THE

CONTRACT OF PAWN,

AS IT EXISTS AT COMMON LAW,
AND AS MODIFIED BY THE PAWNBROKERS' ACTS,
THE FACTORS' ACTS, AND OTHER STATUTES.

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ADVERTISEMENT.

A CONSIDERABLE time has now elapsed since the publication of any work specially treating of the Contract of Pawn. During the interval several statutes have been passed, and many decisions pronounced, more or less directly bearing upon the subject. These circumstances having been represented to the author as sufficient to justify an attempt to fill a vacant place in the Lawyer's Library, he was induced to undertake the task. In many parts of the work, considerable use has been made of the admirable treatises of Sir William Jones and Mr. Justice Story, on the Law of Bailments, wherein the principles of that law are laid down in terms upon whose clearness and conciseness it would be hopeless to attempt to improve, and which have, in consequence, taken rank among the recognized and authoritative definitions of legal doctrine. When thus availing himself of the labours of others, the author has almost invariably adopted the language in which other and abler writers than himself have expressed their thoughts, and he has never intentionally omitted to acknowledge the source to which he was indebted, or to verify references to authorities cited in support of the propositions quoted. His endeavour has been to produce a book which may be useful to the members of both branches of his own profession, and which may also so deal with every-day questions on this important branch of the law of contracts, that both pawnors and pawnees may be able to consult it with advantantage.

FRA^{S}. TURNER.

5, Pump Court, Temple,
Sept. 1866.

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ADDENDA ET CORRIGENDA.

Page 59, line 16, *for* "But there can be no doubt that the rule would not apply," *read* "But there can no doubt that the statute would apply."

Page 124, line 28, *for* "July," *read* "August."

Page 152, line 12, *for* "17th section," *read* "14th section."

Page 184, line 29, *after* "goods," *insert* "when sold by Pawnbrokers in accordance with the provisions of the Pawnbrokers' Act."

Page 239, n (*a*), *for* "12 & 13 Vict., cap. 43," *read* "11 & 12 Vict., cap. 43."

Page 262, *insert* provisions applicable to pawnors of goods belonging to Greenwich Hospital, in 20 Geo. 2, cap. 24, sec. 16, mentioned pp. 35, 256.

Page 269, line 2, *for* "Certiorari lies," *read* "No certiorari lies."

While this work has been in the press, the following Statues have been repealed or superseded by others :—

27 Vict., cap. 3, sec. 85 (Mutiny Act) cited p. 33, by 28 & 29 Vict., cap. 11, sec. 84, cited p. 253.

27 Vict., cap. 4, sec. 89 (Marine Mutiny Act), cited p. 34, by 28 & 29 Vict., cap. 12, sec. 89, cited p. 254. In both these cases, however, the later statutes merely re-enact the provisions of those they supersede.

25 & 26 Vict., cap. 64 (Naval and Victualling Stores Act), cited p. 33, by 27 & 28 Vict., cap. 91, cited p. 252. This last statute alters the law in some important particulars.

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TABLE OF REFERENCES TO REPORTS, &c.

A.

Ad. & El.—Adolphus & Ellis.
Anon.—Anonymous.
Atk.—Atkyn's.

B.

B. & Ad.—Barnewall & Adolphus.
B. & Ald.—Barnewall & Alderson.
B. & B., and Ba. & Be.—Ball & Beatty.
Bac. Abr.—Bacon's Abridgement.
B. & C.—Barnewall & Cresswell.
Beav.—Beavan.
Bell C. C. R.—Bell's Crown Cases Reserved.
Bing.—Bingham.
Bl. Com.—Blackstone's Commentaries.
Bro. Ab.—Brooke's Abridgement.
Bro. C. C.—Brown's Cases in Chancery.
B. & S.—Best & Smith.
Buck. — Buck's Bankruptcy Reports.
Bulst.—Bulstrode.
Burr.—Burrows.

C.

Ca. Temp. Hardk.—Cases Tempore Hardwicke.
Camp.—Campbell.
Car. & Marsh.—Carrington & Marshman.
Chit.—Chitty Reports.
C. & K.—Carrington & Kirwan.
C. L. R.—Common Law Reports.
C. & M.—Crompton & Meeson.
C. M. & R.—Crompton, Meeson, & Roscoe.
Com. Dig.—Comyn's Digest.
Cooke's B. L.—Cooke's Bankruptcy Laws.
Cowp.—Cowper.
Cox's C. C.—Cox's Crown Cases.
C. & P.—Carrington & Payne.
Cr. & J.—Crompton & Jervis.
Cro. Jac.—Croke James.

D.

D. & B. C. C.—Dearsley & Bell's Crown Cases.
Dea. — Deacon's Bankruptcy Reports.
Dea. & Ch.—Deacon & Chitty.
Den. C. C. R. — Denison's Crown Cases Reserved.
D. G.—De Gex's Bankruptcy Reports.
D. G. & J.—De Gex & Jones.
D. G., J., & Sm.—De Gex, Jones, and Smale.
D. & L.—Dowling and Lowndes.
D. G., M., & G.—De Gex, Macnaghten, and Gordon.
Dowl.—Dowling.
D. & R.—Dowling & Ryland.
Dyer.—Dyer's Reports.

E.

East.—East's Reports.
E. & B.—Ellis & Blackburn.
E., B., & E.—Ellis, Blackburn, & Ellis.
E. & E.—Ellis & Ellis.
Esp.—Espinasse.
Ex.—Exchequer Reports.

F.

F. & F.—Foster & Finlaison.

G.

Giff.—Giffard.
Gilb.—Gilbert's Exchequer Reports.
Glyn & Jam.—Glyn and Jameson.

H.

Ha.—Hare.
H. Bl.—Henry Blackstone's Reports.
H. & C.—Hurlstone & Coltman.
H. L. Ca.—House of Lords Cases.
H. & N.—Hurlstone & Norman.
Hob.—Hobart.
Holt N. P. C.—Holt's Nisi Prius Cases.
Howard (U. S).— Howard's United States Reports.
H. & Tw.—Hall & Twells.

I.

Ir. L. R.—Irish Law Reports.

J.

Jac. Ch. R.—Jacob's Chancery Reports.
Jac. & Walk. — Jacob and Walker.
Jenk.—Jenkins' Reports (Exchequer).
Johnson (U. S.) — Johnson's States Reports.
J. P.—Justice of the Peace.
Jur.—Jurist.
J. & W.—Jacob & Walker.

L.

Ld. Raym.—Lord Raymond.
Leon.—Leonard.
L. J. Ch.—Law Journal, Chancery.
L. J. Q.B. — Law Journal, Queen's Bench.
L. J. Ex.—Law Journal, Exchequer.
L. J. C.P.—Law Journal, Common Pleas.
L. J. M.C.—Law Journal, Magistrate's Cases.
Lofft.—Lofft's Reports, K.B.
L. T.—Law Times.

M.

Mac. & G.—Macnaghten & Gordon.
Macq. H. L. Ca.—Macqueen's House of Lords Cases.
Madd.—Maddox.
Man. & Ry.—Manning & Ryan.
Marsh. — Marshall's Reports, C.P.
Mass. (U.S.) R.—Massachussetts United States Reports.
Mau. & S.—Maule & Selwyn.
M. & G.—Manning & Granger.
M. & M.—Moody & Malkin.
Mod.—Modern Reports.
Mont.—Montagu.
Mont. & Ayr.—Montagu & Ayrton.
Mont. D. & D.—Montagu, Deacon, & De Gex.
Mont. & D.—Montagu & De Gex.
Moo. & M. N. P. C.—Moody & Malkin's Nisi Prius Cases.
Moo. & P.—Moore & Payne.
Moore—Moore's Reports.
M. & Sc.—Moore & Scott.
M. & W.—Meeson & Welsby.
My. & K.—Mylne & Keen.

N.

Nev. & M.—Neville & Manning.
N.S.—New Series.

P.

Pick.—Pickering.
Pre. Ch.—Precedents in Chancery.
Pri.—Price's Exchequer Reports.
P. Wms.—Peere Williams.

Q.

Q. B.—Queen's Bench Reports.

R.

Reeves.—Reeves' History of English Law.
Rep.—Coke's Reports.
Roll. Abr.—Rolle's Abridgement.
Rose.—Rose's Bankruptcy Reports.
Russ.—Russell.
Ry. & M.—Ryan & Manning.

S.

Salk.—Salkeld.
Sch. & L.—Schoales & Lefroy.
Sid.—Siderfin.
Sim.—Simons.
Smith's L. C.—Smith's Leading Cases.
Stark.—Starkie.
Stra.—Strange.

T.

Taunt.—Taunton.
T. R.—Term Reports.
Tudor's L. C.—Tudor's Leading Cases.
Tyr.—Tyrwhitt.
Tyr. & G.—Tyrwhitt & Granger.

V.

Vent.—Ventris.
V. & B.—Vesey & Beames.
Vern.—Vernon.
Ves.—Vesey.
Vin. Abr.—Viner's Abridgement.

W.

W. R.—Weekly Reporter.
W. & T. L. C.—White & Tudor's Leading Cases.
Wm. Saund.—Williams's Saunders.

Y.

Yelv.—Yelverton.

THE CONTRACT OF PAWN.

HISTORY OF PAWNING.

Before attempting to discuss the manner in which Pawning is regarded by the English Law, it may not be altogether out of place to glance briefly at some historical traces of the existence of this contract. We need hardly say that the practice of depositing property as security for goods or money lent, is one of very great antiquity. Occasioned by one of the commonest inconveniences of human life in every age, it may well be that this contract originated many centuries before the invention of a circulating medium, and that the relation of pawnor and pawnee was constituted between persons removed by only a few generations from our primeval ancestors. That it actually existed nearly five hundred years before the children of Israel became a separate nation is beyond all doubt. The earliest known instance of this contract, is recorded in a passage in the book of Genesis (*a*), from which it appears that Jacob's son, Judah, was the first pawnor, and his daughter-in-law, Tamar, the first pawnee. From

(*a*) Chap. xxxviii., ver. 17, 18, 20.

the manner in which the story is told, however, it is manifest that the custom of pawning was both common and well established in the patriarchal age. The lady asks for the signet, the bracelets, and the staff, in as business-like a manner as if she were a Pawnbroker in our own day; and the manner of sending the kid to redeem the chattels personal, only differs from the way in which a modern Londoner would take goods out of pawn, in the absence of a duplicate, and in sending a kid instead of lawful money, as the price of redemption. That Judah, in his character of pawnor, did not lack representatives as the Jewish nation increased, is shown by many provisions respecting Pledges in the Books of Moses. Following sundry regulations on what we should call the Law of Bailments, we read (*a*), "If thou at all take thy neighbour's raiment to pledge, thou shalt deliver it to him by that the sun goeth down." The reason for this injunction is given immediately after:—"for that is his covering only, it is his raiment for his skin, wherein shall he sleep? and it shall come to pass, when he crieth unto Me, that I will hear, for I am gracious." This tender regard of the Mosaic law for the interest of the pawnor, is further shown in its prohibiting any one from taking the upper or nether mill-stone in pawn: "for he taketh a man's life to pledge" (*b*). In the same spirit, a man is forbidden to enter his brother's house in quest of the pledge on which he is about to lend money, for "the man to whom thou dost lend shall *bring* out the pledge abroad unto thee" (*c*); a rule which, in our day, would often work

(*a*) Exod. xxii., 26, 27. (*b*) Deut. xxiv., 6. (*c*) *Ibid*, verse 11.

great hardship to the brother who was to be the lender. So again (*a*), "If a man be poor, thou shalt not sleep with his pledge; in any case thou shalt deliver him the pledge again when the sun goeth down, that he may sleep in his own raiment and bless thee, and it shall be righteousness unto thee, before the Lord thy God." In the 17th verse of the same chapter, "taking the widow's raiment to pledge" is expressly forbidden, and in the book of Job (*b*), Eliphaz the Temanite, after arraigning his unhappy friend with the question, "Is not thy wickedness great, and thine iniquity infinite?" goes on to say:—"for thou hast taken a pledge from thy brother for nought, and hast stripped the naked of their clothing;" as if an extortionate pawnee were one of the very vilest of mankind. And Job himself seems to have held a very similar opinion; for, when wondering at the prosperity of the wicked, he cites, as one of its most remarkable instances, the impunity of those who "take the widow's ox for a pledge;" who "cause the naked to lodge without clothing;" and who "take a pledge of the poor" (*c*). Twice does Solomon repeat his proverb, "Take his garment that is surety for a stranger, and take a pledge of him for a strange woman" (*d*). And Ezekiel mentions the faithful restoration of a pledge, as among the tests that a man "is just, and does that which is lawful and right" (*e*); and also as being among the indications that "a wicked man has turned from his evil way" (*f*).

(*a*) Deut. xxiv., 12, 13. (*b*) Job xxii., 6.
(*c*) Job xxiv., 3, 7, 9. (*d*) Proverbs xx., 16, xxvii., 13.
(*e*) Ezekiel xviii., 7. (*f*) Ezekiel xxxiii., 15.

It is unnecessary to multiply illustrations of the prevalence of this custom among the Jews, and we should far exceed the proposed limits of the present work, were we to show in how many nations pawning has been recognised and practised, under conditions more or less resembling those of our own Common Law. In China, Pawnbrokers are very numerous. They are kept under strict regulations; and any one acting without a license is liable to severe punishment. Three years is the usual period during which a pledge may be redeemed; and three per cent. per month is the highest legal rate of interest; but in the winter, the monthly interest on pledges of wearing apparel is restricted to two per cent., "that the poor may be able the more easily to redeem" (*a*). As most existing Chinese Institutions are but stereotyped copies of originals many hundreds of years old, it is very probable that the regulations we have quoted applied to the Chinese Pawnbrokers of fifteen hundred or two thousand years ago, as completely as they now do to their successors in our own day. In his celebrated treatise on Bailments, Sir Wm. Jones tells us (*b*) that "Pledges were used in very early times by the roving Arabs; one of whom finely remarks, that 'the life of man is no more than a pledge in the hands of destiny;'" and among ancient decisions on this contract, the same learned author mentions (*c*) a decision of the Mufti at Constantinople, which is recorded in an ancient manuscript he had discovered at Cambridge:—"Zaid had left with Amru, divers

(*a*) Sir F. Davis's *China*, vol. ii., page 418.
(*b*) Page 83. (*c*) Jones *On Bailments*, 84.

goods in pledge for a certain sum of money; and some ruffians, having entered the house of Amru, took away his own goods, together with those pawned by Zaid." The inquiry made was whether, since the debt became extinct by the loss of the pledge, and since the goods pawned exceeded in value the amount of the debt, Zaid could legally demand the balance of Amru. To which question, the great law officer of the Othman Court answered, "Olmaz, it cannot be" (*a*). Through the same channel we learn, that by the Laws of the Hindoos, a [pawnee or other] depositary, who undertakes to keep goods, shall preserve them with care and attention; but shall not be bound to restore the value of them, if they be spoiled by unforeseen accident, or burned, or stolen, unless he conceal a part of them that has been saved; or unless his own effects be secured; or unless the accident happen after his refusal to re-deliver the goods on demand made by the depositor, or while the depositary, against the nature of the trust, presumes to make use of them (*b*). In other words, the English and Hindoo laws have this much in common: they both bear the bailee harmless when the thing bailed is injured by inevitable accident; but they hold him liable for fraud, or for such negligence as is presumptive evidence of it, though the latter law is rather more *exigeant* than the former on this matter. It follows therefore, that Lord Holt, when delivering his renowned judgment in *Coggs* v. *Bernard* (*c*), might have quoted from Gentoo

(*a*) Publ. Libr. Camb., MSS. Dd., 4, 3.
(*b*) Jones *On Bailments*, 114.
(*c*) Lord Raymond, 909, 1 Smith's L.C., 5th edit., 171.

lawyers as well as from Justinian, in support of many of the doctrines he therein laid down. Some other provisions of ancient law are referred to in subsequent portions of this work, and on the whole, exhibit a remarkable amount of harmony between diverse systems, when dealing with this contract. Of the manner in which the Roman law regarded it, we deem it unnecessary to speak here, because the doctrines of that Law have been so largely incorporated with ours, in *Ratcliff* v. *Davis* (*a*), and *Coggs* v. *Bernard* (*b*), that we shall have to refer to them pretty frequently in the later portions of this work.

Coming to more modern times, we find that in England at least, the Jews, who settled here about A.D. 750, were the first professed Pawnbrokers, as well as the first money lenders. They carried on both trades, until their expulsion by Edward I. The principal seat of their order in London, and indeed in the kingdom, was in Old Jewry. The interest they charged varied, between 1060 and 1290, from 2d. to 3d. per £1 per week, or from about 45 to 65 per cent. per annum. But these rates did not always content them; for we find, that in 1264, the rabble attacked and destroyed the synagogue, because a Jew had endeavoured to exact from a Christian man, more than the then legal interest of 2d. per week, for a debt of £20 the latter owed him. The populace took a bloody revenge for this attempt at extortion. A riot ensued, in which seven hundred Jews were killed by the mob. A few years later (1275),

(*a*) Yelv. 178, Viner's Abdgt., tit. Pawn.
(*b*) Lord Raymond, 909, 1 Smith's L.C., 5th edit., 171.

the Jews were forbidden to take interest on pain of death, and as the hatred of Jews grew too intense, both in governors and governed, to allow the unfortunate Israelites to remain in this country, even when continually subjected to pillage and persecution, they were ultimately expelled by Edward I., in 1290. After their expulsion, the trade of Pawnbroking fell almost entirely into the hands of the Lombard merchants, who, it is certain, had previously adopted the practice of taking pledges for loans, both of large and small sums of money, since by them Richard I. was accommodated with a considerable amount of money on loan, and his successor's written guarantee to pay the debt, is supposed to be the earliest known instance of a Letter of Credit, afterwards so much in use as a Bill of Exchange(*a*). The Lombards continued to thrive by their Pawnbroking and Money Lending, though taking interest was not made lawful till 1546, when the legal rate was fixed at ten per cent. by 37 Hen. 8, cap. 9. This statute was repealed in 1552, but it was afterwards re-enacted by 13 Eliz., cap. 8, the preamble whereof naïvely recites that the Act for repressing usury "had not done so much good as was hoped it should."

The earliest legislative notice of Pawnbrokers as such, is not very flattering. It is contained in the statute 1 Jac. 1, cap. 21, the preamble of which recites, that "forasmuch as of long and ancient tyme, by divers hundred yeeres, there have ben used within the Citie of London, and the Liberties thereof, certain Freemen of the Citie, to be selected out of the Companies and Mysteries, whereof they are free and members;"

(*a*) Hallam's *Middle Ages*, 5th edit., vol. iii., 405.

who were to be recommended to the Lord Mayor and Aldermen, as "persons meete for to be Broker or Brokers;" and who were to be admitted on taking "their corporal oaths to use and demeane themselves uprightlie and faithfullie between merchant Englishe and merchant strangers and tradesmen;" and these Brokers "never, of any ancient tyme, used to buy and sell garments, household stuffe, or to take pawnes and billes of sale of garments and apparel, and all things that come to hand, for money laide out and lent upon Usurie; as now of late yeeres hathe, and is used by a number of citizens assuminge unto themselves the name of Brokers and Brokerage, as though the same were an honeste and a lawfull trade, misterie, or occupation, tearminge and naminge themselves Brokers, whereas in truth they are not, abusinge the true and honeste ancient name and trade of Broker and Brokerage; and forasmuch as many citizens, freemen of the Citie, being men of manuall occupation, . . . have lefte and given over, and daylie doe leave and give over, theire handie and manuall occupations; and have and daylie doe, set up a trade of buyinge and selling, and taking to pawne, of all kinde of worne apparel, whether it be old, or a little the worse for wearinge; houshold stuffe and goods of whatever kind soever the same be of, findinge therebie that the same is a more idle and easier kind of trade of livinge, and that there riseth and groweth to them a more readie, more greate, more profitable advantage and gaine, than by theire former manuall labours and trades did or coulde bringe them." The Statute, after enumerating divers evils which were considered

likely to flow from this new trade, goes on to enact (*a*), that no sale or Pawn of any stolen goods, to any Pawnbroker in London, Westminster, or Southwark, shall alter the property therein, and that Pawnbrokers refusing to produce the goods to the owner from whom stolen, shall forfeit double value (*b*).

Till the seventeenth century, the Goldsmiths were occasionally bankers, in the only form in which Banking as yet existed. A concurrence of circumstances at this time led to the expansion of this business. The London merchants had been accustomed to deposit their money in the Tower, in the care of the Mint Master, until Charles I., a short time before the meeting of the Long Parliament, seized upon £200,000 he found there, taking this sum professedly as a loan. The merchants then entrusted their money to their clerks and apprentices, but when the civil war broke out, many of these took advantage of the state of affairs to keep the money. At last, in 1645, it became a constant practice for the merchants to place their funds in the hands of the Goldsmiths, who thenceforward made this a part of their ordinary business (*c*). From this beginning our present banking system took its rise.

One object of the Statute of James, already cited, was "the repressinge and abolishinge of the said idle and needlesse trades and upstart Brokers." The Act, however, met with the usual fate of legis-

(*a*) By sec. 5.

(*b*) This is still law, though later statutes have rendered it less important than formerly.

(*c*) Knight's *London*, vol. iii, p. 398.

lative attempts to prevent the supply of a public want. Legal prohibitions were ineffectual against social requirements; and the Pawnbroking Trade continued to grow and flourish. Perhaps one of the best proofs of its prosperity is to be found in the fact that in 1785 an Act was passed (*a*), for granting his Majesty certain Stamp Duties on Licences to be taken out by Pawnbrokers, but these duties were impliedly repealed in 1815 by the Statute 55 Geo. 3, cap. 184, which fixes Pawnbrokers' Licenses at their present rate of £15 in London and £7 10s. in the country. The Act of 25 Geo. 3, cap. 48, nevertheless remained on the statute book till it was repealed, with a number of equally obsolete Acts, by 24 & 25 Vict., cap. 104.

The Act that first imposed a Stamp Duty, is remarkable as containing the earliest attempt at a statutory definition of the term Pawnbroker. It provides (*b*) "That all persons who shall receive or take, by way of pawn, pledge, or exchange, of or from any person or persons whomsoever, any goods or chattels for the repayment of money lent thereon, shall respectively be deemed Pawnbrokers within the intent and meaning of this Act, and shall take out a license for the same accordingly." In accordance with the then popular fallacy that "five per cent. was the natural rate of interest," the 6th section "Provided always, that nothing in this Act contained shall extend, or be construed to extend, to any person or persons, who shall lend money upon pawn or pledge, at or under the rate of £5 per centum per annum interest, without taking any further

(*a*) 25 Geo. 3, cap. 48. (*b*) By sec. 5.

or greater profit for the loan or forbearance of such money lent, on any pretence whatever."

After the passing of the Act of 1785, several temporary statutes were enacted, for regulating the Pawnbroking business. The last of these (*a*) having expired in 1800, was succeeded by the permanent Act of 39 & 40 Geo. 3, cap. 99, which is still in force. This Act brought the executors, administrators, and assigns of deceased Pawnbrokers within its purview; and a number of important regulations were introduced or re-enacted. In 1846 the hours of business in Pawnbrokers' shops were somewhat curtailed (*b*). In 1856, in consequence of constant evasions of the Statutes by the keepers of leaving shops, whose dealings were ostensibly in the nature of sales, but really and truly were Pawns, an Act was passed to bring them within the same regulations as other Pawnbrokers (*c*). Three years later, a general statute (*d*) extended to the whole country certain regulations contained in the Metropolitan Police Act of 1839 (*e*). The effect of these statutes, with the decisions upon them, will be found fully detailed in subsequent portions of this work.

In France and many other countries, Pawnbroking is conducted exclusively by public institutions of a quasi benevolent order, known as *Monts de Piété*. The first of these was established at Padua, in the 15th century, to supply the poor with money at a moderate rate of interest, and to control the usurious

(*a*) 36 Geo. 3, cap. 87. (*b*) By 9 & 10 Vict., cap. 98.
(*c*) 19 & 20 Vict., cap. 27. (*d*) 22 & 23 Vict., cap. 14.
(*e*) 2 & 3 Vict., cap. 71.

practices of the Jews, who were then the great money-lenders of Europe. At a later period these *Monts de Piété* were introduced into many of the Continental States, and some of them still exist at Paris, Madrid, Brussels, Ghent, Antwerp, &c. (*a*). As, very soon after their first establishment, it was found impossible to supply them with funds by voluntary contributions, (as had been originally contemplated), a bull for allowing interest to be charged on the money they lent, was issued by Leo X. in 1521. The practice of these establishments has not always corresponded with their professions, but "on the whole," says Mr. McCulloch, "they have been of essential service to the poor" (*b*). Attempts at introducing them in this country have at various times been made, but without success. In the reigns of Charles I. and his sons, there were many projects for founding Pawnbroking establishments, under the names Charity Banks, and Lumber Houses; and one of the second Stuart's illegal acts, was granting a monopoly, in 1629, for the office of Registrar of Vales and Pawns. In 1708, the Charitable Corporation obtained a Charter for the purpose, so often meditated, of lending money to the industrious but necessitous poor on small pledges, and to persons of better rank on an indubitable security of goods impawned. In the British Museum, the writer met with a curious old tract, entitled "The Mistery of iniquity luckily discovered; or a horrible Plot, and wicked contrivance against Poor honest people of this nation, in a comical dialogue between a Pawnbroker, a

(*a*) Brand's *Dict. of Science and Art*, art. *Mont de Piété.*
(*b*) McCulloch's *Commercial Dict.*, art. Pawnbrokers.

tally-man, a bum bailiff, a town miss, a keeping fool, a vintner's drawer, and a sham devil; setting forth all their roguish intrigues, with a word or two of advice how to avoid them." The Pawnbroker of this dialogue, certainly is not a model citizen. He tells his friends that he lends one third or one half the value at most; and if the pawnors scruple, "he has oaths of his own keeping, and a stock of impudence to face them out." He knows how to make a bolster and pillows out of every bed he has in pawn; he takes the works of good going watches, and puts old ones in their stead, and generally shows a proficiency in knavery, of which the Fagins of our own day would have no reason to feel ashamed. To write thus of Pawnbrokers in our day would be false and libellous, and the Pawnbrokers of 150 years ago, probably did not deserve these reproaches any more than their successors. But if, as we think likely, the tract was published in the interest of the projected Company, the Trade was soon abundantly revenged. The Charitable Corporation obtained its Act in 1708; but it did not commence its business of lending money "to the industrious, but necessitous poor," till 1719. It began with £30,000, and went on for some years, paying 10 per cent. as a dividend. In 1722 it enlarged its capital to £100,000, but as it could not invest so large a sum in Pawnbroking operations, and as it had still to pay a dividend that should not show any falling off, it fell into the same course of jugglery which has been common in modern times. It enlarged its capital by successive stages to six hundred thousand pounds, nearly all of which was lost in gam-

bling on the Stock Exchange. It "made advances" upon the shares of several large Building schemes, for want of better "pledges;" became deeply interested in their success, and then, as the value of the shares fell, sought to sustain them by artificial means. The result was that it sunk deeper and deeper into the mire, finally collapsing with a deficit of more than half a million, for which no equivalent was found. All that could be realized in the way of assets amounted to £36,411. These gigantic frauds seem to have enriched no one, all the more prominent men connected with the Corporation having been ruined and driven into poverty and exile. The Shareholders seem to have been as careless as those of modern days. So long as a good dividend was paid and shares were kept at a premium, they took little heed how it was done, and were willing to give unlimited powers into the hands of those who fulfilled these two conditions, ostensibly by maintaining an abundant revenue, but in reality by keeping up a constant drain upon the capital. The cashier, (a member of the House of Commons), and the keeper of the warehouse, ran away; and Parliament was called on to interfere in the matter, as a grand case of fraud and embezzlement. Two members were expelled the House; many persons of high position were compromised, and, in compassion for the poor people who had been caught in the trap, a Lottery was authorized in 1732, by which a part of their subscription money was repaid them (*a*).

The Bank of England, by virtue of its original charter, has the power of taking pawns

(*a*) Hume and Smollett's *History*, Hughes's edit., 326.

as security for advances. The original act for establishing the Bank, gave the Company power to purchase land, deal in Bills of Exchange, and gold and silver Bullion, but they were not to buy merchandise, though they might sell unredeemed goods on which they had made advances. There is, we believe, among the Bank archives, some record of a golden utensil that was once taken as a pledge for an advance made to a lady of title; but we need not say that the National Banking Establishment in Threadneedle-street, would now consider business of that order far beneath its notice. In 1825, however, the directors lent £300,000 on pawns, and at the same time an Act was passed to facilitate loans on Bills of Lading, and other commercial documents. In 1822 it had been proposed to lend the farmers a large sum on the security of corn stored, but this scheme was never carried into effect. Even now, however, it may be truly said, that not only the Bank of England, but every other Bank in the world, is still a Pawnbroking establishment, the only difference being that the pledges there taken are Bills and such like documents, instead of ordinary chattels.

Mr. Cobbett informs us (*a*) that the pilot bubble of the speculations of 1824-5 was another new scheme for an English Mountain of Piety, whose capital, to the amount of £400,000, speedily vanished. Several schemes for Joint Stock Pawnbroking were started in 1856, only one of which took up an existing business, which has since disappeared. There are, however, several Pawnbroking Com-

(*a*) In his work on Pawns, p. 19.

panies in Edinburgh and Glasgow, which have stood for many years, and are doing a good business, but no English Company which has been formed has met with an equal success. In the course of last year, a Company, on the Limited Liability principle, was started for taking an established Pawnbroking business. But the scheme came to nothing, and the Company is now defunct.

But notwithstanding the ill success of English attempts at founding *Monts de Piété*, these institutions have, in many parts of the Continent, achieved considerable success. That in Paris, was established by Royal ordinance in 1777, and after being destroyed by the Revolution, was again opened in 1797. In 1804, it obtained a monopoly of Pawnbroking in the capital. This establishment grants loans on deposits of such goods as can be preserved, to the amount of two-thirds the estimated value of all goods other than gold and silver, on which four-fifths of the value may be advanced. No loan is granted for less than 3 francs. Advances are made for a year, but the borrower has the option of renewing the engagement. Interest is at the rate of 9 per cent. per annum; with ½ per cent. as a valuation fee. A large portion of the inferior pledges are taken in by Commissionaires who receive a fee of 2 per cent. upon the pledging, and 1 per cent. on redemption. The *Mont* has generally in deposit from 600,000 to 650,000 articles, worth from 12,000,000 to 13,000,000 francs. The expense of management amounts to from 60 to 65 centimes per article, so that a loan of 3 francs never defrays the expense it occasions,

and the profits are wholly drawn from those that exceed 5 francs (*a*). The experience of our own Pawnbrokers is somewhat similar. We have seen a statement, that there is generally a loss on articles under ten shillings, unless they are redeemed (*b*). Though this is hardly credible, we believe that it is not uncommon with the more respectable Pawnbrokers to refuse pledges under 2s. 6d., because the interest allowed does not pay the incidental charges, and the result of this, is to send a large amount of legitimate Pawnbroking into irregular or less reputable channels. A remedy might probably be found for this, by allowing Pawnbrokers to charge a higher rate of interest on pawns below a certain amount. This is already done in Ireland, and the result is that the proportion of small pawns is immensely larger there than here (*c*).

The Pawnbroker was first compelled to give a duplicate by 30 Geo. 2, cap. 24. The Act 39 & 40 Geo. 3, cap. 99, raised the previous rates of charge for this duplicate, and 23 & 24 Vict., cap. 21, made it lawful to charge for tickets issued with pawns under 2s. 6d. each. This was done as a partial remedy for the unwillingness to take small pawns, which we have already noticed. In Scotland, the law of arrestment enables creditors to recover small debts cheaply and expeditiously, and also to attach the wages of workmen in their masters' hands. This perhaps will in part account for the smaller business

(*a*) McCulloch's *Commercial Dicty.*, Art. Pawnbrokers.
(*b*) 'Truths from a Pawnbroker, in *Meliora*, 1852.
(*c*) See a paper on the Usury Laws, read before the Dublin Statistical Society, by W. Neilson Hancock, L.L.D., published in the *Law Review*, vol. 13, p. 88.

done by licensed Pawnbrokers in Scotland, but it must be admitted, that brokers and other unlicensed persons, do, in fact, take pawns, and that thus the poor suffer from many of the abuses which in England they generally escape.

It has at all times been a popular notion, that the Pawnbroking trade is one in which the profits are exceptionally high. Facts, however, do not bear out this idea. According to the best calculations available, there are about 420 Pawnbrokers in London, and perhaps 1800 in the rest of the country —numbers too small to be compatible with the ordinary readiness of mankind to rush into any occupation which promises a royal road to fortune. It is not uncommon for vendors of such goods as find their way to the pawn-shop, to get profits ranging from 15 to 30 per cent. and even more, and this profit, be it remembered, is not made once in twelve months only, but as often as the stock is turned over, which is frequently done three or four times a year, with far less trouble of bookkeeping and duplicate giving than is inseparable from the smallest transaction at a pawn-shop. The heavy fines inflicted on Pawnbrokers for taking more than legal interest may be necessary to protect society, but when a master is fined £5, because his shop boy has made a mistake of one half-penny in a sum of 2s., the Law must often press very hardly on individuals. The same may be said of the Law which compels a Pawnbroker to restore stolen goods, however innocently taken in pledge. On the whole, therefore, it is probable that we ought to attribute public belief in the magnitude of Pawnbrokers' profits, to

the borrower's ordinary feelings of irritation towards the lender, when the money has been spent, and the day of reckoning comes.

For a new account of the Pawnbrokers' sign, we are indebted to that elegant and accomplished writer, Mrs. Jameson (*a*). The popular explanation of the three golden balls is, as everybody knows, that there are two chances to one against the redemption of the things pawned. From this very uncomfortable association of ideas, Mrs. Jameson has rescued us. It appears that the Pawnbrokers' badge and cognizance has been properly enough referred to the Lombard merchants, who, as we have seen, carried on this business in England during the 13th and 14th centuries. But the Lombards had merely assumed the emblem which had been applied to St. Nicholas, as their charitable predecessor in the same line. The good saint was bishop of Myra. "Now in that city there dwelt a certain nobleman who had three daughters, and from being very rich, he became poor; so poor that there remained no means of obtaining food for his daughters but by sacrificing them to an infamous life; and often times it came into his mind to tell them so, but shame and sorrow held him dumb. Meantime the maidens wept continually, not knowing what to do, and not having bread to eat, and their father became more and more desperate. When Nicholas heard of this, he thought it a shame that such a thing should happen in a Christian land; therefore one night, when the maidens were asleep, and their father alone sat watching and weeping, he took a

(*a*) *Sacred and Legendary Art*, vol. ii., 3rd edit., p. 452.

handful of gold, and tying it up in a handkerchief, he repaired to the dwelling of the poor man. He considered how he might bestow it without making himself known, and while he stood irresolute, the moon coming from behind a cloud, showed him a window open; so he threw it in, and it fell at the feet of the father, who, when he found it, returned thanks, and with it he portioned his eldest daughter. The second time Nicholas provided a similar sum, and again he threw it in by night, and with it the nobleman married his second daughter. But he greatly desired to know who it was that came to his aid, therefore he determined to watch, and when the good saint came for the third time, and prepared to throw in the third purse, he was discovered, for the nobleman seized him by the skirt of his robe, and flung himself at his feet, saying, 'Oh, Nicholas! servant of God, why seek to hide thyself?' and he kissed his feet and his hands. But Nicholas made him promise that he would tell no man."

In the engraving which accompanies the story, the saint is represented standing on tip toe, and about to throw a ball-shaped purse into the window of the house. The nobleman is seen through an open doorway, sitting sorrowfully in the nearest room, while his three daughters are sleeping in a chamber beyond. The three purses of gold, or as they are more commonly figured, the three golden balls, disposed in exact Pawnbroker fashion, are to this day the recognized and special emblem of the charitable Nicholas.

It is probable that a much more commonplace explanation of this sign may be given by

supposing that the three balls are the representatives of the article in which the Pawnbroker deals—Money. In the case of most of the London Trading Companies, it will be found that their Armorial bearings are charged with three of those objects which are the staple of that Company's manufacture. Thus the Goldsmiths (in addition to the Leopard's heads), have three cups or chalices; the Saddlers three saddle-trees; the Stationers three books; the Needle-makers three needles, &c. In all probability the Lombards merely adopted the emblems of their traffic, and selected three "Byzants," a gold coin of great purity, current during the middle ages. "Byzant" also is the herald's term for a circle of gold; and thus the device would really be three golden coins on a field azure; a form in which they are commonly presented to the eye even now, whenever the Pawnbroker has to depict his signs upon a flat surface, such as a window blind. As the use of flat sign boards passed out of fashion, the original idea was preserved by the use of golden spheres, which had the advantage of being equally visible from whatever point of view the customer's eye might light upon them. We do not pretend to decide between these conflicting theories; our readers must make their election between piety and pelf, between alms-giving by a mediæval Bishop and money-lending by a modern broker. Still, with the liveliest appreciation of the excellence of the good saint's motives, we greatly doubt whether public interest or private morality would be served by a general imitation of his example. His memory, however, was

highly venerated, especially by the poor. Mrs. Jameson says of him:—"While knighthood had its St. George; serfhood had its St. Nicholas. He was emphatically the saint of the people; the bourgeois saint, invoked by the peaceful citizen, by the labourer who toiled for his daily bread, by the merchant who traded from shore to shore, by the mariner, struggling with the stormy ocean. He was the protector of the weak against the strong, of the poor against the rich, of the captive, the prisoner, the slave. No saint in the calendar has so many churches, chapels and altars dedicated to him. In England, I suppose, there is hardly a town without one church at least bearing his name."

Besides the church bearing his name, we might add, that most towns in England contain at least one establishment bearing his arms. We do not think the holy man who founded the order has any reason to be ashamed of his successors. We may go further and say, that nothing can be said against Pawnbroking in our day, half so severe as might, with reason, be uttered against indiscriminate almsgiving in the manner which has made St. Nicholas immortal. A Pawnbroker of to-day may look very prosaic by the side of a mediæval saint, but an honest member of the craft is a greater public benefactor than the bishop of Myra. He lives to supply a want continually felt in civilized societies. His calling will always exist, if not under legal recognition, then in spite of legal prohibition. If it is true that to some extent it encourages habits of improvidence, it is also true that it continually relieves distress.

It enables a poor man, on a small scale, to do in an hour of difficulty, what the millionaire does at a commercial crisis—to raise the means of meeting a temporary pressure, by getting an advance on some portion of his property, with which he would not, under ordinary circumstances, be willing to part. As the business is, in England, left in the hands of individuals, the pawnee is naturally more anxious to make business by accommodating the pawnor, than he would be, if, as in France and elsewhere, the business were confined to a few establishments, conducted by government officials, with no special motive to please anybody but those above them. By placing the Trade under licence, and subjecting it to stringent regulations as to stolen goods, and other matters, the Legislature has endeavoured to withdraw undue facilities for getting rid of their booty, from the dishonest and fraudulent, without curtailing the advantages which the Trade may afford, both to pawnor and pawnee. As in other social relations, the parties acquire certain rights and incur certain liabilities, as soon as they assume these characters, and we suppose it is one result of the infirmities of our nature, that where rights and liabilities exist, they should occasionally become the subject of dispute. To define these rights, to indicate the extent of these liabilities, has been our object in the present work, and we trust that our endeavours may prove of some service, both to the parties to the contract, and to those from whom they have to seek professional assistance.

SECTION I.

THE CONTRACT OF PAWNING DEFINED.

In the Roman Law, this contract is called Pignus, and is thus mentioned in the Digest:—*Pignus, appellatum a pugno, quia res quæ pignori dantur, manu traduntur* (*a*). And in that law the term was applied to mere personal property and moveables, as opposed to land, and things incorporeal. *Unde etiam videri potest verum esse quod quidam putant, Pignus proprie rei mobilis constitui.* Pothier says the Pawn or Pledge is a contract, by which a debtor gives his creditor a thing to detain as security for his debt (*créance*), which the creditor is bound to return, when the debt is paid (*b*). Sir Wm. Jones (*c*) defines it as "a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged." To somewhat the same effect, Mr. Justice Blackstone, in his Commentaries, says, "If a Pawnbroker receives plate or jewels, as a pledge or security for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time" (*d*). Or even, adds Dr. Stephen, "if he is ready to redeem

(*a*) Dig. Lib. 50, tit. 16, l. 238.
(*b*) *De Nantissement*, Art Prelim., n. 2.
(*c*) *Treatise on Bailments*, p. 118.
(*d*) Vol. ii., p. 452.

them while they still remain in the hands of the Pawnbroker unsold" (*a*). Substantially in harmony with this is the Common Law doctrine, in which a pawn is considered to be a bailment of personal property as a security for some debt or engagement. Lord Holt, in his celebrated judgment in *Coggs* v. *Bernard* (*b*), mentions Pawn as the fourth class of bailments; and says, "it is when goods or chattels are delivered to another as a pawn, to be a security for money borrowed of him by the bailor, and this is called, in Latin, *vadium*, and in English, a pawn or pledge." And a learned text writer expresses the same idea somewhat more precisely, when he says, "The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be holden as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement has been fulfilled (*c*). Passing to the definitions given by transatlantic jurists, we find that Mr. Justice Story, in his Treatise on Bai'ments (*d*), describes Pawning as "a bailment of personal property, as security for some debt or engagement;" and Kent, the learned American commentator, adopting the words of Sir Wm. Jones, says, "it is a bailment or delivery of goods, by a debtor to his creditor, to be kept

(*a*) 2 Stephens's *Blackstone*, 5th edit., page 80, referring to *Walter* v. *Smith*, 5 B. & Ald., 439.

(*b*) Ld. Raymond, 909, 1 Smith's *Leading Cases*, 5th edit., 171, 182.

(*c*) Addison on Contracts, 5th edit., 298.

(*d*) Sec. 286.

till the debt be discharged" (*a*). The whole of these definitions proceed on the assumption, that the goods were not in the creditor's possession before the act of pawning took place; and therefore they do not meet the case of an assignment of the debtor's goods, previously in the creditor's keeping for some other purpose; in which event, the relation of pawnor and pawnee is constituted by the mere agreement of the parties. The Code of Louisiana, 1825, in part meets this, when it says, "The pledge is a contract, by which a debtor gives something to his creditor, as a security for his debt" (*b*); but Story, than whom no one can speak with greater authority on this subject, prefers the definition given by Domat as more accurate, because more comprehensive; viz.:—"It is an appropriation of the thing given, for the security of an engagement" (*c*).

The subject matter of this contract is usually goods and similar chattels personal, though Bills of Exchange, and such like securities, may be, and indeed constantly are, deposited in pledge. In Roman Law, it was held that nothing but what is capable of delivery to the pledgee, is deemed to be the proper subject matter of a pledge, and thence, says Pothier, "by the Roman Law, incorporeal things, (such as debts and other choses in action), cannot become the subject of a pledge, for according to that law, they are incapable of any delivery. *Incorporales res traditionem et usucapionem non recipere, manifestum est* (*d*). Story, however, quotes some passages

(*a*) 2 Kent's *Commentaries*, 9th edit., 777.
(*b*) Art. 3100. (*c*) 1 Dom. Bk. 3, tit. 1, § 1, art. 1.
(*d*) Dig. Lib. 41, tit. 1, l. 43, s. 1, Pothier *de Nantissement*, n. 6 and note (1).

in the Digest, which seem to import a different rule; a difference which Pothier endeavours to reconcile, by supposing that the word Pignus is sometimes used in a strict sense, and sometimes in a broad, or general sense. In a strict sense, it includes only the pledge, where there has been a delivery; and which alone was recognised *jure civile;* while the broader sense includes not only a strict pledge, but also agreements for a pledge, where there was not any delivery, but which agreement would be enforced by the Prœtor, *jure prœtorio* (*a*).

From this it will be seen that a pawn differs from a mere lien, for as Story says, in his *Equity Jurisprudence* (*b*), in the latter, there is not in strictness either a *jus in re,* nor a *jus ad rem;* but simply a right to possess and retain property, until some charge attaching to it is paid or discharged. The lien often arises by operation of Law, but the pledge is a lien arising by contract, created, limited, and enlarged at the will of the contracting parties (*c*). And with this agrees the judgment of Chief Justice Gibbs, in *Pothonier* v. *Dawson*: If goods are deposited as a security for a loan of money, the lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade; and it may be inferred, that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit (*d*). But a lien can be retained only as a security for the debt due, and the subject of the lien, (except in

(*a*) *De Nantissement*, n. 6, note 1. (*b*) Sec. 506.
(*c*) Cross *On Lien*, 63. (*d*) 1 Holt, N. P.C., 385.

some particular cases, where a right of sale exists by local custom,) cannot be sold or parted with, without waiver of the right already possessed (*a*).

It may seem unnecessary further to multiply authorities, but in confirmation and endorsement of what has been already said, we may cite the language of Lord Wensleydale: In the ordinary case of a pledge, the pledgee impliedly [or expressly] undertakes to deliver back the property to the pledgor, when the sum for which it was pledged is paid. On the other hand, the pledgor impliedly [or expressly] undertakes that the property pledged is his own, and may be safely returned to him (*b*). Not only goods, chattels, bills of exchange, and choses in action, but money, as well as other personal property, may be the subject of pawn, as (*c*) where the plaintiff had left a purse, with £22, as security for the re-delivery of 3 butts of sack, which had been seized under a judgment. The court thought that money might be a good pawn, though they gave judgment for the defendant, on the ground that there had been no conversion.

Passing from lawyers to lexicographers, we find that Johnson defines a pawn as something given to pledge as security for money borrowed, or promise made; and says that the verb to pawn is seldom used, but of pledges given for money. Richardson's definition, however, recognizes its more extensive application, which is "to give or deliver; to place in the hands of;

(*a*) Cross *On Lien*, 47.
(*b*) *Cheeseman* v. *Exall*, 6 Ex., 341, 344.
(*c*) *Isaac* v. *Clark*, 2 Bulst., 306.

to deposit anything as gage, warranty, or security; to plight or pledge; to stake." And Webster says "a pawn is something given or deposited as security for the payment of money borrowed; a pledge." The *English Cyclopædia*, under this head, states that "pawning differs from other ways of lending and borrowing money in this;—that the goods are delivered to the lender, as security."

Briefly, as the result of the foregoing, we may say that the Contract of Pawn is one by which a party, either by delivery or by some act equivalent thereto, bails personal property, (other than chattels real), to the other, as a security for the payment of a debt, the fulfilment of an obligation, or the discharge of an undertaking. Unlike a lien, it gives an actual, though qualified property in the thing pawned to the creditor, and besides differing from a mortgage in its subject matter, it does not purport absolutely to divest the debtor of his property in the thing pawned, but renders his title subordinate to, and dependent on, that of his creditor; but the contract is not complete, until the creditor has possession, actual or constructive, of the thing pawned. The debtor, or person pawning, is called the pledgor or pawnor; the creditor, or he that receives the pawn, is called the pledgee or pawnee. Any person competent to contract may be a pawnor or pawnee; but there is one class of pawnees whose business is to receive goods on pledge for advances of money not exceeding Ten Pounds. These persons are called Pawnbrokers; their business is regulated by Statute, and they have special rights, duties, and

liabilities, which do not attach to pawnees at Common Law. The Statute 23 Geo. III., cap. 48, sec. 5, declares that "all persons who shall receive or take, by way of pawn, pledge, or exchange, of or from any persons whomsoever, any goods or chattels for the repayment of money lent thereon, shall respectively be deemed Pawnbrokers within the intent and meaning of this Act, and shall take out a licence for the same accordingly." This obligation to take out a licence is extended by an Act of the present reign (*a*), passed to prevent the evasions of previous Statutes, practised by leaving-shop keepers. This Act makes the term Pawnbroker, with its consequent liabilities, extend to every one who shall keep a house, shop, or other place, for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who shall purchase, or receive, or take in, any goods or chattels, and pay or advance, or lend thereon, any sum of money not exceeding Ten Pounds, with or under any agreement or understanding, express or implied, or which from the nature or character of the dealing may reasonably be inferred, that such goods or chattels may be afterwards redeemed or repurchased on any terms whatever.

(*a*) 19 & 20 Vict., cap. 27.

SECTION II.

WHAT MAY NOT BE PAWNED.

It follows from what we have already said, that though real estate may be mortgaged, it cannot properly be said to be pawned. For, as is said in Roman law, *unde etiam videri potest, verum esse quod quidam putant, Pignus proprie rei mobilis constitui* (*a*). And again, *Pignus appellatum a pugno; quia res quæ pignori dantur, manu traduntur* (*b*). And in our law, chattels, bills, choses in action, money, and all other forms of personal property, are proper subjects of pawn. Upon this proposition, however, certain exceptions have been grafted from motives of public policy. Hence an officer in the army or navy, or other officer of government, cannot assign or pledge his future accruing pay, or other remuneration connected with the right of the government to *future* services from him, because it is contrary to the honour, dignity, and interest of the state that its servants should be in danger of being reduced to poverty, by anticipating those resources which were intended to place them in a suitable condition of respectability, comfort, and efficiency (*c*). And on the principle of not encouraging litigation, assignments, (whether by way of pawn or otherwise,) which involve

(*a*) Dig. Lib. 50, tit. 16, l. 238. (*b*) *Ibid.*
(*c*) Story's *Equity Jurisprudence*, § 1040 1040f. Smith's *Manual of Equity*, 6th edit., 215.

Champerty or Maintenance, or which are intended to convey only a naked right to litigate, will not be permitted (*a*). Independently of the Statutory liabilities of Pawnbrokers to restore stolen goods, it follows from the general principles of our law, that if the pawnor pledges goods which he has stolen, or otherwise improperly obtained, with a person who, at the time of making the advance, is aware of the manner in which they have come into the pawnor's possession, the pawnee cannot lawfully take the goods in pledge, nor can he retain them as against the true owner. But if stolen goods have been sold in market overt, and afterwards pawned with a pawnee ignorant of the fact that they have been so stolen, then, inasmuch as the pawnor had acquired a good title to them, the pawnee will not be bound to give them up to the true or original owner; at least, not until the thief has been prosecuted and convicted, in which case, several statutes provide, that the goods shall be given up, even by an innocent pawnee (*b*). And if he takes the goods in pledge from the thief, then, though the transaction were perfectly *bonâ fide* on his part, he cannot retain them; for, independently of the statutes, the cases at Common Law appear to exclude the custom of market overt altogether in dealings of pawn, for the custom only extends to a sale, and not to a pawn (*c*). In addition to instances of this nature, where the contract of pawn, in relation to

(*a*) Story's *Equity Jurisprudence*, § 1048 d. seq., Smith's *Manual of Equity*, 6th edit., 216, 218.
(*b*) See *post*, Liabilities of Pawnees as to Stolen Property.
(*c*) Jenkins, R., 83.

ordinary chattels, is vitiated by one or both of the parties to the contract having been guilty of acts in themselves unlawful, there are cases in which it is rendered invalid by statute, on account of the nature of its subject matter, when consisting of certain public stores, or of the materials and tools used in particular manufactures. The 25 & 26 Vict., cap. 64, (an Act for the better protection of Her Majesty's Naval and Victualling Stores,) after reciting that the existing Acts for that purpose are numerous and complicated, and that it is expedient to reduce into one Act and simplify and amend them, repeals such previously existing Acts, save as to penalties already incurred, and proceedings already pending. It then proceeds to enact (*a*) that from and after 29th July, 1862, any person knowingly receiving, possessing, keeping, selling, or delivering any Naval or Victualling Stores, marked in the manner defined by the Act, shall be guilty of a misdemeanor, and shall be liable to not more than one year's imprisonment. Knowledge of the marks upon the goods is presumed as against dealers in marine stores, or in old metals, until the contrary is shown (*b*), but not, it would appear, against Pawnbrokers; and the person accused will escape conviction on showing that he was lawfully in possession of the goods (*c*). The annual Mutiny Act (*d*) contains very stringent provisions for the punishment of any person who shall knowingly detain, buy, exchange, or receive from any soldier or deserter, or any other

(*a*) Sec. 7. (*b*) Sec. 8. (*c*) Sec. 9.
(*d*) 27 Vict., cap. 3, s. 85.

person acting for or on his behalf, on any pretence whatsoever, any arms, ammunition, medals, clothes, or military furniture, or any provisions, or any sheets or other articles used in barracks, provided under barrack regulations, or regimental necessaries, or any article of forage provided for any horses belonging to Her Majesty's service, or who shall have such things in his possession without being able satisfactorily to account for the same. The Marine Mutiny Act (*a*) contains similar provisions, and it refers more expressly than the former Act to persons who pawn any of the goods named. By section 48 of the Militia Law Amendment Act, 1854 (*b*), all persons are forbidden knowingly and wilfully to buy, take in exchange, conceal, or *otherwise receive* any militia arms, clothes, or accoutrements, or any such articles as are generally deemed regimental necessaries according to the custom of the army, being provided for the soldier and paid for by deductions out of his pay, or any public stores or ammunition, delivered for the militia, upon any account or pretence whatsoever. The Act for the establishment of a body of Naval Coast Volunteers (*c*) imposes a penalty on any person who shall knowingly and willingly buy, take in exchange, receive in pledge, or otherwise receive or conceal any arms, clothes, or accoutrements, or ammunition belonging to and provided for him under the Act; and a later Act for the establishment of a reserve force of Volunteer Seamen (*d*), contains similar provisions as to the

(*a*) 27 Vict., cap. 4, sec. 89. (*b*) 17 & 18 Vict., cap. 105.
(*c*) 16 & 17 Vict., cap. 73, sec. 19.
(*d*) 22 & 23 Vict., cap. 40, sec. 19.

arms, clothes, accoutrements, or ammunition, or slops or necessaries, provided for the men employed in that force. The Act to consolidate and amend the Acts relating to Corps of Yeomanry and Volunteers (*a*), by its 44th section, imposes penalties on any Volunteer who shall sell, pawn, or lose, any arms, accoutrements, clothing or ammunition delivered to him, and the following section (*b*) makes it penal for any person knowingly and wilfully to buy, take in exchange, conceal, or *otherwise receive* any such goods. An Act of Geo. 2 (*c*), makes it unlawful to give or receive in pawn any of the clothes, linen, or goods appropriated for the wear of pensioners or nurses of Greenwich Hospital, and subjects the Pawnbroker or purchaser to a penalty of £5, recoverable by distress warrant under the hands of one or more justices, or to imprisonment for three months. And similar goods belonging to Chelsea Hospital are protected in like manner, by two Acts of George 4 (*d*). By the first of these, the penalty was fixed at £10, but by the latter, it was increased to £20 for each offence.

The Metropolitan Police Act (*e*) makes it unlawful for any person, not being a constable of the force, to have in his possession, without being able satisfactorily to account for the same, any article, being part of the clothing, accoutrements, or appointments supplied to such constables; and similar provisions are

(*a*) 44 Geo. 3, cap. 54.

(*b*) 44 Geo. 3, cap. 54, sec. 45, see also 26 & 27 Vict., cap. 65, secs. 28 & 29.

(*c*) 20 Geo. 2, cap. 24, sec. 16.

(*d*) 5 Geo. 4, cap. 107, sec. 1., 7 Geo. 4, cap. 16, sec. 34.

(*e*) 2 & 3 Vict., cap. 47, sec. 17.

contained in the City Police Act (*a*), in the Police of Towns Act (*b*), in the County Police Act (*c*), and in other statutes of a corresponding character. The Act to prevent poor persons in workhouses from embezzling certain property provided for their use, forbids (*d*) the taking in pledge any goods bearing the mark of any Board of Guardians, or other public body charged with the duty of providing for the relief of the poor. And by the Act to amend the laws for the prevention of frauds and abuses by persons employed in the woollen, worsted, linen, cotton, flax, mohair, and silk hosiery manufactures (*e*); any person who shall purchase or take in pawn, or who in any other way shall receive into his premises or possession, any of the above materials, whether or not the same, or any part of them, be or be not wholly or partially wrought, made up, or manufactured into merchantable wares, or any tools or apparatus for manufacturing the same, knowing that they are purloined or embezzled, or fraudulently disposed of, or knowing that the person pawning such goods is employed or entrusted by any other person or persons to work up such materials, either by himself or by or with others, without the employers' consent, shall be guilty of a misdemeanour. And the prohibition of this Act (*f*) extends to materials given out to be manufactured, "or for any purpose or work connected with manu-

(*a*) 2 & 3 Vict., cap. xciv., sec. 16.
(*b*) 10 & 11 Vict., cap. 89, sec. 12.
(*c*) 2 & 3 Vict., cap. 93, sec. 15.
(*d*) 55 Geo. 3, cap. 137, sec. 2.
(*e*) 6 & 7 Vict., cap. 40, sec. 4. (*f*) By sec. 2.

facture, or incidental thereto, or any parts, branches, or processes thereof, or any tools or apparatus for manufacturing the said materials."

The Mutiny Acts, and many other of the Acts mentioned under this section empower the justices to issue warrants to search the premises of persons suspected to have such prohibited goods in their possession. When a person is convicted after the exercise of this power, it is not necessary that the conviction should state that the materials, &c., were found *concealed* in the house, nor that they were found under a search warrant (*a*). The penalties imposed for infractions of the Statute above referred to, will be found stated in the Section on the Remedies of the Parties to the Contract.

To these restrictions, arising from the nature of the property pawned, must be added the limitation of its value, contained in the second section of the Pawnbrokers' Act (*b*), by which the amount which can be lawfully lent by a Pawnbroker on any single pawn, is fixed at £10. Hence in an action by the assignees of a Bankrupt against a Pawnbroking firm with whom he had pledged some goods shortly before bankruptcy (*c*), it was shown that the goods had been received by the defendants in one parcel, and that they had advanced different sums of money, each not exceeding £10, as on different parts of the parcel. In summing up the case to the jury, Lord Tenterden said, "It does not necessarily follow from the facts proved, that the goods might not be *bonâ fide* deposited

(*a*) *R.* v. *Jos. Wilcocks*, 14 L. J., N.S., M.C. 104, 9 J. P., 324.
(*b*) 39 & 40 Geo. 3, cap. 99.
(*c*) *Cowie* v. *Harris*, 1 Moo. & M., N. P. C., 141.

on the first day, as a pledge for £10 only, and the subsequent advances be really unconnected transactions, though the circumstances are very suspicious." The jury found that the manner of making the advances was only a contrivance to enable the defendants to get a higher rate of interest than they could, (prior to the repeal of the Usury Laws), have received, and therefore the plaintiff had a verdict for all the goods. In the case of *Tregoning* (assignee) v. *Attenborough* (*a*), the advance was for £200, which the Pawnbroker had entered on his books as several distinct loans of sums not exceeding £10. Chief Justice Tindal left it to the jury to say whether the goods had been deposited with the defendant, on a contract for the payment of more than £5 per cent. interest. The jury found for the plaintiff on the ground of usury. On motion for a new trial the Court unanimously agreed that the question of fact, whether this was or was not an usurious contract, was properly left to the jury, and that their verdict ought not to be disturbed. But, as will be seen hereafter, if this limitation of value is not actually abolished, its importance is at least greatly diminished, by the judicial construction of the Acts for repealing the Laws against Usury (*b*), in the case of *Pennell* v. *Attenborough* (*c*), which will be cited under a later section (*d*), where it was held that the Pawnbrokers' Act does not apply to loans above £10, and that the 2 & 3 Vict., cap. 37, being in force at the time of the

(*a*) 7 Bing. 97, 4 Moore and Payne, 722.

(*b*) 2 & 3 Vict., cap. 37. 17 & 18 Vict., cap. 90.

(*c*) 4 Q.B., 868. See also *Fitch* v. *Rochfort*, 1 Hall & Twels, 255.

(*d*) See *post*, sec. 9.

contract, the loans in question were protected by sec. 1 of that statute from the operation of the Laws against Usury. Pawnbrokers' duplicates, as is well known, may in general be made the subjects of sale or pledge, but by the 21st section of the Act (*a*) Pawnbrokers are forbidden to "purchase or take in pawn, pledge, or exchange, the note or memorandum of any other Pawnbroker."

By the Tippling Act (*b*), retailers of spirituous liquors, whether licensed or not, are forbidden to take any pawn or pledge for the payment of money owing to them for liquors supplied, and any person taking such a pledge, is subjected to a penalty of 40s. for each offence, on conviction by one justice of the peace. This enactment is not affected by a recent statute (*c*), by which the 12th section of the Tippling Act is, in part, repealed.

(*a*) 39 & 40 Geo. 3, cap. 99. (*b*) 24 Geo. 2, cap. 40, sec. 12.
(*c*) 25 & 26 Vict., cap. 38.

SECTION III.

OF THE MANNER OF PAWNING.

Assuming that the contract be made between competent parties, it is of the essence of the contract that there should be an actual delivery of the thing to the pledgee (*a*), for if the thing is not in possession, I cannot grant it as a pawn, though I have a right to it, for a naked right is not transferable over. A pawn is not contracted by a bare promise, but by something done, but Hypotheca may be contracted by a nude pact, or assurance of the thing to be delivered hereafter (*b*). Delivery is the essence of an English pawn (*c*). On this principle, the Court decided in the case of *Robinson and others* v. *Macdonnell and others* (*d*), where the question was, whether an assignment of the freight and earnings of a ship by way of pledge, and subject to a proviso for reconveyance, extended to profits not in actual or potential existence at the time of the assignment. And although the deed of assignment expressly mentioned "all the freight and earnings then due or thereafter to become due," Lord Ellenborough gave judgment against the defendants, (who claimed under the deed), because at the time the deed was made, the oil from which the earnings were to arise had no existence, actual or potential,

(*a*) Story *On Bailments*, sec. 297.
(*b*) Ayliffe Pand. Bk. 4, tit. 18.
(*c*) *Ryall* v. *Rolle*, 1 Atk., 167. (*d*) 5 Man. & S., 228.

and "upon this principle, an assignment of sheep which a lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, have been held inoperative, because the assignor had not at the time of the assignment that which he was professing to assign, either actually or potentially, but in possibility only" (*a*). This decision agrees with what is said in the case of *Ryall* v. *Rolle* (*b*) already cited: "Delivery is of the essence of an English pawn, and though according to Roman Law, the rule is different, yet other countries adopting the Roman Law have corrected this, that if a pawn be not delivered, it shall not affect a purchaser for valuable consideration" (*c*). And again, "The pawn is complete by delivery, but a sale is complete by the contract" (*d*). Still, as will sufficiently appear from the decision in *Robinson* v. *Macdonnell* (*e*), the delivery need not be an actual manual delivery of the thing itself; it is sufficient if it passes the *indicia* of ownership. Thus, in the case of a ship, the delivering over of the muniments of title is a delivery of the ship (*f*), as the delivery of the keys of a warehouse is a delivery of the goods in it (*g*). And orders for delivery to the pawnee are sufficient for this contract (*h*). So if the pledgee has the

(*a*) Wood & Foster's case, 1 Leon., 42, and *Grantham* v. *Hawley*, Hob., 132.

(*b*) 1 Atkyns, 167. (*c*) 1 Atk., 166.

(*d*) *Ibid.* 170, citing Salk., 113, Dyer, 20, 203. (*e*) *Ante.*

(*f*) Subject now to the requirements of the Merchant Shipping Act, 17 & 18 Vict., cap. 104.

(*g*) Per Burnett, J., in *Ryall* v. *Rolle*, 1 Atk., 171.

(*h*) *Harman* v. *Anderson*. 2 Camp., 243, *Hawes* v. *Watson*, 2 B. & C., 540.

thing already in his possession as a deposit, &c., there the very contract transfers to him by operation of Law, a virtual possession as a pledge, the moment the contract is completed (*a*). And it is further of the essence of the contract, that the thing should be delivered as security for some debt or engagement, whether of the pawnor, or of some other person. And the delivery may take place on account of a future as well as for a past debt or engagement; for one or for many debts or engagements; upon condition or absolutely; for a limited time, or for an indefinite period (*b*). And though, under ordinary circumstances, the re-delivery of the thing to the pawnor by the pawnee terminates the contract, still if the thing be delivered back to the owner for a temporary purpose only, with an agreement to re-deliver, the pawnee may recover it on the owner's refusing to restore (*c*). And the delivery need not be to the pawnee himself; a mere formal and temporary possession in the hands of a third person on the pawnee's account has been deemed sufficient (*d*). Besides these essential conditions of a valid pawn at Common Law, the Pawnbrokers' Act provides (*e*) that Pawn-

(*a*) Pothier *De Nantissement*, n. 9.
(*b*) Story *On Bailments*, sec. 300.
(*c*) *Roberts* v. *Wyatt*, 2 Taunt., 268.
(*d*) *Reeves* v. *Capper*, 6 Scott, 877, where a captain had pledged his nautical instruments with the defendants, who afterwards redelivered them to him, under a written agreement, that he might have the use of them for the voyage upon which he was then starting. The captain afterwards pledged the instruments with the plaintiff, but on trial of an interpleader issue, the Court gave judgment for the defendants. See also *exparte Coming*, 9 Ves., Jr. 115.
(*e*) 39 & 40 Geo. 3, cap. 99, sec. 21.

brokers shall not take pawns from persons who shall appear to be under twelve years of age (*a*), or to be intoxicated with liquor. By the same Act they are forbidden to allow pledges to be taken by any person in their employ who shall be under the age of sixteen, nor at any time other than between 8 a.m. and 8 p.m. from Michaelmas to Lady Day, and between 7 a.m. and 9 p.m. during the remainder of the year, excepting only until 11 p.m. of Saturdays, the days before Good Friday, Christmas Day, and Fast and Thanksgiving Days appointed by proclamation; or to carry on their business of Pawnbroking on any Sunday, Good Friday, Christmas Day, or Fast and Thanksgiving Day, appointed as aforesaid. The hours of business as to Pawnbrokers throughout the country, are further limited by an Act of the present reign (*b*), which imposes a penalty on any Pawnbroker receiving or taking in, or permitting or suffering to be received or taken in, any goods in pawn before 8 a.m. or after 7 p.m. from 29th September to 25th of March, and before 7 a.m. or after 8 p.m. during the remainder of the year, with the same exceptions as before for Saturdays, &c.

(*a*) By the Metropolitan Police Act, 2 & 3 Vict., cap. 47, sec. 50, Pawnbrokers in the Metropolitan district are forbidden to take pawns from any person under the apparent age of 16. The same prohibition is imposed on Pawnbrokers in the City of London, by 2 & 3 Vict., cap. xciv., s. 34.

(*b*) 9 & 10 Vict., cap. 98.

SECTION IV.

OF THE PERSON OF THE PAWNOR.

As to the persons by whom and between whom, the contract may be made, a few words will suffice. All persons having a general capacity to contract, may enter into this engagement. But persons under disabilities are affected by the lack of capacity in this, as in other cases of contract. It follows therefore that married women, lunatics, and *non compotes mentis* from age, debility, or otherwise, are wholly unable to make a valid pledge, or indeed to receive one. But with respect to minors it may be otherwise, for their contracts are generally not void, but voidable and are to be avoided only on their own election (*a*). It is not indispensable that the thing pledged should belong to the pledgor; it is sufficient if it is pledged with the consent of the owner. And even without the consent of the owner, the thing may, as between the parties, be completely deemed a pledge; so that the pledgor himself cannot reclaim it, save on discharging the obligation, for it does not lie in his mouth to assert himself not to be the owner (*b*).

Persons incompetent to enter into this contract for themselves, (as infants and married women,) may be agents for others. And a married

(*a*) Story *On Bailments*, sec. 302.
(*b*) Story *On Bailments*, sec. 291.

woman may act as agent of her husband, and as such, with his consent, bind him by her contract, or other act; or she may act as the agent of another in a contract with her own husband, but it is by no means clear that she could act as the agent of a third party against the express dissent of her husband (*a*). And even a person *non compos mentis*, who is nevertheless apparently of sound mind, and not known by the other contracting party to be otherwise, if he enters into a contract for the purchase [or pawn] of property, which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside (*b*). But so far as regards Pawnbrokers, minors can only act as agents for pawnor or pawnee when they have attained the ages specified in the Pawnbrokers' Acts, as mentioned in the preceding section. There may, however, be cases in which the pawnee will lose his right to the pawn, even though the pawnor be a person under none of these disabilities. After much litigation, it was determined that a factor or agent, who *pledged* the goods of his principal, must *primâ facie* be taken to have acted in excess of his authority, and therefore the principal was held not bound by his agent's acts, unless the pawning took place under the *express* authority of the principal. The usual

(*a*) Story *On Agency*, sec. 7.

(*b*) Broom's *Commentaries*, 2nd edit., 588, citing *Molton* v. *Camroux*, 4 Ex. 17, affirming judgment in S. C. 2 Ex. 487.

employment of a factor being to *sell*, it was repeatedly decided that he could not *pledge* the goods entrusted to him (*a*), and that the mere circumstance of a principal's drawing bills on his factor to whom goods were consigned, to be provided for out of the proceeds of such goods, would not authorize the factor to pledge them for the purpose of raising money to meet such bills (*b*). Hence, when a factor had become bankrupt, and a person to whom he had pawned goods sold them, the principal recovered the entire proceeds of the sale in an action for money had and received, though the factor had appropriated part of the money advanced by the pawnee, to the payment of one of the bills drawn by the principal on his agent the pawnor. And this rule was upheld, even when the advances had been made on a bill of lading in the factor's favour, by a person who did not know that he was not the owner of them (*c*). Where a factor had pledged the goods of his principal, the latter might recover the value of them in trover against the pawnee, on tendering *to the factor* what was due to him, without any tender to the pawnee (*d*); and after demand and refusal, he might maintain trover, without tendering the duplicate (*e*). Nor could the pawnee retain

(*a*) Smith's *Mercantile Law*, 6th edit., 140, and cases there cited.

(*b*) *Gill* v. *Kymer*, 5 Moore, 503, *Fielding* v. *Kymer*, 2 B. & B., 639.

(*c*) *Martin* v. *Coles*, 1 M. & S., 140, see also *Barton* v. *Williams*, 5 B & A., 395, S.C., in error *Williams* v. *Barton*, 3 Bng., 139, 10 Moore, 596.

(*d*) *Daubigny* v. *Duval*, 5 T. R., 604.

(*e*) *Peet* v. *Baxter*, 1 Stark, 472.

the goods for the amount of the broker's lien, because such a lien was personal, and not transferable by the tortious act of the broker (*a*).

This Common Law doctrine, being found injuriously to affect credit, was altered by the 4 Geo. 4, cap. 83, amended by 6 Geo. 4, cap. 94, commonly called the Factors' Act, and also by 5 & 6 Vict., cap. 39, from which three statutes, and from the cases which have arisen under them, the Law on the subject must now be collected. The first-named statute provided (*b*) that persons intrusted, for the purpose of sale, with any goods or merchandise, or by whom such goods should be shipped in their own names, should be deemed the owners, so as to entitle consignees to a lien thereon for money or negotiable securities advanced by the latter to the former. And taking goods or bills of lading in pledge, from the consignee thereof was rendered lawful (*c*), but the consignee could not thereby give any better or greater right to the goods than he himself possessed. The next act (*d*), or the Factors' Act, as it is commonly called, refers in its preamble to the former Act, and (*e*) declares that factors or agents intrusted with goods or merchandise, and who shall have shipped such goods, &c., in their own names for the purpose of consignment or of sale, shall be deemed to be the true owners, so as to entitle consignees to a lien thereon in respect of money, &c., advanced to or for the use of the agent, *bonâ fide* and without notice, on the faith of such property. And the agent's possession

(*a*) *McCombie* v. *Davies*, 7 East, 5, 3 Smith, 3. (*b*) Sec. 1.
(*c*) By sec. 2. (*d*) 6 Geo. 4, cap. 94. (*e*) Sec. 1.

shall be taken to have been for the purpose of consignment or sale, unless the contrary be made to appear by bill of discovery or otherwise. Section 2 gives similar protection to persons dealing *bonâ fide* and without notice with persons entrusted with bills of lading, India warrants, dock warrants, or similar instruments. But if the depositing or pledging were for an antecedent debt, the depositee or pledgee should take no further right or interest in the goods or documents than was possessed by the agent (*a*). Section 4 made it lawful to contract with known agents in the ordinary course of business, or out of that course if within the agent's authority, notwithstanding notice of agency, but not when the pawnee, &c., has notice that the agent has no authority to sell the goods, or to receive the purchase money. And the next section made valid a pledge by a known agent, as against his principal, but limited its effect to the amount of the agent's interest in the goods, &c., at the time of making the pledge. This section was held not to apply unless the transaction were made expressly as one of pledge, and not as a sale (*b*). Where the principal drew on his agent, on account of the goods sent him, and the agent accepted the bills so drawn, but did not pay them at maturity, and afterwards pledged the goods with C., but did not inform

(*a*) Sec. 3, see *Taylor* v. *Trueman*, 1 M. & M., 453, where the pledge was for an antecedent debt. The Court held that the defendants (pawnees) could not hold the proceeds against the real owner, but that in estimating the damages they were entitled to credit for any balance due from the owner to the factor.

(*b*) *Thompson* v. *Farmer*, 1 M. & M., 48.

his principal of the transaction, it was held that, not having paid his own acceptances, the agent had no lien upon the goods which he could transfer to C., who had, consequently, no right to retain them as against the principal, for the agent could only transfer such right as he had, which was a right to be indemnified against the bills he had accepted, and the principal having satisfied those bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged (*a*). Like the former statute, the Factors' Act saved the owner's right to follow his goods while in his agent's hands, or in those of his assignees in Bankruptcy (*b*). It also contained other provisions affecting the agents themselves, with which we are not now concerned. The last section expressly saved the rights of parties to their equitable remedies.

The factor's right under the 5th section of this Act to pledge the goods of his principal, depends on the question whether on the face of the *whole* account between them, the principal is indebted to the factor. Therefore where a factor kept both a joint and separate account with his principal, and upon the *two* accounts was indebted to him, but on the separate account, against which the draft was drawn, the balance was in the factor's favour, it was held that the factor had no right to pledge, and that the pledgee could not retain the goods against the principal *(c)*, even though the principal for

(*a*) *Fletcher* v. *Heath*, 1 Man. & Ry., 335, 7 B. & C., 517.
(*b*) 6 Geo. 4, cap. 94, sec. 6.
(*c*) *Robertson* v. *Kensington*, 5 Man. & Ry., 381.

some time after notice of the pledge, forbore to make any demand upon the pledgee, unless it could be shown that the effect of such forbearance had been to alter the position of the principal for the better, or of the pledgee for the worse.

In *Taylor* v. *Freeman* (*a*), East India warrants were held not to be negotiable instruments, as they passed by delivery, and not by endorsement. And as the defendant is bound to prove his contract with the broker or agent, it follows that where there is a written agreement, it must be produced (*b*). In a case which arose under this act (*c*), the plaintiffs had placed a bill of lading endorsed in blank, in the hands of W., their factor, for sale. W. entered the goods at the Custom House in his own name, and, without the plaintiffs' knowledge, obtained a dock warrant for such goods, also in his own name, and afterwards pledged it with the defendants as security. It was held that under the circumstances, it did not sufficiently appear that W. was *intrusted* with this dock warrant within the meaning of the act, and therefore the plaintiffs were entitled to recover. For to make the factor a party *intrusted* with the warrant within the act, it must appear that the owner intended the factor to be possessed of it at the time of the pledge, or that he should exercise the power of obtaining the warrant, which the possession of the bill of lading gave him, whenever he thought fit.

The working of the statute was much canvassed in the above case, and also in *Hatfield*

(*a*) 1 M. & M., 453. (*b*) *Evans* v. *Trueman*, 2 B. & Ad., 886.
(*c*) *Phillips* v. *Huth*, 6 M. & W., 572.

v. *Phillips* (*a*), and the general feeling that it had proved unsatisfactory led to the passing of the New Factors' Act (*b*), which, after reciting the defects of the previously existing law, enacted that "from and after the passing of the Act, any agent entrusted with the possession of goods, or of the documents of title to goods, should be taken to be the owner of them, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bonâ fide* made by any person with such agent, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon, and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent" (*c*). The second section extends this protection to *bonâ fide* deposits in exchange, up to the value of the goods given by the party seeking protection, and the third section limits the operation of the statute to cases where the pledgee makes the advance without notice of the agent's want of authority or *mala fides*, and enacts that the Act shall not extend to protect any lien or pledge on account of an antecedent debt, owing by the agent to the pledgee, though it seems this would be good

(*a*) 9 M. & W., 647. The pleadings and facts of the case were substantially the same as in *Phillips* v. *Huth*, and the Court of Exchequer Chamber supported the previous decision, holding that whether the factor was or was not so intrusted with the warrant, was a question of fact for the jury.

(*b*) 5 & 6 Vict., cap. 39. (*c*) Sec. 1.

up to the amount of the Factor's lien on such goods (*a*). Section 4 is an interpretation clause of certain terms used in the Act, and it also remedies a defect in the former Act already noticed, by making an India warrant, "or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented," a document of title within the meaning of the Act. It makes possession by the agent, *prima facie* evidence of his having been entrusted with the goods by the owner thereof, and such agent shall be deemed possessed of such goods or documents, whether they are in his actual custody, or held by another person, under his control, or on his behalf. And when the advance is made *bonâ fide*, on the faith of a written contract to deposit such goods, &c., by the agent, notice of his want of authority will not vitiate the contract, unless such notice is given before the deposit is actually made. After reserving (*b*) the principal's right to take civil or criminal proceedings against an agent acting *mala fide*, the Act (*c*) saves the owner's right to redeem; to recover the balance of proceeds; or to prove against a Bankrupt Factor's estate for the amount paid to redeem, or for the value of the goods if unredeemed.

Under this Act, therefore, a pledge by a person who is known to have received the

(*a*) Chitty *On Contracts*, 7th edit., 203; see *Blandy* v. *Allan*, 3 C. & P., 447; *Fletcher* v. *Heath*, 7 B. & C., 517.
(*b*) Sec. 6. (*c*) Sec. 7.

goods or documents as the agent of the owner, for the purpose of sale, will be perfectly valid. In order to vitiate such a transaction, it is not sufficient that the owner should have transmitted them simply with directions to sell, and that this should be known to the pawnee, but there must have been a prohibition of pledging by the owner, *and* notice of it to, or *mala fides* on the part of, the person making the advance (*a*). Mere suspicion, or a slight suspicion, will not take away the protection of the Act. If there is not *mala fides* there is an end of the case. I should say that no suspicion will affect it (*b*). The question for the jury where there is no evidence of direct communication is, whether the circumstances were such, that a reasonable man and a man of business, applying his understanding to them, would *know* that the goods were not the pledgor's. If so the defendants, (the pledgees), are not entitled to retain them (*c*). But in a case where a wine merchant's clerk was authorised by his employer to sign delivery orders by procuration, and so got possession of dock warrants relating to his master's goods, and afterwards obtained money upon security of the dock warrants, he was held not to be an agent "entrusted" within the meaning of 5 & 6 Vict., cap. 39, so as to give validity to the contract, and his employer recovered possession of such dock warrants, even from a pawnee who took them *bonâ*

(*a*) Smith's *Mercantile Law*, 6th edit., 148; *Navulshaw* v. *Brownrigg*, 1 Sim. N.S., 573, 2 De G., M. & G., 441.

(*b*) *Ib.* per Lord St. Leonards, 21 L. J., Ch. 911.

(*c*) Per Lord Tenterden, C.J., *Evans* v. *Trueman*, 1 Moo. & R., 10.

fide, for the Factors' Acts do not apply to the case of master and servant, but to that of principal and agent, for (per Blackburn, J.) the agent contemplated by the statute is an agent having mercantile possession so as to be within the mercantile usage of getting advances made (*a*). Nor is the protection secured by an advance made on Saturday, on the faith of a *promise to deposit* warrants, which were not actually deposited till the following Monday, inasmuch as the factor was not entrusted with, or in possession of the warrants at the time of the advance (*b*). But where the defendant pleaded that the factor *was entrusted with and in possession of* the several dock warrants upon which the advances were said to have been made, and the plaintiffs in their replication denied the making of the advance in that manner and form, but did not traverse their factor's being entrusted with them, this was held material, and the plaintiffs therefore were not allowed to give evidence to disprove that part of the defendant's case which they had not contradicted (*c*). The Act applies to mercantile transactions, not to advances on furniture used in a house, and not in the way of trade, by an apparent owner, who afterwards appeared to be an agent entrusted with the custody of the furniture by the true owner, and therefore such an agent is not an agent, nor is such furniture, "goods and merchandise," within the meaning of the statute (*d*), neither are certificates of railway stock "goods" within the meaning of the

(*a*) *Lamb* v. *Attenborough*, 31 L. J., N.S., Q.B. 41, 1 B. & S., 831, 8 Jur. N.S., 280.
(*b*) *Ibid.* (*c*) *Ibid.* (*d*) *Wood* v. *Rowcliffe*, 6 Hare, 191.

statute (*a*). Where A. pledged goods with B., a broker, who re-pledged them to C. to secure advances of which, unknown to C., A. was to have the benefit, it was held that A. had no equity to restrain C. from selling immediately on B.'s default. A person holding bills for the purpose of getting them discounted, has no power to pledge them, or to mix them with bills of other customers and pledge the whole in a mass to secure a loan to himself (*b*).

It is hardly needful to say that a pawnee who claims the benefit of the statute, must have acted *bonâ fide*, and without corrupt agreement or understanding with the pledging factor. Therefore where a plaintiff had consigned goods to his agent, who was liable, together with the defendant, on a Bill of Exchange, which had become due, obtained from the defendant £300 to take up the bill, and at the same time deposited with him some of the plaintiff's goods, the judge told the jury that if they thought the transaction was only a circuitous mode of paying the bill on which defendant was liable, it was not within the protection of the Act. The jury found for the plaintiff, and the Court of Exchequer unanimously upheld the ruling (*c*). But the pledgee will not lose the protection of the statutes unless he is fixed with notice of the agent's *mala fides*, and no mere suspicion will amount to notice (*d*). But the question of *mala fides* is for the jury (*e*). And as the statute

(*a*) *Freeman* v. *Appleyard*, 7 L. T., N.S., 282, 32 L.J., Ex. 175.

(*b*) *Haynes* v. *Foster*, 4 Tyrwhitt, 65.

(*c*) *Learoyd* v. *Robinson*, 12 M. & W., 745.

(*d*) *Navulshaw* v. *Brownrigg*, 21 L. J., Ch. 908.

(*e*) *Douglas* v. *Ewing*, 6 Ir. Law R., (N.S.), 395.

is silent as to the grounds on which the conclusion as to what amounts to notice is to be arrived at, it must be left to the ordinary principles of evidence. But the circumstances must be such that a reasonable man on applying his understanding to them, would certainly know that the agent had no authority to make the pledge or was acting *mala fide* against his principal (*a*). But where there are no *mala fides*, the principal may be bound by the acts of his agent, even when acting under an authority defective in form. As where B. authorised R. by power of attorney to borrow money, and grant a mortgage. R. employed, with leave, a sub-agent, who got the money from D. on producing the power of attorney, and a declaration signed by B. The power of attorney was invalid, and R. failed to account to B., but it was held that B. was estopped from setting this up as against D., and was bound by the acts of R., for the borrowing was not upon condition of the mortgage being valid (*b*). And when authority [whether to pledge or to do any other act] to an agent is general, it will be construed liberally, but according to the usual course of business in such matters; when it is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters, and when it is unexpressed, it is to be ascertained by investigating the course of dealing pursued by the several parties to the transactions (*c*). Therefore when bankers advanced money in the

(*a*) *Chunder Sein* v. *Ryan*, 5 L. T., (N.S.), 559, P. C. 8, Jur. N.S., 343, P. C.

(*b*) *Denyssen* v. *Botha*, 2 L. T., N.S., 126, P. C.

(*c*) *Pole* v. *Leask*, 28 Beav., 562.

way of their business and *bonâ fide*, on security of goods deposited with them, to Sydney Linnet, by agreement with, and at the request of, Jno. Linnet, and John being afterwards entrusted by Sydney, as agent of the plaintiff, with jewels, which he deposited with the bankers as security for past advances to Sydney, and for further advances to be made to Sydney on John's request, and that John should receive back the goods first pledged; it was held that the case was within the Factors' Act (5 & 6 Vict., cap. 39,) and that proof given by plaintiff of his agent's fraud, would not take it out of the meaning of the statute (*a*). But the deposit by one partner of a firm, of shares on his own private account, does not give the bank the right to retain such shares as security for a debt due from him jointly with other members of his firm (*b*). And as *modus et conventio vincunt legem*, so they will also override any custom to which they are repugnant, as where a customer deposited a deed of conveyance with his bankers, giving at the same time a memorandum, pledging one of the properties, as security for a specific sum, and also for his general balance. It was held that as the deposit of the deed was for the special purpose of giving a security on one property only, the bankers could claim no general lien, by the custom of bankers, on the other properties (*c*). Agents fraudulently pledging the goods of their prin-

(*a*) *Sheppard* v. *Union Bk. of London*, 5 L. T., (N.S.), 757, Ex.

(*b*) *Exparte M'Kenna, in re Mortimore*, 7 Jur., N.S., 588., 4 L. T., N.S., 164, on Appeal, from a decision by Mr. Commissioner Holroyd.

(*c*) *Wylde* v. *Radford*, 33 L. J., Ch. 51, 9 Jur., N. S., 1169.

cipals are made guilty of a misdemeanor, by both the Factors' Acts (*a*); and the Fraudulent Trustees' Act (*b*) extends this to any banker merchant, broker, attorney, or agent, who is entrusted for safe custody with the property of any other person, who shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate such property to his own use (*c*). Section 4 of the same Act makes fraudulent bailees guilty of larceny, though they shall not break bulk, or otherwise determine the bailment; section 9 makes any person guilty of a misdemeanor who shall knowingly receive property under such circumstances as to make the party disposing thereof guilty of a misdemeanor under this Act; and section 10 subjects such misdemeanants to penal servitude for three years, or to such other punishment by imprisonment, with or without hard labour, or by fine, as the Court shall award. Convictions under this Act do not deprive the party aggrieved of his civil remedy (*d*), and the sanction of a Judge or of the Attorney-General is requisite before commencing such a prosecution (*e*). This restriction, however, does not apply to prosecutions under the Consolidation Act, 24 & 25 Vict., cap. 96, by whose secs. 75 to 81 the provisions of 20 & 21 Vict., cap. 54, are re-enacted in a somewhat modified form. The maximum of punishment is raised from 3 to 7 years' penal servitude, and to this any person is liable who, "having been intrusted, either solely or jointly with any other person, as a

(*a*) 6 Geo. 4, cap. 94, and 5 and 6 Vict., cap. 39.
(*b*) 20 & 21 Vict., cap. 54. (*c*) Sec. 2. (*d*) Sec. 12.
(*e*) Sec. 13.

banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver" the same, or the proceeds thereof to any person specified, shall, contrary to good faith, pay, &c., it to the benefit of any person other than the person by whom he shall have been so entrusted" (*a*). But a bailment under this statute means one where the *same* property, and not one in which different property, is to be returned. Therefore where the prisoner had omitted to pay over money he had received to the Treasurers of the Chesterfield Church Missionary Society, it was held by Willes, J., that the statute did not apply (*b*). But there can be no doubt that the rule would not apply in most cases of pawns. The penalties of the Act are extended (*c*) to any person entrusted, as aforesaid, with the property of any other person for safe custody, "who shall with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert" in the manner above specified. The 77th section relates to the fraudulent use of powers of attorney; the 78th to factors who in violation of good faith deposit, transfer, or deliver goods by way of pledge, lien or security for money, &c., borrowed, or who, contrary to, or without authority, pledge, &c., such property, for the benefit of themselves or any other person than their employers. Clerks wilfully assisting their masters are liable to the same punishments, but no factor is liable to prosecution who obtains an advance, not greater

(*a*) Sec. 75. (*b*) *Rg.* v. *Garrett*, 2 F. & F., 14.
(*c*) By sec. 76.

than the amount of his own lien. Sec. 79 is an interpretation clause. Secs. 80 and 81, relate respectively to trustees and directors of public companies.

SECTION V.

OF THE PAWNOR; HIS TITLE TO, AND PROPERTY IN THE PAWN.

From what we have already said in defining the Contract of Pawn, it follows that the pawnor does not lose all right to the pawn when he parts with its possession. On the contrary, it is only a special property which passes to the pawnee; the general property remains in the pawnor (*a*). Hence in the leading case of *Ratcliff* v. *Davis* (*b*), it was said per Fleming, C.J., *et alios*, "Pledging does not make an absolute property, but is a delivery only till payment, &c., and may be re-demanded at any time upon payment of the money; for it is delivered only as a security for the money lent; and there is a difference between the mortgaging of land and pledging of goods; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods to detain them for his security." And again, "The delivery is nothing but the bare custody, and it is not like to a mortgage, for there he that has interest ought to have the money, but in the case of a pledge, it is only a special property in him that takes it, and the general property continues in the first owner," *quod non fuit negatum* (*c*). In accordance with

(*a*) *Coggs* v. *Bernard*, Lord Raym., 909, 1 Smith's L. C., 5th edit, 171, 181; Salk. 522; Com. Dig., tit. *Mortgage*, *A.*
(*b*) Cro. Jac. 245, Yelv., 178, Viner's Abr., tit. *Pawn*, 263.
(*c*) *Ibid.*

this view, it was said in the same case, upon the tender of the money lent upon the pawn, by the pawnor or his executor, the property, notwithstanding the refusal, [of the pawnee to redeliver] is reduced instantaneously to the pawnor, &c., without claim, but *per curiam*, the executor shall have debt for money against the pawnee, for upon the redemption it remains a duty (*a*). And trespass on the case lies also upon tender of the money and refusal to deliver the pawn (*b*).

If the pawnor has only a limited title to the thing, as for life or for years, he may still pawn it to the extent of his title; but when that expires, the pawnee must surrender it to the person who succeeds to the ownership although the pawnor had no notice that the pawnee was not the absolute owner (*c*). Therefore in a case which was decided before the Factors' Act, Lord Ellenborough said that though a lien could not be transferred by the *tortious* act of a broker pledging the goods of his principal, yet it might be transferred by the party having the lien to the other, delivering over the goods, on which he had the lien to that other as his servant, and in his name, and as a continnance, in effect, of his own possession (*d*). If the party who has pledged the goods was not the owner of them, the pawnee will not be justified in delivering them to the true owner, if the pledgor has a special property in them, which he is entitled,

(*a*) *Ratcliff* v. *Davis*, Cro. Jac. 245, Yelv. 178, Viner's Ab., tit. *Pawn*, 263.

(*b*) Per Dodderidge, J., in *Isaack* v. *Clark*, 2 Bulst., 309.

(*c*) *Horne* v. *Parker*, 2 T. R., 376.

(*d*) *M'Combie* v. *Davies*, 7 East., 5, 8.

under the circumstances, to assert against the true owner. But the pledgee must not deliver the property for an amount beyond his own debt, or his creditor will acquire no title beyond that which he himself had (*a*). And if the pledgor holds the pledge merely as a pledge from the owner, the second pledgee may discharge himself from any obligation to the owner, by delivering it up to his own pledgor at any time before the offer to redeem be made by the owner. If a clause is inserted in the original contract, providing that if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall be irredeemable, such a clause will not be of any avail. For the common law deems such a stipulation unconscionable on the ground of public policy, as tending to the oppression of debtors. And by a common law doctrine, at least as old as the time of Glanville (*b*), the absolute property in a pledge does not pass from the pawnor to the pawnee, if the debt is not paid at the stipulated time. If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and upon a tender of the debt, he may be compelled to restore it (*c*). The difference between the legal rights of a mortgagor and a pawnor, is clearly pointed out in a passage in Story, adopting doctrines stated in Comyn's *Digest* (*d*). "If the pledge is conveyed by way of mortgage so as to pass the legal title, and it is not redeemed

(*a*) Story *On Bailments*, secs. 324, 325, 326.
(*b*) Glanville, Lib. 10, ch. 16, 1 Reeves, 161, 163.
(*c*) Story *On Bailments*, secs. 345, 346.
(*d*) Tit., *Mortgage*, (B.) Story, sec. 345,

at the specified time, the title of the pledgee becomes absolute at law, and the pledgor has only a remedy in equity. If, however, the transaction is not a transfer of ownership, but a mere pledge, as the pledgor has never parted with the general title, he may *at law* redeem, notwithstanding he has not strictly complied with the condition of his contract." Hence in a case where the assignee of a bankrupt brought a bill for the re-delivery of jewels pledged by the bankrupt, on payment of the sum due upon them, it was held that when no time was given for redemption, the pawnor might redeem during life, if the pawnee had not exercised his right to sell. In this case also it was further held that the statutes of limitation were no bar to the demand (*a*). But it is said, however, (*b*) that after a *long* lapse of time, if no claim for the redemption is made, the right will be deemed to be extinguished, and the property will be held to belong absolutely to the pawnee. It must be confessed, however, that the term "a long lapse of time" is too uncertain to be of much practical value as a guide to pawnees who may wish to realise their security. And as a pawnee cannot be a purchaser (*c*), even a long lapse of time can only give a right of sale on notice to the pawnor. Without such notice, the pawnor does not lose his right to redeem, unless at the beginning of the contract some time was fixed, or some

(*a*) *Kemp* v. *Westbrook*, 1 Ves., 278.

(*b*) In *Lockwood* v. *Ewer*, 2 Atk., R. 303; Matthews *On Presumptive Evidence*, 188, 331; Story *On Bailments*, sec. 346.

(*c*) See *Post*, sec. 11, *Of the Sale of the Pawn.*

act agreed upon, by the lapse or performance of which he was to be taken to have surrendered his right. Probably the true rule is pointed out by Story (*a*) when he says, "If the *debt* is barred by prescription, it is said in Roman law, that the right to the pledge is also gone." And again, "Where the title of the pawnee has remained undisturbed for a great length of time, it seems that such an extraordinary prescription may be insisted on as a bar, for the sake of the repose of titles founded on long possession (*b*). And this view would appear to be confirmed by the case of *Gage* v. *Bulkeley* (*c*) decided by Lord Hardwicke in 1745, where it was held that a deposit of chattels as a pledge, upon condition not to sell them until failure of payment *on a certain day*, was a transaction that might be affected by the statutes of limitation. It would seem that where there is no certain day for redemption, and the pawn remains with the pawnee, there the statute would not operate, but evidence in support of the presumption that the pawnor had abandoned his right to the pawn, might nevertheless be given. This is equally true, says Story, in the common law, when, from the length of time, *there arises a presumption of the payment or discharge of the debt*" (*d*). And further, the same learned author thinks that "the pledgor is not ordinarily barred of his right to redeem the pledge, so long as the pledgee may be presumed

(*a*) *Treatise on Bailments*, sec. 362, citing 1 Domat, B. 3, tit. 7, sec. 1, art. 9, Pothier, Pand., Lib. 20, tit. 6, sec. 5, l. 37, 40.

(*b*) Story *On Bailments*, sec. 347.

(*c*) Ridg. *Cases Temp., Hardwick*, 278.

(*d*) Story *On Bailments*, sec. 362.

to hold it as a pledge," but that "if a very long period has elapsed, and the pledge has continued in the possession of the pledgee, *it affords a presumption* of the abandonment of it by the pledgor, and if any presumption of an extinguishment of the debt arises in such cases, it is an extinguishment by receiving the pledge in satisfaction" (*a*). These passages, together with others which immediately follow, seem to show that in the judgment of this great authority, the right of the pledgor to re-demand the pledge after a very long lapse of time would depend on the presumption raised by the circumstances of the case, whether or not the pledgor had tacitly agreed to satisfy the debt by surrendering his right to the pledge, for "the whole doctrine of extinguishment is resolvable into the very first elements of justice, and is founded upon the express or implied intention of the parties to extinguish the pledge, or upon a virtual extinguishment by the necessary operation of Law" (*b*). But even admitting the full force of all Justice Story has said on this subject, it would seem at least doubtful on principle whether pawnees who occasionally advertise in the newspapers their intention to sell chattels, (other than such as involve a charge for their keep, as horses, &c.,) which they have taken as security, if those chattels are not redeemed *by a certain day*, are not importing into the contract a condition which did not exist at its inception, and which, therefore, would not bind the other party. There may indeed be cases in which such pawnees have no other means of communicating

(*a*) *Ibid.* (*b*) Story *On Bailments*, sec. 365.

with their pawnors than through the ordinary channels of public intelligence, but when this is so, care should be taken to insert the advertisement with reasonable frequency in the papers which the pawnee is presumably most likely to see, and sufficient time should always be allowed for the pawnor to communicate with the pawnee before sale.

Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case, the vendee will have the same legal and equitable rights as the original pledgor, and the pledgee will be bound to allow him to redeem, and to account with him for the pledge and its proceeds. If he refuses, an action at law will lie for damages, as well as a bill in equity to compel a redemption and account (*a*). And as the general property remains in the pawnor, he, like any other bailor, may maintain an action against a stranger for any injury done to it, or for conversion, while it is in the possession of the pawnee, his bailee (*b*). And where a stranger comes into possession under a wrongful title from the pawnee, the owner has a right to consider the contract at an end for many purposes, and may therefore recover it against the stranger, and hold him liable for damages (*c*). But where either pawnee or pawnor recovers against the stranger, the right of the other is

(*a*) Story *On Bailments*, sec. 350; see also *Kemp* v. *Westbrook*, 1 Ves., 278, where the suit was by the assignees of the pledgor.

(*b*) Story, sec. 352, *Coggs* v. *Bernard*, Lord Raym, 909, 1 Smith's L. C., 5th edit., 171.

(*c*) See *Martini* v. *Coles*, 1 M. & Selw., 140, and other cases cited under the preceding section.

ousted, for there cannot be a double satisfaction (*a*). But it is conceived that this latter rule would not apply if either party could shew a separate and independent injury sustained by himself, to which the claim of the other did not extend, as where the pawnee had recovered for the amount of the money advanced, but the value of the chattel being greater than the loan, the pawnor sued the wrong doer for the difference. As the pawnor of a chattel still retains his property in it, he may, (subject to the right of the pawnee), sell that property whilst the chattel is in pawn, and by the sale, transfer it to the buyer; and a pawnee refusing to deliver it on such a buyer's tendering the amount due, becomes liable to an action of trover (*b*), for the pawnor, as owner, has the right of sale, and after the sale, the purchaser has the same interest which the pawnor had.

Where the pawn or other bailment is joint, the bailee is not in general bound to re-deliver the deposit without the consent of all the parties. But this rule applies in strictness, only where the *bailment* has been joint, and not where the *interest* is joint, but the delivery has been by one of the owners, without the consent or privity of the others (*c*). Still in a case where a member of an amicable society was entrusted with a box containing the funds, and was bound by bond to keep it safely, it was held that he could not maintain trover against another member and a third person, who had taken it

(*a*) Story *On Bailments*, sec. 352; Bacon's Abridgment, Trover, C.

(*b*) *Franklin* v. *Neate*, 13 M. & W., 481.

(*c*) *May* v. *Harvey*, 13 East., 197.

from him, for "all the members of the society had a joint property in the box and its contents, and therefore they were tenants in common, and one tenant in common cannot maintain trover against another" (*a*). This decision, it has been well said, is full of hardship and inconvenience, but happily, the cases in which the rule it establishes could apply, are very rare. Indeed if the point were to arise, it might now be contended on the doctrine involved in *Reg.* v. *Watts* (*b*), that as the plaintiff was responsible for the *custody* of the box, and the *property* only remained in the society, he had such a special and peculiar right to it, as would enable him to maintain trover against another member.

A curious illustration of the rule which requires the presence of all joint pawnors when the pledge is re-delivered, is cited by Sir W. Jones (*c*), who says, "I remember to have read of Demosthenes, that he was advocate for a person with whom three men had deposited a valuable utensil of which they were joint owners, and the depositary had delivered it to one of them, of whose knavery he had no suspicion, on which the other two brought an action, but were nonsuited on their own evidence that there was a third bailor whom they had not joined in the suit. For the truth not being proved, Demosthenes insisted that his client could not legally restore the deposit, unless all three proprietors were ready to receive it, and this

(*a*) Per Ashurst, J., *Holliday* v. *Camsell*, 1 T. R., 658.
(*b*) 2 Den., C. C. R. 14; 19 L. J., M. C. 192; 14 Jur. 870.
(*c*) Treatise *On Bailments*, 51.

doctrine was good at Rome (*a*) as well as at Athens, when the thing deposited was in its nature incapable of partition, and it is also law, I apprehend, at Westminster Hall."

(*a*) Digest, Lib. 16, tit. 3, l. 1, sec. 36, Bro. Ab., tit. *Bailment*, pl. 4.

SECTION VI.

OF THE PAWNEE'S PROPERTY IN THE PAWN.

In virtue of the contract of pawn, the pawnee acquires, like other bailees, a special or qualified property in the thing (*a*). And until the fulfilment of the condition, he has a right also to its exclusive possession. Therefore, if the owner should wrongfully re-possess himself of it, the pawnee may maintain a suit for the restitution of the thing itself, or for damages, at his election. If it should be taken possession of by a stranger, he may sue the stranger in like manner (*b*). And in a suit for damages, he may recover against a stranger the full value of the thing, although it is pledged to him for less, as he will be answerable over to the owner for the excess (*c*). And the pawnee may maintain trover or trespass in respect of the thing bailed, which the pawnor cannot do, because the former has the right both of property and of possession, but the latter has the right of

(*a*) Blackstone says, a special qualified property is transferred from the bailor to the bailee, together with the possession, 2 Bl. Com., 453; but Story denies this, and maintains that the pawnee, as a mere depositary, has no property in the deposit, but a custody only, though he has an action against a wrong doer, because he is answerable over. *Bailments*, secs. 93, 280, 336, 352. This reasoning, however, does not seem altogether satisfactory.

(*b*) Story, sec. 303, and authorities there cited; 2 Wms. Saund., 47, n. b.

(*c*) *Lyle* v. *Barker*, 5 Bing., 457.

property only (*a*). But if the pawnee should make improper application of the pawn, as by selling it, or giving it away absolutely, the pawnor would probably be held to have a right of action against the person in possession, the pawnee having, by his own wrongful act, determined the contract (*b*).

If there are any accessorial engagements, which, either tacitly or expressly, are intended by the parties to be attached to the pledge, the pledgee has a title and right to the possession co-extensive with the new engagements (*c*). Hence where the pawnee had advanced money on jewels, and two days afterwards a further sum on a promissory note, it was held, after consideration, by Lord Chancellor Harcourt, that the pawnee's having a pawn of greater value might be the inducement to him to lend, and that therefore the plaintiff must pay the monies due on the note, as well as the other monies due (*d*).

But unless a lien exists at common law, the right so to appropriate the security can only arise by contract, express or implied, from previous dealings or from some usage of trade which the jury might reasonably presume the parties knew of, and adopted in their dealing (*e*). Therefore the mere existence of a former debt due to the pledgee does not authorise him to detain a pledge for that debt, when such pledge

(*a*) *Ward* v. *Macaulay*, 4 T. R., 489; *Bloxam* v. *Saunders*, 4 B. & C., 941.

(*b*) *Newsome* v. *Thornton*, 6 East, 17; *Pickering* v. *Busk*, 15 East, 38.

(*c*) Story *On Bailments*, sec. 304.

(*d*) *Demainbray* v. *Metcalfe*, 2 Vern., 691.

(*e*) *Rushforth* v. *Hadfield*, 7 East, 224.

has been put into his hands for another debt or contract, unless there is some just presumption that such was the intention of the parties (*a*). The same rule applies also to a future or subsequent debt or loan, contracted by the pledger. The rule in all these cases strictly applies, that the particular contract is to govern the rights of the parties, for *modus et conventio vincunt legem* (*b*). Therefore goods in a packer's hands were held liable to his lien, evidence being given that it was usual for factors to lend money to clothiers, the cloths to be a pledge, not only for the work done in packing, but for the money lent; and according to that usage, the packer was in the nature of a factor, and was entitled to a lien for the general balance due to him (*c*). But when goods are delivered for a particular purpose, as corn to be ground, or cloth to be dyed, there is only a specific lien on the goods for the price of grinding or dyeing (*d*). And in like manner, an equitable mortgage by deposit of deeds may be extended beyond its original purpose, by implication or parol (*e*). But the mere existence of a former debt due to the pledgee, does not authorize him to detain the pledge for that debt when it had been put into his hands for another debt, unless there be some just presumption that such was the intention of the parties (*f*). Nor is an express contract to be

(*a*) *Green* v. *Farmer*, 4 Burr., 2214; *Walker* v. *Birch*, 6 T. R., 258. (*b*) Story *On Bailments*, sec. 304.
(*c*) *Ex parte Deeze*, 1 Atk., 228.
(*d*) *Ex parte Ockendon, in re Matthews*, 1 Atk., 235; *Green* v. *Farmer*, 4 Burr., 2214.
(*e*) *Ex parte Kensington*, 2 V. & B., 79.
(*f*) *Jarvis* v. *Rogers*, 15 Mass., (U.S.) R., 389.

overridden by a custom inconsistent with it. Therefore where a banker had securities deposited with him as a pledge for £1,000, he was held to have no lien beyond that amount, though the debtor was indebted in a larger sum (*a*); though Sir Wm. Grant, M.R., seems to have thought the bankers would have had a right to tack, had it not been insisted that a bill had been filed *by creditors*, and a decree made; and that the equity had passed to an assignee, against whom the banker could not retain (*b*).

If the pawn be given in the way of guarantee for a third party, it will be as good, and the pawnee will have the same rights, as if it were pledged on the pawnee's own account. As where A. deposited money with B. as security for the delivery of goods to him (*c*). The pledge applies, not only for the debt or other engagement, but also to the interest, and all the incidental charges and expenses due thereon. If, for instance, a pledge is for a debt, it covers the interest upon the debt. If interest is expressly stipulated for, it follows, from the presumed intention of the parties, that the pledge is to cover both principal and interest. If interest is not stipulated for, and yet is due *ex morâ*, because of the unjust delay of the pledgor to pay the debt when he ought, that also in equity is required to be paid, as well as the principal, before a redemption of the pledge is allowed; for here the rule of the Roman law justly applies, *Minus solvit, qui*

(*a*) *Vanderzee* v. *Willis*, 3 Bro., C.C., 21.
(*b*) *Adams* v. *Claxton*, 6 Ves., 229.
(*c*) *Isaac* v. *Clarke*, 2B ulst., 306.

tardius solvit; nam et tempore minus solvitur (*a*).

If several things are pledged, each is deemed liable for the whole debt or other engagement. And the pledgee may proceed to sell them from time to time, until the debt or other claim is completely discharged. If one thing perishes by accident or casualty without his default, he has a right over all the residue for his whole debt, or other duty, and he may sell, not only the goods pledged, but also their increments (*b*). And the pawn is in all cases understood to be a security for the whole and every part of a debt or engagement. The payment or performance of a part, therefore, still leaves it a good pledge for the residue (*c*).

From what has been already said on the nature of the contract, it follows that the pawnee cannot retain any surplus produce of the sale of the pawn, after his claim is satisfied. On the other hand, if the pawn is insufficient to satisfy the debt, the deficiency constitutes a personal charge on the debtor, and may be recovered accordingly, unless there is an agreement to the contrary (*d*). And the pawnee

(*a*) Story *On Bailments*, sec. 306.

(*b*) Story, sec. 314; *Ratcliffe* v. *Davies*, Yelv. 179; Bac. Abr., tit. *Bailment*.

(*c*) Ayliffe's *Law of Pawns*, 22.

(*d*) Story, sec. 314; Ayliffe, 21, 22; *South Sea Co.* v. *Duncomb*, 2 Str., 919. In illustration of this doctrine, the case of *Muncaster and Warre* v. *Young*, tried in the Shoreditch County Court, before Mr. Sergeant Storks, in February, 1850, may be mentioned. The plaintiffs were Pawnbrokers, in Skinner-street, Snow-hill, and they sued the defendant for £1 11s. 9d., being the amount of a deficiency experienced upon selling a brilliant pin which had been pledged with them for £3, but which only produced £1 11s. 9d. when sold after forfeiture. In giving judgment for the plaintiffs, his Honour

may release one of the things pawned without affecting any of his rights over the others. The pawnee's possession of the pawn does not suspend his right to proceed personally against the pawnor for his whole debt or engagement without selling the pawn, for it is only a

said: "The whole system of Pawnbroking is created in the Act of Parliament. A man having money to lend advances it to another upon the deposit of a pledge or security. Before the passing of the Pawnbrokers' Act, such a man had no power of selling goods except in the manner of a distraint for rent. That is, the property was a pledge for the security of the money lent; but without the act referred to, or a special contract for the purpose [or due and reasonable notice], the lender would have no power to sell. If there was no Pawnbrokers' Act he would have the right to hold, but not to sell. That Act was passed to regulate Pawnbroking, which is a business arising out of the improved state of society, and rendered necessary by the peculiar demands of a great commercial country. This Act created a system of trading, and regulated the manner in which pledges were to be received, the manner in which the property was to be secured to the owner, and the mode of forfeiture and final sale. This was a loan of money by the plaintiffs upon security which they were bound to keep and dispose of under certain regulations, but it was a loan; and for his own security the Pawnbroker ought to take sufficient to secure himself; but if he lends 30s. upon that which only fetches 20s. it does not expunge the original debt, nor alter its character. It is possible that an article should be of a perishable character, and that in the course of a year its value might fall 50 per cent. and yet the Pawnbroker cannot sell it until the end of the year. Thus if he lent £100, is his claim to be satisfied with only £50 where the pledgor is a party who is able to pay the remainder of the debt? I consider the deposit is answerable to the extent of its value. I see no difficulty in this case. I give judgment for the plaintiff." The debt was ordered to be paid in three months. The decision of the learned Serjeant is entirely in harmony with the doctrines already quoted from judicial authorities, and from eminent text writers, though, as will be evident from a perusal of the foregoing pages, some of his positions are open to exception, as being stated rather too broadly.

collateral security (*a*). It was said in *Ratcliffe* v. *Davis*, that if the pawnor, through the default or conversion of the pawnee, has recovered back the pawn, or its value, still the debt remains, and is recoverable unless in such prior action it has been deducted (*b*). And it seems that in such an action for the value, the pawnee has by the Common Law, a right to have the amount of his debt recouped in the damages. Whether or not the pawnee is entitled to use the pawn, is a matter which greatly depends upon circumstances. With reference to this part of the subject Justice Story (*c*) deduces the following rules from the Common Law authorities, and from the presumed intentions of the pawnor. (1) If the pawn is of such a nature that the due preservation of it requires some use, there such use is not only justifiable, but is indispensable to the faithful discharge of the duty of the pawnee (*d*). (2) If the pawn is of such a nature, that it will be worse for the use, such, for instance, as the wearing of clothes that are deposited, there the use is prohibited to the pawnee (*e*). (3) If the pawn is of such a nature that the keeping is a charge to the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse by way of recompense, (as it is said), for the keeping. (4) If the use will be beneficial to the pawn, or it is indifferent, there it seems

(*a*) Anon. 12 Mod. 564. (*b*) 1 Bulst., 31.
(*c*) Treatise *On Bailments*, sec. 329.
(*d*) Jones *On Bailments*, 81.
(*e*) Jones *On Bailments*, 81; *Coggs* v. *Bernard*, 2 Ld. Raym., 909, 917; 1 Smith's L.C., 5th edit., 171.

the pawnee may use it; as if the pawn is of a setting dog, or of books, which will not be injured by a moderate use.

Justice Story considers that the use of the pawn by the pawnee is impliedly *forbidden* when, though the use is without injury, it exposes the pawn to extraordinary perils. In this he is opposed to Sir Wm. Jones, who says (*a*) that "if pawns cannot be hurt by being worn, they may be used, but at the peril of the pledgee, as if chains of gold, earrings, or bracelets, be left in pawn with a lady, and she wears them at a public place, and be robbed of them on her return, she must make them good." Lord Holt, in his judgment in *Coggs* v. *Bernard*, seems to condemn this, when he says, "the pawn is in the nature of a deposit, and as such, is not liable to be used" (*b*); and the verdicts of juries, as well as the principles of law, seem to justify the conclusion of the American jurist, that "unless the contrary is expressly agreed, it may fairly be presumed, that the owner of such a pawn would not assent to the jewels being used as a personal ornament, and thereby be exposed to unnecessary and extraordinary perils" (*c*). Perhaps even Sir Wm. Jones's opinion only goes to this extent, that the use of jewels or similar pawns by the pawnee, is not *per se* actionable, as the use of clothes or similar things would be, if only on this account, that every act of use diminishes their value. In the latter case, damage ensues, *ipso facto*, from the act of using; in the former,

(*a*) Treatise *On Bailments*, p. 81.
(*b*) 2 Lord Raym., 909, 917; 1 Smith's L.C., 5th edit., 171.
(*c*) Story *On Bailments*, sec. 330.

it depends upon the consequences of that act.

Besides the right to the possession of the pawn, and to the re-payment of his advances, the pawnee is very commonly, though not absolutely necessarily, entitled to interest upon the loan so long as it remains unpaid. Upon this point, a usage of trade raises a question which has never been formally decided. It is common with many Pawnbrokers to keep pledges for two or three months after forfeiture before sending them to sale, and as an accommodation to pawnors to allow them that additional term for redemption. In such cases it has sometimes been doubted whether they are entitled to charge Pawnbrokers' interest. But it seems clear that they are so entitled, both by the words of the statute, and by the general principles of equity. Sec. 2 of the Pawnbrokers' Act (*a*) fixes the rate of interest to be paid during the first month, and *every calendar month afterwards*. Secs. 17 & 18 do not say that pledges *shall* be sold, but that they shall be deemed forfeited and *may* be sold at the expiration of one whole year, though it is subsequently provided that such goods *shall* be sold by public auction and not otherwise. The Statute gives a *power* to the Pawnbroker to sell at a particular time; it does not by any means make it a *duty* to sell then, or indeed at all. Again, Sec. 19 compels the Pawnbroker to keep goods three months longer than the year on notice given, but such retention is to be upon the terms stipulated in the Act. *A fortiori*, if he is even more careful

(*a*) 39 & 40 Geo. 3, cap. 99.

of the interest of the pawnor than the Act itself, he ought not to lose by it. One might go further, and say that as, since the repeal of the Usury Laws, any interest is legal on which the parties agree, and as by their original contract they agreed to a certain rate, so, without reference to the statute at all, the Pawnbroker is entitled to the same rate during the whole duration of the contract as he received at its commencement. Unless the pawn were perishable, it would be a benefit to the pawnee to have it kept unsold; therefore it does not lie in his mouth to say that he has a right to take the benefit without paying for it.

Until a few years ago, all contracts were void which stipulated for more than the legal, or as some called it, the natural rate of interest. The abolition of the Usury Laws has now removed this ground of cavil, and it may be said generally, that any contract of pawn would be good, whatever be the rate of interest agreed upon. From this remark, however, must be excepted bargains which, being made with expectant heirs, or being otherwise objectionable on equitable grounds, might be set aside on application to the Court of Chancery. And, as we shall see in a subsequent section, Pawnbrokers, *acting as such*, are prohibited by statute from taking more than specified rates of interest, and from receiving pledges above a certain value. But these restrictions do not bind the Pawnbroker, if, from all the circumstances of the case, it appears that he entered into the transaction, not as a Pawnbroker, but as an ordinary pawnee (*a*).

(*a*) See *post*, sec. 7.

If the party who pledged the goods was not the owner of them, the pawnee may defend himself by showing that he has delivered over the goods to the real owner, unless the pledgor has a special property in them, which he is entitled, under the circumstances, to assert against the owner (*a*). If a servant usually employed to pawn goods for his master or to borrow money for him, borrow money of a pawnee, debt lies against the master thereupon, and if such servant has a note or goods not usually left in the custody of a servant, that is *primâ facie* evidence of his authority to apply them, [by pawning or otherwise], but the presumption thus raised may be rebutted by evidence (*b*). If the pledgor holds the pledge merely as a pledge from the owner, the second pledgee may discharge himself from the obligation to the owner, by delivering it up to his own pledgor at any time before such owner offers to redeem (*c*). And if the pawn be of a perishable nature, as corn, oil, &c., and no time of redemption limited, and the party stays till it is perished and spoiled; as there is no default in him who took the thing in pawn, he shall have an action for his money, and the other no remedy for his pawn (*d*), for the right to the pledge is gone when the thing perishes without the default of the pawnee (*e*). Where a bill of lading may be, and has been, pledged by the consignee of the goods, as a

(*a*) *Ogle* v. *Atkinson*, 1 Marsh., 323, 5 Taunt., 759.
(*b*) Anon, 12 Mod., 504.
(*c*) Story *On Bailments*, sec. 340; *Jarvis* v. *Rogers*, 15 Mass. (U.S.) Reports, 389. (*d*) *Ratcliff* v. *Davis*, Yelv., 178.
(*e*) Story *On Bailments*, sec. 363.

security for his own debt, the legal right to the possession passes to the pledgee; but the right to stop them *in transitu* in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in Equity, to the residue which may remain, after satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledgor himself, the vendor will have a right to have all the pledgor's own goods appropriated to the discharge of the pledgee's claim, before any of the goods comprised within the bill of lading pass. This was decided in *re Westzinthus* (*a*), where L. & Co. had given bills for oil purchased of the plaintiffs, and had pledged the bills of lading with H. & Co., as security for further advances. The vendees became bankrupt, and their bills were dishonoured. At the time of the bankruptcy, H. and Co. held, besides the bills of lading, goods of L. & Co. to the value of £9961 1s. 7d. The Court held that the plaintiff, who had given notice to stop *in transitu*, had a right to insist upon the proceeds of L. & Co.'s own goods being first applied to the discharge of H.'s lien, because the transfer of the property and right of possession to H. was in the nature of a pledge only. That being so, the plaintiff Westzinthus, by his attempted stoppage *in transitu*, acquired a right to the goods in equity, subject to H.'s lien

(*a*) 5 B. & Ad., 817; 1 Smith's L.C., 5th edit., 746.

thereon, as against L. & Co.'s assignees, and as the goods proved sufficient to satisfy the lien, the plaintiff received the entire proceeds of the oils he had sold to the bankrupts. A later case confirms the above, and shows that goods under such circumstances cannot be retained as security for a general balance of account, but only for the specific advance made upon the security of the bill of lading. The consignor's remedy against a factor thus claiming a general balance, is not, it seems, at Law, but in Equity (*a*).

Though a consignor of goods may stop them *in transitu* before they get into his consignee's hands, in case of the insolvency of the consignee, yet if the consignee assign the bills of lading (whether by sale or pawn) to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested entirely or *pro tanto*, whether the indorsement be in blank or to a particular person (*b*), for the consignee of a bill of lading has such a property that he may assign it over (*c*). But it would seem that the endorsement of a bill of lading gives no better right to the endorsee than the endorser himself had, and in this respect a bill of lading differs from a bill of exchange; nor has the Act to amend the law relating to Bills of Lading (*d*) made any alteration in this particular, so that any condition precedent to negotiating the bill of lading, (as the acceptance of a draft), which

(*a*) *Spalding* v. *Ruding*, 6 Beav., 376.

(*b*) *Lickbarrow* v. *Mason*, 2 T. R., 63; 1 H. Bl., 357; 6 East, 131; 1 Smith's L. C., 5th edit., 681.

(*c*) Per Holt, C. J., in *Evans* v. *Martlett*, 1 Ld. Raym., 271, 12 Mod., 156.

(*d*) 18 & 19 Vict., cap. 111.

bound the consignee, will bind any person taking the bill of lading from him. And an assignee acting *mala fide* will stand in the same position as to stoppage *in transitu*, as his assignor had done (*a*). And a condition contained in, or endorsed on, the bill of lading, as that the goods are to be delivered, provided E. F. pay a certain draft, will bind every endorsee who takes it, and he will have no title to the goods unless the condition be performed (*b*).

(*a*) Per Ellenborough, C. J., in *Cumming* v. *Brown*, 9 East, 514.

(*b*) *Barrow* v. *Coles*, 3 Camp., 92.

While this work was passing through the press, the important, and probably leading case of *Donald* v. *Suckling* (*a*), was argued in the Court of Queen's Bench. The facts, according to the construction put by the Court upon the pleadings were, that the plaintiff had deposited certain debentures with one Simpson, as security for the payment of a bill of exchange drawn and endorsed by the plaintiff, and discounted by Simpson as pawnee, upon an agreement that he should have "full power to sell, or otherwise dispose of" the debentures, if the bill were not paid at maturity. These debentures Simpson pledged with the defendant Suckling, and as against the latter, it was assumed by the Court that the pledge took place before the bill it was originally given to secure fell due, and was made also to secure a greater sum than that represented by the said bill. Under these circumstances the plaintiff sued the defendant, the sub-pledgee, in detinue. The defendant pleaded the above facts, and to the plea the plaintiff demurred, the question ultimately brought before the Court being whether this sub-pledge was or was not a lawful exercise of the pawnee's dominion over the pledge, and also, supposing it to be unlawful, whether it made the contract entirely void, so as to entitle the original pawnor to recover the pawn without payment or tender of his debt. In other words, the case turned on the existence of a right in the pawnee to repledge, which, though broadly asserted by Story and other authorities (*b*), does not appear to have been the subject of *express* judicial decision—the case of *Horne* v. *Parker* (*c*), which has been cited as an

(*a*) 1 Law Reports, Q.B., 585; 14 L.T. (N.S.) 772; noticed also in Law Journal Notes of Cases, 284, 1 Law Reports Notes of Cases, 276. To be reported in 6 Best & Smith's Q.B. Reports, 35 Law Journal (N.S.), Q.B., 12 Jurist (N.S.), and Weekly Reporter.

(*b*) See Story "On Bailments," secs. 324, 325, 326, 350, ante pp. 61 to 84.

(*c*) 2 T.R., 376, cited p. 62.

authority for this proposition, appearing rather to justify this liberty to repledge, on the inference drawn by, and stated in, the reporter's marginal note, than to lay it down as a proposition clearly established by authority. The case of *Horne* v. *Parker* was not referred to in the argument, and the point was to a great extent treated by the Court as a new one, and was twice elaborately argued by Harrington for the plaintiff, and Gray, Q.C., for the defendant. The Court took time to consider, and ultimately by a majority, (Cockburn, C.J., Blackburn and Mellor, JJ.) decided in favour of the defendant, thus establishing the right to repledge. Mr. Justice Shee differed from his learned brethren, assuming, on the facts set out in the pleadings, that Simpson, the original pawnee, had put it out of his power to apply the debentures by sale or otherwise, in discharge of the plaintiff's liability on his bill of exchange, in accordance with his contract. His Lordship regarded the contention that a pawnee had a power over the pawn so extensive as that claimed on his behalf, as a proposition for which there would be no authority whatever but for the case of *Johnson* v. *Stear* (*a*). The definitions of a pawn given by Sir Wm. Jones (*b*), Lord Holt (*c*), Lord Stair (*d*), Bell (*e*), by the judges of the Common Pleas in the recent case of *Pigot* v. *Cubley* (*f*), and many other authorities to which we have elsewhere referred, including Story (*g*), were deemed by Mr. Justice Shee to exclude the idea that the pawnee could place the pawn out of the pawnor's power, and out of his own power to redeem it by payment of the amount given to him as security. "Pawnees, like factors, have an absolute right of possession as against all the world but their principals, and against them to the extent of their security. This gives them a right, under certain circumstances, to sell, but none at all to pledge, for that is to put the goods out of their own power, and,

(*a*) 33 L.J. (N.S.), C.P., 130, 15 C.B. (N.S.) 330, 9 L.T. (N.S.), 538.
(*b*) Treatise on Bailments, 36, 117, 118.
(*c*) See judgment in Coggs *v.* Bernard, 1 Lord Raymond, 909, 1 Smith's Leading Cases, 5th edit., 171, 182.
(*d*) Institutions of the Laws of Scotland, 13, s. 11, p. 512.
(*e*) Principles of the Law of Scotland, 4th edit., 512.
(*f*) 15 C.B. (N.S.), 701, 33 L.J. (N.S.), C.P., 134.
(*g*) Treatise on Bailments, secs. 287, 319, 324, 327.

except by the Factors' Acts, to leave pawnees from them defenceless against the suit of the real owners. The cases of *Johnson* v. *Stear* (*a*), *Chinnery* v. *Viall* (*b*), and *Brierly* v. *Kendall* (*c*), only show that in an action for conversion really founded on contract, it is not an inflexible rule to take the full value of the goods as the measure of damages because the plaintiff has sued in tort; but the defendant, if a pawnee, may be entitled to set off the value of his interest against the plaintiff's claim." In great measure the judgment of the dissentient member of the Court rested upon the basis that though the pawnee has "a real right" or *jus in re*, a right of possession *until default made*, he has no right of sale until *after default made*; and much of his reasoning appears to indicate a disposition to apply to the pawnee the rules by which persons in a strictly, and we might almost say exclusively, fiduciary capacity are bound, at least in a degree equal to that which bound parties dealing with factors before the passing of the Factors' Acts. Therefore, said his Lordship, "as in the case under notice, the original pawnee had repawned the debentures with the defendant before default made; and as, by the contract between the plaintiff and Simpson, the latter was to apply the proceeds of the sale, if it became necessary, in payment of a bill of exchange, the repledge by Simpson became wholly wrongful, and the plaintiff was therefore entitled to the current saleable value of the debentures."

The majority of the Court, were, however, of a different opinion. It was assumed by three of the judges that Simpson had given or pretended to give to the defendant a greater interest in the pawn than he himself possessed. Mr. Justice Mellor, recognising the doctrine that a lien gives merely the right of retention and not of sale, said the question is whether the contract of pawn implied that the pledgee should not part with the possession of the pledge until default in payment, and if so, whether it is of the essence of the contract, *so that the violation of it makes void the contract?* On the authority of *Legge* v.

(*a*) 15 C.B. (N.S.), 701, 33 L.J. (N.S.), C.P., 130, 9 L.T. (N.S.), 538.
(*b*) 5 H. & N., 288. (*c*) 17 Q.B., 937.

Evans (*a*) his Lordship said that a lien gave simply a right to hold, and did not confer a power of sale, even when given to secure money advanced. Then, citing *Pothonier* v. *Dawson* (*b*), Story *On Bailments* (*c*), *McCombie* v. *Davies* (*d*), he showed that even a factor could constitute a third party his agent and give him an interest in his principal's goods to the extent of his own lien. In pawns it is clear that the pawnee could sell the pawn on conditions broken, and the parties might, if they chose, make an express contract that the pawnee should not part with the possession, but no engagement not to part with it to the extent of his interest was implied by law, though there might possibly be cases in which the very nature of the pawn itself might induce a jury to believe that it was deposited on the understanding that the possession should not be parted with. But this does not hold *when the only object of the transaction is to secure payment of a loan*, nor does even a wrongful act, such as was done by the defendant in *Johnson* v. *Stear* (*e*), annihilate the pawnee's interest in the goods. And in especial reference to the point we are now considering, the learned judge said: "I think that when the true distinction between the case of a deposit by way of pledges of goods for securing the payment of money, and all cases of lien correctly so described is considered, it will be seen that in the former there is in general no implication of a contract by the pledgee to retain the personal possession of the goods deposited; and I think that although he cannot confer upon any third person a better title or a greater interest than he possesses, yet if he nevertheless does pledge the goods to a third person, for a greater interest than he possesses, *such an act does not annihilate the contract of pledge* as between himself and the pawnor, but that the transaction is simply inoperative as against the original pawnor, who upon tender of the sum secured [qy. advanced to him] immediately becomes entitled to the possession of the goods, and can recover in an action for

(*a*) 6 M. & W., 36, cited post 229.
(*b*) Holt's N.P.C., 383, cited pp. 27, 151, 155.
(*c*) Sec. 289.
(*d*) 7 East, 5. see pp. 46, 62, 168, 227.
(*e*) 33 L.J. (N.S), C.P., 130, 15 C.B. (N.S.), 330, 9 L.T. (N.S.), 538.

any special damage which he may have sustained by reason of the pawnee in repledging the goods; and I think that such is the true effect of Lord Holt's definition of a vadium or pawn in *Coggs* v. *Bernard* (*a*), although he was of opinion that the pawnee could in no case use the pledge if it would thereby be damaged; and says that the creditor is bound to restore the pledge upon payment of the debt, because by detaining it after the tender of the money he is a wrong doer, his special property being determined, yet he nowhere says that the misuse or abuse of the pledge before payment or tender annihilates the contract upon which the deposit took place." Mr. Justice Blackburn, in his review of the case, said: "In detinue the plaintiff's claim is based upon his right to have the chattel itself delivered to him, and *if there still remain in* Simpson, *the original pawnee, or in* the defendant as *his assignee, any interest in the goods*, or any right of detention inconsistent with this right in the plaintiff, the plaintiff must fail in detinue, though he may be entitled to maintain an action of tort against Simpson or the defendant for the damage, if any, sustained by him in consequence of their unauthorised dealing with the debentures." His Lordship, after stating that the question was whether the deposit of the debentures by Simpson put an end to that interest, distinguished between a pledge and a lien; and, referring to cases and authorities elsewhere cited (*b*), observed that as Simpson was not an agent within the Factors' Acts, the Court had to consider "whether the agreement between him and the plaintiff did confer something beyond a mere lien properly so called, an interest in the property, or real right, as distinguished from a mere personal right of detention." Now there is no doubt that a pledge does create in the pawnee a special property or interest in the thing. Until possession is given, the intended pledgee has only a right of action on the contract, and no interest in the thing itself (*c*). But though this possession is necessary for the creation of

(*a*) 1 Lord Raym., 909, 1 Smith's L.C., 5th edit., 171, 182.
(*b*) Daubigny v. Duval, 5 T.R., 605, see p. 46; McCombie v. Davies, 7 East, 5, see pp. 47, 62, 84*e*, 169, 227; Story "On Bailments," secs. 325, 326, 327.
(*c*) Howes v. Ball, 7 B. & C., 481.

special property of the pawnee, it does not follow that it is also necessary for its continuance. The effect of the Civil law is stated by Story (*a*): "It enabled the pawnee to assign over or to pledge the goods again to the extent of his interest in, or lien on, them, and in either case the transferee was entitled to hold the pawn until the original owner discharged the debt for which it was pledged. But beyond this the (second) pledge was inoperative, and conveyed no title, according to the known maxim, *Nemo plus juris ad alium transferre potest quam ipse habet.*" And there are strong authorities in England the same way. In *Morse* v. *Conham* (*b*) it is said, "the pawnee hath such an interest in the pawn as he may assign over, and the assignee shall be subject to detinue if he detains it upon payment of the money by the owner; and though one judge dissented on this very point, that circumstance proves that there was no mistake of the reporter, nor oversight by the majority, but that it was a deliberate decision." After referring to numerous authorities (*c*), his Lordship examined the cases in which a party with a limited interest had been held to have determined his special property, so as to enable the owner to maintain trover as if that interest had never been created, pointing out that in all these the act complained of was wholly inconsistent with the contract, as if a hirer of goods were to sell or destroy them, though even then it might have been better to hold that the owner should bring an action on the case, and recover only the actual damage. But where the act, though unauthorised, is not so repugnant to the contract as to show a disclaimer the law is otherwise (*d*). A sub-pledge seems to come within this rule, unless there has been *a special personal confidence in the pawnee*, and a stipulation that the pawn *shall be kept by him alone. In general all that the pledgor requires is the personal contract of the pledgee, that on bringing the money the pawn shall be given up to him, and*

(*a*) Treatise on Bailments, sec. 328.
(*b*) Owen, 123.
(*c*) Coggs v. Bernard, 1 Lord Raymond, 909, 1 Smith's L.C., 5th edit., 172, 181, Story, sec. 327, Whittaker "On Lien," 140 (pub. 1812).
(*d*) Lee v. Atkinson, Yelv., 172, where the hirer of a horse deviated from the road on which when he hired it, he had said he meant to go.

that in the meantime the pledgee shall be responsible for due care being taken for its safe custody, and this may be very well done, though there has been a sub-pledge, at least the plaintiff should try whether by bringing the money for which he pledged these debentures to Simpson, he cannot get them. And the assignment of the pawn for the purpose of raising money, so long at least as it purports to transfer no more than the pledgee's interest against the pledgor, is so far from being found in practice to be inconsistent with the contract, that it has been introduced into the Factors' Acts, and is, in the civil law and in *Morse* v. *Conham*, treated as a regular incident in a pledge. If it is too early or too great, it is doubtless unlawful, but it is not so repugnant to the contract as to amount to a renunciation of it. After referring to analogous cases of unpaid vendors (*b*), and also to *Johnson* v. *Stear* (*c*), the learned judge said the Court of Common Pleas in that case appeared to have meant to decide that the pledge gave a special property which still continued; and on the same principle the plaintiff in *Donald* v. *Suckling*, not being entitled to the uncontrolled possession of the pawn, could not recover in detinue. The Lord Chief Justice Cockburn, while agreeing with the majority of his puisnes, hesitated to say that a pawnee has a right to transfer his interest in the pawn, because such a right seemed to him quite inconsistent with the right of the pawnor to have the pawn returned to him immediately on tender of the amount due upon it; and as was said by Mr. Justice Mellor, it might be excluded by the very nature of the thing pawned. But even so, the sub-pledge would not put an end to the contract, but would only give the pledgor an action in which he could recover such damages as he had actually sustained. The contract remains in force, and with it the special property which it has created, nor can the pawnor treat it as at an end until he has done that which alone enables him to divest the pawnee of his inchoate right of property in the pawn, or recover back goods (or other chattels) pledged as security for the payment of a debt, until he has paid or tendered the amount of the debt.

(*a*) Bloxam v. Sanders, 4 B. & C., 941; Milgate v. Keble, 3 M. & G., 100.
(*b*) 15 C.B. (N.S.), 390, 33 L.J. (N.S.), C.P., 134, 9 L.T. (N.S.), 538.

The judgments in this case have been given at considerable length, both on account of the importance of the point decided, and of the care with which the learned judges examined and discussed the pre-existing law. On the abstract right to repledge it may be said that no universally binding rule has been laid down, because while Blackburn and Mellor, JJ. think that such a right does exist, the Lord Chief Justice expressly guards himself from a formal recognition of that doctrine, and Mr. Justice Shee formally and emphatically repudiates it. But the great practical value of the decision lies in the degree to which it discourages the old doctrine that any such act as repawning vitiates the entire contract, and renders the pawnee liable to an action of trover, in which the measure of damages would be the full value of the goods pawned. Taken in connection with *Johnson* v. *Stear* (*a*), the case of *Donald* v. *Suckling* (*b*) shows conclusively that even if the pawnee have done an act not altogether warranted by his contract, the pawnor, if he have sustained no real damage, cannot make such an act on the part of the pawnee, a pretext for getting his goods again without payment of the sum for which they were pledged. It also shows that on the question of abstract right, the leaning of the Court is towards that power of free though qualified alienaion of the debtor's property, which is so necessary and sotconvenient in carrying on the affairs of a great commercial nation.

(*a*) 33 L.J. (N.S.), C.P., 130, 15 C.B. (N.S.), 330, 9 L.T .(N.S.) 538.
(*b*) 1 Law Reports, Q.B., 585, 14 L.T. (N.S.) 772; noticed also in 1 Law Journal Notes of Cases, 284, 1 Law Reports Notes of Cases, 276. To be reported in 6 Best & Smith's Q.B. Reports, 35 Law Journal, (N.S.), Q.B., 12 Jurist, (N.S.), and Weekly Reporter.

SECTION VII.

OF THE STATUTORY RIGHTS OF THE PAWNEE.

We need not linger long over this section. The rights which have been given to pawnees dealing with factors and agents have been already discussed, and the interference of the Legislature with pawnees of a particular class, while laying upon them many liabilities, has added but little to the rights they possessed at Common Law. From this remark, however, must be excepted the power of charging interest at particular rates, which Pawnbrokers enjoy, and of exacting certain sums in payment for the note or memorandum which they are obliged to give with each pawn. So long as the Usury Laws were in force, no person was allowed to charge a higher rate of interest than five per cent., unless specially authorised by Statute. And though, in contracts generally, when both parties act *bonâ fide* and without fraud, any rate of interest may now be recovered, for which the parties stipulate, Pawnbrokers, *as such* (*a*), are not entitled to the benefit of the repeal, but must still regulate their charges for interest according to the Pawnbrokers' Act (*b*). This Act provides (*c*), that all persons exer-

(*a*) But when not acting as Pawnbrokers, they are not bound by these restrictions, see *Pennell* v. *Attenborough*, 4 Q.B., 868, 5 Burn's Justice, 474.

(*b*) 39 & 40 Geo. 3, cap. 99. (*c*) By sec. 2.

cising the trade of a Pawnbroker shall be entitled to charge interest at the following rates, and that such interest shall be paid, in addition to the principal, before the Pawnbroker shall be obliged to re-deliver the pawn, viz. :—

	£	s.	d.	d.
For every pledge on which there has been lent any sum not exceeding	0	2	6	
There shall be charged the sum of . . . . . for any time during which the said pledge shall remain in pawn not exceeding one calendar month (*a*) ; and the same for every month afterwards, including the current month in which such pledge shall be redeemed, although such month shall not be expired.				.. 0½
For every pledge on which there has been lent . . .	0	5	0	.. 1
,, ,, ,,	0	7	6	.. 1½
,, ,, ,,	0	10	0	.. 2
,, ,, ,,	0	12	6	.. 2½
,, ,, ,,	0	15	0	.. 3
,, ,, ,,	0	17	6	.. 3½
,, ,, ,,	1	0	0	.. 4
and so on up to 40s.				
If above 40s. and not above 42s.				8

And for every pledge on which any sum above 42s. and not above £10 has been lent, at the

(*a*) See observations on this right to charge interest, *ante*, page 79.

rate of 3d. and no more per calendar month for every 20s., and in proportion for any fractional sum; which several sums shall be in full satisfaction for interest and warehouse room.

Connected with this right to charge interest, are certain liabilities, which it may be convenient to notice here. The fourth section of the above named Act, makes it imperative on Pawnbrokers to give farthings in change, in all cases where the sum payable on redemption, either as interest, or part principal and part interest, "shall amount to a total sum, of which the piece of money of the lowest denomination shall be one farthing"; and also in cases where the person desirous to redeem cannot produce a farthing, but tenders a halfpenny. In the latter case, the Pawnbroker must either produce a farthing in change, or wholly abate the farthing from his demand. And the fifth section provides that where the application to redeem is made within seven days of the expiration of the first calendar month from the time of making the pledge, the pawnor may redeem without paying any interest for those seven days; if the application is made after seven but not after fourteen days, interest shall be charged for a month and a-half; but after fourteen days, the Pawnbroker may charge interest for the whole of the second month; and the like regulations shall apply to every subsequent calendar month wherein application shall be made for redeeming goods pawned.

Upon the construction of these clauses, it has been decided that where the interest payable under the Act to a Pawnbroker on a loan for a month, is a sum which is not an exact number

of farthings, the Pawnbroker, even if entitled to receive 1d. per month on account of the necessity of the case, is not at liberty, on a loan for a longer period, to treat the contract as a monthly contract, taking upon each month the benefit of the fraction of a farthing, when there would no longer be any difficulty in paying him at the exact rate of 20 per cent. (*a*). It has been further held that the intention of the statute was not merely to grant to the Pawnbroking Trade a dispensation from the Usury Laws, when they existed, and that therefore its effect was to render the taking of a higher rate of interest than that fixed by the statute, an offence cognizable by a justice of the peace on summary information. Hence it follows that as no penalty is given by the 2d or 3d sections, taking a larger sum than the Act permits is an offence which comes under the general powers given by the 26th section for punishing those who "in anywise offend," where

(*a*) *Reg.* v. *Goodburn*, 8 A. & E., 508, 3 N. & P., 468, in which the loan was of 4s. The monthly interest was four-fifths of a penny, or one penny for one month. The pledge was redeemed in 11 months and a-half, and the defendant claimed 11½d. But the Court held that he had no right to make monthly rests in this manner, and that the utmost he could claim was 9¼d. It was made a question in this case, but not decided, whether, where the exact sum due to the Pawnbroker for interest would involve a fractional part of a farthing, he is, or is not, entitled to the farthing. In the case of *Morton* v. *Bramner*, 8 C.B., N.S., 791, 2 L.T., N.S., 600, it was held that a poor rate overseer was not entitled to collect more than was actually due, and Willes, J. cited *Baxter* v. *Faulam*, 1 Wilson, 129, as an authority for holding that where an amount comes to something less than any known coin, a ratepayer cannot be called upon to pay it. Whether the same rule would hold as between individuals remains to be decided.

no particular forfeiture or penalty is elsewhere provided or imposed (*a*). "It is prohibited by the Act," said Lord Ellenborough, "to take more than the stipulated rate of profit, and therefore taking more is an offence against the Act, and as no particular penalty is provided for that transgression, it falls within the general words of 26th clause." On the principle which renders void all contracts in which the parties mutually agree that one of them shall do an act contrary to the express provisions of a public statute, it has been decided that if a Pawnbroker upon one contract advance more than £10, and pretend to divide the same as if there were several different loans, and for that purpose give several tickets dated on different days, it is for the jury to say whether the transaction is a mere contrivance to conceal usury, and if they so find, the whole is illegal and void (*b*). The judgment in this case did not proceed on any matter peculiar to the Trade, but on the general rule of the Common Law, *ex dolo malo non oritur actio*. "The object of all law is to repress vice and to promote the general welfare of society, and it does not give its assistance to a person to enforce a demand originating in his breach or violation of its principles and enactments. Contracts in violation of statutes are void, and they are so whether the consideration to be performed, or the act to be done, be a violation of the statute" (*c*). In *Nickisson* v. *Trotter* (*d*)

(*a*) *R.* v. *Beard*, 12 East, 673.
(*b*) *Cowie* v. *Harris*, 1 Moody & M., C.N.P., 141.
(*c*) *Harris* v. *Runnels*, 12 Howard, (U.S.) R. 83.
(*d*) 3 M. & W., 130.

the action was in trover for certain watches. Plea, that defendant was a Pawnbroker, and that the goods were deposited for money advanced, which had not been repaid. Replication, that before they were so pledged, it was corruptly agreed that defendant should lend plaintiff a sum exceeding £10, to wit £77, and that defendant should forbear and give day of payment thereof to the plaintiff, *until the expiration of one year next after such loan and advancement*, that plaintiff should give more than lawful interest . . . . whereby the agreement was wholly void. It was proved at the trial that the watches were deposited, but that no agreement was made as to the time they should remain in pledge. On application, the judge amended the record by inserting after "such loan" the words, *redeemable in the meantime*. Plaintiff had a verdict, and on motion to enter a nonsuit, the Court held that this was a contract within the Pawnbrokers' Act, and that it was to be assumed from the circumstances that the plaintiff had dealt with the defendant *in the character of, and upon the usual terms of dealing with*, a Pawnbroker.

The case of *Tregonning* v. *Attenborough* (*a*) went on the same principle. There the defendant, a Pawnbroker, had advanced £200 to a trader on a deposit of silks, and had entered the transaction in his books as several advances,

(*a*) 7 Bing., 97. In *Fitch* v. *Rochfort*, 1 Hall & Twells, 255; 13 Jur., 351; 1 Mac. & G., 184, it was said by Cottenham, C., that "there is a fraud in advancing money at different times." (Of course this is to be taken with reference only to loans under peculiar circumstances, such as those above referred to.)

each of less than £10. The trader became bankrupt; his assignees sued the defendant in trover, and obtained a verdict. Tindal, C.J., who tried the case, directed the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest. They found the question in the affirmative, and the plaintiff consequently had a verdict. On motion for a new trial, Park, J., referred to the above quoted case of *Cowie* v. *Harris*, and citing Lord Tenterden's ruling in that case, said that it was a question for the jury whether the whole were really one transaction and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void; or whether the advances were really distinct. The court unanimously held the ruling to be right, and refused to disturb the verdict. The practical effect of the statutory restrictions on a Pawnbroker's profits has, however, been greatly narrowed by the lately established doctrine that they only affect him when dealing in his business as a Pawnbroker. This was authoritatively settled in *Pennell* v. *Attenborough* (*a*), where the assignees of a bankrupt sued to recover different articles which the bankrupt had pledged with the defendant, a Pawnbroker. One such transaction took place on April 8th, 1841, and an entry had been made in a book belonging to the defendant, (but not kept according to the requirements of the Pawnbrokers' Act), to the following effect:—"To be held by him as a security for £115 this day lent, with interest thereon from the date hereof, at the rate of 15 per cent. per annum, until payment, and in default of pay-

(*a*) 5 Burn's *Justice*, 474, 4 Q.B., 868.

ment on the 18th of October then next, I do hereby authorise and empower the said R. Attenborough to sell and dispose of such articles, either by public sale or private contract, and to repay himself thereout." The defendant had made no entry of this transaction as required by the statute, nor did he give the bankrupt any duplicate, and the question raised was whether he was acting as a Pawnbroker when he advanced the money. The court considered, that by the statute 39 & 40 Geo. 3, cap. 99, sec. 2, the Pawnbroker was allowed to take 20 per cent. on goods pawned, but it did not mention any case where the sum should be above £10, apparently assuming, that no sum above that amount would ever be borrowed of a Pawnbroker. Looking at 2 & 3 Vict., cap. 37, the court considered that usurious loans of this description were lawful, as the statute 39 & 40 Geo. 3, cap. 99, only applied to loans not exceeding £10. Judgment accordingly was for the defendant. To the same effect also, the Court of Chancery decided some years later than *Pennell* v. *Attenborough*, in the case of *Fitch* v. *Rochfort* (*a*). The Vice-Chancellor of England had granted an injunction restraining the defendant from selling jewellery deposited with him as security for £1,383. The property had been pledged by the plaintiff, a married woman, and the plaintiff having paid all interest due up to a certain time, signed several contract-notes setting forth the terms of the deposit, and duplicate copies of such contracts were given to her by the de-

(*a*) 13 *Jurist*, 351; 1 Mac. & G., 184; Hall and Twells, 255.

fendant. These contracts stipulated for interest at the rate of 3d. per £1 sterling per month, such interest after the first month to be calculated half-monthly; with power to the defendant to sell twelve months after date, and to account for surplus, or claim for deficiency as the case might be, if demanded within three years; in fact embodying in this contract nearly all the special conditions peculiar to a transaction under the Pawnbrokers' Act. The amount mentioned in each contract was above £10, and the contention was, that the transaction was an ordinary Pawnbroking contract, and therefore void. But Lord Cottenham, on appeal, reversed the Vice-Chancellor's decision, and dissolved the injunction without calling on the appellant's counsel to reply. His Lordship held that Pawnbrokers were under no disabilities except that they were bound by the Act if they advanced sums under £10. Therefore transactions above £10 were to be looked at, just as if the Pawnbrokers' Act did not exist at all. The 2 & 3 Vict., cap. 37, provides that *as to all loans under* £10, Pawnbrokers shall be confined to their own act, and as the repeal of the Usury Laws had left every one free with respect to loans above £10, and there was nothing in the Act to incapacitate Pawnbrokers, the Act 39 & 40 Geo. 3, cap. 99, had nothing whatever to do with the transaction, which was just as binding as if the pawnee were not a Pawnbroker. A Pawnbroker, like every one else, may avail himself of the provisions of 2 & 3 Vict., cap. 37, for the purpose of obtaining a higher rate of interest than 5 per cent.; and a contract for that purpose made upon the deposit

of goods will not be invalid merely because it contains stipulations usual in an ordinary Pawnbroking transaction (*a*). So generally is this now recognised and acted upon, that Pawnbroking firms in large business constantly make advances both above and below £10, the only practical difference being that they do not give duplicates for goods pledged for sums above the limit fixed by statute. By the Acts abolishing the Usury Laws (*b*), it is expressly provided that the rates of interest allowed by law to be taken by Pawnbrokers are to remain unaffected by the repeal.

Where an endeavour is made to avoid a Pawnbroking contract on the ground that it is forbidden by the statute, it is not sufficient to aver that it was made "corruptly and against the form of the statute agreed, &c." The illegality must be stated with certainty, and if it depends on a particular statute, that statute must be pleaded (*c*).

The charges for duplicates, authorised by section 6 of the Pawnbrokers' Act, are as follows:—If under 10s., ½d. (*d*); if 10s. and under £1, 1d.; if £1 and under £5, 2d.; if £5 and upwards, 4d. When Duplicates are lost, mislaid, destroyed, or fraudulently obtained, a Copy is to be delivered to the owner on application, (provided the pledge is not re-

(*a*) See also *Turquand* v. *Mosedon*, 7 M. & W., 504.
(*b*) 2 & 3 Vict., cap. 37, sec. 3; 17 & 18 Vict., cap. 90. sec. 4.
(*c*) *Turquand* v. *Mosedon*, 7 M. & W., 504.
(*d*) By 39 & 40 Geo. 3, cap. 99, sec. 6, duplicates were to be delivered gratis when the loan was under 5s., but Pawnbrokers are now authorised to charge ½d. for such duplicates, by "The Halfpenny Act," 23 Vict., cap. 21.

deemed), with a form of *Declaration*, at the following rates, viz. :—if not exceeding 5s., ½d.; above 5s. and not exceeding 10s., 1d.; if 10s. or upwards, then the original cost of the Duplicate is to be paid.

The duplicate or declaration must usually be produced when the pawnee applies to redeem the goods, but when goods have been stolen, or otherwise unlawfully obtained, and then pawned, the Pawnbroker has no right to insist upon the production of the duplicate, nor is the real owner bound to produce it (*a*). The rights of the Pawnbroker with respect to unredeemed pawns will be noticed elsewhere (*b*).

(*a*) *Peet* v. *Baxter*, 1 Stark, 472; *Packer* v. *Gillies*, 2 Camp., 336.

(*b*) See *post*, secs. *Redemption and Sale of Pawn.*

SECTION VIII.

THE COMMON LAW LIABILITIES OF THE PAWNEE.

In his elaborate judgment in the case of *Coggs* v. *Bernard* (*a*), Lord Holt quotes a passage cited by Bracton from Justinian, *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujus modi res in pignus data sit utriusque gratiâ scilicet debitoris quo magis ei pecunia crederetur, et creditoris quo magis (ei) in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit et rem casu amiserit, securus esse possit, nec impedietur creditum petere* (*b*). In accordance with this doctrine, his lordship said, "In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for the debt." And he denies the reason given for this in Southcote's case (*c*), where Lord Coke says it is because the pawnee has a special property in the pawn, and cites from the Book of Assize (*d*) "the true reason of all these cases, which is that the Law requires nothing extraordinary of the pawnee, but only that he shall use an

(*a*) 2 Salk, 909, 1 Smith's L.C., 5th edit., 171.
(*b*) Bracton, 996, Inst., lib. 3, tit. 15, text. 4, *De pignore.*
(*c*) 4 Rep., 83. (*d*) 29 Ass., 28.

ordinary care for restoring the goods (*a*).

(*a*) While this work has been passing through the press, the author's attention has been called, by the courtesy of the Editor of the *Pawnbrokers' Gazette*, to some opinions given by eminent counsel on the pawnee's liability for loss of, or injury to, the pawn under particular circumstances. The late Common-Serjeant, Newman Knowlys, in 1819, was asked his opinion in a case where a coat which had been 20 months in pawn, was found, upon its redemption, to have been seriously injured by moth. The magistrate at Shadwell Police Court thought that the Pawnbroker was liable, but consented to suspend his decision until the learned Common-Serjeant had been consulted. Mr. Knowlys said:—

"I am of opinion the pawnor must fail on the facts here stated. This case must be decided upon the ground of the right of the parties to recover: supposing an action at law had been brought, and the same proof given by competent witnesses, the great case of *Coggs* v. *Bernard*, in 2 Lord Raymond, 916, which is universally acted upon, decides the case in favour of the Pawnbroker. Lord Holt, in delivering his judgment in that case, mentions the different Cases of Bailment, and applies the law distinctly to each; and in speaking of the 4th sort of Bailment, viz., *Vadium* or *Pawn*, he considers in the second place for *what neglects the Pawnee shall answer*, and he says in that case *the law requires nothing extraordinary of the Pawnee*, only that he shall use *an ordinary care* for restoring the goods. The Pawnee is not like the common carrier, an insurer at all events, except for the act of God and the King's enemies; if the Pawnee uses the same care respecting the goods pawned as men generally use respecting their own property, he is not answerable for any damage or deterioration that the goods may undergo whilst under his care. If he has suffered his warehouse to be out of repair, and the goods have received damage by weather, that would be a default, and he must answer for it; or, if he leaves his doors and windows open all night, and the goods are stolen, he must answer. But in this case the pledge has received damage from moth in the course of a twenty months' keeping, and I conceive that cannot be said to be a default. I happen to know by experience in my own family, and in those of several of my friends, that after the utmost care and attention towards that particular mischief, silks, furs, and woollens have suffered considerable deterioration in less than a quarter of the time here specified. The Pawnee is not an

But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable

insurer against all possible loss or deterioration, as is clearly established by the case cited. The words of the statute 39 & 40 Geo. 3., c. 99, do not express any such obligation, and when construed upon legal principles applicable to the cases of pledge, do not, in my opinion, render the Pawnbroker liable in any case circumstanced like the present."

The case was sent back to Mr. Common-Serjeant for re-consideration, but he adhered to the view above given, saying:—

"I take it that on the principle of the pawnee's having a qualified property in the goods, it is, that if he takes the same care of them as a man would take of his own goods, he is not only excused in a total loss, but can, even after a total loss, still maintain his action against the pawnor for the money advanced even upon lost goods. The terms *default and neglect* used in the act of parliament must be construed *secundum subjectum materum* as the law then bore upon it, and must be confined to such damage or loss by default or neglect as would have sustained an action against the pawnee by the pawnor at Common Law. Such action, upon the authority of *Coggs* v. *Bernard*, could only be sustained upon proof of *crassa negligentia*, and would be defeated if it appeared that the pawnee had used the common and ordinary care that a man would use with his own concerns. So much for the law. If it shall be held that the pawnee in all cases of woollen, or silk, or linen goods being deposited with him, is to be at the trouble and expense of having them all daily or weekly unfolded and brushed, or otherwise dealt with, for fear the moth should either have deposited its eggs in it at the time they were brought in, or during their abiding in pawn, I apprehend it might very probably induce the Pawnbroker to decline the taking in of goods of that description, and so the means of raising an occasional supply of money (so indispensable to the poor), would to that extent be cut off, which in my opinion is an argument in point of policy, in addition to what has been urged upon legal principles, in support of the opinion I have conceived on the subject. In the case of a large stock of woollen garments the Pawnbroker would actually be obliged to become a scourer by trade as well as Pawnbroker. If the

for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and the special property of the pawnee is

defendant in the present case has kept his woollen clothes as fairly as the rest of the trade have done theirs, I cannot but conceive that he has done all that the law requires."

On the same principle Lord Campbell, when Attorney-General, advised that where a Pawnbroker, in answer to a summons for compensation, showed a loss by robbery, the plaintiff could not recover:—

"I am of opinion that the Magistrates have no power under the Act 39 & 40 Geo. 3, c. 99, to compel the Pawnbroker to make satisfaction to the pawners of goods lost, under the circumstances stated. The section only applies where the Pawnbroker does not show any REASONABLE cause for not returning the goods, and a reasonable cause is shown by the goods having been stolen," [without negligence on the part of the pawnee.]

In a similar case heard at Worship-street, in 1818, at the suggestion of the sitting Magistrate, the late Mr. Adolphus was asked for his opinion on this question of liability. The learned gentleman said:—

"I have bestowed much attention on this case, and have well considered all the authorities on the subject, not so much because I felt any great difficulty about it on the first perusal, as out of respect to the worthy Magistrate who does me the honour to believe that my opinion can assist in removing any doubt which exists in his mind.

"Viewing the Pawnbroker first in the light of a bailee at Common Law, I am clearly of opinion that under all the circumstances above stated, he is not answerable to the pawnor for the goods which have been stolen by robbers. It is too loosely stated in some books, that if a man pledge goods, and they are stolen, the bailee shall not answer for them; or that the bailee shall not in such case answer for them, if he took as much care of them as he did of his own goods. A man who takes in pawn for profit, has a higher duty thrown upon him; the pawnee is answerable for all defects of care, diligence, or negligence by which the property is lost; and *therefore*, if it was conveyed away by sleight, embezzled by a servant, or snatched from his hand, his counter, or his window, by a thief, who came in suddenly, he would be answerable for it; but if it were taken from his person by robbery, or from his house by burglary, he would not be answerable, and in the present case he is not

determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them is the reason of the loss. (2 Ld. Raym., 917.)

answerable. Robbery or burglary can be no more prevented by him or by care taken, than those accidents by tempest, flood, or fire, which are called the acts of God, or those invasions of the enemy, or tumultuous risings of the people, which can only be restrained or impeded by the public, and not by individual force or foresight. This distinction, which governs this case, is recognised by all writers; indeed, there is hardly a difference among them. See Bacon's Abridm., Gwillim's edit., Bailm. B., and notes. The learned and ample opinion of Holt, C.J., in the case of *Coggs* v. *Bernard*, 2 Lord Raym. 909, particularly at page 917, with the marginal notes and references, by Mr. (afterwards Judge) Bayley. See also Jones *On Bailments*, p. 44, n., for the difference between private and forcible stealing, with the authorities; also the same work, p. 75, for the general law on the subject. If the law has varied in more recent times, it has rather been relaxed than strengthened against the bailee, for where a man undertook, for hire, to keep the goods of another, and they were stolen by the bailee's own servant, Lord Kenyon held that an action against him could not be maintained, even when it was proved that he had been told his servant was dishonest. *Finucane* v. *Small*, 1 Esp. 315.

"I come now to consider how the Pawnbroker is affected by the statute 39 & 40 Geo. 3, c. 99. In respect of his duty as bailee, I think it makes no alteration; it only gives summary remedies in certain cases. The 14th section is made to govern cases where the Pawnbroker, having possession of the pledge, or having parted with it within twelve months, or fifteen months under certain circumstances, neglects or refuses to deliver it up to the pawnor, and for such neglect or refusal does not show reasonable cause to the satisfaction of a justice; I say that the 14th clause governs those cases, because the 24th clause provides a remedy where pawns are embezzled, or lost, or damaged through the default, neglect, or wilful misbehaviour of the Pawnbroker."

It is with great reluctance that the author finds himself compelled to differ in some degree from the eminent gentlemen whose opinions have just been cited. On the first point, however, (the damage by moths), Mr. Knowlys hardly seems

This doctrine of Lord Holt, that the pawnee is bound only to use ordinary care and diligence, is in harmony with several passages in the Digest, and with the great mass of authority, both in this and other countries. Sir Wm. Jones has elaborately discussed and refuted Coke's doctrine, that the pawnee ought to keep the pawnor's goods "no otherwise than

to require enough of the pawnee. It would be unreasonable to require him to "be at the trouble and expense of having all pawns of goods liable to be destroyed by moth daily or weekly unfolded and brushed," but still it seems that he is bound to resort to some means, such as using camphor, or other drug, which kills these troublesome insects, or, as most people know by experience, there would not be much left of any woollen garment at the end of 12 months. It seems less than ordinary care to store goods of this nature, without taking any such precaution, and it is at least as unreasonable for the pawnee so to store the goods, as it would be for the pawnor to require the pawnee to keep a staff of persons incessantly employed in unfolding and brushing them. Mr. Adolphus seems to err in the other direction, when he says :—"A man who takes in pawn for profit, has a higher duty thrown upon him; the pawnee is answerable for all defects of care, diligence, or negligence by which the property is lost; and, *therefore*, if it was conveyed away by sleight, embezzled by a servant, or snatched from his hand, his counter, or his window, by a thief, who came in suddenly, he would be answerable for it; but if it were taken from his person by robbery, or from his house by burglary, he would not be answerable, and in the present case he is not answerable, for the cases there put, are cases in which no negligence can be imputed to the pawnee, and in which, therefore, he ought not to suffer." In all these cases, the difficulty is not in stating the rule, but in applying it. It is very easy to say that the pawnee is liable for gross negligence, but it is not at all easy to draw the line at which gross negligence begins. The solution of this nice and difficult problem is very properly left to the decision of the jury, who, as men of the world, and with a knowledge of business, are peculiarly fitted to express an opinion.

his own because he hath a property in them" (*a*), but Lord Holt's view is now so fully established, that it is unnecessary to quote at length the arguments by which it is supported. But Sir Wm. Jones himself was clearly wrong in maintaining that private theft is presumptive evidence of negligence. The true principle supported by the authorities seems to be, that theft, *per se*, establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by any negligence, the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved, even presumptively, by mere theft; but the proper conclusion must be drawn from weighing all the circumstances of the particular case (*b*). And this view of the pawnee's duty is in accordance with a passage quoted by Sir Wm. Jones from Ulpian—"*Contractus quidam dolum malum duntaxat recipiunt; quidam et dolam et culpam. . . . Dolum et culpam, mandatum, commodatum, venditum, pignori acceptum, locatum*" (*c*). And the reason for this is given in another passage:—"*In contractibus, interdum dolum solum, interdum et culpam, præstamus. Dolum in deposito; nam quia nulla utilitas ejus versatur, apud quem deponitur, merito dolus præstatur solus; nisi forte et merces accessit, tunc enim, ut est et constitutum, etiam culpa exhibetur; . . . . ubi utriusque utilitas vertitur . . . ut in pignore, et dolus et culpa præstatur* (*d*). And

(*a*) Treatise *On Bailments*, 75.
(*b*) Story *On Bailments*, sec. 338, 2 Kent's Com. 580, 581.
(*c*) Dig. Lib. 50, tit. 17, l. 23.
(*d*) Dig. Lib. 13, tit. 6, l. 5, sec. 2, (5).

again; *Quia pignus utriusque gratiâ datur, placuit sufficere si ad eam rem custodiendam eæactam diligentiam adhibeat* (*a*). Gross neglect, *lata culpa*, or as the Roman lawyers most accurately call it, *dolo proxima*, is in practice considered as equivalent to *dolus*, or fraud itself (*b*); and consists, according to the best interpreters, in the omission of that care, which even inattentive and thoughtless men never fail to take of their own property. Slight neglect, *(levissima culpa,)* is the omission of that care which very attentive and diligent persons take of their own goods, or in other words, of very exact diligence; but ordinary neglect, *levis culpa*, is the want of that diligence which the generality of mankind use in their own concerns; that is of ordinary care (*c*); and for lack of such diligence, pawnees are, at Common Law, held responsible. Therefore, even though the pledge be taken openly and violently, yet if it is through the *fault of the pledgee*, he shall be responsible for it, and after tender and refusal of the money owed, which are equivalent to actual payment, the whole property is instantly revested in the pledgor (*d*), for the pawnee makes himself responsible for *all* losses and accidents whenever he has done any act inconsistent with his duty, or has refused to perform his duty. If therefore the pawnor

(*a*) Inst. Lib. 3, tit. 15, sec. 4.

(*b*) Story disputes this proposition, see Treatise *On Bailments*, sec. 20, *et. seq.*; see also a paper in the *Law Magazine* for May, 1839, p. 292, cited by him. But the difference between Jones and Story on this point, is perhaps not much more than verbal.

(*c*) Jones *On Bailments*, 22.

(*d*) *Ratcliffe* v. *Davis*, Yelv. 178.

makes tender of the amount for which the pawn is given, and the pawnee refuses to receive it, or to re-deliver the pledge, the special property which he has in the pledge is determined, and he is thenceforth treated as a wrongdoer, and the pawn is at his sole risk. And the same rule applies to all cases of misuser or conversion of the pawn by the pawnee.

The above principles were recognised in *Vere* v. *Smith* (*a*), which was a suit on a bond to account for money which had come to the defendant's hands as agent. Defendant pleaded that he locked up the money in his master's warehouse, and it was stolen from thence (not saying without default on his part). And it was adjudged that it was a good bar to the action and a sufficient accounting within the condition of the bond. And a case is mentioned in Fitzharris's Abridgement (*b*), where goods were locked in a chest and left with the bailee, and the owner kept the key, and the goods were stolen, the bailee was held to be discharged (*c*). And in the more recent case of *Finucane* v. *Small* (*d*), Lord Kenyon held that a bailee of goods kept for hire, was not liable for a theft committed by his servants, though there were some prior suspicious circumstances impeaching their fidelity. His Lordship said: "To support an action of this nature, positive negligence must be proved. It has appeared in evidence that the goods were lodged in a place of security, and where things of much greater value were

(*a*) 1 Vent. 121. (*b*) 8 Ed. 2, tit. Det. 59.
(*c*) Viner's Ab., tit. *Pawn*. (*d*) 1 Esp., 315.

kept. This is all that it is incumbent on the defendant to do, and if such goods are stolen by the defendant's own servants, that is not a species of negligence of a description to support this action, inasmuch as he has taken as much care of them as of his own." The reason of this rule is stated by Lord Holt to be that "the law requires nothing extraordinary of the bailee, but only that he shall use ordinary care in the storing of the goods." Therefore in each case of this nature, the question really is, has the defendant used such ordinary care? And it is incumbent on the plaintiff, before he can recover, to support his declaration by proper proofs, and the *onus probandi* as to negligence will be on him (*a*).

Another duty of the pawnee is to return the pledge and its increments, if any, after the debt or other duty has been discharged (*b*). This duty is by the Common Law extinguished when the pledge is lost by casualty or other unavoidable accident, or when it perishes through its own intrinsic defects, without the default of the pawnee (*c*). The same rule applies when the pawn is lost by robbery, or by superior force, or even by theft, if the pawnee has exercised reasonable diligence. The same doctrine holds in Roman and continental law, but under those systems the *onus probandi* is cast on the pawnee, to establish the loss to be by such casualty, superior force, or

(*a*) *Dean* v. *Keate*, 3 Camp., N.P.C. 4; *Cooper* v. *Barton*, *ibid* 5; *Marsh* v. *Horne*, 8 D. & R., 223; *Harris* v. *Packwood*, 3 Taunt., 264.

(*b*) *Isaack* v. *Clarke*, 2 Bulst., 306.

(*c*) *Coggs* v. *Bernard*, 2 Ld. Raym., 909, 1 Smith's L. C., 5th edit., 171.

intrinsic defect (*a*). And though, as we have seen, in our law the burden of proof is on the pawnor, it is said by Story (*b*), that the Common does not probably differ from the Roman Law, when a suit is brought for the restitution of the pawn, after a due demand and refusal. In such a case, the demand and refusal would ordinarily be evidence of a tortious conversion of the pawn; and it would then be incumbent on the pawnee to give some evidence of a loss by casualty, or by superior force, independent of his own statement, unless indeed, upon the demand and refusal, he should state the circumstances of the loss; and then the whole statement must be taken together, and submitted to the jury, who would, under all the circumstances, decide whether it was a satisfactory account or not (*c*). But if, as in the case above cited, the action should be brought against the pawnee for a negligent loss of the pawn, there it would be incumbent upon the plaintiff to support the allegations of his declaration by proper proofs, and the *onus probandi* in respect of negligence would be thrown on him. And the bailee's acts and remarks, contemporaneous with the loss, are admissible evidence in his favour, to establish the nature of the loss (*d*). Connected with this question of negligence, Sir W. Jones mentions (*e*) a provision contained in the ancient laws of the

(*a*) Cod. Lib. 4, tit. 24, l. 5; *Pothier, de Nantissement*, n. 31.

(*b*) Treatise *On Bailments*, sec. 339.

(*c*) *Isaack* v. *Clarke*, 2 Bulst., 306; *Shiels* v. *Blackburne*, 1 H. Bl., 158; *Doorman* v. *Jenkins*, 2 Ad. and E., 256, 4 Nev. & M., 170, 2 C. M. & K., 659.

(*d*) *Doorman* v. *Jenkins*, *ut supra*.

(*e*) *Treatise On Bailments*, 112.

Wisigoths, and in the capitularies of Charlemagne and Lewis the Pious, by which a depositary of gold, silver, or valuable trinkets, is made chargeable, if they are destroyed by fire, and his own goods perish not with them; a circumstance which some other legislators have considered as conclusive evidence of gross neglect or fraud. He also mentions a provision in the northern code which he had not seen in that of any other nation: viz., that if precious things were deposited and stolen, time was given to search for the thief, and if he could not be found within the time limited, a moiety of the value was to be paid by the depositary to the owner, *ut damnum ex medio uterque sustineret.* In our law, pawnees are not liable for loss or damage by fire, without proof of negligence (*a*).

It is hardly within the purpose of this work to enter upon an elaborate discussion of the different states of facts which are sufficient to render a pawnee liable for negligence. We may, however, mention, that where A. hired a room of B. for the purpose of depositing goods, and kept the key of a padlock by which the door was fastened, B. was held not liable as a bailee, though the goods were stolen by a member of his family (*b*). And negligence may depend on the nature of the thing bailed, as where the owner of a cartoon painted on paper and pasted on canvas, deposited it with a gratuitous bailee, who kept it in a room next a stable, in which there was a wall that had made it damp and peel. It was left to the jury whether

(*a*) *Syred* v. *Carruthers*, E. B. & E. 469, 4 Jurist, (N.S.) 549, 949, 27 L.J., (N.S.), M.C. 273.

(*b*) *Peers* v. *Sampson*, 4 D. & R., 636.

this was gross neglect. They found this question for the plaintiff, with £30 damages, and the court refused a new trial, because even on a bare leaving a thing in another's custody, the law raises a promise not grossly to neglect or abuse it (*a*). And in *Doorman* v. *Jenkins* (*b*), where the plaintiff had given £32 10s. to the defendant, a coffee house keeper, in whose house he was staying, to keep safely for him without reward, and the money was stolen, together with a larger sum of the defendant's own money, the judge left it to the jury to say whether the defendant was guilty of gross negligence; and he told them that the loss of the defendant's own money did not necessarily prove reasonable care. The jury found for the plaintiff, and the direction was upheld. In this last case, and also in *Rooth* v. *Wilson* (*c*), where the result was similar, the defendant was a *gratuitous* bailee. As in these cases it was held no answer to the action, that the defendant had exposed his own goods to the same peril as the plaintiff's, it could not be expected that under similar circumstances the same plea would protect a remunerated pawnee. Accordingly on a complaint made before justices against a Pawnbroker for refusing to deliver up a pledge, the appellant alleged he was unable to do so in consequence of a burglary having been committed in his house, when the pledge was stolen therefrom. It was proved that he had left his house, without any person therein, on the night

(*a*) *Mytton* v. *Cock*, Stra. 1099.
(*b*) 2 Ad. & El. 256, 4 Nev. & M. 170, 2 C. M. & R. 659.
(*c*) 1 B. & Ald., 59.

in question. The justices thought that the loss was attributable to his laches, and did not constitute any excuse. The Court of Queen's Bench, though they sent the case back to be corrected in form, agreed with the justices on the main point (*a*), and Cockburn, C.J., said this was a stronger case than *Healing* v. *Cattrell* (*b*), where the question was whether leaving valuable goods in the appellant's house during the night, without any person on the premises, was a careful dealing with the goods by the Pawnbroker, in which case, as in *Shackell* v. *West*, the judgment was against the appellant.

Another duty of the pawnee at Common Law is to render a due account of all the income, profits, and advantages derived by him from the pledge, in all cases where such an account is within the scope of the bailment. If the pawn consists of cows, horses, or other cattle, the profits of their labour are to be accounted for, if within the contemplation of the parties. And the pawnee is at liberty to charge all the necessary costs and expenses to which he has been put, and to deduct them from the income or profits. If he has sold the pledge, he is bound to account for the proceeds, and to pay over to the pawnor the surplus beyond his debt or other demand, and the necessary expenses and charges (*c*). The right of the pawnor to redeem the pawn, and the consequent duty of the pawnee to re-deliver it, together with other

(*a*) *Shackell* v. *West*, 6 Jurist, N.S., 95, 29 L. J., (N.S.), M.C. 45, 8 W.R. 22.

(*b*) Nov. 9th, 1859, see note to report of *Shackell* v. *West*, 29 L.J. (N.S.), M.C., 45.

(*c*) Story *On Bailments*, sec. 343.

matters connected with the time and manner of its redemption, and of its sale in default thereof, will be considered in subsequent sections; as also will the liability of the pawnee to restore goods stolen or otherwise unlawfully obtained, and the operation of the doctrine of Market Overt.

SECTION IX.

THE STATUTORY LIABILITIES OF THE PAWNEE, AND HEREIN OF STOLEN PROPERTY.

The liabilities we have just noticed attach to all pawnees by virtue of the Common Law, and, if not expressly excluded, are impliedly assumed by the very fact of taking a pledge. But besides these, there is a large and important class of obligations, which are laid by Statute upon pawnees of a particular class, viz., those who come within the definition already given of *Pawnbrokers* (*a*). While the government of this country has wisely refrained from taking Pawnbroking under its own charge, it has for a long period acted upon the opinion, that to prevent the abuses inseparable from perfectly unrestrained facilities for getting rid of goods by pledging them, it is necessary to place the persons who follow this particular trade under special obligations. By these obligations every Pawnbroker is bound to take out a license; to have his name painted outside his premises in a particular manner; to keep certain books; to give a ticket, called a duplicate, for every pawn he receives in charge; and to exact only certain specified rates of

(*a*) See *ante*, page 10.

interest. The period during which he is to keep the pawn, for the pawnor to exercise his option of redeeming it, is the subject of distinct enactment, as are also the time and manner of selling unredeemed pledges. Again, there are duties cast upon him when property he believes or suspects to be stolen is offered to him in pledge, and he is under peculiar responsibilities with respect to stolen property, on which he has lent money in ignorance of the wrongful act by which the pawnor became possessed of it. Further, a Pawnbroker is liable to penalties for failure or refusal to do certain acts in discharge of his common law liabilities, such as to deliver up the pawn on payment of the charges thereupon. These and other obligations which attach to a Pawnbroker, we shall endeavour to discuss in the present and following sections.

A stamp duty on licences taken out by Pawnbrokers, was imposed by 25 Geo. 3, cap. 48, which fixed the amount payable at £10 a year for London and certain parts of the suburbs, and £5 a year for the rest of the country. The licence was to be renewed annually (*a*), and all persons who received goods by way of pawn, pledge, or exchange, for the repayment of money lent thereon at rates exceeding 5 per cent., were to be deemed Pawnbrokers within the Act, and were bound to take out a licence under a penalty of £50 (*b*). Persons in partnership need only take out one licence (*c*), but no person is to keep more than one shop by reason of one licence (*d*). By 55 Geo. 3, cap. 184, the duty was raised to £15 when the

(*a*) Sec. 4. (*b*) Secs. 3, 5, 6. (*c*) Sec. 8. (*d*) Sec. 7.

business was carried on in London, Westminster, or within the limits of the twopenny post, and £7 10s. if in any other part of the country. The Act 9 Geo. 4, cap. 49, sec. 12, makes all Pawnbrokers' licenses expire annually, on the 31st of July. The Act 55 Geo. 3, cap. 84, sec. 3, places the aforesaid duties under the Commissioners of Stamps; a provision which exempts proceedings against Pawnbrokers for matters connected with their licence, from the operation of Jervis's Act, 11 & 12 Vict., cap. 43 (*a*). An information for this offence may be laid at any time, by any officer of inland revenue, and the conviction may take place before one or more Justices. The penalty is £50, recoverable by distress, and payable to the Queen, but the amount may be mitigated to not less than one fourth of the full penalty (*b*). By 39 & 40 Geo. 3, cap. 99, sec. 23, all persons carrying on the business of Pawnbroking must have their christian and surnames, and also the word Pawnbroker or Pawnbrokers, painted or written in large legible characters over the door of each shop or other place used for carrying on that business, under a penalty of £10 for every place used for a week without complying with this requirement, the penalty to be recoverable by warrant of distress under the hands of two Justices, and if there be no sufficient distress, the offender may be committed to the county gaol or House of Correction, for not more than three

(*a*) By 12 & 13 Vict., cap. 1, the Commissioners of Stamps and Taxes, &c., were consolidated into one Board of Commissioners of Inland Revenue.

(*b*) 19 & 20 Vict., cap. 27, sec. 2.

months, nor less than fourteen days, unless the penalty and costs shall be sooner paid.

A contract made to enter into a partnership in contravention of law is void, and confers no rights upon either party. Therefore, where A. and B. carried on the business of Pawnbroking, under a partnership deed, and A. alone conducted the business, and his name alone appeared over the door, on the printed tickets, duplicates, and in the licence, it was contended that B. could not legally be considered as a partner, nor entitled to receive payment from the profits, on the capital he had advanced. The case came before the Exchequer Chamber on exceptions taken by the defendant's counsel, but the exceptions not having been taken till after the verdict, the Court could not give judgment thereon. But the case was thought to show that though the parties to such a contract might have rendered themselves liable to penalties under the Statute, yet, there being no actual agreement for an infraction of the Law, the contract was not void (*a*). But when the case (*b*) subsequently came before Sir John Leach, M.R., his Honour held that an agreement for a secret partnership in the business of Pawnbroking is a contravention of the statute, and no legal partnership is thereby constituted. This view was afterwards upheld on appeal to Lord Brougham, C. To the same effect also is the more recent case of *Fraser* v. *Hill* (*c*), where it was held that carrying on business as a Pawn-

(*a*) *Armstrong* v. *Lewis*, 4 Moore & Scott, 1, 2 Cr. & Mee. 274.

(*b*) *Armstrong* v. *Armstrong*, 3 My. & K., 45.

(*c*) 1 Macqueen's H. L. Ca., 392, 1 C. L. R. 7.

broker without disclosing the partners, was a violation of the Act, and that no Pawnbroking Contract stipulating to conceal the name of any partner can be valid. A Pawnbroker is bound (*a*) to enter in a book or books to be kept by him, a description of the goods taken in pawn, and also the amount of money lent upon them. When the amount so lent exceeds five shillings, this entry must be made forthwith, and before any money is advanced upon the pawn, but in the case of pawns not exceeding that amount, the entry may be made in the books any time within four hours after the pledge has been received. Besides the description of the goods, and the amount lent, the entry must contain the date; the name of the person pawning; the street and number of the house where he shall abide; whether he is a lodger or householder, these facts being indicated by the letters L. and H. Further, the entry must contain the name and address of the owner of the property, according to the information of the person pawning. And the Pawnbroker "is hereby *required*" to make these inquiries before the money shall be advanced. Accounts of pawns above 10s. must be kept in a separate book or books, and all such pawns taken in pledge in any one month, must be numbered consecutively, and this number shall be fairly and legibly written or printed on the note or memorandum of *such* pledge given to the person pawning the goods. And Pawnbrokers or their Assistants shall give to every person pledging goods a note or memorandum,

(*a*) By 39 & 40 Geo. 3, cap. 99, sec. 6.

fairly and legibly written or printed, with a description of the goods, the date, and other particulars above referred to, as necessary to be entered in the Pawnbroker's books. And upon this note the Pawnbroker's name and address shall be given, which note the party pawning is bound to accept and take in all cases, or the Pawnbroker shall not receive and retain the pledge.

If the sum lent be less than 10s., the Pawnbroker may charge one halfpenny for the duplicate (*a*); if 10s. and under 20s., one penny; 20s. and under £5, twopence; £5 and upwards, fourpence and no more. And the note so given must be produced to the Pawnbroker before he shall be obliged to re-deliver the goods, save as is hereafter excepted. These tickets may be purchased or otherwise dealt with by ordinary persons, but no Pawnbroker is allowed to buy, exchange, or receive in pledge any such ticket, whether issued by himself or by any other Pawnbroker (*b*).

It has been held that non-compliance with these requirements, makes the contract void *ab initio*, and therefore as the Pawnbroker has no right to detain the goods but in virtue of the contract of pawn, his failure to comply with this, which is a condition precedent to its validity, will render him liable in an action. A linendraper in Rupert-street, Haymarket, pledged goods with

(*a*) The Act 39 & 40 Geo. 3, cap. 99, sec. 6 made it compulsory on Pawnbrokers to deliver duplicates gratis when the amount lent was under 5s., but by 23 Vict., cap. 21, sec. 1, they are now allowed to charge one halfpenny for tickets given for all pawns under 10s. The other charges for duplicates remain as before.

(*b*) 39 & 40 Geo. 3, cap. 99, sec. 21.

Norman, a Pawnbroker in the neighbourhood, on 142 different occasions. The draper became bankrupt, and his assignees sued Norman in trover. At the time of action brought, 60 of these pledges were in defendant's possession; the remainder had been sold from time to time, in the ordinary way. The defendant had, except in two cases, made the inquiries directed by statute, and the person pledging had always said his name was Reeves, and that he resided at Pimlico, but not in any street, &c., or house with a number. The matter was referred to arbitration, and the arbitrator assessed the damages at certain sums, subject to the opinion of the Court on the legal effect of the faulty manner in which defendant had made these entries. The Court (Tindal, C.J., Vaughan, Bosanquet, and Coltman, J.J.,) unanimously held the contract void. The object of the statute was to protect, not only the pledgor, but the public, against fraudulent pledging of goods by third persons, without the real owner's consent; therefore a Pawnbroker who omits to pursue the course required by this section, acquires no property in the pledges. Nor does he acquire a lien, for if the contract be void, the lien is void also. And this is so, even though there are specific penalties for the omission of such requisites (*a*). The judgment of the Court, it may be observed, was for the full value of the goods, an amount considerably in excess of the money advanced upon them. But a Pawnbroker who makes the inquiries of the pawnor, which

(*a*) *Ferguson* v. *Norman*, 5 Bing., N.C., 76, 6 Scott, 794, 1 Drn., 418, 3 Jur. 10; see also *Cope* v. *Rowlands*, 2 M. & W., 149, 1 Gale, 231.

this section requires, and delivers to him a note or memorandum drawn up in accordance with the information thus supplied, does not lose his right to the pledge or money advanced if that information proves untrue, unless he knew it to be so at the time when he made the note, and a Pawnbroker, like every one else, is at liberty to draw the ordinary conclusion of a reasonable man from a continued course of trading. It was therefore held that where there have been several acts of pawning with the same Pawnbroker, by the same person on different occasions, the Pawnbroker is not bound to renew on each occasion the inquiry directed by statute, unless he has occasion to suspect a change in the circumstances which the statute requires to be entered on the note (*a*).

When goods are redeemed, the Pawnbroker is bound, at the time of redemption, to write or endorse on the duplicate the amount of profit taken by him on the money lent, and he must keep such duplicate, so endorsed, in his possession for the year next following (*b*).

To prevent inconvenience to persons carrying on the trade of a Pawnbroker, from different persons claiming a property in the same goods, the person producing the duplicate is, so far as concerns the Pawnbroker, to be taken to be the real owner, and the Pawnbroker is by statute indemnified for delivering the goods to such person, unless he has had previous notice to the contrary from the real owner, or unless notice

(*a*) *Attenborough* v. *London*, 8 Ex., 661, 17 Jur., 419, 22 L.J., (N.S.), Ex. 251.

(*b*) 39 & 40 Geo. 3, cap. 99, sec. 7.

has been given to him that the goods are suspected to be stolen or fraudulently obtained, or unless the real owner complies with the provisions made by the Act for cases in which duplicates have been lost (*a*). And any Justice of the Peace is empowered, upon information laid against any Pawnbroker for offences under the Act, or respecting any dispute between any Pawnbroker and pawnor, or respecting any felony or other matter, or on any other occasion whatever in which the Justice shall deem it necessary, to summon the Pawnbroker to attend and produce all and every or any book, note, voucher, memorandum, duplicate, or paper, which is or ought to be in his custody or power; and these books must be produced in the same state as when the pawn was received, without any alteration, erasement, or obliteration whatsoever, under a penalty of not less than £5, nor more than £10, to be applied as elsewhere provided (*b*). And every Pawnbroker is bound (*c*) to keep a table, painted or printed in legible characters, of the rates of profits allowed by the Act to be taken, with the prices of the notes or memorandums, the expense of obtaining copies of the same where the originals have been lost, mislaid, destroyed, or fraudulently obtained. And the same must be kept in a conspicuous part of the shop, &c., so as to be visible to, and legible by the persons in the boxes provided for pawnors.

It has been held by the Court for the Con-

(*a*) Sec. 15.
(*b*) 39 & 40 Geo. 3, cap. 99, sec. 25.
(*c*) By sec. 22.

sideration of Crown Cases Reserved (*a*), that a Pawnbroker's duplicate was the subject of larceny. The prisoner was indicted for larceny and for receiving, and was convicted of receiving the duplicate, which was variously described as a warrant for the delivery of goods, a Pawnbroker's ticket, and a piece of paper. The Court affirmed the conviction, thinking that the duplicate was a warrant for the delivery of goods within 7 & 8 Geo. 4, cap. 29. And even if it were not a warrant, the conviction would still have been good for stealing a piece of paper. Crompton, J., thought that the word "order" in the Act would require that the instrument should contain a direction from one person to another for the delivery of the goods, but that the word "warrant" as applied to the delivery of goods, had a wider signification, and comprehended any instrument which warrants or authorises the party holding the goods to deliver them, and requires him to do so. It would have been difficult to hold a duplicate not to be the subject of larceny, without overruling *Reg.* v. *Boulton* (*b*), where a railway ticket in the ordinary form was held to be the subject of an indictment for obtaining goods under false pretences.

If the Pawnbroker shall have received notice from the owner of a pawn that the duplicate has been lost, mislaid, or fraudulently obtained from the owner, and the pawn still remains unredeemed, the Pawnbroker is bound to give

(*a*) *Reg.* v. *Morrison*, 28 L.J. (N.S.), M.C., 210, 1 Bell, C.C.R., 158, 5 Jur. (N.S.), 604.

(*b*) 19 L.J., (N.S.), M.C., 67, 1 Den. C.C.R., 508; 2 C. & K., 917, 13 Jur., 1034.

a copy of the duplicate with a form of declaration of the circumstances under which the loss took place. For the copy and form, he may charge ½d. if the money lent does not exceed 5s.; above 5s. and under 10s., 1d.; and above 10s. the charge shall be the same as for the original memorandum. The owner must go before a local Justice, and satisfy him of the truth of the circumstances stated; the Justice authenticates the declaration, and the Pawnbroker is then bound to allow the person so satisfying the Justice to redeem, on leaving the said memorandum and declaration with the Pawnbroker (*a*). By the Pawnbrokers' Act, the owner's statement was to be made on oath, but a declaration is now substituted by 5 & 6 Wm. 4, cap. 62, sec. 12. By the 21st section of the same Act, any person making such a declaration wilfully false or untrue in any material particular shall be guilty of a misdemeanor. And sec. 5 makes wilfully making and subscribing such a declaration, an offence of the same character.

If it shall appear in proceedings before any Justice of the Peace, that goods pawned have been sold before the time appointed by the Act, or have been embezzled or lost, or have become of less value than they were at the time of pawning, through the fault of the Pawnbroker or his servants, the Justice may award compensation, either out of, or by way of deduction from, the principal and interest due upon the pawn, or by making an order for payment upon the defaulting Pawnbroker. And if the satis-

(*a*) 39 & 40 Geo. 3, cap. 99, sec. 16.

faction so awarded shall exceed the principal and interest due, the Pawnbroker shall deliver up the goods, and pay the excess over to the person entitled, under a penalty of £10 (*a*). The words of this section apply to all the cases mentioned in it, and not only to those where the pawn has become of less value than it was originally. But Justices have no power *to commit* for offences under this section, when the offender makes default in payment of the satisfaction awarded (*b*).

It is the duty of a person who obtains the form of declaration above mentioned, to go before a Justice of the Peace *immediately*, and the Pawnbroker is not justified in refusing the goods to a person who presents the original duplicate, if a reasonable time has elapsed for verifying the declaration. On the other hand, however, the mere detention of the goods for a reasonable time, with the view to ascertain the real owner, is not in point of law a conversion of them; and refusal to deliver them for a period no longer than is reasonable for so ascertaining the real owner, does not amount in Law to a conversion. This was decided by the Court of Exchequer in the case of *Vaughan* v. *Watt* (*c*), which was an action of trover for wearing apparel. It appeared at the trial that defendant was a Pawnbroker, with whom the goods in question had been pledged on the 24th July, 1839, by a person who gave the name of Mary Warne, and the duplicate was made out accordingly. She was in fact the wife of the plaintiff Vaughan, but

(*a*) 39 & 40 Geo. 3, cap. 99, sec. 24.
(*b*) *Exp. Cording*, 4 B. & Ad., 198, 1 Nev. & M., 35.
(*c*) 6 M. & W., 492.

it did not appear that this fact was then known to the defendant. The next day she sent to say she had lost the duplicate and to demand a copy of it. Defendant gave her a copy, and also a form of declaration of the loss of it. Some days after she sent again to say that she had lost the form of declaration, and to ask for another, which was given to her. On the 6th of August the plaintiff called with the original duplicate, and tendered the money to redeem the goods, but the defendant told him that as declarations of the loss of the duplicate had been obtained, he could not give them up. The plaintiff took out a summons to compel him to do so, and at the hearing before the magistrate, he stated that the person who pledged the goods was his wife;—a circumstance of which, as above stated, the defendant was not previously aware. The magistrate declined to interfere, and the plaintiff then brought his action. At the trial before Lord Cranworth, (then Mr. Baron Rolfe,) that learned Judge was of opinion that the fact of declarations having been obtained, was no defence against the owner of the goods, who might, in that case, never have it in his power to recover possession of them, and the plaintiff thereupon had a verdict with £10 damages. On the motion for a new trial, the plaintiff relied upon the words of the 15th section, that the person who produces the original memorandum of the goods pledged, shall, as against the Pawnbroker, be deemed the owner of them, and the Pawnbroker is thereby required on payment of the principal sum and the interest, to deliver up the goods to such person. It was contended also

that the 16th section did not authorize the Pawnbroker to keep the goods as against the owner, unless the party to whom a declaration had been given, had proved his right to them to the satisfaction of a Justice. For the defendant, reference was made to *Isaac* v. *Clark* (*a*), and to the more recent case of *Green* v. *Dunn* (*b*), where the action was in trover for timber, left on defendant's premises by permission of the servant of a former owner. The plaintiff being the owner of the timber, had demanded it of the defendant, who said he would deliver it if the plaintiff would prove his ownership, but not otherwise. Lord Ellenborough held that this was a qualified refusal, and no evidence of conversion. The Court, (Lord Cranworth concurring), with some reluctance granted a new trial, because the question whether more than a reasonable time had elapsed for the defendant to ascertain the title to the goods, was not, as it should have been, left to the jury. Baron Parke said, "The party obtaining a declaration is bound to go before a magistrate and satisfy him by evidence that he is the real owner of the goods, and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of July, for a supposed defect of title. The Statute supposes that the party will go before the magistrate immediately, and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed."

(*a*) 2 Bulst., 312. (*b*) 3 Camp., 215 n.

As to the extent to which a Pawnbroker delivering pawns to a party who makes a false declaration is protected by the statute, a question of some importance has been raised, but never formally decided. On the one hand, it has been said that the statute protects him from all risks, and on the other, that he stands in the position of a banker who pays a forged cheque at his own peril.

A careful examination of the statute, however, does not appear to support either of these views. The 15th & 16th sections of the Pawnbrokers' Act (39 & 40 Geo. 3, cap. 99) seem intended to be read together. The 15th section defines what the Pawnbroker is to do when any person, whether the real owner or not, presents a duplicate, of whose loss the pawnee has not had notice. The 16th section provides for cases in which from loss, &c., the owner or pawnor cannot possibly produce the ticket. Why was the 15th section made part of the Act? Its opening words expressly state "to prevent inconvenience to persons carrying on the trade of a Pawnbroker, from several different persons claiming a property in the same goods or chattels." To avert this inconvenience it is enacted that the person producing the duplicate "shall be taken to be, *so far as respects the person or persons having such goods and chattels in pledge*, the real owner of them," and the Pawnbroker is "directed and required," after being paid his principal and interest, to deliver such goods and chattels to the holder of the duplicate. The section then goes on to enact that the Pawnbroker "shall be and is hereby indemnified for so doing," *unless he has notice*

from the owner not to deliver, or unless he has had notice that the goods pawned have been, or are suspected to have been, fraudulently or feloniously taken or obtained, *and unless the real owner proceed in manner hereinafter provided for, (i.e.* by the 16th section,) when the duplicate has been lost, &c. The intention of the 16th section is to prevent the pawnor from losing his property *altogether* through the loss of the duplicate. But it is not the Pawnbroker's duty to inquire into the applicant's right *to the declaration;* on the contrary, he is expressly bound to deliver it at the request of any person who shall represent himself as the owner of the goods in pledge, and such person must then go before the magistrate whom he has to satisfy as to his right to the property. The real owner who obtains the goods through making a declaration, stands in as good a position as he was before, and the Pawnbroker is as much bound to deliver the pawn to such a declarant, as he would previously have been bound to deliver it to a person presenting the duplicate. Now section 15 protects the Pawnbroker who delivers goods to a party wrongfully tendering *a duplicate,* at the expense of the rightful owner of the property, and, *pari ratione,* section 16 protects the Pawnbroker who delivers a pawn on the wrongful tender of *a declaration.* The reason for protecting the Trade from inconvenience is at least as strong in the one case as in the other. The pawnor's liability to lose his property by a wrongful declaration is as much an incident of his contract, as the liability to lose it by losing or being robbed of the duplicate; and the pawnee may

well be held blameless who, having no notice to the contrary, believes the truth of a declaration, to make which falsely, involves the penalties of perjury. It seems probable, therefore, that whenever the question is discussed in Court, it will be held that a Pawnbroker who delivers to a declarant, is only liable under circumstances such as would render him liable if he delivered a pawn to a person wrongfully presenting the duplicate, *i.e.* when the owner has given him notice not to deliver, or when there is notice or suspicion that the goods have been fraudulently or feloniously obtained. For the convenience of trade, the statute indemnifies the Pawnbroker in the one case, and the argument from analogy goes to show that it does the same in the other. This view is strengthened by the fact that when giving judgment in *Vaughan* v. *Watt*, Baron Rolfe, who tried the case, using the words, not of the 16th, but of the 15th section, already cited, (*a*), said that the purpose of the declaration was "to indemnify the Pawnbroker." What amounts to "notice" may, according to circumstances, be a question for the Court or the jury, but unless there be some actual or constructive notice of the matters mentioned in the statute, the Pawnbroker who delivers to a person presenting the statutory declaration, will be protected from all proceedings at the suit of the real owner. But it seems unreasonable to contend that the protection is absolute and complete, so as to exonerate the Pawnbroker from *all* risks, though it does exonerate from all

(*a*) 6 M. & W., 492, 498.

but those arising from actual or constructive notice of matters which would render his delivery of the pawn a breach of duty. A case recently decided in one of the Metropolitan County Courts, *Mack* v. *Walter* (*a*), seems, it is true, to go further than this in favour of the Pawnbroker. The plaintiff had pledged goods with the defendant, and having lost the duplicate, had informed him of the circumstance, and requested him not to deliver the goods to any one but himself. The defendant promised not to do so, and charged plaintiff one penny for putting a notice to that effect on the pawn. Some time afterwards, a person applied for, and obtained a form of declaration from the defendant, who then, notwithstanding the notice, delivered the pawn to the declarant. The plaintiff appeared in person at the hearing, when the defendant's attorney contended that he was indemnified by the statute, and the Deputy-Judge, after consideration, decided in the defendant's favour. With every respect for the learned gentleman's opinion, the author adheres to the views above expressed. The case seems indeed a *reductio ad absurdum* of the absolute indemnity theory. The Pawnbroker made a charge for putting a notice on the pawn, thereby committing an offence under the statute, for which he was liable to a penalty of £10 (*b*), yet he nevertheless delivered it, in violation of the notice. To maintain that the statute sanctions such a breach of duty seems as contrary to the decisions of Common Law as to the dictates

(*a*) *Vide Pawnbrokers' Gazette*, June 19, 1865.
(*b*) Under 39 & 40 Geo. 3, cap. 99, sec. 26.

of common sense. *Vaughan* v. *Watt* establishes that the pawnee has the right to detain the pawn from a declarant for a reasonable time, when he is not satisfied of that declarant's *bonâ fides*, but if he really is so satisfied, or if no reasonable ground for doubt exists, then the statute affords him an indemnity. Yet, if this County Court decision be correct, he is at liberty to deliver the pawn, without any care at all, and even in defiance of the express terms of his promise to the pawnor. While expressing this opinion, it is perhaps hardly necessary for the author to add in terms, that until the matter be judicially decided in a Superior Court, any opinion expressed upon it must be to some extent uncertain, but it is scarcely conceivable that so unreasonable a construction would be upheld.

The question of the Pawnbroker's liability for loss by fire, came before the Court of Queen's Bench in the case of *Syred* v. *Carruthers* (*a*). The appellant had been summoned before a Magistrate at Liverpool, and ordered to pay £1 9s. for a pawn destroyed by an accidental fire on his premises. There was no attempt to question the Common Law doctrine previously laid down (*b*), but the magistrate thought that under 39 & 40 Geo. 3, cap. 99, sec. 24, a *Pawnbroker* was responsible for the state of his premises, and that, unless direct evidence was given of the cause of the fire, showing he was not in fault, it should be inferred that it arose by his default. But the Court (Campbell, C.J., Coleridge, Erle, and Crompton, J.J.), unanim-

(*a*) E. B. & E., 469. (*b*) See *ante*, p.p. 105 *et seq.*

ously held that it would be very unjust to make the appellant liable without any fault of his own, for the statute guarded against that by the very words used (*a*), and so far as the proof went, the fire which destroyed the goods pawned was accidental, without the Pawnbroker's default, neglect, or wilful misbehaviour. This case may be regarded as settling decisively a question which had been previously incidentally noticed in a case under the same Act (*b*), where the defendant, a Pawnbroker, had been committed to prison for non-compliance with a magistrate's order to restore a gun which had been destroyed under circumstances similar to those stated in *Syred* v. *Carruthers*. In that case the Court held the magistrate's order bad on various grounds, the chief of which was that the magistrate had no power to commit under the 24th section. Two of the Judges, however (*c*), distinctly negatived a suggestion that Pawnbrokers were liable for losses so incurred. But on account of the distress which is frequently occasioned by a fire at a Pawnshop, it has been suggested that it would be well to compel Pawnbrokers to keep floating Insurances upon their stock of pawns. Before this can be done, however, it would be necessary to alter the Law which limits the amount recoverable on a policy of insurance to the actual and personal interest of the person paying the premium in the goods he insures.

In previous sections of this work, we have enumerated sundry articles which a Pawn-

(*a*) See the Act, *post*.
(*b*) *Rex* v. *Cording*, 1 N. & M., 35, 4 B. & Ad., 198.
(*c*) Parke, J.; and Taunton, J.

broker cannot lawfully receive, and have also specified the hours within which the conduct of his business must be confined, the persons from whom a pawn must not be taken, and by whom it ought not to be received. We need therefore, in this place, do no more than refer the reader to those sections for information on such points (*a*). Other matters connected with the Pawnbroker's duties as to the redemption and sale of the pawn, will be hereafter dealt with under their proper heads. But we have yet to notice, in the present section, the obligations of pawnees in general, and of Pawnbrokers in particular, with regard to goods which have been stolen or fraudulently obtained, and afterwards pledged with them. Such obligations arise in part from the Common Law, but they are so greatly modified by statute that it seemed desirable to treat them entirely under this section. It is a general rule of the Law of England, that a man who has no authority to sell, cannot, by making a sale, transfer the property to another (*b*), that is to say, he cannot, in this manner, divest of his property the party previously entitled (*c*), unless by sale in market overt, which, however, does not bind the Crown. And it has been laid down, that the owner of property wrongfully taken, has a right to follow it, and, subject to a change by sale in market overt, to treat it as his own, and adopt

(*a*) See *ante*, secs. 2, 3, 4, 5 & 6.
(*b*) Per Abbott, C.J., *Dyer* v. *Pearson*, 3 B. & C., 38, 42, 4 D. & R., 648.
(*c*) Broom's *Legal Maxims*, 3rd edit., 351.

any act done to it (*a*). By the custom of London every shop in which goods are exposed publicly to sale, is market overt for such things only as the owner professes to trade in. But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them (*b*). And if a person wrongfully takes the goods of another and converts them into money, the latter has a right to recover the proceeds in an action for money had and received (*c*). But Pawnbrokers cannot set up the exception of market overt in answer to an owner's claim against them. The Act, 1 Jac. 1, cap. 21, sec. 5, provides that no sale, exchange, or pawn of stolen goods, which takes place within the City of London and the liberties thereof, or within Westminster and Southwark, or two miles of the City of London, shall work any alteration in the property of the person from whom the same were stolen. An action of trover will lie against the Pawnbroker, even though the delinquent has been tried and acquitted (*d*), for the pawnor can only part with such title as he has, and if a person pledges with another property to which he has no title, and which he has no right to pledge, the real owner may interpose and get possession of the property (*e*). And the Pawnbrokers'

(*a*) Per Pollock, C.B., in *Neate* v. *Harding*, 6 Ex., 349, 350, citing *Taylor* v. *Plumer*, 3 M. & S., 562, in which the same doctrine was laid down in an elaborate judgment by Ellenborough, C.J.

(*b*) 2 Bl. Com., 449.

(*c*) Per Parke, J., *Neate* v. *Harding*, 6 Ex., 349, 351.

(*d*) *Packer* v. *Gillies*, 2 Camp., 336 n.

(*e*) *Cheesman* v. *Exall*, 6 Ex., 341.

Act (*a*) empowers any Justice to order the restoration to the true owner, of any goods *unlawfully pawned.* And if the Justice is satisfied that the owner has just grounds for suspecting such goods to be pawned, he may issue a warrant for searching the Pawnbroker's premises within the hours of business, and on admittance being refused, the officer may break open the door within the hours of business, and if, upon search, the goods are found, and the owner's right of property in them is made out to the satisfaction of the Justice, he shall forthwith order them to be restored to the owner or owners thereof. And no Pawnbroker or other person shall oppose or hinder such search.

By the Act for regulating the Metropolitan Police Courts (*b*), it is provided that if any goods be stolen, unlawfully obtained, or being lawfully obtained, shall be unlawfully pawned, and complaint be made to any of the Metropolitan Police Magistrates, that such goods are in the possession of any broker, dealer in marine stores, or person who shall have advanced money upon such goods within the Metropolitan Police district, the magistrate may issue a summons or warrant to compel the appearance of the broker, &c., and the production of the goods. The magistrate, in such a case, on the ownership being made out to his satisfaction, may order the goods to be delivered up to the owner, either without payment, or on payment of such sum, and at such a time as he shall

(*a*) 39 & 40 Geo. 3, cap. 99, sec. 13.
(*b*) 2 & 3 Vict., cap. 71, sec. 27.

think fit, and any broker, &c., refusing or neglecting to give up the goods, or disposing or making away with the same, after notice that such goods were stolen or unlawfully pawned, shall forfeit to the owner of the goods the full value thereof, to be determined by the magistrate. But this order is not to bar the broker or dealer's right to bring an action within six months, to recover the possession of such goods from the person into whose possession they may come by virtue of the magistrates' order. Sec. 28 gives the magistrate power to make similar orders, in cases of summary conviction for illegal pawning, and also in cases where the goods are produced without the issue of a search warrant. And sec. 29 extends this power to goods *charged to have been stolen* or fraudulently obtained, and which are in the possession of any constable by virtue of a warrant of a magistrate, or in prosecution of any charge of felony or misdemeanour, in regard to the obtaining thereof, and the guilty party cannot be found or has been summarily convicted, or discharged, or acquitted, or when he is found guilty, but the property so in custody has not been included in any indictment on which he has been found guilty. If the rightful owner of such goods cannot be found, the magistrate may make such order as seems to him meet. There is the same saving of the rights of the pawnee to bring an action to recover possession, as is contained in sec. 27. Sec. 30 of the same Act goes beyond those which precede it, for it gives the magistrate power to apply the goods for the benefit of the Police Superannuation Fund, after the

expiration of twelve months, during which no person has appeared to claim them. By the Criminal Justice Act (*a*), Justices in Petty Sessions may order the restitution of property stolen, taken, or obtained by false pretences, by any offender dealt with under the Act, in such cases as the Court before whom the prisoner would, but for that Act, have been tried, would have been authorized to order restitution. The powers given by this Act to Justices in Petty Sessions may be exercised by a Stipendiary Magistrate, sitting alone (*b*). And though, under the Juvenile Offenders' Act (*c*), there is no forfeiture of the goods of the party convicted, the Justices may order restitution of the property to the owner in respect of which any conviction under the Act has taken place, whenever any person shall be *deemed guilty* under the provisions of the Act; and if the property is not forthcoming, the Justices, whether they punish or dismiss the complaint, may inquire into and ascertain the value of the property in money, and if they think proper, may order payment of such sum of money to the owner, by the person convicted, either at one time or by instalments at such periods as the Court may deem reasonable, and the party ordered to pay will be liable to be sued for the same.

The Metropolitan Police Act also casts upon any person to whom goods may be offered under suspicious circumstances, the duty of apprehending and detaining the party so

(*a*) 18 & 19 Vict., cap. 126, secs. 1 & 8.
(*b*) 21 & 22 Vict., cap. 73, secs. 1 & 2.
(*c*) 10 & 11 Vict., cap. 82, sec. 12.

offering. "Any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or otherwise unlawfully obtained, is authorized, and if in his power is required, to apprehend and detain the party, and as soon as may be, to deliver him into the custody of a constable, together with such property, to be dealt with according to law" (*a*).

Mr. Oke considers that "the power given by 39 & 40 Geo. 3, cap. 99, sec. 8, to the Justices to issue a warrant to apprehend any person unlawfully pawning the goods of others is supplemental to Jervis's Act (*b*), which authorises either a summons or a warrant to be issued in the first instance on an information for an offence." He adds, also, "it is the practice in London verbally to order the goods pawned, when produced at the hearing of this charge, to be delivered by the Pawnbroker to the owner, when the person pawning is convicted, and the sum ordered for their value, if paid, is handed to the Pawnbroker as the party injured" (*c*). The charge under this section must be of "knowingly and designedly" pawning, to give the magistrate jurisdiction. It is not sufficient that the complainant's information should say that he believed or suspected that the goods had been illegally pawned (*d*).

(*a*) 2 & 3 Vict., cap. 47, sec. 66.
(*b*) 11 & 12 Vict., cap. 43.
(*c*) *Magisterial Synopsis*, 6th edit., 437.
(*d*) *Tate* v. *Chambers*, 3 N. & M., M.C., 302.

The Act for Consolidating the Law of Larceny (*a*) contains some important provisions as to the restitution of property stolen, or otherwise fraudulently obtained. It provides (*b*) that if any person who is guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattels, money, valuable security, or other property whatsoever, shall be indicted for 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 in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanour, 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. There is a proviso that if it shall appear before award or order, that any valuable security has been paid or discharged by some person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken and received by transfer and delivery for a just and valuable consideration without notice of the theft, &c., the Court shall not order the restitution of such security. There is also a second proviso, intended to protect persons who receive goods from factors, under circumstances making their title valid under the Factors' Acts (*c*). The Committee of the Lords sanctioned a third pro-

(*a*) 24 & 25 Vict., cap. 96. (*b*) By sec. 100.
(*c*) 6 Geo. 4, cap. 94, and 5 & 6 Vict., cap. 39.

viso that the Court might, in its discretion, restore property, although the prisoner was acquitted, if the Court were satisfied that it had been stolen; but this clause was struck out in the Commons (*a*). Cases therefore are continually occurring in which the prisoner is tried and acquitted, but in which there is conclusive evidence that the property belonged to the prosecutor, and was stolen from him. We have seen that this discretionary power, which is withheld from Her Majesty's Judges, has been granted to Metropolitan Magistrates. From this anomaly it follows that if a prisoner be discharged by a magistrate, the prosecutor may nevertheless get back his goods; but if the prisoner be acquitted by a jury, the owner is left to his chance of recovering them in an action.

By section 103 of the same Act, a justice may, on oath of any credible witness, grant a warrant to search any person or premises on which he has reasonable cause to suspect that property, stolen or otherwise fraudulently obtained, may be found, and any person to whom the said property is offered to be sold, pawned, or delivered, is authorized, and if in his power is required, to apprehend the person offering the property and forthwith to take him before a Justice of the Peace, together with the property, to be dealt with according to Law. Such a search warrant may be issued on Sunday (*b*). And it may be granted for goods unlawfully pawned (*c*), and for unfinished goods (*d*). A positive oath that larceny is

(*a*) Greaves's *Criminal Law Acts*, 143.
(*b*) 11 & 12 Vict., cap. 42, sec. 4.
(*c*) 39 & 40 Geo. 3, cap. 99, sec. 13. (*d*) Sec. 12.

actually committed is not necessary (*a*). And, independently of statute, the cases show that a pawnee acquires no title to goods stolen, for if a man finds the goods of another man and pledges them for money, the owner may retake them. A country clothier sends cloths to his London factor to sell. Factor pawns them. Pawnee by answer admits factor pawned some cloths, but knows not if they were the plaintiff's. Ordered that the clothier in the presence of two more might have the view of them, which was that the plaintiff might be thereby entitled to bring an action at law (*b*).

It will be observed that one of the statutes just cited, mentions goods "lawfully in possession, but unlawfully pawned." As to when the offence amounts to unlawful pawning, and when to larceny, the rule is that if it appear that his goods were pledged for a temporary purpose, *and* with the intention and reasonable and fair expectation of being enabled shortly, by the receipt of money, to redeem them, the offence is unlawful pawning; but if the party intended permanently to deprive the owner of them, and had no intention or reasonable expectation of redeeming them, it is larceny. But this is a defence against the graver charge, which is not to be generally encouraged (*c*). A Pawnbroker refusing to deliver up goods pawned, on the order of Justices to that effect, in accordance with 39 & 40 Geo. 3, cap. 99, sec. 14, is *entitled*

(*a*) *Elsee* v. *Smith*, 1 D. R., 97, 2 Chit., 304.
(*b*) *Marsden* v. *Panshall*, 1 Vern., 407; see also *Hartop* v. *Hoare*, 2 Stra., 1186; *Williams* v. *Barton*, 3 Bing., 139.
(*c*) *R.* v. *Phatheon*, 9 C. & P., 552.

to be examined on oath (*a*). The charge of unlawfully pawning must be distinctly made. Hence where A. had deposited with B. certain goods as security, and a dispute arose concerning them, upon which A. obtained from C., a Police Magistrate, a summons requiring B.'s appearance on a day named, upon the appearance before C., A. made oath to a written information that he *believed* the goods to have been illegally pawned or disposed of by B. C. gave a further day to the parties, when after evidence being gone into, C. committed B. for re-examination on a charge for *suspicion* of having unlawfully disposed of the goods of A. It was held that the charge was not sufficiently made to give the Magistrate jurisdiction over the matter under the 8th section (*b*). During the progress of the case, the Court expressed some doubt whether, even when a party had been properly brought before the Magistrate in a case upon this statute, he could be committed for re-examination.

Formerly, it was held (*c*) that restitution of goods under 21 Hen. 8, cap. 11, which is re-enacted by 7 & 8 Geo. 4, cap. 29, sec. 57, extended only to a felonious and not to a fraudulent taking. But this power is now extended (*d*) to cases of misdemeanour. A proviso was, however, added especially to protect persons (*e*) who received goods from "any trustee, banker, merchant, attorney, factor,

(*a*) 7 *Justice of the Peace*, 696.
(*b*) *Tate* v. *Chambers*, 3 Nev. & M., (M.C.) 523.
(*c*) *R.* v. *De Veaux*, 2 Leach's C.C., 585.
(*d*) By 24 & 25 Vict., cap. 96, sec. 100.
(*e*) Greaves's *Consolidation Statutes*, 143.

broker, or other agent intrusted with the possession of goods or documents of title to goods *for any misdemeanour* under this Act." But without reference to the Pawnbrokers' Acts, any person may recover property stolen from him by action of trover, against an innocent purchaser, though no steps have been taken to bring the thief to justice, for the obligation which the law imposes on a person to prosecute the party who has stolen the goods does not apply where the action is against a third party innocent of the felony (*a*).

The provisions of the statute 39 & 40 Geo. 3, cap. 99, sec. 13, for compelling, in a summary manner, the return of goods unlawfully pawned, do not take away the Common Law remedy by demand and action of trover or detinue, and the real owner is not bound to tender the duplicate (*b*). And even when the party pawning the goods is an agent, yet if he be convicted of *stealing* them, the Court may order restitution in a summary manner, under the power formerly given by 7 & 8 Geo. 4, cap. 29, sec. 57, and now extended by 24 & 25 Vict., cap. 96, sec. 100. This was decided by Mr. Commissioner Kerr, in a case (*c*) at the Central Criminal Court, Sept. 1860. The prisoner Wollez had been convicted of stealing a large quantity of plush, the property of the prosecutor, for whom he was agent, and an order for restitution under 7 & 8 Geo. 4, cap. 29, was made. At the trial

(*a*) *White* v. *Spettigue*, 13 M. & W., 603.
(*b*) *Peet* v. *Baxter*, 1 Stark, 472; *Hartop* v. *Hoare*, 2 Stra., 1187; *Packer* v. *Gillies*, 2 Camp., 336.
(*c*) *Reg.* v. *Wollez & Bliss*, in re Hart, 8 Cox's C.C., 337.

it appeared that Hart had *bonâ fide* made an advance of £1,200 upon the goods, to the prisoner Wollez, while acting as the prosecutor's agent, and this, it was contended, entitled Hart, under the 7th section of the Factors' Act (*a*), to have the goods redeemed by the prosecutor's paying the money advanced thereon. But the Commissioner held that the Factors' Act did not affect the statute under which the order of restitution had been made, for that statute left the Court no option but to order the restitution of the goods when either the thief or the receiver had been prosecuted to conviction. For the Factors' and Brokers' Act cannot confer on the purchaser a better title *in law* than a sale in market overt, and there was no dispute that had Hart bought the goods in that manner, the property would have re-vested in the prosecutor on conviction. The order for an attachment was therefore made absolute. And the prosecutor has a right to restitution in *specie* (*b*). And such goods may be recovered in trover from the purchaser of them in market overt, upon a conversion by him subsequent to the conviction, even though the Court has omitted to make any order for restitution, for the effect of the statute 7 & 8 Geo. 4, (and of 24 & 25 Vict., cap. 96, sec. 100, where the operative words are the same), is to re-vest the property in stolen goods in the original owner, upon conviction of the felon (or misdemeanant) (*c*). At the same time, said Lord Campbell, "it is much to be

(*a*) 5 & 6 Vict., cap. 39.
(*b*) 8 Cox C.C., 341.
(*c*) *Scattergood* v. *Sylvester*, 19 L. J. (N.S.), Q.B., 447.

regretted whenever an order is not made, so as to obviate the necessity of an action, but it is not a condition precedent, as the property of the plaintiff begins after the conviction of the felon" (*a*). And the owner, if entitled to restitution, may take the goods wherever he can find them, provided he do not break the peace, notwithstanding, as shown by the case just cited, the goods have been sold in market overt. And the owner has a right to restitution if it can be conclusively shown that the goods he claims were bought with money, the proceeds of the offence for which the prisoner was convicted. In a case at the Central Criminal Court (*b*) the prisoner was convicted of stealing money. He had left in charge of another person a horse, which, from the evidence, he *must* have purchased with the money so stolen. It was held by Baron Gurney and Mr. Justice Williams, that the Court which tried him might make an order for the delivery of the horse to the prosecutor. But the general rule on which the Courts act in such matters, may be taken to be that ultimately adopted in the case of *Reg.* v. *Pierce* (*c*). The prisoner had stolen a large quantity of bullion in transit on a Railway, and the carrying Company had paid £10,000 to the consignee. It was clearly proved at the trial that £900, found in the possession of the prisoners, was the produce of the robbery. The Judges ordered this amount to be paid over to the Company, the remainder to lie in the hands of the Commissioner of Police. Subsequently, however, they ordered

(*a*) *Scattergood* v. *Sylvester*, 19 L.J. (N.S.), Q.B., 447.
(*b*) *R.* v. *Powell*, 7 Car. & P., 640. (*c*) 7 Cox's C.C., 207.

a special disposition of this property, in accordance with what appeared to be the equity of the case. But when the matter afterwards came before the Court for consideration of Crown Cases Reserved, it was held that the Judges had no power, either at Common Law or by Statute, to direct the disposal of a felon's goods, not belonging to the prosecutor, and the order was quashed, except as to so much of the convict's property as was clearly shown to have belonged to the Railway Company (*a*). During the arguments it was said by the Solicitor to the Treasury, that the Crown always endeavours to act according to the equity of the case; but the rule may now be regarded as well established in practice, that the Judges will not usually make an order for the summary delivery of stolen property, unless it be identified or in some way ear marked by the prosecution.

The restitution of goods is by virtue of statutes only, for by the Common Law there was no such restitution on an indictment, because it is at the suit of the King alone, and therefore the party was forced to bring an appeal of robbery in order to have his goods again (*b*); but there has been no writ of restitution for nearly three hundred years (*c*.) The practice is for the prosecuting counsel to apply to the judge for an order on the pawnee or purchaser to deliver up the property, immediately after the prisoner's conviction. But it is a recognized doctrine that a summary order of restitution works only after conviction, because if persons in possession of goods were com-

(*a*) 1 Bell's C.C., 235; 27 L.J. (N.S.), M.C., 231.
(*b*) 4 Bl. Com., 361. (*c*) Lofft, 88.

pellable to deliver them up before then, the incitement to convict the felon would be much abated, and this point is sometimes brought forward in actions for trover (*a*). This reason, however, does not seem to meet the case of an owner, who has done all he can towards the conviction, and has shown with moral certainty that the goods were stolen, but has failed to establish it by legal proof; and hence it is greatly to be regretted that the proposed clause in 24 & 25 Vict., cap. 96, sec. 100, giving a *discretionary* power to the Court in such cases, was struck out in the Select Committee of the Commons.

Briefly to recapitulate what has been said upon this subject, the result appears to be that if goods be stolen, the owner may recover them from an innocent purchaser. The custom of market overt may, in some cases, excuse purchasers of goods, which have been wrongfully but not feloniously taken, but this defence is not available to Pawnbrokers or pawnees at Common Law. Recent legislation has empowered the Judge before whom a prisoner is convicted, to make a summary order for the restitution of property which the prisoner has obtained by any felony or misdemeanour, and the same power has been given to Metropolitan Magistrates, Stipendiary Magistrates, and Justices at Petty Sessions, acting under the Criminal Justice Act, and the Juvenile Offenders' Acts. The rights of *bonâ fide* holders of valuable securities and negotiable instruments have been saved by a proviso, and so have those

(*a*) *Horwood* v. *Smith*, 2 T.R., 750, and note to *R.* v. *De Veaux*, 2 Leach, 586.

of persons receiving goods from factors, under circumstances which bring them within the benefit of the Factors' Acts; but this exception will not avail when the factor or agent has *feloniously* taken his principal's goods. Metropolitan Magistrates are distinguished by having a discretionary power to order the restitution of goods when a prisoner cannot be legally convicted, but when the moral presumption of the prosecutor's ownership is conclusive. The Pawnbrokers' Act renders Pawnbrokers liable to return goods which have been lawfully in the pawnor's possession, but which have been unlawfully pawned by him. Powers of search, &c., are given by different statutes, and the duty of arresting suspected persons is cast upon those to whom stolen goods may be offered, when they have power to apprehend them and reason to believe them guilty. When the statutes give power to Judges or Magistrates to order restitution, the order may be made in a summary way, immediately after conviction, but it must be confined to property which can be identified as having formerly belonged to the prosecutor, or to such as is clearly shown to have been obtained with the proceeds of the felony or misdemeanour of which the prisoner has been convicted.

SECTION X.

OF THE TIME AND MANNER OF THE REDEMPTION OF THE PAWN.

If the transaction is not a transfer of ownership, but a mere pledge, as the pledger has never parted with the general title, he may *at Law* redeem, notwithstanding he has not strictly complied with the conditions (*a*). If a clause is inserted in the original contract, providing that if all its terms are not strictly fulfilled at the time, and in the mode prescribed, the pledge shall be irredeemable, it will not be of any avail. For the Common Law deems such a stipulation unconscionable and void, as tending to the oppression of debtors (*b*). The Roman Law held such a stipulation a mere nullity (*c*), but the parties might agree that upon default in payment, the creditor might *bonâ fide* stipulate to take the pledge at a reasonable price. Whether the same principle exists in the Common Law does not appear to have been decided. But there is no doubt, that a subsequent agreement to that effect, or a waiver, *after* pledging, of the right to redeem, would be held binding between the parties (*d*). It is clear that by the Common Law, in cases of a

(*a*) Com. Dig., *Mortgage*, B.

(*b*) Story *On Bailments*, sec. 345; *Cortelyou* v. *Lansing*, 2 Caines (U.S.) Cas. in Error, 200.

(*c*) 1 Domat, B. 3, tit. 1, sec. 3, art. 11.

(*d*) Story *On Bailments*, 345.

mere pledge, if a stipulated time is fixed for the payment of the debt, and the debt is not paid at the time, the absolute property does not pass to the pledgee. This doctrine is at least as old as the time of Glanville (*a*). If the pawnee does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and upon a tender of the debt, he may at any time be compelled to restore it, for prescription, or the statute of limitations, does not run against it (*b*), though after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished and the property will be held to belong absolutely to the pawnee (*c*). And it has been said that where no time of redemption is agreed, he that pawns goods may redeem during his life (*d*), but if he is outlawed, during his outlawry he cannot redeem them (*e*). And Story says (*f*), that where no time is fixed by the contract, there, upon the general principles of law, the pawnor has his whole life to redeem, unless he is previously quickened, as he may be, through a Court of Equity, or by notice *in pais* (*g*). It has been made a question whether, if the pawnor dies without redeeming, the right survives to his representatives, and in *Ratcliff* v. *Davis* (*h*) the Court distinctly said it did not, "for it is a

(*a*) Glanville, Lib. 10, cap. 6, 8, 1 Reeves Hist., 161, 163.
(*b*) *Kemp* v. *Westbrook*, 1 Ves. 278, Com. Dig., tit. *Mortg.*, B.
(*c*) Story *On Bailments*, sec. 346, see *ante*, page 62.
(*d*) *Ratcliff* v. *Davis*, Yelv. 178.
(*e*) S. C. Per Williams, J., 1 Bulst., 29.
(*f*) Treatise *On Bailments*, sec. 348, see also Glanville, Lib. 10, cap. 6, 8.
(*g*) *Cortelyou* v. *Lansing*, 2 Caines (U.S.) Cas. in Error, 200.
(*h*) Yelv. 178.

condition personal." But there have been cases in equity in which the right has been enforced in favour of the representatives, and this seems, according to modern opinions, the true doctrine (*a*); the more so as it has always been held that if the pawnee dies before redemption, the pawnor may still redeem against his representatives (*b*).

By the Roman Law, the pawnor, on redemption, was bound to reimburse the pawnee all necessary expenses and charges in keeping or preserving the pawn (*c*). And though no decision has been found in the Common Law directly on this point (*d*), the same rule would probably be adopted, should the question arise, for as necessary expenses must contribute to the advantage of the pawnor, by improving the pawn, or at least preserving it from injury, it would seem, on principle, to come within the second head of *Lampleigh* v. *Braithwaite* (*e*), by which any one who has adopted and enjoyed the benefit of a consideration, is held to have impliedly promised to have requested and promised in due form. But whatever be the rule as to ordinary expenses and charges in a case of mutual silence, it seems but reasonable that extraordinary expenses and charges which could not have been foreseen, should be reimbursed by the pawnor. As to expenses, not necessary, but useful, the rule of the Roman Law left them to be allowed or disallowed in

(*a*) *Demandray* v. *Metcalf*, Pre. Ch., 420; *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.
(*b*) Com. Dig., *Mortgage*, B., *Ratcliff* v. *Davis*, Yelv., 178.
(*c*) Dig. Lib. 13, tit. 7, l. 8.
(*d*) Story *On Bailments*, sec. 357.
(*e*) Hobart, 105, 1 Smith's L.C., 5th edit., 135.

the discretion of the Court, according to circumstances. But the Common Law has not invested the Courts of Justice with any such discretion, or allowed the pawnee any such latitude of expenditure without the approbation of the pawnor, express or implied (*a*), though probably a jury would lean to an interpretation of acts from which a contract might be implied, which would render the practical effect very similar to that of the Roman Law.

We have already seen that it will depend on express contract, or on usage in trade, or between the parties, whether a pawnor coming to redeem is bound to pay a debt existing before the pawn was deposited (*b*).

Upon tender of the money secured by the pawn, by the pawnor or his executors, the property, notwithstanding the refusal, is reduced instantly to the pawnor, or his executors, without claim. But *per curiam*, the executor shall have action of debt for the money against the pawnor, for upon the redemption it remains a duty (*c*). And he may also bring trover and conversion for them (*d*). And in another case it was said that upon tender of the money, and refusal to deliver the pawn, an action of trespass upon the case lies (*e*), but this it seems was questioned at the time the judgment was given.

It was at one time supposed that where a pawnee refused, on tender of the money, to re-

(*a*) Story *On Bailments*, sec. 358.

(*b*) *Demandray* v. *Metcalf*, Pre. Ch. 419, Gilbert, Ex. R., 104, *Ex parte Deeze*, 1 Atk., 228, 235, 237; *ante* pages 73, 74; *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.

(*c*) *Ratcliff* v. *Davis*, Yelv. 178. (*d*) S. C., 1 Bulst., 30.

(*e*) Per Doderidge, J., *Isaack* v. *Clark*, 2 Bulst., 306, 309.

deliver the goods, he might be indicted as for a misdemeanour, because the goods being secretly pawned, it may be impossible for the pawnor to prove delivery in an action of trover, for want of witnesses (*a*); but this seems at least doubtful without some more conclusive evidence than the mere refusal of the pawnee to re-deliver. But there is no doubt, that if the pawnee wrongfully refuse to re-deliver the pawn, upon demand and tender in due time, he becomes at once a wrong doer, and will be liable, even though the pawn be afterwards lost or stolen from him under circumstances which would not otherwise have made him so. And though refusal by a general agent of a party, is not evidence of a conversion by that party, and it must be shown that the agent acted under the special direction of his principal (*b*), still, proof of a refusal by the servant of a Pawnbroker has been held to be evidence of a conversion by the master (*c*).

The Common Law doctrines as to the pawnor's right to redeem are recognized and limited by the Pawnbrokers' Act, which provides that goods pawned be redeemed within 12 months (*d*), or within 15 months if notice has been given to the pawnee in due time, and before the goods are sold (*e*). The Pawnbroker is bound to deliver back the goods on payment of the sum advanced thereon with interest,

(*a*) Per Lord Holt, Anon. 3 Salk. 267; *Coggs* v. *Bernard*, Holt, R., 529, 2 Salk. 521.
(*b*) Per Gibbs, C.J., *Pothonier* v. *Dawson*, Holt, P.N.C., 383.
(*c*) *Jones* v. *Hart*, 2 Salk., 441.
(*d*) 39 & 40 Geo. 3, cap. 99, sec. 17.
(*e*) Sec. 19.

according to the rates allowed by the Act, and on production of the duplicate. Should he refuse to do so, without showing reasonable cause, any justice or justices may examine the pawnor and other witnesses on oath or solemn affirmation, and on proof of tender and refusal as above, may forthwith order the said goods to be given up, and on neglect or refusal to give up the goods or to make satisfaction as the justice or justices may direct, the Pawnbroker may be committed to prison until he complies. The power of commitment under this 17th section, however, does not extend to the cases of embezzlement, loss, or damage, provided for by the 24th section (*a*). Persons who produce the duplicates are to be deemed the owners (*b*), unless the real owner has given notice to the contrary; and when the duplicate has been lost, mislaid, or fraudulently obtained from the owner thereof, the Pawnbroker is bound to supply a copy, together with a form of affidavit (or since the statute, 5 & 6 Wm. 4, cap. 62, a form of declaration), which declaration, setting forth the circumstances, shall be made before, and to the satisfaction of, some justice of the peace, who shall authenticate the same, whereupon the Pawnbroker shall allow the pawnor to redeem, on leaving with him the copy of the duplicate and the declaration. These provisions, it will be observed, do not indemnify the Pawnbroker against the real owner, who, as we have seen, is not bound to tender the duplicate; but if the Pawnbroker has a *bonâ fide* doubt as to the title to the goods, he may refuse to deliver

(*a*) *R.* v. *Cording*, 1 N. & M. 35; 4 B. & Ad., 198.
(*b*) Sec. 15.

until a reasonable time for satisfying himself on that point. And such *bonâ fides*, and reasonable time, are questions for the jury (*a*).

(*a*) *Vaughan* v. *Watt*, 6 M. & W., 492, see *ante*, pages 122, 127.

SECTION XI.

OF THE SALE OF THE PAWN.

Where goods are pawned, redeemable at a day certain, the pawnee, in case of failure of payment at the day, may sell them (*a*), or he may sue the pawnor for his debt, retaining the pledge as security (*b*). The right of sale results, by the Common Law, from the contract of pledge (*c*). If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and to require the pawn to be sold, on neglect or refusal of the pawnor to comply (*d*).

The Roman law allowed a pledge to be sold though a sale was not mentioned when the contract was made, and even if it were originally prohibited, the pledgee might sell on notice and default of payment (*e*). Such sale might be by judicial act, or by act of parties, but Justinian directed that in the absence of stipulation, the pawnee might sell after two years from proper notice to the party, or from a judicial sentence, and not before (*f*). Modern nations have generally required a judicial sale,

(*a*) 3 Salk., 267, see also *Lockwood* v. *Ewer*, 9 Mod., 278.
(*b*) Per Holt, C.J., Anon., 12 Mod., 564, Viner's Ab., tit. *Pawn*, (H.)
(*c*) Story *On Bailments*, sec. 308. (*d*) Story, sec. 308.
(*e*) Story *On Bailments*, sec. 309.
(*f*) Story, sec. 309, citing Pothier Pand., Lib. 20, tit. 4, n. 18, 19, Cod. Lib., 8, tit. 34, 3, sec. 1.

and the Common Law of England in Glanville's time required a judicial process to justify a sale, or at least to destroy the right of redemption. The law now leaves an election to a pawnee who is not a Pawnbroker. He may file a bill in Equity for a foreclosure and sale, or he may proceed to sell *ex mero motu*, upon giving due notice to the pledger (*a*). And although it was said by Lord Hardwicke, in *Lockwood* v. *Ewer* (*b*), that where the pledge is of personalty, the party has no occasion to come into Court for a foreclosure, yet a judicial sale is most advisable whenever the pledge is of large value; as the Courts watch any other sale with uncommon jealousy and vigilance, and any irregularity may bring its validity into question (*c*). The case of pawns is in this respect distinguishable from ordinary liens, and the foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation (*d*); but in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances (*e*). But the pawnee's right is strictly confined to a sale; for he cannot appropriate the property to himself upon the default of the pledger; and it is in order to secure his fidelity and good faith, that he can never become a purchaser

(*a*) *Kemp* v. *Westbrook*, 1 Ves. 278; Story, sec. 310, and cases there cited. (*b*) 9 Mod., 278.

(*c*) *Demandray* v. *Metcalf*, Pre. Ch. 419; *Kemp* v. *Westbrook*, 1 Ves. 278; *Vandersee* v. *Willis*, 3 Bro. C. Ch., 21.

(*d*) Per Gibbs, C.J., in *Pothonier* v. *Dawson*, 1 Holt's N.P.R., 383.

(*e*) *Ibid*, Story, sec. 311.

at the sale (*a*). The Pawnbrokers' Act, in accordance with this principle, prohibits the Pawnbroker from buying pledges, except at public auction in the manner provided by the Act, and it also forbids him to purchase or take in pledge or exchange the note or memorandum of any other Pawnbroker (*b*). This rule, says Justice Story, will be found recognized equally in the Common and the Roman Law, and it is still more broadly enforced in equity jurisprudence, that where a fiduciary relation exists between parties, the agent shall never be permitted to obtain a personal benefit by any act or purchase which may prejudice his principal, or involve him in a conflict of duties and interests. For a trustee for sale cannot purchase for himself (*c*). And the pawnee in case of a sale would most probably be considered as much a trustee, for the benefit of him entitled to the interest in residue, as the assignee of a bankrupt, or any other person acting in a fiduciary character (*d*). And of such an assignee it has been said that, unless the policy of the law makes it impossible for him to do anything for his own benefit, it is impossible to see in what cases the transaction is morally right (*e*). In the case in which this judgment was given, the purchase had been made by an assignee in bankruptcy, and Lord Eldon said that as he was a trustee for the benefit of those entitled to the residue, he must

(*a*) Story *On Bailments*, secs. 318, 319.
(*b*) 39 & 40 Geo. 3, cap. 99, sec. 21.
(*c*) *Fox* v. *Mackreth*, 2 Bro. C. C. 400, 2 Cox, 320. 1 Tudor's L.C., 2nd edit. 92.
(*d*) Cobbett *On Pawns*, 44.
(*e*) Per Eldon, C., *ex parte* Lacey, 6 Ves. Jr., 629.

buy for them, and not for himself. The analogy between "those entitled to the residue" and the pawnor, is so complete that there can be no doubt but that the rule laid down in the one case would be held to prevail in the other. It has indeed been said (*a*), that if there be no bidder or purchaser to be found, the Judge may ascertain the price thereof to the creditor, and by paying the just value of it (as settled by the Court) unto the debtor, he shall acquire the full property. But it seems questionable whether our Courts would take upon themselves the task of thus ascertaining the value of pledges, except in very peculiar instances. As a pledge is not a transfer of ownership, the pledger may at law redeem, notwithstanding he has not strictly complied with the condition of his contract (*b*). But if the pawnee does not choose to exercise his acknowledged right to sell, he may at any time be compelled to restore it, for prescription, or the Statute of Limitations, does not run against it (*c*).

It follows, therefore, that pawnees at Common Law, have the right to sell by virtue of contract, express or implied, or on due notice to the pawnor; or by virtue of an order in Equity to that effect. And as to Pawnbrokers, goods pledged with them are to be deemed forfeited at the expiration of one whole year, exclusive of the day on which the chattels were pawned; after which time, or after a further delay of three months, on notice from the

(*a*) Ayliffe Pand., Book 4, tit. 18, p. 543.
(*b*) Com. Dig., *Mortgage*, B.,
(*c*) *Kemp* v. *Westbrook*, 1 Ves. 278. *Walter* v. *Smith*, 5 B. & Ald., 439, 441.

pawnor, the Pawnbroker may order to be sold by public auction, and not otherwise, all chattels on which any advance from 10s. to £10 has been made (*a*). The auctioneer must expose the goods to public view; must publish catalogues with the Pawnbroker's name and address; the month the goods were received in pawn; and the number of each pledge from the Pawnbroker's books. He must also advertise the sale in some public newspaper on two several days, two days at least before the first day of sale; the name and address of the Pawnbroker with whom they were pledged; the month during which they were received; and the goods of each Pawnbroker shall be separately catalogued, under a penalty payable to the owner of the goods (*b*). And pictures, prints, books, bronzes, statues, busts, carvings in ivory and marble, cameos, intaglios, musical, mathematical, and philosophical instruments, and china, shall be sold by themselves, four times only in each year, *i.e.* on the first Monday in January, April, July, and October, in every year, and on the days following if the sale shall exceed one day, and at no other time. The sale must be catalogued as above, and advertised twice in some public newspaper, three days at least before the first day of sale. The penalties under this clause are not more than £5 nor

(*a*) It is said that a very unfair advantage has been generally taken of this distinction, inasmuch as where goods of considerably greater value than 10s. are pawned for less than that amount, an absolute forfeiture of such goods is very commonly insisted on. Evans's note to Chitty's *Collection of the Statutes*, 2nd edit., vol. 3, 757. See *infra*, pages 161 to 166.

(*b*) 39 & 40 Geo. 3, cap. 99, sec. 17.

less than 40s (*a*). And on notice in writing or in the presence of one witness, given by the pawnor to the Pawnbroker before the end of the year, not to sell at the end of the year, the Pawnbroker shall abstain from selling, and the pawnor shall have liberty to redeem for three months longer (*b*). But the Pawnbroker has no right to sell unredeemed pledges, even after the expiration of a year from the time they were pledged, if the original owner, before sale, tender him the principal and interest due (*c*). As where the plaintiff had pledged a watch and seals with defendant, a Pawnbroker at Bristol. More than a year and a day afterwards, but while the articles still remained in the defendant's possession, plaintiff demanded to redeem, and tendered the principal and interest due. Defendant refused to return the goods, saying they had become forfeited through the year having expired; they were afterwards sold by auction, and defendant himself became the purchaser. Chief Justice Abbott directed the jury that the plaintiff had a right to recover, for the act did not vest the property absolutely in the Pawnbroker, at the expiration of a year and a day, but only gave him a power to sell, in order to reimburse himself. The jury found for the plaintiff, and the Court unanimously refused a motion for a new trial, saying that, "if, at any time before the sale has actually taken place, the owner of the goods tender the principal and interest and expenses incurred, he has a right to his goods and the Pawn-

(*a*) Sec. 18. (*b*) Sec. 19.
(*c*) *Walter* v. *Smith*, 5 B. & Ald., 439.

broker is not injured" (*a*). For if the party pledging pays these charges to the Pawnbroker before sale, the purposes of a sale are answered, and the Pawnbroker has no right to sell (*b*). The words "shall be deemed forfeited and may be sold" (*c*), mean, not that the things shall become the absolute property of the Pawnbroker, but only that they shall be so far forfeited as that the Pawnbroker may take steps towards a sale (*d*). And the Pawnbroker must keep an account of the sales of all goods pawned with him for upwards of 10s., which shall specify the date of the pledge; the pawnor's name; the date and produce of the sale, and the name and address of the auctioneer. The surplus produce of the sale, after payment of debt, interest, and costs, belong to the pawnor, if he makes demand for the same within three years after the sale. If the entry be not made *bonâ fide*, according to the directions of the Act, the offender shall pay £10 and treble the amount for which the goods were originally pawned to the pawnor or his representatives, the same to be recoverable by distress warrant under the hands of two Justices (*e*).

The words of the Act seem in some measure to exempt Pawnbrokers from the pawnor's disability to purchase the pawn, above referred to. In the 21st section occur the words "save and except at such public auction as aforesaid;" the

(*a*) Per Abbott, C.J., 5 B. & Ald., 441.
(*b*) Per Bayley, Holroyd and Best, J.J., 5 B. & Ald., 442, 443.
(*c*) 39 & 40 Geo. 3, cap. 99, sec. 17.
(*d*) Per Bayley, J., 5 B. & Ald., 442.
(*e*) 39 & 40 Geo. 3, cap. 99, sec. 20.

popular acceptation of which has been, that a Pawnbroker is thereby enabled, by implication, to purchase, and that there can be no objection to his doing so, either at Law or in Equity. And in one of the reports of *Walter* v. *Smith* (*a*) it is incidentally stated that the Pawnbroker had been the purchaser of the goods in question. But the question whether or not such a purchase was lawful, was not then raised.

It has been said that where there is no contract on the part of the pledgee requiring him to sell, at Common Law he is not compellable to do so; but this was said anent the point whether another creditor, by a foreign attachment or execution, could compel the pledgee to sell; and it was very properly held that he could not (*b*).

When several things are pledged, each is deemed liable for the whole debt or other engagement, and the pledgee may sell them from time to time, till the whole debt or claim is discharged. If one thing perishes by accident or casualty without his default, he has a right over all the residue for his whole debt, or duty, and he may sell, not only the things pledged, but also their increments. But when once he has obtained an entire satisfaction, he can proceed no further, and if there is any surplus, it belongs to the pledger (*c*). The liabilities consequent upon this doctrine, will be considered in the following section.

The question has often been raised, but

(*a*) 5 B. & Ald., 439.

(*b*) Story *On Bailments*, sec. 320, citing *Badlam* v. *Tucker*, 1 Pick., 389.

(*c*) Story *On Bailments*, sec. 314.

never authoritatively decided, as to how far the Common Law right to redeem a pawn is controlled or abrogated by the words of the 17th and 20th sections of the Pawnbrokers' Act. It has been contended, and in practice, as appears by Mr. Evans's note (*a*), this view has been pretty generally adopted, that a pawn on which not more than 10s. has been lent, becomes absolutely forfeited at the expiration of the year and day, and that under no circumstances can the pawnor thereafter claim any interest in it. This practice is frequently defended on the authority of a case heard before Justices, and reported 19 *Legal Observer*, p. 261, in which the Bench considered that the observations of the Judges in *Walter* v. *Smith* (*b*) do not apply to pawns on which not more than 10s. has been advanced. But this doctrine will hardly bear examination. It has been elsewhere shown that by the Common Law, the pawnor's right to redeem lasts his life, and passes to his executors, if no notice of sale is given. Now it is a perfectly well settled rule of legal construction, that a Statute in derogation from the Common Law, is to be construed strictly, or in other words, that no greater effect is to be given to its provisions than the words render imperative. When applying this principle to the above named Sections, it is important to notice that Section 17 says that "all goods and chattels which shall be pawned or pledged shall be deemed forfeited and *may be sold* at the expiration of one whole year, &c." Does this

(*a*) See *ante*, page 158.
(*b*) 5 B. & Ald., 439. See *ante*, pages 159, 160.

say that the pawnor loses his right to the goods *ipso facto*, when the year and day have passed? Clearly not; for the very same words are used with reference to pawns above 10s., which *Walter* v. *Smith* (*a*) expressly declares the pawnor has a right to redeem so long as they remain in the pawnee's possession. In that case it was said by Chief Justice Abbott, that the right the Statute gives to the Pawnbroker is "a right to expose and sell the pawn as soon as he can consistently with the provisions of the Act, but if, *before the sale has actually taken place*, the owner of the goods tender the principal, interest, and expenses, he has a right to the goods, and the Pawnbroker is not injured. For the power of sale is merely allowed him to secure him the money which he has advanced, together with the high rate of interest which the law allows him in his character of Pawnbroker." To the same effect were the remarks of Justice Bayley: "The words mean, not that the things pledged shall become the absolute property of the Pawnbroker, but only that they shall be so far forfeited, that the Pawnbroker may take steps towards a sale." Justice Holroyd also said, "the goods are forfeited *for the purposes of sale*;" and Justice Best said the doctrine for which the defendant contended "would be an abuse." It is true that this case arose in respect of a pawn of more than 10s., but it should be remembered that the word "forfeited" is in the 17th section applied to *all* pawns, and it is hardly possible

(*a*) 5 B. & Ald., 439.

to conceive that a Superior Court would hold that the same word means an *absolute* forfeiture *before sale* in the one case, and only a *qualified* forfeiture in the other. It would seem then that the forfeiture incurred is the same in both cases, and the power given is in both, a power of sale, unless it can be shown that the 20th section enlarges the operation of the 17th. But it is impossible to maintain that it has any such operation in this particular. It prescribes the manner of selling pawns above 10s., and protects the interests of the pawnor in the surplus, after they have been sold. But the necessity for this only arises *after sale*, and therefore the pawnor's Common Law right to redeem before sale remains unaffected. Till the sale has actually taken place, the right to redeem remained in the pawnor, and as this right is not taken away by Statute, there is no ground for contending that it does not exist with respect to pawns of small value. "Statutes are not presumed to make any alteration of the Common Law, further or otherwise than the Act does expressly declare, therefore in all general matters the law presumes that the Act did not intend to make any alteration, for if Parliament had had that design, they would have expressed it in the Act" (*a*). And this view derives all the greater force from the consideration that the Pawnbrokers' Act was a remedial Statute, and as such should be construed "to suppress subtle inventions and evasions for continuing the mischief (it was

(*a*) Per Trevor, C.J., 11 Mod., 150.

meant to remedy), *pro privato commodo*, and to give force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*" (*a*). But no public benefit is ensured, though there may be much of private mischief wrought, by refusing to allow the redemption of a pawn of low value after the time during which the pawnor's right to redeem is absolute, but *before sale*.

There remains the further question, whether the pawnor of such a pawn has any rights *after* sale. It seems quite clear that he has not. The 20th section provides for the way in which the Pawnbroker is to keep his books, &c., so as to give the surplus from the more costly pawns to the pawnor, but it says nothing about the smaller ones. Here the maxim *expressio unius est exclusio alterius* clearly applies, and we must conclude that the legislature meant that the pawnor's right to chattels of small value, was to end with their sale. *De minimis non curat lex*, seems to hold good after sale as to these lower priced pawns. To keep the accounts which the Act renders necessary for pawns above 10s. for pledges of a few shillings, or even a few pence, would involve an amount of labour and expense which would make it impossible to carry on that part of the trade, so that it may well be taken to be a part of the bargain between the State and the Pawnbroker, when the latter takes his license, that he shall not have to keep such accounts of the sales of pawns of small value which would be necessary to enable him to return the overplus. In

(*a*) *Miller* v. *Salomons*, 7 Ex., 522.

Ireland, and other countries where the rate of interest is subject to fewer restrictions than with us, the per centage charged on these small pawns is very greatly higher than the Pawnbrokers' Act allows. A careful consideration of the sections of the Act bearing on this subject, leads to the conclusion that as no part of the Act takes away the pawnor's right to redeem *before sale*, he is entitled to exercise that right as to pawns below as well as above 10s., at any time before the sale is actually made, but that after sale, he has no right to the overplus, except as to pawns above ten shillings, for which the Act makes express provision.

SECTION XII.

RIGHTS AND LIABILITIES OF THE PAWNEE AFTER THE SALE.

When once the pawnee has obtained an entire satisfaction, he can proceed no further; and, if there is any surplus, it belongs to the pledger (*a*). And the pawnee's right is strictly confined to a sale; for he cannot appropriate the property to himself upon the default of the pledger (*b*); for it is certain that at Common Law, he cannot alienate the property absolutely, nor beyond the title actually possessed by him, unless in very special cases (*c*). Where the pledge is mere current coin, or a negotiable security, the pawnee may sue for and receive the money due thereon, in his own name. But unless in a very extreme case, he cannot compromise with the parties for less than the sum due, or if he does, he will be compelled to account to the pledger for the full value (*d*). By the Common Law, he may deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest conditionally to another person, without in either case destroy-

(*a*) Story *On Bailments*, sec. 314, 1 Domat, B. 3, tit. 1, sec. 1, art. 29, sec. 3, art. 12, Bac. ab., tit. *Bailment*, B.

(*b*) Story *On Bailments*, sec. 318.

(*c*) *Hartop* v. *Hoare*, 3 Atk. 44, 52, 53.

(*d*) Story *On Bailments*, sec. 321.

ing or invalidating his security (*a*). And he must render an account of all income, profits and advantages derived by him from the pledge, when such an account is within the scope of the Bailment, charging against these, the expenses formerly mentioned (*b*). Pothier thinks that the duty of the pawnee goes further, and that he is bound to account for all the profits and income which he might have received from the pledge, but for his own negligence (*c*). This would, doubtless, be true in the Common Law, in all cases where there is an implied (or express) obligation to employ the pledge at a profit. As if there is a pledge of money, and it is agreed that it shall be let out at interest by the pawnee, and he has neglected his duty, or if the pledge is to be employed in its usual business, upon profit; as a ferry-boat at a ferry, or a coach and horses in the customary carriage of passengers (*d*). It seems unlikely, however, that the Courts would, without express agreement, or irresistible implication, apply the doctrine of trusteeship (*e*) so strictly between pawnor and pawnee as this would involve. And though the latter must account for the profits of the pawn he has employed, he will have an allowance made to him for his loss

(*a*) *Ratcliff* v. *Davis*, 1 Bulst. 29; see also *McCombie* v. *Davis*, 7 East, 5; Story *On Bailments*, sec. 324, citing *Bowman* v. *Wood*, 15 Mass. (U.S.) R., 534; *Garlick* v. *James*, 12 Johns (U.S.) R., 146.

(*b*) See *ante*, page 74.

(*c*) *De Nantissement*, n. 36, Ayliffe, Pand. B. 4, tit. 18, p. 533.

(*d*) Story *On Bailments*, sec. 343.

(*e*) As laid down in *Attorney-General* v. *Alford*, 4 D.G., M. & G. 843, and cases there cited, *Knott* v. *Cottie*, 16 Beav., 77, 80.

of time, skill, and trouble. As in *Brown* v. *Litton* (*a*), where a captain having died, leaving 800 dollars on board his ship, which he intended to invest in trading on that voyage, Lord Keeper Harcourt allowed the mate (who had succeeded to the command), a salary for his pains and trouble in the management thereof. And also as in *Brown* v. *De Tasted* (*b*), where Lord Eldon allowed a surviving partner proper allowances for his management of the business (*c*).

If at the time when the pledger applies to redeem, the pledge has been sold by the pledgee, without any proper notice to [or contract by] the former, no tender of the debt due need be made before bringing an action therefor; for the party has incapacitated himself to comply with his contract to return the pledge (*d*). And the same rule applies where the pledgee dispenses with a tender; as if he refuses, under any circumstances, to restore the pledge. But if an action is brought, the pledgee may recoup his debt in the damages. Subject to the rights of the pledgee, the owner may sell or assign his property in the pawn; and in such a case, the vendee will be substituted for the pledger, and the pledgee will be bound to allow him to redeem, and to account with him for the pledge and its proceeds. And if the pledge has

(*a*) 1 P. Wms., 140, 10 Mod. 20.

(*b*) Jac., Ch. R., 284.

(*c*) See also *Crawshay* v. *Collins*, 15 Ves. 218; 1 J. & W. 267, 2 Russ. 325; *Featherstonhaugh* v. *Fenwick*, 17 Ves., 298; *Coke* v. *Collingridge*, Jac. Ch. R., 607; *Wheatcroft* v. *Hickman*, 9 C.B. (N.S.), 47, 8 H. L. Ca., 268; 30 L. J. (N.S.), C.P. 125.

(*d*) *Cortelyou* v. *Lansing*, 2 Cain. (U.S.) Cases in Error, 200; see also *Cutter* v. *Powell*, 6 T.R., 320, 2 Smith's L.C., 1.

suffered injury by the pledgee's default, the owner, or his representative, is entitled to a recompense in proportion to the injury sustained, unless such injury shall have arisen from accident, or from the natural decay of the pledge (*a*).

This right of the pawnor to any overplus, involves the corollary that if the things pawned are insufficient to pay the debt, or other duty, the deficiency continues a personal charge on the debtor, or other contracting party, and may be recovered accordingly, because, although the security ceases, yet the duty remains, inasmuch as the money lent is not repaid. And in a case where the opposite view was insisted on by the counsel for the defendant, the Court, after proof of many particulars to induce a belief that in these loans no regard was had to the personal security, left it to the jury upon this point, that where money is generally lent upon a pledge, the law will not deprive the lender of his remedy against the person; and that to discharge the person of the borrower, there must be a special agreement to stand to the pledge only (*b*). And the pledgee may release one of the things pawned, without affecting his right to the others.

The Pawnbrokers' Act adopts this Common Law doctrine that the pawnor has a right to any surplus that is produced by the sale of the pawn, after satisfying the amount of the pawnee's claim, by the provision we have already quoted (*c*), compelling the Pawnbroker

(*a*) Story *On Bailments*, secs. 349, 350, 351.
(*b*) *South Sea Co.* v. *Duncomb*, 2 Str. 919.
(*c*) *Ante* sec. xi., pp. 158 *et seq.*

to keep an account of all sales under the Act, and also by a subsequent part of the same section (*a*), which provides that in case pawns on which more than 10s. have been advanced shall be sold for more than the principal and interest due thereon at the time of sale, the Pawnbroker shall pay the overplus on demand by the pawnor or his representatives, if demand be made within three years after such sale, the necessary costs of the sale being first deducted. And the pawnor or his representatives shall be permitted to inspect the entry required by statute to be made, on payment of one penny, and on refusal to allow such inspection to the pawnor, or his representatives, who shall produce the needful documentary evidence of the character in which they appear, or if the entry be not made, or the sale be not *bonâ fide*, or the payment of overplus, on demand, be refused, the Pawnbroker shall be subject to a penalty of £10 and treble value, leviable by distress under the hands of two Justices.

(*a*) 39 & 40 Geo. 3, cap. 99, sec. 20.

SECTION XIII.

PERSONAL LIABILITY OF PAWNOR.

The possession of the pawn does not suspend the right of the pawnee to proceed personally against the pawnor for his whole debt, or other engagement, without selling the pawn, for it is only a collateral security, and to discharge the person of the borrower, there must be a special agreement to stand to the pledge only (*a*). If the pawnor through default or conversion of the pawnee, has recovered the value of the pawn in an action, still the debt remains, and is recoverable, unless in such prior action it has been deducted (*b*). But by the Roman law the pawnee could not be forced to commence a personal suit against the pawnor, for he might rely on the security of his pledge (*c*). Mr. Cobbett, however (*d*), cites a case from a M.S. Year Book, temp. Edw. 1, in Lincoln's Inn library, in which a defendant in an action of debt for money lost, pleaded that she had deposited jewels with the plaintiff as a security for the repayment of the loan, which jewels the plaintiff had not returned. The Court refused to give judgment for the plaintiff, saying that they had no power to award restitution of the deposit. And in a case before

(*a*) *South Sea Co.* v. *Dumcomb*, 2 Str. 919; Bac. Abr., tit. *Bailment*, B.; Story *On Bailments*, sec. 315, and cases there cited. (*b*) *Ratcliff* v. *Davis*, Yelv. 179.

(*c*) Cod. Lib. 8, tit. 14, l. 20, 24; Story *On Bailments*, sec. 316. (*d*) Cobbett *On Pawns*, 46.

Lord Redesdale, in 1803 (*a*), the defendant, a mortgagor, moved for an injunction to restrain the plaintiff, a mortgagee, from proceeding at law on the bond, while suing in equity for a foreclosure. The deeds had got into the possession of the mortgagee's wife, who was at variance with her husband, and her attorney claimed a lien upon them. The Lord Chancellor said that though a mortgagee had a right to proceed on his mortgage in equity and his bond at law at the same time, the mortgagor also had a right not to be obliged to pay the money on his bond, if he is in danger of not getting back his title deeds; for the mortgagee can have nothing but on condition of reconveying and giving up the title deeds which he has received. His lordship granted an injunction to stay proceedings at law, and the money to be paid into the bank to remain until the title deeds were secured and a re-conveyance had; the defendant to pay the costs. And Story (*b*) mentions a case in Massachussetts (*c*) in which it was held that if a pawnee causes the pawned goods to be attached in a personal suit against the pawnor for the very debt for which they were pledged, the right to the pledge is gone; though not, it seems, when the suit is for *other* debts (*d*); and a third case in which a pawnee was held to have no right to attach other property of the pawnor for the debt, without first returning the pawn to him (*e*).

(*a*) *Schoole and Wife* v. *Sall*, 1 Schoal and Lefroy, 177.
(*b*) Treatise *On Bailments*, sec. 366.
(*c*) *Swett* v. *Brown*, 5 Pick. (U.S.) R. 178.
(*d*) *Townsend* v. *Newell*, 14 Pick. (U.S.) R. 332.
(*e*) *Clevarly* v. *Brackett*, 8 Mass. (U.S.) R., 150.

The case before Lord Redesdale, however, only shows that the mortgagee's (and by analogy, the pawnee's) right to sue personally, while retaining the thing mortgaged or pledged, may sometimes be qualified by equitable circumstances, and the cases cited by Story are expressly mentioned as peculiarities in the local jurisprudence of Massachussetts (*a*). It may therefore be regarded as clear, that the possession of the pawn is not, of itself, a bar to proceedings against the pawnor, on his personal liability to the pawnee. And as we have already shown (*b*) that a pawnee is not liable for the loss of the pawn, unless negligence be proved, it follows that though, if a creditor takes a pawn, he is bound to restore it on payment of the debt, yet, if his care in keeping it be exact, and the pawn be lost, he shall be excused, for there is no default in him. And if the pawn be lost, the pawnee has still his remedy for the money; for the law requires nothing extraordinary of the pawnee, but only to use an ordinary care for the restoring of the goods (*c*). And *a fortiori*, if, after a sale has been effected, the produce of such sale is insufficient to satisfy the debt, the pawnor becomes personally liable for the residue unpaid; because, though the security ceases, yet the duty remains (*d*).

(*a*) Story *On Bailments*, sec. 366.
(*b*) *Ante*, sec. viii., pp. 96 *et seq.*
(*c*) *Coggs* v. *Bernard*, Ld. Raym. 909, 1 Smith's L. C., 5th edit., 171.
(*d*) Bac. Abr., *Bailment*, B.; *South Sea Compy.* v. *Duncomb*, 2 Stra., 919; *Coggs* v. *Bernard*, *ut supra*.

SECTION XIV.

EFFECT OF THE DEATH OF PARTIES.

It has been said that where goods are pawned generally, without any day of redemption, and the *pawnor* dies, the pawn is absolute and irredeemable; but that if the *pawnee* dies, it is not so (*a*). In the case of *Ratcliff* v. *Davis* (*b*), to which we have so frequently referred, it was said that though the person that takes the pawn delivers it over to a stranger, yet if the pawnee dies, the tender of the money must be to his executor and not to the stranger, for the delivery makes but the naked custody of it, and if the delivery had been on consideration, it does not alter the case, for the stranger is not privy to the first contract of pawning, nor to the condition. More recent decisions, however, show that the right to redeem is not lost by the death of the pawnor, but goes to his personal representatives. As where A. borrowed £200 on pawn of some jewels and plate worth about £600, taking a note from the pawnee, and afterwards borrowed at several times three other sums of money of the pawnee, for which he gave his note, without referring to the jewels. The executors were admitted to redeem, but only on payment of the money due on the notes as well as on the Pawn (*c*). And in *Vanderzee*

(*a*) Noy 137, 3 Salk., 267.
(*b*) Cro. Jac., 244, Yelv. 178, 1 Bulst., 29.
(*c*) *Demandray* v. *Metcalf*, Prec. Ch., 419.

v. *Willis* (*a*), the executrix of a deceased pawnor was allowed to redeem securities pledged with the defendants, the testator's bankers. By the Pawnbrokers' Act, the right of a deceased pawnor to redeem, and the liability of a deceased pawnee to suffer redemption, are both continued to their executors, administrators, or assignees (*b*). The wording of this section would seem to give to the representatives the rights of the pawnor to a copy of the duplicate under sec. 16; and the Pawnbroker is bound to account, under sec. 20, to the pawnor's executors, administrators, or assignees, as well as to the pawnor himself, for any surplus remaining after the sale of the pawn. It may therefore be taken, that the personal representative may sue on a contract of pawn, as on all other contracts made with the deceased, of which the breach occasions an injury to the personal estate, whether broken in his life-time, or subsequently to his death (*c*), and in like manner, the personal representatives are liable as far as they have assets, on [the contract of pawn, as on other] contracts of the deceased, broken in his life-time (*d*), and likewise on such as are broken after his death, for the due performance of which his skill or taste was not required, and which were not to be performed by the deceased in person, for the executors, as was said by Parke, B. (*e*), are in truth contained in the

(*a*) 3 Brown, C. C. 21.
(*b*) 39 & 40 Geo. 3, cap. 99, sec. 14.
(*c*) Judgm., 2 C. M. & R., 596, 597, *Webb* v. *Cowdell*, 14 M. & W., 820.
(*d*) *Morgan* v. *Ravey*, 6 H. & N., 265, 276.
(*e*) *Wills* v. *Murray*, 4 Ex., 866.

person of the testator, with respect to all his contracts, except such as depend on personal skill (*a*). And by 3 & 4 Wm. 4, cap. 42, sec. 14, action of *debt* on simple contract is maintainable in any Court of Common Law against an executor or administrator. And if the Act complained of be a trespass, the representatives may have an action against the trespassers in like manner as they, whose executors they are, should have had if they were living (*b*).

(*a*) Broom's *Legal Maxims*, 4th edit., 870, 872, 874.
(*b*) Under stat. 4, Edwd. 3, cap. 7, Broom's *Maxims*, 4th edit.

SECTION XV.

WARRANTY OF TITLE—BY PAWNOR WHEN PLEDGING; BY PAWNEE WHEN SELLING. EFFECT OF THE DOCTRINE OF MARKET OVERT.

By the act of pawning, says Mr. Justice Story, the pawnor enters into an implied engagement or warranty that he is the owner of the property pawned; and unless he gives notice of a different interest, that he is the general owner; and that he has good right to pass the pawn. If he violates this engagement, either by a tortious, or by an innocent bailment of property, which is not his own, or by exceeding his interest therein, he is liable to the pawnee in an action for damages. And it follows, that he is under an implied engagement not to retake the pledge, or in any manner to interfere with the rights of the pawnee. If the pawn has a defect, unknown to the pawnee, which destroys its value, the French Law gives him a right of action for another pawn in its stead. And though our Common Law does not give any such right, an action will lie against the pawnor upon his implied warranty of title. And the pawnor is bound to good faith, and is responsible for all frauds, not only in the title, but also in the concoction of the contract, as if he pledged brass for gold, he would be liable therefor; for it is a rule of the Common Law, that fraud vitiates every

contract, and damages may be recovered for all losses and injuries thereby occasioned. But if the pawnee take the pawn with full knowledge of its defects, he is bound by his contract, for *volenti non fit injuria* (*a*).

On this subject, Blackstone says, by the Civil Law an implied warranty was annexed to every sale in respect to the title of the vendor; and so too, in our Law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise and hath used any art to disguise them, or unless they turn out to be different from what he represented them to be to the buyer (*b*). And again, in contracts for sales, it is constantly understood that the seller undertakes that the commodity he sells (and by analogy, that which he pledges also) is his own; and if it proves otherwise, an action on the case lies against him to exact damages for this deceit (*c*).

It is clear that by the Civil Law, a warranty of title was implied on every sale of a chattel (*d*), and this doctrine seems to have been partially adopted by the American Courts. It is, however, now established that there is by the Law of England, no warranty of title in the actual contract of sale, any more than there is of

(*a*) Story *On Bailments*, secs. 354, 355, 356.
(*b*) 2 Bl. Com., 451; see *Reg.* v. *Bryan*, cited *post* p. 183.
(*c*) 3 Bl. Com., 166. (*d*) Dig. Lib. 21, tit. 2, sec. 1.

quality. But, although such is the general rule of our Law, the circumstances attending the sale of a chattel may necessarily import a warranty of title, as if articles are bought in a shop professedly carried on for the sale of goods. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title (*a*), and this doctrine has been much extended in its practical operation by holding that a simple assertion of title is equivalent to a warranty (*b*), by which, if the defendant induced the plaintiff to act, he was bound, and on which he might be sued, although he believed it to be true (*c*), and although he was acting as agent for another. The latest case on this subject is *Eicolz* v. *Bannister* (*d*).

The plaintiff was a commission agent in Manchester, and the defendant was a job warehouseman in the same city. In April last a person sold to the defendant a job lot of what were called "fents," which the plaintiff bought for £19. It turned out that the goods had been stolen, and that the defendant had purchased them of a person who was connected with the thief, though the defendant was quite ignorant of these facts. The plaintiff had to give the things up to the real owner, and he sued the defendant in the local Court of Record to recover back the £19, and the verdict was entered for him for that amount. A rule having been obtained to enter the verdict for

(*a*) Broom's *Legal Maxims*, 4th edit., 767.
(*b*) *Collen* v. *Wright*, 7 E. & B., 301, 312, S.C., 8 Id., 647.
(*c*) Per Campbell, C.J., *Collen* v. *Wright*, 7 E. & B., 312, upheld by six Judges in the Exchequer Chamber, Cockburn, C.J., dissenting.
(*d*) 12 L.T. (N.S.), 76.

the defendant, it was urged against it that the goods having been sold in the defendant's shop, and in the course of his ordinary business, it must be taken that there was a tacit warranty of title, and there having been a total failure of the consideration for which the plaintiff paid his money, he was entitled to recover it back again.

On the defendant's part the dicta of several judges were quoted to show that according to the law of England there was no implied warranty of title upon the sale of a chattel, and that in the event of there being any defect of title the purchaser must bear the loss.

The Lord Chief Justice Erle, however, said that it had not been disputed in the current of authorities, that if a vendor by word or conduct led the purchaser to understand that he was the owner of the goods he was selling, that tacit warranty of ownership became part of the contract; and if it turned out that he was not the owner, the purchaser could seek to recover for the purchase money. In his opinion the circumstances of this case showed a tacit warranty of title by the defendant. In *Morley* v. *Attenborough* (*a*), Mr. Baron Parke said, "There would be no doubt that if articles were bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchased would have a good title to keep the goods purchased." Noy, in his *Maxims*, went so far as to say "If I take the horse of another man and sell him, and the owner take him

(*a*) 3 Ex. 510, 13 Jur. 282; 18 L.J. (N.S.), Ex. 148.

again, I may have an action for debt for the money, for the bargain was perfected by the delivery of the horse," though such a doctrine would shock the understanding of ordinary persons. The defendant, however, had not been able to find any decided case in which the judgment went upon the principle that there was no warranty of title, for in every reported case the Court said that that particular case was not within the rule; and this showed the truth of a remark by Lord Campbell, that the exceptions were so numerous as to eat up the rule. On these grounds his opinion was that the plaintiff was entitled to keep his verdict, and the rule was accordingly discharged.

Applying this reasoning to the case of pawns, it may probably be thought, with Mr. Chitty, that the ordinary case of pawning a thing in the name of one to whom the pawnor knows, or may reasonably believe it not to belong, or falsely assuming to be the owner at the time of pawning it, is such a case as will give a right of action to the pawnee.

Every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended (*a*). And, upon the whole, we may safely conclude that though with regard to the sale (or pledge) of ascertained chattels, there is not any implied warranty either of title or quality, unless there are some circumstances beyond the mere fact of sale (or pledge) from which it may be implied (*b*), yet

(*a*) Note to *Chandelor* v. *Lopus*, 1 Smith's L.C., 5th edit., 161, and cases there cited.

(*b*) Broom's *Legal Maxims*, 4th edit., 768, and cases there cited.

nevertheless, very slight circumstances will often be considered sufficient to fix the vendor or pawnor with liability as having warranted his title, for Mr. J. W. Smith remarks, in his note to *Chandelor* v. *Lopus*, that the plaintiff in such a case would probably succeed now, as the defendant would be held liable in an action on the case for misrepresentation, for his keeping a shop for the sale of jewels, and selling one at a high price, would be taken as a warranty that the thing was what he sold it for.

There are cases in which a pawnor may be liable to criminal proceedings for a false warranty, for a person who obtains from a Pawnbroker, upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute, although the Pawnbroker have the opportunity of testing the article at the time (*a*). But a false representation amounting merely to an expression of opinion as to the *quality* of the goods sold or pledged is not indictable. As where the defendant was convicted on an indictment for obtaining money under false pretences, the pretences being that certain spoons were of the best quality, that they were equal to Elkington's A. (meaning spoons made by Messrs. Elkington and stamped by them with the letter A.), that the foundations were of the best material and that they had as much silver on them as Elkington's A. The representations were made to a Pawnbroker by the defendant for the purpose of obtaining, and he did thereby obtain,

(*a*) *Reg.* v. *Ball*, Car. & Marsham, 249.

advances of money on the spoons, which were in fact of inferior quality, and were of less value than the money advanced upon them, and the Pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the spoons, he would have advanced no money on them. The jury found the defendant guilty of fraudulently and falsely representing that the spoons had as much silver on them as Elkington's A., that the foundations were of the best material, &c., and that he thereby obtained the money. It was nevertheless held, by a large majority of the Judges, that the conviction could not be sustained (*a*). It will be observed that the representation was that the spoons were "*equal* to Elkington's;" not that they were Elkington's, or the result would have been different; for where defendant sold spurious blacking as "Everett's blacking," he was held to be indictable for the false pretence (*b*). And where a defendant had sold common pencils, worth about 4s. a gross, for which he charged 48s. a gross to several small traders, this was held by the Recorder of London to be a false pretence within the statute (*c*).

The absence of warranty in the sale of pawned goods is perfectly clear. This was decided in one of the most important cases relative to the Pawnbroking business that ever came before the Courts, in which the question was whether a Pawnbroker, selling an unredeemed

(*a*) *Reg.* v. *Bryan*, 1 Dears. & B., C.C., 265.
(*b*) *Reg.* v. *Dundas*, 6 Cox, C.C., 380.
(*c*) *Reg.* v. *De Costa*, C.C.C., Nov., 1864.

pledge in the manner prescribed by the Act, warranted his title to the chattel. In the case referred to (*a*), a harp had been pledged with the defendant, a Pawnbroker, by a party who had no title to it. After the time for redemption had expired, the defendant sent it to an auctioneer, who described the articles included in the sale as consisting of unredeemed pledges and other effects. The pledges were numbered so as to distinguish them from the other goods, and the plaintiff purchased the harp at this sale. Being afterwards compelled to give it up to the true owner, he brought his action against the defendant, for an alleged breach of title to sell; and for money had and received. But the Court held that a Pawnbroker who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it. And as the auctioneer had no right to sell the harp except as a forfeited pledge, the defendant was to be considered as selling only that right which he himself had. The plaintiff might have recovered back the purchase-money on the count for money had and received, as upon a consideration that had failed, if there had been a mutual understanding that the bargain should be rescinded, provided the seller should prove not to have a good title. It is needless, however, to say that no such understanding exists in any sale of this nature.

In the section on the liabilities of the pawnee as to stolen property, we have in some measure

(*a*) *Morley* v. *Attenborough*, 3 Ex., 500.

anticipated our remarks upon the doctrine of market overt. On this subject, Blackstone says (*a*) property may in some cases be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is, that all sales and contracts of anything vendible, in fairs or markets overt, (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the *Mirror* informs us (*b*), were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law; insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses (*c*). Market overt in the country is only held on the special days and in the places set apart by custom for the sale of particular goods, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day, and every shop in which goods are exposed publicly to sale, is market overt for such things only as the owner professes to trade in. Therefore if plate be stolen and sold openly in a scrivener's shop on the market day, this sale

(*a*) 2 Comm., 449.
(*b*) Cap. 1, sec. 3.
(*c*) *L.L. Ethel*, 10, 12; *L.L. Eadg. Wilk.*, 80.

should not change the property, but the party should have restitution, for a scrivener's shop is not market overt for plate; for none would search there for such a thing; and *sic de similibus*, &c. But if the sale is in a goldsmith's shop, such a sale must be open, and not behind a hanging, or a cupboard upon which his plate stands, so that one that stood or passed by the shop would not see it (*a*). But if my goods are stolen from me, and sold out of market overt, my property is not altered, and I may take them wherever I find them. And even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) will in no case bind him; though it binds infants, *feme coverts*, idiots or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still if the owner has used due diligence in prosecuting the felon, he loses not his property in the goods (*b*).

As regards Pawnbrokers, we have already said (*c*), that the operation of market overt is restricted by 1 Jac. 1, cap. 21, providing that the sale of any goods wrongfully taken to any Pawnbroker in London or Westminster, or within two miles thereof, shall not alter the property. And independently of statute, it has been held that the custom only extends to a sale, and not to a pawn (*d*). This ruling was referred to and approved in a later case (*e*),

(*a*) The case of Market Overt, 5 Coke's *Reports*, 83.
(*b*) Bacon's *Use of the Law*, 158. (*c*) *Ante*, sec. ix., p. 132.
(*d*) Jenkins R., 83.
(*e*) *Hartop* v. *Hoare*, 2 Stra., 1187.

where the Court said, "If we could take notice of the custom, yet that extends only to a sale, and not to a pawn; sales in market overt are encouraged, because it is a circulation of property; whereas pawning is *pro tempore*, a locking of it up." And the exception applies only to *bonâ fide* sales commenced and perfected in market overt, not to gifts or pawns therein.

SECTION XVI.

OF TAKING THE PAWN IN EXECUTION.

It seems to have been formerly thought that goods pledged could not be taken in execution at all for the debt of the pawnee (*a*). And though this is no longer law, the cases cited in previous portions of this work, show that the rights of the pawnor or the pawnee in the thing pawned, are not to be destroyed by the one without the consent of the other, or without statutory authority. Therefore the goods of one of the parties to the contract of pawn are not liable to be taken in execution, whether for rent or for debts due by the other. The pawnor's creditor cannot take the pawn under a *fi. fa.* without first satisfying the claim of the pawnee, nor on the other hand, can the landlord or creditor of the pawnee, unconditionally sell the pawn, simply because he has found it in the possession of the pawnee. Hence it is said, "If a man delivers goods in pledge for forty pounds, and afterwards the debtor is condemned in £100 in debt to another, these goods shall not be put in execution until the £40 be paid, for the creditor hath interest in it" (*b*). Hence even in times when the King's right to the goods of felons was very strictly enforced, it was held (*c*), that if A. gage goods

(*a*) Comyn's Dig., *Mortgage*, A., referring to *Moses* v. *Conham*, Ow. 124.

(*b*) Viner's *Ab.*, tit. *Pawn*, citing Yelverton, 178.

(*c*) Viner's *Ab.*, tit. *Pawn*, citing Dodderidge, J., in *Waller* v. *Hanger*, 3 Bulst., 17.

to B. and after A. is attainted of felony, yet the King shall not have the goods thus gaged without paying the sum for which they were gaged, because neither of them has the absolute property in the goods so gaged. But the King may redeem on paying the money.

This doctrine has been upheld in modern cases, where it has been said, that goods pawned may be taken in execution and sold, subject to the right of the pawnee. Justice Story says that goods pawned are not liable to be taken in execution in an action against the pawnor; at least not unless the bailment is terminated by payment of the debt, or some other extinguishment of the pawnee's title. In the case of the Crown, however, the pawn may be taken generally, on satisfaction of the debt to the pawnee, or taken and sold subject to his right (*a*). The principle of the cases seems to be, that if articles are sent to a place to remain there, they are distrainable; but if sent for a particular object, and the remaining at that place be an incident necessary for the completion of that object (as in the case of pawn), they are not (*b*).

In *Jenkins* v. *Cooke* (*c*), a Canal Company was authorized to charge certain tolls on the

(*a*) Story *On Bailments*, sec. 353. It is mentioned in a note to this passage that by a statutory provision in Massachussetts, pledges may be attached by the creditors of the pledgor on a tender of the amount due on the pledge, or the pledgee may be summoned as his trustee, to answer for the surplus.

(*b*) Woodfall's *Landlord and Tenant*, 8th edit., 384, referring to *Parsons* v. *Gingell*, 4 C.B., 545, where horses and carriages standing at livery were held not exempt from distress, because they were to remain there at the will of the owner, and not for the purpose of being dealt with in the way of trade.

(*c*) 1 Ad. & El., 372.

carriage of goods, and to distrain any carriage or goods in respect of which any such tolls should be paid. The defendant, the Company's clerk, had taken some carriages which the plaintiff had let to hire to third parties, and had distrained and sold them. It was held that under these circumstances, *the carriages* could not be distrained for arrears of tolls due from the owner for goods carried in them, for they were not carrying the goods of such owner at the time of the distress. The plaintiff's interest being reversionary, that interest would be injured by the sale, but not by the original taking. Very similar to this was the case of *Izod* v. *Lamb* (*a*), where the goods were held under a marriage settlement. The husband and wife were living apart and the wife had let the goods to F. for a term. It became a question whether these goods could properly be seized by the sheriff under a *fi. fa.* It was held that they could not be so seized during the period contained by the demise by the wife to F. as a yearly tenant. Chief Baron Alexander said, "In making this demise, the wife was the agent of her husband. The reversionary interest after the determination of this demise could alone belong to him. The question then is, whether the sheriff could, during the continuance of this demise, take these goods for the debt of the husband. We think he could not, and therefore that the sheriff's return of *nulla bona* is warranted by the law. If these goods, in the possession of the tenant, had been seized by the sheriff under colour of an execution against

(*a*) 1 Cr. & J., 35.

the tenant, or any other person, the reversioner could not have maintained either trespass or trover against him. The reason is, that to maintain this action, the plaintiff must not only have a right of property but a right to the *immediate* possession, and there is no such right during the existence of a lease (*a*). If he himself could maintain no action for the possession, his creditor and the sheriff could derive no authority from the writ against him to take that possession." The rule for a nonsuit was therefore made absolute.

Clearly then, the pawnor whose goods are taken in execution at the suit of the pawnee's creditor, has a right to have his goods restored, subject only to the interest of the pawnee therein. Upon this doctrine, however, modern cases have grafted the qualification that the sheriff is not liable for selling the entire property unless he be informed that the execution debtor has only a special property therein (*b*). To this effect goes the case of *Scott* v. *Scholey* (*c*), which was an action respecting an equitable interest in a term of years which the defendant had seized and sold. The Court held that such an interest could not legally be sold under a *fi. fa.* They assented, however, to the general principle contended for by the plaintiff's counsel in the argument that "goods pawned may be taken in execution against the pawnor [but only] upon satisfaction of the pledge (*d*), and that though

(*a*) *Ward* v. *M'Cunley*, 4 T.R., 489; *Gordon* v. *Harpur*, 7 T.R., 9, were cited in support of this proposition.

(*b*) Chitty's *Archbold's Practice*, tit. *Pawn*.

(*c*) 8 East, 467. (*d*) Bro. Ab., *Pledges*, pl. 24.

it be said that in the case of a lease of land and of a stock of cattle, for a year, they cannot be taken in execution during the term, that is because the lessor himself could not have dispossessed his tenant during the year, and of course the lessor's creditor cannot. But subject to the right of the pawnee in the one case, and of the lessee in the other, the goods may be taken, and if a rent were reserved to the lessor, the debtor, out of the cattle, such rent might presently be taken in execution." Again in the case of *Dean* v. *Whittaker and another*, Sheriffs of Middlesex (*a*), the plaintiff was proprietor of certain goods, which were lent to one Greathead, for a term not expired, which goods the defendants had taken and sold. It was held that the owner might maintain an action on the case against the Sheriff, if he had sold the entire property of such goods, but to support the action he must show that as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the qualified property the hirer had in them. Counsel for the plaintiff contended that the sheriff ought to have seized the goods specially, as for the interest Greathead had in them. But Abbott, C.J., denied this, saying that *prima facie* the sheriff had a right to seize the whole of the goods entirely, as they ostensibly belonged to Greathead; but if the sheriff had been apprised of the owner's special rights, he could then have sold accordingly. The

(*a*) 1 C. & P., 347.

plaintiff not having given this information to the sheriff, was accordingly nonsuited (*a*).

This duty of giving notice to the sheriff, thus cast on a pawnor, would not of course attach in cases where the pawnee was a Pawnbroker, who had kept his stock in a proper manner, because the ordinary way of labelling pawns would of itself be notice to the sheriff of the pawnor's title. But it does not seem absolutely certain on principle, that the pawnor would prevail against the pawnee's creditors in Bankruptcy, if the pawn had been kept undistinguished among other goods of the Pawnbroker. On the one hand it may be contended that the pawnor ought not to be injured by the Pawnbroker's neglect of the duty the statute casts upon him, and on the other, that as the pawnee is, in some sort, the pawnor's agent, we must fall back upon the equitable maxim which says, that where, of two innocent parties, one must suffer, the one who has put it into the power of a third party to do wrong, must bear the loss resulting from his misplaced confidence, and not the one who is equally innocent, and who has not reposed in the wrong doer that trust which has enabled him to commit the wrong. But in either case, it is the pawnor's duty to give notice of his interest as soon as he knows that his goods have been taken in execution.

The whole of the foregoing cases, it will be observed, turn upon the right of the pawnor.

(*a*) See also *Duffill* v. *Spottiswoode*, 3 C.&P., 435, where on the requirement of Best, C.J., evidence was given to show whether the goods had been sold, so as to bring the case within the rule laid down in *Dean* v. *Whittaker*.

It would seem, however, that not only the pawnor, but the pawnee, may maintain an action for the illegal seizure of the pawn. At the Liverpool Summer Assizes, 1864, the case of *Swire* v. *Leach* was tried before Mr. Baron Piggott. The plaintiff had carried on business as a Pawnbroker and clogger in two separate premises. Being in arrears for rent, it was arranged that his brother should carry on the Pawnbroking business, he, (the brother), being accepted by the landlord as the tenant. On the following day, however, the defendant's brother seized the goods in the plaintiff's two houses for the rent in arrear. These goods were afterwards sold by the defendant, an auctioneer. While the sale was going on, plaintiff's attornies gave notice to the defendant that the goods were pledges; the defendant, however, removed the goods, and from time to time restored them to owners who came to redeem, but he refused to give them up to plaintiff on his demand to that effect. The declaration stated that the goods so converted to the defendant's use consisted of unredeemed pledges, for which the plaintiff was liable to the persons who had lodged them with him. In consequence of the distraint, the plaintiff had sustained great loss; the goods at the time of their removal having been worth between £600 and £700. He had since been summoned at the County Court for the recovery of the property to its owners, and had had to pay the damages awarded, as well as the costs. The judge ruled that the costs of these actions were not recoverable, inasmuch as the plaintiff ought not to have defended them, but should have paid the

value of the goods into Court, or have allowed judgment to have gone by default. The learned Baron having directed the Jury that the goods were not distrainable, and that, therefore, the plaintiff was entitled to some damages, a verdict was returned for £30, for injury sustained by unlawful seizure and by the breaking up of his business. A rule *nisi* for a new trial having been obtained, the plaintiff's counsel showed cause against the rule, on the ground that the pawns were privileged from distress. The defendant, on the other hand, contended that they were not within the exemption of "goods delivered to a man in the way of his trade." But the Bench (Erle, C.J., Williams and Keating, J.J.) unanimously held that they were, and that the plaintiff was entitled to recover the full value of the goods, and not simply the plaintiff's interest therein, the defendant having been a trespasser *ab initio* (*a*). It will be seen that, from the circumstances of the case, it became unnecessary to advert to the argument founded on the *pawnor's* property in the pawns taken.

The latter portion of the ruling of the Court in this case is simply a formal declaration that when goods pawned have been improperly distrained, the measure of damages is to be ascertained in the same way as in ordinary cases. Hence where (*b*) the defendant, in the absence of the plaintiff and his family, put in a distress by a broker who got in at a back window, and broke the door open, the Court

(*a*) *Swire* v. *Leach*, 18 C. B. (N. S.), 479, 34 L. J. (N. S.), C. P., 150, 12 Jur. (N. S.), 179, 11 L. T. (N. S.), 680.
(*b*) *Attack* v. *Bramwell*, 32 L. J. (N. S.), Q. B., 146.

of Queen's Bench, in opposition to the ruling of Blackburn, J., at *nisi prius*, held that as the defendant had done acts which made the distress void, and the entry on the premises a trespass *ab initio*, the plaintiff was entitled to recover the actual value of the goods taken, and not merely nominal damages as contended by the defendant's counsel. The ground of this is that where a man, under colour of legal process, does that which makes him a trespasser *ab initio*, he is in the same position as if he were a perfect stranger, and he cannot say, in answer to the action, that he has applied the goods he has so taken, for the advantage or benefit of the person from whom he had taken them. "The man whose goods have been so seized has a right to say, 'I demand to be put in the same position as I was before, and I will not accept your offer to discharge me from the rent in this way. I will insist on having the goods returned to me, or their value in money.' That is the true theory of the law in respect of such cases, and the principle on which we ought to administer the law" (*a*). The Court admitted that the authorities were somewhat conflicting, but they relied on *Keen* v. *Priest* (*b*), as bearing out their view. There the defendant had seized and sold an under tenant's sheep, when there were other goods on the premises and when therefore, the sheep were not distrainable. The Court held that this was altogether unjustifiable, and that the measure of damages was the true value of the sheep so

(*a*) Per Cockburn, C.J., in *Attack* v. *Bramwell*, 32 L.J. (N.S.), Q.B., 146.

(*b*) 4 H. & N., 236.

seized. *Harvey* v. *Pocock* (*a*) was decided on the same principle, but as distrainable and non-distrainable goods were taken together, it was held that the defendant was a trespasser *ab initio* as to the latter goods only.

But though the landlord is thus held liable on the ground that if a man does an illegal act, he is responsible for the consequences, because "it is no answer to an action or claim for damages for taking goods under an illegal warrant, that the goods might have been lawfully detained under a legal warrant" (*b*), he is not liable for the tortious act of the broker in seizing what his warrant does not authorize him to seize, unless he afterwards ratifies the broker's act with knowledge of what he has done (*c*). He is, however, responsible for any irregularity by the broker in dealing with the distress he was authorized to make, as for selling the goods without notice of the distress and without appraisement (*d*). But where the distress is lawful, and the right goods are taken under it, but the broker is afterwards guilty of some irregularity, the landlord is not liable unless there is some act to fix him with knowledge. As in *Freeman* v. *Rosher* (*e*), where the landlord had given the broker a warrant to distrain for rent, and the broker had sold fixtures, the proceeds of which the landlord had received without inquiry, but without knowledge of there having been any irregularity, it was held that there was no such

(*a*) 11 M. & W., 740.
(*b*) See *Keen* v. *Priest*, *supra*.
(*c*) *Haseler* v. *Lemoyne*, 5 C.B., N.S., 530.
(*d*) *Ibid.*
(*e*) 13 Q.B., 780.

authority or assent as would sustain an action against the landlord.

For an excessive distress an action may lie, though the sale, less the expenses, does not realise the rent due. As where the landlord of a warehouse let with heavy weaving machines, distrained property to an excessive amount, locked up the warehouse, and kept the tenant excluded; though the proceeds of the sale, less expenses, did not equal the amount of the rent due, yet there being evidence that the real value was ten times the amount, a verdict for the plaintiff (the tenant), with substantial damages both in trover and in trespass, was upheld (*a*).

(*a*) *Smith* v. *Ashforth*, 29 L. J. (N. S.), Ex., 259.

SECTION XVII.

OF THE OPERATION OF THE BANKRUPT LAWS.

It was at one time doubted whether a Pawnbroker was a trader subject to the bankrupt laws. But this doubt has been removed (*a*), the judges having held long before the passing of the Bankruptcy Act, 1861 (*b*), that he remained liable to them as a Pawnbroker, even though he had ceased to take in pledges, but continued to sell the unredeemed pledges he had on hand (*c*).

Both at Common Law and in Equity, a pledge deposited as a security for money advanced, is in the nature of a mortgage, and can only be redeemed on payment of the money due, so that in most cases, the property of the bankrupt in pledge must be sold, and the deficiency proved as a debt (*d*). But there can be no tacking by the pawnee against creditors, or assignees for valuable consideration (*e*). But an equitable mortgagee, having a simple deposit of title deeds, and no power of sale, cannot realize without an order of the Court, made on petition, and the Court will not interfere where the deposit is made to a solicitor to secure *future* costs (*f*). A petition, however, is not necessary when the sale takes place by

(*a*) *Highmen* v. *Molloy*, 1 Atk., 205.
(*b*) 24 & 25 Vict., cap. 134.
(*c*) *Rawlinson* v. *Pearson*, 5 B. & Ald., 124.
(*d*) *Ex parte* Twogood, 19 Ves. Jr., 231.
(*e*) *Adams* v. *Claxton*, 6 Ves., 226; *Vanderzee* v. *Willis*, 3 Bro., C.C., 21. (*f*) *Ex parte* Wake, 2 Dea., 352.

agreement with the assignees, and when there is no dispute between the parties (*a*).

The 149th section of the Bankrupt Law Consolidation Act, 1849 (*b*), may be regarded as a legislative recognition of an equitable doctrine, inasmuch as it gives the assignees of a bankrupt power to redeem goods deposited or pledged, by the payment of money, or performance of condition, as fully as the bankrupt himself could have done. Therefore where a bankrupt had contracted to buy some bank shares, leaving the certificate in the hands of the vendor as a security for the purchase money, the latter was held entitled, as in the case of an equitable mortgage, to an order for the sale of the shares in satisfaction of the unpaid purchase money, with liberty to prove for the difference (*c*), according to the rule that a bankrupt's property pledged must be sold and the excess proved as a debt (*d*). The deposit of a purchase deed, assigning a house and also the furniture in it, will not include the furniture, where the memorandum of deposit does not mention the furniture. The furniture should be expressly named in the agreement, and a schedule of the articles annexed to it if it is to be effected by such a deposit (*e*).

Where money has been advanced by a creditor to the bankrupt, either upon a mortgage or other security, which fails through

(*a*) *Ex parte* Whitbread, 3 Dea., 311.
(*b*) 12 & 13 Vict., cap. 106.
(*c*) *Ex parte* Shepherd, 2 Mont., D. & D., 431.
(*d*) *Ex parte* Twogood, 19 Ves., Jr. 231.
(*e*) *Ex parte* Hunt, *re* Amer, 1 Mont., D. & D., 139.

bankruptcy intervening, proof may be made for the amount of money advanced (*a*). And if a security is deposited generally, for past and future advances, and at the time of the bankruptcy, the creditor has two demands against his debtor, one provable under the fiat, and the other not, he may apply his security, in the first instance, to reduce that demand which is not provable (*b*). And a creditor who has a bond deposited with him, may apply it to part of the debt, and prove for the residue. The Court will not order the security to be given up (*c*). A mortgagee (or pawnee) may either pray a sale, and prove for the deficiency, or he may throw up his securities, and prove his debt generally (*d*), without prejudice to his claim on any surety for the debt (*e*), or he may take the security *at its value*, and prove for the difference. If he wishes to vote in the choice of assignees, he has a right to require the value to be estimated, and to vote in respect of the difference. He is not bound to wait till after the value has been determined by sale (*f*). The value in such a case is to be taken at the market price of the day of choice of assignees (*g*), but when once he has elected to give up his securities, he cannot retract, even though the sale realized more than his debt (*h*). Nor can he, after he has obtained the

(*a*) *Ex parte* Coming, 9 Ves,, 115.
(*b*) *Ex parte* Hunter, 6 Ves., 94.
(*c*) *Ex parte* Amphlets, 1 Mont., 77.
(*d*) *Ex parte* Grove, 1 Atk., 105.
(*e*) *Ex parte* Bennett, 2 Atk., 528.
(*f*) *Ex parte* Nunn, 1 Rose, 322.
(*g*) *Ex parte* Greenwood, Buck., 323.
(*h*) *Ex parte* Downes, 18 Ves., 290.

common order for sale of a security, with liberty to prove for the deficiency, elect to abandon that order and prove for his whole debt, retaining his security, though the order had not been acted on, and he was not aware of his rights when the order was obtained (*a*). Also where a creditor had a lien on the property of the bankrupt, for his debt, and proved under the commission, he was held to be concluded by proving his debt, and voting in the choice of assignees (*b*). But a creditor having joint property of the bankrupts in pledge, and selling the same after the bankruptcy, may, notwithstanding, prove the remainder of his debt under the separate estates of the bankrupts, if there is no other joint property (*c*). Where goods in which the bankrupts were jointly interested with A. B., were pledged to secure payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove, it was held that he must deduct the amount received before he could prove on the acceptance. Aliter, if the goods had belonged to A. B. alone (*d*). And although it is true, as above stated, that the Court *may* order proof to be admitted on a valuation, instead of sale, its discretionary power in this particular is not too readily exercised. Such an application must depend on its special circum-

(*a*) *Ex parte* Davenport, *in re* Buxton, 1 M. & D., 313; *ex parte* Spicer, 12 L. T. (N. S.), 55.

(*b*) *Ex parte* Solomon, 1 Glyn & Jam., 25.

(*c*) *Ex parte* Davenport, 1 M. & D., 313; *ex parte* Geller, 2 Madd., 262.

(*d*) *Ex parte* Prescott, 4 Deac. & Ch., 23.

stances, among which the general benefit of the creditors, and the amount of the applicant's debt, are very material. Therefore where a creditor to the amount of £3,021 prayed for leave to take the goods of the bankrupt at a valuation of £1,190, and to pay over any surplus above that sum to the assignees, Lord Eldon refused the application, as not disclosing anything to exempt the case from the general practice. The reason for this is obvious. Until the sale, it is impossible to say what the amount of the debt is, and also if there is any doubt of the creditor's right to retain the security, he is entitled in a contest with the rest of his creditors to sustain his disputed title in a situation of predominant advantage (*a*).

A creditor having goods in pledge and wishing to prove for the difference, so as to vote in the choice of assignees, *may* on petition obtain an order that a value shall be set upon them according to the market price of the day of choice, and prove for the difference, on undertaking that if the goods sell for more than the value so set, the general body of the creditors shall have the benefit (*b*). But the court will not make such an order where the goods have been delivered, not as a pledge, but for an undue preference; in such a case the creditor shall not prove for the residue without giving up the goods (*c*). But the mere selling of a pledge by a creditor without fraud, does not destroy his right to prove for the

(*a*) *Ex parte* Smith, *in re* Harvey, 1 Ves. & B., 518, 2 Rose, 63.

(*b*) *Ex parte* Greenwood, Buck, 323.

(*c*) *Ex parte* Smith, 2 Bro., C.C., 46.

remainder (*a*). And a creditor who holds goods as a pledge for his debt and interest, and who, at the assignees' request, delays the sale for a better market, may apply the proceeds in reduction of interest accrued due since the petition (*b*). And the agent of a bankrupt attorney may prove for his whole debt, although he retains securities on which he claims a lien.

If a debtor, by way of collateral security, delivers a bill of exchange or promissory note to his creditor, without his name appearing upon the paper, it must be disposed of as a pledge, and the produce applied to reduce the debt, the residue of the demand only being provable under the commission (*c*). But the apparent intention of the parties makes it either a pledge or a purchase, as where H., a money broker, was in the habit of depositing bills of exchange with B. & Co. as a security for advances, but he did not endorse the bills, nor were they negotiated by B. & Co., or ever presented for payment. One of these bills was for £1,000, accepted by C., who dishonoured it, and some time afterwards became bankrupt on 5th March, 1824. H. also became bankrupt Dec. 12th, 1825, when B. & Co. proved for the balance owing them, accepting this bill as a security, but made no attempt to prove the bill under C's. commission until January, 1826, when the Commissioners rejected the proof. Held that the delivery of the bill by H. to B. &

(*a*) *Ex parte* Geller, 2 Madd., 262, 267.

(*b*) *Ex parte* Kensington, 1 Dea., 58, 2 Mont. & Ayr., 300; but this only applies where there is an express contract, or an implied one (as in this case) on the footing of merchants' accounts.

(*c*) *Ex parte* Troughton, 1 Cooke, B.L., 124.

Co. must be taken to have been by way of pledge, to secure the amount of the advances then due from H. to B. & Co., and not with an intention to transfer the property in it; and that the amount of those advances having been paid, B. & Co. could not, under those circumstances, prove the bill under C's. commission (*a*). And the difference between discount and deposit of bills, depends on the intention to make an absolute transfer, and not on the mere fact of endorsement, though an endorsement is *prima facie* evidence that the transaction is one of discount, unless the object of mere deposit is clearly shown (*b*). As to the difference between bills deposited as security, and property of which the value cannot be ascertained till a sale, it has been said that if the creditor is willing to take the bills at their amount, as they cannot produce more, the estate cannot be damnified, and his proof should be admitted for the difference (*c*). And the proof of a creditor who claims to retain securities, or who has interests inimical to the general creditors, ought not to be rejected (for the amount of his debt beyond the value of his securities) on the ground that he will, by his proof, be enabled to elect himself an assignee (*d*). Nor can his claim be resisted because he has property belonging to the estate in his possession. That is only a ground to restrain payment of the dividends (*e*), or to require security from the creditor that he would give up the property if the Court should be

(*a*) *Ex parte* Britten, *in re* Claughton, 3 Dea. & C., 35.
(*b*) *Ex parte* Twogood, 19 Ves., 231, 232.
(*c*) *Ex parte* De Tasted, 1 Ves. & B., 280.
(*d*) *Ibid.* And see *Ex parte* Hopley, 1 Jac. & Walk., 423.
(*e*) *Ex parte* Dobson, 1 Mont. & Ayr., 606, 4 Dea. & Chit., 69.

of opinion that he had no right to retain it (*a*). And where the property pledged is claimed by a third person, the pawnee may enter a claim on the proceedings for the whole debt, till the legal right to the property is determined (*b*).

When a chose in action is assigned, the security, if there be one, must be delivered over at the time of the assignment, and in assigning *debts*, everything must be done that is equivalent to the delivery of the chattels personal (*c*). Thus a bond, when assigned, must be delivered up to the assignee (*d*). And when a debt is assigned, notice must be given to the debtor, or other party *from whom the assignor is to receive the money* (*e*), even though a security (as a charterparty) has been delivered to the assignee (*f*). And the reason is, that until this is done, the assignor would be able to obtain payment of the debt, which is tantamount to leaving it in his order and disposition. Notice of a dissolution of partnership is not notice to the partnership debtors, unless it can be reasonably inferred that they have seen it (*g*). The deposit of a warrant of attorney with a creditor, without notice to the party who had executed it, was held insufficient to take it out of the reputed ownership of the depositor, though the deposit took place through the

(*a*) *Ex parte* De Tasted, 1 Rose, 324.
(*b*) *Ex parte* Williams, 4 Dea. & Chit., 180.
(*c*) Per Sir W. Grant, M.R., *Jones* v. *Gibbons*, 9 Ves., 407, 410.
(*d*) *Ryal* v. *Rowles*, 1 Ves., sen., 348, 1 Atk., 171.
(*e*) *Gardner* v. *Lachlan*, 8 Sim., 123.
(*f*) Per Cottenham, C., *Ibid.*
(*g*) *Ex parte* Usborne, 1 G. & J., 358; *Dean* v. *James*, 1 Nev. & M., 392.

agency of the solicitor of the acceptor of the bill of exchange and who, *as such solicitor*, had attested the warrant of attorney. Nor does it make any difference that the warrant of attorney was executed to secure a sum primarily secured by a bill of exchange (*a*), for, (contrary to the rule as to notice in the case of real property), such notice to the solicitor is not notice to the client. The deposit of a bill of exchange, though not endorsed, (and, *a fortiori*, when endorsed), is good, without notice, and the depositee is entitled after bankruptcy to have it endorsed, and to the common equitable mortgagee's order (*b*). In one case a bond was executed to secure payment of bills of exchange. The bond was mortgaged together with the bills, which were endorsed. The bonds and bills were deposited by way of sub-pledge and no notice of the sub-pledge was given to the obligor. Under the circumstances, it was held that the sub-pledge was good against the assignees (*c*).

By the Bankruptcy Act of 1849, section 125, if goods are in the possession, order, or disposition of the bankrupt as owner, or with the consent of the true owner at the time of committing the act of bankruptcy (*d*), the Court shall have power to order the same to be sold and disposed of for the benefit of creditors under the bankruptcy. But these goods do not pass to his assignees under adjudica-

(*a*) *Ex parte* Price, 3 M. D. & D., 586; see also *ex parte* Barnett, De G., 194.

(*b*) *Ex parte* Price, 3 M. D. & D., 586.

(*c*) *Ex parte* Barnett, 1 D. G., 194.

(*d*) Not the time at which the fiat is issued. See *Fawcett* v. *Fearne*, 6 Q.B., 20.

tion of bankruptcy by virtue of the 141st section. There must be an order of the Court to sell and dispose of them under this section (*a*). It is sufficient if the order specifies the goods to be sold, without referring by name to the persons supposed to be the true owners of such goods (*b*).

The bare possession of goods entrusted to the bankrupt *for a specific purpose*, (as a pledge), without any power given him to dispose of them, is not sufficient to make it a case of reputed ownership, unless, indeed, the owner has been guilty of laches, and has thus allowed the bankrupt to gain a false credit (*c*). But goods sent on sale or return, and kept undistinguished with the rest of the bankrupt's stock, pass to the assignees as being in his order and disposition, notwithstanding any alleged custom or usage of trade by which goods so deposited did not lead to the belief that they belonged to the trader (*d*). A delivery of goods cannot be qualified by any secret understanding between the parties so as to defeat the claims of their assignees (*e*). If the removal takes place on the very same day when an act of bankruptcy is committed, although in point of time it is prior to the actual commission of it, the rights of the assignees have been held to attach (*f*). And if a person who has given a bill of sale, or

(*a*) *Heslop* v. *Baker*, 15 Jur., 684, 20 L.J. (N.S.), Ex. 350, 6 Ex., 740.

(*b*) *Freshney* v. *Carrick*, 1 H. & N., 653.

(*c*) *West* v. *Skip*, 1 Ves., sen., 243.

(*d*) *Ex parte* Shepherd *in re* Clapham, 4 L.T. (N.S.), 808.

(*e*) *Holroyd* v. *Gwynne*, 2 Taunt., 176.

(*f*) *Arbouin* v. *Williams* 1 Ry. & M., 72.

similar instrument, remains in possession of the goods therein enumerated, the registration of the bill of sale will not prevent the goods from passing under this section as goods in the order and disposition of the bankrupt, with the consent of the true owner (*a*).

If goods have been pledged by an agent within the meaning of the New Factors' Act (*b*), who has become a bankrupt, the owner of the goods so pledged, may prove against his Factor's estate for money paid to redeem such goods, as for money paid to his use before his bankruptcy; or, if not redeemed, for the value of the goods at the time of the pledge, with power to prove for, or set off the sum so paid, or the value of the goods as the case may be. This provision, as we have already seen, relates to merchandise and mercantile transactions merely, and not to furniture, &c. (*c*).

The rights of pawnees, and others who have dealt with the bankrupt, are further protected by 12 & 13 Vict., cap. 106, sec. 133, by which it is enacted that all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before date of the fiat, or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt; and all payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of such petition, and all conveyances by any bankrupt *bonâ fide* made and executed before the date of the fiat or the filing of such petition, and all contracts, dealings, and transactions

(*a*) *Bradger* v. *Shaw*, 2 E. & E., 472.
(*b*) 5 & 6 Vict., cap. 39.
(*c*) *Wood* v. *Rowcliffe*, 6 Hare, 191, see *ante*, page 54.

by, and with any bankrupt, really and *bonâ fide* made and entered into before the date of the fiat, or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bonâ fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt, *bonâ fide* executed and levied by seizure and sale before the date of the fiat, or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with, or paying to, or being paid by, such bankrupt, or at whose suit or in whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed; provided, also, that nothing herein contained shall be deemed or taken to give validity to any payment, or to any delivery or transfer of goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney, or *cognovit actionem*, or judge's order obtained by consent, or given by any bankrupt by way of fraudulent preference.

This section qualifies and mitigates the severity of the doctrine of relation established

by 13 Eliz., cap. 7, by which a trader was made *de facto* a bankrupt the moment he committed an act of bankruptcy, so that as soon as his assignees were appointed, their title related back to the first act done by the bankrupt which would suffice to give them their title; and all intermediate transactions, though done *bonâ fide* and without notice, were at once invalidated. The portions of the section with which we are most concerned, are those which relate to the transfer of property, which, it will be observed, are good, whether by way of pledge or otherwise, when made *bonâ fide*, and without notice. But there are some modes of pledging which are in themselves acts of bankruptcy; as, for instance, the assignment of the whole or the principal part of the bankrupt's property by bill of sale, even though such bill of sale was not executed spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying or defeating the creditors (*a*); or to render it immediately impossible for the bankrupt to carry on his business (*b*); or whether it were simply an endeavour to put all his property out of the reach of liability to pay the debt (*c*). Such transactions are not protected by this section (*d*); neither is an execution levied by

(*a*) *Ex parte* Wensley, 1 De G. J. & Sm., 273, 1 De G. J. & Sm., Bankruptcy Appeals, 49.

(*b*) *Re* Lilburne, 12 L. T. (N. S.), 209; *Goodricke* v. *Taylor*, 2 H. & N., 380; *Young* v. *Fletcher*, 34 L. J. (N. S.), Ex. 154, 11 Jur. (N. S.), 449, 12 L. T. (N. S.), 392.

(*c*) *Goodricke* v. *Taylor*, 2 De G. J. & Sm., 135, where a mortgage of property by a surety was held bad on this ground.

(*d*) *Beavan* v. *Minn*, 9 Bing., 107; see also *Hall* v. *Wallace*, 7 M. & W., 356.

seizure and sale of a trader's goods upon any judgment for a debt or money demand exceeding £50, within the Bankruptcy Act, 1861, sec. 73 (*a*). *Bonâ fide* payments are payments actually made in the usual course of business (*b*), whether by money, goods (*c*), or by settlement in accounts (*d*), where there is no intention by the bankrupt to reclaim (*e*). And contracts, express or implied (as a general lien) (*f*), are protected. As where a creditor had advanced money on a ship in course of construction, "such advance to be a charge on the vessel;" the creditor's lien was not destroyed by the debtor's bankruptcy during the building (*g*). And in another case, where the owner for life of some jewels lent them to her daughter, whose husband became bankrupt, the mother's lien was not defeated by the goods being in the order and disposition of the bankrupt husband (*h*). And when the *bonâ fides* of the party advancing money and receiving a pledge comes in question, it is for the jury to judge from all the circumstances, what the intentions of the parties were. Mere knowledge that the pledgor was in embarrassed circumstances is not sufficient (*i*), and by analogy with the cases in which it has been held that a *bonâ fide* execution is defeated by bankruptcy before the

(*a*) 1 Doria and Macrae's *Bankruptcy*, 456.
(*b*) *Devas* v. *Venables*, 3 Bing. N. C., 404.
(*c*) *Cannan* v. *Wood*, 2 M. &. W., 465.
(*d*) *Stewart* v. *Aberdeir*, 4 M. & W., 211.
(*e*) *Gibson* v. *Muskett*, 4 M. & G., 170.
(*f*) *Bowman* v. *Malcolm*, 11 M. & W., 844.
(*g*) *Swainston* v. *Clay*, 4 Giff., 187.
(*h*) *In re* Robertson, 10 L.T. (N.S.), 105.
(*i*) *White* v. *Bartlett*, 9 Bing., 378.

sale (*a*), so, in general, a contract to pawn, though *bonâ fide* entered into, would be defeated if notice of the act of bankruptcy were given before delivery (*b*). And when a transaction, *prima facie* good, is impeached as wanting in *bonâ fides*, the proper direction is, that unless the jury 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 stands good in law. The whole question turns upon the intention of the trader in disposing of his goods to the particular creditor (*c*). When the trial is a criminal one, and the bankrupt is charged with pawning and disposing of goods with intent to defraud within the meaning of 24 & 25 Vict., cap. 134, sec. 221, the jury are to judge from all the circumstances, whether the bankrupt's intent was to relieve himself from his liabilities without making an honest disclosure and surrender of his property for the benefit of his creditors (*d*).

As a general principle, the title of the assignees to the bankrupt's property dates from the act of bankruptcy, for though they have no title till their appointment, yet when appointed, their title extends backward, and relates to the act of bankruptcy (*e*). But this holds good

(*a*) *Udall* v. *Walton*, 14 M. & W., 254, 9 Jur., 215.

(*b*) See *ante*, sec. 1.

(*c*) *Bills* v. *Smith*, 34 L.J. (N.S.), Q.B., 68, 12 Jur. (N.S.), 155, 12 L.T. (N.S.), 22.

(*d*) *Reg.* v. *Manser*, 4 F. & F., 45; *Reg.* v. *Radnitz*, 4 F. & F., 165.

(*e*) *Kynaston* v. *Crouch*, 14 M. & W., 274; *Fawcett* v. *Fearne*, 6 Q.B., 20.

only when the bankruptcy takes place in consequence of some proceedings by creditors, for when there is no petitioning creditor, but the man is declared bankrupt on his own petition, there is no relation (*a*). Whether, under ordinary circumstances, executing a deed under the Deed clauses of the Bankruptcy Act, 1861 (*b*), gives a title by relation has not been formally decided; but from some expressions used by the judges in *Topping* v. *Keysell* (*c*), it seems probable that there is no such relation, unless, as in that case, there are some peculiar circumstances. The bankrupt having committed an act of bankruptcy, proceedings in bankruptcy were taken against him by a creditor, in consequence of which the assignees' title related back to the date of the act of bankruptcy. Shortly after, the creditors availed themselves of the powers given by the Act, to withdraw the debtor's affairs from Court and arrange them under a deed. It was afterwards contended that as executing the deed was a voluntary act, the assignees under it had no title before its execution and registration, but the Court held that as the steps taken in bankruptcy were the very consideration for the deed, they, and all their consequences, were incorporated in the covenants, just as when a debtor was in custody under 24 & 25 Vict., cap. 134, sec. 103, and afterwards came before the Court on his own petition, the assignees' title was

(*a*) *Stevenson* v. *Newnham*, 13 C.B., 285; *Nicholson* v. *Gooch*, 5 E. & B., 999; *ex parte* Harrison, 26 L. J. (N.S.), Bank., 30; *Paull* v. *Best*, 3 B. & S., 537.

(*b*) 24 & 25 Vict., cap. 134, secs. 192 to 197.

(*c*) 16 C.B. (N.S.), 258, 10 Jur. (N.S.), 774, 33 L.J. (N.S.), C.P., 225, 12 W.R., 756, 10 L.T. (N.S.), 526.

held to prevail against that of a creditor who had seized under a bill of sale, after commitment. The title under such circumstances relates back to the day of commitment or detainer, but not to any antecedent act of bankruptcy (*a*) committed by the bankrupt himself.

In assignments of policies of insurance, it is a proposition of law that clear and distinct notice to the office is necessary; but whether a sufficient notice has been given, is a question of fact (*b*). If no such notice is given, the interest passes to the assignees in bankruptcy, though the office neither required notice, nor recognized its validity when given (*c*). And it is not sufficient to direct letters to be sent to the creditor's attorney, if the office is not informed on whose behalf such attorney is acting (*d*). But when notice has once been given to the office, the policy is no longer in the assignor's order and disposition (*e*). And if the deposit has been made by a mortgagee, and the office has had notice, further notice to his mortgagor is not necessary, in order to prevent a reputed ownership (*f*).

Where the assignee sent an agent to the office, who, while paying the premium, mentioned the assignment in course of conversation with one of the clerks, this was held not sufficient notice to the office (*g*). But where

(*a*) *Bramwell* v. *Eglinton*, 3 B. & S., 39, 10 Jur. (N.S.), 583, 33 L.J. (N.S.), Q.B., 130, 12 W.R., 551, 10 L.T. (N.S.), 295.
(*b*) 1 Deacon's *Bankruptcy*, 3rd edit., 587.
(*c*) *Williams* v. *Thorp*, 2 Sim., 257.
(*d*) *West* v. *Reid*, 2 Hare, 249.
(*e*) 1 Deacon *on Bankruptcy*, 3rd edit., 587.
(*f*) *Ex parte* Barnett, De. G., 194.
(*g*) *Ex parte* Carbin, 4 D. & C., 354.

the bankrupt was one of the directors of the insurance office, and deposited a policy with his bankers, one of whom was also auditor of the office, this was held sufficient (*a*), and so was a letter from the assignee to the secretary, saying "I am the holder of the undermentioned policies," and inquiring what the office would give for them (*b*). But the onus of proof is on the assignees to show that notice was not given (*c*). And it is enough, if notice be given on the very day of, but prior to the Act of Bankruptcy (*d*). And the sufficiency of notice is a question for the jury, and does not depend upon a rule of the office that they will pay no regard to any other than a written notice (*e*). And if a mortgagee be himself the trustee to whom notice is requisite, the transaction itself is notice sufficient (*f*).

By the Bankruptcy Act, 1861 (*g*), sec. 132, any mortgagee may bid at the sale of the mortgaged property by leave of the Court, but he cannot in general have the conduct of the sale (*h*) even though he is also assignee (*i*), nor will such assignee be allowed to bid at the sale in his private character (*k*).

The assignees have no right to interfere with the mortgage of the bankrupt's interest, except to redeem. But if the estate has been mort-

(*a*) *Ex parte* Waithman, 4 D. & C., 412.
(*b*) *Ex parte* Stright, Mont. 502, 2 D. & C., 314.
(*c*) *Ex parte* Stevens, 4 D. & C., 117.
(*d*) *Ex parte* Marjoribanks, De. G., 466.
(*e*) *Edwards* v. *Scott*, 1 Mann. & G., 962.
(*f*) *Smith* v. *Smith*, 4 Tyr., 52, 2 Cr. & M., 231.
(*g*) 24 & 25 Vict., cap. 134.
(*h*) *Ex parte* Macgregor, 4 De. G. & S., 603.
(*i*) *Ex parte* Greenwood, 1 D. & Ch., 542.
(*k*) *Ex parte* Hodgson, 1 G. & J., 12.

gaged considerably below its value, the Court will allow the assignees to fix a reserved bidding at the sale (*a*). But where policies of insurance, valued only at £500, were deposited, by way of equitable mortgage, with a creditor whose debt was £16,000, the Court refused a reserved bidding to the assignees, for "they have no right to interfere with a mortgage, except to redeem." They might, however, have permission to bid, but they must abide by their bidding (*b*). But in *ex parte* Lackington (*c*) leave was given to them to fix such a bidding as the Commissioner should approve. And where an equitable mortgagee with leave to bid, was the only bidder, the Court opened the biddings on an offer of more than twice the amount he had given, in accordance with the practice of the Court of Chancery (*d*).

The Bankruptcy Act, 1849 (*e*), provides that creditors may prove for interest at the rate of 4 per cent., up to the date of the fiat, or the filing of the petition, upon all debts or sums certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which shall be overdue at the issuing of the fiat or filing of the petition, if such debts be payable by virtue of a written instrument at a certain time, or if payable otherwise, then from the time of demand in writing, giving notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

(*a*) *Ex parte* Ellis, 3 D. & Ch., 297, where the mortgage was for £48,000 and the equity of redemption was valued at £63,000. (*b*) *Ex parte* Barnard, 3 D. & Ch., 291.
(*c*) 3 M. D. & D., 331.
(*d*) *Ex parte* Lee, De Gex, 628.
(*e*) 12 & 13 Vict., cap. 106, sec. 180,

In *Bromley* v. *Child* (*a*), Lord Hardwicke refused to allow a depositor of stock in the hands of a bankrupt, to prove for interest, saying there is a plain distinction between debts that carry interest, and a special deposit of goods and stock: for in the former, the interest shall be continued down to the date of the commission, but in the latter, the interest stops from the time of the deposit. If the security be insufficient, the mortgagees cannot prove for interest beyond the date of the adjudication (*b*), even though the sale was postponed at the request of the assignees and for the benefit of the bankrupt's estate (*c*). This was so held by Commissioner Evans, on the authority of *ex parte* Pollard (*d*), in which case, pending an appeal by an equitable mortgagee, it was agreed between the parties that the property should be sold, and the proceeds invested by the assignees to abide the result of the appeal, which was accordingly done, though the assignees, against the wish of the mortgagee, deposited the money in a bank which paid only 2½ per cent. interest. Held, that though the mortgagee was entitled to the interest actually made from the investment, he was not entitled to have interest calculated on his debt subsequent to the date of the fiat, for there was no mention of interest in the agreement, and interest is not allowed in bankruptcy, except in the case of bills and notes, unless it is provided for in the contract, or unless it arises from the dealings of the parties, constituting an implied agree-

(*a*) 1 Atk., 259.
(*b*) *Ex parte* Badger, 4 Ves., 165, *re* Lightfoot, 18 L.T.R., 54.
(*c*) *Ex parte* Baldwin, 33 L.T.R., 263.
(*d*) 1 M. D. & De. G., 264.

ment to pay interest, on the footing of merchants' accounts (*a*).

By the Bankruptcy Act, 1861 (*b*), the assignees may mortgage or pledge the bankrupt's property, with or without powers of sale, if authorized thereto by order of the Court, following a resolution passed at a meeting of the bankrupt's creditors properly summoned for that purpose, at which three-fourths in value of such creditors shall be present or represented. This section is for the benefit of non-traders, and other persons who may be made bankrupt, simply through a lack of *present* means, whose property, though of considerable value, might be sacrificed by a forced sale (*c*). But where, according to law, any conveyance of property would require to be registered, enrolled or recorded in any registry office or court, the certificate of the appointment of assignees shall be registered in the same manner, and the title of any purchaser for valuable consideration without notice, who has duly registered his conveyance, shall not be invalidated by reason of the appointment of the assignees, unless the certificate of appointment be registered within two months of such appointment, if in the United Kingdom, and 12 months if in any other part of Her Majesty's dominions (*d*). But this enactment only defeats the title of the assignees as against purchasers for value (*e*). As against all other persons the title of the assignees is

(*a*) See *ex parte* Kensington, cited *ante*, p. 205.
(*b*) 24 & 25 Vict., cap. 134, sec. 133.
(*c*) 1 Doria & Macrae's *Bankruptcy*, 602.
(*d*) 12 & 13 Vict., cap. 106, sec. 143.
(*e*) *Pentland* v. *Stokes*, 2 Ba. & Be., 75; *Bushell* v. *Bushell*, 1 Scho. & Lef., 609.

absolute (*a*). Therefore when the person pledging becomes bankrupt, the goods cannot be retained, as against his assignees, for subsequent advances (*b*). And goods pledged expressly to secure a creditor, who has previously accepted and paid bills drawn on him by the bankrupt, are released from further charge, as to other bills taken up and paid subsequently, if the amount of the *original sum* paid on account of the bankrupt, has been repaid to the creditor, without the goods being sold (*c*). So also where a creditor's right to retain property was disputed on the ground of preference, the Court refused his application to take it at a valuation, to prove for the difference, and vote in the choice of assignees (*d*). And the Court, also in the exercise of its discretion, refused to order the sale of a bond, but allowed the creditor to prove for his whole debt, because if it had been sold at the time it would have produced nothing, though it might afterwards become valuable (*e*).

By the Bankruptcy Act, 1861 (*f*), a bankrupt is held guilty of a misdemeanour, and liable to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute, if (*inter alia*) after filing the petition for adjudication, or within three months next

(*a*) *Jones* v. *Gibbons*, 9 Ves., 407; *Matthews* v. *Walwyn*, 4 Ves. 118; *ex parte* Coles, 1 D. & Ch., 100.
(*b*) *Vandersee* v. *Willis*, 3 Bro. C. C., 21; *Adams* v. *Claxton*, 6 Ves., 225.
(*c*) *Birdwood* v. *Raphael*, 5 Pri., 593.
(*d*) *Ex parte* Barclay, 1 Glyn & J., 272.
(*e*) *Ex parte Smith and Strickland*, 2 Glyn & J., 105.
(*f*) 24 & 25 Vict., cap. 134, sec. 221.

before adjudication, he shall, knowing that he is at the time unable to meet his engagements, fraudulently, and with intent to diminish the sum to be divided among the general body of his creditors, have made away with, mortgaged, encumbered, or charged any part of his property of what kind soever, or if, being a trader, he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for. And the Court may direct the creditors' assignee, or if none, the official assignee, or any of the creditors of the bankrupt, to act as prosecutor (*a*).

(*a*) 24 & 25 Vict., cap. 134, secs. 222, 223.

SECTION XVIII.

OF THE REMEDIES OF THE PARTIES TO THE CONTRACT OF PAWN.

Where the pledge has suffered injury by the default of pledgee, the owner is entitled to a recompense for the damage sustained. But as we have seen (*a*), no compensation is to be made for any injury which has arisen by accident, or from natural decay of the pledge (*b*). And the pawnor may sue a pawnee through whose negligence the pawn has been injured or lost, in *assumpsit* for breach of contract, for in all cases of bailment, the promise is implied by Law, that defendant was to use reasonable care (*c*). But a bailee dealing negligently with goods entrusted to him, does not thereby *necessarily* lose his character of bailee, so as to be liable as for a conversion (*d*), though to make such a conversion, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him, inconsistent with such right. Therefore the removal of goods *in transitu* by a shipping agent, to a warehouse for his own convenience, was held not to be an excess or breach of duty which should render him liable in trover

(*a*) *Ante*, secs. 6, 8, and 9.

(*b*) *Pothier, de Nantissement*, n. 38, 39; Story *On Bailments*, sec. 336; *Coggs* v. *Bernard*, 2 Lord Raym. 909, 1 Smith's L. C., 5th edit., 171.

(*c*) *Ross* v. *Hill*, 2 C.B., 877, 3 D. & L., 788, 10 Jur., 435 15 L.J. (N.S.), C.P., 182.

(*d*) *Heald* v. *Carey*, 11 C.B., 977, 16 Jur., 197, 21 L. J. (N.S.) C.P., 97.

for the loss of the goods by an accidental fire (*a*). But he would be liable if he had determined the bailment by any active wrong, as by selling the goods bailed (*b*), by misusing them, by treating them in a manner inconsistent with the bailment, and *à fortiori* by destroying them (*c*), for the bailment is thereby determined, and the possessory title reverts to the bailor (*d*), so that the right of possession is sufficient without having actual possession (*e*). And when the bailment is determined in any such manner, trover will lie at the suit either of the pawnor, or of a purchaser from him, against the pawnee, for a wrongful conversion (*f*). So also on demand, if the money or other thing necessary for the redemption of the pawn, be *tendered* to the pawnee, and he refuses to give it up, such demand, tender, and refusal, would ordinarily be evidence of a tortious conversion of the pawn, which is considered as being instantly reduced into the possession of the pawnor, who may therefore in such a case maintain trover for it (*g*). And it would be for the pawnee to give evidence of a loss by casualty or otherwise (*h*). But if the action be for loss or damage, the onus will be on the

(*a*) *Heald* v. *Carey*, 11 C.B., 977, 16 Jur., 197, 21 L.J. (N.S.), C.P., 97.

(*b*) *Cooper* v. *Willomatt*, 1 C.B., 672, 9 Jur., 598, 14 L. J. (N.S.) C.P., 219.

(*c*) Selwyn's *Nisi Prius*, 12th edit., 1340.

(*d*) *Finn* v. *Bittleston*, 7 Ex. 152 ; 21 L. J. (N.S.) Ex. 41.

(*e*) 2 Selwyn, 12th edit., 1341.

(*f*) *Franklin* v. *Neate*, 13 M. & W., 481, 485 ; 14 L. J. (N.S.), Ex. 59.

(*g*) *Ratcliffe* v. *Davis*, Cro. Jac., 244, Yelv. 178.

(*h*) *Ibid.*, *Isaac* v. *Clark*, 2 Bulst., 306, Story *On Bailments*, sec. 339.

pawnor to show negligence on the part of the pawnee (*a*), and the question of negligence is for the jury (*b*).

Though it was formerly doubted whether, in the case of a tortious taking, the plaintiff was not confined to an action of trespass, yet it is now agreed that he may bring either trespass or trover, for a tort may be qualified, though it cannot be increased (*c*). And if a bailee of jewels for safe custody, pawns them to another, the owner may maintain trover against the pawnee (*d*). And by statute, the owner of goods stolen, if pawned in London, Westminster, or Southwark, may maintain trover against the Pawnbroker (*e*).

If several chattels are pawned for an entire sum, and subsequently sold by the pawnor to several purchasers, trover will lie for a conversion at suit of each purchaser against the pawnee, though the latter will not be bound to part with any of the chattels until the whole debt be paid (*f*). And if a thing be deposited by one, with the authority of another, and received by the bailee to keep on the joint account of the two, one cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it (*g*).

The Common Law Procedure Act, 1852 (*h*),

(*a*) *Cooper* v. *Barton*, 3 Camp. 5, *Marsh* v. *Horne*, 5 B. and C., 322, 8 D. & R., 223.
(*b*) *Doorman* v. *Jenkins*, 2 Ad. & E., 256.
(*c*) *Bishop* v. *Montague*, Cro. Jac., 50.
(*d*) *Hartop* v. *Hoare*, 2 Str., 1187.
(*e*) 1 Jac. 1, cap. 21, sec. 5; *Packer* v. *Gillies*, 2 Camp. 336 n. (*f*) *Franklin* v. *Neate*, 13 M. & W., 485.
(*g*) *May* v. *Harvey*, 13 East, 197.
(*h*) 15 & 16 Vict., cap. 76.

sec. 74, recites that it is expedient to preclude doubts that may arise as to the form of pleas in certain forms of action, which may be considered to partake of the character, both of breaches of contract and of wrongs, and then goes on to provide that any plea which shall be good in substance, shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong.

The plea of not guilty operates only as a denial of the wrong alleged; *i.e.*, that the conversion, if any, was illegal (*a*). It does not deny the plaintiff's property in the goods (*b*), but the defendant may deny the plaintiff's title, by pleading that the goods are not the goods of the plaintiff as alleged. This is called the plea of not possessed (*c*). And this puts in issue the plaintiff's right to the possession of goods *as against the defendant* at the time of the conversion (*d*), as that the pawnor has fulfilled the condition on which he was entitled to have the pawn delivered to him. And the defendant may set up the title of a third person, under this plea (*e*). And the pawnor would not succeed if the pawnee could show that his refusal to deliver arose from a *bonâ fide* doubt as to the plaintiff being entitled to the goods (*f*), or from the pawnee's having demanded more than he is entitled to (*g*) or

(*a*) *Young* v. *Cooper*, 6 Ex. 259. (*b*) 20 Pl. R. G., T.T., 1853.
(*c*) 2 Selwyn's N.P., 12th edit., 1359.
(*d*) *Nicolls* v. *Bastard*, 2 C. M. & R. 659.
(*e*) *Leake* v. *Loveday*, 2 Dowl. N.S. 624, 5 Scott N.R., 908, 4 Man & G.. 972, 7 Jur., 17, 12 L.J. (N.S.), C.P. 65.
(*f*) *Vaughan* v. *Watt*, 6 M. & W. 492.
(*g*) *Abington* v. *Lipscombe*, 10 L.J. (N.S.), Q.B., 330, 1 Q.B., 776, 1 Gale & D., 230, 6 Jur. 257.

because the demand is made by one of two joint depositors (*a*), or where any feasible excuse is *bonâ fide* made showing that the party does not wish to appropriate the goods to his own use, in exclusion of the real owner (*b*). But refusing to deliver because another person has also demanded them, or setting up the *jus tertii*, or keeping goods in order to maintain the title of a third party, or detaining them on any pretext, which if just and true would not amount to a justification, is evidence of a conversion. In other words, it is a conversion to detain goods under any pretext, which, if true, would not amount to a justification (*c*).

A bailee, accepting goods from another to be kept for him, is estopped from denying the title of the bailor at the time of the bailment, but may assert that his title has been defeated (*d*). He may, and indeed must, give them up to the real owner, who, (in cases of Pawnbroking transactions), is not bound to tender the duplicate (*e*).

Apart from the pawnee's wrongful refusal to deliver the goods on demand and tender of the money by the pawnor, the latter cannot, it seems, maintain *trover* or trespass for them against the pawnee, because it is necessary, in each of those actions, that he should have both the right of property *and* the possession (*f*). But he may bring detinue, for that form of

(*a*) *May* v. *Harvey*, 13 East, 197.
(*b*) 1 Petersdorff's Ab., 2nd edit., 584.
(*c*) *Atkinson* v. *Marshall*, 12 L.J. (N.S.), Ex. 117.
(*d*) *Thorne* v. *Tilbury*, 27 L.J. (N.S.), Ex. 407, 3 H. and N., 534. (*e*) See *ante*, p. 95.
(*f*) *Ward* v. *Macauley*, 4 T.R., 489; *Gordon* v. *Harper* 7 T.R., 9; *M'Combie* v. *Davies*, 6 East, 153.

action may be maintained by any person who has either an absolute or special property in goods against another, who is in actual possession of such goods either by delivery or finding, and refuses to redeliver them (*a*), and the bailment in detinue is not traversable (*b*). But as the action proceeds on the ground of property in the plaintiff, at the time of action brought, it is said that it cannot be maintained, if the defendant took the goods tortiously (*c*), for by the trespass the property of the plaintiff is divested (*d*). Property in the plaintiff without his ever having had possession is sufficient, but the goods must be such as can be identified, as of money *in a bag* (*e*), but for corn or other things which cannot be distinguished from property of the same kind, detinue will not lie (*f*). And though the gist of the action is the detainer, it will lie against any pawnee who has improperly parted with possession of the pawn (*g*), or who has lost it through negligence (*h*) because it does not lie in the mouth of the pawnee to set up a wrongful act of his, whether of omission or of commission, in answer to the action. It is not necessary, when the action is brought for several articles, to set forth the

(*a*) 1 Selwyn's *Nisi Prius*, 12th edit., 660.

(*b*) *Clossman* v. *White*, 7 C.B., 43, 6 D. & L. 568, 18 L.J. (N.S.), C.P. 151.

(*c*) Bro. Abr. *Detinue* pl., 53, per Brian, C.J., but the plaintiff may have replevin.

(*d*) This is questioned, see *Bishop* v. *Montague*, Cro. Jac. 50.

(*e*) 1 Roll, Abr., 606, (A.) pl., 1.

(*f*) 1 Inst., 286 b.

(*g*) *Jones* v. *Dowle*, 9 M. & W., 19, 11 L. J. (N.S.), Ex. 52.

(*h*) *Reeve* v. *Palmer*, 27 L.J., C.P., 327, 1 F. & F., 48, 4 Jur., (N.S.) 929.

separate value of each in the declaration (*a*), but the jury must sever the values in their verdict.

Detinue lies for the specific recovery of personal chattels wrongfully detained (*b*). It will lie, though the defendant has *bonâ fide* sold the chattel before action (*c*). And it is enough to show that the plaintiff is entitled to the possession, though he has never had actual possession (*d*), but a property merely in reversion, (as of a pawnor who has not paid or tendered the pawnee's debt, or owner of goods let to hire for a term) will not enable the plaintiff to maintain this action (*e*). But any special and temporary ownership, with immediate possession, or right to possession, is sufficient (*f*). As in pawns, the absolute owner has no right to the immediate possession before tender of the amount due, it follows that the pawnee only can in general maintain this action (*g*).

The plea of *non detinet* puts in issue the detention, but not the plaintiff's property in the goods sought to be recovered, and no other defence than such denial shall be admissible under that plea (*h*). The plaintiff's property must be specially traversed. The detention means an adverse withholding from

(*a*) See Form 29, Sched. B., 15 & 16 Vict., cap. 76.

(*b*) 3 Bl. Com., 151.

(*c*) *Jones* v. *Dowle*, and *Reeve* v. *Palmer*, *ut supra*.

(*d*) *Gledstane* v. *Hewitt*, 1 C. & J., 565, Bro. Ab. *Detinue*, pl., 65, 80.

(*e*) *Gordon* v. *Harper*, 7 T.R., 9; *Milgate* v. *Kebble*, 3 Man and G., 100 (which was a case of lien).

(*f*) *Legge* v. *Evans*, 6 M. & W., 36, *Cooper* v. *Willomatt*, 1 C.B., 672, 9 Jur. 598, 14 L.J. (N.S.), C.P., 219.

(*g*) *Nicholls* v. *Bastard*, 2 C.M. & R., 659, *Booth* v. *Wilson*, 1 B. & A., 459.

(*h*) R. G. (Pldg.), 15, T. T., 1853, *Richards* v. *Frankum*, 6 M. & W., 420.

the plaintiff (*a*). The general issue in trespass is not guilty; and in actions for taking, damaging, &c., the plaintiff's goods, that plea operates only as a denial of the wrong alleged, not of the plaintiff's property therein (*b*). Accord and satisfaction is a good plea in trespass, as in all actions which suppose wrong to be done *vi et armis*, or where damages only are to be recovered (*c*), but accord without satisfaction cannot be supported (*d*).

If the goods are injured or taken by a stranger, the pawnor may sue for damage to his reversionary interests, and the bailee to his possessory right. And the pawnor may maintain trover against a purchaser of his goods from the pawnee, even though the purchase was *bonâ fide* (*e*).

In pawns, as in all instances of bailments, there is a *special qualified property* transferred from the bailor to the bailee together with the possession. On account of this qualified property of the bailee, the pawnee is entitled to maintain an action against such as take away these chattels. And the action will lie, not merely for taking them out of his possession, but also for any forcible injury which may be done to them whilst they are in his possession, or in the possession of any person for him, or in removing them from one place to another (*f*); for, as he is responsible to the pawnor if the goods are lost or damaged by his wilful default or gross negligence, or if

(*a*) *Clements* v. *Flight*, 16 M. & W., 42.
(*b*) R. (Pldg.), 20, T. T., 1853.
(*c*) 9 Rep., 78a. (*d*) 1 Roll. Abr., 128 (A), pl. 7.
(*e*) *Cooper* v. *Willomatt*, 1 C. B., 672.
(*f*) *Bushell* v. *Miller*, 1 Stra., 129.

he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right to recover the specific goods, or else a satisfaction in damages, against all other persons who may have purloined or injured them (*a*). There is no *absolute* property in either the person delivering, or him to whom the thing is delivered; for while the bailor hath only the right and not the immediate possession, the bailee hath the possession and only a temporary right. But it is a qualified property in them both; the pledger's property is conditional, and depends on the performance of the condition of repayment, &c.; and so too, is that of the pledgee, which depends upon its non-performance (*b*). From this it follows that the pawnee, as well as the pawnor, may sue any person interfering with his right to the pawn, (even if he be the pawnor himself,) in trover or in detinue; and the cases already cited on the right of the pawnor, will also in most cases apply to the pawnee, except, indeed, that as the latter has not only a qualified property, but a *primâ facie* right to the exclusive possession of the pawn (*c*), so it is in general unnecessary for him to prove right to the possession. And he may also maintain trespass for injury done to it, for in that form of action it is essential that the plaintiff should have exclusive possession, (actual or constructive) (*d*), at the time the injury was committed. The goods may be described generally, as in

(*a*) 2 Bl. Com., 453. (*b*) *Ibid*, 396, citing Cro. Jac., 245.
(*c*) See *ante*, sec. 6.
(*d*) *Smith* v. *Milles*, 1 T. R, 480; *Ward* v. *Macauley*, 4 *Id.* 490.

trover, "for it is certain enough in this action, where damages only are to be recovered" (*a*). The declaration must state that the goods were the plaintiff's, or he will not be entitled to damages (*b*), unless there be an admission of his property in them on the record, for the plaintiff's omission may be made good by the defendant's plea (*c*).

If the plaintiff seeks to recover in trespass, the injury done must arise immediately from the act committed; if it be consequential only, case and not trespass is the proper remedy (*d*). And it is said that if a (pawnee or other) bailee destroy the chattel, trespass will lie against him (*e*).

The pawnee, or other bailee, may maintain trover against a stranger who takes the goods out of his possession (*f*). And possession alone is sufficient to enable him to maintain trover against a wrong doer (*g*). But the plaintiff must establish his right of possession as well as of property (*h*). It may lie even against the owner of goods, as where the pawnee delivers the goods back for an especial purpose, and the owner afterwards refuses to re-deliver them after the special purpose has been answered (*i*). But simple seizure by a

(*a*) 2 Wms. Saund., 74, *in notis*.
(*b*) *Pritchard* v. *Long*, 9 M. & W., 666.
(*c*) *Brooke* v. *Brooke*, 1 Sid., 184.
(*d*) 6 Petersdorff's Abr., 2nd edit., 547.
(*e*) 2 Roll. Abr., 569, pl. 5.
(*f*) *Nicolls* v. *Bastard*, 1 C. M. & R., 659, 1 Tyr. & G., 156, 1 Gale, 295.
(*g*) *Armory* v. *Delamirie*, 1 Stra., 505, 1 Smith's L. C., 5th edit., 151.
(*h*) *Gordon* v. *Harper*, 7 T. R., 9.
(*i*) *Roberts* v. *Wyatt*, 2 Taunt., 268.

stranger, who afterwards relinquishes the possession, is not necessarily a conversion (*a*); there must be the intent to convert to the taker's own use, or that of some third person, or the act done must have the effect either of destroying or changing the quality of the chattel (*b*).

As against the pawnor, the pawnee may sue in debt for the money advanced, even while the pawn remains in his possession, for it is only a collateral security (*c*). And in like manner debt will lie after a sale has been effected, without producing enough to satisfy the debt, because, though the security ceases, yet the duty remains (*d*). And if the defendant pleads payment or set-off of a certain sum, he must prove for such sum in order to entitle him to an entire verdict on his plea (*e*). But he cannot set off uncertain damages, or an unliquidated demand (*f*).

Assumpsit also lies at the suit of the pawnee against the pawnor. And when the terms of the former's agreement have been performed, so as to leave a mere simple debt or duty between the parties, the plaintiff may give the circumstances in evidence, and recover under the *indebitatus* counts (*g*). In consequence of their conciseness, and the latitude of proof

(*a*) *Samuel* v. *Morris*, 6 C. & P., 620.
(*b*) *Foulkes* v. *Willoughby*, 8 M. & W., 540.
(*c*) Story *On Bailments*, sec. 315, Anon., 12 Mod., 564.
(*d*) *South Sea Company* v. *Duncomb*, 2 Stra., 919.
(*e*) *Cousins* v. *Paddon*, 2 C. M. & R., 560. But the pleas may be taken distributively, and the issue found for the defendant as to the amount proved to be paid, and as to the residue, for the plaintiff.
(*f*) *Howlet* v. *Strickland*, 1 Cowp., 56; *Weigall* v. *Waters*, 6 T. R., 488.
(*g*) Per Parke, B., in *Stone* v. *Rogers*, 2 M. & W., 443, 448.

of which they admit at the trial, these counts are generally used where applicable (*a*). And the ordinary pleas of payment, set-off, and tender, are available to the defendant.

As to damages, when the action is in trover, the general rule is that the value of the property converted is the measure of damages. But this is subject to many exceptions (*b*). If the defendant be clearly a wrong doer, *omnia præsumuntur contra spoliatorem* applies, as where defendant detained a jewel, the jury were told to presume the strongest against him and make the value of the best jewels the measure of their damages (*c*). And special damages may be recovered for the detention of the property over and above its value, as in trover by a carpenter for his tools, whereby (the declaration alleged), he was prevented from working at his trade (*d*). When the goods have fluctuated in value it seems very much in the discretion of the jury to say at what point of time the value shall be taken, whether at the time of taking, or at the day when the value was highest or lowest. If the taking were wilful, then the value of the articles so increased; but this should never be when the act was *bonâ fide* (*e*). In cases of pledge, if the pledgee tortiously sell or deal with the pledge, the pledgor's right of recovery is clear, but the pledgee has a right to have the amount of his debt recouped in the

(*a*) 1 Selwyn's *Nisi Prius*, 12 edit., 70.
(*b*) Sedgwick *On Damages*, 474.
(*c*) *Armory* v. *Delamirie*, 1 Stra., 505, 1 Smith's L. C. 5th edit., 151.
(*d*) *Bodley* v. *Reynolds*, 8 Q. B., 779.
(*e*) Sedgwick *On Damages*, 478, 495.

damages (*a*). And a case (*b*) came very recently before the Court of Common Pleas, where A. deposited a dock warrant for certain goods with B. as security for a loan to be repaid on a certain day, with liberty to B. to sell the pledge in default. A. became bankrupt, and B. *before* the day of payment entered into an absolute contract for the sale of the goods; he handed the dock warrant to the Dock Company *on* the day of payment, and the vendee took actual possession of the goods the day after: Held, that this was a wrongful conversion of the goods by B., but (*dissentiente* Williams, J.) that the measure of damages was not the full value of the goods, but the damage which A. had actually incurred by the premature sale, which in this case was merely nominal. In detinue the damages are in general merely nominal, but the jury find the value of the articles detained, and the Common Law judgment is that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict and the costs of increase (*c*). And special damages may be recoverable for the detention, if laid in the declaration (*d*). But if no special damage be alleged, or only colourably so, the defendant may in general obtain an order for a stay of the proceedings on delivering up the goods or deeds in question, and paying nominal damages and costs; or if the plaintiff insists on proceeding for damages, the order will be for the delivery up

(*a*) Story *On Bailments*, sec. 315.
(*b*) *Johnson* v. *Stear*, 33 L. J. (N. S.), C. P., 130.
(*c*) *Phillips* v. *Jones*, 15 Q.B., 859, 19 L.J. (N.S.), Q.B., 374.
(*d*) *Williams* v. *Archer*, 5 C. B., 318.

of the deeds or goods, and that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the goods, &c. (*a*). But not, in general, where the goods have been sold, and it is uncertain whether they were sold for the real value or not (*b*). An action for the recovery of chattels detained is an action to try a right besides the mere right to recover damages, and therefore is not within the Common Law Procedure Act, 1860 (*c*), which enables a judge in any action for an alleged wrong to certify to the contrary, in order to deprive the plaintiff of his costs upon recovery by verdict of less than £5 (*d*).

In trespass for distraining goods (as pawns) which are not distrainable, the tenant can only recover for the actual injury he has sustained (*e*). If the seller of goods retake them from the buyer before they have been paid for, the buyer may nevertheless recover the entire value as damages in trespass, and the jury cannot allow any deduction on account of the debt the buyer owes the seller for the price unpaid (*f*). In action of debt, the plaintiff is to recover the sum *in numero*, and not a compensation in damages, as in those actions which sound in damages only, as *assumpsit*. The damages given for the detention of the debt are merely nominal (*g*).

(*a*) *Williams* v. *Archer*, 5 C.B., 318.
(*b*) *Gibson* v. *Humphrey*, 2 Dowl., 68.
(*c*) 23 & 24 Vict., cap. 126, sec. 34.
(*d*) *Danby* v. *Lamb*, 31 L.J. (N.S.), C.P., 17.
(*e*) *Harvey* v. *Pocock*, 11 M. & W., 740.
(*f*) *Gillard* v. *Brittan*, 8 M. & W., 575.
(*g*) Selwyn's *Nisi Prius*, 570.

In trespass, where no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property, with interest, furnishes the measure of damages (*a*); but in one case it was said (*b*), it was entirely a question for the jury what damages they would allow. "Juries have not much compassion for trespassers; and I do not think they were bound to weigh in golden scales how much injury a party has sustained by trespass."

In debt or in *assumpsit* between the parties to this contract motive is immaterial, and, indeed, will be irrelevant to the issue raised (*c*), and the damages should be limited to the pecuniary loss resulting from the breach of contract (*d*), which, when the suit is by the pawnee, *prima facie*, will be the precise sum stipulated to be paid, together with interest when recoverable (*e*).

Besides these legal remedies the parties may, if they please, go into Equity. And if a time for redemption is fixed by the contract, still the pledgor may redeem it afterwards, if he applies to the Court of Chancery within a reasonable time. If no time is specified for payment, the pledgor may redeem it at any time during his life, unless he is called upon to redeem by the pledgee; and if he fails in so redeeming it, his representatives may redeem it. But the remedy is at law, unless some special ground is shown, as if an account or

(*a*) Sedgwick *On Damages*, 530.
(*b*) Per Alderson, B., in *Lockley* v. *Pye*, 8 M. & W., 135.
(*c*) Broom's Commentaries, 3rd edit., 613. (*d*) *Ibid.*
(*e*) No matter what the amount of inconvenience sustained by the plaintiff. Per Willes, J., in *Fletcher* v. *Tayleur*, 17 C. B., 21, 29.

discovery is wanted, or there has been an assignment of the pledge (*a*).

On the other hand the pledgee may bring a bill in equity to foreclose and sell the pledge, but it has been also said that on due notice given to the pledgor, the pledgee may sell the pledge without any decree of sale (*b*). And this would seem to be true, as there would appear to be no ground of distinction between mortgages and pledges of personalty in that point of view (*c*).

Where the pawn has a special and peculiar value to the owner, specific delivery of it will be decreed at the suit of the pawnor, on the same principle as was recognised in the case of the Pusey horn (*d*); and a bill lies to compel delivery of an altar-piece, or other curiosity in specie (*e*). Even where there is no peculiar value, it would probably be ordered between pawnor and pawnee, on the ground of fiduciary relation, recognised in *Wood* v. *Rowcliffe* (*f*), where furniture was deposited in trust, and *Jackson* v. *Butler* (*g*), where an agent had deposited mortgage deeds.

Supplementary to these remedies at Common Law and in Equity, are a number of provisions in the Pawnbrokers' and other Acts, giving

(*a*) Story's *Equity Jurisprudence*, sec. 1032, 2 Spence's *Ibid*, secs. 637, 772, 773; *Kemp* v. *Westbrook*, 1 Ves. 278; *Demandray* v. *Metcalf*, Pre. Ch., 419, 420; *Jones* v. *Smith*, 2 Ves., jr., 372.

(*b*) Story's *Equity*, sec. 1033, Spence's *Ibid.*, 637, 771.

(*c*) Smith's *Manual of Equity*, 6th edit., 304.

(*d*) *Pusey* v. *Pusey*, 1 Vern., 273, 1 White and Tudor's *Leading Cases*, 2nd edit., 654.

(*e*) *Duke of Somerset* v. *Cookson*, 3 P. Wms., 389, 1 White and Tudor's *Leading Cases*, 2nd edit., 655.

(*f*) 3 Hare, 304. (*g*) 2 Atk., 306.

summary remedies by proceedings before one or more magistrates. These provisions are set forth in the following pages. Unless otherwise specified, procedure in these cases is according to Jervis's Act, 11 & 12 Vict., cap 43, and conviction may be before any one or more magistrates.

OFFENCES.

I.—BY PAWNBROKERS.

—o—

AS TO THE MANNER OF CONDUCTING BUSINESS.

Not taking out an Annual License (*a*)

For each house, shop, or place used for taking in goods or chattels to pawn.

STATUTES.—25 Geo. 3, cap. 48; 55 Geo. 3, cap. 184; 9 Geo. 4, cap. 49, sec. 12; 19 & 20 Vict., cap. 27.

PENALTY.—£50.

Mode of enforcing.—By action in any of the Courts at Westminster, or in the Court of Session or Justiciary, or Exchequer in Scotland.

(*a*) Proceedings for this offence are excepted from the operation of 12 & 13 Vict., cap. 43, but where the information or complaint, though grounded on some matter contained in a statute relating to these excepted subjects, does not *itself* relate to them, the exception does not apply. Therefore a conviction under 4 & 5 Will. 4., cap. 85, sec. 8, for signing a false certificate for the purpose of obtaining a beer license, is valid, though drawn up according to the form prescribed by 11 & 12 Vict., cap. 43 (*Reg.* v. *Bakewell*, 26 L. J. (N. S.), M. C., 150). In excise prosecutions it is not enough to describe trading co-partnerships by the name of the firm (*Reg.* v. *Harrison*, 8 T. R., 508).

Not taking out an Annual License.

Application of penalty.—Plaintiff's own use, with double costs.

For offences under 19 & 20 Vict., cap. 27, justices may mitigate the penalties to any sum not less than one-fourth of that fixed by the Act.

For offences respecting Licenses, the information need not be on oath; it may be laid at any time; must be laid by an officer of Inland Revenue; any justice may convict. There is no power to summon witnesses. The penalties go to Her Majesty, subject to appeal, as provided in sect. 35 of the Pawnbrokers' Act.

Name over Door.

Not having painted or written in large legible characters, the Pawnbroker's name, and the word Pawnbroker, over door of shop or other place of business, which shall have been made use of for the space of one week. (Proceedings for this offence not taken before a metropolitan or stipendiary magistrate must be taken before two magistrates, near to the place where it was committed.)

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 23.

PENALTY.—£10 for every shop.

Mode of enforcing.—By distress, or imprisonment for not more than three months, nor less than fourteen days, unless sooner paid.

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed (sec. 26.)

Time of carrying on business.

Exercising or carrying on trade on a Sunday, Good Friday, Christmas Day, or any Fast or Thanksgiving Day by proclamation.

Buying goods in the course of trade before 8 a.m., or after 7 p.m., throughout the year.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 21.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress, or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Receiving or taking in pawn, or permitting or suffering to be received or taken in pawn, any goods before 8 a.m., or after 7 p.m., between September 29th and March 25th following.

Or before 7 a.m., or after 8 p.m., during the remainder of the year. (Except only in both cases until 11 o'clock on the evenings of Saturday during the year, and the evenings next preceding Christmas Day, Good Friday, and a public Fast or Thanksgiving day.)

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 21; amended by 9 & 10 Vict., 98.

PENALTY.—Not more than £5.

Mode of enforcing.—Distress, or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

[*Time of carrying on business.*]

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Table of Interest.

Not having painted, or printed, and exhibited in a conspicuous part of the shop, a table of profits, prices of pawn tickets, and the expense of obtaining a second note or memorandum.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 22.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress, or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Farthings.

Not giving to person offering to redeem goods, a farthing in exchange for a halfpenny tendered, in cases where a farthing only is due.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 4.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress, or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

As to the persons engaged in forming the contract.

Purchasing, or receiving, or taking pledges from persons apparently under twelve years of age, or intoxicated with liquor.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 21.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress, or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant and remainder to poor of parish where offence committed.

By 2 & 3 Vict., cap. 47, sec. 50, the person pawning within the Metropolitan Police District, must be of the apparent age of sixteen years.

PENALTY.—Not more than £5.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22.)

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Employing any servant or apprentice, or any other person under sixteen to take in pledges.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 21.

PENALTY.—Not more than £5.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

[*As to the persons engaged in forming the contract.*]

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

As to entries in Books, Duplicates, &c.

Not entering respecting goods pawned for above 5s., the sum advanced, date, name, address, &c., of pawnor and owner of goods (if known), with a description of such goods, in a book, *before* the sum is lent (*a*).

In cases where the sum advanced does not exceed 5s., not making such entry within four hours after sum is lent; or

Not entering in same manner where sum advanced exceeds 10s. in a separate book, with progressive numbers commencing each month; or

Not printing or writing on pawn ticket where sum exceeds 10s. the number of entry in book.

Not giving pawnor at the time of taking the pledge, a ticket containing a description of the goods, the sum advanced, date, name, and address, &c., of pawnor and owner of the goods (if known), and name and abode of Pawnbroker.

Receiving and taking the pledge where the pawnor does not accept and take the pawn ticket.

(*a*) If the Pawnbroker fail in making entries of the goods pledged, no property is vested in him, nor has he any lien upon them for the money advanced: (*Ferguson* v. *Norman*, 8 L.J., (N.S.), C.P., 3, see *ante*, p. 117).

[*As to entries in Books, Duplicates, &c.*]

Taking more than the sum allowed for the pawn ticket, *i. e.*, where the sum lent is less than 10s., ½d. (23 Vict., cap. 21); where 10s. and less than 20s., 1d.; where 20s. and less than £5, 2d.; where £5 or upwards, 4d.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 6.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Not endorsing upon every duplicate at the time of redemption, the amount of profits taken.

Not keeping duplicate one year thereafter.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 7.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22.)

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Not producing Books.

Neglecting or refusing to attend justices' summons with books, pawn tickets, &c., and to produce the same in their true and perfect state.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 25.

[*Not producing Books.*]

PENALTY.—Not above £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Neglecting to make, or cause to be made, any such entry as is required by the Act, in a fair and legible manner (see secs. 6, 20).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 26.

PENALTY.—Not exceeding £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Not giving copy of ticket and form of declaration, on receiving notice from the owner of unredeemed goods having been fraudulently obtained, &c., or in cases where the pawn ticket has been lost, not delivering to owner a copy of pawn ticket and form of declaration, on payment of ½d. where sum lent is not above 5s., 1d. where it is 5s. and not above 10s., and if above 10s. then on payment of the same sum as for the original ticket.

Not suffering person pawning property, and producing declaration, &c., made before

[*Not producing Books.*]

a justice, and authenticated by his hand, with copy of pawn ticket, to redeem the goods. (See also *post*, under the heads "Redemption" and "Sale.")

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 16.

PENALTY.—Not exceeding £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of Penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Interest.

Taking by way of profit upon a pledge, more than the legal interest allowed.

STATUTE.—39 & 40 Geo. 3, cap. 99, secs. 2, 3, 4, 5, and 26.

PENALTY.—Not more than £10 (*a*).

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed (sec. 26).

As to Redemption.

Neglecting or refusing without reasonable cause to deliver up goods pawned for

(*a*) As the Act provides no specific penalty for this offence, it falls within the general words of the 26th section: *Reg.* v. *Beard*, 12 East, 673, see *ante*, p. 89.

[*As to Redemption*]

not more than £10, and redeemable (within a year or fifteen months, sec. 1[illegible] on tender of principal and interest, or to make satisfaction as ordered by a justice or justices (*a*).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 14.

PENALTY.—Restoration of the goods, or making satisfaction to the owner.

Mode of enforcing.—Committal to prison without bail or mainprize until the order be complied with.

Not giving up goods to person producing pawn ticket on receiving satisfaction, as to principal and profit pursuant to the provisions of the Act, (unless notice received from real owner, or that goods have been fraudulently obtained or stolen, and owner proceeds as directed by sec. 16).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 15.

PENALTY.—Not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where the offence was committed.

(*a*) It would be a good answer to show that the pledgor was not the true owner (*Cheesman* v. *Exall*, 6 Ex., 341). And the Pawnbroker may take a reasonable time to ascertain the facts (*Vaughan* v. *Watt*, 6 M. & W., 492), or of the *bona fides* of the applicant (*Ibid.*), see *ante*, p. 122.

As to Sale, and matters connected therewith.

Purchasing, either by himself or other person for him, any pawned goods while in his custody as a pledge, except at public auction conducted as the Act directs; or

Suffering the same to be redeemed with a view to purchase; or

Making, or causing to be made, any agreement with pawnor or owner for purchase, sale, or disposition of goods pawned, before the expiration of the year from the time of pledging the same; or

Purchasing or taking in pledge, &c., the duplicate of any other Pawnbroker.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 21.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not exceeding three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Selling goods forfeited, and not redeemed within the year, the sum lent upon them being above 10s., otherwise than by public auction, in the manner required by the Act.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 17.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not exceeding three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

[*As to Sale, and matters connected therewith.*]

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Not selling pictures, &c., separately, and as required by the Act.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 18.

PENALTY.—Not more than £5.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not exceeding three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—Moiety to complainant, and remainder to poor of parish where offence committed.

Not entering sales of goods pawned for more than 10s. in a book, with date of pledge, sale, and other particulars mentioned in the Act (*a*).

Refusing to pay on demand, (made within three years of sale,) overplus on sale to owner of goods.

Refusing to permit pawnor or owner to inspect entry of sale in books, on paying 1d.; or

Entering in such book a less sum than that for which the goods were sold; or

Not *bond fide*, according to the directions of the Act, selling the goods.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 20.

PENALTY.—£10, and treble the sum for which the goods were pawned.

(*a*) Except before metropolitan or stipendiary magistrates, proceedings under 20th section must be before two or more justices.

[*As to Sale, and matters connected therewith.*]

Mode of enforcing.—Distress (sec. 26), or imprisonment for not exceeding three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—To the person by or for whom the goods pawned.

Goods lost or improperly received in Pawn.

Not obeying justices' order for making satisfaction to owner of goods sold before the time allowed, or not according to the Act, or embezzled, or lost, or rendered of less value than when pawned, by default of Pawnbroker (*a*).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 24.

PENALTY.—£10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—To the person by or for whom the goods pawned.

Knowingly buying, or taking in as a pledge or in exchange, goods of any manufacture, or any materials plainly intended for manufacture, after the goods are put in course of manufacture and before their completion or finish for wear, or any linen or apparel, the goods, linen,

(*a*) Sec. 14 applies where the Pawnbroker still has the goods: Oke's *Magisterial Synopsis*, 465. And a Pawnbroker is *entitled* to be examined on oath in answer to any charge of refusing to deliver up goods pawned, on order of justices: 7 J. P., 696.

[*Goods lost, or improperly received in Pawn.*]

&c., being entrusted to a person to wash, mend, manufacture, &c.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec 11.

PENALTY.—Forfeit double the sum given for or lent on the same, *and* to restore the goods, &c., to the owner.

Mode of enforcing.—By distress (sec. 26), or imprisonment for not exceeding three calendar months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.— Poor of parish where offence committed.

Knowingly (*a*) receiving, possessing, keeping, selling, or delivering any naval or victualling stores, marked as set forth in fifth section of the Act (*b*).

STATUTE.—27 & 28 Vict., cap. 91, secs. 5, 7, and 8.

PENALTY.—(Sec. 5.) The party charged shall be guilty of a misdemeanor, and liable on conviction to not more than one year's imprisonment, with or without hard labour. By sec. 9, when the value of the stores, the subject of the

(*a*) By sec. 7 proof of lawful authority to receive, possess, keep, sell, or deliver such goods, shall lie on the accused. By sec. 8 knowledge of the marks, &c., is presumed against dealers in marine stores and old metals, but not against Pawnbrokers; but by sec. 11, in order to prevent the failure of justice by reason of the difficulty of proving knowledge of the marks, the justice may fine any person £5 who does not satisfy him that he came by the goods lawfully.

(*b*) Receivers, &c., may be dealt with under the Criminal Justice Act (18 & 19 Vict., cap. 126, sec. 1), when the value of the stores to which the charge relates, does not exceed £1. If above that value, sec. 3 of the same act shall apply.

[*Goods lost, or improperly received in Pawn.*]

charge, does not exceed £5, the offender may be fined £20, or subjected to six months' imprisonment at the discretion of the justice.

Application of penalty.—(Sec. 16.) As the Admiralty shall direct. By sec. 15 only the Admiralty can institute a prosecution for any offence under this Act.

Knowingly detaining, buying, exchanging, or receiving from any soldier or deserter, or other person acting for or on his behalf, any arms, ammunition, medals, clothes, military furniture, articles used in barracks, regimental necessaries, &c.; or

Having such in possession, or keeping without giving a satisfactory account how he came by the same.

STATUTE.—28 & 29 Vict., cap. 11, sec. 84 (Mutiny Act).

PENALTY.—First offence not above £20, and treble value. For second or later offence not less than £5 nor more than £20, and treble value, *and* in addition not more than six months' imprisonment, with or without hard labour.

Mode of enforcing.—Distress, and imprisonment for not more than six months.

Application of penalty.—By sec. 90 half the penalty (not including the treble value) to the informer, or if the informer proves the case, the whole penalty to the general agent for the recruiting service in London, at the disposal of the Secretary of State for War.

[*Goods lost, or improperly received in Pawn.*]

The like as to any goods which, by the custom of the Royal Marine corps, are generally deemed regimental or divisional necessaries.

STATUTE.—28 & 29 Vict., cap. 12, sec. 89 (Marine Mutiny Act).

PENALTY.—First offence not above £20, and treble value for second or later offence. Not less than £5 nor more than £20, and treble value, *and* in addition not more than six months' imprisonment, with or without hard labour.

Mode of enforcing.—Distress, or imprisonment for not more than six months.

Application of penalty.—Half the penalty (not including the treble value) to the informer; or if the informer proves the case, the whole penalty to the general agent for the recruiting service in London, at the disposal of the Secretary of State for War; remainder at the disposal of the Commissioners of the Admiralty.

Buying, taking in exchange, concealing, or otherwise receiving militia arms, clothes, accoutrements, or regimental necessaries.

STATUTE.—17 & 18 Vict., cap. 105, sec. 48.

PENALTY.—Not more than £10.

Mode of enforcing.—Distress, or six months' imprisonment with or without hard labour, if the same be not sooner paid.

Application of penalty.—Half to the informer, remainder, or if the informer shall prove the case, the whole, as the Secretary at War shall direct.

[*Goods lost, or improperly received in Pawn.*]

Buying, taking in exchange, concealing, or otherwise receiving from any member of a yeomanry corps, arms, accoutrements, or public stores or ammunition delivered for their use.

STATUTE.—44 Geo. 3, cap. 54, sec. 45.

PENALTY.—Not more than £10.

Mode of enforcing.—Distress, or imprisonment, without bail or mainprize, for three months, unless the fine be sooner paid.

Buying, or taking in exchange from any volunteer any public stores or ammunition issued for the use of a volunteer corps or regiment.

STATUTE.—26 & 27 Vict., cap. 65, sec. 29.

PENALTY.—First offence not more than £10; subsequent offence not less than £5 nor more than £20, with or without imprisonment of not more than six months.

Mode of enforcing.—Distress or imprisonment, as in other cases, (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—To the general fund of the regiment.

Buying, taking in exchange, receiving in pledge, or otherwise receiving or concealing any arms, clothes, accoutrements, ammunition, slops, or necessaries of the Reserve Volunteer Force of Seamen.

STATUTE.—22 & 23 Vict., cap. 40, sec. 19.

PENALTY.—Not more than £10 and treble value.

Mode of enforcing.—Distress, or imprisonment, with or without hard labour for not more than six months.

[*Goods lost, or improperly received in Pawn.*]

Application of penalty.—Half to the informer (not including the treble value), and remainder (or if the informer proves the case, then the whole) to the Commissioners of Admiralty.

Doing the like as to the Naval Coast Volunteers.

STATUTE.—16 & 17 Vict., cap. 73, sec. 19.

PENALTY.—Not more than £10 and treble value.

Mode of enforcing.—Distress, or imprisonment with or without hard labour for not more than six months.

Application of penalty.—Half to the informer (not including the treble value), remainder, (or if the informer proves the case, then the whole) to the Commissioners of Admiralty.

Taking in pawn, buying, &c., any clothes, linen, or other goods marked "Chelsea Hospital."

STATUTE.—7 Geo. 4, cap. 16, sec. 34.

PENALTY.—£20.

Mode of enforcing.—Distress, or imprisonment for three months, or till the penalty be paid.

Application of penalty.—Half to informer, remainder to the Hospital.

The like as to goods belonging to Greenwich Hospital.

STATUTE.—20 Geo. 2, cap. 24, sec. 16.

PENALTY.—£5.

Mode of enforcing.—Distress, imprisonment for three months, and public whipping at the discretion of the justice.

[*Goods lost, or improperly received in Pawn.*]

Application of penalty.—Half to informer, remainder to the Hospital.

The like as to goods, chattels, furniture, clothes, &c., provided for the use of the poor in workhouses by the overseers, or other persons appointed for that purpose.

STATUTE.—55 Geo. 3, cap. 137, sec. 2.

PENALTY.—Not more than £5.

Mode of enforcing.—Two months' imprisonment (*a*).

Application of penalty.—Half to the informer, and half to the overseers, &c., to whom the goods belong.

Having in possession any part of the clothing, accoutrements, or appointments of any Metropolitan Police-constable, without being able satisfactorily to account for the same.

STATUTE.—2 & 3 Vict., cap. 47, sec. 17.

PENALTY.—Not more than £10.

Mode of enforcing.—(By sec. 77) imprisonment for not more than one calendar month. If not more than £5 imprisonment to cease on payment.

Application of penalty.—Part to informer at discretion of magistrate, remainder to receiver of Metropolitan Police.

The like as to the City Police.

STATUTE.—2 & 3 Vict, cap. 94, sec. 16.

PENALTY.—Not more than £10.

Mode of enforcing.—Imprisonment for not more than one calendar month. If not

(*a*) By 13 & 14 Vict., cap. 101, persons committed to prison for offences against this Act may be kept to hard labour. Query, whether this applies to the Pawnbroker, or only to the pauper pawnor.

[*Goods lost, or improperly received in Pawn.*]

more than £5 imprisonment to cease on payment.

Application of penalty.—To Chamberlain of the City.

The like as to the Police of towns.

STATUTE.—10 & 11 Vict., cap. 89, sec. 12.

PENALTY.—Not more than £10.

Mode of enforcing.—Imprisonment for not more than one calendar month. If not more than £5 imprisonment to cease on payment.

Application of penalty.—According to the provisions of Railway Clauses Consolidation Act, 1845.

Purchasing, taking in pawn, or in any other way receiving into Pawnbroker's premises or possession any woollen, worsted, cotton, flax, mohair, or silk materials, whether made up or not, or any tools or apparatus for the same, he knowing the same to be purloined, or embezzled, or fraudulently disposed of; or that the person from whom he shall purchase, take in pawn, &c., them, is employed or entrusted by any other person to work up such materials by himself or others (*a*).

STATUTE.—6 & 7 Vict., cap. 40, sec. 4.

PENALTY.—Shall be guilty of a misdemeanour, and liable to a fine not exceeding £20 with costs, in addition to the forfeiture of the goods.

Mode of enforcing.—Distress, if not sufficient one justice may commit for not

(*a*) Proceedings must be before two or more justices.

[*Goods lost, or improperly received in Pawn.*]

more than four months' imprisonment, with or without hard labour, unless the fine, &c., be sooner paid.

Application of penalty.—In making satisfaction to the party injured, and remainder, if any, to the Queen, according to 3 Geo. 4, cap. 46.

Search for Goods.

Opposing or hindering search of house, &c., by peace officer under justice's warrant, for unfinished goods, linen, &c.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 12.

PENALTY.—(By sec. 26) not more than £10.

Mode of enforcing.—Distress (sec. 26), or imprisonment for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—In making satisfaction to the party injured, remainder to the poor of the parish where the offence was committed.

The like for goods unlawfully obtained, or taken, or pawned without authority of owner.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 13.

PENALTY.—Not more than £10.

Mode of enforcing.—Distress (sec. 26), if not sufficient any justice may commit for not more than three months, unless sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—In making satisfaction to the party injured, remainder to the poor of the parish where the offence was committed.

II.—BY PERSONS OTHER THAN PAWNBROKERS.

—o—

Unlawfully Pawning, &c.

Any person who shall knowingly and designedly pawn, pledge, or exchange;
Or unlawfully dispose of the goods of any other person, not being employed or authorised by the owner thereof to do so (*a*).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 8.
PENALTY.—Not more than £5 nor less than 20s., and full value of the goods.
Mode of enforcing.—Imprisonment with hard labour for not more than three calendar months, unless the forfeitures sooner paid.
Application of penalty.—Value and portion of penalty to person injured, remainder to use of the poor (*b*).

Persons offering to pawn or redeem goods not giving a satisfactory account of themselves and of the goods, the same

(*a*) A search warrant may be granted for goods unlawfully pawned (see 39 & 40 Geo. 3, cap. 99, sec. 13), as also for unfinished goods, &c. (see 39 & 40 Geo. 3, cap. 99, sec. 12). As to what is unlawful pawning, see *Reg.* v. *Petheon*, 9 C. & P., 552, *ante*, p. 139.

(*b*) By 39 & 40 Geo. 3, cap. 99, sec. 8, a justice may grant his *warrant* to apprehend any person so offending. This power, Mr. Oke considers, is in addition to that given by 11 & 12 Vict., cap. 43, sec. 13, which authorises either a summons or a warrant to be issued in the first instance on an information for any offences.

[*Unlawfully Pawning, &c.*]

appearing to be stolen, or illegally or clandestinely obtained (*a*).

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 10.

PENALTY.—Where no other law applicable, committal to prison for not more than three months.

Retailer of spirituous liquors taking a pledge for money owing for spirituous liquors.

STATUTE.—24 Geo. 2, cap. 40, sec. 12.

PENALTY.—40s., and pawnor may sue for the restoration of the pawn as if it had never been pledged.

Mode of enforcing.—Warrant under the hand of one justice.

Application of penalty.—Half to the poor, remainder to informer.

Member of any corps of yeomanry selling, pawning, or losing his arms, accoutrements, clothing, or ammunition.

STATUTE.—44 Geo. 3, cap. 54, sec. 44.

PENALTY.—40s.

Mode of enforcing.—Imprisonment with hard labour for one week, or until the penalty be paid.

Member of volunteer force doing the like with any public stores or ammunition issued for the use of his corps or regiment.

STATUTE.—26 & 27 Vict., cap. 65, sec. 28.

PENALTY.—£5 in addition to the value.

Mode of enforcing.—Distress, or imprisonment with or without hard labour for not more than three months.

(*a*) Offender may be given into custody.

[*Unlawfully Pawning, &c.*]

Application of penalty.—To the general fund of offender's corps or regiment.

Member of Reserve Volunteer Force of Seamen doing the like with the above, or with slops or necessaries.

STATUTE.—22 & 23 Vict., cap. 40, sec. 19.

PENALTY.—Not above £3.

Mode of enforcing.—(Sec. 25.) Distress, or imprisonment with or without hard labour for not more than six months.

Application of penalty.—(Sec. 25.) Half to informer, remainder, (or if he proves the case, the whole), to the Admiralty Commissioners.

Naval Coast Volunteers doing the like.

STATUTE.—16 & 17 Vict., cap. 73, sec. 19.

PENALTY.—Not above £3.

Mode of enforcing.—Distress, or imprisonment with or without hard labour, for not more than six months.

Application of penalty.—Half to informer, remainder, (or if he proves the case the whole,) to the Admiralty Commissioners.

Chelsea pensioner or other person pawning, selling, or illegally disposing of clothes, linen, stores, and other articles marked with the words "Chelsea Hospital."

STATUTE.—7 Geo. 4, cap. 16, sec. 34.

PENALTY.—£20.

Mode of enforcing.—Distress, three months' imprisonment, or till the fine be paid.

Application of penalty.—Half to the informer, remainder to the use of the Hospital.

[*Unlawfully Pawning, &c.*]

Person employed in the woollen, worsted, &c., trades (see *ante*, p. 258) selling, pawning, exchanging, or otherwise disposing of materials, tools, or apparatus (*a*).

STATUTE.—6 & 7 Vict., cap. 40, sec. 5.

PENALTY.—£20 and costs.

Mode of enforcing.—Distress, if not sufficient any justice may commit for not more than four months, unless sooner paid.

Application of penalty —In making satisfaction to the party injured, remainder to the Queen, under 3 Geo. 4, cap. 46.

Forging Tickets.

Any persons counterfeiting, forging, or altering; or

Causing or procuring to be counterfeited, forged, or altered, any pawn ticket; or

Uttering, vending, or selling the same knowing it to be counterfeited, &c., with intent to defraud any person.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 9.

PENALTY.—Imprisonment for not more than three calendar months. [The party may be detained on suspicion by the person to whom he offers the same, or by his agents or servants.] (*b*)

(*a*) Proceedings must be before two justices.

(*b*) A person who utters a forged Pawnbroker's duplicate may be indicted for *uttering* a forged accountable receipt of goods, under 11 Geo. 4, and 1 Will. 4, cap. 66, sec. 10 (or now by 24 & 25 Vict., cap. 98, sec. 10): *Reg.* v. *Fitchie*, 1 D. & B., C.C., 175, 3 Jur. (N.S.), 419, 26 L.J., (N.S.), M.C., 90.

Declarations.

As to the declarations substituted for oaths, required by 39 & 40 Geo. 3, cap. 99. Making such a declaration wilfully false in any material particular.

STATUTE.—5 & 6 Will. 4, cap. 62, secs. 12, 18.

PENALTY.—Offender to be guilty of a misdemeanour.

Subscribing such a declaration in the same manner.

STATUTE.—5 & 6 Will. 4, cap. 62, sec. 21.

PENALTY.—Guilty of a misdemeanour.

Sale of Pledges by Auctioneer.

Auctioneer not advertising the sale of pledges, or not exposing the goods to public view.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 17.

PENALTY.—Not above £10.

Mode of enforcing.—(Sec. 26) distress, or imprisonment for not more than three months, unless the penalty be sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—To the owners of the goods pawned.

The like if the particulars required by the section be not given in the published catalogues.

STATUTE.—39 & 40 Geo. 3, cap. 99, sec. 17.

PENALTY.—Not above £10.

Mode of enforcing.—(Sec. 26) distress, or imprisonment for not more than three months, unless the penalty be sooner paid (11 & 12 Vict., cap. 43, sec. 22).

Application of penalty.—To the owners of the goods pawned.

Where the justices of the peace do not give direction to the churchwarden or overseers, it would appear that any other person may prosecute (*a*). Any doubt that might formerly have existed on this point has been recently removed by a decision in the Court of Queen's Bench, in the case of *Caswell* (appellant) v. *Morgan* (respondent) (*b*), where the prosecutor was a common informer. The Court held, not only that any one who was not one of the persons described in sec. 29 might inform or prosecute for offences against the Act, but also (*c*) that a common informer laying such an information was entitled to a moiety of the penalty.

But the corrupt practices of which common informers were too frequently guilty, led to the incorporation of certain provisions in the Metropolitan Police Act (*d*), by sec. 32 of which it is enacted that whereas informations are often laid for the mere sake of gain, or by persons not truly aggrieved, and the offences charged in such informations are not further prosecuted, or it appears upon prosecution that there was no sufficient ground for making the charge, be it enacted that in every case in which any information or complaint of any offence shall be made or laid before any of the said magistrates, and shall not be further prosecuted, or in which, if further prosecuted, it shall appear to the magistrate by whom the case shall be heard that there was no sufficient ground for making the charge, the magistrate shall have power to award such amends, not more than the sum of £5, to be paid by the

(*a*) 13 J.P., 675.
(*b*) 33 L.T., 120, Q.B.
(*c*) 28 L.J., 275, Q.B.
(*d*) 2 & 3 Vict., cap. 71.

informer to the party informed or complained against, for his loss of time and expenses in the matter, as to the magistrate shall seem meet.

The next section of the same Act provides that in case any person shall lodge any information before any of the said magistrates for any offence alleged to have been committed, by which he was not personally aggrieved, and shall afterwards directly or indirectly receive, without the permission of one of the said magistrates, any sum of money or other reward for compounding, delaying, or withdrawing the information, it shall be lawful for any one of the said magistrates to issue his warrant or summons, as he may deem best, for bringing before him the party charged with the offence of such compounding, delay, or withdrawal; and if such offence be proved by the confession of the party, or by the oath of any credible witness, such informer shall be liable to a penalty of not more than £10.

And sec. 34 enacts that whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered, is directed to be adjudged to the informer, and the same has been found to encourage the corrupt practices of common informers; for the prevention thereof be it enacted that where by any Act now in force, *or hereafter to be passed,* a moiety or other fixed portion of the penalties thereby imposed is *or shall be* directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said justices (of the metropolitan Police-courts) before whom such conviction shall be had, to adjudge that no part, or such part only of the penalty as he shall think

fit, shall be paid to the informer. And sec. 35 provides that whereas by divers Acts, certain limited penalties or terms of imprisonment are imposed for offences therein mentioned, and sufficient power is not given to the justice or justices before whom the offender is convicted, to reduce or lessen such penalty or term of imprisonment, whereby much hardship is experienced, be it enacted that where by any Act now in force, *or hereafter to be* passed, a limited penalty or term of imprisonment is imposed on conviction of any offender before any justice or justices of the peace, it shall be lawful for any one of the said justices before whom such conviction shall be had, to reduce or lessen such penalty or term of imprisonment in such manner as he may think fit. Provided always, that no penalty for the infringement of any Act relating to the revenue of Customs or Excise, Stamps or Taxes, shall be reduced by such magistrate below the amount or proportion allowed in that behalf by the Act or Acts specially relating thereto, without the consent of the Commissioners of Customs or Excise, or Stamps and Taxes respectively.

The powers given by these sections to magistrates of the metropolitan district with respect to offences under the 39 & 40 Geo. 3, cap. 99, have since been extended to all justices, by 22 & 23 Vict., cap. 14. This Act does not *in terms* extend to the more recent pawnbroking statutes, but it is conceived that it has this effect by implication. The question is, however, not altogether free from doubt, as its solution depends upon a rather nice application of some of the canons of construction.

Informations in every case should follow the statute; but when two or more persons are charged with one offence, only one information is necessary, though more than one may have concurred in its commission (*a*). But when several persons are joined in a charge and found guilty, they must be separately convicted and fined, for otherwise, if one refused to pay his share, the others might have to pay the whole or be imprisoned till the first had paid his fine. A conviction imposing a joint fine is bad, and a party committed under such a conviction may recover in trespass against the committing magistrate (*b*).

In *qui tam* actions by informers for penalties, a summons should be issued to show cause why a distress should not issue (*c*). An informer is no longer objectionable as a witness on the ground of interest (*d*).

An action will often lie, where there is a summary remedy before justices, as for the recovery of stolen goods after the conviction of the thief, though no order for restitution has been made (*e*).

It was formerly an established rule of law that if any ground of appeal, or other document brought before the Court of Quarter Sessions, received a construction from them which it was capable of bearing, their decision could not be reviewed, unless they had themselves reserved the point (*f*). But now by 11 & 12 Vict.,

(*a*) Stone's *Petty Sessions*, 69.
(*b*) *Morgan* v. *Brown*, 4 Ad. & E., 515.
(*c*) Stone's *Petty Sessions*, 152.
(*d*) By 6 & 7 Vict., cap. 85, and 14 & 15 Vict., cap. 99.
(*e*) *Scattergood* v. *Sylvester*, 15 Q.B., 506.
(*f*) *R.* v. *Kesteven*, 3 Q.B., 810.

cap. 31, sec. 7, and 12 & 13 Vict., cap. 45, sec. 9, *certiorari* lies, unless where the order or conviction is wholly beyond the justices' jurisdiction, or where they were interested, or their decision was obtained by fraud. They have, however, by 20 & 21 Vict., cap. 43, the power of stating a case founded on any judicial act done by them, and the party aggrieved may submit it for the consideration of the Superior Courts.

As to the Power of Appeal.—Defendants have not a legal right, either by the Common Law, or by any general statute, to appeal to the Court of Quarter Sessions against summary convictions of justices of the peace, and can, therefore, only have such appeal in those cases where the particular statutes under which the convictions have been made, expressly allow it. And when the defendant has the power, he must comply with the requisitions of the statute with regard to notice of appeal, and entering into recognisances, and when the appeal is given to "parties aggrieved," the appellant must describe himself accordingly (*a*). Therefore, says Mr. Stone (*b*), whenever it is deemed advisable to appeal, the defendant, or his professional adviser, should carefully examine the Act itself under which the conviction has been made, and inform himself fully of its various provisions; as many appeals have miscarried from a neglect of this caution, and placing too much reliance upon a quotation of the statute,

(*a*) *R.* v. *Justices of the West Riding of Yorkshire*, 1 M. & R., 547. Mr. Stone says (*Petty Sessions*, 178,) that two recognisances of £10 each are generally required.

(*b*) *Petty Sessions*, 172.

although contained, perhaps, in a work of general accuracy and great repute. When the statute gives an appeal, if the sum adjudged to be paid exceeds a given amount, there is no appeal, unless the sum adjudged as penalty, exclusive of costs, exceeds the specified sum (*a*). There is, however, no such limit in the Pawnbrokers' Act (39 & 40 Geo. 3, cap. 99), the provisions as to appeal under which are contained in sec. 35. On appeal the case is reheard, and must be proved *de novo*. The defendant is generally required by statutes to specify the grounds of appeal. And these grounds must be clear and distinct, as the appellant cannot give evidence of, or argue on, other grounds than those specified in the notice, so as to leave latitude for all the evidence (*b*).

Fourteen clear days' notice of appeal at least shall in all cases be given, and such shall be sufficient notice in every case (*c*). But this does not extend to proceedings under the Excise, Customs, Stamps, Taxes, or Post-office. The costs of an appeal may be ordered by the Court of Quarter Sessions (*d*).

The statute 20 & 21 Vict., cap. 43, which gives power to justices to state a case for the opinion of the Superior Courts, applies to the determinations of justices on informations or complaints. And where the respondent could not be found, and notice of appeal and a copy of the case were served within the prescribed

(*a*) *Reg.* v. *Justices of Warwickshire*, 25 L.J. (N.S.), M.C., 119. (*b*) Stone's *Petty Sessions*, 175.

(*c*) 12 & 13 Vict., cap. 45, sec. 1.

(*d*) 11 & 12 Vict., cap. 43, sec. 27, and 12 & 13 Vict., cap. 45, sec. 5.

time, on the attorney who appeared for her before the justices, and they afterwards, and before the hearing, came to her hand, it was held that the section had been sufficiently complied with, and the Court heard the case, though the respondent did not appear (*a*). The provisions as to applying in writing for a case within three days after the decision, and as to transmitting the case to the Superior Court within three days after receiving it, are conditions precedent to the right of appeal, and unless they are complied with the Court has no jurisdiction to entertain the case, and Sunday is not to be excluded in computing the three days even though it be the last of the three (*b*); and the condition precedent cannot be waived. A writ of *certiorari* is not required to remove a case stated (*c*). The Court will not send back a case on a *suggestion* that it has been badly stated. And no case should be stated but where there is some question of law involved. The magistrates, by sec. 4 of the Act, may refuse to state a case, but when necessary, the Court of Queen's Bench is empowered by section 5, to make an order compelling them to do so. But the Court will not order them to state a case when the objection was that they had improperly received evidence. To enable the Court to interfere it must appear that the determination of the justices was wrong (*d*), for the purpose of this Act is to allow the judges

(*a*) *Syred* v. *Carruthers*, 1 E. B. & E., 469.
(*b*) *Peacock* v. *Reg.*, 4 C.B. (N.S.), 264, 27 L.J. (N.S.), C.P., 224.
(*c*) *Morgan* v. *Edwards*, 5 H. & N., 415, 6 Jur. (N.S.), 379, 29 L.J. (M.C.), 108.
(*d*) Stone's *Petty Sessions*, 191.

of the Superior Courts to review the decision of justices when acting within their jurisdiction (*a*), as the remedy by *certiorari* is designed to restrain them from exceeding their jurisdiction (*b*).

As to Search Warrants.—By 7 & 8 Geo. 4, cap. 29, sec. 63, if any credible witness proves on oath before a justice of the peace that he has reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any kind of stealing under that Act, whether punishable by indictment or summarily, has been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods. Such a search warrant may also be issued for goods unlawfully pawned (*c*), and for unfinished goods (*d*), if suspected to be in the possession of any Pawnbroker. A search warrant may be issued on Sunday (*e*).

(*a*) Per Campbell, C.J., in *Flannagan* v. *Overseers of Bishopswearmouth*, 8 E. & B., 455, 27 L.J. (N.S.), M.C., 46.

(*b*) *Reg.* v. *Justices of Macclesfield*, 2 L.T. (N.S.), 352. In this case the objection was that the magistrates had allowed a witness for the prosecution to refresh his memory by referring to a *copy* of a memorandum he had made, as to the subject matter of the charge, which copy, neither the defendant nor his counsel were permitted to see.

(*c*) By 39 & 40 Geo. 3, cap. 99, sec. 13. (*d*) sec. 14.
(*e*) 11 & 12 Vict., cap. 42, sec. 4.

SECTION XIX.

INTERPLEADER.

When *a defendant* is sued in *assumpsit*, debt, detinue, or trover, for a matter in which he does not claim any interest, and also in cases of cross claims on the same subject matter, parties may take the benefit of the statute 1 & 2 Will. 4, cap. 58, as to procedure in interpleader (*a*). But the Court cannot give relief under this Act to stakeholders who are only *threatened* with proceedings; an action must be brought and the plaintiff declare, before the Court can interfere. Still the stakeholder acting in good faith, is entitled to his costs from the party ultimately unsuccessful (*b*). Again, the Act does not apply where the defendant has by his own act incurred a personal liability in respect of the subject matter (*c*). Nor where the declaration contained a count *in case* as well as in trover (*d*). Nor to claims set up in consequence of proceedings in equity (*e*). Nor where A. has given a promissory note to B., and B. has deposited it with C., who brings an action upon it, is it any ground for obtaining relief under the Act that an action is anticipated at the suit of the creditor (*f*), but where

(*a*) *Farr* v. *Ward*, 2 M. & W., 844.
(*b*) *Parker* v. *Linnett*, 2 Dowl., 562.
(*c*) *Horton* v. *Earl of Devon*, 7 D. & L., 206, 4 Ex., 497, 19 L.J. (N.S.), Ex., 52; or where he has identified himself with the claimant by taking an indemnity from him: *Tucker* v. *Morris*, 1 Dowl., 639, 1 C. & M., 73.
(*d*) *Lawrence* v. *Mathews*, 5 Dowl., 149, 2 A. & W., 123.
(*e*) *Sturgess* v. *Claude*, 1 Dowl., 505.
(*f*) *Newton* v. *Moody*, 7 Dowl., C.P., 582.

of two plaintiffs each claimed to be the lawful owner of the note, an interpleader issue was ordered (*a*). The Act, however, is seldom useful in pawn transactions, inasmuch as it does not apply when the defendant claims *any* interest in the subject matter of the suit (*b*).

A judge may dispose of the matter summarily (whenever, from the smallness of the amount, it may appear desirable,) under the Common Law Procedure Act, 1860 (*c*), and relief may be granted under sec. 12 of this Act, though the conflicting titles have not a common origin.

On execution in a County Court against the goods of a defendant in a suit of A. *v.* B., goods in the hands of C. were seized, C. paid money to release them, and proceeded by interpleader. The goods originally belonged to B., but previous to the execution had been pawned with a Pawnbroker (it did not appear by whom), and the duplicate had been deposited in the hands of C. by L., to redeem them, and hold them as security for the money advanced, and L. redeemed accordingly. There was no evidence to show the time at which, or the circumstances under which, L. became possessed of the duplicate, or that he had any interest therein. Held, that C. was entitled to the money paid to release the goods (*d*).

(*a*) *Regan* v. *Serle*, 9 Dowl., 193.

(*b*) *Lindsey* v. *Barron*, 6 C.B., 291; *Braddock* v. *Smith*, 2 Bing., 84, 2 M. & Sc., 131 (which was a case of lien). It would seem, however, that where the defendant's claim is in the nature of a lien (or a pawn), he may interplead as to all but the value of his lien or claim to the property. (*Best* v. *Heyes*, 3 F. & F., 113, 1 H. & C., 718, 32 L.J. (N.S.), Ex., 129).

(*c*) 23 & 24 Vict., cap. 126, sec. 14.

(*d*) *Furber* v. *Sturmy*, 5 Jur., (N.S.), 45 Ex.

SECTION XX.

OF THE EXTINCTION OF THE CONTRACT OF PAWN.

The extinguishment of the contract may occur in various ways (*a*). (1) By the payment of the debt, or the discharge of the other engagements for which the pledge was given. *Si dominus solverit pecuniam, pignus quoque perimitur* (*b*). (2) By a satisfaction of the debt, in any other mode, either in fact or by operation of law. *Item liberatur pignus, sive solutum est debitum, sive eo nomine satisfactum est* (*c*). (3) By taking a higher or different security for the debt, as a bond or obligation for a promissory note, without any agreement that the pledge shall be retained therefor; which, in Roman law, is called a Novation. But mere change of security will not extinguish the right to the pledge, without the express or implied intention of both parties. Any thing which, by operation of law, extinguishes the debt, extinguishes the right to the pledge also, as judgment for the pledgor in a suit brought by the pledgee for the debt. (4) By the bar by prescription, when from length of time there arises a presumption of the payment or discharge of the debt. But the Statute of Limitations, it has been already shown, is not of itself such a bar as would destroy the rights of parties in the pawn

(*a*) Story *On Bailments*, secs. 359, 360, 361, 362, 363, 364.
(*b*) Dig. Lib., 20, tit. 1, l. 13, sec. 2.
(*c*) Dig. Lib., 20, tit. 6, l. 6.

and in the sum secured by it. And if the pledgor admits the debt, and brings a bill to redeem, he can do so only on payment of the debt, although the statute might otherwise be pleaded as a bar to it. (5) The right to the pledge is also gone, when the pawn perishes. *Sicut re corporali extincta, ita et usufructu extincto, pignus hypothecave perit,* is the language of Roman law (*a*). And that law held that the contract might be extinguished by any permanent and essential transmutation of the pawn. But by the Common Law it will still be held a pledge, as far as it can be traced, whatever transmutations it may have undergone without the assent of the pledgee (*b*). (6) By release or waiver by the pledgee. If the pledgee yields up possession of the pledge to the pledgor, or consents that the latter shall alienate it, or pledge it to another person, either of these acts will amount to a waiver of his right to the pledge. Indeed, the whole doctrine of extinguishment is resolvable into the very first elements of justice, and is founded upon the express or implied intention of the parties to extinguish the pledge, or upon a virtual extinguishment by the necessary operation of law.

(*a*) Dig. Lib. 20, tit. 6, l. 8; Pothier Pand., Lib. 20, tit. 6, n. 12.

(*b*) *Taylor* v. *Plumer*, 3 M. & S., 562.

APPENDIX.

ANNO TRICESIMO NONO & QUADRAGESIMO

GEORGII III. REGIS.

CAP. XCIX.

An Act for better regulating the Business of Pawnbrokers.

[28*th July*, 1800.

WHEREAS an Act was passed in the Thirty-sixth Year of the Reign of His present Majesty, intituled *An Act for regulating the Trade or Business of Pawnbrokers*, which was to be in force for Three whole Years, and from thence until the End of the then next Session of Parliament, and no longer: And whereas it is expedient that Provision should be made for more effectually regulating the Trade or Business of Pawnbrokers, from the Time when the said Act will expire: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, That the said Act passed in the Thirty-sixth Year of the Reign of His present Majesty, for regulating the Trade or Business of Pawnbrokers, shall be and the same is hereby declared to be in full Force and Effect until the Expiration of the present Session of Parliament, and from and after such Expiration this Act shall commence and take effect and be put in execution instead of the said recited Act. 36 G. 3, c. 87. recited.

II. And be it further enacted, That upon and from the Commencement of this Act, it shall be lawful for all Persons using and exercising the Trade or Business of a Pawnbroker to demand, receive, and take, of and from all and every Person and Persons applying or offering to redeem any Goods or Chattels pawned or pledged with such Pawnbroker a Profit after the following Rates, over and above the Principal Sum and Sums which shall have been lent and advanced upon the respective Pledge or Pledges, before any such Pawnbrokers shall be obliged to re-deliver the same; (*videlicet*) Pawnbrokers allowed to take certain Rates.

For every Pledge upon which there shall have been lent any Sum not exceeding Two Shillings and Sixpence, the Rates.

Sum of One Halfpenny for any Time during which the said Pledge shall remain in Pawn not exceeding One Calendar Month, and the same for every Calendar Month afterwards, including the current Month in which such Pledge shall be redeemed, although such Month shall not be expired:

For every Pledge upon which there shall have been lent the Sum of Five Shillings, One Penny:

For every Pledge upon which there shall have been lent Seven Shillings and Sixpence, One Penny Halfpenny:

For every Pledge upon which there shall have been lent Ten Shillings, Twopence:

For every Pledge upon which there shall have been lent Twelve Shillings and Sixpence, Twopence Halfpenny:

For every Pledge upon which there shall have been lent Fifteen Shillings, Threepence:

For every Pledge upon which there shall have been lent Seventeen Shillings and Sixpence, Threepence Halfpenny:

For every Pledge upon which there shall have been lent One Pound, Fourpence, and so on progressively and in proportion for any Sum not exceeding Forty Shillings:

For every Pledge upon which there shall have been lent any Sum of Money exceeding Forty Shillings and not exceeding Forty-two Shillings, Eightpence:

And for every Pledge upon which there shall have been lent any Sum exceeding Forty-two Shillings and not exceeding Ten Pounds, at and after the Rate of Threepence and no more, for the Loan of every Twenty Shillings for all such Money so lent by the Calendar Month, including the current Month, and so in proportion for any fractional Sum:

Which said several Sums shall be taken in lieu of and as a full Satisfaction for all Interest due and Charges for Warehouse Room.

When the intermediate Sum lent exceeds 2s. 6d. but does not exceed 40s., the Rate of 4d. for the Loan of 20s. by the Month to be paid.

III. And be it further enacted by the Authority aforesaid, That in all Cases where any intermediate Sum lent upon any Pawn or Pledge shall exceed the Sum of Two Shillings and Sixpence and not exceeding the Sum of Forty Shillings, the Person lending the same shall and may take, by way of Profit as aforesaid, at and after the Rate of Fourpence and no more for the Loan of Twenty Shillings by the Calendar Month, including the current Month as aforesaid.

Pawnbrokers to give Farthings in Change.

IV. Provided always, and be it further enacted, That in all Cases where the sum to be demanded, received, and taken by any Pawnbroker or Pawnbrokers, his, her, or their Servant or Agent, of and from any Person or Persons applying or offering to redeem any Goods or Chattels

pawned or pledged with such Pawnbroker or Pawnbrokers either as Profit upon any Sum Lent, or as part Principal and Part Profit, shall amount to a total Sum of which the Piece of Money of the lowest Denomination shall be one Farthing; and where the Person or Persons so applying or offering to redeem such Goods or Chattels shall have paid down the Sum due for such Principal and Profit, or for such Profit only (as the Case may be), except the last remaining Farthing, and shall not be able to produce and pay to such Pawnbroker or Pawnbrokers, his, her, or their Servant or Agent, a current Farthing, and which shall be to the Satisfaction and Liking of such Person or Persons to receive the same, but shall in lieu thereof tender to such Person or Persons to receive the same, One Halfpenny in order to discharge the said remaining Farthing so due as aforesaid, the said Pawnbroker or Pawnbrokers, his, her, or their Servant or Agent, to whom such Tender of a Halfpenny for such Purpose as aforesaid shall be made, shall in exchange thereof deliver unto such Person or Persons so redeeming Goods as aforesaid One good and lawful Farthing of the current Coin of this Kingdom, or in default thereof shall wholly abate the said remaining Farthing from the total Sum to be received by him or them of such Person or Persons so redeeming Goods or Chattels as aforesaid.

Limiting the Profits for Part of a Month.

V. Provided always, and be it further enacted, That in all Cases where the Party or Parties entitled to and applying for the Redemption of Goods pawned within the Space of Seven Days after the Expiration of the First Calendar Month after the same shall have been pledged, he, she, or they shall and may be at liberty to redeem the same without paying anything by way of Profit to the Pawnbroker for the said Seven Days, or such Part thereof as shall then have elapsed; and that in all Cases where the Party or Parties so entitled and applying as aforesaid after the Expiration of the said First Seven Days and before the Expiration of the First Fourteen Days of the Second Calendar Month, he, she, or they shall and may be at liberty to redeem such Goods upon paying the Profit payable for One Calendar Month and the Half of another Calendar Month to the Pawnbroker; but that in all Cases where the Party or Parties so entitled and applying as aforesaid after the Expiration of the said First Fourteen Days, and before the Expiration of the said Second Calendar Month, it shall be lawful for the Pawnbroker to demand and take the Profit of the whole Second Month; and that the like Regulation and Restriction shall take place and be in force in every subsequent Calendar Month wherein Application shall be made for redeeming goods pawned.

Pawns to be entered in Books.

VI. And be it further enacted, That all and every Person and Persons who, from and after the Commencement of this Act, shall take, by way of Pawn or Pledge, of or from any Person or Persons whomsoever, any Goods or Chattels, of what Kind soever the same shall be, and whereon shall be lent any Sum of Money exceeding Five Shillings, shall forthwith, and before he, she, or they shall or may advance or lend any Money upon such Pawn or Pledge, enter or cause to be entered in a fair and regular Manner in a Book or Books to be kept by him, her, or them for that Purpose, a Description of the Goods or Chattels which he, she, or they shall receive in Pawn, Pledge, or Exchange, and also the Sum of Money to be advanced or lent thereon, with the Day of the Month and Year on which and the Name of the Person or Persons by whom such Goods or Chattels are so Pawned, Pledged, or Exchanged, and the Name of the Street and Number of the House, if the same shall be said to be numbered, where such Person shall abide, and whether such Person or Persons is or are a Lodger in or the Keeper of such House by using the Letter "L" if a Lodger, and the Letter "H" if a Housekeeper, and also the Name and Place of Abode of the Owner or Owners of such Goods and Chattels according to the Information of the Person pawning, pledging, or exchanging the same, into all which Circumstances the Pawnbroker is hereby required to inquire of the Party pawning, before any Money shall be lent or advanced; and in all Cases where the Money lent on any such Goods or Chattels shall not exceed the Sum of Five Shillings such Entry shall be made in such Book or Books, by all and every such Person and Persons so taking the same by way of Pawn, Pledge, or Exchange as aforesaid, within Four Hours next after the said Goods and Chattels shall have been so pawned, pledged, or exchanged as aforesaid; and every Pledge upon which shall be lent any Sum of Money above Ten Shillings shall be entered in the Manner aforesaid in a Book or Books to be kept for that Purpose, separate and apart from all other Pledges whatever; and every such Entry of such Pledge whereon shall be lent any Sum of Money exceeding Ten Shillings shall be numbered in such Book or Books progressively as they are received in Pawn in the Manner following; (*videlicet*,) the First Pledge that is received in Pawn in the Month of *September* next shall be numbered No. 1, the second No. 2, and so on progressively until the End of the month; and the First Pledge that is received in the next Month shall be numbered No. 1, and the Second No. 2, and so on progressively and in like Manner until the End of the Month; and the like Regulation with respect to the Numbers of all

Pledges above Ten Shillings shall be observed in every succeeding Month throughout the Year; and upon every Note or Memorandum respecting any such Pledge whereon shall be lent any Sum exceeding Ten Shillings as aforesaid shall be fairly and legibly written or printed the Number of the Entry of such Pledge so entered in such Book or Books as aforesaid (a); and every such Person shall, at the Time of the taking of every Pawn, Pledge, or Exchange whatsoever, give to the Person or Persons so pawning, pledging, or exchanging the same a Note or Memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein in like Manner a Description of the Goods and Chattels which he, she, or they have received in Pawn, Pledge, or Exchange, and also the Sum of Money advanced thereon, with the Day of the Month and Year on which, and the Name and Place of Abode and Number of the House, if said to be numbered, of the Person or Persons by whom such Goods or Chattels are so pawned, pledged, or exchanged, and whether such Person is a Lodger or Housekeeper as aforesaid, by using a Letter "L" if a Lodger, and the Letter "H" if a Housekeeper, and also the Name and Place of Abode of the Owner or Owners thereof according to the Information aforesaid, and upon which said Note or Memorandum or on the Back whereof shall be moreover fairly written or printed the Name and Place of Abode of the Pawnbroker giving the same, which said Note or Memorandum the Party and Parties pawning, pledging, or exchanging the said Goods or Chattels shall and he, she, or they is and are hereby required to accept and take in all Cases, and the Pawnbroker shall not receive and retain such Pledge unless the Party pledging or offering to pledge the same shall accept and take such Note or Memorandum; and every such Note, where the Sum lent shall be less than Five Shillings, shall be delivered *gratis*; and where the Sum lent shall be Five Shillings or upwards, and less than Ten Shillings, such Pawnbroker shall and may take One Halfpenny for the same; and where the Sum lent shall be Ten Shillings or upwards, and less than Twenty Shillings, such Pawnbroker shall and may take One Penny for the same; and where the Sum lent shall be Twenty Shillings or upwards, and less than Five Pounds, the Sum of Two-

Pawnbrokers to give a Note describing Things pawned.

(a) The importance of rigidly adhering to the requirements of the Statute in all matters of Bookkeeping will be evident from a perusal of a case (Ferguson v. Norman, 8 L.J. (N.S.) C.P., 3) tried in the Court of Common Pleas, where the Court decided, that if the Pawnbroker fail in making entries of the goods pledged with him, no property in the goods is vested in him, nor has he any lien upon them for the money advanced.

pence for the same; and where the Sum lent shall be Five Pounds or upwards, the Sum of Fourpence and no more; and which Note shall be produced to the Pawnbroker before he or she shall be obliged to re-deliver the respective Goods or Chattels, except as herein-after is excepted.

The amount of Profits on Duplicates indorsed on Pledges redeemed.

VII. And be it further enacted, That in all Cases where any Goods or Chattels pawned or pledged shall be redeemed, the Pawnbroker of whom the same shall be redeemed shall, at the Time of such Redemption, fairly and legibly write or indorse, or cause to be written or indorsed, upon every Duplicate respecting such Pawn or Pledge, the Amount of the Profit taken by him or on his Account, on the Money lent upon such Goods or Chattels so redeemed, and shall keep such Duplicate in his Custody for the Space of One Year then next following.

Penalty against unlawfully pawning Goods the Property of others.

VIII. And be it further enacted, That from and after the Commencement of this Act, if any Person or Persons shall knowingly and designedly pawn, pledge, or exchange, or unlawfully dispose of the Goods or Chattels of any other Person or Persons, not being employed or authorized by the Owner or Owners thereof so to do, it shall be lawful for any Justice to grant his Warrant to apprehend any Person so offending, and if he, she, or they shall be thereof convicted by the Oath of any credible Witness or Witnesses, or by the Confession of the Person or Persons charged with such Offence, before any Justice or Justices of the Peace, for the County, Riding, Division, City, Liberty, Town, or Place where the Offence shall be committed, (which Oath every such Justice or Justices as aforesaid is and are hereby empowered and required to administer), every such Offender shall for every such Offence forfeit any Sum not exceeding Five Pounds nor less than Twenty Shillings, and also the full Value of the Goods or Chattels so pawned, pledged, exchanged, or disposed of, such Value to be ascertained by such Justice or Justices; and in case the said Forfeitures shall not be forthwith paid, the Justice or Justices of the Peace as aforesaid before whom such Conviction shall be had shall commit the Party or Parties so convicted to the House of Correction or some other public Prison of the County, Riding, Division, City, Liberty, Town, or Place wherein the Offender or Offenders shall reside or be convicted, there to remain and be kept to Hard Labour for a Space not exceeding Three Calendar Months, unless the said Forfeitures shall be sooner paid; and if within Three Days before the Expiration of the said Term of Commitment the said Forfeitures shall not be paid, the said Justice or Justices, at his and their Discretion, may order the Person or Persons so convicted to be

publicly whipped in the House of Correction or Prison to which the Offender or Offenders shall have been committed, or in some other public Place of the County, Riding, Division, City, Liberty, Town, or Place where the Offence shall have been committed, as to such Justice or Justices shall seem proper; and the said respective Forfeitures, when recovered, shall be applied towards making Satisfaction thereout to the Party or Parties injured, and defraying the Costs of the Prosecution, as shall be adjudged reasonable by the Justice or Justices before whom such Conviction shall be had; but if the Party or Parties injured shall decline to accept of such Satisfaction and Costs, or if there shall be any Overplus of the said respective Forfeitures after making such Satisfaction and paying such Costs as aforesaid, then such respective Forfeitures or the Overplus thereof (as the Case shall happen) shall be paid and applied to and for the Use of the Poor of the Parish or Place where such Offence shall have been committed, and shall be paid to the Overseers of the Poor of such Parish or Place for that Purpose.

Persons forging or counterfeiting Notes.

IX. And be it further enacted, That if any Person or Persons whomsoever shall counterfeit, forge, or alter, or cause or procure to be counterfeited, forged, or altered, any such Note or Memorandum as aforesaid, or shall utter, vend, or sell any such Note as aforesaid, knowing the same to be counterfeited, forged, or altered, with Intent to defraud any Person or Persons whomsoever, in all or any or either of the said Cases such Person or Persons shall be punished in manner herein-after mentioned; and it shall be lawful for any Person or Persons, his, her, or their Servants or Agents, to whom any Note shall be uttered or produced, shown, or offered, which he, she, or they shall have Reason to suspect to have been counterfeited, forged, or altered, to seize and detain such Person or Persons uttering, producing, showing, or offering the same, and to deliver him, her, or them, as soon as conveniently may be, into the Custody of a Constable or other Peace Officer, who shall and is hereby required, as soon as conveniently may be, to convey such Person or Persons before some Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place wherein the Offence shall be supposed to have been committed; and if upon Examination it shall appear to the Satisfaction of such Justice or Justices that the Person or Persons charged with having committed any such Offence is or are guilty thereof, then and in every such Case the said Justice or Justices is and are hereby authorized and required to commit the Party or Parties offending to the Common Gaol or House of

Correction of the County, Riding, Division, City, Liberty, Town, or Place, wherein the Offence shall be committed, there to be imprisoned for any Time not exceeding the Space of Three Calendar Months, at the Discretion of such Justice or Justices.

Persons not giving a good Account of themselves on offering to pawn Goods liable to Punishment.

X. And be it further enacted, That in case any Person or Persons who shall offer by way of Pawn, Pledge, Exchange, or Sale any Goods or Chattels shall not be able or shall refuse to give a satisfactory Account of himself, herself, or themselves, or of the Means by which he, she, or they became possessed of such Goods or Chattels, or shall wilfully give any false Information to the Pawnbroker, or to his or her Servant or Servants, as to whether such Goods or Chattels are his, her, or their own Property or not, or of his or her Name and Place of Abode, or of the Name and Place of Abode of the Owner or Owners of the said Goods or Chattels, or if there shall be any other Reason to suspect that such Goods or Chattels are stolen, or otherwise illegally or clandestinely obtained, or if any Person or Persons not entitled, nor having any Colour of Title, by Law to redeem Goods or Chattels in Pledge or Pawn, shall attempt or endeavour to redeem the same, it shall be lawful for any Person or Persons, his, her, or their Servants or Agents, to whom such Goods or Chattels shall be so offered, or with whom such Goods or Chattels are in Pledge, to seize and detain such Person or Persons and the said Goods or Chattels, and to deliver such Person or Persons immediately into the Custody of a Constable or other Peace Officer, who shall and is hereby required as soon as may be to convey such Person or Persons and the said Goods and Chattels so offered before some Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place wherein the Offence shall be supposed to have been committed; and if such Justice or Justices shall, upon Examination and Inquiry, have Cause to suspect that the said Goods or Chattels were stolen, or illegally or clandestinely obtained, or that the Person or Persons offering and endeavouring to redeem the same shall not have any Pretence or Colour of Right to redeem the same, it shall be lawful for such Justice or Justices to commit such Person or Persons into safe Custody for such reasonable Time as shall be necessary for the obtaining proper Information on the Subject, in order to be further examined; and if upon either of the said Examinations it shall appear to the Satisfaction of such Justice or Justices that the said Goods or Chattels were stolen, or illegally or clandestinely obtained, or that the Person or Persons

offering or endeavouring to redeem the same hath or have not any Pretence or Colour of Right so to do, the said Justice or Justices is and are hereby authorized and required to commit the Party or Parties offending to the Common Goal or House of Correction for the County, Riding, Division, City, Liberty, Town, or Place, wherein the Offence shall be committed, there to be dealt with according to Law, where the Nature of the Offence shall authorize such Commitment by any other Law, and where the Nature of the Offence shall not authorize such Commitment by any other Law, then such Commitment shall be for any Time not exceeding Three Calendar Months, at the Discretion of such Justice or Justices.

Persons buying or taking in Pledge unfinished Goods, Linen, or Apparel, intrusted to others to wash or mend, to forfeit double the Sum lent, and restore the Goods.

XI. And be it further enacted, that from and after the Commencement of this Act, if any Person or Persons shall knowingly buy or take in as a Pledge or Pawn, or in Exchange, any Goods of any Manufacture, or of any Part or Branch of any Manufacture, either mixed or separate, or any Materials whatsoever plainly intended for the composing or manufacturing of any Goods after such Goods or Materials respectively are put into a State or Course of Manufacture or into a State for any Precess or Operation to be thereupon or therewith performed, and before such Goods or Materials are completed or finished for the Purposes of Wear or Consumption, or any Linen or Apparel, which Goods, Materials, Linen, or Apparel are or shall be intrusted to any Person or Persons to wash, scour, iron, mend, manufacture, work up, finish, or make up, and shall be convicted of the same on the Oath of One credible Witness, or on Confession of the Party or Parties, before One or more Justice or Justices, every such Person or Persons shall forfeit double the sum given for or lent on the same, to be paid to the Poor of the Parish where the Offence is committed, to be recovered in the same Manner as any other Forfeitures are by this Act directed to be recovered, and shall likewise be obliged to restore the said Goods and Materials to the Owner or Owners thereof in the Presence of the said Justice or Justices.

Empowering Peace Officers to search for unfinished Goods unlawfully come by.

XII. And be it further enacted, that if the Owner or Owners of any Goods of any Manufacture, or of any Part or Branch of any Manufacture, either mixed or separate, or any Materials whatsoever plainly intended for the composing or manufacturing of any Goods after such Goods or Materials respectively are put into a State or Course of Manufacture, or into a State for any Process or Operation to be thereupon or therewith performed, and before such Goods or Materials are completed or finished for the Purposes of Wear or Consumption, or any Linen, or Apparel,

which Goods, Materials, Linen, or Apparel are or shall be so intrusted as aforesaid, unlawfully pawned, pledged, or exchanged, shall make out, either on his, her, or their Oath, or by the Oath of any credible Witness, or, being One of the People called Quakers, by solemn Affirmation, before any Justice or Justices of the Peace within his or their Jurisdiction, that there is just Cause to suspect that any Person or Persons within the Jurisdiction of any such Justice or Justices hath or have taken to pawn, or by way of Pledge or in Exchange, any such Goods or Materials, Linen or Apparel, so intrusted as aforesaid, of such Owner or Owners, and without the Privity or Authority of such Owner or Owners thereof, and shall make appear to the Satisfaction of any such Justice or Justices probable Grounds for such the Suspicion of the Owner or Owners thereof, then and in any such Case any Justice or Justices of the Peace within his or their Jurisdiction may issue his or their Warrant for searching within the Hours of Business, the House, Warehouse, or other Place of any such Person or Persons who shall be charged, on Oath or Affirmation as aforesaid, as suspected to have received or taken in Pawn, or by way of Pledge, or in Exchange, any such Goods or Materials, Linen, or Apparel, without the Privity of or Authority from the Owner or Owners thereof; and if the Occupier or Occupiers of any House, Warehouse, or other Place wherein any such Goods, Materials, Linen, or Apparel shall, on Oath or Affirmation as aforesaid, be charged or suspected to be, shall, after the Commencement of this Act, on Request made to him, her, or them to open the same by any Peace Officer authorized to search there by Warrant from any Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place in which such House, Warehouse, or other Place shall be situate, refuse to open the same and permit the same to be searched, it shall be lawful for any Peace Officer to break open any such House, Warehouse, or other Place within the Hours of Business, and to search as he shall think fit therein for the Goods, Materials, Linen, or Apparel suspected to be there, doing no wilful Damage, and no Pawnbroker or other Person or Persons shall oppose or hinder any such Search; and if upon the Search of the House, Warehouse, or other Place of any such suspected Person or Persons as aforesaid any of the Goods, Materials, Linen, or Apparel which shall have been so pawned, pledged, or exchanged as aforesaid shall be found, and the Property of the Owner or Owners thereof shall be made out to the Satisfaction of any such Justice or Justices by the Oath of One or more credible Witness or Wit-

nesses, or if any such Witness or Witnesses shall be of the People called Quakers, by solemn Affirmation, or by the Confession of the Person or Persons charged with any such Offence, any such Justice or Justices shall thereupon cause the Goods, Materials, Linen, or Apparel found on any such Search, and pawned, pledged, or exchanged as aforesaid, to be forthwith restored to the Owner or Owners thereof.

Where Goods are unlawfully pawned, the Pawnbroker to restore them.

XIII. And be it further enacted, That if the Owner or Owners of any Goods or Chattels unlawfully pawned, pledged, or exchanged, shall make out, either on his, her, or their Oath, or by the Oath of any credible Witness, or, being One of the People called Quakers, by solemn Affirmation, before any Justice or Justices of the Peace within his or their Jurisdiction, that such Owner or Owners hath or have had his, her, or their Goods or Chattels unlawfully obtained or taken from him, her, or them, and that there is just Cause to suspect that any Person or Persons within the Jurisdiction of any such Justice or Justices hath or have taken to pawn, or by way of Pledge or in Exchange, any Goods or Chattels of such Owner or Owners, and without the Privity or Authority of such Owner or Owners thereof, and shall make appear, to the Satisfaction of any such Justice or Justices, probable Grounds for such the Suspicion of the Owner or Owners thereof, then and in any such Case any Justice or Justices of the Peace within his or their Jurisdiction may issue his or their Warrant for searching within the Hours of Business, the House, Warehouse, or other Place of any such Person or Persons who shall be charged on Oath or Affirmation as aforesaid, as suspected to have received or taken in Pawn, or by way of Pledge or in Exchange, any such Goods or Chattels, without the Privity of or Authority from the Owner or Owners thereof; and if the Occupier or Occupiers of any House, Warehouse, or other Place wherein any such Goods or Chattels shall, on Oath or Affirmation as aforesaid, be charged or suspected to be, shall, after the Commencement of this Act, on Request made to him, her, or them, to open the same by any Peace Officer authorized to search there, by Warrant from a Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place in which such House, Warehouse, or other Place shall be situate, refuse to open the same, and permit the same to be searched, it shall be lawful for any Peace Officer to break open any such House, Warehouse, or other Place, within the Hours of Business, and to search as he shall think fit therein for the Goods or Chattels suspected to be there, doing no wilful Damage; and no Pawnbroker or other Person or Persons shall oppose or hinder any such

Search; and if upon the Search of the House, Warehouse, or other Place of any such suspected Person or Persons as aforesaid, any of the Goods or Chattels which shall have been so pawned, pledged, or exchanged as aforesaid shall be found, and the Property of the Owner or Owners from whom the same shall have been unlawfully obtained or taken shall be made out to the Satisfaction of any such Justice or Justices by the Oath of One or more credible Witness or Witnesses, or if any such Witness or Witnesses shall be of the People called Quakers, by solemn Affirmation, or by the Confession of the Person or Persons charged with any such Offence, any such Justice or Justices shall thereupon cause the Goods and Chattels found on any such Search, and pawned, pledged, or exchanged as aforesaid, to be forthwith restored to the Owner or Owners thereof.

Punishing the Pawnbroker who will not deliver up Goods to the Pawner.

XIV. And be it further enacted, That from and after the Commencement of this Act, if any Goods or Chattels shall be pawned or pledged for securing any Money lent thereon not exceeding in the whole the Principal Sum of Ten Pounds, and the Profit thereof, and if within One Year after the pawning or pledging thereof (Proof having been made on Oath or Affirmation as aforesaid by One or more credible Witness or Witnesses, and by producing the Note or Memorandum directed to be given by this Act as aforesaid, before any Justice or Justices, to the Satisfaction of any such Justice or Justices, of the pawning or pledging of any such Goods or Chattels within the said Space of One Year, or One Year and Three Months, as the Case may be,) any such Pawner or Pawners who was or were the real Owner or Owners of such Goods or Chattels at the Time of the pawning or pledging thereof, his, her, or their Executors, Administrators, or Assigns, shall tender unto the Person or Persons who lent, on the Security of the Goods or Chattels pawned, his Executors, Administrators, or Assigns, the Principal Money borrowed thereon, and Profit according to the Table of Rates by this Act established; and the Person who took such Goods or Chattels in Pawn, his or her Executors, Administrators, or Assigns, shall thereupon, without showing reasonable Cause for so doing to the Satisfaction of such Justice or Justices, neglect or refuse to deliver back the Goods or Chattels so pawned for any Sum or Sums of Money not exceeding the said Principal Sum of Ten Pounds, to the Person or Persons who borrowed the Money thereon, his, her, or their Executors, Administrators, or Assigns, then and in any such Case, on Oath or Affirmation as aforesaid thereof made by the Pawner or Pawners thereof, his, her, or their Executors, Administrators, or Assigns, or some other credible Person,

any Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place where the Person or Persons who took such Pawn as aforesaid, his Executors, Administrators, or Assigns, shall dwell, on the Application of the Borrower or Borrowers, his, her, or their Executors, Administrators, or Assigns, is and are hereby required to cause such Person or Persons who took such Pawn, his, her, or their Executors, Administrators, or Assigns, within the Jurisdiction of the Justice or Justices, to come before such Justice or Justices, and such Justice or Justices is and are hereby authorized and required to examine on Oath or solemn Affirmation, as the Case may require, the Parties themselves, and such other credible Person or Persons as shall appear before him or them, touching the Premises; and if Tender of the Principal Money due, and all Profit thereon as aforesaid, shall be proved by Oath or Affirmation as aforesaid to have been made (such Principal Money not exceeding the said Sum of Ten Pounds) to the Lender or Lenders thereof, his, her, or their Executors, Administrators, or Assigns, by the Borrower or Borrowers of such Principal Money, his, her, or their Executors, Administrators, or Assigns, within the said Space of One Year, or One Year and Three Months, as the Case may be, after the said pawning or pledging of the Goods or Chattels, then, on Payment by the Borrower or Borrowers, his, her, or their Executors, Administrators, or Assigns, of such Principal Money, and the Profit due thereon as aforesaid, to the Lender or Lenders, his, her, or their Executors, Administrators, or Assigns, and in case the Lender or Lenders, his, her, or their Executors, Administrators, or Assigns, shall refuse to accept thereof, on Tender thereof to him, her, or them made by the Borrower or Borrowers thereof, his, her, or their Executors, Administrators, or Assigns, before any such Justice or Justices, such Justice or Justices shall thereupon by Order under his or their Hand or Hands, direct the Goods or Chattels so pawned forthwith to be delivered up to the Pawner or Pawners thereof, his, her, or their Executors, Administrators, or Assigns; and if the Person or Persons who shall have lent any Principal Sum or Sums of Money, not exceeding in the whole the said Sum of Ten Pounds, on any Goods or Chattels pawned, his, her, or their Executors, Administrators, or Assigns, shall neglect or refuse to deliver up or make Satisfaction for the Goods or Chattels which shall be so proved to the Satisfaction of such Justice or Justices as aforesaid to have been so pawned, as any such Justice or Justices of the Peace as aforesaid shall order and direct, then any such Justice or Justices shall and is and are hereby autho-

rized and required to commit the Party or Parties so refusing to deliver up or make Satisfaction for the same to the House of Correction or some other public Prison for the County, Riding, Division, City, Liberty, Town, or Place wherein the Offender or Offenders shall reside or be convicted, there to remain without Bail or Mainprise, until he, she, or they shall deliver up the Goods or Chattels so pawned, and continuing redeemable as aforesaid, according to the Order of such Justice or Justices as aforesaid, or make such Satisfaction or Compensation as such Justice or Justices shall adjudge reasonable, for the Value thereof, to the Party or Parties entitled to the Redemption of such Goods or Chattels so pawned, and continuing redeemable as aforesaid.

Persons producing Notes or Memorandums deemed the Owners.

XV. And, to prevent any Inconvenience to Persons carrying on the Trade and Business of a Pawnbroker from several different Persons claiming a Property in the same Goods or Chattels, be it further enacted, That from and after the Commencement of this Act any Person or Persons who shall at any Time produce any such Note or Memorandum as aforesaid to the Person or Persons with whom the Goods therein specified were pawned or pledged, as the Owner thereof, or as authorized by the Owner thereof to redeem the same, and require a Delivery of the Goods or Chattels mentioned therein to him, her, or them, such Person or Persons shall be and is and are hereby deemed and taken to be, so far as respects the Person or Persons having such Goods and Chattels in Pledge, the real Owner and Owners, Proprietor and Proprietors of such Goods and Chattels, and the Person or Persons so using the said Trade and Business of a Pawnbroker shall be and is and are hereby directed and required, after receiving Satisfaction pursuant to the Provisions of this Act respecting Principal and Profit, to deliver such Goods and Chattels to the Person or Persons who shall so produce the said Note or Memorandum to him, her, or them, and shall be and is and are hereby indemnified for so doing, unless he, she, or they shall have had previous Notice from the real Owner or Owners thereof not to deliver the same to the Person or Persons producing such Note, or unless Notice shall have been given to him, her, or them that the Goods and Chattels pawned have been or are suspected to have been fraudulently or feloniously taken or obtained, and unless the real Owner or Owners thereof proceeds or proceed in manner hereinafter provided and directed for the redeeming of Goods and Chattels pledged where such Note hath been lost, mislaid, destroyed, or fraudulently obtained from the Owner or Owners thereof.

XVI. And be it further enacted, That in case any Pawnbroker shall have had such previous Notice as aforesaid, or in case any such Note or Memorandum as aforesaid shall be lost, mislaid, destroyed, or fraudulently obtained from the Owner or Owners thereof, and the Goods and Chattels mentioned therein shall remain unredeemed, that then and in every such Case the Pawnbroker or Pawnbrokers with whom the said Goods and Chattels were so pledged shall, at the Request and Application of any Person or Persons who shall represent himself, herself, or themselves to the Pawnbroker as the Owner or Owners of the Goods and Chattels in Pledge as aforesaid, deliver to such Person or Persons so requesting and applying for the same a Copy of the Note or Memorandum so lost, mislaid, destroyed, or fraudulently obtained as aforesaid, with the Form of an Affidavit of the particular Circumstances attending the Case, printed or written or in part printed and in part written, on the said Copy, as the same shall be stated to him or her by the Party applying as aforesaid, for which Copy of such Note or Memorandum, and Form of Affidavit, in case the Money lent shall not exceed the Sum of Five Shillings, the Pawnbroker shall receive the Sum of One Halfpenny, and in case the Money lent shall exceed the Sum of Five Shillings and not exceed the Sum of Ten Shillings the Pawnbroker shall receive the Sum of One Penny, and in case the Money lent shall exceed the Sum of Ten Shillings the Pawnbroker shall receive the like Sum of Money as he is entitled to receive and take on giving the original Note or Memorandum, such Money to be paid by the Party applying for the same at the Time of making the said Application; and the Person or Persons having so obtained such Copy of the Note or Memorandum, and Form of Affidavit as aforesaid, shall thereupon prove his, her, or their Property in or Right to such Goods and Chattels to the Satisfaction of some Justice of the Peace for the County, Riding, Division, City, Town, Liberty, or Place where the said Goods or Chattels shall have been pledged, pawned, or exchanged, and shall also verify on Oath or Affirmation, as the Case may be, before the said Justice, the Truth of the particular Circumstances attending the Case mentioned in such Affidavit or Affirmation to be made as aforesaid, the Caption of such Oath or Affirmation to be authenticated by the Handwriting thereto of the Justice before whom the same shall be made, and who shall and is hereby required so to authenticate the same, whereupon the Pawnbroker shall suffer the Person or Persons proving such Property to the Satisfaction of such Justice as aforesaid, and making such Affidavit or

Where Notes or Memorandums lost, the Pawnbroker to deliver a Copy.

Affirmation as aforesaid, on leaving such Copy of the said Note or Memorandum, and the said Affidavit or Affirmation, with the said Pawnbroker, to redeem such Goods or Chattels (*a*).

Pawned Goods deemed forfeited at the End of a Year.

XVII. And be it further enacted, That all Goods and Chattels which shall be pawned or pledged shall be deemed forfeited and may be sold at the Expiration of One whole Year, exclusive of the Day whereon the Goods and Chattels were so pawned as aforesaid (*b*); and that all Goods and Chattels so forfeited on which any Sum above Ten Shillings and not exceeding Ten Pounds shall have been lent shall be sold by Public Auction, and not otherwise, by the Order of the Person having the same in Pawn, at and after the Expiration of the said Year, but the Person employed to sell such Goods and Chattels by Auction, shall and he is hereby required to cause the same to be exposed to public View, and Catalogues thereof to be published, containing the Name and Place of Abode of the Pawnbroker, and also the Month such Goods were received in Pawn; and the Number of every such Pledge as entered in the Book or Books kept for that purpose at the Time the same were pawned, and an Advertisement giving Notice of such Sale, and containing the Name or Names and Place of Abode of the Pawnbroker or Pawnbrokers with whom the said Goods or Chattels were in Pledge, and also the Month such Goods were received in Pawn, to be inserted on Two several Days in some public Newspaper Two Days at least before the First Day of Sale; and the Goods and Chattels pledged with every Pawnbroker shall be inserted in every Catalogue separate and apart from each other, upon pain of forfeiting to the Owner or Owners of the said Goods or Chattels for every Offence in the Premises any Sum not exceeding Ten Pounds nor less than Forty Shillings.

Directing certain Goods to be sold separate from other Goods.

XVIII. Provided always, and be it further enacted, That all Pictures, Prints, Books, Bronzes, Statues, Busts, Carvings in Ivory and Marble, Cameos, Intaglios, Musical, Mathematical, and Philosophical Instruments, and China, which shall be sold by Public Auction as aforesaid, shall

(*a*) By 5 & 6 Wm. 4, cap. 62, sec. 12, a declaration is substituted for the oath or affirmation required in cases coming within the above section.

(*b*) "All goods . . . shall be deemed forfeited, and may be sold at the expiration of one whole year, &c." These words do not vest the property in a pledge absolutely in the Pawnbroker after the expiration of a year and a day, but only give him a power to sell in order to reimburse himself his principal and interest. Where, therefore, the pawnor tendered the Pawnbroker principal, interest, and costs before such sale, on refusal by the Pawnbroker to return them, the pawnor can recover in trover (Walter *v.* Smith, 5 B. & A., 539, see ante, p. 159 *et seq.*)

be sold by themselves, and without other Goods being sold at such Sale, Four Times only in every Year, (that is to say,) on the First *Monday* in the Months of *January*, *April*, *July*, and *October* in every Year, and on the following Day and Days if the Sale shall exceed One Day, and at no other Time; and the Person who shall be employed to sell the same by Auction shall and he is hereby required to cause the same to be exposed to public View and Catalogues thereof to be published, and an Advertisement giving Notice of such Sale, and containing the Name or Names of the Pawnbroker or Pawnbrokers with whom the said Goods were in Pledge, to be inserted Two several Days in some public Newspaper Three Days at the least before the First Day of Sale, upon pain of forfeiting to the Owner or Owners of the said Goods for every Offence in the Premises any Sum not exceeding Five Pounds nor less than Forty Shillings.

On Notice from Persons having Goods in Pledge not to sell, Three Months further allowed beyond the Year for Redemption.

XIX. Provided always, and be it further enacted, That in case any Person or Persons entitled to redeem Goods or Chattels in Pledge shall, before or upon the Expiration of the said One Year from the Time of pawning the same, give Notice in Writing, or in the Presence of One Witness, to the Person or Persons having the same in Pledge, or leave the same at his, her, or their usual Place of Abode, not to sell the same at the End of the said One Year, then and in every such Case such Goods or Chattels shall not be sold or disposed of by the Person or Persons having the same in Pledge until after the Expiration of Three Calendar Months to be computed from the Expiration of the said Year, during which said Term of Three Calendar Months the Owner or Owners of the said Goods and Chattels shall have Liberty to redeem the same, upon the Terms stipulated and provided by this Act.

Account of Sales to be entered by the Pawnbrokers in a Book;

XX. And be it further enacted, That all and every Person or Persons with whom any Goods or Chattels shall have been pawned or pledged shall from Time to Time enter in a Book or Books, to be kept by him, her, or them for that Purpose, a true and just Account of the Sale of all Goods and Chattels pawned with him, her, or them for upwards of Ten Shillings, which shall be sold as aforesaid, expressing the Day of the Month when such Goods were pledged, and the Name of the Person pledging the same, according to the Entry made at the Time of receiving the same in Pawn; and also the Day when and the Money for which such Goods or Chattels pawned were sold, together with the Name and Place of Abode of the Auctioneer by whom the same were sold, according to the Information thereof from the Auctioneer; and in case any such Goods

and Overplus

paid to the Owner of the Goods pawned or sold, &c.

or Chattels shall be sold for more than the Principal Money and Profit aforesaid due thereon at the Time of such Sale, the Overplus shall, by every such Pawnbroker, be paid, on Demand, to the Person by whom or on whose Account such Goods or Chattels were pawned, his, her, or their Executors, Administrators, or Assigns, in case such Demand shall be made within Three Years after such Sale, the necessary Costs and Charges of such Sale being first deducted; and such Person or Persons who pawned or pledged such Goods or Chattels, or for whom such Goods or Chattels were so pawned or pledged, his, her, or their Executors, Administrators, or Assigns, shall for his, her, or their Satisfaction in this Matter, be permitted to inspect the Entry to be made as aforesaid of every such Sale, paying for such Inspection the Sum of One Penny, and no more; and in case any Person or Persons shall refuse to permit any such Person or Persons who pawned or pledged such Goods or Chattels, or who is or are entitled to such overplus Money, to inspect such Entry as aforesaid in any such Book or Books (such Person or Persons, if an Executor or Executors, Administrator or Administrators, Assignee or Assignees, at such Time producing his, her, or their Letters Testamentary, Letters of Administration or Assignment,) or in case the Goods or Chattels were sold for more than the Sum entered in any such Book or Books, or if any such Person or Persons shall not make such Entry as aforesaid, or shall not have *bonâ fide*, according to the Directions of this Act, sold the same, or shall refuse to pay such Overplus, upon Demand, to the Pawner or Pawners, Owner or Owners, his, her, or their Executors, Administrators, or Assigns, (he, she, or they producing such their Letters Testamentary, Letters of Administration or Assignment,) every such Person or Persons so offending shall for every such Offence forfeit the Sum of Ten Pounds, and treble the Sum such Goods and Chattels shall originally have been pawned for, to the Person or Persons by whom or on whose Account such Goods or Chattels were pawned, his, her, or their Executors, Administrators, or Assigns, to be levied by Distress and Sale of the Offender's Goods and Chattels, by Warrant under the Hands and Seals of any Two Justices of the Peace for the County, Riding, Division, City, Town, Liberty, or Place where the Offence shall be committed.

Pawnbroker not to purchase Goods while in pledge.

XXI. And be it further enacted, That from and after the Commencement of this Act no Person or Persons having any Goods or Chattels in Pledge shall, under any Pretence whatsoever, either by himself or herself, or by any other Person for him or her, purchase any such

Goods or Chattels so being in Pledge with him or her during the Time the same shall remain in his or her Custody as such Pledge, save and except at such Public Auction as aforesaid, nor shall suffer the same to be redeemed with a View or Intention to purchase the same; nor shall any such Person taking or having any Goods or Chattels in Pledge make or cause to be made any Contract or Agreement with any Person or Persons offering to pledge or pledging the same with the Owner or Owners of the Pledge for the Purchase, Sale, or Disposition of the said Goods and Chattels before the Expiration of One whole Year from the Time of pawning or pledging the same; nor shall any Pawnbroker purchase or receive or take any Goods or Chattels in Pledge of or from any Person or Persons who shall appear to be under the Age of Twelve Years, or to be intoxicated with Liquor; or purchase, or take in Pawn, Pledge, or Exchange, the Note or Memorandum aforesaid of any other Pawnbroker, nor buy any Goods or Chattels in the course of his, her, or their Trade or Business before the Hour of Eight of the Clock in the Forenoon or after the Hour of Seven of the Clock in the Evening throughout the Year; nor employ any Servant or Apprentice or any other Person under the Age of Sixteen Years to take in any Pledge or Pledges; nor receive or take in any Goods or Chattels by way of Pawn, Pledge, or in Exchange before Eight of the Clock in the Forenoon or after Eight of the Clock in the Evening between *Michaelmas Day* and *Lady Day* following, or before Seven of the Clock in the Forenoon or after Nine of the Clock in the Evening during the Remainder of the Year, excepting only until Eleven of the Clock on the Evenings of *Saturday* throughout the whole Year, and the Evenings preceding *Good Friday* and *Christmas Day*, and every Fast or Thanksgiving Day to be appointed by His Majesty; nor shall any Person or Persons exercise or carry on the Trade or Business of a Pawnbroker on any *Sunday*, *Good Friday*, *Christmas Day*, or on any Fast Day or Thanksgiving Day to be appointed as aforesaid.

Pledges not to be taken from Persons under 12 Years of Age, or intoxicated.

Time of buying Goods or taking in Pawns limited.

XXII. And be it further enacted, That upon and from and after the Commencement of this Act all and every Person and Persons who shall follow and carry on the Trade and Business of a Pawnbroker shall cause to be painted or printed in large legible Characters the Rate of Profit allowed by this Act to be taken by him, her, or them, and also the various Prices of the Notes or Memorandums to be given by him, her, or them, according to the Rates aforesaid, and an Account of what Notes or Memorandums are to be delivered *gratis*, and of the Expense of obtaining a second Note or Memorandum where the former

Pawnbrokers to place in View the Table of Profits, &c.

one has been lost, mislaid, destroyed, or fraudulently obtained, and place the same in a conspicuous Part or Parts of the Shop or other Place wherein he, she, or they shall carry on such Trade or Business, so as to be visible to and legible by the Persons pledging Goods and Chattels standing in the several Boxes or Places provided for such Persons coming to pawn or redeem Goods and Chattels at such Shop.

Pawnbroker's Names and Business to be placed over his Door, on Penalty of £10.

XXIII. And for the better manifesting by whom the Trade or Business of a Pawnbroker shall hereafter be carried on, be it further enacted, That from and after the Commencement of this Act all and every Person or Persons who shall follow or carry on the Trade or Business of a Pawnbroker shall cause to be painted or written, in large legible Characters, over the Door of each Shop or other Place by him, her, or them respectively made use of for carrying on that Trade or Business, the Christian and Surname or Names of the Person or Persons so carrying on the said Trade or Business, and the Word "Pawnbroker" or "Pawnbrokers" as the Case may be, following the same, upon pain of forfeiting the Sum of Ten Pounds for every Shop or Place which shall be so made use of for the Space of One Week without having such Name or Names and the said Word so painted or written as aforesaid, to be recovered by Distress and Sale of the Offender's Goods and Chattels, by Warrant under the Hands and Seals of any Two Justices of the Peace acting within the respective County, Riding, Division, City, Town, Liberty, or Place, (which Warrant such Justices are hereby authorised and required to grant,) upon the Confession of the Party or Parties, or upon the Information of any credible Witness or Witnesses, upon Oath or Affirmation, as the Case may be; and in case sufficient Distress shall not be found, or such Penalty shall not be forthwith paid, it shall be lawful for such Justices and they are hereby required, by Warrant under their Hands and Seals, to cause the Offender or Offenders to be committed to the County Gaol or House of Correction, there to remain without Bail or Mainprise, for any Time not exceeding Three Calendar Months nor less than Fourteen Days, unless the said Penalty and all reasonable Charges shall be sooner paid and satisfied.

Penalty on Pawnbrokers selling Goods before limited ...ur-

XXIV. And be it further enacted, That if in the course of any Proceedings before any Justice or Justices of the Peace in pursuance of or under this Act it shall appear or be proved to the Satisfaction of the Justice or Justices, upon Oath or solemn Affirmation, that any of the Goods and Chattels pawned as aforesaid have been sold before the Time allowed by this Act, or otherwise than according to

the Directions of this Act, or have been embezzled or lost, or are become or have been rendered of less Value than the same were at the Time of pawning or pledging thereof, by or through the Default, Neglect, or wilful Misbehaviour of the Person or Persons with whom the same were so pledged or pawned, his, her, or their Executors, Administrators or Assigns, Agents or Servants, then and in any such Case it shall be lawful for every such Justice or Justices and he and they is and are hereby required to allow and award a reasonable Satisfaction to the Owner or Owners of such Goods or Chattels in respect thereof or of such Damage, and the Sum or Sums of Money so allowed or awarded, in case the same shall not amount to the Principal and Profit aforesaid which shall appear to be due to any Person or Persons with whom the same were so pledged or pawned, his, her, or their Executors, Administrators, or Assigns, shall be deducted out of the said Principal and Profit; and in all Cases where the Goods and Chattels pawned as aforesaid shall have been damaged as aforesaid, it shall be sufficient for the Pawner or Pawners, his, her, or their Executors, Administrators, or Assigns, to pay or tender the Money due upon the Balance, after deducting out of the Principal and Profit as aforesaid, for the Goods or Chattels pawned, such reasonable Satisfaction in respect to such Damage as any such Justice or Justices shall order or award, and upon so doing the Justice or Justices shall proceed as if the Pawner or Pawners, his, her, or their Executors, Administrators, or Assigns, had paid or tendered the whole Money due for the Principal and Profit aforesaid; and if the Satisfaction to be allowed and awarded to the Owner or Owners of such Goods or Chattels shall be equal to or exceed the Principal and Profit aforesaid then and in such Case the Person or Persons to whom the same were so pledged or pawned, his, her, or their Executors, Administrators, or Assigns, shall deliver the Goods and Chattels so pledged to the Owner or Owners thereof, without being paid anything for Principal or Profit in respect thereof, and shall also pay such Excess (if any) to the Person or Persons entitled thereto, under the Penalty of Ten Pounds, to be recovered and applied in manner hereinafter mentioned.

Pawnbrokers to produce their Books when necessary.

XXV. And be it further enacted, That it shall be lawful for any Justice of the Peace, upon Complaint made to him on the Oath or Affirmation of One or more credible Witness or Witnesses, wherein any Information shall be laid against any Pawnbroker for having offended against this Act, or respecting any Dispute between any Pawnbroker and Person having pawned Goods, or the Owner or Owners

of Goods pawned, or respecting any Felony or other Matter, or on any other Occasion whatsoever which in the Judgment of any Justice or Justices shall make the Production of any Book, Note, Voucher, Memorandum, Duplicate, or other Paper necessary, which shall or ought to be in the Hands, Custody, or Power of any Pawnbroker, to summon such Pawnbroker before him to attend, with all and every or any Book, Note, Voucher, Memorandum, Duplicate, or Paper which he or she may or ought to have in his or her Custody or Power relating to the same, which he or she is hereby required to produce before such Justice or Justices in the State the same was or were made at the Time the Pawn or Pledge was received, without any Alteration, Erasement, or Obliteration whatsoever; and in case such Pawnbroker shall neglect or refuse to attend, or to produce the same in its true and perfect State, such Pawnbroker shall, in case he or she doth not show good Cause for such Neglect or Refusal, to the Satisfaction of such Justice or Justices, forfeit any Sum not exceeding Ten Pounds nor less than Five Pounds, to be levied and applied in the Manner hereinafter mentioned.

Penalty on Pawnbrokers offending against this Act.

XXVI. And be it further enacted, That in case any Pawnbroker shall, from and after the Commencement of this Act, in anywise offend against this Act, every such Pawnbroker shall, for every such Offence in neglecting to make or cause to be made, in a fair and regular Manner, in such Book or Books as aforesaid, any such Entry as is required to be made by him, her, or them by this Act, forfeit such Sum of Money as to the Justice or Justices before and by whom any Information thereon shall be heard and determined in his or their Discretion shall seem reasonable and fit, not exceeding the Sum of Ten Pounds, and for every other Offence against this Act, where no Forfeiture or Penalty is provided or imposed on any particular or specific Offence against any Part of this Act, not less than Forty Shillings nor more than Ten Pounds, and that all Forfeitures incurred by any Offence committed against this Act shall and may be levied by Distress and Sale of the Goods and Chattels of the Offender or Offenders, by Warrant under the Hand and Seal or Hands and Seals of any Justice or Justices of the Peace for the County, Riding, Division, City, Liberty, Town, or Place where the Offence shall be committed; and the Justices shall award One Moiety of the said Penalties to the Party complaining, and the Remainder of the aforesaid Penalty or Penalties not otherwise disposed of and applied by this Act is to be paid and applied to and for the Use of the Poor of the Parish or Place where the Offence shall have been committed, and

shall be paid to the Overseers of the Poor of such Parish or Place for that Purpose.

Limiting the Time of Prosecuting by Information.

XXVII. Provided always, and be it further enacted, That no Person or Persons using or exercising the Trade or Business of a Pawnbroker shall be subject or liable to any Prosecution or Information before any Justice or Justices of the Peace by virtue of this Act, for any Offence or Offences against this Act, unless Information shall be given of such Offence or Offences within Twelve Calendar Months next after the Offence or Offences committed; and that all and every such Information and Informations shall be given and prosecuted before such Justice or Justices of the Peace as shall act as such Justice or Justices near to the Place where such Offence or Offences shall have been committed, unless the same shall have been committed within the City or Liberties of *London*.

Churchwardens &c., to prosecute, &c.

XXVIII. And be it further enacted, That the Churchwardens and Overseers of the Poor of any Parish or Place where any Offence shall be supposed to have been committed by any Pawnbroker against this Act, or some or One of such Officers, at the Discretion or Direction of any Justice of the Peace, on having Notice from such Justice of the Peace of such Offence being supposed to have been committed, shall, and they, or some or One of them, to be nominated by such Justice as aforesaid, are and is hereby required to prosecute every Offender for every Offence so to be suggested by such Justice to have been committed against this Act, at the Expense of the respective Parish whereof they or he are, is, or shall be for the Time being such Officers or Officer.

Convicted Persons, &c., not to prosecute or inform against any Person, &c.

XXIX. And be it further enacted, That no Person who has been convicted of any Fraud, or of obtaining Money under false Pretences, or of any Felony whatsoever, shall be allowed to prosecute or inform against any Person or Persons, for any Offence or Offences committed against this Act.

Act not to extend to Persons lending Money at 5 Pounds per Cent. without further Profit.

XXX. Provided always, That nothing in this Act contained shall extend or be construed to extend to any Person or Persons whomsoever who shall lend Money to any Person or Persons whomsoever upon Pawn or Pledge, at the Rate of Five Pounds *per Centum per Annum* Interest, without taking any further or greater Profit for the Loan or Forbearance of such Money lent, on any Pretence whatsoever.

The Act to extend to Executors, &c., of Pawnbrokers.

XXXI. And be it further enacted, That all and every the Provisions, Regulations, and Clauses contained in this present Act shall, from and after the End of this present Session of Parliament, extend to and include the Executors,

Administrators, and Assigns of all and every deceased Pawnbroker in the same Manner as the same extend to and include the Pawnbroker when living, save and except that no such Executor or Administrator of any such deceased Pawnbroker shall be answerable for any Penalty or Forfeiture personally, or to be paid out of his, her, or their own Monies or Estate, unless the same shall be incurred and forfeited by his, her, or their own Act or Neglect.

Persons sued may plead the General Issue.

XXXII. And be it further enacted, That if any Person or Persons shall at any Time or Times be sued, molested, or prosecuted for any thing by him, her, or them done or executed in pursuance of this Act, or of any Clause, Matter, or Thing herein contained, such Person or Persons may plead the General Issue, and give the special Matter in Evidence for his, her, or their Defence; and if upon the Trial a Verdict shall pass for the Defendant or Defendants, or the Plaintiff or Plaintiffs shall become nonsuited, then such Defendant or Defendants shall have Double Costs awarded to him, her, or them against such Plaintiff or Plaintiffs.

Inhabitants of any Place where Offences committed deemed competent Witnesses.

XXXIII. Provided always, and be it enacted, That in all Actions, Suits, Informations, Trials, and other Proceedings in pursuance of this Act, or in relation to any Matter or Thing herein contained, any Inhabitant of the Parish, Town, or Place in which any Offence or Offences shall be committed contrary to the true Intent and Meaning of this Act, shall be admitted to give Evidence, and shall be deemed a competent Witness, notwithstanding his or her being an Inhabitant of the Parish, Town, or Place, wherein any such Offence or Offences shall be supposed to have been committed.

XXXIV. And be it further enacted, That the Justice or Justices before whom any Person shall be convicted in manner prescribed by this Act shall cause such respective Convictions to be drawn up in the Form or to the Effect following; (that is to say,)

Form of Conviction.

'} to wit. } BE it remembered, That on this Day of in the Year of His Majesty's Reign, *A.B.* is convicted before of His Majesty's Justices of the Peace for the said County of [*or* for the Riding or Division of the said County of *or* the City, Liberty, or Town of *as the case shall happen to be*] for and the said do adjudge him [or *her*] to pay and forfeit for the same the Sum of . Given under the Day and Year aforesaid.'

And the said Justice or Justices before whom such Con-

viction shall be had shall cause the same, so drawn up in the Form or to the Effect aforesaid, to be fairly written upon Parchment, and transmitted to the next General or General Quarter Session of the Peace to be held for the County, Riding, Division, City, Town, Liberty, or Place wherein such Conviction was had, to be filed and kept amongst the Records of the said General or Quarter Session; and in case any Person or Persons so convicted shall appeal from the Judgment of the said Justice or Justices to the said General or Quarter Session, the Justices in such General or Quarter Session are hereby required, upon receiving the said Conviction, drawn up in the Form or to the Effect aforesaid, to proceed to the Hearing and Determination of the Matter of the said Appeal at such next Session, and not afterwards, according to the Directions of this Act, any Law, Custom, or Usage to the contrary notwithstanding, and no Certiorari shall be granted to remove any Conviction or other Proceedings had thereon in pursuance of this Act.

Appeal.

XXXV. Provided always, and it is hereby further enacted, That if any Person convicted of any Offence or Offences punishable by this Act shall think himself or herself aggrieved by the Judgment of the Justice or Justices before whom he or she shall have been convicted, such Person shall have Liberty to appeal to the Justices at the next General or Quarter Session of the Peace which shall be held for the County, Riding, Division, City, Liberty, Town, or Place where such Judgment shall have been given, and that the Execution of the said Judgment shall in such Case be suspended, the Person so convicted entering into a Recognizance at the Time of such Conviction with Two sufficient Sureties, in double the Sum which such Person shall have been adjudged to pay or forfeit, upon Condition to prosecute such Appeal with Effect, and to be forthcoming to abide the Judgment and Determination of the Justices in their said next General or Quarter Session, and to pay such Costs as the said Justices in such Session shall award on such Occasion, which Recognizance the said Justice or Justices before whom such Conviction shall be had is and are hereby empowered and required to take; and the Justices in the said General or Quarter Session are hereby authorised and required to hear and finally determine the Matter of the said Appeal, and to award such Costs as to them shall appear just and reasonable to be paid by either Party; and if upon the Hearing of the said Appeal the Judgment of the Justice or Justices before whom the Appellant shall have been convicted shall be affirmed, such Appellant shall immediately pay the Sum

which he or she shall have been adjudged to forfeit, together with such Costs as the Justices in the said General or Quarter Session shall award to be paid for defraying the Expenses sustained by the Defendant or Defendants in such Appeal, or in default of making such Payment shall suffer the respective Pains and Penalties by this Act inflicted upon Persons respectively who shall neglect to pay or shall not pay the respective Sums or Forfeitures by this Act to be paid by or imposed upon Persons respectively who shall be convicted by virtue of this Act.

Public Act.

XXXVI. And be it further enacted, That this Act shall be deemed a Public Act, and be judicially taken notice of as such by all Judges, Justices, and other Persons whomsoever, without the same being specially pleaded.

ANNO NONO & DECIMO

VICTORIÆ REGINÆ.

CAP. XCVIII.

An Act to amend the Law for regulating the Hours of receiving and delivering Goods and Chattels as Pawns in Pawnbrokers' Shops. [28*th August*, 1846.

WHEREAS it is expedient that Amendment should be made in the Hours within which the Business of a Pawnbroker may be lawfully carried on: And whereas by an Act of Parliament made in the Thirty-ninth and Fortieth Years of the Reign of His late Majesty King *George* the Third, intituled *An Act for the better regulating the Business of Pawnbrokers*, it is enacted, that no Pawnbroker should receive or take in any Goods by way of Pawn before Eight of the Clock in the Forenoon or after Eight of the Clock in the Evening between *Michaelmas Day* and *Lady Day* following or before Seven of the Clock in the Forenoon or after Nine of the Clock in the Evening during the Remainder of the Year, excepting only until Eleven on *Saturdays*, and the Evenings preceding *Good Friday*, *Christmas Day*, and every Fast Day: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Twenty-ninth Day of *September* next after the passing of this Act no Pawnbroker shall receive or take in, or permit or suffer to be received or taken in, any Goods or Chattels by way of Pawn, Pledge, or in Exchange, before Eight of the Clock in the Forenoon or after Seven of the Clock in the Evening between the Twenty-ninth Day of *September* and the Twenty-fifth Day of *March* following, or before Seven of the Clock in the Forenoon or after Eight of the Clock in the Evening during the Remainder of the Year, excepting only until Eleven of the Clock on the Evenings of *Saturday* throughout the Year, and the Evenings next preceding *Good Friday* and *Christmas Day*, and every Fast or Thanks-

39 & 40 G. 3, c. 99.

Hours between which Pawnbrokers are allowed to receive or take in Pledges.

Penalty on Pawnbrokers offending against this Act.

giving Day appointed by Her Majesty; and in case any Pawnbroker offend against the provisions of this Act every such Pawnbroker shall, for every such Offence, on Conviction thereof upon the Oath of any One or more credible Witness or Witnesses, before any One or more of Her Majesty's Justices of the Peace having Jurisdiction over the Place where such Offence shall have been or shall be committed, forfeit and pay not less than Twenty Shillings nor exceeding Five Pounds, as such Justice or Justices shall adjudge; and every such Penalty shall and may be levied, together with the Costs attending the Information, Summons, and Conviction, by Distress and Sale of the Goods and Chattels of the Offender or Offenders, or Person or Persons liable to pay the same respectively, by Warrant under the Hand and Seal or Hands and Seals of any Justice or Justices before whom such Offender or Offenders, Person or Persons, shall or may have been convicted; and every such Penalty shall be applied and disposed of in like Manner as Forfeitures incurred for any Offence against the last recited Act.

Penalty and Costs may be levied by Distress.

ANNO DECIMO NONO & VICESIMO

VICTORIÆ REGINÆ.

CAP. XXVII.

An Act to amend the Acts relating to Pawnbrokers.
[23rd *June*, 1856.

WHEREAS under and by virtue of an Act passed in the Twenty-fifth Year of the Reign of King *George* the Third, Chapter Forty-eight, all Persons using or exercising the Trade or Business of a Pawnbroker in *Great Britain* are required to take out a Licence annually for that Purpose in the Manner prescribed by the said Act, under the Penalty of Fifty Pounds for any Neglect in that Behalf; and such Licences are chargeable with certain Stamp Duties granted and imposed thereon by an Act passed in the Fifty-fifth Year of the said King's Reign, Chapter One hundred and eighty-four: And whereas an Act was passed in the Thirty-ninth and Fortieth Years of the said King's Reign, Chapter Ninety-nine, for better regulating the Business of Pawnbrokers: And whereas Attempts are made to evade the Provisions of the said Acts by Persons who receive Goods and Chattels into their Possession, and advance Money thereon, under the Pretence that the Transaction is a Sale and Purchase of such Goods and Chattels, and not a receiving or taking of the same by way of Pawn or Pledge; and it is expedient to amend the said Acts with a view to prevent such Evasions and the Mischiefs arising therefrom: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

25 G. 3. c. 48.

55 G. 3. c. 184.

39 & 40 G. 3. c. 99.

I. The following shall be deemed to be Persons using and exercising the Trade and Business of a Pawnbroker within the Meaning of the several Acts aforesaid, and subject and liable to all the Provisions and Regulations thereof in relation to Pawnbrokers, as well as the Persons who by or under the said Acts or any of them are declared or deemed to be Persons using or exercising the said Trade or Business; (that is to say,) every Person who shall keep a House, Shop, or other Place for the Purchase or Sale of

Persons herein described deemed to be Pawnbrokers.

Goods or Chattels, or for taking in Goods or Chattels by way of Security for Money advanced thereon, and shall purchase, or receive, or take in any Goods or Chattels, and pay or advance or lend thereon any Sum of Money not exceeding Ten Pounds, with or under any Agreement or Understanding, express or implied, or which from the Nature or Character of the Dealing may reasonably be inferred, that such Goods or Chattels may be afterwards redeemed or repurchased on any Terms whatever.

Penalty on Persons declared or deemed to be Pawnbrokers not taking out proper Licences.

II. If any Person by or under this Act or the several Acts aforesaid or any of them declared or deemed to be a Person using and exercising the Trade or Business of a Pawnbroker shall neglect or omit to take out the proper Licence in that Behalf he shall forfeit the Sum of Fifty Pounds, which shall be recoverable by Information before any Justice of the Peace in the Name of an Officer of Inland Revenue prosecuting for the same on behalf of Her Majesty; and in every Information or other Proceeding for the Recovery of such Penalty it shall be a sufficient Description of the Offence to charge that the Defendant did use and exercise the Trade and Business of a Pawnbroker without taking out a proper Licence in that Behalf; and upon the Conviction of such Defendant the like Proceedings shall be had for the levying of the Penalty or for the recording of such Conviction, and for the Appeal of the Defendant if he shall feel himself aggrieved thereby, as are provided by Law, and may be adopted with regard to any Penalty incurred under the said Act of the Thirty-ninth and Fortieth Years of King *George* the Third: Provided always that it shall be lawful for the Justice before whom any such Defendant shall be convicted to mitigate or lessen the said Penalty, if he shall think fit, to any Sum not less than One Fourth thereof; provided also, that any Proceeding authorized or directed by the said recited Acts or this Act to take place before a Justice of the Peace may, in *Scotland*, take place before the Sheriff of the County in which the Proceeding is instituted, or his Substitute; but no Appeal shall lie from the Judgment of any Sheriff to the Quarter Sessions of the Peace, nor shall any other Appeal lie, save from the Judgment of the Sheriff Substitute to the Sheriff, whose Decision shall in all Cases be final, and not subject to Review.

Penalties recoverable by summary Information.

Power to Justices to mitigate Penalties.

ANNO VICESIMO SECUNDO & VICESIMO TERTIO

VICTORIÆ REGINÆ.

CAP. XIV.

An Act to amend an Act of the Thirty-ninth and Fortieth Years of King George *the Third, for better regulating the Business of Pawnbrokers.* [*8th August* 1859.

WHEREAS certain Provisions relating to Informations, Penalties, and Convictions are contained in certain Sections, herein-after more particularly referred to, of an Act passed in the Second and Third Years of the Reign of Her present Majesty, Chapter Seventy-one, intituled *An Act for Regulating the Police Courts in the Metropolis;* but such Provisions are restricted in their Operation to the Metropolitan Police Districts: And whereas another Act was passed in the Thirty-ninth and Fortieth Years of King *George* the Third, intituled *An Act for better regulating the Business of Pawnbrokers:* And whereas it is expedient to extend certain Provisions of the first-recited Act to the second-recited Act: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

2 & 3 Vict. c. 71.

39 & 40 G. 3. c. 99.

Provisions contained in Sections 32, 33, 34, and 35 of 2 & 3 Vict. c. 71, extended to 39 & 40 G. 3. c. 99. and to all Parts of England.

The Provisions and Enactments contained in the Thirty-second, Thirty-third, Thirty-fourth, and Thirty-fifth Sections of the said recited Act of the Second and Third *Victoria*, Chapter Seventy-one, for regulating the Police Courts in the Metropolis, shall extend and be construed, deemed, and taken to extend to the said Act of the Thirty-ninth and Fortieth Years of King *George* the Third, and to all Parts of *England;* in the same Manner and to the same Extent, and to all Intents and Purposes, as if the said Provisions and Enactments were herein repeated and set forth at Length: Provided, that whenever the word "Magistrate" is used in the said Sections, or any of them, it shall be construed, deemed, and taken, for the Purposes of this Act, to mean any Stipendiary Magistrate or other Justice or Justices of the Peace for the District, County, Riding, Division, City, Liberty, Town, or Place where the Offence has been committed.

THE SECTIONS REFERRED TO IN 22 & 23 VICT., CAP. 14.

2 & 3 VICTORIÆ, Cap. 71.

Amends may be awarded for frivolous Informations.

XXXII. And whereas Informations are often laid for the mere Sake of Gain, or by Parties not truly aggrieved, and the Offences charged in such Informations are not further prosecuted, or it appears upon Prosecution that there was no sufficient Ground for making the Charge: Be it enacted, That in every Case in which any Information or Complaint of any offence shall be laid or made before any of the said Magistrates, and shall not be further prosecuted, or in which, if further prosecuted, it shall appear to the Magistrate by whom the Case shall be heard that there was no sufficient Ground for making the Charge, the Magistrate shall have Power to award such Amends, not more than the Sum of Five Pounds, to be paid by the Informer to the Party informed or complained against, for his Loss of Time and Expenses in the Matter, as to the Magistrate shall seem meet.

Penalty on Common Informers for Compounding Informations

XXXIII. And be it enacted, That in case any person shall lodge any Information before any of the said Magistrates for any offence alleged to have been committed by which he was not personally aggrieved, and shall afterwards directly or indirectly receive, without the Permission of One of the said Magistrates, any sum of Money or other Reward for compounding, delaying, or withdrawing the Information, it shall be lawful for any One of the said Magistrates to issue his Warrant or Summons, as he may deem best, for bringing before him the Party charged with the Offence of such Compounding, Delay, or Withdrawal; and if such offence be proved by the confession of the Party, or by the Oath of any credible Witness, such Informer shall be liable to a Penalty not more than Ten Pounds.

Power to lessen the Share of Informers.

XXXIV. And whereas by divers Acts the Moiety or other fixed Portion of the Penalties to be thereby recovered is directed to be adjudged to the Informer, and the same has been found to encourage the corrupt practices of Common Informers; for Prevention thereof be it enacted, That where by any Act now in force or hereafter to be

passed a Moiety or other fixed Portion of the Penalty or Penalties thereby imposed is or shall be directed to be paid to the Informer, not being the Party aggrieved, it shall be lawful for any One of the said Magistrates before whom the Conviction shall be had to adjudge that no Part, or such Part only of the Penalty as he shall think fit shall be paid to the Informer.

Power to mitigate Penalties.

XXXV. And whereas by divers Acts certain limited Penalties or Terms of Imprisonment are imposed for Offences therein mentioned, and sufficient power is not given to the Justice or Justices before whom the Offender is Convicted, to reduce or lessen such penalty or Term of Imprisonment, whereby much Hardship is experienced: Be it enacted, That where by any act now in force or hereafter to be passed a limited Penalty or Term of Imprisonment is imposed on Conviction of an Offender before a Justice or Justices of the Peace, it shall be lawful for any One of the said Magistrates before whom such conviction shall be had to reduce or lessen such Penalty or Term of Imprisonment in such Manner as he may think fit: Provided always, that no Penalty for the Infringement of any Act relating to the Revenue, of Customs or Excise, Stamps or Taxes, shall be reduced by any such Magistrate below the Amount or Proportion allowed in that Behalf by the Act or Acts specially relating thereunto without the consent of the Commissioners of Customs or Excise or Stamps and Taxes respectively.

Proviso as to Revenue Acts.

ANNO VICESIMO TERTIO

VICTORIÆ REGINÆ.

CAP. XXI.

An Act to Amend the Act for better regulating the Business of Pawnbrokers. [15*th May*, 1860.

39 & 40 G. 3, c. 99.

WHEREAS by an Act of Parliament passed in the Thirty-ninth and Fortieth Years of the Reign of King *George* the Third, intituled *An Act for better regulating the Business of Pawnbrokers*, it is enacted, that every Pawnbroker shall, at the Time of the taking of every Pawn, Pledge, or Exchange whatsoever, give to the Person or Persons so pawning, pledging, or exchanging the same a Note or Memorandum containing a Description thereof, with other Particulars, as in the Sixth Section of the said Act mentioned, and that every such Note, where the Sum lent shall be less than Five Shillings, shall be delivered gratis: And whereas it is expedient that Amendment should be made with respect to such Delivery: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; that is to say,

Pawnbrokers may charge One Halfpenny for Notes describing Things pawned under 10s.

I. Upon and from the Commencement of this Act it shall be lawful for all Persons using and exercising the Trade or Business of a Pawnbroker to take One Halfpenny for every such Note or Memorandum as aforesaid where the Sum lent shall be less than Ten Shillings, anything in the said Act contained to the contrary notwithstanding; and the said Sixth Section of the said Act shall be read and construed as if it contained no Enactment for the Delivery of any Note or Memorandum gratis.

Payment for Pawns of 10s. or upwards to remain as stated in Sect. 6 of recited Act.

II. Provided always, That for every such Note or Memorandum where the Sum lent shall be Ten Shillings or upwards, the respective Sum specified in such Behalf in the said Sixth Section shall and may be taken as heretofore.

ANNO SEXTO

GEORGII IV. REGIS.

CAP. XCIV.

An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize intrusted to Factors or Agents. [*5th July*, 1825.

WHEREAS an Act passed in the Fourth Year of the Reign of His present Majesty, intituled *An Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, or Merchandize intrusted to Factors or Agents:* And whereas it is expedient to alter and amend the said Act, and to make further Provisions in relation to such Contracts or Agreements, as hereinafter provided: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act any Person or Persons intrusted, for the Purpose of Consignment or of Sale, with any Goods, Wares, or Merchandize, and who shall have shipped such Goods, Wares, or Merchandize in his, her, or their own Name or Names, and any Person or Persons in whose Name or Names any Goods, Wares, or Merchandize shall be shipped by any other Person or Persons, shall be deemed and taken to be the true Owner or Owners thereof, so far as to entitle the Consignee or Consignees of such Goods, Wares, and Merchandize to a Lien thereon in respect of any Money or negotiable Security or Securities advanced or given by such Consignee or Consignees to or for the Use of the Person or Persons in whose Name or Names such Goods, Wares, or Merchandize shall be shipped, or in respect of any Money or negotiable Security or Securities received by him, her, or them to the Use of such Consignee or Consignees, in the like Manner to all Intents and Purposes as if such Person or Persons was or were the true Owner or Owners of such Goods, Wares, and Merchandize; provided such Consignee or Consignees shall not have Notice by the

4 G. 4, c. 83.

Factors or Agents having Goods or Merchandize in their Possession shall be deemed to be the true Owners, so as to give Validity to Contracts with Persons dealing bona fide upon the Faith of such Property.

Bill of Lading for the Delivery of such Goods, Wares, or Merchandize or otherwise, at or before the Time of any Advance of such Money or negotiable Security, or of such Receipt of Money or Negotiable Security in respect of which such Lien is claimed, that such Person or Persons so shipping in his, her, or their own Name or Names, or in whose Name or Names any Goods, Wares, or Merchandize shall be shipped by any Person or Persons, is or are not the actual and *bonâ fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares, and Merchandize so shipped as aforesaid, any Law, Usage, or Custom to the contrary thereof in anywise notwithstanding: Provided also, that the Person or Persons in whose Name or Names any such Goods, Wares, or Merchandize are so shipped as aforesaid shall be taken, for the Purposes of this Act, to have been intrusted therewith for the Purpose of Consignment or of Sale, unless the contrary thereof shall be made to appear by Bill of Discovery or otherwise, or be made to appear, or be shown in Evidence by any Person disputing such Fact.

Persons in possession of Bills of Lading, &c., to be the Owner, so far as to make valid Contracts.

II. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty-six any Person or Persons intrusted with and in possession of any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keeper's Certificate, Wharfinger's Certificate, Warrant or Order for Delivery of Goods, shall be deemed and taken to be the true Owner or Owners of the Goods, Wares, and Merchandize described and mentioned in the said several Documents hereinbefore stated respectively, or either of them, so far as to give Validity to any Contract or Agreement thereafter to be made or entered into by such Person or Persons so entrusted and in possession as aforesaid, with any Person or Persons, Body or Bodies Politic or Corporate, for the Sale or Disposition of the said Goods, Wares, and Merchandize, or any Part thereof, or for the Deposit or Pledge thereof, or any Part thereof, as a Security for any Money or negotiable Instrument or Instruments advanced or given by such Person or Persons, Body or Bodies Politic or Corporate, upon the Faith of such several Documents or either of them: Provided such Person or Persons, Body or Bodies Politic or Corporate, shall not have Notice by such Documents or either of them or otherwise, that such Person or Persons so intrusted as aforesaid is or are not the actual and *bonâ fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares, or Merchandize so sold or deposited or pledged as aforesaid; any Law, Usage, or Custom to the contrary thereof in anywise notwithstanding.

No Person to acquire a Security upon Goods in the Hands of an Agent for an antecedent Debt, beyond the Amount of the Agent's Interest in the Goods.

III. Provided always, and be it further enacted, That in case any Person or Persons, Body or Bodies Politic or Corporate, shall, after the passing of this Act, accept and take any such Goods, Wares, or Merchandize in Deposit or Pledge from any such Person or Persons so in possession and intrusted as aforesaid, without Notice as aforesaid, as a Security for any Debt or Demand due and owing from such Person or Persons so intrusted and in possession as aforesaid to such Person or Persons, Body or Bodies Politic or Corporate, before the Time of such Deposit or Pledge, then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares, or Merchandize in Deposit or Pledge, shall acquire no further or other Right, Title, or Interest in or upon or to the said Goods, Wares, or Merchandize, or any such Document as aforesaid, than was possessed or could or might have been enforced by the said Person or Persons so possessed and intrusted as aforesaid, at the Time of such Deposit or Pledge as a Security as last aforesaid, but such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares, or Merchandize in Deposit or Pledge, shall and may acquire, possess, and enforce such Right, Title, or Interest as was possessed and might have been enforced by such Person or Persons so possessed and intrusted as aforesaid, any Rule of Law, Usage, or Custom to the contrary notwithstanding.

Persons may contract with known Agents in the ordinary Course of Business, or out of that Course if within the Agent's Authority.

IV. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty-six it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to contract with any Agent or Agents intrusted with any Goods, Wares, or Merchandize, or to whom the same may be consigned, for the Purchase of any such Goods, Wares, and Merchandize, and to receive the same of and pay for the same to such Agent or Agents; and such Contract and Payment shall be binding upon and good against the Owner of such Goods, Wares, and Merchandize, notwithstanding such Person or Persons, Body or Bodies Politic or Corporate, shall have Notice that the Person or Persons making and entering into such Contract, or on whose Behalf such Contract is made or entered into, is an Agent or Agents, provided such Contract and Payment be made in the usual and ordinary Course of Business, and that such Person or Persons, Body or Bodies Politic or Corporate, shall not, when such Contract is entered into or Payment made, have Notice that such Agent or Agents is or are not authorised to sell the

said Goods, Wares, and Merchandise, or to receive the said Purchase Money.

Persons may accept and take Goods, &c. in Pledge from known Agents; but in that Case shall acquire no further Interest than possessed by such Agent at the Time of such Pledge.

V. And be it further enacted, That from and after the passing of this Act it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to accept and take any such Goods, Wares, or Merchandize, or any such Document as aforesaid, in Deposit or Pledge from any such Factor or Factors, Agent or Agents, notwithstanding such Person or Persons, Body or Bodies Politic or Corporate, shall have such Notice as aforesaid, that the Person or Persons making such Deposit or Pledge is or are a Factor or Factors, Agent or Agents; but then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, shall acquire no further or other Right, Title, or Interest in or upon or to the said Goods, Wares, or Merchandize, or any such Document as aforesaid, for the Delivery thereof, than was possessed or could or might have been enforced by the said Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as a Security as last aforesaid, but such Person or Persons, Body or Bodies Politic or Corporate, shall and may acquire, possess, and enforce such Right, Title, or Interest as was possessed and might have been enforced by such Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as aforesaid, any Rule or Law, Usage or Custom to the contrary notwithstanding.

Right of the true Owner to follow his Goods while in the Hands of his Agent or of his Assignee, in case of Bankruptcy, or to recover them from a Third Person, upon paying his advances secured upon them.

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true Owner or Owners or Proprietor or Proprietors of such Goods, Wares, or Merchandize from demanding and recovering the same from his, her, or their Factor or Factors, Agent or Agents, before the same shall have been so sold, deposited, or pledged, or from the Assignee or Assignees of such Factor or Factors, Agent or Agents, in the event of his, her, or their Bankruptcy; nor to prevent such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from any Person or Persons, Body or Bodies Politic or Corporate the Price or Sum agreed to be paid for the Purchase of such Goods, Wares, or Merchandize, subject to any Right of Set-off on the Part of such Person or Persons, Body or Bodies Politic or Corporate, against such Factor or Factors Agent or Agents; not to prevent such Owner or Owners Proprietor or Proprietors, from demanding or recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, such Goods, Wares, or Merchandize so deposited or pledged, upon Repayment of the Money or or

Restoration of the negotiable Instrument or Instruments so advanced or given on the Security of such Goods, Wares, or Merchandize as aforesaid, by such Person or Persons, Body or Bodies Politic or Corporate, to such Factor or Factors, Agent or Agents, and upon Payment of such further Sum of Money or on Restoration of such other negotiable Instrument or Instruments (if any) as may have been advanced or given by such Factor or Factors, Agent or Agents, to such Owner or Owners, Proprietor or Proprietors, or on Payment of a Sum of Money equal to the Amount of such Instrument or Instruments; nor to prevent the said Owner or Owners, Proprietor or Proprietors, from recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, any Balance or Sum of Money remaining in his, her, or their Hands as the Produce of the Sale of such Goods, Wares, or Merchandize, after deducting thereout the Amount of the Money or negotiable Instrument or Instruments so advanced or given upon the Security thereof as aforesaid: Provided always, that in case of the Bankruptcy of any such Factor or Agent the Owner or Owners, Proprietor or Proprietors of the Goods, Wares, and Merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the Debt due by him, her, or them to the Estate of such Bankrupt.

In case of Bankruptcy of Factor, the Owner of Goods so pledged and redeemed shall be held to have discharged pro tanto the Debt due from him to Bankrupt.

VII. And whereas it is expedient to prevent the improper Deposit or Pledge of Goods, Wares, or Merchandize, or the Documents relating to such Goods, Wares, or Merchandize, intrusted or consigned as aforesaid to Factors or Agents; be it therefore enacted, That if any such Factor or Agent, at any Time from and after the said First Day of *October* One thousand eight hundred and twenty-six, shall deposit or pledge any Goods, Wares, or Merchandize intrusted or consigned as aforesaid to his or her Care or Management, or any of the said several Documents so possessed and intrusted as aforesaid, with any Person or Persons, Body or Bodies Politic or Corporate, as a Security for any Money or negotiable Instrument or Instruments borrowed or received by such Factor or Agent, and shall apply or dispose thereof to his or her own Use, in violation of good Faith, and with Intent to defraud the Owner or Owners of any such Goods, Wares, or Merchandize, every Person so offending in any Part of the United Kingdom shall be deemed and taken to be guilty of a Misdemeanor, and, being convicted thereof according to Law, shall be sentenced to Transportation for any Term not exceeding Fourteen Years, or to receive such other Punishment as may by Law be inflicted on Persons guilty of a Misde-

Agents fraudulently pledging the Goods of their Principals deemed guilty of a Misdemeanor; may be transported not exceeding Fourteen Years, &c.

meanor, and as the Court before whom such Offender may be tried and convicted shall adjudge.

Not to extend to Cases in which the Agent has not made the Goods a Security for any Sum beyond the extent of his own Lien.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any Person or Persons to Prosecution for having deposited or pledged any Goods, Wares, or Merchandize so intrusted or consigned to him, her, or them, provided the same shall not be made a Security for or subject to the Payment of any greater Sum or Sums of Money than at the Time of such Deposit or Pledge was justly due and owing to such Person or Persons from his, her, or their Principal or Principals: Provided nevertheless, that the Acceptance of Bills of Exchange by such Person or Persons drawn by or on Account of such Principal or Principals shall not be considered as constituting any Part of such Debt so due and owing from such Principal or Principals within the true Intent and Meaning of this Act, so as to excuse the Consequence of such a Deposit or Pledge, unless such Bills shall be paid when the same shall respectively become due.

Acceptances of Bills by an Agent not to create a Lien so as to excuse the Pledge, unless the Bills are paid when due.

Act not to extend to Partners not being Privy to the Offence.

IX. Provided also, and be it further enacted, That the Penalty by this Act annexed to the Commission of any Offence intended to be guarded against by this Act shall not extend or be construed to extend to any Partner or Partners or other Person or Persons of or belonging to any Partnership, Society, or Firm, except only such Partner or Partners, Person or Persons, as shall be accessory or privy to the Commission of such Offence, anything herein contained to the contrary in anywise notwithstanding.

Act not to lessen any Remedy at Law or Equity which the Party aggrieved may be entitled to adopt.

X. Provided also, and be it further enacted, That nothing in this Act contained, nor any Proceeding, Conviction, or Judgment to be had or taken thereupon, shall hinder, prevent, lessen, or impeach any Remedy at Law or in Equity which any Party or Parties aggrieved by any Offence against this Act might or would have had or have been entitled to against any such Offender if this Act had not been made, nor any Proceeding, Conviction, or Judgment had been had or taken thereupon; but nevertheless the Conviction of any Offender against this Act shall not be received in Evidence in any Action at Law or Suit in Equity against such Offender: And further that no Person shall be liable to be convicted by any Evidence whatever as an Offender against this Act, in respect of any Act, Matter, or Thing done by him, if he shall at any Time previously to his being indicted for such Offence have disclosed any such Matter or Thing on Oath under or in consequence of any compulsory Process of any Court of Law or Equity, in any Action, Suit, or Proceeding in or to which he shall

have been a Party, and which shall have been *bonâ fide* instituted by the Party aggrieved by the Act, Matter, or Thing which shall have been committed by such Offender aforesaid.

ANNO QUINTO & SEXTO

VICTORIÆ REGINÆ.

CAP. XXXIX.

An Act to amend the Law relating to Advances bonâ fide *made to Agents intrusted with Goods.*

[*30th June*, 1842.

6 G. 4, c. 94.

WHEREAS by an Act passed in the Sixth Year of the Reign of His late Majesty King *George* the Fourth, intituled *An Act to alter and amend an Act for the better Protection of the Property of Merchants and others who may hereafter enter into Contracts or Agreements in relation to Goods, Wares, and Merchandize intrusted to Factors or Agents*, Validity is given, under certain Circumstances, to Contracts or Agreements made with Persons intrusted with and in possession of the Documents of Title to Goods and Merchandize, and Consignees making Advances to Persons abroad who are intrusted with any Goods and Merchandize are entitled, under certain Circumstances, to a Lien thereon, but under the said Act and the present State of the Law Advances cannot safely be made upon Goods or Documents to Persons known to have Possession thereof as Agents only: And whereas by the said Act it is amongst other things further enacted, "that it shall be lawful to and for any Person to contract with any Agent intrusted with any Goods, or to whom the same may be consigned, for the Purchase of any such Goods, and to receive the same of and to pay for the same to such Agent, and such Contract and Payment shall be binding upon and good against the Owner of such Goods, notwithstanding such Person shall have Notice that the Person making such Contract, or on whose Behalf such Contract is made, is an Agent; provided such Contract or Payment be made in the usual and ordinary Course of Business, and that such Person shall not, when such Contract is entered into or Payment made, have Notice that such Agent is not authorized to sell the same, or to receive the said Purchase Money:" And whereas Advances on the Security of Goods and Merchandize have become an usual and ordinary Course of Business, and it is expedient and necessary that reasonable and safe Facilities should be afforded thereto, and that the

same Protection and Validity should be extended to *bonâ fide* Advances upon Goods and Merchandize as by the said recited Act is given to Sales, and that Owners intrusting Agents with the Possession of Goods and Merchandize, or of Documents of Title thereto, should in all Cases where such Owners by the said recited Act or otherwise would be bound by a Contract or Agreement of Sale be in like Manner bound by any Contract or Agreement of Pledge or Lien for any Advances *bonâ fide* made on the Security thereof: And whereas much Litigation has arisen on the Construction of the said recited Act, and the same does not extend to protect Exchanges of Securities *bonâ fide* made, and so much Uncertainty exists in respect thereof that it is expedient to alter and amend the same, and to extend the Provisions thereof, and to put the Law on a clear and certain Basis: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act any Agent who shall thereafter be intrusted with the Possession of Goods, or of the Documents of Title to Goods, shall be deemed and taken to be Owner of such Goods and Documents, so far as to give Validity to any Contract or Agreement by way of Pledge, Lien, or Security *bonâ fide* made by any Person with such Agent so intrusted as aforesaid, as well for any original Loan, Advance, or Payment made upon the Security of such Goods or Documents, as also for any further or continuing Advance in respect thereof, and such Contract or Agreement shall be binding upon and good against the Owner of such Goods, and all other Persons interested therein, notwithstanding the Person claiming such Pledge or Lien may have had Notice that the Person with whom such Contract or Agreement is made is only an Agent.

Bona fide Advances to Persons intrusted with the possession of Goods or Documents of Title, though known to be Agents, protected.

II. And be it enacted, That where any such Contract or Agreement for Pledge, Lien, or Security shall be made in consideration of the Delivery or Transfer to such Agent of any other Goods or Merchandize, or Document of Title, or negotiable Security, upon which the Person so delivering up the same had at the Time a valid and available Lien and Security for or in respect of a previous Advance by virtue of some Contract or Agreement made with such Agent, such Contract and Agreement, if *bonâ fide* on the Part of the Person with whom the same may be made, shall be deemed to be a Contract made in consideration of an Advance within the true Intent and Meaning of this Act, and shall be as valid and effectual, to all Intents and

Bona fide Deposits in exchange protected;

Purposes, and to the same Extent, as if the Consideration for the same had been a *bonâ fide* present Advance of Money: Provided always, that the Lien acquired under such last-mentioned Contract or Agreement upon the Goods or Documents deposited in exchange shall not exceed the Value at the Time of the Goods and Merchandize which, or the Documents of Title to which, or the negotiable Security which shall be delivered up and exchanged.

but no Lien beyond the Value of the Goods given up:

But the Statute to be construed to protect only Transactions bona fide without Notice that the Agent pledging is acting without Authority, or mala fide against the Owner.

III. Provided always, and be it enacted, That this Act, and every Matter and Thing herein contained, shall be deemed and construed to give Validity to such Contracts and Agreements only, and to protect only such Loans, Advances, and Exchanges, as shall be made *bonâ fide*, and without Notice that the Agent making such Contracts or Agreements as aforesaid has not Authority to make the same, or is acting *malâ fide* in respect thereof against the Owner of such Goods and Merchandize; and nothing herein contained shall be construed to extend to or protect any Lien or Pledge for or in respect of any antecedent Debt owing from any Agent to any Person with or to whom such Lien or Pledge shall be given, nor to authorize any Agent intrusted as aforesaid in deviating from any express Orders or Authority received from the Owner; but that, for the Purpose and to the Intent of protecting all such *bonâ fide* Loans, Advances, and Exchanges as aforesaid, (though made with Notice of such Agent not being the Owner, but without any Notice of the Agent's acting without Authority) and to no further or other Intent or Purpose, such Contract or Agreement as aforesaid shall be binding on the Owner and all other Persons interested in such Goods.

Meaning of the Term "Document of Title;"

and when Agent intrusted;

IV. And be it enacted, That any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keeper's Certificate, Warrant, or Order for the 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 Indorsement or by Delivery, the Possessor of such Document to transfer or receive Goods thereby represented, shall be deemed and taken to be a Document of Title within the Meaning of this Act; and any Agent intrusted as aforesaid, and possessed of any such Document of Title, whether derived immediately from the Owner of such Goods, or obtained by reason of such Agent's having been intrusted with the Possession of the Goods, or of any other Document of Title thereto, shall be deemed and taken to have been intrusted with the Possession of the Goods represented by

such Document of Title as aforesaid, and all Contracts pledging or giving a Lien upon such Document of Title as aforesaid shall be deemed and taken to be respectively Pledges of and Liens upon the Goods to which the same relates; and such Agent shall be deemed to be possessed of such Goods or Documents, whether the same shall be in his actual Custody, or shall be held by any other Person subject to his Control or for him or on his Behalf; and where any Loan or Advance shall be *bonâ fide* made to any Agent entrusted with and in possession of any such Goods or Documents of Title as aforesaid, on the Faith of any Contract or Agreement in Writing to consign, deposit, transfer, or deliver such Goods or Documents of Title as aforesaid, and such Goods or Documents of Title shall actually be received by the Person making such Loan or Advance, without Notice that such Agent was not authorized to make such Pledge or Security, every such Loan or Advance shall be deemed and taken to be a Loan or Advance on the Security of such Goods or Documents of Title within the Meaning of this Act, though such Goods or Documents of Title shall not actually be received by the Person making such Loan or Advance till the Period subsequent thereto; and any Contract or Agreement, whether made direct with such Agent as aforesaid, or with any Clerk or other Person on his Behalf, shall be deemed a Contract or Agreement with such Agent; and any Payment made, whether by Money or Bills of Exchange, or other negotiable Security, shall be deemed and taken to be an Advance within the Meaning of this Act; and an Agent in possession as aforesaid of such Goods or Documents shall be taken, for the Purposes of this Act, to have been intrusted therewith by the Owner thereof, unless the contrary can be shown in Evidence.

and when in possession.

What to be deemed a "Contract or Agreement," and "Advance."

Possession prima facie Evidence of intrusting.

V. Provided always, and be it enacted, That nothing herein contained shall lessen, vary, alter, or affect the civil Responsibility of an Agent for any Breach of Duty or Contract, or Non-fulfilment of his Orders or Authority in respect of any such Contract, Agreement, Lien, or Pledge as aforesaid.

Agent's civil Responsibility not to be diminished.

VI. Provided always, and be it enacted, That if any Agent intrusted as aforesaid shall contrary to or without the Authority of his Principal in that Behalf, for his own Benefit and in Violation of good Faith, make any Consignment, Deposit, Transfer, or Delivery of Goods or Documents of Title so intrusted to him as aforesaid, as and by way of a Pledge, Lien, or Security; or shall, contrary to or without such Authority, for his own Benefit and in Violation of good Faith, accept any Advance on the Faith

Agent making Consignments contrary to Instruction of Principal, guilty of Misdemeanor.

of any Contract or Agreement to consign, deposit, transfer, or deliver such Goods or Documents of Title as aforesaid; every such Agent shall be deemed guilty of a Misdemeanor, and being convicted thereof, shall be sentenced to Transportation for any Term not exceeding Fourteen Years nor less than Seven Years, or to suffer such other Punishment by Fine or Imprisonment, or by both, as the Court shall award; and every Clerk or other Person who shall knowingly and wilfully act and assist in making any such Consignment, Deposit, Transfer, or Delivery, or in accepting or procuring such Advance as aforesaid, shall be deemed guilty of a Misdemeanor, and being convicted thereof, shall be liable, at the Discretion of the Court, to any of the Punishments which the Court shall award, as hereinbefore last mentioned: Provided nevertheless, that no such Agent shall be liable to any Prosecution for consigning, depositing, transferring, or delivering any such Goods or Documents of Title, in case the same shall not be made a Security for or subject to the Payment of any greater Sum of Money than the Amount which at the Time of such Consignment, Deposit, Transfer, or Delivery was justly due and owing to such Agent from his Principal, together with the Amount of any Bills of Exchange drawn by or on account of such Principal, and accepted by such Agent: Provided also, that the Conviction of any such Agent so convicted as aforesaid shall not be received in Evidence in any Action at Law or Suit in Equity against him, and no Agent intrusted as aforesaid shall be liable to be convicted by any Evidence whatsoever in respect of any Act done by him, if he shall, at any Time previously to his being indicted for such Offence, have disclosed such Act, on Oath, in compulsory Process of any Court of Law or Equity in any Action, Suit, or Proceeding which shall have been *bonâ fide* instituted by any Party aggrieved, or if he shall have disclosed the same in any Examination or Deposition before any Commissioner of Bankrupt.

Right of Owner to redeem;

VII. Provided also, and be it enacted, That nothing herein contained shall prevent such Owner as aforesaid from having the Right to redeem such Goods or Documents of Title pledged as aforesaid, at any Time before such Goods shall have been sold, upon Repayment of the Amount of the Lien thereon, or Restoration of the Securities in respect of which such Lien may exist, and upon Payment or Satisfaction to such Agent, if by him required, of any Sum of Money for or in respect of which such Agent would by Law be entitled to retain the same Goods or Documents, or any of them, by way of Lien as against such Owner, or to prevent the said Owner from recovering of

or to recover Ba- Proceeds

and from such Person with whom any such Goods or Documents may have been pledged, or who shall have any such Lien thereon as aforesaid, any Balance or Sum of Money remaining in his Hands as the Produce of the Sale of such Goods, after deducting the Amount of the Lien of such Person under Contract or Agreement as aforesaid: Provided always, that in case of the Bankruptcy of any such Agent the Owner of the Goods which shall have been so redeemed by such Owner as aforesaid shall, in respect of the Sum paid by him on account of Agent for such Redemption, be held to have paid such Sum for the Use of such Agent before his Bankruptcy, or in case the Goods shall not be so redeemed the Owner shall be deemed a Creditor of such Agent for the Value of the Goods so pledged at the Time of the Pledge, and shall, if he shall think fit, be entitled in such Cases to prove for or set off the Sum so paid, or the Value of such Goods as the Case may be.

In case of Bankruptcy Owner to prove for Amount paid to redeem, or for Value of Goods, if unredeemed.

VIII. And be it enacted, That in construing this Act the Word "Person" shall be taken to designate a Body Corporate or Company as well as an Individual; and that Words in the Singular Number shall, when necessary to give Effect to the Intention of the said Act, import also the Plural, and *vice versâ*; and Words used in the Masculine Gender shall, when required, be taken to apply to a Female as a Male.

Interpretation of Act.

IX Provided also, and be it enacted, That nothing herein contained shall be construed to give Validity to or in anywise to affect any Contract, Agreement, Lien, Pledge, or other Act, Matter, or Thing made or done before the passing of this Act.

Not to affect any Contract made before the passing of this Act.

ANNO VICESIMO QUINTO

GEORGII III. REGIS.

CAP. XLVIII.

An Act for granting to His Majesty certain Stamp-duties on Licenses to be taken out by Persons using or exercising the Trade or Business of a Pawnbroker.

Most Gracious Sovereign,

Preamble.

WE, Your Majesty's most dutiful and loyal Subjects, the Commons of *Great Britain*, in Parliament assembled, towards raising the necessary Supplies to defray Your Majesty's public Expenses, have resolved to give and grant unto Your Majesty the Duties hereinafter mentioned; and do most humbly beseech Your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Fifth Day of *July*, One thousand seven hundred and eight-five, there shall be raised, levied, collected, and paid, throughout the Kingdom of *Great Britain*, unto and for the Use of His Majesty, His Heirs and Successors, the Rates and Duties following; (that is to say), All Persons using or exercising the Trade or Business of a Pawnbroker in *Great Britain*, shall annually take out a License for that Purpose in Manner hereinafter prescribed:

From July 5, 1785, the following duties to be paid to his Majesty.

By every Pawnbroker residing in London or Westminster, &c., £10 per annum.

Where the Person using or exercising the Trade or Business of a Pawnbroker as aforesaid, shall reside within the Cities of *London* and *Westminster*, the Parish of *Saint Mary le Bone*, and *Saint Pancras*, in the County of *Middlesex*, or within the distance of the Bills of Mortality, or within the Borough of *Southwark* in the County of *Surrey*, there shall be charged a Stamp-duty of Ten Pounds:

And in any other Part of Great Britain, £5.

And where the Person using or exercising the Trade or Business of a Pawnbroker as aforesaid, shall reside in any other Part of *Great Britain*, there shall be charged a Stamp-duty of Five Pounds. (a)

(a) Raised by 55 Geo. 3, cap. 184, to £15 and £7 10s. respectively.

Penalty on Pawnbrokers acting as such without a proper License.

III. And be it further enacted, That from and after the Fifth Day of *July*, One thousand seven hundred and eighty-five, no Person whatsoever required by this Act to be licensed, shall, unless he or she be licensed in manner hereinafter prescribed, receive or take, by way of Pawn, Pledge, or Exchange, of or from any Person or Persons whomsoever, any Goods or Chattels for the Repayment of Money lent thereon, in *Great Britain*, upon Pain to forfeit for every Offence the Sum of Fifty Pounds, to be recovered and applied as hereinafter is directed.

Two Commissioners may grant Licenses.

IV. And be it further enacted, That from and after the Fifth Day of *July*, One thousand seven hundred and eighty-five, any Two or more of His Majesty's Commissioners appointed for managing the Duties arising by Stamps on Vellum, Parchment, and Paper, or some Person duly authorised by them, shall grant Licenses to such Persons who shall apply for the same, to use or exercise the Trade or Business of a Pawnbroker, as aforesaid, in any City, Town, or other Place within *Great Britain*, for the Space of One Year, to commence from the said Fifth Day of *July*, One thousand seven hundred and eighty-five, upon all Licenses to be granted on or before that Day; and upon Licences to be first granted to any Person or Persons after the said Fifth Day of *July*, One thousand seven hundred and eighty-five, to commence from the Day of the Date of every such License: And all and every Person and Persons who shall take out such License for using or exercising the said Trade or Business of a Pawnbroker, shall take out another License for another Year, Ten Days at least before the Expiration of that Year for which he or she shall be so licensed, if he or she shall continue to use and exercise the said Trade or Business of a Pawnbroker; and shall in like manner renew such License from Year to Year, paying down the respective Sums due for the Stamps on such License, so long as he or she shall continue to use or exercise the Trade or Business of a Pawnbroker.

Licenses to be renewed annually.

Who shall be deemed Pawnbrokers.

V. And be it further enacted, That all Persons who shall receive or take, by way of Pawn, Pledge, or Exchange, of or from any Person or Persons whomsoever, any Goods or Chattels for the Repayment of Money lent thereon, shall respectively be deemed Pawnbrokers within the Intent and Meaning of this Act, and shall take out a License for the same accordingly.

Not to extend to Persons who lend Money at or under 5 per Cent.

VI. Provided always, That nothing in this Act contained shall extend, or be construed to extend, to any Person or Persons who shall lend Money upon Pawn or Pledge, at or under the Rate of Five Pounds *per Centum per Annum* interest without taking any further or greater Profit for the Loan

or Forbearance of such Money lent, on any Pretence whatever.

Not to keep more than One Shop by virtue of One Licence.

VII. And be it further enacted, That no Pawnbroker, or other Person receiving or taking, by way of Pawn, Pledge, or Exchange, any Goods or Chattels for the Repayment of Money lent thereon, licensed or to be licensed by Authority of this Act, shall, by virtue of One License, keep more than One House, Shop, or other Place, for taking in Goods or Chattels to Pawn; but for each and every House, Shop, or other Place, which any Person shall keep for the Purposes aforesaid, a separate and distinct License shall be taken out and paid for by such Pawnbroker or other Person.

Persons in Partnership need take out only one License.

VIII. Provided always, That Persons in Partnership, and carrying on the Trade and Business of a Pawnbroker in One House, Shop, or Tenement only, shall not be obliged to take out more than One License, in any One Year, for the carrying on such Trade or Business.

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