequer appearing to be, that no such contract really existed. The facts of the case of Kingsford *v.* Merry, as they appeared in the Court of Exchequer Chamber, were as follows:—In April, 1853, Jones & Co., brokers, sold for the plaintiffs, manufacturing chemists, two tons of tartaric acid, to be delivered in November. In October, 1853, Gray & Co., brokers, sold for the plaintiffs two tons of tartaric acid to be delivered in November. Jones & Co. and Gray & Co. respectively, sent to the plaintiffs sold notes, not disclosing any principal. In November, a clerk of one Anderson, a merchant, left at the plaintiffs' counting-house two delivery orders. One was from Jones & Co. for delivery to T. Broomhall or order of one of the tons of acid: this order was endorsed by T. Broomhall, "Deliver to my order." The other delivery order was from Gray & Co. for delivery to T. Broomhall or order of two tons of acid: this order was endorsed, "T. Broomhall—Deliver to W. Leask. J. Ellis—Deliver at Custom House Quay to my sub-order. W. Leask." Anderson induced Leask to purchase from Ellis the acid for him, upon a *false representation that he was acting on behalf* of Van Notten & Co. Ellis thereupon gave to Leask the delivery-orders which he had received from Broomhall. Leask endorsed the orders specially deliverable to himself, and delivered

them to Anderson for the purpose of enabling him to inspect the acid. On the 28th of November, Anderson went to the plaintiffs and stated that he had purchased from Leask the acid mentioned in the delivery-orders, and he requested the plaintiffs to deliver it at the Custom House Quay for him. On the faith of this statement, the plaintiffs gave Anderson a delivery order, and the acid was transferred into his name. Anderson then obtained warrants, and pledged the acid with the defendant *for a *bonâ fide* advance. [*725 It was held by the Court of Exchequer Chamber, reversing the decision of the Court of Exchequer, that under these circumstances, the relation of vendor and purchaser did not subsist between the plaintiffs and Anderson, neither did the property in the acid pass to Anderson, and that mere possession with no further *indicia* of title than the delivery-orders was not sufficient to entitle the defendant, though a *bonâ fide* pawnee, to resist the claim of the plaintiffs in an action of trover.

The decision in the case of Kingsford *v.* Merry occasioned great dissatisfaction in the city, where the grounds of the decision in the Exchequer Chamber were misunderstood. It appears also to have been thought, that delivery-orders were negotiable instruments, so that the property ought to have passed with them. It seems, however, to have been forgotten, that so late as the year 1817, a jury of the city of London, said by Lord Ellenborough, C. J., to have been "a most intelligent jury," expressly found that a person having mere possession of "a delivery order, was not thereby armed with such *indicia* of property as to be enabled to deal with it as his own." See Boyson *v.* Coles, 6 M. & Selw. 14. The subsequent case of Higgons *v.* Burton, 26 L. J. Exch. 342, proceeds on the same principle as Kingsford *v.* Merry: there the plaintiffs, who were partners as silk-merchants, had in 1855, dealings with one Fitzgibbon, a merchant at Cork, in whose employ, until July in that year, was one Dix, who had become known to the plaintiffs as Fitzgibbon's agent. On the 26th of July, Dix, after he had been discharged by Fitzgibbon, proposed to purchase of the plaintiffs, in Fitzgibbon's name, certain silks, which were delivered to him, and by him sent to the defendant, an auctioneer, by whom they were sold, and the proceeds paid to Dix. In September Dix obtained other goods of the plaintiffs in a similar way, and sent them to the defendant for sale. The *defendant made an advance of* 60*l.* upon

this parcel of goods, and *afterwards*, but not before, had notice from the plaintiffs that all the silks had been fraudulently obtained from them. It was held by the Court of Exchequer that as there was no contract with Dix, and as he had obtained the goods by fraud, the plaintiffs were entitled to recover the full amount of the proceeds of the silks. "Dix," said Watson, B., "only affected to have the authority of Fitzgibbon to purchase the goods; he had, in fact, no such authority, and no property passed to him. There was no real contract, and he could give no better title than he had; and the pledge to the defendant passed no property."

3. *Transfer of Negotiable Instruments by Persons not entitled to them.*—Besides the cases already considered, another important exception to the general rule exists in the case of negotiable instru-
*726] *ments, for the property in them will pass like cash, by mere delivery to a person taking them *bonâ fide* and for value, who will be entitled to retain them as against the former owner, who may either have lost them, or from whom they may have been stolen. Nor is it essential to the validity of the transfer that it should be made in market overt. The leading case upon this subject is Miller *v.* Race, 1 Burr. 452; 1 Smith's Leading Cases 389: there a bank-note payable as usual to bearer, sent by post under cover, had been taken out of the mail by a robber, and afterwards came into the hands of the plaintiff for full and valuable consideration in the usual course and way of business, and without any notice or knowledge of the bank-note having been taken out of the mail. It was held by the Court of King's Bench, that the plaintiff had a sufficient property in the bank-note to entitle him to recover in an action against the bank. Lord Mansfield, in giving judgment, said "that the case had been very ingeniously argued for the defendant. But the whole fallacy of the argument turned upon comparing bank-notes to what they did not resemble, and what they ought not to be compared to, viz: to goods or to securities, or documents for debts. Now they were not goods, nor securities, nor documents for debts, nor were so esteemed; but were treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gave them the credit and currency of money, to all intents and purposes. That they were as much money as guineas themselves were, or any other current coin that

was used in common payment as money or cash. . . And it was necessary for the purposes of commerce, that their currency should be established and secured."

So likewise it has long been settled that drafts on bankers, bills of exchange, or promissory notes, either payable to order and endorsed in blank, or payable to bearer, when taken *bonâ fide*, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferree, without regard to the title or want of title in the person transferring them. Per Holroyd, J., 4 B. & Ald. 9 (6 E. C. L. R.); see also Grant *v.* Vaughan, 3 Burr. 1516; Peacock *v.* Rhodes, Doug. 636; Collins *v.* Martin, 1 Bos. & Pul. 648.

The same principles have been held applicable to exchequer bills. Thus in Wookey *v.* Pole, 4 B. & Ald. 1 (6 E. C. L. R.), an exchequer bill, the blank in which had not been filled up, was placed by the proprietor in the hands of stockbrokers for the purpose of being sold. The stockbrokers, however, instead of selling it, deposited it at their bankers, who made advances to them upon its security to the amount of its value. The stockbrokers afterwards became bankrupt. It was held by the Court of King's Bench, consisting of Best, J., Holroyd, J., and Abbott, C. J., (Bayley, J., dissentiente), that the owner of the exchequer bill could not maintain *trover against the bankers, inasmuch as the property in such [*727 exchequer bill, like bank-notes and bills of exchange, passed by delivery. Holroyd, J., in his judgment, after alluding to the decisions of Miller *v.* Race, 1 Burr. 452, and Peacock *v.* Rhodes, Doug. 636, relative to bank-notes and bills of exchange, observes, "Those cases have proceeded on the nature and effect of the instruments, which have been considered as distinguishable from goods. In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the courts have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to the money, and following the nature of their principal. . . . These decisions proceed upon the nature of the property, viz. money, to which such instruments give the right, and which is itself current; and the effect of the instruments, which

either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it. The question then is, whether these principles apply to the present case, or whether this exchequer bill and the right thereto, follow the nature of goods, which, except in market overt, can only be transferred by the owner, or under his authority.? In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns, and as to its negotiability or currency by law. In its original state, it purports to entitle the holder to the sum of 1000*l.* and interest; and the original holder may, if he pleases, secure it to himself; but it is payable to the bearer, until some name is inserted, and when that is done, it becomes payable to such nominee or his order. But if the original holder parts with it or keeps it in blank; he by that very act, or by his negligence if he loses it, authorizes the bearer, whoever he may be, to receive the money; and so, if he were to insert his own name, but endorse it in blank instead of restraining its negotiability, either by not endorsing it at all, or by making a special endorsement, he thereby authorizes and empowers any person who may be the holder *bonâ fide* and for value to receive it; and he cannot revoke that authority, when it has become coupled with an interest. . . . An exchequer bill is an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money, put into circulation and made current by law. It is not, therefore, like goods saleable only in market overt, and not otherwise transferable, except by the owner or under his authority, but is, in all those several re-

*728] spects, *similar to bills of exchange and promissory notes, and transferable in the same manner as they are."

And it is immaterial whether the person who delivered the negotiable instruments to a *bonâ fide* holder, either sold them, or merely pawned them; in either case he would pass the property to the holder, which in the first case would be absolute; in the latter qualified, viz. conferring a right to detain them until the sum raised upon them was paid: Wookey *v.* Pole, 4 B. & Ald. 9 (6 E. C. L. R.); Collins *v.* Martin, 1 Bos. & T. 648; 2 Esp. 520; Barber *v.* Richards, 20 L. J. Exch. 135.

So it has been laid down as clearly law, that if one deposit with his banker negotiable bills, and that banker afterwards deposit

them with a third person, as a pledge for his own debt, the property in such bills will pass to the pledgee: per Dallas, J., in Treuttel *v.* Barandon, 8 Taunt. 103 (4 E. C. L. R.). As to the onus of proving notice of the title of a third party to a negotiable instrument transferred for value, see Middleton *v.* Barned, 4 Exch. 241.

Where, however, an instrument does not pass by delivery, but upon a transfer of a right merely to sue upon it in the name of the transferror or original party, is given to the transferree, such instrument is not properly termed a negotiable instrument, and a person taking it, although *bonâ fide*, and for valuable consideration, will take it subject to the defects in the title of the transferror. Thus before Indian bonds were rendered negotiable by 51 Geo. III. c. 64, s. 4, a transferree could obtain no better title to them than the person who transferred them to him had: Glyn *v.* Baker, 13 East 509. See also Williamson *v.* Thompson, 16 Ves. 443. Croxon *v.* Moss, 2 Fos. & Fin. 539.

An instrument which is ordinarily negotiable may cease to be so by a special endorsement, of a restrictive character. Endorsements such as the following have been held to be restrictive: "Pay to A. B. or order per account of C. D." "Pay to A. B. or order for my use." "Pay to A. B. only." "The within must be credited to A. B." See Edie *v.* East India Company, 2 Burr. 1227; Evans *v.* Cramlington, Carth. 5; Cramlington *v.* Evans, 2 Vent. 307; Ancher *v.* Bank of England, Doug. 615. In Treuttel *v.* Barandon, 8 Taunt. 100, 1 J. B. Moo. 543 (4 E. C. L. R.), a bill was thus endorsed by the payee, "Pay to J. P. De Roure, Esq., or order for account of Messrs. Treuttel and Wurtz." De Roure endorsed the bill to the defendants with whom he deposited it *as a security for his own account.* It was held by the Court of Common Pleas, that as the defendants took the deposit of the bill with sufficient notice on its face that it did not belong to De Roure, the Messrs. Treuttel and Wurtz were entitled to recover the value of the bill in an action of trover. In the important case of Sigourney *v.* Lloyd, 8 B. & C. 622 (16 E. C. L. R.), a bill *drawn in America on a house in London payable to order, was endorsed by the [*729 payee generally to A. Attwood, who endorsed it to the plaintiff, by whom it was endorsed thus, "Pay to Js. Williams, Esq., *or his order for my use.*" Williams endorsed the bill to the defendants,

his bankers, who discounted it for him, without making any inquiry, and applied the amount of the bill, less the discount, to the use of Williams, who soon afterwards became bankrupt. When the bill arrived at maturity, the amount was received by the defendants. It was held by the Court of King's Bench, in an action for money had and received, that the bankers were liable to refund the money to the plaintiff. Lord Tenterden, C. J., in his elaborate judgment, fully examines the authorities, and most satisfactorily states the principles upon which they proceed. "It appears," said his lordship, "from the report of the case of Snee *v.* Prescott, 1 Atk. 247, that in 1743 an endorsement in this form was not unusual; and it appears to have been the opinion of Lord Hardwicke in that case, and also to have been the opinion of Mr. Justice Wilmot, in the case of Edie *v.* The East India Company, 2 Burr. 1227, that such an endorsement will have the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the endorsement. The case of Ancher and Others *v.* The Bank of England, Doug. 637, is an authority to the same effect. The endorsement was not precisely in the same form as in the present case; but the effect of it is the same. The endorsement there was, "The within must be credited to Captain Moreton L. Dahl, value in account." An endorsement purporting to have been made by Dahl was afterwards forged, and the Bank of England discounted the bill. The acceptors did not pay it; before it became due they had failed, and one Fulgberg paid it for the honor of Ancher and Co., the plaintiffs; and upon the ground that the endorsement had restrained the negotiability of the bill, they brought an action for money had and received against the bank. Lord Mansfield directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord Mansfield, Willes and Ashurst, JJ., thought the endorsement restrictive, and that the plaintiffs were entitled to recover; but Buller, J., thought otherwise; upon which Lord Mansfield said, the whole turned on the question, whether the bill continued negotiable? And if they altered their opinion they would mention the case again; but it never was mentioned afterwards; and upon a new trial, Lord Mansfield directed the jury to find for the plaintiff, which they did. It has been said that the endorsement "Pay to Williams for my use," is a mere direction to Williams to apply the money procured

by the bill to Sigourney's use; but the words taken in that sense would *be useless; for whether the words be on the face of the endorsement or not, as soon as Williams received the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of making the first endorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original endorser. The case of Evans *v.* Cramlington, Carth. 5; 2 Vent. 307; Skinn. 264; 1 Show. 4), when duly considered, does not seem to me to be sufficient to countervail the authorities to which I have adverted. The bill in that case was drawn by Cramlington upon one Ryder, payable to T. Price or his order, for the use of F. Calvert. Ryder accepted, but did not pay the bill. Price endorsed it to Evans for value. The latter brought an action against Cramlington the drawer; he pleaded that Calvert (who was named in the bill as *cestui que use*) was an officer of the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king in such a sum, this 500*l.* was extended in his hands. To this plea there was a demurrer. It appears, therefore, that Cramlington, in answer to the claim of Evans, the endorsee, set up what is sometimes denominated the *jus tertii*; and the only question which it was necessary for the Court to determine was, whether the bill being in trust only for the use of Calvert, was liable to be seized under the extent against him? The Court were of opinion that it was not. The proposition of Cramlington, that the *jus tertii* intervened, failed entirely, and it became unnecessary to decide any other point. That case, therefore, as it seems to me, is not of sufficient weight to countervail the opinions delivered in Snee *v.* Prescot, 1 Atk. 247; Edie *v.* The East India Company, 2 Burr. 1216; and Ancher *v.* The Bank of England, Doug. 637. The use of endorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an *endorsement will not prevent the endorsee from receiving the money from the acceptor when the bill becomes due.* If he pay it to his principal all will be well, but the endorsee must look to him for the application of it. *It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to*

[*730

relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an endorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that bankers or others when requested to discount such bills as this, should look into the
*731] accounts between the *principal and his agent. I agree it cannot be expected they should; but still if they take the bill so endorsed, they take it at their peril, *and must be bound by the state of the accounts between those parties.*

Although the property in negotiable instruments is ordinarily inseparable from the possession, nevertheless where "they come *malâ fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced, the true owner has a right to recover:" per Lord Mansfield, C. J., Cowp. 200. Thus where a person has discounted a negotiable instrument out of the ordinary course of business, and without giving full value for it, he cannot recover upon it: Egan *v.* Threlfall, 5 D. & R. 326, 329 n. (16 E. C. L. R.).

For a long period, and in opposition to a case decided by Lord Kenyon (Lawson *v.* Weston, 4 Esp. 56), it seems to have been the general opinion that fraud or *malâ fides* ought to be presumed where a negotiable instrument was taken under circumstances which ought to have excited *the suspicion of a prudent man.* See Gill *v.* Cubitt, 3 B. & C. 466 (10 E. C. L. R.); Solomons *v.* The Bank of England, 13 East 135 n.; Down *v.* Hulling, 3 B. & C. 330 (10 E. C. L. R.); Slater *v.* West, Dans. & Lloyd 15; Beckwith *v.* Corral, 3 Bing. 444 (11 E. C. L. R.).

It is now, however, very generally considered that these cases have gone too far and ought to be restricted, and that *gross negligence only ought to be considered as evidence of fraud.* In the case of Lawson *v.* Weston, 4 Esp. 56, it appeared that the endorsee of a bill of exchange for 500*l.* either lost it or had it stolen from him: its loss was immediately advertised. The plaintiffs, who were country bankers, discounted the bill in the usual course of their business, for a person who brought it to their shop, but was unknown to them. The bankers knew the handwriting of the parties to the bill, and upon the person for whom they discounted the bill putting his name on it, they, without any further inquiry, paid him

the amount, deducting the discount. It was held by the Court of King's Bench, that the plaintiffs were entitled to recover the amount of the note. "If," said Lord Kenyon, "there was any fraud in the transaction, or if a *bonâ fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say, that a banker was bound to make inquiry concerning every bill brought to him to discount: it would apply as well to a bill for 10*l.* as for 10,000*l.* With respect to the evidence offered of the usage of *other banking-houses, I cannot admit it: it [*732 depends on their mode of doing their business, or on their funds. This could not affect others who acted on different principles, but with equal integrity. That which had been called the usage of trade, depended on the different degree of confidence which different men possessed, and not on any settled or regular rules."

"The magnitude of the bill has been pressed as a ground of suspicion by the defendant's counsel. I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the plaintiffs; but I think they are bound, under the circumstances of the case, to prove the value actually paid for it." The plaintiffs proved the consideration paid for it, and had a verdict.

In Raphael *v.* The Bank of England, 17 C. B. 161 (84 E. C. L. R.), St. Paul and Co., money-changers at Paris, gave cash for a 500*l.* bank-note, according to the course of exchange of the day, to a person who showed his passport, and wrote his name and address on the note. The note had been stolen about a year and a half before, and payment had been stopped and the loss advertised by means of handbills circulated amongst other places at Paris; and there was some evidence to show that one of the notices had come to the hands of St. Paul and Co. at Paris. It appeared that it was the practice of their house to file all notices of stolen or lost notes served upon them, and to look to them if the amount was important;

but that on this occasion the partner who changed the note did not look at the file, and had no recollection of the notice, or he would not have taken the note. It was held by the Court of Common Pleas, that the property in the note passed to St. Paul and Co. "It seems to me," said Cresswell, J., "that the omission of St. Paul, who is substantially the plaintiff here, to avail himself of the means of knowledge of the alleged felony that were at his disposal, was not the point on which the decision of the case could properly be rested. A person who takes a negotiable instrument *bonâ fide* for value, has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof, may amount to negligence: and Lord Tenterden at one time thought negligence was an answer to the action. But the doctrine of Gill *v.* Cubitt, 3 B. & C. 456 (5 E. C. L. R.), 5 D. & R. 324 (16 E. C. L. R.) is not now approved of." See also The Bank of Bengal *v.* Macleod, 7 Moore, P. C. C. 35; The Bank of Bengal *v.* Fagan, 7 Id. 72; Crook *v.* Jadis, 5 B. & Ad. 909 (27 E. C. L. R.); Backhouse *v.* Harrison, 5 Id. 1098 (27 E. C. L. R.); Foster *v.* Pearson, 5 Tyrw. 262; Uther *v.* Rich, 10 Ad. & E. 784 (37 E. C. L. R.).

*733] *As to what instruments will be considered negotiable, see Smith's Leading Cases 398, 4th ed.

4. *Sale under Power expressly conferred or implied by Law.*—The owner of chattels may be bound by the sale of a person authorized by the law to effect it, as in the case of a sheriff selling goods under a writ of execution, in which case it seems a *bonâ fide* purchaser will be protected, though the writ be afterwards set aside (Manning's Case, 8 Co. 94, *b*; Doe *v.* Thorne, 1 M. & Selw. 425), but it seems in the apparently analogous case of a purchaser under a distress warrant a *bonâ fide* purchaser will not be protected, if the warrant be bad. See Lock *v.* Sellwood, 1 Q. B. 736 (41 E. C. L. R.), where Lord Denman thought that the analogy did not hold, but he did not, in fact, decide the point, because the Court was of opinion in that case that the purchase had not been made *bonâ fide*.

The owner of chattels will be bound by their sale, if he has placed them in the hands of persons whose business it is to sell them, in such a manner as to raise with respect to third persons an

implied power to sell. See Pickering *v.* Busk, 15 East, 38: there a purchaser of hemp lying at wharfs in London had, at the time of his purchase, the hemp transferred in the wharfinger's books partly into the name of the broker who effected the purchase for him, and partly into the names of himself "*or*" the broker. It was held by the Court of Queen's Bench that the broker had an implied power to sell the hemp, and that his sale and receipt of the money bound his principal. "Strangers," said Lord Ellenborough, C. J., "can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker, and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository for sale, can it be implied that he sent it thither for any other purpose than that of sale? Or, if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is *sent in such a way and in such a place, as to exhibit an apparent purpose of sale, the principal will be bound *and the purchaser safe*." [*734

Where the owner of goods stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, he cannot recover them from the vendee: Gregg *v.* Wells, 10 Ad. & E. 90 (37 E. C. L. R.); Waller *v.* Drakeford, 22 L. J. 274 (Q. B.).

An agent or person in possession of a bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or

authorizing or purporting to authorize either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, may in many cases, under the provisions contained in the Factors Acts (6 Geo. IV. c. 94, 5 & 6 Vict. c. 39), make a valid sale or pledge of the goods of another. See Smith's Merc. Law, 133–140, 7th ed. And see Heyman *v.* Flewker, 13 C. B. N. S. 519 (106 E. C. L. R.); Sheppard *v.* The Union Bank of London, 7 Hurlst. & N. 661; Iewaa *v.* Whitworth, 2 Law Rep. Eq. (V.-C. W.) 692; Portalis *v.* Tetley, 5 Law Rep. Eq. (V.-C. W.) 140; 37 L. J. Ch. (V.-C. W.) 139.

It will, however, be invalid if there is sufficient to show that the circumstances of the case were such that a reasonable man, and a man of business applying his understanding to them would certainly know that the agent had not authority to make the pledge or that he was acting *malâ fide* in respect thereof against his principals: Chunder Sein *v.* The Administrator General of Bengal, 10 W. R. (P. C.) 155. And see Evans *v.* Trueman, 1 Moo. & Rob. 10; Navulshaw *v.* Browning, 2 De G., M. & G. 452. And a pledge by a factor after the revocation of his authority, is invalid: Fuertes *v.* Montis, 3 W. R. 52.

But where a merchant's clerk, having in his possession, in the course of his employment, certain dock warrants for the delivery of his master's goods, fraudulently pledged them as owner, it was held by the Court of Queen's Bench that the pledge was not protected by the Factors Act, because the pledgor had possession of the warrants, as the servant and not as the agent of the owner: Lamb *v.* Attenborough, 1 B. & S. 831 (101 E. C. L. R.).

As to the punishment of persons entrusted with the property of another for safe custody, selling, negotiating, transferring, pledging, or in any manner converting or appropriating such property or any part thereof to their own use with intent to defraud, see 20 & 21 Vict. c. 54; 24 & 25 Vict. c. 96.

In this country markets overt as they exist in England are unknown: Hosack *v.* Weaver, 1 Yeates 478; Hardy *v.* Metzger, 2 Id. 347; Leeky *v.* McDermott, 8 S. & R. 500; Roland *v.* Gundy, 1 Hammond 203; Wheelwright *v.* Depeyster, 1 Johns. 471; Dame *v.* Baldwin, 8 Mass. 518; Town

v. Collins, 14 Id. 499; Carmichael *v.* Buck, Richardson 332; Manly *v.* Culver, 20 Texas 143; Fawcett *v.* Osborn, 32 Ill. 411. The purchaser of a chattel, from one in possession, who had no title nor authority to sell, is responsible for the value to the true owner: Pool *v.* Adkisson, 1 Dana 110; Williams *v.* Merle, 11 Wend. 80; Wheelwright *v.* Depeyster, 1 Johns. 471; Heacock *v.* Walker, 1 Tyler 338; Andrew *v.* Dietrich, 14 Wend. 31; Bradeen *v.* Brooks, 9 Shepley 463; McMahon *v.* Sloan, 2 Jones 227; Carmichael *v.* Buck, 10 Richardson 332; Robinson *v.* Skipworth, 23 Ind. 311; Putnam *v.* Lamphier, 36 Cal. 151; Wilson *v.* Crocket, 43 Missouri 216. A sale by a bailee of property to an innocent purchaser without notice, confers no right of property: Chism *v.* Woods, Hardin 531; Lecky *v.* McDermott, 8 S. & R. 500; Kitchell *v.* Vanadar, 1 Blackf. 356; Wooster *v.* Sherwood, 25 N. Y. 278; Ballard *v.* Burgett, 40 N. Y. 314. A thief hired of a livery stable keeper a team, giving him a worthless draft as security for the return of the property, and for a valuable consideration sold it to A., an innocent purchaser. without notice of the thief's defect of title. Held that A. could not hold the team against the stable keeper: Dodd *v.* Arnold, 28 Texas 97.

A *bonâ fide* purchaser without notice from a fraudulent grantee is protected: Jackson *v.* Anderson, 4 Wend. 474; Buffington *v.* Gerrish, 15 Mass. 359; Seave *v.* Dingley, 4 Greene 306; Hoffman *v.* Noble, 6 Metc. 68; Danforth *v.* Dart, 4 Duer 101; Lewis *v* Palmer, Hill & Denio 68; Beavers *v.* Lane, 6 Duer 232; Arendale *v.* Morgan, 6 Sneed 703; Gosney *v.* Frost, 27 Ill. 53; Anderson *v.* Nicholas, 28 N Y. 600; Hutchinson *v.* Watkins, 17 Iowa 475; Hall *v.* Hicks, 21 Md. 406; Chicago Dock Company *v.* Foster, 48 Ill. 507; Craig *v.* Marsh, 2 Daly 61. The rule that a *bonâ fide* purchaser from a vendee acquires a title where the original sale was void for fraud, does not apply where there has been no delivery nor any part of the price paid, so that such purchaser's loss, if the owner recovers the goods, is only one of anticipated profits: Beavers *v* Lane, 6 Duer 232. A derivative purchaser without notice of a fraud, cannot be affected by a notice to his immediate vendor; and if he purchases with notice, he may protect himself by the want of notice in such vendor: Horton *v.* Smith, 8 Ala. 73. But see, Palmer *v.* Clark, 31 Georgia 351. Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry: Cooper *v.* Newman, 45 N. H. 339. The equitable owner of property cannot divest the title of a *bonâ fide* purchaser without notice, who has bought from an agent, to whom he has confided the legal title: Calais Company *v.* Van Pelt, 2 Black (S. C.) 372; Crocker *v.* Crocker, 31 N. Y. 507. Where a horse bought with counterfeit money was subsequently sold in the street of a city below the value of the animal, it is a question for the jury whether the

purchase was *bonâ fide:* Green *v.* Humphrey, 14 Wright 212. A person or consignee, who advances money on a consignment of goods from the fraudulent bailee, will also be protected: Hoffman *v.* Noble, 6 Metc. 68; Dows *v.* Rush, 28 Barb. 157; Western Transportation Company *v.* Marshall, 37 Id. 509; Williams *v.* Tilt, 36 N. Y. 319. So it has been held that an attaching creditor, who has trusted the fraudulent vendee upon the credit of the goods stands on the same ground: Thompson *v.* Rose, 16 Conn. 71; *contrà:* Field *v.* Stearns, 42 Verm. 106. So an assignee for benefit of creditors: Wickham *v.* Martin, 13 Gratt. 427. *Quære:* But not a pledge to secure preëxisting debts: Abbot *v.* Marshall, 48 Maine 44; though it is otherwise if taken in payment: Shufeldt *v.* Pease, 16 Wis. 659; Rice *v.* Cutler, 17 Id. 351; Butters *v.* Haughwout, 42 Illinois 9. Where chattels are sold and delivered conditionally, the vendor's right to the property remains good as against the vendee and his voluntary assignee, but not as against a *bonâ fide* purchaser without notice: Wait *v.* Green, 36 N. Y. 556. But see, Ballard *v.* Burgett, 40 N. Y. 314.

As to cases where the wrongful vendor has been intrusted with the *indicia* of ownership by the true owner: Bucklin *v.* Beals, 38 Verm. 653; Lewis *v.* Castleman, 27 Texas 407; McCauley *v.* Brown, 2 Daly 426. The purchaser of cattle from a tenant of a farm is put upon inquiry as to the ownership of property upon the landlord's lands: Johnson *v.* Willey, 46 N. H. 75; Bucklin *v.* Beals, 38 Verm. 653.

As to the title of a *bonâ fide* holder of negotiable paper see Byles on Bills, Chapter X., 5th American Edition and the American cases cited in the notes to that chapter. The holder of a negotiable note, *bonâ fide* for value, without notice, can recover upon it notwithstanding he took it under circumstances which ought to excite the suspicion of a prudent man. In order to destroy such holder's title, it must be shown that he took the note *malâ fide:* Gill *v.* Cubitt, 3 B. & C. 466, considered and held not to be law: Phelan *v.* Moss, 17 P. F. Smith 59.

*THE TWEE GEBROEDERS, Northolt, Master. [*735

Nov. 27, 1801.

[Reported 3 C. Rob. 336.]

Protection of Neutral Territory.]—*Territorial claim to protect capture, on the part of Prussia, held not to be established; vessel condemned.*

This was a case of considerable importance, as it respected the claim of a sovereign state for a right of territory over the spot where the capture in question was alleged to have taken place.

The case arose on the capture of vessels in the Groningen Watt, on a suggestion that they were bound from Hamburgh to Amsterdam, then under blockade; and a claim was given under the authority of the Prussian minister, averring the place in question to be within the territories of the King of Prussia.[1]

JUDGMENT.

Sir W. Scott.—This is the case of a ship and goods proceeded against for a breach of the blockade of Amsterdam; they are claimed as being taken on neutral territory; but it is denied, on the part of the captors, that they were *so* taken.

[1] The claim of the Prussian consul described the captured vessels to have been lying at anchor upon the Outhousen Watt, near Eems, close to the third beacon; and the capture to have been made 14th of July, 1799, by a boat from the ship "L'Espiègle," then lying in the Wester Balg, and also on the river Eems, and within the territories and dominions of his Prussian Majesty. The affidavit of the captors gave a different account of the situation of the capturing vessel.

On the blockade of Amsterdam this court has been inclined to hold generally, that all sea passages to Amsterdam by that great body of water, the Zuyder Zee, were blockaded, supposing those sea passages to be in the possession of the enemy: such as were *in the possession of neutrals, it was of opinion were not included, unless the blockading force could be applied at the interior extremity of their communication. Whether the present capture in question was made in a sea passage to the Zuyder Zee, belonging to the enemy or to a neutral power, will be decided by the considerations which are to be examined on the further pursuit of this question. 2dly. Supposing that question determined against the immunity of the place of capture, another question is proposed, whether the belligerent party having passed over neutral territory, *animo capiendi*, to the place where his rights have been exercised, those rights of capture so exercised are not thereby invalidated?

*736]

The capture is represented on both sides to have been made in the Watt, which runs along the coast of Groningen, by two or three of his Majesty's ships that went up the Eems. It is not, I think, contended, that the capturing ships were stationed on the neutral territory, unless the whole of the Watt passage is to be so considered. The precise place where the capturing ships lay is not very distinctly marked; but the balance of evidence inclines to establish, that they were on the other side a line of buoys which Captain M'Kenzie swears were considered as being on Dutch territory, and that he placed his ship as near as possible in the place where some Dutch armed vessels (which were driven away on his approach) were stationed. On the whole that is to be collected from the evidence, as to the exact spot, I am led to suppose that the ships were not stationed on neutral territory, unless the whole of the Watt passage is to be so considered.

It is scarcely necessary to observe, that a *claim of territory is of a most sacred nature.* In ordinary cases where the place of capture is admitted, it proves itself; the facts happen within acknowledged and notorious limits; no inquiry is either required or permitted. But otherwise, when it happens in places which the neutral country does not possess by any general principle, or by any acknowledged right; in such a case, it being contended by those who represent the belligerent state, that no right exists, and that therefore the capture is free and legal, it can never be deemed an act of disrespect on the part of the foreign tribunal, if it proceeds to inquire into the fact of territorial rights—certainly not with a view of deciding generally upon such rights, but merely with respect to this particular fact of capture—not for the purpose of shaking or invalidating such rights, but that it may enforce a *legal observance of them, if the facts on which they depend are competently established. [*737

Something has been said in argument of the reverence due to the assertion of princes whose claim is advanced; and this Court is disposed to pay the fullest measures of reverence which the case will allow. It is not improper to remark, that it is a question discussed much at length by foreign writers, on general law, in what cases the sole assertion of princes is to be taken as conclusive legal proof: and no principle is more universally established among them, than that the *mere assertion is not to be received as full and complete proof*, or as *Farrinacious* expresses it, "Assertioni principis non statur quando agitur de propria ipsius principis, vel de ejus commodo aut interesse;"[1] and, indeed, a contrary rule would carry the reverence due to these august personages to an extravagance that derided all reason and justice.

[1] Tunc enim illius assertioni minimè standum esse scripserunt Gabr. etc. et Aym. ubi exemplificat in principe asserente castrum ad se pertinere. L. 2 tit. 6 Quest. 63 n. 173.

Strictly speaking, the nature of the claim brought forward on this occasion, is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different states: the law of rivers flowing entirely through the provinces of one state is perfectly clear. In the sea, out of the reach of cannon shot, universal use is presumed. In rivers flowing through conterminous states, a common use to the different states is presumed. Yet in both of these, there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states; the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.

The usual manner of establishing such a claim is either by the express recorded acknowledgment of the conterminous states, or by an ancient exercise of executive jurisdic-
*738] tion, founded presumptively *on an admission of prior settlement, or of subsequent cession. One hardly sees a third species of evidence, unless it be, what this case professes to exhibit, the decision of some common superior in the case of a contested river. The sea admits of no common sovereign; but it may happen that conterminous states, through which a river flows, may acknowledge a common paramount sovereign, who, in virtue of his political relation to them, may be qualified to appropriate exclusively and authoritatively, the rights of territory over such a river, to one or other of them.

It will be proper for me to consider, first, the natural quality and position of this place. It is the Watt passage, running along the Dutch coast of Groningen, and called the Groningen Watt to the Lower Zee. Some ancient history, traditional or other, has been alluded to indistinctly and without particular reference, as representing this Watt, with the neighboring shoals, sands, and islands, to have formerly made part of the continent. If so, it must have formed part of Groningen,—and if ever a part of Groningen, it is obvious that it was most unlikely to have been ceded. It must have been the whole substance and line of the external coast; the very last thing that would have been parted with to a neighbor, the very party with whom alone it was to be expected that frequent occasions of competition and quarrel would arise.

Supposing such an avulsion ever to have taken place, I must still apply to the present remaining coast the title of *external coast;* for it appears difficult to accede to the propriety of a phrase repeatedly used in this discussion, calling this the *interior of Germany*. How is it to be considered as interior? It is quite open and patent to the sea; there are no headlands that shoot beyond, so as to make what are called *chambers;* no shores projecting extra. There are some islands beyond; one of which, Rottum, lies at a considerable distance, and rather at the eastern extremity, and is admitted, by these papers, to belong to *Groningen*, the *Dutch province*. So that if the certain legal effect of an island lying out at sea, could be to appropriate to the main land all the intermediate waters, these must belong to Groningen; with East Friesland, speaking physically, they can have nothing to do. They can be connected only politically, by some title of acquisition or conquest, of which no proof is or can be shown; or by the grant of a common superior, or by exercise of ancient jurisdiction, implying some one or more of these titles.

*739] *It is necessary for me to notice here another phrase which has been used, "that all this is *river* and not *sea*." That it is not quite so, is indisputably clear; it is true there are two passages which, during the reflux of the sea, carry down the river title of Eems a great way from the main land; and for the convenience of navigation they are indicated by buoys: but surely it might be questioned, without impropriety, supposing no decided understanding in this particular case, how far such streams, beyond all capes and headlands, are *at all times* of the flow of the ocean to be deemed mere *river*. In common understanding, the *embouchure*, or mouth of a river, is that spot where the river enters the open space to which the sea flows, and where the points of the coast project no further. There may be shoals and sands beyond; as on the coast of this kingdom, the *Goodwin Sands;* and buoys may be placed, and they may be distinguished from the sea at low water; but what are these when the tide flows up, or at half-tide one way or the other? undistinguishably parts of the ocean—*undique pontas*. I will not venture to lay down anything more positively on this matter, than that the nature of such sea passages must be held to be, *divisi imperii*, between the ocean and the main land; and when the sea flows for navigation, they should rather seem to belong to the former than the latter. It is the less necessary to be precise on this point, because the capture in question did not happen in these streams, the Eastern or Western Eems, but in the Watt; and supposing that these two passages were at all times *rivers*, and mere rivers, how does it follow that all the water with which they communicate are not only river, but parts of those rivers? They seem, certainly, not to be so considered by the neighboring states. Do they carry with them the name of Eems? By no means. They have a denomination of their own. In the chart which has been exhibited, and is referred to on both sides, though not introduced by authority, how is the

bank of land described? The *new Zee dyke*, not the *river dyke*, which it ought to be, if the portion of waters was considered a river and not a sea; how is the portion of waters at the other end of it to be denominated? the lower Zee. What do the witnesses say? It is stated in one affidavit, that Groningen extends as far as a man standing on the coast can throw a horseshoe. So the other witness uses the same expression, "*standing on the coast*," a word very strangely applied to a river, but the proper word *applied to the sea. Where is the horseshoe to be thrown? Into the *sea*, not into the *river*, as they all express themselves. [*740

Conformable to this representation, are the terms in which the extreme shore is described, "*buyten land*"—*the without, or utmost land*—that point which has no headland beyond it. I observe, too, that at particular times of the tide, the Watt passage is totally dry. The British captors walked over the sand to take possession of the ships, which were at that time lying on land, but they were compelled to retire by the reflux of the sea. It is then at high water to be taken as part of the sea, but at low water as part of the land. But of what land? of the land to which it is connected physically—the land of Groningen. It would be strange, indeed, that the jurisdiction of another country, separated by water, should extend beyond that water, over a space connected with the main land, and at times making an actual part of it.

But leaving this out of the case, on what grounds is the Watt to be considered as part of the Eems, which runs at one end of it, *at some states* of the tides; rather than as part of the sea, which *at all times* runs at the other end? Admitting that the two passages were at all times to be deemed the river Eems, how follows it that all sea passages communicating with it are to be deemed not only river, but parts of that river? On the mere physical circumstances,

it is not too much to say, that the claim is against all special as well as all general presumption; upon all visible circumstances it must be taken not as part of East Friesland, but either as part of the general sea or of the land of Groningen.

Does the history support the claim better than the geography? History supplies no proof of original occupancy or subsequent cession; as far as remote historical tradition goes, it seems to appropriate it to Groningen, and to speak of it as a part or parcel of that land, from which it has been since withdrawn by the irruption of the sea. But there is evidence of an historical nature offered of two kinds: 1st, there is an asserted grant of the Emperor, as a common sovereign, in 1454; and 2d, the exercise of dominion. On the grant two things are to be ascertained: 1st, the authority; and 2d, the effect. It would ill become this Court to question the extent of imperial rights; but it is not too much to say that the carving out a common river, even in the interior of Germany, into private and exclusive possession, is a very high act of prerogative; and it is not shown by any German *741] *jurist of authority that the relation which the Emperor, as head of that *feudal* confederacy, bears to its members, and which has been very different at different periods, did at any time, or particularly at the time in question, invest him with any such prerogative. Suppose this case, that an imperial grant did in the most express terms declare that one of the maritime provinces of the empire should not have its natural extent of sea-jurisdiction, but that another province should possess it, and should confine and beard up its neighbor to the narrow extent within which a man can throw a horseshoe or a ploughshare from the shore! No one can say that a foreign Court might not, without any immodesty or irreverence, desire some information respecting the constitutional validity of such a grant,—a grant which opposes all common principles, and which, coming from the general protector of the empire, deprives

one province of its natural amplitude and means of defence, and exposes it to constant uneasiness and irritation from another province; and all this, without any assigned reason, —a grant which represents the whole German empire (a free constitution as it fundamentally is) subject to as capricious a state of dependence on its chief as can possibly be described.

But, 2dly, no such injustice is imputable to the grant; for construing it, as I am compelled to do for the present purpose, I can attribute it to no such intended effect. What is it? It is truly described by the Prussian minister, Baron Jacobi, "*as conferring on Count Ulric the feudal investiture of East Friesland.*" It grants East Friesland in its full integrity, and no more; it enlarges no rights; it abridges no rights of another province; it grants nothing to the territory; it is a mere personal grant of that territory to the individual and his heirs. This is the general purview of the grant. What does it convey? *from the western Eems*—not inclusively: without any reference to established usage the terms could hardly be understood to inure to a grant of the western Eems itself; because it is not the natural construction of the words. And secondly, because it interferes with the national right of the conterminous province; for nobody denies that Ruttum belongs to Groningen, and that Borcum is the last Prussian island. It gives the river Eems and all other "*streams, rivers, and rivulets,*" as if depository of river navigations; but, whether it be or not, it is expressly qualified by the *reserve* "*of rights appertaining to East Friesland;*" so that it leaves everything on the footing of pre-existing rights, adding or diminishing nothing. This seems to *be admitted by the persons authorizing the claim, [*742 and alleging this grant in support of it; for it is said on their part, *that the grant is to receive its construction from the later usage*, which usage is to be taken as evidence of the pre-existing right.

That being the case, there being no evidence of acquisition, no proof of cession, and no direct authority to be derived from the terms of the grant, the whole question is again reduced to usage. If that is proved, it is certainly evidence of the most favored kind. All men have a common interest in maintaining the sanctity of ancient possession, however acquired; ancient landmarks and ancient seamarks are *res sacerrimæ*, and whoever moves them *piaculum esto*. Then what is the natural evidence to be expected of ancient and constant usage? And how much of this has been produced? How is ancient jurisdiction proved on such a subject? By formal acts of authority, by holding courts of conservancy of the navigation, by ceremonious processions to ascertain the boundaries in the nature of perambulation, by marked distinctions in maps and charts prepared under public inspection and control, by levying of tolls, by exclusive fisheries, by permanent and visible emblems of power there established, by the appointment of officers specially designated to that station, by stationary guardships, by records and muniments, showing that the right has always been asserted, and whenever resisted, asserted with effect. This is the natural evidence to be looked for generally; and such as it is more particularly reasonable to require, where a right is claimed against all general principles, and also against the national rights and limits, and, indeed, against the independence and security of neighboring states.

How much of this evidence is produced? A map or chart is produced, not published by authority, but adopted by authority; in which there is no distinction whatever made that applies to the support of this claim. Upon that map a person is examined at Emden, who puts a mark or distinction of his own as the limits of what he conceives to be the extremity of the Prussian territory. He proceeds to mention what is the only important fact in the case, on that side of the question; "that thirty-seven years ago he was em-

ployed in fixing buoys and beacons, and that whenever he or his fellows fixed them beyond that point, the Dutch took them up, and threw them away, considering them as signs of authority and jurisdiction." This cannot undoubtedly be considered as of little or no weight; but that it should be conclusive, *cannot be maintained. One observation [*743 immediately arises on it, that if this man and his fellows did fix these buoys beyond these limits, *they* at that time either did not perfectly comprehend the meaning of the buoys, or the exact limits of the territory; because, if they considered them as indications of territory, how came they to place them beyond what are now assigned as the just limits, if these were recognised limits? This witness is confirmed by three other persons, shipmasters of Emden and Papenberg, with respect to their belief and understanding of the matter; but without referring to any particular fact as the ground of their opinion. They only say, "that they understand the buoys and beacons at each extremity were marks of sovereignty:" but no beacons whatever appear to be marked in this chart, as in the Watt passage. And how is it possible that the court can hold the buoys and beacons to be marks of sovereignty, when it appears that the city of Emden maintains establishments of that kind in the Island of Rottum, which is admitted to be a Dutch island belonging to Groningen? Indeed, the laying down buoys and beacons is not in its nature to be considered as a necessary indication of territory, nor is it so understood by foreign writers.[1] The laying them down may be a *servitus* and a burden, or it may be neither; it may be only, that this is a navigation in which the city of Emden is much interested, and the Dutch comparatively

[1] "Iste autem modus vasa in flumine prominentia habendi, quod in transcursu notandum, non semper arguit dominium in mari aut flumine publico; cum etiam ab illis qui dominium tale non vendicant, usurpari soleat, in securitatem navigationis, et libertatem commerciorum, illis in tali loco concessam."—Loccenius, De Jure Maritimo, L. 2, ch. 1.

little; and therefore are content to leave the care and expense of it upon their neighbors. The claim relies on these *as proofs of sovereignty;* perhaps the evidence is rather to show it to be more directly a corporation right of the city of Emden; which of course would belong to the Count of East Friesland, the sovereign of that city. I do not mean to lay stress on this observation, any further than that if it is in any degree of that nature, it may somewhat enervate the evidence of the persons connected with that place; since the practice of the civil and imperial law holds principles very similar to those of our own municipal law, on the credit of testimony in such cases; and, on this particular question, the exceptions stated by Farinacius might not unfairly be objected against the Emden witness (if it were necessary to urge them), in a matter which *concerned the right and jurisdiction of his own city. *744]

"Limita, ut nec testes de universitate, ad favorem universitatis admittantur, quando esset magno affectio ob annexum commodum, ut puta quia ageretur de magno honore, vel de aliqua jurisdictione, aut etiam pro statu ipsius universitatis." And again:—"Si testis de universitate admittatur ad testificadum pro suâ universitate, non est omni exceptione major, nec integræ fidei:" L. 2. t. 6; Qu. 60 n. 522–536.

Then, with respect to the custom on which the claim is to be sustained, what is the evidence that is required of it? It is laid down by Gail, an imperial writer of credit on this subject,[1] and by many other writers of the best authority,

[1] Those who have any curiosity to inquire into the rules and practice of the imperial law, and the reasonings of the civil law writers on this subject will find them treated of by Gail, lib. 2. ch. 3, De Consuetudine et Requisitis. Some of his positions are: "Quod at frequentiam actuum, communis est opinio duos actu cum lapsu temporis sufficere ad introducendam consuetudinem, hoc tamen moderamine, ut procedat, quando boni illi actus ita sunt notorii, ut verisimiliter in populi notitiam veniant; alias actus duo non sufficerent, sed tot requiruntur ut ex iis tacitus populi consensus colligi possit. Sed quid de actibus extrajudicialibus? Breviter, communis opinio tenet non solum actus judiciales sed etiam extrajudiciales sufficere, dummodo tales sint actus ut ex iis de tacito populi con-

that there must be at least two witnesses to prove a custom; and that they must assign acts done as the ground of their belief. It is indeed, doubted by them whether mere extra-judicial acts do afford sufficient evidence; they incline to think, however, that they do; but the whole course of their reasoning on the nature of the evidence to be admitted, is very similar to our own municipal rules on this subject, which seem derived from the same sources.

As to all other evidence in this case, except the testimony of one person, speaking to the fact of his being employed to lay down buoys and of having had a scuffle with some Dutch persons as to the position of them, and excepting the depositions of two *others speaking *to their belief only* without assigning any reason of fact, there is a [*745 total silence; there are no tolls but for the Barcum light-house; no water-bailiff, no court-rolls of any water jurisdiction, nothing in the nature of perambulation, no stationary officers or guardships. But on the contrary, there is a most material fact arising, that the Dutch not only had guard-ships in the Groningen Watt, but that they exercised actual hostilities there; certainly this exercise of hostility is not conclusive evidence that the place where this happened was not Prussian territory; because it might be an irregularity on the part of the Dutch, and the subject of complaint on the part of Prussia; but as far as it appears in this evidence, it stands a naked fact; it does not appear to have been com-

sensu constare possit. Modo ad praxim veniamus, qui super consuetudine intentionem suam fundat, is eam probare debet, quia consuetudo facti est, et facta non præsumuntur nisi probentur, et probare eam debet cum suis requisitis, alias succumbet. Proinde testes ad probandam consuetudinem producti, de hujusmodi requisitis cum ratione scientiæ deponere debent; quia non sufficit talem extare consuetudinem, sed necesse est dare rationem scientiæ, ut puta quia viderunt ita observari in similibus casibus et actibus, idque frequenter, et longo tempore, publicè, præsentibus et scientibus multis personis, adeo quod inde appareat intercessisse consensum populi. Præterea testes in tempore et actuum identitate conveniri debent; alias si de diversis actibus deponerent, tamquam singulares, fidem non facerent."

plained of as an irregularity or encroachment on the Prussian territory, and therefore it is not to be presumed by this court that it is so to be considered.

On this evidence then, it is impossible for me to pronounce, that these captures are invalidated by being actually made on Prussian territory. There remains the other question, whether they are not vitiated by the capturing ship having passed over neutral territory to accomplish the capture? as it is alleged they passed up the Western Eems, and that the whole of that is Prussian territory. I have already intimated some doubts that might possibly be entertained upon the present evidence, whether the Western Eems is to be deemed at all times and in all parts of it clearly Prussian territory; but supposing it to be so, is it a violation of territory to have committed an act of capture after having passed over this territory to effect it? On this point there are some observations of law, and some of fact, that appear not unworthy of notice: In the first place, the place of capture is accessible by other passages, not asserted to be neutral; it is not alleged that a hostile force might not have reached these ships by another route, through the Lower Zee, or other communications: it is not to be said that they were so enclosed and protected on all sides by neutral territory, that you could not approach them without passing over it. In the next place, it is not the case of an internal passage into the heart of the country, into the Homegat, if I may adopt their own term; it is a passage over an external portion of water, which you may prescribe for as territory, but not as inland river, or as part of the internal territory; it is not an entrance of an armed force up an *746] *inward passage, to reach an enemy lying in the interior of the land. Thirdly, it is an observation of law, that the passage of ships over territorial portions of the sea, or external water, is a thing less guarded than the passage of armies over land, and for obvious reasons. An army,

in the strictest state of discipline, can hardly pass into a country without great inconvenience to the inhabitants; roads are broken up; the price of provisions is raised; the sick are quartered on individuals, and a general uneasiness and terror is excited; but the passage of two or three vessels, or of a fleet over external waters, may be neither felt nor perceived. For this reason, the act of inoffensively passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state—permission is not usually required; such waters are considered as the common thoroughfare of nations, though they may be so far territory, as that any actual exercise of hostility is prohibited therein. Fourthly, it is to be observed, that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission. Grotius and Vattel both agree[1] that it is no ground of complaint, nor cause of war against the intermediate neutral state, if it grants passage to the troops of a belligerent, though inconvenience may ensue to the state beyond; the ground of the right of refusal being the inconvenience that such passages bring with them to the neutral state itself. This being the general state of the fact and of the law, it would be a proposition which could not be maintained in a full universal extent, that the passing over

[1] "On est aussi tenu de laisser passer librement par les terres, les fleuves et les endroits de la mer qui puevent nous appartenir, ceux qui veulent aller ailleurs pour des justes causes; ou s'ils vont trafiquer avec un peuple éloigné, ou s'ils ont enterpris une guerre juste."—Grot. l. ii. c. 2, s. 13. "A toutes les nations ce devoir s'étend, aux troupes comme aux particuliers; mais c'est au maître du territoire de juger si le passage est innocent, et il est très-difficile que celui d'une armée le soit entièrement; le seul danger q'il y a à recevoir chez soi une armée puissante, peut autoriser à lui refuser l'entrée du pays."—Vatt. l. iii. c. 7, s. 119–123. Grotius does not allow the right of refusal on this ground, but points out the precautions to which the intermediate state may resort: "En faisant passage, les troupes, par petites bandes séparées, ou sans armes, ou lui demander otages."

water, claimed as neutral territory, would vitiate any ulterior capture made on a third party. Suppose the case of a war between England and Russia, and that the *Sound *747] was the pass in question, over which Denmark claims and exercises imperial rights, on stronger grounds than can be maintained in support of this claim; or suppose a war between France and Russia, and the Dardanelles to be the pass in question; or suppose any two powers exercising hostilities in the Mediterranean, after having passed through the Straits of Gibraltar, occupied by an English fortress on one side, and by Tangier on the other, formerly in possession of this country; could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations? Where a free passage is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an unpermitted passage, over territory where permission is regularly requested; or a passage under a permission obtained on false representation and suggestions of the purpose designed. In either of these cases there might be an original misfeasance and trespass, that travelled throughout and contaminated the whole; but if nothing of this sort can be objected, I am of opinion, that a capture, otherwise legal, is in no degree affected by a passage over territory, in itself otherwise legal and permitted.

Having before said that this act of capture was not exercised on neutral territory, as far as I am enabled to judge by the present evidence, I must pronounce that no sufficient objections are shown against the validity of these captures; and that the ships must be adjudged lawful prize to the captors, being bound to Amsterdam in breach of the blockade.

No proposition is better established than that a belligerent is forbidden, by the principles of international law, to exercise hostilities within the territorial jurisdiction of a neutral state. Thus, although it is doubtless a general rule in maritime warfare (save when modified by treaty or convention), that a belligerent has a right to seize property which belongs to the enemy, or which is *of a hostile character, wherever it is found, an exception to that rule [*748 has been long since established in the protection against capture afforded by a neutral territory. See Vrow Anna Catherina, Mahts, 5 C. Rob. 15, 16. If a capture be really made within neutral territory, it is a nullity, and the property must be restored, notwithstanding that it may actually belong to the enemy. And if the captor should appear to have acted wilfully, and not merely through ignorance, he will be subject to further punishment: Id.

The law upon the subject is clear, but difficulties often arise, as in the principal case, in determining the limits of the neutral territory, and whether the capture or other hostile act took place within it.

As is laid down in the principal case, the territory of country at sea extends about three miles from the shore, as that has been considered to be out of the reach of cannon-shot; the rule being founded upon the well-known maxim, "terræ dominium finitur, ubi finitur armorum vis:" The Anna, La Porte, 3 C. Rob. 385 c. Any capture then made at sea within three miles from the coast of a neutral country will be clearly illegal.

When this rule was laid down, three miles seems to have been the extreme limit of the range of warlike projectiles: it has since been greatly increased. On principle, therefore, it would seem to follow that there should be a proportionate extension of the neutral territory at sea. In other words, if a cannon of improved construction can throw a ball or shell five miles from the shore, the neutral territory and the protection which it affords should be extended at sea to the same distance from the shore.

Where the exact measurement cannot easily be obtained, the Court will not willingly act with an unfavorable minuteness towards a neutral state, but will be disposed to calculate the distance very liberally (The Twee Gebroeders, Alberts, 3 C. Rob. 163), and will take into consideration other circumstances favorable to the claim of the territory on which the capture was effected being neutral;

as, for instance, when the place in question is a sand covered with water only on the flow of the tide, and immediately connected with the land of the neutral territory, so as when dry to be considered as making part of it: Id.

The right of territory will be reckoned from islands which are appendages of the coast, and not merely from the mainland. Thus, in the case of The Anna, La Porte, 5 C. Rob. 373, it appeared that there were a number of little mud islands composed of earth and trees drifted down by the river Mississippi, and which formed a kind of portico to the mainland. The capture in question took place within three miles of these islands, but beyond that distance from the mainland. It was contended that such islands were not to be *749] considered as any part of the territory *of America; that they were a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds'-nests. It was also argued that the line of territory was to be taken only from the Balise—a fort raised on made land by the former Spanish possessors. Lord Stowell, however, held that the protection of territory was to be reckoned from those islands. "They are," he observed, "the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet (Inst. Lib. ii. Tit. 1, § 21), even if it had been carried over to an adjoining territory. Consider what the consequences would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion,

for the right of dominion does not depend upon the texture of the soil.

The maritime territory of every state, moreover, extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands, belonging to the same state: Wheaton, Internat. Law, s. 177, 8th ed.

The exclusive territorial jurisdiction of the British Crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the King's Chambers; that is, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbors of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, *would be restored by the Court of Admiralty, if made within the King's Chambers. So, also, the British "Hovering Act," passed in 1736 (9 Geo. II. cap. 35), assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance, without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usages of nations: Id. 179; and see Life and Works of Sir Leoline Jenkins, vol. ii. pp. 727, 728, 780. [*750

Again, the straits and sounds, bounded on both sides by the territory of the same state, and so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, will by the usages of international law be considered as belonging to the maritime territory of such state: Id. ss. 181, 188, 190.

In the sea out of cannon-shot, as is laid down in the principal case, universal use is presumed, though by legal possibility this presumption may be rebutted by proof of the existence of a peculiar property excluding the universal or common use: *ante*, p. 737.

Inland lakes and seas entirely enclosed within the limits of a state, are considered part of its territory: Wheaton, Internat. Law, 182, 8th ed.

With regard to rivers, where the land on both banks belongs to the same state, they clearly form part of its territory, from their sources to their mouths, including the bays or estuaries formed by their junction with the sea: Id. s. 192; and see The Anna, La Porte, 5 C. Rob. 385.

In rivers flowing through conterminous states, as is laid down in the principal case, a common use to the different states is presumed: *ante*, p. 737. The boundary, however, between the two states being the *medium filum*, or the middle of the channel: Wheaton, Internat. Law, s. 192, 8th ed.

This common use may, however, be rebutted by proof of a peculiar property. "The banks on one side," observed by Sir William Scott in the principal case, "may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events:" *ante*, p. 737.

The proof, however, of this peculiar property must be clear, for, adds the learned judge, "the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence:" *ante*, p. 737.

Having briefly noticed what will be considered as coming within
*751] the maritime territory of a state, *we may again observe that any capture on the part of a belligerent effected at a place clearly *within* the limits of such territory will be illegal.

Moreover, a capture made by the commander of a vessel stationed within neutral limits, of another vessel lying beyond its limits, will be invalid. Thus, where an English ship of war lying in the Eastern Eems, a neutral territory belonging to Prussia, sent out armed boats by which she captured certain Dutch ships beyond the limits of such territory, it was held by Sir William Scott that the capture could not be maintained, and accordingly he directed the vessels to be restored. "It is said," observed the learned judge, "that the ship was in all respects observant of the peace of the neutral territory; that nothing was done by her which could

affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed was applied to the captured vessel *lying out* of the territory. But that is a doctrine that goes a great deal too far; I am of opinion that no use of a neutral territory, for the purposes of war, is to be permitted; I do not say *remote* uses, such as procuring provisions and refreshments, and acts of that nature which the law of nations universally tolerates; but that no *proximate* acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on a neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted: for, suppose that even *a direct hostile use* should be required to bring it within the prohibition of the law of nations, nobody will say that the act of sending out boats to effect a capture, is not itself an act directly hostile,—not complete, indeed, but inchoate and clothed with all the character of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated nor received on neutral ground; but no one would say that such an act would not be a hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles' distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat that is sent out on such an errand of force.

"If it were necessary, therefore, to prove that a *direct* and *immediate* *act of hostility had been committed, I should be disposed to hold that it was sufficiently made out by the facts of this case. But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility. In the same manner, an act of hostility is [*752

not to take its commencement on neutral ground. It is not sufficient to say it is not *completed* there—you are not to take any measure there that shall lead to immediate violence; you are not to avail yourself of a station on a neutral territory, making, as it were, a vantage ground of the neutral country—a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage. Many instances have occurred in which such an irregular use of a neutral country has been warmly resented, and some during the present war; the practice which has been tolerated in the Northern States of Europe, of permitting French privateers to make stations of their ports and to sally out to capture British vessels in that neighborhood, is of that number; and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war:" Twee Gebroeders, Alberts, 3 C. Rob. 162.

In a subsequent case Sir William Scott said, "Captors must understand that they are not to station themselves in the mouth of a neutral river for the purpose of exercising the rights of war from that river, much less in the very river itself. . . . The captors appear by their own description to *have been standing off and on*, obtaining information at the Balize, overhauling vessels in their course down the river (Mississippi), and making the river as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the states of America are called upon to resist, and which the Court of Admiralty is bound on every principle to discourage and correct:" The Anna, La Porte, 5 C. Rob. 385, e.

But, although the practice of making a neutral harbor an habitual station for captures was strongly reprobated by Sir William Scott, he has nevertheless laid it down as his opinion that "if whilst a privateer is *accidentally* lying in a neutral harbor she sees an enemy approaching, she may go out and capture, without any violation

*of the peace or immunity of the neutral port, provided that be done beyond the limits of the port:" Vrow Anna Catherina, Mahts, 5 C. Rob. 15, 18. [*753

It has been contended that the act of capture is to be carried to the commencement of the pursuit, and that if a contest begins before it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state. And Bynkershoek has been cited as an authority upon this point, who after a discussion of some length, with some qualifications, arrived at this result:—"Uno verbo, territorium communis amici valet ad prohibendam vim quæ ibi inchoatur, non valet ad inhibendam, quæ extra territorium inchoata, dum fervet opus, in ipso territorio continuatur:" Qu. Jur. Pub. p. 66. In the Anna, La Porte, 5 C. Rob. 373, 385, where the capture of the vessel after a chase had been effected at the mouth of the river Mississippi, Sir W. Scott, in reference to the authority of Bynkershoek upon this point, observes, "True it is that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without injury or annoyance to any person whatever, quietly taken posession of his prey, it would be stretching the point too hardly against the captor to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful."

It was decided in the principal case that where a free passage over a portion of the sea is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if a party after an inoffensive passage over the water, conducted in the usual manner, begins an act of hostility and effects a capture, beyond the neutral territory. "Suppose," said the learned judge, "the case of a war between England and Russia, and that the sound were the pass in question, over which

Denmark claims and exercises imperial rights on stronger grounds than can be maintained in support of this claim; or suppose a war between France and Russia, and the Dardanelles to be the pass in question; or suppose any two powers exercising hostilities in the Mediterranean, after having passed through the straits of Gibraltar, occupied by an English fortress on the one side, and by Tangier on
*754] the other, *formerly in possession of this country; could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations:" *ante*, p. 633. The capture, however, might be invalidated by an unpermitted passage over territory where permission is regularly requested, or a passage under a permission obtained on false representation, and suggestions of the purpose designed: Id. 634.

A claim for the restitution of property, captured by a belligerent from the enemy, upon the suggestion that the capture was effected within the limits of neutral territory, cannot be set up by an individual claimant as the owner of the property, but it must proceed from the government, whose territory is asserted to have been violated: Etrusco, 3 C. Rob. 162, n.; and see La Purissima Conception, 6 C. Rob. 45, 47; The Diligentia, 1 Dods. 413; The Eliza Ann and others, 1 Dods. 245.

But in order to give effect to a claim of this kind, it must be shown that the party making it was then in a state of clear and indisputable neutrality. If he has shown more favor to one side than to the other, if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. A country showing such an invidious distinction is not entitled to claim in the character of a neutral state. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists: The Eliza Ann, 1 Dods. Adm. Rep. 244, 245.

Where the capture has been made when the situation of the vessel captured was too dubious to affect the parties with any intentional violation of neutral rights, or has arisen from misapprehension and mistake, the restitution will be ordered without making the captors pay costs or damages: The Twee Gebroeders, Alberts, 3 C. Rob. 162, 166. Where, however, there has been a clear violation of

neutral territory, and *à fortiori*, if there has been misconduct on the part of the captors, as by their making the seizure without sufficient grounds, or bringing the prize to England when they might have obtained an adjudication at a Court nearer the scene of action, the captors will be decreed to pay costs and damages: Id.; The Anna, La Porte, 5 C. Rob. 373, 385, h.

In certain cases, where the neutral state does not obtain redress for a capture effected by one of the belligerents within its territory, it may be bound to make compensation to the other belligerent whose property has been so captured.

It has, however, been recently assumed or laid down that the neutral state will be released from all responsibility on account of *any capture which takes place within its territory, where [*755 the commander of the captured vessel has resort to force, without in the first instance demanding the protection of the neutral state. Thus, in a valuable note to Wheaton's International Law, p. 493, 6th ed., it is said that "a case of violation of neutral territory occurred in the destruction, in the harbor of Fayal, in September, 1814, of the American privateer 'General Armstrong,' by an English squadron. Reclamations, founded on it, were made against the government of Portugal, which were, by the 2d Article of the Treaty of 26th February, 1851 (Treaties of the United States, 1854, p. 22), agreed to be submitted to the arbitration of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties. Under this provision Louis Napoleon, the President of the French Republic, was selected as arbitrator. There is some discrepancy between the American statement and the summary of facts on which the award proceeds. The Prince President, however, in pronouncing that no indemnity was due from Portugal, does not deny the responsibility of a neutral to make compensation to a belligerent, whose property has been captured or destroyed within the jurisdictional limits by the opposing belligerent; but he bases his decision on the assumed fact that the American commander had not applied from the beginning for the intervention of the neutral sovereign; that by having recourse to arms, to repel an unjust aggression of which he pretended to be the object, he had himself failed to respect the neutrality of the territory of the foreign sovereign, and had thereby released that sovereign from the obligation to afford him protection by any other means than that of

pacific intervention; and that the Portuguese government could not be held responsible for the result of the collision which took place, in contempt of its rights of sovereignty, and in violation of the neutrality of its territory, and without the local officers being required, in proper time, to grant the necessary aid and protection." See Cong. Doc. 32; Cong. 1st Session H. Rep. Ex. Doc. No. 53; 32 Cong. 2 Sess. Senate Ex. Doc. No. 24.

Although, as we have before seen, no captures can be made within neutral territories, it is laid down by an able author "that there is no authority in neutral states to release the goods or vessels of a friend when they are brought to her ports by that friend's antagonist in war. And that it is the duty of neutrals to abstain from all interference whatever, except in those cases where special treaty intervenes. And in these latter cases a deviation from the strict principle of equal treatment is allowed without an abandonment of neutrality: Maning's Law of Nations 387.

Formerly, by the regulations of most states, captors were not al-
*756] lowed to take their prizes into *any ports but those of their own states: Id. But many special treaties are mentioned by Manning, in which the common rule of non-interference is altered: Id. p. 388.

It is of course competent to neutrals to forbid the belligerents carrying prizes into their ports. And this was done by the governments of Great Britain, France, and Spain, at the commencement of hostilities between the Northern and Southern portions of the United States: Kent's International Law, by Abdy, p. 337.

In order to prevent hostilities between belligerents resorting to the same neutral port, it has been usual with many neutral States to issue regulations that when a ship belonging to one of the belligerents has left a neutral port, no vessel belonging to the other belligerent shall be allowed to leave that port till after an interval of twenty-four hours: Manning's Law of Nations 386.

For the general principles as to the violation of neutral territory see Wheaton's International Law, p. 491. The right of war can only be exercised by a nation on its own territory, or that of an enemy, or in one which is vacant; neutral ground cannot be trespassed upon: The People *v.*

McLeod, 1 Hill 377. If a ship or cargo is enemy's property, or either is otherwise liable to condemnation, the circumstance that the vessel at the time of the capture was in neutral waters, will not of itself avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territories had suffered trespass, for apology or indemnity. But neither an enemy, or neutral acting the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters: The Sir William Peel, 5 Wallace (S. C.) 517; The Adela, 6 Id. 266.

*757] *THE MARIA, PAULSEN, MASTER.[1]

June 11, 1799.

[REPORTED 1 C. ROB. 340.]

RIGHT OF VISITATION AND SEARCH.]—*A vessel sailing under convoy of an armed ship, for the purpose of resisting visitation and search, condemned.*

THIS was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals and iron, to several ports of France, Portugal and the Mediterranean, and taken, January, 1798, *sailing under a convoy of a ship of war*, and proceeded against for resistance of visitation and search by British cruisers.

In December, 1797, this case coming on to be argued on the original evidence, the Court directed further information to be given by both parties, respecting the precise acts that took place at the time of capture, the instructions under which the conveyed ships were sailing, and also the instructions to the Swedish frigate.

On a subsequent day, this information being procured, it was argued at much length.

On the part of the captors, the *King's Advocate* and *Arnold*, in substance, contended, if the case of the ship and cargo were to be considered singly, and separated from the principal question of convoy, there are many circumstances attending it of a very noxious aspect. It was going on an

[1] Affirmed on appeal, July 2d, 1802.

asserted destination to Genoa, at a time when that port was become almost a hostile port, by its subserviency to all the purposes of the French marine, whilst our ships and cruisers were absolutely excluded. It was going under the certificate of the French consul, in compliance with the unjust decree of the French government,[1] and the articles of *which the cargo consisted were articles of a contraband nature. It is true they are such articles as the [*758 Swedes are now permitted to carry in time of war, under certain circumstances, but only under a strict observance of good faith, a conduct perfectly neutral, and in all cases subject to a right of pre-emption on the part of a belligerent nation. And farther, the truth of this asserted destination to Genoa is exposed to great suspicion from the discretionary power with which the master was entrusted, of going elsewhere.

These are circumstances unfavorable in themselves; but they assume a more distinct hostile character from the circumstance of being taken sailing under the protection of an armed force, and associated for the purpose of resisting visitation and search from the cruisers of this country. The act of resistance to the lawful rights of search, is the ground on which it is principally contended that this case is subject to confiscation. For although this fact may receive color and complexion of a more hostile nature from other circumstances, it is alone sufficient to incur the penalty of confiscation. The right of visitation and search in time of war,

[1] Decree 18th January, 1797:—"L'état des navires en ce qui concerne leur qualité de neutre ou d'ennemi sera déterminé par leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre ou de ses possessions, sera déclaré de bonne prise, quel que soit le propriétaire de ces denrées ou marchandises." See Atcheson's Report of a case in the King's Bench, Appendix, page 155, where the reader will see the late regulations of the French government in matters of prizes.

In consequence of this decree, all neutrals were required to take a certificate from the French consuls, that their goods were not of British produce or manufacture.

even in the most innoxious cases, is an established right of belligerent powers, acknowledged and referred to in the treaties of the states of Europe. It is admitted by all speculative writers on the laws of nations. Bynkershoek expressly admits it in these words: "*Velim animadvertas, eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse.*"—Lib. i. ch. 14. And Vattel, lib. iii. § 114, acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible this right may be wrongfully exercised by cruisers, resistance is not the legal remedy, as there is a regular and effectual remedy, provided by all the maritime codes of Europe, in the responsibility which cruisers lie under to make compensation for any injurious exercise of their right in costs
*759] *and damages. These principles being admitted, as they were indeed admitted in the former hearing, it becomes a question of fact, whether there was that hostile resistance that will subject the parties to the penalty of confiscation. On this point it is submitted that the instructions of the Swedish government to the commander of this convoy[1] lay upon him as a positive injunction to prevent search by all possible means, and "that violence must be opposed by violence." These are carried into execution by

[1] Instructions to the commander:—"In case the lieutenant-colonel should meet with any ships of war of other nations, one or more of any fleet whatever, then the lieutenant-colonel is to treat them with all possible friendship, and not give any occasion of enmity; but if you meet with any foreign armed vessel, which on speaking should be desirous of having still further assurance that your frigate belongs to the King of Sweden, then the lieutenant-colonel, is by the Swedish flag and salute, to make them know that it is so; or if they would make any search among the merchant ships which are under your convoy, which ought to be endeavored to be prevented as much as possible, then the lieutenat-colonel is, in case such thing should be insisted on, and that remonstrances could not be amicably made, and that notwithstanding your amicable deportment, the merchant ships shall be nevertheless violently attacked, then violence must be opposed against violence."

the sailing orders,[1] which forbid their merchantmen "to submit to search; but if any boat attempted to come alongside, to sheer off from them." It is still further carried into effect by all that passed at the time; and more especially by the act of forcibly removing an officer who had taken possession of one ship, and carrying him on board the frigate. And it is again confirmed by the regret which the commander expressed that he had not fired, protesting "that if the ships had not been seized at night he would have resisted."

For the claimants, Lawrence and *Swabey.*—The original importance of this question, great as it undoubtedly was, has been very materially increased by the manner in which it has been brought on.

The claimants have reason to complain that everything has been brought forward *ex parte* by the captors. The instructions of the Swedish commander are produced in an unauthenticated form, and introduced only under a note from the under-secretary of state. It is not proved that they were the whole of the instructions. *It must therefore, rest with the Court to say how far they [*760 are sufficiently authenticated. The instructions under which the English commander acted have been altogether withheld. On the part of the claimant's evidence, the officer of the Swedish frigate has been sent away to render an account to his own government, and by that means the parties are deprived of the benefit of his evidence. Under these disadvantages, however, it is still to be contended that there has been no act of hostility committed against this country. There is no disposition to assert a right on the part of neutral merchant ships, to resist visitation and search by the cruisers of a belligerent state. It is not to be argued, un-

[1] *Sailing Instructions to the Merchantmen.*—"All merchantmen ships, during the time they are under convoy of his Majesty's ships, frigates, or sloops, are forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats show an intention to come alongside, the merchant ships are to sheer off from them."

doubtedly, that neutrals have a right in all cases to resist search. If such a speculative doctriue is asserted by any states, it is for them to maintain it. In the present case we stand upon no such position, but upon something which appears to have been overlooked—a treaty on this important question of search between the two countries—Treaty between England and Sweden, 1661, art. 12. After an express treaty, it is not allowable to presume anything contrary to that compact on the part of the other state, nor to argue on general principles to defeat the force of the obligation arising from it on our parts. Search is by this treaty to be exercised only on a refusal to produce the certificates or ship's papers; in no other case is it justifiable. And although a strong suspicion might still justify a seizure under the responsibility of costs and damages, still in the manner of making this seizure (and the whole of this case rests on the course of the proceedings), if we did not proceed in the manner in which we ought to have done, there is an end of our right under the compact; and we are not at liberty to impute anything that ensued in consequence of our own irregularity, as an act of aggression against the other party. These are the principles on which it is intended to support the present claim. Originally, and in its natural appearance, this convoy is to be considered as a neutral convoy; and therefore it lies on the captor to show by some act that there was a departure from neutrality, for it cannot be pretended that a mere intention (if it were proved) would be sufficient, under any system of law, to incur the penalty of an actual offence. It seemed to be admitted by the Court on a former day, that there was a just distinction to be made between two cases of convoy—between a convoy of an enemy's force and a neutral convoy. The former would stamp a primary character of hostility on all ships *761] *sailing under its protection; and it would rest with the parties to take themselves out of the presump-

tion raised against them. But that it would be, even in that case, nothing more than a presumption, is determined by a late case before the Lords—*The Sampson Barney*—an asserted American armed ship, sailing with French cruisers at the time they engaged some English ships, and communicating with the French ships by signal for battle. In that case, although there had been a condemnation below, the Lords sent it to further proof, to ascertain whether there had been an actual resistance. [COURT.—I do not admit the authority of that case to the extent you push it. That question is still reserved, although the lords might wish to know as much of the facts as possible.]

In the other case of a neutral convoy, there is no presumption of a hostile character arising from it, and therefore it remains with the captors to show that there was an actual resistance in this case. Coming then to the question of fact, with the provisions of the treaty kept constantly in view, and remembering that when there is a treaty regulating the mode and manner of proceeding, both parties are bound to proceed accordingly, and that any presumptions which are raised should proceed upon the words of that compact, and not depart from it, where will the captors find any actual resistance in the conduct of these parties?

The instructions are relied upon, but they are general, and do not, any more than the other circumstances preceding or attending this transaction, point in any degree to a resistance towards this country. It is notorious, that at the time of passing the French decree against English merchandise, which is deservedly reprobated on all sides, the Swedish merchants did apply for a protection of this kind; and, therefore, the probability is at least as great, that it was intended to protect them against French cruisers as against this country. The directions are "to observe an amicable deportment, but that violence must be opposed by violence;" expressions on which it will not be fair to put any other con-

struction than what is compatible with the provisions of the treaty, or to suppose that they meant more than that the stipulations of the treaty were to be faithfully maintained. What passed then at the time? Was there anything like actual personal resistance? Certainly not. From the evidence of M'Dougal, it appears that there was nothing like a hostile appearance shown towards the "Wolverine," till after
*762] four days had passed in discussion between *the commanders. The Swedish commander had a right to expect to have been first addressed; under the treaty the certificates should have been demanded. If not produced, the ships might have been searched; and, on strong suspicion, seizure might have been made. But the question is, have the captors proceeded in this way? If, in opposition to this, they have at once superseded all forms and said, "We seize and detain them," the matter assumes a different aspect, and we have no right to exact a rigid observance of form on the other side. On descrying the convoy, what was done on the part of the captors? It was on that side that the first appearance of menace was shown. The English ships immediately beat to quarters; the destination is inquired of, and answer given; but there is no demand for papers; no attempt to search. Captain Lawford states, that, as a measure of prudence, he sent immediately to the Admiralty for particular instructions, and received orders to detain the convoy. On the first interview, the Swedish commander immediately communicated his instructions with the greatest readiness; from which it appears that, in his opinion, they contained nothing hostile to this country. The removal of a petty officer, that has been relied on as an act of resistance, was more a matter of form than actual opposition, and as a sort of protest against the irregular proceeding of the captors, and did not for a moment retard the actual delivery of possession on the part of the merchantmen. The subsequent acts show still more strongly how little the

acts of the captors were directed by the treaty; and how little they themselves thought that any penalty of prize had accrued to them by this circumstance of convoy. Instead of the usual demand for the ship's papers in the first instance, they were not demanded till August. They were afterwards returned to one vessel, and an offer was made to all those bound to neutral ports to depart; but they refusing to go without some compensation for detention, proceedings were then instituted for the first time, on the principles of convoy—a principle which cannot now come into discussion, owing to the irregular proceedings of the captors; and which, besides, cannot fairly be enforced against the merchantmen by this Court, whilst the government has permitted the frigate to depart, and has declined to consider the act of the commander as an act of hostility against the state. On these grounds, and adverting to former practice, in which some instances occur of restitution of ships taken under convoy, whilst no precedents of condemnation on this principle are adduced, it is *submitted that the claimants have done nothing to forfeit their neutral character, and are therefore entitled to restitution. [*763

JUDGMENT.

Sir W. Scott.—This ship was taken in the British Channel, in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

The facts attending the capture did not sufficiently appear to the Court upon the original evidence; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attestations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate

sailed, transmitted to the King's Proctor from the office of the British Secretary of State for the Foreign Department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the Court has to determine this most important question; for its importance is very sensibly felt by the Court. I have, therefore, taken some time to weigh the matter maturely; I should regret much if that delay has produced any private inconvenience; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the Court) that I have interposed more time in forming my judgment than was fairly due to the importance of the question and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer, with indifference, that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pre-
*764] tensions on the part of Great *Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean

should be considered, as the universal law upon the question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favor of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary limited and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted; and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced; I mean Baron Puffendorff.[1] The passage to which I allude is to be found in a note of Barbeyrac's, in his larger work, l. viii. c. 6, s. 8. Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV., by a lawyer upon the continent, Groningius, who was desirous of supporting the claims of neutral commerce, in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:—

[1] Puffendorff was not actually born in Sweden, but is usually claimed and allowed as a writer of that country, from his employment in it under the King of Sweden. The great work on which his fame is principally built, was given to the world during his residence in that country.

"I am not surprised that the Northern Powers should consult the general interest of all Europe, without regard to the complaints of some greedy merchants, who care not
*765] how things go, provided *they can but satisfy their thirst of gain. Those princes wiesly judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power, which threatens Europe with slavery and the Protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard." In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. His words are memorable. I do not overrate their importance, when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely, without notice, as another preliminary observation (though without meaning to lay any particular stress upon it), that the transaction in question took place in the British Channel, close upon the British coast, a station over which the crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors, for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he despatched immediately a messenger *to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by [*766 the return of his messenger to detain these merchant-ships, and carry them into the nearest English port, he sent Sir Charles Lindsay and Captain Raper to communicate them in the civilest terms to the Swedish commodore, who showed his instructions to repel force by force, if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British squadron to prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by "The Romney," keeping close under his lee, lower-deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish

commander sent an officer of his own on board Captain Lawford's [ship] to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads, he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

Captain Raper states, that on going on board the Swedish frigate, he found all the men at their quarters, and the ship clear for action; that the commodore showed his orders and expressed his firm determination to carry them into execution. Captain Lawford sent a boat with an officer on board several of the convoy, to desire they would follow into Margate Roads; their answer was they would obey no one but their own commodore.

Lieutenant M'Dougal describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring to without firing at them. On his going on board one of them, *767] the master declared that he *had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who, by his order, took possession of the helm.

Mr. Cockcraft is another witness to the same effect, and Mr. Candish, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach against the proceedings of the English were addressed to him, and the commodore protested, that if he had not been surprised he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts: that a large number of vessels, connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and other not, with cargoes consisting, amongst other things, of naval stores, were met with, close upon the British coast, by his Britannic Majesty's cruisers; that a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruisers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force which overawed it; and the act being effected in the night, by the prudence of the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night; that a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr. Raper's log-book, which proves that the merchantmen refused to admit the British officers on board, and declared that they would obey nobody but their own commodore; a fact to which Mr. M'Dougal likewise bears testimony. It is contradicted still more forcibly by the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels. The latter have been brought into [*768
*court by themselves, and of the authenticity of the

former there is no reasonable doubt; for they are transmitted to me upon the faith of one of the great public offices of the British government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the court; because if the act of the captors was illegal, the orders of the Admiralty would not justify it, and the want of orders would not vitiate, if the act was legal. No mystery, however, was made about these, for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruisers of Tripoli, and an affidavit has been brought in to show that that government had begun hostilities against the Swedes. The language, however, of these instructions is as universal as language possibly can be; it is pointed against the "fleets of any nation whatever." It is, however, said, that this was merely to avoid giving offence to the Tripoline government. But is the Tripoline government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state, merely to save appearances with a government which, they allege in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion, neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it is clear that if it had been so, the commander of the frigate must have had most explicit instructions to that effect. They could never have put such

general instructions on board, meaning that they should be limited in their application to one particular state, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use, whereas nothing can be more certain than that he had been left without any such restrictive instructions; he therefore acts, as any other man would do, upon the natural sense and meaning of the only instructions he had received. On *this part of the case, therefore, the question is, What is it that these general instructions purport? [*769

The terms of the instructions are these—they are incapable of being misunderstood: "In case the commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the commander is to treat them with all possible friendship, and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should be desirous of having further assurance that your frigate belongs to the King of Sweden, then the commander is, by the Swedish flag and salute, to make known that it is so; or if they would make any search amongst the merchant-vessels under your convoy, which ought to be endeavored to be prevented as much as possible, then the commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made, and that notwithstanding your amicable comportment, the merchant-ships should nevertheless be violently attacked, then violence must be opposed against violence." Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension—"If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to talk them out of their purpose if you can; and if you can't, you are to

fight them out of it." That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon is already shown in the affidavits which I have stated; that they were deliberately accepted, appears from their own instructions, which exactly tally with them. These instructions declare in express terms, "that all merchant-ships, during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats show an intention of coming alongside, the merchant-ships are to sheer off from them." It appears from the attestation, that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act—an act common to all the *770] parties concerned *in it; and of which every part belongs to all; and for which all the parties, being associated with one common consent, are legally and equitably answerable.

This being the actual state of the fact, it is proper for me to examine—2dly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st. That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say be the ships, the cargoes, and the destinations what they may, because till they are visited

and searched, it does not appear what the ships or the cargoes or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force; something in the nature of civil process where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit, that wherever force is employed, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to *attack by force, and the other has an equally perfect right to repel by force. But in the relative [*771 situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

2dly. That the authority of the sovereign of the neutral

country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. I say legally, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed[1]) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has

[1] It is made an article of treaty between America and Holland, an. 1782, Art. 10, Mart. Tr. vol. ii. p. 255.

been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant. The law and practice of nations (I include particularly the *practice of Sweden when it happens to be belligerent) give them [*772 no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget them when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostilities, as it has ever existed among mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In Book III. ch. vii. s. 114, he expresses himself thus:—"On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on

rencontre en mer; on est donc en droit de les visiter. Quelques nations puissantes ont refusé en différent temps de se soumettre à cette visite; aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise." Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the cele-
*773] brated French Ordinance of 1681, *now in force, Article 12, "That every vessel shall be good prize in case of resistance and combat." And Valin, in his smaller Commentary, p. 81, says expressly that, although the expression is in the conjunctive, yet the resistance alone is sufficient.[1] He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, "in case of resistance or combat." And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the Institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty,[2] is in the order of Coun-

[1] In some of the treaties of France this Article is expressly inserted in the disjunctive. Treaty between France and the Duchy of Mecklenburg, Art. 18, an. 1779, Mart. Tr. vol. ii. p. 40. Also between France and Hamburg, an. 1769.

[2] "B. 7. Item se aucune nef ou vessel de la ditte flotte a congie et pouvoir de l'admiral de passer hors de la flotte entour aucun message ou autre besongne, s'ilz encontrent ou trouvent aucuns vesseaulx estranges sur la mer ou en ports des ennemys, adonques ceulx de nostre flotte doivent demander des maistres et gouverneurs de telz vesseaulx etrangers dont ilz sont et eulx bien examiner de

cil, 1664, Article 12,[1] which directs, "That when any ship, met withal by the *Royal Navy or other ship commissionated, shall fight or make resistance, the said [*774

leur charge ensemblement avecques leurs muniments et endentures, et s'il est trouve aucune chose de suspicion en telz vesseaulx que les biens sont aux ennemys, qui sont trouvez dedens les dits vesseaulx avec leur maistres et gouverneurs ensemblement avecque les biens dedens icelle estants sauvement seront amenees devant, l'admiral, et illecques s'il est trouve qu'ilz sont loyaulz marchants et amys sans suspicion de colerer, les biens seront a eulz redeliveres sans eulz rien dommager, autrement seront pris avec leurs biens et raensonnez comme la loy de mer veult et demande.

"B. 8. Se aucunes de noz nefs ou vessaulx encontrent sur la mer ou en ports aucuns autres vesseaulx, qui facent rebelletees ou defense encontre ceulx de noz nef ou vesseaulx, adoncques bien life a noz gents les autres comme ennemys assailir et par forte mayn les prendre et amener entierement, comme ilz les ont gaignez, devant l'admiral sans eulz piller ou endommager, illecques de prendre ce que loy et coustume de mer veult et demande, etc."

[1] During the struggle for naval superiority, which took place between the maritime states of Europe about the middle of the seventeenth century, the pretension of resisting search by protection of convoy was put forward with much caution, and apparently for the first time by Christina, Queen of Sweden, August, 1653, Art. 4: "They shall in all possible ways decline that they or any of those belonging to them, be searched. For seeing they are only sent to prevent all inconvenience and clandestine dealings, it is expected that they may be believed, and suffered to pass and proceed on their course unmolested, with all such things as are under their care." It was restrained to neutral ports, Art. 6. "And more especially, for certain reasons, it is our command, that our men-of-war *do chiefly, and in the beginning*, steer their course to such *ports as are neutral* in the English and Dutch war, till we give any further directions on that account. However, without any hindrance to our own subjects, that intend to carry on their own free trade to England and Holland *without* convoy:" Thurloe's St. Papers, vol. i. p. 424.

In 1655 it was taken up by Holland: "They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and to their ships:" Id. vol. iv. p. 203.

In May, 1656, there happened an actual encounter on this subject between a fleet of merchantmen from Cadiz (Spain being then at war with England) under the convoy of De Ruyter, with seven men-of-war and the commodore of some English frigates. "Antwerp. We have certain news of the arrival of De Ruyter in Zealand from Cadiz, from whence he brought stores of plate mostly belonging to merchants in this city; he was met withal at sea by some English frigates, but finding themselves too weak they let him go:" Id. vol. iv. p. 740. See also the particular account of what passed, given by a Dutch officer to the States-General: "That upon De Ruyter declaring that there was not anything on board belonging to the King of Spain, they parted:" Id. vol. iv. p. 730. It appears, however, that the arrival occasioned great triumph in Holland and

ship and goods shall be adjudged lawful prize." A similar article occurs in the proclamation of 1672. I am aware

Flanders, and the fleet was deeply laden with silver for the King of Spain and the service of his armies in Flanders. "De Ruyter brought in his own ship and others in his fleet the sum of 20,000,000 (perhaps rials) of gold and silver, the greatest part for the King of Spain's use and the merchants of Brabant and Flanders:" Id. vol. iv. pp. 748, 732. The 12th Article of the Eng. Ord. of 1664 might, perhaps, be pointed against these pretensions.

In another letter in the same collection, 21st September, 1657, from Nieuport, the Dutch ambassador in England, we find the subject of convoy was strongly pressed at that time, and resisted on the part of this country: "Respecting secret articles concerning the visitation of ships which are convoyed under the flag of the state, I acquainted their lordships that of old all kings and states had made a difference between particular ships sailing upon their risques and adventures and between ships of the state and those which pass the sea under their flag and protection. That their high and mighty lords were of an opinion that it does strengthen the security of this state, that the ships of the state and officers should be responsible, as it were, for the ships sailing under their convoy; and that which I had proposed in my last memorandum concerning the same on behalf of their high and mighty lords was no new thing, but that plan had been most commonly proposed in all the treaties since the year 1651, in that manner that without regulating the same according to the said articles, the troubles at sea, whereof I had so often complained, could not be removed and prevented, and I alleged several examples. Upon which, now one, then the other, of the said three lords (Thurloe, Walsely, Jones) replied, and did very much insist, that it could not consist with their security; that they could not nor *ought* to trust so much to particular captains at sea; that it would be an introduction and encouragement to disaffected persons to assist the enemy, and urged especially that in no former treaties any such articles were found, and that their high and mighty lords had no reason to desire any such novelty. I said that the practice on this side in regard of searching and visiting ships without difference was a new thing, and that the inhabitants of the United Netherlands, feeling the trouble and inconvenience of it, had reason to insist that it may be rectified by a good regulation:" vol. vi. p. 511. See also, for the former conference, vol. v. p. 663.

It appears that so many objections had arisen on the treaty proposed on the part of Holland, that it was found necessary to form an entirely new *project:* vol. vi. p. 523–558.

In a subsequent letter from the Hague, 30th Nov. 1657, it appears that the treaty broke off on this difference: "Le Sieur Nieuport n'est pas encore ici arrivé, mais il escrit aussi d'avoir prins son congé. Il est fort croyable qu'il ne sera guère content d'avoir faillé a achever le traitee de la marine; neanmoins, je m'imagine que la Hollande à present ne seroit pas fort marry de n'l'avoir pas achevé, pour ne se pas oster la liberté de visiter des mêmes en cette guerre contre Portugal:" Thurloe's State Pap., vol. vi. p. 622.

On the subject of search generally, without any *expressed reference* to convoy, there is this letter from Cromwell to General Montagu:

"The secretary hath communicated to us your letter of the 28th, by which you

*that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon.[1] But the article I refer to is not of those he reprehends, and it is observable that Sir Robert Wiseman, then the King's Advocate-General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am, therefore, warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other rights and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason—upon the distinct authority of Vattel—upon the Institutes of other great maritime countries, as well as those of our own country, when I venture to *lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to [*775 [*776

acquaint him with the directions you have given for the searching of a Flushing and other Dutch ships, which (as you are informed) have bullion and other goods aboard them belonging to the Spaniard, the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the laws of nations and the particular treaties which are between this Commonwealth and the United Provinces, and therefore we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein.

"*Hampton Court*, 30th August, 1657."

[1] Lord Clarendon's Life, p. 242.

search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

The first ground of exemption stated on the part of the claimants, is the treaty with Sweden, 1661, Article 12, and it was insisted by Dr. Lawrence that although the belligerent country is authorized by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "there is any other just and strong cause of suspicion," then the ship is to undergo search.[1] The

[1] It is said by Secretary Thurloe, in his conference with the Dutch ambassador, December, 1656, "that the point of passes was very considerable to the state, and that the same was never agreed to in any treaty with any nation, but lately, to Sweden:" Thurl. St. Pap., vol. v., p. 663.

A reference to the certificate of foreign magistrates, with a primary but inconclusive credit ascribed to them, appears to have been established in Denmark by Frederic II. in 1583, as a custom-house regulation respecting the customs and Sound duties payable by foreign merchants. Speaking of abuses, "we not minding any longer to suffer the same, do therefore will that henceforth every man which uses his trade of merchandise and navigation through our custom, towns and streams, do cause a certain and just brief of all the laden merchandises and goods to be comprehended in the certificates which he is to take under the seal of *his magistrate, and deliver* the same to our customers, with this warning, that if any man arrive there without such true and just certificate, and any hindrance and inconvenience do happen unto him in that respect, the ship being searched, that then he impute the same unto himself, and not unto us or ours; and if *upon cause of suspicion the ships should be searched*, notwithstanding that a particular certificate had been delivered; and that in them more merchants' goods should be found than were comprehended in the certificates which were brought in, then not only those goods, but the whole ship and goods, as being forfeited, shall be confiscated and seized upon." Promulged, 1583. Rym. Fœd. vol. xvi. pp. 347, 352.

treaty, therefore, recognises the rights of inquiry and search, and the violation of those rights is not less a violation of the treaty than it is of the *general law of nations. It is said that the demand ought first to have been made upon the frigate. I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant-ships, is not a *casus fœderis* that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance, and the answer returned was, that "they were Swedish ships bound to various ports in the Mediterranean, laden with iron, hemp, pitch, and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of sending on board each particular ship for their several papers; for each particular ship, without doubt, had his own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making that treaty which is the basis of it. I mean the treaty in which Whitlock was employed in the year 1656; for I conceive that Valin expresses the truth of this matter when he says, p. 68, "*De droit ces choses*" (speaking of naval stores) "sont de contrabande *aujourd'hui* et depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins;" and Vattel, [*777

the best recent writer upon these matters, explicitly admits, amongst positive contraband "les bois et tout ce qui sert à la construction et à l'armament de vaisseaux de guerre." Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble lord (the late Earl of Mansfield), then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion that although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty and of *the latter treaty derived from it, yet *778] that the exposition which the later judgment and practice of Europe has given upon this subject would, in some degree, affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750, the Lords of Appeal in this country declared pitch and tar, the produce of Sweden and on board a Swedish ship bound to a French port, to be contraband and subject to confiscation, in the memorable case of the *Med Good's Hjelpe* (Lords, 1750). In the more modern understanding of this matter, goods of this nature, being the produce of Sweden, and the actual property of Swedes and conveyed by their own navigation, have been deemed in British Courts of Admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and many be de-

tained without any violation of national or individual justice. Thirdly, another right accrued, that of bringing in for a more deliberate inquiry than could possibly have been conducted at sea, upon such a number of vessels, even those which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty refers to, excited by the circumstances of such number of vessels with such cargoes intended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced? Certainly not by the treaty itself; for the remedy for infraction is provided in compensations to be levied and punishments to be inflicted upon delinquents by their own respective sovereigns: Article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done *vexatiously and without just cause, a merchant-vessel has not a right to [*779 say for itself (and an armed vessel has not a right to say for it), "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel

will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing and putting it upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences of this kind where they have happened through accident or error; and to redress by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimant, was, that the intention was never carried into act. And I agree with Dr. Lawrence, that if the intention was voluntarily and clearly abandoned, and intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right. But how stands the fact in the present case? The intention gives way, so far as it does give way, only to a superior force. It is for those who give such instructions to recollect that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions and the sailing under them, was sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences. If he meets with a superior force, he abandons his hostile purpose. If he

meets with an inferior force, he carries it *into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success, and where you cannot, it is submission and striking your colors. Nothing can be more clear, upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be, and when it can maintain itself no longer, *fugit indignata.* [*780

3. It is said that the papers were not immediately taken possession of nor proceedings instituted till long after the arrival in port. These are unquestionably irregularities, but I agree with the King's Advocate in maintaining that they are not such irregularities as will destroy the captor's right of proceeding, for the claimant had his remedy in the way of monition. How these delays were occasioned, whether in consequence of pending negotiations (as has been repeatedly asserted in the course of the argument), I am judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate, the principal wrongdoer. On what grounds this was done, whether on that sort of comity and respect which is not usually shown to the immediate property of great and august sovereigns, or how otherwise—I am, again, not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a rede-

livery of her papers, the act of the captors may perhaps, furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no further.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for anything that I know), that other considera-
*781] tions should be interposed to soften *the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honor and good faith of the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a Court of the law of nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? by the direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other—it has been for some few years past preparing in Europe—it is extremely fit that it should be brought to the test of a judicial decision; for a worse state of things cannot exist, than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it; and, in my apprehension, not more inconsistent with it than with the amity of neighboring states and the personal safety of their respective subjects.

The only remaining question which I have to consider is,

the matter of expenses: and this I think myself bound to dispose of with as much tenderness as I can use in favor of individuals. It is to be observed that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such person. The authority of their country has been in some degree surprised in this matter. The captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the claimants are clearly entitled to have their expenses charged upon the value of the property up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, and it is no answer in the Court to say that this gentleman or another gentleman did not think it advisable to commit their private fortunes to the extent of the security required. It is the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expenses for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order of further *proof; and, condemning the ship and cargo, [*782 I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially in this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself; I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

"The international law on the subject of the right of visitation and search," says Wheaton, "is ably summed up by Sir William

Scott in the case of The Maria, where the exercise of that right was attempted to be resisted by the interposition of a convoy of Swedish ships of war:" Wheaton's Elements of International Law, p. 588. The judgment of Sir William Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a "Treatise on the Visitation of Neutral Ships under Convoy" (trans. Lond. 1801), and vindicated by Dr. Croke in "Remarks on M. Schlegel's Work," 1801. The learned judge, in the above-mentioned case, lays down certain principles upon this subject which he took to be incontrovertible. 1st. That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. "I say," he adds, "be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, the cargoes, or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain, by sufficient inquiry, whether there is property that can be legally captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not:" *ante*, p. 770. See Cargo Ex Catherina, Lush. Adm. Rep. 142; The Springbok, Blatchford's Prize Cases 349; The Peterhoff, Id. 463.

*783] To illustrate these observations, *we may remark, that if the right to search merchant-ships were not permitted, in the case of hostile ships they might escape capture by assuming the character of neutrals, which it would be impossible to detect without a close inspection. So likewise in the case of neutral vessels, they might either contain enemy's goods, which according to the general international law it is allowable to capture, or they might contain contraband of war, the nature of which could only be ascertained by an examination of the cargo and finding out the destination of the ship. Moreover, it would in many cases be impossible to say whether a vessel was or was not guilty of a breach of blockade, unless it were visited and searched, in order to determine from what

port it had come or for what port it was bound. "The right of search," says Sir William Scott, "is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it without the exception even of Hubner himself, the great champion of neutral privileges:" *ante*, p. 770.

The right of search being lawful, it follows, as laid down secondly in the principal case, "that the authority of the sovereign of a neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser." Hence it was there decided that Swedish merchantmen in time of *war* might be legally visited and searched by British cruisers, although under convoy of a Swedish ship of war, and that by resistance on the part of the convoying ship, the whole of the merchantmen were liable to confiscation. See also The Elsabe, 4 C. Rob. 408.

Two sovereigns, however, may, as is laid down in the principal case, unquestionably agree, if they think fit (as in some instances they have agreed) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenants, is the right of personal visitation and search, to be exercised by those who have the interest in making it: *ante*, p. 771.

The right of visitation and search is a purely *belligerent* claim, and can only be exercised in time of war; it does not exist in time of peace, because it has not then the same foundation on which alone it *is tolerated in war—the necessities of self-defence. See the Le Louis, 2 Dods. 210, 245, where the sentence of [*784 a Vice-Admiralty Court, condemning a French ship for being employed in the slave-trade, and forcibly resisting the search of the king's cruisers in *time of peace*, was reversed.

Hence a nation has no right, in the absence of treaty, to visit and search in time of peace all the apparent vessels of other countries on the high seas, in order to institute an inquiry, whether they are not in truth its own vessels violating its own laws. No such right has ever been claimed; nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries: Id. 253.

The right to visit and search vessels suspected of being engaged in the slave-trade has given rise to much discussion, especially between England and the United States, but the doctrine laid down in the case of Le Louis, upon which it seems strange that any doubt could possibly be thrown, must now be considered as an accurate exposition of international law upon this subject. Hence it is clear that *in the absence of treaty* neither Great Britain nor any other country employing cruisers for the suppression of the slave-trade has any right, in time of peace, to visit and search vessels sailing under the flag of another country. See this object discussed at some length, and from an American point of view, in Lawrence's "Right of Visitation and Search." And see Kent's Internat. Law by Abdy, p. 389.

Maritime states, however, have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their own shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations, more immediately affecting their safety and welfare. Such are the hovering laws (9 Geo. II. c. 35), which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This, however, has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean: The Le Louis, Forest, 2 Dods. 245.

The penalty for the violent contravention of the right of search is the confiscation of the property so withheld from visitation and search. See *ante*, p. 772, where the authorities on the subject are cited and discussed.

The resistance, however, of an *enemy* merchant-vessel will not, in general, be a sufficient cause for confiscating any neutral property on board, for resistance in such a case on the part of an enemy is a lawful and justifiable act, which on the part of a neutral

would be considered both unjustifiable and contrary, as we have seen, to the general principles of international *law. "If," says Sir W. Scott, "a *neutral* master attempts a rescue, or [*785 to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo intrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an *enemy* master, the case is very different: no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right so to do:" The Catherina Elizabeth, 5 C. Rob. 232; and see The Dispatch, 3 C. Rob. 278.

But if a neutral put goods on board a belligerent armed ship, they will, according to the law as laid down by Sir William Scott, be subject to confiscation on the capture of the vessel. For in such a case the owner of the goods has every reason to presume that the vessel will be defended against the enemy by force. The owner of the goods, therefore, betrays an intention to resist visitation and search, which he would not do by putting them on board a mere merchant-vessel, and so far as he does this he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; it is quite clear, therefore, that if a party act in association with a hostile force, and relies upon that force for protection, he is *pro hac vice* to be considered as an enemy: The Fanny, Lawton, 1 Dods. 448. See, however, The Fereide, 9 Cranch 388.

Upon the same principle it follows that neutral vessels sailing under enemy's convoy are liable to capture: The Sampson, Barney, *ante*, p. 761, cited; Manning's Commentaries on the Law of Nations, pp. 369, 370; but see Wheat. Internat. Law 594, 6th ed.

"The judgment of condemnation pronounced in the case of The Maria," says Wheaton, "was followed by the treaty of armed neutrality entered into by the Baltic powers in 1800, which league was dissolved by the death of the Emperor Paul, and the points in controversy between those powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th Article

of this convention, the right of search as to merchant-vessels sailing under neutral convoy was modified, by limiting it to *public* ships of war of the belligerent party, *excluding* private armed vessels. Subject to this modification, the pretension of resisting by means of convoy the exercise of the belligerent right of search was surrendered by Russia and other northern powers, and various regulations provided to prevent the abuse of that right to the injury of neutral commerce:" Wheat. Internat. Law 590.

*786] On strict principle, to defeat the *right of search by evasion, might be as penal as to resist it by force, though it has not been so held in practice; but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties, in any matter requiring explanation of their conduct: The Mentor, Williams, Edw. 208. A mere attempt to escape, before any possession assumed, has never, it seems, been held to draw with it the consequences of condemnation: The St. Juan Baptista and La Purissima Conception, 5 C. Rob. 35.

A vessel will not be liable to confiscation for resisting search, if she was not aware of a war having broken out. Thus, where some Spanish ships which had left port before they were aware that a war had broken out between Great Britain and France and Holland, were detained by a British cruiser on the ground of having resisted the exercise of visitation and search, it was held by Sir William Scott that the ships ought to be restored. "Among the facts," observed the learned judge, "necessary to bring the case within the operation of the law, it must be shown, in the first instance, that the vessel had reasonable grounds to be satisfied of the existence of a war; otherwise there is no such thing as neutral character, nor any foundation for the several duties which the law of nations imposes on that character. It is, therefore a very material circumstance in this case, that at the time of sailing no war was supposed to exist in the knowledge or contemplation of those who commanded these vessels. They sailed in perfect ignorance of war, and consequently unconscious that they had any neutral duties to perform:" The St. Juan Baptista and La Purissima Conception, 5 C. Rob. 33.

The right of search does not extend to ships of war belonging to neutral states. See Manning's Commentaries of the Law of Nations 370–376.

The right to visit and detain for search is a belligerent right; but it must be conducted with as much regard to the rights and safety of the vessel detained as is consistent with a thorough examination of her character and voyage: The Anna Maria, 2 Wheat. 327.. A belligerent has a right to detain for examination every vessel, not a national vessel, that he meets on the ocean; and the injury casually resulting to the vessel detained is *damnum absque injuria:* The Eleanor, 2 Wheat. 345. The commander of a belligerent, detaining a vessel for search is not bound to put on board of her a prize-crew and officer, although he may by the modern usage of war, enforce the presence of her principal officers with the papers on his own quarter-deck, for examination: Id. Ships of war, have in time of peace the right to approach other vessels to ascertain their real character, although in time of peace the right of visitation and search does not exist: The Marianna Flora, 11 Wheat. 1. Visitation and search is strictly a belligerent right. American ships, however, offending against our laws, and foreign ships in like manner offending within our jurisdiction, may afterwards be pursued and seized, and rightfully brought into our ports for adjudication; but the party in such cases seizes at his peril. If he establish the forfeiture he is justified. If he fail he must make full compensation in damages: Id. The right of visitation and search does not exist in time of peace. A vessel engaged in the slave trade, even if prohibited by the laws of the country to which it belongs, cannot for that cause alone, be seized on the high seas, and brought in for adjudication, in time of peace in the Courts of another country. But if the laws of that other country be violated or the proceeding be authorized by treaty, the act of capture is not in that case unlawful: The Antelope, 10 Wheat. 67.

*787] *THE HOOP, CORNELIS, MASTER.

Feb. 13, 1799, *High Court of Admiralty.*

[REPORTED 1 C. ROB. 196.]

TRADE WITH THE ENEMY—LICENSES.]—*British merchants are not at liberty to trade with the enemy without the King's license; all property taken in such a trade, is confiscable as prize to the captor.*

THIS was a case of a claim of several British merchants for goods purchased on their account in Holland, and shipped on board a neutral vessel.

The affidavit annexed to the claim set forth: That Mr. Malcolm, of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with Holland, in the importation of various articles of the produce of Holland, which were particularly wanted for the use of Glasgow, and essentially necessary to the agriculture and manufacture of that part of the kingdom; and that, after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his Majesty in council, permitting them to continue that trade; that after the passing of the Acts of Parliament, 35 Geo. III. c. 15[1] and 80; 36 Geo. III. c. 76; 37 Geo. III.

[1] The 35 Geo. III. c. 15 (16 March, 1795), reciting and confirming the orders of council of the 16th and 21st January, (which allowed goods coming to ports of this kingdom directly from any port of Holland, and navigated in any manner, to be landed and secured in warehouses for the use of the proprietors till further orders), enacts, that it shall be lawful to import such goods belonging to sub-

c. 12; confirming and continuing the orders in council of the 16th and *21st January, it was apprehended in [*788
that part of Great Britain that by these acts the importation of such goods was made legal. But for the greater security they still made application to *the Commissioners of Customs at Glasgow*, to know what they considered to be the interpretation of the said acts, and whether his Majesty's license was still necessary; and that in answer to such application, the merchants were informed, under the opinion of the law advisers of the said Commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces would in future be entered without them; and that in consequence of such information, they had caused the goods in question to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers.

JUDGMENT.

Sir W. Scott.—This is the case of a ship laden with flax, madder geneva, and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of which I see no reason to doubt the truth) the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the Commissioners of the Customs in Scotland, that they might be lawfully imported without any license, by virtue of the Statute 35 Geo. III. cc. 15 and 80.

It is said that these circumstances compose a case entitled

jects of the United Provinces, or *to any* subject of his Majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue. The subsequent acts contain further regulations for property coming from Holland, in the ambiguous situation of the two countries at that time.

to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law: *Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quam vis nulla specialis sit, commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, etc.* He proceeds to observe, that the interests of trade and the necessity of obtaining certain commodities have some-
*789] *times so far overpowered this rule, that different species of traffic have been permitted, *prout e re suâ, subditorumque suorum esse censent principes:* Bynk. Q. J. B. book i. c. 3. But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc.* It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis.* It appears from these passages to have been the law of Holland; Valin, l. iii. tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels. It will appear from a case which I shall have occasion to mention (*The Fortuna*), to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by per-

mitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the *direct permission of the state.* Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct it in its application, forbids this *sort of communication as fundamentally inconsistent with the relation at that time [*790 subsisting between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue or to sustain in the language of civilians a *persona standi in judicio.* The peculiar law of our own country applies this principle

with great rigor. The same principle is received in our Courts of the law of nations; they are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hâc vice*. But otherwise he is totally *exlex;* even in the case of ransoms,[1] which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction—they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says that cases of commerce are undistinguishable from cases of any other species in this respect. *Si hosti semel permittas actiones exercere, difficilè est distinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

Upon these and similar grounds it has been the established

[1] Ransoms, except in cases of necessity to be allowed by the Court of Admiralty, have been abolished: 22 Geo. III. c. 25; 35 Geo. III. c. 66, ss. 35, 36; 45 Geo. III. c. 72, ss. 16 *et seq.*; 17 & 18 Vict. c. 18, ss. 42, 43, 44. See Wildman on International Law, p. 275.

*rule of the law of this court, confirmed by the judgment of the Supreme Court, that *a trading with the enemy, except under a royal license, subjects the property to confiscation;* and the most eminent persons of the law sitting in the Supreme Courts have uniformly sustained such judgments. [*791

In *The Ringende Jacob*, 1747, Andreas Laud, master, a Swede, which went from London to Bordeaux in ballast, there took in seventy-one tuns of wine for Mr. Minet, Mr. Challie, and Mr. Fetherstonhagh, to be delivered at Guernsey, but with false clearances at Bordeaux to deceive the enemy. Condemned by the Lords of Appeal, 7th of February, 1750, in affirmance of the judgment of the Admiralty.

In *The Lady Jane*, a Hamburgh ship, laden at Malaga with mountain wine, cargo claimed by English merchants, as the produce of goods sent to Spain before the war. Condemned 13th of April, 1749; present, Lord President, Archbishop of York, and Baron Clerke.

In *The Deergarden*, of Stockholm, woollen goods shipped ostensibly at Lisbon, voyage in fact to the ememy's port at Bilboa, but on British account. Cargo condemned, 15th of March, 1747.

In *The Elizabeth*, of Ostend, cargo the property of British subjects coming from an enemy's port. Condemned 27th of January, 1749; present, Duke of Dorset, Earl of Pembroke, Right Hon. W. Pitt, Mr. Justice Dennison, Mr. Justice Clive. Held, "that a British subject cannot trade with the enemy, but that the only punishment which the Admiralty can inflict was confiscation of the goods."

In *The Juffrow Louisa Margaretha*, Lords, 3d of April, 1781, a case of a claim of Messrs. Escott and Read, of London, for wines and other articles shipped on board a Dutch ship, April 7, 1780, at Malaga, for their account. The affidavit of the claim stated, that Mr. Escott was one of a house of trade, known by the name of Escott and Read, of

London; that they had for twenty years immediately preceding hostilities between Great Britain and Spain, carried on considerable trade to and from Malaga, and had an established house of trade at Malaga, where Mr. Escott had resided about thirty years preceding, excepting the last ten months, when he had left that place, and had since resided in England. It further stated, that considerable quantities of wine and other merchandise belonging to the said house (deposited in vaults and warehouses set apart for the same) *792] had been left at *Malaga under the care of Mr. Grivegnee, a Fleming by birth, brought up in that house, who was suffered to remain to preserve the said goods during hostilities, unless a favorable opportunity should offer of sending them to London. It stated the destination to have been to Ostend, and the property to have been described for neutral account and risk, to avoid the enemy's cruisers; and claimed the whole as the entire property of the house of London, out of which Mr. Grivegnee was to receive fourteen per cent., but no other emolument whatever. The judgment of the Court of Admiralty, rejecting the claim of Mr. Escott, was affirmed; present, the Earls of Bathurst, Sandwich, Marchmont, Hillsborough, Clarendon, Viscount Stormont, Lord Gratham, Lord Loughborough, Chief Justice of the Common Pleas, Sir Richard Worsley, Sir J. Goodricke, Sir J. Eardley Wilmot.

In *The St. Louis*, alias *El Allesandro*, Lords, July 18th, 1781, the case of a claim of Messrs. Morgan and Mather, for certain peltries shipped by them on board a vessel of New Orleans, bound to Bordeaux, and consigned to merchants there, on the proper account and risk of the shippers. The affidavit stated the history of Mr. Morgan from the year 1764, when he left England to settle in West Florida, and his subsequent transactions from 1774, on the river Mississippi; where, finding no troops nor any sort of protection granted by the British government to those settled on

the British part of the banks of that river, he had kept a ship as a floating storehouse, living himself at New Orleans by permission of the governor, under an express condition that he should not land any sort of goods in any part of the Spanish dominions. It then stated, that in 1779, finding the American troops in such force all over the river as to prevent any English ship from coming up the river, and that it was impossible to make any remittances to England but by hiring neutral vessels, he shipped the goods in question on board the "St. Louis," 27th of April, 1779, belonging to inhabitants of New Orleans, at the time neutral subjects, that being the only vessel at New Orleans bound to any port of Europe; that they were consigned to merchants at Bordeaux, to be there sold, and the proceeds remitted to Mr. Mather in London; that he was obliged to this mode of remittance that the goods might not perish on his hands.

Annexed to the affidavit was a certificate of Colonel Dickson, the British commander in those parts, certifying that Mr. Morgan a *British subject,[1] had received permission, under the twelfth article of the Capitulation [*793

[1] In *The Victoria*, Lords, July 20, 1781, the property of the same gentleman, Mr. Morgan, in the ship purchased of a Spanish subject, 21st of April, 1779, and in the cargo shipped at New Orleans, 16th of April, 1779, and consigned to London, was restored.

The circumstances of that case were that Mr. Morgan had shipped the goods 16th of April, 1779, on board a Spanish ship, bound to a Spanish port, but afterwards the destination was altered for London; on the 20th the ship sailed, but the master hearing in the river that there was a prospect of approaching hostilities between England and Spain, returned, and refused to proceed, unless he was indemnified against all loss. Mr. Morgan then purchased the ship of the master; she sailed for London, with the Spanish master and crew, and under Spanish colors, and was captured 7th of June, 1779, by a privateer commissioned against France. The order of Council for reprisals against Spain issued 18th of June, 1779.

The præsertim of the Appeal stated the transfer of the ship to have been a fictitious transfer, and that Mr. Morgan was at the time of the transfer a Spanish subject, residing and carrying on trade at New Orleans; that by the proofs, the ship and cargo appeared to be Spanish property, and as such, being taken by a priva-

of Baton Rouge, to convey himself and family to London under a passport from the Spanish governor. The sentence of the Court of Admiralty, condemning the ship and cargo as enemy's property, or otherwise liable to confiscation, was affirmed; present Earl of Bathurst, Earl of Clarendon, Lord Loughborough, Chief Justice of the Common Pleas.

In *The Compte de Wohronzoff*, Lords, 19th of July, 1781, a case of a claim of Mr. Daly, Mr. G. Byrne, and other Irish merchants, for the ship and certain quantities of French wines shipped at Bordeaux, May, 1780, on their account, with ostensible papers for Russia. It was stated in support of their claim, that during the whole of the war the Commissioners of his Majesty's revenue and excise in Ireland, had constantly permitted trade to be carried on from Bordeaux to Dublin, in the same manner as it was before hostilities commenced; and all ships belonging to British owners, navigated, according to law, with cargoes the property of British owners coming immediately and openly from Bordeaux, had been and still were admitted to enter and invoice their cargoes from thence; and that on all cargoes so entered the regular duties had been paid.

An Act of Parliament was recited, passed in Ireland in the 19th and 20th of his present majesty, by which it is enacted, that from the 24th of June, 1780, till the 25th of
*794] December, 1781, there *should be paid an additional duty of 10*l.* 7*s.* per ton on all French wines imported into the kingdom of Ireland during the said period. The practice of admitting such cargo to an entry was proved by an extract from the entries office, by which it appeared that several cargoes of a similar nature had been permitted to enter. And it was contended, that the Act of the Irish

teer having no commission against Spain, they were to be condemned as *droits* of Admiralty.

Mr. Morgan returned to England after the Capitulation of Baton Rouge, and arrived in London 29th of July, 1780.

legislature was decisive, as far as it was competent for them to decide, being made long after the commencement of hostilities, as it could not be imagined that they would be inattentive to public affairs, or propose to draw a revenue from a trade prohibited and illegal. The judgment of the Court of Admiralty, condemning the ship and cargo as good and lawful prize, was affirmed, and the appellant was condemned in the costs of the appeal; present, Earl of Bathurst, Earl of Hillsborough, Earl of Clarendon, Lord Loughborough, Chief Justice of the Common Pleas.

In *The Expedite van Roterdam*, Lords, 18th of July, 1782, a case of the claim of Messrs. Gregory and Turnbull, of London, for a quantity of wine and other articles shipped on board a Dutch ship, December 20th, 1780, at Malaga, for them, though ostensibly for the account and risk of Mr. Carl Thomasze, of Amsterdam, their agent, Holland being then at peace with this country. The affidavit of the claimant recited an Act passed in the twentieth year of his majesty's reign to permit goods the product or manufacture of certain places within the Levant or Mediterranean seas to be imported into Great Britain or Ireland, in British or foreign vessels, from any place whatsoever, enacting that, from the 1st of January, 1780, any goods which had been usually imported from any port or place in Europe, within the Straits of Gibraltar (with an exception respecting the dominions of the Grand Signior), should and might during the continuance of the said Act, be imported and brought by any person or persons whatsoever into Great Britain or Ireland, in any ship belonging to any state in amity with his Majesty. The affidavit stated, that the importation had been in every respect conformable to the said Act, and that the said goods were coming for the sole account, risk, and benefit of their house, being described in the bill of lading to be at the account and risk of Carl Thomasze, only to avoid the enemy's cruisers. The judgment of the

Court of Admiralty condemning these goods was affirmed; present, Lord Camden, Earl of Effingham, and Lord Ashburton.

In *The Bella Guidita*, Lords, 20th of July, 1785, a case of a *claim of Mr. Vaughan and other British merchants, sending a cargo of provisions on board a Venetian vessel from Ireland to Grenada, one of the islands then lately taken by the French. The affidavit of claim set forth the particular situation of that and the other islands, since they had fallen into the possession of the French; that they were not considered by the French government as entirely French islands; that by a certain ordinance of the French king, it was ordained that the merchants and inhabitants of all or most of the conquered islands should, as to their trade and commerce, be upon the same terms and footing as the British merchants and inhabitants of the island of Dominica; that by the 17th Article of the Capitulation of the island of Dominica, in 1778, it was permitted to the merchants of the said island, until peace, to receive vessels (except English) to their address from all parts of the world, without their being confiscated; that before Dutch hostilities broke out, the trade between the conquered islands and Great Britain had been carried on through the island of St. Eustatius, under the sanction of British Acts of Parliament, for the purpose of supplying the islands with provisions absolutely necessary for their subsistence; and of taking off the produce in payment to British merchants, as the only means of keeping down the interest due to them on mortgage on the plantations.

*795]

"That after the Dutch hostilities it became notorious to the British government that the obstruction of this trade would be attended with very serious consequences to the British interests in the said islands, and under these considerations an Act was passed in the 20th Geo. III. reciting, that during the said hostilities the islands of Grenada and

the Grenadines had been taken by the French king, but it was just and expedient to give every relief to the proprietors of estates in the said islands; and enacting, that no goods or merchandise of the growth, produce, or manufacture of the said islands, on board neutral vessels, going to neutral ports, should be liable to condemnation as prize.

"That under this view of the necessitous situation of the said island, and of the favorable manner in which it was considered by the government of this country, the claimants chartered this ship to carry out a cargo of provisions to Grenada, and bring back in return a cargo of the produce of that island; that there was an ostensible destination to St. Thomas merely for the purpose of avoiding the enemies' cruisers.

"The judgment of the Vice-Admiralty Court of Barbadoes, *condemning the cargo as French property, was affirmed, and the appellant condemned in the costs of appeal; present, Lord Camden, President of the Council, Earl of Effingham, Marquis of Caermarthen, Viscount Howe, and Lord Sydney."[1] [*796

[1] The printed papers of appeal contain the following strong representation of the hardship of this case:—

The appellants and intervener in support of their case beg leave to observe that, as the facts stand now disclosed to your lordships, the single question arises, *whether it was so unlawful for a* British *subject to send supplies to the* British *plantations in the* Grenada *islands whilst under the misfortune of a temporary subjection to the* French, *as that a confiscation of the supplies so sent should be the just and legal consequences of his misconduct?* and they humbly presume that this question cannot possibly be answered in the affirmative by those who consider the favorable principles of the various Acts of Parliament relating to the British captured islands, the attentions of his Majesty's ministers to the relief of the proprietors, and the peculiar exigence of public affairs which called both upon the legislature and the executive government to authorize special provisions for cases which happily have had but few precedents in the history of this country.

"In the late unfortunate war Great Britain saw many of its valuable West Indian possessions fall into the hands of the enemy, from its absolute inability to protect them. The proprietors being still British in principle and affection, and many of them by actual residence, and the hope being constantly entertained, as well by the public as by individuals, that these islands would soon revert to the dominion of their natural sovereign, the Parliament, in the several cases of

*797] *In *The Eenigheid*, Lords, 21st of March, 1795, a case of a claim of Mr. Hankey, of London, and of Mr. Alphen, of Rotterdam, for a quantity of corn shipped on board a Lubec ship, in December, 1792, from Rotterdam to Nantes. It appeared from the evidence, that the ship was chartered for this voyage on the 6th of December, 1792, and that the cargo was actually laden in the same month, but by various accidental delays the ship was prevented from putting to sea till the 9th of February. Hostilities

Nevis, Montserrat, St. Christopher's, Grenada, and the Grenadines, expressly permitted the produce of these plantations to be conveyed to Europe free from British capture, under limitations intended merely to prevent the abuse of this permission by the clandestine extension of it to the produce of foreign colonies. In this provision the principle appears to be clearly recognised and established *that these islands, though captured, were not to be considered as* French; for upon what other principle could British protection have been imparted to them? and if the British legislature did thus solemnly declare its intention to protect and encourage the produce of these plantations during the remainder of the war, upon what grounds of legal or political analogy can it be contended that it was criminal to transmit those supplies, without which these plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of necessary importation, without which the pretended permission of the other is merely nugatory and insulting?

"The conduct of his Majesty's executive government was no less favorable to the interests of the unfortunate British proprietors. Various applications to his Majesty's ministers on the behalf of these proprietors were always readily entertained and attentively considered; and the appellants and intervener deem much too highly of the wisdom and integrity of his Majesty's servants to suppose, that whilst they were listening to every proposal for the relief of these islands, they were at that moment conscious to themselves that in truth they were only consulting for the better security of the property of the French.

"Upon the extreme exigence of public affairs at that period, the appellants and intervener forbear to enlarge. It remains for your lordships to decide whether these could possibly be the intentions of the British government, viz.: That those islands should be condemned to absolute sterility by a refusal of such necessary supplie as the French, from a partiality for their own islands, found it convenient to withhold from them; that the only practicable mode for the immediate collection of British debts, secured upon these plantations to an enormous amount, should be prohibited and punished; and that Great Britain, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider as its own, should lie at the mercy of the ancient markets of the enemy upon such terms as a successful monopoly would prescribe."

were declared by the ruling powers of France against England and Holland on the 1st of February, 1793. It was contended for the captors, that hostilities having been declared by the ruling powers of France against England and Holland, on the 1st of February, 1793, no cargo could lawfully be sent from Holland for France, on account of British and Dutch subjects, on the 9th of the same month; subsequent to which, this ship with the cargo of wheat in question on board, set sail from Helvoetsluys for Nantes; and having been captured in such voyage on the 26th of that month, the cargo was rightly, justly, and lawfully condemned as prize to the British captors. The sentence of the Court of Admiralty condemning the whole cargo was affirmed; present, Earl of Mansfield, President of the Council, Lord Auckland, Sir Richard Pepper Arden, Master of the Rolls, Sir J. Eyre, Chief Justice of the Common Pleas, Sir W. Wynne, Charles Greville, Esq.

In *The Fortuna, Kock*, Lords, 27th of June, 1795, a case of a claim of Messrs. Tupper & Drake, British merchants carrying on trade at Barcelona, for a quantity of goods shipped on board a Swedish vessel at Barcelona, January, 1793, and destined to Calais. It appeared in evidence that the ship was chartered for this voyage on the 11th of January, 1793, that she sailed to Tarragona and Saloe (in which latter port she arrived on the 15th of February), and completed her cargo, and sailed on her voyage to Calais on the 21st of March. The ship was taken on the 8th of April, by a Spanish frigate, and released under this sentence of the Spanish Court of Admiralty, in these terms: "That considering the vessel *is under neutral colors; that [*798 the cargo does not consist of contraband goods; that the concerned do not appear other than merchants resident in Spain; that the war was not declared against France, neither when she was laden nor when she was detained, because it was on the 20th of March, and the last bill of

lading appears dated at Saloe on the 15th of the said month, from whence she sailed on the 21st, they ought and did command the said brig to be set at liberty." For the captors it was contended, that the ship was liable to confiscation, because she sailed from Spain for Calais many months subsequent to the commencement of hostilities by the French against this country and against Spain; and because it was incumbent on the proprietors to have prevented the sailing of this ship from Spain for Calais, or to have shown that every endeavor had been used for that purpose. The sentence of the High Court of Admiralty condemning the cargo was affirmed; present, Earl of Mansfield, Lord St. Helens, Sir W. Wynne, Sylvester Douglas, Esq.

In *The Freeden*, Lords, July 4, 1795, a case of a claim of Messrs. Herries, Keith, and Stembor, of Barcelona, merchants, for a quantity of brandies shipped on board a Swedish ship at different Spanish ports, in the months of March and April, 1793. It appeared in evidence that the firm consisted of Sir Robert Herries and Charles Herries, resident in London, Alexander Keith, a British subject resident at Barcelona, George Keith, a British subject resident at Ostend, and Frederick Stembor, a Dutch subject resident at Barcelona. The vessel was chartered on the 7th of March, for Ostend. On the 14th of March, she sailed from Barcelona to Terrendembarra, and from thence on the 23d of March for Terragona, where the cargo in question was completed; she sailed from thence on the 3d of April, and put into Malaga on the 6th of May; and proceeding on her voyage was taken on the 2d of June by a French privateer, and retaken on the 23d by the respondents. On the former hearing leave was given to Sir Robert Herries, resident in London, to give proof that on the breaking out of hostilities they had taken means to prevent their being implicated in the consequences of an illicit commerce. A letter was accordingly brought in, written on the 12th of February,

1793, in which was this passage: "We have learnt with certainty the declaration of war in France against this country and Holland, as well as the actual commencement of hostilities by the capture of several of our own trading-vessels; in consequence of which letters of *marque and general reprisals are granted here against all [*799 ships and goods belonging to France, or to any persons being subjects of France, or inhabiting within any of the territories of France." The judgment of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of Mansfield, Lord President of the Council, Sir Richard Pepper Arden, Sir W. Wynne, Sylvester Douglas, and Charles Greville, Esqrs.

In *The William*, Lords, December 19th, 1795, a case of a claim of Messrs. Munro, Macfarlane and Co., of Grenada, for a quantity of sugars shipped on their account at Guadaloupe, in June, 1793. It appeared from the claimant's affidavit, that for some years prior to the war a trade had been carried on by the merchants of the British islands, supplying the French islands with slaves on credit, to receive payment in sugars of the ensuing year. That there was on that account always a considerable debt due to them from the French merchants. That the sugar in question had actually been received at Guadaloupe by the agent of the claimants, for slaves sold on their account prior to the war. The judgment of the Vice-Admiralty Court of St. Christopher, condemning the ship and cargo, was affirmed;[1] present, Earl of

[1] In this case, the extreme hardship of the rule contended for was strongly urged by Dr. Nicholl (afterwards King's Advocate), and Mr. Stephen, as applied to the situation of the present claimants. It was argued, that there was no other means of obtaining a remittance, as payment by produce was the usual mode of dealing as well in the English as the French islands; that they were too remote from the seat of government to obtain a license from England in time, and that there was no authority in the West Indies competent to dispense with the rule contended for; that to deny the claimants this mode of getting off their effects was to maintain that they were absolutely bound, without any alternative, to leave them in the hands of the enemy; that this distinction arose be-

*800] Mansfield, President *of the Council, Lord St. Helens, Sir Richard Pepper Arden, Master of the Rolls, and Sir W. Wynne.

I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established that no one case exists which has been permitted to contravene it. For I take upon me to aver that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced. Where Acts of Parliament have on different occasions been made to relax the navigation law and other revenue acts; where the government has authorized, under the sanction of an Act of Parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the

tween the present case and former precedents—that there was in this case no accommodation to the enemy, but rather an impoverishment, in taking out of their reach valuable articles for which no further compensation was to be made; that it differed therefore from cases of exporting to the enemy's country, or of importing from thence for reciprocal profit; that the commercial treaty between Great Britain and France allowed a month after the breaking out of hostilities for the removing of property from the enemy's country; that the present shipment was within that period after the time when notice of the war first arrived in these parts; and that if British subjects were not permitted by their own government to avail themselves of the favorable stipulation of the treaty, it became a snare rather than a protection to those who were induced to engage in trade on the faith of it.

For the captors. All questions respecting the property which had been contested in the Court below, were given up by the then King's Advocate, Sir *W. Scott;* and the case was expressly placed on the ground that the claimants, being British or Dutch subjects, were taken in the act of trading with the enemy contrary to their allegiance. The case of *The Lady Jane*, in 1749, in which the produce of goods sold in the enemy's country before the truce, and that of *The Juffrow Margarctha*, where wines left in store and afterwards shipped in specie, were condemned, were relied on. It was expressly contended that there was no difference between *going to* or *coming from* the enemy's ports, as they were equally acts of commercial intercourse with the enemy, which by the law of war was universally prohibited; that the power of the crown to dispense with this rule, in particular cases, was a sufficient answer to every objection on the ground of hardship; and that the allowing of commerce with the enemy, even for the specious purpose of withdrawing property, without such previous license, would be opening a wide door for treasonable communications with the enemy.

same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claims not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its *allies* in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply mutually to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England.[1] And he who for so long a time assisted at the decisions of that Court, at that period, could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess prove him to have been *personally present at those particular judgments. What is meant by the addition "but this does not extend to a neutral vessel," it is difficult to conjecture, because no man was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation; and therefore I cannot but conclude, that the words of that great person must have been received with some slight degree of misapprehension. [*801

What the common law of England may be, it is not necessary nor perhaps proper for me to inquire. But it is difficult to conceive that it can by any possibility be otherwise; for the rule in no degree arises from the transaction being upon the water, but from principles of public policy

[1] *Gist* v. *Mason*, 1 Term Rep. 85.

and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country; but when an enemy existed in the other part of the island (the only instance in which it could occur upon the land), it appears from the case referred to by that noble person, to have been deemed equally criminal in the jurisprudence of the country.

The general rule of law being, in my apprehension, clear, it is only to be inquired whether there are any distinctions which take this case out of the application? But I need not add that these must be legal distinctions, and not such as present mere considerations of indulgence and compassion, or mere considerations of the utility of the particular commerce; for to these the court has no power to give way. A reference has been made to the statutes. It is not argued that the statutes will, in the just apprehension of them, authorize such a trade, but that they might have led to an innocent mistake on the subject. These statutes, it is admitted, were made to apply only to the property of persons in Holland while hostilities were impending. It was necessary that some provisions should be made for the security of the loyal Dutchmen who might migrate to this country. It was found necessary, on this account, to relax the navigation laws; and for this purpose an order of council first issued, which was afterwards confirmed by these acts as necessary to support the order and protect those who acted under it, but merely with respect to property so circumstanced. These were mere custom-house regulations and nothing else; and it is impossible to entertain a doubt respecting the interpretation of them.

*802] *It appears that these parties had before applied to council for special orders, and had always obtained them. It is much to be regretted that they had not ap-

plied again to the same source of information. Instead of doing so, they consulted the Commissioners of the Customs, very proper judges to ascertain what goods might be imported under the revenue laws; but this is a matter of general law, on which they are not the persons best qualified to give information or advice. The intention of all the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law which no innocence of intention can do away. The same pleas were urged, and with equal reason, for Mr. Escott, and in many other cases; but it has been decided by a court which has much greater power of construction, that such pleas could not be sustained. I may feel greatly for the individuals, who, I have reason to presume, acted ignorantly under advice that they thought safe. But the court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the claims.

Freight and expenses were given to the master.

On application that the court would decree the expenses of the claims, to be paid out of the cargo, it was contended that there was no instance in which the court had done this but in cases of recapture.

The court directed the expenses to be paid.

"In the case of The Hoop," observes a late eminent judge and jurist,—Mr. Justice Story, "Sir William Scott discussed at large the question, how far trading with a public enemy was allowable; he reviewed all the authorities, and adverted to the leading principles of reason and policy. He declared that there existed a general rule in the maritime jurisprudence of the country, by which *all trading with the public enemy, unless with the permission of the sovereign, was interdicted*, and he showed that this was a general principle of law in most of the countries in Europe. . . . By plain, clear, and, as it appears to me, masterly reasoning, did Sir William

Scott overthrow the notion of any admissible trade with the enemy, without the authentic and special license of the king. . . . It is difficult to conceive that the common law of England can, by any *803] possibility, be *otherwise, for the rule in no degree arises from the transactions being upon the water, but from principles of public policy and public law, which are just as weighty upon the one element as the other. The Court has no power to depart from the law on this subject on considerations of compassion or of the utility of the particular commerce. The property engaged in such commerce is subjected to forfeiture; and the rule was unbendingly applied in the very case of The Hoop, though the articles imported from Holland were of essential use in manufactures, and were imported under an assurance from the Commissioners of Customs in Scotland that they might be lawfully imported without license, under the statute 35 Geo. III. Sir William Scott said he felt greatly for the individuals, who he had reason to presume acted ignorantly, under advice that they thought safe; but the Court had no power to depart from the law which had been laid down. I can only add upon the conclusion of that decision, that any court of justice that can expound the law with such admirable perspicuity, and maintain it with such intrepid firmness, in spite of all personal feelings and of the hardships and compassion of the case, must impart honor to the country in which it is instituted, as well as command the confidence and esteem of the rest of mankind." See also Potts *v.* Bell, 8 Term Rep. 548–561; The Charlotta, Dupleix, 1 Dods. 387; Esposito *v.* Bowden, 7 E. & B. 763–778; The Ionian Ships, Spinks, Adm. Rep. 193–206; The Neptune, Spinks, Adm. Rep. 281, 284.

In ascertaining who will be considered an alien enemy, so as to render a trade with him illegal, it should be remembered that domicil will be the test for determining his character. If a person is domiciled with the enemy, whether he be a neutral or even a native-born subject (The Indian Chief, 3 C. Rob. Adm. Rep. 18; The Aina, Spinks, Adm. Rep. 8), he will be considered as an alien enemy, and all dealings with him will be illegal. See Potts *v.* Bell, 8 Term Rep. 548; M'Connell *v.* Hector, 3 Bos. & Pul. 113, 118; Roberts *v.* Hardy, 3 M. & Selw. 533; Willison *v.* Patterson, 7 Taunt. 439 (2 E. C. L. R.); O'Mealey *v.* Wilson, 1 Campb. 481.

Any country or port of which the enemy is in the occupation,

though taken from a neutral, will, for the purpose of the rule forbidding intercourse with the enemy, be considered as being the enemy's country, where it is recognised by our own government as such. This was often decided during the wars of the first Napoleon, with reference to the countries occupied by his armies (Bromley *v.* Hesseltine, 1 Campb. 75; Blackburne *v.* Thompson, 3 Campb. 61; Donaldson *v.* Thompson, 86, 428; Johnson *v.* Greaves, 2 Taunt. 344; Hagedorn *v.* Bell, 1 M. & Selw. 450); and in The Bella Guidita, cited in the principal case (*ante*, p. 974), supplies sent to a British colony while under temporary subjection to the *enemy were condemned as prize, the transmission of them being considered as a dealing with the enemy. [*804

Without going at large into the question what will constitute a domicile in the enemy's territories, we may briefly remark that all persons who go to reside therein with a knowledge of the war, especially if they have trading establishments therein, and all persons who having come to reside therein *before* the war, continue their residence for a longer period than is necessary for their convenient departure will be considered as domiciled with the enemy: Wildman's Inst. of Internat. Law, vol. ii. p. 8. As to national character, see Wheat. Internat. Law, 394, 6th ed.; Wildman's Inst. of Internat. Law, vol. ii. p. 36–117; Manual of Law of Maritime Warfare, by Hazlitt & Roche, p. 22.

Foreigners resident in the country of a belligerent incur all the obligations of subjects of that country, with respect to trading with the enemy. Thus in the well-known case of The Angelique, Streng, 3 C. Rob. App. B. 7, a ship and cargo claimed on behalf of Armenian merchants resident at Madras, taken on a voyage from Madras to the Spanish settlement of Manilla (Great Britain being then at war with Spain), was condemned by the Court of Appeal (affirming the sentence of the Vice-Admiralty Court), as being taken trading with the enemy. The Court of Appeal, after a very full hearing, stated it to be their opinion, that by the general law all foreigners resident within the British dominions incurred all the obligations of British subjects; that there was nothing to distinguish this particular class of merchants, in point of law, from the general rule; that whatever doubt might be entertained whether the East India Company might not, in wars originating with them under the power of their charter, relax the operation of war so far as to license the

trade of individuals with such an enemy, they could unquestionably have no such power in respect of a trade carried on with a general and public enemy of the crown of Great Britain; that it would on that account be useless to admit the claimants to prove, as it was offered, the fact of a tacit or acknowledged permission from the Governor in Council in India. See also The Indian Chief, Skinner, 3 C. Rob. 12.

It is not allowable for the subject of an ally to trade with the enemy during a conjoint war, without being liable to a forfeiture of his property engaged in such trade, in the Court of the ally. See The Nayade, Mertz, 4 C. Rob. 251–253, where it is stated that the case of The Eenigheid (cited *ante*, p. 797) had effectually disposed of this question, where it being contended that we had no right to inflict forfeiture on a subject of Holland, it was replied, "that it was no particular law of this country that inflicted such a penalty, but that it was an universal principle of the law of nations, *805] and that it would *place this country in a very disadvantageous situation indeed, if the subjects of an ally in war might trade with the enemy, whilst the property of British subjects so employed was subject to confiscation."

There is an important exception to the rule, that a subject of a belligerent power cannot trade with the enemy of his country, for if such subject be domiciled in a neutral country, he acquires the privileges of a neutral, and may therefore carry on trade with powers at war with his own country: The Danous, 4 C. Rob. 255, n.; Bell *v.* Reid, 1 M. & Selw. 726; The Emanuel, Soderstrom, 1 C. Rob. 296; Bell *v.* Buller, 1 M. & Selw. 726; Marryat *v.* Wilson, 1 Bos. & Pul. 430; The Neptunus, 6 C. Rob. 408; The Ann, Smith, 1 Dods. 223.

All *property* taken when engaged in trade with the enemy will be forfeited as prize to captor, and not to the crown. "The ground of the forfeiture is," as observed by a learned judge, "that the property is taken adhering to the enemy, and therefore the proprietor is *pro hâc vice* to be considered as an enemy:" The Nelly, Perrie, 1 C. Rob. 219 n.

Persons whose nation is merely under the protectorate, and who are not *subjects*, of Great Britain, may carry on trade with the enemy. This was decided during the late war with Russia. See the case of The Ionian Ships, Spinks, Adm. Rep. 193. There *it*

was held by Dr. Lushington, that the inhabitants of the Ionian Islands might trade with Russia. "I should," said the learned judge, "restore the ship on the following grounds. First, because it is not the property of British *subjects* in any sense of the term, consequently it cannot be, as the property of a British subject, illegally engaged in trade with Russia on the ground of the war with Russia. Now it may be, as to this head, not unimportant to consider on what ground the property of a British merchant trading with the enemy of Great Britain during war is condemned. We have all the law in the case of The Hoop, 1 C. Rob. 196, and in The Nelly, cited in The Hoop. It is upon the ground that such property is taken adhering to the enemy; and therefore the property being bound not so to adhere, is considered, *pro hâc vice*, committing an illegal act. Such property belonging to a neutral, is not adhering to the enemy in the sense which is meant in this judgment, for he has no enemies to adhere to. The prohibition is to British subjects only, or to allies in the war. Now Lord Stowell, in the case of The Hoop, especially relied on the authority of Bynkershoek, and upon a greater authority he could not have placed his dependence; and every word in the passages quoted, and in the whole treatise, relates to *subditi*—to *subjects*, and to *subjects only*. This is the expression used by Bynkershoek—to subjects and subjects only. So in the numerous cases cited by Lord Stowell, the whole inquiry is, whether the property *claimed was the property of British subjects—the subjects of Great Britain [*806 in the sense in which the term is used in the Courts of Prize, namely, *persons carrying on trade in territories subject to the British crown*, and consequently owing at least a temporary allegiance to the crown of Great Britain. Do then the subjects of the Ionian States stand *in eâdem conditione?* It is admitted on all hands that they are not British subjects in the proper sense of the term; for to make such an averment would set the whole treaty at naught; it would be to make a mockery of the most stringent stipulations contained in that treaty. Diplomatic authorities may do so—a court of justice cannot. . . . I shall restore; because the property is not the property of allies in the war, for neither by the treaty nor by the law of nations can I impose on the subjects of the Ionian States that character. Again, I shall restore, because if Great Britain had the right by treaty of declaring war between the Ionian

Islands and Russia, she has not done it; and because, in the absence of all such declaration or solemn act, in whatever form, I am of opinion that the Ionian subjects are not placed in a state of war." See also The Leucade, 1 Spinks, Adm. Rep. 217.

As might naturally be supposed, from the relations existing between the subjects of different states during a state of peace, many attempts, upon the breaking out of war, will be made to evade the rule, forbidding any dealing or trade with the enemy. The Courts, however, will enforce it strictly, and will not suffer it to be infringed by any indirect means or through the intervention of a third party. Hence it has been held that it is illegal for a subject, without the license of the crown, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent resident in the enemy's country after the commencement of hostilities; though it might not appear that they were purchased from the enemy: Potts *v.* Bell, 8 Term Rep. 548.

Nor will a British subject be able to evade the consequences of trading with the enemy, by shipping goods in the first instance to a neutral port. "The interposition," says Sir William Scott, "of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance that the goods are first to go to a neutral port will not make it lawful. The trade is still liable to the same abuse and to the same political danger, whatever that may be. I can have no hesitation in saying, that during a war with Holland it is not consistent to a British merchant to send goods to Embden, with a view of sending them forward *on his own account* to a Dutch port, consigned by him to persons there, as in the course of ordinary commerce:" The Jonge Pieter, 4 C. Rob. 84.

If the property of a subject of a belligerent state has been fraudulently transferred to a neutral, in *order to evade the con-
*807] sequences of trading with the enemy, it will be forfeited. See The Odin, Hals, Master, 1 C. Rob. 248. There a British ship which had been ostensibly transferred to a Dane, was seized trading with the enemy: it was held by Sir William Scott, that the cargo as well as the vessel, both of which were claimed by the Dane, were forfeitable, the ship not having been *bonâ fide* transferred, and therefore still remaining British property. "If the claim," said the learned judge, "is deemed fraudulent as it respects the property of the ship, it will, I think, be entitled to little regard as it respects

the property of the cargo *claimed for the same proprietor and appearing evidently to be concerned in one and the same original adventure.* I am not aware of the obligation that lies upon the Court, in the case of such a claim, to separate its sound from its diseased parts, for the benefit of a claimant detected in the falsehood of a considerable portion of his claim. He has no right to insist that a discrimination shall be made in the property, which, if any part be his own, he has fraudulently and with corrupt views mixed up with the property of others."

In order to constitute the offence of trading with the enemy, there must be an *act* of trading to the enemy's country as well as the *intention* of doing so after the breaking out of war. In The Abby, 5 C. Rob. 251, a ship belonging to a British subject before the breaking out of hostilities with Holland, sailed from Liverpool to Demerara, at that time a Dutch colony, and was taken off that island, after its surrender to the British forces: Sir William Scott decreed restitution on payment of the captor's expenses. "If," said the learned judge, "a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favor; the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy (which, I have already observed, cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared), but at the time of carrying the design into effect the person is become not an enemy, the intention here wants the *corpus delicti.* No case has been produced in which a mere *intention* to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has inured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle I am of opinion that the party is free from the charge of illegal trading. As to the other ground, there appears *to me to have been neither *intention or act.* . . . On both these points, therefore, I am of opinion, that the claimant is entitled to the restitution of his property. On the first there was *no illegal* [*808

act; on the second, there was neither *intention* nor *act.* On the first ground the Court would have expected the party to have exonerated himself from the intention of trading with the enemy after the knowledge of hostilities, if the colony had remained hostile. As the colony was not hostile at the time of the supposed importation, I think that is not necessary in this case."

A subject resident in an enemy's country cannot carry on commerce there, except by license of the crown; "but the person residing there under that authority, may so lend himself to the enemy's purposes, as in a question with this country to identify himself with the foreign state. The Prize Courts have frequently determined, that if a person residing by license in an enemy's country, even the representatives of the crown, should trade there, he is not in that character representing the crown, but is lending himself to the purposes of the enemy, and his property therefore would be lawful prize:" Ex parte Baglehole, 18 Ves. 529; 1 Rose 271.

As laid down in the principal case, by special license of their respective sovereigns, intercourse may be carried on between the subjects of hostile states. "Under this view of the matter," observes Sir William Scott, "it is clear that a license is a high act of sovereignty, an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controlled:" 4 C. Rob. 11. "The consent of the crown to such a course of trade must be interposed in some way or other. The particular mode in which this consent may be expressed is not material. It may be signified in a variety of ways: by a license granted to the individual for the special occasion, by an order in council, by proclamation, or under the authority of an Act of Parliament, to which the crown is necessarily a party:" per Sir William Scott in The Charlotta, Dupleix, 1 Dods. 390. The crown, however, cannot control a statute by its license: Toulmin *v.* Anderson, 1 Taunt. 227.

A license to trade with the enemy has been dispensed with upon grounds of public policy. Thus in the Madonna delle Gracie, Copenzia, 4 C. Rob. 195, a person having been long resident in Spain as British consul, before the breaking out of hostilites purchased wines for the supply of the British fleet. After the war had com-

menced, they were captured on their voyage to Leghorn, to which place they were shipped. Sir William Scott decreed restitution. "It would be a considerable discouragement," he observed, "to persons in such *situations, at a distance from home, and employed in the public service, if they were to know that in [*809 case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a license; inasmuch as if a license had been applied for, it must have been granted. . . . On the whole I do not think that, by restoring this property, I break in upon any one of the principles which this Court is bound to sustain, as against subjects of this government trading with the enemy."

In like manner as a subject of our own country may trade with the enemy under the license of the sovereign, so may a subject of an ally do so with the permission of the proper authorities: The Neptunus, 6 Rob. 403. Where this permission is readily accorded, it may constitute a good reason for the other co-belligerents granting the same permission, in order that their subjects may enjoy equal commercial advantages. Thus "in 1705, when England and Holland were allies in war against France and Spain, and it was at first (according to the general policy) attempted to prevent all trade with the enemy, on the part of English and Dutch merchants, and several Dutch ships caught in the act of trading to the enemy's country were captured and brought into this country. It appeared afterwards to the English government, that as the Dutch government encouraged their merchants to trade to Spain under passes, it would not be in the power of England effectually to prevent this trade, and that it might prove very detrimental to England if Holland should, by this opportunity, gain possession of the bullion trade, and retain it after the war. Under these considerations, the English government issued an order, August, 1705, for the liberation of all Dutch ships so detained, and directed English cruisers for the rest of that war not to molest English or Dutch ships sailing on a trade to Spain under the passes of their respective governments, since her Majesty has opened the trade with the enemy:" 4 C. Rob. 254 n.

The license of an ally to one of its own subjects must, however, be shown either to have been given with the consent of the confederate

state, or at any rate that the intercourse carried on with the enemy is of such a nature as not to interfere with their common operations. "It is of no importance to other nations," says Sir William Scott, "how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do anything to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence *may be that it will supply that *810] aid and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of his ally. It should seem that it is not enough therefore to say that one state has allowed this practice to its own subjects; it should appear to be at least desirable that it should be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state:" The Neptunus, 6 C. Rob. 406.

The mode in which licenses are to be construed has been thus laid down by Sir William Scott. "Licenses," he observed, "are high acts of sovereignty, they are unnecessarily *stricti juris*, and must not be carried further than the intention of the great authority which grants them may be supposed to extend. . . . . The circumstances are requisite to give the due effect to a license; first, that the intention of the grantor shall be pursued; and secondly, that there shall be entire *bona fides* on the part of the user. It has been contended that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential that that only shall be done which the grantor intended to permit; whatever he did not mean to permit is absolutely interdicted, and the party who uses the license engages not only for fair intentions, but for an accurate interpretation and execution; when I say an accurate interpretation and execution, I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the grantor liberally understood:" The Cosmopolite, 4 C. Rob. 11, 13.

In these terms the law was laid down in the year 1801, by Sir William Scott. Eight years afterwards, when the greater part of

Europe was under the dominion of France, and intercourse with the different nations of Europe could only be carried on by giving a greater extension to the grant of licenses, which were considered not as mere matters of special and rare indulgence, but were granted with great liberality to all merchants of good character and expressed in general terms, licenses received an enlarged and liberal interpretation, not indeed contrary to the principles before laid down by the same learned judge, but in order to carry out the intentions of the government. In the leading case of The Goede Hoop, Pieters, Edw. 332, he laid it down as a general rule "that where no fraud had been committed, where no fraud had been meditated, as far as appeared, and where the parties had been prevented from carrying the license into literal execution by a power which they could not control, they should be entitled to the benefit of its protection, [*811 although the terms might not have been literally *and strictly fulfilled." See also The Vrow Cornelia, Dykstra, Edw. 350; The Johan Pieter, Schwartz, Id. 355; The Dankbaarheit, 1 Dods. 187; Flindt *v.* Scott, and Flindt *v.* Crockatt, 5 Taunt. 674 (1 E. C. L. R.) 15 East 525. Moreover, when a government grants a license, it must be supposed to grant all that is necessary to carry it into effect: The Clio, 6 C. Rob. 69, 70. And if it legalizes a trade which would otherwise be unlawful, it must be presumed to authorize all measures necessary to be adopted for its due and effectual prosecution: Kennington *v.* Inglis, 8 East 273; Uspariche *v.* Noble, 13 East 332.

Whatever is the fair construction of a particular license when issued, necessarily continues the same while it remains in force, and it will not be considered that government intended to restrict it by a general order in council: Hendrick, Hansen, 1 Acton 322, 330. See further as to licenses and their construction, Wildman's Instit. of Internat. Law. vol. ii. p. 245–269; Manual of Law of Maritime Warfare, by Hazlitt and Roche, 366.

But another principle of law, as is laid down by Sir Wm. Scott (*ante*, p. 790), forbidding communication with the enemy as fundamentally inconsistent with the relation at that time existing between the two countries, is the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. It follows therefore that a state in which contracts cannot be enforced, cannot be a legal state of commerce.

All *executory* contracts with subjects of the enemy become at once void on the breaking out of war. All contracts of affreightment, for instance, made during the war, or even made before, if they remain *unexecuted* at the time war is declared, are (as the further execution becomes unlawful or impossible) dissolved on breaking out of the war, and no remedy can be obtained for an alleged breach of them. See Esposito *v.* Bowden, 7 E. & B. 779 (90 E. C. L. R.); and the elaborate and able judgment of Willes, J. See also Reid *v.* Hoskins, 5 E. & B. 729 (85 E. C. L. R.); 6 E. & B. 953 (88 E. C. L. R.); Avery *v.* Bowden, 5 E. & B. 714 (85 E. C. L. R.); 6 E. & B. 953 (88 E. C. L. R.); Barrick *v.* Buba, 2 C. B. N. S. 563 (89 E. C. L. R.).

Although they were formerly supported by Lord Mansfield (Planché *v.* Fletcher, Doug. 251; Gist *v.* Mason, 1 Term Rep. 84; Lavabore *v.* Wilson, Doug. 284), it has since been clearly decided that all contracts of assurance of an enemy's property, unless he have license to trade (Wells *v.* Williams, 1 Salk. 45; 1 Ld. Raym. 282; Kensington *v.* Inglis, 8 East 273; Conway *v.* Gray, 10 East 536; Usparicha *v.* Noble, 13 East 332), are invalid, and no action can be brought upon them after the restoration of peace, even when entered into before hostilities broke out, where the loss by a British capture took place afterwards: Furtado *v.* Rodgers, 3 Bos. & Pul. 191; and see Brandon *v.* Nesbitt, 6 Term Rep. 23; Bristow *v.* Towers, *812] Id. 35; Kellner *v.* Le Mesurier, 4 East 396; Gamba *v.* Le *Mesurier, Id. 407; Crandon *v.* Curling, Id. 410; M'Connell *v.* Hector, 3 Bos. & Pul. 113; De Luneville *v.* Phillips, 2 Bos. & Pul. N. R. 97. But see Clemontson *v.* Blessig, 11 Exch. 135, 141, and the notes by the learned reporter at Id. p. 141.

As we have before seen, war puts an end to a partnership between persons whose respective countries have become involved in hostilities: *ante*, p. 373.

Where the cause of action arises *before* hostilities have commenced, the right of a party to the contract to sue, who thereby becomes an enemy, is only suspended during the war, and revives on the restoration of peace. Thus where an agent effected an insurance on behalf of an alien, and the loss happened *before* he became an enemy, it was held that as the contract was complete, there was only a temporary suspension of the right to sue, and in the absence of a plea of alien-enemy, the plaintiff was entitled to recover: Flindt *v.* Waters,

15 East 260; and see Harmer *v.* Kingston, 3 Campb. 152; Boulton *v.* Dobree, 2 Campb. 162; Alcinous *v.* Nigreu, 4 E. & B. 217 (82 E. C. L. R.).

So it seems if a breach of a contract of affreightment took place before the breaking out of war, an alien enemy whose rights to damages for such breach would be suspended during the war, might be asserted on the arrival of peace.

Upon the same principle, where a foreigner whose country was at war with England, made an application to prove a debt which became due to him from the bankrupt before the breaking out of the war, Lord Chancellor Erskine ordered the claim to be entered, and the dividend to be reserved. "If," said his Lordship, "this had been a debt arising from a contract with an alien-enemy, it could not possibly stand, for the contract would be void; but if the two nations were at peace *at the date of the contract*, from the time of war taking place the creditor could not sue; but the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action; and it is true, a court of law would not take notice of the objection without a plea. It must appear upon the record. Has the case of a contract originally good, and the right suspended by war, never before occurred? Yet I do not know an instance of an application by an alien enemy to the Court to keep the fund, until his right to sue should survive. The policy, avoiding contracts with an enemy, is sound and wise: but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost is very different: Ex parte Bousmaker, 13 Ves. 71.

It may be here mentioned that courts of justice will not, for the *purpose of their proceedings, direct the subjects of their own country to hold communication with the enemy's country. [*813 Thus a commission will not be granted for the examination of witnesses in a hostile country: Barrick *v.* Buba, 16 C. B. 492 (81 E. C. L. R.).

During times of war, truce, or cartel, ships are employed for the purpose of effecting the exchange of prisoners, but if such ships

trade with the enemy they will be liable to capture. "Cartel-ships,' says Sir William Scott, "are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country. Both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must therefore be held prohibited, and it is not without the consent of *both* governments that vessels engaged on that service can be permitted to take in any goods whatever:" The Venus, 4 C. Rob. 358; The Rose in Bloom, 1 Dods. 60; The Carolina Verhage, 6 C. Rob. 336.

The law preventing trade with the enemy was considerably relaxed during the late Russian war, by an order in Council of the 15th of April, 1854, whereby it was ordered "that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in her Majesty's dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong." And it was further ordered, "That save only and except as aforesaid, all the subjects of her Majesty and the subjects or citizens of any neutral or friendly state shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in possession or occupation of her Majesty's enemies:" 1 Spinks, Adm. Rep., Append. v.

The effect of this order appears to have been the allowance, indirectly and through the medium of a neutral flag, of a trade with the enemy.

During war all trade with the enemy, unless by permission of the sovereign, is interdicted and subjects the property engaged therein to confiscation: The Rapid, 1 Gallis. 295; The Eliza, 2 Id. 4. A shipment made during war by an American citizen from an enemy's port to a port in his

colonies is a trading with the enemy: The Diana, 2 Id. 93. If an American vessel, after knowledge of the war, proceed from a neutral to an enemy's port on freight, it is a trading with the enemy, which subjects the vessel to forfeiture and she is liable therefor on her return voyage to the United States: The Joseph, 1 Gallis. 545. A voyage by a vessel from an enemy's port with a cargo on board, without the license of our government is of itself a probable cause for the capture of the vessel and cargo: The Liverpool Packet, Id. 513. A license or protection from the enemy, found on an American vessel, on a voyage to a neutral port in alliance with the enemy, the terms of which were subservient to enemy's interests, subjects the vessel and cargo to confiscation as prize of war: The Julia, Id. 594. Property engaged in an illicit intercourse with the enemy must be condemned to the captors and not to the United States: The Sally, 8 Cranch 382. A vessel sailed to an enemy's country after knowledge of the war, and was taken while bringing from that country a cargo consisting chiefly of enemy goods. Held, that she was liable to confiscation as prize of war: The St. Lawrence, 8 Cranch 434; The Alexander, 1 Gallis. 532. By the mere act of illicit intercourse the property of a citizen is not divested *ipso facto*. It is only liable to be condemned as enemy property or as adhering to the enemy, if rightfully captured during the voyage: The Thomas Gibbons, 8 Cranch 421. Trading with an enemy's country is unlawful; but a citizen of one belligerent may withdraw his property from the country of the other belligerent if he does it within a reasonable time after the declaration of the war, and does not himself go to the enemy's country for that purpose: Amory *v.* McGregor, 15 Johns. 24. Property acquired before a war cannot be withdrawn from the enemy's country, after the knowledge of the war, without permission of the government. And if a vessel is sent to withdraw such property, both vessel and cargo will be liable to confiscation: The Rapid, 1 Gallis. 295; The St. Lawrence, Id. 467; The Mary, Id. 560. Trading with an enemy is not excused by the necessity of obtaining funds to pay the expenses of the ship; nor by the opinion of an American minister expressed to the master, that by undertaking the voyage he would violate no law of the United States: The Joseph, 8 Cranch 451. During the war between the United States and Mexico, the goods of an American trader who went into the provinces of Mexico, which were in possession of the military authorities of the United States, and there with the sanction of the Executive department, and of the commander of the forces of the United States, carried on a trade with the inhabitants, could not lawfully be seized by an officer of the United States on the ground of trading with the enemy: Mitchell *v.* Harmony, 13 Howard (S. C.) 115. The effect of war is to dissolve a partnership existing between citizens of nations at war, and it is the duty of the loyal citizen to withdraw his property from such

partnership without delay, and dispose of all his interest; otherwise his interest becomes impressed with the character of the enemy, and liable to the consequences attending enemy's property: The William Bagaly, 5 Wallace (S. C.) 377.

The question whether a plaintiff should be excluded from our courts as an alien enemy, depends not so much upon whether he had a legal citizenship in the enemy's country at the opening of the war, which he may resume at its close, but on the questions, where is his actual residence during the war, and whether if he is allowed to recover his claim, the probable effect will be to place the amount within reach of the enemy: Zacharie *v.* Godfrey, 50 Ill. 186.

*THE IMMANUEL, EYSENBERG, MASTER. [*814

Nov. 7, 1799.

[REPORTED 2 C. ROB. 186.]

COLONIAL TRADE OF ENEMY—RULE OF WAR OF 1756.]—*According to the rule of war of* 1756, *a neutral cannot carry on trade between a belligerent country and its colonies, if he were excluded from that trade in time of peace.*

Relaxations of the rule are not to be extended by construction.

Semble, if the supreme power in the captor's country had authorized a trade to be carried on by its own subjects between the enemy's country and its colonies, that would be deemed to be an authorization of the same trade to neutral countries.

Secus, if it had merely authorized its subjects to trade between its own country and the enemy's colonies, as that could authorize no more than a trading between the neutral country itself and those colonies:

Voyage by a neutral from a French port to St. Domingo, a French colony, held to be illegal.

THIS was a case of an asserted Hamburg ship taken on the 14th of August, 1799, on a voyage from Hamburg to St. Domingo,[1] having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and secondly, supposing it to be neutral property,

[1] Then a French colony.

whether a trade from the mother-country of France to St. Domingo, a French colony, was not an illegal trade, and such as would render the property of neutrals engaged in
*815] it liable to be considered as the property of *enemies, and subject to confiscation? It was denied that St. Domingo was to be considered in its present state as a French colony. After various observations on these points, further proof was directed to be made of the property; and permission was given to both parties to produce information as to the state and condition of St. Domingo at that time.

On the 5th of August, 1800, the cause was heard on further proof.

For the captors, *King's Advocate* and *Lawrence*.—The proofs of property that have been brought forward seem not to be exposed to much objection, and therefore allowing it to be neutral property, the question remains only as to the effect of the trade in which it has been engaged. Whether St. Domingo is not to be taken as a French colony? And taking it so to be, whether property so engaged in trade between the mother-country and her colony is not, under the established principles of this country, subject to condemnation? That St. Domingo is to be considered as a French colony, sufficiently appears from a variety of circumstances, some of them arising in this very cause: besides the general professions of Toussaint, and the continual communications that are passing between that colony and France, we find in this cause an exemption of duties in respect to the importation of its produce into France, and a general understanding on the part of Mr. Jennish's correspondent at Bordeaux, that the French laws were still in force there. Considering besides that no proof which the court can receive has been produced on the other side, the fact may be assumed without further argument, that St. Domingo was a French colony and that sufficient ground is laid for the operation of the principle of law, which has

always been applied to such cases. As to the general principle of law, it has so often been a *vexata quæstio* in this court, that it will not be necessary to go at length into all the details of history and reasoning by which it is supported. It will be sufficient to advert to the principles of the war of 1756, when this matter was fully settled on principles that have never yet been abandoned, notwithstanding that they may have undergone temporary relaxations; as in the last war, owing to the fallacious professions of the French government as to the changes of their colonial system. It is notorious that these professions proved untrue: the former principle was re-established, and it has ever since been taken to be in full force, as far as it is *not relaxed by the Orders of Council that have been issued this war. [*816

The first orders of 1793 contained no relaxation whatever. In January, 1794, fresh instructions issued, directing the bringing in of West India produce *coming to Europe*, being a *relaxation* as to the intercourse of America with the West India markets; a change thought reasonable from the particular situation of that country, and the treaties that had been made with it; but not operating as any abandonment of the general principle as it respected the colonial system of Europe Afterwards a *further relaxation* took place, 25th January, 1798, as to the allowance of bringing the produce of the West India Islands to Europe, but only *to the ports of this country, or to some port of the country to which the neutral merchant belonged.* This is the extent of the relaxations that have passed; they have not gone so far as to authorize a commerce between a colony and the mother-country; and by parity of reasoning there can be no pretence to say there has been any relaxation as to the *outward* trade from the mother-country of the belligerent to the colony. In point of principle there can be no distinction made. There is the same support and maintenance of

their revenues by payment of duties, the same employment of the experience and industry of French merchants in assorting the cargo, and the same return of profits to them. On the contrary, the injury to the other belligerents is in some respects greater, as it furnishes a supply of war stores, as appears by many of the articles of this cargo, hemp, flax, iron, bricks. It is besides a general consequence of these outward speculations, that they bring a return of importation of colonial produce into France; as it appears in this case that many neutral ships had gone from Bordeaux to St. Domingo, which had found their way back to Bordeaux, although the return of this particular vessel is represented to have been destined for Hamburg. On these grounds it is submitted that this is an illegal trade, subjecting the property engaged in it to condemnation.

For the claimant, *Arnold* and *Sewell*.—The particulars of this case are, that it was a speculation, beginning at Hamburg, to send certain goods to the market of St. Domingo, with a liberty of touching at Bordeaux, where some of the goods were to be landed and others taken in for St. Domingo. In the original scheme of the voyage the bricks and iron pots were to have been carried on to St. Domingo; but it being found at Bordeaux that some *difficulties *817] were likely to arise at the custom-house on the clearing out of such articles, and as it was apprehended that similar difficulties might arise at St. Domingo, they were landed at Bordeaux, to be sent back to Hamburg, and other articles of the same kind, but about which the same difficulties were not likely to arise, were put on board. The hemp, about which some argument was at first attempted to be raised, was not on board at the time of the capture, and therefore it is conceived that may be laid out of the case. The principal question arises on the legality of going on a voyage of this description from a port of France to a French colony. In respect to the state of St. Domingo, it cannot

be denied that the representations of the state of the island were numerous and opposite, clearly showing that the island was at least in a very unsettled state, and affording a just cause of impression on the mind of Mr. Jennish to suppose it was no longer a French colony; there is at least a fair ground for the inducement under which Mr. Jennish states himself to have acted "in engaging in this trade, principally owing to the unsettled state of the island." It being shown that there was sufficient to justify this impression on the part of Mr. Jennish, it may be better to address the argument to the general question, allowing, for argument's sake, that St. Domingo was at this time a French colony.

It is true that the general colonial law of Europe has created a monopoly, from which other countries are generally precluded; at the same time, laws respecting colonies, and laws respecting trade in general, have always undergone some change and relaxation after the breaking out of hostilities. It is necessary that it should be so, with regard to the rights of neutral nations; because, as war cannot be carried on between the principal powers of Europe, in such a manner as to confine the effects of it to themselves alone, it follows that there must be some changes and variation in the trade of Europe; and it cannot be said that neutrals may not take the benefit of any advantages that may offer from these changes—because, if so, it would lead to a total destruction of neutral trade; if they were to suffer the obstructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce. Such a position, therefore, cannot be maintained, that they may not avail themselves of what is beneficial in these changes, in lieu of what they must necessarily suffer, in other parts of their trade, in time of war. It is not meant that *they should be entirely set at liberty from all the restrictions of peace,—that would be going too [*818

far; but that, as there has been a regular course of relaxations, as well in our navigation laws as in the colonial trade, in admitting importations and exportations not allowed in time of peace, it seems not to be too much to say, that, if they have been regularly relaxed in former wars, neutral merchants may think themselves at liberty to engage in it, in any ensuing war, with impunity; and it does not justify a presumption, that, as a belligerent country allows a change in its own system as necessary, and invites neutrals to trade in its colonies under relaxations, so it would allow them to trade, in the same manner, with the colonies of the enemy. It may be said that the strict principle of war is, to do all possible mischief to your enemy, and destroy his resources and trade as much as you can: this may be true in theory, but it must be understood only as the strict theoretic principle which, in practice, is limited by other considerations, and by the rights of other parties; the whole trade of the enemy cannot be destroyed without the greatest injury to neutral nations, therefore this right against the enemy must be limited, in some degree, by the rights of neutral trade. If you can find, indeed, a trade wholly and exclusively confined to the enemy, that is the point on which it is lawful for you to strike; that was the rule and the foundation of the principles set up in 1756; the state of the colonies at that time justified it—the system remained entire—and as long as the colonial trade remained an exclusive trade, that was the point on which it was lawful to strike; but, since that time, relaxations have been regularly admitted; at the commencement of the last war it was so allowed to be, and on that account the same principle was not enforced; the principle might not be abandoned, but the fact being that the French had opened their ports, the principle was not applied. In the same manner, the French have opened their ports in this war, and various relaxations have been admitted; it is now held to be an allowable trade from a

neutral country to the colony of a belligerent. The war commenced with a general prohibition in the instructions of November, 1793, and all vessels were directed to be taken that were carrying supplies to the colonies of the enemy, or bringing produce from them; but these were relaxed in January, 1794, and other instructions issued of narrower extent. It was then directed to bring in those vessels that were carrying West India produce from the West India *Islands to Europe, and those that appeared to be going to such islands in the West Indies as were [*819 under blockade. This seems to be the only restriction on trade to the West India Islands, that it should not be going to islands under blockade; this order continued in force four years, till the restriction was still further taken off by allowing neutral vessels to carry West India produce to Europe, either to our ports or to the ports of their own country. It is not asserted that the whole of the colonial trade is laid open by these relaxations, or that a neutral ship might go from a port of France to a colony and back again to France—making one whole and entire transaction; in that case the returns would be projected before the voyage began; and that, it must be allowed, would be only the trade of the enemy on increased freight. But as to separate voyages the matter is very different, as well in regard to the nature and effect of the trade itself as to the terms of the instructions respecting it:—the legality of the trade homeward from the colony to France is a question at present suspended before the Lords; and such a trade might be construed to fall within the scope of the King's instructions, although it is not so affirmatively expressed; but this trade outward to the colony cannot, by any implication, come with the terms of the instruction. It remains, then, only to inquire, whether there is anything in the nature of it that should induce the Court to consider it as illegal? It cannot be illegal on the ground that it is not legal for the

neutral to go to the colony of the enemy, because he is now allowed to go from his own port; therefore the same supplies may be afforded. It cannot be, that he assists the enemy by taking articles from the mother country; that he might do circuitously, by going to his own country first, with equal advantage to the mother-country in respect to its revenues arising from duties. On these grounds it cannot be illegal; neither is it made so by notification, or in the King's instructions to his cruisers. With respect to authorities, it cannot be expected that there should be any. The question has not arisen in this war, or it would not be discussed so much at length in the present case. During the last war there could not arise any precedent, as there was then a general relaxation. But there is a case of *The Verwagteg*, 1 C. Rob. 300, cited, in 1780, where freight was given to a neutral ship going from Marseilles to a French colony and back; from which it appears that, whilst neutrals were admitted generally to partake in the colonial trade, it
*820] was not thought to *afford any ground of distinction that they were going from a French port.

Sir Wm. Scott.—This is the case of a ship taken on a voyage originally from Hamburg, first to Bordeaux, where she discharged part of her cargo, and having taken on board other goods, proceeded to the colony of St. Domingo, and was taken in this period of the voyage. The first point made on the part of the claimants is, that St. Domingo is not to be considered as a French colony, but as in a state of independence; and a second point made is, that even if it were considered as French, yet as the English have themselves traded with that island, this must be deemed a permission to the subjects of neutral countries to do the like.

In proof of the former allegation, an attempt was made to introduce extracts from the common English newspapers, which the Court would not permit to be read; "The Gazette"

is the only authority of this species admitted and respected by the Court for reasons too obvious to require a particular notice. From other more legitimate evidence than any contained in unauthorized publications of that nature, I think it is legally to be held that St. Domingo continues a French colony. It appears that a direct commercial correspondence and communication is carried on between France and that island, which could hardly be if it was deemed to be in a state of revolt and disruption from the mother-country; the French custom-house ordinances and regulations appear all to be in full force there; ships go certificated and bonded as upon the former system; and if there are parts of the island not under French dominion, it does not at all appear that it was in the view of the present parties to trade with those parts exclusively.

Upon the second preliminary point, viz., that an English trading with this French colony must, at all events, be deemed an authorization of the same trade to the subjects of other countries, I have only to observe, that it might be admitted to have that effect, if the fact were true in the degree necessary to support the conclusion. The matter of illegality imputed to the present claimants is a direct trading between the mother-country of the enemy and his colony, a lending of themselves to the purpose of a direct communication between the two. To show that Englishmen have traded to St. Domingo, and under the authority of their government, is not showing enough, unless it is likewise *shown that they had, under that authority, lent themselves to be the instruments of a direct commercial correspondence between France and its colony; a trading between the dominions of Great Britain and St. Domingo could authorize no more than a trading between the neutral country itself and that colony. [*821

On the other hand, it has been pressed against the claimants, that some part of the cargo which came from Hamburg

and was discharged at Bordeaux was contraband, and being he property of the same person would affect the goods which travelled with them from Hamburg, and were proceeding onward to their ultimate destination of St. Domingo. The goods which are charged to be of the nature of contraband are hemp, or some similar substance under another name fit for the manufacture of ropes. As these commodities are not now remaining on board the ship, they cannot become the subjects of any inspection, which the Court could order for the purpose of ascertaining their real nature and probable use. It is argued indeed, that the claimants' agents at Bordeaux speak in a letter of their expectation that the rope-makers employed by the government at that place would purchase them; but it does not appear that these persons had themselves seen the articles, or that they had anything more than general hope that the goods might find a vent of that kind. On the other hand, it appears that these goods had been inspected by a British man-of-war at Dover, when the ship put in there in the course of her voyage to Bordeaux; there is reason to presume that the search was not made in a perfunctory manner; it was made in a harbor where a search could be conveniently made, and by persons generally sincere enough in their desire to make such searches effectual. The inference is that they were not of a contraband nature; at best it is left ambiguous, and without any particular means remaining of affording a certainty upon the matter. If so, it is useless to inquire what the effect of contraband in such circumstances would have been. I shall say no more, than that I incline to think that the discharge of the goods at Bordeaux would have extinguished their powers of infection. It would be an extension of this rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a mortal tait stuck to the goods with with which it had once travelled, and rendered them liable

to confiscation, even after the contraband itself was out of its reach.

Another consideration was likewise pressed against these goods; that having been entered at Bordeaux, and exported from thence, *it must be deemed an actual exportation from that port, and consequently that they are liable to be treated legally in the same manner (whatever that manner may be) as the goods first put on board at Bordeaux. I incline to think that this would be much too rigorous an application of principles, rather belonging to the revenue law of this kingdom—a system of law having little in common with the general prize law of nations; and that these goods are entitled to be considered as coming from Hamburg, the original place of their shipment; and former decisions having fully established that a direct commerce from a neutral country to French settlement was open, I decree restitution of these goods, which all appear to be neutral property. [*822

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, viz.:—*Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be considered by this Court as liable to confiscation?* And first with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case, however, they are entitled to freight and expenses. I do not mean to say, that in the accidents of war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this

kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is that the neutral has a right to carry on, in time of war, his *accustomed* trade to the utmost extent of which that *accustomed* trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in time of peace, and which in fact, can obtain in war by no other title than by the success of the one
*823] belligerent against the other, and at the *expense of that very belligerent under whose success he sets up his title—and such I take to be the colonial trade generally speaking.

What is the colonial trade generally speaking? It is a trade generally shut up to the exclusive use of the mother-country to which the colony belongs, and this to a double use: that of supplying a market for the consumption of native commodities, and the other of furnishing to the mother-country the peculiar commodities of the colonial regions. To these two purposes of the mother-country the general policy respecting colonies belonging to the states of Europe has restricted them. With respect to other countries, generally speaking, the colony has no existence. It is possible that, indirectly and remotely, such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany; but as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the

mountains of the moon; to commercial purposes they are not in the same planet. If they were annihilated it would make no chasm in the commercial map of Hamburg. If Guadaloupe could be sunk in the sea, by the effect of hostility, at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England if it could be made the subject of a similar act of violence; but such events would find their way into the chronicles of other countries as events of disinterested curiosity, and nothing more.

Upon the interruption of a war, what are the rights of belligerents and neutrals respectively, regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence as colonies on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say: "True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, *and, by sharing its benefits, [*824 prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we have never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of force of arms alone has effected. Supplies shall be sent, and

their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories; and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure, not of French councils, but of British force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy—intended, I presume, to be carried into effect on the same footing on which the prohibition had been legally enforced in the war of 1756—a period when, Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Courts of Appeal were known and revered by every state in Europe.

Upon further inquiry, it turned out that one favored nation, the Americans, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case. Whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession.

Different degrees of relaxation have been expressed in

different instructions, issued at various times during the existence of the war. It is admitted that no such relaxation has gone the length of authorizing a direct commerce of neutrals between the mother-country of the enemy and its colonies, because such a commerce *could not be admitted without a total surrender of the principle; [*825 for allow such a commerce to neutrals, and the mother-country of the enemy recovers, with some increase of expense, the direct market of the colonies and the direct influx of their productions. It enjoys, as before, the duties of import and export, the same facilities of sale and supply, and the mass of public inconvenience is very slightly diminished. Even supposing that this trade is carried on with integrity (which it is difficult to hope, under all the temptations and opportunities of fraud which a direct intercourse will supply), there is every reason to believe that the ancient monopoly will, in effect, revive itself without the aid of exclusive prohibitions. The force of long-established connection and of ancient habits of trade would in a great measure preserve for a time to the mother-country its ancient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

Much argument has been employed on grounds of commercial analogy: *this trade* is allowed; *that trade* is not more injurious. *Why not that* to be considered *as equally permitted?* The obvious answer is, that the true rule to this Court is the text of the instructions; what is not found therein permitted is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis et gradûs* would be entitled to the favor of the permission; but the relaxation is not to be extended by construction, particularly

where authority has been gradual in its relaxation. Where it has distinguished, and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony. Why not *immediately* from France, since the same purpose is effected? It is to be answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufacture of France into his own country (which he will rarely do if he has like manufactures of his own, but which in all cases he has an uncontrollable right to do), and exports them afterwards to the French colony—which he does, not in their original French
*826] *character, but as goods which by importation, had become a part of the national stock of his own neutral country—they come to that colony with all the inconvenience of aggravated delay and expense. So, if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother-country under a proportionate disadvantage; in short, the rule presses upon the supply at both extremities, and, therefore, if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade that considerations of this nature have their chief and most effective operation.

It is an argument rather of a more legal nature than any derived from these general topics of commercial policy, that variations are made in the commercial systems of every country, *in wars and on account of wars*, by means of which neutrals are admitted and invited into different kinds of trade,

from which they stand usually excluded; and, if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made for similar reasons in the commercial policy of its enemy.

And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war, and on account of the state of war, the party who makes it binds himself in all the variations to which the necessities of the enemy can compel him, the whole colony trade of the enemy is legalized; and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself, although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war; it is frequently a peace measure in the colonial system of every country; there are others which more directly arise out of the necessities of war. The admission of foreigners into the merchant service, as well as into the military service of this country; the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the Act of Navigation, and other regulations founded thereon; these, it is true, take place in war, and arise out of a state of war; but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom; and that I take to be the true foundation of *the principle. It is not every convenience, or even every necessity arising out of a state of war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus in time of war every country admits foreigners into its general service; every country obtains, [*827

by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive either by means of his navigation or its own. These are ordinary measures to which every country has resort in every war, whether prosperous or adverse. They arise, it is true, out of a state of war, but are totally independent of its events, and have, therefore, no common origin with these compelled relaxations of the colonial monopoly; these are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged, and have their force; it is sufficient that the variations alluded to stand upon grounds of a most distinguishable nature.

Upon the whole view of the case, as it concerns the goods shipped at Bordeaux, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that *I am not authorized* either by general legal principles applying to this commerce, or by the letter of the King's instructions, *to restore goods, although neutral property, passing in direct voyages between the mother-country of the enemy and its colonies.* I see no favorable distinction between an *outward* voyage and a *return* voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned.

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods could be considered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule. I incline to apply a more favorable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights; it is a

case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from Hamburg in the commencement of the voyage; she was not picked up for this particular occasion, but was intended *to be employed in her owner's general commerce. Attending to these considerations, I shall [*828 go no further than to pronounce for a forfeiture of freight and expenses, with a restitution of the vessel.

[Part of the] cargo, taken in at Bordeaux, condemned, [and the remainder of the cargo and] ship restored, without freight.

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*THE WHILELMINA, Otto. [*829

26th November, 1801.

[Reported 4 C. Rob., Append. p. 4.]

Colonial Trade of Enemy—Rule of War of 1756.]—*Neutrals are not at liberty to engage in a trade with the colony of the enemy in time of war, which is not permitted to foreign vessels in time of peace. A Danish vessel was taken July*, 1798, *on a voyage from a colony of Spain to a port of Europe, not being a port of Great Britain nor of the country to which either the ship or cargo belonged. Held, as the voyage was not protected by any relaxation of the rule derived from the instructions for the war, the ship and cargo were liable to confiscation.*

A Danish vessel, taken July, 1798, on a voyage from La Guayra to Leghorn, and carrying a cargo of colonial produce, claimed for merchants of Bremen. From the discus-

sion of this case may be stated most of the topics of argument applicable to the general question.

On the part of the claimant, it was contended that whatever authority might be ascribed to the decisions in the war in 1756, they did not by any means determine the question now before the Court. They were cases of neutral vessels going to the colonies of France, at first under special licenses and certificates of permission from the government of France; which rendered them liable to be considered as adopted French ships. Though the same course of decisions continued during that war, after the licenses had been laid aside, it was on the same view of things that the fact of *special permission* was equally notorious; the trade itself being in direct departure from the restriction, which had heretofore invariably excluded all foreign vessels from the colonial trade of France. *It was therefore a rule not laid down at that time so broadly as to comprehend all trade with the colonies of the enemies generally, but founded on the special fact of the previous restriction of the French system. From this circumstance arose a material distinction in favor of the present case. No such restrictions have been shown to be common to the colonial system of Spain. On the contrary, in that same war, a class of cases were uniformly restored in which produce brought immediately from Monte Christi was proved to have come originally from the Spanish ports of St. Domingo, while the produce taken from the same place of general deposit, but coming originally from the French possessions, was condemned. So long ago therefore as the war of 1756, neutral traders appear not to have been precluded from purchasing the produce of the colonies of Spain in the West Indies. In the same manner, before the date of the present hostilities with Spain, a direct intercourse had been permitted to English vessels and ships of other nations. The fact, therefore, on which the

*830]

old rule is founded, totally fails. A material difference presents itself also in respect to the motives under which the rule has been established. Originally the pretension *to exclude all neutrals* was uniformly applied on the part of the belligerent; by which the effect of reducing such settlements, for want of supplies, became a profitable issue of war: *now*, since the relaxations have conceded to neutral merchants the liberty of carrying thither cargoes of innoxious articles, and also of withdrawing the produce of the colony for the purpose of carrying it to their own ports—*now*, to restrict them from carrying such cargoes *directly to the ports of other neutral states*, becomes a rule apparently capricious in its operation, and one of which the policy is not so evident. From the northern nations of Europe no apprehensions are to be entertained of a competition injurious to the commercial interests of our own country. To exclude them from this mode of traffic in the produce of the enemy's colonies, is to throw a further advantage into the hands of the American merchants, who can with greater ease import it first into their own country, and then send it on by *re-exportation*—a course of trade which affords no means of detecting whether such re-exportation is in fact a fair transaction, originating in fresh speculations on commodities already imported and become part of the national stock—or whether it is only a fraudulent mode of concealing the continuance of the first illegal destination.

Taking the present case, therefore, to be entirely beside the
" *principle of those precedents of 1756, and free from [*831
any mischief intended to be guarded against by that train of decisions, putting these precedents out of the question—From what quarter is the law of condemnation to be derived? In the American war no obstruction was given to a free trade with the colonies of Spain. The instructions which have issued during this present war contain

no such rule; in those of 1793 and 1794 the Spanish colonies were not mentioned; those of 1798 are scarcely applicable to this transaction in point of time, but even they prescribe no rule of condemnation to the court. They direct only "the bringing in," leaving it to the court to apply the rule of decision that should be fairly deducible from the law of nations. No such rule has ever yet been applied to trade with the colonies of Spain. If it were deemed fit and proper to establish such a rule, it is equitable at least that there should be some notification before it can be enforced to the confiscation of valuable property, which neutral merchants may reasonably think themselves at liberty to employ in a trade not pronounced illegal, either by public declaration or by the antecedent practice of this Court.

On the part of the captors.—The question in this case is, whether ship and cargo were engaged in a lawful trade, being taken on a voyage from the colony of Spain to a port in Europe, not being a port of this kingdom nor of the country to which either ship or cargo belongs? If that cannot be maintained, the penalty of confiscation will follow, not from any particular instruction, but under the general law of nations; which when it has distinguished what is an unlawful trade in time of war, inflicts the penalty of confiscation, as the sanction by which alone the principles of that species of law are to be enforced. If it were by the instructions alone that this question was to be decided, there might be some ground for demanding from whence the penalty of confiscation is derived; since they make no mention of it. The important fact however is, that the instructions *do not constitute the law;* they have none of the characteristics that would accompany them if they had been so intended; they neither specify the punishment nor describe the several situations to which the penalty of confiscation has been already applied; they contain nothing rela-

tive to a trade *to* the colonies, which has, however, both in this Court and in the Court of Admiralty, been considered as falling equally within the penalty of the law: 2 C. Rob. 208. The instructions are *not* circulated to foreign states by general notification, nor were delivered to our *own cruisers; they are, therefore, manifestly deficient in the essential qualities of a law, and are to be taken only as so many declarations of the degree in which the executive government is, from time to time, disposed to remit some part of the full right accruing under the general principle of law. To what then can the court look for its authority on this subject better than to the decisions of this Board on the very same question presenting itself in the year 1756? At that period there were no instructions in which the principle was laid down; yet then the court did not hesitate to come to a conclusion on the illegality of such a trade. [*832

The general rule that neutrals cannot legally trade to the colonies of belligerents, is indeed deducible from the most clear and admitted principles of the law of nations; a belligerent has a right, so far as his enemy only is concerned, to distress, and even to annihilate the commerce of the enemy. That right is, however, restricted by another belonging to neutral nations, viz.: the right to carry on *their accustomed trade.* But the colonial trade being a branch of commerce from which neutrals are excluded in time of peace, they can suffer *no* injury by not being allowed to engage in it during hostilities. On the contrary, it is their known duty to abstain from such a trade; inasmuch as it is an obvious and undoubted principle of general law that neutrals are not to interpose in war, so as to afford to one enemy a manifest aid or relief from the pressure of his adversary—*hostem hosti imminenti eripere.* This is an admitted principle in respect to its intrinsic fitness and propriety, whatever difference of opinion may sometimes arise, as to

the particular circumstances which are necessary to warrant the application of it. In many instances indeed, it may be difficult to discriminate between the trade assumed by neutrals in *consequence of war*, and the ordinary state of their commerce. But the universal principle of restriction on which the colonial system of Europe is built, put the question of fact on this point beyond all doubt.

The principle of monopoly[1] is as evident and notorious as the existence of the colonies themselves. If, under this system, neutrals are without injustice and without complaint on their part, rigorously excluded in time of peace, on what ground can *they claim to be admitted in time of war, merely in consequence of the distress felt or apprehended from the arms of the adversary? The produce of the colonies is become a most important article of national resource to nations possessing such establishments. The supply to be afforded to the colonies is also essential to their preservation. The interruption of this intercourse operates to destroy these resources, as well as to compel the surrender of these possessions, in which it is that maritime states are most vulnerable. Out of this distinguishing and peculiar character of the colonial trade, the general principle has grown, that neutrals are not at liberty to interpose in it in time of war. But, it is said, "*there have been relaxations*, and it is therefore not to be inferred that the old system would be again resumed without notice and public declaration." On the contrary, the *old rule* is to be taken as the standing principle, from which no relaxations are to be presumed or extended, beyond the fair meaning of the terms in which they are conveyed. The relaxation as to France, during the American war, stood upon the peculiar ground of an asserted change of system, which proved afterwards to

*833]

[1] Since the time when this judgment was delivered, the monopoly in the trade of the colonies has to a great extent been abolished by most European nations.

be but a fallacious and temporary expedient.[1] As to the Spanish colonies in that war, Spain was scarcely engaged in that war long enough to bring them under consideration. In the present war, instructions have issued imparting a measured relaxation of the principle, as far as particular consideration seemed to require. Since none of these extend to the permission of a trade like the present, the consequence will be, that this transaction, deriving no protection from any of the instructions, falls back into the general law, and is by that subject to condemnation.

Lord Chancellor Loughborough[2] delivered the judgment of the Court to the following effect:—The question in this case has been accurately stated to be, *whether the ship and cargo were taken in a lawful trade, going from a colony of Spain to a port of Europe, not being a port of this kingdom, nor of the country to which either the ship or cargo belongs?* In the course of the discussion, *some observations have been thrown out upon the policy of applying any restriction to such a trade; but the question for this Court to consider is, not whether the Executive Government has done wisely in restraining the relaxations within certain limits, but whether by the law of nations, this ship and cargo, not falling within the reach of these relaxations, are liable to confiscation. It has been disputed also, "whether, by the colonial system of Spain, a foreign merchant might not have been permitted to engage in such a trade in time of peace?" On this fact the Court is disposed to hold it to be notorious, that such a trade would not have been allowed. [*834

[1] In the same manner, after the termination of the late war, so early as the 21st December, 1801, public notice was given at the Havanna, and circulated in the American papers, "That neutral traders would no longer be admitted into that port." See also a letter of the Intendant of Louisiana to the American States, 16th October, 1782:—"As long as it was necessary to tolerate the commerce of neutrals, which is now abolished." Polit. Regist. vol. ii. p. 34.

[2] Afterwards Earl of Rosslyn.

It was the duty of those proposing to derive any benefit from such a permission to have proved it to have existed; that not having been done, the Court thinks itself justified in holding as a notorious fact, that such a trade in time of peace would not have been permitted. The question is, then, whether property taken in such a voyage is liable to confiscation? It has been repeatedly determined at this Board, *that neutrals are not at liberty to engage in a trade with the colony of the enemy, in time of war, which is not permitted to foreign vessels in time of peace.* Although the instructions of 1793 could not be said to make property so engaged liable to confiscation, if it were not so by the general law, it will not be too much to attribute to those instructions to say, that they are to be taken as proof that the government of this country understood such to be the law of nations at the time when those instructions issued. From the conduct of France, also, in opening the ports of her colonies a short time previous to the breaking out of the American war, for the purpose of avoiding the application of this principle, it is manifest that the principle itself was thoroughly understood by that government to be agreeable to the law of nations.

Taking the rule, then, to proceed from a known principle of public law, the question will be, whether there have been any such relaxations of the general rule as will embrace the circumstances of this case. To the practice of the last war it is needless to advert, since *that* rested solely on the peculiar circumstances, which have been before hinted at, in the conduct of France. If any protection can be derived from the instructions of the present war, it must be from those of 1794 or of 1798. If neither of these can be said to apply, the consequence will be that the case, falling under the general rule, will be liable to confiscation.

By the instructions of 1794, it is not easy to conceive how

any *protection can be afforded to this cargo. It has indeed been urged, in way of argument, that the [*835 colonies of Spain are not mentioned in those instructions. On that circumstance it is observable as far as it can be thought to operate favorably for the present case, that it was at least obvious to expect that the same principle which was applied to the colonies of France would also be applied to other countries becoming enemies, and holding colonies and settlements of a similar nature. Without dwelling, however, on that argument, it is more important to observe, that it is not the instructions which impose the penalty of confiscation,—they only direct cruisers to bring in "for legal adjudication;" and then the question arises, *Whether, under the law of nations, the penalty of confiscation does not attach?* If the instructions of 1794 do not protect property taken in such a course of a trade; if those of 1798 are to be referred to, *they* expressly direct "the bringing in of ships coming with the produce of any colonies or settlement of France, Spain, or the United Provinces, to any port of Europe, not being a port of this kingdom, nor a port to which the ship belongs." This is the case of a Danish ship going from La Guyara to Leghorn with a cargo, the produce of the Spanish settlement, and claimed for merchants of Bremen. It is, therefore, a case not included in the relaxations of either of these instructions, but falling under the general law. It has already been pronounced to be the opinion of this Court, that, *by the general law of nations, it is not competent in neutrals to assume, in time of war, a trade with the colony of the enemy, which was not permitted in time of peace;* and, under this general position, the Court is of opinion that this ship[1]

[1] On this part of the judgment, it is to be observed that the terms apply as well to the ship as to the cargo; and in the printed case of the appellant, the ship was by mistake represented *as condemned*, and as forming part of the appeal. In the sentence of the Court below, however, the ship was restored, and there does not appear to have been any appeal from that part of the sentence on the

*836] and cargo *are liable to confiscation. On the authority of this decision several cases[1] were determined of similar voyages, subsequent to the instructions of 1793. At the same time, a class of causes was reserved for further argument, in which the whole transaction had taken place *prior to the issuing of the instructions of Nov.* 1793. In the case of *The Charlotte, Coffin,* an American vessel, taken on a voyage from Cayenne to Bordeaux, October, 1793, the matter came again under discussion. On the part of the claimants, it was argued that however sound the principle might be of not permitting neutrals in time of war to engage in any trade with the colonies of the enemy which was not permitted in time of peace, it was not so obvious and known in practice as to fix on neutral merchants an obligation of presuming "that it would necessarily be re-established at the commencement of this war," in opposition to the intermediate practice that had prevailed. Vessels engaging in such a trade, prior to any declaration of the belligerents, stood on a much more favorable footing than those so employed after the instructions of 1793, since those instructions contained an admonition to neutral merchants to obtain from such a trade as was then marked out

part of the captor. So in the case of *The Jonge, Thomas,* Lords, November, 1801, 3 C. Rob. 233, n., although the terms of the Court were general, attaching as well on the ship as on the cargo, yet that voyage having been of ambiguous origin, commencing at Amsterdam, but touching at Emden, it was not precisely a judgment *on a ship going singly from a neutral country to the colonies of the enemy.* Owing to these circumstances in *The Nancy, Benjamin,* December 19, 1803, an American ship going from La Guyara to Hamburg, it was for some time disputed whether the Court had, in any precedent, pronounced the penalty of confiscation on the ship in such a voyage, or whether the favorable distinction admitted by the Court of Admiralty in *The Minerva,* 3 C. Rob. Adm. Rep. 232, was not to be applied. The Court was strongly impressed with a notion that the penalty had been enforced, holding it clearly to be within the same principle. In adverting to other cases (*Volant, Bessom,* December, 1801) determined after *The Whilelmina,* on the authority of that case, it appeared that in several the ship had been condemned. The principle was accordingly understood to extend to the ship as well as the cargo.

[1] *Volant, Bessom,* and other cases, December, 1801.

as a just cause of seizure at least. On this distinction it was contended that, considering the changeable ground on which the principle was first established in 1756, and the apparent abandonment of it during the last war, there was enough to entitle the claimant to the benefit of a justifiable ignorance, to protect this property from confiscation.

On the other side it was contended, by arguments which have been consolidated in the argument of the preceding case, that the principle was sufficiently obvious, as a principle of public law, without any instructions; that relaxations were to be confined to the circumstances of the war that had given rise to them, and that neutrals were not to presume they would be continued. On the 29th March, 1803, the Court of Appeal pronounced the ship and cargo subject to condemnation: by the same judgment also were condemned *The Jerusha, Giles*, and *The Betsey, Kinsman*,— cases under similar circumstances as to the time of capture, and reserved on the same question.

*By these decisions, the *illegality* of voyages from the colonies of the enemy to neutral ports in Europe, not being the ports of the proprietors of the ship or cargo nor a port of this kingdom, is fully established. [*837

On the same principle in *The Lucy, Glover*, 18th May, 1802, a Swedish ship and cargo, taken 1799, on a voyage from a French colony to a *port of America*, was pronounced subject to condemnation. In this case a reference had been made to the case of *The Sally, Hess*, and *The Hector, Smith*, American ships, taken on a voyage from a French colony in the West Indies (St. Domingo) to the neutral island of St. Thomas, and restored.

Judgment was pronounced by the Master of the Rolls (Sir WILLIAM GRANT) to the following effect: In *The Sally, Hess*,[1] the court thought they were going further than they

[1] In *The Sally, Hess*, Lords, December 10, 1801, an American ship taken on a voyage from St. Domingo to St. Thomas in 1794, it had been contended that it

should have been disposed to go if it had not been for the authority of *The Hector*, *Smith* (5th July, 1800). Now we are required to go further. In neither of those cases was the produce of the colonies carried out of the West Indies. If an American vessel would not be permitted to trade from St. Domingo to Sweden, there can be no reason why the same rule should not be applied to a Swedish vessel trading between the colony of the enemy and America. Condemned.

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*838] *"On the illegality of the trade of a neutral between the colony and the parent state of the enemy," writes Sir C. Robinson, "a solemn decision has been pronounced in the Court of Admiralty in the case of The Immanuel. In that case the judge entered much at length into the nature of colonial establishments, and adverted to the prohibition intimated in the first instructions of 1793 as the rule to be applied in all cases which did not fall within the reach of any relaxation. In that case a cargo taken in at Bordeaux to be carried to St. Domingo, as asserted, on the actual

was not a case within the instructions of 1794, by which the former and more extensive prohibition in the instruction of 1793 had been revoked, before the commencement of this transaction; that the instructions of 1794 directed only the bringing-in "of ships bound to Europe;" that the produce in this instance was not carried out of the West Indies; and that there had been a similar case in 1800, *The Hector*, *Smith*, taken on a voyage from a French colony to St. Thomas, in which the court had decreed restitution.

On the part of the captor it was contended, in conformity to the general argument, that no instructions were necessary to establish the illegality of a trade like the present, not permitted in time of peace; that if such a distinction as was here advanced could be allowed, it would tend to establish a depôt in the neutral island of St. Thomas or St. Croix, from whence a trade might be carried on to any part of the world, entirely frustrating the restraints that had been pronounced still to attach on a trade with the colonies of the enemy.

The judgment of the court was pronounced by the Master of the Rolls to the following effect: It appears that in *The Hector*, *Smith*, taken on a voyage similar to that in the present case, from a French colony to St. Thomas, restitution took place; and in other cases it has been the intimation of persons composing this Board, that such a voyage was not illegal. Under these precedents, the court is disposed to think there must be restitution, whatever might be our own opinion, if the question were *res integra* before us.

account and risk of neutral merchants, was condemned on the question of law. . . . In the variety of cases transmitted to the Court of Appeal from the Courts of Vice-Admiralty, *other* questions have arisen which have carried the discussion of this subject considerably further. The *leading* judgment that has been delivered on these questions in the Court of Appeal, was in the case of the The Whilelmina, Otto." See 4 C. Rob. App. A. p. 3.

Although in discussing the questions in the principal cases, it was fully admitted that neutrals with the exception of being excluded from trade to blockaded places, and in contraband of war, and being liable to visitation and search, have a right to carry on their *accustomed* trade, it is laid down as a rule forming part of the general law of nations, "*that neutrals are not at liberty to engage in a trade with a colony of the enemy in time of war, which was not permitted to foreign vessels in time of peace.*"

This rule is usually termed "the rule of the war of 1756;" "because," says a learned author, "in the war of 1756, commonly called the Seven Years' War, the French, finding themselves worsted at sea, and unable from our maritime superiority to carry on their colonial trade themselves, repealed their old exclusive laws which restricted foreigners from prosecuting the trade between France and the French colonies, and opened this trade to the ships of the neutral powers. But Great Britain denied that neutrals could have any right to enter upon such a traffic, which was a direct interference with her maritime rights, as it might enable colonies to hold out that would otherwise fall into her power; and might enable France to withdraw seamen from her merchant service to man her fleet, who would otherwise have been obliged to be engaged in the colonial trade, or France would have risked the surrender of her colonies:" Manning's Law of Nations 196.

Notwithstanding its name, the rule appears to have been in operation previous to the year 1756: 2 Reddie 446.

The true foundation for the rule appears in effect to be, that a neutral, by carrying on a trade between the colony and mother-country in time of war, from which he was excluded in time of peace, shows conclusively that he is trading not merely *with* but *for* the enemy, and therefore comes within the *ordinary rule which subjects the property of the enemy to seizure and confiscation. And where neutrals are so treated, it is not by [*839

the interference of the belligerent with their trade, but with that of the enemy. Hence it has been laid down by Sir William Scott that the trade between the colony and the mother-country in Europe, being opened by the enemy for his own relief under the pressure of war, cannot innocently be undertaken by a neutral, nor without the hazard of rendering him liable to be considered as giving immediate aid and adherence to that belligerent to the unjust disadvantage of his adversary. See The Nancy, Joy, 3 C. Rob. 81, 83; The Anne, Lord, Id. 91, n.

Such a commerce will receive aggravation by an attempt to carry it on fraudulently, as under a mask of false papers showing a false destination (The Nancy, Joy, 3 C. Rob. 82, 83), and where it is carried on under concealment and with the aggravation of fraud, the party concerned clearly at once subjects himself to be considered as an enemy in all the consequences of that transaction (The Phœnix, Susini, 3 C. Rob. 186–191; and see The Star, Id. p. 193, n.); and it has been held that although it appears in evidence in the clearest manner that the cargo of a ship is neutral property, still if it be proved that the ship is going from the mother-country of the enemy to their colony under false papers and a false mask, and coming back again to the mother-country, she would be subject to confiscation: The Calypso, Speck, 2 C. Rob. 161.

The same principles have been held equally applicable in the case of a neutral going in a direct voyage from the mother-country of *one* enemy to the colony of *another enemy allied* in the war: The Rose, Young, 2 C. Rob. 206. So likewise if a neutral carries on a trade between the *settlement of one enemy* and *the colonial possession* of an allied enemy: The New Adventure, 4 C. Rob. App. A. p. 4. in Lords, Nov. 26, 1801; Oxolm, Id. Lords, 11 March, 1802; The Minerva, Andaulle, 3 C. Rob. 229.

Where the original destination of a neutral vessel from a colony of the enemy to the mother-country has been diverted only in consequence of a *vis major*, which it was unable to resist. it will not be considered as a defeasance of the original illegality, any more than if the diversion had been occasioned by the temporary fury of the elements. For in both cases the original movement of the vessel must be considered; to which it must be presumed she would again immediately recur as soon as an opportunity presented itself. Thus in The Minerva, Andaulle, 3 C. Rob. 229 (March 20, 1801), a

neutral ship on a voyage from Languera, a Spanish settlement, to Corunna, was taken by the French, and afterwards retaken by a British cruiser while on her voyage to a French port. It was held that such compulsory diversion did not defeat the illegality of the original voyage, and that whether the destination *was to a Spanish or a French port it was immaterial. "An allusion," [*840 said Sir William Scott in his judgment, "has been made to the case of The Imina, Bauman Vroom, 3 C. Rob. 167, in which the Court allowed to a party the full benefit of a deviation *voluntarily* made by the master upon receiving information in the course of his voyage that Amsterdam was in a state of blockade. There it was deemed not unreasonable to allow the act of the master in changing his course a favorable operation respecting the cargo; considering that it was taken in a voyage no longer in the act of being prosecuted towards the enemy's country according to the intention of of him to whom it had been confided. The Court presumed favorably that the owners would have approved of this deviation. But it would be going a great deal further to say that the act of foreign necessity, to which this vessel and cargo were giving a temporary submission, no longer than whilst they were compelled so to do, was to be considered as a total discontinuance and abandonment of the intended voyage on the part of the owners. The voyage of the ship and cargo when left to their own discretion would have continued the same, and must therefore be considered to be still existing *in law*, though controlled *in fact* by that overbearing necessity for the moment. But even giving the owners the benefit of a deviation compelled by the superior force of a party who stood in no relation of privity to them; yet this deviation being to a French port, it would be a voyage from the colony of an enemy to the mother-country of an allied enemy; which I have before held is attended with undistinguishable consequences as to the cargo."

If during peace other nations were allowed to trade with the colonies of a belligerent, they would still be entitled to carry on their accustomed trade in time of war: The Juliana, Carstens, 4 C. Rob. 328.

With regard to the mode in which the general international law upon this subject has been in some instances either wholly waived or partially relaxed, a very useful account is given in a note by Sir C. Robinson. "During the war," he observes, "between England

and America and the several powers of Europe that interfered to foment those differences, the principle was altogether intermitted, and on the ground that France had professed, a short time *before* the commencement of hostilities, to have *altogether* abandoned the principle of monopoly, and meant, as a *permanent regulation*, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation; but for a time the effect was the same. The Court of Admiralty of this country did not, during that war, apply the principle, or interrupt the intercourse of neutral vessels in that branch of commerce more than any other.

*841] *Soon after the commencement of the war of November 6, 1793, the first set of instructions that issued was framed, not on the exception of the American war, but on the antecedent practice; and directed cruisers "to bring in for lawful adjudication all vessels laden with goods the produce of any colony of France, or carrying provisions or supplies for the use of any such colony." The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles and on certain conditions with the colonies both of this country and of France. Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in *time of peace*. The commerce of America was therefore abridged by the *foregoing instructions*, and debarred of the right generally ascribed to neutrals in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruisers were issued, January 8, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were "to bring in all vessels laden with goods the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe."

In consequence of this relaxation of the general principle in favor of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption was conceded

to the neutral states of Europe. To this effect, a third set of public instructions issued, January 25th, 1798, which, after reciting as the special course of further alteration, "the present state of the commerce of this country, as well as that of neutral countries," direct cruisers "to bring in all vessels coming with cargoes the produce of any island or settlement of France, Spain, or Holland, and coming directly from any port of the said islands or settlements to any port of Europe not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged."

Neutral vessels were, by this relaxation, allowed to carry on a *direct* commerce between the colony of the enemy and their own country: a concession rendered more reasonable by the events of the war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the states of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets: 4 C. Rob. App. A. p. 2.

Various decisions which are mentioned in the principal case *of The Whilelmina, Otto (*ante*, p. 829), determined the illegality of the voyages of neutrals from the colonies of the [*842 enemy to neutral ports in Europe, not being the ports of the proprietors of the ship or cargo, nor a port of the United Kingdom. But under the relaxation last mentioned, a direct trade by a neutral between his own country and a hostile colony was held good. Thus in the principal case of The Immanuel, Eysenberg (*ante*, p. 814), goods shipped at Hamburg with an ultimate destination to a French colony were restored, although they had been entered at and exported from Bordeaux, the learned judge who decided that case considering that those goods were entitled to be considered as coming from Hamburg, the original place of their shipment, and former decisions having fully established that a direct commerce from a neutral country to a French settlement was open. See also The Conferenzrath, Baur, 6 C. Rob. 362; The Rosalie and Betty, 2 C. Rob. 343.

Where a belligerent country authorizes its own subjects to carry on a direct trade between the mother-country of the enemy and his colonies, it would have, it seems, the effect of authorizing neutrals by implication to carry on a similar trade. Where, however, a belligerent power merely authorizes its subjects to carry on a trade between their own country and a colony of the enemy, that, as laid

down in the principal case of The Immanuel, could authorize no more than a trading between the neutral country itself and that country. See *ante*, pp. 820, 821.

So general was the system of monopoly which European countries maintained as to their colonial trade in the West Indies, that it was ordinarily presumed to be exclusively confined to the subjects of the parent state, unless the contrary were shown: 4 C. Rob. 341. The presumption, however, was not considered to be so strong as to settlements in the East, so that the Court of Admiralty would require evidence from the captors to show on what principle foreigners were permitted to trade with them, Id.; and on failure of proof to show an exclusion of foreign nations from such trade restitution has been decreed: Patapsco, Hall, 1 Acton 270.

In the principal case of The Immanuel, Eysenberg, the cargo only was held to be confiscable, and the same view was taken in other cases. See The Minerva, Andaulle, 3 C. Rob. 229; The Anna Dorothea, Id. 233, n. However in a subsequent case (The Jonge Thomas, Lords, 3 C. Rob. 233, n., Nov. 1801), where a ship was taken in a voyage from Amsterdam to Surinam, the Court of Appeal considered the illegality to attach as strongly on the ship as on the cargo, and pronounced the ship subject to condemnation, on the ground of the illegality of the trade between the mother-country and the colony of the enemy.

Although a neutral could not, according to the rule in question, *843] *export goods directly from the mother-country of the enemy to its colonies, he might first import such goods to his own country, so as to make them part of the national stock of his own country, and then export them to the enemy's colonies: The Immanuel, *ante*, pp. 826, 827. And in like manner the commodities of the colony might, in this circuitous mode, legally find their way to the mother-country: *ante*, p. 826. Questions, however, of some difficulty often arose, as to what amounted to a direct trade, or what amounted to an intermediate *bonâ fide* importation to a neutral country.

The Courts have not, however, laid down any rule, or attempted to define what shall be deemed universally the test of a *bonâ fide* importation (5 C. Rob. 399); and it is clear that the mere proof of landing and payment of duties in a neutral port, before proceeding to the enemy's port, although it may be important as evidence, is

not necessarily conclusive as to such *bona fides;* indeed, if from other evidence it appears that a vessel has touched at a particular port for the mere purpose of giving to the voyage the color and appearance of having begun there, it is immaterial to inquire whether the payment of duties has been one of the means employed to disguise the true nature of the transaction: The Mercury, Roberts, 5 C. Rob. 400, cited.

The principles upon which the Court of Admiralty acts in determining these questions has been well stated by Sir William Grant, M. R., in the leading case of The William, Trefry, 5 C. Rob. 385, Lords, March 11, 1806, where an elaborate examination of the decisions upon this subject is to be found. "Nobody," said the learned judge, "has ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation—whether it be of more or fewer leagues, whether towards the coast of Africa or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the *place where it happened to become [*844
necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwith-

standing the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discerned, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colorable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them, the landing of the cargo, the entry at the Custom House, and the payment of such duties as the law of the place requires, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no national connection whatever with the purpose of sending on the cargo to another market, and which therefore would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue the appearance of being broken by an importation which he has resolved not really to make." See The Polly, Lasky, 2 C. Rob. 361; The Mercury, 4 C. Rob. App. A. p. 6, n.; The Eagle, Weeks, Id.; The Maria, Jackson, 5 C. Rob. 365.

The principles according to which neutrals are forbidden in time of war from carrying on the colonial trade of a belligerent, from which they are excluded in time of peace, are equally applicable to the coasting trade of a belligerent if, during time of peace, he retains a monopoly of it, and only throws it open to neutrals in time of war. "As to the coasting trade," asks Sir William Scott, in a *845] well-known *case (supposing it to be a trade not usually opened to foreign vessels), can there be described a more effective accommodation that can be given to an enemy during a

war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing anything new into the country—and it certainly is not; but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures and for the necessities of domestic life of this metropolis, is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of an actual military assistance in the war?" The Emanuel, Soderstrom, 1 C. Rob. 300.

In a note to the second annotated edition of the late Mr. Wheaton's "Elements of International Law," it is stated that the rule of the war of 1756 has become obsolete; that "the free trade which England has proffered to the navigation of all the world, including a participation in her colonial and coasting trade on an equality with her own vessels, does not admit of rules which governed in a period of monopoly, and when any relaxation which a belligerent accorded to neutrals might be deemed not a permanent regulation of trade, but strictly a measure to evade those advantages which a superior military marine placed within the control of the enemy:" Wheaton's International Law, p. 819, n.

Now, this assertion is not quite accurate. It is true that, as England has thrown open her colonial and coasting trade to the world, no nation at war with England could have any pretence for capturing neutrals carrying on the colonial or coasting trade of England, because they would be only carrying on in time of war their *accustomed* trade in time of peace, which the rule of war or 1756 does not attempt to prevent their doing. In the case also of other nations, who, like England, have ceased to retain a monopoly of their colonial and coasting trade, and who in time of peace have thrown it open to foreign nations, neutrals carrying on such trade in time of war (as in the case of neutrals carrying on a similar trade with regard to England), will not come within the operation of the rule of the war of 1756.

In the case, however, of such nations as now or hereafter may

retain the monopoly either of their colonial or coasting trade, and in time of peace exclude therefrom other nations, the rule of war of
*846] 1756 is still operative, and justly *so, too. The enemy, it is clear, has no right to complain that property engaged in such trade should be liable to capture; nor yet can neutrals, for the reasons so ably given by Sir William Scott, in the principal case of The Immanuel, Eysenberg. Indeed, the retention of the rule in its strict integrity may have the good effect of inducing other nations to follow the example of England, and, laying aside the selfish spirit of monopoly, to adopt, not partially, but universally, the liberal and enlightened principles of free trade. See Phillimore, International Law, vol. 3, p. 298.

During the late war with Russia (assuming that country to have had colonies to which it was applicable), the rule of war of 1756 appears to have been superseded by the Order in Council of the 15th of April, 1854, by which it is declared that "the subjects or citizens of any neutral or friendly state shall and may, during the present hostilities with Russia, freely trade with all ports and places, wheresoever situate, which shall not be in a state of blockade." See Phillimore, International Law, vol. 3, p. 298; Kent's International Law by Abdy 226; Letters by Historicus 175, 176.

For an able examination of the Rule of the War of 1756, see Appendix to 1 Wheaton, note 3, p. 507.

*THE JONGE MARGARETHA, KLAUSEN, MASTER. [*847

February 5th, 1799.

[REPORTED 1 C. ROB. 189.]

CONTRABAND OF WAR.]—*According to the modern established rule, articles of provision are generally not contraband of war, but they may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it.*

Provisions are less liable to be treated as contraband when they are of the growth of the country which exports them, and when they are not prepared for immediate use.

Where articles of provisions are going to a commercial port, the presumption is that they are going there for civil use; contrà, *if they are going to a port of naval military equipment, and especially if there be a hostile armament then preparing there.*

Cheese sent by a Papenberg merchant-vessel (Holland and France being then at war with England), from Amsterdam to Brest, in which a considerable armament was being prepared, condemned.

THIS was the case of a Papenberg ship, taken on a voyage from Amsterdam to Brest, with a cargo of cheese, April, 1797.

For the captors, the *King's Advocate* contended that the ship and cargo, belonging to the same person, were clearly confiscable, as concerned in a contraband trade of provisions

to a port of naval equipment, and relied on the case of *The Vriendschap, Jansen* (Adm. July 5, 1798), in which the ship carrying salted beef from a French port to Brest was condemned, although not belonging to the owner of the cargo.

For the claimants, *Arnold* and *Swabey*.—It is contended that this *ship and cargo, being the property of the same person, are both confiscable as concerned in a contraband trade. But provisions are not generally deemed contraband. Grotius speaks of them as articles *promiscui usus*, and specifies some circumstances under which they may become contraband; but these circumstances are of a very particular nature, such as the relief of places in distress; and the general character is left free from exception, unless under such particular situations and circumstances.

*848]

Under the French law, which is a law of great severity, they have never been considered as contraband; nor under the law of England, except in conjunction with other particular facts. The case on which the captors rely was composed of such facts—the papers were false—the voyage was from one French port to another; and the cargo consisted of articles in a more prepared state—of a quantity of salted beef. The cargo was besides never claimed, and the ship was considered in the adopted character of a French victualler and condemned as such. If the case is to be decided on precedents, the claimants are entitled to argue that no precedents in point have been cited against them; but that there are, on the other side, a variety of old cases in which cheese has been restored as not contraband. In 1747, *The Endraught*, a Prussian ship from Amsterdam to Bordeaux; 3d of March, 1747, *The Jeffrow Magdalena*, a Prussian ship from Amsterdam to Bordeaux. In this last case there were many articles given up as contraband, but beer and cheese were restored with this dictum, "that they were articles of luxury, and not merely ship's provisions." In the present case the cheese is in no state different from what would be

useful for consumption on land as well as at sea. There have been no instances in which this article has been condemned, either in the present or in the last war; and therefore it is submitted these claimants are entitled to restitution.

COURT.—I have many cases in which cheese has been restored; but are there any that apply to the circumstance of a destination to ports of naval equipment? I shall defer this case that more precedents may be examined; and in the meantime, I direct an inquiry to be made as to the particular nature and quality of these cheeses by some officer of the King's stores.

On the 20th of March, the storekeeper's certificate was produced, stating them "to be such cheeses as are used in English ships' *stores, when foreign cheeses are served, and such as are used in French ships almost exclusively of others." [*849

JUDGMENT.

SIR W. SCOTT.—There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question—Is this a legal transaction in a neutral, being a transaction of a Papenberg ship carry Dutch cheeses from Amsterdam to Brest or Morlaix (it is said), but certainly to Brest; or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, *not the product and manufacture of his own country*, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy?

If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description if I noticed what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state

of preparation for sallying forth on a hostile expedition; its motions at that time watched with great anxiety by a British fleet, which lay off the harbor for the purpose of defeating its designs. Is the carriage of such a supply to such a place and on such an occasion, a traffic so purely neutral as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision, is universally contraband, the question would be readily answered; but the court lays down no such position.

The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. "I do agree," says he (reprobating the regulations that had been published, and observing that rules are not to be so hardly laid *down as to press upon neutrals), "that corn, wine, and oil will be deemed contraband."

*850]

These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in *The Jonge Andreas*, butter, going to Rochelle, was condemned; how it happened that cheese at the same time was more favorably considered according to the case cited by Dr. Swabey, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ships' use. Salted cod and salmon were condemned in *The Jonge*

Frederick, going to Rochelle in the same year. In 1748, in *The Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favorable positions laid down upon this matter by Wolfius and Vattel and other writers of the continent, although Vattel[1] expressly admits that provisions may, under circumstances be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. The court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence by the practice of nations is shown, is when the articles are in their native and *unmanufactured state. Thus, iron [*851 is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered as so noxious a commodity as any of the

[1] "Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi, s'appellent marchandises de contrabande Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction et à l'armement des vaisseaux de guerre, les chevaux, et les *vivres mêmes* en certaines occasions, où l'on espère de réduire l'ennemi par la faim:" Vattel, book iii. ch. 7, sect. 11.

final preparations of it for human use. In the present case the article falls under this unfavorable consideration, being a manufacture prepared for immediate use.

But the most important distinction is whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contrà*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which a supply of those articles would be eminently useful.

In the case of *The Endraught*, cited for the claimant, the destination was to Bordeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation[1] in the same manner as Brest is universally known to be.

[1] Agreeably to this distinction, Dutch cheeses going from Amsterdam to Bordeaux, on account of a merchant of Altona, were restored on further proof: *The Welvaart, Kwest*, Aug. 27, 1799.

The Court, however, was unwilling in the present case to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and *quality. The claimant has exhibited none; but here are authentic certificates from [*852 persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

Attending to all these circumstances I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As however the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied, I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

One of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides, is that which forbids them to supply any of them with what is called contraband of war: under which term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes.

Neutrals cannot complain of this being an improper interference with their rights, because it would be a clear deviation from neutrality on the part of a neutral state to supply one belligerent with those articles which would enable him either to resist or attack the other, and such conduct therefore is not permissible to the individuals of such neutral state. If it were, neutrals, although not

parties to the war, would have it in their power, by favoring one of the belligerents, very materially to influence its issue, and injure his opponent—in some cases even more effectually than by a hostile alliance.

As is laid down in the principal case, the catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to the particular circumstances, the history of which has not accompanied the history of the decisions: *ante*, p. 849.

Possibly a good reason for each article in the list of contraband at different periods might be given, if we could get at the history of the circumstances under which each was either added to or elimi-
*853] nated from it. For nothing can *be clearer than that the supply of certain articles at some particular period or under particular circumstances to a belligerent might be most noxious to his enemy; while at another time and under different circumstances, the supply, so far as the war was concerned, could have not the slightest influence upon its result. "Of this," says a learned author, "a good illustration is given by Mr. Ward (Essay on Contraband, p. 248) in the case of *hides*, which are in themselves an innocent article of trafic, but in such a conjuncture as where floating batteries designed for an attack on Gibraltar were being constructed at Algeziras, and hides were used as a chief article in the fitting out of that armament, we should be justified in stopping, if not in confiscating, hides carried to that port of equipment:" Manning's Law of Nations, p. 282.

What are Articles of Contraband.—Without endeavoring to enumerate what articles either are or are not to be deemed contraband under treaties existing between various nations (as to which see Manning on the Law of Nations, p. 284 *et seq.*; 3 Phil. International Law, 374), an attempt will be made briefly to show what articles are generally, under the law of nations, existing independently of express convention, deemed contraband of war.

In the first place, all warlike instruments or materials by their own nature fit to be used in war are deemed contraband. See Wheaton, International Law, p. 536, 6th ed.

There are however many things *ancipitis usus* which are equally useful for civil as well as military or naval purposes, and, as is laid

down in the principal case with regard to provisions, the question whether articles *ancipitis usus* are contraband or not will often turn upon their port of destination, whether it be a mercantile port or a port of military or naval equipment. In case of the former being the port of destination the articles may not be deemed contraband, whereas if the latter were the port of destination they could clearly be deemed such.

With regard to naval stores and materials for building ships, in determining whether they are contraband or not, much depends upon whether they are the produce of the country importing them or whether they are the produce of another country. Thus pitch and tar are universally contraband, unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported, in which latter case they are considered, as we shall hereafter see, subject to pre-emption only: The Twee Juffrowen, 4 C. Rob. 242; see also The Sarah Christina, 1 C. Rob. 241; The Jonge Tobias, Id. 329; The Richmond, 5 C. Rob. 325; and see The Nentralitet, 3 C. Rob. 295.

Rosin and tallow, if bound to an enemy's port of military or naval *equipment, will be considered as contraband, but not if it be going to a mercantile port (Nostra Signora de Begona, 5 C. Rob. 97); and tallow has been held not contraband going to a mercantile port, although it was also a port of naval equipment: The Neptunus, 3 C. Rob. 108. Sailcloth is contraband, although it be taken on a destination to ports of mere mercantile equipment: Id. [*854

As coal is now so much used on board steamships of war, it would seem to follow upon principle that coals taken in their destination to an enemy's port of naval equipment would be considered as contraband of war. See Kent, International Law, by Abdy, p. 360, note.

Hemp, not the produce of the importing country, unless it be unfit for naval purposes (The Gute Gesellschaft Michael, 4 C. Rob. 94; The Jonge Hermanus, Id. 95, n.), will be treated as contraband: The Evert, 4 C. Rob. 354; The Apollo, Id. 158.

A cargo of ship-timber going to an enemy's port of naval equipment will come under the description of the character of contraband (per Sir Wm. Scott, in The Endraught, 1 C. Rob. 25; The Twende Brodre, 4 C. Rob. 33); and masts, it seems, will be considered so,

whether bound to a mercantile port only or to a port of naval military equipment (The Charlotte, 5 C. Rob. 314; The Staadt Embden, 1 C. Rob. 29); and a ship constructed so as to be convertible into a privateer will be contraband (The Richmond, 5 C. Rob. 325; The Brutus, Id. Append. 1); but where ships of ambiguous character, but previously employed in trade, were captured on their way to an enemy's colony in order to be sold there, they were restored: The Fanny, 5 C. Rob. App. 1, cited; The Raven, Id. 2, cited.

Moreover, as is laid down in the principal case, though iron in its unmanufactured state is treated with indulgence, anchors and other instruments fabricated out of it are directly contraband: *ante*, p. 851.

The modern established rule with regard to provisions is, as laid down in the principal case, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it. Thus it has been frequently held, as in the principal case, that cheese fit for naval use and going to a port of naval equipment is contraband: Zelden Rust, 6 C. Rob. 93; The Frau Margaretha, 6 C. Rob. 92. So ship-biscuits (The Ranger, 6 C. Rob. 125) and wines (The Edward, 4 C. Rob. 68) going to a naval port of the enemy have been held to be contraband. Cheeses however not fit for naval use, but merely luxurious for the use of domestic tables, as was admitted in the principal case by Sir Wm. Scott, would not be contraband, though going to a port of naval equipment (*ante*, p. 851); moreover such cheeses as were deemed contraband in the
*855] principal case, on account of their destination, would *not be so if their port of destination is not a port of naval military equipment, although smaller vessels of war may be occasionally built and fitted out there: The Endraught, cited *ante*, p. 851; and see The Frau Margaretha, 6 C. Rob. 92; The Welvaart, *ante*, p. 851, n.

As a general rule articles of contraband must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port, and from the moment of quitting a port for a hostile destination the offence is complete (The Imina, 3 C. Rob. 168; Hobbs *v.* Henning, 17 C. B. N. S. 791 (112 E. C. L. R.),) and the result is the same although the voyage be taken from one port of the enemy to another (The Edward, 4 C. Rob. 68, 70); and a person will not be permitted to

carry articles of a contraband nature to a hostile port under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination: The Trende Sostre, 6 C. Rob. 390, 392, n.

Goods going to a neutral port cannot come under the description of contraband, *all goods* going there being equally lawful (The Imina, 3 C. Rob. 167); and goods will not be held contraband, even though their destination be a hostile port, if they were innocently shipped on board a vessel which sailed in *bonâ fide* ignorance of the war (Jurgan *v.* Logan, 1 Stair's Decisions 477); or if before capture of the ship the port for which she was bound had fallen into the possession of the power by which she was captured. See The Trende Sostre, 6 C. Rob. 390, n. There a neutral vessel was seized as prize by a British ship at the Cape of Good Hope, which had been recently captured by the British forces from the Dutch. Her cargo was cordage, tar, gin, iron, wine, and she had dispatches on board from the minister of state in Holland for the Dutch governor at the Cape. Her ulterior destination was Tranquebar—a neutral port. Lord Stowell held that as the port had ceased to be hostile, no offence had been committed by the captured vessel. "If," said the learned judge, "the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement; and the consequence of any pre-emption that could be put upon them would be British pre-emption. It has been said that this is a principle which the Court has not applied to cases of contraband; and that the Court, in applying it to cases of blockade, did it only in consideration of the particular *hardships consequent on that class of cases. But I [*856
am not aware of any material distinction; because the principle on which the Court proceeded was, that there must be a *delictum* existing at the moment of the seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party; and if the

seizure had been made whilst the offence continued, the property would have been subject to condemnation. But where the character of the goods is altered, and they are no longer to be considered as contraband, going to the port of an enemy, it is not enough to say that they were going under an illegal intention. There may be the *mens rea*, not accompanied by the acts of going to an enemy's port. I am of opinion therefore that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied to those of blockade. I am not aware of any cases in which the penalty of contraband has been inflicted on goods not *in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this—that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in the fact, though not in the intent. I am of opinion that it is a discharge, and a complete acquittal, that long before the time of the seizure these goods had lost their noxious character of going as contraband to an enemy's port."

Under the present law of nations the proceeds of contraband cannot be taken on the return voyage, as it is said that the offence is deposited with the cargo (The Frederick Molke, post, p. 874), nor can the rest of the cargo, if innocent, be seized after the contraband part of the cargo has been disposed of. For as Sir William Scott has observed, "it would be an extension of the rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a moral taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation even after the contraband itself was out of reach:" The Immanuel, Eysenberg, 2 C. Rob. 196, *ante*, p. 821.

Although a ship on her return is not liable to confiscation for having carried a cargo of contraband, yet it would be a little too much to say that all impression is done away; because if it appears that the owner had such a cargo under a certificate obtained on a false oath that there was no contraband on board, it could not

*but affect his credit at the least, and induce the court to look very scrupulously to all the actions and representations of such a person: The Margaretha, Magdalena, 2 C. Rob. 140, per Sir William Scott. [*857

It has moreover been held that the carrying of contraband to a settlement of the enemy with false papers would affect even the return voyage: The Charlotte, 6 C. Rob. 386 n.; Rosalie and Betty, Id.; Margaret, 1 Acton 333, 335; Santissima Coracoa de Maria, 2 Id. 91; and see The Nancy Knudsen, 3 C. Rob. 122, where Sir William Scott considered the proceeds of contraband taken under false papers from Europe to a settlement of the enemy in the East Indies as liable to confiscation. "It is said," he observed, "that this is a past transaction, and that in cases of contraband the returned voyage has not usually been deemed connected with the outward. In European voyages of no great extent, where the master goes out on one adventure, and receives at his delivering ports new instructions and further orders in consequenee of advice obtained of the state of the markets and other contingent circumstances, that rule has prevailed; but I do not think that in distant voyages to the East Indies, conducted in the manner this has been, the same rule is fit to be applied. In such a transaction, the different parts are not to be considered as two voyages but as one entire transaction, formed upon one original plan, conducted by the same persons and under one set of instructions *ab ovo usque ad mala.* The whole of it is termed by the parties themselves in these very papers, *the expedition* in which the returns are essentially connected with the outward cargo, and all considered as composing one adventure. Shall I then, viewing the matter in this light, separate for the benefit of such parties as these that which they have joined together? Shall I say, that this returned cargo is so unconnected with the original shipment from Europe as to receive no taint of discredit from the manner in which the parties have conducted themselves in the whole of the outward voyage? Till I am better instructed, I shall hold that parties setting out on such an expedition with ill faith, and pursuing that measure of ill faith up to its consummation in the delivery of the outward cargo, are implicated in the consequences of such a conduct throughout the whole sequel of that transaction. I shall therefore reject the claim as to the cargo on the ground that these parties have, by their original *mala fides*,

forfeited their fair pretensions to be admitted to any further proof."

Penalties for carrying contraband.—Formerly, by the law of nations, the carrying of contraband articles in all cases involved a forfeiture of the ship, but in later times this practice has been relaxed (The Jonge Tobias, 1 C. Rob. 330), for where the owners of the ship and contraband cargo are different *persons, the ship is allowed to go free, but subject to the forfeiture of freight and to expenses on the part of the neutral owner (Id.; The Mercurius, 1 C. Rob. 288; The Ringende, Jacob, 1 Id. 89, 90), though freight and expenses have been allowed where the contraband articles were but in a small quantity amongst a variety of other articles: The Neptunus, 3 C. Rob. 108.

*858]

The ground upon which such relaxation was introduced seems to have been that noxious or doubtful articles might have been taken on board without the personal knowledge of the owner (3 C. Rob. 297), but a neutral master will not be allowed to aver ignorance of the contents of his cargo: The Oster, Risoer, 4 C. Rob. 199.

Sir William Scott, although he decided many cases according to the new practice, considered that the ancient practice was perfectly defensible on every principle of justice. Inasmuch as "if the supplying the enemy with articles of contraband is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent: 3 C. Rob. 295. The relaxations however do not apply to cases attended with aggravating circumstances, as where the vessel is taken on her way to a hostile port with a false destination, as that will subject both ship and cargo to condemnation: The Franklin, 3 C. Rob. 217; The Edward, 4 Id. 68; The Ranger, 6 Id. 125; The Eliza, cited 1 Id. 91; The Tubal Cain, Blatchford's Prize Cases, p. 240; The Ann, Id. 242; The Ouachita, Id. 306; The Stephen Hart, Id. 387.

So likewise where the owner of the ship knowingly carries contraband in violation of a treaty, the ship will be liable to confiscation: The Neutralitet, 3 C. Rob. 295.

As a general rule, however, all the other property of the owner of the contraband captured at the same time, whether it be cargo (The Staadt Embden, Jacobs, 1 C. Rob. 26), or the ship (The Neptunus, Backman, 6 C. Rob. 409), or a share in it (Jonge Tobias,

Hilken, 1 C. Rob. 329), will be equally liable to confiscation as being involved in the same unlawful transaction *à fortiori* if the vessel be taken with a false destination: The Floreat Commercium, Radecker, 3 C. Rob. 178; The Springbok, Blatchford's Prize Cases, p. 434; The Peterhoff, Id. 463.

Innocent parts of the same cargo, to escape from the contagion of contraband, must be the property of a different owner: The Staadt Embden, Jacobs, 1 C. Rob. 301.

A clause in a treaty "that free ships make free goods," will not extend to any illegal trade as contraband (The Asia, cited in the Index to 6 C. Rob. p. 4), neither will permission to trade with the enemy in "innocent articles" extend to a mixed *assorted cargo*, consisting of articles partly innocent and partly noxious: The Eleanora Whilelmina, 6 C. Rob. 331.

**Doctrine of pre-emption.*—The right of pre-emption by a belligerent has been before alluded to. It is confined to a certain class of articles which it would act to the disadvantage of a belligerent to allow their transport to the enemy, but which a mitigation of the former law does not now permit us to confiscate as contraband. [*859

The right of pre-emption is generally applied to cases where the articles seized are *ancipitis usus*, and are the products of the country exporting them. Thus, for instance, where pitch and tar (The Twee Jeffrowen, Etjes, 4 C. Rob. 242, 243; The Resolution, Id. 166, n.), or hemp (The Apollo, Bottcher, 4 C. Rob. 158; The Evert, Everts, Id. 354), timber (The Juffrow Wobetha, 4 C. Rob. 163, cited) or provisions (The Haabet, 2 C. Rob. 182), are the produce of the country from which they are exported or the property of a merchant of the exporting country, they will be liable to pre-emption only, and not to confiscation, which would be their fate had they been the products of another country.

The practice which has substituted pre-emption for confiscation has been introduced because it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of articles, which in the case of some countries constitute a considerable part of their native produce and ordinary commerce. "No unfair compromise," says Sir William Scott, "as it should seem, between the belligerents' rights, founded on the necessity of self-defence, and the claims of

the neutral to export his native commodities though immediately subservient to the purposes of hostility:" 1 C. Rob. 237.

It is incumbent, however, upon the claimants to show that they come within the relaxation in favor of nations exporting their *own* produce: The Evert, Everts, 4 C. Rob. 354; The Twee Jeffrowen, Etjes, Id. 242.

In certain instances where the articles seized constitute the great staple commodity of the exporting country, as in the case of pitch and tar exported from Sweden, the presumption might be allowed in favor of the claimant without absolute proof: per Sir William Scott, 4 C. Rob. 243.

To entitle a party to the benefit of the rule of pre-emption, a perfect *bona fides* on his part is required. Thus, in The Sarah Christina, 1 C. Rob. 237, a Swedish vessel laden with tar, pitch, iron hoops and bars, was taken on her voyage to a French port under a colorable destination to a neutral port, Sir William Scott condemned the cargo, withholding the allowance of freight and expenses to the ship. "It is asked," he observed, "why should a real destination to French ports be concealed if the neutral has a right to carry them avowedly? Clearly to give the French market a greater security. If pitch and tar are going avowedly to the enemy, they may be brought in for pre-emption; but if papers *860] holding out a neutral destination are put *on board, this right is eluded, and the enemy is commodiously and securely provided with the instruments of war. The cruiser can only examine to satisfy himself of the fact of the destination; but he cannot detain without a responsibility in damages. The false representation therefore is not useless for purposes of mischief; it is the passport and convoy for noxious articles to the ports of the enemy." See also The Edward, Bartlett, 4 C. Rob. 68.

With regard to the price to be paid for articles detained under the right of pre-emption, Sir William Scott has made the following important observation: "It is no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of pre emption, that it is to receive a price calculated exactly in the same manner and amounting precisely to the same value as it would have done if it had arrived at its port of destination in the ordinary course of trade. The right of taking possession of cargoes of this description —*commeatus, or provisions* going to the enemy's ports—is no pecu-

culiar claim of this country, it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind; or that on the side of neutral the same exact compensation is to be expected which he might have demanded from the enemy in his own port; the enemy may be distressed by famine and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on *the same terms on which an enemy would be content to purchase them; [*861. much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war:" The Haabet, 2 C. Rob. 181.

Carrying of Military Persons, Public Agents, and Despatches belonging to Belligerents.—The transport of naval or military forces of the enemy to a hostile destination will lead to the condemnation of the ship and cargo as for a carriage of contraband of the most noxious character (The Friendship, 6 C. Rob. 420), nor is the

number of such persons conveyed very material, for, as observed by Sir William Scott, "number alone is an insignificant circumstance in the consideration on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general to take the command of forces might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish:" The Orozembo, 6 C. Rob. 430, 434.

Upon the same principle, the offence of fraudulently carrying despatches in the service of the enemy will subject to confiscation the neutral vessel in which they are carried. "The carrying of two or three cargoes of military stores," says Sir W. Scott, "is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world. It is true, as it is said, that one ball might take off a Charles XII., and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of evanescent quantity of which no account is taken; and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different: it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service therefore which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which con-
*862] stitutes the penalty in contraband *where the vessel and cargo do not belong to the same person, would be ridiculous when applied to *despatches*. There would be *no* freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are

carried must therefore be confiscated:" The Atalanta, 6 C. Rob. 440, 455.

With regard to what will be considered despatches, Sir William Scott has laid it down "that they are all official communications of official persons on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the Court will not construct a scale of relative importance, which, in fact, it has not the means of doing with any degree of accuracy or satisfaction to itself: it is sufficient that they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve. It is not to be said, therefore, that this or that letter is of small moment: the true criterion will be, is it on the public business of the state, and passing between public persons in the public service? That is the question. If individuals take papers coming from official persons and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the Court will not split hairs, and consider their relative importance. For on what grounds can it proceed to make such estimate with any accuracy? What appears small in words, or what may perhaps be artfully disguised, may relate to objects of infinite importance, known only to the enemy, and of which the Court has no means of judging. The Court, therefore, will not take upon itself the burthen of forming such a scale, but will look only to the fact, whether the case falls within the general description or not:" The Caroline, 6 C. Rob. 465; and see The Susan, Id. 461, n.

Where the papers are committed to the charge of a neutral by a person not invested with a public character, they will not be considered as despatches. See The Rapid, Edw. 228; The Caroline, 6 C. Rob. 469.

A neutral may carry despatches from an ambassador of the enemy resident in the neutral country to the ambassador's own government. "These," says Sir William Scott, "are despatches from persons who

are, in a peculiar manner, the favorite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that state and their own *863] *government. On this ground a very material distinction arises with respect to the right of furnishing the conveyance . . . . The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. . . . . The limits assigned to the operations of war against ambassadors by writers on public law are, that the belligerent may exercise his right of war against them whereever the character of hostility exists: he may stop the ambassador of his enemy on his passage, but when he has arrived in the neutral country and taken on himself the functions of his office and has been admitted in his representative character, he becomes a sort of *middle-man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are in some degree interested. If it be argued that he retains his national character unmixed, and that even his residence is considered as a residence in his own country, it is answered that this is a fiction of law, invented for his further protection only; and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege, and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not, he is there for the purpose of carrying on the relations of peace and amity, for the interests of his own country primarily, but at the same time for the furtherance and protection of the interest which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral state; for its interest may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration that an ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there, without the opportunity of such communication? It is too much to say that all the business of the two states shall be trans-

acted by the minister of the neutral state resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent powers, and of an "immediate negotiation with them:" per Sir W. Scott, in The Caroline, 6 C. Rob. 461.

Upon the same principle despatches may be conveyed on board a neutral vessel going from a hostile port to a consul of the enemy resident in a neutral country: The Madison, Edw. 224.

But if papers are really of a *hostile or illegal nature, [*864 they will derive no protection by their being conveyed under the sanction of a neutral ambassador resident in the enemy's country. For the Court of Admiralty has held, in cases of convoy, that even the interposition of the sovereign of a neutral state will not take off the criminality of an illegal act (see The Maria, *ante*, p. 757); still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect: The Madison, Edw. 226.

There is nothing criminal in carrying despatches of a purely commercial character (The Hope, 6 C. Rob. 456, cited), nor in carrying despatches to a port of destination which ceased to be a colony of the enemy before the vessel reaches it (The Trende Sostre, 6 C. Rob. 457, cited), nor where the despatches have been put on board in fraud of the master, notwithstanding he has done all he could to prevent their being received: The Lisette, 6 C. Rob. 457, cited.

Where, however, a neutral master, from want of proper caution, suffers despatches to be conveyed on board his vessel, the plea of ignorance will not avail him: The Rapid, Edw. 228.

Where, however, the destination of a vessel is neutral, neither military officers, nor public agents of the enemy, nor hostile despatches on board of her, can be treated as contraband of war. See The Hendric and Allda, Marriott's Adm. Rep. 139: in that case a Dutch ship, in the time of our first American war (1777), sailing from a Dutch port to St. Eustatia, a Dutch settlement, was seized having on board powder, guns, naval stores, and five military officers, with rebel commissions (which, however, had been destroyed before the taking of the vessel), and all going avowedly to serve in the rebel army. It was argued that the vessel merely intended to touch at St. Eustatia, and that her real destination was

hostile, namely, New England. But the hostile destination not being clear, the judge, Sir George Hay, restored the ship and cargo, and it appears from other sources that the officers were not detained as prisoners of war. "It would be too high," said the learned judge, "for any such court of justice as this to assert, that the Dutch may not carry in their own ships to their own colonies and settlements everything they please, whether arms or ammunition, or any other species of merchandise, provided they do it with the permission of their own laws; and if they act contrary to them, I am no judge of the laws of Holland."

In the case of The Trent, a captain of the United States navy stopped a British royal mail steamer in her passage from Havanna, a neutral port, to England, a neutral country, and took from the steamer certain persons supposed to be ambassadors, and also supposed to be bearers of despatches from the so-called Confederate
*865] *States, to its agents in Europe, though no despatches were found. The British government having demanded the restoration of the persons so seized, they were given up by the United States. See the affair of The Trent discussed at length. Kent on International Law, by Abdy, 381; Historicus on International Law 187, 198.

We have before seen that the fraudulent carrying of the enemy's despatches by a neutral involves a forfeiture of the ship. The same penalty will also be extended to the cargo when it is the property of the same owners (The Atalanta, 6 C. Rob. 440; and see The Constantia, Id. 461, n.), except where the master does not appear to be agent for the cargo (The Hope, 6 C. Rob. 463, n.); but the master's private adventure would in such a case be confiscated: The Susan, 6 C. Rob. 461, n.

Although the carrying of despatches may not be fraudulent, the ship and cargo will only be restored on payment of the captor's expenses, for a private merchant is under no obligation to be the carrier of the enemy's dispatches to his own government. And one inconvenience to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they *may* be papers of an injurious tendency, although not such, in any *a priori* presumption, as to

subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconveniences that may attend it: The Caroline, 6 C. Rob. 461, 469; The Madison, Edw. 226; The Rapid, Id. 231.

It may be here mentioned, that by a declaration made by the Queen on the 15th of April, 1854, although her majesty, during the late Russian war, waived the right of seizing enemy's property laden on board a neutral ship, it was declared to be "impossible for her majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches."

The supply of Contraband not an offence against the law of the Neutral State.—Although, as we have before seen, it is an offence against the law of nations for the subject of a neutral country to supply a belligerent with contraband of war, his doing so is not a violation of the national neutrality, nor is it ordinarily an infringement of the municipal law of his own country, unless by what he does he comes within the provisions of some special act. Thus in the important case of The Santissima Trinidad, 7 Wheaton 283, 340, the question arose, whether the sending of an armed vessel and munitions of war, from a port of the United States then neutral, *to Buenos Ayres, a colony which had revolted from [*866 and was at war with Spain, was illegal according to the laws of the United States. Story, J., in delivering the judgment of the Supreme Court, said, "The question as to the original illegal armament and outfit of the vessel may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure—contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres

to have been a *bonâ fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid."

It follows therefore that contracts relating to the supply of contraband to a belligerent are valid, and may be enforced in the country of the neutral who enters into them. See Ex parte Chavasse, In re Grazebrook, 34 L. J. (Bktcy.) 17; there Lord Chancellor Westbury, reversing the decision of Mr. Commissioner Perry, held that a contract to share in a joint adventure to carry goods contraband of war to a port of a belligerent, and there to dispose of the goods, and convert them into others, to be re-exported from the belligerent port, though blockaded, is not an illegal contract, but constitutes a valid partnership in the adventure, and that the courts of this country are bound to entertain proceedings for an account between the partners to their assigns, if thereto required by either partner or his assigns. "In the view of international law," said his Lordship, "the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labor with the inhabitants of every other country. If hostilities occur between the two nations, and they become belligerents, neither belligerent has a right to interpose, or to require a neutral government to interpose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights, which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the high-road of nations, any munitions of war which are
*867] destined and in the act of being transported in a *neutral ship to its enemy. This right, which the laws of war gave to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a sub-

ject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal. There is, however, much incorrectness of expression in some writers on the subject, who in consequence of this right of the belligerent to seize *in transitu* munitions of war while being conveyed by a neutral to his enemy, speak of this act of transport by the neutral as unlawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequences beyond his judicial condemnation of the ship and cargo, nor can he make it the subject of complaint." See also The Helen, 1 Law Rep. (Adm.) 1, 2.

Upon the same principle, although insurances on articles contraband of war are void in the country of the hostile belligerent, and incapable of being enforced in their Courts (2 Arn. Mar. Ins. 656, 3d ed., citing 1 Marsh. Ins. 75, Gibson *v.* Service, 5 Taunt. 433 (1 E. C. L. R.), 1 Marsh. 119), nevertheless an insurance effected by or for neutrals of articles contraband of war, being *per se* a valid contract, may be enforced in the Courts of the neutral country, provided the nature of the trade and of the goods were disclosed to the underwriter, or providing there be just ground from the circumstances of the trade or otherwise to presume that he was duly informed thereof: 2 Arn. Mar. Ins. 656, 3d ed., citing 3 Kent. Comm. 267; *1 Id. 142; The Santissima Trinidad, 7 Wheat. 283; Ex parte Chavasse, In re Grazebrook, 34 L. J. (Bktcy.) 17. And see Letters by Historicus 138–145. [*868

The proclamation usually made by the Crown to warn subjects not to contravene the provisions of the Foreign Enlistment Act, or to act contrary to the rules of international law, does render any

act merely in breach of international law (and which is punishable as such by the Admiralty Courts of the belligerents) illegal by the municipal laws of this country. This is well explained by Lord Chancellor Westbury in a case where it was held that the Queen's proclamation of the 13th May, 1861 (see 34 L. J. Bktcy. 18, note) did not render a contract for a neutral to supply belligerents with articles of contraband invalid. "The object of the proclamation of 1861," said his lordship, "is to make known the existing law—it can neither make nor unmake law. In truth, the proclamation is directed, and very properly, to two objects; first, to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of her Majesty. The proclamation has no effect whatever on the legality of this adventure."

Foreign Enlistment Acts.—In order to prevent subjects of this country enlisting or serving in foreign service, or "equipping, furnishing, fitting out or arming" vessels, in order to aid in military operations with any foreign powers without leave or license of the Crown, the legislature of this country in the year 1819 passed the Foreign Enlistment Act, 59 Geo. 3, c. 69. A somewhat similar Act had been passed on the 20th of April, 1817, by the United States of America.

The principal decisions upon the American Act are The Santissima Trinidad, 7 Wheat. 284, cited on another subject *ante*, p. 865; and The United States *v.* Quincy, 6 Peters 445. In the latter case the indictment charged the defendant with being knowingly concerned in the fitting out, in the port of Baltimore, a vessel called "The Bolivar," with intent to employ her in the service of a "foreign people"—the United Provinces of Buenos Ayres—against the subjects of the Emperor of Brazil, with whom the United States were at peace. The vessel went from Baltimore to St. Thomas, *and was there fully armed.* She afterwards cruised under the Buenos Ayrean flag. Thompson, J., in delivering the judgment of the superior Court said, "The offence consists principally in the inten-

tion with which the preparations *were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States; and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention; not conditional or contingent, depending on some future arrangements. This intention is a question belonging to the jury to decide. It is the material point on which the legality or criminality of the act must turn; and decides whether the adventure is of a commercial or warlike character. The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed *by them* to commit hostilities against foreign powers at peace with the United States. The collectors are not authorized to detain vessels, *although manifestly built for warlike purposes, and about to depart from the United States*, unless circumstances render it probable that such vessels are intended to be employed *by the owners to commit hostilities* against some foreign power at peace with the United States. All the latitude, therefore, necessary for commercial purposes is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in a war." "These decisions," in the eloquent language of an able writer on international law, "prove decisively that the Foreign Enlistment Act was not intended to, and did not in fact, operate so as in any way to limit or control the absolute freedom of neutral commerce. The Enlistment Act is directed not against the *animus vendendi*, but the *animus belligerandi*. It prohibits warlike enterprises, but it does not interfere with commercial adventure. A subject of the Crown may sell a ship of war as he may sell a musket to either belligerent with impunity; nay, he may even despatch it for sale to the belligerents. But he may not take part in the overt act of making war with a people with whom his sovereign is at peace. The purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against his own sovereign, not to prevent transactions in contraband with the belligerents:" Historicus on International Law, p. 168. And on the Foreign Enlistment Acts see the able chapter by Professor Abdy in his edition of Kent on International Law, pp. 291, 321; Gibb's Foreign Enlistment Act. [*869

The English Foreign Enlistment Act, 59 Geo. III., c. 69, was much discussed in the great case of The Alexandra, reported under the name of Attorney-General *v.* Sillem, 2 Hurlst. & C. 431: in that case there was an information against the ship Alexandra, charging that the defendants and others had been guilty of a viola-
*870] tion *of the Foreign Enlistment Act in respect of that vessel. The ship Alexandra had been built and partly rigged at Liverpool, and had been seized on the 6th of April by an officer of the customs, on the ground of a breach of the 7th section of the statute. The defendants claimed the ship, and pleaded that it was not forfeited. The information charged them with every possible violation of the Act as to *equipping*, *furnishing*, and *fitting* out, but omitted to charge anything in respect of arming. The cause was tried before Pollock, C. B., on the 22d of June and the three following days. The evidence for the Crown clearly established the warlike character of the vessel: that it was not at all adapted for commerce, but was capable of being adapted for warlike purposes; and though it might have been used as a yacht, according to the evidence of Captain Inglefield, R. N., it was in all probability intended to be used by the so-called Confederate States as a vessel of war, when adapted for that purpose by suitable equipments and fittings-up being furnished. No evidence was given on behalf of the defendants. The learned Chief Baron, after adverting to the law as laid down in Kent's Commentaries, vol. i., marg. p 142, and the statement of Story, J., in The Santissima Trinidad, 7 Wheat. 283, 340, that the law of nations did not prohibit the sending armed vessels, as well as munitions of war, to foreign ports for sale, told the jury that the question which he proposed to submit to them was whether the Alexandra was merely in the course of building for the purpose of being delivered in pursuance of a contract, which in his Lordship's opinion was perfectly lawful; or whether there was any intention that in the port of Liverpool, or any other English port, the vessel should be equipped, fitted out, and furnished or armed for the purpose of aggression. His Lordship proceeded to say that the Foreign Enlistment Act did not prohibit the building of ships for a belligerent power; the *sale* by any person in this kingdom to a belligerent power of any quantity of arms, ammunition, or destructive material was not forbidden either by international or municipal law; and if so, why should ships be an

exception? which, in his opinion, were not. That if it was lawful for a person to build a ship easily convertible into a man-of-war, and offer it for sale to either of the belligerents, it was lawful for the Confederate States to employ a builder to build a ship of the same description and to send it to them. That the object of the statute was not the protection of belligerents, otherwise the legislature would have prohibited the sale of gunpowder; but to prevent the equipment for war, in the ports of this country, of vessels which might possibly come into hostile communication before they passed the neutral line. . . . His Lordship finally left the question to the jury *as follows: "Was there any intention that in the port of Liverpool [*871 or in any other port, she should be either equipped, furnished, fitted-out, or armed with the intention of taking part in any contest? If you think the object was to equip, furnish, fit out, or arm that vessel at Liverpool, then that is a sufficient matter. But if you think the object really was to build a ship in obedience to an order, and in compliance with a contract, leaving it to those who bought it to make what use they thought fit of it, then it appears to me that the Foreign Enlistment Act has not been in any degree broken." The jury having found a verdict for the defendants, on cause being shown to make absolute a rule nisi for a new trial, the Court being equally divided in opinion as to whether the rule ought to be made absolute, Pigott, B., withdrew his judgment, and the rule was discharged.

It was held, however, that the building in pursuance of a contract with intention to sell and deliver to a belligerent power, the hull of a vessel suitable for war, but unarmed, and not equipped, furnished or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the Foreign Enlistment Act (59 Geo. III., c. 69).

Pollock, C. B., and Bramwell, B., held also that the equipment forbidden by the statute is an equipment of such a warlike character as enables the ship on leaving a port in this kingdom to cruise or commit hostilities. Channell, B., held that if the equipment is doubtful, it may be explained by the evidence of the intent of the parties. And that the act includes a case where the equipment is such, that although the ship when it leaves a port in this kindom is not in a condition at once to commit hostilities, is yet capable of being used for war, and the intent is clear that it is to be used for

war. While Pigott, B., held that any act of equipping, furnishing, or fitting out, done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within the language, and also within the spirit of the statute. The Crown appealed to the Exchequer Chamber against the decision of the Court of Exchequer discharging the rule for a new trial, but it was held no appeal lay: 2 Hurlst. & C. 581. See also Ex parte Chavasse, In re Grazebrook, 34 L. J. (Bktcy.) 20.

Since the termination of the war between the so-called Confederate States and the United States, the United States have demanded compensation from this country in respect of the damage done to their commerce by the "Alabama" and certain other ships of war built, but not equipped in this country, for the so-called Confederate States. It is difficult, however, to see how far, upon any principle of law, this demand can be supported. Such ships, *872] no doubt, were contraband *of war, and as such might have been seized and confiscated by the United States on their voyage to a port of the so-called Confederated States, just as rightfully as other warlike materials, such as cannon, small-arms, or gunpowder, supplied by this country to the United States, might have been seized and confiscated by the so-called Confederate States.

Even if such ships had been permitted to leave this country in violation of our own Foreign Enlistment Act, it may be fairly urged that there was no legal obligation on the part of England to enforce her municipal laws—intended for a different object—for the benefit of a foreign state. However, as upon a careful and dispassionate view of the facts relating to those ships it appears that the government of this country had done all that it *legally* could do, to prevent any evasion of the Foreign Enlistment Act to the detriment of the United States, it is not only unprecedented, but unreasonable to demand compensation for any damage afterwards done by those ships, while in the service of the so-called Confederate States, to the commerce of their opponents. See this subject discussed at length, Kent's International Law, by Abdy, 291–321; Historicus on International Law 165, 176.

Vessels conveying contraband cargo to belligerent ports not under blockade are liable to seizure and condemnation from the commencement to the end of the voyage: The Bermuda, 3 Wallace (S. C.) 514. The proper inquiry in testing the lawfulness of the transportation of contraband goods is whether they are intended for sale or consumption in a neutral market, or whether the direct or intended object of their transportation is to supply the enemy with them: The Stephen Hart, Blatchford's Prize Cases 387; The Springbok, Id. 434; The Peterhoff, Id. 463. Military equipments, military clothing, manufactured articles fitted in their natural state for military use and cordage, are deemed contraband of war when destined for the enemy: The Peterhoff, Blatchford's Prize Cases 463. Articles manufactured and primarily and ordinarily used for military purposes are always contraband when destined to a belligerent: The Peterhoff, 5 Wallace (S. C.) 28. If articles capable of military use are going to a place where any need of their employment in military use exists, it will be presumed that they are going for military use, although it is possible that they may be applied to civil consumption: The Peterhoff, Blatchford's Prize Cases 463. Articles which may be and are used for purposes of war or peace, according to circumstances, are contraband only when actually destined to the military or naval use of a belligerent: The Peterhoff, 5 Wallace (S. C.) 28. Provisions destined to an enemy's naval port are contraband: Maisonnaire *v.* Keating, 2 Gallis. 325. A cargo belonging to neutral owners, known to be engaged in illegal traffic with a belligerent, was held to be properly condemned when it appeared that its destination was a neutral port notoriously used as one of transshipment of goods intended for belligerents, that the cargo was in part specially fitted and in part well adapted to military use, and that the bills of lading concealed the character of part of the cargo and the owner's name, and disclosed no consignee: The Springbok, 5 Wallace (S. C.) 1. If a contraband cargo shipped from a neutral port is really destined, when it leaves port, for the use of the enemy in their country, the mere touching or intention of touching at a neutral port, either for the purpose of making it a new point of departure for an enemy port or for the purpose of transshipping the cargo into another vessel, which may carry it to the enemy port, does not exempt the vessel and cargo from capture as prize of war at any period of the voyage: The Stephen Hart, Blatchford's Prize Cases 387; The Springbok, Id. 434; The Peterhoff, Id. 463.

When contraband goods destined to the use of the enemy are found on board a vessel, all other goods, however innocent in themselves, belonging to the same owner and found on board, will be forfeited: The Springbok, Blatchford's Prize Cases 434; The Peterhoff, Id. 463. Portions of cargo not contraband, belonging to the owner of contraband part, are equally

liable to condemnation: The Peterhoff, 5 Wallace (S. C.) 28. A vessel is liable to condemnation if the owner is privy to the carriage of contraband articles: The Peterhoff, Blatchford's Prize Cases 463. A vessel belonging to a neutral is subject to forfeiture for carrying articles contraband of war when she sails with a false destination: The Stephen Hart, Blatchford's Prize Cases 387; The Springbok, Id. 434. In the case of a blockade, the deviation of a vessel into the blockaded port is presumed to be in the service of the cargo, and the owner is bound by it, except in the absence of notice of the blockade at the time the vessel sailed: The Sunbeam, Blatchford's Prize Cases 656 When a vessel sails with false papers, and her master testifies falsely, and that he does not know the contents of her cargo, she will be condemned: The Peterhoff, Blatchford's Prize Cases 463. Forfeiture of freight only attaches to the conveyance of contraband merchandise: The Peterhoff, 5 Wallace (U. S.) 28.

The Act of Congress of the United States, passed April 20, 1818, 3 Statutes at Large 447, 3 Story 1694, makes it a high misdemeanor, punishable by fine and imprisonment, for any person within the limits of the United States to fit out and arm, or procure to be furnished, fitted out and armed, or knowingly to be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state with whom the United States are at peace, or to issue or deliver a commission, within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, or to increase or augment, or procure to be increased or augmented, or knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser or other armed vessel, which at the time of her arrival within the United States was a ship of war, or cruiser or armed vessel in the service of any foreign prince or state at war with any other foreign prince or state with whom the United States are at peace.

A capture made by a vessel fitted out and armed in an American port, in contravention of the statutes of neutrality, and proceeding thence on a cruise, cannot be justified, whether the vessel was with or without a commission: The Santa Maria, 7 Wheat. 490. Prizes made by armed vessels, which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports: The Santissima Trinidad, 7 Wheat. 471; The Gran Para, Id. 471. A vessel captured by an armed vessel fitted out in a port of the United States in violation of our neutrality, will be restored to the original owners, and the claim of an alleged *bonâ fide* purchaser in a foreign port rejected: La Con-

ception, 6 Wheat. 235; The Fanny, 9 Id. 659. Property captured in violation of the neutrality of the United States will be restored to its former owners, if claimed by the original wrongdoer, though it may have come back to his possession after a regular condemnation as prize: The Arrogante Barcelones, 7 Wheat. 496. If a captured vessel be brought or comes *infra præsidia* of a neutral nation, that nation may ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture: The Estrella, 4 Wheat. 298. Whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. But our courts will only decree restitution of the specific property with the costs and expenses during the pendency of the judicial proceedings. They will not inflict exemplary damages as in the ordinary cases of marine torts: La Armistad de Rues, 5 Wheat. 385.

A citizen of the United States cannot claim in their courts the property of foreign nations in amity with the United States, captured by him in war, wheresoever the capturing vessel may have been equipped or by whomsoever commissioned: The Bello Corrunes, 6 Wheat. 152. Neutrality rights are not violated by the grant of a commission to a neutral while within the territory of a belligerent: Santissima Trinidad, 1 Brock. 478.

The claims of the United States upon Great Britain for the depredations upon their commerce by the Alabama and other ships built in the latter country for the so-called Confederate States were, under the provisions of a treaty between the two countries, concluded at Washington, May 8, 1871, submitted to a tribunal of arbitration convened at Geneva. The decision of that tribunal, contrary to the opinion of the learned editor, was in favor of the United States, and a large sum of money was awarded to be paid by the government of Great Britain as an indemnity for those losses. By the treaty of Washington the following rules were recognised and adopted as applicable to the case: "A neutral government is bound, First, to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel, which it has reasonable ground to believe, is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

*873] *THE FREDERICK MOLKE, Boysen, Master.

December 10, 1798.

[Reported 1 C. Rob. 85.]

Blockade.]—*A vessel coming out of a blockaded port with a cargo is* primâ facie *liable to seizure. If the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation.*

This was the case of a Danish vessel taken coming out of Havre, on the 18th of August, 1798, and bound on a voyage from Havre to the coast of Africa, with a miscellaneous cargo.

JUDGMENT.

Sir W. Scott.—In this case a claim has been given for the ship and cargo, as the property of the same person, a Danish merchant of Christiana.

Several questions have been raised respecting the property,—the previous conduct of the vessel,—the legality of this sort of trade, and the actual violation of a blockade. I shall first consider the last question, because if that is determined against the claimant, it will render a discussion of all other points unnecessary.

First, then, as to the blockade, these facts appear in the depositions of the master: "That on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruisers; that he was warned by an English frigate, 'The Diamond,' off

Havre, not to go into Havre, as there were two or three ships that would stop him; but that he slipped in at night and delivered his cargo." It is therefore sufficiently proved that there were ships on that station to prevent *ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing further is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice or prohibition given to the party.[1] [*874

But it is still further material that this blockade certainly continued till the ship came out again. It is notorious indeed that Havre was blockaded for some time; and although the blockade varied occasionally, it still continued; for it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension, and the reason of the suspension are known), that will be sufficient in law to remove a blockade.

It is said, this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage: but is there that analogy between the two cases which should make the law of one necessarily, or in reason applicable to the other also? I cannot think there is such an affinity between them; there is this essential difference, that in contraband the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

For what is the object of blockade? Not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. I must therefore consider

[1] It has since appeared, that the blockade of Havre was notified to foreign ministers on the 23d of February, 1798.

the act of egress[1] to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

There may indeed be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, that they might not be at liberty to retire. But even then a question might
*875] arise, if it were attempted *to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade.

A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intention. In the present case, the ingress was criminal and the egress was criminal; and I am decidedly of opinion, that both ship and cargo, being the property of the same person, are subject to confiscation. Condemned.

THE BETSEY, Murphy, Master.[2]

December 18*th*, 1798.

[Reported 1 C. Rob. 93.]

Blockade.]—*A declaration of blockade by a commander without an actual investment will not constitute blockade. In a*

[1] Such is also the law and the practice of Holland. Bynkershoek, commenting on the orders of the States-General, June 26, 1630, says: "Scilicet commercii intercludendi ergo ordines generales portus Flandriæ navibus bellicis obsederant, adeoque omnes quorumcunque naves eo destinatas, iudique exeuntes publicabant; quemadmodum ex ratione, et gentium usu, urbibus obsessis nihil quicquam licet advehere, vel ex his evehere." Bynk. 2 Q. P. book i. c. 4.

[2] Affirmed on Appeal, June 2, 1799.

case of neutral property captured by the English and recaptured by the French, compensation was sued from the original British captors, but refused, on the ground of bonæ fidei *possession; irregularities, to bind a former captor being a* bonæ fidei *possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.*

THIS was a case of a ship and cargo taken by the English at the capture of Guadaloupe, April the 13th, 1774, and retaken, together with that island, by the French in June following. The ship was claimed for Mr. Patterson, of Baltimore, and the cargo, as American property. The captors, being served with a monition to proceed to adjudication, appeared under protest; and the cause now came on upon the question, whether the claimants were entitled to demand of the first British captors restitution in value for the property which had been passed from them to the French recaptors? *The first seizure was defended on a suggestion that *The Betsey* had broken the blockade at Guadaloupe. [*876

JUDGMENT.

SIR W. SCOTT.—This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade, and then proceed to inquire on whom the loss of the recapture by the French ought to fall under all the circumstances of the case.

On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party; and 3dly, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet

after the commencement of a blockade a neutral cannot I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive; but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to put themselves under the protection of the English: that on a refusal, hostile operations were commenced against them all." But it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is further stated, "that in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The words "complete" is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication; but from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands they were put into a state of complete blockade." *It is a term, therefore, which was applied to all those islands at the same time under the first proclamation.

*877]

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be sufficient to produce the effect which the captors erroneously ascribe to it; but from the misapplication of these phrases in one instance I learn that we must not give too much

weight to the use of them on this occasion, and from the generality of these expressions I think we must infer that there was not that actual blackade which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering, and from the declaration of the municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy which we require to constitute a blockade. I cannot, therefore, lay it down that a blockade did exist till the operations of the forces were actually directed against Guadaloupe in April.

It would be necessary for me, however, to go much further, and to say that I am satisfied also that the parties had knowledge of it; but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in. I shall therefore dismiss this part of the case.

The case being on the first point pronounced a case of restitution, a second point arises out of the recapture of the property by the French; and the question is, whether the original captors are exonerated by their responsibility to the American claimants? It is to be observed that at the time of the recapture America was a neutral country and in amity

with France. I premise this fact as an important circumstance in one part of the case; but the principal points for
*878] our consideration are whether the possession of *the original captors was, in its commencement, a legal *bonæ fidei* possession? and 2dly, whether such a possession, being just in its commencement, became afterwards by any subsequent conduct of the captors tortious and illegal? for on both these points the law is clear, "that a *bonæ fidei* possessor is not responsible for casualties," "but that he may by subsequent misconduct forfeit the protection of his fair title and render himself liable to be considered as a trespasser from the beginning." This is the law, not of this Court only, but of all Courts, and one of the first principles of universal jurisprudence.

The cases in which it has been particularly applied in this Court have been cited in the arguments; and I will briefly advert to the circumstances of them, as they will afford much light to direct us in the present case. *The Nicolas and Jan* was one of several Dutch ships taken at St. Eustatius and sent home under convoy to England for adjudication. In the mouth of the channel they were retaken by the French fleet: there was much neutral property on board sufficiently documented; and in that case a demand was made on behalf of a merchant of Hamburg for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger by bringing it home, whilst they might have resorted to the Admiralty Courts in the West Indies; and therefore, that the claimants were entitled to demand indemnification from them; but on this point the Court was of opinion that under the dubious circumstances in which those cases were involved, and under the great pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion which is necessarily entrusted to them by the nature of their command.

It was urged also against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on these grounds our courts rejected their claims.

In *The Heindrick and Jacob* also (Lords, July 21, 1790), the case turned upon similar considerations of the nature of the possession. It was a case of a Hamburghese ship, taken erroneously as Dutch, and retaken by a French privateer. In going into Nantes the vessel foundered and was lost. On demand for restitution against the original British captor, the Lords of Appeal decided, that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French recaptor *had a justifiable possession under prize taken from his enemy, he was not responsible for the accident [*879 that had befallen the property in his hands; that if the property had been saved, indeed, the claimant must have looked for redress, to the justice of his ally, the French; but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. Under a view of these precedents, we must inquire first into the nature of the original seizure in the present case; whether it was so wrongful as to bring the seizor all the consequences of that strict responsibility which attaches to a tortious and injustifiable possession.

It has been rather insinuated than affirmed openly in argument, that there was anything wrong or unjustifiable in the first capture; but it is said the great injustice arises from the detention, and from that irregularity of conduct in the captors which has put it out of the power of the claimants to support their claim and obtain restitution from the French.

In respect to the first seizure, although it is admitted now that there was not a blockade, yet it must be allowed also on the other side, that the island of Guadaloupe was at that

time in a situation extremely ambiguous and critical. It could be no secret in America that the British forces were advancing against this island; and that the planters would be eager to avail themselves of the interference of neutral persons to screen and carry off their property. Under such a posture of affairs, therefore, ships found in the harbors of Guadaloupe must have fallen under very strong suspicions, and have become justly liable to very close examination. The suspicion besides would be still further aggravated, if it appeared, as in this case it did appear, that those for whom the ships were claimed, kept agents stationed on the island; and might therefore be supposed to be connected in character and interest with the commerce of the place. It is true, indeed, the Lords of Appeal have since pronounced the island to have been not under blockade; but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise.

The same considerations which justify the seizure, apply also to the second charge of detention in this case; for under these suspicions and these doubts, it was not a slight examination of formal papers that could be deemed sufficient. The captors were entitled to reserve the property so taken for legal adjudication; and as *they could not erect a jurisdiction on the spot, so neither were they at leisure then to send the cases to distant courts. The first capture was made April 13; the recapture took place so early as the 2d of June following; there was an interval but of six weeks. The French were, as the subsequent event proves, in great force in those parts; the commanders had much to occupy their attention; the number of vessels taken under these circumstances was very considerable; and therefore it is not to be mentioned as an injurious or unnecessary delay, that in six weeks so employed, no means were found to bring the ships to adjudication.

*880]

But it is said, the irregular proceedings of the captors have rendered them liable to the strictest responsibility. Now on this point I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these Courts to exonerate the original captors.

What then has been the nature of these irregularities? It is said that the masters and proprietors were sent away from their ships; and therefore that there was no one to apply for restitution at the time of recapture. But what was there to prevent them from making these applications afterwards? Are the French more than the English courts exempted from making subsequent restitution? They hold, indeed, that possession of twenty-four hours will convert the property of prize; but this is not applicable to a neutral vessel. So strongly did the maritime jurisprudence of ancient France consider neutral property to be in a state of absolute inviolability, that no salvage was allowed on retaking neutral vessels, on the supposition that no service had been rendered to them. Such was the language of their law, and therefore no bar to restitution can have arisen from the impossibility of making immediate application.

It is said further, that the papers were all thrown confusedly together; by which it was put out of the power of the claimants to produce that proof and those documents which the courts of France require.

I know it was a maxim of the French law, and a maxim not deficient in justice, that if in time of war a ship is found sailing *about the world without any credentials of character, she is liable to confiscation; but if a just [*881

reason could be given for this defect, if accident or force could be shown to have stripped her of these documents, can it be conceived that the general rule would be applied to such a case? Unless the courts of France have renounced every principle of justice, such a consequence could not have ensued from the want of documents in these cases; and therefore it is not in reason to be presumed. Supposing these irregularities to have existed, and in the censurable degree which this argument imputes to them, they have not in any manner taken off the obligation which the French lie under to restore this property; I must determine that they would not, under any proceedings of justice, have prevented restitution from the French.

On no other ground can the proprietors be entitled to claim it from the British. If the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice. I must pronounce the protest to be well founded, and the captors to be discharged from any further proceedings.

Lawrence said there was a quantity of silver on board which had not been retaken.

King's Advocate.—After what has fallen from the Court, I cannot object to the restitution of the specie.

June 22, 1799. This cause was reheard before the Lords of Appeal. The sentence of the Court below was affirmed.

Nothing is better established, as an exception to the general freedom of the trading operations of neutrals in time of war than this, that it is unlawful for a neutral to trade with a port or place besieged or blockaded by one of the belligerent powers, whatever that trade may be, and although the articles furnished thereby may not come within the meaning of the term contraband. The reason

is this, that it is the duty of a neutral to preserve a strict impartiality in his dealings with the belligerents, whereas by furnishing supplies to one during a blockade, he would be favoring such one at the expense of the other, by perhaps supplying the very articles *which enabled the blockaded place to prolong its resistance, or even to compel the besieging party to raise the blockade. [*882

Of course neither the subjects nor the allies of the country establishing a blockade would be permitted to violate it, for such conduct, in addition to the other objections which would apply to it in common with a similar attempt on the part of neutrals, would amount to such dealing or intercourse with the enemy as we have before seen (see note to The Hoop, *ante*, p. 787) will not, without proper license, be allowed. See Baltazzi *v.* Ryder, 12 Moo. P. C. C. 187.

A declaration of blockade is a high act of sovereign authority, and cannot in general be either imposed or extended by a commander without special authority: The Henrick and Maria, 1 C. Rob. 148; and see 6 C. Rob. 365.

Where, however, a commander goes out to a distant station, he may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him, as may be necessary to provide for the exigencies of the service in which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different; but in distant parts of the world it cannot be disputed, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy as against the enemy himself, for the more immediate purpose of reduction: The Rolla, 6 C. Rob. 364, 366.

There is no doubt that any portion of the enemy's coast may be blockaded, provided an adequate force be applied for that purpose. The first Napoleon, it is true, in his celebrated Berlin Decree, dated the 21st of November, 1806, questioned this right, and complained that England "extended the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers," while, as he alleged, "this right, according to reason and the usage of civilized nations, is only applicable to fortified places." But, as observed by a learned author, "this limitation of those who ventured to call them-

selves the assertors of the law of nations, namely, confining the right of blockade to fortified places, and leaving harbors exempt from such restraint, was entirely new and unheard of, and in opposition to the clear principles of blockade:" Manning's Law of Nations, p. 337.

Another objection taken in the Berlin Decree to the conduct of England was, that she "declared blockaded places before which she had not a single ship of war, although a place cannot be decmed blockaded, unless it be so invested that there is an evident danger in entering: and that she declared blockaded places which her *883] whole forces united would be unable to *blockade—whole coasts, and all an empire." And by the Milan Decree, dated 17th of December, 1807, Napoleon declared the British Islands and her colonies in a state of blockade.

A blockade of such a character, which has been well termed "a paper blockade," is, no doubt, contrary to the law of nations, for, as we shall hereafter see, a blockade, in order to be effectual, must be actual, and supported by an adequate force; but the system of blockade complained of by the Berlin Decree, was adopted by England as a mode of retaliation for the unwarrantable proceedings of the first Napoleon, when he commenced those operations which afterwards ripened into what was termed "the continental system," by which he endeavored to exclude all nations, even neutrals, from all commerce with England. France, in effect, declared that the subjects of other states should have no access to England; England, on that account, declared that the subjects of other states should have no access to France. "So far," says Sir William Scott, in remarking on this state of affairs, "this retaliatory blockade (if blockade it is to be called) is co-extensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse, by virtue of the act of France:" The Fox, Edw. 321.

The conduct of England, therefore, in declaring blockades, unsupported by a sufficient force, was adopted in order to meet an exceptional case, and could not therefore be approved of under other circumstances, or be referred to, on ordinary occasions, as a precedent to guide belligerents in future wars.

For a brief and admirable sketch of "The Continental System,"

see Manning's Law of Nations 330–349; Historicus on International Law 89, 118; The Arthur, 1 Dods. 423, 425; The Fox, Edw. 311, 321; The Snipe, Id. 381.

In the principal case of The Betsey, it is laid down by Sir William Scott, that to constitute a violation of blockade "three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party supposed to have offended; and 3dly, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade."

1st. There must be an existence of an actual blockade. In order to constitute an actual blockade, the law requires that there should be an adequate force present to prevent all communication with the blockaded ports. "The usual and regular mode of enforcing blockades," says Sir William Scott, "is by stationing a number of ships, and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. Then, if the arch fails in any one part, the blockade fails altogether:" 1 Dods. 425.

*Another definition of what amounts to a lawful blockade, and which is generally considered to be correct, is that taken from the Convention of 1801 between Great Britain and Russia, which declares, "That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering." See 3 Art. s. 4. [*884

In the late war between the so-called Confederate States and the United States, the Supreme Court appears to have been satisfied by a much laxer system of blockade than that required by Sir William Scott. See The Baigorry, 2 Wallace 474.

Where there is a merely maritime blockade of a place, it will not be violated by any communication by means of inland navigation, to which the blockade is not applied. Thus, in The Stert, 4 C. Rob. 65, it was held that the blockade of Amsterdam was not violated by shipments to Embden by inland navigation, with an ulterior destination to London. "The Court," said Sir William Scott, "cannot take upon itself to say, that a legal blockade exists where no actual blockade can be applied. In the very notion of a complete blockade it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no

blockade of that quarter where its power cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed that this was no more than what was foreseen by the blockading state, which nevertheless thought proper to impose it to the extent to which it was practicable."

The blockade will not be suspended although the blockading force is by accident, as by the winds, kept at a distance. In The Columbia, 1 C. Rob. 154, Sir William Scott says, "The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade, but the blockade is not therefore suspended. The contrary is laid down in all the books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud." But it may be inferred from what is laid down by Sir William Scott, in the principal case of The Frederick Molke, that a blockade might under such circumstances be considered as removed if the reason of the suspension of the blockade by the blockading force being blown off by the wind were unknown: *ante*, p. 874.

The principle, however, that when a blockading squadron is driven off by adverse winds, neutrals are bound to presume it will return, and that there is no discontinuance of the blockade, cannot be extended to the case of a blockading squadron driven off by a superior force, *as in that case there will be a total defeasance of the blockade and its operation: The Hoffnung, 6 C. Rob. 112, 117, 120; The Triheten, 6 C. Rob. 65.

*885]

A blockade has been well characterized as a universal exclusion of all vessels not privileged by law. If, therefore, some vessels are permitted to pass, others will have a right to infer that the blockade is raised: The Rolla, 6 C. Rob. 372.; The Juffrouw Maria Schroeder, 3 C. Rob. 147, 156; The Vrouw Barbara, Id. 158, n.; The Christina Margaretha, 6 C. Rob. 62.

A relaxation of blockade in favor of belligerents, to the exclusion of neutrals, is clearly illegal; nor, it seems, will a similar relaxation in favor of some neutrals make it legal. Thus, in Northcote *v.* Douglas (The Fransciska), 10 Moo. P. C. C. 37, on the 15th of April, 1854, the commander of the Baltic fleet blockaded *de facto*, amongst other places, the Gulf of Riga. The English government

on the same day issued an Order in Council giving permission, up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Seas to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French government, and the Russian government, by a ukase, allowed the same indulgence to English and French ships. On the 14th of May, 1854, a neutral vessel, under Danish colors, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22d of that month, for a breach of the blockade of that port. It was held by the Judicial Committee and Lords of the Privy Council, reversing the decision of Dr. Lushington, 1 Spinks 111, that, as the Order in Council must be taken to have extended to British and French ships, and as it relaxed the blockade in favor of the belligerents to the exclusion of neutrals, the blockade was illegal: restitution was therefore decreed, though without costs. "Lord Stowell," observed Lord Kingsdown, in delivering judgment, "when he defines a blockade, always speaks of it as the exclusion of the blockaded place from *all* commerce, whether by egress or ingress. In The Frederick Molke, 1 C. Rob. 87, he says:—'What is the object of a blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off *all* communication of commerce with the blockaded place.' In The Betsey, 1 C. Rob. 93, 'After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy.' In The Vrouw Judith, 1 C. Rob. 151: 'A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be *entirely* cut off; and a neutral is no more at liberty to assist the traffic of *exportation than of importation.' In The Rolla, 6 C. Rob. 372:—'What is a blockade [*886 but a uniform exclusion of all vessels not privileged by law?' In The Success, 1 Dods. 134:—'The measure which has been resorted to being in the nature of a blockade, must operate to the entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded.'

"It is contended that the objection of a neutral to the validity

of a blockade, on the ground of its relaxation by a belligerent in his own favor, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation which may be of the greatest value to the belligerents may be of little or no value to the neutral. . . . Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist; namely, the necessity of interdicting *all* communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself, and that, if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself. But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals; and if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case:" The Steen Bille, 1 Spinks 161; The Union, Id. 164; The Jeanne Marie, Id. 167; The Nornen, Id. 171, belonged to the same class of cases as The Fransciska, which was selected to try the question.

If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral states, and that they should be fully apprised what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from *the decision of its Court of Admiralty, whether the conduct they have pursued is or is not protected by an equitable interpretation of an instrument in which they are not expressly included: per Lord Kingsdown in Northcote *v.* Douglas, 10 Moo. P. C. C. 54.

*887]

An important distinction is observed with respect to the burthen of proof as to the existence of blockade in the case of a blockade by simple fact, and in the case of a blockade by a notification accompanied with the fact. "In the former case, when the fact ceases (otherwise than by accident or the shifting of the wind) there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, it seems that, *primâ facie*, the blockade must be supposed to exist until it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it: to suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral nations, and a conduct which it is not to be supposed any country would pursue. It cannot indeed be said that a blockade of this sort might not in any possible case expire *de facto;* but such conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, it will be held that a blockade by notification is *primâ facie* to be presumed to continue till the notification is revoked: The Neptunus, 1 C. Rob. 171.

The blockade will cease when the place blockaded falls into the possession of the blockading power, and vessels though taken with the intention of violating the former blockade cannot be condemned as prize. See The Lisette, 6 C. Rob. 387; The Trende Sostre, Id. 390, n.; The Abby, 5 Id. 251. The principle upon which these cases were decided was departed from by the decision of the Supreme Court of the United States in the case of The Circassian, 2 Wallace (Amer.) 134, where it was held, *dissentiente* Nelson, J., that a vessel which had sailed from a neutral port with the intention of breaking the blockade of New Orleans, and which was seized by a United States ship of war several days after the city and port of New Orleans had been reduced, and the full authority of the United States extended over them, was a lawful prize for an attempted breach of the blockade. Nelson, J., in his very able judgment in dissenting from the decision of the Court, made the following important observations, which are in accordance with the principles always acted upon by Lord Stowell. "I think," said the learned judge, "the proof sufficient to show that the purpose of the master was to break the blockade of the port of New Orleans, and that it

existed from the inception of the voyage; but in my judgment, the
*888] defect in the *case is *that no blockade existed at the port of New Orleans at the time when the seizure was made.* . . . . . Now the capture and possession of the port of the enemy by the blockading force, or by the forces of the belligerent in the course of the prosecution of the war, puts an end to the blockade and all the penal consequences growing out of this measure to neutral commerce. The altered condition of things and state of the war between the two parties in respect to the besieged port or town, makes the continuance of the blockade inconsistent with the code of international law on the subject, *as no right exists on the part of the belligerent as against the neutral powers to blockade his own ports.* . . . . . It is not necessary that the belligerents should give notice of the capture of the town, in order to put in operation the municipal laws of the place against neutrals. The act is a public event, of which foreign nations are bound to take notice, and conform their intercourse to the local laws. The same principle applies to the blockade, and the effect of the capture of the port upon it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood." The majority of the Court appear to have acted upon the principle that the mere occupation of a city by blockading belligerents does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war; and still less does it terminate a blockade proclaimed and maintained, not only against that city, but against the port and district commercially dependent upon it, and blockaded by its blockade. See also The Venice, 2 Wallace (Amer.) 258.

2dly. In order to constitute a violation of a blockade, not only must an actual blockade exist, but it is necessary that it should be brought to the knowledge of the party supposed to have offended. "It may be notified in a public and solemn manner by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice:" The Vrouw Judith, 1 C. Rob. 52.

"But it may commence also *de facto* by a blockading force giving notice on the spot to those who come from a distance, and who therefore may be ignorant of the fact. Vessels *going in* are, in that

case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But it is quite otherwise with vessels coming out of the port which is the object of blockade; there no notice is necessary after the blockade has existed *de facto* for any length of time: the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce. The *notoriety of the thing supersedes the necessity of particular notice to each ship:" Id. [*889

"The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. A neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* it may be otherwise:" The Neptunus, 2 C. Rob. 111; The Spes and Irene, 5 Id. 76.

It is the duty of a government, having received a public notification of a blockade, to communicate it to its subjects in foreign ports (The Welvaart Van Pillaw, 2 C. Rob. 130), but it will not be presumed that such communication has been made until after a reasonable time has elapsed: The Calypso, 2 C. Rob. 298; The Neptunus, 3 Id. 175; The Adelaide, Id. 285; The Jonge Petronella, 2 Id. 131.

Another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done the port is to be considered as closed up; and from the moment of quitting port to sail on such a destination the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination: The Neptunus, 2 C. Rob. 113.

The notice of a blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which really is blockaded: Northcote *v.* Douglas, 10 Moo. P. C. C. 59. See also The Henrick and Maria, 1 C. Rob. 148. There an officer of the blockading squadron had informed a neutral that *all* the Dutch ports were in a state *890] of blockade, *whereas the blockade was confined to Amsterdam; and Lord Stowell, in decreeing restitution, observed, "The notice is, I think, in point of authority illegal; at the time when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it. The notice is also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what port of Holland he should go when he found the port of his destination under blockade."

But a blockade will not be vitiated merely on account of the omission of one of the conditions under which vessels might be permitted to go out: The Rolla, 6 C. Rob. 370.

3dly. In addition to the notice of blockade, there must be some act of violation either by going in, or by coming out with a cargo laden after the commencement of the blockade. The sailing of a vessel with an intention of evading a blockade by ingress, is a beginning to execute that intention, and is an overt act constituting the offence, and from that moment the blockade is fraudulently invaded: The Columbia, 1 C. Rob. 154–156; The Tutela, 6 Id. 181. And after knowledge of an existing blockade a vessel must not go to the station of the blockade under pretence of inquiry as to the blockade (The Spes and Irene, 5 C. Rob. 76; The Posten, 1 Id. 335, n.; The Admiral, 3 Wallace's Rep. (Amer.) 603; The Cheshire, 3 Id. 231), or for a pilot: The Arthur, Edw. 206. And where a vessel is entering or approaching a blockaded port, it is no valid

excuse on the part of the master to allege that he was bound by his charter-party to sail there (The Tutela, 6 C. Rob. 181), that he is merely sailing in ballast (The Comet, Edw. 32), that he is in want of a pilot to carry him to a lawful port (The Elizabeth, Edw. 198; The Charlotte Christine, 6 C. Rob. 101), or that he wishes to make inquiries (The James Cook, Edw. 263; The Posten, 1 C. Rob. 335, n.; The Arthur, Edw. 202), or to procure a license: The Josephine, 3 Wallace's Rep. (Amer.) 83.

Where a vessel is in an equivocal situation with reference to the place blockaded, the master is bound on the first notice to take himself out of it, and if he obstinately refuses and neglects to do so, such conduct will amount to breach of the blockade, and subject the vessel to condemnation: The Apollo, 5 C. Rob. 290. Indeed it may be laid down that neutral ships cannot innocently place themselves in a situaton where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary *means of enforcing that right; and if a vessel could, under the pretence of going further, approach cypres close up to [*891 the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. It would be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war: The Neutralitet, 6 C. Rob. 35; The Charlotte Christine, 6 Id. 101; and see The Cornelius, 3 Wallace's Rep. (Amer.) 214. If a vessel be taken out of its course and in the neighborhood of a blockaded port it cannot be restored without further proof of destination, and if the claimant declines further proof the Court is bound to condemn the property: The Chryssys, Moraiti, Spinks 343.

The evidence of the place of capture must be taken from the depositions, log, and ship-papers, and as to the deduction to be drawn from the place of capture when once fixed by such evidence, except in a glaring case, the Court will never take upon itself to pronounce an opinion without the assistance of Trinity Masters. It is obvious that it could not safely do so, because so many nautical matters,

such as courses, winds, and currents, must be taken into consideration, that none but persons of nautical science could safely draw any conclusion: per Lushington, Dr., in the Fortuna, Anderson, Spinks 309.

It has been held that ships sailing from America before the knowledge of a blockade had reached America, were entitled to a notice even at the blockaded port; and that ships sailing afterwards might sail on a contingent destination even to that port, with the purpose of calling at some British port or at some neutral port for information; and that they should be allowed the benefit of such contingent destination, to be ascertained and rendered definite by the information which they should receive in Europe. But in no case has it been held that they might sail to the mouth of a blockaded port, to inquire whether a blockade of which they had received previous formal notice was still in existence or not: The Spes and Irene, 5 C. Rob. 81; The Shepherdess, Id. 262.

A blockade is just as much violated by a vessel passed outwards as inwards, and a neutral vessel cannot lawfully take from the place blockaded a cargo laden after the commencement of the blockade. "A blockade," says Sir Wm. Scott, "is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral *892] *is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this Court means to apply, that a neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade:" The Vrow Judith, 1 C. Rob. 151: The Neptunus, 1 C. Rob. 170; The Johanna Maria, Spinks 307; Cremidi *v.* Powell, 11 Moo. P. C. C. 116.

Thus, where a master voluntarily entered a blockaded port, and after having been compelled, as he alleged, to sell his cargo, he took on board another cargo, it was held that both the entry into the blockaded port, and the sailing out with a fresh cargo were violations of the blockade: Byfield, Edw. 188.

A vessel cannot after the commencement of the blockade be purchased from the enemy by a neutral in a blockaded port, as a traffic cannot be allowed in ships more than in goods, and consequently such transfer is illegal (The Speculation, Edw. 346), and it is immaterial out of what funds the purchase is effected: The Vigilantia, 6 C. Rob. 122.

Where a vessel, that was clearly the property of the enemy at the commencement of the war, is taken coming out of a blockaded port from which she could not sail if she had been transferred from the enemy during the existence of the blockade, satisfactory proof must be given of the transfer before the commencement of the blockade, or the ship will be condemned: The Vigilantia, 6 C. Rob. 122, 124.

But a transfer of a vessel from one neutral to another, as it is in no manner connected with the commerce of the blockaded port, is allowable, and such vessel may come out of a blockaded port: The Potsdam, 4 C. Rob. 89; The Vigilantia, 6 C. Rob. 124, 125.

Where a vessel has entered a blockaded port before the blockade, she is entitled to come out again with the cargo she took in or in ballast, or with a cargo taken on board before notice of the blockade: The Juno, 2 C. Rob. 119; The Nossa Senhora, 5 C. Rob. 52; The Potsdam, 4 C. Rob. 89; Cremidi *v.* Powell, 11 Moo. P. C. C. 116. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietors: The Juffrouw Maria Schroeder, 4 C. Rob. 89, n.

Where, however, a ship comes out of a blockaded port in ballast, and is afterwards taken with a cargo on board, sent out of the same port in lighters under charterparty with the ship, the ship and cargo will be condemned: The *Charlotte Sophia, 6 C. Rob. 204, n.; The Maria, 6 C. Rob. 201; The Lisette, 6 C. Rob. 394. [*893

And as, *primâ facie*, every vessel whatsoever laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule, the very fact of coming out of a blockaded port is probable cause for detention, and the captors, although the ship and cargo be restored, run no risk of being condemned in costs and damages: The Otto and Olaf, Spinks 257, 259.

Where a place has been declared to be blockaded for the purpose of preventing the importation of a particular article wanted by the enemy, it will not amount to a breach of blockade, if a vessel leaves the blockaded place exporting a cargo of that particular article, especially if its exportation be forbidden by the enemy. See Cremidi *v.* Powell, 11 Moo. P. C. C. 88, 115. There, in the summer of 1854, the Russian forces in the Turkish territories being straitened for provisions, the allied fleets desired to prevent the importation of provisions up the Danube, and with this view the two admirals in command of the English and French fleets issued a proclamation, dated the 2d of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprised all vessels of every nation that they will not be able to enter the river until further orders. On the 26th of June, the Russians forbade all export of cereals after the 2d of July. Any exportation of cereals, therefore, was in furtherance of the object of the allies, and to the prejudice of the Russians. It was held by the Judicial Committee and Lords of the Privy Council, that a neutral ship, even if she had notice, of this blockade, was not liable to capture by the allies for *exporting* provisions, inasmuch as the whole object of the blockade was declared to be to prevent their *import*.

If a ship that has broken a blockade, is taken in any part of her voyage, she is taken *in delicto*, and subject to confiscation. See The Welvaart, Van Pillaw, 1 C. Rob. 128, where a Prussian ship having sailed with a cargo from Amsterdam, then blockaded, was taken in April, 1799, off Dungeness; Sir W. Scott, in his judgment condemning the vessel, said, "One circumstance on which exemption is prayed, is that the ship had escaped the interior circumvallation, if I may so call it; that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument; if the principle is sound, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know of no other natural termination of
*894] the offence but the end *of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free; this would be a most absurd application of the prin-

ciple. If that is sound, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated:" The Juffrouw Maria Schroeder, 3 C. Rob. 153.

There is no analogy between the law of contraband, where, as we have seen, as a general rule the penalty does not attach on the returned voyage, for there is this essential difference, that in contraband the offence is deposited with the cargo, whilst by egress from a blockaded port the offence is continued and renewed in the subsequent conduct of the ship. For the object of blockade is, not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place. The act of egress therefore is as culpable as the act of ingress, and the vessel on her return is still liable to seizure and confiscation: The Frederick Molke, Boysen, *ante*, p. 873; The Adelaide, 2 C. Rob. 111, n.; The General Hamilton, 6 C. Rob. 61.

However, although the offence incurred by a breach of blockade generally remains during the voyage, it must be understood as subject to the condition, that the blockade itself continues. Thus in The Lisette, 6 C. Rob. 387, a vessel which had broken a blockade was captured during the voyage, but not till after the blockade had ceased: it was held by Sir William Scott that she ought to be restored. "When the blockade is raised," he observed, "a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events entirely done away."

Where a neutral vessel has been permitted to leave a blockaded port upon permission under Orders in Council (see Order in Council of January, 1807), to go to a neutral port, if notwithstanding she goes to a hostile port, she will be liable to capture on her subsequent voyage after leaving such port. It is only by such means that such an order can be maintained, or such conduct repressed. For until the vessel actually enters into the interdicted port, nothing appears, whether she be *in delicto* or not. Cruisers see nothing; she goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again that any opportunity is afforded of vindicating the law, and of enforcing the restriction of the order. It might be objected, that if the penalty was applied to the subsequent voyage, it might travel on with the

vessel for ever. In principle, perhaps, it might not unjustly be pursued further than to the immediate voyage; but in practice it has not been carried further than to the voyage succeeding, *895] *which affords the first opportunity of enforcing the law: The Christianberg, Vanderweyde, 6 C. Rob. 376; Rander's Bye, Id. n., p. 382.

The question has arisen, how far the conduct of the ship taken in violation of blockade will affect the cargo. In the case of The Mercurius, 1 C. Rob. 80, which came before Lord Stowell in 1798, a cargo had been put on board The Mercurius in America, at a time when it could not have been known in that country that the blockade of the Texel had been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because as Lord Stowell observes, the *shippers, at the time of shipment, could not have known of the blockade;* and the master, although he was the agent of the owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them.

Where, however, at the time of the shipment the blockade either was or might have been known by the owners of the cargo, and they might therefore possibly be aware of an intention of violating the blockade, if the vessel be condemned for breach of blockade, they cannot save the vessel from condemnation by showing their innocence in the transaction, but will be considered as concluded by the illegal act of the master, although it was done without their privity, and even if it were done contrary to their wishes. See Baltazzi *v.* Ryder, 12 Moo. P. C. C. 168; there The Panaghia Rhomba took in a cargo of wheat at Galatz in the month of September, 1855 (during the Russian war), to be conveyed to the Piræus or Syra, on the joint account of Signor Cuppa, an Ionian merchant resident at Constantinople, and of Messrs. Baltazzi, British merchants, resident in London. In the month of November following the vessel was captured by her Majesty's ship "Dauntless," for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing. It was held by the Judicial Committee and Lords of the Privy Council, affirming the decision of Dr. Lushington, that it was not competent to the owners of the cargo to protect their property

from condemnation by showing their innocence in the transaction, and that they were concluded by the illegal act of the master. "In the case of The Mercurius, 1 C. Rob. 80," said Lord Kingsdown, in delivering judgment for their Lordships, "Lord Stowell seems to have thought that the owners of cargo were not bound by the act of the master without their authority; and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, 'Violation of blockade by the master affects the ship, but not the cargo, unless the property *of the same owner, or unless the owner is cognisant of the [*896 same owner, or unless the owner is cognisant of the intended violation.' Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of The Mercurius, their Lordships would have great difficulty in assenting to the decision now under review. But the subsequent cases appear to have carried the rule much further, and to have established that, when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment and the additional authorities mentioned at the bar. In the case of The Alexander, 4 C. Rob. 94, which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the Court must infer 'that a ship going in fraudulently is going in the service of the cargo with the knowledge and by the direction of the owner.' In the case of The Adonis, 5 C. Rob. 259, which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned. The same doctrine is

laid down by the same great judge in the case of The Exchange, 1 Edwards' Rep. 42, in 1808, and in The James Cook, 1 Edwards 261, in 1810. We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which nevertheless may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects. The propriety, or rather the necessity of these rules, is rested by Lord Stowell on the notoriety of the fact that, in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were
*897] at liberty to *allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been intrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if in reality the penalty was incurred without any privity on their part."

Although at the time of sailing the blockade be unknown to the owners, even when by treaty a previous warning of the blockade is necessary, if the master, consignees and all persons intrusted with the management of the ship, are sufficiently informed of the blockade, the cargo will be condemned with the ship, for the owner having delegated general powers to others, upon their misusing their trust his remedy must be against them: The Columbia, Weeks, 1 C. Rob. 154. As owners however of cargo will not be strictly bound by the act of an enemy shipper acting as their agent, if the breach of blockade by egress be committed without their knowledge, although the ship and freight of their agent be forfeited, the cargo will be restored: The Neptunus, Kuyp, 3 C. Rob. 173; The Adelaide, Box, 3 Id. 281; The Manchester, Reynolds, 2 Acton 60. This is just, for although, as a general rule, principals must be held bound by the acts of their agents, the Court of Admiralty is not disposed

to carry the rule to the full extent to which it might properly be applied in ordinary transactions, and looks with indulgence towards those cases where neutrals, without any fault of their own, have had their property placed in jeopardy by the breaking out of hostilities, and the acts of agents over whom they could not at the time exercise control, and who might have an interest in the very act which endangered the property of their principals: The Jeanne Marie, Kolle, Spinks 167. A cargo, however, purchased by a supercargo sent by the owners for that purpose, will be condemned upon her egress from a blockaded port: The Nornen, Dahl, Spinks 171.

Restitution with costs and damages will be made if it appears distinctly from the papers of a ship that she has committed no breach of blockade, and that her captors have seized her without any ostensible cause. Thus, in The Ostsee, Voss, Spinks 174, a neutral was captured by one of Her Majesty's ships of war, and sent in for adjudication as for breach of the blockade of Cronstadt. It turned out that Cronstadt was not blockaded at the time when the vessel entered that port, nor at the time when she took her cargo on board, nor at the time when she left Cronstadt, nor even at the time when she was captured, nor for more than three weeks afterwards; and no blockade of Cronstadt *had been proclaimed, [*898 either by the British government or by the admiral. It was held by the Court of Appeal, reversing the decision of Dr. Lushington, that the neutral was entitled to costs and damages as well as restitution. "The law which we are to lay down," said Lord Kingsdown, in delivering the judgment of the Court, "cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favor, or in favor of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English Courts; and, whatever may have been the case in former times, no authorities are now cited in English Courts, in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy, will be held by the tribunals of every country, both

on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.

"By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say that where no ground of suspicion can be shown, and all that the captor can allege is that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, 'True, nothing suspicious appeared in your case at the time of seizure, but upon further inquiry something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience; go about your business, and be thankful for your escape'? We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent." See also s. c., 9 Moo. P. C. C. 150, nom. Schacht *v.* Otter; see also The Fortuna, Anderson, Spinks 307; The Elize, Spinks 88.

But where the ship by her suspicious conduct may give rise to an appearance of an intention to violate a blockade, simple restitution only will be made: The Queen *v.* Hildebrandt; The Aline and Fanny, 10 Moo. P. C. C. 491.

As to the allowances to *bonâ fide* captors where a vessel has been sold under a decree afterwards reversed, and simple restitution decreed, see The Franciska; The Union, 10 Moo. P. C. C. 73.

Restitution with costs and damages may be decreed against the captor of a vessel for an alleged breach of blockade, where in consequence of his wrongful act the *claimant has been deprived of an opportunity of affording the explanations which the rules were intended to secure him. See Cremidi *v.* Powell, 11 Moo. P. C. C. 88.

*899]

Exemptions from Forfeiture.—The question has been mooted but not decided, as to how far under a treaty of "free ships, free goods," the privilege can be extended to the carrying of enemy's property out of a blockaded town: The Nossa Senhora, 5 C. Rob. 52. The better opinion would seem to be that, the privilege would not be held to apply to such a case.

An express license from the supreme power of the blockading

country will be a sufficient protection to a vessel sailing to or from a blockaded port: The Juno, 2 C. Rob. 116; The Hoffnung, 2 C. Rob. 162, 163. It has however been laid down that "a license expressed in general terms, to authorize a ship to sail from *any* port with a cargo, will *not authorize* her to sail from a *blockaded* port with a cargo taken in there;—to exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the license; otherwise a blockaded port shall be taken as an exception to the general description in the license:" Byfield, Forster, Edw. 190.

As however the exclusion from all commerce with blockaded ports is a great inconvenience to neutrals, licenses to trade with them will be construed liberally. Thus where a neutral had a license to go to certain ports, but the license contained no provision as to bringing back any cargo, it was held by Sir Wm. Scott, whatever might be the legal effect of such a license, that the bringing away a cargo in the absence of any fraud, was a mere innocent misapprehension, which carried no consequences of penalty after it: The Juno, 2 C. Rob. 116.

Where a vessel has a license to enter a blockaded port, liberty to come out again with a return cargo, in the absence of any provision upon the subject, will be considered as a benefit incidental to the license: Id. 116, 118.

A belligerent, it seems, has no right to interrupt the communication between a neutral government and its representative in a blockaded port; at any rate, if the despatches are carried in a public manner, in vessels commissioned by the state for that purpose, and vested with the character of packets. It is doubtful whether a merchant-vessel would be protected by carrying papers of such a description, while engaged in a transaction otherwise illegal; that question however can only be raised by a claim given on the part of the government, and cannot be set up by the merchant-vessel as a ground for protection: The Drummond, Langdon, 1 Dods. 103, 104.

Although a vessel by sailing to a blockaded port after notification, renders herself liable to be captured on her voyage, as being taken *in *delicto*, it has nevertheless been held that if she has been misinformed by a cruiser of the enemy that the [*900 port is not blockaded, she will be restored, although taken in at-

tempting to enter the port. For although a fleet cannot give a person any authority to go into a blockaded port, still after such information he is not taken *in delicto*, and it would be too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly: The Neptunus, Hempel, 2 C. Rob. 110, 115.

Permission, however, by a former captor of a vessel to proceed on her voyage under a mistake of law, will not justify a breach of blockade: The Comet, Mix, Edw. 32. Where there is a misinformation as to the fact of the blockade, it may have a different effect (see The Neptunus, Hempel, *ante*), but the neutral is bound to know the law, and cannot allege that he has been ill-instructed in that by a belligerent cruiser. If the cruiser had told the parties they might go on whilst they were conusant of the fact of the blockade, such misinformation upon a point of law would not protect the ship: The Comet, Mix, Edw. 34, per Sir Wm. Scott; and see The Courier, Erick, Id. 249.

A vessel will be restored if the breach of blockade has been occasioned by unavoidable necessity: as where a vessel has been compelled to put into the blockaded port by stress of weather (The Charlotta, Elliot, Edw. 252; The Fortuna, Rhode, 5 C. Rob. 27); or from being in want of repairs, and for such purpose only (Edw. 252): it must however be proved that the breach of blockade was clearly an act of imperative and overruling necessity: The Elizabeth, Nowell, Edw. 198; The Christiansberg, Vanderweyde, 6 C. Rob. 376, 378; Baltazzi *v.* Ryder, 12 Moo. P. C. C. 168, 171, 172. The want of provisions is an excuse which will not on light grounds be received; because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighboring port, but it can hardly ever force a person to resort exclusively to the blockaded port: The Fortuna, Rhode, 5 C. Rob. 27, per Sir Wm. Scott; and see The Hurtige Hane, Dahl, 2 C. Rob. 124.

The immediate and pressing danger of seizure and confiscation by the country of the blockaded port, will, it seems, justify egress of a vessel. Thus in The Drie Vrienden, Cassens, 1 Dods. 269, it was held that a neutral ship coming out of a blockaded port, in consequence of a rumor that hostilities were likely to take place

between the enemy and the country to which the vessel belonged, was not liable to condemnation, though laden with a cargo, as the regulations of the enemy would not permit a departure in ballast; but the cargo was condemned, though put *on board against the will of the master. [*901

The mere apprehension, however, of possible and remote danger, as for instance that of seizure by the enemy, will not justify a master in bringing a cargo out of a blockaded port; for even if his apprehensions be well founded, that will not justify his violating the rights of another country. He must rely upon his neutrality, and look to his own government for protection: The Wasser Hundt, Lorentzen, 1 Dods. 270, n.

It is no excuse for egress from a blockaded port to say, that the cargo is to be brought to the blockading country; the ship is no more at liberty to break the blockade for such a purpose than for any other: The Byfield, Forster, Edw. 189, per Sir Wm. Scott.

It may be here mentioned that it is no breach of municipal law for a neutral to carry on trade with a blockaded force, and any contract having that object in view will be valid. See Ex parte Chavasse, In re Grazebrook, 34 L. J. (Bktcy.) 17, *ante*, p. 866, and The Helen, 1 Law Rep. (Adm.), where in a suit for wages upon an agreement entered into for the purpose of breaking the blockade of the so-called Confederate States of America, an article in the defendant's answer alleging such agreement to be contrary to law, was ordered to be struck out.

Neutrals may question the existence of a blockade and the legal authority of those undertaking to establish it: Prize Causes, 2 Black (S. C.) 635.

A vessel is not liable to seizure for violating a blockade, which is not made efficient by forces stationed at the blockaded port, adequate to render such violation physically hazardous: The Sarah Starr, Blatchford's Prize Cases 69. The fact that a vessel is arrested in attempting to violate a blockade, is proof that such blockade was effectively established: The Hallie Jackson, Blatchford's Prize Cases 41. There can be no constructive extension of a blockade: The Peterhoff, 5 Wallace (S. C.) 28. A blockade may be made effectual by batteries on shore as well as by ships afloat; and in case of an inland port may be maintained by batteries commanding the river or inlet, by which it may be approached, supported by a naval force

sufficient to warn off innocent and capture offending vessels attempting to enter: The Circassian, 2 Wallace (S. C.) 135. The occupation of a city, by a blockading belligerent, does not terminate a public blockade of it previously existing, the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it, and blockaded by its blockade: The Circassian, 2 Wallace (S. C.) 135; The Baigony, Id. 474.

A public blockade, that is a blockade regularly notified to neutral governments and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion or under directions of his superiors, must, in the absence of clear proof of a discontinuance, be presumed to continue until notification is given by the blockading government of such discontinuance: The Circassian, 2 Wallace (S. C.) 135.

To justify a blockade and the capture of a neutral vessel undertaking to violate it, actual war must exist and the intention to blockade must be brought to the knowledge or notice of the neutral: Prize Causes, 2 Black (S. C.) 635. A notice of blockade to the officials of a neutral government is sufficient to the subjects thereof: The Hiawatha, Blatchford's Prize Cases 1; The Empress, Id. 175. A vessel in a blockaded port is presumed to have notice of a blockade, immediately upon its beginning: Prize Causes, 2 Black (S. C.) 635. A neutral vessel in port has a right, on the notice of the blockade thereof, to withdraw, but only with the cargo honestly laden on board before such notice is given: The Hiawatha, Blatchford's Prize Cases 1. A warning of the blockade need not have been previously endorsed on the register of the captured vessel, in order to legalize the capture: Prize Causes, 2 Black (S. C.) 635. Where a vessel sails for a blockaded port without knowledge of the blockade, she may on arrival be turned away, but cannot be detained or confiscated, unless after notice she again attempts to enter: The Nayade, 1 Newberry 366. The fact that the master and mate saw no blockading ships off the port where their vessel was loaded and from which she sailed, is not enough to show that a blockade once established and notified has been discontinued: The Baigony, 2 Wallace (S. C.) 474; The Andromeda, Id. 481. A vessel which is seeking to violate a blockade of which she has knowledge, does not by being warned off become freed from liability to seizure and forfeiture, though on such warning she abandons her purpose: The Louisa Agnes, Blatchford's Prize Cases 107. A vessel approaching a port with intent to violate the blockade, is not entitled to be warned off: The Hallie Jackson, Blatchford's Prize Cases 41.

If a vessel is found without a proper license near a blockading squadron, under circumstances indicating an intent to run the blockade, she cannot set up as an excuse that she was seeking the squadron with a view to getting authority to proceed: The Josephine, 3 Wallace (S. C.) 83; The Cheshire, Id. 231; The Admiral, Id. 603. Intent to run a blockade may be inferred in part from delay of the vessel to sail after being completely laden, and from changing the ship's course in order to escape a ship of war cruising for blockade runners: The Baigony, 2 Wallace (S. C.) 474. A barque sailed for a blockaded port, with knowledge of the blockade, received a pilot off the port and delivered letters and papers to a person from the shore: Held to be a violation of the blockade: The Coosa, 1 Newberry 393. Intent to violate a blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel, and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture: The Circassian, 2 Wallace (S. C.) 135. A vessel may approach a blockaded port to inquire as to the blockade: The Forest King, Blatchford's Prize Cases 45; The Empress, Id. 659. A neutral trader cannot, with knowledge of a blockade, lawfully proceed to the port blockaded for the purpose of obtaining information as to the continuance of such blockade: The Delta, Blatchford's Prize Cases 133, 654; The Cheshire, Id. 151, 643; The Empress, Id. 175. Where a vessel warned off returned to the blockading squadron for water, but evidently had no intention of attempting to enter, it was held that a serious want of water was a sufficient excuse: The Nayade, 1 Newberry 366. A vessel may visit a blockaded port to obtain supplies necessary to the prosecution of her voyage: The Forest King, Blatchford's Prize Cases 45; The Argonaut, Id. 62; The Major Barbour, Id. 167. To justify a neutral vessel in attempting to enter a blockaded port, the case must be one of absolute and uncontrollable necessity: The Diana, 7 Wallace (S. C.) 354. A neutral vessel in a blockaded port, which weighs anchor and proceeds with intent to violate the blockade, but afterwards stops before such violation, and returns to the place of her departure, is not liable to capture as prize of war: The John Gilpin, Blatchford's Prize Cases 291. A vessel overstaying the time allowed by proclamation for leaving, is liable to capture although her delay was the result of an accident: Prize Causes, 2 Black (S. C.) 635. There is no illegality in a neutral trade with a blockaded country by inland transportation or navigation: The Peterhoff, 5 Wallace (S. C.) 28.

Upon a question of breach of blockade the owners of a vessel are deemed, in a prize court, conclusively bound in all cases by the act of the master; and so as a general rule are persons interested in the cargo: The Aries, 2 Sprague 198. Where a part of a cargo of a ship seized for a violation of

blockade belongs to neutrals, who were the consignees and had no knowledge of such blockade at the time of the violation, and the master of the ship was not their agent and was not authorized by them to sail in violation of the blockade, and was not in privity with the consignors, such part is not liable to forfeiture: The Crenshaw, Blatchford's Prize Cases 23.

Vessels conveying cargoes to blockaded ports are liable to seizure and condemnation from the beginning to the end of the voyage: The Bermuda, 3 Wallace (S. C.) 514. A vessel, which has been guilty of a breach of blockade, may be legally captured if taken during her return voyage, but not after this voyage is ended: The Wren, 6 Wallace (S. C.) 582. A vessel sailing from a neutral port with intent to violate a blockade, is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at the time of the capture, with ulterior destination to the blockaded port: The Circassian, 2 Wallace (S. C.) 135. A violation of blockade is not a personal offence, but it only affects the vessel and cargo, and unless they are captured *in delicto*, the offence is purged: Szymanski *v.* Plassan, 20 La. Ann. 90. A neutral consignee at a neutral port acquires a perfect title to a cargo shipped to him by a runner of a blockade, and such cargo is not liable to seizure after it has been laden on board a neutral vessel at, and is in process of transportation from, said port: The Isabella Thompson, Blatchford's Prize Cases 377. It is sufficient cause for condemnation of the vessel and cargo, for the claimant to be guilty of persistent misrepresentation of the character and destination of the voyage of the captured vessel: The Revere, 2 Sprague 107.

*THE FORTUNA, TADSEN, MASTER. [*902

June 24th, 1802.

[REPORTED 4 C. ROB. 278.]

CAPTURE OF ENEMY'S SHIP—CARGO BELONGING TO NEUTRAL RESTORED.]—*When an enemy's ship is taken having cargo belonging to a neutral on board, the ship will be condemned and the cargo restored, as being neutral property. If the captor takes the cargo to its original port of destination, he will be entitled to freight;* secus, *if he does not proceed there and perform the original voyage.*

THIS was a case on petition of the captors, praying to be allowed freight for a *cargo which had been restored as neutral property*. The demand for freight was founded on a suggestion, that *the ship which had been condemned* had actually performed the contract of the original affreightment, by carrying the cargo to the place of its destination. It had been objected on a former day, that as the decree of restitution had passed without any order respecting freight, it was not competent for the Court now to entertain a new suit on property which had actually been restored.

In answer to that objection, it was said that although a decree of restitution had passed, the proceeds had not been paid out of the Registry; that so long as they were in the custody of the Court, it was competent for the Court to make a new order respecting them.

It appeared that after the decree of restitution had passed, the proctor for the captor had entered a *caveat* in the Reg-

istry, warning the Registrar not to pay out the proceeds. And then the demand for freight was instituted on the part of the captors. On the former day, when this was stated, the Court reserved the cause for further consideration on this part of the case.

*903] *On this day. COURT.—I am of opinion, that the cargo still remaining in the hands of the Court, is subject to the order of the Court notwithstanding the decree of restitution which has passed. It was the intention of the Court (not being apprised of any further demand) that the proceeds should be paid out, but that decree has not been carried into effect. I must observe, however, in reference to what has been done in this case, that when there is a decree of the Court for restitution, it is not to be obstructed by the mere *caveat* of the party. Notice should be given to the Court, whose duty it is to look to the prompt execution of its decrees. If there is any delay interposed, it should be notified to the Court.

[*Registrar.*—Parties enter their *caveat* and warn me not to pay out the proceeds.]

COURT.—I think the party has no absolute right to do that. He may enter it provisionally and then come before the Court and state his reason why the proceeds should not be paid out; but I cannot think that it is correct practice for the individual to stop the payment, absolutely and as long as he pleases, without the authority of this Court, or of any other Court which may legally interfere. It may be a fit subject for a general rule. At present, in this particular case, as the cargo is still in the hands of the Court, I am of opinion that it is subject to the order of the Court, and that the question is fit to be entertained.

Lawrence then contended, on the particular question in this cause, that the contract of freight justly inured to the benefit of the captor whenever the original contract of

affreightment was fulfilled by the captor, and the neutral cargo was carried to its place of destination, under the same principle and by the same rule of equity by which the demand was not sustainable on the part of the captor, when the original voyage was interrupted. The case of *The Vreyheid*, Lords, April 23, 1784, before the Lords was relied on, in which the captors were allowed freight for a cargo of fish carried to Leghorn, its original port of destination.

The King's Advocate, on the other side.—Captors have no claim generally for freight on the neutral cargo restored. Claims of that sort can only be supported on the ground of some special service performed by which the cargo may be supposed to have derived benefit. The carrying the cargo to the place of its destination, is the common ground of such a claim; but it is not in itself alone sufficient to establish the demand, unless it is performed in such a *manner [*904 as to render effectual service, by putting the claimant into possession of the property. In this case the capture took place ——, 1798. A claim was given for the cargo in 1799, when further proof was directed to be made. From that time the claimant was entitled to the possession; but the agents of the captors have detained the proceeds in their hands till they were assigned to bring them into Court in January, 1801. The cargo was undoubtedly carried to the place of its destination, but not for the benefit of the claimants, nor delivered to their consignees. It has been kept in the hands of the captors ever since. All benefit that might have been derived from an arrival at the port of destination, has been counteracted and frustrated by this conduct. On these grounds, the claimants apprehend they are not liable to pay freight to the captor.

JUDGMENT.

Sir W. Scott.—This is the case of a ship which had carried a cargo of corn to Lisbon, the original port of destina-

tion. In such a case I apprehend the rule to be that the captor is entitled to freight, and on the same principle on which he would be held not to be entitled where he does not proceed, and perform the original voyage. The specific contract is performed in one case, and not performed in the other. It is the rule of practice laid down in the case of *The Vreyheid*—a case perfectly within my recollection as a case very deliberately considered at the Cockpit. It is conformable to the text-law, and the opinion of eminent jurists. —"Quod additur de vecturæ pretiis solvendis," says Bynkershoek, Q. J. P. lib. 1, ch. 13, "ejus juris rationem non adsequor. Satis intelligo, qui navem hostilem occupavit, etiam occupasse omne jus quod navi, sine navarcho debebatur, ob merces translatas in portum destinatum. Proponitur autem, navem in ipso itinere fuisse captam. Eccur igitur capienti solvam mercedes? Si qui cepit navem, eam cum mercibus in locum destinatum perducere paratus sit, ejus juris rationem intelligerem, ceteroquin non intelligo."[1]

In the case of *The Vreyheid*, all the considerations that could be applied to this question were fully canvassed, and it was then recognised as the true rule, that the captor who has performed the contract of the vessel is, as a matter of right, *905] and *de cursu* entitled *to freight; although, if he has done anything to the injury of the property, or has been guilty of any misconduct, he may remain answerable for the effect of such misconduct or injury, in the way of set-off against him.

The case then is reduced to a question, whether the captor, in this instance, has done anything to forfeit the right which, under the general rule, he had acquired? He had made a capture, which is fully justified by the condemnation of the ship, and by the order for further proof as to the cargo. He carried the cargo to Lisbon, where the consignee

[1] Bynkershoek is, in this passage, discussing the propriety of the regulation of the Consolato, c. 273. See Collectanea Maritima, secs. 6, 7, 8 of the 273d chap.

was put into possession, though informally and apparently without any shadow of right, by the hand of the Portuguese government. Such interference was however given at the suit of the consignee of the cargo, and by these means that consignee obtained possession of it.

Being a cargo of corn, it was necessary that it should be sold. The sale was entrusted to Mr. Paxton by the agreement of both parties, and under a condition, as it is stated, that the proceeds should remain in his hands till a sentence of final adjudication could be obtained. This gentleman is, therefore, to be taken as the common depositary of both parties. When it is said that the captor did not bring in the proceeds as soon as was required of him, we must consider whether it was in his power. The proceeds were left in the hands of this house at Lisbon with the consent of the consignee, and they have not been transmitted; so that what has been brought in, at last, is an advance, made out of the private funds of the captor. If there has been any error in these proceedings, it has been the common error of both parties. Under the circumstances of this case, I am of opinion that the captor has not forfeited the interest which he had acquired.

Freight decreed to the captor.

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*THE BREMEN FLUGGE, Meyer, Master. [*906

November 7th, 1801.

[Reported 4 C. Rob. 90.]

Capture of Enemy's Goods on board Neutral Ship.]— *Enemy's goods on board a neutral ship liable to capture, but the neutral ship will be restored.*

A neutral has a right to carry the property of the enemy, subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to an adjudication: but the freight will attach as a lien on the cargo, which must be paid by the captor, provided there are no unneutral circamstances in the conduct of the ship to induce a forfeiture of this demand.

In general the expenses of the neutral master will be allowed, but they do not stand on the same ground as freight, decreed to be a charge on the cargo.

Expenses of neutral master will be postponed to the expenses of the captor, where the latter had obtained condemnation of the cargo, and was entitled to an indemnification for the expenses incurred by him.

THIS was a question respecting the remaining proceeds of a cargo, which had been condemned for want of further proof; *the ship having been restored as a neutral ship*, with freight and expenses decreed to be a charge on the cargo. The sum of 1050*l.* had been paid in discharge of the freight, and the question now was, whether the neutral master was entitled to the remaining sum, being not more than 50*l.*, under the decree for his expenses; or whether the captor had not a prior claim to it, to defray the expenses which he had necessarily incurred.

Lawrence, on the part of the claimant, contended that the *907] neutral *had a right to his freight, in the first instance, as a lien attaching on the cargo at the moment of capture; and that he was further entitled to the expenses of adjudication, to which he was brought by the captor without any justifiable cause.

JUDGMENT.

SIR W. SCOTT.—This is a question concerning a remnant of a cargo left in the Registry, which has been condemned

for want of further proof, after the neutral owner of the ship had obtained a sentence of restitution of the vessel, with freight and expenses, decreed to be a charge on the cargo. It is true such a decree passed; but this decree of freight and expenses is not to be taken as exclusive of all further orders of the Court respecting the cargo, nor as giving a decided preference of payment to the exclusion of other just claims upon it, if the fund should prove insufficient to satisfy all demands.

On general principles, when condemnation has been obtained, the captor's claims appear to have rather the advantage. It has heretofore been a question of doubt, whether the neutral vessel can lawfully carry the property of a belligerent at all. The modern rule, and indeed an ancient rule of this country, has been established on more liberal principles; and it is now held almost universally, *that the neutral has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication.* It is now, I say, generally held, that a neutral vessel so engaged is not exposed to any penalty at all, but that she is entitled to her freight, as a lien attaching on the cargo. The captor takes *cum onere.* The freight attaches as a lien which he must discharge by payment, provided, as it must always be understood, that there are no unneutral circumstances in the conduct of the ship, to induce a forfeiture of this demand. But the expenses of the neutral master appear to stand on a somewhat different footing. As to them this distinction seems to present itself, supposing the law to be, that the neutral ship is liable to be brought in; if she can carry the property of the enemy lawfully on that condition only, I do not know that she is entitled to the expenses incurred in consequence of being so brought in.

Putting practice out of the question, which has established an indulgent rule, it does not appear that the neutral

master would as a principle merely, be entitled to an in-
*908] demnification for expenses *so incurred. He is bound to know the condition annexed to his right, and to abide the consequences. A more favorable practice has obtained, under which his expenses are usually allowed, and this practice the Court will be disposed to sustain, as far as it does not interfere with other rights, equally protected by practice, and more strongly protected by principle. But it is not a claim which the neutral master is entitled to urge against the captor, as a right equally original and equally vested in him, and in the same manner as freight is vested, by the receipt of the cargo on board and the performance of the contract of the conveyance. It is said that the cargo was condemned, not as enemy's property, but for want of further proof, and the attestation of the asserted owner. Can that make any difference? The legal conclusion will be the same, that condemnation passed because it was not proved to be the property of the neutral claimant; the want of proof of neutral property induces the legal conclusion, that it is the property of enemies. The captor is as much entitled as if the cargo had been condemned on affirmative grounds, and in the first instance on positive evidence, that it was the property of the enemy. On these considerations, I think the captor is entitled to the priority.

The money decreed to be paid to the captor.

THE SANTA CRUZ, Picoa, Master.

December 7th, 1798.

[Reported 1 C. Rob. 49.]

Recaptured from the Enemy.]—*The law of England, on recapture of property of allies, is the law of reciprocity; it adopts the rule of the country to which the claimant belongs.*

This was the case of a Portguese vessel taken by the French on the 1st of August, 1796, and retaken by English cruisers on *the 28th, after being a month in the possession of the enemy: it was *the leading case* of several of the same nature, as to the general law of recapture between England and Portugal. [*909

For the captors, the *King's Advocate* and *Lawrence*.—This is the case of a Portuguese vessel, taken by the French on the 1st of August, and retaken by English cruisers on the 28th. The French had sent away or destroyed the papers, so that there did not appear sufficient proof of the property; but all inquiry on that point is superseded by a consideration of law. In the opening, on a former day, the whole case was distinctly placed on the authority of the decision in *The San Iago;* and the principle of reciprocity which determined that case was so readily admitted by the Court, that the parties were immediately referred to produce evidence respecting the law and practice of Portugal on the subject of recapture: the principle of law, therefore, must be held to be established; the evidence of the fact is now before the Court. On the part of the captors, it consists

not of ordinances and expositions of ordinances, but of acts which no argument can affect: they appear in the proceedings of the Court of Portugal on two British ships, *The Anne* and *The Endeavor*, which, coming out of the hands of the French into the possession of Portuguese subjects, were claimed for the original owners, but were condemned as lawful prize.

On these grounds, on the authority of the law of Portugal, it is submitted this vessel must be condemned to the British captors.

For the claimant, *Arnold* and *Sewell*.—This is a case which respects the property of an ally, recaptured from the common enemy; and the question is, why restitution should not pass to the original proprietor? On all general reasoning, and the principles of common equity, it is a demand that seems to admit of no opposition; but it is still more strongly supported by the ancient law of Europe, and the daily practice of these Courts. In respect to the time when property is to be deemed converted by capture, the ancient law of Europe, Consol. del M. C. 287, Bynk. Q. J. P. lib. i. c. 4 & 5, held that a bringing *infra præsidia* was absolutely necessary to fortify the possession of the captor, and divest the original proprietor of his claim. Some nations have, indeed, by later regulations, substituted a possession of twenty-four hours as a state of sufficient security, but it is an alteration *910] which does not appear to be founded on *any rational principle; and, what is of more importance to the present argument, it has never been admitted into the practice of these Courts;[1] for this country has ever resisted the

[1] It is asserted by Grotius, b. iii., c. 6, s. 4, note 7, on the authority of Albericus Gentilis, b. i., c. 3, that England was among the nations that had adopted the rule of twenty-four hours in prize matters; but the passage in A. Gentilis is no authority to this effect, as it is taken from the chapter treating especially *de judicio militum*, and the practice of different nations in respect to military booty, which Gentilis himself contends stands on different grounds from maritime prize; on which latter point he maintains that it was necessary, *et ut capta sit, et perducta*

innovation, *and adhered strictly to the old rule as a fundamental principle of its Prize Law. But, it [*911

infra præsidia. In respect to military booty. the law of England appears to have held anciently, "that if an enemy dispossessed an Englishman, and another Englishman took the booty from the enemy, the former owner shall lose his property so gained in battle, unless he comes and claims in the same day, *ante occasum solis*, and neither the king, nor the admiral, nor the former owner shall have any claim to it:" 7 Edw. IV. 14. In "Crompton's Jurisdiction of Courts" this is cited under the chapter on the High Steward, Constable or Marshal's Court; and although the word "Admiral" is used, both the original dictum in "The Year-book," and the passage to which it is applied, relate to land capture. It is not improbable that the principle might be common to maritime as well as military capture; but the authority cited by Grotius does not ascertain it. In the early periods of English history, 31 Edw. III., and again 2 Hen. IV., two instances occur in which it is maintained, against Portugal and Prussia, that capture from the enemy was sufficient to vest the property, even of goods, before taken from a neutral (Rym. Fœd. v. 6–14, vol. viii., p. 203); but there is no mention of the rule of twenty-four hours. It is not impossible, however, that Grotius might be in some degree justified in his fact, on more recent authority, and more immediately pointing to the doctrine of twenty-four hours; for soon after the publication of his work, and before the additional notes were added by him in his later editions, the question is asserted to have been mooted in England, and settled in this manner. In Thurloe's State Papers, vol. iv., p. 589, there is a specific assertion of the Dutch Resident, in 1656, "that after many suits, and afterwards appeals had in the Council of the King, *anno* 1632, it was understood that *jure postliminii* no ships ought to be restored which had been twenty-four hours in the power of the taker." But *quære*—so soon afterwards as 1672, we have the testimony of the then Judge of the Admiralty, Sir L. Jenkins, that he could find no traces of it in the earliest part of that century; his words will show that it was not practised during the usurpation, nor acknowledged afterwards by him.

On a case referred to him by the King, he reports: "In England we have not the letter of any law for our direction; only I could never find that this Court of Admiralty, either before the late troubles or since your Majesty's happy restoration, has in these cases adjudged the ships of one subject good prize to another; and the late usurpers made a law, in 1649, that all ships rescued, whether by their own men-of-war or by privateers, should be restored on paying one-eighth salvage without any regard to the time such ship had been in possession of the enemy, or to any other circumstances, unless the ship taken were made a man-of-war by the enemy; and in that case a moiety went for salvage, but the ship was still to be restored. Whether the usurpers intended this as a novelty or an affirmance of the ancient custom of England, I will not take upon me to determine; only I will say, condemnation upon the enemy's possession for twenty-four hours is a modern usage:" Life of Sir L. Jenkins, vol. ii., p. 770.

In Holland the rule had prevailed, and was abrogated by Ord. 11, March 1632, Groenwegen, De Leg. Abr. Dig. l. 49, tit. 15.

In France it is spoken of in an Ordinance of 1557 as an ancient rule; and an

may be said, this practice stands upon the regulations of our Prize Acts; the acts, however, but carry into effect the principles of the old and general law; and were they even in this respect matters of novel institution, whilst they prescribe a law to British subjects, they would create an equitable right for our allies to have the benefit extended to them; and, in fact, the right to restitution, on whatever ground it is founded, has always been acknowledged in the practice of this Court.

In the present war, there have been many cases relating to several of our allies, in which it has been so adjudged; there are some relating particularly to Portugal; and others may be produced from the earliest parts of the present century. In 1703, *The Saint Catherine;* in 1707, *The Blackiston*—both Portuguese vessels—were restored, on recapture, after having been many days in the possession of the enemy, but never carried into ports. In the present war, *The Memphis*, *The Minerva*, *The Joachim d'Aloa*, all Portuguese vessels, have been restored without opposition, and sufficiently establish the law of this country to be towards allies, as well as towards British subjects, a law of restitution on salvage.

But between Portugal and this country the rule has also been recognised and confirmed by treaty. By the treaty of 1654, Art. 19, the two countries bind themselves to "restore prize goods brought into the ports of either by an enemy;" and therefore they must, *à fortiori*, be bound to restore, in recaptures arising from the operation of a joint

Edict of King Henry issued at that time to restrict it still further to twelve hours, "for the purpose of stimulating cruisers to recover captured property before it was carried into the enemy's ports;" as it was said, might easily be done in eight or nine hours, owing to the proximity of the English coast. The parliament refused to sanction the alteration, and the old rule was retained. Ter. p. 565.

This ordonnance shows the true spirit of the rule, and marks it as a private regulation of expediency rather than as a rule containing in it any rational principle of public law.

and common war. It is said, however, that these equitable principles, and the established practice of this Court, must now give place to a minute reciprocity—to an inquiry into the law of Portugal, and into the fate of each *individual case which has occurred before the tribunals [*912 of Portugal on the subject of recapture; and on this point the whole argument rests on the case of *The San Iago.* But without impeaching the justice of that decision, it may be allowable to deprecate the application of it as a general rule of law: it was not so pronounced, nor in that extent; it respected a different country; it is a single case, and remains at present unsupported by any series of decisions to establish the principle of it to be an universal principle of prize law. The name and character of England seem to require that such a country should administer justice by a firm adherence to principles which it has itself approved, rather than by occasional references to foreign codes. The inconvenience of resorting to the law of foreign countries amounts in some points of view almost to an absurdity: we shall have rather a medley of particular cases than a rational and consistent train of legal decisions. Shall England take its law from Tunis or Algiers? or shall it be left, as such a principle may leave it, to the weakest and worst governed state to give the law to the rest of Europe?

But even in respect to the fact which has been made the subject of inquiry in this case, the claimant has nothing to apprehend: it is certified on the best authority, on the authority of eminent lawyers, and of the principal persons in the government of Portugal, that there was no law on the subject of recapture in that country before the ordinance of December, 1796. The Judges of the Court of Admiralty make this declaration, and further certify, that "there had been no instance in which recaptured British property had been condemned in Portugal;" and "that considering the practice of England, and the treaty between the two coun-

tries, they should have restored British property in a similar situation;" such, then, was the state of the law of Portugal when the recapture was made. The ordinance of December, 1796, which declares ships recaptured after a possession of the enemy for twenty-four hours to be lawful prize, is in respect to this case an *ex post facto* law. If that ordinance is applied to the present case, the later ordinance of May, 1797, which directs restitution, must likewise be applied; but it is still further observable, on the ordinance of 1797, that it relates only to the ships and subjects of Portugal.

A particular explanation has also been given of the circumstances of two cases which have been cited on the part *913] of the *captors, as a proof of the law of Portugal; and it appears, that in these the claimants failed of redress, the one by applying to an incompetent jurisdiction, and the other by relinquishing his claim. In the certificate of the judges, it is stated that *The Endeavour* was carried before an incompetent jurisdiction; that the decision was founded on wrong principles; and that there has been an order given for rehearing the cause before the proper Court.

In *The Anne*, the certificate gives this statement of the proceedings :—" The British master had obtained an embargo on the vessel, which, on application by the Portuguese master, was taken off by the Secretary of State; the British claimant then deserted his claim, whilst he was still entitled to bring it before the Court." The Secretary of State also certifies, " that the order given by him to remove the embargo was not intended to obstruct the claim, or prejudice the final decision of the cause." There is nothing then in either of these cases that can be admitted as proof of the law of Portugal as it is administered by the proper Courts; the judges of those Courts declare, " there was no law by which they should have condemned," but, " that they should have restored British property under similar circumstances;" and this statement of the law has received additional con-

firmation from the subsequent act of the state: for since the circumstances of the present war have called for more explicit declaration of the laws of prize, all doubt has been removed from this question by an ordinance, which expressly directs restitution of the property of allies on the payment of one-fifth salvage. On these considerations, therefore, of the equity of the case, of the laws and practice of England, and of the rules observed in Portugal, the claimant stands entitled to restitution on the accustomed salvage.

The *King's Advocate* and *Lawrence*, in reply.—Under the authority of *The San Iago* it is now unnecessary to argue the rule of reciprocity. It will be sufficient to observe, that it was not laid down in that case as novel in principle or limited in application; it stands on a principle of natural equity, which must ever prevail between parties acting freely in support of their own rights, and independent of any common control. The judges themselves recognise the principle when they say, "that looking to treaties, and the practice of England, they should have restored." In respect to the treaty of 1654, it is clear that it has not been considered by this Court as applicable to decide the present question; *for if it were so, reference would not have been made for information on the rule and practice of Portugal; it is a treaty which refers evidently to a state of neutrality in one party, and therefore does not apply to the cases of a common war. [*914

If it is to be applied by inference or construction, the true meaning of an ancient treaty will be best sought in the practice which has been observed under it. It is attempted to confound principle with the evidence of fact, but the principle of reciprocity being established, the fact only is known to be examined. The opinions and explanations of lawyers can avail nothing against the clear fact, that Portugal has condemned British property under similar circumstances.

It is besides observable, that these opinions and certificates do not assert that there was no law, but that there was no positive law. In this doubtful state of their law, the practice of the Courts of Portugal will be the best guide. The public Courts of Lisbon, acting, as appears, under a communication with the Cabinet of Lisbon, have in two cases adjudged British property coming out of the hands of the enemy to the recaptor. On these grounds it is submitted this vessel must be condemned.

THE COURT, after the argument in *The Santa Cruz*, desired to hear the distinctions that were to be taken in favor of, or against the remaining cases.

On *The Santa Reta*, taken on the 12th of March, 1797, and retaken on the 20th, it was argued for the captors, that subsequent to the ordinance, 1796, the law was still stronger and more clear on this point than it was in the preceding cases; for that ordinance expressly declared all recaptures after a possession by the enemy for twenty-four hours to be lawful prize.

For the claimant, it was contended that the ordinance of December, 1796, related solely to the Portuguese cases, and left the general law towards allies on the ancient footing; that the only operation which this ordinance could have was favorable to the claimants, as it served to prove that the general law before that time had not led to condemnation.

In the remaining cases, retaken after the ordinance of May, 1797, it was contended on the part of the captors, that the government of Portugal having established a general law, and acted under it, was not at liberty to alter this rule during a war; that such changes were introduced from the fluctuations of their own views of interest, and not from any fixed principles of justice; and *therefore that they were such alterations as an ally was not bound to admit.

*915]

JUDGMENT.

SIR WM. SCOTT.—These are cases of Portuguese ships or cargoes, eight in number, which have been recaptured at different times by British cruisers.

As far as the dates of the recaptures are material, they are to be distinguished under three periods:—The first vessel was recaptured before the month of December, 1796, when an ordinance on the subject of recapture passed in Portugal; the second was retaken between the months of December, 1796, and May, 1797, when another ordinance took place more expressly respecting the property of allies recaptured from the enemy. The rest may be stated generally, without further distinction, to have been taken subsequently to the 9th of May, 1797. It is necessary to distinguish these dates, as it is said the difference of date may affect the application of the general principle, whatever that may be, to the particular cases.

They are cases of very considerable value, of much importance, and of no mean difficulty in many respects. Under a choice of cases they are not such as I should particularly wish to determine; but they devolve on me in the regular course of my duty, and I am bound to decide them according to my own best informed apprehensions of law and justice of the general law of nations, as it has been understood and administered in the British Courts of Admiralty.

In the arguments of the counsel, I have heard much of the rules which the law of nations prescribe on recapture, respecting the time when property vests in the captor; and it certainly is a question of much curiosity, to inquire what is the true rule on this subject; when I say the true rule, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various; you admit there is no rule operating with the proper force and authority of a general law.

It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours' possession, or it might be the rule of bringing *infra præsidia*, or it might be a rule requiring an actual sentence of condemnation. Either of these
*916] rules might be sufficient for *general practical convenience, although in theory perhaps one might appear more just than another; but the fact is, there is no such rule of practice; nations concur in principle indeed, so far as to require firm and secure possession; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European states more distinctly agreed on any principle as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

That obligation could arise only from a reciprocity[1] of practice in other nations, for from the very circumstance of the prevalence of a different rule among other nations it would become not only lawful, but necessary, to that one nation to pursue a different conduct; for instance, were there a rule prevailing among other nations, that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle; and to lay it down as a general rule that a bringing *infra*

[1] This principle of reciprocity is acknowledged as a necessary principle of public law by Valin:—". . . . Me feroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leurs effets repris sur des pirates par des François, ne doivent s'entendre que de ceux qui suivent le même jurisprudence que nous; autrement, il n'y auroit pas de reciprocité: ce que blesseroit l'égalité de justice, que les états se doivent les uns aux autres:" Valin, l. iii. tit. 9, art. 10.

See also the same principle adverted to in a case arising on this practice of France: Life of Sir L. Jenkins, vol. ii., p. 744.

præsidia, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effect of adhering to such a rule would be gross injustice to British subjects; and a rule from which gross injustice must ensue in practice, can never be the true rule of law between independent nations: for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent states.

If I am asked, under the known diversity of practice on this subject, what is the proper rule for a state to apply to the recaptured *property of the allies? I should answer that the liberal and rational proceeding would be to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just to the recaptured; it presents his own consent, bound up in the legislative wisdom of his own country; to the recaptor it cannot be considered as injurious. Where the rule of the recaptured would condemn whilst the rule of the recaptor prevailing amongst his own countrymen would restore, it brings an obvious advantage; and even in the case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in reliance of receiving reciprocal justice in its turn. [*917

It may be said, what if this reliance should be disappointed? Redress must then be sought from retaliation; which in the disputes of independent states, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution: this will be their ultimate security, and it is a security sufficient to warrant the

trust. For the transactions of states cannot be balanced by minute arithmetic; something must on all occasions be hazarded on just and liberal presumptions.

Or it may be asked, what if there is no rule in the country of the recaptured? I answer, first, this is scarcely to be supposed: there may be no ordinance, no Prize Acts immediately applying to recapture, but there is a law of habit, a law of usage, a standing and known principle upon the subject, in all civilized commercial countries; it is the common practice of European states, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of the Prize Acts. But *secondly*, if there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule, and rest on the presumption that that rule will be adopted and administered in the future practice of its allies.

Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular. It may be so, but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked also, will you adopt the rules of Tunis and Algiers? If you *take the people of Tunis and Algiers for your allies, undoubtedly you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections, it is to be observed, that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety. A regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule to be observed towards other parties who have originally established it for themselves.

*918]

So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this; that the maritime law of England, having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, *gives the benefit of that rule to its allies till it appears that they act towards British property on a less liberal principle;* in such a case it adopts their rule and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject. It was clearly recognised in the case of *The San Iago*—a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practioner in this profession (Sir E. Simpson), which records the practice and the rule as it was understood to prevail in his time. "The rule is that England restores on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule."

I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law. *At the breaking out of war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores.*

It is a principle sanctioned by that great foundation of the law of England, Magna Charta itself,[1] which prescribes,

[1] Art 41. Omnes mercatores, etc. . . . Et si sint de terra contra nos gwerrina, et si tales inveniantur in terrâ nostrâ in principio gwerre, attachiantur sine damp-

*919] that at the *commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

In recaptures, it is observable, the liberality of this country outsteps its caution; *it restores on salvage without inquiry, till it appears that the ally pursues a different rule.* It may be said, there may be inequality and hazard in this prompt liberality; and we may restore while the enemy condemns; and so the fact has been; for it is not to be denied that before the case of *The San Iago* had introduced a more accurate knowledge of the Spanish law, restitutions of Spanish property on recapture had passed of course; the more accurate rule however is that which I have laid down.

In the present state of hostility (if so it may be called) between America and France, the practice of this Court restores American property on its own rule, without inquiring into the practice of America. It acts on the same principle towards Danes and Swedes and Hamburgers,[1] in the ambiguous state in which the rapine of France has placed the subjects of these governments. Towards Portugal then undoubtedly a less liberal treatment would not be observed; connected by long alliance, by ancient treaties, by mutual interests and common dangers, if Portugal forfeits the benefit of a rule which has been before observed as a general rule, it can be only on this ground, that the Courts of that country have applied a different rule to the property of British subjects. The question then for the Court to determine will be simply this, Has Portugal applied a different rule to British property taken by the enemy, and coming out of their hands into the possession of Portuguese subjects?

no corporum et rerum, donec sciatur a nobis, vel Capitali Justiciario nostro, quomodo mercatores terre nostre tractentur, qui tunc inveniantur in terrâ contra nos guerrina, et si nostri salvi sint, alii salvi sint in terrâ nostrâ.

[1] Neutrals.

But before I enter on this inquiry, it may be proper to consider the treaties that subsist between the two countries; because if they have prescribed a rule, it will render all further discussion unnecessary. A treaty to which much reference has been made thus strongly and emphatically expresses the terms of union between the two countries. "Neither of the confederates shall suffer the ships and goods of the other, or of the people of either, which shall at any time be taken by the enemies of the one and carried into the ports of the other, to be conveyed away from the owners or proprietors; but the same shall be restored to them or their attorneys, provided they claim them before they are sold or cleared, and prove *the rights within three [*920 months, and pay the necessary expenses for preservation and custody:" Treaty, 1654, Art. 19. Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations; for no neutral country can interpose to wrest from a belligerent prizes lawfully taken;[1] but I think it goes a great way to prove the spirit

[1] The notion of receiving restitution from a neutral power seems, soon after this treaty, to have been found to be inconsistent with the rights of belligerents, as acknowledged by the law of nations. Between the years 1666 and 1670 there is this report among the letters of Sir L. Jenkins (vol. ii., p. 732):—"The question in law is, whether this Biscainer, being brought into your Majesty's port, ought not on account of your Majesty being at amity with the Catholic King, to be rescued from under the power and force of his enemy; and *jure postliminii* to be restored to his own. The law of nations, as it is at this day observed, seems not to pass any obligation on your Majesty to impart your royal protection with one friend to the prejudice of another; this captor being *jure belli*, which is a very good title, in full and quiet possession of his prize, and so he was for a fortnight together at Portsmouth before he was discovered, will take it for an act of partiality to have it now wrested out of his hands and given to his enemies; whereas no man's condition is to be made worse than another's in a place that is reputed of common security, upon the public faith. Besides, the French ordinances do expressly provide that leave be given to all strangers to depart those ports with such prizes as they happen to bring in: it is the practice of Spain at this day, and of all other parts that I can learn anything of, in cases of neutrality."—A similar article to this referred to in the treaties with Portugal, is to be found in a variety of ancient treaties from the beginning of the fifteenth century.

of the contracting parties: and I agree with Doctor Arnold, that it goes the whole length of the present claim; for such a treaty of alliance is not a thing *stricti juris*, but ought to be interpreted with liberal explanations. And although it may seem to point more immediately to a state of things in which one of the contracting parties is neutral, yet it would be strange to say that it binds the party to seize, for the purpose of restitution, where there is no right of seizure; but it shall not oblige him to restore, when he has a complete right of seizure, and has already acted on that right. The treaty does therefore in its spirit and meaning embrace the restitution of property.

But then again, I am to inquire whether Portugal has put the same interpretation upon it? for if that government has used a different interpretation, that forms the rule which I must follow; the case therefore upon the treaty comes exactly to the same question as the case upon the law. What has Portugal done? What acts are there from which we may collect the construction which Portugal puts upon the law and upon the treaty?

*921] *I come then to this important question on the fact: On the original papers and depositions nothing appeared; restitution therefore would have passed on salvage, according to what I have described to be the law of England; but the captors offered papers to show that a different rule had prevailed in Portugal with respect to British property. In this state of doubt the Court ordered further information and proof to be produced respecting the law of Portugal on recapture, and by *both parties*. Now the first question is, who is more particularly expected to produce this proof? And it has been much pressed by the counsel for the claimant, that the *onus probandi* lies on the recaptors; it lies with them, it has been said, to show that Portugal uses a different rule; or at least to raise a strong presumption of that fact. But I am of opinion that the re-

captors have sufficiently discharged their duty to the Court by the papers which have been produced.

The *onus probandi* then shifts, and it becomes a duty on the claimants to exonerate themselves from the presumption raised against them, and to show that their law is not such as the *primâ facie* evidence of the captors represents it to be.

They have besides great advantages in this research. The law and country are their own: access is easy to them. They have reason to expect all that the diligence, the acuteness, and the zeal of their countrymen can produce on their side; but the captors must hunt out a foreign law, through a foreign language, and with the assistance of professors not much disposed to promote their inquiries. The means are evidently unequal between the parties; and the means being unequal, the obligation is by no means equal. All defect of proof therefore must press principally on the claimants, from whom the Court is entitled to expect proof of the fullest and most satisfactory nature.

It has been asked, what proof must we produce? The question admits of an obvious answer. In the first place the Court will expect the text-law, the existing ordinances; now I think it does appear that there are ordinances on the subject which have not been produced. The ordinance of 1796 refers to an ordinance of the year 1704 as the basis on which it was framed. I have therefore a right to conclude that this ordinance has formed the subject of the Portuguese prize-law for a century; but yet no notice has been taken of it. In the next place information would be required respecting the decisions which have passed on their own recaptures: and if none such can be found, a certificate to this effect should be *exhibited. But there is no [*922
certificate; besides, it is, I think, scarcely probable that there should not have passed some decisions on this subject previous to December, 1796. Portugal has been

active in the war and the enemy has been active on those coasts; recaptures must have occurred; they must also have been brought to adjudication, and the rule by which they have been decided would have been considered by me as the law of Portugal.

It might have been expected also that authorities even more immediately in point might have been produced from decisions respecting the recaptured property of allies; some instances cannot but have occurred previous to May, 1797, when an edict issued on that subject. Three cases have occurred within three months after the edict, and afterwards many more; and it is scarcely probable that so many should have happened after that time, and none before. It has been suggested that the records of Portugal are not so kept as to furnish a ready answer to such inquiries; but I cannot admit an excuse so dishonorable to the tribunals of that great country; there is therefore a defect of evidence for which no sufficient reason has been given on the part of the claimants.

After this statement of the reasonable expectations of the Court, let us now see what evidence has been produced. It consists of many documents, of which some must be immediately dismissed, as of no use or authority in this case. Of these the first is a certificate from the Portuguese Minister Plenipotentiary at this Court. As far as character, truly honorable both in public and private life, can give weight to an opinion, as far as conviction that the party delivering that opinion delivers the sincere and unbiassed persuasion of his own mind, can influence me to respect it, this opinion must command the greatest attention; but the whole weight of this opinion is confined to these considerations; for it is to be remembered that the Chevalier d'Almeida is not a professor of the law, but a diplomatic character; and therefore incompetent to instruct us in questions of law.

Another paper which I shall dismiss also, is an opinion of Mr. Da Sylva Lisboa, described to be a lawyer of considerable eminence in his own country. Upon this opinion many observations have been made, and more particularly on the impropriety with which it undertakes to explain to us the British laws of recapture, whilst it almost pleads ignorance of the Portuguese laws on the same subject. It is scarcely necessary to observe that the representation *which [*923
it gives of our law is erroneous; it is besides very deficient in the preliminary circumstances which can alone give credit to it, or even make it intelligible to us; for it is not accompanied by any statement of the questions that were addressed to this gentleman. He could scarcely have imagined that the British Court of Admiralty would apply to Portuguese professors for information on British law; and we are at a loss to conjecture in what view he could suppose we should derive any knowledge of the law of Portugal from such an opinion; it would perhaps therefore be but due civility to the reputation of this gentleman to consider it as an opinion hastily obtained on an imperfect representation of the case; and under this character, as it can avail nothing in point of authority, I would recommend it to those who have to argue this case again, if it should go to an appeal, to dismiss this paper wholly from the case.

The last paper which I shall dismiss is the certificate of Mr. Nash, a reputable merchant of this town: this paper relates something of a transaction that has happened to Portuguese masters accepting from the enemy, by donations, ships taken from the Portuguese, and states that "The enemy had captured a number of vessels, some Portuguese and some English; and willing to disencumber themselves of their prisoners, they gave to the Portuguese and English masters, jointly, one of the Portuguese ships: on carrying their present into Portugal, these persons are represented to have been severely treated, and to have been imprisoned by the

government." I am at a loss to understand this account, when I recollect the cases of *The Anne* and *The Endeavor*, unless I am to suppose that this severity was practised on them subsequently to the last ordinance, which pronounced such donations null and void; for otherwise I must suppose that donations of Portuguese property were considered void, whilst similar donations of British property were held to be perfectly good and valid: the same paper informs us, further, "that the Portuguese masters remitted to England, to the captains of the English vessels, a part of the proceeds as their share of the donation." I am sorry for it, because the property belonged not to either party, but to the former Portuguese owners; and no interest could accrue to those masters but an ordinary salvage on restitution to the original proprietors.

This certificate cites also, as a sort of precedent, the acceptance of four pipes of wine in the same manner by an English Captain Bennet. It would be ridiculous to treat *924] the conduct of this man *as an authority; it was an irregular proceeding, and as irrelevant to this case as the former parts of this certificate.

Laying aside, therefore, these several documents, I come now to examine those papers which may be considered as matter of evidence in the case: there are on the part of the claimants, 1st, opinions of Portuguese lawyers; 2d, a certificate of the Judges of the Supreme Court of Admiralty in Portugal; 3d, the decree of the Queen of Portugal, November, 1797, in the case of *The Anne;* and 4thly, a certificate of the Foreign Secretary of State of that country, Mr. Pinto de Souza. But it is scarcely possible to consider the effect of these documents, without bringing under our view those, at the same time, which have been brought in by the captors; these are the ordinances of December, 1796, and of May, 1797; and the proceedings relative to the British ships, *The Anne* and *The Endeavor*.

In the ordinance of December, 1796, no mention is made of the recaptured property of allies. The ninth article refers only to their own recaptures; but a reasonable presumption arises from it, that they would apply the same law to their allies; for this principle is not only liberal and just, but it is actually observed in the practice of England, France, and Spain: a presumption therefore arises, that Portugal would pursue a similar rule. But I think there are two circumstances which convince me, beyond mere presumption, that Portugal did act on this principle, and did mean to apply its own rule to the cases of allies. In the case of *The Endeavor*, which concerned the property of an ally, the sentence was in these words:—"Having heard what has been alleged concerning the rule of twenty-four hours, it appears to us that that rule serves only to regulate the right of actions arising on recapture." Now, certainly, if this rule on recapture did not apply to the property of allies, it would have been entirely irrelevant to discuss that rule in such a case. We may infer therefore, I think, that the rule of twenty-four hours' possession was the rule of Portugal, and also that, had the case of *The Endeavor* been considered as a case of recapture, it must have been governed and decided by that rule. The manner in which Portugal has acted on the last ordinance confirms me also in supposing that it was the practice of Portugal to extend its own rule to the cases of allies. The salvage there obtained for Portuguese property is one-fifth, and this proportion has been observed also in subsequent cases of British property, although it is not the proportion of salvage which our own law prescribes. I may, therefore, *conclude it was the practice of Portugal to apply its own law to the case of an ally. [*925

But, it is said, this rule of twenty-four hours' possession had not prevailed in Portugal before the ordinance of 1796; and therefore I may presume that ancient ordinance was fundamentally the same. Had there been a difference so

material, it was the duty of the claimant to have produced that ordinance for the information of the Court, and to have convinced us that the modern practice was a change and an alteration in the jurisprudence of Portugal. It cannot, indeed, be supposed that an alteration so monstrous, so gigantic, so opposite to the general course of the relaxations which have gradually taken place in the law of prize during this century, should have found its way into the Courts of Portugal, and have been adopted by them for the first time in 1796. We know it to have been the ancient law of Spain. The vicinity of the two countries, their affinity of habits, the resemblance of their legal institutions, still further strengthen the probability that this rule had also been the ancient law, or at least the usage of Portugal on this subject.

I consider myself, therefore, justified to conclude that the *law of Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner, and also, that it would have applied the same rule to the property of allies.*

But, I acknowledge, it is not sufficient to say such a rule would have been applied. It is also necessary to show that there have been actual proceedings under it; and for that purpose two cases have been produced—the cases of *The Anne* and *The Endeavor*.

The case of *The Endeavor* was, I believe, prior in time. It was the case of a British ship taken by the French on the 24th of January, 1796: the French captain gave it to the master of a Portuguese vessel which he had also taken; the ship was carried into Portugal; the English master demanded restitution, but it was denied to him, not only by the individual, but also by the Courts of Justice of Portugal. The case of *The Anne* happened in September, 1796, and is in one respect still stronger than that of *The Endeavor*, as it was a ship given in the same manner by the French

captor to the very man who had been the master of this vessel, *The Santa Cruz*. Let us suppose the master had been also the owner of *The Santa Cruz:* by what justice could he have claimed to have his own property restored from British hands, at *the same time that his own law confirmed him in his refusal to restore British property under circumstances precisely similar? But restitution was refused, under a particular order of the state, which declared "the property of the English owner had been divested, and that the title of the Portuguese owner was good and valid." [*926

Now these are two cases strongly in point; and unless they can be overthrown, they will, I think, sufficiently establish this fact—that it was the practice of the Courts of Portugal, either under ancient ordinance or under a silent and prevailing usage, or under some recent edict, to confiscate the property of allies coming into the possession of Portuguese subjects from the hands of the enemy. It is immaterial under which of those authorities the practice prevailed. These decisions are represented to us to be the only decisions that have passed during the present war on that subject, and they therefore establish the law of Portugal, from whatever sources it might be derived.

But the force of these cases has been attacked in different ways. It is said, in the first place, that they were cases not of recapture, but of donation; and it has been attempted to raise distinctions between these titles; but in all legal considerations they are precisely the same; they are both equally matter of prize: donation between enemy and enemy cannot take effect. The character of enemy at once extinguishes all civil intercourse, from which such a title could arise. So distinctly is this rule acknowledged to be the law of this country, that if a case should happen in which an enemy after capture had made a donation, as it is called, in this manner to the original owner, that vessel

must be condemned as a droit or perquisite of Admiralty; and the original proprietor could acquire no interest but as salvor, or from the subsequent liberality of the Crown.

I think I have evidence also that this matter is so considered in Portugal. In the certificate of the Secretary, Mr. Pinto de Souza, he says, "The order given by him was not intended to suspend the suit of the English claimant, but only to dispose of that property which of right belonged to the Queen, as being acquired from the enemy without letters of marque." It is then under this description only the case of prize taken by a non-commissioned captor, and in this Mr. Pinto de Souza seems to coincide exactly with us in the view in which we should have considered it here. It has been said, however, that the law of Portugal *927] *does distinguish between donations and recaptures; but it is sufficient to observe, that no proof has been produced of this assertion; and besides it is a distinction which cannot in the nature of things reasonably exist; nor indeed should I consider myself by any means bound to pursue a foreign law through a variety of minute or subtle distinctions, which at last might be found to exist only in theory. It would be sufficient for me to know, that I understand the practice as it has been administered in the only cases that have occurred on this subject.

But it is said, these cases were decided before an incompetent tribunal; although, I believe, this objection applies only to *The Endeavor;* this objection however does not appear to have been taken by the Portuguese lawyers. In the order of her Sacred Majesty, it is said indeed, "the Council of Commerce had no jurisdiction to decide questions of this nature." But the certificates of the judges speak a different language; they say not that the jurisdiction was incompetent, but "that the sentence which had been given by the Board of Commerce was founded on frivolous and insufficient reasons, and that the party might have appealed."

The terms used by them are just the terms which would have been applied to cases proceeding in their due and ordinary course.

In the case of *The Anne*, it is not, I think, pretended that the Court before which it was brought had not a competent jurisdiction; but it is argued against the British claimant, that he acquiesced in the decision when he might have appealed. But let us see what would have been his prospect of success. The hope which the Portuguese lawyers held out to him, is not founded on any opinion on the merits of his case, but on a point of form, "because the Order in Council had not been produced." Whilst the cause was under investigation, the supreme authority of the state interposed to inform the Court that the title of the Portuguese master was legal and valid. The Court of Justice assents to this authority, and decides accordingly; and it is against a decision so deliberately pronounced, and so irregularly influenced by the supreme authority of the country, that this foreign claimant, the master of a small English vessel, is required to persevere: I must think it could not be expected of him.

Such are the observations which I think myself justified in making on the proceedings in these two cases; and after the general view which I have taken of the whole of this subject, it may be unnecessary *to dwell more particularly on the minute parts of the several papers. [*928
It is, I think, clearly proved, that before the ordinance of May, 1797, the courts of Portugal considered British property coming out of the hands of the enemy as subject to confiscation: in two instances such property was actually confiscated, not by remote and inferior jurisdiction, but in their highest courts, in the capital of the empire, and under the direction of the state. The Ordinance of 1797 cannot be applicable to pre-existing cases. I must determine all cases, as if they had come before me at the time of cap-

ture. The two former cases therefore, of this class, can receive no protection from this Ordinance.

Looking then to the conduct which Portugal had observed towards British property, and conceiving myself bound by the general laws of this country, and more particularly by the authority of the case of *The San Iago*, to proceed on strict principles of reciprocity, I have no hesitation in pronouncing the first two cases subject to confiscation.

I now come to the consideration of the subsequent cases. It has already been laid down, that the law of England restores no salvage unless it is forced out of its natural course by the practice of its allies. In the preceding cases it has been reluctantly so diverted from its free course; but in May, 1797, it apppears Portugal renounced the harsher principles, and adopted a more liberal rule; upon what ground then can it be contended, that this country must, in regard to those cases which have occurred subsequent to this Ordinance, follow the harsh and antiquated, in preference to the new and more lenient rule? It is said Portugal is not at liberty to make such an alteration in time of war; and that those who have once established a rule, must abide the consequence of it; but I see no one reason on which this exercise of legislation can be denied to an independent state.

It is said Portugal will then legislate for this country; and so must every country in some degree legislate for us, whilst Great Britain professes to act upon the old principle, and adopt the law of its ally. In peace it is allowed, such an alteration might be made; and why not in a time of war? There are no depending interests to be affected by it: it was an alteration as harmless to the world, as if it had been made in times of the most profound peace; but it is said, the law is not even now established on equal terms of reciprocity towards this country; the salvage which Portugal has decreed is one-fifth, whilst the law of this country re-

stores on payment *of a sixth only. Perhaps a rule more closely concurring with our own might have been more convenient; but the difference is not sufficient to justify this country in refusing Portuguese subjects the benefit of their alteration. [*929

In professing to act on the law of our ally, we must do so for better and for worse.

I therefore restore the several vessels that have been taken since the Ordinance of May, 1797, on the salvage which Portugal has established, a salvage of one-eighth to ships of war and one-fifth to privateers.

In the condemned cases, I order the expenses of the claimants to be defrayed out of the proceeds.

On the breaking out of war important questions arise as to how far property of the *enemy*, or of those considered as adhering to him, is liable to capture and confiscation. These questions it is proposed to consider in this note.

First of all it should be mentioned, that before war is declared a nation may lay an *embargo* upon the property of another nation within its territories. "Such a seizure is," to use the words of Sir William Scott, "at first equivocal; and if the matter in dispute terminates in reconciliation, the seizure is converted into a mere civil embargo, so terminated. That will be the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be *no embargo*, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus by which it was done, that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons trespassers *ab initio*, and guilty of injuries which they have refused to redeem by any amicable alteration of their measures. This is the necessary course if no particular compact intervenes for the restitution of such pro-

perty taken before a formal declaration of hostilities:" The Boedes Lust, 5 C. Rob. 246; The Gertruyda, De Vries, 2 C. Rob. 211.

During the period that an embargo lasts, the Court cannot restore; because on due notice of embargoes it is bound to enforce them. It would be a high misprision in the Court to break them *930] by re-delivery of possession to the *foreign owner of that property, which the Crown had directed to be seized and detained for further orders. The Court acting in pursuance of the general orders of the state, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done, that is an account to be settled between the states. The Court has no responsibility, for it has no ability to act: 5 C. Rob. 245.

Assuming, however, a war to be declared, what right has one belligerent to confiscate the property of the other seized before the war? Upon this subject, it has been said by Sir William Scott, in the principal case of The Santa Cruz, to be the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. "It is a principle," he adds, "sanctioned by that great foundation of the law of England—Magna Charta itself, which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country." *Ante*, p. 918.

In modern warfare a certain time is generally allowed by Orders in Council, within which the subjects of the enemy may depart with their ships and cargoes, without being liable to capture on their voyage. See The Phœnix, 1 Spinks 1; The Argo, Id. 52. But enemy's ships will not be allowed to protect themselves under such Orders in Council if they endeavor, under disguise, to pass themselves off as neutrals: The Odessa, 1 Spinks 208, 213.

With regard to debts due to the enemy from individuals *before* the commencement of war, although the Crown may have the prerogative of confiscating them, it has nevertheless never adopted such a course of proceeding as to enforce any debt due to an alien enemy from any of its subjects. "Nor," says a learned judge, "is it very probable that such a course of proceeding ever will be adopted, as well from the difficulties attending it, as the disinclina-

tion to put in force such a prerogative:" per Lord Alvanley, C. J., in Furtado *v.* Rodgers, 3 Bos. & Pul. 201. In effect the right of the enemy-creditor to sue is suspended during the war, and revives upon the declaration of peace. See Ex parte Boussmaker, 13 Ves. 71; The Nuestra Señora de los Dolores, Morales, Edw. 60; and see *ante*, p. 811.

Public debts due from one country to the subjects of a belligerent state, are not subject to confiscation upon the breaking out of war. In the answer to the Prussian memorial concerning the capture of Prussian ships, when the King of Prussia, by way of reprisals, had confiscated debts due from Prussia to English subjects on account of the Silesian Loan, it is stated "that it would not be easy to find an instance where a *prince has thought fit to make reprisals upon a debt due from himself to private men. [*931 A private man lends money to a prince upon the faith of an engagement of honor, because a prince cannot be compelled, like other men, in an adverse way by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made whether any part of the public debts was due to the subjects of the enemy, though it was certain many English had money in the French funds, and many French in ours:" Harg. Coll. Jurid. 154.

Although, according to the usages of ancient warfare, all property belonging to the conquered passed to the victor (Manning's Law of Nations 132), the severity of former times has been gradually considerably modified.

First with regard to landed property and immovable property in general, it is not liable to confiscation from the effects of war. "A conquering state enters upon the rights of the sovereign of a vanquished state; national domain and national revenues pass to the victor; but the immovable property of private individuals is by the positive law of nations not liable to be seized by the rights of war:" Manning's Law of Nations 135. This change in the law of nations, which no doubt very much mitigates the costs of war, has perhaps been as much the result of policy as of humanity, for it must be the interest of a person intending to conquer a country not to render the inhabitants hostile to him, and this he can best effect by allowing them to remain in possession of their property, for retaining it, many might be indifferent who were their rulers.

With regard to movable property on land, the law is not so moderate as that which regulates the dealings of a conquering state with immovable property. "Movable property," says a learned author, "is still considered as liable to seizure; but by the practice of modern warfare, this also is frequently respected, the right of seizing movable property being relinquished for the levy of requisitions, or forced contributions, of different things needed by the invading army; *and as long as these are supplied*, all other movable property, unless paid for, excepting such cases as where towns are taken by assault, or where retaliation is used for the conduct of the enemy. It is hardly necessary to say that such respect for private property was not shown by the French armies during the last war;[1] but the practice as above stated is now considered as the general usage of civilized warfare. *Requisitions in a hostile country have advantages* over a system of irregular booty, both to the invading army, *because greater irregularity in its supplies may be relied on when irregular plunder is not allowed*, and to the *possessors of property, because they will only have to supply what the army requires, and not be exposed to the additional evils of the cupidity and license of a marauding soldiery:" Manning's Law of Nations 136; and see Wheat. Internat. Law 420; The Johanna Emilie, 1 Spinks 14.

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The right, however, of a belligerent to destroy or lay waste his enemy's property, when it is necessary to do so for the purpose of warlike operations, or of bringing the war to a successful conclusion, is admitted by all writers of any authority upon international law. As, for instance, in the siege or bombardment of a town, or in laying waste a country, where the belligerent by so doing could either compel the retreat or defeat the hostile army. Any useless destruction of property would, very properly in these times, be stigmatised as cruel and unjustifiable. See Manning's Law of Nations 138, 139.

With regard however to maritine warfare, operations are carried on with much more severity, and it is clear that "when two powers are at war they have a right to make prizes of the ships, goods, and effects of each other upon the high seas. Whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken provided he observed his neutrality:" Harg. Coll. Jur. 134.

[1] The Wars of the First Napoleon.

The reason for distinction between the treatment of movable property of the enemy captured on land, and movable property captured on sea, is said by a learned author to be "occasioned by the nature of maritime warfare, of which the object is, in a great measure, the destruction of the commerce of the enemy; and it may partly result from the connexion between piracy and maritime warfare which formerly existed," (Manning's Law of Nations 137), though more probably such distinction, so far as it exists, depends upon the real or supposed interest of the captors.

By the treaty between the United States and Prussia, in 1785, made in accordance with what Franklin called his "Quaker notions," it was agreed that the merchant ships of the contracting parties should not be liable to capture by each other's cruisers during war; but this article was not renewed in the treaty between the same powers in 1799. With this single exception the practice of states has been always unvaried—in subjecting to confiscation the property of enemies captured at sea: Manning's Law of Nations 136.

Where the vessel of an enemy is taken having on board goods also belonging to an enemy, both the vessel and the goods will be good prize, but cases of a mixed character may occur: a neutral vessel may be taken with goods belonging to an enemy on board, and on the other hand a vessel of the enemy may be taken having goods of a neutral on board.

It has always, until the late *Russian war, been held by England that the goods of an enemy laden on the ship of a friend are liable to capture, but that the lawful goods of a friend on board a ship of an enemy must be restored. [*933

The captor however of enemy's property on board a neutral vessel takes it with the freight attaching thereon *cum onere*. The rule of this country being, as is laid down in the principal case of The Bremen Flugge, "that a neutral *has* a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication:" *ante* 907. See The Fortuna, Edw. 57.

Where however there have been unneutral circumstances in the conduct of a neutral ship carrying enemy's property captured by a belligerent, as if it is carrying on the coasting (The Atlas, 3 C. Rob. 299) or colonial (The Immanuel, *ante*, p. 814; The Rebecca, 2 C. Rob. 101) trade of the enemy, if the ship is sailing with a false

destination (The America, 3 C. Rob. 36), or if the owner has prevaricated or conducted himself otherwise in any respect with ill faith (The Vrouw Henrica, 4 C. Rob. 347), a forfeiture of the freight will take place.

The captor of enemy's property on board a neutral ship will only be bound to pay an adequate freight, and not necessarily the freight named in the charter-party. For "the charter-party is not the measure by which the captor in all cases is bound, even where no fraud is imputed to the contract itself. When by the events of war navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflamed rate of freight as when no such circumstance exists; when a ship is carrying on an ordinary trade the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo and takes with that specific lien upon it:" The Twilling Riget, 5 C. Rob. 82, 85.

The expenses of the neutral master, as is laid down in the principal cases of The Bremen Flugge, do not stand upon the same footing as freight, but will be postponed to the expenses of the captors. See also as to the expenses of captors, The Vrouw Henrica, 4 C. Rob. 343, 347.

Where an enemy's ship is taken with neutral cargo on board, although the cargo will be restored, the owner will be liable to pay freight to the captor if the captor takes the cargo, as in the principal case of The Fortuna, to its original destination; but he will not be entitled to freight if he takes it to another destination: The Hoop, 5 C. Rob. 75, n.; The Vrouw Anna Catherina, 6 C. Rob. 269. There are two rules, says Sir Wm. Scott "on this subject equally general. The first is, that if goods are not carried to their
*934] original destination within the intention of the *contracting parties, freight shall not be due; and on this ground, that the contract not being completed either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost and the party has to provide another vehicle to carry on the goods to the port of their destination. In some cases indeed it may happen that the port to which the goods are brought may prove more beneficial and afford a better market. But the Court does not enter into the minutæ of such calculations, which would be attended with great trouble in the inquiry and much uncertainty in

the result. It takes the presumption arising from destination only, and founds upon it the general rule that in such case the claimant shall receive restitution of his goods without the burthen of freight.

"The other rule, equally general, is, that when the contract *is* executed by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract. In some instances it may prove disadvantageous to the claimant; and it is certainly a clear inconvenience in all cases to be obliged to receive the goods under the process of a Prize Court, subject to the expenses which may have been incurred, or to the delay of further proof, instead of taking them with more facility in the course of their original consignment. But on the same principle the Court declines, on this side also, to enter into a minute estimate of these circumstances, which must in every case branch out into particulars of infinite variety. It constructs a general rule on the same ground of presumption which it assumes on the other side, and decrees freight to be paid to the captor in the same manner as if the goods had been delivered under the original consignment:" The Diana, 5 C. Rob. 71. In the case of the Vrouw Henrietta, on the claim of Mr. Ancrum, a merchant of London, a distinction was taken that the goods were not brought to London, but were delivered at Plymouth, and therefore that they had not been brought to the claimant's own port. The Court, however, overruled the distinction, and held the parcel of goods to be equally subject to freight: 5 C. Rob. 75 n.

Where, however, the voyage, although it has not been precisely that described in the contract, is that which the owners would have elected if not prevented and diverted by the overruling policy of another country, the captor of the vessel will be entitled to freight. See The Diana, 5 C. Rob. 67, 72. There Dutch colonial produce claimed by British merchants removing their goods at the commencement of war, was captured on board a Dutch vessel on its way to Holland under the compulsion *of Dutch ordinances, but [*935
with a final intention, according to the representations of the British merchants on their parts, to have their goods remitted either in specie or in proceeds to this country, to which they would immediately have consigned them if at liberty so to do; it was held by Sir

William Scott, that the captor, having brought the goods in the captured vessel to London, was entitled to freight. "Looking at the substance of the case," said Sir William Scott, "and seeing that the parties have obtained restitution in their own country, and generally in the very port which they would have elected if they had not been diverted by an overruling necessity, I think it may be considered as coming under the second rule, or, if not under that, under another resting on nearly the same principles."

Where the captor has done any injury to neutral property captured on board an enemy's ship, or has been guilty of any misconduct, he may, as laid down in the principal case of The Fortuna, remain answerable for the effect of such misconduct or injury, in the way of a set-off against him: *ante*, p. 905.

The expenses however of a neutral owner of cargo will not be defrayed out of the proceeds of the sale of an enemy's vessel on board of which such cargo was shipped: The Primus, 1 Spinks 59.

Although England, in accordance with what is believed to be a sound principle of international law, has (at any rate until lately) invariably maintained that the goods of an enemy are liable to capture although on board a neutral vessel, other nations have at different times strongly insisted that the flag should cover the cargo, or in other words have laid down as a maxim, "free ships, free goods." A stipulation to this effect was inserted in treaties between many nations before the commencement of the armed neutrality of 1780, the nations who adhered to which insisted, in the 2d Article of their manifesto, "That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband." This was not acquiesced in by England, although other nations had made so many treaties entering into the engagement, "that free ships make free goods," that, to use the words of a learned author, "it appeared to be the general wish of maritime powers that this practice should be adopted, and that it might probably become the conventional law of Europe, among those states, and only those states, which were entering into these engagements." He adds however (and this should be a caution to us not to rely too implicity upon the stability of treaties on such subjects), "But such an opinion was soon proved fallacious by the result. Not fifteen years from the date of the armed neutrality, the wars with France had involved almost every European state; and the

principle which appeared obtaining such general prevalence, was abandoned *by nearly all the members of the northern confederacy, the great leader of that alliance, Russia, being the [*936 chief instigator of the unusual severities which were adopted towards neutrals:" Manning's Law of Nations 271.

The armed neutrality of 1800, with Russia at the head, was alike unsuccessful in changing the rule upon which Great Britain had heretofore acted, and eventually a treaty was entered into with Russia (to which Denmark and Sweden afterwards acceded), by which it was agreed, "that goods embarked in the ships of neutrals shall be free, excepting contraband of war, *and the property of enemies:*" Id. 274–278.

France and some other nations, adopting the principle of "free ships, free goods," have also adopted the correlative principle of "enemy ships, enemy goods," according to which the goods of a friend on board the ship of an enemy will be confiscated. The two maxims, "free ships, free goods," and "enemy's ships, enemy's goods," have frequently been embodied together in the same treaty, although they are not necessarily connected, and the only merit which they seem to have is that they simplify judicial proceedings in questions of prize, and reduce the question to be determined by Courts of Admiralty to the simple point, What is the national character of the captured vessel?

Previous to the late war carried on by the English and French as allies, against Russia, it became necessary that their respective navies should act upon the same rules in matters of prize. This was effected by means of a compromise, for while England, during the war, "waived the right of seizing enemy's property laden on board a neutral vessel, unless it were contraband of war," France, on the other hand, acceded to the principle that neutral property on board enemies' ships should not be liable to confiscation.

The same principle was adopted by the plenipotentiaries who signed the Treaty of Paris, the 30th March, 1856, by which it was declared that "the neutral flag covers enemy's goods, with the exception of contraband of war," Art. 2. "And that neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," Art. 3.

Having already stated how far the property of persons who are clearly enemies is liable to capture, it will be necessary to examine

how far persons and property may acquire a hostile character, although the former may not actually be, or the latter belong to, enemies strictly so called. For it has long since been clearly settled by numerous decisions, that there may be a hostile character merely as to commercial purposes, and that hostility may attach only to the person as a temporary enemy, or that it may attach only to property of a particular description. This hostile character, which
*937] subjects property to capture in the same way as if it *belonged to one who was actually an enemy, may arise in various modes.

Where, for instance, in time of war a neutral or subject is carrying contraband of war (The Jonge Margaretha, Klausen, *ante*, p. 847 and note), is guilty of a breach of blockade (The Frederick Molke and The Betsy, *ante*, pp. 873, 875, and note), resists the right of visitation and search (The Maria, *ante*, p. 757 and note), or carries on the colonial or coasting trade of the enemy (The Immanuel and The Wilhelmina, *ante*, pp. 814, 829, and note), or where a subject, or a neutral domiciled with a belligerent, trades with the enemy (The Hoop, *ante*, p. 787 and note; The Andromeda, 2 Wallace (Amer.) 481): in all these cases their property engaged in such transactions will be liable to capture and confiscation.

The character of enemy for the purposes of capture extends to neutrals, or even the subjects of a belligerent domiciled with the enemy (The Matchless, Vint, 1 Hagg. 103; O'Mealy *v.* Wilson, 1 Campb. 482; The Jonge Klassina, Bol. 5, C. Rob. 297; The Aina, Nystrom, Spinks 8; The Johann Christoph, Bohss, Spinks, 60; The Johanna Emilie, Ontjes, Id. 12, 15, 16; Cremidi *v.* Powell, 11 Moo. P. C. C. 88). Even a neutral residing in an enemy's country as consul, if he trades there, is considered as an enemy, and his property at sea is liable to capture: Sorensen *v.* The Queen, 11 Moo. P. C. C. 141. The reason why persons domiciled in a hostile country are treated as enemies is, that their persons, their lives, and their industry are employed for the benefit of the state, under whose protection they live, and they pay their proportion of taxes, imposts, and the like, equally with natural-born subjects:" Wheat. Internat. Law 395, 6th ed. It is however a very difficult question to determine what constitutes a domicil, as there is no universal agreement as to definition of the term, and the gradation from residence to domicil consists both of circumstances and intention: Maltass *v.* Maltass, 1 Robertson, Eccls. Rep. 75.

The term or duration of residence constitutes in a great measure the test as to whether a person is domiciled in a foreign country. "Of the few principles," says Sir William Scott, "that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a person may or shall occupy; for if the purpose be of a nature that may probably, or does actually, detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special *purpose may lead a man to a country where it shall detain him the [*938 whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach, though the fact may be true) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a time there must be.

"In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicil in a certain space of time, would nevertheless have that

effect if distributed over a larger space of time. Suppose an American comes to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicil:" The Harmony, Bool, 2 C. Rob.

The native character however easily reverts, and it requires fewer circumstances to constitute domicil in the case of a native subject than to impress the national character on one who is originally of another country: La Virginie, Coigneau, 5 C. Rob. 99.

National character by occupation may be more easily changed than that by birth, but the change must be *bonâ fide* and cannot be *effected by a mere money payment: The Ernst Merck, 1 Spinks 102.

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A person however who on the breaking out of hostilities takes early steps to withdraw himself from the enemy's country, will be entitled to restitution of his property, although he may have been prevented from carrying out his intention by violent detention within the territories of the enemy: The Ocean, Harmsen, 5 C. Rob. 90. "So," says Sir C. Robinson, in a note to his Reports, "in The Doornhaag restitution was decreed to A. B., removing from Holland, of a ship and parts of a cargo allotted to him on the dissolution of the partnership for the purpose of his removal. The situation of British subjects wishing to remove from the country of the enemy in the event of a war, but prevented by the sudden interruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be advisable for persons so situated on their actual removal to make application to government for a special pass, rather than to hazard valuable property, to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into

execution:" 5 C. Rob. 91, n. See also The Dree Gebroeders, 4 C. Rob. 234; The Juffrouw Catharina, Hansen, 5 C. Rob. 141; Cremidi *v.* Powell, 11 Moo. P. C. C. 88.

Although in general a person acquires the national character of the country in which he is domiciled, this has been held not to be the case where a person was resident in eastern countries. "Wherever," says Sir Wm. Scott, "a mere factory is founded in the eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest times an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—*Doris amara suam non intermiscuit undam;* not acquiring any national character under the general sovereignty of *the country, and not trading under any recognised authority of their own original country, they have been held to derive [*940 their present character from that of the association or factory under whose protection they live and carry on their trade.

"With respect to establishments in Turkey, it was declared in the case of Mr. Fremeaux (1784) in the last war, that a merchant carrying on trade at Smyrna under the protection of the Dutch consul at Smyrna, was to be considered as a Dutchman, and in that case the ship and goods belonging to Mr. Fremeaux being taken after the order of reprisals against Holland, were condemned as Dutch property. The same in China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and being not admitted to assume the character of the country, they are considered only in

the character of that association or factory:" The Indian Chief, 3 C. Rob. 28.

These considerations, however, even in former times, were not applicable to persons domiciled in British India; "for though," observes Sir William Scott, "the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists otherwise than as a phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty, and if the high, or as I may almost say this empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for purposes of policy, it by no means interferes with that actual authority which this country and the East India Company—a creature of this country—exercises there with full effect:" The Indian Chief, 3 C. Rob. 22, 31.

The property of a person may acquire a hostile character independently of his national character derived from personal residence. Thus it is clear that if a person enter into a house of trade in the enemy's country in time of war, or continue that connection during the war, he will not be able to protect himself by mere residence either in a neutral (The Vigilantia, Gerritz, 1 C. Rob. 15) or belligerent country. See The Jonge Klassina, Bol, 5 C. Rob. 297, in which case it was urged on behalf of a British subject who was carrying on a trade in Holland; "that he was settled in this country and engaged in extensive manufactures here." Sir William Scott however held that his establishment in this country could not be permitted to affect his national character. "A man," added the learned judge, "may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries. That he has no counting-house in the enemy's *country will not be decisive. How much of *941] the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea that a counting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself and acts as a merchant of that place, it is sufficient; and the mere want of a fixed

counting-house there will make no breach in the mercantile character which may well exist without it:" The Nina, 1 Spinks 276.

In the case however of a person carrying on trade habitually in the country of the enemy, though not resident there, he is entitled to have time to withdraw himself from that commerce; for it would press too heavily on neutrals to say that immediately on the first breaking out of a war, their goods should become subject to confiscation: The Vigilantia, Gerritz, 1 C. Rob. 15; The Portland Farrie, 3 D. Rob. 41; Haasum and Ernst, The Jacobus Johannes, Miller, Lords, Feb. 10, 1785, cited 1 C. Rob. 14; The Ospray, Paddock, Lords, March 28, 1795, Id. And it would be immaterial if a person on the breaking out of war takes immediate steps to return to his own country, that he has been prevented by the violence of the enemy from carrying his intention into effect: 5 C. Rob. 90.

There are transactions so radically and fundamentally national, as to impress the national character independent of peace or war and the local residence of the parties. Thus, the produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation: per Sir William Scott, in The Vrouw Anna Catherina, Mahts, 5 C. Rob. 167. In The Phœnix, Wildeboer, 5 C. Rob. 20, a claim was given on behalf of certain persons domiciled in a neutral country for property taken on a voyage from the colony of an enemy and described to be the produce of *their own estates;* Sir William Scott held the property liable to condemnation. "Certainly," he observed, "nothing can be more decided and fixed as the principle of this Court, and of the Supreme Court upon very solemn arguments there, that the possession of the soil does impress upon the owner the character of the country as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. . . . . As the produce of the claimant's own plantation in the colony of the enemy, this property must fall under the general law and be pronounced subject to condemnation."

Where there is nothing particular *or special in the conduct of a vessel, the national character will be determined [*942

by the residence of the owner: The Vigilantia, Gerritz, 1 C. Rob. 13.

There may however be circumstances arising from the conduct of a vessel which will lead to a contrary conclusion. Thus it is a known and well-established rule with respect to a vessel, that if she is navigating under the flag or pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails; she makes part of its navigation, and is in every respect liable to be considered as a vessel of that country, and if that be hostile, will be condemned. Thus in The Vrouw Elizabeth, Probst, 5 C. Rob. 2 (Sept. 6, 1803), a ship having been taken under a Dutch flag and pass on a voyage from Surinam to Holland, a claim was given on the part of a merchant of Bremen, stating, "the ship to have been *bonâ fide* his property, though nominally transferred to a Dutch merchant, and placed under a Dutch flag and pass, for the purpose of enabling her to trade between the Dutch colonies and Holland:" Sir William Scott, without any hesitation, pronounced the ship to be subject to condemnation. "I hold the claim," he observed, "to be against the established rules of law, by which it has been decided, that a vessel sailing under the colors and pass of a nation is to be considered as clothed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claim of interest that persons living in neutral countries may have in them. In the war before the last, this principle was strongly recognised in the case of a ship taken on a voyage from Surinam to Amsterdam, and documented as a Dutch ship. Claims were given for specific shares on behalf of persons resident in Switzerland, and one claim was on behalf of a lady, to whom a share had devolved by inheritance, whether during hostilities or not I do not accurately remember, but if it was so she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment, without

being subject at the same time to the inconveniences attaching on it." And see The Vrouw Anna Catherina, Mahts, 5 C. Rob. 167; The Goed Hoop, 2 Acton 32.

Although when a vessel is sailing under a neutral flag, the captors may show that all the property is not neutral, but that part belongs *to the enemy, and in that case the hostile part only will be condemned; the converse of the proposition is not true, for where a vessel is sailing under a hostile flag, a neutral cannot claim any part of the property in the vessel under such flag: The Industrie, 1 Spinks 54, 57; The Primus, Id. 48. [*943

The rule however under purticular circumstances may be departed from. Thus, when it had been stipulated by the Treaty of Amiens that the British should have liberty to withdraw their property from the ceded and restored islands, but the governments of France and Holland afterwards refused to suffer such property to be exported from these colonies otherwise than in ships of France or Holland, and on a destination to those countries; the difficulty which arose in the removal of British property, for want of shipping, induced our own government to permit *British ships to put themselves under Dutch flags* for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute the Treaty, entitled such parties to a declaration of the general rule: 5 C. Rob. 7; and see The Onderneeming, 5 C. Rob. 7, n.

Although however a subject's or neutral's share of a ship navigating under an enemy's flag and pass will in general be confiscated, he may obtain restitution of such parts of the cargo belonging to him, if he has not assumed the character of the enemy, so as to render such parts liable to be considered as enemy's property: The Vreede, Scholtys, 5 C. Rob. 5, n.; Broders Lust, Id. 6, n.

Although the flag or pass of a nation subjects the vessel bearing it to be treated as belonging to that nation, it will not be considered to impress upon him that character conclusively; in effect, all that has been decided respecting the flag and pass is this, "that the party who takes the benefit of them is himself bound by them; he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oaths or solemn declarations; but they do not bind other parties as against him; other

parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of the Court of Admiralty to pull off this mask, and exhibit the vessel so disguised in her true character of an enemy's vessel:" The Fortuna, Verissimo, 1 Dods. 87; The Success, Smith, Id. 131.

In like manner and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account *944] of the war, that vessel will be deemed *a ship of the country from which she is so navigating, in the same manner as if she evidently belonged to the inhabitants of it: The Vigilantia, Gerritz, 1 C. Rob. 13; The Endraught, Broetjas, Id. 20; The Omnibus, Tennes, 6 C. Rob. 71.

In countries where the coasting trade is not thrown open to foreign vessels, habitual employment in such trade will stamp a neutral vessel with a hostile character (The Welvaart, Cornelis, 1 C. Rob. 122); one voyage however would not have that effect: Id. 124.

In time of peace, a transfer of property may be made *in transitu* to a neutral; when war intervenes, another rule is set up by the Courts of Admiralty.

In a state of war, *existing* or *imminent*, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It has on that principle been held as a general rule, that property cannot be converted *in transitu* by an enemy: Vrouw Margaretha, Crigsman, 1 C. Rob. 336; see also The Sechs Geschwistern, 4 C. Rob. 100; The Jan Frederick, 5 Id. 128; The Benedict, Spinks 314; The Caroline, Kraft, Id. 252; The Neptune, Keetley, Id. 281; The Rapid, Hansen, Id. 80; The Christine, Schwartz, Id. 82; The Ernst Merck, Krüger, Id. 98; The Rapida, Bokelman, Id. 172; The Soglasie, Fischer, Id. 104.

Upon the same principle, if, during or in contemplation of war, property shipped by a neutral and going to be delivered in the

enemy's country, under a contract to become the property of the enemy immediately on its arrival, be taken *in transitu*, it will be considered as enemy's property, and the capture being considered as delivery, and the captors by the rights of war standing in the place of the enemy, they are entitled to a condemnation of goods passing under such a contract, as of enemy's property: The Sally, Griffiths, 3 C. Rob. 300, n., 302, n.; The Anna Catherina, Wupper, 4 C. Rob. 107; The Danckébaar, Africaan, Smit, 1 C. Rob. 107.

And, as we have before seen, when a ship sails in a particular character she cannot change it *in transitu:* The Negotie en Zeevart, cited 1 C. Rob. 110, 112; The Herstelder, De Koe, Id. 116.

Although however a ship may not have reached her original port of destination, the *transitus* will be held to have ceased when she has come into the actual possession of a neutral transferee, and if she be afterwards captured, she must be restored. See Sorensen *v.* The Queen, 11 Moo. P. C. C. 141. There a Russian vessel was sold, *bonâ fide* and absolutely, by an enemy to a neutral, when the *war between Russia and Great Britain was imminent. The [*945 vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. It was held in the Privy Council (reversing the sentence of the Admiralty Court), that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into the possession of the purchaser, before the seizure.

It is a moot question whether a British subject can, when war is imminent, enter legally into a contract with a subject of a state likely to become hostile for the purpose of purchasing his property in ships: per Dr. Lushington, 1 Spinks 268.

It is competent however to neutrals to purchase the property of the enemy to another country, if it be not *in transitu, imminente bello*, or even *flagrante bello;* and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port (Spinks 16; Batten *v.* The Queen, 11 Moo. P. C. C. 271; Sorensen *v.* The Queen, Id. 119), but the transfer must be *bonâ fide.* The Johanna Emilie, 1 Spinks 12; The Johann Christoph, Id. 60; The Rapid, Id. 80; The Ernst, Merck, Id. 98.

Where a ship, asserted to have been transferred, "is continued under the former agency in the former habits of trade, all the swear-

ing in the world will not convince the Court that it is a genuine transaction :" The Omnibus, 6 C. Rob. 71 ; The Christine, 1 Spinks 82 ; The Soglasie, Id. 104.

No lien claimed by a neutral upon property captured from the enemy will be allowed to prevail in a Court of Prize. " Captors," says Sir Wm. Scott, " are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant, and the application of that law in different countries, under all the diversities in which that law exists. From necessity therefore the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property, with scarcely any exceptions :" The Marianna, Posadillo, 6 C. Rob. *25 ; see also, The Josephine, Fish, 4 C. Rob. 25 ; The Tobago, *946] 5 Id. 218 ; The Aina, Nystrom, Spinks 8 ; The Ida, Steen, Id. 26.

Recaptures from the Enemy.—An important question arises in the case of recaptures from the enemy, whether the property in the goods recaptured had already passed to him from the original owner or not ; for if the property has passed to the enemy, the captors will be absolutely entitled to it. If, on the other hand, it had not absolutely vested in him, it would, according to the *jus postliminii*, be restored to the original owner upon payment of salvage.

It appears from the judgment of Sir William Scott in The Santa Cruz, that there is no uniform law of nations upon the subject.

According to some nations the rule of pernoctation and twenty-four hours' possession prevails ; that is to say, if a vessel has been

captured, upon the captor retaining possession of it for twenty-four hours the property is changed and the vessel passes to him. According to some nations it is necessary to bring the captured ship *infra præsidia*, that is to say, to a place of security, whether that be to a port or a fleet belonging to the captor's nation, in order to vest the property in him. Other nations, and amongst those Great Britain, deem a regular sentence of condemnation by a competent court necessary to change the property.

Where a British ship, captured by the enemy, has been sold to a neutral after having been condemned by a competent tribunal (The Henrick and Maria, 4 C. Rob. 43; The Comet, 5 C. Rob. 285; The Cornelia, Edw. 244; The Purissima Conception, 6 C. Rob. 45), or where the sale to a neutral has taken place after an irregular condemnation, and the vessel has been afterwards legally condemned (The Falcon, 6 C. Rob. 194), or where peace has intervened after the transfer (The Schoone Sophie, 6 C. Rob. 138), the original British owner cannot, on a recapture, claim possession of the ship; and see The Helena, 4 C. Rob. 3.

Where, however, a British ship has been recaptured from the enemy before condemnation, she will be restored to the former owner on the terms of his paying salvage.

The Prize Acts have been drawn with the intention of expressing the sense and meaning of the law of nations which existed independently of them. See The Ceylon, 1 Dods. 116.

By the Prize Act, 45 Geo. III. c. 72, s. 7, it is in effect enacted that any vessel or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment of a salvage of one-eighth part of the value thereof, if retaken by his Majesty's ships, and if retaken by any privateer, or other ship or vessel under his Majesty's protection, of one-sixth part of such value. And if the same shall *have been retaken by the joint operation of his Majesty's ships and privateers, then the proper court shall [*947 order such salvage as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been *set forth* by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors.

The Prize Act of Russia, 1854, 17 & 18 Vict. c. 18, is somewhat

similar in its terms, omitting, however, all reference to privateers, who were not allowed to be employed during the Russian war. It enacts that "any ship, vessel, goods, or merchandise, belonging to any of her Majesty's subjects captured by any of her Majesty's enemies, and afterwards recaptured from the enemy by any of her Majesty's ships or vessels of war, shall be adjudged by the decree of the Court of Admiralty to be restored to the owner or proprietor thereof upon payment for and in lieu of salvage of one-eighth part of the true value of the said ship, vessel, goods, or merchandise respectively, and such salvage of one-eighth shall be divided and distributed in such manner and proportion as is hereinbefore directed in cases of prize; provided nevertheless that if any such ship or vessel captured and recaptured as aforesaid, shall have been by her Majesty's enemies set forth or used as a ship or vessel of war, it shall not be restored to the former owner or proprietor thereof, but shall be adjudged lawful prize for the benefit of the captors:" s. 9. And ships of her Majesty's subjects recaptured before being carried into an enemy's port may be allowed to prosecute their voyage: s. 10.

This Act is repealed by 27 & 28 Vict. c. 23, and 27 & 28 Vict. c. 25 (An Act for Regulating Naval Prize of War), was passed for the purpose of enacting permanently, with amendments, such provisions concerning naval prize, and matters connected therewith, as had theretofore been usually passed at the beginning of a war. See also 27 & 28 Vict. c. 24, "The Naval Agency and Distribution Act, 1864."

As to what constitutes *a setting forth* by the enemy of a captured vessel as a ship of war, see The Ceylon, 1 Dods. 105; The Georgiana, Id. 397, 401; L'Actif, Edw. 185; The Nostra Signora del Rosario, 3 C. Rob. 10; The Horatio, 6 C. Rob. 320.

The point sometimes arises as to what amounts to such a capture by the enemy as would found a case of recapture. It is by no means necessary that the possession of the enemy should be long maintained. The question will be whether it was an effectual possession, not whether it was a complete and firm possession, which for some purposes is in contemplation of law, not held to be effected till the prize is carried *infra præsidia*. The rule of *infra præsidia*, however, is certainly not to be applied to questions of this kind, as

the clause of the Prize Act alludes to cases of salvage in which no such *complete possession in supposed, since it speaks of vessels being recaptured and permitted to continue on their original voyage: 5 C. Rob. 320. [*948

If a vessel under convoy has been taken by the enemy, it is not necessary that she should have been out of sight in order to found a case of recapture; it will be sufficient, if there has been that complete and absolute possesion which supersedes the authority of the convoying ship, and on recapture by the convoying ship, the recaptors will be entitled to salvage. See The Wight, 5 C. Rob. 315, 321.

Indeed, a vessel may, under the general maritime law, be considered as captured, if it were in the power, although it may never have been in the actual possession, of the enemy. See the Edward and Mary, 3 C. Rob. 305; there a British merchantman, which had separated from convoy during a storm, had been brought to by a French lugger, which came up and told the master to stay by her till the storm moderated, when they would send a boat on board. The lugger continued alongside, sometimes ahead, and sometimes astern, and sometimes to windward for three or four hours. A British frigate, "The Arethusa," coming in sight, chased the lugger and captured her, during which time the merchantman escaped. It was held by Sir William Scott, that the recaptor was entitled to salvage under the general maritime law, although the vessel never came into the possession of the recaptor so as to bring the case within the terms of the Act of Parliament. "There have," said the learned judge, "been many cases of capture where no man has been put on board, as in ships driven on shore or into port. I remember particularly a famous case of a small British vessel armed with two swivels, which took a French privateer row-boat from Dunkirk that had attacked her; the British vessel having only three men on board, and no arms but swivels, was afraid to board the row-boat, which was full of men armed with muskets and cutlasses; but by the terror of her swivels she compelled their submission, and obliged them to go into the port of Ostend, then the port of an ally, she following them all the way at a proper distance. The only question will be, whether it is a case of salvage under the Act of Parliament, on the ground that the vessel never came into the actual and bodily possession of the recaptor. I rather incline to

think it is not. The terms of the Act of Parliament, 'if at any time afterwards surprised and retaken by any of his Majesty's ships of war,' etc., seem to point to a case attended with the circumstance of an actual possession taken. But if it is not a case of recapture under the Act, it is however still a case of salvage under the general maritime law, and I shall give the same award as if it had been under the Act of Partiament." See also The Pensamento Feliz, Edw. 115; The Resolution, 6 C. Rob. 13.

*949] *But salvage will not be granted where the recaptor does not rescue property already in the power of the enemy; it will not be sufficient to found the claim that he probably prevents it from getting into the enemy's hands. Thus in The Franklin, 4 C. Rob. 147, salvage was refused for preventing a British ship from going into an enemy's port, when, after having met with bad weather, she had sprung a leak, and intended going into an enemy's port for the preservation of the lives of the crew. "I know of no case," said Sir William Scott, "in which military salvage has been given where the property rescued was not in the possession of the enemy, or so nearly as to be entirely and inevitably under his grasp. There has been no case of salvage, where the possession if not absolute was not almost indefeasible, as when the ship had struck and was so near as to be virtually in the hands and gripe of the enemy. In such cases, the same hazard is incurred by the salvor, and the same reason exists to hold out a stimulus to recaptors. But in this case there was no enemy to encounter, the danger to the parties was contingent only, and though probable to occur, had not actually occurred. The case which has been cited in argument, does not in point of authority apply. It was the case of a Spanish ship (Navarro, Lords, 18th July, 1795) coming from New Orleans, ignorant of hostilities which had lately commenced, and going into the port of Bordeaux, where she would undoubtedly have been confiscated. A claim of salvage was set up on the part of a British cruiser; but the Court said, No, the danger was something distant and eventual; you had no conflict to sustain; as well might you demand salvage for giving the first information of a war. On the same principle, a British man-of-war on the breaking out of hostilities, might seize a whole fleet going, ignorant of the war, into an enemy's port, and set up a claim of salvage against them."

A vessel liberated by the enemy on bail, by a deposit of money,

although not altogether out of his power, will not found a case for salvage on a recapture; for although it may be said that the ship might be seized again, that is not enough, the Court will not grant salvage on prospective and ideal danger, and the reseizure of a ship after the value has been deposited in a Court of Prize, is so unheard-of and improbable an event as not to be presumed; for from the moment the bail is accepted the ship is sacred to the government by which she has been liberated: The Robert Hale, Edw. 265, 266, 267.

The right of recaptors to salvage is extinguished by a subsequent capture and sentence of condemnation, carried into execution, because it works a conversion of the property, and consequently a defeasance of the right of the salvors (1 Dods. 199); but where the sentence of the Prize Court is overruled by an order of release from the sovereign power of the state, *the legal fiction of conversion cannot be resorted to, and the right of the recaptors to salvage will not be defeated: The Charlotte Caroline, 1 Dods. 192. [*950

The seizure and condemnation, in time of peace, of a British vessel for a violation of the revenue laws of another country, will have the effect of working an entire defeasance of the British title, and upon war afterwards breaking out between the two countries, the ship will be condemned to the captor as property of the enemy, taken in the ordinary course of prize: The Jeune Voyageur, 5 C. Rob. 1.

If an enemy after capture, should make a donation of a vessel to the original owner, the vessel would be condemned as a droit or perquisite of Admiralty, and the original proprietor would acquire no interest but as salvor, or from the subsequent liberality of the Crown. This is laid down in the principal case of The Santa Cruz, *ante*, p. 908.

With regard to the property of allies recaptured from the enemy, Sir William Scott lays down the law in the principal case of The Santa Cruz as follows, "That the maritime law of England, having adopted a most liberal rule of restitution on salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice. This was recognised to be the law of England in the case of The San

Iago, a case which was not decided on special circumstances nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in the profession (Sir E. Simpson), which records the practice and the rule as it was understood to prevail in his time. 'The rule is that England restores on salvage to its allies; but if instances can be given of British property retaken by them, and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.' This principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law: at the breaking out of a war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores." See *ante*, p. 918.

This rule is very well illustrated in the principal case of The Santa Cruz, where it will be observed that the Portuguese ships recaptured before May, 1797, were condemned, because British ships had previous to that date on recapture been confiscated by the Portuguese; but as Portugal had by an ordinance of May, 1797, directed the ships of allies recaptured from the enemy to be restored on salvage, the Portuguese vessels recaptured after that date were upon *951] *the principle of reciprocity also restored upon salvage. See The San Francisco, Edw. 279, as to the treaty upon this subject between England and Spain.

Neutral property recaptured is not subject to salvage by the general rule of law on this subject, founded on a supposition that justice would have been done if the vessel had been carried into the port of the enemy; and that if any injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country to whose cognisance the case would regularly have been submitted: The Huntress, 6 C. Rob. 104, 108.

In such cases the recaptured neutral property is restored without salvage, upon the presumption that no peril has been incurred, but that on being carried into the courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favor of every state, which has not sullied its character by a gross violation of the law of nations.

But the contrary presumption takes place if states hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule had been founded is then done away; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation. Of this nature was the decree of the French government, which was issued on the 21st November, 1806, according to which neutrals trading with Great Britain were liable to condemnation, and in such cases of recapture from the French property was restored only on payment of salvage: The Sansom, 6 C. Rob. 410, 413; see also The War Onskan, 2 C. Rob. 299; The Eleonora Catherina, 4 C. Rob. 156; The Carlotta, 5 C. Rob. 59; The Acteon, Edw. 254.

Where moreover the enemy might on just and sound principles condemn neutral property, as, for instance, for breach of blockade, for being contraband of war, or on account of resistance to the right of visitation and search, it is clear that upon a recapture of such property the captors on restoring it would be entitled to salvage. Upon the same principle salvage was decreed on the recapture of neutral goods previously taken by the enemy on board a British armed ship: The Fanny, 1 Dods. 443; and see The Elsebe, 5 C. Rob. 176.

Who are authorized to make Prize.]—Although the declaration of war places all the subjects of the belligerent powers in a state of hostility to each other, the usage of nations only legalizes such acts of hostilities as may be committed by persons duly commissoined by the sovereign authority. In maritime warfare, ships of the navy are duly authorized to make prize; moreover letters of marque may *according to the usage of nations be granted to private armed vessels, usually termed privateers. The use however [*952 of privateers has been disapproved of by many nations, and in the last war between England, France, and Sardinia on the one side, and Russia on the other, no letters of marque were issued by any of the belligerents. The Queen of England, in the declaration of war, declaring "that being anxious as much as possible to lessen the evils of war, and to restrict its operations to the regularly organized forces of the country, it was not her present intention to

issue letters of marque for the commissioning of privateers." Most of the neutral powers of Europe strictly prohibited their subjects from any participation in the war by accepting of letters of marque. And it appears to be contrary to the law of the United States, for any citizens or residents therein to equip privateers for the purpose of taking part in a *foreign* war: Wheaton, Intern. Law 434, 435, n., 6th ed.

It is perfectly legal however for any of her Majesty's subjects, although they may not have a commission, to seize an enemy's ship; but it does not become the property of the captor, but of the Crown as a droit of Admiralty. There are many instances in which a capture has been made in port by non-commissioned captors, and the usual form has been for the proceedings to be conducted under the authority of the Proctor for the Admiralty, and condemnation has passed to her Majesty in her office of Admiralty: The Johanna Emilie, 1 Spinks 14.

As to the Mode of determining whether a Prize be good or not.]—"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not lawful prize.

"Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding wherein both parties may be heard, and condemnation thereupon as prize in a Court of Admiralty, judging by the law of nations and treaties.

"The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

"The evidence to acquit or condemn with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board and the examination on oath of the master and other principal officers; for which purpose there are officers of Admiralty in all the considerable seaports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn, an enemy's property or contraband, goods going to the enemy, there must be an acquittal; unless from the aforesaid evi-
*953] dence the property *shall appear so doubtful that it is reasonable to go into the further proof thereof.

"A claim of ships or goods must be supported by the oath of somebody, at least as to belief.

"The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

"To enforce these rules, if there be false or colorable papers, if any papers be thrown overboard, if the master and officers examined *in præparatorio* grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehavior or suspicion arising from the fault of the ship taken and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose all privateers are obliged to give security for their good behavior; and this is referred to and expressly stipulated by many treaties.

"Though from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not show the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a Superior Court of Review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this Superior Court judges by the same rule which governs the Court of Admiralty, viz. the law of nations and the treaties subsisting with that neutral power whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive." Answer to the Prussian Memorial concerning Neutral Ships, Harg. Coll. Jur. 134, and see 27 & 28 Vict. c. 25; and Schacht *v.* Otter, 9 Moo. P. C. C. 156, 157, 158.

As to the general duties of officers of her Majesty's navy in time of war, see a Manual of Naval Prize Law, by Godfrey Lushington.

The general rule is that a prize shall be brought into a port belonging to the captor's country, or to an ally, but under peculiar circumstances the Court of Admiralty will condemn a prize which *954] has *been taken into and is in a neutral port and allow it to be sold there: The Polka, Spinks 57; and see The Henrick and Maria, 4 C. Rob. 43.

In the case of The Trent, the English government rightly demanded direct and immediate redress, because the American officer by his conduct—in not taking in the vessel for adjudication—had withdrawn the question from the possibility of the proper legal adjudication: Historicus on International Law, Additional Letters, p. 5.

For the subjects of the foregoing note, in general, see 1 Kent Com. Lectures IV. and VI., and Wheaton on International Law, Part IV., Chapter III.

Loyal citizens or neutrals, who trade with an enemy or have a mercantile domicil in an enemy's country, are regarded in prize courts, in their commercial dealings and transactions there, as enemies in relation to vessels and cargoes owned by them and captured at sea: The Hiawatha, Blatchford's Prize Cases 1; The Sarah Starr, Id. 69; The Prince Leopold, Id. 89; The Shark, Id. 215; The John Gilpin, Id. 291; The Sally Magee, Id. 379; The Stephen Hart, Id. 387; The Peterhoff, Id. 463; The Mary Clinton, Id. 556. A vessel and cargo, even when perhaps owned by neutrals, may be condemned as enemy property, because of the employment of the vessel in enemy trade, and because of an attempt to violate a blockade and to elude visitation and search: The Baigony, 2 Wallace (S. C.) 474. The mere fact that enemy's property is shipped to the order of a neutral, does not affect its liability to seizure and forfeiture as prize of war: The Hannah M. Johnson, Blatchford's Prize Cases 35. A neutral cargo shipped in an enemy's bottom from a neutral port to an unblockaded port of a belligerent, is not liable to seizure as prize: The Velasco, Blatchford's Prize Cases 54. A neutral ship conveying goods, whose ultimate destination is a belligerent port, to a neutral port, having genuine papers, which do not show signs of spoliation, and sailing under a charter made in good faith and without fraudulent connection on the part of her owners with

the final destination of the goods, is not liable to condemnation, though she may be seized in order that the goods may be confiscated: The Springbok, 5 Wallace (S. C.) 1. A foreign consul of a neutral country, who resides in a belligerent state and carries on private trade, has no privilege and his property is liable to condemnation: The Pioneer, Blatchford's Prize Cases 666. The neutral owner of a vessel, who gives up the entire control and management to a third party, is responsible for any violation of belligerent right which she commits: The Stephen Hart, Blatchford's Prize Cases 387; The Springbok, Id. 434. Where a neutral has, by residence in an enemy's country, acquired a domicil there, his property is considered enemy property and liable to confiscation: Cargo of El Telegrafo, 1 Newberry 383; The Amado, Id. 400. The property of a commercial house established in an enemy's country is subject to condemnation as prize, although some of the partners have a neutral domicil: The Cheshire, 3 Wallace (S. C.) 231. If a partner in a trading house in a neutral country be domiciled in the enemy's country and ship goods to the partners on their joint account, they are not liable to condemnation. *Aliter* if they are shipped for their separate account: The San Jose Indiano, 2 Gallis. 268. The share of a partner in a neutral house, when his own domicil is in a hostile country, is subject to confiscation *jure belli*: The Francia, 1 Gallis. 618; The San Jose Indiano, 2 Id. 268; The Antonia Johanna, 1 Wheat. 159. The stipulation in a treaty that "free ships shall make free goods," does not imply the converse of the proposition "that enemy ships shall make enemy goods:" The Nereide, 9 Cranch 388. By investing his means and participating in the trade of a belligerent nation, a neutral affixes to himself the hostile character of that nation: The Mary Clinton, Blatchford's Prize Cases 556.

Where a party goes into an enemy's country just before the breaking out of the war, who leaves after that event as soon as he can convert his property into funds, which can be conveniently carried with him, he is not regarded as an enemy: 52 Bales of Cotton, Blatchford's Prize Cases 644; The Sarah Starr, Id. 650; The John Gilpin, Id. 661.

No American consul in an enemy's country, nor the commander of an American frigate, has any authority to grant any license or permit, which can have the legal effect of exempting the property of an enemy from capture and confiscation: The Amado, 1 Newberry 400.

A ship of war owned by a belligerent was taken into a neutral port from fear of capture and sold to a neutral residing there, who purchased her in good faith and fitted her for the merchant service: Held that she remained liable to capture by the other belligerent: The Georgia, 7 Wallace (S. C.) 32. A colorable sale of a vessel made by the owner, who is a citizen and resident of a belligerent country, for the purpose of transferring

her to a neutral state, is no protection from her seizure and condemnation as prize: The Sarah Starr, Blatchford's Prize Cases 69; The Mersey, Id. 187.

The fact that an innocent party has a lien upon goods seized as prize of war, does not affect their liability to forfeiture: The Winifred, Blatchford's Prize Cases 33; The Delta, Id. 123; The Mary Clinton, Id. 556. Property of an enemy shipped to a creditor with the intention of its being applied in payment of the latter's claim, is liable to forfeiture if seized before reaching the creditor's hands: The Hannah M. Johnson, Blatchford's Prize Cases 91. A bill of lading transmitted to a party to cover advances made on a cargo embraced in such bill, does not pass the title to such cargo under the prize law: The Lynchburg, Blatchford's Prize Cases 49. Where a neutral merchant purchased a cargo for enemies, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, held that as he had the legal title and possession, he was not to be deemed a lien-holder but rather a trustee, with the right of retention until his advance should be repaid: The Amy Warwick, 2 Sprague 150.

Sailing under the flag and pass of an enemy is sufficient of itself to confiscate both ship and cargo: Cargo of El Telegrafo, 1 Newberry 383; The Amado, Id. 400; The Hiawatha, Blatchford's Prize Cases 1; The Hallie Jackson, Id. 41. The sailing under an enemy's license is legal cause for the forfeiture of a neutral vessel: The Alliance, Blatchford's Prize Cases 262; The Gondar, Id. 266. If a neutral owner of a portion of the property captured as prize on the high seas, interposes a claim for another part belonging to an enemy for the purpose of deceiving the court, the portion belonging to the neutral will be condemned as a penalty for his fraudulent conduct: The Lilla, 2 Sprague 177. A vessel and cargo were condemned as enemy property, upon proof of the spoliation of papers at the moment of capture, and that a former enemy owner remained in possession as master of the vessel for a year through two alleged sales to neutrals, the alleged neutral owners leaving the whole defence to the master: The Andromeda, 2 Wallace (S. C.) 481.

The produce of the enemy's soil owned by a neutral, while it remains in the enemy's country, particularly if obtained there by a resident agent of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is *pro hâc vice* an enemy: The Mary Clinton, Blatchford's Prize Cases 556. The libelling by the United States of a prize captured by a transport in its service, but not a commissioned ship of war, is equivalent to an original seizure by the government, and is an affirmance of the capture: The Emma, Blatchford's Prize Cases 561. Neutral merchant steamers carrying mails are not privileged from search by vessels of war:

The Peterhoff, 5 Wallace (S. C.) 28. Captors are not in general entitled to freight, on the capture of neutral property on board of an enemy's ship, unless the goods are carried to the port of destination within the intent of the contracting parties: The Ann Green, 1 Gallis. 274. The property of persons domiciled in a neutral country is good prize, if recaptured after being twenty-four hours in the possession of the enemy, where such is the rule in the neutral country: The Adeline, 9 Cranch 244. See Ship Resolution, 2 Dall. 1.

INDEX TO THE NOTES.

THE PAGES REFERRED TO ARE THOSE BETWEEN [ ].

ABANDONMENT,
History of, in Roux *v.* Salvador, 157.
Doctrine of, upon what founded, *id.* *See* TOTAL LOSS.
What is necessary to constitute, 181.
Not necessary in case of absolute total loss, *id.*
Insured entitled "to salvage-loss without notice of abandonment," *id.*
In a proper case, on receiving intelligence of loss, assured may treat it as total or average, *id.*
If treated as total, notice of, must be given within a reasonable time, *id.*
What is a reasonable time, depends upon circumstances of each case, *id.*
Assured, on receiving certain intelligence of disaster, should give notice of, without waiting for result, *id.*
As on ship's capture, *id.*
Or detention in a foreign port, *id.*
But he may wait until he has received certain and accurate intelligence, *id.*
And has acquired a full knowledge of the damage done to the thing insured, 182, 183.
Will not be allowed to give notice of, after lying by and treating loss as average, 183.
Or if he prejudices the interests of the underwriters in recovering the proceeds of the insured property, 184.
Cannot be partial, *id.*
Must be absolute and unconditional, *id.*
Person not having unconditional right to possession of goods cannot make, *id.*
Generally made in writing, *id.*
May be by parol, *id.*
Must be express and unequivocal, *id.*
Must be given by assured, 185.
Or by person having authority from him, *id.*
Underwriters, by conduct, may acquiesce in informal notice of, *id.*
Notice of, when accepted, irrevocable, *id.*
Though things insured be restored before action brought, *id.*
And title of underwriters has relation back to time of alleged loss, *id.*
Acceptance of notice of, may be in writing, *id.*
Or verbal, *id.*
It must be distinct and unequivocal, *id.*

ABANDONMENT—*continued.*

If underwriters wish to dispute notice of, they must do so within a reasonable time, 185.

Or they may be held bound by acquiescence, *id.*

before acceptance may be revoked by acts of assured, *id.*

Or waived, *id.*

Acts of master as agent of *both* parties will not have that effect, *id.*

Nor will acts of insured, unless they clearly amount to acts of ownership, *id.*

Effects of, *id.*

operates as an assignment to the insurers, 186.

Except in the case of a ship where in consequence of the Registry Acts it amounts merely to an agreement to assign, *id.*

Thing transferred by, to underwriters, is termed "*Salvage*," *id.*

Losses that give rise to right of, are termed, what, *id.*

Incidents to things abandoned pass with it, *id.*

As claim on account of damage from collision, *id.*

Proceeds of reprisals, *id.*

Freight earned by ship instead of freight insured, *id.*

Freight pending at the time of casualty will belong to underwriters on ship, *id.*

Or freight earned after abandonment, *id.*

Where owners of ship and cargo are distinct, underwriters on ship become entitled to freight pending at, and earned after, casualty, 187.

And shipowner cannot recover it from underwriter on freight, 187, 188.

Where same person is owner of ship and cargo, freight will not, upon, pass to underwriters on ship, 188, 189, 190.

Nor does freight earned on transshipment of cargo, 190.

As to deductions made from from freight before proceeds paid to underwriters, *id.* *See* TOTAL LOSS.

ABSOLUTE TOTAL LOSS. *See* TOTAL LOSS.

ACCOUNTS

Between partners taken by Courts of Equity, 365.

Whether it is essential that dissolution of partnership should be sought, *id.* *See* PARTNERSHIP.

ACKNOWLEDGMENT,

Partner can bind firm by, 300. *See* PARTNER—PARTNERSHIP.

ADJUSTMENT OF AVERAGE.

Underwriters' liability to make good loss, depends upon principle of indemnity, 211.

Standard of value in the case of a valued policy, *id.*

an open policy, *id.*

Example in the case of a valued policy where there is a total loss, *id.*

Assured not required to prove value of thing assured, 211, 212.

Except in case of fraudulent overvaluation, *id.*

Immaterial that thing insured is reduced in value at time of loss, 212.

Example in case of total loss, where there has been no valuation, *id.*

ADJUSTMENT OF AVERAGE—*continued.*
Where loss is partial, in the case of an open policy the prime cost is standard for ascertaining liability, 212.
In the case of a valued policy the sum fixed, *id.*
Proportion of loss, how calculated, *id.*
Rule for ascertaining sum to be paid by the insurers, *id.*
Rule equally applicable, whether goods come to a rising or a falling market, *id.*
Lord Mansfield's illustration of the rule, *id.*
Lord Ellenborough's observations upon it, 213.
To what amount insurer should insure in order to keep within principle of indemnity, *id.*
In caclulating a partial loss on a policy, the difference between the respective gross proceeds of the sale of sound and damaged goods should be taken, *id.*
And not the net proceeds, *id.*
Where, on trial, amount of loss is left to be ascertained by an arbitrator, 214.
In case of valued policy, liability of underwriters where *part* only of cargo is on board, *id.*
In the adjustment of particular average on a continuing policy, *id.*
In the case of a ship in valued policies, the sum fixed, except in cases of fraud, is the standard for the adjustment of particular average, *id.*
In open policies, the value of ship at the commencement of risk, 215.
Mode of adjusting particular average on ship, *id.*
Rule as to the deduction of one-third of the expenses of repairs of ship, *id.*
Not applicable on first voyage, *id.*
As to what will be considered a first voyage, *id.*
Rule of the Marine Insurance Company, *id.*
Preference of Lord Abinger for the last rule, *id.*
No deduction of one-third where the owner could not regain ship through default of underwriters, *id.*
Secus where ship was not regained through owner's default, *id.*
Deduction of thirds in respect of other parts of the ship's furniture, 216.
Expenses for repairs may be recovered in addition to total loss, when, *id.*
But not for an average loss where no expenses have been incurred in addition to a total loss, *id.*
Secus if average loss has been followed by an improper sale of ship, 217.
Adjustment of partial loss on freight, *id.*
Where part only of the cargo is on board or contracted for in a valued policy at the time of loss, *id.*
In open policy on freight loss is adjusted on the gross and not on the net amount of the freight, 218.
Where part only of the cargo is on board or contracted for in case of open policy at time of loss, *id.*
Valuation in policy conclusive only between the assured and underwriters, *id.*
And without taking into consideration what has been transacted between assured and third persons, *id.*

ADJUSTMENT OF AVERAGE—*continued.*

Insurer effecting two policies valued differently not limited by lowest valuation, 218.

But having received part of sum assured under some policies can only recover difference under others, *id.*

Insurer effecting two insurances declaring the same value in each, bound by it, 219.

Where assured has an interest in cargo on a valued policy, unnecessary for him to prove the amount, *id.*

Onus lies on underwriter of showing policy to be a valued one, *id.*

ADMISSION,

Partner can bind firm by, 300. *See* PARTNER—PARTNERSHIP.

ADMISSION OF PARTNER

In proceedings in law or equity, how far binding on firm, 305. *See* PARTNER.

AGENT.

Partner agent for firm, 292. *See* PARTNER—PARTNERSHIP.

ALIEN

Friend may enter into partnership, 337.

But not an alien enemy, *id.*

Or a person domiciled in an alien enemy's country, *id.* *See* PARTNERSHIP.

Friend protected in the enjoyment of trade marks, 580. *See* TRADE MARKS.

APPORTIONMENT

Of premium on maritime insurance, when made, 228. *See* PREMIUM.

APPROPRIATION

Of goods in performance of contract of sale, 614. *See* SALE OF CHATTELS.

APPROPRIATION OF PAYMENTS.

Explanation of the term, 17.

Questions as to, arise at law and in equity, 18.

Court of Equity will not determine purely legal question as to, *id.*

1. Rule. *Debtor* in the first instance has power to make, *id.*

At the time of making a payment, *id.*

By declaring his wish in express terms, *id.*

Or it may be inferred from his conduct or circumstances of payment, 19.

Where payment is made in consequence of application for a particular debt, *id.*

by realization of the security, *id.*

or of exact amount of goods supplied, 20.

or within time allowed for discount, *id.*

to a banker who has a subsisting demand is a payment and not a deposit, *id.*

generally on account of principal and interest, will be attributed to debts not barred by Statute of Limitation, *id.*

APPROPRIATION OF PAYMENTS—*continued.*
2. Rule. *Creditor* may make, if debtor do not, 21.
And court of law will recognise when made in discharge of an equitable debt, *id.*
May be made by creditor at any time before trial, *id.*
But if communicated to the debtor it cannot be altered, 22.
Cannot make to an unlawful demand, *id.*
But may to a debt barred by statute, *id.*
as by Statute of Limitations, *id.*
or by Statute regulating sale of Spirituous Liquors, *id.*
Attorney may make, in respect of costs not enforceable at law, when, 22.
Creditor by making, does not prevent operation of Statute of Limitations, 22, 23, 24.
General payment applicable to legal debt in preference to an uncertain or disputed debt, 24.
Cannot be appropriated to debt due from the payor as executor when another is due from him in his own right, *id.*
Entire demand cannot be split by creditor for the purpose of making, *id.*
As in the case of attorney's bill containing taxable and non-taxable items, *id.*
3. Rule. Where neither party makes, law does to earlier debt, *id.*
As the first item of a general banking account, *id.*
Even in the case of trust-moneys paid in to trustee's account, 25.
By new firm in payment of debts of old partnership, *id.*
Exception in the case of particular dealings or stipulations between the parties, 25, 26, 27.
as where liability was to be regarded as continuing, *id.*
Ordinarily when past may be varied by contract, 27.
not by executor, *id.*
Payments by firm cannot be appropriated by creditor to debt of individual partner, *id.*
General payment applicable first to payment of interest, *id.*
afterwards to payment of principal, *id.*
Roman law the same, 28.
General payment on account of interest not appropriated to interest barred by Statute of Limitations, *id.*
To demand arising from lawful, in preference to demand arising from unlawful contract, *id.*
When apportioned between two debts, 29.
Appropriation of securities, *id.*

ARBITRATION.
Partner cannot bind firm by submission to, 301.
Court of Equity will not decree specific performance of contract to refer to, 365.
Nor substitute Master for Arbitrator, *id.* *See* PARTNER—PARTNERSHIP.

ARREST.
Of person depends on the *lex fori*, 277.
And will take place though not allowable where debt contracted, *id.* *See* CONFLICT OF LAWS.

ASSENT.
Partner can bind firm by, when, 300. *See* PARTNER—PARTNERSHIP.
In the case of a deed for benefit of creditors, 308.

ATTORNEY.
Appropriation of payments by, in respect of costs not enforceable at law, when, 22.
In case of bill containing taxable and non-taxable items, 24. *See* APPROPRIATION OF PAYMENTS.

ATTORNEYS.
Firm of, how far bound by receipt of partner, 304, 305. *See* PARTNER.

AVERAGE. *See* ADJUSTMENT OF AVERAGE—GENERAL AVERAGE.

AWARD.
Partner entering into a submission to, liable to an action on firm refusing to be bound, 302. *See* PARTNER.

BANKRUPTCY.
When effect of, in a foreign country, is a mere discharge of bankrupt's person, it is no defence to proceedings here, 274.
Certificate under bankruptcy in England, discharge for debt contracted before bankruptcy at Calcutta, 275.
Though debtor residing at Calcutta had no notice of it, *id.* *See* CONFLICT OF LAWS.
Of firm, how property is distributable on.
Joint debts are first payable out of joint effects, 410.
And then out of residue of separate effects after satisfying separate creditors, *id.*
Separate creditors first payable out of separate estate, *id.*
And then out of residue of joint effects after satisfying joint creditors, *id.*
Question determined in *Ex parte Rowlandson*, *ante*, p. 407, *id.*
What is joint estate, 411.
separate estate, 411, 412.
What are joint debts, 413.
separate debts, *id.*
joint and separate debts, *id.*
breaches of trust by firm, *id.*
Debt due from firm consisting of a dormant and ostensible partner, *id.*
By consent of all parties, a joint may be converted into a separate debt, 414.
Or a separate debt into a joint debt, *id.*
Instrument in writing is the best evidence of intention to convert, *id.*
And creditor must have complied with terms imposed by it, *id.*
Debt may be converted by parol agreement, *id.*
by conduct from which agreement may be inferred, *id.*
Creditor seeking to show conversion of debt, must prove his assent previous to, 415.
Joint debt merged in separate bond, *id.*
Joint debt of firm merged in judgment against one of the partners, *id.*

BANKRUPTCY—*continued.*
Joint and several debt merged in joint judgment, 414.
Exception where parties against whom judgment is not obtained are out of the jurisdiction, *id.*
Merger of debt in a higher security prevented by the intention of the parties, 416.
As where warrant of attorney on which judgment was entered up was intended to be a collateral security only, *id.*
Or a bond and judgment, entered up thereon, *id.*
Remedy against separate estate remains, where partnership security was intended to be only collateral, *id.*
Taking of a separate security will not necessarily convert a joint into a separate debt, *id.*
As when the joint security is given as a mode of satisfaction, *id.*
Secus when it is given in substitution for the original debt, *id.*
Importance of question whether a debt has been converted with or without extinguishment, 417.
Right of proof against joint and separate estates, 417.
Proof by joint creditors against joint estates, 419.
partners, or their estates, against the joint estate, *id.*
Exceptions to rule against proof by partners against joint estate, 420.
Proof by separate creditors against joint estate, 421.
against separate estates by separate creditors, 422.
by joint creditors against separate estates, *id.*
Exception to rule, 422.
First—where joint creditor is petitioning creditor under a separate petition, *id.*
Although he has a separate debt sufficient to support the petition, *id.*
Secondly—where there is no joint estate, and no living solvent ostensible partner, 423.
Notwithstanding the estate of a deceased partner be solvent, *id.*
Secus if there be joint estate, however small in amount, *id.*
But it must be such as can be reached by the Court, *id.*
Goods belonging to the partnership pledged to creditor for more than they are worth not considered joint estate, *id.*
Joint creditor cannot prove against separate estate if there be a solvent partner, *id.*
Unless he is abroad and cannot be reached, 424.
Mere insolvency of a partner not sufficient, *id.*
Inquiry directed whether there is any joint estate, *id.*
Separate estate paying joint creditors must be reimbursed if there is any joint estate, *id.*
Where several firms engaged in a joint adventure and all but one abroad, *id.*
Thirdly—Joint creditor can prove against separate estate where there are no separate debts, *id.*
Or if he has paid all the separate debts, *id.*
Fourthly—Exception where partner has fraudulently converted property of the firm to his own use, *id.*

BANKRUPTCY—*continued.*

Fifthly—Exception where partner carrying on distinct trade becomes indebted to the firm, 425.

Proof by partner against separate estate, *id.*

Partner can prove debt due from partnership upon a separate adjudication against copartner, *id.*

But not in competition with the partnership creditors, *id.*

Firm cannot prove against separate estate of copartner, *id.*

Unless debt is constituted by fraud, *id.*

Proof in respect of sum paid by person induced by fraud to become a partner, *id.*

Proof by company against estate of a shareholder, 426.

By solvent against separate creditors if he pay joint creditors all due to them, *id.*

or part in discharge of the whole, *id.*

not sufficient that he should merely indemnify estate of bankrupt partner against joint debts, *id.*

But indemnity sufficient where one of the joint creditors is a lunatic, *id.*

Solvent partners may prove debt against bankrupt partner's separate estate after payment of partnership debts, *id.*

Or if there are no joint debts, 426.

Or where joint have been converted into separate debts, *id.*

Proof by retiring partner in respect of debts which remaining partner covenanted to indemnify him from, 427.

Although retiring partner when he left firm knew it to be insolvent, *id.*

If he neglect to prove discharge bars action on the covenant of indemnity, *id.*

To what extent solvent partner paying joint debts can prove against separate estate of his partners, *id.*

According to Sir John Leach, *id.*

Lord Eldon, 427, 428.

Surplus after paying debts of separate creditors, less interest applicable in payment of principal to joint creditors, 428.

Partner making good deficiency of joint estate entitled to surplus of separate estate before interest is paid to separate creditors, *id.*

Surplus of joint estate payable to solvent partners in part payment of balance due to them, with liberty to prove against separate estate for the balance, *id.*

But so as not to disturb dividends already made, *id.*

Jurisdiction of Court of Bankruptcy to compel a partner to account for over-receipts of joint estate to executor of solvent partner, *id.*

Partner may prove against separate estate, if insufficient to pay separate creditors, when, 429.

But proof may be expunged if there appears surplus available for joint creditors, *id.*

Contribution between estates, *id.*

Proof against both joint and separate estates and as to election of proof, *id.*

Joint and separate creditor should at first prove against both estates, *id.*

Must elect before he receives a dividend whether he will proceed against joint or separate estate, *id.*

BANKRUPTCY—*continued.*
Lord Talbot's reasoning upon the doctrine of election of proof, 429.
Remarks upon it by Lord Eldon, 430.
Mr. Commissioner Hill, *id.*
Lord Talbot's doctrine acted upon, *id.*
In order to put creditor to his election, immaterial whether security arises from the same or different instruments, *id.*
Creditor holding a bill of exchange drawn by one partner and accepted by the firm must elect, *id.*
At all events if he was aware of relation between the drawer and the firm, *id.*
And semble, even if he were ignorant of that, *id.*
Joint creditor obtaining a separate adjudication may elect to prove against joint or separate estates, 431.
Must resort to joint estate upon a joint adjudication, *id.*
Right of a joint creditor upon a separate commission being superseded by a joint commission to elect, *id.*
Right of a joint and separate creditor taking out separate commission superseded by joint commission to elect, *id.*
Creditor may prove against joint or separate estate where separate debt has been converted by collusion, *id.*
As where a fiduciary applies trust funds to the use of firm its knowledge, as in the case of a trustee, *id.*
or assignee of a bankrupt, *id.*
Secus if rest of firm were not aware of the misapplication of the trust funds, *id.*
Creditor having elected is entitled to no other advantage over other creditors, *id.*
And if he elects to go against joint estate, he has no preference over other joint creditors, *id.*
Excluded from the other fund unless there remains a surplus, *id.*
Creditor before electing is entitled to look into accounts, 431, 432.
And on refunding he may sometimes waive proof, and prove against the other estate, 432.
As if he has first proved in ignorance of his right to elect, *id.*
or of the value of both funds, *id.*
But waiver of proof not allowed to disturb dividends already made, *id.*
Or where it affected certificate of bankrupt already signed, *id.*
Secus where it would not affect it, *id.*
When value of estates not ascertained, order made for equal dividend in both estates, *id.*
Mistake made by creditor proving against wrong estate rectified, *id.*
Election made after full knowledge of facts cannot be recalled, *id.*
Proof of debt election not to proceed in an action, *id.*
Double proof admitted in cases in which there has been an aggregate and distinct trade by some or one of the members of a firm, when, 433.
Not in recent cases, *id.*
Rule against double proof prevails only in bankruptcy, *id.*
Exception to rule in certain cases in favor of holding bills of exchange and promissory notes by 24 and 25 Vict., c. 134, *id.*

BANKRUPTCY—*continued.*
When debtor is liable in respect of distinct contracts as member of two or more firms carrying on separate and distinct trades, 433.
Or as a sole trader and also as the member of the firm, *id.*
Consolidation of estates were allowed, 434.
Creditor holding security not allowed to prove unless he gives up his security, *id.*
or after realizing it, *id.*
Secus where creditor has a security on the estate of a third person, *id.*
Joint creditor is entitled to prove against separate estate without giving up security on separate estate, 435.
Joint creditor may prove against bankrupt, and sue the solvent partner, *id.*
Debt due from firm secured as to part by a joint and as to part by a joint and separate security, may be proved against both estates, how far, *id.*
Proof in respect of separate debt of partner secured as to part by joint security of firm, *id.*
See PARTNERS, PARTNERSHIP—REPUTED OWNERSHIP.

BILL OF EXCHANGE
Made abroad. *See* CONFLICT OF LAWS.
Partner can bind firm by, when, 294. *See* PARTNERS—PARTNERSHIP.

BILLS OF SALE ACT
Does not alter doctrine of reputed ownership, 456.

BLOCKADE.
Neutral cannot trade with place affected by, 881.
Nor the subjects of a belligerent, 882.
nor his allies, *id.*
unless under a proper license, *id.*
Declaration of act of sovereign authority, *id.*
By commander on a distant station, *id.*
Not confined to fortified places, *id.*
Complaints of Napoleon I. in the Berlin Decree, 882, 883.
how far founded on truth, *id.*
What constitutes a violation of, 883, 884.
What constitutes an actual blockade, *id.*
Maritime blockade not violated by egress by inland navigation, 884.
not suspended by blockading force being driven off by accident, *id.*
as by the winds, *id.*
unless reason of suspension were unknown, *id.*
at an end, when blockading squadron is driven off by superior force, *id.*
presumed to be raised, when some vessels are permitted to pass, 885.
Relaxation of, in favor of belligerents to exclusion of neutrals, illegal, 885, 886.
or in favor of some neutrals, 886.
Modification of, should be notified to neutral states, *id.*
Existence of, burden of proof as to, 887.
In case of blockade by simple fact, *id.*
blockade by notification, accompanied by fact, *id.*

BLOCKADE—*continued.*
Ceases when place blockaded falls into the possession of the blockading power, 887.
Vessels taken with intention of violating, in such case cannot be condemned, *id.*
2. To constitute violation of, notice of, to offending party, requisite, 888.
By public notification, *id.*
Or by notice *de facto* by blockading force to vessels going in, *id.*
Notice not necessary to vessels coming out, when, *id.*
Effect of notification of, to foreign government, 889.
Individuals of nations cannot plead ignorance of, *id.*
Duty of foreign government to communicate notification, *id.*
Presumption that it has been made, *id.*
violated by sailing for place after it has been notified, *id.*
Secus when existing only *de facto*, *id.*
Notice of, more extensive than blockade, may be disregarded by neutrals, *id.*
not violated by omission of one of the conditions under which vessels may go out, 890.
3. What constitutes act of violation of, *id.*
Violation of blockade by ingress, what is, *id.*
Beginning to execute intention, *id.*
Going to station of blockade to make inquiries, *id.*
No excuse that charter-party binds master to sail to port blockaded, *id.*
that he is merely sailing in ballast, *id.*
in want of a pilot, *id.*
or wishes to make inquiries, *id.*
or to procure a license, *id.*
Violation of, by master refusing to quit equivocal position, *id.*
Consequence of being found in place where blockade might be broke, *id.*
Evidence of place of capture, 891.
Ships sailing from America for blockaded place, entitled to notice there, when, *id.*
Violation of, by egress with cargo, *id.*
Unless taken in before the commencement of, 892.
Violated by egress of ship purchased by neutral after commencement of, *id.*
Immaterial out of what fund ship is purchased, *id.*
Proof as to transfer of enemy's ship before blockade, *id.*
Transfer of ship purchased by one neutral from another, allowable, *id.*
Ship entering port before, may come out with the same cargo, *id.*
or in ballast, *id.*
or with cargo taken on board before notice of, *id.*
Neutrals may withdraw from blockaded port merchandise sent in before, *id.*
Cargo cannot be sent in lighters to neutral ship coming out in ballast, *id.*
Probable cause for detention of all vessels coming out of blockaded port, 893.
For particular purpose, not violated by egress, when, *id.*
Ship taken on any part of her voyage after breach of, confiscable, *id.*
Unless the blockade has ceased, 894.

BLOCKADE—*continued.*

Neutral ship may leave blockaded port upon permission under Orders in Council, 894.

But she may be captured on a subsequent voyage, if she goes to a hostile instead of a neutral port, *id.*

Cargo when condemned for a violation of blockade by the ship, 895, 896, 897.

When no breach of, committed, captors seizing without ostensible cause, liable to costs and damages, 897.

Simple restitution made when conduct of ship is suspicious, 898.

Allowance to captors, *id.*

Where vessel has been sold under a decree, *id.*

Costs and damages decreed against captor not affording opportunity for explanations, *id.*

Semble, under treaty of "free ships, free goods," enemy's property cannot be carried from blockaded place, 899.

License will protect ingress or egress from blockaded port, when, *id.*

Licenses construed liberally, *id.*

Public vessel may carry dispatches of neutral government to its representatives in a blockaded place, *id.*

Such dispatches will not protect a merchant-vessel, *id.*

Misinformation by cruiser that port is blockaded, cause for restoration, 899, 900.

Permission of captor to proceed under mistake of law, does not justify breach of, 900.

Distinction between misinformation, as to fact of, *id.*

As to the law of, *id.*

Breach of, justified by necessity, *id.*

as stress of weather, *id.*

want of repairs, *id.*

Necessity must be proved to be imperative and overruling, *id.*

Excuse of want of provisions not readily received, *id.*

Egress justified by danger of seizure and confiscation of blockaded country, when, *id.*

Mere apprehension of danger not sufficient, 901.

No excuse for breach of, that cargo is to be brought to the blockading country, *id.*

Trade with a blockaded force no breach of municipal law, *id.*

BOTTOMRY BOND.

Power of master to enter into, for hypothecation of cargo as well as ship and freight, 55.

Reason for rule of law giving this power, *id.*

Depends upon the necessity of the case, 55.

Cannot be given on cargo not shipped, *id.*

Nature of, *id.*

Origin of name of bottomry instruments, *id.*

Statutory regulations affecting bottomry on British ships proceeding to or from the East Indies, *id.*

BOTTOMRY BOND—*continued.*
Is a chose in action and not assignable at law, 55.
But is considered a negotiable interest in the Admiralty Court, *id.*
And assignee may there sue upon it, *id.*
Loan on, differs from ordinary loans, how, *id.*
From respondentia, 57.
Sea risk must be incurred by lender, *id.*
Pledge only effectual on safe arrival of ship, *id.*
risk may only be assumed by implication as well as by express words, *id.*
Liberally construed to give effect to intention of parties, 58.
risk of outward voyage sufficient, when, *id.*
Not affected by illegal transactions between the owner and mortgagee, *id.*
High rate of interest will not affect validity of, *id.*
On reference to registrar and merchants, interest reduced by Admiralty Court, *id.*
when excessive, *id.*
or fraudulent, *id.*
but in these cases the Court acts with great caution, *id.*
as to bills drawn at too high a rate of exchange, given as collateral securities to, *id.*
as to costs of reference, *id.*
when voyage not made bondholder entitled to ordinary interest only, *id.*
not essential to validity of, that more than ordinary interest should be charged, *id.*
But rate of interest material in determining nature of instrument, 59.
Where blanks left in bond for amount of interest, *id.*
As to allowance of commissions included in, *id.*
May be given by the owner of ship, *id.*
even without the concurrence of the master, *id.*
by the master, *id.*
with express authority of owner, *id.*
by his implied authority in proper cases, *id.*
implied authority may be exercised by ostensible and acting master, *id.*
though not registered, *id.*
or only appointed by owner's agent, *id.*
by a consignee of cargo, *id.*
by a British consul in a foreign port, *id.*
May be given by consul himself, *id.*
When executed in this country by owner before voyage, Admiralty has no jurisdiction, *id.*
Secus when executed in a foreign country by authority of owner, *id.*
though owner resides there, *id.*
Master cannot give, by consent of owner, on British ship in British port suable in the Admiralty Court, *id.*
Reasons why he cannot, 60.
What justifies master in entering into, *id.*
the express consent of the owner as to ship and freight, *id.*

BOTTOMRY BOND—*continued.*
in the absence of consent, master must first attempt to raise funds on credit of owner, 60.
hence he must endeavor to communicate with owner, *id.*
question whether master was able to communicate with owner within time commensurate with necessities of ship, *id.*
validity of bond depends on, though owner was in the same country, *id.*
law discussed in Wallace *v.* Fielden, 7 Moo. P. C. C. 398—60, 61, 62.
Semble, opinion of Lord Cottenham, differing from Knight Bruce, V.-C., in Glascott *v.* Long, wrong, 62.
on ship and *cargo* may, in case of necessity, be granted by master in foreign country where shipowners reside, with their consent, *id.*
and without communication, with owners of cargo, *id.*
what amounts to absolute necessity, justifying, 63.
necessary repairs, *id.*
arrest of ship in foreign country, *id.*
but not for arrest of master, *id.*
nor for debt incurred on a former voyage, 64.
nor for necessaries supplied to other ships, *id.*
though belonging to the same owner, *id.*
Entered into by master for expenses incurred when he was out of possession, held valid, when, *id.*
When vessel was liable to arrest for advances for repairs, *id.*
Holder of, cannot recover if funds advanced were not required for necessities of the ship, *id.*
Or could have been procured on personal credit of the owner, *id.*
Persons properly advancing money on, not bound to see to its application, 64.
Sale of, by auction, does not discharge purchaser from inquiring whether it was justifiably entered into, 65.
May be good in part, though void for residue, *id.*
Except perhaps where larger proportion of the claim is bad, *id.*
May be given by master in a foreign port for a *new* voyage, *id.*
Holder of, may recover though vessel be lost, if she had deviated from her voyage, *id.*
Unless deviation were justifiable, *id.*
Presumption of law in favor of validity of, when, *id.*
small items expended before entering into, presumed to be advanced in contemplation of security, 66.
to whom it may be given, *id.*
by master to consignees of cargo, *id.*
to an agent of the owner, *id.*
especially if given with owner's sanction, *id.*
mortgage cannot be given by master, instead of, *id.*
Proceedings on, taken in the Admiralty Court, *id.*
They are *in rem* against the ship, freight, and cargo, *id.*
And not against the owner, *id.*
Agreement for, sufficient to give jurisdiction to Admiralty, *id.*

BOTTOMRY BOND—*continued.*
Admiralty Court may decide questions of title, or ownership of ship, 67.
or as to her proceeds, *id.*
when in suit upon, freight has been paid into the Admiralty Court, an action at law for freight not maintainable, *id.*
Vessels arrested in a cause of bottomry cannot be taken by sheriff, *id.*
Nor can distress be levied for seamen's wages, *id.*
Advance to pay off, not recoverable in Admiralty Court, *id.*
Jurisdiction of Chancery to give relief upon, *id.*
May restrain proceedings in Admiralty, *id.*
in cases of fraud, *id.*
where there are equities between the parties, *id.*
where Chancery can deal with the matter more effectually, *id.*
Priorities of, *id.*
Holder of, entitled to priority over other creditors, *id.*
Even over a mortgage, *id.*
not bound to give mortgagee notice of, *id.*
Mortgagee cannot set up laches of holder as defence to, *id.*
unless his position has been thereby prejudiced, *id.*
Not affected by agreement of holder to purchase the ship, 68.
Priority of wages over, *id.*
of seaman's wages, *id.*
of master's wages, *id.*
except where he has bound himself personally by the bond, *id.*
Priority of lien in a cause of damage for collision, when, *id.*
Admiralty, when one of two creditors has a double security, will compel him to resort to security, on which other creditors has no claim, when, *id.*
of later date takes priority of those of earlier, 69.
unless it were intended that bonds were to be paid *pari passu*, *id.*
Court of Admiralty has no jurisdiction over voluntary contract to postpone, 69.
Including freight will not attach upon freight advanced before bond being given, *id.*
Or where advances are made on, pursuant to prior charter-party, *id.*
Leave to pay wages and expenses must be obtained by shipowner, when, *id.*
Given to bondholder in recent case with lien, *id.*
Ship and freight, primary fund for payment of, 70.
Cargo when liable, only the secondary fund, *id.*
Master hypothecating cargo acts as agent of the shipowner, *id.*
Owner of cargo may recover loss occasioned by hypothecation from shipowner, *id.*
Even when it was justifiable, *id.*
Unless by law of country to which the ship belongs the shipowner may escape liability by abandoning ship and freight, 71.
Ship and freight usually first hypothecated, 72.
If omitted from bond in its literal terms, would be liable to contribution, *id.*

BOTTOMRY BOND—*continued.*
Power of master to sell part of cargo for repairs, 72, 77.
the ship or the whole of the cargo, 73, 74, 75, 76, 77.
to transship cargo, 77, 78, 79, 80, 81, 82.
See MASTER OF SHIP.

CAPITAL.
Partner, without express authority of firm, cannot raise money to increase, 294. *See* PARTNER—PARTNERSHIP.

CAPTURE.
Property seized before war by embargo, when condemned, 929, 930.
Time generally allowed for subjects of the enemy to depart with their property, 930.
Right to recover debts due to individuals of the hostile nation only suspended during the war, *id.*
Public debts due from one country to subjects of belligerent states not confiscated, *id.*
Formerly all property of the conquered passed to the victor, 931.
Changes of the law as to immovable property, *id.*
Law as to capture of movable property on land, *id.*
Different treatment of property captured at sea, 932.
Reasons for the distinction, *id.*
Treaty between the United States and Prussia, exempting merchant ships from capture, *id.*
not renewed, *id.*
goods of an enemy on board enemy's ship liable to capture, *id.*
Goods of an enemy on ship of a friend liable to, prior to Russian war, *id.*
Goods of a friend on board ship of an enemy restored, 933.
Captor of enemy's property in neutral ship takes it *cum onere*, *id.*
and is liable to freight, *id.*
unless there has been unneutral conduct on the part of the ship, *id.*
What freight will be allowed, *id.*
Expenses of neutral master postponed to expenses of captor, *id.*
Neutral cargo taken in enemy's ship restored, *id.*
Owner of cargo liable to pay freight to captor, in what cases, 933, 934, 935.
Set-off in case of injury to neutral property from misconduct of captor, 935.
Expenses of neutral owner not defrayed out of proceeds of sale of ship, *id.*
As to maxim, "free ship, free goods," *id.*
Armed neutrality of 1780 insisted on it, *id.*
Armed neutrality of 1800, 936.
Maxim adopted by France, *id.*
also maxim of "enemy's ships, enemy's goods," *id.*
Rules adopted in the late war against Russia, *id.*
by the plenipotentiaries signing the Treaty of Paris of 1856, *id.*
May be made of property not belonging to the enemy, which has acquired hostile character, *id.*
In the case of contraband of war, 937.
Breach of blockade, *id.*

CAPTURE—*continued.*
Resistance to the right of visitation and search, 137.
Carrying on the colonial or coasting trade of the enemy, *id.*
Subject or neutrals domiciled with belligerents carrying on trade with the enemy, *id.*
where neutrals or subjects are domiciled with the enemy, *id.*
What constitutes domicil, 937, 938.
in eastern countries generally, 939.
in the East Indies, 940.
where a person is connected with a house of trade in the enemy's country, *id.*
Produce of a person's plantation in an enemy's colony liable to, 941.
national character of ship determined by the residence of the owner, *id.*
Ship navigating under flag or pass of enemy liable to, 942.
Rule when departed from, 943.
Ship purchased in the enemy's country and employed in his trade, liable to, when, *id.*
When employed in the coasting trade of the enemy, 944.
Transfer of enemy's ship *in transitu* does not prevent, *id.*
Property taken *in transitu* to the enemy, liable to, *id.*
Whether British subject can purchase ships of state likely to become hostile, *imminente bello*, 945.
Neutrals may, if not *in transitu*, *id.*
But transfer must be *bonâ fide*, *id.*
Liens of neutrals on property captured from the enemy not allowed, *id.*
Who are authorized to make prize, 951.
Duly commissioned ships, *id.*
Privateers and letters of marque, *id.*
Use of privateers and letters of marque, not approved, 952.
by non-commissioned subjects, *id.*
Mode of determining whether prize be good or not, 952, 953.
Where prizes must be brought, 953.
See RECAPTURE.

CARGO. ABANDONMENT—AVERAGE—ADJUSTMENT OF AVERAGE—BOTTOMRY BOND—MASTER OF SHIP—HYPOTHECATION—TOTAL LOSS—TRANSSHIPMENT OF CARGO.

CARRIERS,
Lien of, 687. *See* LIEN.

CESSIO BONORUM,
When effect of, in a foreign country, is a mere discharge of the person of the debtor, it is no defence to proceedings here, 274. See CONFLICT OF LAWS—SEQUESTRATION.

COASTING TRADE OF ENEMY,
Semble, neutral cannot carry on, in time of war, 844.
Unless it were open to him in time of peace, *id.* *See* COLONIAL TRADE OF ENEMY.

COLONIAL TRADE OF ENEMY,
Rule of war of 1756, as to, 838.

COLONIAL TRADE OF ENEMY—*continued.*
Prohibits to neutrals from engaging in, if not allowed in time of peace, 838.
Origin of rule, *id.*
Foundation for it, *id.*
Use of false papers, showing false destination, by neutrals, in carrying on, 839.
Neutral ship going from mother-country of enemy to his colony, confiscable, *id.*
Or from mother-country of one enemy to the colony of an allied enemy, *id.*
Or between settlement of one enemy and the colonial possessions of an allied enemy, *id.*
Diversion by *vis major* of vessel engaged in, immaterial, *id.*
as by a storm, *id.*
or capture, *id.*
Allowed to neutrals in time of war, if allowed in time of peace, 840.
Relaxations of rule on different occasions, 840, 841.
Decisions on relaxations, 841.
Effect of belligerent authorizing its own subjects to trade between country of the enemy and his colonies, 842.
between their own country and the colonies of the enemy, *id.*
Presumption of monopoly of trade between European countries and their West Indian colonies, *id.*
Not so strong in the case of settlements in the East, *id.*
Ship and cargo of neutral engaged in, confiscable, *id.*
After *bonâ fide* importation to his own country, neutral might send goods of enemy to his colonies, 843.
And the commodities of the colony to the mother-country, *id.*
What amounts to a *bonâ fide* importation, *id.*
Principle upon which the Courts act in determining the *bona fides*, 843, 844.
Rule of war of 1756 considered, in a note to Wheaton, to be obsolete, 845.
Semble, it may still be enforced, *id.*
Superseded during late war with Russia, 846. *See* COASTING TRADE OF ENEMY.

COMMUNITY
Of interest in the property of partnership, 335, 338.
In profit and loss, 338. *See* PARTNERSHIP.

CONFLICT OF LAWS.
Interesting nature of subject, 248.
Remarks of Mr. Justice Story upon, *id.*
Division of subject, *id.*
By what law the *capacity* of a person to contract is governed, 249.
According to foreign jurists, by the *lex domicilii*, *id.*
According to English law, by the *lex loci contractûs*, *id.*
Remarks upon the case Guépratte *v.* Young, 4 De Gex & Sm. 217, 250, 251.
By the law of what country the *validity* of a contract is to be determined, 251.
by the *lex loci contractûs*, *id.*
Unless it is to be performed in another place, *id.*

CONFLICT OF LAWS—*continued.*

Case of bill of exchange made and endorsed in blank in France, 251.

Sale of personal chattels abroad, 251, 252, 253.

Contract, though valid where entered into, not enforced here, if of an immoral character, 353.

or is made in fraud of the laws of this country, *id.*

Contract for sale of goods in foreign country to a person who smuggled them into England, valid here, *id.*

Unless any acts are done by vendors to enable the purchasers to smuggle the goods, 254.

Remarks of Mr. Justice Story, 255.

Contract valid here though an evasion of the revenue laws of another country, 256.

Contract entered into in a foreign country contrary to morality cannot be enforced here, *id.*

as contract by courtezan for price of prostitution, *id.*

Securities for gambling debts contracted in this country, though given abroad, cannot be enforced here, *id.*

But money won by, or lent for, gambling, in a foreign country where gambling is not illegal, recoverable here, *id.*

Contracts contrary to public policy not enforced, *id.*

as for raising money to support subjects of friendly power rebelling against their government, *id.*

entered into with country not recognised by this country, 257.

How far courts of this country will entertain action upon contracts for the sale of slaves, *id.*

Foreigner may recover here damages for wrongful seizure of slaves, when, *id.*

Contract by British subject for sale of slaves in country where slavery is legal, enforced, 258.

By what law the *form* of a contract is to be regulated, *id.*

Contract, unless executed with the forms required by the law of the country where entered into, not enforced here, *id.*

Unstamped promissory note made in a country where a stamp is necessary, *id.*

Remarks on Wynne *v.* Jackson, 2 Russ. 351, and James *v.* Catherwood, 3 Dowl. & Ry. 190, *id.*

Unstamped receipts given in a foreign country, how far admissible here, 259.

Semble, receivable, unless it be proved by the law of the place where receipts were given, that stamp was necessary, *id.*

Contract entered into in this country by foreigners valid, if executed as required by our law, 259, 260.

though not complying with formalities of the law of the domicil of the parties, *id.*

Foreign contract to be *construed* by the *lex loci contractûs*, 260.

thus if the acceptance of a bill of exchange be void, the acceptor cannot be sued here, 261.

CONFLICT OF LAWS—*continued.*

The *lex loci contractûs* regulates the extent of obligation, 261.
thus holder of Scotch heritable bond, having a primary charge upon realty, heir cannot claim exoneration out of personalty here, *id.*
though heir could do so in the case of an English bond, *id.*
or a Scotch movable debt, *id.*

If where contract is made, right *in rem* only is conferred, it will not raise personal obligation in country where enforced, *id.*

Holder of bill of exchange, endorsed in blank in France, cannot recover here, *id.*

Interpretation of contract depends on the *lex loci contractûs*, 262.

Bill drawn in Ireland payable here in Irish currency, *id.*
bears interest as a debt of the country where it was drawn, *id.*

Country where bill of exchange is signed and endorsed is the place of contract, *id.*
although blanks in it be filled up in another country, *id.*
hence, bill signed and endorsed abroad is not an inland bill, *id.*
and need not be stamped as one, 262, 263.

Contract entered into in one country to be performed in another, is governed by the law of the place of performance, 263.
as to its validity, *id.*
nature, *id.*
obligation, *id.*
interpretation, *id.*

Promissory note transferable abroad, according to law of country where made payable, *id.*
time of payment calculated by the same law, *id.*
and days of grace, *id.*
notice of dishonor given and received in a foreign country, by what law regulated, *id.*
protest and notice of dishonor transmitted from a foreign country, 264.
validity of bottomry bond, by what law regulated, *id.*

Interest payable at the rate of the place of performance, *id.*
Roman law the same, *id.*

Bill drawn at one place and endorsed at several other places, *quære*, what rate of interest payable, *id.*

If bill drawn in one country and payable in another is dishonored, drawer liable according to the *lex loci contractûs*, 265, 266, 267.
and not the law where bill made payable, *id.*
and, if no interest was reserved, interest at current rate of the country where bill was drawn, will be due, 267.
interest due where bill has been endorsed in different places, *id.*

Whether contract is usurious or not, depends on law of country where made and to be executed, 268.

Rate of interest may be stipulated for usurious at place of contract, if not so at place of payment or performance, *id.*

Usury laws in this country repealed, *id.*

Rate of interest according to place of contract, when damages recovered for breach of contract, *ex morâ*, *id.*

CONFLICT OF LAWS—*continued.*

Mode of estimating amount of debt, when sum payable in the currency of another country is recovered at law, 268, 269, 270.

semble, by the rate of exchange at the particular time, *id.*

Le case of mixt moneys, Davy's Rep. 18, 270.

Depreciation of currency in the time intervening between contracting liability and payment, 270, 271, 272.

Discharge or dissolution of contract governed by the law of country where entered into, 272, 273.

Where effect in foreign country of bankruptcy is a mere discharge of bankrupt's person, it is no defence to proceedings here, 274.

Nor where the effect of insolvency or a *cessio bonorum* is the same in a foreign country, *id.*

Discharge of a contract in a place where it was not made or to be performed, no discharge elsewhere, *id.*

Thus order for discharge under a Maryland Insolvent Act, no bar to suit for debt contracted here, *id.*

Under statute 54 Geo. III. c. 137, debt contracted in England barred by a discharge under a Scotch sequestration, *id.*

Certificate under bankruptcy in England discharge for debt contracted before bankruptcy in Calcutta, 275.

though debtor residing at Calcutta had no notice of the bankruptcy, *id.*

Discharge in foreign country contrary to international law, not recognised, *id.*

Contract not necessarily discharged or dissolved only by the same law under which it was entered into, 275, 276.

Defence of infancy depends on the *lex loci contractûs*, 276.

Whatever relates to the *remedy* to be enforced depends on the *lex fori*, 276, 277.

Difficulty in determining what relates to the merits or validity of a contract, and what relates to remedy, 277.

Parties to suit belong to the remedy, *id.*

As who must sue when chose in action as a debt has been assigned, *id.*

a balance of an account due to bankrupt's estate under Scotch Bankrupt Act, *id.*

where debt is by the *lex loci contractûs* legally assignable, *id.*

assignee of Irish judgment, *id.*

of a Scotch bond, *id.*

Arrest of person depends upon the *lex fori*, *id.*

and will take place, though not allowable where debt contracted, *id.*

Absence of criminal proceedings no bar to civil proceedings here, though requisite where cause of action arose, 278.

Proceedings by master of foreign vessel against the freight, belong to the remedy, *id.*

and are therefore governed by the *lex fori*, *id.*

Admission of evidence and its weight belong to the *lex fori*, *id.*

Semble, action will not lie here on contract made abroad, not suable on if made here, by reason of the Statute of Frauds, 279.

Statute of Frauds applies not to the validity of a contract, but only to procedure, *id.*

CONFLICT OF LAWS—*continued.*
Leroux *v.* Brown, 12 C. B. 801, disapproved of, 280.
Set-off or compensation belongs to the remedy, *id.*
As do also liens, *id.*
implied hypothecations, *id.*
priorities of satisfaction given to creditors, *id.*
order of payment of debts, *id.*
limitation of actions, 280, 281.
Lord Brougham's observations on the Limitations of Actions being governed by the *lex fori*, 281, 282.
Distinction taken by Mr. Justice Story where parties reside during the whole period in a country, where the law extinguishes his debt, 282.
And not merely the right of action, *id.*
Point not yet decided, *id.*
Foreign judgments how far binding and enforceable here, *id.*
Foreign law must be proved as matter of fact, *id.*
by properly qualified witnesses, *id.*
must be pleaded as a fact, *id.*
and not merely in an argumentative and inferential manner, *id.*
Evidence of foreign law on same point in a former case not sufficient, *id.*
Facilities given by 22 & 23 Vict. c. 63, for the ascertainment of the law in different parts of her Majesty's dominions, 283.
by 24 Vict. c. 11, for the ascertainment of the law of foreign countries, *id.*
Practice of the courts on difficult cases of foreign law, *id.*
Mode of dealing with foreign countries as laid down by Lord Cranworth, *id.*
Until proved, presumption is that foreign is the same as English law, *id.*
Mr. Westlake's Treatise on Private International Law, 284.

CONSTRUCTIVE TOTAL LOSS. *See* TOTAL LOSS.

CONTRABAND OF WAR,
What is comprehended under term, 852.
Neutrals must not furnish to belligerents, *id.*
Catalogue of, has varied, *id.*
Reasons for variations, *id.*
What are articles of contraband.
Warlike instruments or materials fit to be used in war are deemed, 853.
Things *ancipitis usus*, when deemed, *id.*
Naval stores and materials for building ships, when deemed, *id.*
pitch and tar, *id.*
rosin and tallow, *id.*
sailcloth, 854.
coals, *id.*
hemp, *id.*
ship timber, *id.*
masts, *id.*
ship convertible into a privateer, *id.*

CONTRABAND OF WAR—*continued.*
ship, when of ambiguous character and previously employed in trade, 854.
iron, *id.*
anchors and other instruments fabricated from iron, *id.*
provisions, when deemed, *id.*
cheese, *id.*
ship biscuits, *id.*
wines, *id.*
Must be taken *in delicto*, on voyage to enemy's port, 855.
Though voyage be from one enemy's port to another, *id.*
Neutral cannot carry to hostile port with ulterior destination, *id.*
Goods going to neutral port not considered, *id.*
Proceeds of cannot be taken on return voyage, 856.
Nor can rest of cargo, if innocent, be taken, *id.*
Carriage of, to a settlement of the enemy, with false papers, affects return voyage, 857.
Penalties for carrying contraband.
formerly involved a forfeiture of ship, *id.*
now only of cargo, where ship belongs to a different owner, *id.*
but freight and expenses of neutral owner not allowed, 858.
except where articles of contraband are small in quantity, *id.*
Ground of relaxation of law, *id.*
Neutral master cannot aver ignorance of his cargo, *id.*
Relaxations do not apply where ship is taken with false papers, *id.*
Or where treaty is violated by carriage of, *id.*
All property of owner, if captured at same time, forfeited, *id.*
Whether it be cargo, *id.*
ship, *id.*
or share in ship, *id.*
A fortiori if destination be false, *id.*
Innocent parts of cargo, forfeited unless belonging to a different owner, *id.*
Clause of "free ships, free goods," does not legalize trade in, *id.*
Nor permission to trade with enemy in innocent articles, *id.*
Doctrine of pre-emption.
Pre-emption of articles *ancipitis usus*, when product of exporting country, 859.
Or of merchant of exporting country, *id.*
As in case of pitch and tar, *id.*
hemp, *id.*
timber, *id.*
provisions, *id.*
Claimants must show that they are exporting their own produce, *id.*
Unless it is staple commodity of his own country, *id.*
As pitch and tar exported from Sweden, *id.*
Pre-emption only exercised when *bona fides* is shown on part of exporter, 859.
As to price of articles detained under right of pre-emption, 860.
Carrying of military persons, public agents, and despatches of belligerents.
Transport of naval or military forces of the enemy deemed, 861.

CONTRABAND OF WAR—*continued.*
Number immaterial, 861.
Carrying of enemy's despatches amounts to, *id.*
As to what will be considered despatches, 862.
Neutral may carry despatches from ambassador of the enemy resident in the neutral country, *id.*
Or from a hostile port to a consul of the enemy in a neutral country, 863.
Hostile papers not protected by conveyance under sanction of a neutral ambassador in the enemy's country, *id.*
Nothing criminal in despatches of a purely commercial character, 864.
Nor in carrying despatches to colony which has ceased to belong to the enemy, *id.*
Nor when put on board in fraud of the master, *id.*
Unless he has not shown sufficient caution, *id.*
Military officers not deemed when destination of a vessel is neutral, *id.*
Nor public agents, *id.*
Nor hostile despatches, *id.*
Case of the Trent, *id.*
Penalty for carrying enemy's despatches, 865.
Declaration as to, during late Russian war, *id.*
Supply of contraband not ordinarily an offence against the law of the neutral state, *id.*
Unless under some statute, *id.*
Contract relating to, may be enforced by municipal laws, 866, 867.
Insurance on, void in the country of the hostile belligerent, 867.
May be enforced in courts of neutral country, *id.*
Proclamation of the crown issued in times of war, meaning of, 868.
Foreign Enlistments Act of England, *id.*
of the United States, *id.*
Decisions, principal, in the United States. *id.*
The case of the Alexandra, Attorney-General *v.* Silem, 869, 870, 871.
Demand for compensation by the United States on account of the Alabama, 871.
Claim unprecedented and unreasonable, *id.*

CONTRIBUTION. *See* GENERAL AVERAGE.

CONVERSION
Of real property held for partnership purposes, 356, 357. *See* PARTNERSHIP.

DEBTS.
Order of payment belongs to the remedy, 288.
Whether joint or separate, 412. *See* APPROPRIATION OF PAYMENTS—BANKRUPTCY—CONFLICT OF LAWS.

DEED.
Whether partner can bind firm by, 308. *See* PARTNER.

DEVIATION.
Implied warranty against, 120.
Discharges underwriter from liability, 121.
Principal applies to other cases where risk is changed, *id.*

DEVIATION—*continued.*
Voluntary delay operates as, 121.
In order to constitute, not necessary to show risk to be increased, *id.*
Sufficient if it be varied, *id.*
Underwriter discharged after, though ship return safely into her proper course, *id.*
Though made by ignorance of captain, *id.*
Assured may recover for loss which has taken place before, *id.*
Mere intention to make will not discharge underwriter, *id.*
Change or abandonment of voyage discharges underwriter, 122.
Though loss occurs before vessel reaches the point of, *id.*
Mere intention of putting into another port will not amount to change of voyage, 122.
Nor of taking an intermediate voyage, *id.*
But undertaking a distinct, unconnected voyage will, *id.*
As will determination to proceed to a different port, *id.*
Mere fact of taking in goods and clearing out for different port is not sufficient evidence of abandonment of voyage, *id.*
May amount only to evidence of intention to deviate, *id.*
Touching at an intermediate port, though not mentioned in the policy, no deviation if it is customary, *id.*
As to custom to make intermediate voyage in the East Indian and Newfoundland trades, 123.
Usage to stop at intermediate port must be clear, *id.*
When policy gives liberty to touch at an intermediate port, touching at any other, even a customary port, amounts to, *id.*
As to the order in which intermediate ports should be visited, *id.*
As to the construction of the clauses giving a liberty "to touch," *id.*
"to call," *id.*
"to touch and stay," *id.*
"to touch, stay, and trade," *id.*
Renders policy void, although all parties to the policy know it has taken place, when, *id.*
What will justify, 124.
Necessity, *id.*
But voyage of necessity must be pursued in the shortest manner, *id.*
Underwriter not discharged where vessel is taken out of her course by a ship of the Royal Navy, *id.*
Or by a mutinous crew, *id.*
Secus where ship at the request of the captain of the navy goes in pursuit of a strange sail, *id.*
Is justifiable where vessel goes, for a necessary period only, to refit, 125.
to obtain repairs, *id.*
to get ballast, *id.*
to recruit a disabled crew, or get fresh hands, *id.*
Unless she were inadequately manned at first, *id.*
Justifiable when driven off her course by stress of weather, *id.*
Though captain sends ashore for provisions, or transmits a letter at the same time, 125.

DEVIATION.—*continued.*

when vessel cannot reach her port by reason of an embargo, 125.

or from its being blocked up by ice, *id.*

unless she abandons her voyage by returning home, *id.*

Justifiable, where vessel *bonâ fide* seeks convoy, *id.*

Whether she be warranted to sail with convoy or not, *id.*

And if, warranted to sail with, after having been driven back she sail without convoy, she does not deviate, *id.*

Secus, if ship instructed to call at one port for convoy goes to another, 126.

Justifiable in succouring ship in distress, when, *id.*

if rendered necessary by exercise of overpowering force, *id.*

Holder of bottomry bond may recover if vessel be lost after, 65.

Unless justifiable, *id.* *See* BOTTOMRY BOND.

DISSOLUTION OF PARTNERSHIP.

When and how effected, 371. *See* PARTNERSHIP.

DOCUMENTS OF SHIP.

Implied warranty on the part of the ship-owner that they are proper, 136.

according to the law of nations, *id.*

or treaties with particular nations, *id.*

Underwriters discharged if ship be not properly documented on starting, if there be express warranty, of national character, 137.

Secus, in the case of an implied warranty if documents are produced at the time of capture, *id.*

Court will look to grounds of foreign sentence as well as to the sentence itself, *id.*

No implied warranty on the part of the owner of goods that they shall be proper, *id.*

Secus, where the owner of the goods is also owner of the ship, *id.*

Are sufficient, if they be such as are required by general international law, *id.*

Or by treaty with the country of the capturing ship, *id.*

Underwriters not discharged, if ship be condemned for breach of a mere private ordinance, *id.*

Nor for want of a register, *id.*

Unless possession of, be required by treaty, *id.*

Consequence of ship carrying simulated papers, *id.*

Without the consent of the underwriters, *id.*

With their consent, 138. *See* SEAWORTHINESS.

DOMICIL.

Law of, how far it regulates contracts, 249. *See* CAPTURE—CONFLICT OF LAWS.

DORMANT PARTNER. *See* PARTNER—PARTNERSHIP.

DOUBLE PROOF

In bankruptcy, when allowed, 432. *See* BANKRUPTCY.

ELECTION OF PROOF,

Where creditor has taken a joint and several security, 429.

See BANKRUPTCY.

EMBARGO,
When laid on property of another nation, 929.

EVIDENCE,
Admission of, belongs to the *lex fori*, 278. *See* CONFLICT OF LAWS.

FIRM,
Partner agent for, how far, 292.
Name of must be used by partner in order to bind, 294.
See PARTNER—PARTNERSHIP.

FOREIGN JUDGMENTS,
How far binding and enforceable here, 282. *See* CONFLICT OF LAWS.

FOREIGN LAW,
How it must be proved here, 282. *See* CONFLICT OF LAWS.

FORM OF CONTRACT,
By what law regulated, 258. *See* CONFLICT OF LAWS.

FRAUD
Of partner, how far binding on the firm, 306. *See* PARTNER.

FRAUDULENT CONVEYANCE, &c.
By trader, an act of bankruptcy, 544.
within 13 Eliz. c. 5, *id.*
Or as being in contravention of bankrupt laws, *id.*
under statutes of Eliz. an act of bankruptcy, *id.*
And is void against assignees upon an insolvency, *id.*
Doctrine of fraudulent conveyances, &c., by what enactments now regulated, *id.*
As to traders, *id.*
As to non-traders, *id.*
Must be made with intent to defeat or delay creditors, *id.*
Evidence of intent, how afforded, *id.*
Onus of showing intent lies on party impeaching deed, 545.
Formerly fraudulent transaction unless a deed not an act of bankruptcy, *id.*
Extended by recent Acts to "gifts, delivery, or transfer of" property, *id.*
Deed must have been perfect, *id.*
Deed may be used as act of bankruptcy though unstamped, *id.*
and unregistered, *id.*
though kept by a party in his own possession, *id.*
Formerly not an act of bankruptcy if executed abroad, *id.*
Law altered by Act of 1849.
Semble, not by Act of 1861 as to non-traders, *id.*
Fraudulent delivery of bill of exchange an act of bankruptcy, 546.
So voluntary payment of money to a particular creditor, when, *id.*
1. *Sale when an act of bankruptcy*, *id.*
Absolute conveyance of all a man's property in consideration of antecedent debt, *id.*
Or of all property with colorable exceptions, *id.*
Bonâ fide sale of all property valid, *id.*

FRAUDULENT CONVEYANCE—*continued.*
Even though trader without knowledge of purchaser was about to abscond, 547.
Sale not invalidated by knowledge of intended execution, *id.*
Bill of sale in consideration of former and present advances to pay creditors valid, *id.*
Sale of goods below market value not fraudulent, *id.*
Unless with intent to defeat and delay creditors, *id.*
Or to cheat creditors, 548.
Conveyance by partner to continuing partner when an act of bankruptcy, *id.*
2. *Mortgage or trust deed when an act of bankruptcy.*
Mortgage of all property to secure present advance not an act of bankruptcy, *id.*
Secus, if fresh advance colorable, *id.*
Assignment to relieve property from charges, equivalent to present advance, *id.*
Or in consideration of creditor taking up a bill accepted by the debtor, 549.
Or for an advance to apply in payment of existing debts, *id.*
Secus, if lender was aware that the borrower's object was to defeat and delay his creditors, *id.*
Mortgage of all his property by a trader to secure a pre-existing debt is an act of bankruptcy, *id.*
In the case of a surety as well as a principal debtor, 550.
Immaterial that debtor was pressed by the creditor, 549.
Or was under arrest at his suit, 550.
that he retained possession of his goods, *id.*
that possession was taken by the grantee, *id.*
that deed does not purport to transfer all the property, *id.*
Conveyance of all effects at a particular place not an act of bankruptcy, 551.
Unless it be shown that he had no other property, *id.*
Colorable exception of part of trader's property from an assignment of all does not prevent its being an act of bankruptcy, *id.*
Immaterial that value of property assigned greatly exceeds liabilities, *id.*
Or that there is an express trust of surplus for assignor, *id.*
Test for ascertaining whether an assignment of all property with the exception of part is an act of bankruptcy, 551, 552.
Question is not, whether assignment stops the trade of the assignor, 552.
But whether the necessary effect of assignment is to delay the creditors, *id.*
Although they are merely the general and not the trade creditors, *id.*
Conveyance of all a trader's property in consideration of marriage when an act of bankruptcy, 553.
Mortgage to secure past and future advances an act of bankruptcy, *id.*
to secure future advances not necessarily an act of bankruptcy, *id.*
As if it be for the purpose of carrying on trade, *id.*
Conveyance in consideration of a present advance and a by-gone debt of all property, including advance and property to be purchased with it, an act of bankruptcy, 553, 554, 555.

FRAUDULENT CONVEYANCE—*continued.*
An assignment of all effects in pursuance of a legal obligation valid, 555.
Or if made in pursuance of an agreement when antecedent advance made, *id.*
Inedequacy of advance as compared with value of property not material, *id.*
Assignment by a trader of all his property to secure a surety to a composition deed an act of bankruptcy, 556.
Agreement for transfer for valuable consideration amounts to equitable assignment, 557.
Conveyance by a trader of *all* his property, an act of bankruptcy, if upon trust for a particular creditor, *id.*
Or for a certain number of creditors, *id.*
Or for all creditors at large, *id.*
Even though it be for effecting an equal distribution among them, *id.*
Or though by proviso deed is to be void if trustees think fit, 558.
Or if all the creditors shall not execute, *id.*
Or if creditors to a certain amount shall not execute, *id.*
Or a commission shall issue, *id.*
Or though deed may be merely intended to make trader a bankrupt, *id.*
Semble, that it is material to show existence of a debt due at the execution of the deed, 557.
Reasons why such deed should be considered fraudulent, 557, 558.
Execution of deed intended to be registered under sect. 192 of the Act of 1861, an act of bankruptcy, 558.
Petition for adjudication dismissed if deed registered, *id.*
Deed, though registered under sect. 192, an act of bankruptcy, if requirements of that section have not been complied with, *id.*
Registration of deed under sect. 194 of the Act of 1861, does not prevent deed being an act of bankruptcy, 559.
Effect of deed of assignment purporting to be executed by three traders being only executed by one, *id.*
Vesting property in trustees for more ready conversion, held in equity not to amount to act of bankruptcy, *id.*
Assignment of part of a trader's effects, though to secure antecedent debt, not necessarily fraudulent, *id.*
Secus, if the intent be to defeat, delay, or defraud creditors, 560.
Fraudulent gift of part of a man's property, when an act of bankruptcy, *id.*
Creditor executing a deed of assignment in favor of creditors, cannot treat it as act of bankruptcy, *id.*
Nor can a person who was privy to or acted under deed, *id.*
Nor his representative, *id.*
No objection that some of the assignees executed deed, *id.*
Creditor not bound by deed containing unexplained stipulation in favor of a particular creditor, *id.*
Trustee may be a petitioning creditor, *id.*
But semble, not unless his *cestui que* trusts acquiesce, *id.*
Creditors not party or privy to trust deed, in certain cases prevented by the Bankrupt Act from nullifying deed, 560, 561.
Assignment of all property upon trust for creditors not to be an act of bankruptcy unless petition filed within three months, when, 561.

FRAUDULENT CONVEYANCE—*continued.*

Semble, continued existence of debt due at the execution of the deed necessary in order to set it aside, 561.

Subsequent creditors may impeach deed under statute of Eliz. c. 5, if creditors at the execution of the deed remain unpaid, *id.*

Immaterial whether debtor, making voluntary settlement, was solvent, if a creditor at the date thereof is defeated or delayed thereby, 562.

When voluntary deed impeached by subsequent creditors, what is necessary to be shown, *id.*

Immaterial that voluntary settlor retains enough to pay the debts he owes at the time of the settlement, *id.*

Court of Bankruptcy will annul an adjudication upon a bankrupt's own petition, to enable creditor to file a petition under which fraudulent conveyance may be impeached, *id.*

Sale through agent to *bonâ fide* purchasers for the benefit of the bankrupt and agent, not an act of bankruptcy, *id.*

Though it was in contemplation of bankruptcy, *id.*

Nor a secret removal of goods, to prevent their being taken in execution, *id.*

FRAUDULENT PREFERENCE.

How the law as to has arisen, 533.

What constitutes, 534.

Transfer must be in contemplation of bankruptcy, and voluntary, *id.*

What is to be considered as a payment or transfer in contemplation of bankruptcy, is a question for a jury, *id.*

Court of Equity may direct an issue, *id.*

Onus of proof, *id.*

What evidence necessary, *id.*

Embarrassed circumstances not conclusive evidence, *id.*

Nor a mere consciousness of insolvency, 534, 535, 536.

Quære, effect of payment when trader is hopelessly insolvent, 536.

Payment or transfer not voluntary where proceedings are threatened at law, *id.*

Or in a criminal court, *id.*

Or there is a demand accompanied by pressure, *id.*

Mere demand of debt is sufficient, *id.*

Even if not then due, *id.*

So goods given up to vendor on demand, 537.

Payment made at request of surety, *id.*

Effect of pressure, *id.*

Pre-arranged pressure, *id.*

Payment in discharge of obligation not, *id.*

Though there be a mistake as to the obligation, *id.*

Result is the same if debtor under like circumstances makes an assignment, *id.*

Or returns specific goods, *id.*

Secus, where the allegation is general, 538.

Payment in the course of business, good, 538.

Pressure by solicitor against client, valid, *id.*

FRAUDULENT PREFERENCE—*continued.*
Preference to be fraudulent not necessarily to be intended as benefit to a particular creditor, 538, 539
Payment of a debt not due at request of creditor, not a, 539.
Payment under special contract will not amount to, 540.
Or in the usual course of maintaining a son, *id.*
Circumstances to be left to the jury, *id.*
Mere form of transaction immaterial, *id.*
A mere notice by a trader that he is about to stop payment, whereby he is compelled to pay debt, not a, 541.
Whether debt is made in contemplation of bankruptcy or whether it is voluntary, are questions for a jury, *id.*
And also whether payment has been made in consequence of pressure, or with a view to fraudulent preference, *id.*
Court will not readily disturb verdict, 541, 542.
As to when rule for a new trial will be granted, 542.
How far declarations of bankrupt are admissible, *id.*
Fraudulent preference may be impeached under an adjudication on a creditor's petition, 542.
And also under an adjudication on a bankrupt's own petition, *id.*
Even if there were not a sufficient creditor's debt at the time of preference, *id.*
Effect of bankruptcy on, *id.*
Title of *bonâ fide* purchaser from person acquiring goods by means of a fraudulent preference indefeasible, *id.*
Transfer to person by fraudulent preference valid, except as avoided by assignees in bankruptcy, *id.*
Doctrine of fraudulent preference not applicable to trustee restoring trust property to *cestui que* trust, 543.
Applicable where trust deed registered under section 192 of the Act of 1861, *id.*

FREIGHT. *See* ABANDONMENT—AVERAGE—ADJUSTMENT OF AVERAGE—CONFLICT OF LAWS—HYPOTHECATION—TOTAL LOSS.

GAMBLING DEBTS,
Securities for, contracted abroad, 256. *See* CONFLICT OF LAWS.

GENERAL AVERAGE,
Principle of, 90.
Origin of in Rhodian law, *id.*
Adopted by Roman law, *id.*
Rhodian law extended in its operation, *id.*
Distinction between general and particular average, *id.*
In order to give rise to, loss must be incurred for the *whole* adventure, 91.
Not merely for a part, *id.*
As where corn is sold at low rate out of ship to a mob, *id.*
Or specie is thrown overboard to prevent enemy getting it, *id.*
Immaterial whether ship, cargo, and freight belong to one or different adventurers, *id.*

GENERAL AVERAGE—*continued.*

Or whether they are partially interested, 91.

Not essential that there should be any consultation previous to making a sacrifice, to give rise to, 92.

Protests to be made by captain on entering port, *id.*

Jettison of part of cargo to preserve ship and rest of goods, will give rise to, *id.*

Exception in the case of goods carried on deck, *id.*

Unless there be a usage to carry them there, *id.*

As timber on a voyage between London and Quebec, *id.*

Carboys of vitrol, *id.*

Pigs from Waterford to London, *id.*

Custom that underwriters are not liable for deck goods jettisoned valid, 93.

Owners of part of cargo shipped in lighters or boats, when lost can claim contribution where, *id.*

And the owners of the lighters and cargoes, when, *id.*

Part of cargo transshipped, not liable to contribute if rest of cargo and ship perish, *id.*

Nor will part of the cargo if saved when ship is lost contribute if goods transshipped be lost, *id.*

Secus had there been a jettison of the goods, *id.*

No contribution on loss of goods put into lighters in ordinary course, 94.

Contribution on goods given to pirates by way of ransom, *id.*

Secus if they be forcibly taken by pirates, *id.*

Ransom to an enemy now illegal, *id.*

Protection afforded at law to persons necessarily sacrificing goods of others, *id.*

Sale of part of cargo subject of general average when it is to make good a general average loss, *id.*

As for making good part of ship or tackle sacrificed for the general safety, *id.*

Secus where accidental damage only has been made good, *id.*

Or where the money was raised to release the master from prison for a private debt, 95, 96.

Shipowner can claim contribution as for, when part of ship or tackle has been sacrificed for the whole concern, 96.

As if sails are cut down in a tempest, *id.*

Secus if the loss is accidental, *id.*

As where damage is done by carrying unusual press of sail to escape an enemy, *id.*

Or damage is done to the vessel in resisting a capture, *id.*

Semble, loss occasioned by ship being run aground to escape shipwreck, gives rise to, 97, 98, 99.

Arising from extraordinary expenditure for joint benefit of ship and cargo, 99.

On transshipment of cargo, if ship goes into a port for repairs, when, *id.*

Or unloading or reloading cargo, *id.*

Remarks on Plummer *v.* Wildman, 3 M. & Selw. 482, 99, 109, 101.

Wages and provisions of crew during detention by embargo, not the subject of, 101.

GENERAL AVERAGE—*continued.*
The expense of hiring extra hands to pump at a leak is, 101.
But not the hiring of men in place of deserters, *id.*
Nor gratuities for men to do their duty, 101.
Cost of extra coal for auxiliary steam vessel held not to be, *id.*
Expenses incurred after fortuitous stranding of a vessel until discharge of cargo, come under, 102.
Secus as to expenses incurred after cargo is safe, 102, 108.
Expenses in repairs of the ship accidentally stranded are not, *id.*
Or in bringing her to a place to be repaired, 103.
Unless the discharge of the goods from the ship and the saving of the ship form part of one continuous operation, *id.*
What articles are liable to contribute to, 104.
Ship, *id.*
Freight, *id.*
Cargo, *id.*
If there are no goods, ship and freight contribute rateably, *id.*
Calculation to be made when ship and freight are insured separately, *id.*
Charterer must contribute in respect of freight paid in advance, 105.
Wearing apparel and jewels if carried on the person do not contribute, *id.*
Articles of value such as gold, silver, jewels, etc., if not attached to the person, must contribute, *id.*
As must goods carried on deck, *id.*
Even though in some cases they cannot claim contribution, *id.*
Provisions and warlike stores are exempted from, *id.*
As to mode of adjusting, *id.*
Distinction between expenditure and a sacrifice made for the benefit of all, *id.*
No contribution where after a sacrifice the rest of the property perishes, 106.
Where cargo is sold for expenses which shipowner is bound to defray, *id.*
Where expenses are of an extraordinary character, *id.*
Where goods are jettisoned, loss how to be estimated, *id.*
Where part of the ship is sacrificed, 107.
Loss of freight, *id.*
Expense of raising money abroad, *id.*
Contributory value of ship, *id.*
of freight, *id.*
of goods, *id.*
Settlement of case in a foreign port of destination, *id.*
Underwriter when bound by it, *id.*
Parties primarily liable to contribution, *id.*
Master has a lien on the goods for, *id.*
Court of Admiralty cannot enforce lien, *id.*
But will not dispose of property without regarding it, *id.*
Mere consignee of goods, not liable for, when, 108.
Lord Tenterden's recommendation of a stipulation in a bill of lading, *id.*
Underwriters, how far liable to make good an average loss to the insured, *id.*
Court of Equity has only concurrent jurisdiction in cases of contribution to general average, *id.*

GENERAL AVERAGE—*continued.*
As action will lie by one shipper of goods against another, for, 108.
By the shipowner against the owners of cargo, *id.*
Or by either the shipper of goods or the shipowner against the underwriter, *id.*

GENERAL BALANCE, lien of, for. *See* LIEN.

GOODS AND CHATTELS.
What are within the meaning of the reputed ownership clause, 457. *See* REPUTED OWNERSHIP.

GOODWILL.
Of commercial business an interest of outgoing partner, 357.
May be valued, *id.*
Sale of, *id.*
Right of purchaser, *id.*.
Partner obtaining exclusively on dissolution, *id.*
Only valuable when not separated from business, *id.*
In trade marks, 358.
Does not on dissolution of partnership belong to surviving or continuing partner, *id.*
Except by express agreement, *id.*
Sale of by decree of Court, *id.*
Surviving partner may carry on business at the same place, *id.*
When retiring partner not allowed anything for, *id.*
In professional business, goes to surviving partner, *id.*
as in case of profession of surgeon, *id.*
or solicitor, *id.* *See* PARTNERSHIP.

GUARANTEE.
Whether partner can bind firm by, 299.
Of one partner, action may be maintained by firm on, when, 369.
For goods addressed to one partner may be declared on by firm, *id.*
When addressed to no one, must be declared on by person to whom given, *id.* *See* PARTNER—PARTNERSHIP.

HERITABLE BOND.
Heir entitled to, cannot claim exoneration out of personalty in England, 261.
Though heir could do so in the case of an English bond, *id.*
Or of a Scotch movable debt, *id.* *See* CONFLICT OF LAWS.

HYPOTHECATIONS,
Implied, belong to the remedy, 280. *See* CONFLICT OF LAWS.
By master of ship. *See* BOTTOMRY BOND.

IMMORAL CONTRACTS,
Entered into abroad, 256. *See* CONFLICT OF LAWS.

IMPLIED WARRANTIES. *See* DEVIATION—DOCUMENTS OF SHIP—SEAWORTHINESS.

INFANCY,
Defence of, depends on *lex loci contractûs*, 276. *See* CONFLICT OF LAWS.

INFANT.
Contract of, to enter into partnership, not void, 337.
liable if he expressly intimates his desire to remain a partner after his majority, *id.*
Or if he does not repudiate contract within a seasonable time, *id.*
Equity will sanction departure from articles of partnership, if beneficial to, 361. *See* PARTNERSHIP.

INJUNCTION
Against partner, when granted, 366. *See* PARTNERSHIP.

INSOLVENCY.
Where effect of, in a foreign country, is a mere discharge of the debtor's person, it is no defence to proceedings here, 274.
Order for discharge under Maryland Insolvent Act, no bar to suit for debt contracted here.

INNKEEPERS.
Lien of, 687. *See* LIEN.

INSURANCE. *See* ABANDONMENT—AVERAGE—ADJUSTMENT OF AVERAGE—PREMIUM—TOTAL LOSS.

INTEREST
On bill drawn abroad, at what rate payable, 264. *See* BOTTOMRY BOND—CONFLICT OF LAWS.

JETTISON
Of part of cargo to preserve ship and goods gives rise to general average, when, 92. *See* GENERAL AVERAGE.

JOINT CREDITORS. *See* BANKRUPTCY—PARTNERSHIP.

JOINT DEBTS,
How payable in case of bankruptcy, 417. *See* BANKRUPTCY.

JOINT ESTATE,
How distributable in case of bankruptcy, 417. *See* BANKRUPTCY.

JUDGMENT.
Partner cannot bind firm by consent to an order for, 302. *See* FOREIGN JUDGMENTS—PARTNER.

LEX LOCI CONTRACTUS.
When it governs a contract. *See* CONFLICT OF LAWS.

LEX DOMICILII.
How far it governs a contract. *See* CONFLICT OF LAWS.

LEX FORI.
What is governed by. *See* CONFLICT OF LAWS.

LIEN,
Definition of, 686.
Can be claimed only when possession is lawful, *id.*
Is either particular and general, *id.*

LIEN—*continued.*
1. *At common law,*
of carriers, 687.
and innkeepers, *id.*
may be claimed on goods belonging to others than guests and employers, *id.*
Secus when parties claiming have notice that the goods belong to others, 688.
Innkeeper cannot take clothes from the person of guest, *id.*
Or detain his person, 688.
But his goods only, *id.*
Custom of London and Exeter for innkeeper to sell guest's horse, when, *id.*
Lien of innkeeper particular only, *id.*
Does not lose it by occasional absence of guest with the things on which which lien is claimed, 689.
Does not lose it by guest going away without payment, *id.*
Will not have it unless goods came into his possession in his character of innkeeper as belonging to a guest, *id.*
Cannot be claimed in respect of horses and carriage standing at livery, *id.*
Nor reckoning for beer and ale drunk by guests, unless requirements of Stat. 11 & 12 Will. III. c. 15, have been complied with, *id.*
Has a lien by express contract for money lent to his guest, *id.*
Of common carrier is a common law lien, *id.*
Can only detain goods for price of carriage, *id.*
Except under contract or usage, *id.*
Claim to retain for general balance by proving usage, *id.*
under a contract, 690.
by giving notice of which employer is cognisant, *id.*
of common carrier will not affect right of consignor to stop *in transitu*, 691.
for booking or warehouse-room, when not claimable, *id.*
not enforced for general balance due from the consignor against consignee, *id.*
of coach-proprietor on luggage, *id.*
of shipowner, for what, *id.*
not confined to charterer's goods, *id.*
on goods of sub-freighters in a general ship, *id.*
of shipowner destroyed by his entering into contract inconsistent with it, 692, 693, 694.
of shipowner lost when ship is demised to charterer, and master becomes his agent, 695.
what is sufficient to show intention to give up possession of ship, *id.*
not lost on capture of ship if recaptured, 696.
of underwriter on sum payable on account of damages for collision, *id.*
for salvage, *id.*
at common law of bailee for labor and skill expended on chattel, *id.*
as in the case of a farrier, *id.*
horsebreaker, *id.*
shipwright, *id.*

LIEN—*continued.*
Claim, as in the case of a printer, 696.
miller, *id.*
tailor, *id.*
trainer of racehorse, 697.
owner of stallion, *id.*
favored at law, *id.*
Bailee not entitled to, when he does not confer any additional value on chattel, *id.*
as in case of agister, 697.
livery-stable keeper, *id.*
Bailee cannot charge for care of chattel while detained, 698.
Common law lien generally does not authorize sale, 699.
Exceptions, *id.*
Mere fact that accounts require adjustment does not give jurisdiction to equity Courts to direct sale, *id.*
Not existing at common law, must arise from express contract or usage, *id.*
2. *Liens arising by express contract, id.*
may be modified or extended by express contract, *id.*
Or by terms of contract or usage inconsistent with existence of, *id.*
Instance in cases of agistment of milch cows, 700.
and in training of race horses, *id.*
Or where work on chattel is contracted to be paid in a particular manner, *id.*
or out of a particular fund, *id.*
not where there is merely a contract for payment of a fixed sum, *id.*
by contract, may be either particular or general, *id.*
Of common carrier for general balance by express contract, 701.
By implied contract, as by giving public notice, *id.*
Goods of third parties not liable to, *id.*
Common carrier cannot refuse to carry goods except on terms of a lien for his general balance, *id.*
Nor can innkeeper refuse to receive guests, *id.*
Lien of banking company under its articles on the shares of its shareholders, *id.*
3. *Liens arising by implication, id.*
from usage, *id.*
or dealings between the parties, *id.*
general liens cannot be claimed according to general law of principal and agent, *id.*
only from custom or dealings of particular trades, *id.*
Of factor for general balance, *id.*
Whether he be home or foreign factor, *id.*
Claim limited to goods coming into his hands as factor, *id.*
Factor has general lien on proceeds of goods sold by him as factor, 702.
Assignees in bankruptcy of the factor will have the same rights, *id.*
Factor has no, for debts due before his character of factor commenced, *id.*
of packers for general balance, 703.
of bankers on securities of customers deposited with them as bankers, *id.*

LIEN—*continued.*
even when in case of negotiable instruments they belong to third parties, 703.
Bankers cannot claim when securities have been deposited for purpose inconsistent with lien, 703, 704.
Deposit to secure a specific sum not inconsistent with a general lien, 704.
None on deposit of partner on his separate account for general balance of firm of which he is a member, 705.
Nor on muniments left by mistake, 705.
of consignee, for general balance, *id.*
of brokers, for general balance, *id.*
of policy broker for general balance against his employers, *id.*
though they are merely agents when, *id.*
of broker employing a factor to insure, 706.
for general balance of dyers, *id.*
calico printers, *id.*
wharfingers, *id.*
But general balance must arise from work done in the course of the same business, *id.*
Decisions as to lien of dyers not uniform, *id.*
Fullers have no lien for their general balance, *id.*
Usage of trade as to lien for general balance may vary in different localities, *id.*
Onus of making out right of general lien lies upon wharfinger, *id.*
of attorney for general balance on papers of client, 707.
Unless they have come into his hands in another capacity, *id.*
master of ship has none on ship or freight for wages, *id.*
or for expenditure, *id.*
4. *How the right of lien may be lost.*
lost by abandonment of possession of goods, *id.*
by payment away of money the subject of a, *id.*
will not revive on recovery of possession, 708.
unless they had been stolen or taken by fraud, *id.*
not lost by deposit of goods for safe custody, *id.*
of shipowner, how preserved after discharge of goods from the ship, *id.*
remains over goods placed in bond warehouse, when, *id.*
shipping agent having lien on goods may have them brought home when, 709.
lost by a person taking them in execution at his own suit, *id.*
though sold to him under the execution, *id.*
lost on satisfaction of the debt, *id.*
by release of it in a composition deed, *id.*
by taking security payable at a distant day, *id.*
Semble, immaterial that securities are already due, *id.*
may be lost by misconduct of party claiming, 710.
as by holder of pledging goods, *id.*
not destroyed by a set off, *id.*
unless by contract between the parties, *id.*
Vendee takes goods subject to, *id.*

LIEN—*continued.*
on indorsement of bill of lading when, 710.
not necessary to prove actual tender in an action of trover for goods detained for, when, 711.
waived by a claim to retain on a different ground, *id.*
specific, not lost by wrongful claim to retain it for general balance, *id.*
right of, not lost by lapse of time, *id.*
of vendors of realty for unpaid purchase-money, *id.*
of person advancing money upon a deposit of title-deeds, *id.*
of consignee of West Indian estate, 711.
Roman, Dutch law of, 712.
none against books of account of a bankrupt, *id.*

LIMITATION OF ACTIONS
Belongs to the remedy, 280. *See* CONFLICT OF LAWS.

LOAN
Obtained by one partner binds firm, 293. *See* PARTNER—PARTNERSHIP.

MANAGER,
Or receiver of partnership property, when appointed, 368.
See PARTNERSHIP.

MARKET OVERT,
Sale in, 714. *See* SALE OF CHATTELS.

MARRIED WOMAN,
When she can enter into partnership, 337.
See PARTNERSHIP.

MARSHALLING
By Court of Admiralty, when one of two creditors has a double security, 68.
See BOTTOMRY BOND.

MASTER OF SHIP.
Power to sell *part* of cargo for *repairs* of ship, when, 72.
amounts to a loan from the shipper or owner of goods, *id.*
He may claim to be repaid by the shipowner, *id.*
Either the price of the goods at the place of sale, *id.*
or at the port of destination, *id.*
unless the vessel failed to reach it, *id.*
quære whether in such case he could recover sum for which goods sold, *id.*
reason why master can sell only part of cargo for repairs of ship, 73.
when the owner of the goods must contribute under the head of general average, *id.* *See* GENERAL AVERAGE.
Can sell the ship when voyage becomes hopeless, *id.*
As when vessel becomes a complete wreck, *id.*
Or repairs would exceed her value, *id.*
Where no communication is to be had with owners, and no money can be obtained for repairs, *id.*
Sale by, only permitted in cases of urgent necessity, 74.
Sale only justifiable after all attempts to rescue ship have failed, *id.*

MASTER OF SHIP—*continued.*
Or if capable of repair, that money could not be procured, 74.
Sale not justifiable from mere difficulty in procuring funds, *id.*
Or materials for repairs, *id.*
Nor though vessel be in imminent danger, *id.*
If master sells without a sufficient examination, *id.*
Or unless on the best and soundest judgment under the circumstances, *id.*
Burden of proof of propriety of sale lies on purchaser, when, 74.
should consult consul before sale of ship in a foreign port, *id.*
Surveyors employed to survey ship may be purchasers, when, *id.*
acquiescence in sale by owner, 75.
confirmation, 74, 75.
Has authority to receive proceeds of sale himself, 75.
or to order payment of them to others, *id.*
Has authority to sell cargo for proprietors of, when, *id.*
in cases of instant and unforeseen necessity, *id.*
as in case of a perishable cargo driven into port, *id.*
shipowner as well as master liable in trover for cargo erroneously sold by master, 76.
though master exercised his discretion, *bonâ fide*, *id.*
No freight due if cargo sold by, at intermediate port, *id.*
When he may transship cargo, 77.
Whether it be his right or duty to transship, *id.*
When not bound as agent of his owner, *id.*
Is entitled to the whole freight contracted for when goods transshipped, 77, 78, 79.
Though goods carried for less, *id.*
Upon whom loss falls when transshipment is effected at higher rate of freight, 79.
Semble, he can then transship only as agent for the freighter, *id.*
Case of Matthews *v.* Gibbs, 3 Ell. & Ell. 282, 80.
Has no implied authority to bind owner of cargo to pay more than current rate of freight, *id.*
Not justified in transshipping without consulting agent of shipper, *id.*
Not conveying cargo to destination not entitled to freight, 81.
Freighter must pay the whole if he prevents conveyance of cargo to destination, 82.
Freighter voluntarily receiving goods at intermediate port must pay *pro ratâ*, *id.*
by virtue of new contract, *id.*
See BOTTOMRY BOND.

NEUTRAL TERRITORY.
Belligerent cannot exercise hostilities within, 747.
Or seize property belonging to his enemy, *id.*
If he does so it must be restored, 748.
Limits of, difficulty in ascertaining, *id.*
Extent of at sea, from shore, *id.*
Reason for this, *id.*

NEUTRAL TERRITORY—*continued.*
Whether neutral territory at sea should be more extended, 748.
Distance calculated liberally for a neutral state, *id.*
Favorable circumstances taken into consideration, *id.*
Reckoned from islands, appendages to the coast, *id.*
And not merely from the mainland, *id.*
Extends to ports, 749.
harbors, *id.*
bays, *id.*
mouths of rivers, *id.*
adjacent parts of sea inclosed by headlands, 749.
Jurisdiction of British Crown over bays called "the King's Chambers," *id.*
of the United States over Delaware Bay, *id.*
Jurisdiction of four leagues from the coast under the British Hovering Acts, 750.
Straits and sounds within, when, *id.*
Inland lakes and seas, *id.*
Rivers where land on both banks belongs to the same state, *id.*
bays and estuaries, *id.*
Rivers flowing through conterminous states, *id.*
Common use to different states presumed in, *id.*
May be rebutted by proof of a peculiar property, *id.*
It must be clear, *id.*
Capture of vessel within neutral territory invalid, *id.*
Or of vessel beyond neutral territory by vessel within it, 751, 752.
Captors must not station themselves in mouths of neutral rivers, 752.
Nor within neutral harbor, *id.*
But if accidentally within neutral harbor, may capture enemy beyond, protection of, *id.*
Whether if contest is commenced out of, belligerent may seize prize within, 753.
Capture of vessel may be effected after passage through, when, *id.*
The neutral state only can claim property captured within, 754.
Claimant must be in a clear state of neutrality, *id.*
As to cost of captors, *id.*
Whether neutral state not obtaining redress for capture made within, bound to compensate owners of captured property, 754, 755.
Secus where commander of captured ship resorts to force, when, *id.*
Neutral cannot release goods or vessels of friend brought into its ports by a belligerent, 755.
Captors usually not allowed to take prizes into neutral ports, *id.*
Regulation to prevent vessel of one belligerent following that of another out of a neutral port, 756.

NEUTRALS. *See* BLOCKADE—CAPTURE—COASTING TRADE OF ENEMY—CONTRABAND OF WAR—NEUTRAL TERRITORY—VISITATION AND SEARCH.

NOMINAL PARTNER. *See* PARTNER—PARTNERSHIP.

NOTICE
To one partner, how far binding on the firm, 305. *See* PARTNER.

NOTICE—*continued.*
Of abandonment in cases of total loss, when it must be given to insurers, 171, 172. *See* TOTAL LOSS.

NOTICE TO QUIT,
One of two or more joint lessors cannot give, 306.
Unless they hold as partners in trade, *id.*
See PARTNERS.

OPEN POLICY. *See* ADJUSTMENT OF AVERAGE.

ORDER AND DISPOSITION. *See* REPUTED OWNERSHIP.

OSTENSIBLE PARTNER. *See* PARTNER—PARTNERSHIP.

PARTICULAR AVERAGE. *See* ADJUSTMENT OF AVERAGE.

PARTIES TO SUIT,
The *lex fori* regulates. *See* CONFLICT OF LAWS.

PARTNER,
General rule that each is agent for, and may bind the rest in partnership business, 292.
Whether they be active, *id.*
nominal, *id.*
or dormant, *id.*
Although partners may agree not to do certain partnership acts, act of one binds them to third parties, 293.
Even dormant partners are bound, *id.*
But have no implied power to bind the firm, *id.*
Unless the third parties have notice of the agreement, *id.*
in partnership business may bind the firm by a loan, *id.*
purchase of goods, *id.*
sale of partnership goods, *id.*
or a pledge of them, *id.*
Even in the case of a particular adventure, *id.*
Distinction between joint-purchase or sub-purchase and partnership, 294.
Joint-owner can only pledge or sell his own share, *id.*
Partner cannot, it seems, without express authority of firm, bind them by raising money to increase capital, *id.*
in partnership in trade can bind firm by drawing checks on the banker of the firm, *id.*
by drawing a bill of exchange in the name of the firm, *id.*
by accepting bill of exchange, *id.*
or endorsing one, *id.*
by giving promissory note, *id.*
Unless title of person seeking to charge them can be impeached, *id.*
Bill drawn in the name of the firm, and accepted by one partner binding on all, when, *id.*
or if partnership is carried on in the name of one, when, *id.*
As to onus of, showing that a single name is not used for the firm, *id.*

PARTNER—*continued.*
without special authority, can only bind firm by the partnership name, 295.
Result of signing the true names of partners instead of fictitious name of firm, *id.*
Slight deviation from name of firm not material, *id.*
Firm may use one name for general business, and another for endorsing negotiable instruments, *id.*
not liable for bills or notes accepted or given before he joined the firm, *id.*
liable for acceptance so far as it covered debt incurred after he joined firm, 296.
can only bind copartners by a joint bill or note, *id.*
joint and several note only binds partner giving it severally, *id.*
where business is not mercantile, cannot bind firm by bill of exchange, *id.*
or promissory note, *id.*
As in the case of an attorney, *id.*
a farmer, *id.*
a partner in a farming concern, *id.*
or in a mine, *id.*
Power by partner in a non-mercantile firm to bind by bill or note, when necessary in a particular instance, *id.*
or when usual in similar partnerships, *id.*
Coal mining company may be considered sometimes a trading company, 297.
Not known to the world has no implied authority in the absence of express power to bind the firm, 298.
Ordinarily cannot bind partnership by a guarantee for a collateral purpose, 299.
Secus where it is within the scope of the partnership dealings, *id.*
Firm may be bound by, though given out of usual course of business, if adopted by firm, *id.*
Question of adoption left for consideration of jury, *id.*
Case of Brettel *v.* Williams (4 Exch. 623), 299, 300.
Partner may also bind firm by an acknowledgment, 300.
accounts rendered, *id.*
admission, *id.*
promise to pay, *id.*
assent to transfer account to a new banker, *id.*
Effect of tender to or by one, *id.*
Part payment of principal or interest by one partner or co-contractor, was formerly an answer to plea of Statute of Limitations, 301.
Secus since Mercantile Law Amendment Act (19 & 20 Vict. c. 97), *id.*
Conflicting authorities as to whether sect. 14 of act is retrospective, *id.*
Quære, whether a copartner is an agent duly authorized under the 13th section, *id.*
Acts of surviving partners before statute did not keep debt alive against representatives of deceased partner, *id.*
cannot bind firm by a submission to arbitration, *id.*

PARTNER—*continued.*
cannot bind firm by a consent to an order for a judgment, 302.
or by giving a cognovit to pay debt and costs, *id.*
entering into a submission to an award liable to an action on firm refusing to be bound, *id.*
Firm not bound by contract of a partner not in the name of the partnership, *id.*
Though firm may have profited thereby, *id.*
As where one partner signs in his own name a promissory note, *id.*
or draws or accepts a bill of exchange, *id.*
or executes a power of attorney, *id.*
or borrows a sum of money, *id.*
Secus if one partner purchases and applies to use of firm goods in which it usually deals, *id.*
Liability of firm on general contract though one partner enters into contract as security for firm, 302, 303.
cannot bind firm by contract wholly unconnected with its business, 303.
Firm not bound by securities fraudulently obtained from a partner, 303.
As where money is fraudulently raised by one partner on negotiable instruments, *id.*
Giving a promissory note or accepting a bill in the name of the firm for his own debt, *id.*
Even if they get into the hands of an indorsee, 304.
Unless he can prove that he gave a valuable consideration for them, *id.*
They may be enforced against partnership by indorsee for value without fraud, *id.*
Or without notice that they had been fraudulently obtained, *id.*
Has implied power to receive debts due to firm, *id.*
Even after dissolution, *id.*
Unless debtors have notice of an assignment of the debts, *id.*
Or there be an order of Court to pay them to another partner, *id.*
Firm bound by receipt of debts, *id.*
Unless given in fraud of the partnership, *id.*
Though partner may misappropriate receipts, *id.*
Firm of attorneys bound by receipt of a partner for money to be invested on a particular security, *id.*
Secus where the money is paid for the general purpose of investing it, *id.*
Onus probandi, when separate creditor takes partnership security, 305.
Liability of partnership for money advanced to individual partner on negotiable security in the name of the firm, *id.*
not rebutted by mere knowledge of creditor that advance has been carried to account of partner, *id.*
Under what circumstances firm is liable for security given for antecedent debt of partner, *id.*
Act or admission of partner in proceedings in law or equity binding on firm, *id.*
As is notice to one partner, *id.*
may bind firm by agreeing to stay proceedings, *id.*
or entering an appearance, *id.*

PARTNER—*continued.*
may give notice in legal proceedings, 305.
Or of abandonment of a cargo in cases of insurance, 306.
One of two or more joint lessors cannot give notice to quit, *id.*
Unless they hold lease as partners in trade, *id.*
Firm bound by fraud of, against innocent parties in matters connected with business, *id.*
As where one partner purchases goods for his own use, *id.*
fraudulently negotiates a partnership security, *id.*
converts money of customers of bank to his own use, *id.*
makes a fraudulent statement, *id.*
or fraudulently colludes with partner of another firm, *id.*
may render firm liable for a wrong, *id.*
for personal negligence, *id.*
for breach of the revenue laws, *id.*
and in some cases not only civilly but criminally, *id.*
may sign petition in bankruptcy for firm, *id.*
demand and notice in a trader debtor summons, *id.*
may prove a debt, 306.
sign a letter of attorney for firm in bankruptcy, *id.*
may revoke power to vote in choice of assignees given by another partner, 307.
cannot except under express power, bind firm by deed, *id.*
though the partnership agreement be under seal, *id.*
Subsequent acknowledgment of power by other partners, *id.*
may bind rest of firm by executing deed in their presence and by their authority, *id.*
though there be only one seal, *id.*
Distinction between deed operating as a grant and a release, *id.*
Semble, partner may bind firm by deed operating as a release, *id.*
Covenant by one partner not to sue, cannot be pleaded in bar to an action by the firm, 308.
May assent to a creditor's deed on behalf of firm, *id.*
Where partner has authority to bind firm in a transaction, it will not be invalidated by use of a deed, *id.*
Can, with consent of firm, execute a warrant of attorney for signing judgment, *id.* *See* PARTNERSHIP.
Retiring partner, though surety not discharged by acts of continuing partner, when, *id.*
Promoter of company not liable as, 309.
Allottees not liable for acts of managers, *id.*

PARTNERSHIP,
Terms of, usually regulated by articles, 334.
Private unincorporated, may be entered into by parol, *id.*
Or be inferred from acts of parties, *id.*
Persons may engage in as ostensible partners, *id.*
as nominal partners, *id.*

PARTNERSHIP—*continued.*
Persons may engage in as dormant partners, 335.
1. *What constitutes a partnership.*
Definition of, *id.*
is a voluntary contract, *id.*
Distinction between partnership and community of interest independent of contract, *id.*
As between tenants in common, *id.*
joint tenants, *id.*
persons purchasing for mere purpose of division, *id.*
the representatives of a deceased partner and the surviving partners, *id.*
joint contractors, *id.*
is founded on the *delectus personæ*, 336.
Third person cannot be introduced into, without the consent of all the partners, *id.*
But he may become a partner of a partner in his share, *id.*
Surviving partner not bound to take representatives of deceased partner into, *id.*
Except in the case of a stipulation to that effect, *id.*
According to Roman law such stipulation was void, *id.*
By English law, any person or class of persons by stipulation may be introduced into, 336.
But stipulation must be clear, *id.*
Option reserved to executors of deceased partner to enter into, effect of, *id.*
All persons, *sui juris*, are competent to enter into, *id.*
Contract of infant to enter into voidable, not void, 337.
Infant when liable as partner, *id.*
An alien friend may enter into, *id.*
But not an alien enemy, *id.*
Or a person domiciled in an alien enemy's country, *id.*
Married woman by common law cannot enter into, *id.*
but she may by special custom, as by custom of London, *id.*
upon civil death of her husband, *id.*
or his transportation for a term of years, *id.*
or if, being a foreigner, he do not come within the realm, *id.*
in equity she can bind her separate property by, *id.*
and she may trade in during separation, under Divorce and Matrimonial Causes Act, *id.*
Essential to contract of, that something should be put into, *id.*
either money, effects, labor, or skill, *id.*
Not necessary that each partner should contribute the same thing to, *id.*
One may contribute labor and industry, 338.
Roman law the same, *id.*
Stipulation with regard to property in capital binding, *id.*
whether it be express, *id.*
or implied, *id.*
Presumption, in the absence of stipulation, *id.*

PARTNERSHIP—*continued.*
may exist in capital stock, although price in first instance is advanced by one party, 338.
Agreement on purchase of goods by one party for a division of profits of sale, will not give another property in goods, *id.*
Partner having property in, can pledge stock, 339.
secus, if he has only an interest in profits, *id.*
part-owner, can pledge share only, *id.*
must be constituted for a lawful purpose, *id.*
Void if for an immoral purpose, *id.*
As for keeping house of ill fame, *id.*
a gambling-house, *id.*
or if it be in contravention of Act of Parliament, *id.*
Communion of profits essential to creation of, 340.
But partner may stipulate with co-partner to be free from loss, *id.*
But he will still be liable to third parties, *id.*
Exists between parties when there is a community of interest in the stock and profits, *id.*
But is not essential that there should be a communion of interest in the capital stock, *id.*
If there be a community of profit and loss, *id.*
Partners in the absence of contract will participate equally in profits and losses, 340, 341.
By the law of Scotland it is a question for a jury, 341.
Proportion of partners in profits may be inferred from their dealings, *id.*
As entries in the books of, *id.*
In the absence of contract partners not entitled to interest on capital, 342.
although one partner may not have brought in capital, according to agreement, *id.*
when interest payable on capital, allowed up to what time, *id.*
when allowed on advances by partner to, *id.*
what rate allowed, *id.*
partner not charged with interest on balances in hand, *id.*
or sums drawn out or advanced to him, *id.*
secus, when money of firm fraudulently retained, *id.*
or improperly applied, *id.*
when accounts kept badly by a surviving partner, 343.
2. *Liability of persons as partners to third parties though not partners, inter se quasi partnership.*
law before Cox *v.* Hickman, and 28 & 29 Vict. c. 86, *id.*
as to third persons, where person has a share in profits though a mere agent or clerk, *id.*
not created as regards partners, when an agent or servant is to be remunerated by a *portion* of profits, *id.*
As between them and third parties it is a partnership, *id.*
Secus, where agent or servant is to be remunerated by part of a gross fund or stock not altogether composed of profits, *id.*
or a sum of money calculated in proportion to a given quantum of profits, 344.
Option to enter into, while unexercised, does not make person a partner, *id.*

PARTNERSHIP—*continued.*
nor receipt of interest or annuity fixed as to amount and duration for money advanced firm, 344.
Secus, if he received an annuity out of profits, *id.*
or in lieu of them, *id.*
or determinable on cessation of the trade, *id.*
or an annuity on rate of interest fluctuating with the rate of profits, *id.*
though it be contingent, *id.*
Dormant partner liable for engagements of, *id.*
Departure in Cox *v.* Hickman, 8 H. L. Ca. 268, from the rule as to the effect of sharing profits, 344, 345, 346, 347.
further limitation of the rule as to the effect of sharing profits, by 28 & 29 Vict. c. 86–347, 348.
Person allowing his name to be used by, liable as if a partner to third parties, when, 348.
the holding out must have been by his express or implied authority, 349,
must have been known to person seeking to render him liable, *id.*
and before contract in respect of which liability was entered into, arose, *id.*
executor of deceased partner not rendered liable by partnership being carried on in the name of the old firm, *id.*
unless perhaps where the surviving partner was executor, *id.*
3. *Liabilities of partners.*
How far one partner can bind the partnership, 349. *See* PARTNER.
Liability of partner begins with commencement of, *id.*
Immaterial that deed of partnership was not signed, *id.*
Partner not liable for contracts made previous to commencement of, *id.*
Though partners agreed that partnership was to have a retrospective operation, 350.
Person not liable for goods furnished when he was a partner, under contract made before, *id.*
nor if conditions of future partnership have not been fulfilled, when, *id.*
Liability of *ostensible* partner ceases on retirement, and after proper notice of dissolution, *id.*
But he will be liable for previous contracts of, *id.*
Liability will continue if he do not give proper notice of dissolution, *id.*
Notice in the "Gazette" sufficient to those who have not previously dealt with, *id.*
Actual notice should be sent to those who have had dealings with, *id.*
Circular letter generally sent to them, 351.
Notice may be presumed, when, *id.*
although given, liability of partner allowing his name to be used continues, *id.*
Secus, if his name be used without his authority, *id.*
Dormant partner chargeable only in respect of liabilities when actually a member of, *id.*
Not necessary for him to give notice of retirement, *id.*
except to those aware of his being a partner, *id.*
Representatives of deceased partner not liable at *law* for contracts of firm, *id.*

PARTNERSHIP—*continued.*
Secus in equity, 351.
Joint creditors on insolvency or bankruptcy of partner postponed in eqnity to separate creditors as to separate estate, *id.*
Joint creditors may proceed in equity against representatives of deceased partner, 352.
Though it be not proved that surviving partner is insolvent, 352, 353.
Equity will treat joint security for antecedent debt of, as several, 353.
Secus, where it is executed as a matter of arbitrary convention for no antecedent liability, *id.*
Claims against a retired partner and the estate of a deceased partner lessened by appropriations of payments, when, *id.*
Agreement on dissolution between partners as to payment of debts binding on them, *id.*
does not vary rights of creditors, *id.*
By consent of all parties including creditors, debts of old, may be transferred to new, partnership, *id.*
Creditor of a firm taking separate security of one partner in discharge of joint debt discharges firm, *id.*
Secus, where the creditor takes only collateral security from one partner, 354.
or only receives interest from him on joint debt, *id.*
Question as to whether creditor has made such agreement is for determination of jury, *id.*
Cases at law on this subject arise on dissolution of partnership by arrangement, 355.
Cases in equity where dissolution has taken place on death of a partner, *id.*
An intention must appear, or agreement be proved, to release estate of deceased partner, *id.*
Secus, where transactions show that creditor has accepted liability of the survivor, *id.*
discharged by payment of a debt by one partner, *id.*
or by a release or discharge to one partner, *id.*
though debt be joint and several, *id.*
but not a mere covenant not to sue one partner, *id.*
4. *Rights and interests of partners in the partnership property.*
are joint owners, *id.*
How interest of partners differs from that of joint-tenants and tenants in common, *id.*
Partner may dispose of property of, consisting of personalty, when, *id.*
Tenant in common or joint-tenant can only dispose of his share, 356.
Survivorship in case of property of, *id.*
In case of *real* property surviving parties trustees for representatives of deceased partner, *id.*
Real property held for partnership purposes when treated in equity as personalty, *id.*
as when purchased with partnership capital, for the purposes of partnership in trade, *id.*
Secus, where real estate, though used for partnership purposes in trade, belonged to partners when they entered into, *id.*

PARTNERSHIP—*continued.*
Or was acquired by them out of private moneys, 356.
or by gift, *id.*
Or if though purchased out of capital of, was not purchased for partnership purposes in trade, *id.*
Agreement or direction for sale amounts to conversion, *id.*
Partner's lien on property of, for his share under, *id.*
For his own advances to, 357.
For moneys abstracted by partner from, *id.*
Share of partner, how ascertained, *id.*
Goodwill ought to be sold with book debts, how, *id.*
rights of person purchasing goodwill, *id.*
how valued by Court, when partner obtaining the benefit of, is made accountable for, *id.*
Goodwill not valuable unless connected with the business, *id.*
in connection with trade-marks, 358.
Estate of deceased partner, or surviving partner, entitled to participate in, when, *id.*
On sale of partnership under decree, *id.*
When retiring partner not allowed anything for goodwill, *id.*
Goodwill in professional business in the absence of contract goes to surviving partner, *id.*
as in case of profession of surgeon, *id.*
or solicitor, *id.*
5. *Rights, duties, and obligations of partners between themselves.*
contract of, must be characterized by good faith, *id.*
may be set aside by person induced fraudulently to enter into it, *id.*
fraud must be clearly proved, *id.*
lease renewed by one partner held in trust for firm, when, 359.
lease acquired for the partnership purposes partnership assets, when, *id.*
Partner not allowed to derive any underhand advantage, *id.*
as in making a purchase, *id.*
negotiating a new partnership, *id.*
undertaking clandestinely business of the firm for his own profit, *id.*
by bartering his own goods for things purchased by him for the firm, 360.
by selling his own goods to firm, *id.*
parties may, by contract, take themselves out of principle, *id.*
Duty of partner not to exclude another from the equal management of, *id.*
to enter receipts in books of, *id.*
to keep precise accounts, *id.*
to have them ready for inspection, *id.*
to devote due amount of time, interest, and skill, to affairs of, *id.*
Partner, save under contract, not entitled to compensation for his time, labor, or skill, *id.*
even in the case of a surviving partner carrying on, 361.
but only to costs out of pocket, *id.*
Duty of partners to conform to articles of, *id.*

PARTNERSHIP—*continued.*
Construction to be placed upon them, 361.
Equity will sanction departure from articles of, if beneficial to infants, *id.*
articles may be varied by consent of partners, *id.*
either by writing, or by mode of carrying on business, *id.*
Special clauses, as for instance, as to taking accounts considered to be expunged if not acted upon, when, *id.*
Carried on after expiration of term, how far regulated by articles, 362.
Two partners taking third, he joins on the same terms, *id.*
Except as varied by stipulation, *id.*
Duration of, not to be inferred from length of lease, part of the subject-matter of partnership, *id.*
Sub-partnership in the absence of contract not necessarily co-extensive with original partnership, *id.*
6. *Remedies of partners as between themselves.*
At *law*, account cannot in general be taken between partners, *id.*
Nor can one partner bring an action against another for money, advanced on account of, 363.
But he may maintain action on a covenant by deed, *id.*
Or a special undertaking not by deed, *id.*
for money advanced before partnership for its formation, *id.*
for work done for firm before he joined it, *id.*
for balance of an account struck by the firm, 363
by the court, *id.*
by an arbitrator, *id.*
implied promise to pay is sufficient, *id.*
Partners may bring action against copartner for advance made to him in respect of what he is to contribute to joint capital, *id.*
or in respect of matter withdrawn from the adjustment of the partnership concerns, *id.*
or for amount of liability for using his name after dissolution, 364.
Equity gives more extensive remedies than law in cases of, *id.*
will decree specific performance of contract to enter into for a term, *id.*
Secus where no term fixed, *id.*
or though term is fixed, if amount of capital and mode of carrying on business is undefined, *id.*
Nor will equity decree specific performance of covenant to refer to arbitration, 365.
nor substitute master for arbitrator, *id.*
Plea to refer to arbitration, no valid objection to bill, *id.*
Doubtful whether action would lie for breach of covenant to refer, *id.*
Or that any but nominal damages should be obtained, *id.*
Covenants to refer to arbitration, how made effectual, *id.*
Partner may file a bill against another for amount of profits of business carried on in breach of covenant, *id.*
Unless he has acquiesced in breach, *id.*
Courts of equity will take accounts between partners, *id.*
And it is not essential that at the same time a dissolution be sought, *id.*

PARTNERSHIP—*continued.*
At all events where partner is acting in violation of partnership contract, 365.
Where partner has committed acts which would warrant equity in decreeing a dissolution, it will grant an injunction, 366.
As where partner for his own purposes has been drawing, accepting, or endorsing bills of exchange, *id.*
Or been using resources of partnership for a rival business, *id.*
Or been obstructing or interrupting of the carrying on of the business of, *id.*
Excluding his partner from the business, *id*
abstracting the partnership books contrary to covenant, *id.*
doing acts of waste or injury to the property of, *id.*
carrying on business after dissolution in breach of agreement, *id.*
Injunction granted for giving partnership bill for separate debt, when, *id.*
not necessary that there should be such facts as if proved at hearing would be grounds for a dissolution, *id.*
to prevent violation of covenant of deed of, 367.
but it must be studied, intentional, and prolonged, *id.*
After dissolution of, equity will restrain any of former member of firm from doing acts inconsistent with duty of winding it up, *id.*
as if one of them carries on the business for his own benefit, *id.*
and will restrain representativse of deceased partner from using lease for other than partnership purposes, *id.*
and surviving partner from ejecting representatives of deceased partner from leaseholds of, *id.*
Receiver or manager of property of appointed, *id.*
But partner seeking must either show a dissolution, *id.*
Or facts entitling him to one at the hearing, *id.*
As where partner is excluding him from the business, *id.*
Or insists on legal objection destroying his right to share in, *id.*
Partners may, by contract, exclude interference of the court, 368.
Or provide that in certain events one partner may exclude the other, *id.*
Receiver appointed where dissolution is sought or has taken place, *id.*
when breach of contract of has been committed, *id.*
As where one partner refuses to account for effects of, *id.*
Or after dissolution carries on trade with effects of on his own account, *id.*
Or excludes his copartner from winding up of, *id.*
Collects debts contrary to agreement, *id.*
Where surviving partner carries on business with assets of deceased partner, *id.*
Receiver and manager appointed on interlocutory application, when, *id.*
But questions between partners not then determined, *id.*
Where all partners are dead, receiver in a suit appointed as of course, *id.*
7. *Rights of partners against third parties.*
Debtor liable to firm for advance of one of its members, when, 369.
All partners may sue on account of sale or purchase by one of them when, *id.*
Person indebted to ostensible partner sued by firm may set off debt of ostensible partner, *id.*

PARTNERSHIP—*continued.*
Action may be maintained by firm on guarantee of one partner, when, 369.
Guarantee for goods addressed to one partner may be declared on by firm, *id.*
When addressed to no one must be declared on by person to whom given, *id.*
Security for future advances given to a firm, whether by specialty or simple contract, ceases on change of firm, 369, 370.
as on coming in of new partner, 370.
upon the death of an old partner, *id.*
or outgoing of old partner, *id.*
Unless security was intended to be in force notwithstanding change, *id.*
Case of Strange *v.* Lee, 3 East 484. 370, 371.
As to guarantee to or for a firm under 19 & 20 Vict. c. 97, s. 4. 371.
One partner in the absence of fraud may release third parties from liability of, to, *id.*
And payment of debt to one partner is valid, *id.*
Even after dissolution, *id.*
Though by clause in the articles of, another partner is to receive debts, *id.*
One partner may give time to debtor of, as by taking his acceptance, *id.*
or by his act may prevent partnership from suing debtor, *id.*
8. *Dissolution of partnership, when and how effected.*
1. by operation of law, *id.*
as by partner becoming outlawed, convicted, and attainted, *id.*
by marriage of female partner, 372.
by general assignment of one or more of the partners, when, *id.*
By partnership effects of one of the partners being taken in execution, *id.*
by insolvency or bankruptcy of one or more of the partners, *id.*
and dissolution has, on adjudication, relation back to act of bankruptcy, *id.*
by war between countries of partners, 373.
by death of partner, if no stipulation to the contrary, *id.*
though partnership be for definite period, *id.*
irrespective of notice to partners or third persons, *id.*
2. Dissolution of partnership by the partners themselves, *id.*
by consent of all, though entered into for a limited period, *id.*
not by the mere will of one of the partners, *id.*
by the will of one partner on giving proper notice if no time be fixed for duration of, *id.*
Not requisite that notice should be given as in Roman law at a seasonable time, 373, 374, 375.
Power, under articles, of expelling partner must be exercised in good faith, 375.
And not for the benefit of a particular partner, *id.*
may expire by efflux of time, *id.*
Business carried on after dissolution considered partnership at will, *id.*
and may be dissolved immediately, though under original articles notice of dissolution was required, *id.*
may expire by extinction of subject-matter of, *id.*

PARTNERSHIP—*continued.*
may expire by termination of business, 375.
3. As to dissolution by decree of a court of equity, 376.
where partnership originated in fraud, misrepresentation, or oppression, *id.*
in case of gross misconduct of a partner, *id.*
as a breach of good faith, *id.*
raising money on credit of, for his private use, *id.*
fraudulently applying trust funds to his own use, *id.*
exclusion of copartner from business, *id.*
not entering receipts, or not leaving books open to inspection of, *id.*
allowing bills to be improperly drawn on, *id.*
where conduct of copartner prevents business being properly carried on, *id.*
or misconduct of both parties, *id.*
where there is violent and lasting dissension between partners, *id.*
slight misconduct or ill-temper of co-partner not sufficient, *id.*
especially if there has been acquiescence, *id.*
or where conduct of partner making the application is the cause of dissension, 377.
where it becomes impossible to carry on, according to original intention, *id.*
when business cannot be carried on at a profit without further capital, *id.*
à fortiori, if firm be insolvent, *id.*
where there is incurable insanity of one of the partners, 377.
it must be clearly proved, or inquiry or issue will be directed, 378.
proof of person being found lunatic under a commission conclusive, *id.*
but decree will not, in the absence of contract, be retrospective, *id.*
costs of suit for dissolution on ground of insanity of co-partner, *id.*
notice to determine may be given to insane co-partner, *id.*
power of Lord Chancellor to dissolve under the Lunacy Regulation Act when partner becomes lunatic, 379.
On dissolution by decree, equity will determine rights between partners, *id.*
As, for instance, where premium for entering into should be returned wholly or in part, 379, 380.
may be dissolved by award of arbitrator, when, *id.*
9. *Effects and consequences of dissolution.*
as between the partners themselves, 380.
they can enter into no *new* engagements, *id.*
for community exists only for purpose of winding up affairs of, *id.*
Each partner can insist that funds shall be applied in discharge of debts and liabilities, *id.*
And single partner may pay and collect debts, *id.*
And give receipts and discharges, *id.*
And equity will restrain partner acting inconsistently with purpose of winding up, *id.*
Partner may do any act necessary for winding up affairs of, 381.
But he will not be allowed to derive any private advantage, *id.*

PARTNERSHIP—*continued.*
As by composition of debts, 381.
Or by getting a lease in his own name for partnership purposes, *id.*
Partner cannot advertise discontinuance of business, *id.*
Except as regards himself, *id.*
Not in the absence of stipulation allowed anything for winding up, *id.*
Representative of partner, in the absence of stipulation or direction in his will, may have concern wound up and disposed of, *id.*
If surviving partner continues trade, how representative of deceased partner can charge him, *id.*
where property consists partly of leaseholds, *id.*
if renewed by surviving partner, 382.
where trade is of a speculative character requiring great outlay, *id.*
where surviving partner refuses to give representatives of deceased partner information as to affairs, *id.*
accounts between surviving partner and estate of deceased partner, how taken when capital of the latter not withdrawn, *id.*
Effect of dissolution by bankruptcy of partners, *id.*
Assignees become tenants in common with solvent partners, *id.*
And at law, actions must be brought in the names of the assignees and solvent partners, 383.
Actions by third parties against solvent partners and bankrupt, *id.*
Solvent partners cannot engage in new transactions, *id.*
But solvent partners and assignees may wind up affairs of, *id.*
Solvent partners enter into new contracts at their own risk, *id.*
liable at the option of the assignees to account for profits, or pay interest, *id.*
and are subject to all losses, *id.*
Power of solvent partner to sell partnership property, cannot be assigned to another, *id.*
Or exercised by a judgment creditor, *id.*
Accounts of, must be taken according to special agreement, *id.*
If waived by parties, then in the usual way, *id.*
Partner withholding books and documents of, from the Court of Chancery, in taking accounts charged arbitrarily, *id.*
After dissolution of, property of, will be sold, 384.
Even in case of death or bankruptcy of a partner, the survivors cannot insist on taking effects at a valuation, *id.*
Nor can partner in the absence of contract compel his co-partners to buy at a valuation, *id.*
Sale of effects may be directed on motion, when, *id.*
Surviving partners may purchase share of deceased partner, *id.*
Court will give liberty to partners to bid at the sale of the effects of, *id.*
Except to partner having the conduct of the sale, *id.*
How long estate of deceased partner is liable to demands of surviving partners, *id.*
not subject of positive enactment, *id.*
how dealt with in equity, *id.*
Effects of dissolution as to rights of creditors, 385.

PARTNERSHIP—*continued.*

Rights of creditors against partners not altered by dissolution, 385.

Bonâ fide assignment of share of retiring to continuing partner valid, *id.*

And joint property of, becomes separate property, *id.*

And no longer liable to claims of joint creditors, *id.*

Creditor has no lien on effects of partnership while it is going on, *id.*

But he may get judgment and take out execution, *id.*

On dissolution, partners, or their representatives, have a lien in equity on effects of, for shares, *id.*

Joint creditors have a *quasi* lien, through equity of partners, *id.*

Lien of representative of deceased partner does not extend to property of surviving partner acquired after dissolution, 386.

On dissolution by death of partner, at *law* joint creditors can only proceed against the survivors, *id.*

In equity against the estate of the deceased partner, *id.*

But surviving partners would be proper parties to suit, *id.*

As to administration of partnership assets in bankruptcy, *id.*

in equity, *id.*

Where estate of deceased partner is insolvent, and surviving partner solvent, *id.*

Where estates of deceased, and surviving partner, are insolvent, *id.*

Where both partners die before administration takes place, *id.*

10. *Conversion of partnership assets.*

If retiring partner, on dissolution of, *bonâ fide* assigns stock to remaining partner, it becomes his separate property, 397.

and is distributable among his separate creditors, *id.*

Principle upon which Ex parte Ruffin, *ante* 387, was decided, *id.*

Remarks of Lord Eldon in Ex parte Williams, 11 Ves. 5. 397, 398.

Transfer in order to convert joint or partnership into separate property must be complete, 399.

By legal deed of assignment, *id.*

By mere agreement if there be a delivery of the goods *in specie*, 399, 400.

Mere executory agreement not sufficient, 400.

Effect of interference of the Court of Chancery after an assignment and previous to bankruptcy, *id.*

Fact of consideration for assignment being made up of bills of exchange will not make it executory, 400, 401.

Lien of retiring partner for unpaid purchase-money of real estate, 401.

Notwithstanding assignment, joint creditors entitled to personal effects remaining in order and disposition of firm, *id.*

Mere dissolution or retirement of one partner will not convert joint into separate property, *id.*

Case of Ex parte Taylor, Mont. Rep. 240, *id.*

Joint creditors of partner, to whom effects of, have been assigned, may *before* bankruptcy elect to become separate creditors, *id.*

But not afterwards, *id.*

Joint creditors may, after assignment to one partner, proceed against both, 402.

Transfer, in order to convert joint into separate property, must be *bonâ fide*, 402.

PARTNERSHIP—*continued.*
Not converted in case of fraud or collusion, 402.
Or where the firm and partners collectively and individually are insolvent at the time of the transfer, *id.*
Case of Ex parte Mayou, In re Edwards-Wood and Greenwood, *id.*
Case of Ex parte Peake, In re Lightoller distinguished, 404, 405, 406.
Mere happening of bankruptcy immediately after assignment will not in the absence of fraud render it void.
See BANKRUPTCY—REPUTED OWNERSHIP.

PAYMENT. *See* APPROPRIATION OF PAYMENTS.

PIRATES. *See* RANSOM.

PLEDGE,
By one partner when it binds firm, 293. *See* PARTNER—PARTNERSHIP.

POLICY OF INSURANCE. *See* ADJUSTMENT OF AVERAGE—GENERAL AVERAGE—PREMIUM—TOTAL LOSS.

PREMIUM,
Return of, when question arises as to, 226.
1. Rule laid down by Lord Mansfield as to, *id.*
Returned where risk has not been run, *id.*
Though through fault or will of the insured, *id.*
or any other cause, *id.*
Lord Mansfield's reason for the rule, *id.*
Application of the rule where assured had no goods on board, *id.*
Where insured had no insurable interest, and underwriters set that up as a defence to an action, *id.*
But there must be no illegality in the voyage, *id.*
Or fraud in effecting the policy, *id.*
Where risk has been run, premium cannot be recovered on ground of plaintiff not having insurable interest, 226.
Proportionable return of, for short interest when part of goods insured only on board, *id.*
In valued policy, *id.*
open policy, *id.*
Return for short interest when profits are insured, 227.
In case of valued policy, no return of, because goods, being all on board, were not of value mentioned in policy, *id.*
Return of in case of over-insurance, *id.*
where there are several underwriters, *id.*
Several policies of the same date considered one policy, *id.*
How returned where there are several policies of different dates, *id.*
Principle upon which cases proceed, 228.
Difference of date when immaterial, *id.*
Returned where assured does not comply with express or implied warranty, *id.*
as express warranty of neutrality, *id.*
or of sailing with convoy, *id.*
or implied warranty of seaworthiness, *id.*

PREMIUM—*continued.*
Return of, where risk has never commenced, 228.
2. Rule laid down by Lord Mansfield, *id.*
No apportionment or return of, if risk has once commenced, *id.*
No return of, where ship insured "at and from a port" is seaworthy for port, though unseaworthy for voyage, 229.
or where ship has deviated from her course, *id.*
Apportionment of, where insurance comprises two distinct voyages, and one has not commenced, *id.*
Usage of trade to consider risks of voyage divisible, 230.
or to make a rateable return for risk on part of voyage, *id.*
No return of, where policy is void for illegality, *id.*
as where it is a wager policy, *id.*
or it affects a re-insurance void under 19 Geo. II., c. 37, s. 4, *id.*
or covers a voyage carrying on trade with the enemy, *id.*
Maxim on which law depends, *id.*
Ignorance of law is no excuse, *id.*
even in the case of a foreigner, *id.*
May be recovered where policy was effected in ignorance of facts, *id.*
As that war had been declared with country the trading to which is covered by policy, *id.*
Where vessel departed without license contrary to expectation, *id.*
Secus, where assured knew vessel left without license, *id.*
Though he may afterwards procure one, *id.*
May be recovered semble, though voyage illegal, if action be commenced before risk is over, *id.*
Before action for return of, insured must renounce contract to insurer, *id.*
Even though risk may not have commenced, *id.*
May be recovered if underwriter, when he subscribed policy, was aware of arrival of ship, 231.
or makes positive misrepresentations in a point of materiality, *id.*
Not returned if vessel was insured when insurer knew it was lost, *id.*
Returned if risk has not attached where there has been misrepresentation of assured, if without fraud, 232.
Not returned if assured renders policy void by his own act alone, *id.*
As by adding a further subject-matter of insurance to policy after its subscription, *id.*
or by tearing off seal of policy, *id.*
Return of, under express stipulation, *id.*
Allowance of one-half per cent. to underwriter on return of, *id.*
As to the practice of paying into Court, *id.*

PROFITS,
In case of insurance of, when there is a total loss, 170. *See* TOTAL LOSS.

PROFITS AND LOSS,
of partners. *See* PARTNERSHIP.

PROMISE TO PAY,
Partner can bind firm by, 300. *See* PARTNER—PARTNERSHIP.

PROMISSORY NOTE,
Partner can bind firm by, when, 294. *See* PARTNER—PARTNERSHIP.

PROOF OF DEBTS.
In bankruptcy. *See* BANKRUPTCY.

PROPERTY IN CHATTELS,
When it passes to vendee, 610. *See* SALE OF CHATTELS.

PURCHASE,
By one partner binds firm, when 293. *See* PARTNER—PARTNERSHIP.

RANSOM,
Contribution in cases of general average, as goods given to pirates by way of, 94.
Secus, if goods are forcibly taken by, *id.*
to an enemy, now illegal, *id.* *See* GENERAL AVERAGE.

RECAPTURE,
Consequence of, in case of a total loss, 172, 173. *See* TOTAL LOSS.
From enemy of property vested in him, not restored to original owner, 945.
Secus, if not vested, on payment of salvage, 946.
No uniform rule as to law of vesting, *id.*
Law of England, *id.*
Of British ship when not restored to original owner, *id.*
When restored on terms of salvage, *id.*
Prize Acts, 946, 947.
What constitutes a setting forth of a captured ship as a ship of war, 947.
What amounts to a capture by the enemy upon which to found case of, 948.
When salvage not granted, 949.
When right to, extinguished, *id.*
Effect of donation of ship by captor to original owner, 950.
Of property of allies from enemy, *id.*
In what cases they are restored, *id.*
Rule of reciprocity, *id.*
Of neutral property generally restored without salvage, 951.
In what cases salvage is payable, *id.* *See* CAPTURE.

RECEIPT,
Of partner, how far binding on the firm, 304. *See* PARTNER.

RECEIVER
Or manager of partnership property, when appointed, 368. *See* PARTNERSHIP.

REMEDY,
Whatever relates to, depends on the *lex loci contractûs*, 277.
Difficulty in determining what relates to the merits or validity of a contract, and what relates to remedy, *id.* *See* CONFLICT OF LAWS.

REPUTED OWNERSHIP,
Doctrine of, how derived, 455.
Section of Bankrupt Act, now governing doctrine of, *id.*
How it differs from 11 & 12 sections of 21 Jac. 1, c. 19, *id.*
Proviso as to shipping new, 456.
Lord Redesdale's exposition of doctrine of, *id.*
Provisions respecting, in the Insolvent Debtor Acts, since repealed, *id.*
Bills of Sale Act does not alter doctrine of, *id.*
1. *What property comes within meaning of goods and chattels*, 457.
Furniture, *id.*
Utensils of trade not fixed to freehold, *id.*
except perhaps such as are usually let to traders, *id.*
Ships, *id.*
unless in case of a mortgage they are duly registered, *id.*
Freight of ships, 458.
Choses in action, as debts, *id.*
bills of exchange, *id.*
promissory notes, *id.*
stock, *id.*
policies of assurance, *id.*
annuities, *id.*
benefit of a contract, *id.*
Shares in a public company being personal property, *id.*
As shares in an assurance company, *id.*
in a newspaper, *id.*
Shares in public companies made personalty by Act of Parliament or deed constituting the company, *id.*
As shares in railway companies, *id.*
gas companies, *id.*
canal or water-work companies, *id.*
Shares in commercial company possessed of land in foreign country for trade, *id.*
Reversionary interest in personal property, *id.*
Though not falling into possession until after bankruptcy, *id.*
But not real property, 458.
Chattel interests in real property, *id.*
Debts secured on mortgages of real estate, *id.*
Shares in companies whose incomes arise wholly from real estate, *id.*
Moneys to arise from sale of real estate come within meaning of goods and chattels, 459.
Portions to be raised by trustees by sale, *id.*
By mortgage or otherwise, *id.*
But not not fixtures affixed to freehold, *id.*
Though removable as between landlord and tenant, *id.*
Decision of Trappes *v.* Harter, correct, *id.*
Distinction taken between fixtures annexed to freehold by owner and by tenant not to be relied upon, 460.
Principle of decisions does not depend upon custom of demising fixtures with premises, *id.*

REPUTED OWNERSHIP—*continued.*
Heirlooms not goods and chattels, 460.
2. *What will be considered as "possession, order, or disposition" of a bankrupt as reputed owner, id.*
With regard to goods and chattels passing by manual delivery, *id.*
Cases divided into two classes, *id.*
First, where bankrupt was original owner of goods and chattels, *id.*
Second where he was not, *id.*
Evidence to establish, in each of these cases different, *id.*
Presumption in the first class of cases that bankrupt is both reputed and real owner, *id.*
In the second reputed ownership must be established, *id.*
First class illustrated by cases where bankrupt has continued in possession of goods after a sale, 461.
or mortgage, *id.*
Possession of mortgagor or vendor considered to be that of owner, *id.*
Unless change of ownership notorious, *id.*
Or from nature of business of vendor it is not to be inferred that goods in his possession belong to him, *id.*
What will be sufficient evidence of notoriety of change of property, *id.*
Effect of writing initials of purchaser upon goods, *id.*
of handing over key of house to mortgagee of furniture, 462.
setting goods apart, marking them with purchasers seal, and entering them in books as his, *id.*
of seizure of goods in execution, 463.
Owner remaining in possession of goods under circumstances not calculated to mislead, *id.*
Clocks left with clockmaker, 464.
Carriage with maker, *id.*
Ship with builder, *id.*
Books with publisher, *id.*
Lambs and pigs in Lincolnshire with seller, *id.*
Horse left at hire with seller, *id.*
Possession of servant that of his master, *id.*
Possession of person to whom goods lent is that of lender, *id.*
Possession of a carrier, that of his employer, *id.*
Lien of such persons not enforced against goods on bankruptcy of owner, 464.
As to joint possession of servants of bankrupt, and of the owner, 465.
Of pawnee, not that of pawnor, *id.*
Goods in the custody of the law not in a bankrupt's possession, *id.*
As when seized for rent, *id.*
Or by officers of excise, *id.*
Tortuous seizure by sheriff, will not take goods out of possession of reputed owner, 466.
Whether the doctrine of, has application where person in possession is a limited owner, *id.*
Suggestion for framing mortgage of personal chattels remaining in possession of the mortgagor so as to prevent consequences of, 467.
Semble, such contrivance is ineffectual, *id.*

REPUTED OWNERSHIP—*continued.*
Second class of cases, where bankrupt not originally owner of goods in his possession, 467.
Reputation of ownership destroyed by evidence, *id.*
Case of furniture let with ready-furnished house, *id.*
Horses let on job, *id.*
Furniture let to hire, 468.
Silversmiths and jewellers, having plate and jewels of others in their possession, *id.*
Utensils hired or let to trader for carrying on his trade *primâ facie* considered as being in his, *id.*
as vats and utensils of brewery, *id.*
implements of a mill and forge iron, *id.*
Custom of trade to let out utensils may rebut presumption of ownership, *id.*
as the machinery in certain collieries, *id.*
furniture let to hotel-keepers, *id.*
barges hired out to coal-merchants, *id.*
stocking frames in certain counties, *id.*
Custom must be generally known to persons dealing with bankrupt, *id.*
and must be clearly proved, 469.
will not have effect if it be likely to deceive the public, *id.*
Husband not reputed owner of chattels in her possession according to trust, *id.*
Choses in action,
On transfer of choses in action, notice must be given to debtor, or holder, to take them out of clause relating to, 470.
Delivery of a bond to assignee, if notice not given to debtor, immaterial, *id.*
So, on assignment of freight, notice to charterers necessary, *id.*
Notice to person from whom assignor will receive payment only necessary, 471.
Notice necessary though bankrupt be assignee without having given notice of assignment to himself, 472.
A fortiori if he have given notice, *id.*
Notice necessary where debts are assigned by a retiring to a continuing partner, *id.*
Notice to pay debts to one of the partners not sufficient, *id.*
Notice not required in the case of negotiable instruments, *id.*
Nor where bill of exchange endorsed by drawer, and a bond given by acceptor as additional security, are mortgaged together, 473.
Necessary to give validity to a deposit of a warrant of attorney, executed to secure bill of exchange not endorsed, *id.*
As to notice when there are several co-debtors or co-trustees, *id.*
Not necessary that notice should be in writing, *id.*
Immaterial for what purpose notice in given, *id.*
Where co-trustee of goods and chattels assigns his beneficial interest, 474.
Where co-trustee takes an assignment, *id.*
Notice to solicitor of trustees sufficient, *id.*
Notice must be given to office on assignment of a policy of assurance, *id.*
Although policy be delivered to the assignee, *id.*

REPUTED OWNERSHIP—*continued.*
Rule of office not to attend to notices immaterial, 474.
Notice to insurers necessary where bankrupts are only equitable mortgagees, 475.
Decision at law of Edwards *v.* Scott, 1 Man. & Gr. 962. 475, 476.
Assignees of bankrupt cannot recover in trover policy of assurance deposited by bankrupt, 476.
where they can do so, *id.*
Gibson *v.* Overbury, 7 M. & W. 655, remarked on, *id.*
Notice of assignment of policy sufficient if given to directors, 477.
or to an officer representing the company, *id.*
even though given to him in another capacity, *id.*
Secus if the agent of the office be himself the assignor, *id.*
Or where no notice is given, and the assignor is merely a shareholder in a mutual assurance office, and entitled to profits of the company, *id.*
Notice to the office of a sub-mortgage of policy by deposit sufficient, *id.*
Deposit of policy with bankers, one of whom is auditor of insurance office, semble, sufficient notice, *id.*
Notice of mortgage of policy, once given, sufficient, though none given on subsequent change of, in object of mortgage, 478.
Notice generally given to office in writing, *id.*
Verbal notice is sufficient, *id.*
though not entered in the books, *id.*
it must be clear and distinct, *id.*
But slightest circumstance of notice is sufficient, 479.
Fact of agent of office being party to assignment of policy not notice, *id.*
unless he were agent for that purpose, *id.*
Where policy was effected in central office, notice to country agent not sufficient, *id.*
A fortiori if agent were himself the assignor, *id.*
Whether notice acquired by person, as agent to one office, affects another office for which he is also agent, *id.*
In case of mortgage of policy by deposit, onus of proving notice does not lie on mortgagee, *id.*
Whether shares in a public company are taken out of order and disposition of assignor by transfer not complying with statute, *id.*
Ex parte The Lancaster Canal Company, Re Dilworth, 1 D. & C. 411; Mont. & B. 94, considered, 479, 480, 481, 482, 483.
Deposit of such shares valid upon notice being given to directors, 483.
or the secretary, 484.
Bankrupt holding shares under a secret trust, is reputed owner, *id.*
To whom notice to company should be given, *id.*
Where mortgagor of shares is the person to whom notice is usually given, notice must be given to the company, *id.*
whether deposit by one director of his shares is sufficient notice, 485.
by all the directors, including the manager and secretary, *id.*
Doctrine of, not applicable where ostensible partner has possession of goods and chattels of firm, 485, 486, 487.
Secus, where firm uses goods and chattels of a copartner, 487.

REPUTED OWNERSHIP—*continued.*

Doctrine of, not applicable where there has been an assignment to partner in possession, 487.

Nor where, on bankruptcy of one joint tenant, the goods are in the possession of the other, *id.*

On assignment of goods vested in trustees, notice should be given to them, 488.

of a fund in Court, a stop order should be obtained, *id.*

notice to an executor of an assignment of a fund in Court, when sufficient, *id.*

priority gained by stop order, when, *id.*

of a right to publish a newspaper, notice should be given to the Stamp Office, *id.*

3. *What is meant by the consent and permission of the true owner, id.*

Purchaser of goods and chattels is true owner, 489.

so is a mortgagee, *id.*

and assignee of bankrupt, *id.*

Assignee of insolvent could seize goods left in his possession by his assignee in bankruptcy, *id.*

Consent of true owner not implied when he had no means of knowing interest of bankrupt, *id.*

Unless there have been *laches* on his part, *id.*

A legal trustee is true owner, *id.*

And his consent will bind his *cestui que trusts*, though infants, *id.*

Quære, whether bare trustee is true owner, *id.*

Cestui que trust, absolutely entitled, is true owner, 490.

His goods, left in possession of his trustee, will be in his reputed ownership, *id.*

True owner must have capacity to give consent, *id.*

Infants cannot, *id.*

Case of women married to men having a former wife living, *id.*

Bankrupt must have possession with consent of true owner, *id.*

Doctrine of, not applicable to goods bought with fraudulent intention of not paying for them, *id.*

to goods not accepted by the vendee, of which the vendor intended him to be the true owner, 491.

to goods stopped *in transitu*, 492.

Goods not in possession of trader with consent of owner, when he tries by all means to obtain possession of them, 492.

As when purchaser of chose in action gives notice of assignment as soon as he can, *id.*

Notice of assignment before act of bankruptcy sufficient, 493.

Delivery of bills of lading and invoice to assignee of goods at sea, *id.*

4. *As to the time at which goods and chattels must be in the possession of the bankrupt to come within the clause.*

Possession to bring case within doctrine of, must continue up to time of committing an act of bankruptcy, *id.*

Though prior to act on which adjudication is founded, *id.*

True owner entitled to goods which he takes out of possession of bankrupt after secret act of bankruptcy, when, *id.*

REPUTED OWNERSHIP—*continued.*
adjudication of prisoner in gaol relates back to commitment, 494.
True owner entitled to goods even if he has only demanded possession of them, 495.
Mere intention to demand or get possession of the goods not sufficient, *id.*
mere seizure and attempted sale not sufficient to take goods out of reputed ownership of mortgagor in possession of them, *id.*
assignee for value of chose in action will not gain priority over the assignees in bankruptcy by giving notice, *id.*
5. *Exceptions from the operation of the clause.*
Where a person has possession in *auter droit*, 496.
as executor or administrator, *id.*
as husband of executrix or administratrix, *id.*
Secus where person keeps possession as executor *de son tort* with consent of person who might have taken out administration, *id.*
Exception in the case of chattels in possession of a trustee, *id.*
Though blended with his own funds, 497.
Secus where possession of trustee is contrary to title, 498.
Or trustee holds upon secret trust for absolute owner, 498, 499.
Exception where bankrupt holds goods as factor, 499, 500.
Even where goods are sold, if money is distinguishable, 500.
or where he holds good for a specific purpose, *id.*
as checks, 501.
or bills of exchange or promissory notes, *id.*
bills of exchange remitted to an agent or factor or banker, and entered short while unpaid, 502.
and bills paid in generally to be received and not to be discounted or treated as cash, *id.*
proceeds if received by assignees, must not be returned to principal, subject to lien of factor or banker, *id.*
But assignees entitled to bills delivered to banker to be discounted, *id.*
Or where bills are regarded by both parties as cash, minus the discount, *id.*
Contract to buy or discount bills must be shown in order to change property in them, *id.*
Such contract not presumed without strong evidence, *id.*
Not to be presumed that customer assented to bills being considered as cash, from amount being carried by banker to cash column, 502, 503
Principle acted upon by Lord Cottenham in Jombart *v.* Woollett, 2 Myl. & Cr. 389. 503.
Onus of proving assent of customers to bills entered as cash being so considered, lies upon banker, 504.
6. *Power of court over goods coming within reputed ownership clause.*
Goods in the reputed ownership of the bankrupt do not pass by adjudication, 504.
Order must be made by commissioner to enable assignees to sell them, *id.*
Order to sell should be made upon *ex parte* application by assignees, *id.*
But it must be specifically directed to the particular goods, *id.*
Not necessary to mention them in detail, 505.

REPUTED OWNERSHIP—*continued.*
Not necessary to refer by name to the persons supposed to be true owners, 505.
Order for sale relates back to act of bankruptcy, *id.*
may be made after sale by assignees, *id.*
Order for sale not final or binding on true owner, *id.*
He may try question of reputed ownership at law by jury, *id.*
Power of Court of Chancery to restrain a sale, *id.*
Effect of law of, is not forfeiture of property, *id.* *See* BANKRUPTCY—FRAUDULENT CONVEYANCE—PARTNERSHIP.
Whether reputed ownership clause applies to deed registered under the 192d section of the Bankruptcy Act, 1861, 506.

RESPONDENTIA,
In which respects similar to bottomry contracts, 57.
Now almost disused, *id.* *See* BOTTOMRY BOND.

RETURN OF PREMIUM,
On policy, in maritime insurance, 226. *See* PREMIUM.

REVENUE LAWS,
Partner can render firm liable for breach of, 306. *See* PARTNER.

RHODIAN LAW,
As to general average, 90. *See* GENERAL AVERAGE.

SALE OF CARGO,
For repairs of ship. *See* MASTER OF SHIP.
In cases of abandonment. *See* TOTAL LOSS.

SALE OF CHATTELS,
When property in passes to vendee, 610.
When it is immediate, and nothing remains to be done by vendor, 611.
Vendor entitled to lien for purchase-money, *id.*
Unless day of payment be deferred, *id.*
Though time of payment be deferred, vendor may stipulate for possession until payment, 612.
Goods will be at risk of vendee, *id.*
Evidence of commercial usage admissible to show when delivery is to take place, *id.*
Property on, will only pass without delivery in case chattels are specific and ascertained, *id.*
Not sufficient that they are to be taken from a larger specified stock, 613, 614.
After contract of sale specific goods may be appropriated in performance of, 614.
But vendee must agree to all the terms of appropriation, 615.
Except where vendor has sole authority to make it, *id.*
Appropriation when revocable, *id.*
Assent to appropriation is a question of fact, 616.
Intention to appropriate, question of law, *id.*
Rule in Heyward's Case, 2 Co. 36, *id.*

SALE OF CHATTELS—*continued.*
When act of appropriation by vendor takes place, 616.
As dispatch of goods on journey, when, *id.*
On placing goods in bags or bottles furnished by purchaser, 616, 617, 618.
Mere preparations for performing contract not a sufficient act of appropriation, 618.
Secus if assent be given to intended appropriation, *id.*
Delivery to agent of vendee equivalent to delivery to vendee, *id.*
Property on, does not pass where it was not the intention of the vendor to part with control of, 619.
Does not pass property when act remains to be done to put them into a deliverable state, *id.*
Or when they have not been weighed, measured, or tested, to ascertain price, 619, 620.
Even though there has been a delivery of part of the chattels sold, 621, 622, 623.
Unless weighing and measuring is only necessary for satisfaction of purchaser, that he has got things purchased, 623.
Unless it appears by the contract that the property was to pass, *id.*
Mere adding up of the whole not necessary to complete measurement, *id.*
Goods pass to vendee on being put in deliverable state, *id.*
Immaterial that vendors are bound to pay warehouse rent for a period, *id.*
By contract property may pass, although price of goods not agreed upon, *id.*
When property in thing to be made passes, 624, 625.
Effect of license to use materials in completing chattel, 625.
When goods pass by a bill of lading, *id.*
Goods sold by deed pass on delivery of the deed, *id.*
Grant of expectant goods passes no property at law, *id.*
Secus in equity, *id.*
But they may at law be seized by a creditor under a power in a deed, *id.*
Condition made precedent to vesting of goods must be fulfilled, 626.
Case of goods sent "on approval or return," *id.*
No property vests until approval, *id.*
Property passes on fulfilment of condition, *id.*
Case of goods sent "on sale or return," *id.*
If not returned within reasonable time sale is absolute, *id.*
Bonâ fide purchase from vendor before performance of condition, *id.*
First purchaser's remedy only against the vendor, *id.*
Parties may estop themselves from disputing title of another, *id.*
As where warehouseman has acknowledged that he holds chattels on account of another, 627, 628.
Or a vendor has acknowledged the title of a sub-vendee, when, 627, 628.
Delivery essential to transfer of chattel by gift, 628.
If chattel in possession of donee, will not pass by verbal gift, *id.*
Voluntary assignment in equity must be complete, *id.*
But donor may constitute himself trustee for donee, *id.*
Whether vendor can revest property in himself by rescinding contract of, 628, 629, 630.
By express agreement time may be made of the essence of contract in, 630.

SALE OF CHATTELS—*continued.*
Goods sold on condition of resale, if not paid for at specified time, 630.
Contract for may be rescinded by mutual consent, *id.*
Sale of chattels by person not being the owner.
By person not being the true owner, will not pass any property, 714.
Owner of goods may maintain trover against *bonâ fide* purchaser from person who feloniously obtained them, *id.*
Though he has not prosecuted felon, *id.*
Owner may maintain trover against purchaser from hirer of goods, *id.*
Sales in market overt.
Sale of goods found or stolen in market overt valid, when, 715.
Policy of the law, *id.*
What is a market overt in the city of London, *id.*
And for what things, *id.*
in the country, *id.*
Shop in a country town not a market overt, 716.
even for things usually sold there, *id.*
Horse repository out of London not a market overt for the sale of horses, *id.*
Wharf not a market overt, *id.*
Even for things usually sold there, *id.*
In a shop being a market overt, must be made openly, *id.*
in market overt, will not be binding if the goods were the king's, 717.
or if the buyer knew whose they were, *id.*
or if the sale were fraudulent, *id.*
or without consideration, *id.*
or by an infant, when, *id.*
or by a feme covert, when, *id.*
nor unless made between sunrising and sunset, *id.*
nor unless contract were wholly made in the market, *id.*
as where sale is by sample, *id.*
in market overt not binding, when the goods belonged to the purchaser, *id.*
wrongful vendor by acquiring goods again from purchaser cannot retain them against owner, *id.*
true owner not bound by mere pawn in market overt, *id.*
in market overt will bind infants, *id.*
femes coverts, *id.*
lunatics, *id.*
persons at sea, *id.*
in prison, *id.*
whether possessed in their own right, *id.*
or as executors or administrators, 717.
whether a shop is a market overt for purchases as well as for sales, *id.*
Restitution to owner of stolen property though sold in market overt under 7 & 8 Geo. IV. c. 29. 718.
On conviction of the felon, 718, 719.
And owner may maintain trover without order for restitution, 719.
in market overt by purchaser before conviction of felon, good, *id.*
though owner may have given notice of robbery, *id.*

SALE OF CHATTELS—*continued.*
And secus when stolen goods are not sold in market overt, 720.
property in stolen horses not altered by sale in market overt, when, *id.*
by judgment debtors, *id.*
Right of sheriff defeated by transfer of goods in market overt, *id.*
By execution of an assignment for benefit of creditors before delivery of writ of *fi. fa.* to undersheriff, *id.*
Delivery to sheriff's deputy in London amounts to a delivery to the sheriff, 721.
Title of *bonâ fide* purchaser of goods before actual seizure or attachment, when valid, *id.*
Bonâ fide purchasers out of market overt from fraudulent vendees.
to fraudulent vendee who never intends to pay for them, may at election of vendor be treated as void before goods have left hands of purchaser, *id.*
or his assignees, *id.*
Liability of carrier wrongfully delivering goods ordered by a fraudulent purchaser, *id.*
Mere consciousness of purchaser that he will be unable to pay for goods will not vitiate the contract, 722.
when fictitious to defraud creditors, may be recovered by owner in trover, *id.*
But original sale cannot be treated as void after a sale by a fraudulent to a *bonâ fide* purchaser, *id.*
Or a transfer to a *bonâ fide* pawnee, 723.
But the relation of vendor and purchaser must have existed between the original owner and the second vendor or pawnor, *id.*
Case of Kingsford *v.* Merry, misunderstood in the city, 725.
followed in the case of Higgons *v.* Burton, *id.*
Transfer of negotiable instruments by parties not entitled to them.
Property in negotiable instruments passes by delivery to person taking *bonâ fide*, and for value, *id.*
Though owner may have lost them, 726.
Or they may have been stolen from him, *id.*
Not essential that transfer should be in market overt, *id.*
Leading case of Miller *v.* Race, 1 Burr. 452, *id.*
So in case of drafts on bankers when negotiable, *id.*
Bills of exchange, *id.*
Or promissory notes, *id.*
Exchequer bills, *id.*
Immaterial whether sold or pawned, 728.
Deposit by pledgee with third person valid, *id.*
Onus of proving notice of title of a third person to a negotiable instrument, 728.
Transferee for value of instrument not passing by delivery takes subject to defects in title of transferor, *id.*
case of India Bonds before they became negotiable, *id.*
Negotiable instrument may cease to be so by restrictive endorsement, 728, 729, 730, 731.

SALE OF CHATTELS—*continued.*
Property in negotiable instrument does not pass to persons taking them *malâ fide*, 731.
As where person discounts it out of ordinary course of business, and without giving full value, *id.*
But gross negligence in taking only ought to be considered evidence of fraud, 731, 732, 733.
Sale under power expressly conferred or implied by law.
by person authorized by law may bind owner, 733.
sheriff selling goods under writ, *id.*
bonâ fide purchaser from protected, though writ set afterwards aside, *id.*
Secus in the case of a purchaser under a bad distress warrant, *id.*
by person having with respect to third persons an implied power to sell, *id.*
by person, owner standing by, 734.
sale or pledge of goods under factors acts, *id.*
merchant's clerk not an agent, *id.*
punishment of persons intrusted with property for improperly dealing with it, *id.*

SALE OF SHIP,
When abandoned for total loss, 175, 176. *See* TOTAL LOSS.

SALVAGE. *See* RECAPTURE.

SEARCH AND VISITATION.
Right of, 782.

SEAWORTHINESS,
Implied warranty of, in a voyage-policy, 127.
Meaning of term, *id.*
Underwriter discharged if vessel be not seaworthy, *id.*
Though no fraud were intended by the assured, *id.*
And though vessel may have been surveyed, *id.*
Whether insurance be effected by owner of vessel, *id.*
or of the goods in the vessel, *id.*
Degree of, implied by law for different stages of her voyage, *id.*
Want of, by mistake or accident, may be remedied before loss, *id.*
Implied warranty of, satisfied if vessel be seaworthy when she sails, 128.
Not necessary that she should be seaworthy upon sailing homeward, *id.*
or from any intermediate port, *id.*
Liability of shipowner to owner of cargo for loss in consequence of vessel originally seaworthy going to sea in unseaworthy condition, *id.*
Warranty of, must be limited to capacity of vessel, *id.*
Subsequent negligence or misconduct of master or crew if originally competent, no defence to an action on the policy, 128, 129.
Remarks on the case of Law *v.* Hollingsworth, 7 Term Rep. 160. 129.
implied warranty of, in a voyage policy of insurance on salvage, *id.*
no implied warranty of from the relation of ship-owner and seaman, 130.
no implied warranty of, in time policies, 130, 131, 132, 133.

SEAWORTHINESS—*continued.*
Owner of vessel insured by time policy cannot recover expenses of repairs from underwriters, when 133.
Insured cannot recover on time policy effected on ship known to be unseaworthy, when, *id.*
What amounts to, *id.*
A vessel will be unseaworthy when her hull is not suitable for the voyage, *id.*
or her masts or sails, 134.
or ground tackling, *id.*
as bower-anchor, *id.*
or she has insufficient stores and supplies, *id.*
or medicines, *id.*
or she is heavily or improperly laden, *id.*
or has not a master of reasonably competent skill, *id.*
or even on a long voyage, if she has not a person competent to act as captain on captain's becoming ill or competent, *id.*
or if she has not a competent crew, *id.*
or if she sails without a pilot when one is requisite, 135.
or semble, if master arriving at a port dismisses pilot before necessity for him has ceased, *id*
Case where captain cannot procure a pilot, *id.*
Proof of want of seaworthiness falls on the underwriter, *id.*
except where inability to perform the voyage is evident on commencement of risk, *id.*
is a question peculiarly for a jury, *id.*
as to the best evidence of, *id.*
may be dispensed with by clause admitting in policy, *id.*
Implied warranty of, does not extend to lighters employment to land cargc, 136. *See* DOCUMENTS OF SHIP.

SEPARATE CREDITORS. *See* BANKRUPTCY—PARTNERSHIP.

SEPARATE DEBTS,
How payable in case of bankruptcy. *See* BANKRUPTCY.

SEPARATE ESTATE,
How distributable in case of bankruptcy. *See* BANKRUPTCY.

SEQUESTRATION,
In Scotland bars debt contracted in England, 274.

SET-OFF
Belongs to the remedy, 280. *See* CONFLICT OF LAWS.

SLAVES,
Contracts for the sale of, when enforced in this country, 257. *See* CONFLICT OF LAWS.

SMUGGLING OF GOODS,
Contracts as to, entered into abroad, 253, 254, 255, 256. *See* CONFLICT OF LAWS.

STAMPS,
How far necessary on promissory notes given abroad, 258.
or on receipts given abroad. *See* CONFLICT OF LAWS.

STATUTE OF FRAUDS. *See* CONFLICT OF LAWS—EVIDENCE.

STATUTE OF LIMITATIONS.
Part payment of a partner of a debt, how far binding on firm as an acknowledgment, 301. *See* APPROPRIATION OF PAYMENTS—PARTNER—PARTNERSHIP.

STOPPAGE IN TRANSITU,
Vendor's right of, 647.
History of law relating to, 647, 648, 649.
Jurisdiction of equity with regard to, 649.
Of Court of Admiralty arises, when, *id.*
1. *By whom right may be exercised.*
Right of, can only be exercised by vendor of goods, *id.*
Or person standing in position of a vendor, *id.*
As correspondent abroad procuring goods on his own credit, 650.
Transferree of bill of lading, *id.*
Sufficient if vendor has merely an interest in the goods under a contract, *id.*
Mere surety has no right to effect a, *id.*
Nor a person having a mere lien, who has parted with goods, *id.*
Agent with sufficient authority can effect, 651.
But authority must be given before *transitus* ceases, 651, 652.
Actual possession by vendor's agent will not amount to, unless taken with that intent, 652.
Not rendered invalid in consequence of its having been suggested by the purchaser, *id.*
2. *When right of arises.*
Right to effect, arises on the vendee's bankruptcy, 653.
or insolvency, *id.*
What is meant by insolvency, *id.*
Vendor must have good ground for believing vendee to be insolvent, *id.*
Whole or part of the purchase-money must be unpaid, *id.*
Vendor may exercise right of, though goods were sold on credit, *id.*
Or he received securities, as bills of exchange, for the price, 654.
And though he may have negotiated them, and they are yet outstanding, *id.*
A fortiori if they have been dishonored, *id.*
Secus where vendor has elected to take a bill instead of cash, *id.*
Cannot be effected of goods consigned to vendee on account of balance due to him from vendor, *id*
When balance is occasioned by vendee's acceptances for vendor, *id.*
Or where payment has been made to agent who has embezzled the money, *id.*
3. *During what period right of continues.*
Right to stop goods continues during their transit, *id.*
Cases where vendor's possession ends and that of vendee begins confounded with cases of, *id.*
When goods sold are in the vendor's warehouse, *id.*
Receipt of rent from a sub-vendee amounts to a delivery, 655.
Not as between the original vendor and vendee, *id.*
Effect of sub-vendee being accepted as owner by vendee, *id.*

STOPPAGE IN TRANSITU—*continued.*
Where goods sold are in possession of a warehouseman or wharfinger, 656.
Right of will be gone if actual possession be given to purchaser, *id.*
Mere equivocal acts, without removal of goods, will not prevent right of, *id.*
As merely marking, taking samples of, or coopering goods, *id.*
Secus where warehouseman has assented to keep goods as agent for purchaser, *id.*
Mere giving of a delivery order will not prevent, *id.*
Warehouseman's consent to hold goods for vendor may be shown by transferring goods into his name, *id.*
By his assent, on receipt of the delivery order, to hold them for vendee, *id.*
Either verbally or by acquiescence, *id.*
Right to remains in warehouseman or wharfinger, on receipt of delivery order, to refuse to hold goods not in the name of the vendor for vendee, 657.
Secus where goods are in the name of the vendor, *id.*
Condition of delivery order must be fulfilled, *id.*
as payment of ready money, *id.*
giving security, *id.*
weighing, *id.*
If not, the right of, will not be put an end to on receipt of delivery order, 658.
Or even by transfer in books of warehouseman, *id.*
Unless weighing is for the satisfaction of the buyer only, *id.*
Direction in delivery order to excise, in bonded warehouse, to receive duty not conditional, *id.*
But an agreement to pay duty may be made conditional, 659.
Transitus of goods continues while in the hands of an agent to forward them, *id.*
As a public carrier by land or water, *id.*
Transitus ends when goods are put in vessel or cart of the vendee, *id.*
Immaterial whether ship is a general trader, or is expressly sent for goods, if known to be the purchaser's, *id.*
Semble, secus if vendor did not know that the ship was the consignee's, 660.
Master of a chartered ship generally mere agent to forward, 661.
Exception where vessel is chartered for term of years under charterer's sole control, *id.*
Vendor may restrain effect of delivery on board purchaser's own ship, *id.*
As by bill of lading, making goods deliverable to the order of the consignor or his assigns, *id.*
Want of authority by the master to accept goods on such terms immaterial, *id.*
Mere possession of bill of lading by consignee or his agent will not prevent, *id.*
Though afterwards endorsed to the order of the consignee, 662.
And the property in the goods pass to him, *id.*
Right to may be preserved by vendors taking receipt from person in charge of vessel that goods are shipped to his account, *id.*

STOPPAGE IN TRANSITU—*continued.*
Even if captain upon being asked refuses to sign such receipt, 662.
Secus if the shipment must be a complete delivery of the goods, *id.*
Cannot be effected when goods have reached agent to forward or to hold subject to orders of vendee, *id.*
Secus where they have reached a mere middleman, or agent, to forward, 663, 664.
Where carrier acts in different capacities, 664.
as warehouseman, *id.*
or wharfinger, *id.*
Carrier may contract to hold goods subject to order of purchaser, *id.*
expressly, *id.*
or by implication, *id.*
In the absence of such contract *transitus* continues until purchaser takes possession, *id.*
Purchaser, by taking possession, may anticipate natural termination of *transitus*, *id.*
Even without the consent of the carrier, 665.
But, semble, carrier has a right of action, *id.*
What amounts to a taking of possession, 665, 666.
Whether delivery of part of the goods amounts to delivery of the whole, *id.*
Whether vendee, taking possession of a part of the goods, puts an end to right of, with respect to the whole, 667.
Mere touching of goods, *id.*
Demand of goods from holder refusing them, *id.*
Transitus at an end when goods delivered at appointed place to consignee, *id.*
or, on his bankruptcy, to his assignees, *id.*
Parties to contract may rescind it, *id.*
Rights of third parties intervening cannot be defeated by vendee returning goods, *id.*
Or so as to give the vendor a fraudulent preference, 668.
Mere delivery at place of destination not a necessary termination of the transit, *id.*
A fortiori where the purchaser declines to receive the goods, *id.*
Carriers bound to deliver goods arriving at their place of destination, *id.*
Right of, cannot be revived on re-delivery of goods to vendor for special purpose, *id.*
4. *How the right may be exercised.*
Actual possession by vendor, or his agent, not essential to effect, *id.*
Notice to carrier by the unpaid vendor is sufficient, *id.*
or by his agent, *id.*
Notice must be given to the person having immediate custody of goods, 669.
Or to his principal, in time to communicate with him, *id.*
5. *Effect of the exercise of right of.*
Semble, does not rescind the contract, 670.
But gives vendor lien for price unpaid, *id.*
Lien diminished only *pro tanto* upon proof of bills for price under bankruptcy of vendee, *id.*
Vendee may obtain goods on payment or tender of price, *id.*

STOPPAGE IN TRANSITU—*continued.*
May bring action against vendor for wrongful sale, 670.
But cannot maintain action in which right of property and possession are both requisite, *id.*
Unless he has both those rights, *id.*
On stoppage of goods, carrier has only a lien for sum due for carriage, *id.*
Cannot retain them on account of general balance between him and the consignee, *id.*
Right of, cannot be defeated by process of attachment out of Lord Mayor's Court against the consignee, 671.
Semble, goods stopped remain at the risk of the vendee, *id.*
if wrongful, does not effect rescission of contract, *id.*
or vendor's right of suing for price of goods, *id.*
6. *How right of may be defeated.*
Not by sale to subvendee, *id.*
Except in case of endorsement of bill of lading from the vendor to subvendee by vendee or his consignee, *id.*
But it must be for valuable consideration and without notice, *id.*
And bill of lading must have come into possession of purchaser with authority of original vendor, *id.*
Assignee of bill of lading knowing that cosignee is in insolvent circumstances cannot defeat vendor's right of, 672.
Notice that vendor has not paid for goods will not render transfer fraudulent, *id.*
Condition annexed to bill of lading must be fulfilled, 673.
Right of, defeated by putting goods on board a vessel on account and at the risk of vendee and endorsing a bill of lading to him, *id.*
Though vendee refuse to accept a bill according to agreement on receipt of the invoice and bill of lading, *id.*
How vendor should preserve his right to effect, until acceptance of bill, *id.*
duty of master if bills of lading are presented by two different holders, *id.*
Right of vendor to effect, defeated at law by endorsement of bill of lading for a limited purpose, 673, 674.
as a mortgage, *id.*
But it will remain in equity, *id.*
Endorsement of West India Dock warrants, defeats right of, 674.
Semble, document similar to bill of lading given by master of canal boat, does not transfer property, *id.*
Nor the mere handing over of a shipping note, 675.
or a delivery order, *id.*
Right of, not affected by Act to amend the law relating bills of lading, *id.*
Factors Acts, *id.*

SURETY
Has no right to effect a stoppage *in transitu*, 650.

SURVIVORSHIP
at law, in case of real property of partnership, 356. *See* PARTNERSHIP.
secus in equity, *id.*

TIME POLICIES,
No implied warranty of seaworthiness in, 130, 131, 132, 153. *See* SEAWORTHINESS.
TOTAL LOSS,
Is absolute, 157
or constructive, *id.*
Definition of absolute, *id.*
of constructive, *id.*
Abandonment required, when, *id.*
Foundation of doctrine of abandonment, *id.*
Policy may limit liability of underwriters to cases of total absolute loss, *id.*
But the intention must be clear, *id.*
Absolute total loss, 158.
No notice of abandonment in case of, to insurer, necessary, *id.*
Two kinds of, *id.*
Ship foundered at sea, *id.*
or burnt, *id.*
or become a mere wreck, *id.*
or where expenses of repairs would exceed value, *id.*
In such cases owner may recover the total loss without notice of abandonment, *id.*
Though master has sold the vessel, or her materials, *id.*
But where ship, although damaged, retains the character of ship, notice of abandonment must be given, 159.
Lord Campbell's reason for necessity of giving notice of abandonment in such cases, *id.*
Vessels which may be saved cannot by sale be turned into a, 160.
Though sale may be *bonâ fide*, if erroneous, *id.*
Insurer may recover for absolute, though vessel reaches port of destination, if not worth repairing, *id.*
But advisable in such case to give notice of abandonment, *id.*
Is absolute as *to goods* when they go down with ship foundered at sea, when, *id.*
Or if seized in an enemy's port, 161.
Or plundered by wreckers, *id.*
If there be a hope of recovery of goods before action brought, notice of abandonment should be given, *id.*
As where goods confiscated by the enemy are, in consequence of negotiation, restored before action brought, *id.*
Memorandum as to perishable goods warranted "free of average," *id.*
does not vary the rules upon which loss shall be partial or total, *id.*
only precludes indemnity for partial loss, except on certain conditions, *id.*
If perishable goods, though existing in specie, lost their original character and were thrown overboard, notice of abandonment not necessary, 161, 162, 163, 164.
So, if they were sold at an intermediate port, if they would lose their original character before arriving at port of destination, 164.

TOTAL LOSS—*continued.*
Secus where they would not lose original character before reaching their port of destination, 164, 165.
Unless damage cannot be repaired for more than goods are worth, 165.
What must be taken into account in determining amount of damage, 166.
Mode of estimating by Court of Admiralty in cases of total loss by collision, *id.*
Expenses in relation to goods included in the warranty "free from particular average," *id.*
If goods arrive in specie at port of destination retaining original character, there will not be, 167.
However much damaged or deteriorated, *id.*
And it is immaterial that the ship is wrecked, *id.*
Quære, if they have lost their original character, *id.*
What amounts to, in the case of cargo of packages insured separately, *id.*
In the case of goods of the same species free of average, *id.*
of different species, free of average, 168.
on "goods valued against total loss only," *id.*
of *freight* is absolute when ship, with her cargo, founders at sea, when, 169.
risk of chartered vessel sailing to take her cargo on board commences at time of sailing, *id.*
Though she had no cargo then on board, *id.*
Insurance on freight, payable on delivery of goods, by general ship, may recover as for, on loss of ship, if full cargo has been contracted for, and is ready, *id.*
Although part only, or even none of the cargo, was on board ship when lost, *id.*
Result where part of the cargo only is on board, and the rest not contracted for, 170.
Of freight is absolute where chartered vessel is captured before goods are taken in an intermediate port, when, *id.*
Of outward freight is absolute on capture of outward cargo, *id.*
Though master, by repurchasing vessel, may gain a homeward freight, *id.*
Of homeward freight not incurred where goods of charterers not on board, and a full freight is earned *aliunde*, *id.*
Even though expenses of vessel, while detained waiting for cargo, exceed freight earned, *id.*
In the case of insurance of *profits*, if there is a total loss of goods, *id.*
Or an abandonment of goods on a partial loss, *id.*
And a separate abandonment of profits is unnecessary, *id.*
Losses must arise from perils insured against, *id.*
Constructive total loss, 171.
Notice of abandonment must be given to insurers, *id.*
Takes place on capture of a ship, in what cases, 172.
Consequences of a recapture, 172, 173.
of restoration of the ship, 173.
Mere loss of voyage will not justify abandonment of ship, *id.*
Assured cannot recover for, unless at one time he has been completely deprived of ship, 174.

TOTAL LOSS—*continued.*
Shipowner has, *primâ facie*, a right to abandon on arrest of ship, 174.
her detention, *id.*
or embargo, *id.*
Parties may stipulate that loss shall be treated as after official news of capture, *id.*
or embargo, *id.*
Master buying a captured vessel before notice of abandonment, agent for owners, 175.
And on restoration by him they can only claim for an average loss, *id.*
Is constructive where ship cannot keep at sea without repairs and cannot obtain them, *id.*
Or where funds cannot be procured for repairs, *id.*
And ship may be sold and notice of abandonment given, *id.*
But sale and abandonment will not be justified by bottomry interest being extravagantly high, *id.*
Or that there is a difficulty in procuring materials for repairs, *id.*
Right to abandon depends upon sale being justifiable, *id.*
Sale justifiable where there is no reasonable hope of extricating vessel, *id.*
Or of extracting or repairing her save at a cost greater than her value, 176.
Sale at the time thereof must, according to the best judgment, appear most beneficial to all parties, *id.*
And assured may recover for, though vessel may be repaired by purchaser for less than her repaired value, *id.*
Immaterial whether sale be effected by the master alone, *id.*
by the master with the sanction of one of the part owners, *id.*
by the owner, *id.*
or by a part owner who is also master, *id.*
Sale not essential to recover for, where notice of abandonment of vessel is given, *id.*
As to mode of estimating cost of repairs, *id.*
of the value of the ship, *id.*
Where master elects to repair, shipowner cannot abandon on his return, 177.
Though amount of repairs is greater than her value, *id.*
Secus where money is raised on bottomry for repairs at request of underwriters, *id.*
Of cargo, is constructive when it has been captured, *id.*
Notice of abandonment necessary, *id.*
But assured cannot recover for if cargo be restored before action brought, *id.*
But the cargo must be restored effectively to the owners, *id.*
not detained by an embargo, *id.*
or by blockade, *id.*
or delivered merely to an agent abroad in a state worthless, if sent to port of destination, *id.*
Or sent to this country by persons acting neither as agents nor on behalf of the assured, *id.*
Mere loss or retardation of voyage not a constructive total loss of imperishable goods, 178.

TOTAL LOSS—*continued.*
Nor of perishable goods, unless they cannot be forwarded to destination in a merchantable state, 178.
Or except at an expense exceeding their value, *id.*
Result the same where article, sea-damaged, though not perishable, is likely to be spoiled, *id.*
Cargo recovered after submersion, 179.
Sale of the whole cargo will not make the loss total, if part can be forwarded to its destination, *id.*
Where goods worthless if forwarded are sold, loss is total, *id.*
Rule laid down by Jervis, C. J., to determine when loss in respect of damaged goods is partial or total, *id.*
Assured on freight can abandon where there has been constructive total loss of ship, *id.*
as on capture of a vessel, *id.*
or her detention by arrest or embargo, *id.*
But he cannot recover if vessel arrive, earning freight, before action brought, 180.
And it is immaterial whether it be the freight contracted for or not, *id.*
If freight earned, mere retardation of voyage will not give assured right to recover for, *id.*
Although freight has been swallowed up by bottomry charges, *id.*
Assured on freight may abandon on receiving intelligence of loss of ship, *id.*
or of her disability, *id.*
If goods are transshipped, he can recover for, if ship does not arrive before action brought, *id.*
Secus if they do, *id.*
If ship and cargo justifiably sold abroad, no notice of abandonment is necessary from the insured on freight, *id.*
Notice inoperative if ship is not justifiably sold, *id.*
Mere inability to send on *entire* cargo by repairing ship will not amount to, *id.*
of freight, if cargo cannot be sent to its destination except at expense beyond its value, 181. *See* ABANDONMENT.
Right of underwriters in cases of, to have inspection of documents, 181.
Contract that amount of damages on may be determined by arbitration binding, 191.

TRADE MARKS,
Principle upon which they are ordinarily protected, 568.
Person may acquire a title to, according to Lord Cottenham, *id.*
1. *Ground of interposition at law in respect of wrongful use of*, 569.
Fraudulent intention in using, must be shown at law, *id.*
Action relating to, in nature of an action for deceit, *id.*
Notice of resemblance not sufficient cause for action at law, *id.*
But it is not essential to show that purchasers are deceived, if the public may be through their means, *id.*
Plaintiff entitled to damages for fraudulent use of, though no special damage be proved, *id.*

TRADE MARKS—*continued.*
what plaintiff must prove against person having assumed his name or style, 570.
semble, action lies against a corporation assuming the name of another, *id.*
2. *Ground of interposition in equity in respect of wrongful use of*, 571.
Relief may be obtained in equity when it could not at law, *id.*
Proof of the *scienter* necessary at law, not in equity, *id.*
Remarks of Sir W. Page Wood, V.-C., on Millington *v.* Fox, *id.*
Semble, the cases at law and in equity not inconsistent, considering the nature of the relief afforded by each, *id.*
Remarks of Lord Westbury in Hall *v.* Barrows, 572.
3. *Different kinds of trade marks*, 573.
Instances in which courts have interposed in cases of the violation of, *id.*
Uses of similar name or address, *id.*
stamp, *id.*
label, *id.*
system of numbers, *id.*
packets for goods, *id.*
title-page or wrapper for books, *id.*
divisible into five classes:—
local, *id.*
personal, *id.*
symbolical, *id.*
fancy names, *id.*
compound, *id.*
Names, words, and devices on an omnibus, 574.
uses of name of rival shopkeeper, *id.*
Same principle applicable to restraining publication of a work, newspaper, or magazine, represented to be that of another, 574, 575.
Or a poem represented to be that of another person, 575.
Person selling trade with goodwill not restrained from setting up similar trade, *id.*
unless he represented it as a continuation of the old trade, *id.*
4. *Property in a trade mark how acquired*, *id.*
by exclusive user, in the first instance, *id.*
length of user regarded, how far, *id.*
may be acquired by short user, *id.*
cannot be acquired before articles have been actually put upon market for sale with, 576.
Case of Maxwell *v.* Hogg, 2 Law Rep. Ch. App. 307. 576, 577, 785.
Exclusive use of fancy term, 578.
Cannot be claimed when word has found its way into dictionaries, *id.*
or has become known as an article of commerce, *id.*
monopoly cannot be acquired in a word in common use, *id.*
fancy name applied to a new article of commerce protected, *id.*
5. *Devolution or transfer of trade mark*, 579.
may be transferred by act *inter vivos*, *id.*
may be bequeathed by will, *id.*

TRADE MARKS—*continued.*
survives on death of a member of a firm, 579.
goes to personal representative of intestate, *id.*
may become the property of two or more persons, *id.*
6. *Jurisdiction of Court of Equity to protect trade marks*, 580.
interferes by injunction when legal right is clear, *id.*
in general puts party to try his right at law, *id.*
or permits plaintiff to bring an action, *id.*
defendant rarely prevented from disputing plaintiff's title at law, *id.*
until trial, court may direct the defendant to keep an account of sales, *id.*
of an alien friend protected, *id.*
though the goods are not sold in this country, *id.*
of an alien friend are protected in the United States, *id.*
doctrine of foreign tribunals respecting, 581.
Violation of, test for discovery of, *id.*
Person may sell an article in own name, though article is sold by another of same name, 582.
Presumption when person assumes the name of another, *id.*
Company assuming name similar to another, 583.
Person cannot prevent another selling goods under the same title, *id.*
Secus if he endeavors to sell his goods as the goods of another, *id.*
Court will restrain the use of a secret obtained by a person by a violation of contract, *id.*
Or a breach of trust and confidence, *id.*
Relief will also be granted against person to whom such secret has been divulged, 584.
Person manufacturing for fraudulent use restrained, *id.*
Action by innocent person against another fraudulently employing him to make, *id.*
Injunction to restrain making when not granted, *id.*
When may be made lawfully, *id.*
7. *Defences to an application for an injunction to restrain use of*, 585.
Person not entitled in equity to an injunction in the first instance when he has made misstatements, 585.
But will be left to enter proceedings at law, *id.*
As if trade mark untruly represents article as protected by patent, *id.*
Distinction when article has been the subject of an expired patent, *id.*
Remarks on the distinction by Lord Kingsdown, 586.
Use of name of old firm held not to be a misrepresentation, 587.
Artist or artisan cannot although by leave, without fraud use the name of another, *id.*
Nor firm in one locality use the trade mark of firm in another locality, *id.*
Produce of one country cannot be stamped as the produce of another country, 588.
Mere puffing by vendor of quack medicine held not to disentitle him to relief, *id.*
Equity will only interfere where mischief is done to property, *id.*
Not merely where a person is injured by the use of his name, *id.*
Or where falsehood is not an infringement of any right vested in the plaintiff, 589.

TRADE MARKS—*continued.*

Account of profits when directed as incident to an injunction, 589.
Disclosure of sales by persons directed to account, *id.*
Plaintiffs put to election between an account of profits and an account of damages, when, *id.*
Inquiry as to damages, bow conducted, 590.
Consequences of breach of an injunction, 592.
As to costs, 589, 591.

8. *Rights of third parties with respect to goods having fraudulent trade marks upon them.*

Depositee of goods having counterfeit trade marks justified in retaining them, when, *id.*
Persons having *bonâ fide* advanced money upon security of such goods entitled to retain, *id.*
But counterfeit trade marks must be removed, *id.*

9. *Merchandise Marks Act*, 1861.

Jurisdiction conferred upon courts of law and equity by Merchandise Marks Act, 592, 593.
Piracy of trade marks, how far an indictable offence at common law, 593.
Criminal proceedings under Merchandise Marks Act, 593, 594.
Merchandise Marks Act does not affect former legal and equitable remedies, 594, 595.
Abandonment of right to trade mark, 595.

TRADE WITH THE ENEMY,

Not allowed, 802.
Except by permission of the sovereign, *id.*
Person domiciled with the enemy considered as an alien enemy, 803.
Though he be a neutral, *id.*
Or even a native born subject, *id.*
Country in the occupation of the enemy considered as his country, when, *id.*
British colony in the occupation of the enemy, *id.*
What constitutes domicile in the enemy's country, 804.
Foreigners resident in country of a belligerent cannot engage in, *id.*
Nor subject of an ally, *id.*
Subject of a belligerent domiciled in a neutral territory can carry on, 805.
Property engaged in, prize to the captor, *id.*
Nations merely under the protectorate of Great Britain may carry on, *id.*
As in the case of the inhabitants of the Ionian Islands, *id.*
Rule preventing, strictly enforced, 806.
Not allowed to be evaded by intervention of a third party, *id.*
As by a neutral ship, *id.*
Or by shipping goods in the first instance to a neutral port *id.*
Or by fraudulent transfer of property to a neutral, *id.*
What will constitute offence of carrying on, 807.
Subject resident of the enemy's country cannot carry on, 808.
Except by license of the crown, *id.*
Subjects may carry on by license of sovereign, *id.*
Which may be granted to an individual specially, *id.*

TRADE WITH THE ENEMY—*continued.*
by an Order in Council, 808.
by proclamation, *id.*
by Act of Parliament, *id.*
the crown cannot control a statute by its license, *id.*
License may be dispensed with on grounds of public policy, *id.*
Subject of an ally may carry on, by license of his sovereign, 809.
Consent of confederate state how far requisite, *id.*
Mode in which licenses are to be construed, 810.
What is authorized by a license to carry on, 811.
Particular license not restricted by general Order in Council, *id.*
Effect of war upon debts and contracts, 811, 812, 813. *See* WAR.
Courts of justice will not direct communications to be held with enemy's country, 813.
Will not grant commission to examine witnesses there, *id.*
Cartel or truce ships must not engage in, *id.*
Relaxation of rule preventing, in the late Russian war, *id.*
Effect of, *id.*
No return of premium, when voyage is illegal, for carrying on, 230. *See* PREMIUM—WAR.

TRANSSHIPMENT OF CARGO.
Power of master to effect, 77. *See* MASTER OF SHIP.

UNDERWRITERS. *See* ABANDONMENT—ADJUSTMENT OF AVERAGE—DEVIATION—DOCUMENTS OF SHIP—GENERAL AVERAGE—SEAWORTHINESS—TOTAL LOSS.

USURY,
Laws against not applicable to bottomry contracts, 56, 57.
Whether contract is affected by, depends on the law of the country where it is made and to be executed, 268.
Rate of interest may be stipulated for, usurious at place of contract, if not so at the place of payment and performance, *id.*
Laws relating to in this country repealed, *id.* *See* CONFLICT OF LAWS.

VALUED POLICY. *See* ADJUSTMENT OF AVERAGE.

VENDORS,
Right of stoppage *in transitu*, 647. *See* LIEN—SALE OF CHATTELS—STOPPAGE IN TRANSITU.

VISITATION AND SEARCH,
Of merchant ships in time of war, 782.
Cannot be legally prevented by sovereign of neutral country, 783.
Except by treaty, *id.*
Cannot be exercised in time of peace, *id.*
except by treaty, *id.*
Of vessels engaged in the slave-trade, 784.
Not allowable in the absence of treaty, *id.*
By nations for fiscal and domestic purposes, *id.*
Confined within certain limits from their own shores, *id.*

VISITATION AND SEARCH—*continued.*
Penalty for contravention of the right of, *id.*
Neutral property on board enemy merchant-ship not confiscated by its resistance, *id.*
Secus if on board a belligerent armed ship, 785.
Neutral vessels sailing under enemy's convoy, *id.*
Consequences of the judgment in the case of The Maria, *id.*
evasion of right of, *id.*
attempt to escape, 786.
Resistance of, not cause of confiscation if war was not known, *id.*
does not extend to ships of war belonging to neutral states, *id.*

WAGER POLICY,
No return of premium in case of, when, 230. *See* PREMIUM.

WAR,
Executory contracts become void on breaking out of, 811.
As in the case of contracts of affreightment, *id.*
Or contracts of assurance, *id.*
Though entered into before hostilities, if loss occurs afterwards by British capture, *id.*
Between countries of partners puts an end to partnership, 812.
Right of action only suspended by, when cause of action arose before hostilities, *id.*
Loss on insurance before, *id.*
Breach of contract of affreightment before, *id.*
suspends right to prove debt in bankruptcy due before hostilities commenced, *id.*
See TRADE WITH THE ENEMY.

WARRANTIES,
Express in policies of marine insurance, 120.
Implied in, *id.*
Not to deviate, *id.*
That the vessel is seaworthy, 127.
That ship shall be properly documented, 136. *See* DEVIATION—DOCUMENTS OF SHIP—SEAWORTHINESS.

WRONG,
Partner can render firm liable for, 306. *See* PARTNER.

THE END.